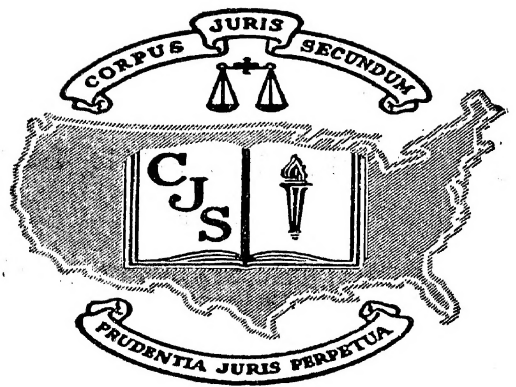


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CORPUS JURIS SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE
AMERICAN LAW

AS DEVELOPED BY
ALL REPORTED CASES

By
FRANCIS J. LUDS
Editor-in-Chief
and
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Assisted by
The Combined Editorial Staffs
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PREFACE

THE litigation which has occurred, and the innovations introduced into the law, since publication of Volume 35 almost two decades ago, have required a re-examination of the subjects contained therein.

Every title included in this volume has been completely re-examined and revised to date to reflect the new developments since the publication of the original volume.

Also the many Definitions within the scope of this volume have been brought to date and implemented with modern concepts.

An exhaustive Descriptive-Word Index has been prepared, thumb-indexed for convenience, leads the user directly to the precise point desired. The volume will be kept currently to date by means of annual Cumulative Pocket Parts.

THE PUBLISHERS

June, 1960

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REPORTS AND TEXTBOOKS

A			
A.	Atlantic Reporter	Am.L.Reg.	American Law Register
A.2d	Atlantic Reporter Second Series	Am.L.Reg.N.S.	American Law Register New Series
Abb.	Abbott (U.S.)	Am.Law Reg.O.S.	American Law Register Old Series
Abb.Adm.	Abbott's Admiralty (U.S.)	Am.L.Rev.	American Law Review
Abb.App.Dec.	Abbott's Appeals Decisions (N.Y.)	Am.L.T.Bankr.	American Law Times Bankruptcy Reports
Abb.Dec.	Abbott's Decisions (N.Y.)	Am.Law Inst.	American Law Institute, Restatement of the Law
Abb.N.Cas.	Abbott's New Cases (N.Y.)	Am.Negl.Cas.	American Negligence Cases
Abb.Pr.	Abbott's Practice (N.Y.)	Am.Negl.R.	American Negligence Reports
Abb.Pr.N.S.	Abbott's Practice New Series (N.Y.)	A.M.&O.	Armstrong, Macartney & Ogle (Ir.)
A'Beck.Res.	A'Beckett's Reserved Judgments (Vict.)	Am.Prob.	American Probate
Judgm.	[1917] Appeal Cases (Can.)	Am.Prob.N.S.	American Probate New Series
[1917] A.C.	Law Reports [1918] Appeal Cases (Eng.)	Am.Pr.	American Practice
[1918] A.C.	Acton (Eng.)	Am.R.	American Reports
Acton	Adams Reports (N.H.)	Am.R.&Corp.	American Railroad & Corporation
Adams	Appellate Division Second Series (N.Y.)	Am.R.Rep.	American Railway Reports
A.D.2d	Addison (Pa.)	Am.S.R.	American State Reports
Add.	Addams' Ecclesiastical (Eng.)	Am.St.R.D.	American Street Railway Decisions
Add.Eccl.	Adolphus & Ellis (Eng.)	And.	Anderson (Eng.)
A.&E.	American & English Encyclopædia of Law	Andr.	Andrews (Eng.)
A.&E.Enc.L.	American & English Encyclopædia of Law & Practice	Ann.Cas.	American & English Annotated Cases
A.&E.Enc.L.&Pr.	Aikens (Vt.)	Ann.Cas.1912A	American Annotated Cases 1912A, et seq.
Aik.	A. K. Marshall (Ky.)	Anstr.	Anstruther (Eng.)
A.K.Marsh.	Alabama	Anth.N.P.	Anthon's Nisi Prius (N.Y.)
Ala.	Alabama Appellate Court	App.D.C.	Appeal Cases (D.C.)
Ala.App.	Alaska	App.Cas.	Law Reports Appeal Cases (Eng.)
Alaska	Albany Law Journal	App.Div.	Appellate Division (N.Y.)
Alb.L.J.	American Leading Cases	App.Div.2d	Appellate Division, Second Series (N.Y.)
A.L.C.	Alcott & Napier (Eng.)	Ariz.	Arizona
Alc.&N.	Alcock's Registry Cases (Eng.)	Ark.	Arkansas
Alc.Reg.Cas.	Aleyn (Eng.)	Ark.Just.	Arkley's Justiciary (Sc.)
Aleyn	Alison's Practice (Sc.)	Arn.	Arnold (Eng.)
Alison Pr.	Allen (Mass.)	Arn.&H.	Arnold & Hodges (Eng.)
Allen	Allen, New Brunswick	Ashm.	Ashmead (Pa.)
Allen (N.B.)	Alberta Law	Aspin.	Aspinal's Maritime Cases (Eng.)
Alta.L.	American Law Reports	Atk.	Atkyn (Eng.)
A.L.R.	American Law Reports, Second Series	Austr.C.L.R.	Commonwealth Law Reports, Australia
A.L.R.2d	American Bankruptcy (U.S.)	Austr.Jur.	Australian Jurist
Am.Bankr.	Ambler (Eng.)	Austr.L.T.	Australian Law Times
Ambl.	American Maritime Cases		
A.M.C.	American Corporation Cases		
Am.Corp.Cas.	American Criminal		
Am.Cr.	American Decisions		
Am.D.	American & English Corporation Cases		
Am.&E.Corp.Cas.	American & English Corporation Cases New Series		
Am.&E.Corp.Cas. N.S.	American and English Encyclopedia of Law		
Am.&Eng.Ency. Law	American & English Decisions in Equity		
Am.&Eng.Pat. Cas.	American and English Patent Cases		
Am.&E.Eq.D.	American and English Railroad Cases		
Am.&Eng.R.R. Cas.	American Electrical Cases		
Am.Electr.Cas.	American & English Railroad Cases		
Am.&E.R.Cas.	American & English Railroad Cases New Series		
Am.&E.R.Cas.N. S.	American Journal of International Law		
Am.J.Int.L.	American Law Journal (Pa.)		
Am.L.J.	American Law Journal New Series (Pa.)		
Am.L.J.N.S.	American Law Record (Ohio)		
Am.L.Rec.			

Beav. & Wal.Ry. Cas.
Beav.R.&C.Cas.
Beaver
Beaw.Lex.Mer.
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Bell
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C.J. Ann. Corpus Juris
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Clayt. Clayton's Reports, York Assizes (Eng.)
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Co.Inst. Coke's Institutes
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Curt. Cushing (Mass.)
Curt.Eccl. United States Customs Appeals
Cush. Cyclopaedia of Law & Procedure
Cust.A. Cyclopaedia of Law & Procedure Annotations
Cyc.
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Dak. Dakota
Dal.C.P. Dalison's Common Pleas (Eng.)
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D.B.&M. Dunlop, Bell & Murray (Sc.)
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Deac. Deacon (Eng.)
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Dods. Dodson's Admiralty (Eng.)

Dom.L.R. Dominion Law Reports (Can.)
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 Dougl. Douglas (Eng.)
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 Dougl.ELCas. Douglas' Election Cases (Eng.)
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 Dow & Cl. Dow & Clark (Eng.)
 Dow & L. Dowling & Lowndes (Eng.)
 Dow.N.S. Dowling, New Series (Eng.)
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 D.&R. Dowling & Ryland (Eng.)
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 Dr.&Sm. Drewry & Smale (Eng.)
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E

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 East.L.R. Eastern Law Reporter (Can.)
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 Edw. Edwards (Eng.)
 Edw. Edwards' Chancery (N.Y.)
 Edw.Abr. Edwards' Abridgment of Prerogative Court Cases
 Edw.Adm. Edwards' Admiralty (Eng.)
 E.&E. Ellis & Ellis (Eng.)
 Em.App. Emergency Court of Appeals (U.S.)
 Enc.Pl.&Pr. Encyclopædia of Pleading & Practice
 Ency.Law American and English Encyclopædia of Law
 Eng.Ad. English Admiralty
 Eng.C.C. English Crown Cases
 Eng.Ch. English Chancery
 Eng.Eccl. English Ecclesiastical Reports
 Eng.Ecc.R. English Ecclesiastical Reports
 Eng.Exch. English Exchequer Reports
 Eng.L.&Eq. English Law & Equity
 Eng.Rep.R. English Reports, Full Reprint
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 Eq.Cas.Abr. Equity Cases Abridged (Eng.)
 Eq.Rep. Equity Reports (Eng.)
 E.R.C. English Ruling Cases
 Erie. Erie County Law Journal (Pa.)
 Esp. Espinasse's Nisi Prius (Eng.)
 Euer (Eng.)
 Exch. Exchequer (Eng.)
 Exch.Cas. Exchequer Cases (Sc.)
 Ex.D. Law Reports Exchequer Division (Eng.)
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Falc. Falconer's Court of Sessions (Sc.)
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 F.Cas.No. Federal Cases (U.S.)
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 F.&F. Foster & Finlason (Eng.)
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 Fish.Pat.Cas. Fisher's Patent Cases (U.S.)
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 Fox. Fox Reports (Eng.)
 Fox & S. Fox & Smith (Ir.)
 Freem. Freeman's Chancery (Eng.)
 Freem. Freeman's Chancery (Miss.)
 Freem.K.B. Freeman's King's Bench (Eng.)

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 Ga.App. Georgia Appeals
 Ga.Dec. Georgia Decisions
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 G.Coop. G. Cooper (Eng.)
 G.&D. Gale & Davidson (Eng.)
 Geld.&M. Geldart & Maddock (Eng.)
 Gibb.Surr. Gibbon's Surrogate (N.Y.)
 Giffard (Eng.)
 Giff.&H. Giffard and Hemming (Eng.)
 Gil. Gilfillan's Edition (Minn.)
 Gilb. Gilbert's (Eng.)
 Gilb.Cas. Gilbert's Cases (Eng.)
 Gilb.C.P. Gilbert's Common Pleas (Eng.)
 Gilb.Exch. Gilbert's Exchequer (Eng.)
 Gill (Md.)
 Gill&J. Gill & Johnson (Md.)
 Gilm. Gilmer (Va.)
 Gilm.&Falc. Gilmour & Falconer (Sc.)
 Gilp. Gilpin (U.S.)
 Glasc. Glascock (Ir.)
 Glyn&J. Glyn & Jameson (Eng.)
 Godb. Godbolt (Eng.)
 Godo. Godolphin's Abridgment of Ecclesiastical Law
 Goeb. Goebel's Probate Court Cases
 Gosf. Gosford (Eng.)
 Gouldsb. Gouldsborough (Eng.)
 Gow (Eng.)
 Gow N.P. Gow's English Nisi Prius Cases
 Grant. Grant's Cases (Pa.)
 Grant Ch. Grant's Chancery (U.C.)
 Grant Err.&App. Grant's Error & Appeal (U.C.)
 Gratt. Grattan (Va.)
 Gray (Mass.)
 Green Cr. Green's Criminal Law (Eng.)
 Greene (Iowa)
 Gwillm.T.Cas. Gwillim's Tithe Cases (Eng.)

H

Hadd. Haddington (Eng.)
 Hagg.Adm. Haggard's Admiralty (Eng.)

Hagg.Cons.	Haggard's Consistory (Eng.)	Hughes	Hughes (Ky.)
Hagg.Eccl.	Haggard's Ecclesiastical (Eng.)	Hughes	Hughes (U.S.)
Hailes Dec.	Hailes' Decisions (Sc.)	Hume	Hume's Decisions (Sc.)
Hale	Hale's Common Law (Eng.)	Humphr.	Humphreys (Tenn.)
Hale Ecc.	Hale's Ecclesiastical (Eng.)	Hun	Hun (N.Y.)
Hale P.C.	Hale's Pleas of the Crown (Eng.)	Hurl.&Gord.	Hurlstone & Gordon (Eng.)
Hall	Hall's Superior Court (N.Y.)	Hurl.&W.	Hurlstone & Walmsley (Eng.)
Hall&T.	Hall & Twells (Eng.)	Hutt.	Hutton (Eng.)
Halsbury L.Eng.	Halsbury's Law of England		
Handy	Handy (Oh.)		
Han.(N.B.)	Hannay's Reports, New Brunswick		
Hard.	Hardin (Ky.)		
Hardres	Hardres (Eng.)		
Hare	Hare (Eng.)		
Harp.Eq.	Harper (S.C.)		
Harr.	Harrison's Chancery (Mich.)		
Harr.Del.	Harrington (Del.)		
Harr.Mich.	Harrington's Michigan Chancery Reports		
			I
Harr.&G.	Harris & Gill (Md.)	Idaho	Idaho
Harr.Ch.	Harrison's Chancery (Eng.)	Iddings D.R.D.	Iddings Dayton Term Reports
Harr.&H.	Harrison & Hodgins (U.C.)	I.L.E.	Indiana Law Encyclopedia
Harr.&J.	Harris & Johnson (Md.)	Ill.	Illinois Reports
Harr.&M.	Harris & McHenry (Md.)	Ill.2d	Illinois Reports, Second Series
Harr.&R.	Harrison & Rutherford (Eng.)	Ill.App.	Illinois Appellate Court Reports
Harr.&W.	Harrison & Wollaston (Eng.)	Ill.App.2d	Illinois Appellate Court Reports, Second Series
Hask.	Haskell (U.S.)	Ill.Cir.	Illinois Circuit Court
Havil.	Haviland (Pr.Edw.Isl.)	I.L.P.	Illinois Law and Practice
Hawaii	Hawaiian	Ind.	Indiana
Hawaii Fed.	Hawaiian Federal	Ind.App.	Indiana Appellate Court
Hawaii Rep.	Hawaii Reports	Ind.T.	Indian Territory
Hawk.P.C.	Hawkins' Pleas of the Crown (Eng.)	Ins.L.J.	Insurance Law Journal
Hay.Exch.	Hayes Exchequer (Ir.)	Int.Com.Commn.	Interstate Commerce Commission
Hayes	Hayes (Ir.)	Int.Com.Rep.	Interstate Commerce Reports
Hayes&J.	Hayes & Jones (Ir.)	Int.Rev.Rec.	Internal Revenue Record
Hay&M.	Hay & Marriott (Eng.)	Iowa	Iowa
Hayw.	Haywood (N.C.)	[1891] Ir.	Law Reports [1891] Irish
Hayw.	Haywood (Tenn.)	Ir.Ch.	Irish Chancery
Hayw.&H.	Haywood & Hazelton (U.S.)	Ir.C.L.	Irish Common Law
Haz.Reg.	Hazard's Register (Pa.)	Ir.Eccl.	Irish Ecclesiastical Reports
H.Bi.	Henry Blackstone (Eng.)	Ired.	Iredell (N.C.)
H.&C.	Hurlstone & Coltman (Eng.)	Ir.Eq.	Irish Equity
Head	Head (Tenn.)	Ir.Law Rep.	Irish Law Reports
Heisk.	Heiskell (Tenn.)	Ir.Law&Eq.	Irish Law and Equity Reports
Hem.&M.	Hemming & Miller (Eng.)	Ir.R.1894.	Irish Law Reports for Year 1894
Hempst.	Hempstead (U.S.)	Ir.R.C.L.	Irish Reports Common Law
Hen.&M.	Hening & Munford (Va.)	Ir.R.Eq.	Irish Reports Equity
Het.	Hetley (Eng.)	Irv.Just.	Irvine's Justiciary Cases (Eng.)
Het.C.P.	Hetley's Common Pleas (Eng.)		
H.&H.	Horn & Hurlstone (Eng.)		J
Hill	Hill (N.Y.)	Jac.	Jacob (Eng.)
Hill S.C.	Hill (S.C.)	Jac.&W.	Jacob & Walker (Eng.)
Hill & Den.	Hill & Denio (N.Y.)	J.Bridgm.	John Bridgman (Eng.)
Hill & Den.Supp.	Lalor's Supplement to Hill & Denio's (N.Y.)	J.&C.	Jones & Carey (Ir.)
		Jebb&B.	Jebb & Bourke (Ir.)
Hilt.	Hilton (N.Y.)	Jebb C.C.	Jebb's Crown Cases (Ir.)
Hil.T.	Hilary Term (Eng.)	Jebb&S.	Jebb & Symes (Ir.)
H.L.Cas.	House of Lords Cases (Eng.)	Jeff.	Jefferson (Va.)
H.&N.	Hurlstone & Norman (Eng.)	Jenk.	Jenkins (Eng.)
Hob.	Hobart (Eng.)	J.J.Marsh.	J. J. Marshall (Ky.)
Hodg.El.	Hodgins' Election (U.C.)	J.&L.	Jones & La Touche (Eng.)
Hodges	Hodges (Eng.)	Johns.	Johnson (Eng.)
Hoffm.	Hoffman's Chancery (N.Y.)	Johns.	Johnson (N.Y.)
Hoffm.Land Cas.	Hoffman's Land Cases (U.S.)	Johns.Cas.	Johnson's Cases (N.Y.)
Hog.	Hogan (Ir.)	Johns.Ch.	Johnson's Chancery (N.Y.)
Holmes	Holmes (U.S.)	Johns.V.C.	Johnson's English Vice-Chancellors (Eng.)
Holt's Adm.Cas.	Holt's English Admiralty Cases		Johnson & Hemming (Eng.)
Holt Eq.	Holt's Equity (Eng.)		Jones Exchequer (Ir.)
Holt K.B.	Holt's King's Bench (Eng.)		Sir Thomas Jones' English King's Bench Reports
Holt N.P.	Holt's Nisi Prius (Eng.)		Sir William Jones' English King's Bench Reports
Home	Home (Sc.)		Jones & Spencer (N.Y.)
Hope Dec.	Hope's Decisions (Sc.)		Journal of Jurisprudence (Pa.)
Hopk.	Hopkins' Chancery (N.Y.)		Justice of Peace (Eng.)
Hopk.Dec.	Hopkins' Decisions (Pa.)		Jurist (Eng.)
Hopw.&C.	Hopwood & Coltman (Eng.)		Jurist New Series (Eng.)
Hopw.&P.	Hopwood & Philbrick (Eng.)		Justices' Law Reporter (Pa.)
Hosea	Hosea (Ohio)		
Houst.	Houston (Del.)		K
Houst.Cr.	Houston's Criminal Cases (Del.)		Kames Dec.
How.	Howard (U.S.)		Kames Elucid.
How.Miss.	Howard (Miss.)		Kames Rem.Dec.
How.A.Cas.	Howard's Appeal Cases (N.Y.)		Kames Sel.Dec.
How.N.P.	Howell's Nisi Prius (Mich.)		Kan.
How.Pr.	Howard's Practice (N.Y.)		Kan.App.
How.Pr.N.S.	Howard's Practice New Series (N.Y.)		Kay
How.St.Tr.	Howell's State Trials (Eng.)		Kay (Eng.)
Hud.&B.	Hudson & Brooke (Ir.)		Kay & Johnson (Eng.)
			Law Reports [1917] King's Bench (Eng.)
			Keane & Grant (Eng.)

Keb.	Keble (Eng.)	L.J.Ch.	Law Journal Chancery New Series (Eng.)
Keen	Keen (Eng.)	L.J.Ch.O.S.	Law Journal Chancery Old Series (Eng.)
Keil.	Keilway (Eng.)	L.J.C.P.	Law Journal Common Pleas New Series (Eng.)
Keilw.	Keilway (Eng.)	L.J.C.P.O.S.	Law Journal Common Pleas Old Series (Eng.)
Kel.C.C.	Kelyng's Crown Cases (Eng.)	L.J.Ecd.	Law Journal Ecclesiastical New Series (Eng.)
Kelly	Kelly (Ga.)	L.J.Exch.	Law Journal Exchequer New Series (Eng.)
Kelyng, J.	Kelyng's English Crown Cases	L.J.Exch.O.S.	Law Journal Exchequer Old Series (Eng.)
Kelynge, W.	Kelynge's Chancery (Eng.)	L.J.K.B.	Law Journal King's Bench New Series (Eng.)
Keyes	Keyes (N.Y.)	L.J.K.B.O.S.	Law Journal King's Bench Old Series (Eng.)
K.&G.	Keane & Grant (Eng.)	L.J.M.C.	Law Journal Magistrate Cases New Series (Eng.)
Kilk.	Kilkerran's Decisions (Sc.)	L.J.M.C.O.S.	Law Journal Magistrate Cases Old Series (Eng.)
Kirby	Kirby (Conn.)	L.J.P.C.	Law Journal Privy Council New Series (Eng.)
Knapp	Knapp (Eng.)	L.J.P.D.&Adm.	Law Journal Probate Divorce & Admiralty New Series (Eng.)
Knapp & O.	Knapp & Omler (Eng.)	L.J.P.&M.	Law Journal Probate & Matrimonial New Series (Eng.)
Kn.&Moo.	Knapp & Moore (Eng.)	L.J.Q.B.	Law Journal Queen's Bench New Series (Eng.)
Knox	Knox (N.S.Wales)	L.J.Rep.	Law Journal Reports (Eng.)
Knox & F.	Knox & Fitzhardinge (N.S.Wales)	L.J.G.&T.Pl.	Lloyd & Gould temp. Plunket (Ir.)
Kulp	Kulp (Pa.)	L.J.G.&T.S.	Lloyd & Gould temp. Sugden (Ir.)
Ky.	Kentucky	L.&W.	Lloyd & Welsby (Eng.)
Ky.Dec.	Kentucky Decisions	L.M.	Lowndes & Maxwell (Eng.)
Ky.L.	Kentucky Law Reporter	L.M.&P.	Lowndes, Maxwell & Pollack (Eng.)
Ky.Op.	Kentucky Opinions	Loc.Gov.	Local Government (Eng.)
L		Lofft	Lofft (Eng.)
La.	Louisiana	Longf.&T.	Longfield & Townsend (Ir.)
La.App.	Louisiana Court of Appeals	Low.Can.Seign.	Lower Canada Seigniorial Reports
La.A.(Orleans)	Court of Appeal, Parish of Orleans	Lowell	Lowell (U.S.)
La.Ann.	Louisiana Annual	L.R.	Law Reports (U.S.)
Lab.	Labatt's District Court (Cal.)	L.R.A.	Lawyers' Reports Annotated
Lack.Bar	Lackawanna Bar (Pa.)	L.R.A.1915A	Lawyers' Reports Annotated 1915A
Lack.Jur.	Lackawanna Jurist (Pa.)	L.R.App.Cas.	English Law Reports, Appeal Cases (Eng.)
Lack.Leg.N.	Lackawanna Legal News (Pa.)	L.R.A.&E.	Law Reports Admiralty & Ecclesiastical (Eng.)
Lack.Leg.Rec.	Lackawanna Legal Record (Pa.)	L.R.A.N.S.	Lawyers' Reports Annotated New Series
Lalor	Lalor's Supplement to Hill & Denio (N.Y.)	L.R.C.C.	Law Reports Crown Cases (Eng.)
Lanc.Bar	Lancaster Bar (Pa.)	L.R.Ch.	Law Reports Chancery Appeal Cases (Eng.)
Lanc.Rev.	Lancaster Law Review (Pa.)	L.R.C.P.	Law Reports Common Pleas Cases (Eng.)
Land Dec.	Land Decisions (U.S.)	L.R.Eq.	Law Reports Equity Cases (Eng.)
Lane	Lane (Eng.)	L.R.Exch.	Law Reports Exchequer Cases (Eng.)
Lans.	Lansing (N.Y.)	L.R.H.L.	Law Reports House of Lords (English & Irish Appeal Cases)
Lans.Ch.	Lansing Chancery Decisions (N.Y.)	L.R.H.L.Sc.	Law Reports House of Lords (Scotch Appeal Cases)
Latch	Latch (Eng.)	L.R.Indian App.	Law Reports Indian Appeals (Eng.)
Law Rep.N.S.	Law Reports New Series (N.Y.)	L.R.Ir.	Law Reports Irish
Law.L.J.	Lawrence Law Journal (Pa.)	L.R.P.C.	Law Reports Privy Council (Eng.)
L.C.	Lower Canada	L.R.P.&D.	Law Reports Probate & Divorce (Eng.)
L.&C.	Leigh & Cave (Eng.)	L.R.Q.B.	Law Reports Queen's Bench Cases (Eng.)
L.C.Jur.	Lower Canada Jurist	L.T.	Law Times (Pa.)
L.C.L.J.	Lower Canada Law Journal	L.T.N.S.	Law Times, New Series (Pa.)
L.C.Rep.S.Qu.	Lower Canada Reports Seigniorial Questions	L.T.O.S.	Law Times, Old Series (Eng.)
L.D.	Law Dictionary	L.T.O.S.	Law Times, Old Series (Pa.)
Ld.Ken.	Lord Kenyon (Eng.)	L.T.Rep.N.S.	Law Times Reports, New Series (Eng.)
Ld.Raym.	Lord Raymond (Eng.)	Lush.	Lushington's Admiralty (Eng.)
Lea	Lea (Tenn.)	Lutw.	Lutwyche (Eng.)
Leach C.C.	Leach's Crown Cases (Eng.)	Lutw.Reg.Cas.	Lutwyche's Registration Cases (Eng.)
Lebanon	Lebanon County Legal Journal (Pa.)	Luz.Leg.Obs.	Luzerne Legal Observer (Pa.)
L.Ed.	Lawyers' Edition United States Supreme Court	Luz.Leg.Reg.	Luzerne Legal Register (Pa.)
L.Ed.2d	Lawyer's Edition United States Supreme Court, Second Series	Luz.L.J.	Luzerne Law Journal (Pa.)
Lee Eccl.	Lee's Ecclesiastical (Eng.)	Lycoming	Lycoming Reporter (Pa.)
Lee t.Hardw.	Lee temp. Hardwicke (Eng.)	Lynd.Prov.	Lyndwood's Provinciales
Lef.Dec.	Lefevre's Parliamentary Decisions (Eng.)	MacA.Pat.Cas.	MacArthur's Patent Cases (D.C.)
Leg.Chron.	Legal Chronicle (Pa.)	MacArth.	MacArthur's District of Columbia Reports
Leg.Gaz.	Legal Gazette (Pa.)		
Leg.&Ins.R.	Legal & Insurance Reporter (Pa.)		
Leg.Int.	Legal Intelligencer (Pa.)		
Leg.Op.	Legal Opinions (Pa.)		
Leg.Rec.	Legal Record (Pa.)		
Leh.L.J.	Lehigh County Law Journal (Pa.)		
Lehigh Val.L.R.	Lehigh Valley Law Reporter (Pa.)		
Leigh	Leigh (Va.)		
Leigh & C.	Leigh & Cave's English Crown Cases		
Leon.	Leonard (Eng.)		
Lev.	Levinz (Eng.)		
Lew.C.C.	Lewin's Crown Cases (Eng.)		
Ley	Ley (Eng.)		
L.G.	Law Glossary		
Liberian L.	Liberian Law		
Litt.	Littell (Ky.)		
Litt.	Littleton (Eng.)		
Litt.Sel.Cas.	Littell's Select Cases (Ky.)		
L.J.Adm.	Law Journal Admiralty New Series (Eng.)		
L.J.Bankr.	Law Journal Bankruptcy New Series (Eng.)		

MacAr.&M. MacArthur & Mackey's District of Columbia Reports
Maccl. Macclesfield (Eng.)
MacFarl. MacFarlane (Sc.)
Mackey Mackey's Reports, District of Columbia
MacL.&R. Maclean & Robinson (Eng.)
Macn.&G. Macnaghten & Gordon (Eng.)
Macph. Macpherson (Sc.)
Macph.S.&L. Macpherson, Shirreff & Lee (Sc.)
Macq. Macqueen's Scotch Appeal Cases
Madd. Maddock (Eng.)
Madd.Ch.Pr. Maddock's Chancery Practice (Eng.)
Malloy Malloy (Ir.)
Man. Manitoba Law
Man.El.Cas. Manning's Election Cases (Eng.)
Man.Exch.Pr. Manning's Exchequer Practice (Eng.)
Man.Gr.&S. Manning, Granger & Scott (Eng.)
Man.L.J. Manitoba Law Journal
Man.&Ry. Manning & Ryland (Eng.)
Man.&Ry.Mag. Manning & Ryland's Magistrates' Cases (Eng.)
Man.&S. Manning & Scott (Eng.)
Man.Unrep.Cas. Manning's Unreported Cases (La.)
Manson Manson (Eng.)
Man.t.Wood Manitoba temp. Wood
March March (Eng.)
Mar.Prov. Maritime Province Reports (Can.)
Mars.Adm. Marsden's Admiralty (Eng.)
Marsh. Marshall (Eng.)
Marsh.J.J. J. J. Marshall (Ky.)
Mart. Martin Old Series (La.)
Mart. Martin (N.C.)
Mart.N.S. Martin New Series (La.)
Mart.&Y. Martin & Yerger (Tenn.)
Marv. Marvel (Del.)
Mason Mason (U.S.)
Mass. Massachusetts
Maule & S. Maule & Selwyn (Eng.)
Mayn. Maynard (Eng.)
McAll. McAllister (U.S.)
McC. McCahon (Kan.)
McClell. McClelland (Eng.)
McClell.&Y. McClelland & Younge (Eng.)
McCord McCord (S.C.)
McCrary McCrary (U.S.)
McG. McGloin (La.)
McLean McLean (U.S.)
McMull. McMullan (S.C.)
Md. Maryland
Md.Ch. Maryland Chancery
Me. Maine
Mees.&Ros. Meeson & Roscoe (Eng.)
Mees.&W. Meeson & Welsby (Eng.)
Meg. Megone (Eng.)
Meigs Meigs (Tenn.)
Menzies Cape of Good Hope
Meriv. Merivale (Eng.)
Metc. Metcalf (Mass.)
Metc. Metcalfe (Ky.)
M.&G. Manning & Granger (Eng.)
M.&H. Murphy & Hurlstone (Eng.)
Mich. Michigan
Mich.N.P. Michigan Nisi Prius
Mich.T. Michaelmas Term (Eng.)
Miles Miles (Pa.)
Mill Const. Mill's Constitutional (S.C.)
Mill.Dec. Miller's Decisions (U.S.)
Mills Mills (N.Y.)
Milw. Milward (Ir.)
Minn. Minnesota
Minor Minor (Ala.)
Misc. Miscellaneous Reports (N.Y.)
Misc.2d Miscellaneous Reports, Second Series (N.Y.)
Miss. Mississippi
Miss.Dec. Mississippi Decisions
Miss.St.Cas. Mississippi State Cases
M.L.P. Michigan Law and Practice
M.&M. Moody & Malkin (Eng.)
Mo. Missouri
Mo.App. Missouri Appeals
Moak Moak (Eng.)
Mo.A.R. Missouri Appeals Reporter
Mod. Modern (Eng.)
M.A.L. Modern American Law
Mod.Cas.L.&Eq. Modern Cases at Law and Equity (Eng.)
Molloy Molloy (Ir.)
Mon. Monaghan (Pa.)
Monroe L.R. Monroe Law Reports (Pa.)
Mont. Montana
Mont. Bank.Rep. Montagu's English Bankruptcy Reports
Mont.L.R. Montreal Law Reports (Can.)
Mont.&A. Montagu & Ayrton (Eng.)
Mont.&B. Montagu & Bligh (Eng.)
Mont.&C. Montagu & Chitty (Eng.)
Mont.D.&DeG. Montagu, Deacon & De Gex (Eng.)
Montg. Montgomery County Law Reporter (Pa.)
Mont.&M. Montagu & McArthur (Eng.)
Montr.Cond.Rep. Montreal Condensed Reports
Montr.Leg.N. Montreal Legal News
Montr.Q.B. Montreal Law Reports Queen's Bench
Montr.Super. Montreal Law Reports Superior Court
Moody C.C. Moody's Crown Cases (Eng.)
Moore C.P. Moore's Common Pleas (Eng.)
Moore Indian App. Moore's Indian Appeals (Eng.)
Moore K.B. Moore's King's Bench (Eng.)
Moore P.C. Moore's Privy Council Old Series (Eng.)
Moore P.C.N.S. Moore's Privy Council New Series (Eng.)
Moore&S. Moore & Scott (Eng.)
Moore&W. Moore & Walker (Tex.)
Mor.Min.Rep. Morrison's Mining Reports
Morr. Morris (Iowa)
Morr.Bankr.Cas. Morrell's Bankruptcy Cases (Eng.)
Morr.St.Cas. Morris' State Cases (Miss.)
Mosely Mosely (Eng.)
M.&P. Moore & Payne (Eng.)
M.&R. Manning & Ryland (Eng.)
M.&Rob. Moody & Robinson (Eng.)
M.&S. Maule & Selwyn (Eng.)
Mun. Municipal Law Reporter (Pa.)
Mun.Corp.Cas. Municipal Corporation Cases
Munf. Munford (Va.)
Murph. Murphey (N.C.)
Murr. Murray (Sc.)
M.&W. Meeson & Welsby (Eng.)
Myl.&C. Mylne & Craig (Eng.)
Myl.&K. Mylne & Keen (Eng.)
Myr.Prob. Myrick's Probate (Cal.)
N. National Bankruptcy Register (U.S.)
Nat.Bankr.Reg. National Corporation Reporter
Nat.Corp.Rep. National Law Reporter
Nat.L.Rep. New Brunswick
N.B. New Benloe (Eng.)
N.Benl. New Brunswick Equity
N.B.Eq. North Carolina
N.C. N. Chipman (Vt.)
N.Chipm. North Carolina Conference
N.C.Conf. North Carolina Term Reports
N.C.T.Rep. North Dakota
N.D. North Eastern Reporter
N.E. North Eastern Reporter Second Series
N.E.2d Nebraska
Neb. Nebraska Unofficial
Neb.Unoff. Nelson (Eng.)
Nels. Nelson's Abridgment of the Common Law
Nels.Abr. Nevada
Nev. Newberry's Admiralty (U.S.)
Newb.Adm. Newfoundland
Newfoundl. Newfoundland Select Cases
Newf.Sel.Cas. New Reports in all Courts (Eng.)
NewRep. New Session Cases (Eng.)
NewSess.Cas. New Zealand Law
NewZeal.L. New Hampshire
N.H. New Jersey Reports
N.J. New Jersey Equity
N.J.Eq. New Jersey Law
N.J.Law. New Jersey Law Journal
N.J.L.J. New Jersey Miscellaneous
N.J.Misc. New Jersey Superior Court Reports
N.J.Super. New Mexico
N.M. Neville & Manning (Eng.)
N.&M.

N. & Macn.	Neville & Macnamara (Eng.)
Nolan	Nolan (Eng.)
North.	Northington (Eng.)
North.	Northampton County Reporter (Pa.)
Northumb.Co.Leg.	Northumberland County Legal News (Pa.)
N.	Northumberland County Legal News (Pa.)
Northumb.L.J.	Northumberland Legal Journal (Pa.)
Notes of Cas.	Notes of Cases (Eng.)
Nott & McC.	Nott & McCord (S.C.)
Noy	Noy (Eng.)
N. & P.	Neville & Perry (Eng.)
N.S.	Nova Scotia
N.S.Dec.	Nova Scotia Decisions
N.S.Wales	New South Wales
N.S.Wales L.	New South Wales Law
N.S.Wales L.R.Eq.	New South Wales Law Reports Equity
N.W.	North Western Reporter
N.W.2d	North Western Reporter Second Series
N.Y.	New York
N.Y.2d	New York Second Series
N.Y.Ann.Cas.	New York Annotated Cases
N.Y.City Ct.	New York City Court
N.Y.City Ct.Suppl.	New York City Court Supplement
N.Y.Civ.Proc.	New York Civil Procedure
N.Y.Civ.Pr.Rep.	New York Civil Procedure Reports
N.Y.Code Reports	
N.S.	New York Code Reports, New Series
N.Y.Cr.	New York Criminal
N.Y.Leg.Obs.	New York Legal Observer
N.Y.L.Rec.	New York Law Record
N.Y.Month.L.Bul.	New York Monthly Law Bulletin
N.Y.S.	New York Supplement
N.Y.S.2d	New York Supplement Second Series
N.Y.St.	New York State Reporter
N.Y.Super.	New York Superior Court
N.Y.Wkly.Dig.	New York Weekly Digest

O

O.Ben.	Old Benloe (Eng.)
O.Bridgm.	Orlando Bridgman (Eng.)
Off.Gaz.	Official Gazette
Ohio	Ohio
Ohio App.	Ohio Court of Appeals
Ohio Cir.Ct.	Ohio Circuit Court
Ohio Cir.Ct.N.S.	Ohio Circuit Court New Series
Ohio Cir.Dec.	Ohio Circuit Decisions
Ohio Dec. Reprint	Ohio Decisions (Reprint)
Ohio F.Dec.	Ohio Federal Decisions
Ohio L.J.	Ohio Law Journal
Ohio N.P.	Ohio Nisi Prius
Ohio N.P.N.S.	Ohio Nisi Prius New Series
Ohio O.	Ohio Opinions
Ohio O.2d	Ohio Opinions, Second Series
Ohio Prob.	Ohio Probate
Ohio S. & C.P.	Ohio Superior & Common Pleas Decisions
Ohio St.	Ohio State
Ohio Supp.	Ohio Supplement
Okl.	Oklahoma
Okl.Cr.	Oklahoma Criminal
Olcott	Olcott (U.S.)
Oliv.B. & L.	Oliver, Beavan & Lefroy (Eng.)
O'M. & H.	O'Malley & Hardcastle (Ir.)
Ont.	Ontario
Ont.A.	Ontario Appeals
Ont.El.Cas.	Ontario Election Cases
Ont.L.	Ontario Law
Ont.L.J.	Ontario Law Journal
Ont.L.J.N.S.	Ontario Law Journal New Series
Ont.Pr.	Ontario Practice
Ont.W.N.	Ontario Weekly Notes
Ont.W.R.	Ontario Weekly Reporter
Op.Att'y-Gen.	Opinions of Attorneys-General (U.S.)
Op.Sol.Dept.	
Labor	Opinions of the Solicitor for the Department of Labor Dealing with Workmen's Compensation
Or.	Oregon
Orleans App.	Orleans Appeals (La.)
Overt.	Overtown (Tenn.)
Owen	Owen (Eng.)

P

P.	Pacific Reporter
P.2d.	Pacific Reporter Second Series
[1891] P.	Law Reports [1891] Probate (Eng.)
Pa.	Pennsylvania State
Pa.Cas.	Pennsylvania Supreme Court Cases (Sadler)
Pa.Co.	Pennsylvania County Court
Pa.Corp.	Pennsylvania Corporation Reporter
Pa.C.P.I.	Common Pleas (Pa.)
Pa.Dist.	Pennsylvania District
Pa.D. & C.	Pennsylvania District and County
Pa.D. & C.2d	Pennsylvania District and County Second Series
Paige	Paige's Chancery (N.Y.)
Paine	Paine (U.S.)
Pa.L.J.	Pennsylvania Law Journal
Pa.L.Rec.	Pennsylvania Law Record
Pa.L.J.R.	Clark's Pennsylvania Law Journal Reports
Palmer	Palmer (Eng.)
Pa.Rec.	Pennsylvania Record
Park.	Parker (Eng.)
Park.Cr.	Parker's Criminal (N.Y.)
Park.Exch.	Parker's Exchequer (Eng.)
Park.Ins.	Parker's Insurance (Eng.)
Pars.Eq.Cas.	Parsons' Equity Cases (Pa.)
Pa.Super.	Pennsylvania Superior Court
Paton App.Cas.	Paton's Appeal Cases (Sc.)
Patrick El.Cas.	Patrick's Election Cases (Can.)
Patton & H.	Patton & Heath (Va.)
P.D.	Law Reports Probate Division (Eng.)
P. & D.	Perry & Davison (Eng.)
Peake N.P.	Peake's Nisi Prius (Eng.)
Pearce C.C.	Pearce's Reports in Dearsly's (Eng.)
Pearson	Pearson (Pa.)
Peck	Peck (Tenn.)
Peck.El.Cas.	Peckwell's Election Cases (Eng.)
Pennew.	Pennewill (Del.)
Pennyp.	Pennypacker (Pa.)
Penr. & W.	Penrose & Watts (Pa.)
Perry & Kn.	Perry & Knapp Election Cases (Eng.)
Pet.	Peters (U.S.)
Pet.Adm.	Peters' Admiralty (U.S.)
Pet.C.C.	Peters' Circuit Court (U.S.)
Phil.	Phillips (Eng.)
Phil.	Phillip (N.C.)
Phila.	Philadelphia (Pa.)
Philippine	Philippine
Phillim.	Phillimore Ecclesiastical (Eng.)
Pick.	Pickering (Mass.)
Pig. & R.	Pigott & Rodwell (Eng.)
Pig.Rec.	Pigott's Recoveries (Eng.)
Pinn.	Pinney (Wis.)
Pittsb.	Pittsburgh (Pa.)
P. & K.	Perry & Knapp (Eng.)
P.L.E.	Pennsylvania Law Encyclopedia
P.L.J.	Pittsburgh Legal Journal (Pa.)
P.L.J.N.S.	Pittsburgh Legal Journal New Series (Pa.)
Plowd.	Plowden (Eng.)
Pollexf.	Pollexfen (Eng.)
Poph.	Popham (Eng.)
Port.	Porter (Ala.)
Posey	Posey's Unreported Cases (Tex.)
Puerto Rico	Puerto Rico
Puerto Rico Fed.	Puerto Rico Federal
Pow.Surr.	Powers' Surrogate (N.Y.)
P.R. & D.El.Cas.	Power, Rodwell & Dew's Election Cases (Eng.)
Prec.Ch.	Precedents in Chancery (Eng.)
Pr.Edw.Isl.	Prince Edward Island
Price	Price (Eng.)
Price Pr.Cas.	Price's Practice Cases (Eng.)
Prid. & C.	Prideaux & Cole (Eng.)
Prob.[1917]	Law Reports, Probate Division (Eng.)
Prob.Rep.	Probate Reports (Eng.)
Pr.Rep.	Practice Reports (Eng.)
P.Wms.	Peere-Williams (Eng.)
P.U.R.	Public Utilities Reports
Pyke	Pyke (Can.)

Q

Q.B.

Queen's Bench (Adolphus & Ellis New Series) (Eng.)

TABLE OF ABBREVIATIONS

x

[1891]Q.B.	Law Reports [1891] Queen's Bench (Eng.)	Sandf.Ch.	Sandford's Chancery (N.Y.)
Q.B.D.	Law Reports Queen's Bench Division (Eng.)	Sask.L.	Saskatchewan Law
Queensl.J.P.	Queensland Justice of the Peace	Saund.	Saunders (Eng.)
Queensl.L.	Queensland Law	Saund.&C.	Saunders & Cole (Eng.)
Queensl.L.J.	Queensland Law Journal	Sau.&Sc.	Sausse & Scully (Ir.)
Que.L.	Quebec Law	S.Austr.L.	South Australia Law
Que.Pr.	Quebec Practice	Sav.	Savile (Eng.)
Que.Q.B.	Quebec Official Reports Queen's Bench	Sawy.	Sawyer (U.S.)
Que.Rev.Jud.	Quebec Revised Judicial	Saxt.	Saxton (N.J.)
Que.Super.	Quebec Official Reports Superior Court	Sayer (Eng.)	South Carolina
Quincy	Quincy (Mass.)	[1907]S.C.	Court of Session Cases (Sc.)
R		Scam.	Scammon (Ill.)
Rand.	Randolph (Va.)	S.C.Eq.	South Carolina Equity
Rap.Jud. Q.C.S.	Rapport's Judiciaries de Quebec Cour Superieure	Sch.&Lef.	Schoales & Lefroy (Ir.)
Rawle	Rawle (Pa.)	Sch.Leg.Rec.	Schuykill Legal Record (Pa.)
R.C.L.	Ruling Case Law	Sch.Reg.	Schuykill Register (Pa.)
R.&Can.Cas.	Railway & Canal Cases (Eng.)	[1907]S.C.(J.)	Court of Judiciary Cases (Sc.)
R.&Can.Tr.Cas.	Railway & Canal Traffic Cases (Eng.)	Sc.Jur.	Scottish Jurist
Redf.	Redfield's Surrogate (N.Y.)	S.C.L.	South Carolina Law
Redf.&B.	Redfield & Bigelow's Leading Cases (Eng.)	Sc.L.Rep.	Scottish Law Reporter
Redf.R.Cas.	Redfield's Railway Cases (Eng.)	Scot.L.T.	Scot Law Times
Redf.Surr.	Redfield's Surrogate (N.Y.)	Scott	Scott (Eng.)
Reeve Eng.L.	Reeve's English Law	Scott N.R.	Scott's New Reports (Eng.)
Reports	Reports (Eng.)	Ser.L.T.	Scranton Law Times (Pa.)
Reprint	English Reprint	Sc.Sess.Cas.	Scotch Court of Session Cases
Rep.t.Finch	Cases temp. Finch (Eng.)	S.Ct.	Supreme Court Reporter (U.S.)
Rep.t.Hard.	Lee's Reports <i>tempore</i> Hardwicke (Eng.)	S.D.	South Dakota
Rep.t.Holt	Reports <i>tempore</i> Holt (English Cases of Settlement)	S.E.	South Eastern Reporter
Res.&Eq.Judgm.	Reserved & Equity Judgments (N.S. Wales)	S.E.2d	South Eastern Reporter Second Series
Rev.Crit.	Revue Critique (Can.)	Searle & Sm.	Searle & Smith (Eng.)
Rev.de Jur.	Revue de Jurisprudence (Can.)	Sel.Cas.Ch.	Select Cases in Chancery (Eng.)
Rev.de Legis.	Revue de Legislation (Can.)	Seld.	Selden's Notes (N.Y.)
Rev.Leg.	Revue Legale (Can.)	Selden	Selden (N.Y.)
Rev.Leg.N.S.	Revue Legale New Series (Can.)	Selw.	Selwyn's Nisi Prius (Eng.)
Rev.Rep.	Revised Reports (Eng.)	Serg.&R.	Sergeant & Rawle (Pa.)
R.I.	Rhode Island	Sess.Cas.	Court of Session Cases (Eng.)
Rice	Rice (S.C.)	Shan.	Shannon (Tenn.)
Rich.	Richardson (S.C.)	Shaw	Shaw (Sc.)
Rich.C.P.	Richardson's Practice Common Pleas (Eng.)	Shaw & D.	Shaw & Dunlop (Sc.)
Ridg.	Ridgeway's Reports <i>tempore</i> Hardwicke (Eng.)	Shaw Dec.	Shaw's Digest of Decisions (Sc.)
Ridg.Ap.	Ridgeway's Appeal (Ir.)	Shaw.Dunl.&B.	Shaw, Dunlop & Bell (Sc.)
Ridg.L.&S.	Ridgeway, Lapp & Schoale (Ir.)	Shaw&M.	Shaw & MacLean (Sc.)
Ridg.P.C.	Ridgeway's Parliament Cases (Ir.)	Sheld.	Sheldon (N.Y.)
Ridg.t.Hardw.	Ridgeway temp. Hardwicke (Eng.)	Shep.Abr.	Sheppard's Abridgment
Riley	Riley (S.C.)	Sheph.Sel.Cas.	Shepherd's Select Cases (Ala.)
R.&M.	Ryan & Moody (Eng.)	Show.	Shower (Eng.)
R.M.Charlt.	R. M. Charlton (Ga.)	Show.P.C.	Shower's Parliament Cases (Eng.)
Rob.	Robinson (La.)	Sid.	Siderfin (Eng.)
Rob.	Robinson (Va.)	Silv.A.	Silvernail's Appeals (N.Y.)
Robb Pat.Cas.	Robb's Patent Cases (U.S.)	Silv.Sup.	Silvernail's Supreme (N.Y.)
Robert.App.Cas.	Robertson's Appeal Cases (Sc.)	Sim.	Simons (Eng.)
Rob.Eccl.	Robertson's Ecclesiastical (Eng.)	Sim.N.S.	Simons New Series (Eng.)
Robin.App.Cas.	Robinson's Appeal Cases (Sc.)	Sim.&St.	Simons & Stuart (Eng.)
Rob.Wm.Adm.	William Robinson's Admiralty (Eng.)	Skin.	Skinner (Eng.)
Rolle	Rolle (Eng.)	Smale&G.	Smale & Giffard (Eng.)
Rolle Abr.	Rolle's Abridgment (Eng.)	Smith	Smith (Ind.)
Rolls Ct.Rep.	Rolls' Court Reports	Smith	Smith (N.H.)
Rom.Cas.	Romilly's Notes of Cases (Eng.)	Smith&B.	Smith & Batty (Ir.)
Root	Root (Conn.)	Smith K.B.	Smith's King's Bench (Eng.)
Rose	Rose (Eng.)	Smith Lead.Cas.	Smith's Leading Cases (Eng.)
Ross Lead.Cas.	Ross' Leading Cases (Eng.)	Smith Reg.	Smith's Registration (Eng.)
R.&R.	Russell & Ryan Crown Cases (Eng.)	Sm.&M.	Smedes & Marshall (Miss.)
Russ.	Russell (Eng.)	Sm.&M.Ch.	Smedes & Marshall Chancery (Miss.)
Russ.&C.Eq.Cas.	Russell's & Chesley's Equity Cases (N.S.)	Smythe	Smythe (Ir.)
Russ.Eq.Cas.	Russell's Equity Cases (N.S.)	Sneed	Sneed (Tenn.)
Russ.&Geld.	Russell & Geldert, Nova Scotia	So.	Southern Reporter
Russ.&M.	Russell & Mylne (Eng.)	So.2d	Southern Reporter Second Series
Ry.&M.	Ryan & Moody (Eng.)	Sol.J.	Solicitor's Journal (Eng.)
S		Som.	Somerset Legal Journal (Pa.)
Salk.	Salkeld (Eng.)	Sp.	Speers (S.C.)
Sandf.	Sandford's Superior Court (N.Y.)	Spinks	Spinks Admiralty (Eng.)
		Spinks	Spinks' Ecclesiastical and Admiralty (Eng.)
		Spinks, P.C.	Spinks' Prize Cases (Eng.)
		Spottisw.	Spottiswoode (Sc.)
		Spottisw.Eq.	Spottiswoode's Equity (Sc.)
		Sprague	Sprague (U.S.)
		Stair	Stair (Sc.)
		Stark.	Starkie Nisi Prius (Eng.)
		Stat. at L.	United States Statutes at Large
		Stew.	Stewart (Ala.)
		Stew.	Stewart's Reports (N.S.)
		Stew.&P.	Stewart & Porter (Ala.)
		Stockt.Vice-Adm.	Stockton's Vice-Admiralty (N.B.)
		Story	Story (U.S.)
		Str.	Strange (Eng.)

TABLE OF ABBREVIATIONS

Strob.	Strobhart (S.C.)	Vaugh.	Vaughan (Eng.)
Stuart Vice-Adm.	Stuart's Vice-Admiralty (L.C.)	Vaux	Vaux's Decisions (Pa.)
Stu.M.&P.	Stuart, Milne & Peddie (Sc.)	Vent.	Ventris (Eng.)
Style	Style (Eng.)	Vern.	Vernon's Cases (Eng.)
Sumn.	Sumner (U.S.)	Vern.Ch.	Vernon's Chancery (Eng.)
Susq.Leg.Chron.	Susquehanna Legal Chronicle (Pa.)	Vern.&S.	Vernon & Scriven (Ir.)
S.W.	South Western Reporter	Ves.	Vesey Senior (Eng.)
S.W.2d	South Western Reporter Second Series	Ves.& B.	Vesey & Beames (Eng.)
Swab.	Swabey's Admiralty (Eng.)	Ves.Jr.	Vesey Junior (Eng.)
Swab.&Tr.	Swabey & Tristram (Eng.)	Ves.Jr.Suppl.	Vesey Junior Supplement (Eng.)
Swan	Swan (Tenn.)	Ves.Suppl.	Vesey Senior Supplement (Eng.)
Swanston.	Swanston (Eng.)	Vict.	Victorian
	T	Vict.L.	Victorian Law
Taml.	Tamlyn (Eng.)	Vict.L.T.	Victorian Law Times
Taney	Taney (U.S.)	Vict.Rep.	Victorian Reports
Tapp.	Tappan (Oh.)	Vict.St.Tr.	Victorian State Trials
Taunt.	Taunton (Eng.)	Vin.Abr.	Viner's Abridgment (Eng.)
Taylor	Taylor (N.C.)	Virgin Islands	Virgin Islands
T.B.Mon.	T. B. Monroe (Ky.)	Vt.	Vermont
Tenn.	Tennessee		W
Tenn.App.	Tennessee Appeals	Walk.	Walker (Pa.)
Tenn.Cas.	Unreported Tennessee Cases	Walk.	Walker's Chancery (Mich.)
Tenn.Ch.	Tennessee Chancery	Wall.	Wallace (U.S.)
Tenn.Ch.A.	Tennessee Chancery Appeals	Wall.C.C.	Wallace (U.S.)
Tenn.Civ.A.	Tennessee Civil Appeals	Wall.Jr.	Wallace Junior (U.S.)
Terr.L.	Territories Law (Northwest Territories)	Wall.Sr.	Wallace Senior (U.S.)
	Texas	Wallis	Wallis (Ir.)
Tex.	Texas	Ware	Ware (U.S.)
Tex.App.	Texas Court of Appeals	Wash.	Washington
Tex.A.Civ.Cas.	White & Wilson's Civil Cases (Tex.)	Wash.2d	Washington Reports, Second Series
Tex.Civ.App.	Texas Civil Appeals	Wash.	Washington (Va.)
Tex.Cr.	Texas Criminal	Wash.St.	Washington State
Tex.Suppl.	Texas Supplement	Wash.C.C.	Washington Circuit Court (U.S.)
Tex.Unrep.Cas.	Posey's Unreported Cases (Tex.)	Wash.Co.	Washington County Reports (Pa.)
Thach.Cr.	Thacher's Criminal Cases (Mass.)	Wash.T.	Washington Territory
Thomps.&C.	Thompson & Cook (N.Y.)	Watts	Watts (Pa.)
Thomps.Cas.	Thompson's Cases (Tenn.)	Watts & S.	Watts & Sergeant (Pa.)
Tinw.	Tinwald (Sc.)	W.B.I.	William Blackstone (Eng.)
T.Jones	Thomas Jones (Eng.)	W.C.C.	Minton-Senhouse's Workmen's Compensation Cases (Eng.)
T.L.R.	Times Law Reports (Eng.)		
T.M.R.	Trade Mark Reports	Webb, A'B.&W.I.	
T.&M.	Temple & Mew (Eng.)	P.&M.	
Toth.	Tothill (Eng.)		
T.R.	Term Reports (Durnford & East) (Eng.)	Web.Pat.Cas.	Webb, A'Beckett & Williams' Insolvency, Probate, and Matrimonial Reports (Victoria)
Transcr.A.	Transcript Appeals (N.Y.)	Webster New	Webster's Patent Cases (Eng.)
T.Raym.	Thomas Raymond (Eng.)	Int.D.	Webster's New International Dictionary
Tread.Const.	Treadway Constitutional (S.C.)	Welsh	Welsh Registry Cases (Ir.)
Treas.Dec.	Treasury Decisions (U.S.)	Wend.	Wendell (N.Y.)
Tr.&H.Pr.	Troubat & Haly's Practice (Pa.)	West.	West (Eng.)
Trint.T.	Trinity Term (Eng.)		
Truem.Eq.Cas.	Trueman's Equity Cases (N.B.)	West.L.J.	Westmoreland County Law Journal (Pa.)
Tuck.Sel.Cas.	Tucker's Select Cases (Newfoundland)	West.L.Month.	Western Law Journal (Oh.)
Tuck.Surr.	Tucker's Surrogate (N.Y.)	West.L.R.	Western Law Monthly (Oh.)
T.U.P.Charlft.	T. U. P. Charlton (Ga.)	West.L.T.	Western Law Reporter (Can.)
Turn.&R.	Turner & Russell (Eng.)	West.R.	Western Law Times (Can.)
Tyler	Tyler (Vt.)	West t.Hardw.	Western Reporter
Tyrw.	Tyrwhitt (Eng.)	West.Wkly.	West temp. Hardwicke (Eng.)
Tyrw.&G.	Tyrwhitt & Granger (Eng.)	[1917] West.Wkly.	Western Weekly (Can.)
	U	Whart.	[1917] Western Weekly (Can.)
U.C.	Upper Canada	Wheat.	Wharton (Pa.)
U.C.Ch.	Upper Canada Chancery	Wheel.Cr.	Wheaton (U.S.)
U.C.Cham.	Upper Canada Chamber	White & T.Lead.	Wheeler's Criminal (N.Y.)
U.C.C.P.	Upper Canada Common Pleas	Cas.Eq.	
U.C.E.&A.	Upper Canada Error and Appeal		
U.C.K.B.	Upper Canada King's Bench Reports	Whitm.Pat.Cas.	White & Tudor's Leading Cases in Equity (Eng.)
U.C.Q.B.	Upper Canada Queen's Bench	Wight.	Whitman's Patent Cases (U.S.)
U.C.Q.B.O.S.	Upper Canada Queen's Bench Old Series	Wilcox	Wightwicke (Eng.)
	United States	Willes	Wilcox (Pa.)
U.S.	United States	Wilm.	Willes (Eng.)
U.S.App.D.C.	United States Appeal Cases (D.C.)	Wils.	Wilmot's Notes (Eng.)
U.S.Aviation Rep.	Aviation Reports (U.S.)	Wils.Ch.	Wilson (Ind.)
U.S.C.A.	United States Code Annotated	Wils.C.P.	Wilson's Chancery (Eng.)
Utah	Utah Reports	Wils.Exch.	Wilson's Common Pleas (Eng.)
Utah 2d	Utah Reports Second Series	Wils.P.C.	Wilson's Exchequer (Eng.)
	V	Wils.&S.	Wilson's Privy Council (Eng.)
Va.	Virginia	Winch	Wilson & Shaw (Sc.)
Va.Cas.	Virginia Cases	Winst.	Winch (Eng.)
Va.Ch.Dec.	Chancery Decisions (Va.)	Wis.	Winston (N.C.)
Va.Dec.	Virginia Decisions	Wis.2d	Wisconsin Reports
Van Ness Prize Cas.	Van Ness Prize Cases (U.S.)	W.Jones	Wisconsin Reports, Second Series
		W.Kel.	William Jones (Eng.)
		Wkly.L.Gaz.	William Kelynge (Eng.)
			Weekly Law Gazette (Oh.)

Wkly.N.C.	Weekly Notes of Cases (Pa.)	W.W.&H.	Willmore, Wollaston & Hodges (Eng.)
Wkly.Rep.	Weekly Reporter (Eng.)	Wyo.	Wyoming
Wms.Saund.	Williams Notes to Saunders' Reports	Wythe	Wythe's Chancery (Va.)
W.N.	Weekly Notes (Eng.)	Wy.&W.	Wyatt & Webb (Vict.)
Wolf.&B.	Wolferstan & Bristow's Election Cases (Eng.)	Wy.W.&A'Beck.	Wyatt, Webb & A'Beckett (Vict.)
Wolf.&D.	Wolferstan & Dew's Election Cases (Eng.)		
Woll.	Wollaston (Eng.)		
Woodb.&M.	Woodbury & Minot (U.S.)		
Woods	Woods (U.S.)		
Woodw.	Woodward's Decisions (Pa.)		
Woolw.	Woolworth (U.S.)		
Words & Phrases	Words & Phrases		
Wright	Wright (Oh.)		
W.Rob.	William Robinson's Admiralty (Eng.)		
Wr.Pa.	Wright (Pa.)		
W.Va.	West Virginia		
W.W.Harr.	W. W. Harrington (Del.)		
W.W.&D.	Willmore, Wollaston & Davidson (Eng.)		

Y

Yates Sel.Cas.	Yates Select Cases (N.Y.)
Y.B.	Year Book (Eng.)
Y.&C.Exch.	Younge & Collyer's Exchequer (Eng.)
Y.&Coll.	Younge & Collyer's Chancery (Eng.)
Yeates	Yeates (Pa.)
Yelv.	Yelverton (Eng.)
Yerger	Yerger (Tenn.)
Y.&J.	Younge & Jervis (Eng.)
York	York Legal Record (Pa.)
Young Adm.	Younge's Admiralty Decisions (N.S.)
Younge	Younge Exchequer (Eng.)

LAW REVIEWS AND LAW JOURNALS

A.B.A.Jour.	American Bar Association Journal	Md.L.Rev.	Maryland Law Review
Ala.L.Rev.	Alabama Law Review	Mass.L.Q.	Massachusetts Law Quarterly
Albany L.Rev.	Albany Law Review	Mercer, Beasley	
Am.J.Int.Law	American Journal of International Law	L.Rev.	Mercer, Beasley Law Review
Am.Law S.Rev.	American Law School Review	Miami L.Q.	Miami Law Quarterly
Ark.L.Rev.	Arkansas Law Review	Mich.L.Rev.	Michigan Law Review
Aust.L.J.	Australian Law Journal	Minn.L.Rev.	Minnesota Law Review
B.U.L.Rev.	Boston University Law Review	Miss.L.J.	Mississippi Law Journal
Brooklyn L.Rev.	Brooklyn Law Review	Mo.L.Rev.	Missouri Law Review
Calif.L.Rev.	California Law Review	Montana L.Rev.	Montana Law Review
Camb.L.J.	Cambridge Law Journal	Neb.L.B.	Nebraska Law Bulletin
Chi.-Kent Rev.	Chicago-Kent Review	N.J.L.J.	New Jersey Law Journal
Colum.L.Rev.	Columbia Law Review	N.J.L.Rev.	New Jersey Law Review
Com.L.J.	Commercial Law Journal	N.Y.U.L.Q.Rev.	New York University Law Quarterly Review
Cornell L.Q.	Cornell Law Quarterly	Notre Dame Law.	Notre Dame Lawyer
Detroit L.Rev.	Detroit Law Review	N.C.L.Rev.	North Carolina Law Review
Dick.L.Rev.	Dickinson Law Review	Okla.L.Rev.	Oklahoma Law Review
Fed.B.A.J.	Federal Bar Association Journal	Oreg.L.Rev.	Oregon Law Review
Fla.L.J.	Florida Law Journal	Phil.L.J.	Philippine Law Journal
Fordham L.Rev.	Fordham Law Review	Rocky Mt.L.Rev.	Rocky Mountain Law Review
Geo.Wash.L.Rev.	George Washington Law Review	Rutgers U.L.Rev.	Rutgers University Law Review
Geo.L.J.	Georgetown Law Journal	St. John's L.Rev.	St. John's Law Review
Harv.L.Rev.	Harvard Law Review	St. Louis L.Rev.	St. Louis Law Review (now Wash- ton University Law Quarterly)
Ia.L.Rev.	Iowa Law Review	So.Calif.L.Rev.	Southern California Law Review
Idaho L.J.	Idaho Law Journal	Southwestern L.J.	Southwestern Law Journal
Ill.L.Rev.	Illinois Law Review	Stanford L.Rev.	Stanford Law Review
Ind.L.J.	Indiana Law Journal	Temp.L.Q.	Temple Law Quarterly
J.Am.Jud.Soc.	Journal of the American Judicature Society	Tenn.L.Rev.	Tennessee Law Review
J.Comp.Leg.	Journal of the Society of Comparative Legislation	Tex.L.Rev.	Texas Law Review
J.N.A.Referees Bank.	Journal of the National Association of Referees in Bankruptcy	Tul.L.Rev.	Tulane Law Review
J.Soc.Pub.Teach. Law	Journal of the Society of Pub. Teachers of Law	U.Chi.L.Rev.	University of Chicago Law Review
John Marshall L. Q.	The John Marshall Law Quarterly	U.Cin.L.Rev.	University of Cincinnati Law Review
Kan.City L.Rev.	Kansas City Law Review	U.Detroit L.J.	University of Detroit Law Journal
Kan.St.L.J.	Kansas State Law Journal	U.Florida L.Rev.	University of Florida Law Review
Ky.L.J.	Kentucky Law Journal	U.Kan.City L.Rev.	University of Kansas City Law Re- view.
L.J.	Law Journal	U.Pa.L.Rev.	University of Pennsylvania Law Re- view
L.Lib.J.	Law Library Journal	U. of Pitts.L.Rev.	University of Pittsburgh Law Review
Law Q.Rev.	Law Quarterly Review	U.Toronto L.J.	University of Toronto Law Journal
Law Ser.Mo.Bull.	University of Missouri Bulletin, Law Series	Vanderbilt L.Rev.	Vanderbilt Law Review
Law Soc.J.	Law Society Journal	Va.L.Rev.	Virginia Law Review
Lincoln L.Rev.	Lincoln Law Review	Wash.L.Rev.	Washington Law Review
La.L.Rev.	Louisiana Law Review	Wash.U.L.Q.	Washington University Law Quarterly
Loyola L.Rev.	Loyola Law Review	Wash.& Lee L.Rev.	Washington and Lee Law Review
Marq.L.Rev.	Marquette Law Review	W.Va.L.Q.	West Virginia Law Quarterly and The Bar
		Wis.L.Rev.	Wisconsin Law Review
		Wyo.L.J.	Wyoming Law Journal
		Yale L.J.	Yale Law Journal

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CORPUS JURIS SECUNDUM

Abandonment	Associations	Colleges and Universities
Abatement and Revival	Assumpsit, Action of	Collision
Abduction	Asylums	Commerce
Abortion	Attachment	Common Lands
Absentees	Attorney and Client	Common Law
Abstracts of Title	Attorney General	Common Scold
Accession	Auctions and Auctioneers	Compositions with Creditors
Accord and Satisfaction	Audita Querela	Compounding Offenses
Account, Action on	Bail	Compromise and Settlement
Accounting	Bailments	Concealment of Birth or Death
Account Stated	Bankruptcy	Conflict of Laws
Acknowledgments	Banks and Banking	Confusion of Goods
Actions	Barratry	Conspiracy
Adjoining Landowners	Bastards	Constitutional Law
Admiralty	Beneficial Associations	Contempt
Adoption of Children	Bigamy	Continuances
Adulteration	Bills and Notes	Contracts
Adultery	Blasphemy	Contratos
Adverse Possession	Bonds	Contribution
Aerial Navigation	Boundaries	Conversion
Affidavits	Bounties	Convicts
Affray	Breach of Marriage Promise	Copyright and Literary
Agency	Breach of the Peace	Property
Agriculture	Bribery	Coroners
Aliens	Bridges	Corporations
Alteration of Instruments	Brokers	Costs
Ambassadors' and Consuls	Building and Loan Associations	Counterfeiting
Amicus Curiae	Burglary	Counties
Animals	Business Trusts	Court Commissioners
Annuities	Canals	Courts
Appeal and Error	Cancellation of Instruments	Covenant, Action of
Appearances	Carriers	Covenants
Apprentices	Case, Action on	Creditors' Suits
Arbitration and Award	Cemeteries	Criminal Law
Architects	Census	Crops
Army and Navy	Certiorari	Culpa
Arrest	Champerty and Maintenance	Curtesy
Arson	Charities	Customs and Usages
Assault and Battery	Chattel Mortgages	Customs Duties
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Assignments for Benefit of	Civil Rights	Dead Bodies
Creditors	Clerks of Courts	Death
Assistance, Writ of	Clubs	Debt, Action of

Declaratory Judgments	Federal Civil Procedure	International Law
Dedication	Federal Courts	Interpleader
Deeds	Fences	Intoxicating Liquors
Dependencies, Colonies, and British Possessions	Ferries	Joint Adventures
Depositories	Finding Lost Goods	Joint Stock Companies
Depositions	Fines	Joint Tenancy
Deposits in Court	Fires	Judges
Descent and Distribution	Fish	Judgments
Detectives	Fixtures	Judicial Sales
Detinue	Flags	Juries
Discovery	Food	Justices of the Peace
Dismissal and Nonsuit	Forcible Entry and Detainer	Kidnapping
Disorderly Conduct	Forfeitures	Landlord and Tenant
Disorderly Houses	Forgery	Larceny
District and Prosecuting Attorneys	Fornication	Levees and Flood Control
District of Columbia	Franchises	Lewdness
Disturbance of Public Meetings	Fraud	Libel and Slander
Divorce	Frauds, Statute of	Licenses
Domicile	Fraudulent Conveyances	Liens
Dower	Game	Limitations of Actions
Drains	Gaming	Lis Pendens
Druggists	Garnishment	Livery Stable Keepers
Drunkards	Gas	Logs and Logging
Dueling	Gifts	Lost Instruments
Easements	Good Will	Lotteries
Ejectment	Grand Juries	Malicious Mischief
Election of Remedies	Ground Rents	Malicious Prosecution
Elections	Guaranty	Mandamus
Electricity	Guardian and Ward	Manufactures
Embezzlement	Habeas Corpus	Maritime Liens
Embracery	Hawkers and Peddlers	Marriage
Eminent Domain	Health	Marshaling Assets and Securities
Entry, Writ of	Highways	Master and Servant
Equity	Holidays	Masters' and Employers' Associations
Escape	Homesteads	Mayhem
Escheat	Homicide	Mechanics' Liens
Escrows	Hospitals	Mercantile Agencies
Estates	Husband and Wife	Militia
Estoppel	Improvements	Mills
Evidence	Incest	Mines and Minerals
Exchange of Property	Indemnity	Miscegenation
Exchanges	Indians	Modern Civil Law
Executions	Indictments and Informations	Money Lenders
Executors and Administrators	Industrial Co-operative Societies	Money Lent
Exemptions	Infants	Money Paid
Explosives	Injunctions	Money Received
Extortion	Innkeepers	Monopolies
Extradition	Insane Persons	Mortgages
Extraterritoriality	Insolvency	Motions and Orders
Factors	Inspection	Motor Vehicles
False Imprisonment	Insurance	Municipal Corporations
False Personation	Insurrection and Sedition	Names
False Pretenses	Interest	Navigable Waters
	Internal Revenue	

Ne Exeat
 Negligence
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CORPUS JURIS

SECUNDUM

EXEMPTION. In its broad general sense, a favor, grace, or immunity;³³ an immunity or privilege, freedom from a charge or burden to which others are subject;³⁴ the personal privilege of the person exempted, with which no one else has any concern.³⁵

The word conveys the idea of being taken out from under the general rule; not to be like others who are not exempt; to receive, and not make a return;³⁶ it implies a release from some burden, duty, or obligation, or service;³⁷ and competency for, as well as capability or liability to perform, such duty or service.³⁸

It has been held equivalent to "immunity."³⁹

It has been compared with, or distinguished from, "deduction" see the C.J.S. definition of that term, "disqualification,"⁴⁰ and "limitation."⁴¹

Specifically as the freedom of the property of debtors from seizure under legal process see Exemptions § 1 and Homesteads § 1; and as to exemptions from jury service see Juries § 153; and from taxes see Taxation § 215 et seq.

Phrases employing the word are set out in the note.⁴²

33. U.S.—Bartholomew v. City of Austin, Tex., 85 F. 359, 368, 29 C.C. A. 568.

Me.—Maine Water Co. v. City of Waterville, 45 A. 830, 833, 93 Me. 586, 49 L.R.A. 294.

34. Ind.—State v. Smith, 63 N.E. 25, 29, 158 Ind. 543—Florer v. Sheridan, 36 N.E. 365, 369, 137 Ind. 28, 23 L.R.A. 278.

Neb.—Koenig v. Omaha & N. W. R. Co., 3 Neb. 373, 380.

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An immunity; a privilege.

Md.—Green v. State, 59 Md. 123, 128, 43 Am.R. 542.

Mich.—People v. Rawn, 51 N.W. 522, 523, 90 Mich. 377.

35. Kan.—State v. Stunkle, 21 P. 675, 676, 41 Kan. 456.

36. U.S.—Bartholomew v. City of Austin, Tex., 85 F. 359, 368, 29 C.C.A. 568.

Me.—Maine Water Co. v. City of Waterville, 45 A. 830, 833, 93 Me. 586, 49 L.R.A. 294.

37. La.—Meyers v. Flournoy, 25 So. 2d 601, 603, 209 La. 812.

Me.—Maine Water Co. v. City of Waterville, 45 A. 830, 833, 93 Me. 586, 49 L.R.A. 294.

38. Md.—Green v. State, 59 Md. 123, 131, 43 Am.R. 542.

Mich.—People v. Rawn, 51 N.W. 522, 523, 90 Mich. 377.

N.H.—State v. Forshner, 43 N.H. 89, 90, 80 Am.D. 132.

"A person disqualified, and therefore incompetent and incapable, cannot be exempted from a duty or a service, when the law imposes no such duty or service upon him."

Mich.—People v. Rawn, 51 N.W. 522, 523, 90 Mich. 377.

N.H.—State v. Forshner, 43 N.H. 89, 90, 80 Am.D. 132.

39. U.S.—Long v. Converse, Mass., 91 U.S. 105, 113, 23 L.Ed. 233.

40. Md.—Green v. State, 59 Md. 123, 131, 43 Am.R. 542.

41. U.S.—Ingram-Richardson Mfg. Co. of Indiana v. Department of

Treasury of State of Indiana, C.C. A.Ind., 114 F.2d 889, 891.

42. Phrases construed

(1) "Additional exemption."

Nev.—State v. Eureka Consolidated Mining Co., 8 Nev. 15, 23.

(2) "Exemption from liability," as equivalent to "limitation of liability."

Va.—Chesapeake & Ohio Ry. Co. v. Beasley, Couch & Co., 52 S.E. 566, 569, 104 Va. 788, 3 L.R.A., N.S., 183.

(3) "Exemption from liability for a tax."

Cal.—Miller v. McColgan, 110 P.2d 419, 424, 17 C.2d 432, 134 A.L.R. 1424.

(4) "Exemption statute."

Wis.—In re Henes' Guardianship, 296 N.W. 60, 61, 236 Wis. 635.

(5) "Title, right, privilege, or exemption," as equivalent to "title, right, privilege, or immunity."

U.S.—Long v. Converse, Mass., 91 U.S. 105, 113, 23 L.Ed. 233.

EXEMPTIONS

This Title includes exemption from liability to seizure and sale, under legal process for payment of debts, of property of debtors, more particularly of personal property; constitutional and statutory provisions for such exemption; nature, grounds, and extent thereof in general; who are entitled to benefit of such exemptions; what articles, amount or value, are exempt; against what liabilities exemption is allowed; waiver or loss of right to exemption; and protection and enforcement of the right.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. NATURE AND EXTENT IN GENERAL

§ 1. Definition, Origin, Nature, and Purpose

It is frequently provided by law that certain property of debtors shall not be liable to seizure and sale under legal process for the payment of their debts, the freedom so conferred being termed an exemption. The right to an exemption rests entirely on constitutional or statutory provisions.

In its broad, general sense "exemption" is defined

as "immunity,"¹ a "privilege,"² "freedom from any service, charge, burden, taxes, etc., to which others are subject."³

As employed in this title, the term "exemption" may be defined as the freedom of property of debtors from liability to seizure and sale under legal process for the payment of their debts.⁴ The free-

- 1. Md.—Green v. State, 59 Md. 123, 128, 43 Am.R. 542.
- Mich.—People v. Rawn, 51 N.W. 522, 523, 90 Mich. 377.
- Neb.—Koenig v. Omaha & N. W. R. Co., 3 Neb. 373, 380.
- 2. Md.—Green v. State, 59 Md. 123, 128, 43 Am.R. 542.
- Mich.—People v. Rawn, 51 N.W. 522, 523, 90 Mich. 377.
- N.D.—Congress Candy Co. v. Farmer, 12 N.W.2d 796, 73 N.D. 174, 150 A. L.R. 1316.
- 3. Neb.—Koenig v. Omaha & N. W. R. Co., 3 Neb. 373, 380.

Other definitions see 25 C.J. p 8 note 1 [b] (1), (2).

A liability removed by some constitutional or statutory provision is presupposed by the term.

Minn.—Foster v. Duluth, 140 N.W. 129, 120 Minn. 484, 48 L.R.A., N.S., 707.

A person exempt is one freed or released from some duty.

Mich.—People v. Rawn, 51 N.W. 522, 90 Mich. 377.

4. U.S.—Corpus Juris cited in Clark v. Nirenbaum, C.C.A.Ga., 8 F. 2d 451, 452, certiorari denied Pow-

ell v. Anderson, 46 S.Ct. 349, 270 U. S. 649, 70 L.Ed. 780.

Other definitions

(1) A right given by law to a debtor to retain a portion of his property free from the claims of creditors. Tenn.—Poore v. Bowlin, 265 S.W. 671, 150 Tenn. 412.

Tex.—Pickens v. Pickens, 83 S.W.2d 951, 125 Tex. 410.

(2) A privilege or immunity allowed by law to a judgment debtor by which he may hold property to a certain amount or certain classes of property, free from all liability to

dom of real property of the debtor from such liability, ordinarily termed a "homestead" exemption, is treated in the title Homesteads. While homestead and personal property exemptions are of the same general nature,⁵ a homestead and an exemption are distinguishable in that the former consists of the home or family residence and is necessarily realty, while the latter, although commonly

confined to personal property, may refer to realty or personalty, or both, without regard to home or residence.⁶ The exemption is regarded as personal in character and not as an incident of property.⁷

Exemptions of the character herein considered rest entirely on constitutional or statutory provisions,⁸ and such exemptions from liability to seizure

levy and sell, on execution, attachment, or other process issued in pursuance of, and for the satisfaction of, a money judgment.

U.S.—In re T. C. Burnett & Co., D.C. Tenn., 201 F. 162, 165.

(3) According to Bouvier's L.D., an exemption is the right given by law to a debtor to retain a portion of his property without its being liable to execution at the suit of a creditor or to distress for rent.

U.S.—In re Trammell, D.C.Ga., 5 F.2d 326, 327, petition denied, C.C.A., Clark v. Nirenbaum, 8 F.2d 451, certiorari denied Powell v. Anderson, 46 S.Ct. 349, 270 U.S. 649, 70 L.Ed. 780.

In re T. C. Burnett & Co., D.C. Tenn., 201 F. 162, 165.

The phrase "not exempt by law," in a statute providing that property not exempt by law shall be subject to payment of debts and shall be liable to be taken on execution, includes exemptions conferred by federal as well as by state laws.

Kan.—Brewer v. Warner, 182 P. 411, 105 Kan. 168.

Effect of exemption

Property once selected or awarded as exempt cannot be reached by creditors.

Ohio.—Gledhill v. Walker, 55 N.E.2d 647, 143 Ohio St. 381.

Statutes held not exemption statutes

(1) Statute enacted to provide for distribution of avails of life insurance made payable to deceased, his personal representatives, his heirs, or estate.

N.D.—Lapland v. Stearns, 54 N.W.2d 748, 79 N.D. 62.

(2) Statute permitting creditor whose execution has been returned unsatisfied to file bill to compel discovery of property including property held in trust for debtor except when trust is declared by will duly recorded, or a deed duly registered.

Tenn.—State v. Caldwell, 178 S.W.2d 624, 181 Tenn. 74, 151 A.L.R. 1410.

5. S.C.—Pender v. Lancaster, 14 S. C. 25, 37 Am.R. 720.
25 C.J. p 8 note 6.

"Pony homestead"

(1) In Georgia, the property of a debtor which is exempt by law from levy and sale under any process is a "pony homestead."

Ga.—Bennett v. State Trust Co., 32 S.E. 625, 626, 106 Ga. 578.

(2) It is popularly so called for the reason that the first act of that nature included in its protected articles a "trooper's horse."

U.S.—In re Hargraves, D.C.Ga., 160 F. 758, 759.

6. U.S.—In re Trammell, D.C.Ga., 5 F.2d 326, petition denied, C.C.A., Clark v. Nirenbaum, 8 F.2d 451, certiorari denied Powell v. Anderson, 46 S.Ct. 349, 270 U.S. 649, 70 L.Ed. 780.

Other distinctions

(1) Exemption from execution is incidental to the establishment of a homestead, while in an exemption law the exemption is direct and absolute and is, indeed, the principal enactment.

U.S.—In re Trammell, D.C.Ga., 5 F.2d 326, petition denied, C.C.A., Clark v. Nirenbaum, 8 F.2d 451, certiorari denied Powell v. Anderson, 46 S.Ct. 349, 270 U.S. 649, 70 L.Ed. 780.

(2) A further distinction is made in respect of the persons against whom the protection extends, an exemption right standing between the head of a family and his creditors alone, while the right of occupancy of a homestead by a surviving spouse stands between such survivor and all other persons, except holders of liens expressly made enforceable by statute.

Okl.—In re Gardner's Estate, 250 P. 490, 122 Okl. 26.

7. Pa.—Front & Huntingdon Building & Loan Ass'n v. Berzinski, 196 A. 572, 130 Pa.Super. 297.

Tex.—Pickens v. Pickens, 83 S.W.2d 951, 125 Tex. 410.

Exemption as estate or chattel interest

(1) An exemption of personal property is not in the nature of an estate in the property analogous to a homestead right in land.

Tex.—Lyon & Matthews Co. v. Modern Order of Prætorians, Civ.App., 142 S.W. 29.

(2) The debtor's interest, if it can be called an interest at all and if it is anything beyond a mere negative immunity from disturbance under a particular writ, is in the nature of a chattel interest.

Mo.—State v. Harrington, 33 Mo.App. 476.

Inchoate encumbrance

However, in a state wherein the exemption is of property of a specified aggregate value, whether the property is realty or personalty or both, the right of exemption is deemed to affect the debtor's whole property as an inchoate encumbrance created by law.

U.S.—In re Trammell, D.C.Ga., 5 F.2d 326, petition denied, C.C.A., Clark v. Nirenbaum, 8 F.2d 451, certiorari denied Powell v. Anderson, 46 S.Ct. 349, 270 U.S. 649, 70 L.Ed. 780.

Personal privilege

Pa.—Fickes v. Skiles, Com.Pl., 53 Lanc.L.Rev. 427.

8. Cal.—Medical Finance Ass'n v. Short, 92 P.2d 961, 36 C.A.2d Supp. 745—Hammond v. Hoskins, 79 P. 2d 1116, 30 C.A.2d Supp. 779.

Iowa.—Farmers' Elevator & Live Stock Co. v. Satre, 195 N.W. 1011, 196 Iowa 1076.

Ky.—Corpus Juris cited in First Nat. Bank v. Cann's Ex'x, 57 S. W.2d 461, 463, 247 Ky. 618.

Or.—Cabler v. Alexander, 224 P. 1076, 111 Or. 257.

Pa.—In re Yoder's Estate, 19 A.2d 139, 341 Pa. 81.

Tenn.—Corpus Juris Secundum cited in State v. Caldwell, 178 S.W.2d 624, 628, 181 Tenn. 74, 151 A.L.R. 1410.

Tex.—Pickens v. Pickens, 83 S.W.2d 951, 125 Tex. 410.

Wis.—Northwest Bank & Trust Co., Davenport, Iowa v. Minor, 82 N. W.2d 323, 275 Wis. 516.

25 C.J. p 8 note 3.

Common law

(1) Such exemptions are unknown to the common law.

Ohio.—Chandler v. Horne, 154 N.E. 748, 23 Ohio App. 1.

Or.—Cabler v. Alexander, 224 P. 1076, 111 Or. 257.

Tex.—Pickens v. Pickens, 83 S.W.2d 951, 125 Tex. 410.

(2) They are also in derogation thereof.

N.Y.—Northern New York Trust Co. v. Bano, 273 N.Y.S. 694, 151 Misc. 684.

Exemption is affirmative statutory right, and any claim therefor must be predicated on statute.

Iowa.—Booth v. Propp, 242 N.W. 60, 214 Iowa 208, 81 A.L.R. 919—In re

and sale under legal process are not created by contract;⁹ but they are exceptions to, and in derogation of, the usual course of the law¹⁰ and of the general rule and policy of laws which contemplate that all of a debtor's property is the common pledge of his creditors and may be subjected to the payment of his debts if it can be reached in an appropriate proceeding,¹¹ and in so far as the debtor's rights are in derogation of the creditor's rights at common law, they are to be determined by the constitution or statute creating the exemption and a

proper construction thereof.¹²

Purpose; public policy. The exemption laws are founded on public policy.¹³ Some authorities regard the allowance of the exemption as being for the benefit of the debtor,¹⁴ while others regard it as in the nature of a police regulation primarily for the benefit of the community;¹⁵ in any event, the purpose underlying exemption legislation is the securing to the unfortunate debtor of the means to support himself and his family,¹⁶ the protection

- Tellier's Estate, 230 N.W. 545, 210 Iowa 20.
- No property is exempt from execution** unless it is made so by express provision of law.
- U.S.—In re Rash, D.C.Wash., 81 F. Supp. 389.
- Cal.—Hammond v. Hoskins, 79 P.2d 1116, 30 C.A.2d Supp. 779—Wade v. Rathbun, 67 P.2d 765, 23 C.A.2d Supp. 758.
- N.Y.—Northern New York Trust Co. v. Bano, 273 N.Y.S. 694, 151 Misc. 684—Herbach v. Herbach, 265 N.Y. S. 144, 148 Misc. 33.
- Wash.—Kelley v. Butler, 47 P.2d 664, 182 Wash. 310.
- Wis.—Gillett State Bank v. Knaack, 281 N.W. 913, 229 Wis. 179, 119 A.L.R. 464.
9. Ky.—First Nat. Bank v. Cann's Ex'x, 57 S.W.2d 461, 247 Ky. 618.
10. Pa.—In re Yoder's Estate, 19 A. 2d 139, 341 Pa. 81.
In re Roskop's Estate, Com.Pl., 47 Sch.Leg.Rec. 91.
- Wash.—Lien v. Hoffman, 306 P.2d 240, 49 Wash.2d 642—First Nat. Bank of Everett v. Tiffany, 242 P. 169, 40 Wash.2d 193.
11. Cal.—Hammond v. Hoskins, 79 P.2d 1116, 30 C.A.2d Supp. 779.
- La.—A. Wilbert's Sons Lumber & Shingle Co. v. Ricard, 119 So. 411, 167 La. 416.
Webb v. Larcade, 134 So. 292, 17 La.App. 21, rehearing denied 135 So. 262, 17 La.App. 21.
- Ohio.—Marquis v. New York Life Ins. Co., 108 N.E.2d 227, 92 Ohio App. 389, 37 A.L.R.2d 261.
- R.I.—Ellbey v. Cunningham, 168 A. 815, 54 R.I. 4.
- S.D.—Mohawk Rubber Co. of New York v. Cronin, 252 N.W. 642, 62 S.D. 249.
- Wis.—Northwest Bank & Trust Co., Davenport, Iowa v. Minor, 82 N. W.2d 323, 275 Wis. 516.
12. Iowa.—In re Todd's Estate, 54 N.W.2d 521, 243 Iowa 930.
- Pa.—Andrews Sand Co. v. Carlton, 29 Pa.Dist. & Co. 470, 19 Erie Co. 118.
Fickes v. Skiles, Com.Pl., 53 Lanc.L.Rev. 427.
25 C.J. p 8 note 4.
13. Ind.—H. C. Smith Coal Co. v. Finley, 131 N.E. 5, 190 Ind. 481.
- La.—**Corpus Juris Secundum** quoted in Mickenheim v. Cathcart, 84 So. 2d 449, 451, 228 La. 890, 54 A.L.R. 2d 1418.
- Neb.—Application of Laffin, 239 N.W. 836, 122 Neb. 210.
- Ohio.—Chandler v. Horne, 154 N.E. 748, 23 Ohio App. 1.
- Pa.—Kruczaj v. Koman, 24 Pa.Dist. & Co., 211, 26 Del.Co. 363.
In re Stefkos Estate, Orph., 33 North.Co. 217.
- Strong expression of policy**
No policy of state of Florida is more strongly expressed in its constitution, laws, and decisions than the policy of the exemption laws.
- Fla.—Sherbill v. Miller Mfg. Co., 89 So.2d 28, 60 A.L.R.2d 1445.
- Statute held declarative of public policy** to safeguard a reasonable sum for sustenance from hands of creditors.
- N.J.—Chelsea-Wheeler Coal Co. v. Marvin, 35 A.2d 874, 134 N.J.Eq. 432.
14. Ark.—Williams v. Swann, 251 S.W.2d 111, 220 Ark. 906—Pemberton v. Bank of Eastern Arkansas, 294 S.W. 64, 173 Ark. 949.
- La.—**Corpus Juris** quoted in Young v. Geter, 170 So. 240, 241, 185 La. 709, 107 A.L.R. 608, answers to certified questions conformed to, App., 170 So. 410.
- Tenn.—State ex rel. v. Nashville Trust Co., 190 S.W.2d 785, 28 Tenn. App. 388.
- Wash.—First Nat. Bank of Everett v. Tiffany, 242 P.2d 169, 40 Wash.2d 193.
25 C.J. p 8 note 9.
- Prevention of poverty or destitution**
(1) The state is interested in its exemption laws to end that owners of exempt property and their families shall not be reduced to absolute destitution, thus becoming charges on public.
- Fla.—Slatcoff v. Dezen, 76 So.2d 792.
- (2) The fundamental reason for the enactment of exemption laws is to protect a person from being reduced by financial misfortune to poverty.
- Cal.—Bertozzi v. Swisher, 81 P.2d 1016, 27 C.A.2d 739.
- (3) The purpose of the exemption statute is to prevent a judgment debtor from being left destitute and wholly dependent on the public or charitably inclined persons, by permitting him to retain property or money to the amount of three hundred dollars to tide him over his financial extremity and the loss of his property by sale on execution process.
- Pa.—Maschke, to Use of Ehnes, v. O'Brien, 17 A.2d 923, 142 Pa.Super. 559.
- Luxuries**
However, it is not the purpose of exemption laws to provide the debtor with luxuries at the expense of his creditor.
- Ky.—Thomson v. Dennis' Ex'x, 138 S.W.2d 490, 282 Ky. 352.
15. Colo.—**Corpus Juris Secundum** cited in In re Wallace's Estate, 246 P.2d 894, 901, 125 Colo. 584.
- La.—**Corpus Juris** quoted in Young v. Geter, 170 So. 240, 241, 185 La. 709, 107 A.L.R. 608, answers to certified questions conformed to, App., 170 So. 410.
25 C.J. p 8 note 10.
- "[Exemption] laws are passed not only for protection of low income families, but also for the protection of the community at large. They are designed to give assurance that the wage earner shall always have enough, beyond the reach of attaching creditors, to support his family and to prevent them from becoming public charges."
- D.C.—Hollywood Credit Clothing Co. v. Jones, Mun.App., 117 A.2d 226, 227, 51 A.L.R.2d 944.
16. U.S.—In re Mattingly, D.C.Ky., 42 F.Supp. 83.
- D.C.—**Corpus Juris Secundum** cited in Hollywood Credit Clothing Co. v. Jones, Mun.App., 117 A.2d 226, 227, 51 A.L.R.2d 944.
- Fla.—Patten Package Co. v. Houser, 136 So. 353, 102 Fla. 603.
- La.—**Corpus Juris Secundum** quoted in Mickenheim v. Cathcart, 84 So. 2d 449, 451, 228 La. 890, 54 A.L.R. 2d 1418—**Corpus Juris** quoted in Young v. Geter, 170 So. 240, 241,

of the family being the main consideration.¹⁷ Exemption statutes do not protect the rights of creditors,^{17.5} and they are not for the purpose of enabling some creditor to secure for himself a percentage of the debtor's estate larger than that secured by other general creditors.^{17.10}

Permanency of exemption. It has been stated that an essential feature of an exemption is that the property shall be permanently exempt in the debtor's hands from seizure by his creditors under judicial process.¹⁸ When this feature is present, or at least where the property was exempt when debts were incurred, the exempt property is something on which creditors cannot be regarded as

having extended credit, and from which they cannot have anticipated satisfaction,¹⁹ and, therefore, they are not injured or deprived of any rights by the exemption.²⁰

§ 2. What Law Governs

As a general rule, all questions of exemption are to be determined by the laws of the forum, although in some instances the exemption laws of the place of the debtor's residence are afforded recognition in other states as a matter of comity.

Since exemption laws are usually regarded as pertaining to the remedy only²¹ and as having no extraterritorial effect,²² they will not be enforced

185 La. 709, 107 A.L.R. 608, answers to certified questions conformed to, App., 170 So. 410.

Corpus Juris quoted in *Mounger v. Ferrell*, App., 11 So.2d 56, 60. Minn.—Fullerton Lumber Co. v. Carstens, 80 N.W.2d 1, 248 Minn. 254. N.Y.—**Corpus Juris** quoted in *Michigan Furniture Co. v. Southern Pac. Co.*, 287 N.Y.S. 178, 182, 158 Misc. 781.

Utah.—*Russell M. Miller Co. v. Givan*, 325 P.2d 908, 7 Utah 2d 380.

Wash.—*First Nat. Bank of Everett v. Tiffany*, 242 P.2d 169, 40 Wash. 2d 193.

25 C.J. p 8 note 11.

"The humane and enlightened purpose of an exemption is to protect a debtor and his family against absolute want by allowing them out of his property some reasonable means of support and education and the maintenance of the decencies and proprieties of life. The legislative purpose was to adapt the exemptions granted to the circumstances and needs of different classes of debtors."

Minn.—Fullerton Lumber Co. v. Carstens, 80 N.W.2d 1, 7, 248 Minn. 254—*Poznanovic v. Maki*, 296 N.W. 415, 417, 209 Minn. 379.

Benefit of debtor and dependents

Primary purpose of exemption statute is to secure exempted property to use and benefit of debtor and those dependent on him.

Cal.—*Avilla v. Avilla*, 183 P.2d 668, 81 C.A.2d 210.

To secure poor

Object of exemption laws is to secure poor in possession and use of means necessary for their existence. Tenn.—*Keen v. Alexander*, 260 S.W. 2d 297, 195 Tenn. 564—*Jones v. Williams*, 2 Swan 105.

17. U.S.—In re *Adelberger*, D.C.Fla., 280 F. 405.

Ind.—*H. C. Smith Coal Co. v. Finley*, 131 N.E. 5, 190 Ind. 481.

Iowa.—*Ohio Casualty Ins. Co. v. Galvin*, 269 N.W. 254, 222 Iowa 670,

108 A.L.R. 1036—*Shepard v. Findley*, 214 N.W. 676, 204 Iowa 107.

La.—**Corpus Juris Secundum** quoted in *Mickenheim v. Cathcart*, 84 So. 2d 449, 451, 228 La. 890—**Corpus Juris** quoted in *Young v. Geter*, 170 So. 240, 241, 185 La. 709, 107 A.L.R. 608, answers to certified questions conformed to, App., 170 So. 410.

Corpus Juris quoted in *Mounger v. Ferrell*, App., 11 So.2d 56, 60.

N.M.—*Hewatt v. Clark*, 103 P.2d 646, 44 N.M. 453.

Ohio.—*Cowen v. Wassman*, 28 N.E.2d 201, 64 Ohio App. 84.

Klienman v. Brown, 30 Ohio N.P., N.S., 69.

25 C.J. p 8 note 12.

Service of purpose

Purpose of exemption statutes is to preserve to beneficiary benefits thereof for support and maintenance of himself, his wife, and children and that purpose is served when some of benefits thereof are devoted to support of wife and children.

N.Y.—*Jackson v. Jackson*, 86 N.Y.S. 2d 516, 194 Misc. 134.

Protection of family and public

(1) The exemption is for the benefit of the debtor's family and in part for the protection of the general public.

Ohio.—*Troutman v. Eichar*, 28 N.E. 2d 953, 64 Ohio App. 415.

(2) Under ordinary circumstances the exemption in fact works a protection of the debtor from want, of his dependents from the deprivation of means of support, and of the public from the danger of the debtor and his dependents becoming public charges.

D.C.—*Schlaefter v. Schlaefter*, 112 F. 2d 177, 71 App.D.C. 350, 130 A.L.R. 1014.

(3) It is not the purpose of exemption laws to relieve the debtor of family obligations.

D.C.—*Schlaefter v. Schlaefter*, supra.

Exempted property is for use and benefit of family of debtor from whose estate property has been exempted.

Ga.—*Wood v. Wood*, 155 S.E. 678, 171 Ga. 389.

Articles necessary to family existence

The purpose of the exemption statute is to exempt articles necessary to family existence in reasonable comfort.

Ky.—*Thomson v. Dennis' Ex'r*, 138 S.W.2d 490, 282 Ky. 352.

Care of dependents

Purpose of exemption statutes is to provide for care of dependents.

U.S.—In re *Welch*, D.C.N.D., 8 F. Supp. 838.

17.5 Wash.—*Lien v. Hoffman*, 306 P.2d 240, 49 Wash.2d 642.

17.10 U.S.—In re *Mattingly*, D.C. Ky., 42 F.Supp. 83.

18. U.S.—In re *T. C. Burnett & Co.*, D.C.Tenn., 201 F. 162.

19. Kan.—*Taylor v. Winnie*, 51 P. 890, 59 Kan. 16, 68 Am.S.R. 339.

25 C.J. p 8 note 14.

20. Fla.—*Milam v. Davis*, 123 So. 668, 97 Fla. 916, certiorari denied *Tiffany & Co. v. Davis*, 50 S.Ct. 82, 280 U.S. 601, 74 L.Ed. 646.

21. Ky.—**Corpus Juris** cited in *Pinson v. Murphy*, 295 S.W. 442, 444, 220 Ky. 464.

N.Y.—*Morris Plan Indus. Bank of N. Y. v. Gunning*, 67 N.E.2d 510, 295 N.Y. 324.

Corpus Juris cited in *Foley v. Equitable Life Assur. Soc. of U. S.*, 19 N.Y.S.2d 502, 504, 173 Misc. 1031.

N.C.—*Merchants Bank v. Weaver*, 197 S.E. 551, 213 N.C. 767.

Tenn.—**Corpus Juris** cited in *Sherwin-Williams Co. v. Morris*, 156 S. W.2d 350, 352, 25 Tenn.App. 272. 25 C.J. p 12 note 65.

22. U.S.—*Armour Fertilizer Works v. Sanders*, C.C.A.Tex., 63 F.2d 902, affirmed *Sanders v. Armour Fer-*

by the courts of another state.²³ They create a personal privilege rather than a right²⁴ and do not enter into the contract in such a way that they may be set up in any jurisdiction in which it may be sought to subject the property of the debtor to the satisfaction of the debt.²⁵

Generally speaking, therefore, all questions of exemption are to be determined solely by the laws of the forum.²⁶ This rule applies when a debtor endeavors to claim the benefit of the exemption laws of a jurisdiction other than that of the for-

um,²⁷ and, if there is no right of exemption under the statutes of the state in which the proceedings are brought, the debtor cannot set up the exemption laws of another state of which he is a resident, unless there is something in the rule of comity between the states to require recognition of such laws.²⁸

Comity. There is no rule of comity which demands a recognition of a foreign exemption law,²⁹ particularly where proceedings are instituted by a resident creditor against a nonresident debtor,³⁰

tilizer Works, 54 S.Ct. 677, 292 U.S. 190, 78 L.Ed. 1206, 91 A.L.R. 950, rehearing denied 54 S.Ct. 855, 292 U.S. 612, 78 L.Ed. 1472.
Ind.—Baltimore & O. S. W. R. Co. v. Hollenbeck, 69 N.E. 136, 161 Ind. 452.

Mo.—*Corpus Juris Secundum* cited in Ferneau v. Armour & Co., App., 303 S.W.2d 161, 167.

N.Y.—*Corpus Juris* cited in Foley v. Equitable Life Assur. Soc. of U. S., 19 N.Y.S.2d 502, 504, 173 Misc. 1031.

Foley v. Equitable Life Assur. Soc. of U. S., 31 N.Y.S.2d 992, reversed on other grounds 33 N.Y.S.2d 917, 263 App.Div. 605, reargument denied 35 N.Y.S.2d 726, 264 App.Div. 780, reversed on other grounds 49 N.E.2d 511, 290 N.Y. 424.

Tenn.—*Corpus Juris* cited in Sherwin-Williams Co. v. Morris, 156 S.W.2d 350, 352, 25 Tenn.App. 272.

Tex.—Strawn Mercantile Co. v. First Nat. Bank, Civ.App., 279 S.W. 473—Wm. Cameron & Co. v. Abbott, Civ.App., 258 S.W. 562.
25 C.J. p 12 note 66.

Protection in state of claimants' residence

Exemption laws are a protection only against executions issued in the state where claimants reside, and have no extraterritorial effect.

N.C.—Merchants Bank v. Weaver, 197 S.E. 551, 213 N.C. 767.

Courts recognizing rule

The fact that an exemption law has no extraterritorial obligation is recognized not only by foreign courts but by the courts of the jurisdiction in which the statute exists.

Ind.—Baltimore & O. S. W. R. Co. v. Hollenbeck, 69 N.E. 136, 161 Ind. 452.

25 C.J. p 13 note 74.

Local in nature

Exemption laws are local in their nature and have no extraterritorial force or operation.

Tex.—Baumgardner v. Southern Pac. Co., Civ.App., 177 S.W.2d 317.

23. Tenn.—*Corpus Juris* cited in Sherwin-Williams Co. v. Morris,

156 S.W.2d 350, 352, 25 Tenn.App. 272.

25 C.J. p 12 note 67.

24. Ga.—Smith v. Georgia Granite Corporation, 198 S.E. 772, 186 Ga. 634, 119 A.L.R. 550.

25 C.J. p 12 note 68.

25. Ky.—Pinson v. Murphy, 295 S. W. 442, 220 Ky. 464.

N.Y.—*Corpus Juris* cited in Foley v. Equitable Life Assur. Soc. of U. S., 19 N.Y.S.2d 502, 504, 173 Misc. 1031.

N.C.—Merchants Bank v. Weaver, 197 S.E. 551, 213 N.C. 767.

25 C.J. p 12 note 69.

Exemption as part of substantive law

A different conclusion is reached as to an exemption which arises from the inherent nature of the title of tenants by the entirety and constitutes a part of the substantive law of the state.

Ohio.—State ex rel. Fulton v. Heinrich, 194 N.E. 395, 48 Ohio App. 455.

26. Ky.—Pinson v. Murphy, 295 S. W. 442, 220 Ky. 464.

N.Y.—Morris Plan Indus. Bank of N. Y. v. Gunning, 67 N.E.2d 510, 295 N.Y. 324.

Pa.—Commonwealth ex rel. Bolen v. Bolen, 74 A.2d 542, 167 Pa.Super. 168.

Tenn.—Bruce v. Bruce, 222 S.W.2d 228, 32 Tenn.App. 222—Sherwin-Williams Co. v. Morris, 156 S.W.2d 350, 25 Tenn.App. 272.

A married woman is entitled only to the exemptions provided by the statutes of the state where she resides and is sued.

Wash.—Clark v. Eltinge, 80 P. 556, 38 Wash. 376, 107 Am.S.R. 858.

Statutes applicable

A general exemption statute, rather than another statute declaring that the general exemption shall not be allowed in attachment or execution on a judgment or order issued to enforce a decree for alimony, will be applied in garnishment proceedings to enforce a domestic judgment for the amount due for alimony and support under a foreign decree, as the

special statutes in aid of enforcement of divorce and alimony decrees apply only to decrees of domestic courts.

Mo.—Harrington v. Harrington, 121 S.W.2d 291, 233 Mo.App. 390.

27. N.J.—*Corpus Juris* quoted in J. B. Van Sciver Co. v. Flurer, 167 A. 513, 514, 11 N.J.Misc. 464.

N.C.—Merchants Bank v. Weaver, 197 S.E. 551, 213 N.C. 767.

Ohio.—Yeager v. Yeager, 10 Ohio Supp. 4.

Pa.—Commonwealth ex rel. Bolen v. Bolen, 74 A.2d 542, 167 Pa.Super. 168.

25 C.J. p 12 note 70.

Waiver of exemption

Where a note executed in one jurisdiction and payable in another contains a waiver of exemption, the debtor, when sued in the state where the note is executed, cannot assert that the law of the state where the note is payable violates the waiver of exemption.

Ga.—Gamble v. Central R. & Banking Co., 7 S.E. 315, 80 Ga. 595, 12 Am.S.R. 276, distinguishing Cleg-horn v. Greeson, 77 Ga. 343.

25 C.J. p 13 note 72.

28. N.J.—*Corpus Juris* quoted in J. B. Van Sciver Co. v. Flurer, 167 A. 513, 514, 11 N.J.Misc. 464.

25 C.J. p 12 note 71.

In garnishment proceedings, a non-resident cannot set up the exemption laws of the state in which he resides.

Iowa.—Lyon v. Callopy, 54 N.W. 476, 87 Iowa 567, 43 Am.S.R. 396.

25 C.J. p 13 note 73.

29. N.J.—*Corpus Juris* quoted in J. B. Van Sciver Co. v. Flurer, 167 A. 513, 514, 11 N.J.Misc. 464.

Tex.—*Corpus Juris Secundum* cited in Baumgardner v. Southern Pac. Co., Civ.App., 177 S.W.2d 317, 320—*Corpus Juris* cited in Wm. Cameron & Co. v. Abbott, Civ.App., 258 S.W. 562, 565.

25 C.J. p 13 note 75.

30. N.J.—*Corpus Juris* quoted in J. B. Van Sciver Co. v. Flurer, 167 A. 513, 514, 11 N.J.Misc. 464.

25 C.J. p 13 note 76.

or where the creditor and debtor are both nonresidents but are residents of different states.³¹ It is obvious that, where the exemption laws in the foreign and domestic jurisdictions are the same, no occasion arises for the application of the doctrine of comity;³² but the doctrine has been applied where the laws of the two states are similar or practically the same and manifest the same policy.³³

Evasion of law of debtor's residence. Even though suit is brought within the state by a non-resident creditor for the purpose of evading an exemption right conferred by the state of the debtor's residence, it has been held that the courts will not enforce an exemption conferred by the law of another state,³⁴ although, where the statutes of the forum do not limit the benefit of the exemption laws to residents, they will allow the exemption conferred by the local statute;³⁵ but on principles of comity it has been held in some jurisdictions that, where the debtor and creditor are non-residents and the suit is brought for the purpose of evading the exemption laws of the place of the debtor's residence, the court will recognize and enforce such laws,³⁶ as where it is sought to reach the wages earned by the debtor in the state of his residence and exempt by the law of such state.³⁷

A similar conclusion has been reached on the reasoning that, where a creditor, a debtor, and a garnishee at the time of the creation of both debts are residents of another state wherein the debts are intended to be payable, the exemption of wages is such an incident and condition of the debt of the

employer that it will follow the debt if the debt follows the person of the garnishee into another state and attach itself to every process of collection in that state unless jurisdiction is obtained over the person of the principal debtor.³⁸ Conversely, it has been held that, where the debt for wages was exempt from execution by the law of the forum, the employer could not as against the employee set off a payment made by it as garnishee in a foreign state, the employee never having gone into such state.³⁹

By statute in some jurisdictions provision is made, at least in certain classes of cases, for allowing a nonresident debtor the same exemption as is afforded to him by the law of the state in which he resides,⁴⁰ as in case of proceedings within the state to reach wages earned and payable to the debtor outside of the state.⁴¹ Other statutes make it unlawful to assign or transfer a debt for the purpose of having it collected outside of the state for the purpose of evading the law of the state as to exemptions.⁴²

Proceeds of insurance. It has been held that, where the contract between insurer and insured is made in a state wherein insurer is incorporated and domiciled, its funds are kept, and its certificate is payable, an exemption of money payable thereunder from seizure for the debts of a certificate holder or of any beneficiary named in the certificate afforded by the law of insurer's domicile may be availed of by a beneficiary in a foreign jurisdiction.⁴³

31. Kan.—Williamson v. Kansas & T. Coal Co., 50 P. 106, 6 Kan.App. 443.

32. Wis.—Pierce v. Chicago & Northwestern R. Co., 36 Wis. 283. 25 C.J. p 13 note 78.

33. Tex.—Strawn Mercantile Co. v. First Nat. Bank, Civ.App., 279 S.W. 473.

Child support; alimony

Where Nebraska law allowed same exemption as Missouri law, wage earner was entitled to that exemption. However, policy of the Nebraska law that exemption statutes will not be construed to permit a father to shield himself against the claims of his child would not be enforced because contrary to the policy of Missouri. Likewise, judgment debtor was not entitled under rule of comity to any exemption under Nebraska statute with respect to provisions of judgment relating to alimony, in view of the public policy of Missouri to allow no exemptions of wages in proceedings in garnishment

in aid of execution of decrees for alimony.

Mo.—Ferneau v. Armour & Co., App., 303 S.W.2d 161.

34. Colo.—Atchison, T. & S. F. R. Co. v. Maggard, 39 P. 985, 6 Colo. App. 85.

N.Y.—Morris Plan Indus. Bank of N. Y. v. Gunning, 67 N.E.2d 510, 295 N.Y. 324.

25 C.J. p 13 note 79.

Subsequent statutes in some states have, as shown *infra* this section, substituted a different rule in certain classes of cases.

35. Ill.—Wabash R. Co. v. Dougan, 31 N.E. 594, 142 Ill. 248, 34 Am. S.R. 74.

Kan.—Missouri Pac. R. Co. v. Maltby, 8 P. 235, 34 Kan. 125.

36. Mo.—Schroeder Wine & Liquor Co. v. Willis Coal & Mining Co., 161 S.W. 352, 179 Mo.App. 93. 25 C.J. p 13 note 82.

37. U.S.—Mason v. Beebee, C.C. Iowa, 44 F. 556.

La.—Meyers v. Flournoy, 25 So.2d 601, 603, 209 La. 812. 25 C.J. p 13 note 83.

38. Mich.—Drake v. Lake Shore & M. S. R. Co., 37 N.W. 70, 69 Mich. 168, 13 Am.S.R. 382.

39. Ill.—Becker v. Illinois Cent. R. Co., 95 N.E. 42, 250 Ill. 40, 35 L.R. A.N.S., 1154.

25 C.J. p 13 note 85.

40. Ill.—Jackson v. Republic Iron & Steel Co., 141 Ill.App. 453. 25 C.J. p 13 note 86.

41. Ill.—Wabash R. Co. v. Dougan, 31 N.E. 594, 142 Ill. 248, 34 Am. S.R. 74.

Fuller v. Bridgeport Wood Finishing Co., 203 Ill.App. 227.

42. Ill.—Becker v. Illinois Cent. R. Co., 95 N.E. 42, 250 Ill. 40, 35 L.R. A.N.S., 1154.

Neb.—Singer Mfg. Co. v. Fleming, 58 N.W. 226, 39 Neb. 679, 42 Am.S.R. 613, 23 L.R.A. 210.

43. Pa.—Craven v. Roberts, 60 Pa. Super. 140.

§ 3. Constitutional and Statutory Provisions

Subject to constitutional limitations, directions, or requirements, the legislature may enact, amend, or repeal exemption laws.

While effect is accorded constitutional provisions expressly fixing the amount, or the amount and

character, of personal property exemptions,⁴⁴ or directing the legislature to enact laws granting exemptions,⁴⁵ nevertheless, subject to constitutional limitations, restrictions, directions, or requirements,⁴⁶ it is within the power of the legislature to enact,⁴⁷ amend,⁴⁸ or repeal⁴⁹ exemption laws.

The point was mentioned in a case wherein the decision, however, was placed on the ground that the fund in question was not liable to attachment under the laws of the forum.

Pa.—Ogle v. Barron, 92 A. 1071, 247 Pa. 19.

44. W.Va.—Hibner v. Belcher, 176 S.E. 422, 115 W.Va. 387. 25 C.J. p 9 note 15.

45. Ind.—Martin v. Loula, 194 N.E. 178, 208 Ind. 346, rehearing denied 195 N.E. 881, 208 Ind. 346, followed in White v. White, 194 N.E. 355, 208 Ind. 314, rehearing denied 196 N.E. 95, 208 Ind. 314, followed in Indianapolis Morris Plan Co. v. Fitzgerald, 194 N.E. 355, 207 Ind. 708, Tam v. East Side Loan Co., 194 N.E. 355, 207 Ind. 709, Benson v. Sandusky, 194 N.E. 355, 207 Ind. 709, and Barlow v. Kellar, 194 N.E. 356, 207 Ind. 709.

Wash.—Pacific Coast Adjustment Co. v. Reese, 65 P.2d 1057, 189 Wash. 347.

25 C.J. p 9 note 24.

46. U.S.—In re Fox, D.C.Cal., 16 F. Supp. 320.

Ind.—Galesburg Coulter Disc Co. v. Hunter, 196 N.E. 94, 208 Ind. 330—Martin v. Loula, 194 N.E. 178, 208 Ind. 346, rehearing denied 195 N.E. 881, 208 Ind. 346, followed in White v. White, 194 N.E. 355, 208 Ind. 314, rehearing denied 196 N.E. 95, 208 Ind. 314, followed in Indianapolis Morris Plan Co. v. Fitzgerald, 194 N.E. 355, 207 Ind. 708, Tam v. East Side Loan Co., 194 N.E. 355, 207 Ind. 709, Benson v. Sandusky, 194 N.E. 355, 207 Ind. 709, and Barlow v. Kellar, 194 N.E. 356, 207 Ind. 709.

Abrogation of all exemptions

The legislature cannot, in violation of constitutional provisions relating to exemption, practically destroy all exemption rights or abrogate all exemption laws without the contemporaneous passage of substitutes therefor.

Wash.—Verino v. Hickey, 237 P. 5, 135 Wash. 71.

25 C.J. p 9 note 35.

Endowment policy proceeds

An unreasonable exemption of property from seizure and sale for payment of debt in violation of the constitution does not arise with respect to endowment policy proceeds, which are not due and payable to insured and which have not vested in him and which, in absence of exer-

cise of his strictly personal right of option, will not become due during the policy's prematurity period.

Minn.—Fox v. Swartz, 51 N.W.2d 80, 235 Minn. 337, 30 A.L.R.2d 739.

47. U.S.—In re Goetz, D.C.Ky., 28 F.Supp. 689—In re Durband, D.C. Iowa, 8 F.Supp. 63.

Ind.—Spangler v. Bolinger, 22 N.E. 2d 983, 216 Ind. 28, 128 A.L.R. 103—Allen v. Sullivan, 22 N.E.2d 981, 216 Ind. 394, modified on other grounds 23 N.E.2d 471, 216 Ind. 394.

N.Y.—In re Thellusson, 74 N.Y.S.2d 837, 190 Misc. 470.

Ohio.—McWhorter v. Curran, 13 N.E. 2d 362, 57 Ohio App. 233.

Funds in hands of governmental agency

The legislature has the power to provide that funds in the hands of governmental agencies shall not be subject to attachment or legal process of any kind.

Pa.—Commonwealth v. Mooney, 92 A.2d 258, 172 Pa.Super. 30.

Legislative policy

(1) Where the constitution does not direct the legislature to set aside any particular property, the amount and kind of property to be exempt from execution is purely a question of legislative policy.

U.S.—In re Vonhee, D.C.Wash., 238 F. 422.

25 C.J. p 9 note 34.

(2) As stated in Constitutional Law § 154, the courts will not interfere with such policy.

Method of selecting property

Under constitutional provision allowing head of family to select personalty exempt from sale on execution for debt based on contract, general assembly has power to prescribe method of selecting property claimed to be exempt from execution.

Ark.—Andrews v. Briggs, 158 S.W. 2d 269, 203 Ark. 714—Settles v. Bond, 4 S.W. 286, 49 Ark. 114.

Process in behalf of wife

Congress or the state legislature may immunize a fund from every attachment including process on behalf of a wife for the collection of a support order.

Pa.—Commonwealth v. Berfield, 51 A. 2d 523, 160 Pa.Super. 438.

Provision held not unconstitutional

Provision of statute, exempting from garnishment twenty dollars out of weekly wages due to head of a family, that no money due or earned

as wages shall be exempt from garnishment in lieu of any other property, is not unconstitutional as violative of provision requiring legislature to protect from forced sale certain portion of property of heads of families, since head of family still has twenty dollars per week exemption out of wages and can still claim a lieu exemption out of any property other than wages if he does not possess certain domestic animals.

Wash.—Pacific Coast Adjustment Co. v. Reese, 65 P.2d 1057, 189 Wash. 347.

Statute distinct from constitutional provision

The law making linens and clothing belonging to the debtor and his wife and tools and instruments necessary for exercise of his or her calling, trade, or profession in which he or she makes a living, exempt from seizure, is entirely distinct from homestead exemption provisions of constitution.

La.—Mounger v. Ferrell, App., 11 So. 2d 56.

Statute held not invalid under former constitutional provision.

S.C.—Oliver v. White, 18 S.C. 235.

48. U.S.—In re Goetz, D.C.Ky., 28 F. Supp. 689.

Wash.—Verino v. Hickey, 237 P. 5, 135 Wash. 71.

25 C.J. p 9 note 35.

Amendment by inconsistent act

Where a new legislative act covers the same subject matter as an existing statute, and the two are so plainly repugnant and inconsistent that they cannot stand together, the old statute is to be regarded as amended by the new so as to become conformable thereto.

Me.—Jumper v. Moore, 85 A. 485, 110 Me. 159.

49. Tenn.—Majors v. Carter, 135 S. W.2d 924, 175 Tenn. 450.

Repeal by revision or amendment

(1) A revision of the whole subject matter repeals former provisions.

Tenn.—Frazier v. Nashville Veterinary Hospital, 201 S.W. 751, 139 Tenn. 440.

25 C.J. p 10 note 49.

(2) Where an act provides that a prior statute "should be amended so as to read as follows," the amendatory act is a substitute for the original statute and repeals all those parts of the prior act which are omitted.

Similarly, in a field wherein congress may legislate, it may enact exemption laws.⁵⁰

While it has been held that a more extended exemption given in a statute than in the constitution is unconstitutional and void,⁵¹ it is, of course, held otherwise where the constitutional provision is not regarded as exhaustive or exclusive or as a limitation on the legislative power over the species of property in question.⁵² At any rate, a statute cannot restrict an exemption allowed by the constitution,⁵³ nor can the legislature grant an exemption as against a debt which the constitution expressly excepts.⁵⁴

Consideration is given in other titles to the validity of exemption laws as against objections that they constitute class legislation, see Constitutional Law, § 500 b, grant special privileges or immunities, Constitutional Law § 465 a, impair vested rights, Constitutional Law § 236, impair the obligation of contracts, Constitutional Law § 390 a, deny due process of law, Constitutional Law § 625 c, and violate constitutional provisions as to the subjects and titles of acts generally, Statutes § 235, and amendatory acts, Statutes § 254. Whether constitutional provisions relating to exemptions are self-executing is discussed in Constitutional Law

§ 51. The constitutionality of statutes exempting the proceeds of life insurance policies is considered infra §§ 39, 40, the constitutionality of statutory exceptions to general exemption laws infra § 71, and the operation and effect of a constitutional provision allowing a debtor to waive his exemptions infra § 102.

§ 4. — Construction of Statutes

- a. In general
- b. Strict or liberal construction

a. In General

Exemption laws are to be construed in accordance with general principles of statutory construction, with a view to carrying out the lawmakers' intention.

One of the cardinal rules of construction of exemption laws is that the intention of the lawmakers must be ascertained and carried out.⁵⁵ The usual principles of statutory construction which are applied in construing exemption laws include the principles that the intention of the lawmaker must prevail over the literal sense of the terms, and the spirit and intention of the statute must prevail over its strict letter;⁵⁶ that where a statute is ambiguous the court will, in construing it, have regard to its object and spirit and follow that construction

Minn.—Shadewald v. Phillips, 75 N. W. 717, 72 Minn. 520.
25 C.J. p 10 note 48.

Repeals by implication are not favored, an intent to repeal not being imputed to the legislature in the absence of clear and unmistakable language.

N.M.—Hewatt v. Clark, 103 P.2d 646, 44 N.M. 453.
25 C.J. p 10 note 46.

Statute held not repealed

Okl.—Norton Motor Sales Co. v. Johnson, 237 P. 128, 110 Okl. 174.
Pa.—In re Beall's Estate, 119 A.2d 216, 384 Pa. 14.

Statute held to override prior act

Pa.—Commonwealth ex rel. Deutsch v. Deutsch, 31 A.2d 526, 347 Pa. 66.

50. Exemption of soldiers' benefits

U.S.—Mahar v. McIntyre, D.C.Mass., 16 F.Supp. 961.

Exemption of wages of seamen

(1) Congressional act protecting wages of seamen from garnishment is valid, since congress has exclusive jurisdiction in maritime realm.
N.Y.—Michigan Furniture Co. v. Southern Pac. Co., 287 N.Y.S. 178, 158 Misc. 781.

(2) Federal statute, exempting wages of fishermen and all seamen from execution or attachment, repealed act excepting seamen of

coastwise trade from exemption given them by earlier statute.

N.Y.—Manufacturers' Trust Co. v. Anderson, 271 N.Y.S. 333, 241 App. Div. 843, certiorari dismissed Posner v. Anderson, 55 S.Ct. 208, 293 U.S. 531, 79 L.Ed. 640.

51. Minn.—In re How, 61 N.W. 456, 59 Minn. 415, modified on other grounds 63 N.W. 627, 61 Minn. 217.
25 C.J. p 9 note 27.

Proceeds of insurance policies

(1) Statute enacted to provide for distribution of avails of life insurance made payable to deceased, his personal representatives, his heirs or estate, and providing that avails should not be subject to debts of decedent, is not an exemption statute and does not violate constitutional provision that right of a debtor to enjoy comforts and necessities of life shall be recognized by law as exempting to all heads of families a homestead, the value of which shall be limited and defined by law, and a reasonable amount of personalty.

N.D.—Lapland v. Stearns, 54 N.W.2d 748, 79 N.D. 62.

(2) The preference or exemption given to an insured's beneficiary under statutes giving beneficiaries of a life policy a preferred right to its proceeds over the claims of the insured's creditors does not create a discriminatory classification as to

creditors, with respect to proceeds in violation of the constitution dealing with exemption of property from seizure and sale for payment of debt.
Minn.—Fox v. Swartz, 51 N.W.2d 80, 235 Minn. 337, 30 A.L.R.2d 739.

52. Fla.—Milam v. Davis, 123 So. 668, 97 Fla. 916, certiorari denied Tiffany & Co. v. Davis, 50 S.Ct. 82, 280 U.S. 601, 74 L.Ed. 646.

Ga.—Southall v. Blount, 185 S.E. 321, 182 Ga. 368.

53. Minn.—Bofferding v. Mengelkoch, 152 N.W. 135, 129 Minn. 184.
25 C.J. p 9 note 32.

54. Nev.—Dunker v. Chedic, 4 Nev. 378.

55. Ind.—Lauer Auto Co. v. Moody, 154 N.E. 501, 85 Ind.App. 523.

La.—Young v. Geter, 170 So. 240, 185 La. 709, 107 A.L.R. 608, answers to certified questions conformed to, App., 170 So. 410.

Fant v. Miller, App., 170 So. 412, followed in Fant v. Deville, 170 So. 415.

N.D.—Imperial Elevator Co. v. Warren, 217 N.W. 523, 56 N.D. 329.

Va.—South Hill Production Credit Ass'n v. Hudson, 6 S.E.2d 668, 174 Va. 284.
25 C.J. p 10 note 50.

56. Pa.—In re Bell's Estate, 10 A.2d 835, 139 Pa.Super. 11.
25 C.J. p 9 note 39.

which carries out the purpose for which it was passed;⁵⁷ that all parts of the statute must be construed together;⁵⁸ that all statutes in *pari materia* must be construed together and the intent of the lawmakers must be determined from a consideration of the whole;⁵⁹ that a statute must be construed so that, if it can be prevented, no clause, section, or word should be void, superfluous, or without significance;⁶⁰ that particular words may be ignored if out of harmony with the general purpose of the act, unless they are used by way of proviso or exception, or indicate a positive intent inconsistent with the general spirit;⁶¹ that words used in the statute must be given their ordinary meaning;⁶² that where special words are used, followed by words of more general import, the

general words are to be limited to things of the same kind as are described by the special words, unless an intention may be found to extend their meaning;⁶³ and that the express mention of one thing implies the exclusion of another of the same class.⁶⁴

b. Strict or Liberal Construction

Exemption laws are to be construed liberally, in favor of persons within their purview, so as to effectuate their beneficent purposes.

Although it has been held that exemption laws are to be strictly construed,⁶⁵ the rule adopted by practically all of the courts is that they are to be construed liberally, in favor of persons within their purview, so as to effectuate their beneficent purposes⁶⁶ and that they are to be construed liberally

57. Pa.—Kruczaj v. Komar, 24 Pa. Dist. & Co. 211, 26 Del.Co. 363.

58. N.Y.—Taylor v. Barker, 95 N.Y. S. 474, 108 App.Div. 21.

Wis.—Ellison v. Straw, 92 N.W. 1094, 116 Wis. 207.

59. Ind.—Martin v. Loula, 195 N.E. 881, 208 Ind. 346, denying rehearing 194 N.E. 178, 208 Ind. 346, followed in White v. White, 194 N.E. 355, 208 Ind. 314, rehearing denied 196 N.E. 95, 208 Ind. 314, followed in Indianapolis Morris Plan Co. v. Fitzgerald, 194 N.E. 355, 207 Ind. 708, Tam v. East Side Loan Co., 194 N.E. 355, 207 Ind. 709, Benson v. Sandusky, 194 N.E. 355, 207 Ind. 709, and Barlow v. Kellar, 194 N.E. 356, 207 Ind. 709.

25 C.J. p 10 note 42.

Wage exemption

The statute authorizing garnishment of funds in hands of state does not affect the right to claim as exempt any wages due an employee, when that right otherwise exists.

Ark.—Ross v. Rich, 194 S.W.2d 297, 210 Ark. 74.

60. Ga.—Russell v. Arnold, 25 Ga. 625.

Minn.—Brown v. Balfour, 48 N.W. 604, 46 Minn. 68, 12 L.R.A. 373.

61. U.S.—In re Safady Bros., D.C. Wis., 228 F. 538.

62. N.Y.—Northern New York Trust Co. v. Bano, 273 N.Y.S. 694, 151 Misc. 684.

63. U.S.—*Corpus Juris* quoted in In re Pulis, D.C.Iowa, 15 F.Supp. 10, 11.

25 C.J. p 10 note 44.

64. U.S.—*Corpus Juris* quoted in In re Pulis, D.C.Iowa, 15 F.Supp. 10, 11.

N.Y.—Taylor v. Barker, 95 N.Y.S. 474, 108 App.Div. 21.

65. N.J.—Beierlein v. Faulkner, 190 A. 853, 15 N.J.Misc. 313.

Strict construction of statutes granting exemptions from:

Internal revenue see Internal Revenue § 53 b.

State taxation see Taxation § 227.

66. U.S.—Meritz v. Palmer, C.A. Tex., 266 F.2d 265—Barutha v. Prentice, C.A.7, 189 F.2d 29, certiorari denied 72 S.Ct. 69, 342 U.S. 841, 96 L.Ed. 635—In re Fogel, C. C.A.Ind., 164 F.2d 214, certiorari denied Bangs v. Fogel, 68 S.Ct. 741, 338 U.S. 862, 92 L.Ed. 1141—Doethlaff v. Penn Mut. Life Ins. Co., C.C.A.Ohio, 117 F.2d 582, certiorari denied Gardner v. Doethlaff, 61 S.Ct. 1100, 313 U.S. 579, 85 L.Ed. 1536, and Gardner v. Penn Mut. Life Ins. Co., 61 S.Ct. 1100, 313 U.S. 579, 85 L.Ed. 1536—In re Feilchenfeld, C.C.A.Ill., 99 F.2d 710—In re Keil, C.C.A.N.Y., 88 F.2d 7, certiorari denied Duberstein v. Keil, 57 S.Ct. 941, 301 U.S. 708, 81 L.Ed. 1362—In re McFarland, D. C.Wash., 49 F.2d 342—Hyman v. Stern, C.C.A.N.C., 43 F.2d 666—Hickman v. Hanover, C.C.A.Md., 33 F.2d 873.

In re Haas, D.C.Colo., 165 F. Supp. 488—In re Shelton, D.C. Wash., 102 F.Supp. 629—In re Rash, D.C.Wash., 81 F.Supp. 389—In re Isele, D.C.Tenn., 33 F.Supp. 853—In re Fox, D.C.Cal., 16 F. Supp. 320—In re Welch, D.C.N.D., 8 F.Supp. 838—In re Sollars, D.C. Wash., 5 F.Supp. 483.

In re Adelberger, D.C.Fla., 280 F. 405.

Ala.—Warley v. Patterson, 185 So. 891, 237 Ala. 126.

Ariz.—Gardenhire v. Glasser, 226 P. 911, 26 Ariz. 503.

Ark.—Williams v. Swann, 251 S.W.2d 111, 220 Ark. 906—Ward v. Nu-Wa Laundry Cleaners, 170 S.W.2d 381, 205 Ark. 713—City Nat. Bank v. Johnson, 96 S.W.2d 482, 192 Ark. 945—Bunting v. Rollins, 70 S.W.2d 40, 189 Ark. 12—Pemberton v.

Bank of Eastern Arkansas, 294 S. W. 64, 173 Ark. 949.

Cal.—North British & Mercantile Ins. Co. v. Ingalls, 292 P. 678, 109 C.A. 147—In re Millington's Estate, 218 P. 1022, 63 C.A. 498.

Twining v. Taylor, Super., 339 P.2d 646—Los Angeles Finance Co. v. Flores, 243 P.2d 139, 110 C.A.2d Supp. 850—Medical Finance Ass'n v. Rambo, 86 P.2d 159, 33 C.A.2d Supp. 756—Wade v. Rathbun, 67 P.2d 765, 23 C.A.2d Supp. 758—White v. Gobey, 19 P.2d 876, 130 C.A.Supp. 789.

D.C.—Frank v. Hyman, C.A., 260 F. 2d 721.

Corpus Juris Secundum cited in Hollywood Credit Clothing Co. v. Jones, Mun.App., 117 A.2d 226, 227, 51 A.L.R.2d 944.

Fla.—Patten Package Co. v. Houser, 136 So. 353, 102 Fla. 603—Milam v. Davis, 123 So. 668, 97 Fla. 916, certiorari denied Tiffany & Co. v. Davis, 50 S.Ct. 82, 280 U.S. 601, 74 L.Ed. 646.

Hawaii.—Garcia v. Ichikawa, 34 Hawaii 748.

Idaho.—McMillan v. U. S. Fire Ins. Co., 280 P. 220, 48 Idaho 163.

Ind.—Cowan Tent Co. No. 61 v. Treesh, 155 N.E. 42, 199 Ind. 24—H. C. Smith Coal Co. v. Finley, 131 N.E. 5, 190 Ind. 481.

Iowa.—Kelly v. Degelau, 58 N.W.2d 374, 244 Iowa 873, 37 A.L.R.2d 709—In re Jones' Estate, 35 N.W.2d 36, 239 Iowa 1364—In re Kline's Estate, 24 N.W.2d 481, 237 Iowa 1086—In re Haines' Estate, 12 N.W.2d 812, 234 Iowa 396—Iowa Methodist Hospital v. Long, 12 N.W.2d 171, 234 Iowa 843, 150 A.L.R. 440—Ohio Casualty Ins. Co. v. Galvin, 269 N.W. 254, 222 Iowa 670, 108 A.L.R. 1036—Scott v. Wamsley, 253 N.W. 524, 218 Iowa 670—Booth v. Propp, 242 N.W. 60, 214 Iowa 208, 81 A.L.R. 919—First Nat. Bank v. Larson, 239 N.W. 134, 213

Iowa 468—Blakeslee v. Paull, 238 N.W. 447, 212 Iowa 1385—Dunbar v. Spratt-Snyder Co., 226 N.W. 22, 208 Iowa 490, 63 A.L.R. 1016—Berner v. Dellinger, 222 N.W. 370, 206 Iowa 1382—Solnar v. Solnar, 216 N.W. 288, 205 Iowa 701—Shepard v. Findley, 214 N.W. 676, 204 Iowa 107—Hoyer v. McBride, 211 N.W. 847, 202 Iowa 1278—Wilson v. Wright, 198 N.W. 782, 197 Iowa 1300—Johanson v. Rowland, 195 N.W. 358, 196 Iowa 724.

Ky.—Parks v. Parks' Ex'rs, 156 S.W. 2d 90, 288 Ky. 350, 138 A.L.R. 782—Wallins Nat. Bank v. Turner, 299 S.W. 194, 221 Ky. 562.

Miss.—Bank of Myrtle v. Garrison, 184 So. 291, 183 Miss. 526—Holsomback v. Slaughter, 171 So. 542, 177 Miss. 553—Adams v. Strong, 158 So. 204, 171 Miss. 510—Abernethy v. Savage, 132 So. 553, 159 Miss. 506—Breland v. Parker, 116 So. 879, 150 Miss. 476—U. S. Fidelity & Guaranty Co. v. Holt, 114 So. 818, 148 Miss. 885.

Mo.—Prouty v. Hall, App., 31 S.W.2d 103.

Mont.—Williams v. Sorenson, 75 P.2d 784, 106 Mont. 122—White v. Corbett, 52 P.2d 156, 101 Mont. 1—McMullen v. Shields, 29 P.2d 652, 96 Mont. 191—In re Metcalf's Estate, 19 P.2d 905, 93 Mont. 542.

Neb.—Application of Laffin, 239 N.W. 836, 122 Neb. 210.

N.M.—Hewatt v. Clark, 103 P.2d 646, 44 N.M. 453—McFadden v. Murray, 257 P. 999, 32 N.M. 361.

Ohio.—Troutman v. Eichar, 28 N.E. 2d 953, 64 Ohio App. 415—Cowan v. Wassaman, 28 N.E.2d 201, 64 Ohio App. 84.

Kleinman v. Brown, 30 Ohio N.P., N.S., 69.

Okl.—State v. Brown, 218 P. 816, 92 Okl. 137.

S.D.—Rames v. Norbraten, 272 N.W. 826, 65 S.D. 269—Bowman v. Larsen, 220 N.W. 489, 53 S.D. 246.

Tenn.—Whitfield v. People's Union Bank & Trust Co., 73 S.W.2d 690, 168 Tenn. 24—Dawson v. National Life Ins. Co., 300 S.W. 567, 156 Tenn. 306.

Tex.—Cities Service Oil Co. v. North River Ins. Co., 107 S.W.2d 994, 130 Tex. 186—Gaddy v. First Nat. Bank, 283 S.W. 472, 115 Tex. 393.

Illich v. Household Furniture Co., Civ.App., 103 S.W.2d 873, error refused—J. M. Radford Grocery Co. v. McKean, Civ.App., 41 S.W.2d 639—Malone v. Kennedy, Civ.App., 272 S.W. 509.

Utah.—Russell M. Miller Co. v. Givan, 325 P.2d 908, 7 Utah 2d 380.

Va.—South Hill Production Credit Ass'n v. Hudson, 6 S.E.2d 668, 174 Va. 284—Atlantic Life Ins. Co. v. Ring, 187 S.E. 449, 167 Va. 121, 106 A.L.R. 1064.

Wash.—Lien v. Hoffman, 306 P.2d 240, 49 Wash.2d 642—First Nat.

Bank of Everett v. Tiffany, 242 P. 2d 169, 40 Wash.2d 193—Grimm v. Naugle, 208 P.2d 123, 34 Wash.2d 75—In re Poli's Estate, 179 P.2d 704, 27 Wash.2d 670—State ex rel. White v. Douglas, 107 P.2d 593, 6 Wash.2d 356—Northern Savings & Loan Ass'n v. Kneisley, 76 P.2d 297, 193 Wash. 372—Kelley v. Butler, 47 P.2d 664, 182 Wash. 310—Van Slyke v. Bumgarner, 31 P.2d 1014, 171 Wash. 326.

Wis.—Julius v. Druckrey, 254 N.W. 358, 214 Wis. 643, 94 A.L.R. 293.

Wyo.—Corpus Juris cited in Pellish Bros. v. Cooper, 38 P.2d 607, 609, 47 Wyo. 480.

25 C.J. p 10 note 52.

Axiomatic

It is axiomatic that exemption statutes are given a liberal construction.

U.S.—In re Bailey, D.C.Neb., 172 F. Supp. 925.

Doubts resolved in favor of exemption

Exemption statutes should receive a liberal construction and any doubts as to a claimed exemption should be resolved in favor of those claiming the benefits provided.

Iowa.—Johnson v. Williams, 17 N.W. 2d 405, 235 Iowa 688.

Okl.—Davis v. Wright, 152 P.2d 921, 194 Okl. 451.

Tex.—Hickman v. Hickman, 234 S.W.2d 410, 149 Tex. 439.

Carson v. McFarland, Civ.App., 206 S.W.2d 131.

Consideration of spirit of statute

Liberal construction of exemption statute requires that the spirit as well as the literal wording of the statute be taken into consideration in construing it.

U.S.—Dinkins v. Cornish, D.C.Ark., 41 F.2d 766.

Most liberal construction

Exemption statutes are generally subject to most liberal construction courts can possibly give them.

U.S.—In re Dudley, D.C.Cal., 72 F. Supp. 943, affirmed, C.A., Goggin v. Dudley, 166 F.2d 1023.

In Louisiana

(1) The latest authorities are in accord with the rule stated in the text.

U.S.—In re Trotter, D.C.La., 97 F. Supp. 249.

La.—Corpus Juris cited in Young v. Geter, 170 So. 240, 242, 185 La. 709, 107 A.L.R. 608, answers to certified questions conformed to, App., 170 So. 410.

Mounger v. Ferrell, App., 11 So. 2d 56—Fant v. Miller, App., 170 So. 412, followed in Fant v. Deville, 170 So. 415.

(2) In a prior case it was held that exemption laws are to be construed as they are written, the court

neither favoring a liberal construction nor adopting a strict one.

La.—Rynella Mill & Mercantile Co. v. Segura, 55 So. 2, 128 La. 643.

(3) In a number of other cases the rule of strict construction was adopted and adhered to.

La.—A. Wilbert's Sons Lumber & Shingle Co. v. Ricard, 119 So. 411, 167 La. 416.

25 C.J. p 11 note 53 [a].

(4) Even under the rule of strict construction, it was held, however, that exemption laws must not be so strictly construed as to destroy their purpose.

La.—A. Wilbert's Sons Lumber & Shingle Co. v. Ricard, supra.

(5) Whenever claim to exemption can be brought within purpose and intent of statute by a fair and reasonable interpretation, exemption will be allowed.

La.—Young v. Geter, 170 So. 240, 185 La. 709, 107 A.L.R. 608, answers to certified questions conformed to, App., 170 So. 410—A. Wilbert's Sons Lumber & Shingle Co. v. Ricard, supra.

Fant v. Miller, App., 170 So. 412, followed in Fant v. Deville, App., 170 So. 415.

In New York

(1) There are numerous cases supporting the text rule.

N.Y.—Phoenix Mut. Life Ins. Co. v. Fellg, 5 N.Y.S.2d 170, 254 App.Div. 364—Di Donato v. Rosenberg, 225 N.Y.S. 46, 221 App.Div. 624.

In re McCormick's Estate, 8 N.Y.S.2d 179, 169 Misc. 672—In re Distefano's Estate, 5 N.Y.S.2d 87, 167 Misc. 678, affirmed 8 N.Y.S.2d 669, 255 App.Div. 957—Billings v. Lynch, 292 N.Y.S. 344, 161 Misc. 496—Michigan Furniture Co. v. Southern Pac. Co., 287 N.Y.S. 178, 158 Misc. 781—Northern New York Trust Co. v. Bano, 273 N.Y.S. 694, 151 Misc. 684.

25 C.J. p 10 note 52.

(2) However, there is an early case to the contrary.

N.Y.—Rue v. Alter, 5 Den. 119.

25 C.J. p 10 note 51 [a].

In Pennsylvania

(1) There are decisions supporting the rule stated in the text.

Pa.—Crossniklaus v. Kisecker, 30 Del.Co. 378.

25 C.J. p 10 note 52.

(2) Also, it is said that the exemption statute should be applied in the liberal and benevolent spirit in which it was enacted.

Pa.—Maschke, to Use of Ehnes v. O'Brien, 17 A.2d 923, 142 Pa.Super. 559.

(3) According to other cases, however, exemption statutes must be strictly construed.

Pa.—Reinhart v. Gerhardt, 31 A.2d 737, 152 Pa.Super. 229—In re Stein, 180 A. 577, 118 Pa.Super. 549, af-

in favor of such persons so as to promote justice;^{66.5} but the construction, although liberal, must be reasonable.⁶⁷ Such laws are not to be interpreted against obvious intention or manifest justice;⁶⁸ nor are they to be so interpreted as to pervert their benevolent design by enabling gross frauds to be perpetrated under color of law.⁶⁹

The rule of liberal construction must not be indulged to the extent of conferring privileges and benefits by construction which were not intended to be conferred by the legislature,⁷⁰ or to the extent of doing violence to the express terms of the statute;⁷¹ so, where a specified article or class of personal property is made exempt, the courts are not authorized to extend the exemption by construction to any other or different article or class.⁷²

Likewise, the rule of liberal construction applies

only where claimant proves to be in the statutory class given exemption;⁷³ the statutes should not be extended for the benefit of those not coming within their purview,⁷⁴ and debtors claiming the benefit of such statutes must bring themselves at least within the spirit of their provisions.⁷⁵ Furthermore, the rule of liberal construction applies only to the grant of an exemption, provisions which limit or take away the exemption being strictly construed, whether in provisos⁷⁶ and exceptions, as discussed *infra* § 71, or in amending statutes.⁷⁷ Also, a strict or limited construction will be favored where such a construction will preserve the constitutionality of a statute conferring an exemption, as by avoiding a retroactive construction.⁷⁸

§ 5. — Retroactive Operation Generally

A law granting an exemption is deemed not to ap-

armed *Hines v. Stein*, 56 S.Ct. 699, 298 U.S. 94, 80 L.Ed. 1063, rehearing denied 56 S.Ct. 945, 298 U.S. 692, 80 L.Ed. 1409.

Croft v. Livingston, 82 Pa.Dist. & Co. 277.—*Andrews Land Co., to Use, v. Carlton*, 29 Pa.Dist. & Co. 470, 19 Erie Co. 118.

(4) Although once right to exemption is established some liberality may be allowed in accomplishing statutory purpose, in determining whether one is within class entitled to exemption, statutes must be strictly construed.

Pa.—Fell v. Johnston, 36 A.2d 227, 154 Pa.Super. 470.

66.5 U.S.—*Meritz v. Palmer*, C.A. Tex., 266 F.2d 265.

Tex.—*Moore v. Neyland*, Civ.App., 180 S.W.2d 658.

67. Cal.—*In re Crosby's Estate*, 41 P.2d 928, 2 C.2d 470.

Idaho.—*McMillan v. U. S. Fire Ins. Co.*, 280 P. 220, 48 Idaho 163.

Ind.—*H. C. Smith Coal Co. v. Finley*, 131 N.E. 5, 190 Ind. 481.

68. Colo.—*Penrose v. Stevens*, 65 P. 2d 697, 100 Colo. 83.

25 C.J. p 12 note 61.

69. Ala.—*Warley v. Patterson*, 185 So. 891, 237 Ala. 126.

Cal.—*In re Crosby's Estate*, 41 P.2d 928, 2 C.2d 470.

Colo.—*Penrose v. Stevens*, 65 P.2d 697, 100 Colo. 83.

25 C.J. p 12 note 62.

Imposition on creditors

The well-recognized rule that exemption laws should be liberally construed to accomplish their purpose does not permit them to be construed so as to impose upon creditors.

U.S.—*In re Adelberger*, D.C.Fla., 280 F. 405.

Dishonesty

(1) Exemption laws are not to be

used as a means of encouraging or promoting dishonesty.

Ark.—*Ward v. Nu-Wa Laundry Cleaners*, 170 S.W.2d 381, 205 Ark. 713.

(2) Exemption laws were designed for the honest debtor, and, while they must be liberally construed, they should not be so applied as to become an instrument of fraud on creditors; but it must be assumed that the debtor is honest unless and until the contrary is established.

Fla.—*Slatcoff v. Dezen*, 76 So.2d 792.

70. Cal.—*Conlin v. Traeger*, 258 P. 433, 84 C.A. 730.

Iowa.—*In re Todd's Estate*, 54 N.W. 2d 521, 243 Iowa 930—Iowa Methodist Hospital v. Long, 12 N.W.2d 171, 234 Iowa 843, 150 A.L.R. 440 —*Farmers' Elevator & Live Stock Co. v. Satre*, 195 N.W. 1011, 196 Iowa 1076.

25 C.J. p 11 note 58.

71. Cal.—*Wade v. Rathbun*, 67 P.2d 765, 23 C.A.2d Supp. 758.

Mass.—*Pond v. Kimball*, 101 Mass. 105.

N.Y.—*Billings v. Lynch*, 292 N.Y.S. 344, 161 Misc. 496.

S.D.—*Rames v. Norbraten*, 272 N.W. 826, 65 S.D. 269.

Plain legislative mandates cannot be disregarded.

Mont.—*White v. Corbett*, 52 P.2d 156, 101 Mont. 1.

Substantial departure from express language of exemption statutes is not permitted by the rule that favors liberal construction of such statutes.

Iowa.—*First Nat. Bank v. Larson*, 239 N.W. 134, 213 Iowa 468—*Wertz v. Hale*, 234 N.W. 534, 212 Iowa 294.

72. U.S.—*Barutha v. Prentice*, C.A. 7, 189 F.2d 29, certiorari denied 72 S.Ct. 69, 342 U.S. 841, 96 L.Ed. 635.

Cal.—*Security-First Nat. Bank v. Pierson*, 38 P.2d 784, 2 C.2d 63.

Hammond v. Hoskins, 79 P.2d 1116, 30 C.A.2d Supp. 779.

Idaho.—*Young v. Wright*, 290 P.2d 1086, 77 Idaho 244.

Wash.—*Grimm v. Naugle*, 208 P.2d 123, 34 Wash.2d 75.

25 C.J. p 11 note 60.

Exemptions by implication

When the legislature has enumerated items exempt from garnishment, exemptions by implication are excluded except that things necessary for use and enjoyment of exempt items are also exempt.

Tex.—*Cities Service Oil Co. v. North River Ins. Co.*, 107 S.W.2d 994, 130 Tex. 186.

73. U.S.—*In re Frazier*, D.C.Mont., 5 F.Supp. 903.

74. Fla.—*Patten Package Co. v. Houser*, 136 So. 353, 102 Fla. 603.

Wis.—*Northwest Bank & Trust Co., Davenport, Iowa v. Minor*, 82 N.W.2d 323, 275 Wis. 516.

75. Cal.—*Corpus Juris cited in* *Petrich v. Francis*, 256 P. 444, 83 C.A. 72.

25 C.J. p 12 note 63.

76. Cal.—*Corpus Juris quoted in* *Los Angeles Finance Co. v. Flores*, 243 P.2d 139, 143, 110 C.A.2d Supp. 850.

Ill.—*Epps v. Epps*, 17 Ill.App. 196.

Ohio.—*State v. Shook*, 118 N.E. 1010, 97 Ohio St. 164.

77. Cal.—*Corpus Juris quoted in* *Los Angeles Finance Co. v. Flores*, 243 P.2d 139, 143, 110 C.A.2d Supp. 850.

N.Y.—*Osterhoudt v. Stade*, 117 N.Y. S. 809, 133 App.Div. 83.

25 C.J. p 11 note 56.

78. U.S.—*In re Bonvillain*, D.C.La., 232 F. 370, appeal dismissed 39 S.Ct. 5, 248 U.S. 588, 63 L.Ed. 435.

ply or operate retroactively unless the intention that it shall do so is clear; so it will not otherwise apply as against debts in existence prior to the date it became effective.

An exemption law will not be construed as retroactive unless the intention that it shall so operate is clearly apparent,⁷⁹ particularly where such construction would affect the rights of preëxisting creditors or alter vested contractual rights,⁸⁰ or would invalidate the statute,⁸¹ as where it would make the statute violative of constitutional provisions forbidding laws impairing the obligation of contracts⁸² or retrospective in their operation.⁸³ Consequently the law does not apply as against debts in existence prior to the date it became effective.⁸⁴ Effect will be accorded to provisions of exemption laws that they shall apply only as against judgments or liabilities on contracts entered into after their enactment or after a specified date thereafter,⁸⁵ but a statute providing that it shall not apply to any judgment obtained prior to a specified date is construed to mean that it applies to any judgment obtained on or after the specified date, including a judgment based on a former judgment.⁸⁶ A statute exempting the proceeds of disability insurance may apply to the proceeds of policies written before its enactment.⁸⁷

Judgment on running account. Where certain items of an account accrued prior to the taking effect of an exemption statute and others subsequent thereto, and the creditor sues on the entire account and obtains judgment for the full amount, it has been held in one jurisdiction that the debtor is entitled to claim the benefit of the exemption law as against the entire judgment,⁸⁸ while in another ju-

risdiction it has been held that under such circumstances the debtor, in order to have the benefit of the exemption, must pay that portion of the judgment representing the part of the debt contracted before the taking effect of the exemption.⁸⁹

Antedated note. When a note is dated prior to the date when a statute of exemption takes effect, the exemption cannot be claimed as against liability to a bona fide purchaser of the note, although it may not have been put in circulation until after such date.⁹⁰

§ 6. — Effect of Change or Repeal of Exemption and Change of Form, Merger, or Renewal of Debt

A statute diminishing or taking away, but not one increasing or extending, exemptions granted by a prior law may apply retrospectively as against debts previously contracted. Whether a change in a previously contracted indebtedness, or the evidence thereof, after a change in an exemption law, renders the indebtedness subject to the law as changed depends on whether the old indebtedness is extinguished and a new obligation created or there is a mere renewal, or change in the form, of the indebtedness.

A statutory amendment which adds to, increases, or extends exemptions granted by a prior law does not apply retroactively⁹¹ as against debts existing prior to the effective date of the amendment,⁹² or at least it will not be construed so to apply where, if so applied, it would violate constitutional prohibitions of laws impairing the obligation of contracts.⁹³ In such case, the law in force at the time the debt was contracted, and not that which is in force when the exemption is claimed, will control as to the debtor's right of exemption;⁹⁴ indeed, it

79. U.S.—In re Weisman, D.C.N.Y., 10 F.Supp. 312.

Cal.—Medical Finance Ass'n v. Wood, 63 P.2d 1219, 20 C.A.2d Supp. 749.

N.Y.—Horowitz v. Weinberg, 281 N.Y.S. 644, 156 Misc. 629, affirmed 284 N.Y.S. 989, 246 App.Div. 701.

25 C.J. p 14 note 90.

Retrospective operation of exceptions see *infra* § 71.

80. N.Y.—Phoenix Mut. Life Ins. Co. v. Felig, 5 N.Y.S.2d 170, 254 App.Div. 364.

81. U.S.—In re Bonvillain, D.C.La., 232 F. 377, appeal dismissed 39 S. Ct. 5, 248 U.S. 588, 63 L.Ed. 435.

Construction rendering constitutionality extremely doubtful will be avoided.

N.Y.—Phoenix Mut. Life Ins. Co. v. Felig, 5 N.Y.S.2d 170, 254 App.Div. 364.

82. Cal.—Smith v. Hume, 74 P.2d 566, 29 C.A.2d Supp. 747—Medical Finance Ass'n v. Wood, 63 P.2d 1219, 20 C.A.2d Supp. 749.

83. Mo.—Cunningham v. Gray, 20 Mo. 170.

25 C.J. p 14 note 93.

84. U.S.—Samuels v. Quartin, C.C. A.N.Y., 108 F.2d 789.

U. S. v. Sullivan, D.C.N.Y., 19 F. Supp. 695, affirmed, C.C.A., 95 F.2d 1021—In re Weisman, D.C.N.Y., 10 F.Supp. 312.

Cal.—Medical Finance Ass'n v. Wood, 63 P.2d 1219, 20 C.A.2d Supp. 749.

N.Y.—Horowitz v. Weinberg, 281 N.Y.S. 644, 156 Misc. 629, affirmed 284 N.Y.S. 989, 246 App.Div. 701.

Tenn.—Crook v. L. H. Brooks Co., 124 S.W.2d 259, 174 Tenn. 194.

25 C.J. p 14 note 96.

85. Ind.—O'Neil v. Beck, 69 Ind. 239.

25 C.J. p 14 note 94.

86. Ind.—Allen v. Sullivan, 23 N.E. 2d 471, 216 Ind. 394.

87. N.Y.—Associated Indemnity Corporation v. Chais, 293 N.Y.S. 280, 161 Misc. 763, dismissed 10 N.E.2d 570, 274 N.Y. 599.

Application of statutory exemption of proceeds of life insurance to preëxisting policies see *infra* § 39.

88. Tenn.—Bachman v. Crawford, 3 Humphr. 213, 39 Am.D. 163.

89. Pa.—Harleman v. Buck, 30 Pa. 267, 271.

90. N.H.—Ladd v. Dudley, 45 N.H. 61.

91. Ga.—Goodwin v. Bowen, 191 S.E. 691, 184 Ga. 408.

Wis.—In re Gardner, 264 N.W. 643, 220 Wis. 493.

92. Mont.—Rieger v. Wilson, 56 P. 2d 176, 102 Mont. 86.

93. Ala.—Love v. First Nat. Bank, 153 So. 189, 228 Ala. 258.

Cal.—Smith v. Hume, 74 P.2d 566, 29 C.A.2d Supp. 747.

94. N.Y.—Ehnes v. Krinsky, 110 N.Y.S.2d 347, 279 App.Div. 405.

Tenn.—Hair v. Ramsey, 53 S.W.2d 381, 165 Tenn. 148.

Wis.—Campbell v. Mickelson, 279 N.W. 73, 227 Wis. 429.

25 C.J. p 14 note 96.

has been broadly stated that the exemption laws in effect at the time of the creation of the obligation, and not those in effect at the time of an execution, determine what personal property of the debtor is exempt.⁹⁵ However, it is generally held that, where the debtor's exemptions have been diminished or taken away, the law at the time the execution or garnishment is issued,⁹⁶ rather than the prior law,⁹⁷ controls, it being permissible for such new law to have a retrospective effect.⁹⁸

It would seem that where the old exemption is not recognized by the subsequent statute, but is entirely repealed, the debtor's right of exemption is destroyed, since the law conferring an exemption must be in force when the exemption is claimed,⁹⁹ and a law which has been repealed cannot be revived by a claim made under it, although it may have been in force when the contract was made.¹ It should be noted, however, that, while the debtor does not have a vested right in the exemption, he may under the operation of an exemption law acquire a vested right,² as where his property has been sold and a portion of the proceeds set apart to him as exempt.³ Where the exemption law as changed does not withdraw from liability more property in value than was exempt at the time the contract was made, the debtor may have the advantage of the law as changed.⁴

Effect will, of course, be given to provisions in new exemption laws which expressly save the exemptions in force prior to their enactment with regard to contracts made before such time.⁵

The effect of the unconstitutionality of an act purporting to amend an exemption law is considered in Statutes § 270.

Change in indebtedness or evidence thereof generally. After a change in an exemption law, a debt is not rendered subject to the law as changed by a mere change in the form of the debt,⁶ or a renewal

thereof,⁷ or a merger in a new security without intention to satisfy the original debt.⁸ So, where a note is made up of several items of indebtedness against part only of which an exemption may be claimed, the debtor cannot claim his exemption as against the entire amount of the note;⁹ but where a note is given in payment of a simple contract debt the note will be subject to the exemption right existing at the time of its execution,¹⁰ and a similar rule applies where new notes are executed in payment of existing notes and not simply in renewal thereof,¹¹ or where an original indebtedness is extinguished and merged in an instrument under seal.¹²

New promise to pay barred debt. In those jurisdictions in which the view is adopted that, where a barred debt has been revived by a new promise, action should be brought on the new promise and not on the original demand, as discussed in Limitations of Actions § 320, the exemption law applicable to an action on such new promise is that existing at the time the promise was made.¹³

New promise after discharge in bankruptcy. It has been held that the date of a promise to pay a debt discharged by bankruptcy is not the date when the promise to pay is entered into, since the promise does not create a new contract, but merely revives the old debt, which is then governed by the exemption law in force at the time it is made, as against an amending law increasing the exemption;¹⁴ but under other authority the original debt is revived only as of the date of the new note, and the exemption law then in force governs as against a judgment on the note.¹⁵

Wife's antenuptial debt. Where a judgment is recovered against husband and wife on a debt owed by the wife at the time of her marriage, the husband's exemption rights are to be determined by the law in force at the time of his marriage and

95. Tenn.—Saunders v. Moore, 110 S.W.2d 1046, 21 Tenn.App. 375.

96. Tenn.—Majors v. Carter, 135 S.W.2d 924, 175 Tenn. 450.

Sherwin-Williams Co. v. Morris, 156 S.W.2d 350, 25 Tenn.App. 272. 25 C.J. p 14 note 99.

97. Ohio.—Chandler v. Horne, 154 N.E. 748, 23 Ohio App. 1.

98. Ohio.—Chandler v. Horne, supra.

99. Ala.—Nelson v. McCrary, 60 Ala. 301.

Fla.—Alexander v. Kilpatrick, 14 Fla. 450.

1. Ala.—Nelson v. McCrary, 60 Ala. 301.

2. Md.—Bramble v. State, 41 Md. 435.

S.C.—Frierson v. Wesberry, 45 S.C.L. 353.

3. Md.—Bramble v. State, 41 Md. 435.

4. N.C.—Gamble v. Rhyne, 80 N.C. 183—Earle v. Hardie, 80 N.C. 177.

5. Ark.—Moore v. Boozier, 42 Ark. 385.

N.Y.—Ehnes v. Krinsky, 110 N.Y.S. 2d 347, 279 App.Div. 405.

6. Pa.—In re Weaver, 25 Pa. 434. 25 C.J. p 15 note 19.

7. Mass.—Tucker v. Drake, 11 Allen 145.

8. Pa.—Reed v. Defebaugh, 24 Pa. 495.

25 C.J. p 15 note 21.

9. Ky.—Kibbey v. Jones, 7 Bush 243.

10. Mass.—Tucker v. Drake, 11 Allen 145.

11. Mass.—Tucker v. Drake, supra.

12. N.C.—Dean v. King, 35 N.C. 20.

13. Tex.—Grayson v. Taylor, 14 Tex. 672—Coles v. Kelsey, 2 Tex. 541, 47 Am.D. 661.

14. Ark.—Nowland v. Lanagan, 45 Ark. 108.

15. Ind.—Willis v. Cushman, 17 N.E. 168, 115 Ind. 100.

not by that in force at the time the debt was contracted.¹⁶ The wife's exemptions as to her separate property, however, are governed by the law in force at the time she contracted the debt.¹⁷

§ 7. Exemptions in Lieu of Homestead

The right to exemptions of personalty given, under some statutes, in lieu of a homestead or to those who have no property subject to exemption as a homestead depends on the terms and construction of the pertinent statute and its applicability to the facts of the particular case.

Under some statutes exemptions of personal property are given in lieu of a homestead or to those who have no property subject to exemption as a homestead; and such statutes will be accorded effect where they are applicable,¹⁸ but not otherwise; so, such exemptions cannot be claimed by one who owns a homestead, or who owns property subject to homestead exemption.¹⁹

Under some statutes the exemption given in lieu of a homestead is absolute, and, whether it is taken in personal or real property, the debtor acquires in and to the property so exempt an absolute ownership with full power of disposition,^{19.5} although he holds it subject to such liabilities as are enforceable against the exemption right.²⁰

Ownership, estate, or interest generally. The ownership, estate, or interest which is essential and sufficient to support a homestead exemption is considered at length in Homesteads §§ 78-92. In accordance with the rules there stated, a debtor may have a sufficient interest in property occupied by him as a homestead to prevent his claiming an exemption of personalty in lieu of a homestead where he has a life estate in the land,²¹ or the interest possessed by the equitable mortgagor of a life estate,²² or the interest of a tenant in common;²³ but a tenancy for a single year of a house, stable,

and parcel of land is not sufficient, especially where the tenant does not claim a homestead in the property.²⁴

The ownership of realty in which a homestead cannot be asserted will not deprive the debtor of an exemption in lieu of homestead.²⁵

Ownership by spouse. Under a statute giving the right of exemption to "husband and wife living together . . . and not the owner of a homestead," when real estate occupied as a family homestead is owned either by the husband or the wife, neither can claim the personal property exemption,²⁶ but the ownership by the wife of property not occupied as a family homestead will not prevent the husband from claiming his exemption in personalty.²⁷ Where the statute simply provides that an exemption shall not apply to any person "who shall have a homestead exempt under the general laws of the state," the husband is not precluded from claiming an exemption by the fact that the wife owns the dwelling occupied as a family homestead;²⁸ but a contrary conclusion has been reached under a statute providing that all "heads of families who have neither lands, town lots or houses subject to such exemption as a homestead" may have an exemption in personalty.²⁹

A claim of a widow for exemptions in lieu of a homestead may be asserted only as to claims against her individually³⁰ and is limited to property which is owned by her in her individual right, as distinguished from property which was owned by her husband during his lifetime.³¹ A statute providing that, where no homestead has been claimed in the manner provided by law, either prior or subsequent to the death of the person whose estate is being administered, the court shall award and set off to the surviving spouse property of the estate not exceeding a certain value and the award shall be in lieu

16. Ark.—Williams v. Rivercomb, 31 Ark. 292.

17. Ark.—Williams v. Rivercomb, supra.

18. Neb.—Application of Lafin, 239 N.W. 836, 122 Neb. 210.

Ohio.—Caton v. Kohler, 44 N.E.2d 138, 69 Ohio App. 455—Berlin Heights Banking Co. v. Felton, 177 N.E. 526, 39 Ohio App. 289.

In re Barnhisser's Estate, 10 Ohio Supp. 117.
25 C.J. p 15 note 29.

19. Neb.—Woolfson v. Mead, 148 N.W. 153, 96 Neb. 528, L.R.A.1915A 396.

25 C.J. p 15 note 28.

Origin of homestead right

In what law, state or national, the

homestead right has its origin is immaterial.

Neb.—Axtell v. Warden, 7 Neb. 182.

19.5 Ohio.—Gledhill v. Walker, 55 N.E.2d 647, 143 Ohio St. 381.

20. U.S.—In re Stern, D.C. Ohio, 208 F. 488.

25 C.J. p 16 note 36.

21. Ohio.—Staley v. Wooley, 8 Ohio Cir.Ct. 35, 4 Ohio Cir.Dec. 550.

25 C.J. p 16 note 38.

22. Ohio.—Biddinger v. Pratt, 35 N.E. 795, 5 Ohio St. 719.

23. Ohio.—Keys v. Young, 4 Ohio S. & C.P. 113, 2 Ohio N.P. 390.

25 C.J. p 16 note 40.

24. Ohio.—Colwell v. Carper, 15 Ohio St. 279.

25. Neb.—Widemair v. Woolsey, 73 N.W. 947, 53 Neb. 468.

25 C.J. p 15 note 30.

26. Ohio.—Dwinell v. Edwards, 23 Ohio St. 603.

25 C.J. p 15 note 31.

27. Ohio.—Ryan v. Miller, 40 Ohio St. 232.

28. Mich.—Morley v. National Loan & Investment Co., 78 N.W. 1078, 120 Mich. 171.

29. Neb.—Creason v. Wells, 62 N.W. 2d 327, 158 Neb. 78—Stout v. Rapp, 23 N.W. 364, 17 Neb. 462.

30. Ohio.—Dillman v. Warner, 6 N.E.2d 757, 54 Ohio App. 170.

31. Ohio.—Dillman v. Warner, supra.

Wolverton v. Paddock, 3 Ohio Cir.Ct. 488, 2 Ohio Cir.Dec. 279.

of all homestead provisions and of exemptions, while having the effect of freeing the property awarded from the burden of provable debts of the estate, is not strictly an exemption statute, but is more in the nature of a distribution or preferred creditor statute;³² and the question whether property so awarded, and which manifestly becomes the separate property of the surviving spouse, is exempt from execution in satisfaction of his or her separate debts is to be determined, not under such statute, but under the general homestead and exemption statutes.³³

Mortgage or sale of homestead. The fact that the homestead is encumbered does not give the debtor any right to claim the exemption in personalty,³⁴ although the encumbrance is for its full value,³⁵ or even for more than its full value,³⁶ or although foreclosure proceedings have been begun;³⁷ but after a sale on foreclosure the personal property exemptions may be claimed in lieu of homestead,³⁸ even before confirmation of the foreclosure sale.³⁹ The right to demand an allowance in lieu of a homestead out of the proceeds of a sale is to be determined by the state of facts at the time the surplus arising from the sale is finally disposed of by the court,^{39.5} and an inchoate right to an allowance in lieu of homestead does not constitute exempt property.^{39.10}

If the debtor sold his homestead in good faith before the levy and several days after the levy the contract was fully executed, he was not at the time of the levy the "owner of a homestead," so as to be precluded from his exemption in personalty,⁴⁰

but, if the debtor owns a homestead or land subject to exemption as a homestead at the time of the levy on personal property or the service of a garnishee summons, he cannot by afterward transferring the homestead render the personal property exempt.⁴¹

Allowance from wages or money due. Under statute so permitting, exemptions in lieu of homestead may properly be claimed out of current wages which have been garnished;⁴² and, while a statute expressly precluding allowance of the exemption from money, salary, or wages due the debtor from any person, partnership, or corporation will, when applicable, be accorded effect,⁴³ such a statute has been held not to apply to government bonds⁴⁴ or to money arising from the sale of real estate under an order of court to satisfy a judgment lien.⁴⁵

§ 8. Effect of Ownership or Possession of Other Property

With some qualifications and exceptions in particular jurisdictions, the general rule is that the fact that other property, which is not exempt, is owned or possessed by the debtor or members of his family does not defeat his right to the benefit of a statutory exemption of the property in question. A debtor having the right to select the property which he will hold as exempt cannot be compelled to select encumbered, rather than unencumbered, property.

The debtor's right to claim an exemption given him by statute to personal property of a specified value⁴⁶ or specific articles of personalty⁴⁷ is not affected by the fact that he owns other property. In at least one jurisdiction the debtor is not required to turn out other property possessed by him

32. Wash.—Greer v. Robinson, 272 P. 28, 149 Wash. 659.

33. Wash.—Greer v. Robinson, supra.

34. Neb.—State v. Townsend, 23 N. W. 509, 17 Neb. 530.

Ohio.—Biddinger v. Pratt, 35 N.E. 795, 50 Ohio St. 719.

35. Neb.—State v. Krumpos, 14 N. W. 409, 13 Neb. 321.

36. Ohio.—Bartram v. McCracken, 41 Ohio St. 377.
25 C.J. p 16 note 45.

37. Ohio.—Olding v. Kemker, 9 Ohio Dec., Reprint, 601, 15 Cinc.L.Bul. 310.

25 C.J. p 16 note 46.

38. Ohio.—Niehaus v. Faul, 1 N.E. 87, 43 Ohio St. 63.

25 C.J. p 16 note 47.

Application of specific statute

Delinquent taxes on homestead properties constitute a "lien" precluding the allowance of a homestead within meaning of statute providing that, where homestead is charged

with liens, some of which preclude the allowance of a homestead, but others of which do not, and sale of such homestead is had, then, after payment, out of proceeds of sale, of liens precluding the allowance of a homestead, balance, not exceeding five hundred dollars, shall be awarded to the head of the family or the wife in lieu of such homestead; and this statute being a specific one intended to reach just such a situation as is presented in the case, a homestead cannot be set up in defiance of it.

Ohio.—Cowen v. Wassman, 28 N.E.2d 201, 64 Ohio App. 84.

39. Ohio.—Carter v. Ross, 8 Ohio Cir.Ct. 139, 4 Ohio Cir.Dec. 333.

39.5 Ohio.—Gledhill v. Walker, 55 N.E.2d 647, 143 Ohio St. 381.

39.10 Ohio.—Gledhill v. Walker, supra.

40. Ohio.—Muse v. Darrah, 2 Ohio Dec., Reprint, 604, 4 West.L.Month. 149.

41. Neb.—Van Kirk v. Beckley, 242 N.W. 358, 123 Neb. 148—Kilpatrick-Koch Dry Goods Co. v. Callender, 52 N.W. 403, 34 Neb. 727.

Ohio.—Radford v. Kachman, 160 N.E. 875, 27 Ohio App. 86.

42. N.M.—Dowling-Moody Co. v. Hyatt, 48 P.2d 776, 39 N.M. 401—McFadden v. Murray, 257 P. 999, 32 N.M. 361.

43. Ohio.—Morris Plan Bank of Cleveland v. Viona, 170 N.E. 650, 122 Ohio St. 28.

44. Ohio.—Troutman v. Eichar, 28 N.E.2d 953, 64 Ohio App. 415.

45. Ohio.—Berlin Heights Banking Co. v. Felton, 177 N.E. 526, 39 Ohio App. 289.

46. Or.—Childers v. Brown, 158 P. 166, 81 Or. 1, Ann.Cas.1918D 170.
25 C.J. p 16 note 52.

47. N.Y.—Wilcox v. Hawley, 31 N.Y. 648.
25 C.J. p 16 note 53.

for levy as a condition to a claim of his exemption,⁴⁸ but in other jurisdictions the debtor, in claiming a right of selection, must offer to surrender to the officer other property in his hands subject to execution,⁴⁹ or other property of the particular kind taken,⁵⁰ at least where the article levied on is not specifically exempt⁵¹ or, if specifically exempt, is levied on without his knowledge.⁵² A debtor who has no more property than the law allows him to claim as exempt is of course not bound to surrender any part of such property to be levied on, as a condition on which he may claim the rest.⁵³

The selection by the debtor of property claimed by him as exempt where he owns property or articles in excess of the value or number exempted by law is considered *infra* § 138, and his claim or selection, under permissive statutory provisions, of other property in lieu of articles specifically exempted *infra* § 56. The effect of ownership, or lack of ownership, of a homestead on the right to an exemption in lieu of a homestead is treated *supra* § 7.

Income other than earnings for personal services. An exemption, granted by statute, of a specified portion of the earnings of the judgment debtor received for his personal services at any time within a stated period next preceding the levy is not to be denied because other income, regardless of its amount, may have been received by, or become due to, him during the statutory period.⁵⁴

Ownership by members of family. Where the statute gives the exemption right to the head of the family, his right is not affected by the ownership of other property by the other members of the family;⁵⁵ but the rule is otherwise where the statute exempts property for the use of the family.⁵⁶

Mere possession of other property will not affect

the debtor's right to exemption of property owned by him,⁵⁷ unless the statute expressly puts property in his possession on the same footing as property which he owns;⁵⁸ and under such a statute, property in the debtor's possession may be regarded as his property, even though the title to it is in doubt, where it appears that the question of ownership has been made doubtful by the debtor himself.⁵⁹

Deductions. Money paid out by the debtor between the time of filing his claim of exemptions and the filing of his inventory will be deducted from the amount of his exemption,⁶⁰ unless the payment was of just debts.⁶¹ Where property of nominally greater value than the claim against him was conveyed by a debtor to his creditor in payment of the debt, with a provision that if more was realized from the sale of the property than was required for payment of the debt the surplus should be returned to the debtor, no deduction can be made from the debtor's exemption on that account, in the absence of anything to show that any sum would accrue to the debtor from this source;⁶² but, where a surplus from the sale is shown over and above the amount of the debt, the amount of the surplus will be deducted from the debtor's exemption.⁶³

Property sold or encumbered by debtor. Property which a debtor has sold, and delivered to the purchaser, on condition that it is to become his on paying for it, is not owned by the debtor to such an extent as to prevent him from claiming other property as exempt.⁶⁴ However, a debtor, after a suit has been brought against him, cannot dispose of a portion of his property and then claim that he possesses nothing but what is exempt.⁶⁵ When the debtor has a right to select the property which he will hold as exempt, he cannot be compelled to select property that is mortgaged or pledged or oth-

48. Ala.—Bray v. Laird, 44 Ala. 295. 25 C.J. p 17 note 54.

49. Ill.—McMasters v. Alsop, 85 Ill. 157. 25 C.J. p 17 note 55.

50. Cal.—Keybers v. McComber, 7 P. 838, 87 C. 395. 25 C.J. p 17 note 56.

51. Ill.—McMasters v. Alsop, 85 Ill. 157—Amend v. Murphy, 69 Ill. 337.

52. Ill.—Bonnell v. Bowman, 53 Ill. 460—Smothers v. Holly, 47 Ill. 331.

53. Ill.—Vaughan v. Thompson, 17 Ill. 78.

54. Cal.—Medical Finance Ass'n v. Rambo, 86 P.2d 159, 33 C.A.2d Supp. 756.

Money from another employer

Where, prior to levy of garnishment on one of debtor's employers,

judgment debtor received money from another employer for services rendered during the thirty-day period, amount received from such other employer would not have to be added to take-home pay due judgment creditor from employer levied on in determining what were "all of such earnings" on which exemption from garnishment could be based. Cal.—Snyder v. Swenson, 311 P.2d 644, 151 C.A.2d Supp. 847.

55. Ky.—Crigler v. Connor, 15 Ky. L. 751.

25 C.J. p 17 note 62.

56. Ala.—Simonds v. Gulley, 7 Ala. 721.

25 C.J. p 17 note 63.

57. Pa.—Hetrick v. Campbell, 14 Pa. 263.

25 C.J. p 17 note 64.

58. Pa.—Lindsey v. Fuller, 10 Watts 144.

25 C.J. p 17 note 65.

59. Pa.—Trevillo v. Shingles, 10 Watts 438.

25 C.J. p 17 note 66.

60. Ala.—Pinkus v. Bamberger, 13 So. 578, 99 Ala. 266.

61. Ala.—Trager v. Feibleman, 10 So. 213, 95 Ala. 60.

62. Ala.—Pinkus v. Bamberger, 13 So. 578, 99 Ala. 266.

63. Ala.—Pinkus v. Bamberger, *supra*.

64. Vt.—Wilkinson v. Wait, 44 Vt. 508, 8 Am.R. 391.

65. Neb.—Kilpatrick - Koch Dry Goods Co. v. Callender, 52 N.W. 403, 34 Neb. 727.

erwise encumbered, instead of unencumbered property,⁶⁶ or at least he will not be compelled to accept his exemption out of the encumbered property at its full value.⁶⁷ Property on which there is no lien must be first exhausted in allotting the debtor's exemption.⁶⁸ Under the rule, stated *supra* this section, that the debtor must surrender other property than that which he claims as exempt, he is not excused by the fact that the other property is mortgaged if he does not inform the officer of the facts.⁶⁹

A statute exempting one half of the debtor's earnings for his personal services rendered within a specified period next preceding the levy applies to one half of the earnings levied on regardless of the disposition made of past earnings or of income from some other source.⁷⁰

Mortgage or sale of the homestead as affecting the right to claim exemption in lieu of homestead is considered *supra* § 7, and the effect of fraudulent conveyance of property on the right to exemption *infra* § 118.

Property outside of jurisdiction. It would seem that a debtor is not prevented from claiming property as exempt in one county because he may have property outside the county which is not levied on,⁷¹ although there is also authority to the contrary.⁷² Inability of the debtor to surrender other property owned by him, because it is held under execution by the sheriff of another county, excuses him,⁷³ and his failure to surrender under such circumstances will not justify the officer in levying on property selected by the debtor as exempt.⁷⁴

Liquor license. On a contest of a claim for exemptions, a license to retail liquors cannot be estimated as property for the purpose of reducing the exemptions claimed by the debtor to whom it is

granted, where it is a mere personal privilege and is not transferable or a subject of sale.⁷⁵

§ 9. Intent in Acquisition of Property

Consideration is given *infra* § 118 to the effect, if any, of the purpose with which nonexempt property was converted into exempt property, as well as the effect, on a claim of exemption, of the acquisition in fraud of creditors of the property in which the exemption is claimed.

Examine Pocket Parts for later cases.

§ 10. Duration and Termination

The law is extremely reluctant to deprive a person of the benefits and advantages of an exemption. In the absence of statutory provision for its continuance thereafter, an exemption terminates on the death of the person in whose favor it was created.

The law is extremely solicitous of the rights of those to whom it accords exemption, and it is extremely reluctant, after conferring its beneficence on a person, to deprive him of the benefits and advantages he has earned.^{75.50} Under a statute so providing, a debtor who "is about to leave the state" may be entitled to no exemptions, and the statute applies to a debtor who has left the state before the execution is issued.^{75.55}

An exemption does not continue after the death of the person in whose favor it was created, in the absence of a statute providing for such continuance.⁷⁶ At least as to certain classes of exempt property, a judgment obtained during the lifetime of the debtor does not create any lien, dormant or otherwise;⁷⁷ and, in such case, on the death of the debtor, judgment creditors stand on the same footing as ordinary creditors and have no priority over such creditors or among themselves.⁷⁸

The duration of an exemption of the proceeds of a life insurance policy is considered *infra* § 41.

66. Mich.—Ganong v. Green, 38 N. W. 661, 71 Mich. 1.
25 C.J. p 17 note 72.

67. Kan.—Rice v. Nolan, 5 P. 437, 33 Kan. 28.

68. N.C.—Cowan v. Phillips, 28 S.E. 961, 128 N.C. 70.

69. Ill.—Smothers v. Holly, 47 Ill. 331.

70. Cal.—Medical Finance Ass'n v. Rambo, 86 P.2d 159, 33 C.A.2d Supp. 756.

71. Mich.—Baldwin v. Talbot, 4 N. W. 547, 43 Mich. 11.
25 C.J. p 18 note 78.

72. Ky.—Robinson v. Myers, 3 Dana 441.

25 C.J. p 18 note 79.

73. Ill.—Keefer v. Guffin, 38 Ill.App. 622.

74. Ill.—Keefer v. Guffin, *supra*.

75. Ala.—Jones v. Motley, 78 Ala. 370.

75.50 La.—Skelley v. Accounts Supervision Co., App., 53 So.2d 520.

75.55 Mo.—R. F. C. v. Ball, 206 S. W.2d 35, 239 Mo.App. 1189.

A corporation is a "person" within statute providing that any person holding a judgment against another who is about to leave the state may have execution issued against property and effects of such person and that no exemptions shall be allowed execution debtor.
Mo.—R. F. C. v. Ball, *supra*.

76. Tex.—Pickens v. Pickens, 83 S. W.2d 951, 125 Tex. 410.

77. Iowa.—Beatty v. Cook, 185 N.W. 360, 192 Iowa 542.

78. Iowa.—Beatty v. Cook, *supra*.

II. PERSONS ENTITLED TO PRIVILEGE

§ 11. In General

Only those persons who come within the terms of the statutes creating exemptions may claim them.

Exemptions of the character under consideration, being purely statutory in their origin, as discussed supra § 1, may be claimed only by those persons who come within the terms of the statutes creating them.⁷⁹

§ 12. Residence and Citizenship

- a. In general
- b. Sufficiency of residence
- c. Residence of wife
- d. Residence of family

a. In General

Where the statute expressly requires residence, non-residents may not claim exemptions thereunder, but in the absence of express provision the courts disagree as to whether the exemption statute is for the benefit of residents only. Unless otherwise specified by the statute, resident aliens are within its terms.

In the absence of an express provision in an exemption statute restricting its operation to residents of the state, it has been held by some courts that persons only temporarily within the state, if otherwise coming within the terms of the statute, are entitled to its benefits.⁸⁰ A contrary view is taken by other courts, however, and the operation of the statute is restricted to residents of the state.⁸¹

a construction which may be aided by the fact that another statute provides that no exemption shall be allowed the execution debtor in case of an execution issued against one who is about to leave the state.⁸² In these states a nonresident debtor cannot claim the exemption privilege simply because, in the suit brought against him, garnishment proceedings are instituted against a resident.⁸³

Express restriction to residents. When the statute in express terms requires residence, as is often the case, it is clear that nonresidents cannot claim the benefit thereof,⁸⁴ and this rule applies also to nonresidents who are temporarily in the state.⁸⁵ A statute denying to nonresident debtors the benefit of exemption laws does not remove them from the operation of a statute which is not one of exemption but which amounts to a limitation of jurisdiction and withdraws certain property from the operation of a particular process.⁸⁶ A statute giving exemptions to residents of cities, towns, and villages is applicable to urban districts although not incorporated, where such districts are in fact settled and inhabited as cities and towns.⁸⁷

Time of becoming resident. When a statute requires a debtor to be a resident of the state to entitle him to the benefit of the exemption laws, it is not necessary that he shall have been a resident at the time when the debt was contracted, but it is sufficient if he is a resident at the time of the levy as

79. Mont.—White v. Corbett, 52 P. 2d 156, 101 Mont. 1.

Pa.—Fickes v. Skiles, Com.Pl., 53 Lanc.L.Rev. 427.

Particular classes of persons see infra §§ 14-25.

Administrator as debtor

In proceeding on objections to final report of an administrator who at time of his appointment was indebted to decedent whose estate he undertook to administer, administrator was not required to surrender his exemptions, since it is the policy of the law to preserve these for the protection of debtor's family.

Iowa.—In re Windhorst's Estate, 288 N.W. 892, 227 Iowa 808.

80. Iowa.—Stark v. Stark, 213 N.W. 235, 203 Iowa 1261.

Miss.—Laurel Mills v. Ward, 102 So. 263, 137 Miss. 221.

25 C.J. p 18 note 85.

81. Ark.—Washington v. Jolliff, 288 S.W.2d 600, 226 Ark. 190.

Ga.—Corpus Juris quoted in Smith v. Georgia Granite Corporation, 198 S.E. 772, 775, 186 Ga. 634, 119 A.L.R. 550.

Mich.—Leonetti v. Tolton, 250 N.W. 512, 264 Mich. 618, 92 A.L.R. 1050.

Minn.—Wagner v. Farmers' Co-op. Exch. Co. of Good Thunder, 180 N.W. 231, 147 Minn. 376, 14 A.L.R. 279.

Mo.—Ferneau v. Armour & Co., App., 303 S.W.2d 161.

Pa.—Lippincott v. Lippincott, 42 Pa. Dist. & Co. 566.

25 C.J. p 18 note 86.

"Where an exemption statute is not expressly or impliedly made applicable to non-residents it will not be given effect in their favor."

Ga.—Smith v. Georgia Granite Corporation, 198 S.E. 772, 775, 186 Ga. 634, 119 A.L.R. 550.

Workmen's compensation act, exempting compensation claims from creditors, is not an exemption statute within rule that nonresidents are not entitled to benefit of exemption statutes.

Tenn.—Poore v. Bowlin, 265 S.W. 671, 150 Tenn. 412.

In Louisiana

(1) The court, in construing Act No. 20 of 1914, § 21, par. 1, as amended by Act No. 85 of 1926, held that unless the exemption statute is expressly confined to residents, it also applies to nonresidents of the state.

La.—Festervand v. Laster, 130 So. 634, 15 La.App. 159.

(2) However, in construing Code Practice Art. 644, court held that an exemption statute is not available to one who is not a resident.

La.—Clarke v. Patton, App., 16 So.2d 585.

82. Mo.—Mignogna v. Chiaffarelli, 131 S.W. 769, 151 Mo.App. 359.

83. Ga.—Harvey v. Thompson, 60 S. E. 11, 2 Ga.App. 569.

84. Minn.—Ingebreton v. Montague, 288 N.W. 577, 206 Minn. 336.

Mont.—White v. Corbett, 52 P.2d 156, 101 Mont. 1.

Neb.—Howells State Bank of Howells v. Arps, 219 N.W. 844, 117 Neb. 110.

25 C.J. p 19 note 89.

85. U.S.—In re Dinglehoeof, D.C.N.C., 109 F. 866.

25 C.J. p 19 note 90.

86. Pa.—Mattson v. Bryan, 8 Pa.Co. 355.

25 C.J. p 19 note 91.

87. Miss.—Harris Ice Cream Co. v. Hartsock, 90 So. 7, 127 Miss. 271.

against which the exemption is claimed.⁸⁸

Citizenship. Under statutes so providing, only citizens are entitled to claim exemptions,⁸⁹ although under such statutes the fact of citizenship is presumed from residence.⁹⁰ Unless there is something, however, to show an intention to the contrary, the term "citizen" in a statute giving an exemption to citizens of the state should be construed as equivalent to "resident," and to include unnaturalized residents; and citizenship is not necessary to constitute one a resident within the meaning of the exemption laws.⁹¹

b. Sufficiency of Residence

A person who moves into the state with the intention of making it his home is a resident of the state, within the exemption laws, regardless of the length of time of his residence and even before he obtains a place of permanent residence.

A person who moves into the state with his family and personal property for the purpose of residing therein is a resident of the state, within the exemption laws, before he has secured a place of permanent residence,⁹² even though he moves into the state with the purpose of residing there for only a limited time, and with the purpose of later moving elsewhere.⁹³ He becomes a resident as soon as he has come into the state with the intention of making it his home, and it is not necessary that he should be a resident for any particular length of time.⁹⁴

Residence on an Indian reservation within the state is residence in the state, within the meaning of a residence requirement in the exemption law, and the claimant's right to exemption is not impaired by the fact that technically he is a trespasser on the reservation, although no complaint to his living there had ever been made by the Indians or by the government.⁹⁵

c. Residence of Wife

The domicile of a wife, for the purpose of determin-

ing her right to the benefit of exemption laws requiring residence, is generally that of her husband even though she is actually in another state, unless she is out of the state under circumstances amounting to a wrongful abandonment.

The domicile of a wife, for the purpose of determining her right to the benefit of the exemption laws requiring residence, as for most other purposes, is generally that of her husband, so that she may claim an exemption when her husband is a resident, although she is actually in another state.⁹⁶ Under these circumstances she is not entitled to the benefit of the exemption laws of the state where she actually resides,⁹⁷ even though her husband in the other state has become insane.⁹⁸ The mere fact that the wife has never been in her husband's state, there having been no abandonment, does not prevent her domicile from being that of her husband.⁹⁹ Where, however, in such case, she retains her actual residence in her own state, she is entitled to the benefit of its exemption laws.¹

When a wife voluntarily absents herself under circumstances amounting to a wrongful abandonment of her husband, and permanently resides in another state, it has been held that she loses her residence, and cannot claim the benefit of a statute which expressly or impliedly requires residence.²

d. Residence of Family

Under a statute so providing, the family for whose benefit the exemption is intended must reside within the state, although the debtor need not reside there; in the absence of an express requirement of residence of the family within the state, the authorities are divided as to the necessity therefor.

Some statutes of exemption expressly require that the family for whose benefit they are intended shall reside in the state, and when a statute creates a right of exemption for the benefit of every family in the state it does not extend to one who has no family, or whose family resides in another state.³ Under such a statute, however, the debtor need not

83. S.C.—Gray v. Putnam, 28 S.E. 149, 51 S.C. 97.

83. Colo.—Sandberg v. Borstadt, 109 P. 419, 48 Colo. 96.

90. Colo.—Sandberg v. Borstadt, supra.

91. U.S.—In re Trammell, D.C.Ga., 5 F.2d 326, petition denied, C.C.A., Clark v. Nirenbaum, 8 F.2d 451, certiorari denied Powell v. Anderson, 46 S.Ct. 349, 270 U.S. 649, 70 L.Ed. 780.
25 C.J. p 21 note 39.

92. Iowa.—Cox v. Allen, 59 N.W. 335, 91 Iowa 462.

Neb.—Chesney v. Francisco, 12 N.W. 94, 12 Neb. 626.

93. Wis.—Lowe v. Stringham, 14 Wis. 222.

94. Iowa.—Union County Inv. Co. v. Messix, 132 N.W. 823, 152 Iowa 412.

95. Idaho.—Coe v. Cleghorn, 79 P. 72, 10 Idaho 166, 109 Am.S.R. 199.

96. Tenn.—Prater v. Prater, 9 S.W. 361, 87 Tenn. 78, 10 Am.S.R. 623.

97. Iowa.—Union County Inv. Co. v. Messix, 132 N.W. 823, 152 Iowa 412.

98. Iowa.—Union County Inv. Co. v. Messix, supra.

99. Tex.—Clements v. Lacy, 51 Tex. 150—Lacey v. Clements, 36 Tex. 661.

1. Kan.—Fish v. Street, 27 Kan. 270.

Tenn.—Bruce v. Bruce, 222 S.W.2d 228, 32 Tenn.App. 222.
Claim by wife of absent debtor see infra § 17.

2. Tenn.—Prater v. Prater, 9 S.W. 361, 87 Tenn. 78, 10 Am.S.R. 623.
Tex.—Earle v. Earle, 9 Tex. 630.

3. N.J.—J. B. Van Sciver Co. v. Flurer, 167 A. 513, 11 N.J.Misc. 464.
25 C.J. p 21 note 34.

necessarily reside in the state but it is sufficient if his family resides there.⁴

In the absence of such a requirement it has been held that if the debtor resides in the state, and supports a family, it is immaterial where his family resides,⁵ but he nevertheless must be a part of the family.⁶ According to other authority, the family must be resident within the state in order to warrant a claim of exemption.⁷ Under a statute which exempts the earnings of all persons who have to provide for the entire support of a family within the state, a person who does not reside in the state, and whose family does not reside therein, is not entitled to the exemption.⁸

§ 13. — Change of Residence and Absence from State

- a. In general
- b. Intention or preparations to remove
- c. Temporary absence and intention to return

a. In General

Where residence is necessary, a debtor loses the benefit of the exemption statutes by absconding or removing from the state. The courts disagree as to the application of this rule where the debtor was a resident at the time his property was levied.

When residence is necessary, a person clearly loses his right to claim property as exempt by absconding or removing from the state so as to lose his residence therein.⁹ In some jurisdictions this rule applies although the debtor is a resident at the time of levying on the property.¹⁰ In other jurisdictions it has been held that the debtor's status as a resident is fixed at the time the execution is levied and a claim for exemption is made and will not be defeated by a subsequent removal of the debtor.¹¹

No part of the property left behind by the debtor

who changes his domicile to another state can be held exempt by him.¹² A fugitive from justice who cannot be found within the state is a nonresident within the meaning of the exemption laws in the absence of evidence showing his intention to return,¹³ but where it is shown that he is merely keeping himself hidden to avoid a criminal prosecution, and that he is occasionally seen in the county, he does not lose his residence or cease to be a householder in such a sense as to deprive him of his exemption.¹⁴ Moving from place to place within the state does not affect the debtor's claim to exemption.¹⁵

Although one's intention and acts as to removal from the state may have made him legally a nonresident, yet if, before sale of his property under levy and at the time he claims its exemption therefrom, he has, by change of intention and circumstances, in good faith, again become a resident of the state, he is entitled to the benefit of the exemption law.¹⁶

b. Intention or Preparations to Remove

Unless a statute provides otherwise, a mere intention of the debtor to remove from the state, although avowed and followed by preparations to remove, ordinarily does not affect his right of exemption as a resident of the state.

Mere intention to remove from the state, although avowed, and although followed by preparations to move, does not affect a debtor's right to claim exemptions as a resident of the state,¹⁷ even though the preparations have reached the point where his family has already left the state for the new home,¹⁸ or where he has preceded them and they are at the railroad station on the way with their household goods,¹⁹ or where the household goods have been shipped ahead of the debtor and his family.²⁰ Until he and his family have passed

4. N.J.—*Bonnel v. Dunn*, 29 N.J. Law 435.

25 C.J. p 21 note 35.

5. Mich.—*Pettit v. Muskegon Booming Co.*, 41 N.W. 900, 74 Mich. 214. 25 C.J. p 21 note 36.

6. Kan.—*Zimmerman v. Franke*, 9 P. 747, 34 Kan. 650. 25 C.J. p 21 note 37.

7. U.S.—*In re Trammell*, D.C.Ga., 5 F.2d 326, petition denied, C.C.A., *Clark v. Nirenbaum*, 8 F.2d 451, certiorari denied *Powell v. Anderson*, 46 S.Ct. 349, 270 U.S. 649, 70 L.Ed. 780.

8. Wis.—*Commercial Nat. Bank v. Chicago, M. & St. P. R. Co.*, 45 Wis. 172.

9. N.C.—*Cromer v. Self*, 62 S.E. 885, 149 N.C. 164, 128 Am.S.R. 658.

25 C.J. p 19 note 99.

Necessity of residence see supra § 12. Right of abandoned family see infra § 17.

10. N.C.—*Jones v. Alsbrook*, 20 S.E. 170, 115 N.C. 46. 25 C.J. p 19 note 1.

11. Kan.—*Wamberg v. Hart*, 246 P. 1010, 121 Kan. 218. 25 C.J. p 19 note 2.

12. Mich.—*McHugh v. Curtis*, 12 N.W. 163, 48 Mich. 262.

13. N.C.—*Cromer v. Self*, 62 S.E. 885, 149 N.C. 164, 128 Am.S.R. 658.

14. Ind.—*Norman v. Bellman*, 16 Ind. 156.

Presumption of continuance of residence see infra § 160.

15. Ala.—*Davis v. Allen*, 11 Ala. 164.

25 C.J. p 19 note 6.

16. W.Va.—*Stein v. Staats*, 81 S.E. 1132, 74 W.Va. 357.

17. N.D.—*Corpus Juris* cited in *Murie v. Hartzell*, 225 N.W. 310, 312, 58 N.D. 200. 25 C.J. p 20 note 8.

18. Ky.—*Stirman v. Smith*, 10 S.W. 131, 10 Ky.L. 665, 8 Ky.L. 781. 25 C.J. p 20 note 9.

19. N.J.—*Bonnel v. Dunn*, 28 N.J. Law 153, reversed on other grounds 29 N.J. Law 435.

20. W.Va.—*Brown v. Beckwith*, 51 S.E. 977, 58 W.Va. 140, 112 Am.S.R. 955, 1 L.R.A., N.S., 778.

the boundary into the foreign state, he is a resident of the state he is leaving, and entitled to the benefit of its exemption laws, and his status is not affected by the purpose of his journey.²¹

Some statutory provisions, however, take away the exemption of a debtor starting to leave the state or about to take up his abode in another state,²² or who is in the act of removing with his family from the state,²³ and there is authority, in the absence of statute, that where a resident, with fixed intention to remove to another state and there reside, sets out for that state in pursuance of his intention he becomes a nonresident within the meaning of the exemption law as soon as he begins his removal.²⁴

c. Temporary Absence and Intention to Return

A mere temporary absence of a debtor from the state, however protracted, generally does not defeat his right to the benefit of the exemption laws if he continues to maintain his residence within the jurisdiction and intends to return.

As a general rule, a mere temporary absence of a debtor from the state, however protracted, does not defeat his right to the benefit of the exemption laws,²⁵ even though it may be accompanied by an intention to change his residence at some future time to the foreign state where he is, for the time, sojourning.²⁶ As long as the debtor maintains his residence within the jurisdiction, together with an animus revertendi, he is entitled to his exemption.²⁷ His residence continues until he leaves it with an intention not to return,²⁸ as manifested by his acts and the surrounding circumstances²⁹ or by his direct testimony to that fact.³⁰

It has been said that under the exemption laws a debtor must be conclusively presumed to reside where his family live with his consent, where there has been no separation between husband and wife, and where they occupy the old home, even though

he is voluntarily absent, and he cannot by such voluntary absence deprive his family of their rights in the household property.³¹

While undoubtedly a long absence will not, per se, deprive a debtor of his right of exemption, it may raise a presumption of fact that a change in domicile is intended,³² which a mere floating purpose to return to the state at some indefinite time will not rebut.³³

In this group of cases, of prolonged absence and an indefinite purpose to return, there are some courts with a tendency to restrict the operation of the rule generally followed, which hold that there is a distinction between domicile or legal residence and residence in fact, and that a man who has left the state with his family and settled in another state may cease to be a resident of the state which he has left, within the meaning of the exemption laws, although there may be such an intention to return as will continue legal residence or domicile.³⁴

Temporary absence of a debtor and his family, even though it may not change his residence in law, may deprive him of the character of a "resident householder," and so defeat his claim of exemption, for under such a statute he must keep house in the state.³⁵

§ 14. Particular Classes of Persons

Property is exempt only with relation to the owner or possessor in whose favor the statute creates the exemption.

Exempted property sustains its exempted character only with relation to the owner or possessor in whose favor the statute has declared it to be exempted.³⁶

Particular classes of persons benefited by exemption statutes are considered infra §§ 15-25. The right of a particular person or class of persons

21. Minn.—Grimestad v. Lofgren, 117 N.W. 515, 105 Minn. 286, 127 Am.S.R. 566, 17 L.R.A.,N.S., 990.

22. Mo.—Scott v. Levan, App., 286 S.W. 407.
25 C.J. p 20 note 14.

23. N.D.—Murie v. Hartzell, 225 N. W. 310, 58 N.D. 200.

24. W.Va.—State v. Allen, 35 S.E. 990, 48 W.Va. 154, 86 Am.S.R. 29, 50 L.R.A. 284.

25. Minn.—Thompson v. Peterson, 142 N.W. 307, 122 Minn. 228.
25 C.J. p 20 note 16.

26. Ind.—Astley v. Capron, 89 Ind. 167.

27. Iowa.—Russell v. Dilley, 159 N. W. 189, 177 Iowa 522.
25 C.J. p 20 note 18.

28. Pa.—Ott v. Odenwelder, 31 Pa. Co. 643.
25 C.J. p 20 note 19.

29. Ark.—McAlister v. Robins, 140 S.W. 732, 100 Ark. 540, Ann.Cas. 1913C 728.

30. N.C.—Jones v. Alsbrook, 20 S.E. 170, 115 N.C. 46.
25 C.J. p 20 note 21.

31. Mich.—Freehling v. Bresnahan, 28 N.W. 531, 61 Mich. 540, 1 Am.S. R. 617.

32. Colo.—Wymond v. Amsbury, 2 Colo. 213.

Tenn.—Keelin v. Graves, 165 S.W. 232, 129 Tenn. 103, L.R.A.1915A 421.

33. Tenn.—Keelin v. Graves, supra.

34. N.C.—Munds v. Cassidey, 4 S.E. 353, 355, 98 N.C. 558, 566.
25 C.J. p 21 note 25.

35. Ind.—Ross v. Banta, 34 N.E. 865, 39 N.E. 732, 140 Ind. 120.
25 C.J. p 21 note 26.

36. S.D.—Holleman v. Gaynor, 237 N.W. 827, 58 S.D. 574.

Tex.—Pickens v. Pickens, 83 S.W.2d 951, 125 Tex. 410.

to claim an exemption is affected by the nature and character of the property claimed as exempt, and these matters are considered *infra* §§ 26-62.

§ 15. — "Debtor," "Defendant," and "Tenant"

Under statutes giving the privilege of exemption to "debtors" and "defendants," only those occupying such position may claim the privilege. Unless further qualified by statute a claimant need not be head of a family. "Tenants" who are debtors may also be entitled to exemption privileges under some statutes.

If the statute in terms gives the privilege of exemption to "debtors" and "defendants" only, no person can claim property as exempt unless he occupies this position.³⁷ Where the statute gives the exemption privilege to debtors, without further qualifying their status, it is not necessary that claimant should also be head of the family, to entitle him to the privilege under this statute.³⁸ Further, a statute exempting household articles of any debtor, necessary for himself, his wife and children does not require that he should have a wife or children, or that he must be the head of a family.³⁹ A person engaged in a particular occupation, while he may not be included as such within the terms of a statute granting the exemption privilege to persons within a restricted class of occupations, may be entitled to an exemption as a "debtor" under a statute granting the exemption to debtors, regardless of the occupation in which he is engaged.⁴⁰

Although it has been held that the exemption is personal to the debtor and does not apply to members of the debtor's family,^{40.5} there is also authority to the effect that, where the exemption is in favor of the debtor, either the husband or the wife may under some circumstances claim the exemption.⁴¹ A married woman who is a partner with her husband in a mercantile business and therefore jointly and severally liable with him is entitled

to personal property exemption from execution for partnership debts.⁴²

Tenant. Under some statutes "tenants" are also included, in order to give this class of debtors an exemption in goods in their possession as well as to other debtors in goods they own.⁴³ However, under such provisions, tenants must be debtors,⁴⁴ and the tenant's wife, although in a sense herself a tenant, not being also a debtor, cannot claim exemption.⁴⁵ A subtenant or assignee of the tenant, not recognized by the landlord, cannot claim the benefit of the statute as a debtor against a distress for rent where the goods are levied on as belonging to the original lessee, for the relation of landlord and tenant and, consequently, that of a debtor and creditor does not exist between him and the landlord, although a tenant may make the claim to protect a subtenant or a stranger.⁴⁶

§ 16. — "Family"

Under some statutes a debtor with a family may claim an exemption given "for the use of a family," or to "a member of a family." A "family" is any collective body of persons who live together in one home, apart from a contract relationship, under conditions of a permanent and domestic character, and, according to some authority, under one head; but it is not essential that the group be dependent on the debtor for support.

Statutes giving exemptions "for the use of a family" or to "a member of a family," while they are so far general in terms as not to restrict their operation to heads of families,⁴⁷ are not intended for the benefit of every debtor, but only for the benefit of debtors who have families.⁴⁸ The word "family," as used in these statutes, has been judicially defined to be a collective body of persons, generally relatives and servants; a household living together in one house or curtilage; and does not embrace separate individuals who have no common home.⁴⁹ Other courts, emphasizing the authority of one member over the others as the distinguishing char-

37. Pa.—Appeal of Eberhart, 39 Pa. 509, 80 Am.D. 536.
25 C.J. p 22 note 42.

Judgment debtor

Defendant's husband, not joined as defendant, may claim exemption of his earnings from execution, although not strictly "judgment debtor" within the terms of the statute. Cal.—White v. Gobey, 19 P.2d 876, 130 C.A., Supp. 789.

38. Pa.—Deiffenderfer v. Fisher, 3 Grant 30.
25 C.J. p 22 note 43.

39. Mass.—Brown v. Wait, 19 Pick. 470, 31 Am.D. 154.
25 C.J. p 22 note 44.

40. Iowa.—McCoy v. Cornell, 40 Iowa 457.
25 C.J. p 22 note 46.

40.5 Wis.—Northwest Bank & Trust Co., Davenport, Iowa v. Minor, 82 N.W.2d 323, 275 Wis. 516.

41. Minn.—Boelter v. Klossner, 77 N.W. 4, 74 Minn. 272, 73 Am.S.R. 347.
25 C.J. p 22 note 47.

42. N.C.—Bristol Grocery Co. v. Bails, 98 S.E. 768, 177 N.C. 298.
25 C.J. p 22 note 47 [b], [c].

43. Pa.—Swaney v. Doumont, 44 Pa. Super. 49.

44. Pa.—Swaney v. Doumont, supra.

45. Pa.—Swaney v. Doumont, supra.
25 C.J. p 22 note 50.

46. Pa.—Rosenberger v. Hallowell, 35 Pa. 369, 3 Phila. 330.

47. Okl.—Wineblood v. Payne, 263 P. 669, 129 Okl. 103.
Head of family see *infra* § 17.

48. Ala.—Abercrombie v. Alderson, 9 Ala. 981—Allen v. Manasse, 4 Ala. 554.

Residence of family see *supra* § 12.

49. Kan.—Zimmerman v. Franke, 9 P. 747, 34 Kan. 650.
25 C.J. p 22 note 55.

Family relationship held not shown
Pa.—In re Andrew's Estate, 30 Pa. Dist. & Co. 271.

acteristic between the family and other groups of persons living together, have defined the family as "a collection of persons living together under one head."⁵⁰

An aggregation of individuals sustaining a mere contract relation toward each other, as master and servant or landlord and boarders, even though related,^{50.5} is not a family within the meaning of the exemption laws.⁵¹ The relations existing among the group must be of a permanent and domestic character; a mere abiding together temporarily as strangers or for convenience, there being no legal or moral obligation on the part of one to support the others, with no supervisory power on the part of anyone, does not make the group a family.⁵²

While the fact of support may have evidential value as to the existence of a family, as distinguished from a nonfamily, group,⁵³ it is not, under these statutes, an essential condition on which the claim for exemption must be based.⁵⁴ It has been held, however, that a mother who is not living with her son, but who is destitute and is supported by him as required by law is a member of his family within the statute exempting earnings necessary for the use of the debtor's family.⁵⁵

Number of members. To constitute a family there must be a collection of persons under one head and one person alone cannot be a family.⁵⁶ However, no specific number of persons is required but two are sufficient, as husband and wife, or parent and child.⁵⁷

Children. To constitute a family it is not necessary that there shall be children but the family may consist of husband and wife alone.⁵⁸

Father of bastard. The reputed father of a bastard whom he is under the law not bound to support but who lives with him has no family within the meaning of a statute giving exemptions to persons having families.⁵⁹

Common-law marriage. Parties to a common-law marriage may enjoy the benefits of a family exemption.^{59.5}

§ 17. — "Head of a Family"

- a. In general
- b. Support of family
- c. Living together
- d. After divorce or separation
- e. After death of husband or wife

a. In General

Some statutes limit exemptions "to the head of a family." "Family," as usually defined, consists of a collection of persons living together under one head, independent of any contract relation, under such circumstances that the head is under a legal or moral obligation to support the other members.

By express provisions of some statutes exemptions are limited to persons who are "the head of a family;"⁶⁰ other statutes contain an implied restriction.⁶¹ Where the exemption is reserved in general terms,^{61.5} as, for example, to "every citizen or head of a family,"⁶² it is not necessary that claimant of an exemption be the head of a family.

"Family," as defined by most courts in construing statutes exempting property of the head of the family, means a collection of persons living together under one head, under such circumstances or conditions that the head is under a legal or moral obligation to support the other members, and the

Widowed mother and sister

The word "family," in its ordinary meaning, includes a collection of persons, consisting of a single man, his widowed mother, and his sister, neither of whom had any other home, and who were supported from the earnings of such man.

Tex.—Barry v. Hale, 21 S.W. 783, 2 Tex.Civ.App. 668.

50. U.S.—Poor v. Hudson Ins. Co., C.C.N.H., 2 F. 432.
25 C.J. p 22 note 56.

50.5 Pa.—In re Henry's Estate, 2 Pa. Dist. & Co.2d 27, 4 Fiduciary 589.

51. Conn.—Weed v. Dayton, 40 Conn. 293.

Iowa.—Coffy v. Wilson, 21 N.W. 602, 65 Iowa 270.
25 C.J. p 23 note 57.

52. Iowa.—Blair v. Fritz, 144 N.W. 611, 162 Iowa 716.
25 C.J. p 23 note 58.

53. Iowa.—Blair v. Fritz, supra.
Okl.—Wineblood v. Payne, 263 P. 669, 129 Okl. 103.

Dependent relatives

The word "family," when used in the exemption laws, would include all of those who were dependent on one person (the head) for support, and hence would include an infant brother, sister, or aged and helpless parent of the debtor.

Ky.—Bell v. Keach, 80 Ky. 42, 46, 3 Ky.L. 520, 653.

54. Okl.—Binion v. Lyle, 114 P. 618, 28 Okl. 430.
25 C.J. p 23 note 60.

55. Cal.—Lawson v. Lawson, 115 P. 461, 15 C.A. 496.

56. U.S.—Poor v. Hudson Ins. Co., C.C.N.H., 2 F. 432.

57. U.S.—Poor v. Hudson Ins. Co., supra.
25 C.J. p 23 note 62.

58. Ill.—Kitchell v. Burgwin, 21 Ill. 40.
25 C.J. p 23 note 63.

59. Ohio.—Moore v. Bughman, 8 Ohio S. & C.P. 396, 7 Ohio N.P. 149.

59.5 Tex.—Baker v. Mays & Mays, Civ.App., 199 S.W.2d 279, error dismissed.

60. Neb.—Howells State Bank of Howells v. Arps, 219 N.W. 844, 117 Neb. 110.

Tenn.—Keen v. Alexander, 260 S.W. 2d 297, 195 Tenn. 564.
25 C.J. p 23 note 65.

61. Ky.—Gunn v. Gudehus, 15 B. Mon. 447.

61.5 La.—Mounger v. Ferrell, App., 11 So.2d 56.

62. Tex.—Cobbs v. Coleman, 14 Tex. 594.

other members are dependent on him for support.⁶³ However, some definitions subordinate the idea of dependency.⁶⁴ The husband and father is primarily the head of the family,⁶⁵ but not necessarily so, as appears *infra* §§ 19, 20, where the status of married women and unmarried persons is considered. However, to be entitled to an exemption as head of a family one must be the master in law of the family and as such stand in place of the father.⁶⁶

The family must have actual existence as distinguished from one that exists theoretically only.⁶⁷ Under a statute defining a head of a family as one who has residing on the premises with him and under his care and maintenance his minor child, one is not the head of a family by reason of the fact that he is living with and maintaining an illegitimate child.⁶⁸

Master and servants. It is well settled that an aggregation of individuals sustaining a mere contract relation toward each other is not a family within the meaning of the exemption laws, as discussed *supra* § 16. For this reason a person who lives in a house with servants only is not entitled to the benefit of the exemption laws as the head of a family.⁶⁹

Persons keeping boarders. A person who keeps boarders is not for that reason the head of a family, if she has no person dependent on her for support.⁷⁰ It is otherwise, if she also has living with her a child whom she supports.⁷¹ It has also been held that, if a person has a friend and servants living with her in addition to the boarders, she is the head of a family within the meaning of the law.⁷²

Several families in same house. That several families live together in the same house, as board-

ers, or otherwise, and take their meals at a common table, does not prevent each from being a separate family, and the head of each the head of a family.⁷³

Dwelling and eating in different places. It is not necessary that the members of a family shall dwell and eat in the same house; they may live in one house and take their meals in another, or at a restaurant or hotel.⁷⁴

The age of the person claiming exemption is not material if it is shown that he is actually the head of a family.⁷⁵

Time of acquiring status. When a statute allows an exemption for the benefit of the head of a family, a debtor, to be entitled to an exemption, need not have been the head of a family at the time when the debt was contracted, but it is sufficient if he has such a status at the time of the levy as against which the exemption is claimed.⁷⁶

In several states it has been held that a man may claim property as exempt on the ground that he is a householder or the head of a family, although he may not have married and acquired such a status until after the issue or levy of an execution or attachment.⁷⁷ Other courts, however, have held that after a creditor has acquired a lien by the levy of an execution or attachment, he has a vested right which cannot be defeated by the subsequent marriage and change of status of the debtor.⁷⁸

Acquisition of a status as a householder or head of a family after the sale of property under an execution does not give one a right to the benefit of the exemption law so as to support an action to set aside the sale; to maintain such an action he must have been a householder or the head of a family at the time of the sale.⁷⁹

63. S.D.—*Corpus Juris* cited in *Goodlad v. Smejkal*, 190 N.W. 1017, 1018, 46 S.D. 112.

Tenn.—*Corpus Juris* quoted in *Hurt v. Perryman*, 122 S.W.2d 426, 427, 173 Tenn. 646.

25 C.J. p 23 note 68.

64. Iowa.—*Tyson v. Reynolds*, 3 N.W. 469, 52 Iowa 431.

25 C.J. p 23 note 69.

65. U.S.—*Corpus Juris* cited in *In re Logan*, D.C.Miss., 1 F.Supp. 225, 226.

25 C.J. p 23 note 70.

Husband, not wife

U.S.—*In re Diehl*, D.C.Mo., 53 F.Supp. 703.

66. Iowa.—*Whalen v. Cadman*, 11 Iowa 226.

25 C.J. p 23 note 72.

67. Iowa.—*Linton v. Crosby*, 9 N.W. 311, 56 Iowa 386, 41 Am.R. 107.

25 C.J. p 23 note 73.

68. Wash.—*Peerless Pac. Co. v. Burckhard*, 155 P. 1037, 90 Wash. 221, L.R.A.1917C 353, Ann.Cas. 1918B 247.

69. Va.—*Calhoun v. Williams*, 32 Gratt. (73 Va.) 18, 34 Am.R. 759. 25 C.J. p 24 note 76.

70. Conn.—*Weed v. Dayton*, 40 Conn. 293.

Ky.—*Carter v. Adams*, 4 S.W. 36, 9 Ky.L. 91.

71. Conn.—*Weed v. Dayton*, 40 Conn. 293.

Support of family see *infra* subdivision b of this section.

72. Ill.—*Race v. Oldridge*, 90 Ill. 250, 32 Am.R. 27.

73. Mo.—*Wade v. Jones*, 20 Mo. 75, 61 Am.D. 584.

Tenn.—*Bachman v. Crawford*, 3 Humphr. 213, 39 Am.D. 163.

74. U.S.—*Poor v. Hudson Ins. Co.*, C.C.N.H., 2 F. 432.

75. S.D.—*Goodlad v. Smejkal*, 190 N.W. 1017, 46 S.D. 112.

76. Ga.—*Kirkpatrick Hardware Co. v. Rogers*, 134 S.E. 806, 35 Ga.App. 790.

S.C.—*Gray v. Putnam*, 28 S.E. 149, 51 S.C. 97.

77. Ind.—*Robinson v. Hughes*, 20 N.E. 220, 117 Ind. 293, 10 Am.S.R. 45, 3 L.R.A. 383.

25 C.J. p 24 note 83.

Householder as entitled to exemptions see *infra* § 18.

78. W.Va.—*Corpus Juris* cited in *Stevens v. Carey*, 163 S.E. 772, 773, 112 W.Va. 1, 82 A.L.R. 736.

25 C.J. p 24 note 84.

79. Ind.—*Kingen v. Stroh*, 36 N.E. 519, 136 Ind. 610.

Absence of head of family. When the head of the family having the right to claim exemptions is absent, his wife may interpose and claim the exemption for him, see *infra* § 19, or his child may do so,⁸⁰ or any person may interpose the claim who is authorized to take charge of and protect the property and rights of the debtor during his temporary absence.⁸¹

b. Support of Family

In order to constitute one "the head of a family" within the exemption laws, generally there must be at least a condition of dependence on the part of the other members on the head, and a natural or legal obligation on the part of the head to support them, but actual or entire support need not be shown; the rendering of support does not in itself establish one as head of a family.

It is very generally held that, to constitute one the head of a family within the purpose and intent of the exemption laws, there must be at least a condition of dependence on the part of the other members on the head, and a natural or legal obligation on the part of the head to support them, and that a mere aggregation of individuals is not enough.⁸² Moreover, some statutes require in express terms that the debtor must show that he has a family dependent on him.⁸³

While assistance in the support of a family does not in itself constitute the one who renders the assistance the head of the family,⁸⁴ it is not necessary that he should bear the entire support of the family in order to give him that status;⁸⁵ nor need actual support be shown,⁸⁶ if the obligation to support exists.⁸⁷

Legal or moral obligation. Under some statutes, it is held that a person to be the head of a family must be under a legal obligation to support its

members; that the relation of husband and wife or that of parent and child must exist,⁸⁸ or a statutory duty to support be shown.⁸⁹

Most of the courts, however, do not recognize this doctrine, but hold that a mere moral or natural obligation to support and a condition of dependence, are sufficient.⁹⁰ Nevertheless the claim of exemption will not be allowed where the moral obligation on which the debtor's claim rests is in conflict with a legal obligation or another moral obligation of greater binding force, or where allowance of the claim would result in a perversion of the exemption statute, defeating the intention of the legislature.⁹¹

c. Living Together

In the absence of a statutory requirement the debtor and his dependent children or relatives ordinarily need not live together in order for him to claim the statutory exemption accorded to the head of a family. Temporary separation of the family will not dissolve the family relation or break up the household.

It has been held in some jurisdictions that to constitute one the head of a family or a householder within the meaning of the exemption laws he must keep house or maintain a home, and that the mere fact that he has a child or other persons dependent on him for support, and supports them, is not enough,⁹² at least where the persons residing apart from him are relatives other than his wife and minor children, and he is under no duty to support them;⁹³ and in some jurisdictions the terms of the statute require that the debtor should reside with his family.⁹⁴

However, there are a number of cases in which a person supporting dependent children or relatives

80. Ark.—White v. Swann, 56 S.W. 635, 68 Ark. 102, 82 Am.S.R. 282.

81. Ark.—White v. Swann, *supra*. 25 C.J. p 30 note 83.

Persons entitled to assert claim generally see *infra* § 120.

82. U.S.—In re Adelberger, D.C.Fla., 280 F. 405.

Okl.—Lena v. Clinkenbeard, 44 P.2d 2, 172 Okl. 6.

25 C.J. p 24 note 86.

Adult son

A divorced man, whose adult son was rooming with him in a room paid for by the father, is not the "head of a family," where it appeared that the son was a normal man, physically and mentally, and had supported himself before he came to take employment under his father.

U.S.—In re Adelberger, D.C.Fla., 280 F. 405.

83. N.Y.—Martin v. Sheridan, 2 Hilt. 586.

84. Iowa.—Blair v. Fritz, 144 N.W. 611, 162 Iowa 716. 25 C.J. p 24 note 88.

85. Tex.—Kiggins v. Henne & Meyer Co., Civ.App., 199 S.W. 494. 25 C.J. p 24 note 89.

86. Tex.—Rogers v. Fox, Civ.App., 16 S.W. 781. 25 C.J. p 24 note 90.

87. La.—Garner v. Freeman, 42 So. 767, 118 La. 184, 118 Am.S.R. 361. 25 C.J. p 25 note 91.

88. Ohio.—Riley v. Hitzler, 32 N.E. 753, 49 Ohio St. 651. 25 C.J. p 25 note 92.

89. Ga.—Marsh v. Lezenby, 41 Ga. 153. 25 C.J. p 25 note 93.

90. Okl.—Lena v. Clinkenbeard, 44 P.2d 2, 172 Okl. 6. 25 C.J. p 25 note 94.

91. Mo.—Spengler v. Kaufman, 46 Mo.App. 644, 43 Mo.App. 5. 25 C.J. p 25 note 97.

92. U.S.—Jones v. Gray, C.C.Ga., 13 F.Cas.No.7,463, 3 Woods 494. 25 C.J. p 25 note 98.

Householders as entitled to exemptions see *infra* § 18.

93. Cal.—Lawson v. Lawson, 111 P. 354, 158 C. 446. 25 C.J. p 25 note 99.

94. U.S.—In re Stearns, D.C.N.D., 284 F. 578.

Ohio.—Kleinman v. Brown, 30 Ohio N.P., N.S., 69. 25 C.J. p 25 note 1.

Child at school

Debtor who was unmarried and resided at a hotel, but who maintained and supported a minor adopted daughter at a convent school, was within statute defining "heads of a family" as "every person who has residing on the premises with him

has been regarded as within the statutes, both as a householder and as the head of a family, although he did not keep house, and although he and those who were dependent on him lived in different places;⁹⁵ and, especially, where it is shown that a legal obligation to support exists, a sufficient reason for allowing the exemption appears without requiring further proof as to the maintenance of the home.⁹⁶ The mere fact that a father and adult son who supports himself room together does not make the father the head of a family.⁹⁷

Boarding and living apart. It has been held that the fact that a family boards, instead of keeping house, does not destroy the family relation, and that it can make no difference in such a case that the members board at different houses.⁹⁸

Separation of family and absence of head. To entitle a person to an exemption as a householder or the head of a family, the family need not be kept together as a unit continuously, nor need he always remain with the family; temporary separation of the family, either by the absence of a member or by the absence of the head, however protracted, will not dissolve the family relation or break up the household.⁹⁹

d. After Divorce or Separation

According to some authorities, if a wife obtains a divorce and is awarded the custody of the children, the husband may not claim exemption as head of a family, even though he continues to support the children, but a husband who remarries becomes the head of a new family. Abandonment and nonsupport of his family may deprive a husband of his exemption, and the wife may thereby become head of the family.

The view has been taken that, if a wife obtains a divorce and is awarded the custody of the children, but the husband continues to support the children,

he may still have his exemption as the head of the family.¹ According to some decisions, however, the fact that the husband has recognized and fulfilled his obligation to support the children by means of a transfer of property at the time of divorce,² or by an award of alimony contemplating future payments,³ does not make him the head of the family where the children do not live with him and have been placed in the custody and under the control of the wife.

Where the statute gives the exemption, not to the head of the family, but to the family, a divorced husband who is not awarded the custody of his children and lives after the divorce as a single man is not entitled to exemption under the statute,⁴ even though he contributes to the support of his children and of his former wife.⁵ If there are no children and the divorced husband has no other dependents, he cannot claim exemption as head of a family notwithstanding he continues to occupy his former home.⁶

A debtor who has deserted his family in a foreign country and contributes nothing to their support is not entitled to an exemption.⁷ An abandoned wife who lives with and supports her children is the head of the family.⁸ A wife, however, who, without just cause, separates herself from her husband, has no right to an exemption,⁹ and her husband's right to exemption as head of the family is not affected,¹⁰ even though he is living illicitly with another woman.¹¹ A childless man who lives apart from his wife and has not contributed to her support for a period of years is not the head of a family.¹²

An unsuccessful attempt at divorce does not af-

or her, and under his or her care and maintenance, either his or her child . . . whether by birth or adoption," the residence of the daughter while absent at school being with him, within the meaning of the statute.

U.S.—In re Stearns, D.C.N.D., 284 F. 578.

95. Mich.—Pettit v. Muskegon Booming Co., 41 N.W. 900, 74 Mich. 214.

25 C.J. p 25 note 2.

96. Cal.—Lawson v. Lawson, 115 P. 461, 464, 15 C.A. 496.
25 C.J. p 26 note 3.

97. U.S.—In re Adelberger, D.C.Fla., 280 F. 405.

98. Ala.—Sallee v. Waters, 17 Ala. 482.

25 C.J. p 26 note 4.

99. Miss.—Pearson v. Miller, 14 So. 731, 71 Miss. 379, 42 Am.S.R. 470.

25 C.J. p 26 note 5.

Deserted wife as head of family see infra § 19.

1. Tex.—Crow v. Burmeister, Civ. App., 26 S.W.2d 447.

25 C.J. p 28 note 52.

Husband's exemption as against decree for alimony or maintenance see infra § 83.

2. Iowa.—Armstrong - McClenahan Co. v. Rhoads, 163 N.W. 356, 180 Iowa 710.

3. Iowa.—Sparks v. East, 210 N.W. 969, 202 Iowa 718.

4. Tex.—Hammond v. Pickett, Civ. App., 158 S.W. 174.

25 C.J. p 28 note 54.

Exemption for use of family see supra § 16.

5. Tex.—Hammond v. Pickett, supra.

6. Okl.—McAndrew v. McAndrew, 31 P.2d 956, 168 Okl. 78.

7. Ohio.—Wright v. Ball, 4 Ohio Dec., Reprint, 231, 1 Clev.L.Rep. 140.

8. Ark.—Hoskins v. Fayetteville Grocery Co., 96 S.W. 195, 79 Ark. 399.

Mo.—Nash v. Norment, 5 Mo.App. 545.

9. Pa.—In re Meyers' Estate, 2 Blair Co. 277.

10. Mo.—Whitehead v. Tapp, 69 Mo. 415—Brown v. Brown, 68 Mo. 388.

11. Mo.—Whitehead v. Tapp, 69 Mo. 415.

12. Iowa.—Linton v. Crosby, 9 N.W. 311, 56 Iowa 386, 41 Am.R. 107.

fect the husband's right to exemption as head of the family.¹³

Remarriage. A divorced husband who remarries becomes the head of a new family.¹⁴

e. After Death of Husband or Wife

According to some authorities in the absence of statute a debtor's exemption right does not survive to his widow or children, but generally a widow or a widower may be the head of the family entitled to exemption as such after the death of the spouse, if the existence of the family is established.

A statute which makes no express provision for the survival of the right of exemption after the death of the debtor has been construed not to give the exemption right to the surviving widow or children.¹⁵ However, it has also been held that the exemption law is intended not only for the benefit of the debtor, but also for the benefit of his family, and that the right of exemption survives for the benefit of the widow.¹⁶

Widows. A widow who has living with her a child or children whom she supports is a householder or head of a family within the meaning of the exemption laws.¹⁷ It can make no difference that she lives in her father's house and is supported by him.¹⁸

It is generally considered that, if the widow lives alone and has no one dependent on her for support, she is not entitled as head of a family to an exemption and it can make no difference in such a case that she once had others living with her and dependent on her.¹⁹ There is, however, authority for the allowance of an exemption to the widow as head of a family where her children had all left her and were married,²⁰ and where those living with her were not her children, and were not entitled to look to her for their support.²¹

A widow and mother of children whom she supports is entitled as head of the family to an exemption as long as she remains a widow, but on her second marriage she loses her status as head of the family under the exemption law.²²

Widowers. A widower or a deserted or divorced husband may be a householder or the head of a family if he has a child or children dependent on him for support.²³ However, a widower is not a householder or the head of a family if he has no child or other person dependent on him, although he continues to live in the dwelling house and keeps house after the death of his wife,²⁴ nor does the fact that relatives come to the house to assist him in the housework make him head of a family.²⁵ A widower who lives alone and contributes only in part to the support of relatives is not the head of a family within the statute.²⁶

Under a statute allowing an exemption to a widower living with an unmarried daughter, a stepdaughter is not a daughter within the meaning of the law.²⁷

§ 18. — "Householders" and "Housekeepers"

Where the statute grants an exemption to a "householder," the term has been held to cover one who occupies a house, but under some statutes the debtor must be head of a family residing together and constituting a household. The term "housekeeper" means a housekeeper with a family.

Where the statute confers the right of exemption on a person who is a "householder," the term is given its literal and primary meaning of one who is "the occupier of a house."²⁸ The occupation of a house free from rent does not, of itself, deprive the occupant of his status as a householder within the exemption laws.^{28.5} Under some statutes the householder must be the master or head of a family who

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| <p>13. Tex.—Ray v. Curry, Civ.App., 126 S.W. 26.</p> <p>14. Iowa.—Schooley v. Schooley, 169 N.W. 56, 184 Iowa 835.</p> <p>15. Tex.—Pickens v. Pickens, 83 S. W.2d 951, 125 Tex. 410.
Survival of right of exemption under express statutory provision see infra § 23.</p> <p>16. N.Y.—Becker v. Becker, 47 Barb. 497.</p> <p>17. S.D.—Linander v. Longstaff, 63 N.W. 775, 7 S.D. 157.
25 C.J. p 29 note 67.
Householder as entitled to exemption see infra § 18.</p> <p>18. Tenn.—Bachman v. Crawford, 3 Humphr. 213, 39 Am.D. 163.
25 C.J. p 29 note 68.</p> | <p>19. Iowa.—Emerson v. Leonard, 65 N.W. 153, 96 Iowa 311, 312, 59 Am.S.R. 372.
25 C.J. p 29 note 69.</p> <p>20. Tenn.—Collier v. Latimer, 8 Baxt. 420, 35 Am.R. 711.
25 C.J. p 29 note 70.</p> <p>21. Ill.—Race v. Oldridge, 90 Ill. 250, 32 Am.R. 27.
25 C.J. p 29 note 71.</p> <p>22. Iowa.—Van Doran v. Marden, 48 Iowa 186.</p> <p>23. Iowa.—Tyson v. Reynolds, 3 N. W. 469, 52 Iowa 431.
25 C.J. p 29 note 75.
Head of family after divorce or separation see supra subdivision d of this section.</p> | <p>Householder as entitled to exemption see infra § 18.</p> <p>24. Ky.—Jarboe v. Hayden, 117 S. W. 961, 133 Ky. 378.</p> <p>N.Y.—Chamberlain v. Darrow, 11 N. Y.St. 100, 46 Hun 48.</p> <p>25. N.Y.—Chamberlain v. Darrow, supra.
25 C.J. p 29 note 77.</p> <p>26. U.S.—In re Rainwater, D.C. Miss., 191 F. 738.</p> <p>27. Ohio.—Kraft v. Wolf, 15 Ohio S. & C.P. 554, 3 Ohio N.P., N.S., 105.</p> <p>28. Ind.—Kelley v. McFadden, 80 Ind. 536.</p> <p>28.5 Ind.—Tomlinson v. Miller, 58 N.E.2d 358, 115 Ind.App. 469.</p> |
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resides together and constitutes a household.²⁹ The term may include one who is unmarried³⁰ or is without dependents,³¹ although there is also authority to the contrary.³²

The head of a family occupying a house is a householder,³³ and this is true, although he occupies only a part of a building.³⁴ One is a householder on whom rests the duty of supporting the members of his family or household;³⁵ this is true, although the family is temporarily absent³⁶ or even though he has declared that he will not again live with it.³⁷

A debtor may be a householder although he is in the act of moving his family from one house to another,³⁸ and the statutes sometimes specifically so provide;³⁹ nor does he lose such character by a temporary cessation of housekeeping and the storing of his property with a view of renewing housekeeping at some future time.⁴⁰

"Householder" does not include a person who is a visitor in the house of another.⁴¹

Householder having a family. In some jurisdictions it is necessary that the debtor not only be a householder but that he be a "householder having a family."⁴² Such a householder may be characterized as the head of a family occupying a house and living together in one domestic establishment,⁴³ although the term has also been construed to cover the case of a man who is head of an actual family, dependent on him, whether or not he is housekeeping.⁴⁴

Housekeepers. In some jurisdictions the statute

gives an exemption to a "housekeeper," instead of a "householder."⁴⁵ The term is held by the courts to mean a housekeeper with a family;⁴⁶ and by a strict construction of the statute it is held that to claim the benefit of the law the debtor must both be a housekeeper⁴⁷ and have a family.⁴⁸ However, no legal obligation to support is necessary; a natural and moral obligation to support the family is sufficient.⁴⁹ The debtor may be a housekeeper notwithstanding the temporary absence of his family.⁵⁰

Where a widow is a housekeeper and subsequently marries, the husband becomes a housekeeper and entitled to the benefit of the exemption law.⁵¹

Husband and wife. Where husband and wife are living together and the husband's property is not sufficient to make up the statutory amount of the exemption, the wife may claim an exemption to the extent necessary to make up with the husband's property such an amount.⁵²

§ 19. — Married Women

- a. In general
- b. Wife as head of family

a. In General

Married women, under some statutes, are given the same exemptions as are given to "householders," or to the "heads of families," or to persons who are "married," but a married woman cannot claim an exemption allowed to a single person.

By express provisions of the statutes in some jurisdictions married women are given the same exemptions of property as are given to "household-

29. U.S.—In re French, D.C.N.Y., 231 F. 255.

25 C.J. p 30 note 86.

30. U.S.—In re French, supra.
25 C.J. p 30 note 87.

31. Ind.—Bipus v. Deer, 5 N.E. 894, 106 Ind. 135.
25 C.J. p 30 note 88.

Widower who continues to keep house after the death of his wife is a householder, although he may have no one at all dependent on him.
Ill.—Kimbrel v. Willis, 97 Ill. 494.
25 C.J. p 30 note 88 [a].

32. Wash.—Peterson v. Bingham, 43 P. 42, 13 Wash. 178.
25 C.J. p 30 note 89.

33. Ind.—Sullivan v. Canan, Wils. 532.
25 C.J. p 30 note 90.

34. Ind.—Sullivan v. Canan, supra.
25 C.J. p 30 note 91.

35. N.Y.—Brigham v. Bush, 33 Barb. 596.
25 C.J. p 30 note 92.

Widow is entitled to exemption as householder where she continues to support her children by her first husband.

N.Y.—Brigham v. Bush, supra.
25 C.J. p 29 note 74.

36. Ind.—Bunnell v. Hay, 73 Ind. 452.
25 C.J. p 30 note 93.

37. Ind.—Roney v. Wood, Wils. 378.
25 C.J. p 30 note 94.

38. Ind.—Mark v. State, 15 Ind. 98.
N.Y.—Woodward v. Murray, 18 Johns. 400.

39. N.Y.—Griffin v. Sutherland, 14 Barb. 456.

40. N.Y.—Griffin v. Sutherland, supra.
Cantrell v. Connor, 6 Daly 224, 51 How.Pr. 45.
R.I.—Arch Lumber Co. v. Dohm, 98 A.2d 840, 81 R.I. 69.

41. Ill.—Veile v. Koch, 27 Ill. 129.

42. U.S.—In re Logan, D.C.Miss., 1 F.Supp. 225.
25 C.J. p 31 note 99.

43. U.S.—In re Logan, supra.
25 C.J. p 31 note 1.

44. Mich.—Pettit v. Muskegon Booming Co., 41 N.W. 900, 74 Mich. 214.
25 C.J. p 31 note 2.

45. Ky.—Gunn v. Gudehus, 15 B. Mon. 447.

46. Ky.—Gunn v. Gudehus, supra.

47. Ky.—Carter v. White, 10 Ky.L. 588.

48. Ky.—Bell v. Keach, 80 Ky. 42—Gunn v. Gudehus, 15 B.Mon. 447.
25 C.J. p 31 note 5.

49. Ky.—Bell v. Keach, 80 Ky. 42.
25 C.J. p 31 note 6.

50. Ky.—Seaton v. Marshall, 6 Bush 429, 99 Am.D. 683.
25 C.J. p 31 note 7.

51. Ky.—Clark v. Miller, 9 Ky.L. 402.

52. Ind.—Crane v. Waggoner, 33 Ind. 83.

ers"⁵³ or to the "heads of families."⁵⁴ Where the exemption is given to any resident who is "married or the head of a family," a married woman may claim the exemption where the property belongs to her and she is the debtor;⁵⁵ under such statutes a married woman need not be the head of a family.⁵⁶

Under statutes permitting married women to act as sole traders, they may be entitled to the exemptions afforded by statutes exempting stock in trade.⁵⁷

A married woman cannot claim an exemption in the right of her husband where he has permanently abandoned her or is estranged from her, and the exemption is allowed only to him.⁵⁸ Under a statute providing for certain exemptions for the head of a family or for a single person, a married woman who is not the head of a family cannot claim the exemption.⁵⁹

b. Wife as Head of Family

- (1) In general
- (2) Absconding debtor

(1) In General

A married woman may claim exemption as the head of a family under certain circumstances, even though her husband is living with her, and she may under some statutes claim an exemption which her husband has failed to assert; but the wife's right of exemption does not change or affect the title of the husband to the property claimed as exempt.

The husband is ordinarily the head of the family, as discussed supra § 17 a, but a married woman, although living with her husband, may be entitled to claim an exemption as the head of the family where from necessity she has been compelled to assume the burdens and responsibilities which belong to such headship,⁶⁰ and in some cases it might not be unreasonable to regard either husband or

wife as the head of the family to an extent authorizing an assertion of an exemption right.⁶¹ The wife may be within the meaning of a statute giving an exemption to a person with a family.⁶²

A married woman whose husband is a nonresident of the state and who has no children cannot claim an exemption under a statute providing an exemption for the use of the debtor's family,⁶³ but, where under the same circumstances she is living with a younger sister as a family within the state, it has been held that she may claim as the head of the family.⁶⁴

The wife is not entitled to an exemption as head of a family unless she is in fact its head,⁶⁵ and the evidence must establish this status as a fact.⁶⁶

Wife conducting own business. The mere fact that the wife conducts a business of her own which contributes to the support of the family is not conclusive that she is the head of the family.⁶⁷ However, where it is shown that the wife's business is the family's sole support, and that she herself directs it, her position in the family as its head is established,⁶⁸ and her right to exemption is not affected by the fact that her husband lives with her and that he gives his time and attention to the conducting of his wife's business.⁶⁹

Under a statute which makes it the legal duty of a wife to support her husband when he has no separate property, and is unable, from infirmity, to support himself, a married woman who supports her infirm husband can claim her property as exempt as the head of the family.⁷⁰ In some states there have been similar decisions, without regard to any statute making it the duty of a wife to support her husband.⁷¹ In other states it has been decided that a wife living with her husband cannot be the head

53. Ind.—Junker v. Hustes, 16 N.E. 197, 113 Ind. 524.

Married woman:

As debtor see supra § 15.

As housekeeper see supra § 18.

54. Ohio.—Kimmel v. Paronto, 43 N.E. 1040, 52 Ohio St. 468.

55. Ark.—Memphis & L. R. R. Co. v. Adams, 46 Ark. 159.

56. Ohio.—Shaw v. Foley, 56 N.E. 475, 62 Ohio St. 30—Kimmel v. Paronto, 43 N.E. 1040, 52 Ohio St. 468.

57. Colo.—Martin v. Bond, 24 P. 326, 14 Colo. 466.

Scott v. Mills, 42 P. 1021, 7 Colo. App. 155.

58. Pa.—McNair v. Riesher, 8 Pa. Co. 494.

Mook v. Larsen, 23 Erie Co. 328.

59. S.D.—Holleman v. Gaynor, 237 N.W. 827, 58 S.D. 574.

60. S.D.—Linander v. Longstaff, 63 N.W. 775, 7 S.D. 157.
25 C.J. p 27 note 12.

61. Kan.—Harrison v. Foster, 146 P. 355, 94 Kan. 284.
25 C.J. p 27 note 13.

62. Ky.—Wilson v. Wilson, 42 S.W. 404, 101 Ky. 731, 19 Ky.L. 925.
25 C.J. p 27 note 14.

63. Ala.—Keiffer v. Barney, 31 Ala. 192.
25 C.J. p 27 note 15.

64. Kan.—Fish v. Street, 27 Kan. 270.

65. U.S.—In re Logan, D.C.Miss., 1 F.Supp. 225.

S.D.—Holleman v. Gaynor, 237 N.W. 827, 58 S.D. 574.

25 C.J. p 27 note 17.

66. U.S.—In re Logan, D.C.Miss., 1 F.Supp. 225.
25 C.J. p 27 note 18.

67. U.S.—Corpus Juris cited in In re Logan, D.C.Miss., 1 F.Supp. 225, 226.
25 C.J. p 27 note 19.

68. La.—Ginsberg v. Groner, 41 So. 569, 117 La. 268.

69. La.—Ginsberg v. Groner, supra.

70. S.D.—Linander v. Longstaff, 63 N.W. 775, 7 S.D. 157.

71. Neb.—State v. Houck, 49 N.W. 462, 32 Neb. 525.
25 C.J. p 27 note 24.

of a family so as to be entitled to claim an exemption as such, although her husband is unable to work, and she supports him and their children.⁷²

Insanity of a husband does not, per se, confer headship of the family on the wife,⁷³ but it may render the wife the proper person to claim, select, and hold the exemptions allowed him.⁷⁴

Husband's absence. Where the husband is temporarily or permanently absent from the home, so that the maintenance and support of the family devolves on the wife, she is entitled to the exemption as the head of the family.⁷⁵

Husband's failure to assert claim. There are provisions allowing a wife to claim the exemptions to which her husband is entitled on his failure or refusal to make the claim.⁷⁶ Where there is such a provision as this, and also a statute allowing a firm to claim an exemption in the partnership property, the wife of a partner may assert such claim if her husband fails or refuses to do so.⁷⁷

Title to exempt property. Statutes permitting the wife to claim exemption as head of a family do not change or affect the title to the property; it remains the property of the husband, and the wife merely has the right to the possession of it as against his creditors,⁷⁸ so that a sale by her of specific articles exempted is a conversion of the husband's property by the wife, and she is not protected from a new levy by a creditor of the husband, even under the same attachment;⁷⁹ nor does an appraisal, after the creditor has dismissed his attachment on the wife's filing an inventory and claiming exemption, change the title of the exempt property from the husband to the wife.⁸⁰ The wife, although not herself entitled to an exemption as head of a family, may have an interest as beneficiary in an exemption set apart to the husband, on

his application for the benefit of the wife.⁸¹

(2) Absconding Debtor

When a debtor absconds and abandons his wife, she may claim her own property as exempt if she assumes the position of head of the family, and according to some authorities she may make any claim of exemption that her husband might have made; she may also claim under special statutory provisions covering such circumstances, but such statutes do not give a double exemption, the benefit of which both husband and wife may claim.

When a husband absconds and abandons his wife, and she continues to carry on the household and support the family, she is the head of the family, and may, as such, claim her own property as exempt.⁸² Although there is authority denying the wife of an absconding debtor the right of exemption where she does not establish her status as head of a family,⁸³ it has also been held that she may maintain a claim of exemption that her husband might have made,⁸⁴ under the theory that the exemption laws are for the benefit of the debtor's family and are to be liberally construed to that end,⁸⁵ unless under particular statutes the right of exemption has been lost by reason of the husband's conduct.⁸⁶ An intention on the part of the head of the family to abscond from one part of the state to another will not deprive the family of the exemption privilege.⁸⁷

The wife of an absconding debtor may in many jurisdictions claim the right of exemption under special statutory provisions intended to govern such a case.⁸⁸ To bring the wife of a debtor within such statutes, it is not necessary that he shall have deserted his family or left without their knowledge or consent, but it is enough if he has absconded to escape from the jurisdiction or to avoid the process of the courts.⁸⁹ Under the statute her right to her husband's exemption becomes fixed at the

72. Ga.—Johnson v. Little, 17 S.E. 294, 90 Ga. 781.
25 C.J. p 27 note 25.

73. Iowa.—Union County Inv. Co. v. Messix, 132 N.W. 823, 152 Iowa 412.

74. Mo.—Carthage Stone Co. v. Gerst, 223 S.W. 762, 204 Mo.App. 486.

75. Neb.—Hamilton v. Fleming, 41 N.W. 1002, 26 Neb. 240.
25 C.J. p 27 note 29.

76. Mo.—State ex rel. Schwettman v. Oberheide, App., 39 S.W.2d 395 —Luster v. Cook, App., 297 S.W. 459.

S.D.—Meyers v. Coleman, 192 N.W. 184, 46 S.D. 244.
25 C.J. p 28 note 43.

77. S.D.—Noyes v. Belding, 59 N.W. 1069, 5 S.D. 603.

78. Mo.—Steele v. Leonori, 28 Mo. App. 675.

79. Mo.—Steele v. Leonori, supra.

80. Neb.—Farmers' & Merchants' Bank v. Hoffman, 96 N.W. 1044, 5 Neb., Unoff., 9.

81. Ga.—Floyd v. Floyd, 36 S.E. 879, 111 Ga. 855.

82. Mont.—Mennell v. Wells, 149 P. 954, 51 Mont. 141.
25 C.J. p 27 note 30.

83. U.S.—In re Hallbauer, D.C.Fla., 280 F. 118.

Exemption to widow

A provision that the exemption to the head of a family shall inure to the widow of the party entitled

thereto does not entitle a deserted wife to claim the exemption, since there can be no widow to a live man, although he be an absconder.
U.S.—In re Hallbauer, supra.

84. Neb.—Frazier v. Syas, 4 N.W. 934, 10 Neb. 115, 35 Am.R. 466.
25 C.J. p 27 note 31.

85. Neb.—Frazier v. Syas, supra.
25 C.J. p 27 note 32.

86. Mich.—Betz v. Brenner, 63 N. W. 970, 106 Mich. 87.
25 C.J. p 27 note 33.

87. Ala.—Davis v. Allen, 11 Ala. 164.

88. U.S.—In re Youngstrom, Colo., 153 F. 98, 82 C.C.A. 232.
25 C.J. p 28 note 35.

89. Iowa.—Malvin v. Christoph, 7 N.W. 6, 54 Iowa 562.

time she makes the claim,⁹⁰ and his subsequent return with the express purpose of defeating her claim by appearing in the attachment proceeding and waiving exemption does not deprive her of the right.⁹¹

The wife ordinarily cannot claim the benefit of the statute where the husband has not absconded but has disposed of his property in good faith in anticipation of a penitentiary sentence;⁹² but under a statute providing that a wife may claim the statutory exemptions to which her husband is entitled when he "has absconded or absented himself from his place of abode" a wife may claim the exemptions to which her husband is entitled even when his absence is due to causes beyond his control, as where he is confined to jail, and her right is not affected by the fact that the claim might also have been made by the husband.⁹³ Such a statute, however, does not give a double exemption to husband and wife, the benefit of which both may claim.⁹⁴

Under statutes exempting specific property or money in lieu thereof a wife of an absconding debtor is entitled to the money exemption, where her husband did not have the specific articles.⁹⁵

§ 20. — Unmarried Persons

Unmarried persons may be the heads of families if they have children or other relatives dependent on them for support and if they reside with them.

While the husband and father primarily is the head of the family, as discussed supra § 17 a, he is not necessarily its head.⁹⁶ While an unmarried person, with no one dependent on him, is not the head of a family although he may keep house and have servants,⁹⁷ unmarried persons, whether men or women, may be the heads of families if they have

children or other relatives dependent on them for support.⁹⁸ However, an unmarried debtor who merely contributes to the support of kin who do not reside with him has been held not to be the head of the family.⁹⁹ Some statutes define "head of a family" in terms to include other family relationships in which the element of moral, as well as legal, obligation to support enters.¹

§ 21. — Support of Dependent Females

Under some statutes an exemption may be claimed by one who, although not the head of a family, has the care and support of dependent females of any age.

In some jurisdictions provision is specifically made for an exemption in favor of those who, although not the head of a family, have the care and support of dependent females of any age.² A married woman may be entitled to such exemption.³

§ 22. — "Aged and Infirm Persons"

In some states every "aged or infirm person" who is not the head of a family may claim exemption.

In some states an exemption is allowed by the constitution to every "aged or infirm person" who is not the head of a family.⁴ While the term "aged" as applied to human beings is not for all purposes susceptible of a precise definition, and while it is not practicable arbitrarily to fix the period of life at which the condition of being aged can be said to have certainly begun, the provision can be said to apply to those who are old in years regardless of their physical condition, and the problem of how old a person must be to be aged under the constitution, in the absence of a more specific constitutional or statutory definition, can be met only by an ap-

90. Mo.—Martin v. Barnett, 138 S. W. 538, 158 Mo.App. 375.

91. Mo.—Martin v. Barnett, supra.

92. Iowa.—Brayman v. Brayman, 247 N.W. 621, 215 Iowa 1183.

93. Mo.—Monett First Nat. Bank v. Morkamp, 108 S.W. 1085, 130 Mo. App. 118.

94. Mo.—Martin v. Barnett, 138 S. W. 538, 158 Mo.App. 375.

95. Mo.—Lindsey v. Dixon, 52 Mo. App. 291.

96. Iowa.—Blair v. Fritz, 144 N.W. 611, 162 Iowa 716.

Wife as head of family see supra § 19 b.

Son

(1) Son may be head of his mother's family.

Iowa.—Blair v. Fritz, supra.

(2) Judgment debtor's son, who had a regular job and lived with and

supported his invalid brother and father who earned only one hundred dollars in two years, and not the father, was "head of the family."

Tenn.—Forehand v. Forehand, 187 S. W.2d 635, 28 Tenn.App. 131.

97. Tenn.—Corpus Juris quoted in Hurt v. Perryman, 122 S.W.2d 426, 427, 173 Tenn. 646.
25 C.J. p 26 note 7.

98. S.D.—Goodlad v. Smejkal, 190 N. W. 1017, 46 S.D. 112.

Tenn.—Corpus Juris quoted in Hurt v. Perryman, 122 S.W.2d 426, 427, 173 Tenn. 646.
25 C.J. p 26 note 8.

Unmarried son supporting mother

(1) A twenty-six year old unmarried man who for seven years following father's death rented a home for himself and his mother and his three minor brothers and who entirely supported mother and brothers by farm-

ing and operating a truck was a "head of a family."

Tenn.—Hurt v. Perryman, 122 S.W.2d 426, 173 Tenn. 646.

(2) Other cases see 25 C.J. p 26 note 8 [c].

99. U.S.—In re McGowan, D.C.S.C., 170 F. 493.
25 C.J. p 26 note 9.

1. N.D.—Webster v. McGauvran, 78 N.W. 80, 8 N.D. 274.
25 C.J. p 26 note 10.

2. Ga.—Sparks v. Shelnut, 25 S.E. 853, 99 Ga. 629—Johnson v. Little, 17 S.E. 294, 90 Ga. 781.

3. Ga.—Sparks v. Shelnut, 25 S.E. 853, 99 Ga. 629.
25 C.J. p 31 note 17.

4. Ga.—Allen v. Pearce, 28 S.E. 859, 101 Ga. 316, 65 Am.S.R. 306, 39 L. R.A. 710.

plication of the term, as given, to the facts of the particular case.⁵

§ 23. — Surviving Husband, Wife, Children, and Next of Kin

- a. In general
- b. Widow
- c. Children or heirs

a. In General

Some statutes provide that property exempt during the lifetime of a debtor shall continue so for the benefit of his widow and surviving children, but, unless a statute continues exemption rights in favor of a surviving husband, his rights depend solely on his status as a member or head of a family and they terminate on the deaths of the other members of the family.

Under a number of the statutes, property exempt during the lifetime of a debtor continues so for the benefit of his widow and surviving children.⁶ The only exemption continued may be the homestead exemption, as discussed in Homesteads § 243, and there may be no provision for continuing the personal property exemption.⁷ Whether an exemption is granted not only for the benefit of the class of persons specified but also for the benefit of their distributees or beneficiaries depends on the inten-

tion of the legislative body as evidenced by the particular exemption statute.⁸ Where the exemption is continued in such property as would be exempt to the decedent as head of the family, property which decedent might have claimed as exempt on other grounds is not included.⁹ A statute merely entitling a widow to retain certain property of her deceased husband free from any of his debts does not entitle her to exemption of such property from liability for her individual debts.¹⁰

Where the exempt property of the decedent has been exchanged for other property, the widow and children have been held to have acquired the same rights in the property received in exchange;¹¹ and where the exempt property has been sold under attachment, the proceeds in court, undistributed at the death of the debtor, have been held to pass to the widow and children.¹² Where, by agreement between the interested parties, the proceeds from a sale of property claimed by the widow and child as exempt occupy the same status as the property itself, the court may not impose any condition limiting the use of such proceeds, because to do so would be to prejudice the rights of the parties contrary to the agreement,^{12.5} nor may the court require that

5. Ga.—Allen v. Pearce, supra.
25 C.J. p 31 note 20.

6. Neb.—Dobney v. Chicago & N. W. Ry. Co., 235 N.W. 585, 120 Neb. 824.

N.Y.—Corpus Juris cited in In re Barnes' Estate, 267 N.Y.S. 634, 638, 149 Misc. 149.

Pa.—In re Dent's Estate, 21 Pa. Dist. & Co. 535.

Tenn.—Holden v. McBroom, 116 S.W. 2d 1013, 173 Tenn. 212.

23 C.J. p 1149 note 2—24 C.J. p 233 note 18 [c]—25 C.J. p 32 note 21. Allowance to surviving spouse or children of decedent see Executors and Administrators §§ 323-366.

Head of family after death of husband or wife see supra § 17 e.

Exemptions continued

(1) Statute providing that intestate's estate shall vest immediately in his heirs at law, subject to payment of debts except such as may be exempted by law, was not intended to continue affirmatively in favor of heirs every exemption which legislature might see fit to declare in favor of individual, whether head of a family or not, but was intended to declare that all property should vest subject to such exemptions as were by other statutory provisions continued after death of one in whose favor exemption had been created.

Tex.—Pickens v. Pickens, 83 S.W.2d 951, 125 Tex. 410.

(2) Widow's allowance was not exempt from garnishment under statute

relating to exemptions on death of head of family, in view of another statute which omitted widow's allowance in specifying exemptions which survive death of owner of property.

Colo.—Isbell-Kent-Oakes Dry Goods Co. v. Larimer County Bank & Trust Co., 226 P. 293, 75 Colo. 451.

Removal of chattel liens

Where part of the exempt property had been mortgaged by testator during his lifetime, but credit was not extended to testator because of his exempt property, chattel liens should be removed from the exempt property as far as possible by first exhausting the nonexempt property.

Iowa.—O'Day v. O'Day, 292 N.W. 516, 228 Iowa 650.

Purpose of statute

Purpose of statute is to make provision for support and maintenance of family, those demands of family being deemed superior to those of heirs or creditors, and statute should be liberally construed to obtain its objectives.

Or.—Brown v. Miles, 238 P.2d 761, 193 Or. 466.

7. N.C.—Bruton v. McRae, 34 S.E. 397, 125 N.C. 206.
25 C.J. p 32 note 23.

8. N.Y.—In re Distefano's Estate, 5 N.Y.S.2d 87, 167 Misc. 678, affirmed 8 N.Y.S.2d 669, 255 App.Div. 957.

Particular statutes construed

(1) Statute relating to the retirement of civil service employees, providing that none of the moneys mentioned therein should be assignable in law or in equity or be subject to execution, levy, or other legal process, exempts a fund payable thereunder after a post office employee's death from the claims of all creditors, even if payment is made to his estate, since the exemption attaches to the fund itself.

N.Y.—In re Dickerson's Estate, 5 N.Y.S.2d 86, 168 Misc. 54.

(2) Statute providing for exemption of right accruing under provisions of act providing for teachers' retirement fund has been similarly construed.

N.Y.—In re Distefano's Estate, 5 N.Y.S.2d 87, 167 Misc. 678, affirmed 8 N.Y.S.2d 669, 255 App.Div. 957.

9. Iowa.—Perkins v. Hinckley, 32 N.W. 469, 71 Iowa 499.
25 C.J. p 32 note 24.

10. Fla.—Seashole v. O'Shields, 191 So. 74, 139 Fla. 839.

Ga.—Hamilton v. Hardwick, 170 S.E. 826, 47 Ga.App. 513.

11. Tenn.—Sneed v. Jenkins, 16 S.W. 64, 90 Tenn. 137.

12. D.C.—Howard v. Howard, 38 App.D.C. 575.

Ky.—Myers v. Forsythe, 10 Bush 394.

12.5 Tex.—Hickman v. Hickman, 234 S.W.2d 410, 149 Tex. 439.

security be given to assure the ultimate return of the property to the estate.^{12,10} Under a provision that when the debtor dies his widow is entitled to the exempt property for the use of herself and children of the deceased, the widow becomes the trustee for herself and children as the common beneficiaries,¹³ and the fund, although held in common by the widow and children, is not subject to partition where it appears that the widow is still living and the children are adult and living apart from her.¹⁴ Under such statutes, in default of children, the widow takes the exempt property absolutely.¹⁵

Surviving husband. Under some statutes the husband's right to exemption seems to be based entirely on provisions of law granting him such right as a member of a family, as a debtor with a family or head of a family, or as a householder, as discussed supra §§ 16-18. Accordingly in the absence of statute an exemption of personal property from forced sale, while the debtor has a family, does not continue in his favor, after the other members of the family are dead.¹⁶ The debtor's exemption rights after death of his wife are still dependent upon his status as head of the family or householder, and are not derived from any statutory or constitutional provision granting an exemption to a surviving husband as such.¹⁷ However, in some statutes, express provision is made for a continuance of exemption rights in favor of a surviving husband.¹⁸

b. Widow

The right of exemption of a deceased husband which survives to his widow must be claimed by her within a reasonable time after his death, but her right is not affected by her owning other separate property, or by the fact that she had been abandoned by her husband and lived apart from him. Under some statutes the widow

acquires absolute title to the exempt property, but under other statutes she acquires a qualified title, good only as against creditors and not as against legatees or distributees.

Where the widow wishes to take the benefit of the statute continuing the exemption allowed her deceased husband in his lifetime, she must claim her right within a reasonable time after the death of her husband.¹⁹ However, as soon as she has made her claim, her right to property exempt from execution vests by operation of law and is not affected by the fact that the property has not been formally set off to her;²⁰ nor is her right to exemption under these statutes affected by her owning other separate property,²¹ or by her receiving from the estate of the deceased other property as her distributive share;²² but, under a statute so providing, a widow who is a devisee under will is not entitled to exempt property.²³

A widow is entitled to her exemption even though she had not been a part of her husband's household for some time prior to his death where it is shown that he abandoned her;²⁴ but she is not entitled to her exemption where she had separated from her husband without cause.²⁵

Under some statutes the widow's exemption gives her title to the exempt property absolutely²⁶ so that she becomes entitled to it as against the administrator,²⁷ legatees and distributees,²⁸ and heirs,²⁹ as well as against creditors of the deceased. Under other statutes, the widow's title to exempt property is a qualified title only, good only as against creditors,³⁰ and not good against legatees or distributees.³¹ In these jurisdictions, where the distinction between an absolute and qualified title is made,

12.10 Tex.—Hickman v. Hickman, supra.

13. Tenn.—Holden v. McBroom, 116 S.W.2d 1013, 173 Tenn. 212. 25 C.J. p 32 note 27.

14. Kan.—Spencer v. Barker, 149 P. 736, 96 Kan. 360.

15. Tenn.—Compton v. Perkins, 23 S.W. 66, 92 Tenn. 715.

16. Tex.—Allen v. Ashburn, 65 S.W. 45, 27 Tex.Civ.App. 239.

Property not owned by husband

Surviving husband's right does not include any personalty not owned by him.

Tex.—Wicker v. Rowntree, Civ.App., 185 S.W.2d 150, refused for want of merit.

17. Tex.—Allen v. Ashburn, 65 S.W. 45, 27 Tex.Civ.App. 239. 25 C.J. p 34 note 76.

18. Idaho.—Lemp v. Lemp, 184 P. 222, 32 Idaho 397.

N.D.—Fore v. Fore, 50 N.W. 712, 2 N.D. 260.

19. Pa.—In re Scullin's Estate, 5 Pa.Co. 188. Time of claim by debtor see infra § 131.

Common-law marriage is sufficient to entitle claimant to widow's exemption.

Pa.—In re Tomlinson's Estate, 45 Lanc.L.Rev. 629.

20. Miss.—Grafton v. Smith, 6 So. 209, 66 Miss. 408.

21. Ala.—Darden v. Reese, 62 Ala. 311—Thompson v. Thompson, 51 Ala. 493.

22. Miss.—Wally v. Wally, 41 Miss. 657—Coleman v. Brooke, 37 Miss. 71.

23. Iowa.—In re David's Estate, 288 N.W. 418, 227 Iowa 352.

24. Pa.—In re Grieve's Estate, 30 A. 727, 165 Pa. 126. 25 C.J. p 32 note 34.

25. Pa.—Appeal of Nye, 17 A. 618, 126 Pa. 341, 12 Am.S.R. 873. 25 C.J. p 32 note 35.

26. Iowa.—In re Jones' Estate, 35 N.W.2d 36, 239 Iowa 1364. N.M.—White v. Mayo, 299 P. 1068, 35 N.M. 430. 25 C.J. p 32 note 36.

27. Iowa.—In re Jones' Estate, 35 N.W.2d 36, 239 Iowa 1364. Miss.—Holliday v. Holland, 41 Miss. 528. 25 C.J. p 32 note 37.

28. Tenn.—Duncan v. Duncan, 2 Swan 351.

29. N.D.—Fore v. Fore, 50 N.W. 712, 2 N.D. 260.

30. Tenn.—Duncan v. Duncan, 2 Swan 351.

31. Tenn.—Duncan v. Duncan, supra.

statutes which give an absolute title as against creditors and legatees to certain specific articles will be construed strictly to apply only to the articles named.³² In any event, her title to the exempt property is good as against a trustee in bankruptcy of deceased,³³ and it matters not whether her husband was solvent or insolvent at the time of his death.³⁴

Statutes providing that "property exempt . . . shall not go to the executor or administrator," show that the benefit is intended not only for the widows of those dying intestate, but of those dying testate, and also that the benefit is secured without regard to the size or solvency of the estate.³⁵ Some statutes limit a widow's right to exemption to the period of her widowhood.³⁶

c. Children or Heirs

Under some statutes the surviving children succeed to the debtor's right of exemption, while under other statutes, the heirs, rather than the children as such, succeed to the right.

Under the statutes the exemption may be continued in favor of the widow only,³⁷ or in favor of the widow and children.³⁸ In the latter case, the children of a debtor who dies leaving no widow have the full benefit of the exemption law.³⁹

The debtor's stepchildren are within the terms of a statute continuing the debtor's exemption to his surviving children,⁴⁰ but some statutes expressly provide that, as between a widowed stepmother and the debtor's own children, the children shall be entitled to their father's exemption as against their stepmother.⁴¹ On the death of the widow there remains nothing of her interest in the property to which her second husband can lay claim, as against her children by her first husband.⁴²

In jurisdictions requiring residence of the claimant within the state, the status of the surviving children of the deceased debtor is determined by their residence at the time of their father's death;⁴³ and if, at that time, the children are residents of the state they will be entitled to the exemption.⁴⁴ The exemption can be enjoyed by the children, however, only as long as they are surviving members of the family, and this status is lost, and with it the exemption privilege, when they have been adopted into the family of another.⁴⁵

Age, dependence, or marriage of children. Under some statutes the exemption can be enjoyed by the children during their minority only,⁴⁶ and the creditors are entitled to the exempt property on the marriage or coming of age of the children.⁴⁷ In such cases the rights of all parties are best conserved by the courts administering the estate through a receiver appointed for the purpose, who pays the usufruct from time to time to the guardian of the infants, and holds the corpus for the benefit of the creditors after the termination of the infants' interests in the property.⁴⁸

Under other statutes the dependence and age of the children are immaterial,⁴⁹ and the only facts that need be shown are the family relation and the residence with decedent.⁵⁰ It has even been held under such statutes that a surviving child may claim the right to exemption although his father or mother in their lifetime was dependent on him for their support.⁵¹

Grandchildren. Grandchildren are not entitled as "children," to their grandfather's exemption, unless they are living with him as members of his family at the time of his death.⁵²

32. Tenn.—Duncan v. Duncan, supra.

33. Miss.—Williams v. Hale, 20 Miss. 562.

34. Miss.—Williams v. Hale, supra.

35. Tenn.—Pride v. Watson, 7 Heisk. 232.

36. Miss.—Carpenter v. Brownlee, 38 Miss. 200.
25 C.J. p 33 note 48.

37. Miss.—Loury v. Herbert, 25 Miss. 101.

Tenn.—Vincent v. Vincent, 1 Heisk. 333.

38. Tenn.—Holden v. McBroom, 116 S.W.2d 1013, 173 Tenn. 212.
25 C.J. p 33 note 50.

39. Kan.—Taylor v. Winnie, 51 P. 890, 59 Kan. 16, 68 Am.S.R. 339.

Miss.—Whitcomb v. Reid, 31 Miss. 567, 66 Am.D. 579.

40. Tenn.—Whitworth v. Hager, 140 S.W. 205, 124 Tenn. 355.

41. Tex.—Wilson v. Brinker, Civ. App., 76 S.W. 213—Burns v. Falls, 56 S.W. 576, 23 Tex.Civ.App. 386.
25 C.J. p 33 note 55.

42. Tenn.—Sneed v. Jenkins, 16 S. W. 64, 90 Tenn. 137.

43. Va.—Edgewood Distilling Co. v. Rosser, 82 S.E. 716, 116 Va. 624.

44. Va.—Edgewood Distilling Co. v. Rosser, supra.

45. Cal.—In re Pillsbury, 166 P. 11, 175 C. 454.
25 C.J. p 33 note 66.

46. Tenn.—Holden v. McBroom, 116 S.W.2d 1013, 173 Tenn. 212.
25 C.J. p 33 note 57.

47. Va.—Edgewood Distilling Co. v. Rosser, 82 S.E. 716, 116 Va. 624.

48. Va.—Edgewood Distilling Co. v. Rosser, supra.

49. Kan.—Taylor v. Winnie, 51 P. 890, 59 Kan. 16, 68 Am.S.R. 339.
Pa.—In re DeSimone's Estate, 4 Pa. Dist. & Co.2d 601, 5 Fiduciary 666.
25 C.J. p 33 note 61.

50. Pa.—In re Cullison's Estate, 37 Pa.Dist. & Co. 516, 4 Fiduciary 393.
In re Stevenson's Estate, 41 Pa. Co. 260.
25 C.J. p 33 note 62.

51. Pa.—In re Niedzielski's Estate, 4 Pa.Dist. & Co.2d 290, 38 Erie Co. 171, 5 Fiduciary 323.
In re Stevenson's Estate, 41 Pa. Co. 260.

52. Tex.—Glasscock v. Stringer, Civ. App., 33 S.W. 677.

Guardians of minors. Some exemption laws are extended in express terms to guardians of minor children.⁵³

Heirs. Under some statutes the heirs, rather than the children as such, succeed to their ancestor's rights of exemption.⁵⁴

§ 24. — Persons Engaged in Particular Occupation

- a. In general
- b. Habitual occupation or use
- c. Suspension or abandonment of trade or occupation
- d. Particular trades or occupations

a. In General

Where exemptions are provided for the benefit of persons in particular employments, trades, or businesses, a person may claim the exemption only when he is engaged in the specified occupation at the time the levy is made and the trade or business is not unlawful at the time the exemption is claimed.

Exemptions are provided in some jurisdictions for the benefit of persons in particular employments, trades, or businesses.⁵⁵ When the statute is so restricted a person can claim the exemption only when he is engaged in the specified occupation.⁵⁶ Where the statute is not in express terms restricted to persons engaged in particular occupations but is restricted rather to articles and classes of property which are most used in certain occupations, the question of whether the exemption is restricted to

such occupations is one dependent on the legislative intent.⁵⁷ Any implication to that effect, however, may be negated by express provisions of a later amending or supplemental statute extending the benefits of the law to a larger class of debtors.⁵⁸ Even when a statute uses general terms, it may appear that the legislature intended to confine the benefit of the law to particular persons, and if such is the case the intention of the legislature must govern.⁵⁹

Time of inquiry as to trade or occupation. The time to which the inquiry as to a debtor's occupation or employment relates, for the purpose of determining his right to an exemption, is the time when the property claimed as exempt was levied on.⁶⁰ A mere unexecuted intention formed by the debtor to adopt another trade or calling will not entitle him to claim the exemptions relating thereto.⁶¹ To claim an exemption as a lawyer, the debtor does not necessarily have to be engaged in the practice of law at the very time a levy is made on his property; it is enough if he belongs to the profession and intends to use the property in his profession.⁶²

Unlawful trade or occupation. Statutes exempting property to enable a person to carry on his trade or business are not to be construed as exempting property kept or used by a person in carrying on an unlawful trade or business.⁶³ The trade must be a lawful one,⁶⁴ and it must be lawful at the time the exemption is claimed.⁶⁵

53. Ga.—Rountree v. Dennard, 59 Ga. 629, 27 Am.R. 401.
25 C.J. p 33 note 70.

54. Fla.—Hutchinson v. Stone, 84 So. 151, 79 Fla. 157.
25 C.J. p 33 note 67.

Proceeds of adjusted service certificate, after death of soldier, although paid over to statutory administrator of soldier's estate, are exempt from claims of creditors against his estate and belong to his heirs at law free from such claims. S.C.—Williams v. Hiott, 193 S.E. 133, 184 S.C. 514.

Collateral heirs of surviving wife

Under Const. art 16 § 52, providing that on the death of the husband or wife, or both, the homestead shall descend and vest in the heirs of the deceased, as other real property, and the statutory provisions relating to exemption of homesteads and of personal property on the death of an insolvent husband without issue, the homestead and exempt personalty, all consisting of community property, pass to the wife surviving, free from debts of the community; and on her decease the property descends

to her collateral heirs, free from liability for such debts. Tex.—Cameron v. Morris, 18 S.W. 422, 83 Tex. 14.

55. Iowa.—Weaver v. Florke, 192 N. W. 23, 195 Iowa 1085.
25 C.J. p 34 note 79.
Exemption of tools used in several trades see infra § 46.

56. Ariz.—Mack v. Boots, 239 P. 794, 29 Ariz. 116—Meyers v. Rosenzweig, 232 P. 886, 27 Ariz. 286.
Iowa.—First Nat. Bank of Mason City v. Larson, 239 N.W. 134, 213 Iowa 468—Wertz v. Hale, 234 N.W. 534, 212 Iowa 294—Weaver v. Florke, 192 N.W. 23, 195 Iowa 1085.
Mont.—State ex rel. Bartol v. Justice of Peace Court of Township of Stanford, in Judith Basin County, 55 P.2d 691, 102 Mont. 1.
25 C.J. p 34 note 79.

57. Cal.—Robert v. Adams, 38 C. 383, 99 Am.D. 413.
25 C.J. p 34 note 80.

58. Mo.—State v. Farmer, 21 Mo. 160.
25 C.J. p 34 note 81.

59. Minn.—Poznanovic v. Maki, 296 N.W. 415, 209 Minn. 379.
25 C.J. p 34 note 82.

"Other persons" see infra subdivision d (11) of this section.

60. La.—Ray v. Hayes, 28 La. Ann. 641.
25 C.J. p 34 note 83.

61. Kan.—Kingman State Bank v. Shepherd, 182 P. 653, 105 Kan. 206.

62. Tex.—McBrayer v. Cravens, Dargan & Roberts, Com.App., 265 S.W. 694.

63. Mich.—McCarthy v. Payne, 104 N.W. 981, 141 Mich. 571, 113 Am. S.R. 548.
25 C.J. p 35 note 5.

64. Tex.—Harris v. Todd, Civ.App., 158 S.W. 1189.
25 C.J. p 35 note 6.

65. Mich.—McCarthy v. Payne, 104 N.W. 981, 141 Mich. 571, 113 Am. S.R. 548.

Trade subsequently becoming unlawful

Trade which, when established, is carried on within the law, but which later is carried on in violation of

b. Habitual Occupation or Use

Where the statute so provides, the person claiming the exemption must show that he is "habitually" engaged in the prescribed occupation, or makes "habitual" use of the exempted articles; the word "habitually" does not mean exclusively, but customarily.

Under statutes which qualify their grant of exemption privileges to persons "habitually" engaged in certain occupations, or making "habitual" use of the exempted articles, only persons so designated may claim exemptions.⁶⁶ In the absence of such a statutory requirement it has been held that habitual use is not necessary.⁶⁷

Where there is such a provision, the implements, to be exempt, need not be used exclusively in the business by which the debtor habitually earns his living, for the word "habitually" does not mean exclusively, but customarily;⁶⁸ nor is the right to the exemption defeated by the fact that the debtor derives some revenue from other industries.⁶⁹ One who has merely made a start in his business, but with intention to be engaged in it "habitually," is entitled to his exemption.⁷⁰

c. Suspension or Abandonment of Trade or Occupation

The right to claim an exemption as one who is engaged in a particular occupation is lost if the debtor permanently abandons such occupation, but the right is not lost if he merely suspends his occupation intending to return to it when he has the opportunity.

A debtor loses his right to claim an exemption as one who is engaged in a particular occupation if he permanently abandons such occupation.⁷¹ It is otherwise, however, if he merely suspends his trade

or occupation intending to return to it when he has the opportunity,⁷² although it has been held that such a suspension must be accompanied by a retention of the implements or stock in trade for use when the trade is resumed.⁷³

A temporary suspension of trade in order to move it from one location to another is not evidence of abandonment of the business so as to remove the appliances used therein from the protection of the exemption statute.⁷⁴ A person does not forfeit his right to exemptions as a member of a trade because, while seeking in good faith an opportunity to engage therein, he accepts some other employment to earn a living for himself and family.⁷⁵

Abandonment is shown by acts evidencing an intention to abandon,⁷⁶ as where the debtor conceives the design of absconding,⁷⁷ and it is a question of fact to be determined on the evidence in each case.⁷⁸ The length of time which has elapsed since a temporary suspension of one's calling is an element to be considered in determining whether it has been abandoned.⁷⁹

d. Particular Trades or Occupations

- (1) "Clerks," "employees," or "wage earners"
- (2) "Farmers" and "persons engaged in agriculture"
- (3) "Laborers"
- (4) "Mechanics"
- (5) "Peddlers"
- (6) Persons engaged in business or occupation

law, and is unlawful at the time exemption is claimed, is not within the protection of the statute.
Mich.—McCarthy v. Payne, supra.
25 C.J. p 35 note 8.

66. U.S.—In re Schumm, D.C.Cal., 232 F. 414.
25 C.J. p 34 note 88.
Exemption of tools used in several trades see infra § 46.

67. Iowa.—Perkins v. Wisner, 9 Iowa 320.

68. Cal.—Stanton v. French, 27 P. 657, 91 C. 274, 25 Am.S.R. 174.
Iowa.—Corpus Juris Secundum quoted in Kelly v. Degelau, 58 N.W.2d 374, 376, 244 Iowa 873, 37 A.L.R.2d 709.

69. Cal.—Stanton v. French, 27 P. 657, 91 C. 274, 25 Am.S.R. 174.
La.—A. Wilbert's Sons Lumber & Shingle Co. v. Ricard, 119 So. 411, 167 La. 416.

70. Iowa.—Bevan v. Hayden, 13 Iowa 122.
25 C.J. p 34 note 91.

71. La.—Moseley v. Doran, App., 163 So. 198.
25 C.J. p 35 note 93.
Exemption of tools used in several trades see infra § 46.

72. Hawaii.—Garcia v. Ichikawa, 34 Hawaii 748.
Idaho.—Aslett v. Evans, 280 P. 1036, 48 Idaho 206.
Mont.—State ex rel. Bartol v. Justice of Peace Court of Township of Stanford in Judith Basin County, 55 P.2d 691, 102 Mont. 1.
Tex.—Seiler v. Buckholdt, Civ.App., 293 S.W. 210.
25 C.J. p 36 note 94.

Suspension of attorney's right to practice for period of five years does not deprive him of exemption of books, rugs, and office furniture, where it was his intention to resume practice as soon as possible.
Tex.—McBrayer v. Cravens, Dargan & Roberts, Com.App., 265 S.W. 694.

73. Wis.—Hettinger v. Wells, 155 N. W. 126, 161 Wis. 640.

Intention to resume with new stock

Where debtor is selling his implements and stock in trade and the intention to resume is evidently an intention to resume with a new stock, debtor is not entitled to exemption in the old implements and stock in trade.

Wis.—Hettinger v. Wells, supra.
74. Tex.—Campbell v. Honaker, Civ. App., 166 S.W. 74.

75. Cal.—Van Lue v. Wahrlich-Cornett Co., 108 P. 717, 12 C.A. 749.

76. Minn.—Cable v. Hoolihan, 107 N. W. 967, 98 Minn. 143, 116 Am.S.R. 348.
25 C.J. p 35 note 2.

77. Mo.—Davis v. Wood, 7 Mo. 162.

78. Minn.—Cable v. Hoolihan, 107 N.W. 967, 98 Minn. 143, 116 Am.S.R. 348.

Questions of law and fact in exemption suits generally see infra § 163.

79. Cal.—Van Lue v. Wahrlich-Cornett Co., 108 P. 717, 12 C.A. 749.

- (7) Persons engaged in profession
- (8) Persons engaged in trade
- (9) "Seamen"
- (10) "Teamsters" and "truckmen"
- (11) "Other persons," "other laborers," "other tradesmen," etc.

(1) "Clerks," "Employees," or "Wage Earners"

An independent contractor or one employed on a salary and commissions to sell goods is not a "clerk" within an exemption statute. The term "employee" includes superintendents and salesmen, and the term "wage earner" comprehends persons whose services require physical or manual labor.

Where the statute confers exemptions on persons specifically described as clerks, an independent contractor is not included,⁸⁰ nor is one employed on a salary and commissions to sell goods.⁸¹

"Employees" or "wage earners." The term "employee" which is used in some statutes is a broader term than "laborer," and includes superintendents⁸² and salesmen.⁸³

Some statutes provide for exemption of wages of a "wage earner," and under the statute one is a wage earner whose services require physical or manual labor whether skilled or unskilled.⁸⁴

(2) "Farmers" and "Persons Engaged in Agriculture"

Within exemption statutes, the term "farmer" includes anyone who earns his living by farming, even though temporarily not engaged in that occupation; and a person is "engaged in agriculture" if he derives support for himself and family, in whole or in part, from the tillage of the fields.

Where the statute exempts the property of "farmers" or of persons "engaged in agriculture," the term "farmer" includes anyone who earns his living by farming,⁸⁵ even though he is temporarily

not engaged in that occupation,⁸⁶ nor need he devote his time exclusively to such occupation.⁸⁷ The status of a person as a farmer is not changed by the fact that his farm is sold at a judicial sale if he intends to continue farming as his occupation.⁸⁸

A person is "engaged in agriculture" when he derives the support of himself and family, in whole or in part, from the tillage of the fields; he must cultivate something more than a garden, although it may be much less than a farm.⁸⁹

Laborers engaged in raising a crop are given exemption rights in some states, but only those who are not heads of families are entitled under the terms of the statute granting the exemption.⁹⁰

(3) "Laborers"

The exemption given under some statutes to "laborers" may be claimed only by such persons as perform manual or menial services, under the direction of a superior, and not by independent contractors, or overseers or superintendents who do no labor themselves; the authorities disagree as to whether clerks, bookkeepers, and stenographers are "laborers."

It may be laid down as a general rule that statutes giving to "laborers" or a "laboring man or woman" the right to claim wages or other property as exempt are to be construed as having reference to such persons only as perform manual or menial services, and such as are responsible for no independent action, but do a day's work or a stated job under the direction of a superior.⁹¹ In some of the cases a distinction is made between a laborer and an artisan depending on the amount of skill required in the work as related to the physical effort; where little physical effort is required but great skill, the workman is an artisan but not a laborer within the meaning of the statute.⁹² The mere fact that an employee's wages are payable monthly, weekly, or even daily, or that they are subject to deduction for loss of time, does not make him a

80. La.—Brierre v. Creditors, 9 So. 640, 43 La. Ann. 423.
25 C.J. p 36 note 10.

Exemption of clerks under statute mentioning laborers see infra subdivision d (3) of this section.

81. La.—Weems v. Delta Moss Co., 33 La. Ann. 973.

82. Md.—Moore v. Heaney, 14 Md. 558.
25 C.J. p 36 note 14.

Exemptions to laborers see infra subdivision d (3) of this section.

83. Md.—Wilmer v. Mann, 88 A. 222, 121 Md. 239.

84. Ill.—Sheehan v. Union Stockyard & Transit Co., 172 Ill. App. 528.

25 C.J. p 36 note 17.

85. Idaho.—Aslett v. Evans, 280 P. 1036, 48 Idaho 206.
25 C.J. p 36 note 19.

86. Idaho.—Aslett v. Evans, supra.
25 C.J. p 36 note 20.

Temporary abandonment of particular occupation generally see supra subdivision c of this section.

87. Cal.—McCue v. Tunstead, 4 P. 510, 65 C. 506.
25 C.J. p 36 note 21.

88. Idaho.—Aslett v. Evans, 280 P. 1036, 48 Idaho 206.
25 C.J. p 36 notes 22, 23.

89. Pa.—Springer v. Lewis, 22 Pa. 191.

25 C.J. p 36 note 24.

90. S.C.—Prince v. Nance, 7 S.C. 351.

91. Iowa.—Shepard v. Findley, 214 N.W. 676, 204 Iowa 107.
25 C.J. p 36 note 29.

"Other laborers" see infra subdivision d (11) of this section.

92. La.—Estalotte v. Clements, 8 La. A., (Orleans) 227.
25 C.J. p 36 note 30.

Earnings entitled to exemption as wages see infra § 47.

"Test for laborer"

Whether workman is "laborer" within exemption statute is determined by character of his work, not his class or profession.

La.—Groves & Rosenblath v. Atkins, 107 So. 316, 160 La. 489.

"day laborer" or "laborer" within the meaning of the exemption laws.⁹³

Within the above definition of "laborer" are bricklayers,⁹⁴ car repairers,⁹⁵ locomotive engineers,⁹⁶ mail carriers,⁹⁷ night watchmen,⁹⁸ owners and drivers of oil wagons,⁹⁹ painters,¹ pullman car porters,² and stablemen.³

On the other hand, the term does not include persons performing services other than manual labor.⁴ Agents and salesmen who act independently and go about selling goods on salary or commission,⁵ civil engineers,⁶ commercial travelers,⁷ draughtsmen,⁸ factors and brokers,⁹ lottery proprietors,¹⁰ officers of corporations,¹¹ photographers,¹² professional men,¹³ railroad conductors,¹⁴ and school teachers¹⁵ are not laborers within the exemption laws.

Clerks, bookkeepers, and stenographers. Whether clerks, bookkeepers, stenographers, etc., in stores and offices are to be regarded as laborers within the meaning of laws exempting wages due to laborers, is not clear, and the decisions on the question are conflicting; in some jurisdictions persons engaged in these occupations are not regarded as laborers.¹⁶ Other courts, while considering such statutes as applying only to employees engaged in doing manual

labor, have construed this term more broadly, and have held that bookkeepers and clerks in stores and offices could be regarded as performing manual labor, so as to bring them within the spirit and intent of the statute,¹⁷ holding even that a bookkeeper who also performs the services of a stenographer and private secretary is a laborer within the statute;¹⁸ while the same courts, in other decisions, have held that a clerk in a mercantile establishment is, primarily, not a laborer, but that whether or not, in a particular case, he is so, depends on the character of his service.¹⁹

Contractors. The term "laborers" does not apply to contractors who do no manual work themselves but merely furnish the labor and services of others, or who perform work, under a contract, independently and not under the direction and control of another person.²⁰

Overseers and superintendents. It has been held that the term "laborer" does not include overseers and superintendents,²¹ although a distinction has been made between overseers of plantations, paid by the day, who not only direct the operations of the hands employed, but labor with them,²² and superintendents or heads of departments who receive monthly salaries and do no manual labor.²³

93. Ga.—Briscoe v. Montgomery, 20 S.E. 40, 93 Ga. 602, 44 Am.S.R. 192 —Miller v. Dugas, 77 Ga. 386, 4 Am.S.R. 90.

94. Iowa.—Shepard v. Findley, 214 N.W. 676, 204 Iowa 107.

95. La.—Cole v. Grant, 81 So. 398, 144 La. 916.

96. Ga.—Sanner v. Shivers, 76 Ga. 335.

97. Va.—Farinholt v. Luckhard, 21 S.E. 817, 90 Va. 936, 44 Am.S.R. 953.

Use of own horses and vehicles

Mail carriers may be considered laborers even though they use their own horses and vehicles.

Va.—Farinholt v. Luckhard, 21 S.E. 817, 90 Va. 936, 44 Am.S.R. 953.

98. La.—Cummings v. Griggs, 7 La. App. 88, 25 C.J. p 37 note 36.

99. Iowa.—Consolidated Tank-Line Co. v. Hunt, 48 N.W. 1057, 83 Iowa 6, 32 Am.S.R. 285, 12 L.R.A. 476, 25 C.J. p 37 note 40.

1. Ga.—Moore v. McCown, 64 Ga. 617.

2. La.—Freiberg v. Newman, 2 La. A., (Orleans) 402.

3. Iowa.—Krebs v. Nicholson, 91 N.W. 923, 118 Iowa 134, 96 Am.S.R. 370, 25 C.J. p 37 note 34.

4. Ga.—Kyle v. Montgomery, 73 Ga. 337.

5. Minn.—Wildner v. Ferguson, 43 N.W. 794, 42 Minn. 112, 18 Am.S.R. 495, 6 L.R.A. 338, 25 C.J. p 37 note 42.

6. Ga.—McPherson v. Stroup, 28 S.E. 157, 100 Ga. 228.

7. Ga.—Briscoe v. Montgomery, 20 S.E. 40, 93 Ga. 602, 44 Am.S.R. 192, 25 C.J. p 37 note 43.

8. Pa.—Leinaw v. Albright, 10 Pa. Co. 171, 28 Wkly.N.C. 165.

9. Pa.—Hamberger v. Marcus, 27 A. 681, 157 Pa. 133, 37 Am.S.R. 719.

Real estate broker

Ariz.—Meyers v. Rosenzweig, 232 P. 886, 27 Ariz. 286.

10. Hawaii.—Fugita v. Motoshige, 22 Hawaii 136.

11. Ala.—South & North Alabama R. Co. v. Falkner, 49 Ala. 115.

12. Ga.—Mathewson v. Shewmake, 84 S.E. 174, 15 Ga.App. 706, 25 C.J. p 37 note 45.

13. N.H.—Weymouth v. Sanborn, 43 N.H. 171, 80 Am.D. 144.

14. Ga.—Miller v. Dugas, 77 Ga. 386, 4 Am.S.R. 90, Robinson v. McWilliams-Rankin Co., 64 S.E. 717, 6 Ga.App. 203.

15. Pa.—Schwacke v. Langton, 12 Phila. 402.

However, it was intimated in a case in which decision was rested on other grounds that a school teacher may be considered a "day laborer." Ga.—Hightower v. Slaton, 54 Ga. 108, 21 Am.R. 273.

16. Minn.—Wildner v. Ferguson, 43 N.W. 794, 42 Minn. 112, 18 Am.S.R. 495, 6 L.R.A. 338, 25 C.J. p 37 note 55.

17. Ga.—Abrahams v. Anderson, 5 S.E. 778, 80 Ga. 570, 12 Am.S.R. 274, 25 C.J. p 37 note 56.

18. Ga.—Cohen v. Aldrich, 62 S.E. 1015, 5 Ga.App. 256, 25 C.J. p 37 note 57.

19. Ga.—Oliver v. Macon Hardware Co., 25 S.E. 403, 98 Ga. 249, 58 Am.S.R. 300, 25 C.J. p 37 note 58.

20. Neb.—Henderson v. Nott, 54 N.W. 87, 36 Neb. 154, 38 Am.S.R. 720, 25 C.J. p 37 note 59.

21. Ga.—Kyle v. Montgomery, 73 Ga. 337, 25 C.J. p 38 note 60.

22. Ga.—Caraker v. Matthews, 25 Ga. 571.

23. Ga.—Kyle v. Montgomery, 73 Ga. 337.

§ 24 EXEMPTIONS

Mere employment and supervision of other laborers by a person who is himself employed to perform manual labor, and who does himself perform such labor, does not deprive him of the character of a laborer.²⁴

(4) "Mechanics"

The term "mechanic" within exemption laws includes those persons who work with tools, machines, or instruments, and does not embrace those persons engaged in professions or in the liberal arts, or capitalists and owners of machinery and factories who do not themselves work as mechanics.

The term "mechanic" as employed in an exemption statute is to be liberally construed,²⁵ as including those who work with tools, machines, or instruments,²⁶ whether master mechanics or journeymen.²⁷ A mechanic need not be employed as a journeyman to entitle him to the exemption.²⁸ One may be a mechanic, although he engages incidentally in other work,²⁹ or although he has only recently become a mechanic and has no great amount of skill.³⁰

The term "mechanic" does not include persons engaged in professions,³¹ such as surgeons or dentists,³² or optometrists,³³ or abstracters of title,³⁴ although the tools used in particular professions have been held to be properly exempt as "mechanical tools," as discussed *infra* § 46. The term "mechanics" does not include persons engaged in the liberal arts and similar occupations, such as photographers³⁵ or architects' draughtsmen.³⁶

Capitalists and owners of machinery and factories are not mechanics.³⁷ However, a person who him-

self works with tools and with his own hands is a mechanic within the meaning of the exemption laws, notwithstanding he owns and superintends the factory in which he works, and also employs others to work in it.³⁸ That one is both a mechanic and a manufacturer does not prevent him from claiming his exemption as a mechanic.³⁹

(5) "Peddlers"

Under a statute so providing, the team or other property of a peddler may be exempt, even though he does odd jobs for hire.

Under some statutes the team or other property of a peddler is exempt.⁴⁰ A mere delivery service for another's business does not constitute the person who makes the deliveries a peddler within the meaning of the statute,⁴¹ but mere odd jobs for hire, done by one who habitually earns his living by peddling, will not deprive him of his exemption rights as a peddler.⁴²

(6) Persons Engaged in Business or Occupation

Exemptions conferred with reference to the debtor's "business," "trade or business," or "occupation" generally apply to any employment or occupation in which a person is engaged to procure a living.

By some statutes exemptions are conferred with reference to the debtor's "business," "trade or business," or "occupation."⁴³ These expressions are broader in their meaning than "trade" and denote any employment or occupation in which a person is engaged to procure a living.⁴⁴ The term is even used to include work in which a debtor is engaged,

24. Pa.—*Pennsylvania Coal Co. v. Costello*, 33 Pa. 241.
25 C.J. p 38 note 64.

25. Iowa.—*Baker v. Maxwell*, 168 N. W. 160, 183 Iowa 1192, 2 A.L.R. 814.

26. Ariz.—*Mack v. Boots*, 239 P. 794, 29 Ariz. 116.
Tenn.—*Terry v. McDaniel*, 53 S.W. 732, 103 Tenn. 415, 46 L.R.A. 559.
25 C.J. p 38 note 66.
Mechanics' tools see *infra* § 46.

Barber may be a mechanic within the meaning of the exemption laws. *Puerto Rico—Laguna v. Quinones*, 23 Puerto Rico 358.

Tenn.—*Terry v. McDaniel*, 53 S.W. 732, 103 Tenn. 415, 46 L.R.A. 559.

27. S.C.—*Parkerson v. Wightman*, 35 S.C.L. 363.

28. Cal.—*In re Robb*, 33 P. 890, 39 C. 202, 37 Am.S.R. 48.

29. Tex.—*Willis v. Morris*, 1 S.W. 799, 66 Tex. 628, 59 Am.R. 634.
25 C.J. p 38 note 69.

30. Kan.—*Bliss v. Vedder*, 7 P. 599, 34 Kan. 57, 55 Am.R. 237.
25 C.J. p 38 note 70.

31. Miss.—*Whitcomb v. Reid*, 31 Miss. 567, 66 Am.D. 579.

32. Miss.—*Whitcomb v. Reid*, *supra*.
25 C.J. p 38 note 72.

33. Mont.—*Swanz v. Clark*, 229 P. 1108, 71 Mont. 385.

34. Iowa.—*Tyler v. Coulthard*, 64 N. W. 681, 95 Iowa 705, 58 Am.S.R. 452.

35. Tenn.—*Story v. Walker*, 11 Lea 515, 47 Am.R. 305.

36. Pa.—*Leinaw v. Albright*, 10 Pa. Co. 171, 28 Wkly.N.C. 165.

37. S.C.—*Parkerson v. Wightman*, 35 S.C.L. 363.

Proprietor of auto salesroom with separate department where repairing was done by employee is not a "mechanic."

Iowa.—*First Nat. Bank v. Larson*, 239 N.W. 134, 213 Iowa 468.

38. Tex.—*Willis v. Morris*, 1 S.W. 799, 66 Tex. 628, 59 Am.R. 634.

39. Conn.—*Seeley v. Gwillim*, 40 Conn. 106.

40. Cal.—*Stanton v. French*, 23 P. 355, 83 C. 194.

41. Cal.—*Stanton v. French*, *supra*.
25 C.J. p 38 note 82.

42. Cal.—*Stanton v. French*, 27 P. 657, 91 C. 274, 25 Am.S.R. 174.

43. Mich.—*Wood v. Bresnahan*, 30 N.W. 206, 63 Mich. 614.

44. U.S.—*In re Bailey*, D.C.Neb., 172 F.Supp. 925.
In re Conley, D.C.Neb., 162 F. 806.

Mich.—*Wood v. Bresnahan*, *supra*.
25 C.J. p 39 note 87.

Stock in trade exempt see *infra* § 45.
Tools or implements exempt see *infra* § 46.

Slaughtering of cattle and transportation thereof to market is "trade, profession, or calling," within exemption statutes.

La.—*A. Wilbert's Sons Lumber & Shingle Co. v. Ricard*, 119 So. 411, 167 La. 416.

incidental or supplemental to his principal trade.⁴⁵ On the other hand, it has been held that the business of a contractor is not an "occupation" within the meaning of the statute.⁴⁶ A married woman may be entitled to an exemption of this character, although her husband may be entitled to claim exemptions as the head of the family.⁴⁷

(7) Persons Engaged in Profession

To come within an exemption statute expressly applying to lawyers, physicians, etc., the debtor must have a knowledge of his profession to some extent. The term "profession," as used in some statutes, has sometimes been broadly construed to include any occupation or employment not mechanical or agricultural, or the like.

In some states there are exemption statutes applying in express terms to lawyers, physicians, etc., and, except where the statute so requires,⁴⁸ it is not necessary that the lawyer or physician should also be head of a family to entitle him to the exemption privilege.⁴⁹ It is, however, necessary that he should have a knowledge of his profession to some extent, although no particular degree of skill is required in the practice of it.⁵⁰ An optometrist is not entitled to an exemption as a "physician" or "surgeon."⁵¹ Under a statute giving exemptions to lawyers, a lawyer who combines the practice of his profession with other business is nevertheless entitled to his exemption as a lawyer.⁵²

The term "profession" has also been broadly construed to include any occupation or employment not mechanical or agricultural, or the like, to which one devotes himself.⁵³ It has been held, however, that the business of a contractor is not a "profession" within the meaning of a statute exempting tools and implements.⁵⁴ It has been held that an undertaker is not a professional man.⁵⁵

(8) Persons Engaged in Trade

While the statutory exemption for persons engaged in "trade" is restricted by some courts to persons in mechanical pursuits, other courts broadly construe the term as equivalent to occupation, employment, or business.

By some courts the word "trade," as used in statutes exempting the property of persons engaged in trade, is restricted to mechanical pursuits.⁵⁶ Other courts, however, construe the term in a broader sense as equivalent to occupation, employment, or business.⁵⁷

The term has been variously construed to include a baker,⁵⁸ a blacksmith,⁵⁹ a butcher,⁶⁰ a carpenter,⁶¹ an insurance agent,⁶² an operator of a school bus,⁶³ a person whose business is the running of a threshing machine,⁶⁴ a saddle and harness maker,⁶⁵ one who owns and operates a moving picture show,⁶⁶ or a photographer.⁶⁷

45. N.H.—Parshley v. Green, 58 N. H. 271.

25 C.J. p 39 note 88.

46. U.S.—In re Whetmore, D.C.Or., 29 F.Cas.No.17,508, Deady 585.

47. Colo.—Scott v. Mills, 42 P. 1021, 7 Colo.App. 155.

25 C.J. p 39 note 90.

Exemptions to head of family see supra § 17.

Married woman as entitled to exemptions generally see supra § 19.

48. Neb.—Howells State Bank of Howells v. Arps, 219 N.W. 844, 117 Neb. 110.

49. Kan.—Taylor v. Winnie, 51 P. 890, 59 Kan. 16, 68 Am.S.R. 339. Library exempt see infra § 38.

Tools or implements exempt see infra § 46.

50. Mich.—Sutton v. Facey, 1 Mich. 243.

25 C.J. p 39 note 94.

51. U.S.—In re Frazier, D.C.Mont., 5 F.Supp. 903.

52. Iowa.—Equitable L. Assur. Soc. v. Goode, 70 N.W. 113, 101 Iowa 160, 63 Am.S.R. 378, 35 L.R.A. 690. 25 C.J. p 39 note 95.

53. La.—Hamner & Co. v. Johnson, 135 So. 77, 16 La.App. 580.

25 C.J. p 39 note 96.

Operation of school bus is a "trade" or "profession" within stat-

ute exempting tools or instruments of judgment debtor from seizure under judgment.

La.—Hamner & Co. v. Johnson, supra.

54. U.S.—In re Whetmore, D.C.Or., 29 F.Cas.No.17,508, Deady 585.

55. N.Y.—O'Reilly v. Erlanger, 95 N.Y.S. 760, 108 App.Div. 318.

56. Conn.—Davidson v. Hannon, 34 A. 1050, 67 Conn. 312, 52 Am.S.R. 282, 34 L.R.A. 718.

25 C.J. p 39 note 1. Stock in trade exempt see infra § 45.

Tools or implements exempt see infra § 46.

Making things to supply neighborhood

"Trade," within statute exempting from attachment implements of debtor's "trade," means business of mechanic making things on order for supply of neighborhood, as distinguished from manufacture by machinery of particular article to sell in general market.

Conn.—Flaxman v. Capitol City Press, 185 A. 417, 121 Conn. 423.

57. Tex.—McMillan v. Dean, Civ. App., 174 S.W.2d 737, error refused —Campbell v. Honaker, Civ.App., 166 S.W. 74.

25 C.J. p 39 note 2.

58. U.S.—In re Petersen, D.C.Cal., 95 F. 417.

59. Conn.—Atwood v. De Forest, 19 Conn. 513.

60. Okl.—Hoyt v. Pullman, 152 P. 386, 51 Okl. 717, L.R.A.1916B 1288, overruling so far as in conflict Edgin v. Bell-Wayland Co., 149 P. 1145, L.R.A.1915B 916.

Tex.—Hammond v. McFarland, Civ. App., 161 S.W. 47.

61. Conn.—Atwood v. De Forest, 19 Conn. 513.

62. Tex.—Betz v. Maier, 33 S.W. 710, 12 Tex.Civ.App. 219.

63. La.—Hamner & Co. v. Johnson, 135 So. 77, 16 La.App. 580.

64. Kan.—Jackman v. Lambertson, 80 P. 55, 71 Kan. 138.

65. Tex.—Nichols v. Porter, 26 S.W. 859, 7 Tex.Civ.App. 302.

66. Tex.—Campbell v. Honaker, Civ. App., 166 S.W. 74.

67. Conn.—Davidson v. Hannon, 34 A. 1050, 67 Conn. 312, 52 Am.S.R. 282, 34 L.R.A. 718.

25 C.J. p 39 note 12. However, there is authority to the contrary.

Tenn.—Story v. Walker, 11 Lea 515, 47 Am.R. 305.

On the other hand, the term has been held not to include a contractor,⁶⁸ or a manufacturer who is not a mere mechanic,⁶⁹ or a teamster or carrier,⁷⁰ or a warehouseman.⁷¹

Merchants. By some courts a merchant is held to be a tradesman;⁷² by others a contrary view is taken.⁷³ However, the fact that one who is engaged in a trade within the statute himself sells the product of his industry does not make him any the less entitled to his exemption so far as it relates to his trade,⁷⁴ while, on the other hand, it will not be extended to implements used by him in the sale of the goods which he has made.⁷⁵ This distinction is maintained, even though he makes very few articles, and buys most of the articles sold in his shop.⁷⁶

Professions. The term "trade" has been construed not to include the learned professions, such as that of physicians and surgeons,⁷⁷ dentists,⁷⁸ or optometrists.⁷⁹

(9) "Seamen"

While some state courts do not apply the federal statute of exemption for seamen to seamen operating on coastwise vessels, otherwise than between the Atlantic and Pacific coasts, federal courts apply the statute to all seamen.

Seamen are protected by a federal statute, exempting their wages and property.⁸⁰ It has been held in some of the state courts that the statute does not apply to seamen operating on coastwise vessels, otherwise than between the Atlantic and Pacific coasts.⁸¹ Federal courts, however, have held

that a seaman's wages are exempt, whether or not he is engaged in the coasting trade.⁸² In other jurisdictions it has been held that a seaman in the coasting trade is entitled to an exemption in his wages provided he was shipped by a shipping commissioner, but not otherwise.⁸³

A fisherman is not a seaman within the meaning of the statute,⁸⁴ but an employee on an interstate ferryboat may be.⁸⁵ A pilot,⁸⁶ or a longshoreman employed to stow cargo in, and discharge cargo from, the holds of a ship while it lies in navigable waters⁸⁷ is a "seaman" within the statute, but the master or captain of a vessel is not a "seaman."⁸⁸

(10) "Teamsters" and "Truckmen"

Within various exemption statutes, a "teamster" is a person who is engaged with his own team in the business of hauling freight for other persons for a consideration, and who habitually earns his living thereby. A married woman may be entitled to exemption as a truckman.

A "teamster," within the meaning of a statute exempting the horses and wagon by which a teamster habitually earns his living, is a person who is engaged with his own team in the business of hauling freight for other persons for a consideration, and who habitually earns his living thereby; every one who drives a team is not necessarily a teamster in the sense of the statute but he must be engaged in that business.⁸⁹ To claim the benefits of these statutes a claimant must himself be a teamster; it is not sufficient that he furnishes the capital to start another in the teaming business.⁹⁰ He himself need not, however, necessarily drive, nor need he

68. U.S.—In re Whetmore, D.C.Or., 29 F.Cas.No.17,508, Deady 585.

69. Conn.—Atwood v. De Forest, 19 Conn. 513.
25 C.J. p 40 note 15.

70. Conn.—Enscoe v. Dunn, 44 Conn. 93, 26 Am.R. 430.

71. U.S.—In re Parker, D.C.Or., 18 F.Cas.No.10,724, 5 Sawy. 58.

72. La.—Farmers & Merchants Bank of Memphis v. Franklin, 1 La.Ann. 393.
25 C.J. p 40 note 19.

73. Okl.—Edgin v. Bell-Wayland Co., 149 P. 1145, L.R.A.1915F 916.
25 C.J. p 40 note 20.

74. Okl.—Hoyt v. Pullman, 152 P. 386, 51 Okl. 717, L.R.A.1916B 1288.
25 C.J. p 40 note 21.

75. Tex.—Hammond v. McFarland, Civ.App., 161 S.W. 47.

76. Tex.—Hammond v. McFarland, supra.

77. Mass.—Pierce v. Gray, 7 Gray 67.

78. Miss.—Whitcomb v. Reid, 31 Miss. 567, 66 Am.D. 579.

79. Mont.—Swanz v. Clark, 229 P. 1108, 71 Mont. 385.

80. U.S.—The Amelia, D.C.Ala., 183 F. 899.
"Wages" of seamen as exempt see infra § 47.

81. Mass.—White v. Dunn, 134 Mass. 271.
25 C.J. p 40 note 33.
Contra Ornstein v. Pittsburgh SS. Co., 209 Ill.App. 202.

82. U.S.—The Amelia, D.C.Ala., 183 F. 899.
25 C.J. p 40 note 34.

83. Hawaii.—Byrne v. Kaleiki, 22 Hawaii 160—Schnack v. Clark, 21 Hawaii 661.

84. U.S.—Telles v. Lynde, D.C.Cal., 47 F. 912.

85. U.S.—Hitchcock v. The St. Louis, D.C.Ky., 48 F. 312.

86. N.Y.—Bloomington Bros. v. Butler, 270 N.Y.S. 624, 150 Misc. 903.

Harbor pilot

While a pilot engaged solely in work in New York Harbor is a sea-

man, he cannot claim exemption under the federal statute since such statute is inapplicable to seamen engaged in coastwise shipping.

N.Y.—William Jackman Sons v. Hauffman, 287 N.Y.S. 177, 159 Misc. 182.

87. N.Y.—Michigan Furniture Co. v. Southern Pac. Co., 287 N.Y.S. 178, 158 Misc. 781.

88. U.S.—Blackton v. Gordon, N.J., 58 S.Ct. 417, 303 U.S. 91, 82 L.Ed. 683.

89. Iowa.—Wertz v. Hale, 234 N.W. 534, 212 Iowa 294—In re McClellan's Estate, 174 N.W. 691, 187 Iowa 866.
25 C.J. p 40 note 41.

Habitual use of team see supra subdivision b of this section.

"Teamster or other laborer" see infra subdivision d (11) of this section.

90. Cal.—Brusie v. Griffith, 34 C. 302, 91 Am.D. 695.
25 C.J. p 41 note 43.

be engaged in the business continually.⁹¹ A teamster may do hauling or team work outside the state without forfeiting his rights under the exemption law.⁹²

A married woman who owns a truck which her husband drives and by which she actually earns a living may be entitled to an exemption as a truckman.⁹³

(11) "Other Persons," "Other Laborers," "Other Tradesmen," Etc.

Generally, the statutory exemptions for "other person," "other laborer," etc. do not necessarily include all persons not specifically enumerated, but only such persons as are within the spirit and general intent of the statute; unless a different legislative intent is expressed, the person claiming exemption must be of the same kind as those enumerated.

The words "other person," "other laborer," etc., in a statute exempting property of any person engaged in specified occupations, "or other person," etc. do not necessarily include all persons not specially enumerated, but they include such persons only as are within the spirit and general intent of the statute,⁹⁴ so that, where one subdivision of an exemption statute refers specifically to persons in a particular occupation, they will not be included under the term "other person," contained in another

subdivision of the same statute.⁹⁵ Under the general rules of statutory construction, such terms are generally restricted to persons of the same kind as those enumerated.⁹⁶ The term "other laborer," as used in an exemption statute, may include one whose work is in connection with his own business and not as an employee working for wages or salary.^{96.5}

Although the words "other laborer," if taken alone, would refer to those only who are engaged in physical labor, see *supra* subdivision d (3) of this section, the term may be enlarged to include those engaged in mental labor, and will be, if the classes of persons enumerated, in connection with which the term is used, include those who are engaged in mental labor.⁹⁷

While the scope of the term "other person" or "other laborer" or "other tradesman" is generally determined by the enumeration of classes specifically referred to, it may be still further restricted by other provisions in the statute.⁹⁸ Where the intention of the legislature, disclosed by other parts of the same statute or by other statutes, is obviously not to restrict the operation of the words "other person" to persons of the same kind as those enumerated, the court will not construe the statute as having that effect.⁹⁹

91. Iowa.—Consolidated Tank-Line Co. v. Hunt, 48 N.W. 1057, 83 Iowa 6, 32 Am.S.R. 285, 12 L.R.A. 476. Nev.—Elder v. Williams, 16 Nev. 416.

However, it has been held that a statute granting exemption to a cart or truck by the use of which a cartman, drayman, or other laborer actually earns his living is intended to refer to the person actually driving the dray or truck and thereby earning his living. Accordingly, one who owns three trucks and rents them out to others at stated prices per day or per cubic yard of material hauled is neither a drayman nor a truckman within the meaning of the statute.

Hawaii.—Rapoza v. Sheldon, 30 Hawaii 51.

92. Iowa.—Whicher v. Long, 11 Iowa 48.

93. Hawaii.—Kaiser v. Pua, 23 Hawaii 584.

94. Ariz.—Standard Sanitary Mfg. Co. v. Priser, 31 P.2d 497, 43 Ariz. 352.

Minn.—Poznanovic v. Maki, 296 N.W. 415, 209 Minn. 379. 25 C.J. p 41 note 48.

95. Wis.—Bevitt v. Crandall, 19 Wis. 581. 25 C.J. p 41 note 49.

96. Ariz.—Standard Sanitary Mfg. Co. v. Priser, 31 P.2d 497, 43 Ariz. 352—Meyers v. Rosenzweig, 232 P. 886, 27 Ariz. 286.

Cal.—Corpus Juris cited in Bertozzi v. Swisher, 81 P.2d 1016, 1018, 27 C.A.2d 739. 25 C.J. p 41 note 51.

Debtors held not "other persons"

(1) Manager of business consisting of an automobile salesroom and sales business and an automobile repair garage in connection therewith in which the work was done by employees for the profit of the owner. Iowa.—First Nat. Bank v. Larson, 239 N.W. 134, 213 Iowa 468.

(2) A farmer is not entitled to exemption as a mechanic, miner, or "other person," within statute exempting from levy and sale the tools and instruments of a mechanic, miner, or "other person."

Minn.—Poznanovic v. Maki, 296 N.W. 415, 209 Minn. 379.

Electrical contractor and repairman is not an "other laborer" within statute exempting from execution a motor vehicle by use of which a cartman, drayman, truckman, huckster, hackman, teamster, chauffeur, or "other laborer" habitually earns his living.

Ariz.—Standard Sanitary Mfg. Co. v. Priser, 31 P.2d 497, 43 Ariz. 352.

96.5 Iowa.—In re Haines' Estate, 12 N.W.2d 812, 234 Iowa 396.

Determination held authorized

Where deceased had operated and actively supervised the operation of a coal mine, determination that he was within term "other laborer" as used in exemption statute was authorized.

Iowa.—In re Haines' Estate, *supra*.

97. Iowa.—Corpus Juris Secundum cited in In re Haines' Estate, 12 N.W.2d 812, 814, 234 Iowa 396—Lames v. Armstrong, 144 N.W. 1, 162 Iowa 327, 49 L.R.A., N.S., 691, Ann.Cas.1916B 511. 25 C.J. p 41 note 53.

98. Pa.—Steininger v. Butler, 17 Pa. Co. 97. 25 C.J. p 41 note 54.

99. Kan.—Wamberg v. Hart, 221 P. 547, 114 Kan. 906, 36 A.L.R. 666. 25 C.J. p 41 note 55.

Real estate agent

Statute exempting from execution "the necessary tools and instruments of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business," is broad enough to cover the office furniture of a real estate agent. Kan.—Wamberg v. Hart, *supra*.

§ 25. — Persons in Military or Naval Service

Statutes giving exemptions to persons in the military service of the state do not apply to persons in the military service of the United States and persons in the naval service are not entitled to the benefit of a statute exempting soldiers in actual military service.

In some states exemptions are given to persons in the military service of the state.¹ Under these

statutes, persons mustered into the military service of the United States are not within the statute, even though the military force is raised to protect the frontier of the state, and in response to a requisition by the federal government to the governor of the state.² A person in the naval service is not entitled to the benefit of a statute exempting the property of "soldiers in actual military service."³

III. PROPERTY EXEMPT

A. NATURE AND CHARACTER

1. IN GENERAL

§ 26. General Statement

The nature and character of the property which a debtor may claim as exempt are determined and limited by the exemption statute; and the right to an exemption is to be determined as of the date of the seizure.

The nature and character of the property which a debtor may claim as exempt are determined by the exemption statute, and the exemption is limited to the particular kind of property, or the specific articles, which the statute prescribes,⁴ and then only to the value limited.⁵ The right to an exemption is to be determined as of the date of the seizure⁶ and with reference to the condition of things then existing.⁷

The conversion of nonexempt to exempt property does not of itself invest a creditor with the right to reach such property.⁸

§ 27. "Personal Property" or "Property" under General Clauses

Under a statute exempting "personal property," the debtor may select such personal property as he sees fit, provided it does not exceed the value limited.

Under a statute exempting "personal property" generally to a certain amount, to be selected by the debtor, he may claim any he may see fit, provided it is personal property⁹ and does not exceed the limitation as to value.¹⁰ Where such a statute uses the term "property" only, the range of selection includes debts, earnings, salaries, wages, income from trust funds, and profits,¹¹ and, as appears infra § 30, real property. Within the meaning of a statute exempting "any other property . . . or debts," the rent answered as owing to a judgment defendant by a garnishee tenant constitutes both "property" and "debts."^{11.5}

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| <p>1. Tex.—Highsmith v. Ussery, 25 Tex.Supp. 96.</p> <p>2. Tex.—Highsmith v. Ussery, supra.</p> <p>3. Iowa.—Abrahams v. Bartlet, 18 Iowa 513.</p> <p>4. Cal.—Hammond v. Hoskins, 79 P. 2d 1116, 30 C.A.2d Supp. 779.</p> <p>Iowa.—Iowa Methodist Hospital v. Long, 12 N.W.2d 171, 234 Iowa 843, 150 A.L.R. 440.</p> <p>Pa.—Berman v. Nicholas, 31 Luz. Leg.Reg. 228.</p> <p>25 C.J. p 42 note 58.</p> <p>Selection by debtor see infra § 138.</p> <p>"For the courts to add to the statute any articles not enumerated would in effect be judicial legislation."</p> <p>Cal.—Crown Laundry & Cleaning Co. v. Cameron, 179 P. 525, 39 C.A. 617.</p> <p>Idaho.—Young v. Wright, 290 P.2d 1086, 1087, 77 Idaho 244.</p> <p>Inherited property</p> <p>Property is not exempt from debts merely because it is inherited.</p> | <p>Wash.—Kelley v. Butler, 47 P.2d 664, 182 Wash. 310.</p> <p>State moratorium act declaring that, in addition to items provided in exemption statute, head of family may retain live stock, farm products, farm utensils or machinery, household goods, or "other property" not exceeding five hundred dollars in value, held intended to enlarge exemptions of same general class and kind as those set out in exemption statute.</p> <p>U.S.—In re Pulis, D.C.Iowa, 15 F. Supp. 19.</p> <p>5. Cal.—Hammond v. Hoskins, 79 P. 2d 1116, 30 C.A.2d Supp. 779.</p> <p>6. Conn.—Montague v. Richardson, 24 Conn. 338, 63 Am.D. 173.</p> <p>25 C.J. p 42 note 59.</p> <p>7. Iowa.—First Nat. Bank v. Larson, 239 N.W. 134, 213 Iowa 468.</p> <p>25 C.J. p 42 note 60.</p> <p>8. Iowa.—American Sav. Bank of Marengo v. Willenbrock, 228 N.W. 295, 209 Iowa 250.</p> | <p>Conversion of nonexempt to exempt property as fraudulent conveyance see infra § 118.</p> <p>9. Ala.—Jones v. Motley, 78 Ala. 370.</p> <p>25 C.J. p 80 note 8.</p> <p>10. Miss.—Bernheim v. Andrews, 3 So. 75, 65 Miss. 28.</p> <p>25 C.J. p 80 note 10.</p> <p>11. Ind.—Martin v. Loula, 194 N.E. 178, 208 Ind. 346, rehearing denied 195 N.E. 881, 208 Ind. 346, followed in White v. White, 194 N.E. 355, 208 Ind. 314, rehearing denied 196 N.E. 95, 208 Ind. 314, followed in Indianapolis Morris Plan Co. v. Fitzgerald, 194 N.E. 355, 207 Ind. 708, Tam v. East Side Loan Co., 194 N.E. 355, 207 Ind. 709, Benson v. Sandusky, 194 N.E. 355, 207 Ind. 709, and Barlow v. Kellar, 194 N.E. 356, 207 Ind. 709.</p> <p>11.5 U.S.—U. S. v. Hackett, D.C.Mo., 123 F.Supp. 106.</p> |
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§ 28. — Choses in Action

Although there is some authority to the contrary, the term "personal property" in exemption statutes is generally held to include choses in action.

The term "personal property" is generally held to include choses in action, whether in statutes making an absolute exemption of a certain amount of property or in statutes allowing the debtor to select a certain amount of property, either generally or in lieu of certain articles specifically exempt.¹² However, in some cases the courts have construed an exemption of "personal property" to be limited to tangible property and not to include choses in action;¹³ and under a statute so providing an exemption cannot be taken in money due.¹⁴

Exemptions under a general clause exempting personal property have been held to include a note,¹⁵ money due from a bank¹⁶ or from an insurance company on an insurance policy,¹⁷ or a debt due from any other person.¹⁸ A legatee or distributee may claim his exemption out of his share of the decedent's estate,¹⁹ but not as against the debts which he owes the estate.²⁰ Rents and profits of a life estate,²¹ and even a vested expectant interest of a debtor in a sum of money payable at his own death, or at the death of another person,²² may be claimed to be exempt as "personal property" under the statute. A judgment, although a mere chose in action, is "personal property" within the meaning of the statutes of exemption.²³ An

equity of redemption in personal property may be claimed by the debtor as exempt,²⁴ subject, however, according to at least one authority, to the qualification that he has no other property which he can claim as exempt.²⁵

§ 29. — Money

In the absence of a statutory or constitutional prohibition, the debtor may claim his exemption of "personal property" in money, and even out of money in the custody of the law.

A judgment debtor has been held entitled to claim exemption of money on deposit in the bank;^{25.50} and in the absence of a constitutional or statutory provision forbidding it,²⁶ a debtor may claim his exemption of "personal property" in money.²⁷ Under a statute so providing, there can be no valid allowance of cash as an exemption unless the order of court provides for its investment in personal property;²⁸ but this provision is not applicable where the property exempted is an interest in a judgment.²⁹ Where the property levied on consists of real estate and the debtor elects to retain the amount exempt to him therefrom, and the property cannot be divided without injury to the whole, the debtor may, under authorizing statute, receive the amount of his exemption in money from the proceeds of the sale.³⁰

"Money due the debtor," as excepted by statute from property which may be exempt, includes

12. Fla.—Tracy v. Lucik, 189 So. 430, 138 Fla. 188.

Miss.—First Nat. Bank of Hattiesburg v. Ellison, 99 So. 573, 135 Miss. 42.

25 C.J. p 81 note 26.

13. Vt.—Edson v. Trask, 22 Vt. 18. 25 C.J. p 81 note 27.

14. Ill.—Finlen v. Howard, 18 N.E. 560, 126 Ill. 259.

Ohio.—City Loan & Savings Co. v. Guthridge, 22 N.E.2d 573, 61 Ohio App. 202.

25 C.J. p 80 note 14.

Corporate stock

Under exemption statute providing that exemption shall not be allowed from any money due debtor, a bankrupt by virtue of stock ownership in a corporation was not a "creditor" of the corporation as respects right to claim exemption of stock in bankruptcy proceeding, since stock certificate shows an undivided interest in the assets of the corporation and is not a credit or a debt owing by the corporation to the stockholders in a sense in which the term is generally used.

U.S.—In re Feilchenfeld, C.C.A.III., 99 F.2d 710.

15. Ind.—Smith v. Sills, 25 N.E. 881, 126 Ind. 205.

25 C.J. p 81 note 28.

16. Fla.—Tracy v. Lucik, 189 So. 430, 138 Fla. 188.

Ill.—Fanning v. Jacksonville First Nat. Bank, 76 Ill. 53.

Tenn.—Sherwin-Williams Co. v. Morris, 156 S.W.2d 350, 25 Tenn.App. 272.

17. Ariz.—Wilson v. Lowry, 52 P. 777, 5 Ariz. 335.

25 C.J. p 81 note 30.

18. Ind.—Coppage v. Gregg, 27 N.E. 570, 1 Ind.App. 112.

25 C.J. p 81 note 31.

19. S.C.—Swandale v. Swandale, 25 S.C. 389.

20. Mo.—Duffy v. Duffy, 55 S.W. 1002, 155 Mo. 144.

21. Pa.—Sener v. Scherff, 10 Pa.Co. 529.

22. Pa.—In re Bennett's Case, 6 Phila. 472.

23. Ark.—Draffin v. Smith, 37 S.W. 307, 63 Ark. 83.

25 C.J. p 82 note 36.

24. N.C.—Gaster v. Hardie, 75 N.C. 460.

Contra Moffett v. Sheehey, 52 Ill.App. 376.

25. Ind.—McCray v. Whitney, 104 N. E. 979, 56 Ind.App. 94.

25.50 Tenn.—Sherwin-Williams Co. v. Morris, 156 S.W.2d 350, 25 Tenn. App. 272.

26. Ga.—Johnson v. Dobbs, 69 Ga. 605.

25 C.J. p 80 notes 13, 14.

Money due the debtor may be garnished, although his whole property, including the money, is less than is allowed as an exemption.

Ill.—Finlen v. Howard, 26 Ill.App. 66, affirmed 18 N.E. 560, 126 Ill. 259.

27. N.J.—Corpus Juris cited in Charlton v. Mitchell, 2 A.2d 367, 368, 121 N.J.Law 285.

25 C.J. p 80 note 12.

Money in lieu of specific exemption see infra § 56.

28. Ga.—Hahn v. Allen, 20 S.E. 74, 93 Ga. 612.

25 C.J. p 81 note 16.

29. Ga.—Johnson v. Redwine, 33 S. E. 676, 105 Ga. 449.

30. Pa.—Appeal of Hufman, 81 Pa. 329.

Kerns v. Beam, 11 Lanc.Bar 183.

money held by an administratrix as one distributee's share of the proceeds of the sale of a decedent's realty, after an order by the probate court for the distribution of the decedent's estate.^{30.5}

Money in custody of law. Under some authorities, the debtor may claim his exemption out of money in the custody of the law, as, for instance, out of a fund paid into court,³¹ or money in the hands of the sheriff³² or receiver.³³ A debtor who has failed to make his selection of specific property to which he is entitled as exempt will not be allowed an exemption in the proceeds of its sale;³⁴ but this rule appears not to be applicable where the debtor is not guilty of laches.³⁵

Although exemption cannot be claimed, as a general rule, against a mortgage in the foreclosure thereof, see *infra* § 106, it is held that the exemption may be allowed out of the surplus proceeds of the sale.³⁶

"Money and debts due." Where a shifting stock of merchandise of a debtor is destroyed by fire, the debtor's claim to the proceeds of a policy of fire insurance on the merchandise becomes fixed and is entitled to be claimed as exempt from execution as "moneys and debts due," to the statutory amount, notwithstanding the stock of merchandise is itself not exempt.^{36.5}

§ 30. — Real Property

The term "property" in an exemption statute includes real property.

When the statute in terms exempts "personal property" only, a debtor cannot claim real property,³⁷ but where the general statute exempts "property" to a certain value, and allows the debtor to select either real or personal property, the debtor may claim his entire exemption out of real estate levied on, even though he may own personal property.³⁸

2. SPECIFIC EXEMPTIONS

§ 31. In General

Under empowering statutes, the proceeds of a judgment for personal injuries or of disability insurance may be exempt; but a statutory exemption of the proceeds of a life insurance policy is generally held inapplicable to disability benefits received under such a policy.

Under a statute so providing, the proceeds of a judgment for personal injuries are exempt,³⁹ but such statute does not apply to a recovery under the disability provisions of an indemnity contract.⁴⁰

Disability insurance. In the absence of a statute so providing, the proceeds realized under a policy of disability insurance or under the disability provision of a life insurance policy are not exempt.⁴¹ Although there is some authority to the

contrary,⁴² it is generally held that a statutory exemption of the proceeds of a life insurance policy does not apply to disability benefits received under such a policy.⁴³ It has been held that, under a statute exempting the "proceeds and avails" of a life insurance policy in certain cases, the proceeds under the disability clause of such a policy are exempt,⁴⁴ but there is authority to the contrary.⁴⁵ In any event, the exemption of disability benefits is no broader than that accorded death benefits payable under the policy, and where a statute does not exempt death benefits, if payable to insured, disability benefits, if payable to insured, are not exempt.⁴⁶

30.5 Ohio.—Caton v. Kohler, 44 N. E.2d 138, 69 Ohio App. 455.

31. U.S.—In re Jones, C.C.Kan., 13 F.Cas.No.7,445, 2 Dill 343. 25 C.J. p 81 note 19.

32. Md.—Fowler v. State, 58 A. 444, 99 Md. 594. 25 C.J. p 81 note 20.

33. Ind.—Collins v. C. L. Centlivre Brewing Co., 125 N.E. 791, 73 Ind. App. 570.

34. Ark.—Surratt v. Young, 18 S.W. 539, 55 Ark. 447. Pa.—Appeal of Weaver, 18 Pa. 307.

35. Fla.—Carter v. Carter, 20 Fla. 558, 51 Am.R. 618. 25 C.J. p 81 note 23.

36. Ala.—Beard v. Smith, 71 Ala. 568. 25 C.J. p 81 note 25.

36.5 Va.—Goldburg Co. v. Salyer, 50 S.E.2d 272, 188 Va. 573.

37. N.C.—Dortch v. Benton, 3 S.E. 638, 98 N.C. 190, 2 Am.S.R. 331. 25 C.J. p 82 note 40.

38. Pa.—McNair v. Riesher, 8 Pa. Co. 494.

39. Miss.—Chattanooga Sewer Pipe Works v. Dumler, 120 So. 450, 153 Miss. 276, 62 A.L.R. 999.

40. Miss.—Chattanooga Sewer Pipe Works v. Dumler, *supra*.

41. Ohio.—Baxter v. Old National-City Bank, 189 N.E. 514, 46 Ohio App. 533.

42. Pa.—Baranovich v. Horwatt, 173 A. 676, 113 Pa.Super. 467. Commonwealth v. Guardian Trust Co., 28 Pa.Dist. & Co. 190.

43. Fla.—Western Casualty & Surety Co. v. Rotter, 191 So. 78, 139 Fla. 854.

Miss.—Chattanooga Sewer Pipe Works v. Dumler, 120 So. 450, 153 Miss. 276, 62 A.L.R. 999. Ohio.—Baxter v. Old National-City Bank, 189 N.E. 514, 46 Ohio App. 533.

Exemption of life insurance see *infra* §§ 39-42.

44. N.Y.—Wittman v. Littlefield, 256 N.Y.S. 471, 142 Misc. 916, affirmed 257 N.Y.S. 885, 235 App.Div. 831.

45. N.Y.—Herbach v. Herbach, 265 N.Y.S. 144, 148 Misc. 33.

46. N.Y.—Horowitz v. Weinberg, 281 N.Y.S. 644, 156 Misc. 629, affirmed 284 N.Y.S. 989, 246 App.Div. 701—Lion Credit Union v. Gutman, 265 N.Y.S. 479, 148 Misc. 620.

A statute exempting the proceeds of disability insurance applies to money realized under the disability provisions of a life insurance policy.⁴⁷

A radio is not a musical instrument within a statute exempting such property.⁴⁸

A television set, likewise, is not exempt as a musical instrument.^{48.5}

Children's playthings, except possibly those that are uncommon and overly expensive, have been held exempt under general statutory language.^{48.10}

A merchant's commercial books have been considered exempt from sale under execution.^{48.15}

Building and loan association stock. An exemption of the "shares of stock" in a building and loan association has been considered to refer to an aliquot part of the total stock of an association, and not to refer to withdrawable accumulative shares issued by such an association.^{48.20}

Trust funds. If the statute so provides, a judgment creditor is precluded from proceeding by way of execution against income from trust funds owing to the debtor which does not exceed a certain sum per week.^{48.25}

§ 32. Arms and Accoutrements

Under statutes so providing, arms and accoutrements may be exempt.

Arms are not exempt unless made so by statute.⁴⁹ Under statutes so providing, the arms and accoutrements or equipment of militiamen are ex-

empt.⁵⁰ Under such a statute the arms of an artilleryman are exempt;⁵¹ but a horse and saddle owned by a cavalryman are not exempt under a statute exempting a militiaman's uniform, arms, ammunition, and accoutrements.⁵² Under a statute exempting "the troop horse of each trooper, duly entered and registered with the captain of the troop," a horse "duly entered and registered" is exempt.⁵³ A statute exempting "such military arms and accoutrements as the debtor is required by law to furnish" is of a temporary character, as applied to individuals, and continues as long only as the debtor is bound by law to furnish arms and accoutrements; when the obligation ceases, the exemption ceases.⁵⁴

§ 33. Burial Lots; Property of Cemetery

Under statutes so providing in varying terms, burial grounds and cemetery lands may be exempt.

Under statutes so providing, a debtor may have an exemption in land which is set apart and used as burial ground.⁵⁵ Under particular statutes the exemption may be limited to private or family burying grounds,⁵⁶ or extended to lots or interests in public burying grounds.⁵⁷ Under some statutes the exemption is given in broad terms to all debtors,⁵⁸ and under such statutes cemetery lands owned by a cemetery association are exempt;⁵⁹ or the exemption may be restricted to heads of families.⁶⁰ It is generally required that the lands be set apart or in actual use for burial purposes in order to be exempt.⁶¹

47. Va.—Atlantic Life Ins. Co. v. Ring, 187 S.E. 449, 167 Va. 121, 106 A.L.R. 1064.

The purpose of statute providing that disability benefits payable on insurance contract should not be liable to execution, attachment, garnishment, etc., was to exempt from such process any money or beneficial interest payable on any insurance contract for disability resulting from injury or sickness.

N.J.—Riggin v. Cumberland Nat. Bank of Bridgeton, 4 A.2d 285, 125 N.J.Eq. 221.

48. Iowa.—Dunbar v. Spratt-Snyder Co., 226 N.W. 22, 208 Iowa 490, 63 A.L.R. 1016.

48.5 U.S.—Michealson v. Elliott, C. A.Minn., 209 F.2d 625.

48.10 R.I.—Arch Lumber Co. v. Dohm, 98 A.2d 840, 81 R.I. 69.

48.15 U.S.—In re Rubinfeld, D.C.N.Y., 52 F.Supp. 480.

48.20 U.S.—In re Mulkins & Crawford Elec. Co., D.C.Cal., 145 F.Supp. 146.

48.25 N.J.—Chelsea-Wheeler Coal Co. v. Marvin, 35 A.2d 874, 134 N.J.Eq. 432.

Statute applicable only to involuntary alienation
N.J.—Chelsea-Wheeler Coal Co. v. Marvin, supra.

49. Tex.—Choate v. Redding, 18 Tex. 579.

25 C.J. p 47 note 22.

50. N.Y.—Shields v. Craney, 3 Wend. 274.

25 C.J. p 47 note 24.

51. S.C.—Crocker v. Hunt, 13 S.C.L. 352.

52. Vt.—Fry v. Canfield, 4 Vt. 9.

53. S.C.—Southwell v. Harley, 37 S.C.L. 180.

54. Vt.—Owen v. Gray, 19 Vt. 543. 25 C.J. p 48 note 28.

55. Ala.—Jones v. Lacey, 125 So. 635, 220 Ala. 390.

Property occupied by graves of human beings cannot be sold under execution.

Cal.—Peebler v. Danziger, 231 P.2d 895, 104 C.A.2d 491.

56. N.Y.—Cox v. Stafford, 14 How. Pr. 519.

57. Mo.—Mount v. Yount, 281 S.W. 119, 220 Mo.App. 187. 25 C.J. p 80 note 96.

58. Neb.—Pawnee City First Nat. Bank v. Hazels, 89 N.W. 378, 63 Neb. 844, 56 L.R.A. 765.

59. N.J.—Speer v. Locust Wood Cemetery Co., 66 A. 1068, 72 N.J. Eq. 821.

Mortgages covering cemetery lands
Persons who purchased mortgages knowing that they covered cemetery lands would be required to pursue statutory means of sequestration of income irrespective of whether the process issued from a judgment at law or from a money decree, rather than a sale of lands not presently used for burial purposes.

N.J.—Abramowitz v. Washington Cemetery Ass'n, 51 A.2d 461, 139 N.J.Eq. 293.

60. Iowa.—Swisher v. Swisher, 137 N.W. 1076, 157 Iowa 55.

61. Tex.—Peterson v. Stolz, Civ. App., 269 S.W. 113. 25 C.J. p 80 note 2.

It has been said that it is impossible to reconcile the state's policy to "preserve and maintain the burial places of the dead" with any policy permitting the levy and sale of any part of a cemetery company's personal property which is necessary for the care and maintenance of the cemetery.^{61.5}

Under a statute providing that "lands appropriated and set apart as burial grounds, either for public or private use . . . shall not be subject to sale on execution on any judgment to be hereafter recovered," cemetery lands appropriated and set apart for that purpose are absolutely exempt, and the owner of lots therein is entitled to exemption in them notwithstanding he derives an income from their sale.⁶²

Exemption after death. The lot owner's interest continues to be exempt from his debts after his death.⁶³

Exemption of specific cemetery property. Where the statute exempts specific property of cemetery associations from execution, other property owned by such an association is not exempt.⁶⁴

§ 34. Fodder or Food for Exempt Animals

Under statutes exempting crops for fodder for animals, only such crops as are suitable for fodder or were planted for that purpose are exempt. Under most authorities, the fodder exemption is conditional on the debtor's ownership of the animals for which fodder is exempted.

In order to exempt food for live stock there must be an express provision in the statute;⁶⁵ food for stock is not exempt merely because the stock is exempted.⁶⁶ Under a statute exempting certain

crops for fodder for animals, only those crops which are suitable for the purpose are exempt,⁶⁷ and it is not sufficient to show that the crops may have been fed to animals under certain circumstances, but it must be shown that they are such as are ordinarily used for that purpose,⁶⁸ or that they were planted for fodder purposes and not for sale;⁶⁹ but under a statute exempting all "forage on hand for home consumption" it is not necessary that a particular kind of forage be indispensable, if it is suitable for feeding stock.⁷⁰ Crops which are not suitable cannot be made exempt on the ground that they can be sold and suitable crops purchased with the proceeds;⁷¹ but the fact that the farmer intends to sell the crops and purchase similar crops for fodder at the place to which he is moving does not bar the exemption claim.⁷²

Statutes in a few states have been construed to give an exemption absolute in terms, and not dependent on the debtor's owning all the animals for which fodder is exempted;⁷³ but according to the weight of authority the fodder exemption is conditional on the debtor's ownership of the exempt animals.⁷⁴ The right of a debtor to hold fodder as exempt under a statute exempting "all provisions and forage on hand for home consumption" is not defeated by the fact that he owns more animals than are exempt.⁷⁵

Whether fodder is exempt as necessary may depend on the season of the year in which the levy is made,⁷⁶ but where the statute exempts sufficient fodder for a specified period, a debtor who does not need the food for his animals at the time of the levy cannot claim it at any subsequent time, even though it remains unsold.⁷⁷

Lands of cemetery company which are part of tract laid out for burial purposes cannot be sold to satisfy judgment, even if they are not presently used for such purposes. N.J.—Gottlieb v. West Ridgelawn Cemetery, 158 A. 422, 109 N.J.Eq. 585.

Property not dedicated as cemetery Portion of private property designated as cemetery, which did not contain graves of human beings and which evidence did not show to have been dedicated as cemetery in compliance with exemption statute, was not exempt from execution. Cal.—Peebler v. Danziger, 231 P.2d 895, 104 C.A.2d 491.

61.5 Mich.—Forest Hill Cemetery Co. v. City of Ann Arbor, 5 N.W.2d 564, 303 Mich. 56.

62. Neb.—Pawnee City First Nat. Bank v. Hazels, 89 N.W. 378, 63 Neb. 844, 56 L.R.A. 765.

63. Iowa.—Swisher v. Swisher, 137 N.W. 1076, 157 Iowa 55. 25 C.J. p 80 note 6.

64. Ohio.—Canton Cemetery Ass'n v. Slayman, 121 N.E. 819, 99 Ohio St. 28.

65. N.Y.—Rue v. Alter, 5 Den. 119. Farm stock see *infra* § 44.

66. N.Y.—Rue v. Alter, *supra*. 25 C.J. p 86 note 28.

67. Tex.—Stephens v. Hobbs, 36 S. W. 287, 14 Tex.Civ.App. 148. 25 C.J. p 46 note 73.

68. La.—Fallin v. Stovall, 74 So. 911, 141 La. 220. 25 C.J. p 46 note 74.

69. La.—Fallin v. Stovall, *supra*.

70. Tex.—Stephens v. Hobbs, 36 S. W. 287, 14 Tex.Civ.App. 148.

Oats used for feeding livestock held exempt

Tex.—Hickman v. Hickman, Civ.App., 228 S.W.2d 565, affirmed 234 S.W.2d 410, 149 Tex. 439.

71. Kan.—Voss v. Goss, 84 P. 564, 73 Kan. 120, 117 Am.S.R. 457.

72. Idaho.—Aslett v. Evans, 280 P. 103b, 48 Idaho 206.

73. Vt.—Kimball v. Woodruff, 55 Vt. 229. 25 C.J. p 46 note 78.

74. Kan.—Byrnes v. John Deere Plow Co., 85 P. 819, 74 Kan. 97. 25 C.J. p 46 note 79.

75. Tex.—Burris v. Booth, Civ.App., 40 S.W. 186.

76. N.Y.—Farrell v. Higley, Lator 87.

77. Ohio.—Donahue v. Steele, 1 Ohio Dec. (Reprint) 130, 2 West.L.J. 402.

§ 35. Food and Provisions for Debtor and Family

Under statutes exempting food and provisions for the debtor and his family, only provisions necessary for the sustenance of those persons are exempt; provisions held for sale or as part of the debtor's stock in trade are not exempt. By the weight of authority, the term "provisions" includes crops not yet severed from the soil.

To come within a statutory provision exempting "all provisions . . . on hand for home consumption," articles must be shown to fulfill these requirements.^{77, 50} Under statutes making specific provision for the exemption of food, provisions, and supplies for the sustenance of the debtor and his family, while it has been held that the term "provisions" can include only articles which are in a condition to be consumed as food or to be cooked as food,⁷⁸ this definition has been criticized as too restrictive.⁷⁹

Articles exempt. Under a statute exempting in broad terms "provisions" as such, corn is exempt,⁸⁰ but tobacco is not.⁸¹ Whether unthreshed wheat or oats are "provisions" has been held a question of fact for the jury.⁸² Under a statute which exempts "all necessary meat, fish, flour and vegetables actually provided for family use," Indian corn meal⁸³ and wheat⁸⁴ are not exempt as "flour." Under a statute exempting a debtor's "corn and grain, necessary and sufficient for the sustenance of himself and his family," oats, not being intended for human food, are not exempt,⁸⁵ nor is a barrel of flour purchased by the debtor and manufactured from grain of which he was never the owner.⁸⁶

Necessity. Where the statute exempts provisions "necessary" for the sustenance of the debtor and his family, necessary provisions include only such as are necessary for the debtor and the family,⁸⁷ and do not include provisions required for servants or farm hands,⁸⁸ or food prepared by a res-

taurant keeper for his boarders and customers.⁸⁹ Provisions required for a family would not be "necessary provisions" for an unmarried man.⁹⁰

Property for sale or exchange generally. It is held that the articles claimed exempt as provisions must be such as directly contribute to the sustenance of the debtor or his family, and that it is not sufficient that the articles may by sale and exchange indirectly contribute to the support of the family;⁹¹ but if the provisions are actually necessary for the support of the debtor's family the debtor's exemption will not be defeated by an intention on the part of the debtor to sell them or exchange them for other articles of prime necessity in his family, or even to obtain the means to pay his taxes; and this is so even though the debtor's intention is in process of being carried out.⁹²

Stock in trade. Articles which are in their nature provisions, but which are kept as part of a store of merchandise, and not for the use of the family, are not exempt as provisions,⁹³ even though the statute does not expressly require that the "provisions" shall have been provided for family use;⁹⁴ nor will the fact that the provisions are procured and kept both for the purpose of sale and for the use of the debtor's family avail the debtor where there has been no setting apart of the portion designed for family use,⁹⁵ and, in the absence of actual separation, it matters not that the debtor was in the habit of carrying home small quantities from the store as needed.⁹⁶

Crops. By the weight of authority, the term "provisions" includes crops not yet severed from the soil,⁹⁷ although it has been held, under a statute exempting "provisions actually prepared and designed for the use of the family," that a field of standing corn is not "provisions actually prepared and designed" for family use, and therefore not

77.50 Tex.—Hickman v. Hickman, Civ.App., 228 S.W.2d 565, affirmed 234 S.W.2d 410, 149 Tex. 439.

78. Ga.—Wilson v. McMillan, 6 S. E. 182, 80 Ga. 733.
25 C.J. p 44 note 18.
Property in lieu of provisions see infra § 56.

79. Ga.—Cochran v. Harvey, 14 S.E. 580, 88 Ga. 352.

80. Ark.—Atkinson v. Gatcher, 23 Ark. 101.

La.—Dejean v. Lee, 50 So. 25, 124 La. 239.

81. Ky.—Stone v. Hales, 7 Ky.Op. 110.

82. N.H.—Plummer v. Currier, 52 N. H. 287.

83. N.Y.—Lashaway v. Tucker, 15 N. Y.S. 490, 61 Hun 6.

84. N.Y.—Salsbury v. Parsons, 36 Hun 12.

85. Me.—Blake v. Baker, 41 Me. 78.

86. Me.—Tucker v. Lane, 23 Me. 537.

87. Ky.—McMurray v. Shuck, 6 Bush 111, 99 Am.D. 662.

88. Ky.—McMurray v. Shuck, supra.
25 C.J. p 44 note 31.

89. Iowa.—Coffey v. Wilson, 21 N. W. 602, 65 Iowa 270.

90. Me.—Blake v. Baker, 41 Me. 78.

91. Kan.—George v. Hunter, 29 P. 1148, 48 Kan. 651, 30 Am.S.R. 325.

Ky.—Herndon v. Waters, 14 Ky.L. 667.

92. N.Y.—Shaw v. Davis, 55 Barb. 389.

93. U.S.—In re Lentz, D.C.S.D., 97 F. 486.
25 C.J. p 45 note 38.

Stock in trade as exempt generally see infra § 45.

94. N.H.—Bond v. Tucker, 18 A. 653, 65 N.H. 165.

95. Mass.—Nash v. Farrington, 4 Allen 157.

25 C.J. p 45 note 40.

96. Mo.—State v. Conner, 73 Mo. 572.

97. Mass.—Mulligan v. Newton, 16 Gray 211.

25 C.J. p 45 note 43.

Crops as food for animals see supra § 34.

exempt under the statute.⁹⁸ Creditors may be prohibited by statute from levying on crops before a fixed date of the year in which they are grown, a date late enough to ensure their full growth.⁹⁹

A statute specifically exempting crops from execution has been held to mean only those crops which are suitable for breadstuffs.¹ A statute exempting crops necessary to the farm to which they are attached exempts the crops only as long as they are attached; there is no right to exemption in severed crops under such statutes, even though they are grown, not as money crops, but for family consumption.²

A statute which prohibits the seizure on execution of articles named "separately from the land to which they are attached" is not, properly speaking, an exemption statute, but a statute regulating seizure on execution, and the crops, under such statute, are not, as such, exempt.³

§ 36. — Food Animals

Under the varying language of particular statutes, food animals belonging to the debtor have, in a number of cases, been held to be exempt.

Under statutes so providing, food animals belonging to the debtor and necessary for the support of him and his family are exempt.⁴ Where the statute exempts specific animals, their use, or the necessity thereof, for the support of the debtor's family need not appear.⁵ Food animals have been held to be included under statutes exempting all provisions on hand "or growing for home consumption,"⁶ but not under a statute exempting "provisions" without qualification.⁷ A statute exempting sufficient provisions for a family for one year, any deficiency to be made up by setting apart to the debtor "so much of the live stock suitable for the purpose, and of the growing crop, if any, as may be

necessary to supply it," is construed to apply only to live stock that can be used for food purposes.⁸

Statutes exempting a cow for the use of a debtor have been held to include a heifer,⁹ either where the debtor has no other animal of the kind¹⁰ or where the owner intends to keep the heifer as a milch cow.¹¹ A yearling heifer, however, is not a "calf" within the meaning of a statute exempting a certain number of cows "and a calf," a calf being defined as still being fed by its mother.¹²

A statute which exempts "one swine" to the debtor includes a hog that has been killed.¹³ A statute exempting one hog and the pork of the hog when slaughtered does not exempt a hog in addition to the pork of the slaughtered hog;¹⁴ but a statute exempting a debtor's "best swine or meat of a swine" is construed to exempt one live animal in any event, and the fact that a bankrupt has part of the meat of a swine does not deprive him of the right to select his best remaining swine as exempt.¹⁵ A statute which exempts pork "on foot" includes hogs of all sizes and conditions and at all seasons of the year which may, in due season and at the convenience of the debtor, be prepared for and converted into pork regardless of the question whether or not, at the time of the levy, they are in fit condition for slaughter.¹⁶

§ 37. Household Goods and Furniture

Under statutes generally prevailing, household goods and furniture are exempt, if necessary for, and used by, the debtor and his family; they are not exempt if used commercially, as for a boarding house or restaurant or for the debtor's shop or office.

Under statutes generally prevailing, household goods or furniture, or specific articles thereof, or a limited amount in value thereof, is exempt.¹⁷ A statute exempting household goods should be liberally

98. Ohio.—Donahue v. Steele, 1 Ohio Dec., Reprint, 130, 2 West.L.J. 402.

99. Tenn.—Layman v. Denton, Ch., 42 S.W. 153.

1. Ky.—Herndon v. Waters, 14 Ky. L. 667.
25 C.J. p 45 note 46.

2. La.—Hinton v. Roane, 50 So. 798, 124 La. 927, 134 Am.S.R. 526.
25 C.J. p 45 note 49.

3. La.—Hinton v. Roane, supra.

4. Mo.—Wabash R. Co. v. Bowring, 77 S.W. 106, 103 Mo.App. 158.
25 C.J. p 45 note 55.

Increase of food animals see infra § 62.

Work animals see infra § 54.

5. Kan.—Nuzman v. Schooley, 12 P. 829, 36 Kan. 177.
25 C.J. p 45 note 56.

6. Okl.—Phelan v. Lacey, 151 P. 1070, 51 Okl. 393, L.R.A.1916B 786.
25 C.J. p 45 note 57.

7. Ga.—Wilson v. McMillan, 6 S.E. 182, 80 Ga. 733.

8. Ky.—Russel v. Marr, 9 Ky.Op. 592.
25 C.J. p 45 note 59.

9. Mich.—Parsons v. Kimmel, 173 N.W. 539, 206 Mich. 676.
25 C.J. p 45 note 60.

10. Mass.—Johnson v. Babcock, 8 Allen 583.

11. Okl.—Nelson v. Fightmaster, 44 P. 213, 4 Okl. 38.
25 C.J. p 45 note 62.

12. Iowa.—Mitchell v. Joyce, 28 N. W. 473, 69 Iowa 121.
Tex.—Kiggins v. Henne & Meyer Co., Civ.App., 199 S.W. 494.

13. Mass.—Gibson v. Jenney, 15 Mass. 205.

14. N.H.—Parker v. Tirrell, 19 N.H. 201.
25 C.J. p 46 note 64.

15. U.S.—In re Libby, D.C.Vt., 103 F. 776.

16. Tenn.—Byous v. Mount, 17 S. W. 1037, 89 Tenn. 361.

17. La.—Brooks & Clark v. Broussard, 87 So. 254, 148 La. 509.
S.C.—Caulfield v. McAlister, 15 S.C.L. 378.

Ejusdem generis

(1) Term "such other household articles" in exemption statute refers to same character of articles included in language immediately preceding it.
U.S.—In re Tidball, D.C.Wyo., 40 F. 2d 560.

construed in the householder's favor;^{17.5} and a reasonable and liberal view should be taken as to the degree of necessity contemplated by the statute.^{17.10}

The term "household furniture," it has been said, applies only to those vessels, utensils, or goods which are designed for use in the family as instruments of the household, and for conducting and managing household affairs.¹⁸ Where the statute exempts certain specific articles of household goods and "other household goods, utensils and furniture" not exceeding a certain amount in value, the debtor cannot have additional property of the same class as that specifically named.¹⁹

Necessity and usefulness. The exemption is ordinarily expressly limited to necessary articles,²⁰ the implication being one of necessity for the support of the debtor's family.²¹ The household furniture, to be regarded as necessary for the debtor and his family, need not be absolutely indispensable to the bare existence of life, but may include what may be considered as necessary to comfort and convenience,²² although there is some contrary authority, to the effect that actual necessity must exist.²³ Superfluities, however, and articles of luxury, fancy, and ornament are excluded.²⁴

In determining what articles of household furniture are necessary, regard may be had to the improved standard in living, the improvement in the arts, and the general tendency to increase the

amount of the debtor's exemption;²⁵ but the meaning ought not to be enlarged by a change in the station in life or previous habits of the individual, as is allowable in determining what are necessities for a wife and a minor.²⁶ The necessity is to be determined as of the time when the property is levied on and claimed as exempt, and not as of the time when the statute was enacted.²⁷ No question of necessity is involved under a statute which exempts certain specific household furniture, together with all other household furniture not specially enumerated.²⁸

Use by household or family. To be exempt, the furniture may be required to be kept and used by the debtor and his family;²⁹ furniture devoted to commercial uses does not fall within the exemption statute,³⁰ and the term "household furniture" does not include the furniture of the debtor's shop or office.³¹ Property may be exempt as household furniture even though the debtor is unmarried³² and has no children.³³ Furniture in an apartment sublet by the debtor is not exempt as household furniture.³⁴

In order that furniture may be exempt, it need not necessarily be in actual use at the time when it is levied on;³⁵ it is exempt, although in storage, if it is stored during a mere temporary absence and there is an intention to return and use it again.³⁶

Boarding houses, hotels and restaurants. Household and kitchen furniture used by a keeper of a

(2) This is also true as to the term "all other household furniture not herein enumerated."

U.S.—In re Michealson, D.C.Minn., 113 F.Supp. 929, affirmed, C.A., Michealson v. Elliott, 209 F.2d 625.

17.5 Mich.—Slumpff v. McGuire & Hansen, 235 N.W. 224, 253 Mich. 473.

Liberal construction of exemption laws generally see supra § 4.

17.10 U.S.—In re Michealson, D.C. Minn., 1132 Supp. 929, affirmed, C. A., Michealson v. Elliott, 209 F.2d 625.

18. Mich.—Kehl v. Dunn, 61 N.W. 71, 102 Mich. 581, 47 Am.S.R. 561.

25 C.J. p 42 note 62.

19. U.S.—In re Robison, D.C.Wash., 215 F. 662.

20. Conn.—Montague v. Richardson, 24 Conn. 338, 63 Am.D. 173.

Mass.—Davlin v. Stone, 4 Cush. 359.

21. Conn.—Montague v. Richardson, 24 Conn. 338, 63 Am.D. 173.

22. Cal.—Haswell v. Parsons, 15 C. 266, 76 Am.D. 480.

25 C.J. p 42 note 66.

"The fact that a household article is not only an item of furniture

or utility, but is also ornamental in character and of a value somewhat in excess of a bare necessity of its character, we think does not place it beyond or outside the scope of the exemption statute."

Mich.—Slumpff v. McGuire & Hansen, 235 N.W. 224, 225, 253 Mich. 473.

23. N.Y.—Willson v. Ellis, 1 Den. 462.

25 C.J. p 42 note 67.

24. Conn.—Hitchcock v. Holmes, 43 Conn. 528.

25 C.J. p 42 note 68.

25. Vt.—Leavitt v. Metcalf, 2 Vt. 342, 19 Am.D. 718.

26. Conn.—Hitchcock v. Holmes, 43 Conn. 528.

27. Conn.—Montague v. Richardson, 24 Conn. 338, 63 Am.D. 173.

28. Kan.—Rasure v. Hart, 18 Kan. 340, 26 Am.R. 772.

29. Minn.—Fletcher v. Staples, 64 N.W. 1150, 62 Minn. 471.

Or.—In re Laughlin's Estate, 134 P. 2d 961, 170 Or. 450.

30. Okl.—Corpus Juris cited in Security Building & Loan Ass'n of

Oklahoma City v. Ward, 50 P.2d 651, 656, 174 Okl. 238.

House rented furnished

Furniture in a house which was owned by widow's deceased husband at time of his death, but which was being rented furnished, was not in "actual use" by widow, as required by statute, so as to entitle her to have it set aside to her as exempt from execution.

Or.—In re Laughlin's Estate, 134 P. 2d 961, 170 Or. 450.

31. Ga.—Burt v. Stocks Coal Co., 46 S.E. 828, 119 Ga. 629, 100 Am.S.R. 203.

25 C.J. p 43 note 73.

32. Mass.—Brown v. Wait, 19 Pick. 470, 31 Am.D. 154.

33. Mass.—Brown v. Wait, supra.

34. Okl.—Security Building & Loan Ass'n of Oklahoma City v. Ward, 50 P.2d 651, 174 Okl. 238.

25 C.J. p 43 note 77.

35. Okl.—Security Building & Loan Ass'n of Oklahoma City v. Ward, supra.

25 C.J. p 43 note 78.

36. Conn.—Weed v. Dayton, 40 Conn. 293.

boarding house or restaurant is not exempt from execution,³⁷ except so much of it as is used by him for the use of his family;³⁸ but where used in the latter manner it is immaterial that it was originally purchased for use in a boarding house.³⁹ Under statutes not involving any question of necessity of the furniture for the family support, as where the statute exempts "all other household furniture" in addition to certain enumerated articles, the question of use by the debtor for his family becomes immaterial, so that under such statutes household furniture kept by the debtor for the use of boarders and guests is exempt⁴⁰ if within the statutory limitation of amount.⁴¹

On the other hand, under statutes exempting "all household and kitchen furniture," without limitation as to value, and without expressly requiring that it be necessary for the use of the debtor and his family, it has been held that household and kitchen furniture used in hotels and restaurants, beyond that which is used by the family, is not exempt,⁴² while furniture used by a person who lives in a private house and takes boarders incidentally for the purpose of support is exempt.⁴³

Particular articles. Beds are exempt as "household furniture,"⁴⁴ the number depending on the size of the debtor's family,⁴⁵ not including boarders, where the furniture exempted is restricted to that used by the debtor's family.⁴⁶ Bedding has also been exempted.⁴⁷ A cooking stove is exempt as an article of household furniture necessary for upholding life.⁴⁸ A "family library," exempt as such under the express terms of a statute, includes all books used by the family,⁴⁹ and a surgeon who has

a family may claim to have included in his "family library," as exempt, medical books used by him.⁵⁰ A silver card receiver used on hatrack is household furniture.⁵¹ A traveling trunk, a cabinet box, and a breastpin are not household furniture.⁵² A rifle is not exempt as an article of household and kitchen furniture, although it might be as the furniture of a frontiersman's tent or cabin.⁵³ A television set is not within an exemption of "household furniture."^{53.5} An automobile which is not in use and is stored in a driveway is not within the description of "family stores of a housekeeper," as set out in an exemption statute.^{53.10}

Pianos are generally not considered articles of household furniture, within the meaning of the term as used in the exemption laws,⁵⁴ especially where the statute in terms exempts household furniture "necessary for upholding life."⁵⁵ There is authority, however, for the contrary view under statutes exempting household furniture "necessary for the use and comfort of the family;"⁵⁶ and where the statute does not in terms require household furniture to be necessary in order to be exempt, but exempts "all household and kitchen furniture," the question is one of the character of the use; if the piano is used as household furniture it is exempt,⁵⁷ but if such use has been abandoned, and the piano has been placed on sale in a salesroom, it is not.⁵⁸

Even where only necessary furniture is exempt, there is authority for holding a piano exempt, where there is a statutory limit to the amount of the exemption and all the furniture claimed, including the piano, is within the limit,⁵⁹ as well as where

37. Conn.—Weed v. Dayton, *supra*. 25 C.J. p 43 note 80.

38. Mich.—Vanderhorst v. Bacon, 38 Mich. 669, 31 Am.R. 328.

39. Mich.—Vanderhorst v. Bacon, *supra*.

40. Kan.—Rasure v. Hart, 18 Kan. 340, 26 Am.R. 772.

41. Kan.—Harrison v. Forster, 146 P. 355, 94 Kan. 284.

42. Tex.—Heidenheimer v. Blumenkron, 56 Tex. 308. 25 C.J. p 43 note 86.

43. Tex.—Mueller v. Richardson, 18 S.W. 693, 82 Tex. 361.

44. Ga.—Hendricks v. Lewis, R.M. Charlt. p 105. 25 C.J. p 42 note 66 [a].

45. Mass.—Glidden v. Smith, 15 Mass. 170.

Wis.—Heath v. Keyes, 35 Wis. 668.

46. Mass.—Brown v. Wait, 19 Pick. 470, 31 Am.D. 154.

47. S.C.—Caulfield v. McAlister, 15 S.C.L. 378.

36 C.J. p 561 note 8.

Bags are not bedding within the exemption law where not used as such.

N.Y.—Shaw v. Davis, 55 Barb. 389.

48. Vt.—Hart v. Hyde, 5 Vt. 328. 25 C.J. p 43 note 92.

49. N.Y.—Robinson's Case, 3 Abb. Pr. 466.

50. N.Y.—Robinson's Case, *supra*.

51. Ala.—Phillips v. Phillips, 44 So. 391, 151 Ala. 527, 125 Am.S.R. 40, 15 Ann.Cas. 157.

52. N.H.—Towns v. Pratt, 33 N.H. 345, 66 Am.D. 726.

53. Tex.—Choate v. Redding, 18 Tex. 579.

53.5 U.S.—Michealson v. Elliott, C. A.Minn., 209 F.2d 625.

Rule of ejusdem generis applied

U.S.—In re Michealson, D.C.Minn., 113 F.Supp. 929, affirmed, C.A. Michealson v. Elliott, 209 F.2d 625.

53.10 R.I.—Personal Finance Co. v. Franco, 48 A.2d 355, 72 R.I. 85, 166 A.L.R. 429.

54. Wis.—Tanner v. Billings, 18 Wis. 163, 86 Am.D. 755.

25 C.J. p 43 note 1.

Piano not "necessary article of household furniture"

N.Y.—Lader v. Gordon, 88 N.Y.S.2d 758.

55. Vt.—Dunlap v. Edgerton, 30 Vt. 224.

56. Ala.—Phillips v. Phillips, 44 So. 391, 151 Ala. 527, 125 Am.S.R. 40, 15 Ann.Cas. 157.

57. Ga.—Kemp v. Swainsboro Ice & Fuel Co., 169 S.E. 700, 47 Ga.App. 99.

25 C.J. p 44 note 4.

58. Tex.—McCoy v. Thompson, Civ. App., 138 S.W. 1062.

59. Ga.—Corpus Juris quoted in Kemp v. Swainsboro Ice & Fuel Co., 169 S.E. 700, 702, 47 Ga.App. 99.

no limit is fixed to the amount of household furniture exempt.⁶⁰ Where the statute exempts household furniture "necessary for the debtor's personal use," it is held that whether the piano is exempt or not is a question of fact for the jury to determine, depending on the condition and circumstances of the family.⁶¹

Under a statute expressly exempting musical instruments, a piano is exempt.⁶²

Clocks and watches. Whether a clock is exempt as necessary household furniture is a question of fact for the jury,⁶³ although it has been held that if the clock is the only one in the debtor's house it is, as a matter of law, exempt.⁶⁴ However, an expensive clock has been held not exempt, even though it may be the only one the debtor has.⁶⁵ A watch and chain habitually carried on the person of the debtor for his own convenience, and not used for the benefit of the family, is not exempt as "household furniture."⁶⁶ A watch not worn on the person, but kept in the house in the place of a clock, would be exempt.⁶⁷

§ 38. Library or Instruments of Professional Men

Under statutes so providing, the library, instruments, or working tools of a professional man are exempt; this principle has been applied to the books or instruments of clergymen, lawyers, physicians, dentists, and others.

Under statutes so providing, the library and instruments or working tools of a professional man are exempt in a number of jurisdictions.⁶⁸ A debtor not belonging to the class known as professional men is not entitled under such statutes to an ex-

emption in the tools of his occupation.⁶⁹ Where a limit of value is fixed by statute, only books and instruments within the statutory limit are exempt.⁷⁰ Habitual use of the books and instruments by the debtor in the practice of his profession is not necessary, in the absence of statutory requirement to that effect.⁷¹ It is not necessary that the profession in which the instrument is used be the debtor's sole occupation.⁷²

An abstracter of titles has been held entitled to hold as exempt one set of abstracts, a safe to keep them in, a cabinet, and a table.⁷³

By the enactment of a statute providing that all books, maps, plats, and other papers kept or used by any person for the purpose of making abstracts of title to land constitute property which is exempt from execution, a legislature fully intends to provide that an abstracter be not stripped of his tools and deprived of his effective means of livelihood.^{73.5}

Clergymen. The books used by a minister of the gospel for the purpose of his calling are not liable to seizure.⁷⁴

Dentists. Dental instruments have been held exempt either as "mechanical tools"⁷⁵ or as "instruments necessary for the exercise" of the dentist's profession,⁷⁶ although it has also been held that a dentist is not entitled to exemptions under a statute for the benefit of mechanics.⁷⁷ A dentist is entitled only to the instruments which are appropriate to the practice of dentistry,⁷⁸ and his piano and guitar are not exempt as tools of his profession.⁷⁹ It has been held that a dentist's chair is not exempt as a common tool of trade.⁸⁰

N.Y.—Conklin v. McCauley, 58 N.Y.S. 879, 41 App.Div. 452.

60. Ga.—*Corpus Juris* quoted in Kemp v. Swainsboro Ice & Fuel Co., 169 S.E. 700, 702, 47 Ga.App. 99.

Okl.—Cook v. Fuller, 130 P. 140, 35 Okl. 339, 44 L.R.A., N.S., 76, Ann. Cas. 1914D 507.

61. Mass.—Hamilton v. Lane, 138 Mass. 358.

62. Minn.—Thompson v. Peterson, 142 N.W. 307, 122 Minn. 228.

63. N.Y.—Willson v. Ellis, 1 Den. 462.

64. Vt.—Leavitt v. Metcalf, 2 Vt. 342, 19 Am.D. 718.

65. Conn.—Hitchcock v. Holmes, 43 Conn. 528.

66. S.D.—Brown v. Edmonds, 59 N. W. 731, 5 S.D. 508.

Watch exempt as "working tool" see infra § 46.

67. Me.—Gooch v. Gooch, 33 Me. 535.

68. Minn.—*Corpus Juris* cited in De Coster v. Nenno, 213 N.W. 538, 539, 171 Minn. 108.

Tex.—Hackler v. H. Kohnstamm & Co. of Tex., Civ.App., 227 S.W.2d 347.

69. N.Y.—O'Reilly v. Erlanger, 95 N. Y.S. 760, 108 App.Div. 318.

25 C.J. p 56 note 10.
Persons engaged in professions as entitled to privilege see supra § 24.

Tools and instruments as exempt generally see infra § 46.

70. Mo.—Brown v. Hoffmeister, 71 Mo. 411.

71. Iowa.—Perkins v. Wisner, 9 Iowa 320.

Habitual use see supra § 24.

72. La.—A. Wilbert's Sons Lumber & Shingle Co. v. Ricard, 119 So. 411, 167 La. 416.

73. Kan.—Davidson v. Sechrist, 28 Kan. 324.

73.5 Wis.—State ex rel. Dane County Title Co. v. Board of Review of City of Madison, 85 N.W.2d 864, 2 Wis.2d 51.

74. La.—State v. St. Paul, 35 So. 389, 111 La. 71.

75. Mich.—Maxon v. Perrott, 17 Mich. 332, 97 Am.D. 191.

76. La.—Duperron v. Communy, 6 La. Ann. 789.

77. Miss.—Whitcomb v. Reid, 31 Miss. 567, 66 Am.D. 579.

78. Ga.—Burt v. Stocks Coal Co., 46 S.E. 828, 119 Ga. 629, 100 Am.S. R. 203—Smith v. Rogers, 16 Ga. 479.

79. Ga.—Smith v. Rogers, supra.

80. Ga.—Burt v. Stocks Coal Co., 46 S.E. 828, 119 Ga. 629, 100 Am. S.R. 203.

Lawyers; judges. A lawyer's library is exempt under statutes exempting the library and instruments of professional men;⁸¹ but has been held not exempt under statutes exempting the "common tools" or "working tools" of a debtor,⁸² although there is authority opposed.⁸³ A share in a law library association has been held exempt.⁸⁴ A lawyer's ordinary office furniture, including his table, desk, bookcases, letter press, safe, etc., necessary to enable him to carry on his business, is included in the term "instruments"⁸⁵ or "all tools, apparatus, and books belonging to any trade or profession."⁸⁶

An automobile used by a judge is not exempt as an instrument or tool necessary for the exercise of his profession.⁸⁷

Musician or teacher of music. Under a statute exempting generally the tools and instruments used by a debtor in his trade or calling, a cornet,⁸⁸ violin and bow,⁸⁹ and a piano⁹⁰ have been held exempt, where it appeared that the debtor depended on the instrument for support.

An optometrist is not within the scope of a statute exempting the instruments and office furniture of a physician or surgeon.⁹¹

Physician or surgeon. "Family library," in the exemption laws, has been held to embrace the professional library of a surgeon who is the head of a family,⁹² and his surgical instruments have been held to be exempt as his "tools,"⁹³ as have his safe

to keep them in,⁹⁴ and a buggy and harness to aid him in making his visits,⁹⁵ although there is authority for refusing to exempt a doctor's horse.⁹⁶ A stock of drugs in a physician's office, not kept for sale, but dispensed in connection with his services, has been held to be within an exemption of tools and instruments.^{96.5}

On the other hand, a physician's typewriter has been held not to be exempt as a "tool."⁹⁷ The equipment and apparatus of a private hospital owned by a practicing physician are not exempt as the "library and implements of a professional man."⁹⁸

§ 39. Life Insurance

- a. In general
- b. Particular types of policies
- c. Validity
- d. Beneficiaries
- e. Pecuniary benefits available before maturity

a. In General

Statutes granting an exemption to the proceeds of life insurance are to be liberally construed. The fact that premiums were paid during insolvency, or with funds obtained by fraud, does not, according to some authorities, affect the exemption rights of the beneficiary, but other authorities hold differently.

Under statutes providing to that effect, the proceeds of life insurance are exempt from the claims of creditors,⁹⁹ whether the contract was made with

81. Ohio.—Cleveland Arcade Co. v. Talcott, 154 N.E. 62, 22 Ohio App. 516.

25 C.J. p 56 note 14.

Deceased attorney's library held exempt.

Tex.—Fowler v. Gilmore, 30 Tex. 432.

Suspended attorney

Books, rugs, and office furniture of an attorney at law used by him in the practice of law held exempt from execution levied against them, notwithstanding his suspension for five years of right to practice, where it was his intention to resume practice as soon as possible.

Tex.—McBrayer v. Cravens, Dargan & Roberts, Com.App., 265 S.W. 694.

82. Ga.—Lenoir v. Weeks, 20 Ga. 596.

R.I.—In re Church, 2 A. 761, 15 R.I. 245.

83. La.—Lambeth v. Milton, 2 Rob. 81.

84. N.Y.—Keiher v. Shipperd, 4 N.Y. Civ.Proc. 274.

25 C.J. p 56 note 18.

85. Iowa.—Abraham v. Davenport, 34 N.W. 767, 73 Iowa 111, 5 Am. S.R. 665.

86. Tex.—McBrayer v. Cravens, Dargan & Roberts, Com.App., 265 S.W. 694.

87. La.—Jones v. Scott, App., 167 So. 117.

88. Mass.—Baker v. Willis, 123 Mass. 194, 25 Am.R. 61.

89. Mass.—Goddard v. Chaffee, 2 Allen 395, 79 Am.D. 796.

90. Ill.—Amend v. Murphy, 69 Ill. 337.

91. U.S.—In re Frazier, D.C.Mont., 5 F.Supp. 903.

92. N.Y.—Robinson's Case, 3 Abb. Pr. 466.

93. N.Y.—Robinson's Case, supra.

94. Iowa.—Sterman v. Hann, 141 N.W. 934, 160 Iowa 356, 46 L.R.A., N.S., 287.

95. Iowa.—Farner v. Turner, 1 Iowa 53.
25 C.J. p 56 note 23.

96. La.—Hanna v. Bry, 5 La. Ann. 651, 52 Am.D. 606.

96.5 Iowa.—In re Carpenter's Estate, 5 N.W.2d 172, 232 Iowa 134.

97. Tex.—Massie v. Atchley, 66 S.W. 582, 28 Tex.Civ.App. 114.

98. Minn.—De Coster v. Nenno, 213 N.W. 538, 171 Minn. 108.

99. U.S.—Proutt's Estate v. Commissioner of Internal Revenue, C. C.A., 125 F.2d 591—Royal Indemnity Co. v. Grand Lodge, A.O.U.W., of Kansas, C.C.A.Kan., 60 F.2d 521.

In re Jordan, D.C.Conn., 52 F. Supp. 936—In re Guillot, D.C.La., 47 F.Supp. 929—Fidelity & Columbia Trust Co. v. Glenn, D.C.Ky., 39 F.Supp. 822—In re Horwitz, D.C.N.Y., 3 F.Supp. 16.

Cal.—Prudential Ins. Co. of America v. Beck, 103 P.2d 241, 39 C.A.2d 355.

Fla.—Milam v. Davis, 123 So. 668, 97 Fla. 916, certiorari denied 50 S.Ct. 82, 280 U.S. 601, 74 L.Ed. 646.

Ky.—Thompson v. Latimer, 273 S.W. 65, 209 Ky. 491.

La.—Nulsen v. Herndon, 147 So. 359, 176 La. 1097, 88 A.L.R. 236.

Minn.—Murphy v. Casey, 184 N.W. 783, 150 Minn. 107.

Miss.—**Corpus Juris cited in** Adams v. Strong, 158 So. 204, 205, 171 Miss. 510.

Neb.—Bank of Brule v. Harper, 4 N.W.2d 609, 141 Neb. 616.

the insured or with the beneficiaries,^{99.5} a limitation being sometimes imposed as to amount, as discussed infra § 40, or as to the beneficiaries entitled to the exemption, infra subdivision d of this section. Statutes exempting life insurance are regarded as exemption laws,¹ and not as part of the insurance law of the state,² nor as designed simply to protect

insurer from harassing litigation.³ Such statutes should be construed liberally⁴ and in the light of, and to give effect to, their purpose,^{4.5} as, for example, the enabling of an individual to provide a fund after his death for his family which will be free from the claims of creditors.⁵ The exemption privilege is created not by contract but by legisla-

N.Y.—*Jackson v. Tallmadge*, 158 N. E. 48, 246 N.Y. 133.

Brandt v. Godfrey, 16 N.Y.S.2d 51, 172 Misc. 768, affirmed 23 N.Y. S.2d 464, 260 App.Div. 851, appeal denied 24 N.Y.S.2d 146, 260 App. Div. 917.

N.D.—*Sand v. Merchants Nat. Bank & Trust Co.*, 81 N.W.2d 748.

Tenn.—*American Trust & Banking Co. v. Lessly*, 106 S.W.2d 551, 171 Tenn. 561, 111 A.L.R. 59.

25 C.J. p 72 note 41.

Exemption of disability insurance see supra § 31.

Object of statute

Object of statute is to deprive creditor of power to effect cancellation of any reserve plan life insurance policy through attempts to reach premiums paid, cash surrender value thereof, etc., as long as obligation of insurer to pay these benefits has not ripened or matured or become fixed in accordance with terms of contract.

U.S.—*Reinecke v. C. I. R.*, C.A.8, 220 F.2d 406, certiorari denied 76 S. Ct. 60, 350 U.S. 829, 100 L.Ed. 740.

Effect of claiming exemption in lieu of homestead

The fact that a widow, in the probate of her husband's estate, claims certain exemptions in lieu of homestead does not preclude her from claiming an exemption of life insurance.

Wash.—*Northern Savings & Loan Ass'n v. Kneisley*, 76 P.2d 297, 193 Wash. 372.

While husband lives and the policy is outstanding a creditor gains no rights against insurance policy on husband's life for wife's benefit by appointment of receiver or other transfer in invitum.

N.Y.—*Jackson v. Tallmadge*, 158 N. E. 48, 246 N.Y. 133.

99.5 N.Y.—*Chatham Phenix Nat. Bank & Trust Co. v. Crosney*, 167 N.E. 217, 251 N.Y. 189.

1. U.S.—*Dellefield v. Block*, D.C.N. Y., 40 F.Supp. 616.

Wash.—*Elsom v. Gadd*, 161 P. 483, 162 P. 867, 93 Wash. 603.

Wis.—*Luebke v. Vonnekold*, 27 N.W. 2d 458, 250 Wis. 496.

Statute held not exemption law

(1) A statute providing for the payment of the proceeds of insurance policies to insured's heirs free from claims of creditors has been

held not to be an exemption law within the meaning of a constitutional provision limiting exemptions to a reasonable amount.

N.D.—*Talcott v. Bailey*, 208 N.W. 549, 54 N.D. 19—*Farmers' State Bank v. Smith*, 162 N.W. 302, 36 N.D. 225.

(2) This same result has been reached under an amendment extending the exemption to avails of life insurance made payable to deceased. N.D.—*Lapland v. Stearns*, 54 N.W.2d 748, 79 N.D. 62.

2. Wash.—*Elsom v. Gadd*, 161 P. 483, 162 P. 867, 93 Wash. 603. 25 C.J. p 72 note 44.

3. Ill.—*Rumbold v. Supreme Council Royal League*, 69 N.E. 590, 206 Ill. 513.

25 C.J. p 72 note 45.

4. U.S.—*Schwartz v. Holzman*, C.C. A.N.Y., 69 F.2d 814, certiorari denied 55 S.Ct. 76, 293 U.S. 565, 79 L.Ed. 665.

In re *Beckman*, D.C.Ala., 50 F. Supp. 339—*Dellefield v. Block*, D.C. N.Y., 40 F.Supp. 616—In re *Bowers*, D.C.Pa., 11 F.Supp. 848, reversed on other grounds, C.C.A., *Bowers v. Reinhard*, 78 F.2d 776, certiorari denied *Reinhard v. Bowers*, 56 S.Ct. 173, 296 U.S. 640, 80 L.Ed. 455—In re *Horwitz*, D.C.N. Y., 3 F.Supp. 16.

Iowa.—In re *Harding's Estate*, 16 N. W.2d 585, 235 Iowa 337—In re *Hazeldine's Estate*, 280 N.W. 568, 225 Iowa 369—*Scott v. Wamsley*, 253 N.W. 524, 218 Iowa 670—In re *Grilk's Will*, 231 N.W. 327, 210 Iowa 587.

Kan.—*Exchange State Bank v. Poin-dexter*, 19 P.2d 705, 137 Kan. 101.

Minn.—*Fox v. Swartz*, 51 N.W.2d 80, 235 Minn. 337, 30 A.L.R.2d 739.

Miss.—*Adams v. Strong*, 158 So. 204, 171 Miss. 510.

Mo.—*Bank of Brimson v. Graham*, 76 S.W.2d 376, 335 Mo. 1196, 96 A.L.R. 399.

N.Y.—*Crossman Co. v. Rauch*, 188 N.E. 748, 263 N.Y. 264.

Billings v. Lynch, 292 N.Y.S. 344, 161 Misc. 496—*Herbach v. Herbach*, 265 N.Y.S. 144, 148 Misc. 33—*Addiss v. Selig*, 264 N.Y.S. 816, 147 Misc. 731, affirmed 266 N.Y.S. 1008, 240 App.Div. 829, reversed on other grounds 190 N.E. 490, 264 N.Y. 274, 92 A.L.R. 1384, reargument denied 191 N.E. 621, 264 N. Y. 674—*Wittman v. Littlefield*, 256

N.Y.S. 471, 142 Misc. 916, affirmed 257 N.Y.S. 885, 235 App.Div. 831.

Pa.—*Provident Trust Co. v. Rothman*, 183 A. 793, 321 Pa. 177, 104 A.L.R. 1275, followed in *Washington Trust Co. v. New York Life Ins. Co.*, 183 A. 798, 321 Pa. 188.

Tenn.—*American Trust & Banking Co. v. Lessly*, 106 S.W.2d 551, 171 Tenn. 561, 111 A.L.R. 59—*Dawson v. National Life Ins. Co.*, 300 S.W. 567, 156 Tenn. 306.

McConnell v. Henochsberg, 11 Tenn.App. 176.

Wis.—*Luebke v. Vonnekold*, 27 N.W. 2d 458, 250 Wis. 496.

Liberal construction of exemption laws generally see supra § 4.

Proceeds left with insurer

Public policy evidenced by statute and judicial decisions is to give liberal and practical meaning to exemption accorded to proceeds of life insurance left with insurer.

N.Y.—*Gardiner v. Rauch*, 39 N.Y.S. 2d 652, 179 Misc. 606, affirmed 40 N.Y.S.2d 333, 265 App.Div. 997, appeal denied 41 N.Y.S.2d 203, 266 App.Div. 662.

4.5 Minn.—*Fox v. Swartz*, 51 N.W. 2d 80, 235 Minn. 337, 30 A.L.R.2d 739.

N.Y.—*Genesee Val. Trust Co. v. Glazer*, 66 N.E.2d 169, 295 N.Y. 219, 164 A.L.R. 911, motion denied 68 N.E.2d 49, 295 N.Y. 962.

F. *Frazier Jelke & Co. v. Greene*, 35 N.Y.S.2d 91.

5. U.S.—In re *Bowers*, D.C.Pa., 11 F.Supp. 848, reversed on other grounds, C.C.A., *Bowers v. Reinhard*, 78 F.2d 776, certiorari denied *Reinhard v. Bowers*, 56 S.Ct. 173, 296 U.S. 640, 80 L.Ed. 455.

Cal.—In re *Crosby's Estate*, 41 P.2d 928, 2 C.2d 470.

Miss.—*Adams v. Strong*, 158 So. 204, 171 Miss. 510.

N.Y.—*Addiss v. Selig*, 264 N.Y.S. 816, 147 Misc. 731, affirmed 266 N.Y.S. 1008, 240 App.Div. 829, reversed on other grounds 190 N.E. 490, 264 N.Y. 274, 92 A.L.R. 1384, reargument denied 191 N.E. 621, 264 N.Y. 674.

Pa.—*Provident Trust Co. v. Rothman*, 183 A. 793, 321 Pa. 177, 104 A.L.R. 1275, followed in *Washington Trust Co. v. New York Life Ins. Co.*, 183 A. 798, 321 Pa. 188.

Tenn.—*American Trust & Banking Co. v. Lessly*, 106 S.W.2d 551, 171 Tenn. 561, 111 A.L.R. 59—*Ameri-*

tive grant,⁶ and grounds for the exemption of the proceeds of insurance policies must be found in the statutes.⁷

The proceeds of policies issued before the enactment of the statute may be subject to its provisions,⁸ although it has been held that the statute may not be invoked to defeat the rights of a judgment creditor where the judgment was entered prior to the enactment of the statute.^{8.5}

Statutes exempting money received from life insurance sometimes require that the policy or certificate of insurance be issued by a company or association incorporated within the state,⁹ but this is not a universal rule.¹⁰ The exemption provided for may be confined to policies taken out by a wife for her benefit on the life of her husband;¹¹ but it has been held that statutes exempting a policy which a wife has caused to be taken out on the life of her husband are applicable to insurance taken out by a husband for the benefit of his wife, since in such case he is presumed to have acted for her.¹²

Premiums paid in fraud of creditors or during insolvency. There is authority that where the funds

used by insured to pay premiums were obtained by him by fraud, the proceeds of the policy are not exempt from the claims of those defrauded;¹³ further, by express provision of some statutes, insurance premiums paid in fraud of creditors, may be recovered from the proceeds of the policy for the benefit of insured's estate.¹⁴ According to other authorities, however, even where the money to pay the premiums was secured by the debtor through fraud, the widow's exemption in the proceeds of the policy will not be affected thereby, if she herself was not a party to the fraud.¹⁵

The mere fact that premiums were paid while insured was insolvent does not usually affect the exemption rights of the beneficiary,¹⁶ although, under some statutes, creditors may recover from the proceeds the amount of premiums paid by the insured in fraud of their rights,^{16.5} as, for example, where premiums were paid during insolvency in a given period in excess of an amount stated.¹⁷ It has been held that where insured, while insolvent, changes a policy originally payable to his estate by designating a different beneficiary, making the trans-

can Trust Co. v. Sperry, 5 S.W.2d 957, 157 Tenn. 43.

McConnell v. Henochsberg, 11 Tenn.App. 176.

6. Ky.—*Corpus Juris* cited in First Nat. Bank v. Cann's Ex'x, 57 S.W.2d 461, 463, 247 Ky. 618. N.Y.—Kittel v. Domeyer, 67 N.E. 433, 175 N.Y. 205, reargument denied 67 N.E. 1084, 175 N.Y. 512.

7. Iowa.—In re Tellier's Estate, 230 N.W. 545, 210 Iowa 20.

8. N.Y.—Billings v. Lynch, 292 N.Y. S. 344, 161 Misc. 496. 25 C.J. p 72 note 47.

8.5 U.S.—Schwartz v. Coen, D.C.N.Y., 44 F.Supp. 880, affirmed, C.C.A., 131 F.2d 879.

Validity of statute see *infra* subdivision c of this section.

9. Cal.—Briggs v. McCullough, 36 C. 542.

Ind.—Presbyterian Mut. Assur. Fund v. Allen, 7 N.E. 317, 106 Ind. 593.

10. N.Y.—People's Bank v. Cushman, 79 N.E. 1113, 187 N.Y. 518. Ohio.—Cross v. Armstrong, 10 N.E. 160, 44 Ohio St. 613.

11. Ark.—Peters v. Goodwin, 76 S. W.2d 980, 190 Ark. 24.

12. U.S.—In re Weisman, D.C.N.Y., 10 F.Supp. 312.

Ill.—Houston v. Maddux, 53 N.E. 599, 179 Ill. 377.

Vieth v. Chicago Title & Trust Co., 30 N.E.2d 126, 307 Ill.App. 99. N.Y.—Wagner v. Thieriot, 197 N.Y.S. 560, 203 App.Div. 757, affirmed 142 N.E. 295, 236 N.Y. 588.

13. Tenn.—McConnell v. Henochsberg, 11 Tenn.App. 176.

Payment of premium as fraudulent conveyance see the C.J.S. title Fraudulent Conveyances § 19.

Reason for rule

Statutes exempting life insurance are not designed to encourage fraud. Kan.—Exchange State Bank v. Poin-dexter, 19 P.2d 705, 137 Kan. 101. La.—Succession of Onorato, 51 So.2d 804, 219 La. 1, 24 A.L.R.2d 656. Tenn.—McConnell v. Henochsberg, 11 Tenn.App. 176.

14. U.S.—Doethlaff v. Penn Mut. Life Ins. Co., C.C.A.Ohio, 117 F.2d 582, certiorari denied 61 S.Ct. 1100, two cases, 313 U.S. 579, 85 L.Ed. 1536.

Mass.—Tolman v. Crowell, 193 N.E. 60, 288 Mass. 397.

N.H.—Barbin v. Moore, 159 A. 409, 85 N.H. 362, 83 A.L.R. 62.

N.J.—Middlesex County Welfare Board v. Motalinsky, 35 A.2d 463, 134 N.J.Eq. 323.

Wash.—Northwestern Mut. Life Ins. Co. v. Chehalis County Bank, 118 P. 326, 65 Wash. 374. 25 C.J. p 74 note 84.

15. U.S.—Harriman Nat. Bank v. Huie, S.C., 249 F. 856, 162 C.C.A. 90.

Wife's knowledge of source of funds

The wife becomes a party to the fraud, at least in a limited sense, so as to affect her exemption, where she has knowledge and notice that the funds used for paying premiums have been obtained in an unusual manner.

Kan.—Exchange State Bank v. Poin-dexter, 19 P.2d 705, 137 Kan. 101.

16. Ill.—Betten v. Williams, 277 Ill. App. 353.

Pa.—Potter Title & Trust Co. v. Fidelity Trust Co., 175 A. 400, 316 Pa. 316.

Va.—Mahoney v. James, 26 S.E. 384, 94 Va. 176.

25 C.J. p 74 note 82.

16.5 N.Y.—Addiss v. Selig, 264 N.Y. S. 816, 147 Misc. 731, affirmed 266 N.Y.S. 1008, 240 App.Div. 829, reversed on other grounds 190 N.E. 490, 264 N.Y. 274, 92 A.L.R. 1384, reargument denied 191 N.E. 621, 264 N.Y. 674.

17. U.S.—Harriman Nat. Bank v. Huie, D.C.S.C., 244 F. 216, modified on other grounds 249 F. 856, 162 C.C.A. 90.

Rights as to insurance purchased with excess

Under such statutes, the creditors are restricted to the excess premiums and are not entitled to the proportional part of the insurance bought therewith.

U.S.—Harriman Nat. Bank v. Huie, *supra*.

Recovery of premiums on entire policy

Under a statute limiting the amount of exempt insurance, proceeds in excess thereof are liable for the premiums paid on the entire policy where paid in fraud of creditors and while insured was insolvent.

N.Y.—Johnson v. Bacon, 45 So. 858, 92 Miss. 156.

action tantamount to a gift without consideration to the new beneficiary, creditors of insured are, where insured had knowledge that he was about to die when he made the transfer, entitled to subject the proceeds¹⁸ and that the fraudulent transferee is not entitled to any part thereof.¹⁹

b. Particular Types of Policies

The exemption afforded the proceeds of life insurance policies applies, with certain limitations and exceptions, to endowment policies, federal war risk insurance, fraternal and mutual benefit insurance, group insurance, and annuity policies.

Whether a particular life insurance policy is of a type falling within the exemption statutes, or is excluded from the operation of the statutes by the nature of its provisions, depends on the terms of the governing statutes.²⁰

Endowment policy. In some jurisdictions, exemption of the proceeds of an endowment policy, payable in certain contingencies to insured himself, is not allowed.²¹ In others, the fact that an insurance policy contains endowment features does not abrogate an exemption which would otherwise exist,²² and even where a statute exempts only the proceeds of policies payable to a person other than insured, as for example, his wife or children, the fact that under certain contingencies insured might have received the benefits of an endowment policy will not preclude the right of such other person to the exemption, where the contingencies under which insured might have benefited have never oc-

curred;²³ but, where the contingency under which insured is to benefit has occurred, the proceeds of the endowment policy, set apart and payable to insured, are subject to the payment of insured's debts.²⁴ Where a statute exempts all life insurance regardless of who the beneficiary may be, an endowment policy by which a company agrees to pay insured a sum of money after a certain period has been held to be life insurance within the statutory exemption.²⁵

It has been held that the proceeds of an endowment policy paid at the expiration of the endowment period, even though paid in accordance with its terms, to the wife of insured is not exempt from the claims of insured's creditors where the premiums were paid by insured while insolvent, the transaction being considered as in the nature of a loan and the insurance a mere incident.²⁶

Federal war risk insurance. By federal statute the proceeds of war risk insurance policies are granted certain exemptions from the claims of creditors,^{26.5} and are not subject to attachment, levy, or seizure under any legal or equitable process, either before or after receipt by the beneficiary;^{26.10} and this statute is to be liberally construed.²⁷ The proceeds are exempt from the claims of creditors of any named beneficiary bearing a designated relationship to insured.²⁸ Under the federal statute proceeds payable to the estate of the insured for distribution to his heirs are exempt from the claims of creditors of such heirs,^{28.5} but prior to the

18. U.S.—Navassa Guano Co. v. Cockfield, S.C., 253 F. 883, 165 C. C.A. 363, 6 A.L.R. 1168.
25 C.J. p 74 note 85.

19. U.S.—Navassa Guano Co. v. Cockfield, supra.
25 C.J. p 74 note 86.

20. Reservation of pecuniary benefits

The exemption right is not affected by a reservation of pecuniary benefits to insured payable at various times during the life of the policy. Ala.—Kimball v. Cunningham Hardware Co., 68 So. 309, 192 Ala. 223.

21. U.S.—In re Bray, D.C.N.H., 8 F. Supp. 761.
25 C.J. p 74 note 74.

22. U.S.—In re Horwitz, D.C.N.Y., 3 F.Supp. 16.
Minn.—Fox v. Swartz, 51 N.W.2d 80, 235 Minn. 337, 30 A.L.R.2d 739.
N.J.—Slurszberg v. Prudential Ins. Co. of America, 192 A. 451, 15 N. J.Misc. 423.

Beneficiary's rights as contingent

A wife is entitled to the protection of the statute, as against the contention that she has no present in-

terest in the policy, even though the policy is an endowment policy payable to her husband at the expiration of a certain number of years and she is entitled to the proceeds only in the event of his death prior thereto.

N.J.—Slurszberg v. Prudential Ins. Co. of America, supra.

23. Ala.—Kimball v. Cunningham Hardware Co., 68 So. 309, 192 Ala. 223, overruling Tompkins v. Levy, 6 So. 346, 87 Ala. 263, 13 Am.S.R. 31, so far as in conflict.

N.J.—Slurszberg v. Prudential Ins. Co. of America, 192 A. 451, 15 N. J.Misc. 423.

24. N.Y.—Scobie v. Connor, 157 N.Y. S. 567, 94 Misc. 429.
25 C.J. p 74 note 77.

25. Wash.—Flood v. Libby, 80 P. 533, 38 Wash. 366, 107 Am.S.R. 851.
25 C.J. p 74 note 75.

26. Neb.—Bank of Brule v. Harper, 4 N.W.2d 609, 141 Neb. 616—Talcott v. Field, 52 N.W. 400, 34 Neb. 611, 33 Am.S.R. 662.

26.5 Ala.—Maddox v. Elliott, 27 So. 2d 498, 248 Ala. 271.

Pa.—In re Beall's Estate, 119 A.2d 216, 384 Pa. 14.

26.10 Ala.—Maddox v. Elliott, 27 So. 2d 498, 248 Ala. 271.

Object of statute

Object of statute is to prevent creditors from taking proceeds of soldier's insurance from his beneficiaries.

Ind.—Voelkel v. Tohulka, 141 N.E.2d 344, 236 Ind. 588, certiorari denied 78 S.Ct. 263, 355 U.S. 891, 2 L.Ed. 2d 189.

27. N.C.—Mixon v. Mixon, 166 S.E. 516, 203 N.C. 566.

28. Ark.—Purvis v. Walls, 44 S.W. 2d 353, 184 Ark. 887.

Pa.—In re Johnson's Estate, 26 Pa. Dist. & Co. 665, 18 Erie Co. 110.

The beneficiary may be named in insured's will with the same effect as though named in the policy; but the will must be specific in that respect. Ky.—First Nat. Bank v. Cann's Ex'x, 57 S.W.2d 461, 247 Ky. 618.

28.5 Pa.—In re Beall's Estate, 119 A.2d 216, 384 Pa. 14, 54 A.L.R.2d 1329.

amending of the statute they were not.²⁹ Where the entire amount due under the policy has been paid to a proper beneficiary, who thereafter dies, the amount distributed to the heirs at law of such beneficiary, by virtue of their heirship, is not exempt from the claims of creditors of such heirs.³⁰

The federal war risk insurance statutes as originally enacted afforded no exemption from the claims of insured's creditors where the proceeds became payable to his estate, as, for example, on the death of the named beneficiary.³¹ The same result has been reached notwithstanding an amendment extending the exemption benefit to payments made to, or on account of, any beneficiary of the policy;³² but there is authority holding that such amendment has rendered the proceeds of the policy

exempt from the claims of insured's creditors, even though such proceeds are payable to his estate.³³

The proceeds of war risk insurance may be exempt under state statute,³⁴ and have been held so exempt under a statute exempting from seizure a pension or other reward granted by the United States for military service.³⁵

Fraternal and mutual benefit insurance is specifically exempted under some statutes,³⁶ in which case insurer must fall within the definition, if any, contained in the statute.³⁷ A fund created by a mutual benefit insurance association is exempt as life insurance within the meaning of statutes exempting life insurance generally.³⁸

Group insurance policies, or the proceeds thereof, have been held exempt.³⁹

29. U.S.—Pagel v. Pagel, Minn., 54 S.Ct. 497, 291 U.S. 473, 78 L.Ed. 921.

Tex.—Vita v. Morris, Civ.App., 75 S.W.2d 157.

Wis.—In re Bollow's Estate, 270 N.W. 82, 223 Wis. 262, 109 A.L.R. 429.

Contra Ga.—Hunt v. Slagle, 165 S.E. 287, 45 Ga.App. 470.

N.C.—Mixon v. Mixon, 166 S.E. 516, 203 N.C. 566.

Policy as payable to estate of insured see Army and Navy § 85 f.

Beneficiary as heir

Proceeds received by the estate of an heir of insured by reason of heirship are not exempt merely because such heir was a named beneficiary in the policy.

N.D.—Funk v. Luthile, 226 N.W. 595, 58 N.D. 416.

Pa.—In re Johnson's Estate, 26 Pa. Dist. & Co. 665, 18 Erie Co. 110.

S.D.—In re Fox' Estate, 255 N.W. 565, 62 S.D. 586.

Tenn.—Walker v. Queener, 124 S.W. 2d 236, 174 Tenn. 129.

30. Miss.—Dunagin's Guardianship v. East Mississippi State Hospital, 150 So. 370, 167 Miss. 766.

31. U.S.—Pagel v. Pagel, Minn., 54 S.Ct. 497, 291 U.S. 473, 78 L.Ed. 921.

Ga.—Granite City Bank v. Burt, 183 S.E. 125, 52 Ga.App. 308.

Ky.—First Nat. Bank v. Cann's Ex'x, 57 S.W.2d 461, 247 Ky. 618.

S.C.—Whaley v. Jones, 149 S.E. 841, 152 S.C. 328, certiorari denied Jones v. Whaley, 50 S.Ct. 16, 280 U.S. 556, 74 L.Ed. 611.

Wis.—In re Bollow's Estate, 270 N.W. 82, 223 Wis. 262, 109 A.L.R. 429.

Contra State ex rel. Lankford v. Fidelity & Deposit Co. of Maryland, 74 S.W.2d 904, 228 Mo.App. 953.

Claim for federal income taxes

The proceeds of a policy received

by insured's executor are not exempt from payment of income taxes due from insured to the United States. Okl.—In re Coleman's Estate, 65 P.2d 467, 179 Okl. 251.

Effect of policy provision as to exemption

The rule stated in the text is not changed by the fact that the policy contains a provision purporting to exempt its proceeds from debts of insured.

Ky.—First Nat. Bank v. Cann's Ex'x, 57 S.W.2d 461, 247 Ky. 618.

32. Wis.—In re Bollow's Estate, 270 N.W. 82, 223 Wis. 262, 109 A.L.R. 429.

Reason for rule

Insured's estate is not a beneficiary within the meaning of the statute.

Wis.—In re Bollow's Estate, supra.

33. N.Y.—In re McCormick's Estate, 8 N.Y.S.2d 179, 169 Misc. 672.

Reason for rule

The payment to the estate is made "on account of" the beneficiary within the meaning of the statute.

N.Y.—In re McCormick's Estate, 8 N.Y.S.2d 179, 169 Misc. 672.

34. Miss.—Hill v. Ouzts, 200 So. 254, 190 Miss. 341.

N.Y.—In re Frazier's Estate, 124 N.Y.S.2d 295, 204 Misc. 542—In re McCormick's Estate, 8 N.Y.S.2d 179, 169 Misc. 672.

35. N.Y.—In re Frazier's Estate, 124 N.Y.S.2d 295, 204 Misc. 542—In re McCormick's Estate, 8 N.Y.S.2d 179, 169 Misc. 672.

36. Ala.—Sovereign Camp, W. O. W., v. Snider, 148 So. 831, 227 Ala. 126.

Ill.—Austin v. Royal League, 147 N.E. 106, 316 Ill. 188.

Mo.—Long v. Montgomery, App., 22 S.W.2d 206.

N.Y.—Dominick v. Stern, 139 N.Y.S. 59, 79 Misc. 271, affirmed 142 N.

Y.S. 1115, 157 App.Div. 944, affirmed 107 N.E. 1075, 213 N.Y. 675.

Okl.—Keith v. Winters, 154 P.2d 83, 194 Okl. 634—First Nat. Bank v. Funnell, 290 P. 177, 144 Okl. 188—Johnson v. Roberts, 254 P. 88, 124 Okl. 68—Farmers' Nat. Bank v. Tennison, 217 P. 182, 90 Okl. 216. 25 C.J. p 72 note 50.

All beneficiaries, whether residents or nonresidents, held to be within statute.

Minn.—First Nat. Bank v. Schneider, 228 N.W. 919, 179 Minn. 255.

Money held by trustee

Statute exempting money due under fraternal benefit policies applies to money collected on them and held by trustee.

N.H.—Gagnon v. Marcoux, 157 A. 82, 85 N.H. 237.

37. Conn.—Miles v. Odd Fellows Mut. Aid Assoc., 55 A. 607, 76 Conn. 132.

25 C.J. p 72 note 51.

Organization held within exemption provisions

Pa.—Halper v. Foxman, 20 Pa. Dist. & Co. 104, 48 York Leg. Rec. 7.

Organizations held not within exemption provisions

Ill.—White v. Locomotive Engineers Mut. Life & Accident Ins. Ass'n, 39 N.E.2d 376, 313 Ill.App. 116.

Pa.—Mamlin v. Genoe, 10 A.2d 799, 139 Pa.Super. 100, reversed on other grounds 17 A.2d 407, 340 Pa. 320.

Mamlin v. Genoe, 34 Pa. Dist. & Co. 420.

25 C.J. p 72 note 51 [a].

38. N.H.—Smith v. Bullard, 61 N.H. 381.

25 C.J. p 72 note 52.

39. Pa.—In re Jackman's Estate, 51 Pa. Dist. & Co. 69, 32 Del.Co. 267—Kruczaj v. Komar, 24 Pa. Dist. & Co. 211, 26 Del.Co. 363.

Annuity policies; agreements for retention of proceeds by insurer. Under some statutes, the proceeds of certain annuity agreements, or insurance proceeds retained by insurer under a trust or other agreement of the parties, are exempt from claims of creditors, provided the agreement between the parties contains a provision asserting such exemption.⁴⁰ The exemption has been held not to cease at the moment a payment becomes due to the beneficiary,^{40.5} or where the beneficiary has a right to withdraw all or part of the amount held by the insurer.^{40.10} The proceeds, to be exempt under such statutes, must be left with insurer under an agreement of the type designated by the statute,⁴¹ although the exact words of the statute need not be incorporated in the agreement,^{41.5} it being sufficient if words used in the policy show an intent to come within the statute.^{41.10} A statute exempting the proceeds of an annuity policy⁴² or the proceeds of an insurance policy left with insurer

under a trust or other agreement,⁴³ provided the agreement between the parties sets forth that such proceeds shall be free from legal process, will not exempt an annuity payable under a contract which does not contain the required agreement; nor will such provisions afford exemption under a contract containing the required agreement where such agreement was not made by the "parties," that is, insurer and insured.⁴⁴

c. Validity

Statutes exempting life insurance policies and the cash surrender values thereof are valid, at least as to creditors other than those having existing rights as to policies already issued.

Statutes providing for the exemption of the proceeds of life insurance have been held valid,⁴⁵ at least if protection is afforded with respect to premiums paid to defraud creditors,⁴⁶ and with respect to existing creditors having rights as to policies already issued,⁴⁷ and provided, further, the exemp-

Exempt in part

Where original \$500 life certificate issued under employer's group policy was made payable to a single woman but beneficiary was married at time insured's continued service in employer entitled him to additional insurance of \$1,500 and rider was attached to original certificate making additional insurance payable according to terms of original certificate, the beneficiary was entitled to exemption of additional insurance but not to exemption of original insurance.

Wis.—Luebke v. Vonnekold, 27 N.W. 2d 458, 250 Wis. 496.

40. N.Y.—Crossman Co. v. Rauch, 288 N.Y.S. 827, 248 App.Div. 758.

Gardiner v. Rauch, 39 N.Y.S.2d 652, 179 Misc. 606, affirmed 40 N.Y.S.2d 333, 265 App.Div. 997, appeal denied 41 N.Y.S.2d 203, 266 App. Div. 662.

Matulka v. Van Roosbroeck, 25 N.Y.S.2d 240, affirmed 25 N.Y.S.2d 247.

Pa.—Provident Trust Co. v. Rothman, 183 A. 793, 321 Pa. 177, 104 A.L.R. 1275, followed in Washington Trust Co. v. New York Life Ins. Co., 183 A. 798, 321 Pa. 188.

Application of statute

The statute relating to exemption from legal process of proceeds of life policy left with insurer under trust or other agreement affords protection against order permitting or directing person indebted to pay debt to sheriff or judgment creditor as well as against execution.

N.Y.—F. Frazier Jelke & Co. v. Greene, 35 N.Y.S.2d 91.

40.5 N.Y.—F. Frazier Jelke & Co. v. Greene, supra.

40.10 N.Y.—Genesee Val. Trust Co. v. Glazer, 66 N.E.2d 169, 295 N.Y. 219, 164 A.L.R. 911, motion denied 68 N.E.2d 49, 295 N.Y. 962.

41. Pa.—Greco v. Rainal, Com.Pl., 13 Northumb.Leg.J. 360, reversed on other grounds 4 A.2d 232, 134 Pa.Super. 99.

Supplemental agreement

Where the beneficiary returns, undorsed, a check for the full sum due under a policy, and elects to take annuity certificates in lieu thereof, such an arrangement constitutes a supplemental agreement within the meaning of a statute exempting any proceeds retained by the company pursuant to the policy or any agreement supplemental thereto.

Pa.—Provident Trust Co. v. Rothman, 183 A. 793, 321 Pa. 177, 104 A.L.R. 1275, followed in Washington Trust Co. v. New York Life Ins. Co., 183 A. 798, 321 Pa. 188.

41.5 N.Y.—F. Frazier Jelke & Co. v. Greene, 35 N.Y.S.2d 91—Manufacturers Trust Co. v. Lewis, 18 N.Y.S.2d 714.

41.10 N.Y.—F. Frazier Jelke & Co. v. Greene, 35 N.Y.S.2d 91—Manufacturers Trust Co. v. Lewis, 18 N.Y.S.2d 714.

42. N.Y.—Matulka v. Van Roosbroeck, 25 N.Y.S.2d 240, affirmed 25 N.Y.S.2d 247.

43. N.Y.—Matulka v. Van Roosbroeck, supra.

44. N.Y.—Matulka v. Van Roosbroeck, supra.

45. Fla.—Milam v. Davis, 123 So. 668, 97 Fla. 916, certiorari denied 50 S.Ct. 82, 280 U.S. 601, 74 L.Ed. 646.

Minn.—Fox v. Swartz, 51 N.W.2d 80, 235 Minn. 337, 30 A.L.R.2d 739.

Tenn.—Hamilton Nat. Bank v. Amster, 184 S.W. 5, 134 Tenn. 537. 25 C.J. p 72 note 42.

Fraternal benefit insurance

(1) A statute exempting proceeds of fraternal benefit insurance policies is not in violation of a constitutional provision that "government is instituted for the protection, security, and benefit of the people." N.D.—Brown v. Steckler, 168 N.W. 670, 40 N.D. 113.

(2) Statute exempting money or benefit from fraternal benefit societies from liability for debts of member or beneficiary has been held not to come within constitutional provisions governing general exemptions. S.D.—First Nat. Bank v. Halstead, 229 N.W. 294, 56 S.D. 422.

46. Mass.—Bailey v. Wood, 89 N.E. 147, 202 Mass. 549, 25 L.R.A., N.S., 722.

47. U.S.—In re Beach, D.C.Mass., 8 F.Supp. 910.

N.C.—Commissioner of Banks v. Yelverton, 168 S.E. 505, 204 N.C. 441.

Subsequent policies

A statute exempting insurance policies thereafter issued is valid, even as to existing creditors.

U.S.—In re Beach, D.C.Mass., 8 F. Supp. 910.

Pa.—Irving Bank, New York v. Alexander, 124 A. 634, 280 Pa. 466, 34 A.L.R. 834.

Subsequent creditors

A statute exempting life insurance does not, as to subsequent creditors, violate constitutional prohibitions against impairing the obligations of a contract.

tion granted does not violate constitutional provisions respecting the amount thereof, as considered infra § 40. On the other hand, a statute exempting the proceeds of an existing policy is invalid as to antecedent contractual debts under the contract clause of the federal Constitution,⁴⁸ particularly where the exemption granted is without limitation as to time, amount, circumstances, or need.⁴⁹

A constitutional provision exempting specific property does not invalidate a statute providing for the exemption of life insurance where such constitutional provision is not exclusive or intended to limit the legislative power with respect to life insurance.⁵⁰

Cash surrender value. Where the legislature has power to exempt the proceeds of life insurance, it also has the power to exempt the cash surrender value thereof.⁵¹

d. Beneficiaries

- (1) In general
- (2) Policy payable to insured or his legal representatives
- (3) Option to change beneficiaries

(1) In General

The benefits of a statute exempting insurance proceeds extend, in general, only to the persons whom the statute was designed to protect, and to policies the proceeds of which are payable to such persons.

Statutes limiting the exemption of the proceeds of life insurance policies to a designated class of beneficiaries must be construed according to their intention with regard to the person entitled to take as beneficiary.⁵² The term "heirs" or "heirs at law" as used in a statute exempting the proceeds of a policy payable to such persons means those who bear such relationship to insured at the time of his death.⁵³

It is not necessary, under statutes exempting policies taken for the benefit of a wife or children, that the policy be payable by its terms to such beneficiaries;⁵⁴ it is sufficient that the policy inures to the benefit of the wife by operation of law,⁵⁵ and a policy payable to a trustee for the benefit of the wife or children will be protected.⁵⁶

An annuity contract providing for payments to an individual on his attaining a certain age, and also providing for the payment of a death benefit to his wife in the event of his death before reaching such age, is an annuity contract for the benefit of a wife within the meaning of a statute exempt-

La.—Succession of Morris, 121 So. 358, 10 La.App. 650.

S.D.—First Nat. Bank v. Halstead, 229 N.W. 294, 56 S.D. 422.

48. U.S.—Bank of Minden v. Clement, La., 41 S.Ct. 408, 256 U.S. 126, 65 L.Ed. 857.

49. U.S.—W. B. Worthen Co. v. Thomas, Ark., 54 S.Ct. 816, 292 U.S. 426, 78 L.Ed. 1344, 93 A.L.R. 173.

50. U.S.—Cooper v. Taylor, C.C.A. Fla., 54 F.2d 1055, certiorari denied 52 S.Ct. 579, 286 U.S. 554, 76 L.Ed. 1289.

51. U.S.—Cooper v. Taylor, supra. Fla.—Slatcoff v. Dezen, 76 So.2d 792.

52. Cal.—In re Crosby's Estate, 41 P.2d 928, 2 C.2d 470.

Iowa.—In re Tellier's Estate, 230 N.W. 545, 210 Iowa 20.

Minn.—Fox v. Swartz, 51 N.W.2d 80, 235 Minn. 337.

N.J.—Slurszberg v. Prudential Ins. Co. of America, 192 A. 451, 15 N.J. Misc. 423.

N.D.—Cohen v. Gordon Ferguson, Inc., 218 N.W. 209, 56 N.D. 545.

Ohio.—Hoffman v. Weiland, 29 N.E. 2d 33, 64 Ohio App. 467—Baxter v. Old National-City Bank, 189 N.E. 514, 46 Ohio App. 533.

Pa.—In re Kenin's Trust Estate, 23 A.2d 837, 343 Pa. 549.

25 C.J. p 73 note 56.

Endowment policies see supra subdivision b of this section.

"The policy of the law, even where the rights of creditors may be adversely affected, favors the wife to whom the husband has attempted to secure the benefit of insurance upon his life."

Pa.—Irving Bank, New York v. Alexander, 124 A. 634, 635, 280 Pa. 466, 34 A.L.R. 834—Weil v. Marquis, 101 A. 70, 71, 256 Pa. 608.

Purpose of statute

The purpose of the statute relating to beneficiaries of life policies who are married women is to assure that provision which a man by his life insurance has made for support of his wife and children after his death shall receive substantial protection against claims of his creditors.

U.S.—Phoenix Mut. Life Ins. Co. v. Connelly, C.A.N.J., 188 F.2d 462.

Persons other than widow or children

Benefit of statutory provisions exempting life insurance held not limited to insured's widow and children. Cal.—Prudential Ins. Co. of America v. Beck, 103 P.2d 241, 39 C.A.2d 355.

Creditor's right to question dependency

A creditor who seeks by garnish-

ment to reduce the money due to the beneficiary in a certificate of life insurance duly issued by a fraternal insurance association as defined by statute cannot raise the question of the dependence of the beneficiary on insured in order to relieve the fund from the operation of the law rendering it not liable for the debts of the beneficiary.

Okl.—State v. Collins, 174 P. 568, 70 Okl. 323.

Second husband of widow

Where statutes limit the exemption of insurance proceeds to insured's spouse and family, and the beneficiary, insured's widow, remarries and dies after receiving the proceeds, no exemption exists in such proceeds in favor of her second husband.

Cal.—In re Crosby's Estate, 41 P.2d 928, 2 C.2d 470.

53. N.D.—Jorgensen v. De Viney, 222 N.W. 464, 57 N.D. 63.

54. U.S.—In re Phillips, D.C.Pa., 7 F.Supp. 807.

Iowa.—Scott v. Wamsley, 253 N.W. 524, 218 Iowa 670.

55. Iowa.—Scott v. Wamsley, supra.

56. U.S.—In re Phillips, D.C.Pa., 7 F.Supp. 807.

Ala.—Love v. First Nat. Bank, 153 So. 189, 228 Ala. 258.

Iowa.—Scott v. Wamsley, 253 N.W. 524, 218 Iowa 670.

ing such contracts from the claims of the husband's creditors.⁵⁷

Default of required class of beneficiaries. Exemption statutes designed for the protection of designated relatives of insured, such as his widow and children, have been construed not to create an exemption in favor of the estate of the debtor in case he dies without leaving such relatives;⁵⁸ but under the express terms of some statutes,⁵⁹ and by implication from the language of others,⁶⁰ in the absence of widow or children the proceeds of an insurance policy go to heirs and legatees, exempt from payment of decedent's debts.

It has been held under a statute providing for an exemption in favor of a widow that, where there is no provision as to a beneficiary in case she should not survive to take, the proceeds belong to her children if she has any surviving her, with the same freedom from interference on the part of creditors as in the case of the first beneficiary.⁶¹ A policy originally exempt because payable to a wife loses its exemption on the termination of the marriage by divorce.⁶²

Testamentary disposition. Under statutes exempting the proceeds of life insurance for the benefit of the debtor's widow and children and al-

lowing him to dispose of the insurance money by will, he can, although the estate is insolvent, apportion the insurance money by will between his wife and children as he sees fit,⁶³ but, if he is insolvent, he cannot bestow it by will on other persons.⁶⁴

(2) Policy Payable to Insured or His Legal Representatives

In the absence of express statutory provision to the contrary, policies payable to the insured or his legal representatives are not usually exempt from the claims of the insured's creditors.

Under some statutes a policy payable to insured or to his legal representatives is not exempt from claims of creditors of the estate,⁶⁵ and this is also the general rule where the life insurance exemption statute contains no express provision extending its operation to such policies.⁶⁶ Under other statutes such a policy is exempt from the claims of insured's creditors,⁶⁷ the benefit of such an exemption being sometimes confined to the surviving spouse and children.⁶⁸ A policy payable to insured's estate is exempt under a statute exempting the proceeds or avails of all life insurance.⁶⁹

A statute exempting the proceeds of a policy payable to the representatives, heirs, or estate of an insured will not exempt a policy payable to a part-

57. U.S.—*Bowers v. Reinhard*, C.C. A.Pa., 78 F.2d 776, certiorari denied *Reinhard v. Bowers*, 56 S.Ct. 173, 296 U.S. 640, 80 L.Ed. 455. Contra *In re Bowers*, 21 Pa.Dist. & Co. 562.

58. Cal.—*In re Starr's Estate*, 190 P. 625, 183 C. 121. 25 C.J. p 73 note 71.

59. Miss.—*Coates v. Worthy*, 17 So. 606, 18 So. 916, 72 Miss. 575. 25 C.J. p 73 note 72.

60. Iowa.—*Larrabee v. Palmer*, 70 N.W. 100, 101 Iowa 132. La.—*Succession of Erwin*, 126 So. 223, 169 La. 877. 25 C.J. p 73 note 73.

61. Wis.—*Ellison v. Straw*, 92 N.W. 1094, 116 Wis. 207.

62. Ohio.—*Hoffman v. Weiland*, 29 N.E.2d 33, 64 Ohio App. 467.

63. Me.—*Hathaway v. Sherman*, 61 Me. 466.

64. Me.—*Hathaway v. Sherman*, supra. Ohio.—*Wagner v. Karman*, 6 Ohio Dec., Reprint, 753, 7 Am.L.Rec. 671.

65. U.S.—*In re Bray*, D.C.N.H., 8 F. Supp. 761. Ark.—*Lee v. Potter*, 100 S.W.2d 252, 193 Ark. 401.

N.Y.—*Beigel v. Windschauer*, 274 N.Y.S. 850, 153 Misc. 389—*Billings*

v. Lynch, 292 N.Y.S. 344, 161 Misc. 496—*Stoudt v. Guaranty Trust Co. of New York*, 271 N.Y.S. 409, 150 Misc. 675, affirmed 269 N.Y.S. 997, 241 App.Div. 711—*Lion Credit Union v. Gutman*, 265 N.Y.S. 479, 148 Misc. 620.

Tenn.—*Sparkman-Thompson, Inc. v. Chandler*, 39 S.W.2d 741, 162 Tenn. 614.

25 C.J. p 73 note 63.

Change of beneficiary

(1) Policies which were originally payable to insured but which were subsequently made payable to third person are exempt from insured's creditors, except where beneficiary is changed with intent to defraud creditors.

N.Y.—*Hechtkopf v. Mendlowitz*, 282 N.Y.S. 338, 156 Misc. 635.

(2) Exemption was held available only to beneficiaries named as such when policy was originally issued. Mass.—*McCarthy v. Griffin*, 12 N.E.2d 836, 299 Mass. 309.

Industrial policies payable to insured's executors and administrators unless payment be made under provision, authorizing payment to blood relative or other persons equitably found entitled to proceeds are not exempt.

N.Y.—*Billings v. Lynch*, 292 N.Y.S. 344, 161 Misc. 496.

66. Miss.—*Rice v. Smith*, 16 So. 417, 72 Miss. 42.

25 C.J. p 73 note 64.

67. Fla.—*Milam v. Davis*, 123 So. 668, 97 Fla. 316, certiorari denied 50 S.Ct. 82, 280 U.S. 601, 74 L.Ed. 646.

La.—*Parrott v. Sellers*, 135 So. 73, 16 La.App. 595.

N.D.—*Sands v. Merchants Nat. Bank & Trust Co.*, 81 N.W.2d 748—*Hill v. Hanna*, 222 N.W. 459, 57 N.D. 412.

68. Ala.—*Mitchell v. Allis*, 47 So. 715, 157 Ala. 304.

Iowa.—*In re Hazeldine's Estate*, 280 N.W. 568, 225 Iowa 369—*In re Teller's Estate*, 230 N.W. 545, 210 Iowa 20.

S.D.—*Whiteside v. Fischer*, 250 N.W. 60, 61 S.D. 565.

Marriage after issuance of policy

Where an unmarried man takes such a policy, and subsequently marries, the policy may be held to be controlled by statutes providing for exemption of a husband's life insurance in favor of his widow and next of kin.

Tenn.—*Rose v. Wortham*, 32 S.W. 458, 95 Tenn. 505, 30 L.R.A. 609.

69. La.—*Succession of Le Blanc*, 76 So. 223, 142 La. 27, L.R.A.1917F 1137.

Parrott v. Sellers, 135 So. 73, 16 La.App. 595.

nership, even though the partnership has dissolved and insured has become its successor.⁷⁰

(3) Option to Change Beneficiaries

The exemption granted as to a life insurance policy is usually not lost by the fact that the insured has the right to change the beneficiary.

Under statutes protecting the wife and children of insured, the exemption right, by the weight of authority, is not affected by the fact that an option is reserved to insured to change the beneficiary,⁷¹ where the option is not exercised;⁷² but under statutes less liberal in their terms a different result has been reached.⁷³

e. Pecuniary Benefits Available before Maturity

(1) Dividends

(2) Surrender and loan values

(1) Dividends

The exemption of an insurance policy extends to dividends thereon if not appropriated to the use of the insured; but dividends left with the company to accumulate, and withdrawals at his option, have been held not exempt.

A statute exempting the proceeds and avails of a life insurance policy will exempt dividends due on the policy^{73,50} as long as they have not been appropriated to the use of the debtor,⁷⁴ and thus will exempt dividends which insured has elected to have applied toward the payment of premiums.⁷⁵ It has been held, however, that dividends left with the company to accumulate at interest, but withdrawable by insured at his option, are not exempt.⁷⁶

(2) Surrender and Loan Values

It is the general rule that the cash surrender or loan value may not be appropriated by creditors; but where the proceeds of a policy are not exempt, its cash surrender value is not.

Except as the governing statute may indicate an intention to the contrary,⁷⁷ the general rule is that where the proceeds of a life insurance policy are exempt, sums which could be, but have not been, realized thereon before maturity by virtue of its loan⁷⁸ or surrender⁷⁹ value are also exempt from the demands of creditors, and cannot be appropriated by them; but the exemption does not apply to moneys actually received by insured by the exercise

70. N.D.—Cohen v. Gordon Ferguson, Inc., 218 N.W. 209, 56 N.D. 545.

71. N.H.—Barbin v. Moore, 159 A. 409, 85 N.H. 382, 83 A.L.R. 62.

Pa.—Potter Title & Trust Co. v. Fidelity Trust Co., 175 A. 400, 316 Pa. 316.

S.D.—Corpus Juris cited in Schuler v. Johnson, 246 N.W. 632, 634, 61 S.D. 141.

25 C.J. p 74 note 78.

An annuity contract, otherwise exempt, does not lose its exemption by the fact that the right to change the beneficiary has been reserved.

U.S.—Bowers v. Reinhard, C.C.A.Pa., 78 F.2d 776, certiorari denied Reinhard v. Bowers, 56 S.Ct. 173, 296 U.S. 640, 80 L.Ed. 455.

In New York

(1) Under Insurance Law § 166, and former similar laws, it is expressly provided that a lawful beneficiary shall be entitled to proceeds of life policy against creditors and representatives of insured, regardless of whether right to change beneficiary is reserved.

U.S.—Prever v. Aetna Life Ins. Co., D.C.N.Y., 43 F.Supp. 752.

(2) A federal court in construing Domestic Relations Law § 52, held that an option by the insured to change the beneficiary did not affect the exemption allowed by the statute.

U.S.—In re Weisman, D.C.N.Y., 10 F.Supp. 312.

(3) However, a state court also construing Domestic Relations Law § 52, held that a policy containing a provision allowing the husband to change the beneficiary was not exempt from the husband's creditors. N.Y.—Hall v. Hess, 161 N.Y.S. 418, 97 Misc. 331.

72. Ala.—Young v. Thomas, 60 So. 272, 179 Ala. 454.

N.J.—Corpus Juris cited in Slurszberg v. Prudential Ins. Co. of America, 192 A. 451, 456, 15 N.J. Misc. 423.

73. U.S.—In re Jones, D.C.Md., 249 F. 487.

73.50 Minn.—Fox v. Swartz, 51 N.W.2d 80, 235 Minn. 337, 30 A.L.R. 2d 739.

74. N.Y.—Robro Realty Corporation v. Lazarus, 291 N.Y.S. 678, 161 Misc. 610.

75. N.Y.—Randik Realty Corporation v. Moseyeff, 263 N.Y.S. 440, 147 Misc. 618.

76. Pa.—Commonwealth v. Gault, 21 Pa.Dist. & Co. 420.

In New York

(1) The rule stated in the text has been followed.

N.Y.—242 West 38th Street Corporation v. Meyrowitz, 293 N.Y.S. 708, 162 Misc. 488, affirmed 290 N.Y.S. 109, 248 App.Div. 708.

(2) It has also been held, however, that such dividends are exempt, even though no further premiums are due.

N.Y.—Francis H. Leggett & Co. v. Frank, 291 N.Y.S. 681, 161 Misc. 613.

77. U.S.—Morgan v. McCaffrey, C.C.A.Fla., 286 F. 922.

Creditors prior to enactment of statute

A creditor may resort to cash surrender value of life insurance policy where he was a creditor before any exemption statute was enacted.

U.S.—In re Gordon, C.C.A.N.Y., 90 F. 2d 533.

78. U.S.—In re Lang, D.C.Pa., 20 F. 2d 236, affirmed, C.C.A., Dussoulas v. Lang, 24 F.2d 254, certiorari denied 48 S.Ct. 529, 277 U.S. 593, 72 L.Ed. 1004.

N.Y.—Manufacturers Trust Co. v. Bravin, 29 N.Y.S.2d 983, 177 Misc. 83, affirmed 30 N.Y.S.2d 813, 262 App.Div. 989.

79. U.S.—In re Lang, D.C.Pa., 20 F.2d 236, affirmed, C.C.A., Dussoulas v. Lang, 24 F.2d 254, certiorari denied 48 S.Ct. 529, 277 U.S. 593, 72 L.Ed. 1004.

In re Beckman, D.C.Ala., 50 F. Supp. 339—In re Firestone, D.C.N.Y., 2 F.Supp. 96.

Fla.—Slatcoff v. Dezen, 76 So.2d 792.

Minn.—Fox v. Swartz, 51 N.W.2d 80, 235 Minn. 337, 30 A.L.R.2d 739.

N.Y.—Hechtkopf v. Mendlowitz, 282 N.Y.S. 338, 156 Misc. 635.

Tenn.—Corpus Juris cited in Dawson v. National Life Ins. Co., 300 S.W. 567, 569, 156 Tenn. 306. 25 C.J. p 72 note 53.

of his right to such values.⁸⁰ The general rule applies even though insured has the right to change the beneficiaries or to borrow on or surrender the policy without their consent.⁸¹

If the proceeds of a policy are not exempt, the cash surrender value is not.⁸²

§ 40. — Amount Exempted

The exemption granted to the proceeds of life insurance may be limited by constitutional or statutory provisions, either with respect to the face amount of the policy or as to the amount of the premiums; and no exemption exists as to an amount exceeding the designated limitation.

The amount of insurance which may be exempt is limited under some statutes,⁸³ although not under others.⁸⁴ A restriction of this nature has been held operative even though insured was solvent when

the premiums were paid;⁸⁵ but it has also been held that the limitation on the amount of exempt proceeds is applicable only with respect to premiums paid while insured was financially embarrassed.⁸⁶

Under some statutes the restriction is placed on the amount of premiums, and only such proceeds are exempt as to which the annual premium does not exceed a designated amount.⁸⁷ The amount must be reckoned from premiums paid on all the policies held by insured,⁸⁸ except where the statute clearly has reference to the premium paid on each policy.⁸⁹ Where the premiums paid exceed the amount permitted, the creditors may recover depending on the terms of the governing statute, the excess premiums, with interest,⁹⁰ the insurance purchased by the excess premiums,⁹¹ or even the entire proceeds of the policy.⁹² The fact that the

80. N.J.—Slurszberg v. Prudential Ins. Co. of America, 192 A. 451, 15 N.J.Misc. 423.

N.Y.—Manufacturers Trust Co. v. Bravin, 29 N.Y.S.2d 983, 177 Misc. 83, affirmed 30 N.Y.S.2d 813, 262 App.Div. 989.

Ohio.—Kuhn v. Wolf, 16 N.E.2d 1017, 59 Ohio App. 15—Baxter v. Old National-City Bank, 189 N.E. 514, 46 Ohio App. 533.

Proceeds transferred to wife

Under statute exempting every benefit accruing under life policy from attachment, garnishment, or other legal or equitable process and from all claims of creditors of insured and of beneficiary, cash value of policy received by insured personally on surrender of policy and subsequently given to wife who was beneficiary under policy was not exempt, either in possession of insured or wife, from legal or equitable process or from claims of creditors of insured or of wife.

Neb.—Bank of Brule v. Harper, 4 N. W.2d 609, 141 Neb. 616.

81. U.S.—In re Lang, D.C.Pa., 20 F. 2d 236, affirmed, C.C.A., Dussoulas v. Lang, 24 F.2d 254, certiorari denied 48 S.Ct. 529, 277 U.S. 593, 72 L.Ed. 1004.

In re Horwitz, D.C.N.Y., 3 F. Supp. 16.

Minn.—Murphy v. Casey, 184 N.W. 783, 150 Minn. 107.

N.J.—Slurszberg v. Prudential Ins. Co. of America, 192 A. 451, 15 N.J. Misc. 423.

N.Y.—Maurice v. Travelers' Ins. Co., 201 N.Y.S. 369, 121 Misc. 427.

S.D.—Schuler v. Johnson, 246 N.W. 632, 61 S.D. 141.

82. N.Y.—Billings v. Lynch, 292 N. Y.S. 344, 161 Misc. 496.

Ohio.—Hoffman v. Welland, 29 N.E. 2d 33, 64 Ohio App. 467.

83. U.S.—Pauling v. Pauling, C.C.A. Minn., 159 F.2d 531, certiorari de-

nied 67 S.Ct. 1192, 331 U.S. 808, 91 L.Ed. 1829.

Miss.—Magee v. Bank of Hattiesburg & Trust Co., 98 So. 541, 134 Miss. 126—Cozine v. Grimes, 24 So. 197, 76 Miss. 294.

Amount exempted generally see infra §§ 66-69.

84. U.S.—Hogan v. Hall, C.C.A.La., 118 F.2d 247.

Wash.—Northern Savings & Loan Ass'n v. Kneisley, 76 P.2d 297, 193 Wash. 372.

85. U.S.—Dinkins v. Cornish, D.C. Ark., 41 F.2d 766.

86. Tex.—Red River Nat. Bank v. De Berry, 105 S.W. 998, 47 Tex. Civ.App. 96.

Dower as factor in financial condition

In the absence of special conditions, such as ill health, or imminence of death, the right to dower of the wife is not to be considered on the question of insured's financial condition.

Tex.—Red River Nat. Bank v. De Berry, supra.

Time of incurring debts

In applying the rule stated in the text, the rights of creditors at the time of the insured's death do not depend on whether they were such when the premiums were paid; nor does it matter that they are asserting claims other than those which they held at the time of such payments.

Tex.—Red River Nat. Bank v. De Berry, supra.

87. Cal.—Bowman v. Wilkinson, 314 P.2d 574, 153 C.A.2d 391—Prudential Ins. Co. of America v. Beck, 103 P.2d 241, 39 C.A.2d 355.

N.Y.—Holmes v. John Hancock Mut. Life Ins. Co., 41 N.E.2d 909, 288 N.Y. 106—U. S. Mortgage & Trust Co. v. Ruggles, 179 N.E. 250, 258 N.Y. 32, 70 A.L.R. 802.

Premiums paid by wife

Such provisions do not apply to cases where the insurance is taken out by a wife on the life of her husband and payment of premiums is made by the wife.

Tex.—Red River Nat. Bank v. De Berry, 105 S.W. 998, 47 Tex.Civ. App. 96.

25 C.J. p 75 note 1.

88. Conn.—Bartram v. Hopkins, 42 A. 645, 71 Conn. 505.

Assessments paid for coöperative and assessment life insurance should be excluded where the proceeds of such insurance are wholly exempt.

N.Y.—Dominick v. Stern, 139 N.Y.S. 59, 79 Misc. 271, affirmed 142 N.Y. S. 1115, 157 App.Div. 944, affirmed 107 N.E. 1075, 213 N.Y. 675.

89. Ohio.—Hinch v. D'Utassy, 1 Ohio S. & C.P. 372.

25 C.J. p 75 note 96.

90. U.S.—Harriman Nat. Bank v. Huiet, S.C., 249 F. 856, 162 C.C.A. 90.

25 C.J. p 75 note 97.

91. U.S.—Dinkins v. Cornish, D.C. Ark., 41 F.2d 766.

25 C.J. p 75 note 98.

92. In California

(1) It was held, under a statute exempting moneys accruing on an insurance policy if the annual premium did not exceed five hundred dollars, that if the premiums exceeded that amount the beneficiary could have no exemption at all.

Cal.—In re Brown, 55 P. 1055, 123 C. 399, 69 Am.S.R. 74.

(2) However, subsequent statutory provisions have changed this result, "so as to provide for exemption of such portion of the proceeds from life insurance, when the total annual premiums paid exceed \$500, as said sum of \$500 bears to the total premiums paid."

Cal.—California U. S. Bond & Mort-

policy was procured outside the state has been held not to affect the rights of creditors to recover that part of the proceeds paid for by the insured, while a resident within the state, with premiums in excess of the statutory amount.^{92.5} Under some statutes, it has been held that an amount in excess of a designated amount may be expended for insurance provided such expenditure is done in good faith and without intent to cheat, hinder, or delay creditors.^{92.10}

The exemption may be restricted by statute to proceeds in a designated amount, without regard to the amount of the premiums.⁹³ A statute which exempts the "proceeds" of a policy up to a designated amount has been held to exempt any policy the cash surrender value of which is, at the time, less than the designated amount, notwithstanding the face amount of the policy is in excess thereof.⁹⁴ In the case of a beneficiary who has received more than the exemption allowed, but who has spent part of the proceeds, leaving a balance in an amount less than the exemption, there is authority holding that such balance cannot be reached by creditors;⁹⁵ but other authority holds that such balance can be reached to the extent to which the sum originally received exceeded the allowable exemption.⁹⁶

In determining whether claims against insured's estate should be paid in part from the proceeds of exempt insurance, rather than exclusively from funds on hand in excess thereof, the statutes are

construed, where possible, to allow the full exemption to those entitled thereto.⁹⁷

Validity. The validity of life insurance exemption statutes generally is considered *supra* § 39. There is authority holding that a provision for an unlimited exemption is invalid under constitutional provisions providing for the exemption of a reasonable amount of personal property,⁹⁸ although the contrary has also been held.⁹⁹ A constitutional provision that property exempt from execution shall not exceed in value a specified amount does not invalidate a statute exempting from attachment money or other benefits payable under a certificate issued by a fraternal association, even though the exemption from attachment exceeds in amount the exemption from execution allowed in the constitution.¹ In the absence of constitutional restrictions, the legislature need not limit the amount of insurance which shall be exempt.²

The federal war risk insurance statute cannot be attacked as invalid on the ground that it enlarges the exemptions of an individual beyond the amount fixed by the provisions of a state constitution.³

§ 41. — Duration of Exemption

Differences in the language of the governing statutes have resulted in a difference in view as to whether insurance proceeds continue to be exempt after their receipt by the beneficiary; and a difference also exists as to the exemption of property purchased with such proceeds.

gage Corporation v. Grodzins, 34 P.2d 192, 193, 139 C.A. 240.

92.5 N.Y.—U. S. Mortgage & Trust Co. v. Ruggles, 179 N.E. 250, 258 N.Y. 32, 79 A.L.R. 802.

92.10 Ark.—Lazarus v. Alphin, 46 S.W.2d 1104, 185 Ark. 267.

93. Iowa.—Booth v. Propp, 242 N.W. 60, 214 Iowa 208, 81 A.L.R. 919. S.D.—In re Jacob's Estate, 47 N.W. 2d 809, 68 S.D. 513, 141 A.L.R. 891.

94. U.S.—Magnuson v. Wagner, C. C.A.S.D., 1 F.2d 99. S.D.—Schuler v. Johnson, 246 N.W. 632, 61 S.D. 141.

95. Iowa.—Booth v. Propp, 242 N.W. 60, 214 Iowa 208, 81 A.L.R. 919.

96. Cal.—California U. S. Bond & Mortgage Corporation v. Grodzins, 34 P.2d 192, 139 C.A. 240.

97. Miss.—Abernethy v. Savage, 132 So. 553, 159 Miss. 506—Delta Ins. & Realty Co. v. Benjamin, 84 So. 226, 122 Miss. 275.

Claims excepted from the exemption provisions should be paid from funds other than the insurance proceeds and the balance of such other

funds distributed to general creditors, leaving the full exemption to those entitled thereto; and this is true even though the general creditors will thereby fail to be paid in full.

Miss.—Delta Ins. & Realty Co. v. Benjamin, *supra*.

Attorneys' fees

Where an administrator sues for and obtains insurance moneys in excess of the amount exempted by statute, and the attorneys' fees incurred in collecting the funds are not more than such excess, such fees should be paid out of the excess, and the full exemption allowed to the beneficiaries, and it is improper to apportion such fees between the amount of the exemption and the excess recovered.

Miss.—Abernethy v. Savage, 132 So. 553, 159 Miss. 506.

98. S.D.—Skinner v. Holt, 69 N.W. 595, 9 S.D. 427, 62 Am.S.R. 878. 25 C.J. p 75 note 92.

Amount held reasonable

Statute fixing five thousand dollars as maximum amount to which proceeds of insurance policies were exempt from execution is not uncon-

stitutional, as exempting unreasonable amount.

S.D.—Schuler v. Johnson, 246 N.W. 632, 61 S.D. 141.

Statute exempting benefits of fraternal societies is not contrary to constitutional provisions providing for exemption of reasonable amount of personalty, since the courts take judicial notice that the benefits provided by such associations are limited to a comparatively small amount. S.D.—First Nat. Bank v. Halstead, 229 N.W. 294, 56 S.D. 422.

99. N.D.—Farmers' State Bank v. Smith, 162 N.W. 302, 36 N.D. 225. 25 C.J. p 75 note 93.

1. Md.—Himmel v. Eichengreen, 69 A. 511, 107 Md. 610.

Reason for rule

An attachment is not such an execution as was intended to be affected by the constitutional provision. Md.—Himmel v. Eichengreen, *supra*.

2. Wash.—Northern Savings & Loan Ass'n v. Kneisley, 76 P.2d 297, 193 Wash. 372.

3. Ark.—Purvis v. Walls, 44 S.W.2d 353, 184 Ark. 887.

Under statutes exempting the funds in the hands of the insurer from seizure on legal process for the satisfaction of the debts of insured or the beneficiary, it is held that the exemption continues only while the funds are in the hands of the insurer,⁴ and that they may be reached where they have been paid to the agent of the beneficiary,⁵ or to the beneficiary,⁶ or to the personal representatives of insured,⁷ or have been deposited by the beneficiary to his own credit⁸ at interest.^{8.5} It has also been held that the exemption does not obtain after the policy has matured,^{8.10} as, for example, by the death of the insured,⁹ or payment has become fixed in accordance with the terms of the policy.^{9.5} Under other statutes the proceeds of a policy are exempt in the hand of the beneficiary,¹⁰ and under such a statute the proceeds of an insurance policy do not lose their exemption by being deposited in a bank by the beneficiary¹¹ in a noninterest account,^{11.5} or by being deposited in an attorney's trust account pursuant to a court order.^{11.10}

A statute providing that insurance becoming due and payable under the terms of the policy shall be

exempt from the claims of all creditors of the insured or beneficiary has been held to exempt proceeds collected by the administrator of insured.¹² Under a statute exempting the proceeds of an insurance policy payable to a widow, it has been held that on her death such proceeds become subject to the claims of her creditors on debts contracted by her before her husband's death.¹³

Property purchased with proceeds. Under statutes broadly exempting the proceeds of life insurance, the exemption has been held to extend to property purchased therewith;¹⁴ but under other statutes, less liberal in their terms, a conclusion to the contrary has been reached.¹⁵ In construing life insurance exemption statutes to determine whether property purchased with the proceeds is exempt, analogous statutes dealing with other exempt property should be considered, but are not controlling.¹⁶

§ 42. — Debts Affected

The governing statutes determine whether life insurance proceeds are exempt as against particular debts, such as those founded on claims against the beneficiary, advances on the policy, and funeral expenses; and they

4. Mich.—*Recor v. Recor*, 106 N.W. 82, 142 Mich. 479, 5 L.R.A., N.S., 472, 7 Ann.Cas. 754.
25 C.J. p 75 note 2.

5. Ill.—*Martin v. Martin*, 58 N.E. 230, 187 Ill. 200.

6. Me.—*Hathorn v. Robinson*, 51 A. 236, 96 Me. 33.

N.Y.—*Bull v. Case*, 58 N.Y.S. 774, 41 App.Div. 391, affirmed 59 N.E. 301, 165 N.Y. 578.

7. Ill.—*Hamilton v. Darley*, 107 N.E. 798, 266 Ill. 542.

Mich.—*Auditor General v. Olesnick*, 4 N.W.2d 679, 302 Mich. 336.

8. Mich.—*Recor v. Recor*, 106 N.W. 82, 142 Mich. 479, 5 L.R.A., N.S., 472, 7 Ann.Cas. 754.

8.5 Ohio.—*In re Bowen*, 499 N.E.2d 753, 141 Ohio St. 602.

8.10 U.S.—*Reinecke v. C. I. R.*, C.A. 8, 220 F.2d 406, certiorari denied 76 S.Ct. 60, 350 U.S. 829, 100 L.Ed. 740.

9. N.Y.—*Jackson v. Tallmadge*, 158 N.E. 48, 246 N.Y. 133.

9.5 U.S.—*Reinecke v. C. I. R.*, C.A. 8, 220 F.2d 406, certiorari denied 76 S.Ct. 60, 350 U.S. 829, 100 L.Ed. 740.

10. Cal.—*Prudential Ins. Co. of America v. Beck*, 103 P.2d 241, 39 C.A.2d 355.

11. Okl.—*First Nat. Bank v. Funnell*, 290 P. 177, 144 Okl. 188.
25 C.J. p 75 note 8.

Federal war risk insurance

Ga.—*Payne v. Jordan*, 110 S.E. 4, 152 Ga. 367, answers to certified ques-

tion conformed to 110 S.E. 452, 28 Ga.App. 151.

Tenn.—*Speer v. Pierce*, 77 S.W.2d 77, 18 Tenn.App. 351.

Effect of commingling

Insurance money deposited confusedly with other funds does not thereby cease to be exempt.

La.—*Succession of Erwin*, 126 So. 223, 169 La. 877.

Money deposited on the purchase price of stock is not equivalent to a bank deposit so as to be exempt within the rule stated in the text.

Kan.—*Independence Savings & Loan Ass'n v. Sellars*, 88 P.2d 1059, 149 Kan. 652.

11.5 Ohio.—*In re Bowen*, 49 N.E.2d 753, 141 Ohio St. 602.

11.10 Cal.—*Bowman v. Wilkinson*, 314 P.2d 574, 153 C.A.2d 391.

12. U.S.—*Cramer v. Phoenix Mut. Life Ins. Co. of Hartford, Conn.*, C.C.A.Iowa, 91 F.2d 141, certiorari denied 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602.

Ala.—*Heflin v. Allem*, 48 So. 695, 160 Ala. 241.

N.H.—*Tennant v. Upton*, 99 A. 652, 78 N.H. 600.

13. Iowa.—*In re Tellier's Estate*, 230 N.W. 545, 210 Iowa 20.

14. Wash.—*Northern Savings & Loan Ass'n v. Kneisley*, 76 P.2d 297, 193 Wash. 372.
25 C.J. p 82 note 50 [a].

Income from property so purchased is also exempt.

Wash.—*Northern Savings & Loan Ass'n v. Kneisley*, supra.

15. Kan.—*Independence Savings & Loan Ass'n v. Sellars*, 88 P.2d 1059, 149 Kan. 652—*Pefly v. Reynolds*, 222 P. 121, 115 Kan. 105.

Minn.—*Ross v. Simser*, 258 N.W. 582, 193 Minn. 407.

Mo.—*Bank of Brimson v. Graham*, 76 S.W.2d 376, 335 Mo. 1196, 96 A.L.R. 399.

Okl.—*Keith v. Winters*, 154 P.2d 83, 194 Okl. 634.

Property purchased with federal war risk insurance

Ga.—*Payne v. Jordan*, 138 S.E. 262, 36 Ga.App. 787.

Iowa.—*In re Bagnall's Guardianship*, 29 N.W.2d 597, 238 Iowa 905.

Ohio.—*In re Bowen*, 49 N.E.2d 753, 141 Ohio St. 602.

Proceeds of fraternal benefit insurance

The statutory exemption as to proceeds of fraternal benefit insurance does not extend to property of a non-exempt character purchased with proceeds of insurance policy.

Okl.—*Keith v. Winters*, 154 P.2d 83, 194 Okl. 634.

Securities in which the proceeds have been invested have been held not exempt.

N.Y.—*Bull v. Case*, 58 N.Y.S. 774, 41 App.Div. 391, affirmed 59 N.E. 301, 165 N.Y. 578.

16. Wash.—*Northern Savings & Loan Ass'n v. Kneisley*, 76 P.2d 297, 193 Wash. 372.

may authorize a special contract between the insured and his creditors making debts enforceable against such proceeds, although they would not otherwise be so enforceable.

Whether a claim or debt is affected by, or excepted from, the operation of the statutes exempting the proceeds of life insurance depends on the terms of the governing statutes.¹⁷ Generally the beneficiary or recipient of insurance moneys has no exemption therein as against the claims of his or her own creditors;¹⁸ but the terms of some statutes have been held broad enough to include such an exemption.¹⁹ In the case of a policy payable to a widow or made for her benefit, it has been held that the proceeds are exempt as against her creditors²⁰ or those of any other person.²¹ Under some statutes a wife, in order to be entitled to the proceeds of a policy as against her own creditors, must be the procuring cause of the insurance,^{21.5} while under others, however, it has been held that any person may be the procuring cause.^{21.10}

Notwithstanding a statute exempting the proceeds of a life insurance policy from seizure for any debt of the policyholder or beneficiary, the proceeds may be made subject to the payment of the debts of insured's estate where the surrounding circumstances evidence that such was the intention of insured,²² as where the policy is made payable to his executor or administrator.²³

Time when debt arose. Some statutes exempting life insurance exclude from their operation creditors whose claims arose out of, or were based on, obligations created before the statutes took effect.²⁴ A statute exempting in broad terms the proceeds of all life and accident insurance policies from all liability for any debt has been construed to refer only to such debts as are in existence at the death of insured, when the interest of the beneficiary becomes vested, and not to those incurred thereafter;²⁵ but a result to the contrary has also

17. U.S.—Prudential Ins. Co. of America v. Osadchy, D.C.Mo., 54 F. Supp. 711—Dellefield v. Block, D.C.N.Y., 40 F.Supp. 616.
Pa.—In re Jackman's Estate, 51 Pa. Dist. & Co. 69, 32 Del.Co. 267.
Tenn.—John Bouchard & Sons Co. v. Nashville Protestant Hospital, 146 S.W.2d 956, 177 Tenn. 151.

17. Support of wife

War veteran's wife could not subject his war risk insurance to her claim for support and maintenance in any proceeding adverse to veteran. Tenn.—Brewer v. Brewer, 84 S.W. 2d 1022, 19 Tenn.App. 209.

18. Ark.—Peters v. Goodwin, 76 S. W.2d 980, 190 Ark. 24.
Iowa.—In re Tellier's Estate, 230 N. W. 545, 210 Iowa 20.

N.Y.—Levine v. Laurdan Management Corp., 38 N.Y.S.2d 442, 179 Misc. 241, affirmed 41 N.Y.S.2d 123, 180 Misc. 672, affirmed 43 N.Y.S.2d 751, 266 App.Div. 840.

N.D.—Funk v. Luithle, 226 N.W. 595, 58 N.D. 416.

S.D.—Mason v. Martin, 232 N.W. 29, 57 S.D. 299.

25 C.J. p 75 note 9.

Debt owed by wife as husband's surety

Life policy payable to insured's wife is not exempt from judgment obtained against her alone on note signed by her and her husband, even though as between themselves she was a mere surety.

Miss.—Goza v. Provine, 105 So. 534, 140 Miss. 315.

19. U.S.—Pauling v. Pauling, C.C.A. Minn., 159 F.2d 531, certiorari denied 67 S.Ct. 1192, 331 U.S. 808, 91 L.Ed. 1829.

Dellefield v. Block, D.C.N.Y., 40 F.Supp. 616.

Cal.—In re Crosby's Estate, 41 P.2d 928, 2 C.2d 470.

Prudential Ins. Co. of America v. Beck, 103 P.2d 241, 39 C.A.2d 355.

N.Y.—Levine v. Laurdan Management Corp., 38 N.Y.S.2d 442, 179 Misc. 241, affirmed 41 N.Y.S.2d 123, 180 Misc. 672, affirmed 43 N.Y.S.2d 751, 266 App.Div. 840.

Wis.—Luebke v. Vonnekold, 27 N.W. 2d 458, 250 Wis. 496.

25 C.J. p 76 note 10.

20. Iowa.—In re Tellier's Estate, 230 N.W. 545, 210 Iowa 20.

25 C.J. p 76 note 10 [h].

21. Wis.—Ellison v. Straw, 92 N.W. 1094, 116 Wis. 207.

21.5 N.Y.—Levine v. Laurdan Management Corp., 38 N.Y.S.2d 442, 179 Misc. 241, affirmed 41 N.Y.S.2d 123, 180 Misc. 672, affirmed 43 N.Y.S.2d 751, 266 App.Div. 840.

Wife held not to effect policy

Where a husband obtains insurance upon his own life, names his wife as beneficiary and pays the premiums, the wife does not effect the policy within statute providing that if a person effecting insurance shall be wife of insured, she shall be entitled to proceeds and avails of such policy as against her own creditors, trustees in bankruptcy, and receivers in state and federal courts.

U.S.—In re Bifulci, D.C.N.Y., 154 F. Supp. 629.

21.10 Wis.—Luebke v. Vonnekold, 27 N.W.2d 458, 250 Wis. 496.

Corporate employer as person

Corporate employer was a person within statute permitting a person to effect insurance on life of another and cause it to be made payable to a married woman and exempting proceeds from claims of her creditors.

Wis.—Luebke v. Vonnekold, supra.

22. Mo.—Pietri v. Seguenot, 69 S.W. 1055, 96 Mo.App. 258.

23. Mo.—Pietri v. Seguenot, supra.

24. U.S.—Schwartz v. Coen, D.C.N.Y., 44 F.Supp. 880, affirmed, C.C.A., 131 F.2d 879—In re Beach, D.C. Mass., 8 F.Supp. 910—In re Firestone, D.C.N.Y., 2 F.Supp. 96.

Ill.—Fidelity Coal Co. v. Diamond, 84 N.E.2d 123, 310 Ill. 387.

Mass.—Rosenberg v. Robbins, 194 N. E. 291, 289 Mass. 402.

N.Y.—Addiss v. Selig, 190 N.E. 490, 264 N.Y. 274, 92 A.L.R. 1384, reargument denied 191 N.E. 621, 264 N.Y. 674.

Ehnes v. Krinsky, 110 N.Y.S.2d 347, 279 App.Div. 405—Phoenix Mut. Life Ins. Co. v. Felig, 5 N.Y. S.2d 170, 254 App.Div. 364.

In re Czarniak's Estate, 251 N. Y.S. 536, 140 Misc. 754.

What constitutes existing claim

(1) An insurance exemption statute excluding existing claims from its operation has been construed as referring to claims to which the policy, except for the statute, would be subject; there can be no such claim as to a policy not yet in existence, and hence all creditors are barred as to such a policy, regardless of when their claims arose.

U.S.—In re Beach, D.C.Mass., 8 F. Supp. 910.

(2) Under such a statute, insurance proceeds are exempt as against a claim on a note given after the statute, in extinction of a debt which arose prior thereto.

Mass.—Rosenberg v. Robbins, 194 N. E. 291, 289 Mass. 402.

25. Wash.—Reiff v. Armour, 139 P. 633, 79 Wash. 48, L.R.A.1916A 437. 25 C.J. p 76 note 11.

been reached under a similar statute.²⁶ Under a statute providing that insurance money paid to the surviving widow shall be exempt as to debts of the insured contracted before his death, insurance money paid to the widow will be exempt as to a promissory note signed by the husband, even though she also signs it after his death.²⁷

Advances on policy. Where the policy provides for the payment to the beneficiary of the amount of the policy after deducting amounts owing to the insurance company for advances by it to the insured, the exemption attaches only to the balance of the proceeds after deductions by the insurance company, and cannot be claimed against debts owed by insured to the company.²⁸ An exemption statute excluding from its operation advance payments made on or against the policy has been held to mean advances made to insured or beneficiary by insurer under the terms of the policy, and not those made by strangers.²⁹

Special contracts or arrangements. In order to recover under a statute providing that debts, otherwise not enforceable against the proceeds of an insurance policy, may be made so by a special contract or arrangement securing the debt, entered into between insured and his creditor, the creditor must show a special contract falling within the meaning of the statute;³⁰ further, there must be a meeting of the minds of insured and the creditor whose debt is to be secured by the policy,³¹ and the contract must be clear and explicit.³² The fact that insured expressed his desire that the avails of his policies should go in payment of his debts,³³ or that he promised the creditor to take out a policy of life insurance in the belief that, if he died before paying his creditor, the creditor would be paid from the avails of the insurance,³⁴ does not constitute a special contract or arrangement within the meaning of such a statute. Where the amount of the policy is in excess of the debt for the security

of which it is claimed that the policy is taken out, there must be an assignment of a specific part of the avails of the life insurance policy as security for the debt.³⁵

The beneficiary cannot assert a right of exemption as against a creditor to whom insured has validly assigned the policy during his lifetime, at least where the exemption statutes operate only against general creditors of insured's estate.³⁶ A policy assigned to a third person by both insured and the beneficiary, to secure a debt, has been held not exempt from a claim of a creditor of such third person.³⁷

The funeral expenses of insured are not one of his debts within the meaning of a statute exempting the proceeds of life insurance from decedent's debts.³⁸

Debts arising out of a beneficiary's fraudulent conduct are barred under a life insurance exemption statute, the language of which is broad enough to bar all debts of whatever nature and in whatsoever manner incurred.³⁹

§ 43. Pensions and Bounties

- a. In general
- b. Veterans' compensation

a. In General

- (1) General rules
- (2) Under act of congress
- (3) Under state statutes

(1) General Rules

Under statutes so providing, pension and bounty moneys, and interest and accumulations thereon, are exempt from the claims of creditors.

Questions as to the exemption of pensions and bounties under federal and state statutes, such as the persons entitled to the exemption and the conditions precedent to its allowance, are to be de-

26. Ark.—Ponder v. Jefferson Standard Life Ins. Co., 109 S.W.2d 946, 194 Ark. 829.

27. Iowa.—Booth v. Martin, 139 N.W. 888, 158 Iowa 434.

28. Mo.—Webb v. Missouri State L. Ins. Co., 115 S.W. 481, 134 Mo.App. 576.

29. La.—Nulsen v. Herndon, 147 So. 359, 176 La. 1097, 88 A.L.R. 236.

Loan by agent to pay premium

The rule stated in the text has been applied so as to bar any claim against the proceeds by an insurance agent who had paid a premium on the policy, insured having died thereafter without repaying the agent. La.—Nulsen v. Herndon, supra.

30. Iowa.—In re Paul's Estate, 3 N.W.2d 186, 231 Iowa 1078—In re Hazeldine's Estate, 280 N.W. 568, 225 Iowa 369.

N.D.—Corpus Juris cited in Jorgensen v. De Viney, 222 N.W. 464, 472, 57 N.D. 63.

31. Iowa.—Larrabee v. Palmer, 70 N.W. 100, 101 Iowa 132.

32. Iowa.—In re Donaldson, 101 N.W. 870, 126 Iowa 174—Larrabee v. Palmer, 70 N.W. 100, 101 Iowa 132.

Evidence held insufficient to show agreement

Iowa.—In re Harding's Estate, 16 N.W.2d 585, 235 Iowa 337.

33. Iowa.—Larrabee v. Palmer, 70 N.W. 100, 101 Iowa 132.

34. Iowa.—In re Donaldson, 101 N.W. 870, 126 Iowa 174. 25 C.J. p 77 note 20.

35. Iowa.—In re Donaldson, supra.

36. Pa.—Lemley v. McClure, 185 A. 878, 122 Pa.Super. 225.

37. Ark.—Hill v. Bush, 90 S.W.2d 490, 192 Ark. 181.

38. Miss.—Dobbs v. Chandler, 36 So. 388, 84 Miss. 372.

39. Ark.—Ponder v. Jefferson Standard Life Ins. Co., 109 S.W.2d 946, 194 Ark. 829.

terminated by the terms of these statutes.⁴⁰ In the absence of statute, there is no public policy which exempts pension moneys from the claims of the pensioner's creditors.⁴¹ The exemption of pension moneys has been held not to extend to interest and accumulations on investments made therewith;⁴² but the exemption of the principal is not lost by commingling it with interest received thereon, where each item can be readily identified.⁴³

Bounty money has been protected on grounds of public policy from seizure for the debts of the person to whom the bounty is due, at least until it has been received in his hands,⁴⁴ or even absolutely.⁴⁵ If the statute protects bounty money from seizure only until it can be received in his hands, it is subject to execution for the recipient's debts after he⁴⁶ or his agent⁴⁷ has received it.

(2) Under Act of Congress

The federal statute exempting pension moneys before or during transmission to the pensioner does not protect such funds after their receipt. A fortiori, under most authorities, property purchased with such funds is not exempt.

The principles set forth in this subdivision have been enunciated mainly under U.S.Rev.St.1878 § 4747, 38 U.S.C.A. § 54, providing that "no sum of money due, or to become due, to any pensioner shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, wheth-

er the same remains with the Pension Office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner;" and it should be borne in mind that this statute has been repealed and its place taken by statutes exempting moneys paid under laws relating to veterans, see *infra* this section subdivision b. Under the statute quoted, it is held by the weight of authority that pension money is exempt until it is actually paid to, and received by, the pensioner,⁴⁸ and does not cease to be exempt when he receives the draft.⁴⁹ It follows that a pensioner can give his pension drafts to his wife or to any other person, for the money is protected as long as it is in the form of a government draft, and his creditors in such a case cannot complain,⁵⁰ although there is authority holding that after the proceeds of the check have been realized and paid over to the wife, they are subject to the claims of creditors.⁵¹ While some decisions hold that pension money is exempt even after it has been actually paid to the pensioner,⁵² this construction of the act has been disapproved by the supreme court of the United States,⁵³ and by the state courts generally, most of which have held that the act of congress protects pension money only while it is in the pension office, or with an officer or agent thereof, or in course of transmission to the pensioner, and that after he has actually received the money the exemption ceases.⁵⁴

40. Ill.—Wiedemeyer v. Vivier, 5 N. E.2d 613, 287 Ill.App. 628.

Mich.—Wyrzykowski v. City of Hamtramck, 37 N.W.2d 686, 324 Mich. 731.

N.J.—Corpus Juris cited in Passaic Nat. Bank & Trust Co. v. Eelman, 183 A. 677, 680, 116 N.J.Law 279.

N.Y.—In re Barrett's Estate, 263 N. Y.S. 241, 238 App.Div. 817.

Pa.—In re Swartz' Estate, 42 Lack. Jur. 82, 55 York Leg.Rec. 68.

Tenn.—Peak v. Davidson County, 95 S.W.2d 49, 170 Tenn. 313.

Against whom available

(1) Exemption held available only as against creditors of the pensioner. Ga.—Mobley v. Jackson, 156 S.E. 23, 171 Ga. 434, 71 A.L.R. 1178, confirmed to 156 S.E. 125, 42 Ga.App. 328.

Iowa.—Andrew v. Colo Sav. Bank, 219 N.W. 62, 205 Iowa 872.

(2) A statute granting a bounty "for the relief of heirs" gives the heirs an exemption in the bounty as against creditors of their ancestor. U.S.—Emerson v. Hall, La., 13 Pet. 409, 10 L.Ed. 223.

(3) Under some statutes, the exemption is expressly limited to citizens.

Pa.—Croft v. Livingston, 82 Pa.Dist. & Co. 277.

41. N.J.—Passaic Nat. Bank & Trust Co. v. Eelman, 183 A. 677, 116 N.J.Law 279.

42. Iowa.—Appanoose County v. Henke, 223 N.W. 876, 207 Iowa 835.

43. Iowa.—Appanoose County v. Henke, *supra*.

44. Ky.—Fish v. Hays, 6 Ky.Op. 108.

N.H.—Manchester v. Burns, 45 N.H. 482.

45. N.Y.—Whiting v. Barrett, 7 Lans. 106—Youmans v. Boomhower, 3 Thomps. & C. 21.

46. N.H.—Morse v. Towns, 45 N.H. 185.

47. N.H.—Manchester v. Burns, 45 N.H. 482.

48. Ind.—Sohl v. Wainwright Trust Co., 130 N.E. 282, 76 Ind.App. 198. 25 C.J. p 77 note 27.

49. Iowa.—Farmer v. Turner, 21 N. W. 140, 64 Iowa 690. 25 C.J. p 77 note 28.

50. Pa.—Holmes v. Tallada, 17 A. 238, 125 Pa. 133, 11 Am.S.R. 880, 3 L.R.A. 219.

25 C.J. p 77 note 29.

51. Mass.—Spelman v. Aldrich, 126 Mass. 113.

25 C.J. p 77 note 30.

52. Iowa.—Fayette County v. Hancock, 49 N.W. 1040, 83 Iowa 694—Crow v. Brown, 46 N.W. 993, 81 Iowa 344, 25 Am.S.R. 501, 11 L.R.A. 110, overruling so far as in conflict Foster v. Byrne, 35 N.W. 513, 41 N.W. 22, 76 Iowa 295, and Triplett v. Graham, 12 N.W. 143, 58 Iowa 135—Baugh v. Barrett, 29 N.W. 425, 69 Iowa 495—Farmer v. Turner, 21 N.W. 140, 64 Iowa 690—Webb v. Holt, 11 N.W. 658, 57 Iowa 712.

Power of congress to exempt pension money after reaching the hands of the pensioner has been upheld in these cases.

Iowa.—Fayette County v. Hancock, 49 N.W. 1040, 83 Iowa 694—Crow v. Brown, 46 N.W. 993, 81 Iowa 344, 25 Am.S.R. 501, 11 L.R.A. 110.

53. U.S.—McIntosh v. Aubrey, Pa., 22 S.Ct. 561, 185 U.S. 122, 124, 46 L.Ed. 834.

25 C.J. p 78 note 34.

54. Ind.—Sohl v. Wainwright Trust Co., 130 N.E. 282, 76 Ind.App. 198. Tenn.—Peak v. Davidson County, 95 S.W.2d 49, 170 Tenn. 313.

25 C.J. p 78 note 35.

In some jurisdictions it has been held that, although a pensioner has deposited his pension draft in a bank, and the proceeds have been placed to his credit as a deposit, subject to his check, the proceeds are not subject to attachment, as the money is not to be regarded as having come into his hands until received from the bank.⁵⁵ Most of the courts, however, hold that the pension money, when the proceeds thereof are in bank subject to check, is to be regarded as received by the pensioner, and is no longer exempt.⁵⁶ The proceeds of a pension draft are not exempt after they have been placed by the pensioner in the hands of a third person for safekeeping.⁵⁷

The phrase in the federal act, "shall inure wholly to the benefit of such pensioner," has been construed as giving the pensioner an exemption in the pension money so long as he retains personal possession of it, with the intention of using it for his own benefit or for the comfort of his family,⁵⁸ and a distinction has been made between use of the money for support of himself and his family and its investment in business, the money being exempt under the act in the former case, and not exempt in the latter.⁵⁹

Purchases with, or investments of, proceeds. From the view generally held that pension money paid to the pensioner and in his hands is not exempt, as above set forth, it follows that property

purchased with exemption money is not exempt.⁶⁰ On the other hand, in a jurisdiction where pension money is considered exempt, notwithstanding its payment to the pensioner, there are decisions which hold exempt property in which pension money has been invested, so long as the property can be identified as its proceeds.⁶¹ Lands conveyed to the wife of the pensioner in consideration of pension money have been held exempt,⁶² even under an interpretation of the federal statute giving exemption only as long as the money is in course of transmission to the pensioner;⁶³ but other authority is to the contrary.⁶⁴

(3) Under State Statutes

Some statutes exempt pension moneys only until received by the pensioner; under other statutes such moneys are exempt after their receipt, or deposit in a bank, by the pensioner. There is a corresponding disagreement as to whether the exemption extends to property purchased with the money.

In various states statutory provisions permit the exemption of state,⁶⁵ federal,⁶⁶ or other⁶⁷ pensions; and under the view that the federal statute ceases to be operative after the pension money has been paid over, as discussed supra subdivision a (2) of this section, any right to an exemption in a pensioner must, after the money has been paid to him, be found in the state law.⁶⁸ In some states pension money is protected only up to the time it is received by the pensioner,⁶⁹ although exempt while in the

55. Pa.—Reiff v. Mack, 28 A. 699, 160 Pa. 265, 40 Am.S.R. 720.

56. Vt.—Martin v. Hurlburt, 14 A. 649, 60 Vt. 364.
25 C.J. p 78 note 37.

57. Pa.—Rozelle v. Rhodes, 9 A. 160, 116 Pa. 129, 2 Am.S.R. 591.

58. Pa.—Holmes v. Tallada, 17 A. 238, 125 Pa. 133, 11 Am.S.R. 880, 3 L.R.A. 219.

59. Pa.—Clark v. Ingraham, 15 Phila. 646.

60. U.S.—McIntosh v. Aubrey, Pa., 22 S.Ct. 561, 185 U.S. 122, 46 L.Ed. 834.
25 C.J. p 78 note 42.

61. Iowa.—Crow v. Brown, 46 N.W. 993, 81 Iowa 344, 25 Am.S.R. 501, 11 L.R.A. 110.
25 C.J. p 77 note 32, p 78 note 43.

62. Iowa.—Marquardt v. Mason, 54 N.W. 72, 87 Iowa 136.
25 C.J. p 77 note 29 [a].

63. Iowa.—Farmer v. Turner, 21 N. W. 140, 64 Iowa 690.
W.Va.—Hisse v. Johnson, 27 W.Va. 644, 55 Am.R. 327.

64. Ky.—Johnson v. Elkins, 13 S.W. 448, 90 Ky. 163, 11 Ky.L. 967, 8 L. R.A. 552.
25 C.J. p 78 note 47.

65. U.S.—In re Hoag, D.C.N.Y., 227 F. 480.

66. Iowa.—Appanoose County v. Henke, 223 N.W. 876, 207 Iowa 835.

Wages of Works Progress Administration employee were not exempt from execution as "a pension, or retirement or disability or death or other benefit," from United States government.

Cal.—Hammond v. Hoskins, 79 P.2d 1116, 30 C.A.2d Supp. 779.

Identification and use of pension moneys

State court has no power to compel the federal government to deduct anything from judgment debtor's pension to satisfy a creditor's demand as long as the moneys derived therefrom can be clearly identified, and are used in the purchase of necessary articles, or are loaned or invested for purposes of increase of safety in such form as to secure their available use for the benefit of the pensioner in time of need.

N.Y.—Bowes v. Perkins, 8 N.Y.S.2d 525, 169 Misc. 624.

67. Mich.—Wyrzykowski v. City of Hamtramck, 37 N.W.2d 686, 324 Mich. 731.

Wis.—Courtney v. Courtney, 29 N.W. 2d 759, 251 Wis. 443.

Teacher's pension

(1) The purpose of statute creating exemption in favor of persons entitled to a pension or other benefit from teachers' retirement fund was to stabilize status of persons in educational system, to guard members against result of their own improvidence, and to protect dependents of members.

N.Y.—In re Distefano's Estate, 5 N. Y.S.2d 87, 167 Misc. 678, affirmed 8 N.Y.S.2d 669, 255 App.Div. 957.

Lapolla v. Retirement Bd. of Teachers' Retirement System of City of New York, 140 N.Y.S.2d 449.

(2) The state in setting up a fund to provide for benefits and retirement for its teachers had power to provide that the moneys in the fund should not be subject to execution, garnishment, attachment, or any other process.

N.J.—Nordmann v. Johnson, 8 A.2d 323, 123 N.J.Law 259.

68. N.Y.—Burgett v. Fancher, 35 Hun 647.

69. Ky.—Carter v. Strange, 13 Ky. Op. 650—Hudspeth v. Harrison, 13 Ky.Op. 25.

Pa.—In re Dobbins' Estate, Orph., 45 Sch.Leg.Rec. 76.

possession of the agents of the government or in transit to the pensioner.⁷⁰ Under other statutory provisions pension money received from the United States government is exempt whether in the actual possession of the pensioner or deposited, lent, or invested by him,⁷¹ and under such a statute a public administrator is not entitled to possession of the pension money in order to subject it to the payment of his own fees and commissions.⁷² A state statute exempting "pension money" or a "pension" exempts the money after it has reached the pensioner.⁷³

Pension moneys do not, under some statutes, lose their exemption by being deposited in a bank,⁷⁴ subject to the check of the pensioner,⁷⁵ or in return for an interest-bearing certificate of deposit;⁷⁶ and a statute exempting pension moneys in the hands of the pensioner exempts the proceeds of a pension check on deposit in a savings bank.⁷⁷

Claim for support. Under some statutes pension money is exempt from the claim of a state or county for pensioner's support in a state or county institution,⁷⁸ nor can it be taken on the claim of state or county for the support of pensioner's insane son, even though a statute provides that a rel-

ative of sufficient ability can be compelled to maintain a poor person.⁷⁹

Property purchased with pension money is not exempt where the view is maintained that pension money is no longer exempt after it has reached the debtor's hands.⁸⁰ Under statutes in several jurisdictions, however, such property is exempt,⁸¹ except that the exemption cannot be enforced against debts contracted before the enactment of the statute⁸² or in favor of a pensioner who died before such enactment.⁸³ Property on which a mortgage lien has been discharged with pension money is "purchased property," and exempt as such⁸⁴ to the extent of the amount of pension money invested.⁸⁵ It has been held that property purchased with pension money is exempt even though the pension money was only a part of the money consideration, provided the balance of the purchase price has been paid out of proceeds from the sale of an interest in the land.⁸⁶

Where the pensioner invests in land or in animals, he is entitled generally, under statutes protecting such investments, only to the land and the animals which represent the actual investment,⁸⁷ and the exemption does not extend to crops grown

Police and fire department pensions

(1) The exemption under the police and fire department pension act does not extend to payments made thereunder after the money has reached hands of pensioner.
N.J.—Boylan v. Joyce, 8 A.2d 108, 123 N.J.Law 130.

(2) Under statute providing that money due or to become due any pensioner shall not be liable to attachment, levy, or seizure under any legal or equitable process whether sums remained with treasurer of police relief and pension fund or any other officer or agent of board of trustees, only moneys presently in fund due or to become due to pensioner are immune.

Ohio.—State ex rel. Bailey v. Board of Trustees of Toledo Police Relief and Pension Fund, 157 N.E.2d 317, 169 Ohio St. 1.

70. Ky.—Carter v. Strange, 13 Ky. Op. 650.

Mich.—Wyrzykowski v. City of Hamtramck, 37 N.W.2d 686, 324 Mich. 731.

71. Iowa.—Appanoose County v. Henke, 223 N.W. 876, 207 Iowa 835.

Homestead free from lien of judgment

Under statutes exempting a pension and the homestead purchased with the pension money, such homestead is not subject during the life

of the pensioner to the lien of a judgment against her.

Iowa.—Beatty v. Cook, 185 N.W. 360, 192 Iowa 542.

72. Cal.—Treadway v. Veterans' Home, 111 P. 111, 14 C.A. 75.

73. N.Y.—Yates County Nat. Bank v. Carpenter, 23 N.E. 1108, 119 N.Y. 550, 16 Am.S.R. 855, 7 L.R.A. 557, 25 C.J. p 78 note 52.

74. Tenn.—Sherwin-Williams Co. v. Morris, 156 S.W.2d 350, 25 Tenn. App. 272—Speer v. Pierce, 77 S.W. 2d 77, 18 Tenn.App. 351.

75. N.Y.—Stockwell v. Malone Nat. Bank, 36 Hun 583—Burgett v. Fancher, 35 Hun 647.

76. N.Y.—Yates County Nat. Bank v. Carpenter, 23 N.E. 1108, 119 N.Y. 550, 16 Am.S.R. 855, 7 L.R.A. 557, overruling in effect *In re Kennedy*, 3 N.Y.S. 18, 1 Conn.Surr. 181, and *Beecher v. Barber*, 6 Dem. Surr. 129.

77. Conn.—Price v. Savings Soc., 30 A. 139, 64 Conn. 362, 42 Am.S.R. 198, 25 C.J. p 78 note 55.

78. Iowa.—Fayette County v. Hancock, 49 N.W. 1040, 83 Iowa 694, 25 C.J. p 79 note 57.

79. N.Y.—St. Lawrence State Hospital v. Fowler, 37 N.Y.S. 12, 15 Misc. 159, affirmed 43 N.Y.S. 608, 13 App.Div. 436.

80. Ky.—Ashley v. Terry, 13 Ky. Op. 405.

25 C.J. p 79 note 62.

81. Ga.—*Corpus Juris* cited in *Mobley v. Jackson*, 156 S.E. 23, 24, 171 Ga. 434, 71 A.L.R. 1178.

Iowa.—Appanoose County v. Henke, 223 N.W. 876, 207 Iowa 835.

N.Y.—*In re Thellusson*, 74 N.Y.S.2d 837, 190 Misc. 470, 25 C.J. p 79 note 63.

Personal property as well as realty purchased with pension funds is exempt, and hence the exemption extends to an industrial life policy purchased by judgment debtor with pension moneys received from United States as retired rural mail carrier.
N.Y.—Billings v. Lynch, 292 N.Y.S. 344, 161 Misc. 496.

82. Iowa.—Foster v. Byrne, 35 N.W. 513, 41 N.W. 22, 76 Iowa 295.

83. Iowa.—Baugh v. Barrett, 29 N.W. 425, 69 Iowa 495.

84. Neb.—Dargan v. Williams, 91 N.W. 862, 66 Neb. 1.

85. N.Y.—Countryman v. Countryman, 28 N.Y.S. 258, 23 N.Y.Civ. Proc. 161, 25 C.J. p 79 note 67.

86. Iowa.—Smyth v. Hall, 102 N.W. 520, 126 Iowa 627, 25 C.J. p 79 note 69.

87. Iowa.—Haefer v. Mullison, 57 N.W. 893, 90 Iowa 372, 48 Am.S.R. 451—Diamond v. Palmer, 44 N.W. 819, 79 Iowa 578.

on the land,⁸⁸ or to the increase from the animals,⁸⁹ unless the statute expressly so provides.⁹⁰

The pensioner is entitled to his exemption in the purchased property only as long as the title remains in him,⁹¹ and the exemption privilege does not revive when title to the property reverts in the pensioner by descent or reconveyance;⁹² but if he conveys mere legal title to another, and retains a beneficiary interest in himself, he does not lose his exemption,⁹³ and it has been held that property purchased by the pensioner and conveyed to his wife is exempt from execution for the wife's debts.⁹⁴

The protection of the statute has been given to other property for which the purchased property is exchanged;⁹⁵ but if it becomes impossible to identify the fund in the various articles of property in which, through numerous and successive changes, it has become invested, the pensioner loses his right of exemption.⁹⁶

Effect of pensioner's death. The exemption in the unexpended pension money has been held to survive to the widow and children of the pensioner, or to either widow or children,⁹⁷ but where there is neither widow nor children of the pensioner the exemption does not survive in favor of other descendants.⁹⁸ The right to exemption in the property purchased with pension money does not survive the death of the pensioner.⁹⁹

Disability payments. A statute exempting all money received as a pension or retirement, disability,

death, or other benefit has been applied to disability payments paid to a disabled member of a city fire department.^{99.5} Such payments have been held not subject to execution to enforce an allowance made by divorce decree for support of a minor child.^{99.10}

b. Veterans' Compensation

- (1) In general
- (2) Adjusted compensation
- (3) Disability compensation

(1) In General

Benefits paid to war veterans and their beneficiaries are exempt under federal and some state statutes, from the claims of creditors, even after the receipt of such funds by the beneficiary. Property purchased with such moneys is not exempt under the federal statutes, but may be under a state statute.

Federal statutes exempt from the claims of creditors benefits payable under the laws relating to veterans,¹ where the payments or proceeds are identified and can be traced,^{1.5} and such exemption is not limited to the children, widows, and estates of veterans, but extends as well to the veterans themselves.² The exemption under the federal statute, however, is not extended to the protection of the heirs or next of kin of a deceased pensioner, as against the creditors of the pensioner, where the pension payments have terminated.^{2.5}

Under an act of congress making bounties and back pay due to soldiers dying while in the service

88. Iowa.—Haefer v. Mullison, 57 N.W. 893, 90 Iowa 372, 48 Am.S.R. 451.

25 C.J. p 79 note 77.

89. Iowa.—Diamond v. Palmer, 44 N.W. 819, 79 Iowa 578.

25 C.J. p 79 note 78.

90. Iowa.—Haefer v. Mullison, 57 N.W. 893, 90 Iowa 372, 48 Am.S.R. 451.

91. Iowa.—Ratliff v. Elwell, 119 N.W. 740, 141 Iowa 312, 20 L.R.A., N.S., 223.

N.Y.—Omans v. Beeman, 124 N.Y.S. 166, 66 Misc. 625.

92. Iowa.—Charles City v. Security Trust & Savings Bank, 120 N.W. 114, 143 Iowa 324.

N.Y.—Omans v. Beeman, 124 N.Y.S. 166, 66 Misc. 625.

93. Iowa.—Charles City v. Security Trust & Savings Bank, 120 N.W. 114, 143 Iowa 324—Ratliff v. Elwell, 119 N.W. 740, 141 Iowa 312, 20 L.R.A., N.S., 223.

94. N.Y.—In re Stafford, 94 N.Y.S. 194, 105 App.Div. 46.

95. Iowa.—Smith v. Hill, 49 N.W. 1043, 83 Iowa 684, 32 Am.S.R. 329.

25 C.J. p 79 note 74.

96. N.Y.—Yates County Nat. Bank v. Carpenter, 23 N.E. 1108, 119 N.Y. 550, 16 Am.S.R. 855, 7 L.R.A. 557.

Wygant v. Smith, 2 Lans. 185.

97. N.Y.—Hodge v. Leaning, 2 Dem. Surr. 553.

98. N.Y.—In re Winans, 5 Dem.Surr. 138.

99. N.Y.—Smith v. Blood, 94 N.Y.S. 667, 106 App.Div. 317.

25 C.J. p 80 note 87.

99.5 Cal.—Howard v. Howard, App. 333 P.2d 417.

99.10 Cal.—Howard v. Howard, supra.

1. Ga.—Earl v. Reynolds, 176 S.E. 91, 49 Ga.App. 510.

Pa.—In re Beall's Estate, 119 A.2d 216, 384 Pa. 14.

Federal war risk insurance see supra § 39 b.

1.5 Ohio.—Wilcox v. Wynn, Mun. 83 N.E.2d 411.

2. Cal.—Culp v. Webster, 70 P.2d 273, 25 C.A.2d Supp. 759.

Purpose

(1) The purpose of the statute is not only to protect the recipient of the benefits, but to afford some degree of security to the dependents of such recipient, and to insure the public against the pauperism of recipient and his dependents.

D.C.—In re Flanagan, D.C., 31 F. Supp. 402.

N.Y.—In re Guardianship of Weinberg, 110 N.Y.S.2d 130, 201 Misc. 489—Surplus v. Remmele, 87 N.Y.S.2d 651, 194 Misc. 1036.

(2) The purpose of federal and state statutes exempting war pensions from taxation, creditors' claims, or judicial levy is for the protection of the veteran.

Wis.—In re Buxton's Estate, 16 N.W.2d 399, 246 Wis. 97.

(3) The purpose of federal statutes was to make the payment of benefits under a National Service Life Policy exempt from claims of creditors either before or after receipt of proceeds by beneficiary.

Pa.—In re Beall's Estate, 119 A.2d 216, 384 Pa. 14.

2.5 Ohio.—State v. Wendt, 116 N.E.2d 30, 94 Ohio App. 440.

of the federal government payable to their widows and children and not to their personal representatives, state courts have held that such bounty and back pay in the hands of the widows of deceased soldiers cannot be subject to payment of his debts.³ A state statute exempting pensions or other rewards for military or naval service should be liberally construed,⁴ and the exemption extends to payments received by, or on account of, any beneficiary under the laws relating to veterans.^{4,5} The facts that a recipient was already a deserter when he enlisted and that he enlisted under a fictitious name have been held not to affect his right to his exemption, under a state statute, in the amount of money he received.⁵

In so far as payments made to war veterans are governed by the early federal statutes exempting such funds only while in the course of transmission, such moneys cease to be exempt after their receipt by the veteran,⁶ but the later federal statutes exempt funds payable under any of the laws relating to veterans, whether before or after the receipt of such funds by the beneficiary.⁷

A payment of benefit received by a veteran under the federal statutes does not lose its exemption by being deposited in a bank by him,⁸ although savings

deposits accumulated while the veteran was in prison have been held not exempt from payment under a prison reimbursement act for maintenance of prisoners.^{8,5}

While the exemption given to such compensation does not, under the federal statutes, extend to property purchased therewith,⁹ property so purchased may be exempt under the provisions of a state statute.¹⁰ Income, however, whether current or accumulated, received on pension funds or investment thereof has been held not exempt under either the federal or state statutes.^{10,5} A statute allowing an exemption in personal property "during the term of service of such volunteer" does not protect land bought by the debtor with his bounty money long after the debtor's service expired.¹¹

(2) Adjusted Compensation

Under federal statutes, exemption is afforded to a veteran's service certificate, bonds for which it is exchanged, the proceeds of such bonds, and the proceeds of any loan on the certificate, as long as such funds are in the hands of the veteran or other beneficiary or are otherwise traceable.

Under federal statute, benefits payable to a veteran by way of adjusted compensation under the federal statutes are exempt from attachment, levy, or seizure under any legal or equitable process.¹²

3. Ky.—Avery v. Carter, 7 Ky.Op. 200.

Pa.—In re Stein, 180 A. 577, 118 Pa. Super. 549, affirmed Hines v. Stein, 56 S.Ct. 699, 298 U.S. 94, 80 L.Ed. 1063, rehearing denied 56 S.Ct. 945, 298 U.S. 692, 80 L.Ed. 1409.

4. N.Y.—Vinciguerra v. Busam, 8 N.Y.S.2d 294, 169 Misc. 908.

4.5 N.Y.—Petition of Witten, 109 N.Y.S.2d 755.

5. Ky.—Department of Public Welfare, for Use and Benefit of Central State Hospital v. Allen, 74 S.W.2d 329, 255 Ky. 301.

N.Y.—Youmans v. Boomhower, 3 Thomps. & C. 21.

6. N.J.—Asbury Park & Ocean Grove Bank v. Dam, 199 A. 418, 16 N.J.Misc. 285.

7. Ga.—Hannah v. Hannah, 11 S.E. 2d 779, 191 Ga. 134.

Earl v. Reynolds, 176 S.E. 91, 49 Ga.App. 510.

N.Y.—In re Lancaster's Estate, 39 N.Y.S.2d 561.

Wash.—Pishue v. Pishue, 203 P.2d 1070, 32 Wash.2d 750.

8. Ga.—Hannah v. Hannah, 11 S.E. 2d 779, 191 Ga. 134.

Elbert Sales Co. v. Granite City Bank, 192 S.E. 66, 55 Ga.App. 835.

N.Y.—Surplus v. Remmele, 87 N.Y.S.2d 651, 194 Misc. 1036.

Ohio.—In re Bowen, 49 N.E.2d 753, 141 Ohio St. 602.

Deposit as "Atty."

Money received for retired pay by disabled emergency officer of the World War and deposited in bank in name of officer as "Atty." was not subject to attachment as against contention that by use of word "Atty." officer put funds in account for use in practice of profession and thus expended or invested them.

D.C.—Williams v. U. S. Fidelity & Guaranty Co., 107 F.2d 210, 71 App. D.C. 9.

8.5 Mich.—Auditor General v. Oleznick, 4 N.W.2d 679, 302 Mich. 336.

9. U.S.—Carrier v. Bryant, N.C., 59 S.Ct. 707, 306 U.S. 545, 83 L.Ed. 976.

Ga.—Hannah v. Hannah, 11 S.E.2d 779, 191 Ga. 134.

McCurry v. Peek, 187 S.E. 854, 54 Ga.App. 341—Liles v. H. K. Mulford Co., 184 S.E. 396, 52 Ga.App. 674.

Iowa.—In re Bagnall's Guardianship, 29 N.W.2d 597, 238 Iowa 905.

N.C.—State Hospital at Raleigh v. Security Nat. Bank, 178 S.E. 487, 207 N.C. 697, certiorari denied Security Nat. Bank v. State of North Carolina ex rel. State Hospital for Insane at Raleigh, 55 S.Ct. 921, 295 U.S. 761, 79 L.Ed. 1704.

Ohio.—In re Bowen, 49 N.E.2d 753, 141 Ohio St. 602.

James v. James, 44 N.E.2d 368, 69 Ohio App. 485.

10. N.Y.—Yates County Nat. Bank v. Carpenter, 23 N.E.2d 1108, 119 N.Y. 550, 16 Am.S.R. 855, 7 L.R. A. 557.

In re Stevens' Estate, 24 N.Y.S.2d 786, 261 App.Div. 48.

In re Thellusson, 74 N.Y.S.2d 837, 190 Misc. 470.

10.5 N.Y.—In re Thellusson, 74 N.Y.S.2d 837, 190 Misc. 470.

In re Shinberg, 76 N.Y.S.2d 334.

11. Me.—Knapp v. Beattie, 70 Me. 410.

12. U.S.—Mahar v. McIntyre, D.C. Mass., 16 F.Supp. 961.

W.Va.—Jones v. Price, 146 S.E. 890, 107 W.Va. 55.

Bounties for past military services see Bounties § 17 b.

Interest on adjusted compensation bonds

Adjusted compensation bonds and accrued unpaid interest thereon were exempt from payment for veteran's maintenance in prison under the prison reimbursement act.

Mich.—Auditor General v. Oleznick, 4 N.W.2d 679, 302 Mich. 336.

The language "attachment, levy, or seizure" is not confined to process in the hands of an officer of the court to be executed, but includes any

This exemption statute is binding on the states,¹³ and should be liberally construed in the veteran's favor¹⁴ to effect the legislative purpose,^{14,5} even though inequities may result to the creditors.^{14,10} The exemption extends in favor of the veteran,¹⁵ his dependents,¹⁶ his estate,¹⁷ or any beneficiary named in the act.¹⁸

Under the statute the exemption extends not only to the adjusted service certificate and bonds for which it is exchanged,¹⁹ but also to the proceeds of such bonds²⁰ while still in the form of currency actually received,²¹ and to the proceeds of any loan on the certificate as long as identifiable.²² The proceeds cease to be exempt when they lose their identity as such.²³ They do not lose their exemption by being deposited in a bank,²⁴ at least if de-

posited without interest and not commingled with other deposits in the same account;²⁵ further, proceeds deposited in a bank have been held exempt even though other items are deposited in the same account,²⁶ provided, however, such other items do not affect the traceability of the proceeds.²⁷ It has been held that the proceeds of a loan on the certificate lose their identity, and hence lose their exemption, if the veteran lends them to another²⁸ or voluntarily mixes or commingles such proceeds with other funds.²⁹

A state statute exempting all rewards received for military service will exempt the proceeds of an adjusted service certificate³⁰ and has been held sufficiently broad to exempt property purchased with the proceeds of adjusted service bonds.³¹

judgment or decree of a court of law or equity subjecting the adjusted certificate, or the proceeds of any loan thereon, to the payment of the debts of the veteran.

U.S.—Mahar v. McIntyre, D.C.Mass., 16 F.Supp. 961.

Miss.—De Baum v. Hulett Undertaking Co., 153 So. 513, 169 Miss. 488.

The words "any legal or equitable process" used in the statute should be given broad construction.

Miss.—De Baum v. Hulett Undertaking Co., supra.

Forced seizure

The protection given is against forced seizure.

Tex.—Shaw v. Williams, Civ.App., 60 S.W.2d 1073, error refused, followed in Burke v. Shaw, Civ.App., 63 S.W.2d 1117.

13. Miss.—De Baum v. Hulett Undertaking Co., 153 So. 513, 169 Miss. 488.

14. U.S.—In re Houchins, D.C.W.Va., 17 F.Supp. 556—Mahar v. McIntyre, D.C.Mass., 16 F.Supp. 961.

Miss.—De Baum v. Hulett Undertaking Co., 153 So. 513, 169 Miss. 488—Wilson v. May, 152 So. 878, 169 Miss. 281.

Ohio.—Second Nat. Bank v. Hoblit, 179 N.E. 812, 41 Ohio App. 126.

Tex.—Hoerster v. Johnson City State Bank, Civ.App., 58 S.W.2d 142.

14.5 Ohio.—Wilcox v. Wynn, Mun., 83 N.E.2d 411.

14.10 Ohio.—Wilcox v. Wynn, supra.

15. Miss.—De Baum v. Hulett Undertaking Co., 153 So. 513, 169 Miss. 488.

16. Miss.—De Baum v. Hulett Undertaking Co., supra.

17. Miss.—De Baum v. Hulett Undertaking Co., supra.

N.Y.—In re Cerello's Estate, 281 N.Y.S. 599, 155 Misc. 709.

Pa.—In re McDonald's Estate, 36 Pa. Dist. & Co. 436.

Exemption from all debts

Adjusted compensation payable to estate of veteran is exempt from all debts of veteran, and from expenses of last illness and funeral.

Miss.—Hill v. Ouzts, 200 So. 254, 190 Miss. 341.

18. Miss.—De Baum v. Hulett Undertaking Co., 153 So. 513, 169 Miss. 488.

19. U.S.—In re Houchins, D.C.W.Va., 17 F.Supp. 556.

Wis.—In re Guardianship of Letourneau, 300 N.W. 248, 238 Wis. 473.

20. U.S.—In re Houchins, D.C.W.Va., 17 F.Supp. 556.

Cal.—Culp v. Webster, 70 P.2d 273, 25 C.A.2d Supp. 759.

Pa.—In re McDonald's Estate, 36 Pa. Dist. & Co. 436.

21. U.S.—Mahar v. McIntyre, D.C.Mass., 16 F.Supp. 961.

22. U.S.—In re Houchins, D.C.W.Va., 17 F.Supp. 556.

Miss.—Wilson v. May, 152 So. 878, 169 Miss. 281.

Ohio.—Second Nat. Bank v. Hoblit, 179 N.E. 812, 41 Ohio App. 126.

Wilcox v. Wynn, Mun., 83 N.E.2d 411.

Tex.—Hoerster v. Johnson City State Bank, Civ.App., 58 S.W.2d 142.

Deposit in court

Money which veteran deposited with court clerk in lieu of appearance bond was exempt from garnishment.

Miss.—Wilson v. May, 152 So. 878, 169 Miss. 281.

23. Ohio.—Fulton v. Campbell, 185 N.E. 883, 44 Ohio App. 376.

Investment in other property

(1) Where a veteran cashes adjusted compensation bonds and on the same day buys a home with the proceeds, taking title thereto in the name of his children, for his own benefit and to secure the comforts of his family, such real estate is exempt.

Pa.—Ruth v. Wellington, 32 Pa. Dist. & Co. 657.

(2) It has been held in Ohio that the proceeds of the loan are no longer exempt if invested in other property.

Ohio.—Fulton v. Campbell, 185 N.E. 883, 44 Ohio App. 376.

(3) It has also been held, however, in the same jurisdiction that where the veteran turned the proceeds over to his wife, who purchased stock therewith, and who later returned the stock, depositing the proceeds in a bank, the bank deposit constituted "proceeds" of the loan and was therefore exempt.

Ohio.—Second Nat. Bank v. Hoblit, 179 N.E. 812, 41 Ohio App. 126.

24. Miss.—Wilson v. May, 152 So. 878, 169 Miss. 281.

Ohio.—Lee v. City Sav. & Loan Co., 29 Ohio N.P., N.S., 563—Flanders v. Adams, 28 Ohio N.P., N.S., 542.

Tex.—Hoerster v. Johnson City State Bank, Civ.App., 58 S.W.2d 142.

25. Ohio.—Fulton v. Campbell, 185 N.E. 883, 44 Ohio App. 376.

26. Miss.—Wilson v. May, 152 So. 878, 169 Miss. 281.

Tex.—Hoerster v. Johnson City State Bank, Civ.App., 58 S.W.2d 142.

27. Miss.—Wilson v. May, 152 So. 878, 169 Miss. 281.

Tex.—Hoerster v. Johnson City State Bank, Civ.App., 58 S.W.2d 142.

28. Ohio.—Fulton v. Campbell, 185 N.E. 883, 44 Ohio App. 376.

29. Ohio.—Fulton v. Campbell, supra.

30. N.Y.—In re Murray's Estate, 289 N.Y.S. 81, 159 Misc. 865.

31. N.Y.—Vinciguerra v. Busam, 8 N.Y.S.2d 294, 296, 169 Misc. 908.

Liberal construction

"A literal reading of the statute would restrict its benefits merely to the physical moneys received by the soldier or sailor. However, in inter-

(3) Disability Compensation

Disability compensation paid to a war veteran is exempt from the claims of creditors, but the exemption does not, under the federal statutes, extend to property purchased therewith.

By virtue of federal statute³² and the statutory provisions in some jurisdictions,³³ the disability allowance or compensation payable to a veteran under the federal statutes is exempt from the claims of creditors. There is authority holding that such moneys are not exempt under the federal statute as originally enacted, after they have been paid over to the veteran or other person entitled thereto,³⁴ but as to this there is also authority to the contrary,³⁵ and under later provisions containing broader language it is clear that such moneys are now exempt both before and after their receipt by the veteran or other beneficiary.³⁶

preting this statute, its beneficent purpose must be kept in mind and it should be construed that the very evident intent of its framers will be given a full, broad and liberal effect."

N.Y.—Vinciguerra v. Busam, *supra*.

32. Ark.—Wilson v. Sawyer, 6 S.W. 2d 825, 177 Ark. 492.

D.C.—District of Columbia v. Reilly, 249 F.2d 524, 102 U.S.App.D.C. 9.
La.—Succession of Robinson, 132 So. 261, 16 La.App. 32.

Pa.—In re Musser, 19 Pa.Dist. & Co. 526, 43 Lanc.L.Rev. 649.

Tenn.—Speer v. Pierce, 77 S.W.2d 77, 18 Tenn.App. 351.

"The power of the Congress to protect the fund provided by the government for the support of disabled and incompetent soldiers and their dependents is well settled."

Ala.—Derzis v. Vafes, 150 So. 461, 462, 227 Ala. 471.

Guardian seeking compensation for extraordinary services is not "creditor" within statute.

Iowa.—Hines v. McKenzie, 250 N.W. 687, 216 Iowa 1388.

Proceedings by rule to show cause why the verdict against a guardian of a feeble-minded veteran should not be paid is but another method of attaching the funds, and is therefore prohibited by the federal statute.

Pa.—Skumin v. Skumin, 36 Pa.Dist. & Co. 511, 6 Sch.Reg. 327.

33. Iowa.—Hines v. McKenzie, 250 N.W. 687, 216 Iowa 1388.

N.Y.—Lind v. Miller, 260 N.Y.S. 343, 145 Misc. 477.

Okla.—Champion v. Champion, 218 P. 2d 354, 203 Okl. 105.

4. Ky.—Arms' Committee v. Arms, 86 S.W.2d 542, 260 Ky. 634.

In New York

(1) It has been held that under the federal statute such moneys are not exempt in the hands of the veteran's administrator.

N.Y.—In re Cerello's Estate, 281 N.Y.S. 599, 155 Misc. 709.

(2) There is also authority holding such moneys exempt under the federal statute, notwithstanding the money has been received by the veteran or his committee or guardian.

N.Y.—In re Murphy's Committee, 236 N.Y.S. 343, 134 Misc. 683, modified on other grounds 237 N.Y.S. 448, 227 App.Div. 839.

(3) Other authority holds such funds exempt, even after their receipt by the veteran, his committee, or guardian, under a state statute broadly exempting pensions or other rewards for military service.

N.Y.—Lind v. Miller, 260 N.Y.S. 343, 145 Misc. 477—In re Murphy's Committee, *supra*.

35. Ark.—Stone v. Stone, 67 S.W.2d 189, 188 Ark. 622—Wilson v. Sawyer, 6 S.W.2d 825, 177 Ark. 492.

Funds "payable"

The fact that the statute exempts funds "payable" thereunder does not limit the exemption to funds which have not reached the beneficiary; the word is used to designate funds derived from the government under the act.

Tenn.—Speer v. Pierce, 77 S.W.2d 77, 18 Tenn.App. 351.

36. U.S.—Carrier v. Bryant, N.C., 59 S.Ct. 707, 306 U.S. 545, 83 L.Ed. 976.

Wis.—In re Guardianship of Letourneau, 300 N.W. 248, 238 Wis. 473.

37. U.S.—Carrier v. Bryant, N.C., 59 S.Ct. 707, 306 U.S. 545, 83 L.Ed. 976.

The exemption of the federal statute does not apply to property in which the funds have been invested;³⁷ but money received as disability compensation and deposited in a bank has been held exempt from debts of the veteran,³⁸ although where the pension benefits have been deposited in a savings account at interest they have been held to become investments subject to satisfaction of judgments for torts against the veteran.^{38.5}

§ 44. Seed Grain and Farm Stock

Under some statutes seed grain and farm stock necessary to enable the debtor to carry on his business of farming are exempt.

Under a statute exempting the stock of a farmer to a certain amount, he is entitled to an exemption in seed grain³⁹ or other property which he has upon the farm necessary to enable him to carry on his business of farming.⁴⁰ Under other statutes a spe-

Iowa.—In re Bagnall's Guardianship, 29 N.W.2d 597, 238 Iowa 905.

Mich.—Auditor General v. Olezniczak, 4 N.W.2d 679, 302 Mich. 336.

Ohio.—Guardianship of Pryor, Prob., 106 N.E.2d 672.

Pa.—In re King, 41 Pa.Dist. & Co. 212.

Wis.—In re Guardianship of Letourneau, 300 N.W. 248, 238 Wis. 473—In re Gardner, 264 N.W. 643, 220 Wis. 493.

38. Ohio.—Lee v. City Sav. & Loan Co., 29 Ohio N.P.N.S., 563.

Tenn.—Speer v. Pierce, 77 S.W.2d 77, 18 Tenn.App. 351.

Moneys deposited to credit of incompetent veteran's guardian are exempt.

Ala.—Derzis v. Vafes, 150 So. 461, 227 Ala. 471.

Deposit held by veteran's mother

Moneys delivered by the veteran to his mother and held by her on deposit in a bank are exempt.

Tenn.—Speer v. Pierce, 77 S.W.2d 77, 18 Tenn.App. 351.

38.5 Ohio.—In re Bowen, 49 N.E.2d 753, 141 Ohio St. 602.

39. Mich.—Stillson v. Gibbs, 9 N.W. 254, 46 Mich. 215.

Rice held for sale, not for seed, is not exempt as supplies for plantation.

U.S.—In re Vincent, D.C.La., 28 F.2d 396.

40. Mich.—Hutchinson v. Whitmore, 51 N.W. 451, 90 Mich. 255, 30 Am. S.R. 431.

25 C.J. p 55 note 5.

Chickens on farm leased by bankrupt held exempt as necessary supplies for carrying on plantation.

U.S.—In re Vincent, D.C.La., 28 F.2d 396.

cific exemption is made of necessary seed grain to a limited amount,⁴¹ or of "stock" animals.⁴²

§ 45. Stock in Trade

Where a statute so provides, the stock in trade of a debtor is exempt.

Under statutes exempting the personal property of the debtor to a certain amount, the exemption may be claimed in merchandise kept by the debtor for sale for profit.⁴³ However, under some statutes the allowance of an exemption out of a "shifting stock of merchandise" is inhibited.⁴⁴ Under such a provision an exemption cannot be claimed to goods forming a part of a stock in a store.⁴⁵ The restriction, however, goes to the present condition rather than to the general nature of the stock of merchandise, so that a shifting stock of merchandise owned by a merchant ceases to be a shifting stock on his death and the closing out of the business, and his minor children will be entitled to their exemption in it.⁴⁶

Statutes exempting "tools, implements, and stock in trade." Under statutes exempting "the tools, implements and stock in trade" of any "mechanic, miner or other person"⁴⁷ or of any "merchant"⁴⁸ used or kept for the purpose of carrying on his trade or business, in some jurisdictions goods kept for sale by a merchant are regarded as included. Under such a construction the stock in trade of a retail liquor dealer may be included if his business is lawful,⁴⁹ but not if he is carrying it on without a license.⁵⁰

In other jurisdictions, the term "stock in trade" as used in conjunction with the exemption of the necessary tools and implements of any mechanic,

miner, or other person, has been restricted to the form of property owned by a craftsman upon which he exercises his art, skill, or workmanship and upon which he uses the tools of his trade or business.⁵¹ Under this view the statute applies only to persons using tools or implements in their trade or business,⁵² and does not exempt the stock in trade kept for sale by one who is merely a merchant or shopkeeper.⁵³

In these states "stock in trade" means: (1) Material suitable, of course, for his particular trade,⁵⁴ which the debtor uses in manufacture, that is, material upon which he uses the tools which are exempt by law to him to produce a certain article.⁵⁵ (2) The articles manufactured or in the process of manufacture by the debtor,⁵⁶ even articles made by a tradesman at odd moments or during slack periods of his business, where this extra work may be taken as incidental to his principal occupation, and a part thereof.⁵⁷

Under this construction the exemption becomes a supplement to the exemption of the tools and implements of the debtor in order that he may have something upon which to use his tools and thus make the exemption of them to him a thing of some practical value.⁵⁸ The exemption, however, can be claimed only by tradesmen and manufacturers whose business is carried on on a small scale.⁵⁹ The statute does not apply to the stock and materials of large manufacturers,⁶⁰ nor does it exempt goods bought by a mechanic or small manufacturer merely to be sold by him again, in connection with his manufacturing business, and not to be worked up or manufactured by him, for as to these he is a mere merchant, buying and selling.⁶¹ The fact,

41. Minn.—Matteson v. Munro, 83 N. W. 153, 80 Minn. 340.
25 C.J. p 56 note 6.

42. Tenn.—Byous v. Mount, 17 S. W. 1037, 89 Tenn. 361.
25 C.J. p 56 note 7.

43. Ala.—Brewer v. Granger, 45 Ala. 580.

44. Va.—Edgewood Distilling Co. v. Rosser, 82 S.E. 716, 116 Va. 624.
25 C.J. p 61 note 43.

45. U.S.—Laderburg v. Miller, Va., 210 F. 614, 127 C.C.A. 250.

46. Va.—Edgewood Distilling Co. v. Rosser, 82 S.E. 716, 116 Va. 624.

47. Colo.—Weil v. Nevitt, 31 P. 487, 18 Colo. 10—Martin v. Bond, 24 P. 326, 14 Colo. 466.

But formerly the Colorado statute had received a more limited construction.

U.S.—In re Peabody, D.C.Colo., 19 F. Cas.No.10,866.

48. Wis.—Hettinger v. Wells, 155 N. W. 126, 161 Wis. 640—Wicker v. Comstock, 9 N.W. 25, 52 Wis. 315.

But formerly the statute in Wisconsin had received a more limited construction.

U.S.—Ex parte Robinson, C.C.Wis., 20 F.Cas.No.11,933.

49. Colo.—Weil v. Nevitt, 31 P. 487, 18 Colo. 10.
25 C.J. p 62 note 49.

50. Wis.—Hettinger v. Wells, 155 N.W. 126, 161 Wis. 640—Walsch v. Call, 32 Wis. 159.

51. Kan.—Armstrong-Turner Millinery Co. v. Round, 186 P. 979, 106 Kan. 146.

52. Minn.—Hillyer v. Remore, 44 N. W. 116, 42 Minn. 254.
25 C.J. p 62 note 52.

53. Kan.—Bequillard v. Bartlett, 19 Kan. 382, 27 Am.R. 120.
25 C.J. p 62 note 53.

54. Mich.—Stewart v. Welton, 32 Mich. 56.

55. Kan.—Armstrong-Turner Millinery Co. v. Round, 186 P. 979, 106 Kan. 146.
25 C.J. p 62 note 55.

56. Kan.—Armstrong-Turner Millinery Co. v. Round, supra.
25 C.J. p 62 note 56.

57. Mich.—Fischer v. McIntyre, 33 N.W. 762, 66 Mich. 681.
25 C.J. p 62 note 57.

58. Minn.—Grimes v. Bryne, 2 Minn. 89.

Exemption of tools, implements, etc., see infra § 46.

59. Mass.—Smith v. Gibbs, 6 Gray 298.

60. Mass.—Smith v. Gibbs, supra.

61. Kan.—Bequillard v. Bartlett, 19 Kan. 382, 27 Am.R. 120.

Minn.—Hillyer v. Remore, 44 N.W. 116, 42 Minn. 254.

however, that articles manufactured by the debtor have been placed on sale by him with other property which he has bought for resale will not affect his right of exemption of his own product, provided the manufactured articles and merchandise are kept separate and distinct;⁶² but where articles are kept indiscriminately for sale and as stock for manufacture, as opportunity affords, they are not exempt as stock in trade.⁶³

Use in trade or business. Under some statutes the stock, to be exempt, must be kept and used by the debtor for carrying on his trade or business.⁶⁴ Therefore, although the stock is procured and designed for the purpose of carrying on his trade or business, it ceases to be exempt when the debtor changes his purpose to use it in his trade or business.⁶⁵ It has been held, however, that the debtor does not lose the benefit of the exemption by keeping the goods idle until they can be used to the best advantage;⁶⁶ and that the exempt stock cannot be levied on unless the debtor goes into some new business in which it will be of no material use to him.⁶⁷

Substituted stock in trade. Where a stock of goods has been set aside as exempt, and, in the regular course of trade, it has been sold by the debtor and other similar goods purchased with the proceeds, the new stock so purchased is likewise protected by the exemption.⁶⁸

§ 46. Tools, Implements, Instruments, Etc.

- a. In general
- b. What constitute tools, implements, etc.
- c. Necessity to conduct of occupation or trade
- d. Necessity of employment in occupation or trade

- e. Personal use by debtor
- f. Tools or implements of several trades or occupations
- g. Farming tools and instruments

a. In General

Under the various exemption statutes, the tools and implements of a debtor necessary for carrying on his trade or business are generally exempt.

Statutes very generally exempt to a debtor the "tools," "tools and implements," "tools and instruments," etc., necessary for carrying on his trade or business. The term "trade," as used in such statutes, is given a general meaning in preference to a restricted meaning,^{68,50} in accordance with the policy of liberal construction, as discussed infra § 46 b (1).

This exemption sometimes exists in addition to what is allowed the head of a family,⁶⁹ or independently of whether or not the debtor has a family.⁷⁰ The right to an exemption, however, does not exist in the absence of a statute conferring it.⁷¹

Articles used in trade are sometimes specifically exempted by express statutory provision, and are in that case exempt regardless of whether they may be classified as tools or not.⁷² Where a statute lists all the articles in a trade to be exempted, and contains no general clause for exemption of tools of trade, articles not listed are not exempt.⁷³

The object of a statute exempting a debtor's tools and instruments of trade is to prevent him from being deprived of the means of paying his debts and of making an honest living.⁷⁴

General commercial pursuits. A statute exempting tools and apparatus of trade from execution is not intended to apply to general commercial pursuits, which require no particular skill in the use of the tools and apparatus.^{74.5}

62. Minn.—Hillyer v. Remore, supra.

63. Minn.—Hillyer v. Remore, supra.

64. Mass.—Rayner v. Whicher, 6 Allen 292.

65. Mass.—Rayner v. Whicher, supra.

Sale in gross of unfinished material
Mass.—Rayner v. Whicher, supra.

66. Mich.—Rosenthal v. Scott, 2 N. W. 909, 41 Mich. 632.

67. Mich.—Rosenthal v. Scott, supra.

Abandonment and suspension of trade generally see supra § 24.

68. Ga.—Dodd v. Thompson, 63 Ga. 393.

Pa.—Hanley v. O'Donald, 30 Pa. 261.

68.50 Tex.—McMillan v. Dean, Civ. App., 174 S.W.2d 737, error refused.

69. Mo.—Harrison v. Martin, 7 Mo. 286.

70. Wash.—Geiger v. Kobilka, 66 P. 423, 26 Wash. 171, 90 Am.S.R. 733. Persons entitled to exemption generally see supra §§ 11-25.

71. Tenn.—Bell v. Douglass, 1 Yerg. 397.

25 C.J. p 48 note 35. Instruments of professional men as exempt see supra § 38.

Occupation permitting claim see supra § 24.

72. Conn.—Enscoe v. Dunn, 44 Conn. 93, 26 Am.R. 430.
25 C.J. p 48 note 36.

73. Me.—Martin v. Buswell, 80 A. 828, 108 Me. 263.
25 C.J. p 48 note 38.

74. La.—Young v. Geter, 170 So. 240, 185 La. 709, 107 A.L.R. 608, answers to certified questions conformed to, App., 170 So. 410.

Fant v. Miller, App., 170 So. 412, followed in Fant v. Deville, App., 170 So. 415—Talbot v. Scogin, App., 147 So. 722.

25 C.J. p 48 note 31.

74.5 Tex.—McMillan v. Dean, Civ. App., 174 S.W.2d 737, error refused.

b. What Constitute Tools, Implements, Etc.

- (1) In general
- (2) Machinery
- (3) Printing outfits

(1) In General

The terms "tools," "implements," "instruments," etc., as used in exemption statutes, while difficult to define accurately, are frequently accorded a broad significance, taking into consideration the object of the statute granting the exemption.

75. Particular definitions

(1) A tool is a simple mechanism or instrument used in working, moving, or transforming material.

N.Y.—Northern New York Trust Co. v. Bano, 273 N.Y.S. 694, 151 Misc. 684.

(2) The term "tools," as used in exemption statutes, is presumed to embrace such implements of husbandry or of manual labor as are usually employed in, and are appropriate to, the business of the several trades or classes of the laboring community, and according to the wants of their respective employments or professions, whether farmer, mechanic, manufacturer, or, in fact, any artisan or laborer, who may require the use of such helps to obtain his living.

N.H.—Wilkinson v. Alley, 45 N.H. 551.

"Common tools of trade" construed to mean simple and indispensable appliances used in the debtor's trade. Ga.—Kirksey v. Rowe, 40 S.E. 990, 114 Ga. 893, 88 Am.S.R. 65—Lenoir v. Weeks, 20 Ga. 596.

"Working tools"

(1) "Working tools," as used in exemption statutes, are such tools as are necessary to the debtor's business and without the possession of which he is powerless to carry on his calling.

N.Y.—Sammis v. Smith, 1 Thomps. & C. 444.

(2) They are such utensils as the debtor is accustomed to use in manual work or labor in his usual occupation.

R.I.—In re Church, 2 A. 761, 15 R.I. 245.

(3) The term includes not only "working tools," so called in the dictionary and by learned men, but also such as are so called by the craft, such as the individual uses and has set apart as tools for the advantageous prosecution of his business. R.I.—Healy v. Bateman, 2 R.I. 454, 456, 60 Am.D. 94.

76. Particular definitions

(1) An implement is some tool or utensil forming a part of equipment for work.

Mont.—State ex rel. Bartol v. Justice of Peace Court of Township of

Stanford, in Judith Basin County, 55 P.2d 691, 102 Mont. 1.

(2) Other definitions.

Cal.—In re McManus' Estate, 25 P. 413, 87 C. 292, 22 Am.S.R. 250, 10 L.R.A. 567.

Conn.—Atwood v. De Forest, 19 Conn. 513.

77. Same meaning as "implements"

The words "instruments" and "implements," in the exemption law, were meant to describe the same species of property and should be regarded as of identical import.

Kan.—Williams v. Vincent, 79 P. 121, 70 Kan. 595, 109 Am.S.R. 469, 68 L.R.A. 634.

78. "Apparatus" is defined as any complex device or machine designed or prepared for the accomplishment of a special purpose; any complex appliance for a specific action or operation; machinery; mechanism.

Tex.—Hinckley-Tandy Leather Co. v. Hazelwood, Civ.App., 35 S.W.2d 209 —Harris v. Townley, Civ.App., 161 S.W. 5.

79. Cal.—In re McManus' Estate, 25 P. 413, 87 C. 292, 22 Am.S.R. 250, 10 L.R.A. 567.

La.—Martin v. Reynaud, App., 175 So. 914.

25 C.J. p 49 note 40.

80. Cal.—In re McManus' Estate, 25 P. 413, 87 C. 292, 22 Am.S.R. 250, 10 L.R.A. 567.

81. Particular items held within exemption

(1) Boat.

Mich.—Church v. First Nat. Bank, 238 N.W. 192, 255 Mich. 595, 82 A. L.R. 645.

N.Y.—Sammis v. Smith, 1 Thomps. & C. 444.

(2) Canal boatman's towline.

N.Y.—Fields v. Moul, 15 Abb.Pr. 6.

(3) Clock or watch.

Mass.—Woods v. Keyes, 14 Allen 236, 92 Am.D. 765.

25 C.J. p 49 note 40 [b], [c].

(4) Fishing net.

N.Y.—Sammis v. Smith, supra.

(5) Hair tonic and shampoo owned and used by barber in his business.

Iowa.—Hoyer v. McBride, 211 N.W. 847, 202 Iowa 1278.

(6) Lamp of jeweler.

Kan.—Bequillard v. Bartlett, 19 Kan. 382, 27 Am.R. 120.

While the terms "tools,"⁷⁵ "implements,"⁷⁶ "instruments,"⁷⁷ and "apparatus"⁷⁸ as used in exemption statutes have been defined by a number of courts, and are frequently accorded a broad significance,⁷⁹ it is difficult to define accurately these terms.⁸⁰ In defining them, however, various particular items, considered in the footnotes, have been held to be, or not to be, included therein.⁸¹ The term "tools and implements" includes any implement

(7) Milliner's stove, screen, pitcher, and table cover.

Mass.—Woods v. Keyes, supra.

(8) Miner's coal cars, mining timbers, tie timbers, rails, and wagon scale.

Mont.—State ex rel. Bartol v. Justice of Peace Court of Township of Stanford, in Judith Basin County, 55 P.2d 691, 102 Mont. 1.

(9) Musical instruments.

Mass.—Goddard v. Chaffee, 2 Allen 395, 79 Am.D. 796.

(10) Office furniture.

Kan.—Wamberg v. Hart, 221 P. 547, 114 Kan. 906, 36 A.L.R. 666—Davidson v. Sechrist, 28 Kan. 324.

(11) Photographic lens.

Conn.—Davidson v. Hannon, 34 A. 1050, 67 Conn. 312, 52 Am.S.R. 282, 34 L.R.A. 718.

(12) Set of abstracts belonging to an abstractor of titles.

Kan.—Davidson v. Sechrist, supra.

(13) Lawn mowers, iron bar, shovels, spades, picks and adze, and grave lowering device of sexton of cemetery, who maintained grounds, dug graves, and built boxes for graves.

Cal.—Peebler v. Danziger, 231 P.2d 894, 104 C.A.2d 490.

(14) Stack oven and grill, and a french fryer, purchased by head of family engaged in restaurant business.

Kan.—Emporia Wholesale Coffee Co. v. Rehrig, 252 P.2d 590, 173 Kan. 841.

Particular items held not within exemption

(1) Advertising signs.

Vt.—Wallace v. Barber, 8 Vt. 440. 25 C.J. p 48 note 39 [a].

(2) Bowling alleys.

Kan.—Williams v. Vincent, 79 P. 121, 70 Kan. 595, 109 Am.S.R. 469, 68 L.R.A. 634.

25 C.J. p 48 note 39 [i].

(3) Buildings.

Iowa.—Holden v. Stranahan, 48 Iowa 70.

25 C.J. p 48 note 39 [b].

(4) Chairs for a moving picture show proprietor.

Tex.—Campbell v. Honaker, Civ.App., 166 S.W. 74.

(5) Cows and hogs.

La.—Martin v. Reynaud, App., 175 So. 914.

needed and used for the purpose of carrying on the trade or business of a mechanic or artisan.^{81.5}

What constitute necessary tools, implements, instruments, etc., is considered infra § 46 c.

What constitute farming tools and implements is considered infra § 46 g.

An automobile as a tool, implement, or instrument is considered infra § 54.

Improved and expensive tools. Tools may be exempt even though of an improved and expensive character.⁸²

Rules for determination. In determining whether a particular article is embraced in the statutory exemption, the object of the statute is to be considered;⁸³ and in case of doubt the statute, as a rule, is to be liberally construed.⁸⁴

(6) Restaurant furniture and equipment.
Tex.—Simmang v. Pennsylvania Fire Ins. Co., 112 S.W. 1044, 102 Tex. 39, 132 Am.S.R. 846.

McMillan v. Dean, Civ.App., 174 S.W.2d 737, error refused.
25 C.J. p 48 note 39 [h].

(7) Seat on stock exchange.
N.Y.—Leggett v. Waller, 80 N.Y.S. 13, 39 Misc. 408.
25 C.J. p 48 note 39 [c].

(8) Soda fountain and bar.
Utah.—Lindquist v. Clayton, 179 P. 655, 54 Utah 79.
25 C.J. p 48 note 39 [d].

Buggy and harness

(1) A buggy and harness belonging to an insurance agent, used by him with his horse to carry on his business, are exempt as tools and "implements."

Kan.—Wilhite v. Williams, 21 P. 256, 41 Kan. 258, 13 Am.S.R. 281.

(2) But it has also been held that a buggy and harness are not "tools and apparatus" belonging to the trade of an insurance agent.
Tex.—Cates v. McClure, 66 S.W. 224, 27 Tex.Civ.App. 459.

Horses or mules

(1) It is generally held that a horse or mule is not included in the exemption.

Ark.—Wallace v. Collins, 5 Ark. 41, 39 Am.D. 359.
25 C.J. p 48 note 39 [i].

(2) But there is also authority to the contrary.
La.—Martin v. Reynaud, App., 175 So. 914.
25 C.J. p 49 notes 40 [a], 41 [a].

(3) Horse exempt as necessary tool, instrument, etc., see infra § 46 c.

Iron safe

(1) An iron safe may come within the exemption.

Cal.—In re McManus' Estate, 25 P. 413, 87 C. 232, 22 Am.S.R. 250, 10 L.R.A. 567.

Kan.—Davidson v. Sechrist, 28 Kan. 324.

Wis.—Cunningham v. Britson, 77 N.W. 740, 100 Wis. 378.

(2) In Texas, however, it has been held that a safe is not a "tool or apparatus" in the sense that these terms are used in the exemption statute.

U.S.—In re Kessler, D.C.Tex., 2 F.2d 284.

(3) But formerly a safe used by an insurance agent in his business had been held exempt as a "tool or apparatus" under the Texas statute.
Tex.—Betz v. Maier, 33 S.W. 710, 12 Tex.Civ.App. 219.

Wagons

(1) Under some statutes a wagon is not within the exemption.

Mass.—Gibson v. Gibbs, 9 Gray 62.
25 C.J. p 48 note 39 [f].

(2) But under other statutes it may be.

U.S.—In re Conley, D.C.Neb., 162 F. 806.

25 C.J. p 49 note 40 [a].

(3) Wagons exempt as necessary tools, instruments, etc., see infra § 46 c.

81.5 Cal.—Peebler v. Danziger, 231 P.2d 894, 104 Cal.2d 490.

Trade of garageman

Garage tools, machinery and equipment are exempt from execution, if they are the tools or implements necessary to carry on trade of garageman.

Cal.—Dunlap v. Hood, 130 P.2d 208, 55 C.A.2d 97.

82. Conn.—Seeley v. Gwillim, 40 Conn. 106.

(2) Machinery

(a) In general

(b) Machinery operated by power

(a) In General

Ordinarily simple and inexpensive machinery may be exempt to a debtor as a tool or implement of trade.

The term "tools" in the statutes of exemption has been held to mean simple instruments used by hand, and does not embrace such expensive and complicated machines and appliances as are used in large manufacturing establishments;⁸⁵ nor, by the weight of authority, are such machines and appliances covered by statutes exempting "tools and apparatus," "tools and implements" or "tools and instruments," of a trade or business.⁸⁶ Accordingly paper mill machinery,⁸⁷ foundry machinery,⁸⁸ and well drilling machinery⁸⁹ have been held not to be exempt under such statutes. On the other hand, simple and

83. La.—Talbot v. Scogin, App., 147 So. 722.

25 C.J. p 48 note 32.
Object of exemption see supra § 46 a.

84. U.S.—Meritz v. Palmer, C.A.Tex., 266 F.2d 265.

Tex.—McMillan v. Dean, Civ.App., 174 S.W.2d 737, error refused.

Circumstances requiring strict construction

Exemption statutes are liberally construed in case of doubt whether personalty is tool or implement exempted thereby, but not if it is within class of property or articles specifically mentioned in statute or quantity or number of articles declared exempt is expressly limited.

Cal.—Security-First Nat. Bank v. Pierson, 38 P.2d 784, 2 C.2d 63.

85. U.S.—In re McFrancis, D.C.Tex., 22 F.Supp. 581.

Tex.—Willis v. Morris, 1 S.W. 799, 66 Tex. 628, 59 Am.R. 634.

McMillan v. Dean, Civ.App., 174 S.W.2d 737, error refused.
25 C.J. p 49 note 42.

A machine is distinguished from a tool by its complexity.

N.Y.—Northern New York Trust Co. v. Bano, 273 N.Y.S. 694, 151 Misc. 684.

86. U.S.—In re Turrentine & Thompson, D.C.Tex., 6 F.Supp. 490.

Kan.—Putnam Inv. Co. v. Titus, 266 P. 55, 125 Kan. 623.

25 C.J. p 49 note 43.

87. Mass.—Smith v. Gibbs, 6 Gray 298.

25 C.J. p 49 note 44.

88. La.—Boston Belting Co. v. Ivens, 28 La. Ann. 695.

25 C.J. p 49 note 45.

89. Tex.—Thresher v. McEvoy, Civ. App., 193 S.W. 159.

25 C.J. p 49 note 46.

inexpensive machines operated by hand are covered by such statutes,⁹⁰ such as cheese making implements,⁹¹ a weaver's loom,⁹² a turning lathe,⁹³ a sewing machine of a tailor⁹⁴ or shoemaker,⁹⁵ and machinery for sawing logs and making lumber.⁹⁶

It has been held, however, that a statute exempting "tools" does not exempt any machine, even machines of comparatively simple construction,⁹⁷ as a peg making machine⁹⁸ or a portable spinning machine;⁹⁹ but the word "apparatus" in a statute exempting tools and apparatus used in a trade or business is a broader term than "tools" and may embrace machinery and appliances that would not fall under the head of tools.¹

Machinery as farming tools and implements are considered *infra* § 46.

(b) Machinery Operated by Power

A machine may be exempt to a debtor as an implement or instrument of his trade even though it is propelled by motive power or steam.

While a machine, to be exempt as a "tool," must be operated by hand, and not by steam, electricity, or water power,² machines driven by steam, electricity, gasoline, or water may be exempt under statutes exempting to the debtor, in addition to tools, the "apparatus" or "implements" necessary for carrying on his trade or business.³ Thus a tractor has been held exempt to a farmer,⁴ or one engaged in the occupation of spreading gypsum and fertilizer in fields for farmers,^{4.5} a power driven

90. U.S.—In re Turrentine & Thompson, D.C.Tex., 6 F.Supp. 490. Kan.—Corpus Juris cited in Putnam Inv. Co. v. Titus, 266 P. 55, 57, 125 Kan. 623.

25 C.J. p 50 note 50.

91. Kan.—Fish v. Street, 27 Kan. 270.

25 C.J. p 50 note 51.

92. Pa.—McDowell v. Shotwell, 2 Whart. 26.

25 C.J. p 50 note 52.

93. Cal.—In re Robb, 33 P. 890, 99 C. 202, 37 Am.S.R. 48.

Okl.—Smith v. Roads, 119 P. 627, 29 Okl. 815.

94. Minn.—Cronfeldt v. Arrol, 52 N. W. 857, 50 Minn. 327, 36 Am.S.R. 648.

95. Mass.—Rayner v. Whicher, 6 Allen 292.

25 C.J. p 50 note 55.

96. Kan.—Reeves v. Bascue, 91 P. 77, 76 Kan. 333, 123 Am.S.R. 137.

25 C.J. p 50 note 65.

97. Me.—Knox v. Chadbourne, 28 Me. 160, 48 Am.D. 487.

25 C.J. p 49 note 47.

The mere fact that a machine takes the place of a tool that is exempt does not make it exempt as a "tool."

Vt.—Henry v. Sheldon, 35 Vt. 427, 82 Am.D. 644.

25 C.J. p 50 note 56.

98. Me.—Knox v. Chadbourne, 28 Me. 160, 48 Am.D. 487.

25 C.J. p 49 note 48.

99. Vt.—Kilburn v. Deming, 2 Vt. 404, 21 Am.D. 543.

25 C.J. p 49 note 49.

1. U.S.—In re McFrancis, D.C.Tex., 22 F.Supp. 581.

Tex.—Hinckley-Tandy Leather Co. v. Hazelwood, Civ.App., 35 S.W.2d 209.

25 C.J. p 50 note 57.

2. Tex.—Willis v. Morris, 1 S.W. 799, 66 Tex. 628, 59 Am.R. 634.

McMillan v. Dean, Civ.App., 174 S.W.2d 737, error refused. 25 C.J. p 50 note 60.

3. Colo.—Eckman v. Poor, 87 P. 1088, 38 Colo. 200. 25 C.J. p 50 note 63.

"In this day, when the application of motive power to the operation of what formerly were such distinctively hand tools as the egg beater in the home or hair clipper in the barber shop is a matter of common everyday practice, it cannot be held that propulsion by power per se excludes an implement from the exemption which the statute would otherwise afford."

Conn.—Flaxman v. Capitol City Press, 185 A. 417, 420, 121 Conn. 423.

In Texas

(1) "The law is still in a nebulous state as to what kind of machinery propelled by steam or electric or any power other than hand, if any, is exempt as 'tools or apparatus of trade.'"

U.S.—In re Turrentine & Thompson, D.C.Tex., 6 F.Supp. 490, 491.

(2) In an early case it was said by the supreme court: "Expensive and complicated machinery propelled by steam-power, or any power other than hand, is not exempt as 'tools of trade'; the latter phrase being held to apply only to simple instruments used by hand. . . . The word 'apparatus' used in the statute may take a wider range, and embrace such minor machinery as may be operated by hand."

Tex.—Willis v. Morris, 1 S.W. 799, 803, 66 Tex. 628, 59 Am.R. 634.

(3) This expression by the supreme court, however, was not a holding that the term "apparatus" would embrace only such minor machinery as might be operated by hand.

U.S.—In re Turrentine & Thompson, supra.

Tex.—Hinckley-Tandy Leather Co. v. Hazelwood, Civ.App., 35 S.W.2d 209.

(4) Since that decision a number of the courts of civil appeal have held machinery operated by steam, electricity, and other like power, to be exempt as "apparatus" under the statute.

Tex.—Lopez v. Naegelin, Civ.App., 59 S.W.2d 844—Hinckley - Tandy Leather Co. v. Hazelwood, supra—Harris v. Townley, Civ.App., 161 S.W. 5.

(5) However, while it is true that some recent decisions of the courts of civil appeal seem to hold that the fact that machinery is not run by hand is not the sole test of exemption, these decisions cannot and do not modify the supreme court holding that expensive and complicated machinery propelled by power other than by hand is not a tool of trade under the statute involved. Tex.—McMillan v. Dean, Civ.App., 174 S.W.2d 737.

(6) A federal court in applying the Texas statute has held that "where steam or any other power than hand is used, machinery so propelled is . . . not to be included within the statutory terms."

U.S.—Peyton v. Farmers' National Bank, C.C.A.Tex., 261 F. 326, 330.

(7) Another federal court has held that machinery too bulky and unwieldy to be operated by hand is not exempt under the statute.

U.S.—In re McFrancis, D.C.Tex., 22 F.Supp. 581.

(8) Still another federal court has held that exemption is not denied merely because the tool or apparatus is power driven.

U.S.—Meritz v. Palmer, C.A.Tex., 266 F.2d 265.

4. Tex.—Wollner v. Darnell, Civ. App., 94 S.W.2d 1225.

4.5 Cal.—Twining v. Taylor, Super., 339 P.2d 646.

lathe to a mechanic,⁵ a shoe polishing and grinding machine driven by electricity to a cobbler,⁶ electrically operated baking machinery to a baker,⁷ and portable steam engines for sawing logs and making lumber to a lumberman.⁸ So also automobiles have been held exempt in some jurisdictions, as discussed *infra* § 54, and in jurisdictions where a printing press is exempt, *infra* § 46 b (3), it is generally held that the fact that it is operated by steam or electricity and not by hand or foot power is immaterial.⁹

(3) Printing Outfits

While it has been held that the tools and apparatus of a debtor used in his trade of printing are exempt, the authorities differ as to whether his printing presses, cases, and type are exempt.

While it has been held that the tools and apparatus owned and used by a debtor in his trade or profession of printing or publishing are exempt,¹⁰ there is a direct conflict in the decisions as to whether the printing presses, cases, and type of a printer are within the statutes exempting tools. In some jurisdictions they are exempt.¹¹ In other jurisdictions, however, they are not exempt.¹² In any event, ponderous power driven, expensive, and complicated machines and appliances used in large

printing or publishing establishments are not exempt to the debtor as his tools or apparatus of trade.¹³

c. Necessity to Conduct of Occupation or Trade

To be exempt, a debtor's tools and instruments must be necessary to his trade or occupation.

Statutes exempting tools, instruments, etc., generally require that they shall be necessary for the debtor's trade or occupation; and where this requirement is not expressed it is generally implied.¹⁴ This requirement excludes tools, instruments, etc., which are not necessary to enable the debtor to work at his trade or occupation,¹⁵ but does not require that they shall be indispensable and allows those to be included which enable the debtor to carry on his trade conveniently and in the usual manner.¹⁶ So an implement may be exempt even though it is larger than necessary,¹⁷ and even though it may be possible for the debtor to secure employment with another person who will supply it.¹⁸ When a chattel has been so employed by its owner as to acquire the quality of a tool or instrument necessary to the exercise of a trade, business, or profession, in order to divest such chattel of that quality, proof of such fact must be unusually clear.^{18.5}

5. Okl.—Smith v. Roads, 119 P. 627, 29 Okl. 815.
25 C.J. p 50 note 64.

6. Tex.—Moore v. Neyland, Civ. App., 180 S.W.2d 658—McGehee v. Smith, Civ.App., 163 S.W.2d 730—Hinckley-Tandy Leather Co. v. Hazelwood, Civ.App., 35 S.W.2d 209.

7. Tex.—Moore v. Neyland, Civ. App., 180 S.W.2d 658—McGehee v. Smith, Civ.App., 163 S.W.2d 730—Lopez v. Naegelin, Civ.App., 59 S.W.2d 844.

8. Kan.—Reeves v. Bascue, 91 P. 77, 76 Kan. 333, 123 Am.S.R. 137.
25 C.J. p 50 note 65.

9. Conn.—Flaxman v. Capitol City Press, 185 A. 417, 121 Conn. 423.
Tex.—McGehee v. Smith, Civ.App., 163 S.W.2d 730—Harris v. Townley, Civ.App., 161 S.W. 5.

10. Okl.—Allen v. Clawson, 108 P. 2d 121, 188 Okl. 278—Bogardus v. Salter, 259 P. 561, 127 Okl. 4.
25 C.J. p 50 note 61 [a], p 51 note 70.

Job printer supplying local orders

Ordinary printing equipment used by a person whose only business is job printing to supply local orders produced by his own labor on which he depends to support his family is exempt under a statute exempting "implements of trade."

Conn.—Flaxman v. Capitol City Press, 185 A. 417, 121 Conn. 423.

11. Conn.—Flaxman v. Capitol City Press, *supra*.
La.—Holt v. Flournoy, App., 24 So.2d 171.

Tex.—Moore v. Neyland, Civ.App., 180 S.W.2d 658—McGehee v. Smith, Civ.App., 163 S.W.2d 730.
25 C.J. p 51 note 70.

Printing presses operated by steam or electricity see *supra* § 46 b (2) (b).

12. Mass.—Buckingham v. Billings, 13 Mass. 82.
25 C.J. p 51 note 72.

13. U.S.—In re Turrentine & Thompson, D.C.Tex., 6 F.Supp. 490.
Tex.—McGehee v. Smith, Civ.App., 163 S.W.2d 730.

14. Cal.—In re Baldwin, 12 P. 44, 71 C. 74.
25 C.J. p 51 note 75.

15. Kan.—Putnam Inv. Co. v. Titus, 266 P. 55, 125 Kan. 623.

La.—Young v. Geter, 170 So. 240, 185 La. 709, 107 A.L.R. 608, answers to certified questions conformed to, App., 170 So. 410.

Fant v. Miller, App., 170 So. 412, followed in Fant v. Deville, App., 170 So. 415—Morris-Wilson Buick Co. v. Robertson, App., 146 So. 339.
Tex.—Hackler v. H. Kohnstamm & Co. of Tex., Civ.App., 227 S.W.2d

347—McMillan v. Dean, Civ.App., 174 S.W.2d 737, error refused.
25 C.J. p 51 notes 71, 76.

16. La.—Talbot v. Scogin, App., 147 So. 722.
25 C.J. p 51 note 77.

Meaning of "necessary"

The term "necessary" in this connection has been construed to mean convenient or useful, and that has been deemed convenient or useful which a man procures for his own personal use, unless extravagant.

Vt.—Hooper v. Kennedy, 137 A. 194, 100 Vt. 314—Garrett v. Patchin, 29 Vt. 248, 70 Am.D. 414.

17. Iowa.—Hoyer v. McBride, 211 N. W. 847, 202 Iowa 1278.

18. Cal.—In re Robb, 33 P. 890, 99 C. 202, 37 Am.S.R. 48.

La.—Talbot v. Scogin, App., 147 So. 722.

18.5 La.—Skelley v. Accounts Supervision Co., App., 53 So.2d 520.

Abandonment not shown

Where exempt truck was badly damaged and allowed to remain in repair shop without effort to restore it to operative condition, such facts alone did not amount to abandonment of vehicle as asset of business and did not result in loss of its character as tool or instrument necessary to conduct of business.

La.—Skelley v. Accounts Supervision Co., *supra*.

Whether a particular implement is or is not necessary to the debtor depends in a large measure on what his trade, profession, or business may be,¹⁹ and a judicial determination as what belongs to any particular trade or profession is necessary.^{19.5}

Thus a safe²⁰ and lamp²¹ have been held necessary for a watchmaker; a cornet or violin for a musician;²² a piano for a music teacher;²³ a sewing machine for a tailor;²⁴ clocks, stoves, screens, pitchers, and table covers for a milliner;²⁵ chairs,²⁶ mirrors,²⁷ tables,²⁸ foot rests,²⁹ and other similar items³⁰ for a barber; electric dryers,^{30.5} electric curler,^{30.10} facial chair,^{30.15} and other similar items,^{30.20} for a beauty parlor operator; a buggy and harness,³¹ and safe,³² for an insurance agent; office furniture for a real estate agent;³³ a safe, set

of abstracts, cabinet, and table for an abstractor of titles;³⁴ commercial books,³⁵ safe and show cases,³⁶ for a merchant; a horse and wagon for a carpenter;³⁷ knives, saws, meat blocks, meat racks, scales, pans, a sausage mill, and an ice box for a butcher;³⁸ a mixer, oven, table, counter,³⁹ and other similar items⁴⁰ for a baker; a horse, harness, and wagon for a dealer in eggs and poultry;⁴¹ and appliances for producing moving pictures for a moving picture show proprietor.⁴²

Also pool tables have been held necessary for a proprietor of a pool parlor;⁴³ a boat⁴⁴ and net⁴⁵ for a fisherman; a canoe for a professional guide for hunters and fishermen;⁴⁶ a rifle for a hunter or frontiersman;⁴⁷ a sled⁴⁸ and machinery for saw-

19. La.—Young v. Geter, 170 So. 240, 185 La. 709, 107 A.L.R. 608, answers to certified questions conformed to, App., 170 So. 410.
25 C.J. p 52 note 90-93.

19.5 Tex.—Hackler v. H. Kohnstamm & Co. of Tex., Civ.App., 227 S.W.2d 347.

Laundry

Statute exempting all tools, apparatus, and books belonging to any trade or profession would include the business of a laundry.
Tex.—Hackler v. H. Kohnstamm & Co. of Tex., supra.

20. Cal.—McManus' Estate, 25 P. 413, 87 C. 292, 22 Am.S.R. 250, 10 L.R.A. 567.
25 C.J. p 51 note 80.

21. Kan.—Bequillard v. Bartlett, 19 Kan. 382, 27 Am.R. 120.
25 C.J. p 51 note 81.

22. Mass.—Goddard v. Chaffee, 2 Allen 395, 79 Am.D. 796.

23. Ill.—Amend v. Murphy, 69 Ill. 337.

24. Minn.—Cronfeldt v. Arrol, 52 N.W. 857, 50 Minn. 327, 36 Am.S.R. 648.
25 C.J. p 51 note 84.

25. Mass.—Woods v. Keyes, 14 Allen 236, 92 Am.D. 766.

26. Iowa.—Hoyer v. McBride, 211 N.W. 847, 202 Iowa 1278.
La.—Corpus Juris cited in Talbot v. Scogin, App., 147 So. 722, 723.

Tenn.—Terry v. McDaniel, 53 S.W. 732, 103 Tenn. 415, 46 L.R.A. 559.
Tex.—Moore v. Neyland, Civ.App., 180 S.W.2d 658—McGehee v. Smith, Civ.App., 163 S.W.2d 730.

27. Iowa.—Hoyer v. McBride, 211 N.W. 847, 202 Iowa 1278.

Tenn.—Terry v. McDaniel, 53 S.W. 732, 103 Tenn. 415, 46 L.R.A. 559.
Tex.—Moore v. Neyland, Civ.App., 180 S.W.2d 658—McGehee v. Smith, Civ.App., 163 S.W.2d 730.

28. Iowa.—Hoyer v. McBride, 211 N.W. 847, 202 Iowa 1278.

Tex.—Moore v. Neyland, Civ.App., 180 S.W.2d 658—McGehee v. Smith, Civ.App., 163 S.W.2d 730—Fore v. Cooper, Civ.App., 34 S.W. 341.

29. Vt.—Allen v. Thompson, 45 Vt. 472.

30. La.—Holt v. Flournoy, App., 24 So.2d 171.

Items necessary for one-man shop

The tools, materials, and articles necessary to operate a one-man barber shop may be claimed as exempt.
La.—Talbot v. Scogin, App., 147 So. 722.

Particular items held exempt

(1) Water heater, water tank, heating stove, and lavatory.
Iowa.—Hoyer v. McBride, 211 N.W. 847, 202 Iowa 1278.

La.—Talbot v. Scogin, App., 147 So. 722.

(2) Shampoo stool, mirror case, settee, hat rack, barber pole, ceiling fan, towel and paper urns, cuspidors, sterilizer, light fixtures, towels, powders, and tonics.
La.—Talbot v. Scogin, supra.

(3) Cash register, wall case, hall tree, desk, hair dryer, and other similar items.
La.—Hoyer v. McBride, supra.

Quantity of hair tonic and shampoo

Two gallons of hair tonic and one-half gallon of shampoo held not unreasonable in quantity so as to defeat barber's exemption therein.
La.—Hoyer v. McBride, supra.

30.5 Tex.—McGehee v. Smith, Civ. App., 163 S.W.2d 730.

30.10 Tex.—McGehee v. Smith, supra.

30.15 Tex.—McGehee v. Smith, supra.

30.20 Tex.—McGehee v. Smith, supra.

31. Kan.—Wilhite v. Williams, 21 P. 256, 41 Kan. 288, 13 Am.S.R. 281.

32. Tex.—Moore v. Neyland, Civ. App., 180 S.W.2d 658—Betz v. Mairer, 33 S.W. 710, 12 Tex.Civ.App. 219.

33. Kan.—Wamberg v. Hart, 221 P. 547, 114 Kan. 906, 36 A.L.R. 666.

34. Kan.—Davidson v. Sechrist, 28 Kan. 324.

35. U.S.—In re Rubinfeld, D.C.N.Y., 52 F.Supp. 480.

La.—Farmers & Merchants Bank of Memphis v. Franklin, 1 La. Ann. 393.

36. Wis.—Cunningham v. Brietson, 77 N.W. 740, 100 Wis. 378.

37. N.Y.—Whitmarsh v. Angle, 3 Code Rep. 53.

38. Okl.—Hoyt v. Pullman, 152 P. 386, 51 Okl. 717, L.R.A.1916B 1288.
Tex.—Hammond v. McFarland, Civ. App., 161 S.W. 47.

39. Tex.—Lopez v. Naegelin, Civ. App., 59 S.W.2d 844.

40. U.S.—In re Petersen, D.C.Cal., 95 F. 417, 2 Am.Bankr. 630.
Tex.—Lopez v. Naegelin, Civ.App., 59 S.W.2d 844.

41. U.S.—In re Conley, D.C.Neb., 162 F. 806.

42. Tex.—Campbell v. Honaker, Civ. App., 166 S.W. 74.

43. Tex.—Harris v. Todd, Civ.App., 158 S.W. 1189.

44. La.—Holt v. Flournoy, App., 24 So.2d 171—Lafourche Ice & Shrimp Co. v. Gilbeau, App., 185 So. 310.
N.Y.—Sammis v. Smith, 1 Thomps. & C. 444.

45. N.Y.—Sammis v. Smith, supra.

46. U.S.—In re Mullen, D.C.Me., 140 F. 206.

47. Tex.—Choate v. Redding, 18 Tex. 579.

48. N.H.—Parshley v. Green, 58 N. H. 271.

ing wood⁴⁹ for a lumberman; a horse or team,⁵⁰ a wagon,⁵¹ sled,⁵² and harness⁵³ for a teamster; a wagon and harness for an express man;⁵⁴ an omnibus for a hotel keeper;⁵⁵ a wagon for an itinerant lecturer;⁵⁶ a horse, wagon, and harness for an assayer;⁵⁷ tanks, pumps,^{57.5} and other similar equipment^{57.10} used by a wholesale distributor of petroleum products; a bicycle for a painter and bill poster;⁵⁸ embalming satchels and instruments, embalming boards, couches, canopies, rugs, pedestals, candelabras, door crapes, transfer cases, ice boxes, church trucks, catafalques, and undertakers' wagons and even wearing apparel for an undertaker;⁵⁹ and a photographic lens for a photographer,⁶⁰ in those jurisdictions where a photographer is held to be a person engaged in trade, as discussed supra § 24.

On the other hand, an implement which is not practically related to the particular calling in question cannot be held exempt on this ground.⁶¹ A grain mill is not exempt for a hotel keeper;⁶² or a watch for a plumber;⁶³ or a watch and chain for a cigar maker;⁶⁴ or a bicycle for an architect;⁶⁵ or a buggy and harness for a loan and insurance agent;⁶⁶ or a gum vending machine for a barber;⁶⁷ or a rifle for a professional guide for hunters and fishermen.⁶⁸

A debtor may require several tools of the same kind for his business, and their duplication will not,

therefore, of itself, deprive any one of them of its exempt character as a necessary tool, under the section exempting necessary tools generally,⁶⁹ even though only one is exempt under another section of the same law providing for specific exemptions;⁷⁰ but, as appears supra § 46 a, in the absence of a clause exempting necessary tools generally, a debtor will be restricted to the number of articles fixed by the specific exemption section.

Fairly usable in trade. A statute exempting all tools, apparatus, and books belonging to any trade or profession exempts tools or apparatus fairly belonging to, or usable in, the trade;^{70.5} but the exemption does not extend to articles such as furniture and fixtures and other equipment which have merely a general value and use in setting up a business establishment.^{70.10}

d. Necessity of Employment in Occupation or Trade

To be exempt, tools and instruments of a debtor must be kept for actual use in his trade.

The statutes often expressly require that the tools and implements which they exempt shall be used by the debtor to earn his living, or to carry on his trade or business, their necessity for this purpose being the reason for exempting them;⁷¹ and by the weight of authority, when such a condition is not expressed, it is to be implied.⁷² The

49. Colo.—Eckman v. Poor, 87 P. 1088, 38 Colo. 200.

Kan.—Reeves v. Bascue, 91 P. 77, 76 Kan. 333, 123 Am.S.R. 137.

50. N.H.—Rice v. Wadsworth, 59 N. H. 100.
25 C.J. p 52 note 10.

51. La.—Schwartz v. Dennis, 70 So. 857, 138 La. 848, Ann.Cas.1917D 94.
Holt v. Flournoy, App., 24 So.2d 171.

52. N.H.—Rice v. Wadsworth, 59 N. H. 100.

53. N.H.—Rice v. Wadsworth, supra.
25 C.J. p 52 note 13.

54. N.Y.—Galowitz v. Bumford, 104 N.Y.S. 492, 54 Misc. 41, 39 N.Y.Civ. Proc. 24.

55. Kan.—White v. Gemeny, 28 P. 1011, 47 Kan. 741, 27 Am.S.R. 320.

56. N.H.—Hall v. Nelson, 59 N.H. 573.
25 C.J. p 52 note 16.

57. Colo.—Watson v. Lederer, 19 P. 602, 11 Colo. 577, 7 Am.S.R. 263, 1 L.R.A. 854.

57.5 Tex.—Moore v. Neyland, Civ. App., 180 S.W.2d 658.

57.10 Tex.—Lessing v. Russek, Civ. App., 234 S.W.2d 891, error refused no reversible error—Moore v. Neyland, Civ.App., 180 S.W.2d 658.

58. Iowa.—Roberts v. Parker, 90 N. W. 744, 117 Iowa 389, 94 Am.S.R. 316, 57 L.R.A. 764.
25 C.J. p 52 note 18.

59. U.S.—Steiner v. Marshall, Md., 140 F. 710, 72 C.C.A. 103.
N.Y.—O'Reilly v. Erlanger, 95 N.Y.S. 760, 108 App.Div. 318.

60. Conn.—Davidson v. Hannon, 34 A. 1050, 67 Conn. 312, 52 Am.S.R. 282, 34 L.R.A. 718.

61. La.—Holt v. Flournoy, App., 24 So.2d 171.
Tex.—Choate v. Redding, 18 Tex. 579.

Motorcycle held not exempt
Tex.—Cobert v. Treacchar, Civ.App., 126 S.W.2d 993.

62. Kan.—Reed v. Cooper, 1 P. 822, 30 Kan. 574.

63. U.S.—In re Turnbull, D.C.Mass., 106 F. 667.

64. Minn.—Rothschild v. Boelter, 18 Minn. 361.
25 C.J. p 52 note 25.

65. Tex.—McMillan v. Dean, Civ. App., 174 S.W.2d 737, error refused —Smith v. Horton, 46 S.W. 401, 19 Tex.Civ.App. 28.

66. Tex.—McMillan v. Dean, Civ. App., 174 S.W.2d 737, error refused —Cates v. McClure, 66 S.W. 224, 27 Tex.Civ.App. 459.

67. Iowa.—Hoyer v. McBride, 211 N. W. 847, 202 Iowa 1278.

68. U.S.—In re Mullen, D.C.Me., 140 F. 206.

69. Minn.—Cronfeldt v. Arrol, 52 N. W. 857, 50 Minn. 327, 36 Am.S.R. 648.

Puerto Rico.—Laguna v. Quinones, 23 Puerto Rico 358.

70. Minn.—Cronfeldt v. Arrol, 52 N. W. 857, 50 Minn. 327, 36 Am.S.R. 648.
25 C.J. p 52 note 33.

70.5 U.S.—Meritz v. Palmer, C.A. Tex., 266 F.2d 265.

70.10 U.S.—Meritz v. Palmer, supra.

71. La.—Britt v. Merritt, App., 56 So.2d 766—Holt v. Flournoy, App., 24 So.2d 171—**Corpus Juris quoted in Morris-Wilson Buick Co. v. Robertson**, App., 146 So. 339, 340.

72. Me.—Files v. Stevens, 24 A. 584, 84 Me. 84, 30 Am.S.R. 333.
25 C.J. p 52 note 38.

test in determining whether the property is exempt is whether the debtor will be deprived of a tool or instrument necessary for the exercise of his calling, trade, or profession and whether such loss will prevent him from continuing to follow the calling, trade, or profession in which he has been engaged and in which the particular property has been used.^{72.5} Under these statutes the "tools" of a mechanic or other person must be kept for actual use in his trade,⁷³ not merely for his pleasure or convenience.⁷⁴ It is not necessary, however, that the tools be required for immediate use,⁷⁵ or that they be in actual use at the time of the levy,⁷⁶ or that they shall yet have been used.⁷⁷

e. Personal Use of Debtor

By the weight of authority, tools used in the debtor's business may be exempt even though used by his employees and assistants, provided the tools are not, in effect, capital used for the purpose of profit in the operation of an extensive business.

It has been held that the tools claimed as exempt must be used by the debtor himself, and that those used by his employees are subject to execution;⁷⁸ but this is not the general rule, and, by the weight

of authority, a debtor who carries on a small business, and gives his personal attention to it, is entitled to exemption in the tools employed in it, even though used by his employees and assistants,⁷⁹ although the rule is otherwise where the tools are in effect capital used for the purpose of profit in the operation of an extensive business.⁸⁰ A tool which requires more than one man to operate it may nevertheless be a tool used by the debtor himself and so exempt under the statute.⁸¹

f. Tools or Implements of Several Trades or Occupations

Unless a statute provides otherwise, a debtor engaged in several occupations may claim as exempt the tools or instruments used in either or both of them, if their value does not exceed the statutory limit.

Under a statute exempting a debtor's tools and implements of trade, or other property necessary for carrying on his trade or business, a person engaged in several occupations, all of which are covered by the exemption laws, may claim as exempt the tools or other property used in either of them,⁸² if their value does not exceed the statutory limit.⁸³

72.5 La.—Holt v. Flournoy, App., 24 So.2d 171.

73. Minn.—Prosser v. Hartley, 29 N. W. 156, 35 Minn. 340.

25 C.J. p 52 note 39, p. 53 note 41. Abandonment of trade as affecting status of debtor as person entitled to claim exemption see supra § 24. Habitual use see supra § 24. Unlawfulness of trade see supra § 24.

74. N.H.—Richards v. Hubbard, 59 N.H. 158, 47 Am.R. 188.

25 C.J. p 52 note 40.

75. N.H.—Wilkinson v. Alley, 45 N. H. 551.

76. Hawaii.—Garcia v. Ichikawa, 34 Hawaii 748.

La.—Lafourche Ice & Shrimp Co. v. Gilbeau, App., 185 So. 310.

25 C.J. p 53 note 43.

Future intended use of tools claimed as exempt is as controlling on question of exemption as past use. Vt.—Hooper v. Kennedy, 137 A. 194, 100 Vt. 314.

77. N.Y.—Fields v. Moul, 15 Abb.Pr. 6.

Intention habitually to engage in a newly started business see supra § 24.

78. Ala.—Abercrombie v. Alderson, 9 Ala. 981.

Conn.—Atwood v. De Forest, 19 Conn. 513.

79. U.S.—Meritz v. Palmer, C.A. Tex., 266 F.2d 265.

Iowa.—Corpus Juris cited in Hoyer v.

McBride, 211 N.W. 847, 848, 202 Iowa 1278.

Kan.—Emporia Wholesale Coffee Co. v. Rehrig, 252 P.2d 590, 173 Kan. 841.

Okl.—Allen v. Clawson, 108 P.2d 121, 188 Okl. 278.

Tex.—Commercial Credit Corp. v. Patterson, Civ.App., 248 S.W.2d 965.

25 C.J. p 53 note 48.

"It was apparently the original thought on the subject that the tools were for the exclusive use of the owner, but a broader view has since been followed, and they may be exempt even if used by others in his employ."

Kan.—Putnam Inv. Co. v. Titus, 266 P. 55, 57, 125 Kan. 623.

Work by debtor required

(1) The owner in the use of the tool or implement must perform a considerable portion of the work himself in order to render the tool or instrument exempt.

Kan.—Putnam Inv. Co. v. Titus, supra.

(2) Thus wood-sawing machinery may be exempt where the lumberman debtor and owner uses the machinery in person and performs a considerable portion of the work himself.

Kan.—Reeves v. Bascue, 91 P. 77, 76 Kan. 333, 123 Am.S.R. 137.

80. Iowa.—Hoyer v. McBride, 211 N. W. 847, 202 Iowa 1278.

Barber operating four-chair shop held entitled to exempt only one barber chair, chairs in excess thereof

not being his "proper tools" of trade, but being, in effect, the capital of a business owned and operated by him through others.

Iowa.—Hoyer v. McBride, supra.

Heavy electrical printing machinery operated by employees and only in emergency by partners owning machinery is not exempt from execution under Texas statute as "tools or apparatus of trade."

U.S.—In re Turrentine & Thompson, D.C.Tex., 6 F.Supp. 490.

81. N.Y.—Sammis v. Smith, 1 Thomps. & C. 444.

A boat owned and used by a fisherman may be exempt even though two men are required to operate it. La.—Lafourche Ice & Shrimp Co. v. Gilbeau, App., 185 So. 310.

25 C.J. p 53 note 51 [a].

82. La.—A. Wilbert's Sons Lumber & Shingle Co. v. Ricard, 119 So. 411, 167 La. 416.

25 C.J. p 53 note 53.

Fisherman and trapper

A boat used by a fisherman exclusively in his work was exempt from seizure, notwithstanding fishing was not his exclusive means of earning a livelihood and he was also engaged as a trapper.

La.—Lafourche Ice & Shrimp Co. v. Gilbeau, App., 185 So. 310.

83. Mass.—Baker v. Willis, 123 Mass. 194, 25 Am.R. 61.

25 C.J. p 53 note 53.

Amount of exemption generally see infra §§ 66-69.

By the weight of authority, unless the statute in terms applies to a single business only, he may claim the tools or other property used in more than one business if the value of all is within the statutory limit.⁸⁴ Particularly is this so where the trades are of a kindred nature;⁸⁵ but a debtor cannot, by multiplying his employments, claim cumulatively several exemptions, created by the statute for several distinct pursuits.⁸⁶ Thus, under a statute exempting the tools and implements of a mechanic, miner, or other person, not exceeding a certain sum in value, a debtor cannot, by carrying on the business of a mechanic and miner at the same time, double his exemption.⁸⁷

"Principal" business. There are statutes in some states exempting the tools, implements, etc., necessary to enable a person to carry on the business in which he is "wholly or principally" engaged. Under these statutes his exemption is of course restricted to the tools, implements, etc., of one trade.⁸⁸ Such statutes, when a person is engaged in two or more occupations, are to be construed as referring to the one on which he chiefly relies for a livelihood, and which engrosses most of his time and attention throughout the year,⁸⁹ not necessarily, however, the one that brings him in the most income.⁹⁰ It is not necessary, however, that the debtor should devote any particular amount of time to his business;⁹¹ and the fact that he uses his tool or implement in more than one business or trade does not affect his right of exemption if the implement is appropriate and necessary for his principal business.⁹²

g. Farming Tools and Instruments

Generally the tools and instruments of a farmer necessary to operate his farm are exempt to him.

Statutes sometimes expressly exempt farmers' tools and implements, and statutes exempting the necessary tools or implements of a debtor, without restriction as to occupation, have been held impliedly to exempt the tools of a farmer, as well as those of a mechanic.⁹³ To be exempt, however, the particular tool or instrument must be necessary to the operation of the debtor's farm;⁹⁴ and, when one claims as exempt "an implement of husbandry," it must appear that the implement in question is suitable for that occupation.⁹⁵ What is suitable or necessary depends to some extent at least on the conditions attending agriculture in the jurisdiction where the question arises,⁹⁶ and the number of articles exempt may be considerably increased under such statutory terms as "materials," "stock," or "apparatus."⁹⁷

It has been held in some states that statutes exempting tools and implements of husbandry exempt only such implements as are used by hand;⁹⁸ but in other states the statutes are given a broader construction, and are held to cover ordinary farm implements not used exclusively by hand, and even expensive and improved implements and machinery, the conflict of opinion being accounted for undoubtedly, quite as much by varying farming methods and practices in different parts of the country, as by the phrasing of the statutes. So under various statutes the exemption has been held to extend to binders,⁹⁹ buzz saws,¹ cream separators,² bee-

84. U.S.—In re Robinson, D.C.Idaho, 206 F. 176.
25 C.J. p 53 note 54.

85. Mass.—Howard v. Williams, 2 Pick. 80.
25 C.J. p 54 note 55.

86. Kan.—Jenkins v. McNall, 27 Kan. 532, 41 Am.R. 422.
25 C.J. p 54 note 56.
Double exemptions generally see infra § 68.

87. Wis.—Knapp v. Bartlett, 23 Wis. 68, 99 Am.D. 109—Bevitt v. Crandall, 19 Wis. 581.

88. Mich.—Coville v. Bentley, 42 N. W. 1116, 76 Mich. 248, 15 Am.S.R. 312.
25 C.J. p 54 notes 59, 64.

89. Mich.—Smalley v. Masten, 8 Mich. 529, 77 Am.D. 467.
25 C.J. p 54 note 60.

90. Mich.—Smalley v. Masten, supra.
25 C.J. p 54 note 61.

91. Mich.—Kenyon v. Baker, 16 Mich. 373, 97 Am.D. 158.
25 C.J. p 54 note 63.

92. Mich.—Kenyon v. Baker, supra.

93. La.—Holt v. Flournoy, App., 24 So.2d 171.

N.H.—Wilkinson v. Alley, 45 N.H. 551.

25 C.J. p 54 note 68.

Farming is a "trade or profession," within statutory exemption from operation of lessor's pledge of tools and instruments necessary for exercise of lessee's "trade or profession."

La.—Young v. Geter, 170 So. 240, 185 La. 709, 107 A.L.R. 608, answers to certified questions conformed to, App., 170 So. 410.

Martin v. Reynaud, App., 175 So. 914—Fant v. Miller, App., 170 So. 412, followed in Fant v. Deville, 170 So. 415.

94. La.—Young v. Geter, 170 So. 240, 185 La. 709, 107 A.L.R. 608, answers to certified questions conformed to, App., 170 So. 410.

Martin v. Reynaud, App., 175 So. 914—Fant v. Miller, App., 170 So. 412, followed in Fant v. Deville, App., 170 So. 415.

95. Okl.—Nelson v. Fightmaster, 44 P. 213, 4 Okl. 38.
25 C.J. p 54 note 69.

96. Wash.—State v. Creech, 51 P. 363, 18 Wash. 186.
25 C.J. p 54 note 70.

97. Mich.—Hutchinson v. Whitmore, 51 N.W. 451, 90 Mich. 255, 30 Am. S.R. 431.
25 C.J. p 54 note 71.

98. Vt.—Garrett v. Patchin, 29 Vt. 248, 70 Am.D. 414.
25 C.J. p 54 note 72.

99. Iowa.—Meyer v. Meyer, 23 Iowa 359, 92 Am.D. 432.

1. U.S.—In re French, D.C.N.Y., 231 F. 255.

2. U.S.—In re Hemstreet, D.C.Iowa., 139 F. 958.

hives,^{2.5} cultivators,³ drags,⁴ fanning mills,⁵ harness,⁶ harrows,⁷ harvesters,⁸ combines,^{8.5} hayracks,⁹ ice racks,¹⁰ milk cans,¹¹ mowers,¹² planters,¹³ plows,¹⁴ reapers,¹⁵ sleds,¹⁶ stalk cutters,¹⁷ tractors,¹⁸ wagons,¹⁹ a trailer chassis although never used,^{19.5} and wheels and axletree;²⁰ and the exemption has even been held to extend to work animals and the necessary food therefor.²¹

A threshing machine is not exempt in some jurisdictions;²² in others, it is.²³ A windmill not erect or in use^{23.5} and gates not in use^{23.10} are not exempt.

Within an exemption of "such tools, etc., as may be necessary for upholding life" may be included such simple mechanics' tools as are indispensable for repairing farming implements.²⁴

A statute which enumerates as property exempt the homestead of the family and all implements of husbandry does not restrict the exemption to such

implements of husbandry as are used in the cultivation of the homestead, but all implements, provided they are necessary for the debtor's use in husbandry, are exempt.²⁵

If the debtor uses the implement in question principally in work for hire on other people's farms, and only incidentally on his own farm, the implement is not exempt;²⁶ but, if the debtor uses the implement in question principally in work on his farm, the fact that it is used in harvesting the crops of others will not take it out of the statute.²⁷ The debtor is not confined to any one branch of farming, but has an exemption of all the necessary tools used by a debtor in diversified farming,²⁸ but he is confined to only that number of implements which is necessary.²⁹

Value. If the implement comes under the head of utensils and implements of husbandry, it is exempt regardless of its value or the amount of land

2.5 Tex.—Hickman v. Hickman, Civ. App., 228 S.W.2d 565, affirmed 234 S.W.2d 410, 149 Tex. 439.

3. U.S.—In re French, D.C.N.Y., 231 F. 255.

Tex.—Seiler v. Buckholdt, Civ.App., 293 S.W. 210.

4. N.H.—Wilkinson v. Alley, 45 N. H. 551.

5. Iowa.—Meyer v. Meyer, 23 Iowa 359, 92 Am.D. 432.

6. U.S.—In re French, D.C.N.Y., 231 F. 255.

But, under a statute exempting from execution "implements of husbandry" and two horses or mules and their "harness," saddles, bridles, packing equipment, etc., used on horses ridden by a ranch owner and his employees in the discharge of his duties as stockraiser, are not exempt as "implements of husbandry" in view of the statutory differentiation between that term and the term "harness."

Cal.—Security-First Nat. Bank v. Pierson, 38 P.2d 784, 2 C.2d 63.

7. U.S.—In re French, D.C.N.Y., 231 F. 255.

N.H.—Wilkinson v. Alley, 45 N.H. 551.

8. Cal.—In re Klemp, 50 P. 1062, 119 C. 41, 63 Am.S.R. 69, 39 L.R.A. 340.

25 C.J. p 55 note 81.

8.5 Tex.—Hickman v. Hickman, Civ. App., 228 S.W.2d 565, affirmed 234 S.W.2d 410, 149 Tex. 439.

9. U.S.—In re French, D.C.N.Y., 231 F. 255.

10. U.S.—In re French, supra.

11. U.S.—In re French, supra.

12. Wis.—Humphrey v. Taylor, 45 Wis. 251, 30 Am.R. 738.

25 C.J. p 55 note 78.

13. Tex.—Seiler v. Buckholdt, Civ. App., 293 S.W. 210.

14. Tex.—Seiler v. Buckholdt, supra. 25 C.J. p 55 note 75.

Character of plows exempted

A statute exempting "two plows," without qualifying words, embraces any machine which falls within the general meaning of the term "plow," even though more horses are required to operate such plow than are exempted under the statute.

U.S.—Clay Center State Bank v. McKelvie, C.C.A.Neb., 19 F.2d 308.

15. Iowa.—Meyer v. Meyer, 23 Iowa 359, 92 Am.D. 432.

Okl.—Nelson v. Fightmaster, 44 P. 213, 4 Okl. 38.

16. N.H.—Rice v. Wadsworth, 59 N. H. 100.

25 C.J. p 55 note 86.

17. Tex.—Seiler v. Buckholdt, Civ. App., 293 S.W. 210.

18. Okl.—Davis v. Wright, 152 P.2d 921, 194 Okl. 451.

Where farmer had one tractor and no horses and was unable to farm without tractor, it was exempt from levy as implement of husbandry.

Tex.—Wollner v. Darnell, Civ.App., 94 S.W.2d 1225.

19. N.H.—Hall v. Nelson, 59 N.H. 573.

25 C.J. p 55 note 74.

19.5 Tex.—Hickman v. Hickman, 234 S.W.2d 410, 149 Tex. 439.

20. N.H.—Wilkinson v. Alley, 45 N. H. 551.

21. Mules

Under statute exempting tools and instruments necessary for exercise of trade or profession of debtor, tenant farmer's mules, together with

corn and hay sufficient for mules' subsistence for current year, were exempt from seizure by landlord for rent.

La.—Martin v. Reynaud, App., 175 So. 914.

22. Tex.—McMillan v. Dean, Civ. App., 174 S.W.2d 737, error refused —Comer v. Powell, Civ.App., 189 S.W. 88.

25 C.J. p 55 note 91.

Combine used as thresher, however, was held exempt.

Tex.—Hickman v. Hickman, 234 S.W. 2d 410, 149 Tex. 439.

Grain separator held not exempt.

Iowa.—Vandeventer v. Nelson, 163 N. W. 354, 180 Iowa 705.

23. Cal.—Spence v. Smith, 53 P. 653, 121 C. 536, 66 Am.S.R. 62, modified on other grounds 53 P. 933, 121 C. 536, 66 Am.S.R. 62.

25 C.J. p 55 note 92.

23.5 Tex.—Hickman v. Hickman, Civ.App., 228 S.W.2d 565, affirmed 234 S.W.2d 410, 149 Tex. 439.

23.10 Tex.—Hickman v. Hickman, supra.

24. Vt.—White v. Capron, 52 Vt. 634.

25 C.J. p 55 note 94.

25. Tex.—Smith v. McBryde, Civ. App., 173 S.W. 234.

26. Okl.—Nelson v. Fightmaster, 44 P. 213, 4 Okl. 38.

25 C.J. p 55 note 99.

27. Cal.—Spence v. Smith, 53 P. 653, 121 C. 536, 66 Am.S.R. 62.

25 C.J. p 55 note 1.

28. Cal.—In re Slade, 55 P. 158, 122 C. 434.

29. Cal.—In re Baldwin, 12 P. 44, 71 C. 74.

which may be cultivated therewith,³⁰ except where the statute limits the value of articles exempt.³¹

§ 47. Wages, Salary, and Earnings

- a. In general
- b. Definition and scope of terms
- c. Effect of payment or nonpayment
- d. Salary or compensation of public officers

a. In General

Although statutes granting an exemption are to be liberally construed, wages, salary, and earnings, including wages of seamen, are not exempt unless an exemption is allowed by constitutional or statutory provisions.

Wages, salary, and earnings of a debtor are not exempt³² unless an exemption is allowed by constitutional or statutory provisions.³³ Such provisions should be liberally construed so as to accomplish their purpose of extending protection to those in need.³⁴ Under the most common provision, "wages" of a mechanic or laborer are specifically made exempt.³⁵ Under other statutes, however, all earnings are made exempt without restriction to the earnings of a class.³⁶ In some jurisdictions a claimant of this particular exemption must be the head of a family.³⁷

Under a statute exempting "personal property" to a certain amount, an exemption may be claimed

in wages, salary, or compensation,³⁸ and, where a statute so provides, this exemption may be claimed in addition to a special exemption of wages, salary, or compensation to a stated amount.³⁹ It does not necessarily follow, however, from the fact that wages are personal property that a statute exempting "other property, real and personal or mixed in lieu of exempt property," is intended to exempt wages as "other personal property" unless such is the legislative intent.⁴⁰

Residents and nonresidents. Under some statutes the earnings of persons who are actual residents are made exempt⁴¹ provided they are actual residents at the time of the issuance of the writ or process sought to be enforced.⁴² Under the terms of particular statutes a nonresident may be entitled to the exemption.⁴³ Under other statutes a larger exemption is given to residents than to nonresidents⁴⁴ and this discrimination has been held to be constitutional.⁴⁵

Wages earned out of state. Under a statute exempting wages earned out of state from attachment or garnishment, where the cause of action arises elsewhere and the principal defendant is not personally served with process, where the principal defendant's wages are in fact paid and payable by the garnishee in another state, such wages are exempt.^{45.5}

30. Cal.—Spence v. Smith, 53 P. 653, 121 C. 536, 66 Am.S.R. 62, modified on other grounds 53 P. 933, 121 C. 536, 66 Am.S.R. 62.
25 C.J. p 55 note 81 [a].

31. Wis.—Bevitt v. Crandall, 19 Wis. 581.
25 C.J. p 55 note 96.

32. N.D.—Radke v. Padgett, 192 N. W. 97, 49 N.D. 405.
Tenn.—Crook v. L. H. Brooks Co., 124 S.W.2d 259, 174 Tenn. 194.
25 C.J. p 63 note 72.

33. Ga.—Fitzpatrick Co. v. Shepherd, 95 S.E. 530, 22 Ga.App. 44.
Okla.—Oil Well Supply Co. v. Galbreath, 52 P.2d 780, 175 Okl. 305.
Pa.—Bell v. Roberts, 28 A.2d 715, 150 Pa.Super. 469.

Applicability of general exemption statute

Wages due employee are not exempt under general exemption law without specific provision for exemption of wages.

Ind.—Lauer Auto Co. v. Moody, 154 N.E. 501, 85 Ind.App. 523.

34. U.S.—In re Green, D.C.Va., 34 F. Supp. 791.
Cal.—Perfection Paint Products v. Johnson, App., 330 P.2d 829.
Ind.—Martin v. Loula, 195 N.E. 881, 208 Ind. 346, denying rehearing

194 N.E. 178, 208 Ind. 346, followed in White v. White, 194 N.E. 355, 208 Ind. 314, rehearing denied 196 N.E. 95, 208 Ind. 314, followed in Indianapolis Morris Plan Co. v. Fitzgerald, 194 N.E. 355, 207 Ind. 708, Tam v. East Side Loan Co., 194 N.E. 355, 207 Ind. 709, Benson v. Sandusky, 194 N.E. 355, 207 Ind. 709, Benson v. Kellar, 194 N.E. 356, 207 Ind. 709.

Mont.—Williams v. Sorenson, 75 P. 2d 784, 106 Mont. 122.
Pa.—Wagner-Taylor Co. v. McDowell, 9 A.2d 144, 137 Pa.Super. 425.
Tex.—Brasher v. Carnation Co. of Texas, Civ.App., 92 S.W.2d 573, error dismissed—J. M. Radford Grocery Co. v. McKean, Civ.App., 41 S.W.2d 639.

Liberal construction of exemption statutes generally see supra § 4.

35. Or.—Johnston v. Barrills, 41 P. 656, 27 Or. 251, 258, 50 Am.S.R. 717.
25 C.J. p 63 note 74.

36. N.Y.—Rolt-Wheeler v. Rolt-Wheeler, 162 N.Y.S. 491, 175 App. Div. 852.

37. Fla.—Wolf v. Commander, 188 So. 83, 137 Fla. 313.

Ill.—Harris v. Montag, 247 Ill.App. 89.

25 C.J. p 63 note 76.

38. Ala.—McCormick Harvesting Mach. Co. v. Vaughn, 30 So. 363, 130 Ala. 314.

25 C.J. p 63 note 77.

39. Ala.—Enzor v. Hurt, 76 Ala. 595.

40. Mo.—Gregory v. Evans, 19 Mo. 261.

41. D.C.—Fidelity Sav. Co. v. Fawcett, 22 F.2d 591, 57 App.D.C. 285.

42. D.C.—Fidelity Sav. Co. v. Fawcett, supra.

43. Ga.—Manufacturers Trust Co. v. Wilby-Kinsey Service Corp., 50 S. E.2d 807, 78 Ga.App. 151.

N.Y.—Morris Plan Indus. Bank of N. Y. v. Gunning, 67 N.E.2d 510, 295 N.Y. 324.

N.C.—Goodwin v. Claytor, 49 S.E. 173, 137 N.C. 224, 107 Am.S.R. 479, 67 L.R.A. 209.

25 C.J. p 63 note 81.

44. Ind.—Pomeroy v. Beach, 49 N.E. 370, 149 Ind. 511.

25 C.J. p 63 note 82.

45. Ind.—Pomeroy v. Beach, supra.

45.5 Ill.—Hertz Corp. v. Taylor, 155 N.E.2d 610, 15 Ill.2d 552.

Contention that wages were not payable out of state because garnishee was not shown to be under legal obligation to pay them there is without merit.

Ill.—Hertz Corp. v. Taylor, supra.

Necessity for support of family; necessities. Under some statutes wages or earnings necessary for the support of the debtor or his family are exempt.⁴⁶ The word "necessaries," the money required for which is exempt from execution, is a relative term and the scope of its legal signification has been restricted or enlarged according to the circumstances and conditions of the parties.^{46.5} It includes many of the conveniences of refined society,^{46.10} and what is a necessary of life must, to a considerable extent, be committed to the sound discretion of the trier of fact.^{46.15} In order to be entitled to such exemption the debtor must show that they are required for this purpose.⁴⁷ The exemption afforded by such statutes is not lost unless the debtor fails to collect or receive his earnings, within the time prescribed, after he becomes entitled to receive them,⁴⁸ and he is entitled to such exemption notwithstanding his earnings first become due subsequent to the institution of supplementary proceedings seeking to reach them.⁴⁹ A transfer by the debtor of his personal earnings to a member of the family not supported by his labor cannot be justified as a transfer of property already exempt under such statutes;⁵⁰ nor can the debtor's payment out of his earnings of bills for supplies previously furnished be justified on that ground.⁵¹ Where the statute in terms requires that wages to

be exempt should be necessary "for the use of a family, wholly or partly supported by his (the debtor's) labor," the existence of a family is necessary,⁵² and one having no family is not entitled to the exemption.⁵³

Payment overdue. The mere fact that payment of salary is overdue does not deprive one, otherwise entitled, of the protection of an exemption statute.⁵⁴

Salary earned. In the absence of a statute providing therefor, fund representing salary earned,^{54.5} whether in the possession of the employer, the employee, or a third person,^{54.10} is not exempt.

Retirement annuity of employees. A nonassignable annuity paid to former employees under a retirement plan has been held to be exempt.⁵⁵

Exemption of pensions and bounties is considered *supra* § 43.

Wages of seamen. In the absence of statute a seaman's wages are not exempt.⁵⁶ However, under federal exemption statutes relating to "seamen," discussed generally *supra* § 24, their wages are exempt.⁵⁷ Under such statutes the wages of persons not included within the occupation of "seaman" are not exempt.⁵⁸ However, it has been held that the wages of seamen engaged in coastwise trade

46. Mont.—Williams v. Sorenson, 75 P.2d 784, 106 Mont. 122.

N.Y.—6-8-10 Barrow St. v. Pennefather, 297 N.Y.S. 124, 164 Misc. 18.

24 C.J. p 63 note 85.

Debt contracted by wife before marriage

Under such statute earnings of husband, needed for support of family, may not be subjected to execution to satisfy judgment against wife for debt for clothing bought on her own credit before marriage.

Cal.—White v. Gobey, 19 P.2d 876, 130 C.A.Supp. 789.

"Necessary"

Word "necessary," as used in such statute, means reasonable, requisite, and proper, and does not denote absolute or indispensable necessity.

Mont.—Williams v. Sorenson, 75 P. 2d 784, 106 Mont. 122.

46.5 Cal.—Sanker v. Humborg, 119 P.2d 433, 48 C.A.2d 205.

46.10 Cal.—Sanker v. Humborg, *supra*.

46.15 Cal.—Sanker v. Humborg, *supra*.

Recreation and insurance

Expenditures of five dollars per month for miscellaneous items and recreation, same sum per month for his children's music lessons, and four

dollars and fifty cents per month for his wife and children's insurance, were for "necessaries of life," so as to render money required therefor exempt from execution, held not abuse of discretion.

Cal.—Sanker v. Humborg, *supra*.

47. Okl.—Smith v. Britton, 89 P.2d 953, 185 Okl. 76.

25 C.J. p 63 note 85.

48. N.Y.—6-8-10 Barrow St. v. Pennefather, 297 N.Y.S. 124, 164 Misc. 18.

49. N.Y.—D. L. & W. Coal Co. v. Kenlon, 297 N.Y.S. 126, 164 Misc. 32—6-8-10 Barrow St. v. Pennefather, 297 N.Y.S. 124, 164 Misc. 18.

50. U.S.—In re Condon, D.C.N.Y., 198 F. 947, affirmed 209 F. 800, 126 C.C.A. 524.

51. U.S.—In re Condon, *supra*.

52. U.S.—In re French, D.C.N.Y., 231 F. 255.

N.Y.—Van Vechten v. Hall, 14 How. Pr. 436.

53. U.S.—In re French, D.C.N.Y., 231 F. 255.

N.Y.—Van Vechten v. Hall, 14 How. Pr. 436.

25 C.J. p 64 note 89.

54. Pa.—Danziger v. Ferber, 116 A. 516, 272 Pa. 193.

54.5 N.Y.—Gill v. Schwartz, 78 N.Y. S.2d 721, 273 App.Div. 606, appeal dismissed 90 N.E.2d 488, 300 N.Y. 625—DeLuca v. O'Kelly, 42 N.Y.S. 2d 468, 266 App.Div. 859—Hayward v. Hayward, 164 N.Y.S. 877, 178 App.Div. 92.

54.10 N.Y.—DeLuca v. O'Kelly, 42 N.Y.S.2d 468, 266 App.Div. 859—Hayward v. Hayward, 164 N.Y.S. 877, 178 App.Div. 92.

55. Tenn.—Pritchett-Thomas Co. v. Pennebaker, 10 Tenn.App. 425.

56. U.S.—Telles v. Lynde, D.C.Cal., 47 F. 912.

25 C.J. p 72 note 38.

57. U.S.—Burns v. Fred L. Davis Co., C.C.A.Mass., 271 F. 439—McCarty v. The City of New Bedford, D.C.N.Y., 4 F. 818.

Ill.—Nessen Transp. Co. v. Larsen, 7 N.E.2d 765, 290 Ill.App. 22.

N.Y.—Modern Industrial Bank v. Kennedy, 38 N.Y.S.2d 814, 179 Misc. 646.

25 C.J. p 40 notes 34, 35.

Longshoreman

The wages of a longshoreman are exempt.

N.Y.—Michigan Furniture Co. v. Southern Pac. Co., 287 N.Y.S. 178, 158 Misc. 781.

58. U.S.—Blackton v. Gordon, N.J., 58 S.Ct. 417, 303 U.S. 91, 82 L.Ed. 683.

are protected,^{58.5} although there is also authority to the contrary.⁵⁹

The federal statute providing that seamen's wages shall not be subject to "attachment or arrestment," exempts his wages from execution or proceedings supplemental thereto.⁶⁰

b. Definition and Scope of Terms

- (1) Wages
- (2) "Wages or salary;" "wages, salary, or hire"
- (3) "Earnings" or "personal earnings"
- (4) Income

(1) Wages

- (a) In general
- (b) Earnings under special contract

(a) In General

The term "wages" as used in exemption statutes implies a relation of employer and employee and has been restricted to compensation paid for manual labor, although there is authority to the effect that compensation for services calling for special skill and intellectual fitness is to be included.

The term "wages" as used in exemption statutes implies a relation of employer and employee⁶¹ and does not include the gain, profit, or recompense which accrues to one who is conducting a business of his own and on his own account.⁶²

In some jurisdictions the meaning of the term "wages," has been restricted to compensation for manual labor,⁶³ and as not including compensation for services for which special skill and intellectual fitness are required.⁶⁴ The word "wages," however, is considered a generic term and will not be construed to mean only menial, manual labor;^{64.5} and the term will include compensation for services where the exercise of mental ability is only incidentally involved,⁶⁵ as where it forms the principal part of only a small portion of the debtor's service as compared to that part of his labor which is purely physical.⁶⁶

In other jurisdictions, statutes exempting wages include both wages of those whose labor is chiefly manual and the compensation or salaries of those whose service calls for special skill or intellectual fitness,⁶⁷ even though the exemption is "of the wag-

Master of ship

(1) The wages of the master of a ship are not exempt.
U.S.—Blackton v. Gordon, *supra*.

(2) However, in a state court such wages have been held to be exempt.
Ill.—Nessen Transp. Co. v. Larsen, 7 N.E.2d 765, 290 Ill.App. 22.

Pilot

(1) The wages of a pilot are not exempt.
N.Y.—William Jackman Sons v. Hauffman, 287 N.Y.S. 177, 159 Misc. 182.

(2) However, it has also been held that such wages are exempt.
N.Y.—Bloomingdale Bros. v. Butler, 270 N.Y.S. 624, 150 Misc. 903.
58.5 N.Y.—Migliaccio v. Cappola, 289 N.Y.S. 891, 160 Misc. 557.

In Alabama

(1) Text rule is now followed in Alabama.

Ala.—Waterman S. S. Corp. v. Brill, 9 So.2d 23, 243 Ala. 25.

(2) Previously, the rule was otherwise.
Ala.—Duggar v. Mobile & Gulf Nav. Co., 140 So. 614, 224 Ala. 359.

59. Tugboat

Seaman employed on tugboat plying in and about Hudson River and in its branches, the North River and East River, being engaged in coastwise trade, his wages are not exempt.

N.J.—Gordon v. Blackton, 186 A. 689, 117 N.J.Law 40, affirmed 191 A. 761, 118 N.J.Law 159, affirmed Blackton v. Gordon, 58 S.Ct. 417, 303 U.S. 91, 82 L.Ed. 683.

60. U.S.—Wilder v. Inter-Island Steam Nav. Co., Hawaii, 29 S.Ct. 58, 211 U.S. 239, 53 L.Ed. 164, 15 Ann.Cas. 127.

Before the rule was settled by the supreme court there was some authority to the contrary.

U.S.—Telles v. Lynde, D.C.Cal., 47 F. 912.
25 C.J. p 72 note 39.

61. Ga.—J. Austin Dillon Co. v. Edwards Shoe Stores, 186 S.E. 470, 53 Ga.App. 437.
Or.—Johnston v. Barrills, 41 P. 656, 27 Or. 251, 50 Am.S.R. 717.
25 C.J. p 64 note 90.

62. Ga.—J. Austin Dillon Co. v. Edwards Shoe Stores, 186 S.E. 470, 53 Ga.App. 437.
Or.—Johnston v. Barrills, 41 P. 656, 27 Or. 251, 50 Am.S.R. 717.
25 C.J. p 64 note 91.

63. Ill.—Mid-West Collection Bureau v. Dietrich, 222 Ill.App. 43.
La.—Groves & Rosenblath v. Atkins, 107 So. 316, 160 La. 489.
Or.—Johnston v. Barrills, 41 P. 656, 27 Or. 251, 50 Am.S.R. 717.
25 C.J. p 64 note 92.

64. Ill.—Paisley v. Park Fireproof Storage Co., 222 Ill.App. 96—Mid-West Collection Bureau v. Dietrich, 222 Ill.App. 43.
La.—Groves & Rosenblath v. Atkins, 107 So. 316, 160 La. 489.
25 C.J. p 64 note 93.

Persons entitled to exemption of wages as laborers:

(1) Millwright doing carpenter work.

La.—Groves & Rosenblath v. Atkins, 107 So. 316, 160 La. 489.

(2) Motorman of streetcar.
La.—Livingston Finance Corporation v. Baudin, 120 So. 401, 10 La.App. 17—Commercial Credit Co. v. Parrett, 6 La.App. 423.

(3) One engaged in the work of chipping turpentine boxes.
Ga.—Etowah Monument Co. v. Portal Naval Stores Co., 149 S.E. 317, 40 Ga.App. 257.

(4) Shoe machinery company employee engaged in opening boxes and putting contents on shelves and occasionally helping shipping clerk.
La.—D. H. Holmes Co. v. Kron, 139 So. 672, 19 La.App. 86.

(5) Other cases see 25 C.J. p 64 note 93 [b].

Persons not entitled to exemption of wages as laborers:

(1) Saleswoman in a music store.
S.D.—Howlin v. Fish, 189 N.W. 522, 45 S.D. 567.

(2) Other cases see 25 C.J. p 64 note 93 [a].

64.5 Ga.—Manufacturers Trust Co. v. Wilby-Kinsey Service Corp., 50 S.E.2d 807, 78 Ga.App. 151.

65. Ga.—Central of Georgia R. Co. v. Chas. Wachtel's Son, 74 S.E. 713, 11 Ga.App. 87.
25 C.J. p 64 note 94.

66. Ga.—Georgia R. & Power Co. v. J. M. High Co., 82 S.E. 932, 15 Ga. App. 243.
25 C.J. p 64 note 95.

67. U.S.—In re Green, D.C.Va., 34 F.Supp. 791.

es of a laborer or employee,"⁶⁸ although the same terms in other jurisdictions have been held to restrict the exemption to those whose labor is chiefly manual.⁶⁹ The character of the service, whether mainly physical or mental, determining the status of claimant under the statute is generally a question of fact.⁷⁰

The funds of an insurance agent deposited in a bank with the funds of his company cannot be regarded as wages or hire of an employee in the hands of his employer, so as to be exempt from attachment.⁷¹

Costs due a commissioner in a partition suit are not exempt from execution as wages of a mechanic or laboring man.⁷²

Current wages. Under some constitutional and

statutory provisions the exemption is restricted to "current wages" or "current wages and earnings."⁷³ Under such provisions the term "current wages" has been construed to mean only such wages as are paid periodically or from time to time as the services are rendered or the work performed, as where the services are to be paid for by the hour, day, week, month, or year, or where the compensation for service is measured by the time of its continuance,⁷⁴ and ordinarily does not apply to liquidated demands which have no relation whatever to an employment by the day, week, or month,⁷⁵ but a liquidated demand based on a daily, weekly, or monthly hiring may be "current wages."⁷⁶ Commissions on sales have been held to be exempt as "current wages"⁷⁷ and the proceeds of insurance have also been held to be exempt.⁷⁸ The proceeds derived from

Cal.—Gamble v. Utley, 260 P. 930, 86 C.A. 414.

Pa.—Bair v. Newgeon, 29 Del.Co. 548. 25 C.J. p 64 note 96.

Architect

Architect's compensation is wages. Pa.—Bair v. Newgeon, supra.

Attorney's fees

(1) Fees due or to become due an attorney-at-law are wages.

Pa.—Bell v. Roberts, 28 A.2d 715, 150 Pa.Super. 469.

Bair v. Newgeon, 29 Del.Co. 548. (2) Amount owed to lawyer for legal services performed is within protection of statute exempting "wages" or "salary" from attachment in hands of an employer which generally involve the idea of periodical payments.

Pa.—Bell v. Roberts, supra.

Miners Sav. Bank, Pittston v. Pace, Com.Pl., 37 Luz.Leg.Reg. 241.

(3) Where attorney represented certain persons in corporate reorganization proceeding and on completion of the reorganization and formation of new corporation, the attorney was awarded fee for services and expenses, payable by the new corporation, the new corporation became the attorney's "employer" within statute. Pa.—Bell v. Roberts, supra.

Department head

Where one in charge of frieze department of textile mill was paid individually, according to production, as were other employees of such department, he was an "employee" whose wages were exempt.

Pa.—Huck-Gerhardt Co. v. Davies, 3 A.2d 963, 134 Pa.Super. 430.

Salary of executives

Fla.—White v. Johnson, 59 So.2d 532 —Wolf v. Commander, 188 So. 33, 137 Fla. 313.

Salary of district attorney

Cal.—Gamble v. Utley, 260 P. 930, 86 C.A. 414.

Superior skill and greater compensation than that paid to an ordinary laborer will not deprive earnings of the standing of wages where the debtor actually engages in manual work.

Pa.—Pennsylvania Coal Co. v. Costello, 33 Pa. 241.

Wages of one driving his own truck are exempt.

Pa.—Diamond T. Motor Car Co. v. Patterson, 96 Pa.Super. 305.

Works Progress Administration employee

Money earned by Works Progress Administration employee constituted "wages."

Cal.—Hammond v. Hoskins, 79 P.2d 1116, 30 C.A.2d Supp. 779.

68. Md.—Wilmer v. Mann, 88 A. 222, 121 Md. 239.

25 C.J. p 65 note 97.

69. Ala.—South & North Alabama R. Co. v. Falkner, 49 Ala. 115.

25 C.J. p 65 note 98.

70. Ga.—Buchanan v. Echols, 70 S. E. 28, 8 Ga.App. 565.

71. Md.—Baltimore First Nat. Bank v. Jagers, 31 Md. 38, 100 Am.D. 53.

72. Tenn.—State v. Cobb, 4 Lea 481.

73. Okl.—Warner v. Willard, 242 P. 550, 115 Okl. 224.

Tex.—Alemite Co. of North Texas v. Magnolia Petroleum Co., Civ.App., 50 S.W.2d 369.

"Current wages" as affecting the amount exempted see infra § 48 c.

Current accruing salary

N.Y.—Gill v. Schwartz, 78 N.Y.S.2d 721, 273 App.Div. 606, appeal dismissed 90 N.E.2d 488, 300 N.Y. 625.

Benefit of wage earner

Statute exempting current wages from garnishment was enacted for benefit of wage earner only and no public interest is involved in its enforcement.

Tex.—Smith v. Oak Cliff Bank & Trust Co., Civ.App., 99 S.W.2d 1103.

Applicability in proceeding to recover overtime

A constitutional provision exempting "current wages" is inapplicable in proceedings to recover overtime under Fair Labor Standards Act of 1938 §§ 201-219, 29 U.S.C.A., on the ground that such recovery is not one for "wages" within the meaning of such constitutional provision.

U.S.—Klotz v. Ippolito, D.C.Tex., 40 F.Supp. 422.

74. Tex.—Alemite Co. of North Texas v. Magnolia Petroleum Co., Civ. App., 50 S.W.2d 369—**Corpus Juris cited in J. M. Radford Grocery Co. v. McKean**, Civ.App., 41 S.W. 2d 639, 640.

25 C.J. p 65 note 4.

75. Tex.—Mitchell v. Western Casualty & Guaranty Ins. Co., Civ. App., 163 S.W. 630.

25 C.J. p 65 note 5.

76. Tex.—Sydnor v. Galveston, App., 15 S.W. 202.

25 C.J. p 65 note 6.

77. Tex.—Alemite Co. of North Texas v. Magnolia Petroleum Co., Civ. App., 50 S.W.2d 369—**J. M. Radford Grocery Co. v. McKean**, Civ.App., 41 S.W.2d 639.

Commissions in addition to salary

Commissions paid in addition to salary are exempt as "current wages."

Tex.—J. M. Radford Grocery Co. v. McKean, supra.

78. **Fire policy covering wearing apparel**

Proceeds of a fire policy covering the wearing apparel of the debtor are exempt as "current wages."

Tex.—Cities Service Oil Co. v. North River Ins. Co., Civ.App., 82 S.W.2d 184.

the sale of crops by the person producing them in an agricultural enterprise on his own account are not, however, "current wages or earnings."⁷⁹ The amount of compensation need not be fixed by the contract of hiring in order to render the compensation for the service "current wages" within the meaning of the statute.⁸⁰

Past-due wages left voluntarily in the hands of the employer beyond the prescribed exemption period are not exempt under provisions exempting "current wages or earnings,"⁸¹ although the exempt character of "current wages" is not destroyed by the act of the employer in retaining them over the protest of the employee.⁸² "Current wages" have been held to cease to be such on receipt by the wage earner⁸³ and this is so notwithstanding they are kept by him as a separate fund.⁸⁴

Fund created in part by others. Where the exemption is of "wages for labor performed by" the debtor, a fund created in part by the labor of others is not exempt,⁸⁵ except in the case of a fund created by labor of the debtor together with his wife and minor children.⁸⁶

Judgment for wages. The reduction of a claim for wages to judgment does not destroy the employee's right to exemption therein.⁸⁷ Money recovered as wages by an employee who has been wrongfully discharged before the expiration of his

term is exempt, where wages earned by actual services would be exempt.⁸⁸

Wages of child. Where the parent is entitled to the earnings of his minor child, he may claim an exemption in the wages of the child as against his own debts,⁸⁹ and his right to exemption therein continues as long as his child is legally under his custody and control.⁹⁰

Rent owing to a judgment defendant by a garnishee tenant is not "wages" within an exemption statute.^{90.5}

(b) Earnings under Special Contract

The earnings or compensation of an independent contractor are not exempt as "wages," although earnings or compensation received by persons under other types of special contracts have been held to be exempt as "wages."

The compensation of a person who is really an independent contractor and not an employee is not exempt as "wages."⁹¹ The earnings of a person not engaged under the usual contract of employment as laborer or artisan are, however, often considered wages within the meaning of the statutory exemption.⁹² Thus, where the remuneration is according to the work done, and not according to the length of employment, it has been still considered wages,⁹³ even though the laborer himself employs a helper to aid him in part of his work.⁹⁴

79. Okl.—Clapp v. Smith, 216 P. 120, 91 Okl. 84.

80. Tex.—Dempsey v. McKennell, 23 S.W. 525, 2 Tex.Civ.App. 284. 25 C.J. p 65 note 7.

81. Okl.—Warner v. Willard, 242 P. 550, 115 Okl. 224.

Effect of payment or nonpayment of wages or salary generally see infra subdivision c of this section.

82. Okl.—Warner v. Willard, supra.

83. Tex.—Sutherland v. Young, Civ. App., 292 S.W. 581.

84. Tex.—Sutherland v. Young, supra.

Deposit in bank

Salary or wages voluntarily deposited in bank are not entitled to protection as "current wages." Tex.—Sutherland v. Young, supra.

85. N.H.—Steer v. Dow, 71 A. 217, 75 N.H. 95, 20 L.R.A., N.S., 263. 25 C.J. p 65 note 8.

86. N.H.—Steer v. Dow, supra—Robbins v. Rice, 18 N.H. 507.

87. Pa.—Malloy & Co. v. McCollum, 18 Pa.Dist. 672, 36 Pa.Co. 226.

88. Ga.—Cox v. Bearden, 10 S.E. 627, 84 Ga. 304, 20 Am.S.R. 359.

89. Pa.—Darlington v. Watson, 49 Pa.Super. 611.

25 C.J. p 65 note 10.

90. Pa.—Darlington v. Watson, supra.

90.5 U.S.—U. S. v. Hackett, D.C.Mo., 123 F.Supp. 106.

91. Ga.—Corpus Juris cited in J. Austin Dillon Co. v. Edwards Shoe Stores, 186 S.E. 470, 472, 53 Ga.App. 437.

Tex.—Brasher v. Carnation Co. of Texas, Civ.App., 92 S.W.2d 573, error dismissed.

25 C.J. p 66 note 25.

Joint adventure

Where the contract relation is not that of employment, but of coadventure in a joint enterprise, payments under the contract are not "wages."

La.—Brierre v. His Creditors, 9 So. 640, 43 La.Ann. 423.

25 C.J. p 67 note 33.

Salesman

One selling corporation's oil field tanks and separators for commission on price of goods sold on orders sent by him and accepted by corporation, which did not tell him when or where to work or whom to see, was not agent or servant, but independent contractor, whose compensation was not exempt from garnishment.

Tex.—Shahan v. Biggs & Co., Civ. App., 123 S.W.2d 686.

"Wages for personal service"

A statute exempting "wages for personal service" excludes compensation due to an independent contractor, such as a milk collector for a company who furnished his own transportation, equipment, and employees, paid all taxes in connection with operation, performed his work in his own way, and was required only to make daily deliveries over certain route and to satisfy company's customers.

Tex.—Brasher v. Carnation Co. of Texas, Civ.App., 92 S.W.2d 573, error dismissed.

92. Tex.—Corpus Juris quoted in Alemite Co. of North Texas v. Magnolia Petroleum Co., Civ.App., 50 S.W.2d 369, 370.

93. Colo.—Corpus Juris cited in Stranger v. Harris, 236 P. 1001, 1002, 77 Colo. 340.

Tex.—Corpus Juris quoted in Alemite Co. of North Texas v. Magnolia Petroleum Co., Civ.App., 50 S.W.2d 369, 370.

25 C.J. p 66 note 14.

94. Ga.—Moultrie v. Crocker, 54 S. E. 197, 125 Ga. 82.

The fact that there was no agreement that the debtor should receive his wages periodically as is customary,⁹⁵ or the fact that there was no agreement whatever as to when he should receive his pay,⁹⁶ or what the amount of it should be,⁹⁷ does not put the debtor without the pale of the exemption.

Where a person is not himself a contractor or employer of labor, but merely a supervisor of their work, the fact that his compensation is fixed at a percentage of the aggregate payroll of all workmen under his supervision does not make him a contractor, but is simply a method of determining the amount of what in reality is wages in compensation for his work;⁹⁸ nor do the facts that one employed as foreman is paid a sum to cover the expenses of his department and that he hires and pays his employees convert him from an employee into an independent contractor within contemplation of an exemption statute.⁹⁹ The mere fact that a workman's wages are determined by contract does not make him a contractor within the meaning of the rule barring contractors from the benefits of the wage exemption statute;¹ it may or it may not, depending on the real character of the business relation existing between the contracting parties.² Where the relationship is that of employer and employee, the contract merely fixing the amount and method of payment of employee's compensation, the compensation is "wages," within the meaning of the statute.³ If a contractor performs labor and the amount due him for his labor is separable from the amount due to other elements arising out of the contract, the exemption may be allowed for the wages proper;⁴ but if the wages proper are not distinguishable from the rest no exemption can be allowed,⁵ even though the total amount due is less than the whole exemption allowed by statute.⁶

Payment of commissions to an employee is a payment for work done, and is "wages" within the meaning of the statute,⁷ and the nature of the payment is not changed by payment of a stipulated amount each month by the employer to his employee on his commission account.⁸

Labor for consideration other than money. Under a contract by which the debtor exchanges his labor for a consideration other than money,⁹ as the rent of a house,¹⁰ or a piece of land,¹¹ or a share in the crop grown by a cropper on the landlord's property,¹² the value of his labor is nevertheless considered wages.

(2) "Wages or Salary;" "Wages, Salary, or Hire"

"Wages or salary" or "wages, salary, or hire" are exempt under some statutes, and the fact that compensation is paid in the form of commissions does not render it any the less exempt as wages or salary.

Under statutes expressly so providing, the "wages or salary" of the debtor is exempt.¹³ While "salary" is a broader term than "wages," and applies undoubtedly to employees whose services may be characterized as mental rather than manual,¹⁴ it is not so broad as to include all compensation for services.¹⁵ It still implies an employer and employee relation,¹⁶ so that a compensation for service under circumstances where that relation does not exist is not "salary" within the meaning of the exemption laws.¹⁷ Thus, the idea involved in the words "wages or salary" is compensation for personal services as distinguished from the profits realized in commercial dealings or returns from investments or capital, or returns from the labor of others.^{17.5}

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| <p>95. Ga.—Prothro v. Grubbs, 71 Ga. 863.</p> <p>96. Tex.—Dempsey v. McKennell, 23 S.W. 525, 2 Tex.Civ.App. 284.</p> <p>97. Tex.—Dempsey v. McKennell, supra.
25 C.J. p 66 note 24.</p> <p>98. Pa.—Watson Co. v. Christ, 62 Pa.Super. 604.</p> <p>99. Pa.—Huck-Gerhardt Co. v. Davies, 3 A.2d 963, 134 Pa.Super. 430.</p> <p>1. La.—Brierre v. His Creditors, 9 So. 640, 43 La.Ann. 423.</p> <p>Md.—Moore v. Heaney, 14 Md. 558.</p> <p>2. La.—Brierre v. His Creditors, 9 So. 640, 43 La.Ann. 423.</p> <p>Md.—Moore v. Heaney, 14 Md. 558.</p> <p>3. Md.—Moore v. Heaney, supra.
25 C.J. p 67 note 32.</p> <p>4. Iowa.—Banks v. Rodenbach, 7 N.W. 152, 54 Iowa 695.</p> | <p>Me.—Brainard v. Shannon, 60 Me. 342.</p> <p>5. N.H.—Gray v. Fife, 47 A. 541, 70 N.H. 89, 85 Am.S.R. 603—Robbins v. Rice, 18 N.H. 507.</p> <p>6. Me.—Brainard v. Shannon, 60 Me. 342.</p> <p>7. N.Y.—Laird v. Carton, 89 N.E. 822, 196 N.Y. 169, 25 L.R.A., N.S., 189.</p> <p>Tex.—<i>Corpus Juris</i> quoted in <i>Alemite Co. of North Texas v. Magnolia Petroleum Co.</i>, Civ.App., 50 S.W.2d 369, 370.</p> <p>8. N.Y.—Laird v. Carton, 89 N.E. 822, 196 N.Y. 169, 25 L.R.A., N.S., 189.</p> <p>9. Mass.—Mason v. Ambler, 6 Allen 124.</p> <p>10. Mass.—Mason v. Ambler, supra.</p> <p>11. Pa.—Scott v. Watson, 36 Pa. 342.</p> | <p>12. Ga.—Thompson v. Passmore, 72 S.E. 185, 9 Ga.App. 771.</p> <p>13. U.S.—<i>In re Victory Brewing Co.</i>, D.C.Pa., 54 F.Supp. 11, affirmed, C. C.A., 146 F.2d 831, affirmed 66 S.Ct. 108, 326 U.S. 265, 90 L.Ed. 56.</p> <p>Pa.—<i>Integrity Trust Co. v. Taylor</i>, 167 A. 363, 312 Pa. 3—<i>McCloskey v. Northdale Woolen Mills</i>, 145 A. 846, 296 Pa. 265.</p> <p>14. Ky.—<i>Roberts v. Carrithers</i>, 202 S.W. 659, 180 Ky. 315.
25 C.J. p 67 note 35.</p> <p>15. U.S.—<i>In re Pears</i>, Pa., 205 F. 255, 123 C.C.A. 459.</p> <p>16. U.S.—<i>In re Pears</i>, supra.
25 C.J. p 67 note 37.</p> <p>17. U.S.—<i>In re Pears</i>, supra.
25 C.J. p 67 note 38.</p> <p>17.5 Pa.—<i>Bell v. Roberts</i>, 28 A.2d 715, 150 Pa.Super. 469.</p> |
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Money received under a contract requiring the debtor when called on to perform certain services may be exempt as "salary," notwithstanding he has not been requested to perform services.¹⁸ Money adjudged to be due by a corporate stockholder under his stockholder's liability to an employee of the corporation for salary unpaid by the corporation has been held to be exempt as "salary."¹⁹

A statute exempting "wages, salary, or hire of any laborer or employee" includes all compensation paid for personal services.²⁰

Commissions and profits; traveling expenses. The fact that compensation is paid to an employee in the form of commissions does not render it any the less exempt as wages or salary.²¹ However, such exemption is restricted to compensation to the employee for services rendered by him personally²² and will not be extended to additional compensation received by him for services of others whom he in his turn employs;²³ nor can an interest in the profits of the business over and above a salary received from it be included in the exemption of wages or salary.²⁴ Exemption of "wages or salary" of an employee does not cover commissions earned by a factor or broker²⁵ or selling agent,²⁶ or a share in the profits of a joint enterprise,²⁷ in none of

which cases does the relation of employer and employee exist.²⁸

Allowances for traveling expenses are included within a statute exempting "wages, salary, or hire" of an employee.²⁹

(3) "Earnings" or "Personal Earnings"

"Earnings" are the fruit or reward of labor, and the expressions "earnings," "personal earnings," and the like, as used in exemption statutes, have a broader meaning than the terms "wages" and "salary," and may include earnings of a private and independent business.

"Earnings," within a statute exempting the earnings of a debtor for his personal services from liability for debt, are the fruit or reward of labor, or the price for services performed.^{29,50} The expressions "earnings," "personal earnings," and "earnings for personal services" used in some of the exemption statutes, are clearly broader than the terms "wages" and "salary,"³⁰ although, wages and salaries are exempt as "earnings" under such a statute.³¹

While "wages" and "salary" exemptions are based on an employer and employee relation, as considered supra subdivision b (2) of this section, "earnings" and "personal earnings" include earnings from a private and independent business, where the services of the debtor are the chief factor in it.³²

18. Pa.—Integrity Trust Co. v. Taylor, 167 A. 363, 312 Pa. 3.

Money received under contract to manage theaters

Pa.—Integrity Trust Co. v. Taylor, supra.

19. Pa.—Wagner-Taylor Co. v. McDowell, 9 A.2d 144, 137 Pa.Super. 425.

20. Md.—Shriver v. Carlin & Fulton Co., 141 A. 434, 155 Md. 51, 58 A.L.R. 767.

"Employee;" "laborer"

Word "employee" in such statute is not limited by the word "laborer" but includes persons not described by such term.

Md.—Shriver v. Carlin & Fulton Co., supra.

General sales manager as "employee"

General sales manager paid definite monthly salary is an "employee" of corporation under statute exempting employee's wages, and this is so notwithstanding such manager is also an officer of such corporation. Md.—Shriver v. Carlin & Fulton Co., supra.

21. Pa.—Danziger v. Ferber, 116 A. 516, 272 Pa. 193.

A. Joseph Baltin & Co. v. Griffith, Com.Pl., 52 Lanc.L.Rev. 35. 25 C.J. p 67 note 39.

Renewal commissions

Renewal commissions due a life insurance salesman, being payments

for personal services rendered, are exempted in the hands of the employer.

Pa.—Ellis Building & Loan Ass'n v. Gross, 36 Pa.Dist. & Co. 258.

22. Pa.—McCloskey v. Northdale Woolen Mills, 145 A. 846, 296 Pa. 265.

O'Neill v. Beasley, 17 Pa.Dist. 153.

23. Pa.—McCloskey v. Northdale Woolen Mills, 145 A. 846, 296 Pa. 265.

O'Neill v. Beasley, 17 Pa.Dist. 153.

24. U.S.—In re Pears, Pa., 205 F. 255, 123 C.C.A. 459.

25. Pa.—Hamberger v. Marcus, 27 A. 681, 157 Pa. 133, 37 Am.S.R. 719. 25 C.J. p 67 note 43.

26. Pa.—McCloskey v. Northdale Woolen Mills, 145 A. 846, 296 Pa. 265.

Profits

Part of amount due selling agent under his contract was profits, and not wages or salary exempt.

Pa.—McCloskey v. Northdale Woolen Mills, supra.

27. La.—Brierre v. His Creditors, 9 So. 640, 43 La.Ann. 423.

28. La.—Brierre v. His Creditors, supra.

Pa.—Hamberger v. Marcus, 27 A. 681, 157 Pa. 133, 37 Am.S.R. 719.

29. Md.—Shriver v. Carlin & Fulton Co., 141 A. 434, 155 Md. 51, 58 A.L.R. 767.

Expenses allowed general sales manager

Md.—Shriver v. Carlin & Fulton Co., supra.

29.50 Iowa.—Johnson v. Williams, 17 N.W.2d 405, 235 Iowa 688.

30. Colo.—Corpus Juris cited in Stranger v. Harris, 236 P. 1001, 1002, 77 Colo. 340.

Mont.—Williams v. Sorenson, 75 P.2d 784, 106 Mont. 122.

Utah.—Russell M. Miller Co. v. Giv-
an, 325 P.2d 908, 7 Utah 2d 380.
25 C.J. p 67 note 47.

Mileage and traveling expenses

Mileage and traveling expenses allowed county assessor are exempt as "earnings."

Mont.—Williams v. Sorenson, 75 P. 2d 784, 106 Mont. 122.

31. Ohio.—Beckett v. Wishon, 5 Ohio S. & C.P. 257, 5 Ohio N.P. 155.
25 C.J. p 68 note 48.

32. Colo.—Stranger v. Harris, 236 P. 1001, 77 Colo. 340.

N.Y.—1101 Park Ave. Corporation v. Cornell, 232 N.Y.S. 663, 133 Misc. 397.

Rudley v. Rudley, 111 N.Y.S.2d 665.

Thus they include the earnings of professional men,³³ and of artists,³⁴ photographers,³⁵ one keeping roomers,³⁶ or agents selling goods on commission.³⁷ As a general rule, however, these terms, with the probable exception of the term "earnings" simply,³⁸ do not include a debtor's income arising from a business involving other elements of gain than his personal services, as the employment of capital³⁹ or assistants.⁴⁰

There are decisions, however, in which earnings of a debtor in a business in which he employed assistants have been held exempt as earnings for personal services.⁴¹ In these cases the distinction is made between businesses in which the debtor's services are the chief factor, in which case the profits of the business are held to be personal earnings, and exempt under the statute,⁴² even though such business is conducted with the assistance of others,⁴³ and a business in which the profits of the business represent the services of others than the debtor, and in which the debtor's service does not predominate, in which case the profits are not personal earnings of the debtor.⁴⁴

Where a debtor's income is derived from a business involving other elements of gain than his personal services, he is entitled to an exemption in as much thereof as is necessary to compensate him for his own personal labor, provided it can be ascertained,⁴⁵ notwithstanding he might use some capital or credit, tools or equipment, or other property as an aid in producing such income.^{45.5} If the amount due the debtor because of personal labor cannot be distinguished from the rest, no part of such income will be exempt as "personal earnings" under the statute.⁴⁶

Compensation for personal services performed become "earnings received," and entitled to exemption under applicable statute, as soon as such compensation is earned.⁴⁷

Disability benefits under a life policy do not represent "earnings of the debtor for his personal services," within a statute exempting such earnings from an application for the satisfaction of a judgment.^{47.5}

The value of room and meals furnished by an employer to a domestic servant is properly excluded from salary or earnings in determining whether

Utah.—Russell M. Miller Co. v. Givan, 325 P.2d 908, 7 Utah 2d 380. 25 C.J. p 68 note 50.

33. Cal.—Le Font v. Rankin, App., 334 P.2d 608.

Iowa.—McCoy v. Cornell, 40 Iowa 457.

34. Iowa.—Millington v. Laurer, 56 N.W. 533, 89 Iowa 322, 48 Am.S.R. 385.

35. N.Y.—McSkiman v. Knowlton, 14 N.Y.S. 283, 20 N.Y.Civ.Proc. 274.

36. N.Y.—1101 Park Ave. Corporation v. Cornell, 232 N.Y.S. 663, 133 Misc. 397.

Married woman

Rent received by married woman from roomers is exempt from execution, in absence of proof that rent was not necessary to support debtor's family.

N.Y.—1101 Park Ave. Corporation v. Cornell, *supra*.

37. N.Y.—Sanford v. Goodwin, N.Y. Daily Reg. March 11, 1881.

38. Wis.—Kuntz v. Kinney, 33 Wis. 510. 25 C.J. p 68 note 55.

39. Cal.—Corpus Juris quoted in Fay Securities Co. v. Bowering, 288 P. 41, 42, 106 C.A., Supp., 771. N.Y.—1101 Park Ave. Corporation v. Cornell, 232 N.Y.S. 663, 133 Misc. 397. 25 C.J. p 68 note 56.

35 C.J.S.—7

Operation of motor trucks

Income derived from the operation of motor trucks is not exempt under statutes exempting earnings for personal services, or for personal labor or services.

Cal.—Fay Securities Co. v. Bowering, 288 P. 41, 106 C.A., Supp., 771.

Fla.—Patten Package Co. v. Houser, 136 So. 353, 102 Fla. 603.

Okl.—Wineblood v. Payne, 263 P. 669, 129 Okl. 103.

40. Cal.—Corpus Juris quoted in Fay Securities Co. v. Bowering, 288 P. 41, 42, 106 C.A. Supp., 771. 25 C.J. p 68 note 57.

41. Colo.—Stranger v. Harris, 236 P. 1001, 77 Colo. 340. 25 C.J. p 68 note 58.

Buying used automobiles

Where judgment debtor gained livelihood by buying up various used automobiles which he in turn delivered to automobile auction, if it was necessary for him to incur expenses in hiring others, such expenses should be deducted from gross income so that exemption from execution of one-half of earnings would be allowed only on net income.

Utah.—Russell M. Miller Co. v. Givan, 325 P.2d 908, 7 Utah 2d 380.

42. Colo.—Stranger v. Harris, 236 P. 1001, 77 Colo. 340.

N.Y.—Schafer v. Tyroler, 158 N.Y.S. 1090, 94 Misc. 127.

43. Colo.—Stranger v. Harris, 236 P. 1001, 77 Colo. 340. 25 C.J. p 68 note 60.

Road surfacing contractor

Colo.—Stranger v. Harris, *supra*.

44. N.Y.—Schafer v. Tyroler, 158 N.Y.S. 1090, 94 Misc. 127. 25 C.J. p 69 note 61.

45. Me.—Brainard v. Shannon, 60 Me. 342. Okl.—Corpus Juris quoted in Wineblood v. Payne, 263 P. 669, 671, 129 Okl. 103.

Utah.—Corpus Juris Secundum cited in Russell M. Miller Co. v. Givan, 325 P.2d 908, 910, 7 Utah 2d 380.

45.5 Utah.—Russell M. Miller Co. v. Givan, 325 P.2d 908, 7 Utah 2d 380.

46. Cal.—Corpus Juris cited in Fay Securities Co. v. Bowering, 288 P. 41, 42, 106 C.A., Supp., 771. Me.—Brainard v. Shannon, 60 Me. 342.

47. Cal.—Medical Finance Ass'n v. Rambo, 86 P.2d 159, 33 C.A.2d, Supp., 756.

"Received"

The word "received" as used in such statute signifies "arising and accruing" and does not require that, in order to be exempt, earnings be paid over to the person entitled to them.

Cal.—Medical Finance Ass'n v. Rambo, *supra*.

47.5 S.C.—Matthews v. Matthews, 35 S.E.2d 157, 207 S.C. 170.

the total salary or earnings are in excess of the statutory exemption.^{47.10}

Wages of a debtor's wife for her personal services have been held not to be exempt under the statute as earnings of the debtor for his personal services.⁴⁸

(4) Income

The word "income" within exemption statutes has a broad meaning and is used to define the proceeds of labor, or the receipts of a profession, business, or occupation.

The word "income," used in some of the exemption statutes, is a broader term than those previously discussed in subdivision b of this section and is used to define the proceeds of labor, or the receipts of a profession, business, or occupation.⁴⁹ In a statute exempting wages, salary, or income, the term "income" should be construed to mean income earned by labor.⁵⁰ Where a statute exempts a certain amount per month of the debtor's income, the context indicates that the income cannot consist of property in kind or of any kind of property which cannot be measured in denominations of money per month so as to determine what the income is per month, although it is not necessarily payable at fixed times or in fixed amounts.⁵¹

c. Effect of Payment or Nonpayment

Mere payment of wages or salary has been held

not to deprive them of their exempt character as long as they can be identified, although it has also been held that payment renders them nonexempt.

In the absence of a specific statutory provision, money due for wages and salary, but unpaid, has been held not to be exempt.⁵² However, under statutes so providing, earnings, wages, and income, on becoming due, are exempt⁵³ notwithstanding they have not been paid to the debtor.⁵⁴ The legislative policy expressed by such a statute is the preservation for employees and their families of the fruits of mental or manual labor in order that their earnings may go to supply their daily needs without hindrance from their creditors.^{54.5}

According to some authorities a statute exempting the wages or earnings of a debtor protects them not only in the hands of the employer, but also while passing from him to the debtor, and even after they are in the hands of the debtor, as long as they are capable of identification.⁵⁵ There are, however, decisions to the effect that payment of wages or earnings operates to deprive them of their exempt character.⁵⁶ Nevertheless the taking of a nonnegotiable instrument, as a nonnegotiable note or duebill, for wages due is not payment of the wages, and they may still be claimed as exempt;⁵⁷ and where it is proper for the employer to deposit the debtor's salary in a bank account for the use of the debtor's wife, such deposit does not destroy the exemption

47.10 D.C.—Hollywood Credit Clothing Co. v. Jones, Mun.App., 117 A. 2d 226, 51 A.L.R.2d 944.

48. Iowa.—Booth v. Backus, 166 N. W. 695, 182 Iowa 1319.

49. Ky.—Roberts v. Carrithers, 202 S.W. 659, 180 Ky. 315.

50. Ky.—Roberts v. Carrithers, supra. 25 C.J. p 69 note 66.

51. Ky.—People's Bank v. Coca-naugher, 208 S.W. 322, 183 Ky. 73 —Roberts v. Carrithers, 202 S.W. 659, 180 Ky. 315.

52. N.D.—Radke v. Padgett, 192 N. W. 97, 49 N.D. 405.

Exemption of wages as dependent on statutes generally see supra subdivision a of this section.

Statute enumerating exemptions

Money due for wages and salary is not exempt when not included within the terms of an exemption statute purporting to enumerate all the exemptions allowable in specified types of actions.

N.D.—Radke v. Padgett, supra.

53. Ind.—Martin v. Loula, 195 N.E. 881, 208 Ind. 346, denying rehearing 194 N.E. 178, 208 Ind. 346, followed in White v. White, 194 N.E. 355, 208 Ind. 314, rehearing denied

196 N.E. 95, 208 Ind. 314, followed in Indianapolis Morris Plan Co. v. Fitzgerald, 194 N.E. 355, 207 Ind. 708, Tam v. East Side Loan Co., 194 N.E. 355, 207 Ind. 709, Benson v. Sandusky, 194 N.E. 355, 207 Ind. 709, Benson v. Kellar, 194 N.E. 356, 207 Ind. 709.

Iowa.—Staton v. Vernon, 229 N.W. 763, 209 Iowa 1023, 67 A.L.R. 1200.

54. Iowa.—Staton v. Vernon, supra. Pa.—Bell v. Roberts, 28 A.2d 715, 150 Pa.Super. 469.

Schmidt v. Schmidt, Com.Pl., 43 Lack.Jur. 224—Miners Sav. Bank, Pittston v. Pace, Com.Pl., 37 Luz. Leg.Reg. 241—First Nat. Bank v. Coveleskie, 8 Sch.Reg. 19.

54.5 Pa.—Bell v. Roberts, 28 A.2d 715, 150 Pa.Super. 469.

55. Iowa.—Staton v. Vernon, 229 N. W. 763, 209 Iowa 1023, 67 A.L.R. 1200.

25 C.J. p 70 note 6.

Deposit in name of wage earner and wife

Fact that exempt earnings of husband were deposited in bank in name of both husband and wife, without passing title, did not deprive earnings of exempt character as against judgment creditor of both.

Iowa.—Staton v. Vernon, supra.

Earnings in original form

Under particular statutes earnings paid to the person entitled and remaining in his possession in their original form are, within the time prescribed by statute, exempt. Iowa.—Staton v. Vernon, supra.

56. Del.—Tressler v. Lunt, 158 A. 709, 5 W.W.Harr. 78.

Pa.—Bell v. Roberts, 28 A.2d 715, 150 Pa.Super. 469.

25 C.J. p 71 note 7.

"Current wages" see supra subdivision b (1) (a) of this section.

Wages in hands of employee's attorney

Del.—Tressler v. Lunt, 158 A. 709, 5 W.W.Harr. 78.

25 C.J. p 71 note 7 [a].

"In the hands of the employer"

The words "in the hands of the employer" in statute exempting wages or salary while in hands of employer operate solely to limit the exemption to those cases in which employee has not as yet received his wages or they have not come under his control.

Pa.—Wagner-Taylor Co. v. McDowell, 9 A.2d 144, 137 Pa.Super. 425.

7 Me.—Lock v. Johnson, 36 Me. 464.

belonging to the earnings of the judgment debtor.^{57.5}

Debt for personal services. An exemption from attachment of any debt that has accrued by reason of the personal services of defendant will not exempt from attachment money in the hands of the debtor's agent which has been paid to the agent in settlement of a debt for services.⁵⁸

d. Salary or Compensation of Public Officers

The salary or compensation of public officers ordinarily is exempt.

Independently of statute, and frequently as a result of special statutory provisions, the salary or compensation of public officers is exempt.⁵⁹ It has been held that any employee in a public office is a public officer within the meaning of the special statutes granting exemptions,⁶⁰ an officer elected by the people being particularly within such provisions.⁶¹

Among officers whose salary or compensation is exempt are assessors,⁶² a clerk of a recorder's court,⁶³ an employee of a city board of health,⁶⁴ an inspector of municipal water board,⁶⁵ a fireman,⁶⁶ the keeper of a poor farm,⁶⁷ a sheriff,⁶⁸ and teachers.⁶⁹ On the other hand, persons whose salary or compensation has been held not to be exempt as that of public officers include streetcar conductors⁷⁰ and privately employed policemen.⁷¹

Sometimes the salary of a public officer falls within the general provision for the exemption of salaries or personal earnings,⁷² or an exemption may be found in the form of an exception in a statute subjecting corporations to garnishment for the salaries of its officers.⁷³

Fees of office on changing their status and becoming part of the personal estate of the owner are no longer, it has been held, entitled to exemption.⁷⁴

57.5 N.Y.—Colonial Discount Co. v. Wilhelm, 40 N.Y.S.2d 298.

Judgment debtor engaged in employment which took him out of country

N.Y.—Colonial Discount Co. v. Wilhelm, supra.

58. Conn.—Hewitt v. McNerney, 48 A. 424, 73 Conn. 565.
25 C.J. p 71 note 10.

59. U.S.—In re Victory Brewing Co., D.C.Pa., 54 F.Supp. 11, affirmed, C. C.A., 146 F.2d 831, affirmed 66 S.Ct. 103, 326 U.S. 265, 90 L.Ed. 56.

Ky.—Miracle v. Hopkins, 86 S.W.2d 681, 260 Ky. 712.

La.—Fischer v. Dubroca, 111 So. 710, 163 La. 292.

Duroch v. Caillouet, 6 La.App. 222.

25 C.J. p 71 notes 18, 19.

Salary or compensation as subject to: Execution see Executions § 27.
Garnishment see Garnishment § 116.

Applicability of statute relating to laborers

Statute relating to exemption of salary of laborers and others has no application to salary of public officer. La.—Industrial Discount Co. v. Scherer, 119 So. 295, 9 La.App. 331.

Effect of general statute allowing execution on salaries

Statutes permitting collection on execution of the salary of a judgment debtor due him from any person or corporation, municipal or otherwise, do not have the effect of removing the exemption to which the salaries of state officers are entitled. N.Y.—Osterhoudt v. Stade, 117 N.Y.S. 809, 133 App.Div. 83.

Defaulting officer

In the absence of showing that his status was such as otherwise to entitle him to exemption under statute, the salary of a county treasurer in default for failure to account for funds coming into his hands is not entitled to exemption. Iowa.—Briley v. Board of Sup'rs of Story County, 287 N.W. 242, 227 Iowa 55.

Statute removing exemption

A statute which operates to remove the exemption, if any there be, as regards the salary of public officers, and subjecting such salary to payment of judgments against them, is not invalid as contrary to public policy. Ohio.—Uricich v. Kolesar, 5 N.E.2d 335, 132 Ohio St. 115.

60. La.—Duroch v. Caillouet, 6 La. App. 222.

61. La.—Fischer v. Dubroca, 111 So. 710, 163 La. 292.

62. La.—Fischer v. Dubroca, supra. Miss.—Scruggs v. Electric Paint & Varnish Co., 105 So. 745, 140 Miss. 615.

63. La.—Moll v. Sbisla, 25 So. 141, 51 La. Ann. 290.

64. La.—Jennings v. Trainor, 9 La. App., Orleans, 26.

65. La.—King v. Seymour, 5 La. App., Orleans, 77.

66. La.—Industrial Discount Co. v. Scherer, 119 So. 295, 9 La.App. 331.

67. Ky.—Miracle v. Hopkins, 86 S.W. 2d 681, 260 Ky. 712.

Maintenance of inmates

Funds payable to such keeper for maintenance of inmates are exempt. Ky.—Miracle v. Hopkins, supra.

68. La.—Duroch v. Caillouet, 6 La. App. 222.

69. La.—Fifth Ave. Library Soc. v. Kilshaw, 7 La.App., Orleans, 496.

Teachers in public schools

A statute which declares that all teachers in the public schools shall be regarded as permanent employees of the school board and shall not be removed from office fixes the status of the teacher in the public schools as an officer.

La.—Fifth Ave. Library Soc. v. Kilshaw, supra.

70. La.—Keyes v. Dade, 8 La.App. 257.

71. Ga.—Tabb v. Mallette, 47 S.E. 587, 120 Ga. 97, 102 Am.S.R. 78.

Policemen of corporation

Officers employed by a private corporation to police its property, paid by the company and subject to discharge by the company, are not municipal officers within the meaning of a statute exempting salaries of such officers.

Ga.—Tabb v. Mallette, supra.

72. N.H.—Robinson v. Aiken, 39 N. H. 211.

25 C.J. p 71 note 16.

73. Ga.—Holt v. Experience, 26 Ga. 113.

25 C.J. p 71 note 17.

74. Tex.—Smith v. Bradshaw, Civ. App., 105 S.W.2d 340, affirmed Bradshaw v. Smith, 108 S.W.2d 200, 130 Tex. 180.

Deposit in bank

Fees of constable's office collected by him and deposited in bank lose their exempt character.

Tex.—Bradshaw v. Smith, 108 S.W. 2d 200, 130 Tex. 180.

§ 48. — Amount of Wages and Time within Which Earned

- a. In general
- b. Amount necessary for debtor's family
- c. Earnings within fixed period
- d. Earnings to fixed amount within fixed period
- e. Amount per day, week, or month; percentage

a. In General

As will be observed in subsequent subdivisions of this section, statutes exempting salary, wages, or earnings may restrict such exemption with respect to the amount and the time within which earned.

Examine Pocket Parts for later cases.

b. Amount Necessary for Debtor's Family

Under some statutes the exemption of wages, salary, or earnings is restricted to the amount necessary for the debtor's family.

Under some statutes wages, salary, or earnings for a certain period are exempt to the extent that they are necessary for the use of the debtor's fam-

ily.⁷⁵ The purpose of such statutes is to allow a debtor enough money to maintain a basic standard of living in order that he may have a fair chance to remain a productive member of the community,^{75.5} and to protect his family from privation and want.^{75.10} What is necessary depends largely on the circumstances of each case and the position of the family involved⁷⁶ and the determination must, to a considerable extent, be committed to the sound discretion of the trier of fact.⁷⁷ If all the earnings of the debtor for the statutory period are necessary he may hold all,⁷⁸ but wages or earnings which exceed the amount needed for the support of a family will not be exempted.⁷⁹ In computing the amount necessary for the support of the debtor's family, deductions for social security and the like should be taken into account.⁸⁰

c. Earnings within Fixed Period

Some statutes restrict exemptions of wages, salary, or earnings to the amount earned by the debtor within a prescribed period.

Under some statutes an exemption is conferred as to the entire amount earned by the debtor within the period fixed, irrespective of the needs of the debtor's family, and without limitation of amount.⁸¹

75. Cal.—Sanker v. Humborg, 119 P.2d 433, 48 C.A.2d 205.

White v. Gobey, 19 P.2d 876, 130 C.A. Supp., 789.

N.Y.—Yarmush v. Cohen, 52 N.Y.S.2d 864, 184 Misc. 41, affirmed 55 N.Y.S.2d 860, 185 Misc. 118—6-8-10

Barrow St. v. Pennefather, 297 N.Y.S. 124, 164 Misc. 18.

Rudley v. Rudley, 111 N.Y.S.2d 665.

Tenn.—Family Clothing Corporation v. Richardson, 154 S.W.2d 795, 25 Tenn.App. 195.

Head of family
(1) Only wages of employee who is head of family and residing with it are exempt.

Ill.—Harris v. Montag, 247 Ill.App. 89.

(2) Head of family entitled to exemption see supra § 17.

75.5 Cal.—Perfection Paint Products v. Johnson, 330 P.2d 829, 164 C.A.2d 739.

Purpose of exemption laws generally see supra § 1.

75.10 Okl.—Pendergraph v. Edwards, 283 P.2d 823—Smith v. Britton, 89 P.2d 953, 185 Okl. 76.

76. Cal.—Sanker v. Humborg, 119 P.2d 433, 48 C.A.2d 205.

Snyder v. Swenson, 311 P.2d 644, 151 C.A.2d Supp. 847.

"Necessaries" as relative term
The word "necessaries," money required for which is exempt from execution, is relative term, and scope

of its legal signification has been restricted or enlarged according to circumstances and conditions of parties concerned.

Cal.—Sanker v. Humborg, 119 P.2d 433, 48 C.A.2d 205.

Adult child

Under statute, expenses on behalf of minor daughters incidental to attendance at university were for "necessaries" but adult daughter was not a member of "debtor's family" and earnings expended in sending such daughter did not fall within exemption.

Cal.—Diamond v. Bent, 320 P.2d 621, 157 C.A.2d Supp. 857.

Earnings held not exempt as being necessary for reasonable requirements of debtor and his family dependent on him.

N.Y.—Northeastern Real Estate Securities Corporation v. Goldstein, 44 N.Y.S.2d 105, 266 App.Div. 965.

77. Cal.—Sanker v. Humborg, 119 P.2d 433, 48 C.A.2d 205.

78. Cal.—Sanker v. Humborg, supra.

Ohio.—Vandal v. Dalber, 10 Ohio Cir. Ct. 355, 6 Ohio Cir.Dec. 585.

79. Okl.—Smith v. Britton, 89 P.2d 953, 185 Okl. 76.

25 C.J. p 69 note 72, p 63 note 85 [c].

Sum necessary less than total pay
Where one-half of judgment debtor's take-home pay for personal serv-

ices rendered within thirty days of levy was released as exempt, fact, if true, that judgment debtor needed sum in excess of one-half but less than all of such take-home pay for support of his family during period in question would not justify release of other half.

Cal.—Snyder v. Swenson, 311 P.2d 644, 151 C.A.2d Supp. 847.

Discretion not abused

Where judgment debtor had earned and collected two thousand four hundred sixty dollars during three-month period, trial court did not abuse its discretion in refusing to allow an exemption of the whole amount on the theory that it was necessary for support of debtor's family.

Okl.—Smith v. Britton, 89 P.2d 953, 185 Okl. 76.

80. Earnings in excess of amount necessary for support

Earnings in excess of the amount necessary to support the wage earner's family are exempt where it appears that deductions for social security, unemployment reserve, and the like, when added to the amount actually necessary to support the wage earner's family, exceed the amount of his income.

Cal.—Sanker v. Humborg, 119 P.2d 433, 48 C.A.2d 205.

81. Iowa.—McCoy v. Cornell, 40 Iowa 457.

Some statutes exempt wages for the fixed period whenever earned,⁸² and are not restricted to wages earned during the period named immediately preceding the service of the process.⁸³ However, a statute exempting wages due for a time not exceeding a fixed period next preceding the service of the process exempts only the wages due for labor done during the period named immediately preceding the service of process,⁸⁴ and wages for work performed prior to a fixed exemption period are not exempt.^{84.5}

Duration of exemption period. Under statutes exempting earnings during a fixed period, the exemption expires at the end of the period and is not extended by voluntarily leaving the earnings with the employer,⁸⁵ or by the fact that the earnings are in the hands of the debtor's wife,⁸⁶ or by legal proceedings necessary to reduce the wages to the employee's possession.⁸⁷

Where the statute exempts all of the income earned by the debtor for a fixed period, the creditor must wait until the income for the period stated has accumulated in order to determine the amount of his exemption,⁸⁸ and he cannot seize the debtor's income by garnishment for succeeding periods shorter in duration than the statutory period.⁸⁹ Moreover, under a statute exempting a specified sum of the salary, income, or wages of a person per month, in computing the exemption of one who is paid part of a month's wages in the following month the wages received for both months should be added and the exemptions for two months deducted.⁹⁰

Statutes exempting "current wages" for a fixed period are held to be applicable only as long as wages currently earned are not collected,⁹¹ and wages voluntarily left in the possession of the employer after they become due cease to be "current" within

the meaning of such statutes.⁹² However, past-due wages left with the employer under compulsion,⁹³ or misapprehension as to the state of accounts,⁹⁴ do not cease to be "current wages" within the meaning of the statute. Under particular statutes "current wages or earnings" are limited to those earned within a prescribed time prior to the levy of process sought to be enforced.⁹⁵

d. Earnings to Fixed Amount within Fixed Period

Under some statutes the exemption of wages, salary, or earnings is limited to a fixed amount earned within a fixed period.

Under some statutes the exemption of wages, salary, or earnings, is limited to a certain amount earned within a specified time.⁹⁶ Such a statute has been construed to apply only to the amount remaining in the employee's hands and without regard as to what has been paid to the debtor during the statutory period.⁹⁷

Under statutes not merely limiting the amount earned within the statutory period to a definite sum but further providing that a minimum allowance shall be exempt in all cases, the provisions for minimum exemption are included as a part of the maximum amount allowed and are not additional to it.⁹⁸

e. Amount per Day, Week, or Month; Percentage

Under some statutes, the exemption of wages is restricted to a certain amount per day, week, or month. Some statutes restrict exemptions of wages, salary, or earnings to a certain percentage thereof.

Under some statutes the exemption of wages cannot exceed a certain amount per day, week, or month⁹⁹ or the wages are subject to such limitation in cases in which it is sought to enforce the exemp-

82. Me.—Parks v. Knox, 22 Me. 494. Tenn.—Family Clothing Corporation v. Richardson, 154 S.W.2d 795, 25 Tenn.App. 195.

83. Me.—Parks v. Knox, 22 Me. 494.

84. Okl.—Oil Well Supply Co. v. Galbreath, 52 P.2d 780, 175 Okl. 305.
25 C.J. p 69 note 78.

84.5 Iowa.—Johnson v. Williams, 17 N.W.2d 405, 235 Iowa 688.

85. Wis.—Seligmann v. Heller Bros. Clothing Co., 34 N.W. 232, 69 Wis. 410.
25 C.J. p 69 note 79.

86. Wis.—Bloodgood v. Meissner, 54 N.W. 772, 84 Wis. 452.

87. Iowa.—Connor v. McCormick, 117 N.W. 976, 140 Iowa 739.
25 C.J. p 69 note 81.

88. Tenn.—Frazier v. Nashville Veterinary Hospital, 201 S.W. 751, 139 Tenn. 440.

89. Tenn.—Frazier v. Nashville Veterinary Hospital, supra.

90. Tenn.—Family Clothing Corporation v. Richardson, 154 S.W.2d 795, 25 Tenn.App. 195.

91. Tex.—Smith v. Oak Cliff Bank & Trust Co., Civ.App., 99 S.W.2d 1103.
Definition and scope of "current wages" see supra § 47 b (1) (a).

92. Tex.—Bell v. Indian Live-Stock Co., 11 S.W. 344, 3 L.R.A. 642.
Davidson v. F. H. Logeman Chair Co., Civ.App., 41 S.W. 824.

93. Tex.—Davidson v. F. H. Logeman Chair Co., supra.
25 C.J. p 70 note 86.

94. Tex.—Childress v. Franks, Civ. App., 44 S.W. 868.
25 C.J. p 70 note 87.

95. Okl.—Oil Well Supply Co. v. Galbreath, 52 P.2d 780, 175 Okl. 305.

96. Ga.—Harris v. Atlantic Coast Line R. Co., 155 S.E. 497, 42 Ga. App. 260.
25 C.J. p 70 note 88.

97. Or.—Crites v. Bede, 168 P. 941, 86 Or. 460.

98. Me.—Pike v. Bannon, 98 A. 68, 115 Me. 124.

99. Ga.—Harris v. Atlantic Coast Line R. Co., 155 S.E. 497, 42 Ga. App. 260.

Miss.—Peoples Bank v. Gore, 172 So. 506, 178 Miss. 216.
N.Y.—State Tax Commission v. Bradley, 57 N.Y.S.2d 620, 185 Misc. 733.

tion against debts of a particular nature.¹ The full amount of wages due up to the statutory limit may be exempted as against an ordinary creditor, even though as between employer and employee the amount due may be decreased by deductions which the employer is authorized to make for supplies furnished to his employee.² Where the statute exempts all wages up to a fixed weekly amount, an accumulation of wages where the rate is less than the statutory limit is exempt.³

Under some statutes wages, salary, or earnings are exempt up to a specified percentage,⁴ regardless of need,^{4.5} of the entire earned compensation⁵ or of the compensation earned within a prescribed period.⁶ Under some statutes, in addition to the limitation by percentage, a specified sum must remain exempt from seizure in every case;⁷ but under such statutes the total amount earned by an employee in any month, including any amount paid on account, must be considered in determining how much of the total earnings of a particular period should be considered exempt.^{7.5}

Computation. In computing the amount of exemption under statutes restricting such exemption to a certain amount per day, week, or month, an employee who is paid for his time according to the days or parts thereof that he works is entitled to exemption of his wages as "daily" rather than as "weekly or monthly" wages;⁸ where employment is by the day the exemption is calculated according to

the number of days actually worked;⁹ the wages actually earned by the employee under his contract of employment are to be considered and not the amount which may be due him after deductions made with his consent;¹⁰ and the mere fact that payment is made on a piecework basis does not preclude the employment from being by the day within the contemplation of such statutes.¹¹ In computing the exemption of an employee under a statute exempting earnings up to a specified amount per week, compensation received by him in addition to money is to be included.¹² A statute exempting income to a certain amount per month includes what the debtor may have collected from his employer or may have received from his income from any other source during the month as well as the sum that may belong to him earned or collectable from any source but not actually received by him at the time legal process is served.¹³

Under a statute providing that where husband and wife are living together, the aggregate of the earnings, salaries, insurance, annuities, and pension or retirement payments of the husband and wife shall be the amount which shall be determinative of the exemption of either, the husband's unemployment compensation, which is exempt, may not be aggregated with the wife's earnings in determining her exemption, in the absence of circumstances depriving the husband of his exemption in the unemployment compensation.^{13.5}

1. N.M.—O'Rielly v. Colbert, 120 P. 321, 16 N.M. 647.

2. Ill.—Wohlford v. Wabash Coal Co., 164 Ill.App. 185.

3. N.J.—Georges v. Wegrocki, 4 A.2d 274, 122 N.J.Law 109.

N.Y.—Maged v. New York, 133 N.Y. S. 969, 75 Misc. 634.

Annual salary held exempt

Under statute providing for exemption of wages or salary unless in excess of eighteen dollars a week, five hundred dollars annual salary of member of the state legislature was exempt.

N.J.—Georges v. Wegrocki, 4 A.2d 274, 122 N.J.Law 109.

4. Cal.—Snyder v. Swenson, 311 P. 2d 644, 151 C.A.2d Supp. 847.

La.—Civic Agency v. Quealy, App., 172 So. 555.

Mo.—Southern Coal Co. v. Shepard, 9 S.W.2d 257, 223 Mo.App. 112.

Neb.—Live Stock Nat. Bank v. Jackson, 288 N.W. 515, 137 Neb. 161—Lyons v. Austin, 252 N.W. 908, 126 Neb. 248.

N.Y.—Morris Plan Indus. Bank of N. Y. v. Gunning, 67 N.E.2d 510, 295 N.Y. 324.

Heiskell v. Heiskell, 62 N.Y.S.2d 532.

Ohio.—Fitzgibbon v. De Chant, 16 N.E.2d 794, 53 Ohio App. 453—Southern Ohio Finance Corporation v. Wahl, 171 N.E. 369, 34 Ohio App. 518.

Okl.—Oil Well Supply Co. v. Galbreath, 52 P.2d 780, 175 Okl. 305—Warner v. Willard, 242 P. 550, 115 Okl. 224.

4.5 Cal.—Snyder v. Swenson, 311 P. 2d 644, 151 C.A.2d Supp. 847.

5. La.—Civic Agency v. Quealy, App., 172 So. 555.

6. Mo.—York v. York, App., 249 S. W.2d 870.

Okl.—Oil Well Supply Co. v. Galbreath, 52 P.2d 780, 175 Okl. 305.

7. La.—Civic Agency v. Quealy, App., 172 So. 555.

7.5 La.—C. H. Rice & Son v. Stassi, App., 8 So.2d 805.

8. Ga.—Atlanta & W. P. R. Co. v. Blass, 2 S.E.2d 723, 60 Ga.App. 35.

Extra fireman

The wages of one who was employed by railroad as an extra fire-

man to relieve regular firemen, and who was paid semimonthly, on a mileage basis for the time he should actually work, were exempt under statute as "daily wages."

Ga.—Atlanta & W. P. R. Co. v. Blass, supra.

9. Ga.—Grace v. Bibb Mfg. Co., 171 S.E. 461, 47 Ga.App. 756.

10. Ga.—Harris v. Atlantic Coast Line R. Co., 155 S.E. 497, 42 Ga. App. 260.

11. Ga.—Grace v. Bibb Mfg. Co., 171 S.E. 461, 47 Ga.App. 756.

12. N.Y.—Grostein v. Blumenberg Dairy Corporation, 249 N.Y.S. 728, 139 Misc. 548.

Dairy products received by employee, in addition to a certain amount of money as weekly salary, should be taken into account.

N.Y.—Grostein v. Blumenberg Dairy Corporation, supra.

13. Tenn.—Frazier v. Nashville Veterinary Hospital, 201 S.W. 751, 139 Tenn. 440.

13.5 D.C.—Washington Tel. Federal Credit Union v. Breeden, Mun.App., 151 A.2d 774.

§ 49. — Future Wages or Earnings

A creditor will not be permitted, by garnishment proceedings, to reach a debtor's future wages or earnings, so as to defeat his right to claim them as exempt when they become due.

A creditor cannot reach the debtor's future wages or earnings by garnishment proceedings, so as to defeat his right to claim them as exempt when they become due,¹⁴ and wages earned but not payable are future wages within the meaning of this rule;¹⁵ nor can the creditor get at the debtor's wages over and above the amount allowed as exempt by making the writ in garnishment returnable to a term of court long subsequent to its execution.¹⁶ It is otherwise under a statute expressly providing that wages accruing after service of a writ of attachment and before trial shall be bound by the writ.¹⁷ Some statutes allow a certain percentage of prospective earnings to be reached.¹⁸

§ 50. — Property Purchased with Earnings

According to some authorities property purchased with earnings that are exempt is likewise exempt.

Whether the exemption in wages or personal earnings covers property purchased by the wages or personal earnings is a question on which the authorities differ. In some jurisdictions the property is not exempt;¹⁹ in others it is,²⁰ but only to the extent of the amount exempted by the statute,²¹ and, where the property purchased is a homestead, it is exempt only as long as it is owned and occupied as a homestead.²² Property purchased in excess of the amount allowed by law as exempt will not be exempt.²³

§ 51. Workmen's Compensation

Under some statutes workmen's compensation, claims therefor, and payments or benefits due are exempt.

Under some statutory provisions payments or benefits due under workmen's compensation statutes, as well as compensation, or claims therefor, are exempt.²⁴ The protection of such provisions has been held to extend to compensation or benefits actually paid and collected²⁵ and deposited in a bank,²⁶ par-

14. Ill.—Hoffman v. Fitzwilliam, 81 Ill. 521.

25 C.J. p 70 note 97.

Exemptions which may be claimed in garnishment proceedings generally see infra § 123.

Sums earned after bankruptcy

Ga.—Crystal Laundry & Cleaners, Inc. v. Continental Finance & Loan Co., 104 S.E.2d 654, 97 Ga.App. 823, reversed on other grounds Continental Finance & Loan Co. v. Crystal Laundry & Cleaners, Inc., 105 S.E.2d 727, 214 Ga. 528, opinion conformed to 106 S.E.2d 849, 98 Ga.App. 778.

Successive trustee attachments may not be made to charge trustee with wages due above exemption applicable to separate weekly pay periods and before entry of writ, and trustee is chargeable only with disclosure following first service of trustee process.

N.H.—Cady v. Budd, 41 A.2d 88, 93 N.H. 243.

15. Tenn.—Weaver v. Hill, 37 S.W. 142, 97 Tenn. 402.

16. Miss.—Chapman v. Berry, 18 So. 918, 73 Miss. 437, 55 Am.S.R. 546.

17. Md.—Hagerstown First Nat. Bank v. Weckler, 52 Md. 30.

18. N.Y.—Valentine v. Williams, 159 N.Y.S. 815, affirmed 161 N.Y.S. 1148, 175 App.Div. 931.

19. Ga.—Anderson v. Cook, 30 S.E. 884, 105 Ga. 496.

25 C.J. p 71 note 11.

Mich.—Dunn v. Minnema, 36 N.W.2d 182, 323 Mich. 687, 7 A.L.R.2d 1099. Proceeds and products of exempt

property generally see infra §§ 58-62.

Savings bonds

Wages invested in United States savings bonds lost their exempt character and bonds were subject to seizure.

Iowa.—Iowa Methodist Hospital v. Long, 12 N.W.2d 171, 234 Iowa 843, 150 A.L.R. 440.

20. Ky.—Elliott v. Argenbright, 299 S.W. 957, 221 Ky. 763.

25 C.J. p 71 note 12.

21. Ky.—Miller v. Gray, 2 Ky.Op. 101.

22. Ky.—Elliott v. Argenbright, 299 S.W. 957, 221 Ky. 763.

23. Ky.—Miller v. Gray, 2 Ky.Op. 101.

25 C.J. p 71 note 14 [a].

24. Ariz.—Vukovich v. Ossic, 70 P. 2d 324, 50 Ariz. 194.

Colo.—Employers' Mut. Ins. Co. v. Industrial Commission of Colorado, 3 P.2d 1079, 89 Colo. 475.

La.—Festervand v. Laster, 130 So. 634, 15 La.App. 159.

N.Y.—Sackolwitz v. Charles Hamburg & Co., 67 N.E.2d 152, 295 N.Y. 264.

In re Fontheim's Estate, 11 N.Y. S.2d 819, 171 Misc. 24—Tosti v. Sbrano, 11 N.Y.S.2d 321, 170 Misc. 828.

Okl.—In re Allen's Guardianship, 78 P.2d 700, 182 Okl. 512.

Tex.—Frierson & Co. v. Union Nat. Bank, Civ.App., 285 S.W. 941—Gaddy v. First Nat. Bank, Civ.App., 283 S.W. 277, certified questions answered 283 S.W. 472, 115 Tex. 393.

W.Va.—Billingslea v. Tartell, 35 S.E. 2d 89, 127 W.Va. 750.

Exemption of compensation payments as against claim for support of family see infra § 83.

Construction of statutes

Such statutes are to be given reasonable construction in favor of the purposes and the objects of the exemption authorized, and in case of doubt it should be resolved in favor of the exemption.

Okl.—In re Allen's Guardianship, 78 P.2d 700, 182 Okl. 512.

"Weekly payments"

"Weekly payments" which are specifically made exempt by compensation statute include all amounts payable thereunder, except amount payable when death results from injury, and include a lump sum payable under a compromise judgment.

N.H.—Arsenault v. Lepage, 152 A. 475, 84 N.H. 497.

Compensation held not attachable

R.I.—American Woolen Co. v. Grillini, 78 A.2d 795, 78 R.I. 50.

25. Ariz.—Vukovich v. Ossic, 70 P.2d 324, 50 Ariz. 194.

N.Y.—Surace v. Danna, 161 N.E. 315, 248 N.Y. 18.

Tosti v. Sbrano, 11 N.Y.S.2d 321, 170 Misc. 828.

Tex.—Frierson & Co. v. Union Nat. Bank, Civ.App., 285 S.W. 941—Gaddy v. First Nat. Bank, Civ.App., 283 S.W. 277, certified question answered 283 S.W. 472, 115 Tex. 393.

26. Ariz.—Vukovich v. Ossic, 70 P. 2d 324, 50 Ariz. 194.

N.Y.—Surace v. Danna, 161 N.E. 315, 248 N.Y. 18.

Tex.—Frierson & Co. v. Union Nat. Bank, Civ.App., 285 S.W. 941—

ticularly when not mingled with other funds.²⁷ However, it has also been held that such statutes do not operate to exempt compensation actually collected or received by the injured employee,²⁸ particularly when deposited in a bank²⁹ and mingled with other funds of the employee.³⁰

A judgment in favor of a claimant for workmen's compensation has been held to be exempt under a statute exempting a claim for compensation or a payment due.³¹ Moreover, a judgment against third persons for negligence resulting in the compensable injury has been held to be exempt as a "benefit" entitled to exemption under a compensation statute when no award has yet been made.³²

A statutory provision for the exemption of compensation has been held to operate only during the lifetime of the injured employee,³³ affording no protection to those who succeed to his property at death,³⁴ at least where there is no surviving spouse, minor child, or dependent of the workman.^{34.5}

A statute making workmen's compensation and claims therefor exempt has been held not available to a nonresident workman.³⁵

Property purchased with compensation. According to some authority the exemption of workmen's compensation benefits or payments as provided by statute does not extend to property purchased by

them³⁶ although a result to the contrary has been reached.³⁷

§ 52. Wearing Apparel, Yarn, and Cloth

The debtor's wearing apparel is generally exempt property, and under some statutes this exemption includes yarn and cloth.

In view of the common-law rule that an officer is not authorized to commit a trespass on the person of defendant and thereby provoke a breach of the peace, which gives rise to the rule that wearing apparel is not subject to levy and sale under an execution, see Executions § 19, it seems that even in the absence of a statute expressly so providing wearing apparel is exempt property.³⁸ Ordinarily, under the various statutes, the debtor's wearing apparel, sometimes to the extent of a particular value, is exempt.³⁹

There is quite a diversity of opinion among the courts as to what constitutes "wearing apparel" within the exemption.⁴⁰ The term "wearing apparel" has been taken to mean clothing and to apply only to garments worn to protect the person from exposure.⁴¹ It has also been held to include all of the articles of dress generally worn by persons in the locality and condition of life of the claimant, including whatever is necessary to decent appearance and protection from the changes of

Gaddy v. First Nat. Bank, Civ.App., 283 S.W. 277, certified questions answered 283 S.W. 472, 115 Tex. 393.

27. Okl.—Stephenson v. Hammons, 308 P.2d 317—Commons v. Bragg, 80 P.2d 287, 183 Okl. 122—In re Allen's Guardianship, 78 P.2d 700, 182 Okl. 512.

Tex.—Gaddy v. First Nat. Bank, 283 S.W. 472, 115 Tex. 393.

W.Va.—Billingslea v. Tartell, 35 S.E. 2d 89, 127 W.Va. 750.

28. La.—Hawthorn v. Davis, App., 140 So. 56.

Pa.—Wartella v. Osick, 165 A. 660, 108 Pa.Super. 520.

In hands of employee's attorney

A workmen's compensation fund in hands of injured employee's attorney is not exempt.

Iowa.—Long v. Northrup, 279 N.W. 104, 225 Iowa 132, 116 A.L.R. 1475.

29. Pa.—Wartella v. Osick, 165 A. 660, 108 Pa.Super. 520.

30. N.J.—Beilerlein v. Faulkner, 190 A. 853, 15 N.J.Misc. 313.

Deposit in employee's saving account

N.J.—Beilerlein v. Faulkner, supra.

31. La.—Festervand v. Laster, 130 So. 634, 636, 15 La.App. 159.

Reason for rule

"The judgment . . . does not change the payments fixed by law, but merely orders them to be made according to law . . . whether the payments are collected by or without the aid of a judgment, they still are payments under the Workmen's Compensation Act and . . . are personal to the person entitled to them."

La.—Festervand v. Laster, supra.

32. N.Y.—In re Fontheim's Estate, 11 N.Y.S.2d 819, 171 Misc. 24.

33. Tex.—Pickens v. Pickens, 83 S.W.2d 951, 125 Tex. 410.

34. Tex.—Pickens v. Pickens, supra.

Family or widow and children

One half of compensation awarded to injured employee prior to his death does not constitute property which is exempted to family or widow and minor children and unmarried daughters after his death.

Tex.—Pickens v. Pickens, supra.

34.5 N.Y.—In re Flood's Estate, 148 N.Y.S.2d 564, 1 Misc.2d 483.

35. Ga.—Smith v. Georgia Granite Corporation, 198 S.E. 772, 186 Ga. 634, 119 A.L.R. 550.

Removal to another state

A workman who has removed to another state and is neither perma-

nently nor temporarily residing within the state is not entitled to exemption of compensation awarded in the state while he was a resident. Ga.—Smith v. Georgia Granite Corporation, supra.

36. Ky.—Ball v. Smiddy, 249 S.W.2d 715.

Mich.—Martin v. Lamb, 200 N.W. 160, 228 Mich. 396.

Construing New York statute

N.C.—Merchants Bank v. Weaver, 197 S.E. 551, 213 N.C. 767.

37. N.Y.—Di Donato v. Rosenberg, 225 N.Y.S. 46, 221 App.Div. 624.

38. W.Va.—Ohio Valley Bank v. Minter, 150 S.E. 366, 108 W.Va. 58.

39. La.—Brooks & Clark v. Broussard, 87 So. 254, 148 La. 509.

Mounger v. Ferrell, App., 11 So. 2d 56.

40. Diversity of holdings discussed Cal.—In re Millington's Estate, 218 P. 1022, 63 C.A. 498.

W.Va.—Ohio Valley Bank v. Minter, 150 S.E. 366, 108 W.Va. 58.

41. N.H.—Townsend v. Pratt, 33 N.H. 345, 66 Am.D. 726.

N.J.—Frazier v. Barnum, 19 N.J.Eq. 316, 97 Am.D. 666.

25 C.J. p 46 note 85.

weather, and also to what is reasonably proper and customary in that community in the way of ornament.⁴² The term does not include traveling trunks⁴³ or mahogany cabinet boxes in which the wearing apparel may be kept.⁴⁴ Likewise, wearing apparel does not include clothing purchased by a firm of which the debtor is a member, and held by such firm for sale.⁴⁵

Under some statutes "necessary" wearing apparel is exempt.⁴⁶ "Necessary" wearing apparel includes such articles as are reasonably required for the convenience and comfort of the debtor and his family, and is not limited to such as are indispensable.⁴⁷ In determining whether any article is necessary for the debtor's use, it would seem logical to inquire whether it is reasonable and proper for use in the home and in social intercourse in view of the debtor's insolvency; but no distinction can be based on the previous financial or social position of the insolvent debtor, otherwise the statute would operate unequally between the rich and the poor.⁴⁸ Such a statute exempts clothing suitable and reasonably necessary for all seasons of the year,⁴⁹ and it may exempt an extra suit.⁵⁰

Where the statute in terms exempts "wearing apparel" or "all wearing apparel," without restricting it to such as is necessary, questions as to its value, if bought in good faith as wearing apparel,⁵¹

or the frequency of its use,⁵² or its appropriateness to the debtor's condition of life,⁵³ cannot be inquired into. Under such statutes a lace shawl⁵⁴ and a Masonic uniform⁵⁵ have been held to be exempt. Masonic regalia, with the exception of the hat, however, has been held not to be exempt under other statutes.⁵⁶

"Necessary wearing apparel" includes cloth put into the hands of a tailor and cut up by him into shape for a coat for the debtor.⁵⁷ It even includes cloth and trimmings put into the hands of a tailor to be made up into clothing for the debtor, although the cloth is not yet cut.⁵⁸ Statutes exempting carpeting and manufactured cloth from execution are construed to include cloth not manufactured by the debtor's family, but necessary for their use.⁵⁹ A statute exempting "all sheep, to the number of ten, with their fleeces and the yarn or cloth manufactured from the same," exempts the wool belonging to a debtor, or the yarn or cloth manufactured therefrom, although he does not own the sheep from which the wool was taken.⁶⁰

A statute exempting "all the spun yarn and manufactured cloth . . . manufactured by the family necessary for the use of the family" exempts cloth which a debtor has had manufactured outside the family from yarn purchased by him for the purpose, and is not restricted to cloth manufactured by the family.⁶¹

42. W.Va.—Ohio Valley Bank v. Minter, 150 S.E. 366, 108 W.Va. 58.

Wis.—Milwaukee Accredited Schools of Beauty Culture v. Patti, 296 N. W. 616, 237 Wis. 277.

Ornaments and jewelry as exempt property see *infra* § 53.

43. N.H.—Town v. Pratt, 33 N.H. 345, 66 Am.D. 726.

44. N.H.—Town v. Pratt, *supra*.
Tenn.—Turner v. Staley, 3 Tenn.Civ. App. 47.

45. U.S.—In re Lentz, D.C.S.D., 97 F. 486.

46. Cal.—Los Angeles Finance Co. v. Flores, 243 P.2d 139, 110 C.A.2d Supp. 850.

Statutes construed

(1) Under a statute providing that "necessary household, table, and kitchen furniture belonging to the judgment debtor, including one sewing-machine, stove, stovepipes and furniture, wearing apparel, beds," etc., the word "necessary" limits the term "wearing apparel."
Cal.—In re Millington's Estate, 218 P. 1022, 63 C.A. 498.

(2) As used in statute exempting necessary wearing apparel of debtor from execution, term "necessary

wearing apparel" means necessary to particular debtor considering all the circumstances, his station in life, and his particular type of employment.
Cal.—Los Angeles Finance Co. v. Flores, 243 P.2d 139, 110 C.A.2d Supp. 850.

(3) "Necessary wearing apparel" in statute exempting necessary wearing apparel from attachment is apparel necessary in ordinary circumstances of family living which is not superfluous luxury.
R.I.—Arch Lumber Co. v. Dohm, 98 A.2d 840, 81 R.I. 69.

47. N.H.—Town v. Pratt, 33 N.H. 345, 66 Am.D. 726.

25 C.J. p 47 note 95.

"Of course, the word 'necessary' does not limit wearing apparel to that which is indispensable, but is sufficiently flexible to include things which are usual and appropriate for the reasonable comfort and convenience of a debtor, although they may not be absolutely necessary for mere subsistence."

Cal.—In re Millington's Estate, 218 P. 1022, 1023, 63 C.A. 498.

48. Cal.—In re Millington's Estate, *supra*.

49. N.H.—Peverly v. Sayles, 10 N. H. 356.

Tenn.—Turner v. Staley, 3 Tenn.Civ. App. 47.

50. N.H.—Peverly v. Sayles, 10 N.H. 356.

51. N.J.—Frazier v. Barnum, 19 N. J.Eq. 316, 97 Am.D. 666.

52. U.S.—In re Jones, D.C.Wis., 97 F. 773.

53. N.J.—Frazier v. Barnum, 19 N. J.Eq. 316, 97 Am.D. 666.

54. N.J.—Frazier v. Barnum, *supra*.
25 C.J. p 47 note 3.

55. U.S.—In re Jones, D.C.Wis., 97 F. 773.

56. U.S.—In re Everleth, D.C.Vt., 129 F. 620.

57. Me.—Ordway v. Wilbur, 16 Me. 263, 33 Am.D. 663.

58. Mass.—Richardson v. Buswell, 10 Metc. 506, 43 Am.D. 450.

59. Ky.—Sims v. Reed, 12 B.Mon. 51.

60. N.Y.—Brackett v. Watkins, 21 Wend. 68—Hall v. Penney, 11 Wend. 44, 25 Am.D. 601.

61. Ky.—Sims v. Reed, 12 B.Mon. 51.

§ 53. — Ornaments and Jewelry

Although the rule is not followed in all jurisdictions, as a general rule any article of ornament, if worn in good faith, is exempt as wearing apparel.

Even in the absence of a statute granting an exemption to wearing apparel, the common-law exemption of wearing apparel, see *supra* § 52, has been held to include what is reasonably proper and customary in the debtor's community in the way of ornament.⁶² Although there is authority for the view that any article of ornament, if worn in good faith and not in fraud of creditors, is exempt under a statute exempting "wearing apparel,"⁶³ as, for example, a ring,⁶⁴ or a diamond shirt stud,⁶⁵ or a gold watch and chain,⁶⁶ in other states, under similar statutes, the value of the article claimed has a bearing on the question,⁶⁷ while in still other jurisdictions, under statutes of this kind, notwithstanding there is no restriction to "necessary wearing apparel," such articles have been held not to be exempt,⁶⁸ as, for example, a watch and chain.⁶⁹

Under statutes exempting "necessary wearing apparel," articles generally classed as ornaments are not exempt,⁷⁰ as, for example, a diamond ring,⁷¹ diamond earrings,⁷² a breastpin,⁷³ or a watch,⁷⁴ unless the character of their use,⁷⁵ or their being, together with other articles claimed, within the statutory limit of value,⁷⁶ brings them within the spir-

it, if not the letter, of the law. It has also been held that watches are so generally worn and considered necessities by persons of every financial condition that, under a liberal construction of the statute, it is reasonable to presume that the legislature intended to include them as necessary wearing apparel.⁷⁷

Under statutes exempting "wearing apparel" without qualification, which are construed as applying only to such wearing apparel as is necessary, even if one watch can be regarded as part of a debtor's wearing apparel, two watches cannot be so regarded.⁷⁸

§ 54. Work Animals, Vehicles, and Harness

- a. Animals
- b. Vehicles and harness

a. Animals

Under some statutes work animals used by particular classes of persons are exempt, and the courts have liberally construed such statutes for the benefit of the persons entitled thereto.

In some jurisdictions a broad provision exempts a certain number of horses to a large class of persons who habitually earn their living by the use of the horses, as farmers, teamsters, or other laborers,⁷⁹ to physicians, and to public officers, restrict-

62. Diamond ring

In the absence of proof as to the general custom of wearing expensive jewelry in the debtor's locality among persons similarly situated in society, holding that a ring owned and worn by the debtor, which was worth a thousand dollars, was not exempt was proper.

W.Va.—Ohio Valley Bank v. Minter, 150 S.E. 366, 108 W.Va. 58.

63. U.S.—In re H. L. Evans & Co., D.C.Del., 158 F. 153.

Wis.—Milwaukee Accredited Schools of Beauty Culture v. Patti, 296 N. W. 616, 237 Wis. 277.

25 C.J. p 47 note 7.

64. Tex.—Eagle Lake First Nat. Bank v. Robinson, Civ.App., 124 S. W. 177.

Wis.—Milwaukee Accredited Schools of Beauty Culture v. Patti, 296 N. W. 616, 237 Wis. 277.

Investment of value

Whether jeweled rings are exempt as wearing apparel depends largely on whether they were acquired and used as ornamental apparel, or as an investment of value as a matter of business.

U.S.—In re Leech, Ky., 171 F. 622, 96 C.C.A. 424.

Two diamond rings

Two diamond rings, although not worn continuously by owner and at

times pledged by him as security for loans, were exempt to widow and minor daughter of deceased owner as wearing apparel.

Tex.—Hickman v. Hickman, 234 S.W. 2d 410, 149 Tex. 439.

65. U.S.—In re Smith, D.C.Tex., 96 F. 832.

66. S.D.—Brown v. Edmonds, 66 N. W. 310, 8 S.D. 271, 59 Am.S.R. 762.

Gold watch

U.S.—Sellers v. Bell, Ala., 94 F. 801, 36 C.C.A. 502.

Wrist watch

Wis.—Milwaukee Accredited Schools of Beauty Culture v. Patti, 296 N. W. 616, 237 Wis. 277.

67. U.S.—In re Gemmell, D.C.Pa., 155 F. 551.

25 C.J. p 47 note 11.

68. Minn.—Rothschild v. Boelter, 18 Minn. 361.

25 C.J. p 47 note 12.

Articles of jewelry do not come under the description of wearing apparel.

U.S.—In re Kasson, D.C.N.Y., 14 F. Cas.No.7,616.

69. U.S.—In re Everleth, D.C.Vt., 129 F. 620.

Minn.—Rothschild v. Boelter, 18 Minn. 361.

70. Cal.—In re Millington's Estate, 218 P. 1022, 63 C.A. 498.

25 C.J. p 47 note 14.

71. U.S.—Langever v. Stitt, Tex., 237 F. 83, 150 C.C.A. 285.

Cal.—In re Millington's Estate, 218 P. 1022, 63 C.A. 498.

72. Cal.—In re Millington's Estate, *supra*.

73. N.C.—Townes v. Pratt, 33 N.C. 345, 66 Am.D. 726.

74. N.Y.—Peck v. Mulvihill, 2 N.Y. City Ct. 424.

75. U.S.—In re Turnbull, D.C.Mass., 106 F. 667.

25 C.J. p 47 note 18.

76. Or.—Stewart v. McClung, 8 P. 447, 12 Or. 431, 53 Am.R. 374.

25 C.J. p 47 note 19.

77. Cal.—In re Millington's Estate, 218 P. 1022, 63 C.A. 498.

78. Ga.—Smith v. Rogers, 16 Ga. 479.

79. Cal.—Murphy v. Harris, 19 P. 377, 77 C. 194.

Iowa.—Lames v. Armstrong, 144 N. W. 1, 162 Iowa 327, 49 L.R.A.,N.S., 691, Ann.Cas.1916B 511.

Span of horses

(1) An exemption of a span of horses was held to apply only to one engaged in agricultural pursuits, and not to a contractor, even though he

ing the exemption, however, in some instances to heads of families or householders.⁸⁰ Mules are also sometimes specifically exempted.⁸¹ For the benefit of those who are entitled, the courts have liberally construed the terms of the statutes as to the property exempt.⁸² A debtor is confined to the number of horses exempted by statute to him⁸³ or to his family.⁸⁴

Animals as exempt tools or implements see *supra* § 46.

Oxen. A statute exempting a "yoke of oxen or steers" may exempt a single ox or steer.⁸⁵ An exemption of a yoke of oxen does not necessarily imply cattle already broken to work.⁸⁶ A bull, if used for work, may be within an exemption of oxen or of working cattle.⁸⁷ An exemption of a fixed number of yoke of work cattle and their yokes, how-

ever, does not include horses and their harness,⁸⁸ or a truck used in hauling logs in view of another exemption provision relating to logging.^{88.5} Under a statute which exempts one yoke of oxen to the debtor, the fact that the debtor has an interest in another yoke of oxen which he has sold to another by a conditional sale does not prevent him from holding exempt the yoke remaining to him.⁸⁹

Teams. The term "team," as used in an exemption statute, has been construed to mean one horse or more as the case may be, together with the harness and the vehicle which is customarily attached for use,⁹⁰ and it has been held to apply to a horse not used in connection with a vehicle or harness.⁹¹ A "team" may include a team of oxen as well as a team of horses.⁹² Moreover a wagon alone may be exempt as part of the team.⁹³ Under a statute

occasionally engaged in buying and selling horses.

Minn.—Fullerton Lumber Co. v. Carstens, 80 N.W.2d 1, 248 Minn. 254.

(2) Persons entitled to privilege see *supra* §§ 11–25.

80. Iowa.—Lames v. Armstrong, 144 N.W. 1, 162 Iowa 327, 49 L.R.A., N.S., 691, Ann.Cas.1916B 511.

81. Iowa.—Augustine v. Gold, 174 N.W. 581, 188 Iowa 551.

82. A "work horse" has been defined as a horse which performs the common drudgery of the homestead, either by hauling wood, drawing the plow, carrying the family to church, etc., under the saddle or in traces, and it is not necessary that he should perform all these services; if he is intended to be used in any or all of them, or in others of a kindred character, he is within the exemption of "one work horse."

Ala.—Noland v. Wickham, 9 Ala. 169, 44 Am.D. 435.

Farm-horse or mule

Under a statute exempting "one farm-horse or mule," a horse used in running a dray for the support of the owner and his family is exempt.

Ga.—Kirksey v. Rowe, 40 S.E. 990, 114 Ga. 893, 88 Am.S.R. 65.

Term "horse" or "work horse" includes

(1) A stallion.

Cal.—McCue v. Tunstead, 4 P. 510, 65 C. 506.

Mo.—State v. Jungling, 22 S.W. 688, 116 Mo. 162.

25 C.J. p 57 note 46.

(2) Colts.

Tex.—Hall v. Miller, 51 S.W. 36, 21 Tex.Civ.App. 336.

(3) Mares.

Mo.—White v. Wilson, 80 S.W. 692, 106 Mo.App. 406.

(4) Mule or jackass.

Tenn.—Richardson v. Duncan, 2 Heisk. 220.

Tex.—Seiler v. Buckholdt, Civ.App., 293 S.W. 210.

25 C.J. p 57 notes 49, 50.

83. Tex.—Hawks v. Longbotham, Civ.App., 188 S.W. 734—Pardue v. Recer, Civ.App., 46 S.W. 112.

Limitation in value and number of animals exempt see *infra* § 66.

Pair of horses

A statute, however, exempting "a pair of horses" has been held not to require that they shall be used as a team, but to exempt any two horses selected by the debtor.

Neb.—Conway v. Roberts, 56 N.W. 980, 38 Neb. 456.

Span of horses

(1) Some of the statutes exempt a span or pair of horses. A "span of horses" consists of two animals which may be connected together or united for the purpose of constituting a team, and a mare and her colt are not a span so as to render the colt exempt under such statute.

Wis.—Ames v. Martin, 6 Wis. 361, 70 Am.D. 468.

(2) Statute exempting, among other things, "span of horses," from compulsory process, intends exemption of team or span of horses, meaning two horses, and gives debtor right, if statute applies to his classification, to claim as exempt one or other or both of such span of horses.

Minn.—Fullerton Lumber Co. v. Carstens, 80 N.W.2d 1, 248 Minn. 254.

(3) Under statute exempting from compulsory process "span of horses," or in lieu thereof one "farm tractor," exemption for horses contemplated by legislature comprehends that class of horses which is used in place of, and in the same manner as, a farmer's tractor.

Minn.—Fullerton Lumber Co. v. Carstens, *supra*.

84. Ala.—Simonds v. Gulley, 7 Ala. 721.

85. Tenn.—Wolfenbarger v. Standifer, 3 Sneed 659.

25 C.J. p 57 note 59.

86. Kan.—Mallory v. Berry, 16 Kan. 293.

Minn.—Berg v. Baldwin, 18 N.W. 821, 31 Minn. 541.

87. Me.—Bowzey v. Newbegin, 48 Me. 410.

Okl.—Nelson v. Fightmaster, 44 P. 213, 4 Okl. 38.

25 C.J. p 57 note 61.

88. U.S.—Kennedy v. Hills, Wash., 233 F. 666, 147 C.C.A. 474.

88.5 Wash.—Grimm v. Naugle, 208 P.2d 123, 34 Wash.2d 75.

89. Vt.—Wilkinson v. Wait, 44 Vt. 508, 8 Am.R. 391.

90. N.Y.—Harthouse v. Rikers, 8 N.Y.Super. 606.

25 C.J. p 58 notes 83, 89.

One-horse team

(1) This term covers a one-horse team as well as a double team, on the theory that the debtor may take any portion of what constitutes a team.

N.Y.—Wilcox v. Hawley, 31 N.Y. 648.

25 C.J. p 58 notes 84, 85.

(2) The horse of a country physician whose patients reside at too great a distance to visit on foot is a necessary team within the statute.

N.Y.—Wheeler v. Cropsey, 5 How.Pr. 288.

91. N.Y.—Finnin v. Malloy, 33 N.Y. Super. 382.

25 C.J. p 58 note 90.

92. N.Y.—Harthouse v. Rikers, 8 N.Y.Super. 606.

93. N.Y.—Dains v. Prosser, 32 Barb. 280.

25 C.J. p 59 note 91.

exempting "a team consisting of not more than two horses," two horses, to be exempt, need not be driven together,⁹⁴ but an unbroken colt which has never been used is not exempt as part of a team under the statute.⁹⁵

b. Vehicles and Harness

- (1) In general
- (2) Motor vehicles

(1) In General

Under statutes so providing, wagons and carts, together with the necessary harness, used by a debtor in his business or occupation are exempt.

In many states there are provisions in the exemption laws expressly exempting particular kinds of vehicles used by a debtor in his business or occupation. The word "wagon" has been construed in some jurisdictions to mean any four-wheeled vehicle,⁹⁶ whether covered or placed on springs, or for whatever use it may be employed, in the transportation of either persons or goods, or both;⁹⁷ but it has also been held that correct interpretation confines the term to a vehicle which is suitable for the transportation of goods.⁹⁸ The exemption has also been limited to such vehicles as are used primarily for the transportation of goods, and is not extended to vehicles designed primarily for other purposes, and only incidentally to the transportation of goods.⁹⁹ In some jurisdictions the statute requires that the wagon, to be exempt, must be part of the debtor's team.¹

"Cart" ordinarily means a two-wheeled vehicle, but under the rule requiring a liberal construction of exemption laws it has been held to include a large wagon with four wheels, when used for the same purpose for which the two-wheeled vehicle is ordinarily used.²

Harness has been held not exempt unless so provided by statute.³ Under a statute granting exemption to two horses or two mules and their harness, the debtor is not entitled to an exemption of more harness than will equip two such animals.⁴ The word "harness" as used in such a statute has sufficient flexibility to include saddles and similar equipment.⁵

The exemption of vehicle and harness as necessary for the enjoyment of an exempt horse is discussed infra § 57, and the exemption of wagons and harness as tools and implements supra § 46. Persons entitled to privilege are considered supra §§ 11-25.

(2) Motor Vehicles

Where the exemption statute expressly or impliedly so provides, an automobile or other motor vehicle may be exempt.

In the absence of a statute so providing, an automobile used by the debtor in his business or occupation is not exempt,⁶ and likewise exemption is denied under the express terms of some statutes to automobiles and other motor vehicles.⁷ Where, however, a statute either expressly or impliedly so provides, an automobile or other motor vehicle may be exempt.⁸

94. Iowa.—Corp v. Griswold, 27 Iowa 379.

25 C.J. p 59 note 93.

95. Mich.—Hogan v. Neumeister, 76 N.W. 65, 117 Mich. 498.

96. Minn.—Shadewald v. Phillips, 75 N.W. 717, 72 Minn. 520.

25 C.J. p 57 note 66.

97. Minn.—Kimball v. Jones, 43 N.W. 74, 41 Minn. 318.

25 C.J. p 57 note 67.

98. Cal.—Quigley v. Gorham, 5 C. 418, 63 Am.D. 139.

Buggy

Under this theory a buggy is held not exempt from execution.

Kan.—Gordon v. Shields, 7 Kan. 320.

25 C.J. p 58 note 69.

Express wagons

A statute still further restricting the exemption to "express wagons" has been construed to allow an exemption of any vehicle suitable for carrying luggage even though it is not of the ordinary express wagon type of construction.

Me.—Walker v. Carlin, 34 A. 29, 88 Me. 302.

25 C.J. p 58 note 71.

Hearse

The requirement that the vehicle be for the transportation of goods, in order to be exempt, is construed to include a hearse.

Wis.—Spikes v. Burgess, 27 N.W. 184, 65 Wis. 428.

25 C.J. p 58 note 70.

99. Me.—Smith v. Chase, 71 Me. 164.

25 C.J. p 58 note 72.

1. N.Y.—Brown v. Davis, 9 Hun 43 —Drains v. Prosser, 32 Barb. 290.

2. Ala.—Favers v. Glass, 22 Ala. 621, 58 Am.D. 272.

Tenn.—Webb v. Brandon, 4 Heisk. 285.

25 C.J. p 58 note 74.

3. La.—Green v. Traylor, 77 So. 127, 142 La. 492.

4. Cal.—Security-First Nat. Bank v. Pierson, 38 P.2d 784, 2 C.2d 63.

5. Cal.—Security-First Nat. Bank v. Pierson, supra.

6. Ariz.—Standard Sanitary Mfg. Co. v. Priser, 31 P.2d 497, 43 Ariz. 352 —Mack v. Boots, 239 P. 794, 29 Ariz. 116—Meyers v. Rosenzweig, 232 P. 886, 27 Ariz. 286.

7. Okl.—First State Bank of Perkins v. Pulliam, 239 P. 595, 112 Okl. 22.

Ambulance hearse held motor vehicle.

Okl.—Turner v. Brown, 173 P.2d 943, 197 Okl. 638.

8. Mich.—Youdan v. Kelley, 255 N.W. 342, 267 Mich. 616.

Car and trailer

Where bankrupt earned livelihood by working in harvest fields and doing odd jobs in the back country, automobile house trailer in which he and his family lived was exempt under Oregon laws as being necessary as a means of transportation in enabling bankrupt to carry on his trade or occupation, under evidence indicating that total value of trailer and automobile used to draw it did not exceed four hundred dollars.

U.S.—In re Williams, D.C.Or., 24 F. Supp. 440.

"Pick-up truck" was not exempt to widow and minor child as an "implement of husbandry," but was exempt as an "automobile," even though on occasion it might be used for hauling.

In some jurisdictions it has been held that an automobile is not exempt within a statute exempting a wagon,⁹ under a statute specifically relating to horse drawn vehicles,¹⁰ or under a statute exempting a team¹¹ or work cattle;^{11.5} but it has been held that a motor vehicle serving the purpose of a wagon is included within the term "wagon."¹² An automobile has been held to be exempt under statutes exempting a carriage¹³ or a "wagon or other vehicle."¹⁴

In some jurisdictions an exemption of one horse, with vehicle and harness, or other equipments, is held to include an automobile,¹⁵ but in other jurisdictions such an exemption is held not to include an automobile.¹⁶ A statute providing that two

horses and one wagon are exempt from forced sale has been held to exempt a truck and trailer,^{16.5} and even two trailers have been held exempt.^{16.10} An automobile has also been held to be exempt under a statute exempting "tools, team, and implements used for purpose of carrying on business."¹⁷ Under a statutory exemption of a team and wagon or other vehicle, the debtor is not entitled to an exemption of a wagon, truck, and automobile,¹⁸ and, if the debtor claims a team and harness exempt, an automobile is not also exempt.¹⁹

Tools and implements. In some jurisdictions an automobile has been held not to be exempt under a statute exempting necessary tools and implements of trade,²⁰ but in other jurisdictions it has been held

Tex.—Hickman v. Hickman, Civ.App., 228 S.W.2d 565, affirmed 234 S.W. 2d 410, 149 Tex. 439.

9. Minn.—Poznanovic v. Maki, 296 N.W. 415, 209 Minn. 379. 25 C.J. p 58 note 76.

"At the time of the enactment of the statute . . . the automobile was neither known nor even anticipated in the dreams of the layman or most fanciful and resourceful lawmaker. And although statutes couched in general terms, creating rights and liabilities in respect to known and existing facts and conditions, are often construed to apply to and embrace somewhat dissimilar yet analogous facts or conditions subsequently arising and coming into bearing . . . we discover no sufficient basis for the conclusion that the automobile is so related in character and general use to the wagon as to come within the exemption purposes of this statute."

Minn.—Whitney v. Welnitz, 190 N. W. 57, 58, 153 Minn. 162, 28 A.L.R. 68.

10. Cal.—Crown Laundry & Cleaning Co. v. Cameron, 179 P. 525, 39 C.A. 617.

Hack for one or two horses

A statute exempting "one hack or carriage, for one or two horses, by use of which a . . . hackman . . . habitually earns his living" does not include an automobile taxicab. U.S.—In re Wilder, D.C.Cal., 221 F. 476.

Motor driven trucks

Statute enacted prior to advent of motor vehicles which exempted from attachment two horses and one cart, dray, or a truck did not include trucks driven by motor power.

Idaho.—Young v. Wright, 290 P.2d 1086, 77 Idaho 244.

11. N.Y.—Northern New York Trust Co. v. Bano, 273 N.Y.S. 694, 151 Misc. 684.

Tractor and trailer

Statute exempting to a teamster or drayman his team and a vehicle without reference to money value, when construed with monetary value placed on exemption to a lighterer and on exemption to a logger, whose equipment, at time of enactment of statute, was then capable of being extremely costly in comparison with a drayman's or teamster's equipment, does not indicate legislative intent to exempt to a drayman or teamster as a team and vehicle, any motorized or self propelled vehicle, regardless of how expensive or expansive, and a combination tractor and trailer valued at from four thousand dollars to four thousand five hundred dollars is not included within the language "team . . . with harness, yoke, one wagon, truck, cart, or dray" as appearing in exemption statute.

U.S.—In re Rash, D.C.Wash., 81 F. Supp. 389.

11.5 Wash.—Grimm v. Naugle, 208 P. 2d 123, 34 Wash.2d 75.

"It would seem that if the legislature had desired to substitute modern appliances for the terms used in the statute, it has had ample opportunity to do so."

Wash.—Grimm v. Naugle, supra.

12. U.S.—In re Thompson, D.C.Tex., 103 F.Supp. 942.

Kan.—Foster v. Foster, 61 P.2d 1350, 144 Kan. 528.

Mont.—McMullen v. Shields, 29 P.2d 652, 96 Mont. 191.

Tex.—Malone v. Kennedy, Civ.App., 272 S.W. 509—Stichter v. Southwest Nat. Bank, Civ.App., 258 S.W. 223.

"Farm wagon," as used in exemption law, includes wagon moved by mechanical means.

Colo.—People v. Corder, 259 P. 613, 82 Colo. 318.

13. U.S.—In re Thompson, D.C.Tex., 103 F.Supp. 942.

Tex.—Willis v. Schoelfan, Civ.App., 206 S.W.2d 283—Lanling v. Langford

Inv. Co., Civ.App., 36 S.W.2d 1079 —Stichter v. Southwest Nat. Bank, Civ.App., 258 S.W. 223.

25 C.J. p 58 note 78.

Pickup truck

A pickup truck used in traveling to and from town was properly awarded to widow and minor daughter of deceased owner as exempt "carriage."

Tex.—Hickman v. Hickman, 234 S.W. 2d 410, 149 Tex. 439.

14. Iowa.—First Nat. Bank v. Larson, 239 N.W. 134, 213 Iowa 468—Shepard v. Findley, 214 N.W. 676, 204 Iowa 107—Wearer v. Florke, 192 N.W. 23, 195 Iowa 1085—Waterhouse v. Johnson, 189 N.W. 669, 194 Iowa 343—Lames v. Armstrong, 144 N.W. 1, 162 Iowa 327, 49 L.R. A., N.S., 691, Ann.Cas.1916B 511.

15. Utah.—Spangler v. Corless, 211 P. 692, 61 Utah 88, 28 A.L.R. 72.

16. Cal.—Conlin v. Traeger, 258 P. 433, 84 C.A. 730.

16.5 Tex.—McMillan v. Dean, Civ. App., 174 S.W.2d 737, error refused.

16.10 Tex.—Hickman v. Hickman, Civ.App., 228 S.W.2d 565, affirmed 234 S.W.2d 410, 149 Tex. 439.

17. Taxi driver

Automobile used by taxi driver held exempt.

Wyo.—Pellish Bros. v. Cooper, 38 P. 2d 607, 47 Wyo. 480.

18. Iowa.—Farmers' Elevator & Live Stock Co. v. Satre, 195 N.W. 1011, 196 Iowa 1076.

19. Iowa.—Wertz v. Hale, 234 N.W. 534, 212 Iowa 294.

20. Ohio.—Gordon v. Brewer, 166 N. E. 915, 32 Ohio App. 199.

25 C.J. p 58 note 75.

Ambulance hearse

Undertaker's ambulance hearse is not exempt from execution under statutory provision that all "tools, apparatus and books" belonging and used in any trade or profession, being the property of the head of a

that an automobile or motor vehicle may be exempt as a tool or implement,²¹ or as a necessary tool and instrument,²² used in trade within the meaning of the exemption statute. The fact that the debtor is engaged in several enterprises from the combined operations of which he gains his living does not deprive him of his right to the exemption of a motor truck used in one of the enterprises.²³

It has been stated that the general test which should be applied is whether the motor vehicle is such a tool or instrument as is recognized as being

necessary in the exercise of the general calling, trade, or profession in which the individual is engaged, and by which he makes his living.^{23.5}

§ 55. — Use and Necessity

Where a statute so requires, the vehicle or animal to be exempt must be used for a particular use, and under some statutes it must be necessary to the debtor's business or occupation.

When a statute exempts a particular animal, vehicle, or team absolutely, and without restriction as

family, shall be exempt from execution.

Okl.—Turner v. Brown, 173 P.2d 943, 197 Okl. 638.

Electrical contractor and repairman

Automobile of an electrical contractor and repairman was not exempt from execution as a "tool" or "implement" necessary to carry on his trade.

Ariz.—Standard Sanitary Mfg. Co. v. Priser, 31 P.2d 497, 43 Ariz. 352.

Not working tool

(1) Automobile truck is not exempt from execution as "working tool," since truck is a "machine." N.Y.—Northern New York Trust Co. v. Bano, 273 N.Y.S. 694, 151 Misc. 684.

(2) Trucker's large motor propelled trucks and trailers were not "tools or apparatus of a trade." Tex.—McMillan v. Dean, Civ.App., 174 S.W.2d 737, error refused.

Veterinary and oil scout

Ford car used by "veterinary" and "oil scout" is not within purview of a statute providing that all tools, apparatus and books belonging to and used in any trade or profession, being property of householder and head of family, shall be exempt from attachment, execution, etc.

Okl.—First State Bank of Perkins v. Pulliam, 239 P. 595, 112 Okl. 22.

21. Colo.—Penrose v. Stevens, 65 P. 2d 697, 100 Colo. 83.

Kan.—Foster v. Foster, 61 P.2d 1350, 144 Kan. 528.

Painter

For purposes of statute granting exemption from execution for the "tools and instruments of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business," a painting contractor's panel truck which he used to carry paint, tarps, ladders and brushes, and certain portions of which he had especially adapted to such uses, was within the quoted definition.

U.S.—In re Bailey, D.C.Neb., 172 F. Supp. 925.

Farmer

Automobile used by farmer as im-

plement in conducting farming operations is exempt from levy or execution.

Kan.—Printz v. Shepard, 276 P. 811, 128 Kan. 210.

Foreman of construction company

Where an automobile, owned by the foreman of a construction company, was used by him on his business errands about town, and to carry the workmen over whom he was foreman to and from their employment on out-of-town jobs, and also to carry their tools, such automobile should be considered as a "necessary tool and implement" of his trade or business.

Kan.—Dowd v. Heuson, 252 P. 260, 122 Kan. 278, 52 A.L.R. 823.

Fuel dealer

Automobile truck, used in business of fuel dealer, is exempt from execution as tool or "implement." Kan.—Federal Agency Inv. Co. v. Baker, 252 P. 262, 122 Kan. 460.

22. U.S.—In re Trotter, D.C.La., 97 F.Supp. 249.

La.—Ellis v. Malone, App., 69 So.2d 625.

Particular motor vehicles held exempt

(1) Bus used to transport school children.

La.—Hammer & Co. v. Johnson, 135 So. 77, 16 La.App. 580.

(2) Motor truck, used by farm lessee to transport slaughtered beves to market.

La.—A. Wilbert's Sons Lumber & Shingle Co. v. Ricard, 119 So. 411, 167 La. 416.

(3) Truck used for personal transportation and for transportation of power saw, axes and fuel to logging areas varying from fifteen to thirty-five miles distance from his home, and lumber company, which paid debtor on the basis of a certain amount per log, employed only such men as were able to furnish their own transportation.

La.—Ellis v. Malone, App., 69 So.2d 625.

(4) Practicing physician's automobile.

La.—Webb v. Larcade, 135 So. 262, 17 La.App. 21.

(5) Automobile owned by independent insurance adjuster.

La.—Gunn v. Credit Service Corp., App., 46 So.2d 628.

(6) Automobile used by small scale operator in logging business to travel about country to find and purchase merchantable timber, to find buyers, and to haul crews of cutters and loaders to and from sites of logging operations.

La.—Strozier v. Long, App., 40 So.2d 254.

(7) Automobile, which was indispensable in carrying on his work as sales manager in certain areas, because it was a policy of employer not to furnish sales managers with automobiles.

U.S.—In re Trotter, D.C.La., 97 F. Supp. 249.

Particular motor vehicles held not exempt

(1) Traveling insurance agent's automobile held not exempt from execution as "necessary tool or instrument" for exercise of calling.

La.—Morris-Wilson Buick Co. v. Robertson, App., 146 So. 339.

(2) Automobile used by railroad car repairer for his and his employer's convenience.

La.—Holt v. Flournoy, App., 24 So.2d 171.

(3) Where night marshal of town one mile square was required to patrol widely separated sections as well as remainder of town, and town required individual employed as night marshal to own an automobile, although use of automobile might be necessary for efficient performance of marshal's duties, ownership of automobile was not necessary for exercise of marshal's calling or trade by which he makes a living, and his automobile was not exempt.

La.—Britt v. Merritt, App., 56 So.2d 766.

23. La.—A. Wilbert's Sons Lumber & Shingle Co. v. Ricard, 119 So. 411, 167 La. 416.

23.5 La.—Holt v. Flournoy, App., 24 So.2d 171.

to persons engaged in any particular occupation, or as to the use, any person owning such property may claim it as exempt, whatever the purpose for which he uses it.²⁴ Where, however, the statute exempts animals or vehicles used for a particular purpose, to be entitled to the exemption the use of the property by the debtor must have been such as to come within the terms of the statute.²⁵ Where exemption of a horse as a work horse is sought, in the absence of statutory requirements the horse need not be used in a particular form of service, as with a plow or cart. If he is used in any kind of work, he is a work horse within the statute.²⁶

A horse, even though a work horse, bought and kept for speculative purposes, is not being used by

the debtor as a work horse, and so is not exempt as such,²⁷ but the mere fact that one having an exempt animal, vehicle, or team which he uses in his occupation offers it for sale will not deprive him of the right to the exemption.²⁸ If the horse is bought and kept primarily for speculative purposes, the fact that the debtor, until he makes a sale, uses the horse as a work horse in his business does not make the animal exempt.²⁹ A team kept for pleasure merely is generally not exempt,³⁰ and, where the team is kept principally for pleasure and only occasionally used to carry the debtor to his business, the team is not exempt as work horses under the statute.³¹

Some statutes require in express terms that the property shall be used, or habitually used, by the

24. Kan.—Young v. Bell, 40 P. 675, 1 Kan.App. 265.

25 C.J. p 59 note 95.

25. Minn.—Fullerton Lumber Co. v. Carstens, 80 N.W.2d 1, 248 Minn. 254.

House-trailer not exempt as vehicle

A house-trailer placed on blocks alongside owner's house and used as den, office, and library was not exempt from execution as a "vehicle." Tex.—Clark v. Vitz, Civ.App., 190 S. W.2d 736, error refused.

Farm wagon

Automobile held not exempt from execution as "farm wagon" where evidence did not show that it was used as such. Colo.—People v. Corder, 15 P.2d 621, 91 Colo. 383.

Implication

Sometimes such conditions are impliedly imposed.

Ohio.—Burgess v. Everett, 9 Ohio St. 425.

"Other actual use"

(1) Where a statute exempts a horse "when required for farming or teaming purposes, or other actual use," the words "other actual use" are to be taken as extending the use beyond farming or teaming. N.H.—Towne v. Marshall, 13 A. 648, 64 N.H. 460—George v. Fellows, 59 N.H. 206.

25 C.J. p 60 note 22.

(2) Such words, however, are to be taken as limiting that extension to other uses of a kindred nature. N.H.—Somers v. Emerson, 58 N.H. 48.

25 C.J. p 60 note 23.

Team work

Where a statute exempts a horse "kept and used for team work," the horse, to be exempt, must be kept and used for this purpose. U.S.—In re Libby, D.C.Vt., 103 F. 776. 25 C.J. p 60 note 21.

Use outside of state

The fact that an animal or team

is used outside the state does not defeat the right to claim it as exempt. Iowa.—Whicher v. Long, 11 Iowa 48.

Working cattle

Likewise, a bull if used for work is within a statute exempting "working cattle," or "work-oxen."

Me.—Bowzey v. Newbegin, 48 Me. 410.

Okl.—Nelson v. Fightmaster, 44 P. 213, 4 Okl. 38.

Work horse

(1) If the statute in terms or in effect requires a horse to be a work horse, to be exempt it must be used for work.

Iowa.—Smith v. Dayton, 62 N.W. 650, 94 Iowa 102. 25 C.J. p 59 note 98.

(2) Its character as a work horse may be inferred from its adaptability for that purpose, without direct evidence of its actual use.

Miss.—Matthews v. Redwine, 25 Miss. 99. 25 C.J. p 59 note 99.

(3) By the weight of authority, young and unbroken animals, as colts and young steers, may be claimed as exempt under such a statute exempting work animals, if they are in good faith kept and intended by the debtor for working animals when broken and capable of work. It is not necessary that they shall be worked or capable of work at the time when they are levied on.

Minn.—Berg v. Baldwin, 18 N.W. 821, 31 Minn. 541.

25 C.J. p 59 note 2.

(4) As to the last proposition, however, there is authority to the contrary.

Vt.—Sullivan v. Davis, 50 Vt. 648. 25 C.J. p 59 note 3.

(5) A colt has been held not to be exempt under circumstances showing that it had never been used, that the debtor had other horses up to the statutory limit which he used in his business, and where there was no

evidence showing that the owner intended to use the colt in a team.

Mich.—Hogan v. Neumeister, 76 N. W. 65, 117 Mich. 498.

26. Ala.—Noland v. Wickham, 9 Ala. 169, 44 Am.D. 435.

25 C.J. p 59 note 5.

Any kind of work means any kind of ordinary work for which a work horse is used.

Cal.—Robert v. Adams, 38 C. 383, 99 Am.D. 413.

Stallion

(1) A stallion kept solely for stud service is not exempt as a work horse.

Cal.—Robert v. Adams, supra.

25 C.J. p 60 note 7.

(2) But if in addition to the stud service he is used for work he may be exempt as a work horse.

Ala.—Allman v. Gann, 29 Ala. 240.

Cal.—McCue v. Tunstead, 4 P. 510, 65 C. 506.

(3) The use for which the stallion is kept is a question of inference to be drawn by the jury on a survey of the evidence.

Ala.—Allman v. Gann, supra.

27. Mich.—Boyle v. Walsh, 63 N.W. 435, 105 Mich. 237.

Or.—Gollnick v. Marvin, 118 P. 1016, 60 Or. 312, Ann.Cas.1914A 243.

28. Question is whether, having bought the horse for personal use, he holds it later for sale or speculation rather than for the particular use for which alone it is exempt. If he does, and it is not in fact needed or kept for such use it is not exempt.

Mich.—O'Donnell v. Segar, 25 Mich. 367.

29. Mich.—Boyle v. Walsh, 63 N.W. 435, 105 Mich. 237.

30. Ill.—Washburn v. Goodheart, 88 Ill. 229.

25 C.J. p 60 note 17.

31. Miss.—Tishomingo Saving Institution v. Young, 40 So. 9, 87 Miss. 473, 112 Am.S.R. 454, 3 L.R.A., N.S., 693, 6 Ann.Cas. 776.

debtor for the purpose of earning a living for himself and his family, and in such a case such use has been held necessary,³² but it has also been held that the use need not be required or necessary to enable the person to earn his living and that it is enough if the person actually does use the property for the purpose for which the exemption is granted.^{32.5} Sometimes this condition has been implied when not expressed,³³ but not under statutes giving exemptions in absolute terms, where possession alone, independent of the use of the article, is sufficient ground on which to base the debtor's claim for exemption.³⁴ "Use to support family" in a statute exempting oxen or horses, "used by the debtor in obtaining the support for his family," is a general requirement and restricted to no particular mode of use. The requirement is met where the team is hired to others for a compensation which goes into the general fund to support the family, as well as where the debtor personally uses it, but a team kept for pleasure merely is not within either the letter or the spirit of the statute.³⁵

When the statute exempts the property only when used for work, or for teaming, or to earn a living, etc., it is not necessary that it shall be used exclusively for this purpose. Occasional use for other purposes, therefore, will not defeat the right of exemption.³⁶

It is not necessary, under such requirements, that the property shall be used for the specified purpose at the very time when it is levied on and claimed as exempt.³⁷ An honest intention to devote the property to such use within a reasonable time is sufficient.³⁸ The application to the use, however, must be intended within a reasonable time of the levy. A possible application at some indefinite and uncertain time in the future is not sufficient,³⁹ and where there is no evidence of an intention to use them the animal will not be exempt.⁴⁰ On the other hand, where the use of the animal or vehicle at the time of levy is such as to render it exempt, the fact that it was originally purchased for a nonexempt use is immaterial.⁴¹

Necessity. The proper test, under a statute providing for the exemption of any automobile used or kept for the purpose of carrying on the debtor's trade or business, is whether an automobile is necessary for the owner to pursue successfully his vocation.⁴² Where the statute requires that the work animals or vehicle shall be necessary to the debtor, it does not mean that they must be indispensable, it being sufficient if they are reasonably necessary, convenient, or suitable.⁴³ Where the owner would find it impossible or impracticable to do his work without the aid of the conveyance, whether that aid is invoked after he arrives at his place of operation or whether he requires it in transporting himself thereto, the automobile is exempt.⁴⁴

32. Cal.—Murphy v. Harris, 19 P. 377, 77 C. 194.

25 C.J. p 60 note 24.

Young colts cannot be claimed by a farmer as exempt under a statute exempting horses by which a farmer habitually earns his living. Cal.—Murphy v. Harris, supra.

32.5 Iowa.—Kelly v. Degelau, 58 N. W.2d 374, 244 Iowa 873, 37 A.L.R. 2d 709.

Transportation

The phrase "by use of which he habitually earns living" includes use to transport laborer to his place of employment where he can work for the earnings that supply the living for himself and the family he heads; and where automobile was used habitually by judgment debtor as a conveyance to his place of work, which was a mile and a quarter from his home, said automobile was exempt from execution even though debtor lived on bus line which passed his place of employment and could have conveniently ridden bus to work, since the questions of the balance of convenience and economic necessity are not important.

Iowa.—Kelly v. Degelau, supra.

33. Ohio.—Burgess v. Everett, 9 Ohio St. 425.

34. Kan.—Nuzman v. Schooley, 12 P. 829, 36 Kan. 177.

35. Ill.—Washburn v. Goodheart, 88 Ill. 229.

36. Iowa.—Kelly v. Degelau, 58 N. W.2d 374, 244 Iowa 873, 37 A.L.R. 2d 709.

Wis.—Julius v. Druckrey, 254 N.W. 358, 214 Wis. 643, 94 A.L.R. 293. 25 C.J. p 61 note 32.

37. Or.—Childers v. Brown, 158 P. 166, 81 Or. 1, Ann.Cas.1918D 170. 25 C.J. p 61 note 33.

Awaiting repairs

The right of a debtor to claim a wagon as necessary in earning support for himself and family is not affected by the fact that at the time of levy it has been for some time at a shop awaiting repairs, the debtor in the meantime using a borrowed wagon.

N.Y.—Wolf v. Farley, 16 N.Y.S. 168.

38. Or.—Gollnick v. Marvin, 118 P. 1016, 60 Or. 312, Ann.Cas.1914A 243.

25 C.J. p 61 note 34.

Little opportunity to use

One who procures a team, or part of a team intending at the time of the levy to complete it for use, in good faith, to earn a livelihood, has it in such "habitual use" as to exempt it from levy, whether he has had the opportunity to use it much or little.

Iowa.—Bevan v. Hayden, 13 Iowa 122.

39. N.H.—Jaquith v. Scott, 63 N.H. 5, 56 Am.R. 476.

40. Mich.—Hogan v. Neumeister, 76 N.W. 65, 117 Mich. 498. 25 C.J. p 61 note 36.

41. Iowa.—Farner v. Turner, 1 Iowa 53.

25 C.J. p 60 note 19.

42. Wis.—Julius v. Druckrey, 254 N. W. 358, 214 Wis. 643, 94 A.L.R. 293.

43. Wis.—Corpus Juris cited in Julius v. Druckrey, 254 N.W. 358, 362, 214 Wis. 643, 94 A.L.R. 293.

25 C.J. p 61 note 40.

44. Where laborer was so crippled that it took him twenty to thirty minutes to walk half a mile to work at expense of severe pain, and he was unable to pay for other trans-

§ 56. Property in Lieu of Specific Exemptions

Under some statutes the exemptionist may select other property, to a particular value, in lieu of property specifically exempt.

In the absence of a provision in the statute other property cannot be selected in lieu of property specifically exempted.⁴⁵ A statute which gives the debtor the right to exempt other property in lieu of articles specifically exempt gives the debtor the right to select any articles, provided his whole exemption does not exceed in value the statutory limit.⁴⁶ As long as the statutory limit is not exceeded, the exemptionist may select some articles from those as to which he is entitled to a specific exemption, and select other articles as to which he is not entitled to a specific exemption.⁴⁷

It is not necessary that he should own any of the articles specifically exempt under the statute in order to claim the benefits of other exemptions in lieu thereof.⁴⁸ Accordingly, a debtor who owns only a portion of such articles may select such portion as exempt, and, in addition thereto, any other property which, together with such portion, will not exceed the sum specified in the statute.⁴⁹ However, he must own the property which he claims, and he must own it at the time it is so claimed.⁵⁰

In the absence of other statutory restriction,⁵¹ statutes giving a debtor a right to select "other property" in lieu of property specifically exempted have been held to exempt money,⁵² and the right to the money exemption under an "other property"

statute is not curtailed by a statute in the same jurisdiction providing in express terms for a money exemption in a particular case.⁵³ A debtor entitled to a money exemption out of a fund in the hands of his assignee for the benefit of creditors is restricted to money which he owned or in which he had an interest at the time of the assignment, or at the farthest, to the proceeds for which the property was sold. The claim cannot be extended to money made by the assignee's care, management, and use of the assigned property.⁵⁴ The debtor may claim his exemption out of the rents and profits of a life estate appraised at less than the statutory amount.⁵⁵

Statutes in some jurisdictions exempt other personal property in lieu of provisions and provender not on hand. Under these statutes it is held that a debtor is restricted to an exemption in personal property in his possession and not seized.⁵⁶ Unless he has no other personal property which can be claimed,⁵⁷ he is not entitled to an exemption in personal property which has been seized on execution. Under this rule in order to defeat a claim of exemption in lieu of necessary provisions for the debtor and his family, the debtor must have in his possession property which he can use in order to obtain the necessary provisions. It is not enough to show that he has recovered a judgment for money of an amount sufficient for such purpose.⁵⁸ Improvements erected by a debtor on the land of his wife are not personal property which may be set apart by the debtor as exempt in lieu of provisions and provender not on hand.⁵⁹

portation, his automobile would be exempt.

Wis.—Julius v. Druckrey, 254 N.W. 358, 214 Wis. 643, 94 A.L.R. 293.

45. U.S.—In re Scheier, D.C.Wash., 188 F. 744.

Wash.—Grimm v. Naugle, 208 P.2d 123, 34 Wash.2d 75.
25 C.J. p 84 note 98.

46. Miss.—Hartfield v. Anderson, 126 So. 830, 156 Miss. 724.

Wash.—Pacific Coast Adjustment Co. v. Reese, 65 P.2d 1057, 189 Wash. 347.

25 C.J. p 84 notes 99, 1.

Intangible property

Under Illinois exemption statute providing that debtor's exemption, if not selected from household furniture, may in the alternative be taken from other property, selection of exempt property was not intended to be limited to tangible property, and may include intangible property.

U.S.—In re Feilchenfeld, C.C.A.Ill., 99 F.2d 710.

47. Miss.—Hartfield v. Anderson, 126 So. 830, 156 Miss. 724.

48. Mo.—State v. Beamer, 73 Mo. 37—State v. Farmer, 21 Mo. 160.

49. Mo.—Mahan v. Scruggs, 29 Mo. 282.

50. Property fraudulently conveyed

Where the debtor has fraudulently conveyed property, he cannot afterward make a selection of it in lieu of property specifically exempt and claim it to be exempt under statute, even though the conveyance cannot be held as fraudulent as against property at that time exempt.

Mo.—State v. Freeman, 158 S.W. 726, 173 Mo.App. 294.

51. Money due as wages

Under Remington & B.Code, Wash., § 703, as amended by L.1907 p 477, declaring that no money due as wages shall be exempt from garnishment in lieu of other property, debtor cannot be allowed exemption out of money due as wages in lieu of live stock

specifically exempted to head of family by § 563 subd 4.

U.S.—In re French, D.C.Wash., 250 F. 644.

52. Wash.—Pacific Coast Adjustment Co. v. Reese, 65 P.2d 1057, 189 Wash. 347—Dean v. Opdycke, 276 P. 545, 151 Wash. 504.

25 C.J. p 85 note 8.

53. Md.—Fowler v. State, 58 A. 444, 99 Md. 594.

25 C.J. p 85 note 9.

54. Pa.—Appeal of Bausman, 90 Pa. 178.

25 C.J. p 85 note 11.

55. Pa.—Buchi v. Pund, 9 Pa.Dist. 446, 24 Pa.Co. 335.

Sener v. Scherff, 10 Pa.Co. 529.

56. Ky.—Turner-Looker Co. v. Garvey, 43 S.W. 202, 19 Ky.L. 1205.

25 C.J. p 85 note 14.

57. Ky.—Turner-Looker Co. v. Garvey, supra.

58. Ky.—Braswell v. Rehko, 42 S. W. 916, 19 Ky.L. 1037.

59. Ky.—Lawson v. S. T. Barlow Co., 51 S.W. 314, 21 Ky.L. 308.

Under a statute providing that a husband and wife, living together, and not the owners of a homestead, may in lieu thereof hold exempt from levy and sale real and personal property, to be selected by them not exceeding a certain sum in value, the exemptions should be selected, and received in the form of personal property, at values fixed by appraisement, and it is not proper, when a selection of exempt articles is not rendered impossible by reason of liens, to allow an exemption of the statutory limit in money on sale of the personal property.⁶⁰

§ 57. Property Necessary to Enjoyment of Exempt Property

Property necessary to the enjoyment of exempt property has also been held to be exempt.

It has been held that property essential to the

beneficial enjoyment of property specifically exempted is also exempt.⁶¹ There is authority for holding a rope,⁶² a saddle and bridle,⁶³ and even a wagon and harness⁶⁴ exempt as necessary to the enjoyment of an exempt horse. Where the exemption of a horse is held to carry with it by implication the exemption of other articles necessary to its enjoyment, it is sufficient if they are reasonably necessary and convenient. It is not required that they should be indispensable.⁶⁵

A statute exempting "beasts of the plow" has been held not to exempt a wagon or harness,⁶⁶ and, where a statutory or constitutional provision is so far specific as to include the draft animal and wagon, an omission of the harness is a sufficient indication of the legislative intent to preclude its exemption by judicial construction.⁶⁷

3. PROCEEDS AND PRODUCT OF EXEMPT PROPERTY

§ 58. Proceeds

In some jurisdictions where the proceeds of exempt property are invested in land claimed as homestead property, the land is exempt.

In some jurisdictions, where proceeds of exempt property are invested in land claimed as homestead property, the land is exempt.⁶⁸ A combined result of the proceeds of exempt property and the labor of the debtor is not subject to execution,⁶⁹ unless the value of the labor which is not exempt can be separated from the rest.⁷⁰ Under some statutes the proceeds of exempt property are expressly exempted when held in custodia legis.^{70.5}

For a discussion of the duration of the exemption of, and the exemption of property purchased with, the proceeds of life insurance, see *supra* § 41,

pensions and bounties, see *supra* § 43, wages, salary, and earnings, see *supra* § 50, and workmen's compensation awards, see *supra* § 51.

§ 59. — Sale or Exchange

When exempt property is exchanged for like property, the property received in exchange is exempt, but where exempt property is sold and the proceeds used in the purchase of nonexempt property, or where exempt property is exchanged for nonexempt property, the property so acquired is usually not exempt. On voluntary sale of exempt property, the proceeds are generally held not to be exempt.

When exempt personal property is exchanged for property in kind or like character, the property received in exchange is also exempt.⁷¹ On the other hand, where the debtor voluntarily exchanges property specifically exempted for property that is not

60. U.S.—*In re Crum*, D.C.Ohio, 221 F. 729.

61. Minn.—*Thompson v. Peterson*, 142 N.W. 307, 122 Minn. 228. 25 C.J. p 85 note 20.

62. Tex.—*Dearborn v. Phillips*, 21 Tex. 449.

63. Tex.—*Cobbs v. Coleman*, 14 Tex. 594.

64. Iowa.—*Krebs v. Nicholson*, 91 N.W. 923, 118 Iowa 134, 96 Am.S.R. 370. 25 C.J. p 85 note 26.

65. Cal.—*In re Bowman*, 23 P. 375, 83 C. 153. 25 C.J. p 86 note 27.

66. N.H.—*Somers v. Emerson*, 58 N. H. 48. Vt.—*Carty v. Drew*, 46 Vt. 346.

67. La.—*Green v. Traylor*, 77 So. 127, 142 La. 492.

N.H.—*Somers v. Emerson*, 58 N.H. 48.

25 C.J. p 85 note 22. Exemption of vehicles and harness generally see *supra* § 54.

68. Ga.—*Johnson v. Redwine*, 33 S. E. 676, 105 Ga. 449.

Sale or exchange generally see *infra* § 59.

69. Ga.—*Reed v. Holbrook*, 39 S.E. 445, 113 Ga. 1168.

Property purchased with earnings see *supra* § 50.

70. Ga.—*Brand v. Clements*, 42 S. E. 711, 116 Ga. 392, 94 Am.S.R. 133.

70.5 Kan.—*De Priest v. Ransom*, 193 P.2d 191, 165 Kan. 147.

71. Iowa.—*Booth v. Martin*, 139 N. W. 888, 158 Iowa 434. 25 C.J. p 82 note 50.

Allotment

In some jurisdictions, under statutes requiring an allotment of exempt property and the recording of a list of the property allotted, the rule is qualified to the extent that the property received in exchange must itself be allotted to the debtor as exempt, in the same way as the original property, the allotment in either case being a necessary condition precedent to the exemption. N.C.—*Lloyd v. Durham*, 60 N.C. 282.

Part of consideration

The circumstance that the exempt property given in exchange is only a part of the consideration will not affect the debtor's claim to exemption in the property received in ex-

exempt, or sells property specifically exempted, and purchases property that is not exempt, the property so acquired is not exempt.⁷²

This rule does not apply, of course, where a statute does not restrict the exemption to any particular articles, but allows the debtor to claim and select a certain amount of personal property. In such a case where a debtor has selected property as exempt, he may afterward make any use of it he chooses, and anything he may get in exchange for it will be exempt to the amount allowed by the statute.⁷³ Also, where the statute does not exempt specific articles, but exempts money to a certain amount, the rule does not always apply.⁷⁴ Where none of the debtor's exempt property, already set apart to him as exempt, is given in exchange for the property received, but it is purchased on credit, the fact that later payments on account are made out of earnings secured with the use of the purchased property will not make it exempt.⁷⁵

When exempt property is voluntarily sold for

money, it is generally held that the money received is not exempt;⁷⁶ nor is a claim for the purchase money exempt;⁷⁷ nor will exemption be allowed in a judgment recovered for exempt property sold voluntarily, even where there is a statute providing that an exemption given in property shall apply also to the judgment recovered for its value when wrongfully seized on execution by a creditor.⁷⁸ Likewise, it has been held that if a debtor mortgages property specifically exempted, and it is sold under the mortgage, leaving a surplus, he cannot claim such surplus as exempt.⁷⁹ A wife who is entitled to her husband's exemption is also bound by this rule, and cannot claim as exempt money received from the sale of property, which itself would have been exempt if she had retained it in her possession.⁸⁰

On the other hand, where the owner of exempt property sells it for money, intending to invest the proceeds in other exempt property of like character, the money under these circumstances is held, in some jurisdictions, to be exempt.⁸¹ This qualifica-

change, and he will be entitled to his exemption to the extent that the consideration given represents exempt property.

S.C.—Bridgers v. Howell, 3 S.E. 790, 27 S.C. 425.
25 C.J. p 82 note 54.

72. Kan.—Corpus Juris cited in Independence Savings & Loan Ass'n v. Sellers, 88 P.2d 1059, 1062, 149 Kan. 652—Corpus Juris cited in Pefly v. Reynolds, 222 P. 121, 122, 115 Kan. 105.

Minn.—Corpus Juris cited in Ross v. Simser, 258 N.W. 582, 583, 193 Minn. 407.

Tenn.—Ned Maxey & Son v. Tinsley, 67 S.W.2d 139, 167 Tenn. 128.

Tex.—Fairchild v. Davis, Civ.App., 295 S.W. 640, reversed on other grounds Teague v. Fairchild, Com. App., 15 S.W.2d 585.

25 C.J. p 82 note 57.

In Kentucky

(1) The text rule is followed in general.

Ky.—McLeod v. McLeod, 89 S.W. 199, 28 Ky.L. 284.

(2) A homestead, however, which is not exempt from liability for debts existing prior to its purchase will be, if it is shown that the homestead has been purchased with the proceeds of exempt personality.

Ky.—Nicholson v. Nicholson, 101 S.W. 985, 125 Ky. 629, 31 Ky.L. 217, 128 Am.S.R. 263.

Vanhook v. Robinson, 105 S.W. 129, 31 Ky.L. 1347—Musgrave v. Parish, 11 S.W. 464, 11 Ky.L. 998.

(3) It has also been held in this jurisdiction that notes received in

exchange for exempt property are not subject to the claims of the debtor's creditors.

Ky.—King v. Tompkins, 15 Ky.L. 29.

73. Ala.—Brewer v. Granger, 45 Ala. 580.

74. N.Y.—Yates County Nat. Bank v. Carpenter, 23 N.E. 1108, 119 N.Y. 550, 16 Am.S.R. 855, 7 L.R.A. 557.

Wygant v. Smith, 2 Lans. 185.

75. Ga.—Anderson v. Cook, 30 S.E. 884, 105 Ga. 496.

76. Cal.—Ex parte Smallbone, 106 P.2d 873, 16 C.2d 532, 131 A.L.R. 222.

Iowa.—Millsap v. Faulkes, 20 N.W. 2d 40, 236 Iowa 848, 161 A.L.R. 1252.

Tenn.—Ned Maxey & Son v. Tinsley, 67 S.W.2d 139, 167 Tenn. 128.

25 C.J. p 83 note 60.

A bank deposit, comprising proceeds of judgment debtor's voluntary sale of exempt agricultural implements and property, is not exempt from execution.

Tenn.—Saunders v. Moore, 110 S.W. 2d 1046, 21 Tenn.App. 375.

Personal property

On voluntary sale of exempt personal property, proceeds are not exempt.

Iowa.—First Nat. Bank v. Neve, 235 N.W. 561, 213 Iowa 344.

Statutes exempting proceeds of fire insurance on exempt property and proceeds of sale of homestead do not change rule as to proceeds of vol-

untary sale of other exempt property.

Wis.—Corpus Juris quoted in Gillett State Bank v. Knaack, 281 N.W. 913, 914, 229 Wis. 179, 119 A.L.R. 464.

77. Wis.—Corpus Juris quoted in Gillett State Bank v. Knaack, 281 N.W. 913, 914, 229 Wis. 179, 119 A.L.R. 464.

25 C.J. p 83 note 61.

78. Iowa.—Harrier v. Fassett, 9 N.W. 217, 56 Iowa 264.

79. Wis.—Roundy v. Converse, 37 N.W. 811, 71 Wis. 524, 5 Am.S.R. 240.

25 C.J. p 83 note 64.

80. Mo.—Steele v. Leonori, 28 Mo. App. 675.

81. Kan.—Tally v. Palmer, 210 P. 1104, 112 Kan. 391.

Tex.—Sorenson v. City Nat. Bank, Civ.App., 293 S.W. 638.

25 C.J. p 83 note 67.

Agreement as to status

Agreement that proceeds from sale of property claimed as exempt should take the place of the property sold and that sale should be without prejudice to the rights of anybody concerned was binding, and in view of such agreement, court's direction that proceeds be paid to widow and minor daughter of decedent was not objectionable on ground that sale was voluntary on part of widow.

Tex.—Hickman v. Hickman, 234 S.W. 2d 410, 149 Tex. 439.

Personal property

Proceeds of exempt personal property are exempt for reasonable time

tion of the rule, however, is based on the assumption that a reasonable time only is allowed for reinvestment, and that, under the circumstances of the case, the owner could not be expected reasonably to have carried out his declared intention at the time of his application for exemption.⁸² If an unreasonable time for reinvestment has elapsed, the proceeds of the sale will not be exempt.⁸³ The use by the debtor of a portion of the proceeds of the sale of his exempt property to pay debts and to maintain his family does not destroy his right to exemption in the balance which he intends to invest in exempt property.⁸⁴

Where a part of property is set apart as exempt at a certain valuation and afterward the entire property, both exempt and nonexempt, is sold for less than the inventoried value, claimant to the exemption agreeing thereto, it has been held that he is entitled only to his pro rata share of the proceeds.⁸⁵

§ 60. — Involuntary Conversion; Sale on Execution

The proceeds of an involuntary conversion of exempt property are generally held also to be exempt.

As a general rule, if exempt property is converted into property not exempt otherwise than by the voluntary act of the debtor, the other property may be claimed as exempt.⁸⁶ Thus, where exempt property is wrongfully taken from a debtor by proceedings in invitum, as on execution or attachment, or is injured or lost to him through any other wrongful act of another, a judgment recovered by him in an action for the trespass, conversion, or other

wrong, or the money collected on such a judgment, is exempt.⁸⁷ The same is true of a judgment under a statute making a creditor liable for evading the exemption by sending his claim out of the state for collection.⁸⁸

The judgment in such a case, or the proceeds thereof, however, will not be exempted indefinitely. The debtor must use the proceeds within a reasonable time to replace the exempt property of which he has been deprived.⁸⁹ The costs of the judgment are also held exempt,⁹⁰ but not the additional⁹¹ or exemplary⁹² damages given over and above the value of the thing converted. Where a debtor's exemption rights exist independently of any selection made by him, and the exempt articles are a part only of a large group of the same kind, it has been held that the debtor is entitled to the proceeds of the sale of those articles in the class which brought the highest price.⁹³

The mere fact that the debtor may have been in financial straits or pressed by his creditors will not avail him as a basis for claiming that a sale to which he consented was involuntary.⁹⁴

§ 61. — Insurance Money

Where exempt property is destroyed by fire, it is generally held that the proceeds of a fire insurance policy thereon are exempt.

Although there is authority to the contrary,⁹⁵ it is very generally held, frequently by virtue of express statutory provision, that, when exempt property is destroyed by fire, the proceeds of a policy of insurance thereon are exempt,⁹⁶ even though the

on showing intention to invest them in other exempt personal property.

Okl.—Bogardus v. Salter, 259 P. 561, 127 Okl. 4.

82. Or.—Blackford v. Boak, 143 P. 1136, 73 Or. 61.

83. Or.—Blackford v. Boak, *supra*. 25 C.J. p 83 note 69.

84. Or.—Bogardus v. Salter, 259 P. 561, 127 Okl. 4.

85. U.S.—In re Arnold, D.C.Ga., 169 F. 1000—In re Ansley Bros., D.C. N.C., 153 F. 983.

86. Iowa.—First Nat. Bank v. Neve, 235 N.W. 561, 213 Iowa 344.

Pa.—Bogar v. Chiles, Com.Pl., 3 Cumb.L.J. 52.

25 C.J. p 83 notes 71, 74.

Money awarded to a defendant out of the proceeds of his exempt real estate, and paid over to his attorney by the sheriff, is not liable to be attached in the hands of the attorney.
Pa.—Gery v. Ehrgood, 31 Pa. 329.

Proceeds of sale

A judgment debtor whose automobile was the sole article of property

levied on in execution was entitled under claim for exemption seasonably made within a few days after levy and before sale was advertised, to receive from the sheriff three hundred dollars out of the proceeds of sale.

Pa.—Maschke, to Use of Ehnes v. O'Brien, 17 A.2d 923, 142 Pa.Super. 559.

87. Tenn.—Sherwin-Williams Co. v. Morris, 156 S.W.2d 350, 25 Tenn. App. 272.
25 C.J. p 83 note 72.

Other property part of recovery

If it appears that the value of other property also entered into the judgment, and there is no showing on which to make an apportionment, the rule exempting a judgment for the conversion of exempt property does not apply.

Tex.—Burke v. Hance, 13 S.W. 163, 76 Tex. 76, 18 Am.S.R. 28.

88. Pa.—Steel v. McKerrihan, 33 A. 570, 172 Pa. 280.

25 C.J. p 83 note 73.

89. N.Y.—Tillotson v. Wolcott, 48 N.Y. 188.

90. S.D.—Long v. Collins, 94 N.W. 700, 16 S.D. 625, 102 Am.S.R. 724.

Wis.—Below v. Robbins, 45 N.W. 416, 76 Wis. 600, 20 Am.S.R. 89, 8 L. R.A. 467.

91. Miss.—Johnson v. Edde, 58 Miss. 664.

92. Pa.—Knabb v. Drake, 23 Pa. 489, 62 Am.D. 352.

93. Miss.—Anderson v. Dever, 68 So. 166, 109 Miss. 235.

94. Iowa.—First Nat. Bank v. Neve, 235 N.W. 561, 213 Iowa 344.

95. Ill.—Monnica v. German Ins. Co., 12 Ill.App. 240.

Miss.—Smith v. Ratcliff, 6 So. 460, 66 Miss. 683, 14 Am.S.R. 606.

N.H.—Wooster v. Page, 54 N.H. 125, 20 Am.R. 128.

96. Ky.—*Corpus Juris* quoted in Wallins Nat. Bank v. Turner, 299 S. W. 194, 195, 221 Ky. 562.

La.—Thompson-Ritchie & Co. v. Graves, 120 So. 634, 167 La. 1024, 63 A.L.R. 1283.

creditor had a lien on the property destroyed,⁹⁷ unless there is an agreement between the debtor and the creditor that the debtor will insure the property for the benefit of the creditor.⁹⁸

The property, however, must be exempt,⁹⁹ and it must have been exempt at the time it was burned,¹ unless the insurance money is claimed under a statute allowing an exemption in "money and debts."¹⁵ Proceeds of property, which was not exempt at the time it was burned, but which would have been exempt if it had been in existence at the time of suit, are not exempt.² The debtor is not entitled to an exemption of the proceeds of fire insurance on exempt property where he owns and possesses the same character of personal property as that which was destroyed, and all of which was paid for and acquired without anticipating the proceeds of the insurance on the original exempted personality owned by him;³ but he is entitled to an exemption of the proceeds of insurance on specific exempted articles for which he has not later substituted acquired similar ones.⁴

The statute in some states requires a reinvestment, within a reasonable time, of the proceeds of a fire insurance policy, in other property to replace the property destroyed; and the proceeds of the policy within that limit of time are exempt.⁵

Insurance against loss of wages. Under a statute exempting current wages for personal services, the

proceeds of a claim under an accident insurance policy for loss of wages by the insured while he was incapacitated by illness cannot be brought within the terms of the statute, and are not exempt even though the wages were exempt and the premiums of the policy were paid from the exempt wages.⁶

Automobile insurance. Under a statute exempting one "carriage" of each family from execution, it has been held that the proceeds from an insurance policy, due for damages to an automobile used as a family conveyance, were also exempt from garnishment.^{6.5}

Life insurance. The duration of the exemption of the proceeds of life insurance policies is considered supra § 41.

§ 62. Product

Where specific property is exempted in order that the debtor may have the product for the support of himself and family, the product also is exempt.

When specific property is exempted in order that the debtor may have the product for the support of himself and family, the product also is exempt.⁷ Sometimes the statute exempts the product in express terms.⁸ Crops, however, are not exempted under a statute exempting provisions because of the fact that they are produced by labor performed under sustenance afforded by exempt provisions.⁹ The natural increase of exempt animals has been held subject to execution for the owner's debts.¹⁰

Ohio.—*Corpus Juris* cited in *Dennis v. Smith*, 180 N.E. 638, 641, 125 Ohio St. 120.

Tenn.—*Wright v. Brooks*, 49 S.W. 828, 101 Tenn. 601.

Sherwin-Williams Co. v. Morris, 156 S.W.2d 350, 25 Tenn.App. 272.

Tex.—*Sorenson v. City Nat. Bank*, 49 S.W.2d 718, 121 Tex. 478.

Home Imp. Loan Co. v. Brewer, Civ.App., 318 S.W.2d 673, refused no reversible error—*Glenn v. Shamburger*, Civ.App., 240 S.W. 701, error refused.

25 C.J. p 84 note 85.

Property exempt under federal laws

A state statute, providing that all moneys arising from fire or other insurance on any property exempt from sale or execution is exempt, applies to proceeds of property exempt under the federal laws as well as to property exempt under state law.

Ariz.—*Gardenhire v. Glasser*, 226 P. 911, 26 Ariz. 503.

97. Tex.—*Westchester F. Ins. Co. v. Goggan*, Civ.App., 203 S.W. 163—*Ward v. Goggan*, 23 S.W. 479, 4 Tex.Civ.App. 274.

25 C.J. p 84 note 86.

98. Tex.—*Mosley v. Stratton*, Civ. App., 203 S.W. 397.

Contractual basis

Lienholder's claim to proceeds of policy on exempt property must rest on contractual basis, such as insured's agreement to insure such property for benefit of lienholder. Tex.—*Home Imp. Loan Co. v. Brewer*, Civ.App., 318 S.W.2d 673, refused no reversible error.

99. Tex.—*Cities Service Oil Co. v. North River Ins. Co.*, 107 S.W.2d 994, 130 Tex. 186.

Stratton v. Westchester F. Ins. Co., Civ.App., 182 S.W. 4.

1. Wash.—*Peerless Pac. Co. v. Burckhard*, 155 P. 1037, 90 Wash. 221, L.R.A.1917C 353, Ann.Cas. 1918B 247.

1.5 Va.—*Goldburg Co. v. Salyer*, 50 S.E.2d 272, 188 Va. 573.

2. Wash.—*Peerless Pac. Co. v. Burckhard*, 155 P. 1037, 90 Wash. 221, L.R.A.1917C 353, Ann.Cas. 1918B 247.

3. Ky.—*Wallins Nat. Bank v. Turner*, 299 S.W. 194, 221 Ky. 562.

4. Ky.—*Wallins Nat. Bank v. Turner*, supra.

5. N.Y.—*Bayer v. Sack*, 121 N.Y.S. 1122, 66 Misc. 536.

Six months

Proceeds of insurance policy on homestead are exempt for six months. Tex.—*Sorenson v. City Nat. Bank*, 49 S.W.2d 718, 121 Tex. 478.

Sorenson v. City Nat. Bank, Civ. App., 293 S.W. 638.

6. Tex.—*Mitchell v. Western Casualty & Guaranty Ins. Co.*, Civ. App., 163 S.W. 630.

6.5 Tex.—*Willis v. Schoelman*, Civ. App., 206 S.W.2d 283.

7. Vt.—*Leavitt v. Metcalf*, 2 Vt. 342, 19 Am.D. 718.

25 C.J. p 84 note 94.

8. N.Y.—*Hall v. Penney*, 11 Wend. 44, 25 Am.D. 601.

9. Ga.—*Butler v. Shiver*, 4 S.E. 115, 79 Ga. 172.

10. N.C.—*Citizens' Nat. Bank v. Green*, 78 N.C. 247.

B. TITLE OR RIGHT TO SUPPORT CLAIM

§ 63. In General

As a general rule title or ownership of the property claimed as exempt must rest in the person claiming the exemption.

As a general rule title or ownership of the property claimed as exempt must rest in the person claiming the exemption,¹¹ although there are statutes which permit the claim to be made by one who is merely in the possession of the property,¹² and a statute has been so construed where it merely exempted certain articles, without expressly requiring title.¹³ Further, possession is prima facie evidence of title sufficient to entitle the one in possession to his exemption.¹⁴ Ownership as between the head of a family and other members of the same family becomes immaterial in the case of household furniture specifically exempt.¹⁵ A purchaser who, under the terms of sale from the vendor, does not acquire title to the property until the purchase price has been paid has still such an interest in it as will support his claim of exemption against any creditor other than the vendor of the property.¹⁶ It is not necessary that claimant should be in actual possession of the property as to which he claims exemption,¹⁷ as possession through an agent is sufficient.¹⁸

Mortgage. The fact that exempt property has been mortgaged will not prevent the debtor from

asserting his right of exemption as against persons other than the mortgagee,¹⁹ but, where the property is in the possession of the mortgagee, the mortgagor cannot assert that it is exempt.²⁰

Sale. Where the owner of property sells it to another, he loses his right to exemption in it, as shown infra § 107, unless the contract of sale has been rescinded and the debtor has regained possession.²¹ An intention to sell or exchange property, or negotiations therefor, or even a contract to sell or exchange, does not prevent a debtor from claiming the property as exempt, if there is in fact no consummated sale or exchange.²²

Time of ownership or possession. The requirement that claimant shall be the owner of the property or in possession relates to the date of the seizure.²³ If the claimant is in possession at the date of the seizure, the fact that he is later not in possession becomes immaterial.²⁴

Estoppel. A creditor who attaches a debtor's goods to recover their price is thereby estopped to allege or prove, as a bar to the debtor's claim to exemption, that the goods levied on were consigned by him to defendant for sale, and are therefore not the property of the debtor,²⁵ but the officer who levies on the property as the property of the debtor is not thereby estopped to deny the debtor's title in

11. Ind.—Snell v. Gresso, 19 N.E.2d 1011, 215 Ind. 424.
- N.C.—Merchants Bank v. Weaver, 197 S.E. 551, 213 N.C. 767.
- S.D.—Smith v. Miller, 237 N.W. 829, 58 S.D. 570.
- Va.—Corpus Juris cited in Boswell v. Lipscomb, 14 S.E.2d 305, 306, 177 Va. 309.
- 25 C.J. p 86 note 29.

Debtor's whereabouts unknown

Although debtor was absent without leave from army and his whereabouts were unknown, and debtor's wife used his automobile in going to and from work, the earnings of which enabled her to support herself and her three minor children, automobile was not exempt from attachment.

Wis.—Northwest Bank & Trust Co., Davenport, Iowa v. Minor, 82 N.W. 2d 323, 275 Wis. 516.

Bailee under contract

Debtor's ownership need not be absolute in order to support an exemption in real or personal property, and under a contract for breeding hogs whereby farmer deposited with company market price of brood sows, company furnished necessary boars, farmer was to furnish feed, care for

and market hogs and offspring, title to which was to remain in company with right to select such pigs as it desired, etc., the farmer possessed sufficient attributes of ownership in sows and offspring to come within liberal intent and purpose of exemption law under which farmer was entitled to five hogs and all pigs less than six months old.

U.S.—Bauldry v. Hall, C.A.Iowa, 174 F.2d 379.

12. Ga.—Mozley v. Fontana, 52 S.E. 443, 124 Ga. 376.
- 25 C.J. p 86 note 30.

13. Miss.—Steen v. Hamblet, 5 So. 524, 66 Miss. 112.
- 25 C.J. p 86 note 31.

14. Kan.—Wamberg v. Hart, 246 P. 1010, 121 Kan. 218.
- 25 C.J. p 86 note 32.

15. Kan.—Harrison v. Forster, 146 P. 355, 94 Kan. 284.
- 25 C.J. p 86 note 33.

16. Kan.—Wamberg v. Hart, 246 P. 1010, 121 Kan. 218.
- W.Va.—Stein v. Staats, 81 S.E. 1132, 74 W.Va. 357.

17. Iowa.—Appanoose County v. Carson, 229 N.W. 152, 210 Iowa 801.
- N.J.—Charlton v. Mitchell, 2 A.2d 367, 121 N.J.Law 285.
- Tenn.—Forehand v. Forehand, 187 S.W.2d 635, 28 Tenn.App. 131.
- 25 C.J. p 86 note 35.
18. La.—Garner v. Freeman, 42 So. 767, 118 La. 184, 118 Am.S.R. 361.
19. Mich.—Emerson v. Bacon, 25 N.W. 503, 58 Mich. 526.
- 25 C.J. p 86 note 38.
20. Colo.—Eisenberg v. Burchinell, 52 P. 220, 10 Colo.App. 457.
21. Ind.—Boesker v. Pickett, 81 Ind. 554.
- N.C.—Duvall v. Rollins, 68 N.C. 220.
22. Neb.—Kriesel v. Eddy, 55 N.W. 224, 37 Neb. 63.
- N.C.—Duvall v. Rollins, 68 N.C. 220.
23. La.—Garner v. Freeman, 42 So. 767, 118 La. 184, 118 Am.S.R. 361.
- Newman v. Vella, 119 So. 728, 9 La.App. 504.
24. La.—Garner v. Freeman, 42 So. 767, 118 La. 184, 118 Am.S.R. 361.
25. Ala.—Kolsky v. Loveman, 12 So. 720, 97 Ala. 543.

an action by the debtor against him for disregarding a claim of exemption and selling the property.²⁶

§ 64. Joint Ownership

As a general rule a tenant in common is allowed to claim an exemption in his undivided interest in a chattel.

A tenant in common is generally allowed to claim an exemption in his undivided interest in a chattel,²⁷ and by the weight of authority it makes no difference in the application of this rule that the property is of such a nature as to be incapable of division in kind,²⁸ although there is some authority to the contrary.²⁹

Except where statutes provide otherwise,^{29.5} joint property cannot be set aside as exempt as against a joint debt,³⁰ but where a joint execution is issued against two defendants, and levied on the property of one of them, he may claim his exemption.³¹

§ 65. Partnership Property

- a. Claim by partner against firm debt
- b. Claim by partner against individual debt
- c. Claim of partnership

a. Claim by Partner against Firm Debt

- (1) While partnership continues
- (2) After dissolution

(1) While Partnership Continues

Ordinarily individual partners cannot claim exemptions in the partnership property as against a partnership debt.

According to the weight of authority, individual partners cannot claim exemptions in the partnership property as against a partnership debt.³² However, in some jurisdictions a contrary view prevails and a single member with the consent of the others or all of the members of the firm as individuals have been permitted to claim their exemptions out of the partnership property as against an execution for a partnership debt levied before there has been any division or severance of the property.³³ The majority rule has been rested on various grounds: (1) That partnership property is subject to the payment of partnership debts before all other claims.³⁴ (2) The impracticability³⁵ or even inequity³⁶ of allowing an exemption out of the property. (3) That, under the theory of the civil law that a partnership is an entity,³⁷ a theory not generally recognized by the common law, as shown in Partnership § 67, the partnership property does not

26. Ill.—*Cassell v. Williams*, 12 Ill. 387.

27. Okl.—*Corpus Juris* cited in *Allen v. Clawson*, 108 P.2d 121, 122, 188 Okl. 278.

25 C.J. p 87 note 47.

28. Okl.—*Corpus Juris* cited in *Allen v. Clawson*, 108 P.2d 121, 122, 188 Okl. 278.

25 C.J. p 87 note 48.

In Louisiana

(1) It has been held that under a statute exempting tools and instruments necessary for exercise of debtor's calling, trade, or profession from seizure for ordinary debts, "tools and instruments" owned in common by two persons and being indifferently used in the business of each to provide a livelihood for each would be exempt from seizure for debts.

La.—*Corpus Juris* quoted in *Mounger v. Ferrell*, App., 11 So.2d 56.

(2) It was formerly held, however, that exemption did not attach to an undivided interest in personal property.

La.—*Newman v. Vella*, 119 So. 728, 9 La.App. 504.

29. Wis.—*Wright v. Pratt*, 31 Wis. 99.

25 C.J. p 87 note 49.

29.5 La.—*Mounger v. Ferrell*, App., 11 So.2d 56.

Motor vehicle

A truck owned by father and son jointly, and used by each of them in earning a livelihood, was exempt from seizure for debts under statute exempting "tools and instruments" necessary for exercise of debtor's calling, trade, or profession from seizure.

La.—*Mounger v. Ferrell*, supra.

30. Cal.—*Stanton v. French*, 23 P. 355, 83 C. 194.

Pa.—*South Philadelphia Dressed Beef Co. v. Sugarman*, 33 Del.Co. 485, 60 York Leg.Rec. 101—*Crossniklaus v. Kisecker*, 30 Del.Co. 378. See *Pinsker v. Healy*, 31 Luz.Leg.Reg. 366. 25 C.J. p 87 note 50.

Joint and several property distinguished

In levy on joint and several property owned by joint debtors, each is entitled to exemption out of their severally owned property, but joint claim of exemption is not within purview of statute.

Pa.—*Bohlander v. Collins*, 71 Pa.Dist. & Co. 577, 98 Pittsb.Leg.J. 267.

31. Pa.—*Hawley v. Hampton*, 28 A. 471, 160 Pa. 18. 25 C.J. p 87 note 51.

32. U.S.—*Dixon v. Koplar*, C.C.A.Mo., 102 F.2d 295—*In re Clark*, D.C. Mich., 11 F.2d 540.

Ala.—*Wallace v. American Wholesale Corporation*, 104 So. 776, 20 Ala. App. 642.

Ind.—*Snell v. Gresso*, 19 N.E.2d 1011, 215 Ind. 424.

Ky.—*Elkins v. Briscoe*, 105 S.W. 412, 32 Ky.L. 197.

Nev.—*State v. Elsbury*, 175 P.2d 430, 63 Nev. 463, 169 A.L.R. 364.

Pa.—*Vandergrift v. Waters*, 16 Pa. Dist. & Co. 266, 21 Del.Co. 271.

Wash.—*Peterson v. Box*, 193 P. 215, 113 Wash. 117. 25 C.J. p 87 note 53.

Allowance from partnership property in bankruptcy see Bankruptcy § 499.

Exemptions of partners on assignment for benefit of creditors see Assignments for Benefit of Creditors § 391.

33. N.C.—*Pennell v. Robinson*, 80 S. E. 417, 164 N.C. 257, Ann.Cas.1915D 77.

25 C.J. p 88 note 54.

34. Mass.—*Pond v. Kimball*, 101 Mass. 105.

25 C.J. p 88 note 55.

35. Mo.—*State v. Spencer*, 64 Mo. 355, 27 Am.R. 244.

25 C.J. p 88 note 56.

36. U.S.—*In re Handlin*, C.C.Ark., 11 F.Cas.No.6,018, 3 Dill. 290.

37. La.—*Smith v. McMicken*, 3 La. Ann. 319.

25 C.J. p 88 note 58.

belong to the individual partners, but to the firm, that is, to the legal entity.³⁸ (4) That the different exemption statutes contemplate only individuals and have no reference to partnerships.³⁹ Under the minority rule the partner's right to claim an exemption from firm property is not affected by the fact that he is indebted to the firm for money drawn out by him⁴⁰ or that he has individual property sufficient to make up the exemption.⁴¹

Consent of partners. Even under the minority rule one partner cannot without the consent of the others claim exemption from partnership assets leaving the partnership debts unpaid,⁴² although there is authority to the contrary.⁴³ A married woman incapable of contracting as a partner, if she acts as such, contributing to the capital of the firm and being dealt with by the partners as a copartner, is a partner as to them, and may defeat their claim to exemptions out of the firm property by withholding her consent.⁴⁴ A partner who has given his consent may later withdraw it and thereby defeat his partner's claim to exemption out of the firm property,⁴⁵ provided he withdraws his consent before an allotment of the exemption has been made.⁴⁶ Surviving partners cannot claim exemption without the consent of the administrator of a deceased partner,⁴⁷ but the exemption may be set apart to a surviving partner if he has the consent of the administrator of the deceased partner.⁴⁸ The operation of the majority rule cannot be affected by the fact that the other partners do or do not consent to one of the firm having his exemption out of partnership property.⁴⁹

Individual property used by firm. Although an exemption is not allowed out of firm property, the fact that partners use their individual property in the business of the firm does not make it partner-

ship property or prevent them from claiming it as exempt from seizure by partnership creditors.⁵⁰

The claim of a special creditor of a partner, in so far as it depends on the validity of the debtor's claim to exemption out of the partnership property, will not prevail in these states where a partner has no exemption in the partnership property against partnership debts, over the claims of the general creditors.⁵¹

(2) After Dissolution

The doctrine that partners cannot claim exemptions out of the partnership assets is not affected by the mere dissolution of the partnership, but when partnership property loses its character as such before a partnership creditor has acquired a lien thereon a partner may claim exemption.

The doctrine that partners cannot claim exemptions out of the partnership assets is not affected by the mere fact that the firm has been dissolved.⁵² The reason for the rule ceases, however, and with it the rule itself, when partnership property loses its character as such, and is converted into the individual property of the partners, before a partnership creditor has acquired a lien thereon, and if the partnership property is divided by the partners in good faith, before a levy, so as to make it their individual property, each may claim his exemption.⁵³ If one member of the partnership becomes the bona fide owner of the partnership property by sale from his copartners, he may claim his exemption,⁵⁴ although the purchasing partner has not paid the consideration for the conveyance of the others' shares to him,⁵⁵ and even though at the time of the sale it was expected by the parties to it that the purchasing partner would thereafter avail himself of his exemption rights.⁵⁶

The property in which the exemption is claimed must be of the kind allowed by law,⁵⁷ and property

38. Ky.—Green v. Taylor, 32 S.W. 945, 98 Ky. 330, 17 Ky.L. 897, 56 Am.S.R. 375.

25 C.J. p 88 note 60.

39. U.S.—Jennings v. William A. Stannus & Son, Wash., 191 F. 347, 112 C.C.A. 91.

25 C.J. p 88 note 61.

40. Mich.—McCoy v. Brennan, 28 N.W. 129, 61 Mich. 362, 367, 1 Am.S.R. 589.

25 C.J. p 88 note 62.

41. N.C.—State v. Kenan, 94 N.C. 296.

42. N.C.—Richardson v. Redd, 24 S.E. 420, 118 N.C. 677.

25 C.J. p 88 note 64.

43. Mich.—McCoy v. Brennan, 28 N.W. 129, 61 Mich. 362, 1 Am.S.R. 589.

44. N.C.—Richardson v. Redd, 24 S.E. 420, 118 N.C. 677.

45. N.C.—Stout v. McNeill, 3 S.E. 915, 98 N.C. 1.

46. N.C.—Stout v. McNeill, supra.

47. N.C.—Southern Commission Co. v. Porter, 30 S.E. 119, 122 N.C. 692 —Richardson v. Redd, 24 S.E. 420, 118 N.C. 677.

48. U.S.—In re Seabolt, D.C.N.C., 113 F. 766.

49. Ill.—Wills v. Downs, 38 Ill.App. 269.

50. Okl.—Corpus Juris cited in Allen v. Clawson, 108 P.2d 121, 122, 188 Okl. 278.

25 C.J. p 88 note 72.

51. U.S.—In re I. S. Vickerman & Co., D.C.S.D., 199 F. 589.

52. Ind.—State v. Day, 29 N.E. 436, 3 Ind.App. 155.

25 C.J. p 89 note 74.

53. Ind.—Goudy v. Werbe, 19 N.E. 764, 117 Ind. 154, 3 L.R.A. 114.

25 C.J. p 89 note 76.

54. Tex.—Watson v. McKinnon, 11 S.W. 197, 73 Tex. 210.

25 C.J. p 89 note 77.

55. Ohio.—Voight v. Lafkin, 12 Ohio Cir.Ct. 751, 6 Ohio Cir.Dec. 124.

56. Ohio.—Mortley v. Flanagan, 38 Ohio St. 401.

25 C.J. p 89 note 79.

57. Minn.—Prosser v. Hartley, 29 N.W. 156, 35 Minn. 340.

necessary to the carrying on of the business of the partnership may not be necessary to the carrying on of the individual partner's trade.⁵⁸ Exemption will not be allowed, however, where partnership property is sold to one of the partners, or divided, after the levy of an execution, for the levy creates a lien which they cannot divest,⁵⁹ and if the execution is thereafter levied on the share allotted to one of the partners, such partner cannot claim his exemption therefrom,⁶⁰ but there is authority to the contrary.⁶¹ Where there is no transfer of the partnership property, but mere abandonment by one partner of his interest, an exemption will not be allowed out of partnership assets to the other partner.⁶²

Insolvency or assignment for creditors. Where the partners make an assignment of the partnership property for the benefit of creditors, and then attempt to make a division of the assets among themselves and to hold them in severalty as exempt against the claims of partnership creditors, their claims to exemption will not be allowed.⁶³ It has been held, however, that the mere insolvency of the firm at the time of the conversion of partnership into individual property by a sale or division between the partners does not affect the right to claim an exemption,⁶⁴ although in some jurisdictions a contrary view prevails.⁶⁵

b. Claim by Partner against Individual Debt

The authorities are conflicting as to the right to claim an exemption out of partnership property as against an individual debt.

Some courts make no distinction between a claim of exemption out of partnership property when the debt is against the partnership property and when it is against an individual debt, and do not allow

the exemption even as against an individual debt,⁶⁶ unless the partner's individual interest has been ascertained and segregated;⁶⁷ but other courts take the contrary view,⁶⁸ and it has been held that unless it is expressly and distinctly alleged that the debt is a partnership debt, the exemption will be allowed.⁶⁹

The partner is entitled to his exemption in the partnership property as against an individual debt, even though the debt is due by him to his partner,⁷⁰ and as against an individual debt a partner may have his exemption out of his share of the partnership property after an action for the dissolution of the firm has been brought against him by his copartner.⁷¹ The taking of charge of property by a receiver for the purpose of winding up a copartnership estate is not a seizure or a threatened seizure for the payment of the individual debts of the copartners which justifies one of them in making a claim of exemption.⁷²

c. Claim of Partnership

Ordinarily a partnership or firm has no right to an exemption as against the enforcement of an execution against firm property for the satisfaction of a judgment against the partnership.

For the reason that the exemption laws contemplate only individuals and have no reference to partnerships, the partnership or firm has no right to an exemption as against the enforcement of an execution against firm property for the satisfaction of a judgment against the partnership.⁷³ There are, however, express statutory provisions in some states allowing a partnership to claim firm property as exempt,⁷⁴ and in some jurisdictions a partnership claim to exemption is allowed in the absence of express statutory provisions.⁷⁵

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| 58. Wash.—Peterson v. Box, 193 P. 215, 113 Wash. 117.
25 C.J. p 89 note 81. | 65. Ala.—Aiken v. Steiner, 13 So. 510, 98 Ala. 355, 39 Am.S.R. 58.
25 C.J. p 89 note 88. | N.C.—Evans v. Bryan, 95 N.C. 174, 59 Am.R. 233. |
| 59. Ind.—Goudy v. Werbe, 19 N.E. 764, 117 Ind. 154, 3 L.R.A. 114.
25 C.J. p 89 note 82. | 66. Ark.—Porch v. Arkansas Milling Co., 45 S.W. 51, 65 Ark. 40, 67 Am. S.R. 395.
25 C.J. p 89 note 89. | 71. Wash.—Dennis v. Kass, 39 P. 656, 11 Wash. 353, 48 Am.S.R. 880. |
| 60. Ind.—State v. Day, 29 N.E. 436, 3 Ind.App. 155. | 67. Ark.—Farmers' Union Gin & Milling Co. v. Seitz, 124 S.W. 780, 93 Ark. 329. | 72. Mo.—Weinrich v. Koelling, 21 Mo.App. 133. |
| 61. Ga.—Blanchard v. Paschal, 68 Ga. 32, 45 Am.R. 474. | 68. Wash.—Dennis v. Kass, 39 P. 656, 11 Wash. 353, 48 Am.S.R. 880.
25 C.J. p 89 note 91. | 73. La.—Mounger v. Ferrell, App., 11 So.2d 56.
Wash.—Peterson v. Box, 193 P. 215, 113 Wash. 117.
25 C.J. p 90 note 96. |
| 62. U.S.—In re Abrams, D.C.S.D., 193 F. 271. | 69. Ky.—Bright v. Buhr, 11 Ky.L. 579.
25 C.J. p 89 note 92. | 74. Dak.—Bates v. Callender, 16 N. W. 506, 3 Dak. 256.
S.D.—Noyes v. Belding, 59 N.W. 1069, 5 S.D. 603. |
| 63. Ind.—Ex parte Hopkins, 2 N.E. 587, 104 Ind. 157.
Tenn.—Gill v. Lattimore, 9 Lea 381. | 70. Neb.—Sacks v. Lytle, 230 N.W. 501, 119 Neb. 642. | 75. N.Y.—Stewart v. Brown, 37 N.Y. 350, 93 Am.D. 578. |
| 64. Ohio.—Mortley v. Flanagan, 38 Ohio St. 401.
25 C.J. p 89 note 87. | | |

C. AMOUNT

§ 66. In General

Exemption statutes will be liberally construed with respect to the amount of property exempted, but the debtor's claim cannot exceed the statutory limit.

The exemption laws generally limit the value of the property which a debtor may claim as exempt to a certain sum, or limit the number of particular articles which he may claim, and his claim cannot exceed the statutory limit.⁷⁶ When the exempted property is set aside, the remainder may be sold to pay the ordinary debts of the debtor,^{76.5} but if the whole of the debtor's property is not equal in value to the amount allowed by law none of it can be levied on.⁷⁷

Where there is a question of determining the amount of exemption to which the debtor is entitled, the courts are ever ready to apply the rule that exemption statutes should be liberally construed, whether they are construing a single statutory provision or several provisions together,⁷⁸ but not to the extent of violating the obvious legislative intent.⁷⁹

Where the property is separable, the debtor may select any part that may be detached, and which does not exceed in value the statutory amount.⁸⁰

Alternative exemption. Where the debtor is entitled to claim specific articles in specific amounts in the alternative, he may take his exemption in both, but the aggregate of both must not exceed the maximum mentioned in the statute.⁸¹

Holding property by paying excess. When the statute limits the value of the property that may be claimed as exempt, a debtor cannot select indivisible property exceeding such sum in value⁸² and hold it as exempt on paying the officer the excess.⁸³

Provisions. If the statute does not set out the time for which the exempted provisions are to last, such an amount of provisions is contemplated as will be necessary until the next annual period for laying up provisions.⁸⁴ A statute providing that the exemption is to be in amount sufficient for the current year has been held to mean from harvest to harvest and not the calendar year.⁸⁵ The amount of provisions required to the next harvest is based on the size of the debtor's family,⁸⁶ but "family," as thus used, does not include strangers or boarders lodging with the family,⁸⁷ although it may include the grown children of claimant who have no home elsewhere.⁸⁸

76. U.S.—Clay Center State Bank v. McKelvie, C.C.A.Neb., 19 F.2d 308.

N.D.—Dakota Nat. Bank of Fargo v. Salzwedel, 3 N.W.2d 468, 71 N.D. 643.

W.Va.—McGrew v. Stewart, 166 S. E. 847, 113 W.Va. 45.

25 C.J. p 90 note 2.

Amount of:

Life insurance exempt see supra § 40.

Wages exempt see supra § 48.

Cash exemption

A judgment debtor is not entitled to statutory cash exemption out of nonexempt personalty upon which judgment creditor has caused an execution to be levied if the value of his remaining personalty exceeds the statutory exemption and debtor has the burden of proving the value of such personalty.

Tenn.—Forehand v. Forehand, 187 S. W.2d 635, 28 Tenn.App. 131.

Statutes construed

A proviso is one section of a statute limiting the amount of property exempted from certain debts has been held not to limit the value of property specifically exempted from other debts by another section of such statute.

U.S.—Clay Center State Bank v. McKelvie, C.C.A.Neb., 19 F.2d 308.

What law governs

Exemption from execution is limited to amount fixed by statute in force at time of levy, though suit for damages by deprivation of right to select exemption therefrom was instituted after statute increasing amount became effective.

Mich.—Slumpff v. McGuire & Hansen, 235 N.W. 224, 253 Mich. 473.

76.5 La.—Holmes v. Bordelon, App., 40 So.2d 816.

77. Ark.—Bank of Atkins v. Wirth, 190 S.W.2d 445, 209 Ark. 360.

Ind.—Godman v. Smith, 17 Ind. 152.

Mo.—Hyde v. Copeland, 173 S.W.2d 684, 351 Mo. 580.

State v. Kurtzeborn, 2 Mo.App. 335.

78. Kan.—Donmyer v. Donmyer, 23 P. 627, 43 Kan. 444.

25 C.J. p 90 note 4.

Particular statutes construed

The limitation as to value in a statute providing for the exemption of one farm wagon, cart, or dray, one plow, one harrow, and other farming implements not exceeding fifty dollars in value has been held not to refer to the wagon.

Colo.—People v. Corder, 259 P. 613, 82 Colo. 318.

79. Ohio.—Sweigart v. Sweigart, App., 35 N.E.2d 578.

25 C.J. p 90 note 5.

80. Ill.—Ramsey v. Barnabee, 88 Ill. 135.

25 C.J. p 90 note 6.

81. Tenn.—Byous v. Mount, 17 S.W. 1037, 89 Tenn. 361.

25 C.J. p 90 note 7.

82. Ill.—Waldo v. Gray, 14 Ill. 184 —Cook v. Scott, 6 Ill. 333.

Me.—Everett v. Herrin, 46 Me. 357, 74 Am.D. 455.

83. Ill.—Waldo v. Gray, 14 Ill. 184 —Cook v. Scott, 6 Ill. 333.

84. N.Y.—Farrell v. Higley, Lalor 87.

25 C.J. p 90 note 10.

85. La.—Tolbert v. Freeman, 57 So. 580, 130 La. 47—Hinton v. Roane, 50 So. 798, 124 La. 927, 134 Am. S.R. 526.

86. La.—Rynella-Mill & Mercantile Co. v. Segura, 55 So. 2, 128 La. 643.

Mich.—Stilson v. Gibbs, 18 N.W. 815, 53 Mich. 280.

87. Iowa.—Coffey v. Wilson, 21 N. W. 602, 65 Iowa 270.

88. Mich.—Stilson v. Gibbs, 18 N. W. 815, 53 Mich. 280.

A statute which exempts without qualification the "provisions on hand for family use" exempts all such provisions regardless of what other property the execution debtor may have,⁸⁹ but the term "necessary provisions" within the meaning of a statute does not necessarily include all the provisions on hand, but only as much as a prudent man would ordinarily keep on hand for home consumption in a family of his size,⁹⁰ although the amount exempt is to be determined regardless of what other property the execution debtor may have.⁹¹

Under some statutes a debtor is entitled to an exemption of personal property of a fixed value in lieu of provisions not on hand,⁹² and under such statutes a debtor cannot claim property as exempt in lieu of provisions if he has other property remaining sufficient to supply the deficiency in bread-stuffs,⁹³ but a superseded judgment, however large, cannot be made to supply the deficiency in bread-stuffs, and its recovery by the debtor will not prevent him from claiming exempt, in lieu of provisions for himself and family, chattels which had been seized.⁹⁴ Where defendant has other property in addition to that seized sufficient for the support of his family for the statutory period, he will not be permitted to dispose of or waste it between the time of seizure and the date of the trial, and then claim his exemption from the property seized.⁹⁵

Where a statute allows an exemption of provisions and fuel for a stated period and also a specific exemption of certain animals or other property in lieu of animals to a fixed amount, the setting apart as exempt of other property in lieu of animals to the statutory amount does not exclude the debtor from his right to provisions and fuel under the statute.⁹⁶

Tools and implements. Under a statute exempting the tools necessary for the debtor's trade, more than one machine of the same kind may be exempt, if personally used by the debtor for carrying on his

trade, and reasonably necessary therefor;⁹⁷ and his right in this respect is not affected by another provision exempting generally one machine without reference to the occupation of the debtor, as the latter provision in no way qualifies or restricts the former.⁹⁸

Animals. A provision exempting a horse of a certain value has been held not to include one worth more than that amount,⁹⁹ even though it is the only horse the debtor owns.¹ Under a statute exempting one or two horses not exceeding a certain value a debtor who owns two horses the aggregate value of which does not exceed the statutory limit may hold both;² and where neither is worth the statutory amount, but the aggregate value is in excess, he may claim either,³ but where one is worth more than the statutory amount and the other less, the debtor has no election, the latter only being exempt.⁴ Where a statute exempts specific animals in numero, their number is not doubled when ownership in them is of an undivided half of each.⁵

Automobile. Where a debtor is entitled to the exemption of an automobile, its value is immaterial.⁶ However, a provision exempting an automobile not exceeding a specified value does not include one worth more than that amount.⁷

Fodder. An exemption of fodder for animals, even though the statute exempts a specific amount, has been held to include only such an amount of fodder as is necessary to keep the number of exempt animals which the debtor either has at the time of the levy,⁸ or shows that he has a present bona fide intention and purpose of at once acquiring, so as to need the food for their support.⁹ Where the statute exempts fodder sufficient for a definite period, in the summer months when cattle and sheep are depasturing no such food as the statute contemplates is necessary, and probably none is protected, otherwise so much is exempt as

89. Ark.—Atkinson v. Gatcher, 23 Ark. 101.

90. N.Y.—McCarthy v. McCabe, 115 N.Y.S. 829, 131 App.Div. 396.

Tex.—Ward v. Gibbs, 30 S.W. 1125, 10 Tex.Civ.App. 287.

91. Tex.—Burris v. Booth, Civ.App., 40 S.W. 186.

92. Ky.—Porter v. Rice, 128 S.W. 70.

93. Ky.—Turner-Looker Co. v. Garvey, 43 S.W. 202, 19 Ky.L. 1205.

94. Ky.—Braswell v. Rehkoﬀ, 42 S.W. 916, 19 Ky.L. 1037.

95. Ky.—Rogers v. Allen, 105 S.W. 96, 32 Ky.L. 1.

96. U.S.—In re Buelow, D.C.Wash., 98 F. 86.

97. Mass.—Rayner v. Whicher, 6 Allen 292.

Minn.—Cronfeldt v. Arrol, 52 N.W. 857, 50 Minn. 327, 36 Am.S.R. 648.

98. Minn.—Cronfeldt v. Arrol, 52 N.W. 857, 50 Minn. 327, 36 Am.S.R. 648.

99. Me.—Everett v. Herrin, 46 Me. 357, 74 Am.D. 455.
25 C.J. p 91 note 26.

1. Me.—Everett v. Herrin, supra.

2. Me.—Everett v. Herrin, supra.

3. Me.—Everett v. Herrin, supra.

4. Me.—Everett v. Herrin, supra.

5. Vt.—White v. Capron, 52 Vt. 634, 25 C.J. p 91 note 31.

6. Utah.—Spangler v. Corless, 211 P. 692, 61 Utah 88, 28 A.L.R. 72.

7. U.S.—In re Fox, D.C.Cal., 16 F. Supp. 320.

8. Me.—Foss v. Stewart, 14 Me. 312, 25 C.J. p 91 notes 32, 33.

9. Wis.—Cowan v. Main, 24 Wis. 569.

will be necessary for the next foddering season.¹⁰ The period of time for which the exempt fodder is to last begins to run from the levy.¹¹ Where the statute exempts a specified amount of hay or other forage for certain animals, without restriction as to time, the full amount is exempt notwithstanding part of the winter has passed,¹² with the qualification, however, already mentioned, that the debtor has the full statutory number of exempt animals for which this amount of forage is allowed.¹³

§ 67. Computation

In computing the amount of property claimed to be exempt, the property is to be taken at its fair market value.

In computing the amount of property which may be claimed, it has been held, sometimes by virtue of statutory provisions, that the property is to be taken at its fair market value.¹⁴ In the case of choses in action, as notes, accounts, etc., the debt or demand is to be taken at its real value, and is not necessarily to be valued at the amount appearing on the face of the instrument,¹⁵ and the fact that a debt is secured by a lien on personal property worth more than the statutory limit as to value does not affect the right to claim the debt as exempt, for the value of the debt is not increased beyond the amount due by the value of the property on which it is secured.¹⁶

If a debtor, under a statute allowing him to select and hold property as exempt, not exceeding a certain sum in value, selects property that is mortgaged or otherwise encumbered, it has been held that he cannot deduct the amount of the encumbrance in determining its value, but the value must be determined regardless of the mortgage,¹⁷ but there is authority to the contrary under some statutes.¹⁸

§ 68. Double Exemptions

Where the legislative intent is clear, a claimant may be allowed an exemption under two or more provisions of an exemption statute.

A claimant may be allowed an exemption under two or more heads or clauses of the exemption statute,¹⁹ but where, obviously, the legislature intended that a debtor claiming an exemption as a member of one class should not also claim as a member of another class provided for in the statute, the double exemption will not be allowed.²⁰ Where, however, the debtor has a reasonable doubt as to which class he belongs, he may claim both exemptions, although entitled only to one,²¹ and the court cannot require him to elect on which ground he will base his claim.²²

A statute, providing for exemption of household furniture generally in one section, and in another an exception of specific articles of household furniture, gives claimant an option to elect which one he will have, but no right to both.²³

Where a statute provides for exemptions of two classes, fixing the amount in each, and the legislative intent is clear that the debtor shall take both exemptions, one class cannot be set off against the other for the purpose of diminishing the amount of the exemption of that class,²⁴ and, where successive exemptions are granted by successive laws, the object of one being to protect the debtor and the purpose of the other being to protect the debtor's family, the debtor is entitled to exemptions under both statutes.²⁵ However, under some statutes, the absolute exemptions are not dependent on quantity or value, but the additional exemptions to which the debtor is entitled as the head of the family are dependent on value.^{25.5}

10. N.Y.—Farrell v. Higley, Lalor 87.

25 C.J. p 91 note 36.

11. Ohio.—Donahue v. Steele, 1 Ohio Dec., Reprint, 130, 2 West.L. J. 402.

12. Me.—Kennedy v. Philbrick, 38 Me. 135.

13. Me.—Foss v. Stewart, 14 Me. 312.

14. Ill.—Moffett v. Sheehey, 52 Ill. App. 376.

Appraisement see infra § 137.

Market value is not what the owner could realize at a forced sale, but the price he could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make a sale of like property.

Cal.—Wade v. Rathbun, 67 P.2d 765, 23 C.A.2d Supp. 758.

15. Ind.—Coppage v. Gregg, 27 N.E. 570, 1 Ind.App. 112.

16. Ala.—Kennedy v. Smith, 11 So. 665, 99 Ala. 83.

17. Ill.—Moffett v. Sheehey, 52 Ill. App. 376.

18. Ind.—Citizens' State Bank v. Harris, 48 N.E. 856, 149 Ind. 208.

19. U.S.—In re Zimmerman, D.C. Wis., 202 F. 812.

25 C.J. p 92 note 48.

20. Ga.—Wilbanks v. Wardlaw, 178 S.E. 466, 50 Ga.App. 495.

Tex.—Corpus Juris Secundum cited in Clark v. Vitz, Civ.App., 190 S. W.2d 736, 738, error refused no reversible error.

25 C.J. p 92 note 49.

21. Cal.—Van Lue v. Wahrlich-Cor-nett Co., 108 P. 717, 12 C.A. 749.

22. Cal.—Van Lue v. Wahrlich-Cor-nett Co., supra.

23. Ga.—Wilbanks v. Wardlaw, 178 S.E. 466, 50 Ga.App. 495—McFarlin v. Reeves, 73 S.E. 862, 10 Ga.App. 581.

24. U.S.—In re Strauch, D.C.Ohio, 208 F. 842.

25. Ga.—Holland v. Withers, 76 Ga. 667.

25 C.J. p 92 note 54.

25.5 N.D.—Dakota Nat. Bank of Fargo v. Salzwedel, 3 N.W.2d 468, 71 N.D. 643.

§ 69. Successive Claims

A debtor may claim and select his exemption as against successive executions provided he does not thereby have in his possession at any one time more than the amount he is entitled under the statute to hold as exempt.

While a debtor may be allowed exemptions under two or more clauses of a statute, *supra* § 68, he clearly cannot have more than the amount which is allowed to him in the statute set apart to him at the same time by making several claims,²⁶ but he may claim and select his exemption as against each successive execution, provided he does not thereby have in his possession at any one time more than the amount he is entitled under the statute to hold as exempt,²⁷ although, having made a selection in the same proceeding, he is by such election estopped from subsequently claiming other and different property.²⁸

However, when the property allotted to the debtor under an earlier claim has been consumed in maintaining himself or family, a subsequent exemption may be allowed, to replenish the fund the law permits him to have on hand always for the protection of his family;²⁹ but a disposal of the exempt prop-

erty under such circumstances as to negative the inference that it was used by debtor in the maintenance of himself and family will operate as an estoppel against a claim for an additional exemption.³⁰

Whenever a claim of exemption may be made against successive executions, it must be made against each execution in order to secure an allowance of the exemption since a claim against one levy may not be effectual as against subsequent levies, as shown *infra* § 130.

Wages. The exemption of wages is one which is peculiarly proper for recurring claims.³¹ The claim is usually allowed as often as process is served, so long as at the time of the service of the process the exemption does not exceed the statutory limit.³² Under a statute allowing an exemption of wages to a fixed amount on any writ, original, mesne, or judicial, one exemption to the full statutory amount may be allowed on the original writ, and a second exemption also to the full amount on a mesne attachment served later in aid of the original judgment.³³

IV. LIABILITIES AS AGAINST WHICH EXEMPTIONS MAY BE CLAIMED

§ 70. In General

The right of exemption cannot be asserted against an obligation or liability which does not come within the terms of the exemption laws, or which comes within some exception thereto.

Apart from a waiver, express or implied, or of any other act of the debtor depriving him of his right of exemption, as discussed *infra* §§ 101-118,

the general rule is that exempt property cannot be subjected to any claim of a creditor or to a lien.³⁴ However, the right of exemption under particular constitutional or statutory provisions frequently depends on the nature of the liability or obligation on which the judgment sought to be enforced was recovered, as, for example, whether it was based on contract or tort, as discussed *infra* § 72, the right of exemption being assertable only against judg-

26. Ind.—H. C. Smith Coal Co. v. Finley, 131 N.E. 5, 190 Ind. 481. 24 C.J. p 92 note 56.

27. Fla.—*Corpus Juris* cited in Shollar Crate & Box Co. v. Passmore, 4 So.2d 530, 531, 148 Fla. 466.

Ind.—H. C. Smith Coal Co. v. Finley, 131 N.E. 5, 190 Ind. 481.

Ohio.—Sweigart v. Sweigart, App., 35 N.E.2d 578.

24 C.J. p 92 note 57.

28. Iowa.—Wertz v. Hale, 208 N.W. 859, 202 Iowa 305.

29. Miss.—Chandler v. White, 14 So. 454, 71 Miss. 161.

25 C.J. p 92 note 58.

30. La.—Rivet v. Murrell Planting & Mfg. Co., 46 So. 210, 121 La. 201, 126 Am.S.R. 320.

Va.—Oppenheimer v. Howell, 76 Va. 218.

25 C.J. p 92 note 59.

31. Mass.—Hall v. Hartwell, 8 N.E. 333, 142 Mass. 447.

25 C.J. p 93 note 62.

32. Tenn.—Waite v. Franciola, 16 S.W. 116, 90 Tenn. 191.

25 C.J. p 93 note 63.

33. R.I.—Palmisciano v. Rapone, 94 A. 852, 38 R.I. 10.

34. Cal.—Coakley v. Swim, 23 P.2d 518, 218 C. 340.

Ind.—Perkins v. Johnson, 133 N.E. 15, 77 Ind.App. 13.

Pa.—State Mutual Benefit Soc. v. Jackson, 13 Pa. Dist. & Co. 167, 20 Del.Co. 192, 78 Pittsb.Leg.J. 159.

Purpose of exemption statute

Exemptions are granted for the "welfare of the family," meaning protection of debtor from insistent

creditors, and legislature did not anticipate the fact that creditor might be a deserted wife rearing the debtor's children.

Ohio.—Sweigart v. Sweigart, App., 35 N.E.2d 578.

Exception as to liens

Under statute providing that personal property exemptions shall not apply when the debt is secured by lien on such property, the only requisite is that the lien be such as the law generally recognizes as valid; hence the fact that a chattel attempted to be mortgaged by parol is exempt property does not affect the validity of the mortgage.

Tex.—Sparkman v. First State Bank of Handley, 244 S.W. 127, 112 Tex. 33, answers to certified questions conformed to, Civ.App., 246 S.W. 724.

ments coming within the class contemplated by the exemption provisions.³⁵

Furthermore, the constitutional and statutory provisions under which exemption rights arise frequently except from their operation particular classes of claims or liabilities,³⁶ although, since the exemption laws are liberally construed, as discussed supra § 4, exceptions cannot be read into an exemption statute which are not contained therein.³⁷

Some statutory or constitutional exceptions, although in words broad enough to include personal property exemptions in their operation, have been placed in such a context as to compel their application by the courts to the homestead exemption only.³⁸ On the other hand, statutory or constitutional provisions which, by a strict interpretation of their phrasing, apply to realty only have been construed to apply to personal property exemptions as well.³⁹

Judgment lien

Ala.—Brock Candy Co. v. Elson, 100 So. 94, 211 Ala. 244.

Assignments for benefit of creditors as passing exempt property see Assignments for Benefit of Creditors § 153.

35. Meaning of "debt or liability"

The meaning of "any debt or liability" in the statutory exemption of a particular fund depends on the nature of the fund exempted, the purpose for which it is ordinarily created, the circumstances under which it becomes available to the debtor, and the uses normally made of it in such circumstances.
D.C.—Schlaefter v. Schlaefter, 112 F. 2d 177, 71 App.D.C. 350, 130 A.L.R. 1014.

Classification of legal dependents as ordinary debtors.

D.C.—Schlaefter v. Schlaefter, supra.

Depository of fund not "creditor"

Exemption of government pension funds from execution is available only as against creditors of pensioner, and bank in which pensioner has deposited the funds is not such a creditor.

Iowa.—Andrew v. Colo Sav. Bank, 219 N.W. 62, 205 Iowa 872.

Guardian not creditor

(1) Guardian held not "creditor" within statute exempting payments of compensation to veterans from claims of creditors, since ward's estate has no obligation to pay certain amount of compensation to guardian and amount is discretionary with court of appointment.

Iowa.—Hines v. McKenzie, 250 N.W. 687, 216 Iowa 1388.

(2) Items representing advances made for advances and expenses incurred by a guardian acting de facto for veteran, which were of a nature entitling their allowance had they arisen in guardianship de jure, were creditor's claim within the exemption.

Cal.—In re Giambastiani's Estate, 37 P.2d 142, 1 C.A.2d 639.

Pa.—In re Wolfe's Estate, 19 Pa. Dist. & Co. 107.

36. Miss.—Delta Ins. & Realty Co. v. Benjamin, 84 So. 226, 122 Miss. 275.

Mo.—Pugh v. St. Louis Police Relief Ass'n, 179 S.W.2d 927, 237 Mo.App. 922.
25 C.J. p 93 note 66.

Expenses of last illness, funeral, and administration

(1) Some statutes expressly except from operation of the exemption laws funeral expenses, expenses of last illness, and expenses of administration.

Miss.—Delta Ins. & Realty Co. v. Benjamin, 84 So. 226, 122 Miss. 275.

Wash.—German - American State Bank v. Godman, 145 P. 221, 83 Wash. 231.

(2) Exception of funeral expenses with respect to proceeds of life insurance see supra § 42.

Purchase money and taxes

Under some provisions the only liabilities enforceable against property set apart as exempt are claims for purchase money and taxes.

Ga.—Gray v. Higgs, 88 S.E. 709, 18 Ga.App. 22.

Exceptions to exemption of life insurance proceeds are considered supra § 42.

§ 71. Constitutionality, Construction, and Operation of Exceptions

An exception to exemption cannot be created by statute in conflict with constitutional provisions as to exemptions. Such exceptions are strictly construed; authorities differ as to whether they operate retroactively.

Statutory provisions creating exceptions to exemption laws have been generally sustained as valid and constitutional.⁴⁰ Such an exception, however, cannot be sustained if it is in conflict with the provisions relating to exemptions contained in the state constitution.⁴¹ Accordingly a statute cannot restrict an exemption allowed by the constitution, see supra § 3, as by excepting particular debts.⁴² However, a constitutional provision excepting certain property from payment of "any debt or liability" is construed to protect the property from statutes intended to create involuntary liens only, and

Claims for:

Purchase money see infra § 86.
Taxes see infra § 85.

Reason for inability to pay immaterial

The fact that the debtor's inability to pay a special creditor's judgment was caused by sickness or other circumstances over which he had no control will not be allowed to interfere with the creditor's right to seize the debtor's goods exempt as against other claims.

Ill.—Hughes v. Melville, 60 Ill.App. 419.

37. Ky.—Helton v. Vanderpool, 64 S.W.2d 883, 251 Ky. 312.

Miss.—U. S. Fidelity & Guaranty Co. v. Holt, 114 So. 818, 148 Miss. 885.

38. Ark.—Parham v. McMurray, 32 Ark. 261.

Ill.—Shear v. Reynolds, 90 Ill. 238.
25 C.J. p 93 note 67.

39. Ga.—Phelps v. Porter, 40 Ga. 485.

40. Alimony awards

La.—Festervand v. Laster, 130 So. 634, 15 La.App. 159.

Lien for board and lodging

Minn.—Halsey v. Svitak, 203 N.W. 968, 163 Minn. 253.

41. S.D.—O'Leary v. Croghan, 173 N.W. 844, 42 S.D. 210.

Wash.—Verino v. Hickey, 237 P. 5, 135 Wash. 71.
25 C.J. p 104 note 80.

42. Mich.—Burrows v. Brooks, 71 N.W. 460, 113 Mich. 307.

Minn.—Tuttle v. Strout, 7 Minn. 465, 82 Am.D. 108.

not from statutes providing for liens to be created by the voluntary act of the debtor.⁴³

An exception in an earlier statute will not apply to an exemption under a later statute granting it to debtors absolutely as against all debts.⁴⁴

Retroactive operation. According to the view taken in some jurisdictions, a statute making an exception to the general exemption law is retroactive and affects the debtor's right to an exemption as against a liability for an obligation previously incurred,⁴⁵ except where the statute expressly provides that the exception shall operate only on judgments obtained "from and after the passage of this act."⁴⁶ In other jurisdictions, however, in the absence of such express provision, the exception is held not to operate retroactively.⁴⁷

Strict construction. While, as discussed supra § 4, exemption statutes are liberally construed statutory provisions making an exception to the general exemption laws are strictly construed,⁴⁸ although not so strictly as to render the statute meaningless or nugatory,⁴⁹ or to violate the obvious intention of the legislature;⁵⁰ nor will they be so interpreted as to aid in the perpetration of a fraud.⁵¹

§ 72. Character Based on Contract or Tort

a. In general

b. Determination of character of action

a. In General

The right of exemption under statutes not restricting it to claims of a particular nature may be asserted against judgments for tort. It is otherwise in most cases where the exemption is allowed against judgment obtained on any debt, or any debt contracted, or on contract, express or implied.

Where an exemption statute is general in its terms without restriction as to the nature of the judgment or claim as against which exemptions may be allowed, the right may be asserted as against a judgment for tort,⁵² and in some states exemption is allowed against a judgment for a tort under statutes allowing exemptions as against execution obtained on "any debt," or on "any debt contracted."⁵³ By the weight of authority, however, such statutes, as well as statutes allowing exemptions as against judgments based or founded on contract, express or implied, do not apply as against torts, but are limited to cases of contract.⁵⁴ Where one in committing fraud violates the terms of a contract, and action is brought and judgment secured for the fraud, the judgment is in tort, and exemptions will not be allowed.⁵⁵

Intentional or malicious tort. A statute providing that, in certain cases of intentional or malicious tort, defendant may be arrested and shall not be discharged until he has surrendered his personal property in excess of a fixed amount takes away defendant's exemption above such amount.⁵⁶

43. Minn.—*Flint v. Luhrs*, 68 N.W. 514, 66 Minn. 57, 61 Am.S.R. 391. 25 C.J. p 104 note 82.

44. Wash.—*German-American State Bank v. Godman*, 145 P. 221, 83 Wash. 231. 25 C.J. p 104 note 87.

45. Ind.—*Potter v. State*, 23 Ind. 607. 25 C.J. p 104 note 88.

46. Pa.—*Brown v. Reiser*, 8 Pa.Co. 416.

47. Ga.—*Moore v. McCown*, 64 Ga. 617—*Hawks v. Hawks*, 64 Ga. 239. 25 C.J. p 104 note 90.

48. Fla.—*Citizens' State Bank v. Jones*, 131 So. 369, 100 Fla. 1492. Ill.—*Markus, for Use of Guditus v. Hart, Schaffner & Marx*, 1 N.E.2d 699, 284 Ill.App. 166.

Iowa.—*In re Kline's Estate*, 24 N.W. 2d 481, 237 Iowa 1086—*Johanson v. Rowland*, 195 N.W. 358, 196 Iowa 724. 25 C.J. p 104 note 83.

49. Fla.—*Platt v. Platt*, 39 So. 536, 50 Fla. 594.

50. Ark.—*Friedman v. Sullivan*, 2 S.W. 785, 48 Ark. 213. 25 C.J. p 104 note 85.

51. Fla.—*Platt v. Platt*, 39 So. 536, 50 Fla. 594. 25 C.J. p 104 note 86.

52. Mass.—*Burns v. Marland Mfg. Co.*, 14 Gray 487. 25 C.J. p 93 note 72.

"Any debt by contract or otherwise" Ala.—*Ponder v. Jefferson Standard Life Ins. Co.*, 109 S.W.2d 946, 194 Ark. 829.

53. N.C.—*Oakley v. Lasater*, 89 S.E. 1063, 172 N.C. 96. 25 C.J. p 93 note 73.

Judgment for tort as "debt." Iowa.—*Ohio Casualty Ins. Co. v. Galvin*, 269 N.W. 254, 222 Iowa 670, 108 A.L.R. 1036.

54. Ala.—*Erlenbach v. Cox*, 89 So. 465, 206 Ala. 298.

Huckabee v. Stephens, 195 So. 295, 29 Ala.App. 259.

Ark.—*Bogard v. Powell*, 192 S.W.2d 518, 209 Ark. 714—*Hill v. Bush*, 90 S.W.2d 490, 192 Ark. 181—*Mabry v. Manney*, 77 S.W.2d 975, 190 Ark. 154.

25 C.J. p 93 note 74.

Tort of wife

A husband cannot claim an exemption as against a judgment for his wife's tort, on the ground that her tortious act is a violation of his marriage contract with her, and that the judgment is based on a breach of contract.

Ind.—*McCabe v. Berge*, 89 Ind. 225.

In Pennsylvania

(1) It has been held that the word "contract," in statute exempting property from execution issued upon judgment obtained upon a contract, relates to a contract in fact, and does not include relationship artificially raised by law to enforce equities or to compel performance of a legal duty.

Pa.—*Fell v. Johnston*, 36 A.2d 227, 154 Pa.Super. 470.

(2) Under other authority, the statute applies where the judgments were based on either express or implied contracts.

Pa.—*Schwartz v. Schwartz*, 42 Pa. Dist. & Co. 468—*Lancaster Bone Fertilizer Co. v. Weaver*, 17 Pa. Dist. & Co. 359—*In re Cohen's Estate*, 16 Pa.Dist. & Co. 440, 46 York Leg.Rec. 152.

Ramsdell v. Seybert, 14 Pa.Dist. 247, affirmed 27 Pa.Super. 133.

55. Ind.—*Nowling v. McIntosh*, 89 Ind. 593.

25 C.J. p 93 note 76.

56. N.C.—*Oakley v. Lasater*, 89 S.E. 1063, 172 N.C. 96.

Jury finding of malice necessary

Where, in action for slander, no issue of actual malice was submitted to jury, finding of the trial judge

Particular torts. Under the view that an exemption cannot be claimed as against a liability for tort, it has been held that no exemption can be claimed as against an execution on a judgment in an action of trespass,⁵⁷ detinue,⁵⁸ or trover,⁵⁹ or for conversion,⁶⁰ or in ejectment,⁶¹ or in a statutory action to recover damages against a tenant holding over, based on wrongful detention.⁶² However, a judgment in an ejectment suit brought by a landlord against a tenant, while in form a judgment in an action of trespass and tort, may be an action founded on a contract, and is so where the judgment is entered in accordance with an agreement between the parties, and a tenant has a right to claim his exemption as against a judgment so entered.⁶³

Exemptions will not be allowed against a judgment in an action for negligence,⁶⁴ or for malpractice by a physician or surgeon, if the action brought is in tort,⁶⁵ or in an action on the case for libel and slander,⁶⁶ or in an action for fraud and deceit.⁶⁷ Likewise, a demand for alimony and attorney's fees is, as related to exemptions, a demand in tort and not *ex contractu*.^{67.5}

A statutory exception to the general exemptions statute, providing that no motor vehicle shall be held

exempt from a judgment for damages occasioned by the use thereof on public highways, does not give the injured person a lien on such vehicle.^{67.10}

A fiduciary who has violated his trust,⁶⁸ or a public officer who is guilty of official misconduct or negligence,⁶⁹ or an executor or administrator who has wasted or who wrongfully withholds the assets of the estate,⁷⁰ cannot have the benefit of the exemption laws.

b. Determination of Character of Action

The nature of an action as in tort or contract is determined by the substance of the pleadings, as distinguished from the form or particular allegations.

Whether an action sounds in tort or in contract must be determined by an examination of the pleadings,⁷¹ and of their substance rather than the form or particular allegations,⁷² or the form of the action;⁷³ but for the action to be considered as one in tort, all the essential elements of such an action must be present, otherwise it will be considered as based on contract.⁷⁴ The fact that a declaration in tort contains allegations of promises incidental to the main cause of action is immaterial.⁷⁵ Conversely, that the complaint contains an allegation

that the words were actually malicious could not have the effect of depriving defendant of his personal property exemptions.
N.C.—Crowder v. Stiers, 1 S.E.2d 353, 215 N.C. 123.

57. Ala.—Meredith v. Holmes, 68 Ala. 190.

N.Y.—Lathrop v. Singer, 39 Barb. 396.

58. Ala.—Stuckey v. McKibbin, 8 So. 379, 92 Ala. 622.

59. Ala.—Wright v. Jones, 15 So. 506, 103 Ala. 539.

Ind.—Gentry v. Purcell, 84 Ind. 83.

60. Ala.—Vincent v. State, 74 Ala. 274.

Ark.—Smith v. Ragsdale, 36 Ark. 297.

61. Ind.—Smith v. Wood, 83 Ind. 522.

62. Ala.—Penton v. Diamond, 9 So. 175, 92 Ala. 610.
25 C.J. p 95 note 99.

63. Pa.—Morris Run Coal Min. Co. v. Chrzan, 31 Pa.Super. 184.
Rhoads v. Rhoads, 74 Pa.Dist. & Co. 405, 43 Berks Co. 99.

64. Ark.—Hill v. Bush, 90 S.W.2d 490, 192 Ark. 181—Mabry v. Manney, 77 S.W.2d 975, 190 Ark. 154.
Pa.—Kirkpatrick v. White, 29 Pa. 176.

Negligent and wanton injury

Ala.—Huckabee v. Stephens, 195 So. 295, 29 Ala.App. 259.

65. Ark.—Miller v. Minturn, 83 S.W. 918, 73 Ark. 183.

Ind.—De Hart v. Haun, 26 N.E. 61, 126 Ind. 378.

66. Ga.—Davis v. Henson, 29 Ga. 345.

25 C.J. p 95 note 4.

67. Pa.—Lancaster Bone Fertilizer Co. v. Weaver, 17 Pa.Dist. & Co. 359.

25 C.J. p 95 note 5.

Exemptions against judgment setting aside fraudulent conveyance see *infra* § 118.

67.5 Ala.—Lasseter v. Lasseter, 97 So.2d 555, 266 Ala. 459—Rogers v. Rogers, 111 So. 140, 215 Ala. 259.

67.10 Iowa.—In re Kline's Estate, 24 N.W.2d 481, 237 Iowa 1086.

Purpose of exceptive statute

The purpose of the exceptive statute is to withdraw protection of the general statute so as to allow one injured by operation of an exempt automobile to levy upon it, but court cannot assume that the purpose of the statute is to give the injured person an advantage over other creditors, notwithstanding that result would incidentally follow if the debtor asserted his exemption right against other creditors.

Iowa.—In re Kline's Estate, *supra*.

68. Wash.—Erway v. Hill, 90 P. 590, 46 Wash. 457.

25 C.J. p 95 note 6.

69. Pa.—Kirkpatrick v. White, 29 Pa. 176.

25 C.J. p 95 note 7.

70. Ala.—Dangaix v. Lunsford, 20 So. 639, 112 Ala. 403.

Decree for payment not based on contract

A decree ordering the representative of decedent to pay a sum of money based on a surcharge of his accounts is not a judgment founded on contract within the statutory exemption.

Pa.—Schwartz v. Schwartz, 42 Pa. Dist. & Co. 468—In re Cohen's Estate, 16 Pa.Dist. & Co. 440, 46 York Leg.Rec. 152.

71. Ala.—McDaniel v. Johnston, 19 So. 35, 110 Ala. 526.

25 C.J. p 94 note 79.

72. Va.—Jewett v. Ware, 60 S.E. 131, 107 Va. 802.

25 C.J. p 94 note 80.

73. Va.—Jewett v. Ware, *supra*.
25 C.J. p 94 note 81.

Fact that action was in assumpsit did not, in itself, give defendants benefit of statute exempting property from execution issued on judgment obtained on contract.

Pa.—Fell v. Johnston, 36 A.2d 227, 154 Pa.Super. 470.

74. Ark.—Hembey v. Cornelius, 31 S.W.2d 539, 182 Ark. 417.

75. Ark.—Miller v. Mintun, 83 S.W. 918, 73 Ark. 183.

of a false representation does not render the action in tort if such allegation is not material.⁷⁶

When the complaint on which judgment has been taken shows unequivocally that the cause of action is in tort, there cannot be an inquiry into the evidence used at the hearing for the purpose of showing that the judgment was taken on the contract, so as to admit a claim for exemption.⁷⁷

Joinder of causes. Where the complaint unites causes of action in tort and contract, defendant is allowed to treat the judgment as one rendered on contract and to claim his exemption.⁷⁸

§ 73. — Bonds and Recognizances in Legal Proceedings

Some cases hold that the character of the liability on a bond or recognizance in a legal proceeding depends on the character of the proceeding; but it has also been held that the liability on a replevin undertaking is contractual.

It has been held in some cases that the character of the liability on a bond or recognizance given in a legal proceeding is determined by the character of the proceeding,⁷⁹ and the liability arises out of tort where, for example, the proceeding is one for unlawful detainer⁸⁰ or replevin.⁸¹ On the other hand, it has been held that liability of the bail on an undertaking of replevin bail is contractual notwithstanding the liability of the principal.⁸²

§ 74. — Bonds of Officers and Fiduciaries

The authorities are not in accord as to whether a liability on the bond of a public officer or fiduciary, growing out of a wrong of the principal, may be asserted against the exemption.

A judgment on the bond of a public officer or fiduciary, although growing out of the wrong of the principal, has been held a liability against which an exemption may be claimed;⁸³ but by other au-

thority, the liability is regarded as in the nature of a liability *ex delicto* and the right to an exemption is denied.⁸⁴

§ 75. — Breach of Marriage Promise

An action for breach of a marriage promise has been considered to be founded on contract, but also as founded on tort.

An action for a breach of marriage promise is regarded in some jurisdictions as an action founded on contract,⁸⁵ and in others as an action founded on tort.⁸⁶

§ 76. — Waiver of Tort and Suit in Assumpsit

Unless the statute excepts from the exemption claims arising out of a specified tort, the exemption may be asserted against a claim based on a tort where the tort has been waived and judgment recovered in contract.

An exemption right may be asserted as against a judgment on contract notwithstanding the basis of the action is a tort,⁸⁷ as where plaintiff has waived a tort and recovered judgment in assumpsit.⁸⁸ However, under statutes expressly providing that exemptions shall not be allowed as against a debt incurred for property obtained under false pretenses, the fact that the action is in contract in such a case makes no difference.⁸⁹ Such a statute is an exception to the general rule, and is not repealed or affected in any way by a later reenactment in statutory or constitutional form of the general exemption law.⁹⁰

§ 77. Criminal Acts and Prosecutions

The applicability of the right of exemption to liabilities involving crimes or criminal acts is considered *infra* §§ 78-80.

Examine Pocket Parts for later cases.

Ind.—De Hart v. Haun, 26 N.E. 61, 126 Ind. 378.
25 C.J. p 94 note 82.

76. Ark.—Hembey v. Cornelius, 31 S.W.2d 539, 182 Ark. 417.

77. Ind.—Smith v. Wood, 83 Ind. 522.
Green v. Simon, 46 N.E. 693, 17 Ind.App. 360.

78. Ind.—Ries v. McClatchey, 27 N.E. 349, 128 Ind. 125.

79. Pa.—Commonwealth v. Brown, 17 Pa.Super. 520.
Edwards v. Withrow, 6 Pa.Co. 13.
25 C.J. p 94 note 89.

Surety on appeal bond
Pa.—Ramsdell v. Seybert, 14 Pa.Dist. 247, affirmed 27 Pa.Super. 133.
25 C.J. p 94 note 89 [b].

80. Ind.Terr.—Gaines v. Toles, 37 S.W. 946, 1 Ind.Terr. 543.
25 C.J. p 94 note 90.

81. Ark.—Bowser Furniture Co. v. Johnson, 175 S.W. 516, 117 Ark. 496.
Pa.—Pierce v. Lewis, 9 Pa.Co. 250, 27 Wkly.N.C. 400.
25 C.J. p 95 note 91.

82. Ind.—Maloney v. Newton, 85 Ind. 565, 44 Am.R. 46.
25 C.J. p 95 note 92.

83. Ind.—Green v. Simon, 46 N.E. 693, 17 Ind.App. 360.
25 C.J. p 94 note 87.

84. Ala.—Schuessler v. Dudley, 2 So. 526, 80 Ala. 547, 60 Am.R. 124.
25 C.J. p 94 note 88.

85. Pa.—Keim v. Brumbaugh, 29 Pa. Super. 557.
25 C.J. p 94 note 85.

86. N.Y.—Cook v. Newman, 8 How. Pr. 523.
25 C.J. p 94 note 86.

87. Pa.—Wireman v. Mueller, 7 A. 592.
Keim v. Brumbaugh, 29 Pa.Super. 557.

88. Pa.—Wireman v. Mueller, 7 A. 592.
25 C.J. p 95 note 10.

89. S.D.—Sundback v. Griffith, 63 N.W. 544, 7 S.D. 109.
25 C.J. p 95 note 11.

90. S.D.—Sundback v. Griffith, *supra*.

§ 78. — Civil Liability from Criminal Act

Ordinarily, an exemption can be asserted against the judgment in an action in contract, notwithstanding it is based on acts constituting a crime.

Notwithstanding an action of contract is based on an act constituting a crime, an exemption may be allowed against the judgment.⁹¹ However, it has been held that no exemption can be allowed against a claim for the recovery of money misappropriated by a public officer, his act constituting both a tort and a crime.⁹²

§ 79. — Judgments for Fines and Costs

An exemption against demands for any debt contracted is not available against a fine imposed for violation of a criminal statute. Where the exemption statute is general in its terms, there are cases both allowing and disallowing the exemption against such a demand.

Where an exemption statute is general in its terms without restriction as to the nature of the judgment or claim as against which exemptions may be allowed, the right may be asserted as against a judgment for a fine and costs rendered in a criminal prosecution,⁹³ although there is authority to the contrary.⁹⁴ Under a statute conferring an exemption against demands for "any debt contracted," no exemption can be claimed against a fine imposed for a violation of a criminal statute.⁹⁵

§ 80. — Liabilities on Bonds and Recognizances

The liability of a surety on a bond in a criminal case has been held free of the exemption even though the action be in assumpsit; but such a liability has also been held a debt by contract and hence subject to the exemption.

A judgment on a recognizance in a criminal case has been regarded as not being a judgment on a contract against which a judgment may be allowed,⁹⁶ although the action is in assumpsit.⁹⁷ So, where a statute provides that "there shall be no property exempt from execution for fine and costs

for this offense," the surety of the principal is liable for the fine and costs, for the offense of his principal and to the same extent; and the property of the surety for fine and costs is not more exempt than that of his principal.⁹⁸ Under other authority, a judgment in favor of the state on a forfeited bail bond against the sureties is regarded as on a debt by contract against which an exemption may be claimed.⁹⁹

§ 81. Costs and Fees in Civil Actions

The nature of the original proceedings ordinarily determines the right of exemption against a judgment for costs.

The right of defendant to assert an exemption against a judgment for costs is ordinarily held to be determined by the nature of the original proceeding.¹ Where the action is *ex contractu*, an exemption may be claimed,² while it will ordinarily be denied in actions *ex delicto*.³

In an action involving construction of the exemption statute in which it was determined that the debtor was entitled to the exemption, the exemption cannot be subjected to the payment of costs.⁴

Action to marshal liens. At least one statute provides that the costs of an action to marshal liens are to be paid by the insolvent debtor up to the time he demands his exemption, and after that time by the judgment creditor.⁵

Unsuccessful plaintiff. A judgment for costs against a plaintiff is by some authorities regarded as always based on an implied contract, whether the action is *ex contractu* or *ex delicto*, and hence plaintiff is entitled to claim his exemption.⁶ The other view proceeds on the ground that costs recovered by defendant are not founded on plaintiff's implied promise to pay them, if unsuccessful, but are purely statutory, and as in other cases where the liability is imposed by statute, a claim of exemption will not

91. Ala.—Johnson v. Collier, 49 So. 761, 161 Ala. 204.
Pa.—Wireman v. Mueller, 7 A. 592. 25 C.J. p 95 note 13.

92. Ala.—Vincent v. State, 74 Ala. 274.

93. Ky.—Commonwealth v. Cassady, 169 S.W. 497, 159 Ky. 776.
Mo.—Betterton v. O'Dwyer, 101 S.W. 628, 124 Mo.App. 306.

N.J.—*Corpus Juris Secundum* cited in Williams v. Department of Public Welfare, City of Newark, 129 A.2d 56, 60, 43 N.J.Super. 473. 25 C.J. p 96 note 15.

94. Colo.—Enderman v. Alexander, 187 P. 729, 68 Colo. 110.

95. Va.—Whitacre v. Rector, 29 Gratt. (70 Va.) 714, 26 Am.R. 420.

96. Pa.—Commonwealth v. Dougherty, 8 Phila. 366.

97. Pa.—Commonwealth v. Savage, 30 Pa.Super. 364.

98. Tenn.—Irvin v. State, 6 Lea 588.

99. Ark.—State v. Williford, 36 Ark. 155, 161, 38 Am.R. 34.

1. Pa.—Mengel v. McGee, 22 Pa. Dist. 671.

25 C.J. p 96 note 23.
Costs and disbursements in divorce see *infra* § 83.

On assignment for benefit of creditors see Assignments for Benefit of Creditors § 391 a.

2. Ark.—Edwards v. Thayer, 184 S. W. 64, 122 Ark. 579.

3. Ind.—Russell v. Cleary, 5 N.E. 414, 105 Ind. 502. 25 C.J. p 96 note 25.

4. Tenn.—Family Clothing Corporation v. Richardson, 154 S.W.2d 795, 25 Tenn.App. 195.

5. Ohio.—Warns v. Reeck, 28 Ohio Cir.Ct. 785.

6. Pa.—State Mutual Benefit Soc. v. Jackson, 13 Pa.Dist. & Co. 167, 20 Del.Co. 192, 78 Pittsb.Leg.J. 159. Gutekunst v. Gutekunst, Com. Pl., 24 Erie Co. 209, 56 York Leg. Rec. 207. 25 C.J. p 96 note 28.

be allowed.⁷ However, the liability of a surety on a cost bond for an unsuccessful plaintiff is a liability based on the suretyship contract, and in such case the exemption is allowed.⁸

Set-off against joint plaintiffs. Where part of joint plaintiffs are entitled to exemptions, while others are not, the apparent injustice will not prevent defendant from setting off a judgment in his favor for the costs of an appeal against the interests in the judgment of plaintiffs not entitled to an exemption.⁹

Expenses of impounding estrays. Where an ordinance directs the impounding of stray animals and provides that the costs incurred by the officer in impounding the animals may be enforced against their owner, he will not be allowed an exemption in the animals as against such claim, even though they are exempt for other purposes.¹⁰

§ 82. Penalties

A judgment in an action for a statutory penalty is not within an exemption against judgments based on debts contracted or founded on contract.

A judgment in an action for a statutory penalty is based on the wrongful conduct of defendant and

on the statute, and may be enforced as against exempt property, where the statute allows the exemption only as against judgments "on debts contracted," or "founded upon contract, express or implied."¹¹

§ 83. Alimony or Maintenance

Under most authorities, a judgment for alimony and counsel fees, or for support and maintenance, is excepted from the exemption, either by express provision in the statutes or by construction thereof.

It has been broadly stated that, in the absence of a statutory exception to the exemption law,¹² or in the absence of a waiver of the exemption,¹³ a judgment for alimony cannot be satisfied out of exempt property of the husband. It has also been held, however, that an alimony judgment, constituting judicial recognition of the husband's duty to support, is excepted from the exemption laws even where there is no specific exception to that effect recited in the statute.^{13.5}

According to the weight of authority, a debtor is not entitled to claim an exemption against a claim or judgment recovered by his wife for alimony and counsel fees, or for support and maintenance of herself and her children,¹⁴ and the court has power

7. Ark.—Buckley v. Williams, 105 S.W. 95, 84 Ark. 187, 102 Am.S.R. 24, 13 Ann.Cas. 258.
25 C.J. p 96 note 30.

8. Mo.—Farris v. Smithpeter, 180 S.W. 655, 180 Mo.App. 466.

9. S.C.—Rookard v. Atlanta & C. Air Line R. Co., 71 S.E. 992, 39 S.C. 371.
25 C.J. p 97 note 32.

10. Tex.—Thomason v. Brownwood, Civ.App., 98 S.W. 938.
Wis.—Wilcox v. Hemming, 147 N.W. 435, 58 Wis. 144, 46 Am.R. 625.
25 C.J. p 97 note 34.

11. Ala.—Crawford v. Slaton, 31 So. 940, 133 Ala. 393.
25 C.J. p 97 note 35.
Exemptions against penalties in criminal prosecutions see supra § 79.

12. Cal.—Ex parte Smallbone, 106 P.2d 873, 16 C.2d 532, 131 A.L.R. 222, distinguished in Rankins v. Rankins, 126 P.2d 125, 52 C.A.2d 231.
Howard v. Howard, 333 P.2d 417, 166 C.A.2d 386.

13. Cal.—Ex parte Smallbone, 106 P.2d 873, 16 C.2d 532, 131 A.L.R. 222.
Howard v. Howard, 333 P.2d 417, 166 C.A.2d 386.

13.5 La.—Mickenheim v. Cathcart, 84 So.2d 449, 228 La. 890.

14. Cal.—Bruton v. Tearle, 59 P.2d 953, 7 C.2d 48, 106 A.L.R. 580.

Rankins v. Rankins, 126 P.2d 125, 52 C.A.2d 231—Willen v. Willen, 8 P.2d 942, 121 C.A. 351.
D.C.—Schlaefter v. Schlaefter, 112 F.2d 177, 71 App.D.C. 350, 130 A.L.R. 1014.

Ga.—Huling v. Huling, 22 S.E.2d 832, 194 Ga. 819—Hannah v. Hannah, 11 S.E.2d 779, 191 Ga. 134—Caldwell v. Central of Georgia Ry. Co., 123 S.E. 708, 158 Ga. 392, answers to certified questions conformed to 123 S.E. 911, 32 Ga.App. 487.
Idaho.—In re Irish, 9 P.2d 501, 51 Idaho 604.

Ky.—Boden v. McCoy, 278 S.W.2d 68.
La.—Corpus Juris Secundum cited in Mickenheim v. Cathcart, 84 So.2d 449, 451, 228 La. 890, 54 A.L.R.2d 1418.

Miss.—Felder v. Felder's Estate, 13 So.2d 823, 195 Miss. 326—Stirgus v. Stirgus, 160 So. 285, 172 Miss. 337.
N.Y.—Gates v. Gates, 117 N.Y.S.2d 122, 203 Misc. 534—Franklin v. Franklin, 28 N.Y.S.2d 195, 176 Misc. 612, affirmed 30 N.Y.S.2d 811, 262 App.Div. 991.

Lapolla v. Retirement Bd. of Teachers' Retirement System of City of New York, 140 N.Y.S.2d 449.

N.C.—Walker v. Walker, 167 S.E. 818, 204 N.C. 210.

Okl.—Commons v. Bragg, 80 P.2d 287, 183 Okl. 122.

Pa.—Commonwealth v. Berfield, 51 A.2d 523, 160 Pa.Super. 438—Commonwealth v. Peterson, 100 Pa.Super. 600.

Wash.—Haakenson v. Coldiron, 70 P.2d 294, 190 Wash. 627.

Wis.—Corpus Juris Secundum cited in Courtney v. Courtney, 29 N.W.2d 759, 760, 251 Wis. 443.
25 C.J. p 97 note 36.

Protection of family

Since purpose of exemption statutes is to protect not only husband but also his family from destitution, such statutes will not, unless contrary intention is clearly shown, be construed to enable husband to claim its benefit against very persons to whom he owes obligation of support and maintenance.

Fla.—Anderson v. Anderson, 44 So.2d 652.

Held not "debt" or "debt arising from contract"

(1) Award of alimony.

Cal.—Avilla v. Avilla, 183 P.2d 668, 81 C.A.2d 210.

Ind.—Clay v. Hamilton, 63 N.E.2d 207, 116 Ind.App. 214—Gilchrist v. Cotton, 148 N.E. 435, 83 Ind.App. 415.

Iowa.—Siver v. Shebetka, 65 N.W.2d 173, 245 Iowa 965—In re Bagnall's Guardianship, 29 N.W.2d 597, 238 Iowa 905—Malone v. Moore, 236 N.W. 100, 212 Iowa 58, overruling Schooley v. Schooley, 169 N.W. 56, 184 Iowa 835.

to set aside specific property of the husband to the wife as alimony, whether or not it is exempt.¹⁵ It has been held, however, under a statute providing for the sequestration of a certain percentage

(2) "Primarily, this exceptant was entitled to support from the earnings of her husband; by the divorce decree the court, as a substitute therefor, has granted the award of alimony. It is not a debt but represents the judgment of the court as to the manner in which the husband shall be required to perform his marital and public duty." D.C.—In re Flanagan, D.C., 31 F. Supp. 402, 403.

(3) "In essence an award of alimony is not an adjudication of a debt but a judicial determination of what portion of the husband's estate is to be applied to the performance of the husband's duty to support his wife."

N.Y.—Franklin v. Franklin, 28 N.Y. S.2d 195, 196, 176 Misc. 612, affirmed 30 N.Y.S.2d 811, 262 App. Div. 991.

(4) Award of alimony and counsel fees.

Ala.—Lasseter v. Lasseter, 97 So.2d 555, 266 Ala. 459—Littleton v. Littleton, 139 So. 335, 224 Ala. 103. Ark.—Walker v. Walker, 229 S.W. 11, 148 Ark. 170.

(5) Obligation to support wife or children.

Pa.—Commonwealth ex rel. Deutsch v. Deutsch, 31 A.2d 526, 347 Pa. 66.

Commonwealth v. Berfield, 51 A.2d 523, 160 Pa.Super. 438—Commonwealth v. Peterson, 100 Pa.Super. 600.

Wis.—In re Gardner, 264 N.W. 643, 220 Wis. 493.

(6) Award of property to wife. Ark.—Stone v. Stone, 67 S.W.2d 189, 188 Ark. 622.

(7) Taking of a judgment on a former judgment and order for the support of minor children did not change the character of the "debt" as not being one growing out of, or founded on, a contract within meaning of statute exempting certain property from execution for any "debt growing out of or founded on a contract."

Ind.—Guard v. Guard, 64 N.E.2d 802, 116 Ind.App. 396.

As "necessaries"

Liability to pay alimony is within the phrase "liability incurred for necessities furnished the insured" within meaning of exception.

N.Y.—Franklin v. Franklin, 28 N.Y. S.2d 195, 176 Misc. 612, affirmed 30 N.Y.S.2d 811, 262 App.Div. 991.

Wages

(1) An order for support of divorced wife and child, incorporated in divorce decree, and order of execution on wages for delinquent payments of

support, constituted an "order by any court" within exception of the exemption statute, and exemption from execution was properly denied where allowance thereof would interfere with the support order.

Cal.—Avilla v. Avilla, 183 P.2d 668, 81 C.A.2d 210.

(2) A judgment or decree based on order for support of wife or children by husband or father may be enforced by writ of execution attaching his wages or salary in his employer's hands.

Pa.—Commonwealth ex rel. Deutsch v. Deutsch, 31 A.2d 526, 347 Pa. 66.

Trust funds

Where will devised farm to trustee for benefit of testator's son, income of farm in hands of trustee or beneficiary was subject to supplementary proceedings to enforce alimony judgment against son, regardless of whether will created a spendthrift trust or trust for support.

Ind.—Clay v. Hamilton, 63 N.E.2d 207, 116 Ind.App. 214.

Life insurance proceeds

N.Y.—Rubenstein v. Rubenstein, 105 N.Y.S.2d 24.

Reimbursement for support

New York commissioner of public welfare was held entitled to recover from City Employees' Retirement System accumulated deductions and interest to credit of former municipal court attendant, for support of his abandoned wife and child, since statutory provision for exemption of such funds from execution is inapplicable in such case, notwithstanding lack of notice to employee.

N.Y.—Hodson v. New York City Employees' Retirement System, 278 N.Y.S. 16, 243 App.Div. 480.

Property not held by entirety

In action by abandoned wife for allowance of subsistence and counsel fees from husband's estate, husband cannot claim personal property exemptions in property not held by entireties with right of survivorship.

N.C.—Holton v. Holton, 119 S.E. 751, 186 N.C. 355.

Separation without divorce

The rule applies even though the wife is separated from her husband, but where they are not divorced.

N.Y.—Zwingmann v. Zwingmann, 134 N.Y.S. 1077, 150 App.Div. 358.

Pension, disability, retirement, or annuity funds

(1) Pension fund of husband is not exempt from claim of wife for alimony or support and maintenance of herself or children.

N.J.—Fischer v. Fischer, 98 A.2d 568, 13 N.J. 162.

N.Y.—King v. King, 285 N.Y.S. 97, 246 App.Div. 836.

Wis.—Saunders v. Saunders, 9 N.W. 2d 629, 243 Wis. 94.

25 C.J. p 97 note 37 [a].

(2) Charter provision exempting pension funds and disability insurance funds of policemen's fund from attachment or garnishment or court process for payment of debt or judgment against beneficiary does not take fund out of reach of process when an alimony judgment is sought to be enforced.

Wis.—Courtney v. Courtney, 29 N.W. 2d 759, 251 Wis. 443.

(3) The provision of the Railroad Retirement Act exempting the annuity or pension fund from attachment was not in aid of delinquent husbands seeking to evade their responsibilities, but was intended solely to relieve the federal authorities, as administrators of the fund, from the annoyance of attachment of pensions or annuities in their hands, payable to railroad employees after retirement.

Pa.—Commonwealth v. Berfield, 51 A.2d 523, 160 Pa.Super. 438.

(4) The money accruing to husband under annuity contract with insurance company was not exempt from wife's claim for alimony under judgment of separation.

N.Y.—Jackson v. Jackson, 86 N.Y.S. 2d 516, 194 Misc. 134—Jackson v. Jackson, 73 N.Y.S.2d 122, 194 Misc. 132.

In Ohio

(1) It has been held that compensation benefits to which husband was entitled could not be claimed by divorced wife as satisfaction for delinquent alimony payments as wife, whose husband was still living, was not a dependent within meaning of statute providing compensation before payment shall be exempt from all claims of creditors and from any attachment or execution and shall be paid only to the employees or their dependents.

Ohio.—Bruce v. Bruce, 130 N.E.2d 433, 100 Ohio App. 121.

(2) It was formerly held, however, that workmen's compensation money in hands of employer who was self-insurer was subject to award for alimony.

Ohio.—Chapman v. Chapman, 15 Ohio Supp. 9.

15. Iowa.—Szymanski v. Szymanski, 176 N.W. 806, 188 Iowa 931.

Mass.—Tully v. Tully, 34 N.E. 79, 159 Mass. 91.

25 C.J. p 97 note 37.

of defendant's earnings after a judgment against him has been returned unsatisfied, that a wife's judgment for alimony against her husband may be enforced against the statutory percentage of the husband's earnings, the inference being that it cannot be enforced against the husband's earnings above the statutory limit.¹⁶

In at least one state there are express statutory provisions prohibiting allowance of exemptions against judgments for alimony or maintenance,¹⁷ and such statutes are held not to be in conflict with, but an exception to, the general exemption law.¹⁸ Such a statute, however, has been held not to extend to, or include, a proceeding instituted for divorce in which child support is adjudged.^{18.5} Likewise, statutes exempting wages and salary from execution except in proceedings for desertion, proceedings against a husband to enforce a support judgment, or proceedings in civil support cases have been held not to eliminate from the exemption an action to recover arrearages due under a separation agreement.^{18.10}

It would seem that a husband may practically secure an exemption for his wages against his wife's execution for alimony by having his wages paid to him in advance, so that there will never be any

wages earned in the hands of the employer which can be reached by garnishment. Such an arrangement with reference to exempt property is not a fraud on creditors.¹⁹

Veteran's benefits, in the form of pension, compensation, bonus, etc., are usually considered as not exempt from the claim of a wife for alimony or for support and maintenance of herself or her children.^{19.5}

Fees, costs and disbursements. It has been held that notwithstanding an exemption will not be allowed as against a claim for alimony, it may be allowed as against an allowance for attorney's fees or costs and disbursements in a separation proceeding.²⁰

§ 84. Bastardy Judgment

An order to pay an allowance in a bastardy proceeding is not a debt subject to an exemption, except under statutes creating exemptions against "debt, damages, fine, or amercement."

The liability of the father of a bastard child, who under a statute has been ordered to pay an allowance to the mother, is not a debt due the mother against which an exemption may be claimed.²¹ However, where the exemption is conferred by stat-

16. N.Y.—Rolt-Wheeler v. Rolt-Wheeler, 162 N.Y.S. 491, 175 App. Div. 852.

17. Mo.—Pickel v. Pickel, 147 S.W. 1059, 243 Mo. 641—Haizlip v. Haizlip, 144 S.W. 851, 240 Mo. 392.

Anderson v. Norvell-Shapleigh Hardware Co., 113 S.W. 733, 134 Mo.App. 188.

Retirement funds

The statute exempting retirement allowances from legal process was not intended to depart from state's settled policy of protecting pensioner's family; hence wife of police officer who resigned from police force could sequester husband's interest in retirement fund to pay alimony and counsel fees in divorce suit.

Mo.—Pugh v. St. Louis Police Relief Ass'n, 179 S.W.2d 927, 237 Mo.App. 922.

18. Mo.—Anderson v. Norvell-Shapleigh Hardware Co., 113 S.W. 733, 134 Mo.App. 188.

18.5 Mo.—Ferneau v. Armour & Co., App., 303 S.W.2d 161.

18.10 Pa.—Marble v. Marble, Com. Pl., 103 Pittsb.Leg.J. 70, affirmed 109 A.2d 145, 379 Pa. 238.

Wages

A man's wages are exempt from attachment under a judgment entered in favor of his former wife on a

bond given to secure a separation agreement, and the statute authorizing an attachment against wages in execution of a court order for payment of support due a wife is inapplicable, since plaintiff is no longer defendant's wife.

Pa.—Lowrey v. Lowrey, 46 Pa.Dist. & Co. 385.

19. Mo.—Jarboe v. Jarboe, 79 S.W. 1162, 106 Mo.App. 489.

19.5 Ark.—Stone v. Stone, 67 S.W.2d 189, 188 Ark. 622.

Cal.—Gaskins v. Security-First Nat. Bank of Los Angeles, 86 P.2d 681, 30 C.A.2d 409.

D.C.—In re Flanagan, D.C., 31 F. Supp. 402.

Ga.—Hannah v. Hannah, 11 S.E.2d 779, 191 Ga. 134.

Iowa.—In re Bagnall's Guardianship, 29 N.W.2d 597, 238 Iowa 905.

Ky.—Arms' Committee v. Arms, 86 S.W.2d 542, 260 Ky. 634.

Miss.—Stirgus v. Stirgus, 160 So. 285, 172 Miss. 337.

N.Y.—Riker v. Riker, 289 N.Y.S. 835, 160 Misc. 117.

Reason for rule

Such a claim or obligation is not a debt, but an obligation growing out of status and public policy, and claimant is not a creditor within the exemption provisions.

Cal.—Gaskins v. Security-First Nat. Bank of Los Angeles, 86 P.2d 681, 30 C.A.2d 409.

D.C.—In re Flanagan, D.C., 31 F. Supp. 402.

Ga.—Hannah v. Hannah, 11 S.E.2d 779, 191 Ga. 134.

Miss.—Stirgus v. Stirgus, 160 So. 285, 172 Miss. 337—Hollis v. Bryan, 143 So. 687, 166 Miss. 874.

Wash.—Pishue v. Pishue, 203 P.2d 1070, 32 Wash.2d 750.

Wis.—In re Gardner, 264 N.W. 643, 220 Wis. 493.

Proceeding adverse to veteran

It has been held that a war veteran's wife could not subject compensation received by veteran to her claim for support and maintenance in any proceeding adverse to veteran.

Tenn.—Brewer v. Brewer, 84 S.W.2d 1022, 19 Tenn.App. 209.

Adjusted compensation certificate

In determining whether inability relieved father of contempt in failing to pay for children's support according to divorce decree, father's adjusted compensation certificate could not be considered.

Idaho.—In re Irish, 9 P.2d 501, 51 Idaho 604.

20. La.—Mickenheim v. Cathcart, 84 So.2d 449, 228 La. 890.

N.Y.—Monck v. Monck, 172 N.Y.S. 401, 184 App.Div. 656.

21. N.C.—State v. Parsons, 20 S.E. 511, 115 N.C. 730.
25 C.J. p 97 note 47.

ute as against any "debt, damages, fine, or amercement," it may be claimed as against such a judgment.²²

§ 85. Debts Due Government

Except for such claims due the government as are expressly excepted from the exemption or as do not come within the contemplation of the statute, claims due the government are subject to the right of exemption.

Under some express provisions, exemptions are not allowed as against claims for taxes and certain other claims in favor of the state,²³ as, for example, against sheriffs and other public collectors, or their sureties or personal representatives;²⁴ and in the

absence of express provision it has been held or stated that the exemption laws do not apply as against debts due to the state, on the principle that the state is not to be bound by a statute unless expressly named therein.²⁵ In some cases the exemption statute is held not to be applicable because the obligation due the government is considered as not of a nature contemplated by such statute.²⁶

By the weight of authority, however, exemption statutes are regarded as applicable to ordinary debts due to the government or a governmental institution.²⁷ Even in a jurisdiction where by express provision of the statute exemptions in certain de-

22. Ohio.—State v. O'Brien, 14 Ohio Cir.Ct. 300, 7 Ohio Cir.Dec. 386.

23. Ky.—Commonwealth v. Cassidy, 169 S.W. 497, 159 Ky. 776, L.R.A. 1915A 1214.

25 C.J. p 98 note 49.

24. Ky.—Mason v. Cook, 218 S.W. 740, 187 Ky. 260—Commonwealth v. Cook, 8 Bush 220, 8 Am.R. 456.

25 C.J. p 98 note 50.

25. Pa.—In re Blum's Estate, 38 Pa.Dist. & Co. 598, 54 York Leg. Rec. 31.

25 C.J. p 98 note 51.

26. Pa.—Fell v. Johnston, 36 A.2d 227, 154 Pa.Super. 470.

Public assistance payments not contractual obligation

Exemption statutes may not be invoked against commonwealth in claim by it for reimbursement for public assistance payments, because the liability to reimburse the commonwealth for public assistance payments is not such a contractual relationship as is contemplated by the exemption statutes.

Pa.—In re Blum's Estate, 38 Pa.Dist. & Co. 598, 54 York Leg.Rec. 31.

Taxes not debt voluntarily incurred

Laws exempting property of cemetery corporations from levy of execution relate to debts and obligations voluntarily incurred and do not relate to taxes.

Minn.—Christgau v. Woodlawn Cemetery Ass'n, Winona, 293 N.W. 619, 208 Minn. 263.

Applicability of exemption to claims for taxes see the C.J.S. title Taxation § 644, also 61 C.J. p 1041 note 59—p 1042 note 63.

Subrogation on payment of taxes

Holder of mortgage, on paying taxes assessed against property before he acquired it in order to protect his title, had same status as taxing authorities, under doctrine of subrogation, and, as an incident, the right to collect taxes in full from mortgagors as registered owners at time of assessment, and former owners could not claim exemptions under statute exempting property from execution

issued on judgment obtained on a "contract."

Pa.—Fell v. Johnston, 36 A.2d 227, 154 Pa.Super. 470.

27. Iowa.—Corpus Juris cited in Ohio Casualty Ins. Co. v. Galvin, 269 N.W. 254, 258, 222 Iowa 670, 108 A.L.R. 1036.

La.—Corpus Juris cited in Succession of Hedden, App., 146 So. 732, 733.

Pa.—In re Beall's Estate, 119 A.2d 216, 384 Pa. 14.

25 C.J. p 98 note 52.

Claim for defalcation reduced to judgment held "debt" within exemption statute.

Iowa.—Ohio Casualty Ins. Co. v. Galvin, 269 N.W. 254, 222 Iowa 670, 108 A.L.R. 1036.

Public policy not involved

Judgment against defaulting official is "debt" within exemption statute as against contention that it was against public policy to permit public official who had been unfaithful to his trust to benefit by his own wrong by claiming protection of exemption law.

Iowa.—Ohio Casualty Ins. Co. v. Galvin, supra.

Preexisting debts

Congress has power to relieve pensions paid by the government from preexisting debts owing to governmental institutions.

U.S.—Reynolds v. U. S., Ct.Cl., 54 S. Ct. 800, 292 U.S. 443, 78 L.Ed. 1353.

Veteran's benefits; support and maintenance

(1) United States Adjusted Service Bonds issued under the World War Adjusted Compensation Act and the proceeds thereof are exempt from claim for maintenance and support of decedent in city or state institution.

Pa.—In re McDonald's Estate, 36 Pa. Dist. & Co. 436.

Wis.—In re Guardianship of Letourneau, 300 N.W. 248, 238 Wis. 473.

(2) In various jurisdictions the statutes exempting veteran's benefits from claims of creditors have been

applied, with the result that claims of a state hospital for maintenance of a veteran, incurred before appointment of his guardian, will not be allowed out of compensation and disability allowance paid to guardian after his appointment.

Cal.—In re Ferarazza's Estate, 28 P. 2d 670, 219 C. 668.

In re Bayly's Estate, 212 P.2d 587, 95 C.A.2d 174.

N.Y.—In re Murphy's Committee, 237 N.Y.S. 448, 227 App.Div. 839.

Pa.—In re Kelly, 17 Pa.Dist. & Co. 157.

In re Rothenberger, Com.Pl., 51 Berks Co. 35.

Wis.—In re Guardianship of Bemowski, 88 N.W.2d 22, 3 Wis.2d 133.

(3) It has also been held, however, that the statutes exempting veteran's benefits do not apply to a claim by a state for reimbursement for the support furnished to an incompetent veteran after the appointment of a guardian or committee.

Cal.—In re Bayly's Estate, supra.

Mich.—In re Lewis' Estate, 283 N.W. 21, 287 Mich. 179.

N.Y.—In re Murphy's Committee, supra.

Wis.—In re Guardianship of Bemowski, 88 N.W.2d 22, 3 Wis.2d 133, overruling In re Guardianship of Letourneau, 300 N.W. 248, 238 Wis. 473.

(4) Likewise, such statutes have been held inapplicable in an action by a state to recover the amounts expended for the maintenance and support of the infant children of a veteran, who are entitled to such benefits.

N.Y.—In re Guardianship of Weinberg, 110 N.Y.S.2d 130, 201 Misc. 489.

In re Delano's Guardianship, 114 N.Y.S.2d 183.

(5) So, where it is considered that the exemption applies only to funds the veteran is entitled to receive and not to funds in his possession, money or property purchased therewith is subject to a claim of a state insti-

financed cases are not allowed against the state, the courts have refused to extend the operation of such statutes to claims other than those named.²⁸ In any event, a statute of exemption should not be construed so as to allow an exemption as against debts to the state, if under the circumstances the exemption could not be claimed as against a private debt.²⁹

It has been held that a state exemption law will not affect the United States unless allowed by the laws of the latter.³⁰ A state statute exempting wages or salary in the hands of an employer has been held unavailable as against the federal government, in view of the fact that it would also be unavailable as against the state.^{30.5} However, under the act of congress adopting generally, for the enforcement of judgments recovered in the federal courts, the remedy by execution as allowed by the laws of the respective states, exemptions may be claimed under the state laws as against execution on a judgment of a federal court in favor of the United States.³¹

§ 86. Purchase Money

- a. In general
- b. Persons entitled to benefit of exception
- c. Assertion of lien or exception against third persons

tution for care and maintenance of the disabled veteran.

Ky.—Department of Public Welfare for Use and Benefit of Central State Hospital v. Allen, 74 S.W.2d 329, 255 Ky. 301.

(6) Where the veterans' bureau had and exercised the right to make use of a certain hospital for insane veterans, such a hospital is within a provision that all hospital facilities under the control and jurisdiction of the veterans' bureau shall be available to veterans of the Spanish-American War, and forbidding deductions for board from their pensions.

U.S.—Reynolds v. U. S., Ct.Cl., 54 S. Ct. 800, 292 U.S. 443, 78 L.Ed. 1353.

28. Ky.—Commonwealth v. Lay, 12 Bush 283, 23 Am.R. 718.

29. Ga.—Brooks v. State, 54 Ga. 36. Pa.—In re Yerger's Estate, 32 Pa.Co. 237.

25 C.J. p 98 note 55.

30. U.S.—Fried v. U. S., C.A.N.Y., 241 F.2d 504, certiorari denied 77 S.Ct. 1382, 354 U.S. 922, 1 L.Ed.2d 1437.

McGuirk v. Kyle, D.C.Pa., 10 F. Supp. 705, reversed on other grounds, C.C.A., Kyle v. McGuirk, 82 F.2d 212.

30.5 U.S.—U. S. v. Miller, C.A.Pa., 229 F.2d 839.

31. U.S.—Fink v. O'Neil, Wis., 1 S. Ct. 325, 106 U.S. 272, 27 L.Ed. 196, overruling U. S. v. Howell, C.C.N.C., 9 F. 674, 4 Hughes 483. 25 C.J. p 98 note 56.

32. Ark.—Osborn v. Lindley, 259 S. W. 729, 163 Ark. 260—Coblentz & Logsdon v. L. D. Powell Co., 229 S.W. 25, 148 Ark. 151.

Fla.—Citizens' State Bank v. Jones, 131 So. 369, 100 Fla. 1492.

Ga.—Moseman v. Comer, 127 S.E. 406, 160 Ga. 106.

Gray Bros. v. Higgs, 88 S.E. 709, 18 Ga.App. 22.

Iowa.—Wilson v. Wright, 198 N.W. 782, 197 Iowa 1300—Johanson v. Rowland, 195 N.W. 358, 196 Iowa 724.

La.—Ferrell v. Jena Auto Co., App., 16 So.2d 548.

25 C.J. p 98 note 58.

Strict construction in favor of family

Fla.—Citizens' State Bank v. Jones, 131 So. 369, 100 Fla. 1492.

Where lien created

If by contract buyer gave seller lien on automobile to secure payment of purchase-money note, automobile was not exempt from forced sale, although buyer was head of family and automobile was only one he owned.

- d. Character of claim within exception
- e. Subjection of other exempt property

a. In General

An exception from the right of exemption is ordinarily made in favor of a claim for the purchase price of property.

An exemption is not ordinarily allowed, under the statutes, as against a claim for the purchase price of property sold the debtor, statutes sometimes expressly so providing.³² However, under some statutes no exception is made in favor of such claims,³³ or certain property is excluded from the exception.³⁴ Even a statute granting the purchase-money exception in general terms will have no application to articles for which other statutes expressly and specifically provide an absolute exemption.³⁵

Under the exception in behalf of purchase-money claims, the specific property for which purchase money is due is liable to a judgment therefor, notwithstanding it has been set apart as exempt as against other claims,³⁶ or the debtor has other property sufficient to satisfy the claim.³⁷

Conditional sale. A statute providing for an exception in favor of claims for purchase money applies in the case of a conditional sale.³⁸

Tex.—Runnels Chevrolet Co. v. Travis, Civ.App., 62 S.W.2d 225.

33. Ky.—Helton v. Vanderpool, 64 S.W.2d 883, 251 Ky. 312.

25 C.J. p 98 note 59.

In the absence of express exception Ky.—Helton v. Vanderpool, supra.

34. Mich.—Vanderhorst v. Bacon, 38 Mich. 669, 31 Am.R. 328—Maxon v. Perrott, 17 Mich. 332, 97 Am.D. 191.

25 C.J. p 98 note 60.

35. N.J.—Spear v. Locust Wood Cemetery Co., 66 A. 1068, 72 N.J. Eq. 821.

Cemetery lands are under statutes absolutely exempt, and a person who sells land to a cemetery association with full knowledge that it is for use as a cemetery is precluded under such statutes from enforcing his claim for the purchase money against the land.

N.J.—Spear v. Locust Wood Cemetery Co., supra.

36. Ga.—Loyless v. Collins, 55 Ga. 370—Tift v. Newsom, 44 Ga. 600.

37. Colo.—Behymer v. Cook, 5 Colo. 395.

38. Ark.—Coblentz v. Logsdon v. L. D. Powell Co., 229 S.W. 25, 148 Ark. 151.

25 C.J. p 98 note 64.

b. Persons Entitled to Benefit of Exception

One claiming the benefit of the statutory exception from exemption in an action for the purchase price of property must bring himself clearly within the terms of the statute. The authorities are not in accord as to whether an assignee of the vendor may assert the exception in favor of the purchase price.

A party who claims the benefits of the exception from exemption prescribed by statute in an action brought for the purchase price of property or any part thereof must bring himself clearly within the terms of the statute.^{38,50}

Some authorities hold that an exemption may be claimed as against an assignee of a note given for purchase money,³⁹ while others hold that the assignee takes all the rights of his assignor.⁴⁰

A creditor of the vendor who has brought suit against the vendor and has instituted garnishment proceedings against the purchaser is entitled to an enforcement of the vendor's rights as against the exemption rights of the purchaser.⁴¹

c. Assertion of Lien or Exception against Third Persons

Ordinarily, the exception from exemption in favor of the purchase price is assertable only while the property is in the hands of the purchaser.

The provision for the purchase-money exception adopted in most of the states merely allows the seller of property to subject it to the satisfaction of a judgment for the purchase price while it is in the hands of the purchaser; it does not give a lien so as to bind the property in the hands of one to whom the purchaser may sell it,⁴² or affect priorities between creditors.⁴³

At least one statute expressly provides that the property sold must be in the purchaser's hands.⁴⁴ Property will be considered as in the purchaser's hands within the meaning of such a statute where it has been sold by his trustee in bankruptcy, reserving to the bankrupt the right to assert his claim to exemption against the proceeds of a sale instead of against the specific articles sold.⁴⁵

d. Character of Claim within Exception

With respect to the exception from exemption, a judgment on a note given for the purchase price and various other types of claims, such as claims for rent and supplies, or for money lent for the purchase, have been considered in the nature of claims for purchase money.

A judgment on a note given for purchase money is regarded as a claim for purchase money in some

38.50 N.D.—Congress Candy Co. v. Farmer, 12 N.W.2d 796, 73 N.D. 174, 150 A.L.R. 1316.

39. Iowa.—Johanson v. Rowland, 195 N.W. 358, 359, 196 Iowa 724. 25 C.J. p 100 note 94.

Reason for rule

"The statute does not give a seller of personal property a lien thereon for the purchase price, and no lien attaches thereto until the execution is levied. The assignment of the note . . . did not therefore operate to transfer a lien upon the property to it. The assignee purchased nothing but the note. It does not stand in the relation to appellee of seller, but merely as the owner of a note executed by him. The judgment entered was upon the note, and not in any sense for the purchase price. . . . The original seller received payment of the purchase price from the assignee. The assignor thereafter had no claim against the maker of the note for purchase money."

Iowa.—Johanson v. Rowland, *supra*.

40. Minn.—Langevin v. Bloom, 71 N.W. 697, 69 Minn. 22, 23, 65 Am. S.R. 546.

25 C.J. p 100 note 95.

41. Ark.—Liddell v. Jones, 88 S.W. 961, 76 Ark. 344, 113 Am.S.R. 99.

42. Ark.—Holman v. Nutt, 179 S.W. 811, 120 Ark. 446—Clements v. Hamilton-Brown Shoe Co., 138 S.

W. 971, 99 Ark. 335—McComb v. Judsonia State Bank, 120 S.W. 844, 91 Ark. 218.

Iowa.—Corpus Juris Secundum cited in *In re Kline's Estate*, 24 N.W.2d 481, 483, 237 Iowa 1086.

Miss.—Frank v. Robinson, 3 So. 253, 65 Miss. 162.

N.D.—Corpus Juris Secundum quoted in Congress Candy Co. v. Farmer, 12 N.W.2d 796, 806, 73 N.D. 174, 150 A.L.R. 1316.

25 C.J. p 98 note 65.

Property taken by receiver

It is too late for vendor of personalty to obtain lien by seizure after property of buyer, an insolvent corporation, has passed into hands of receiver.

Ark.—Gordon Hollow Blast Grate Co. v. Zearing, 198 S.W. 97, 130 Ark. 535.

Exception to exemption statute does not create seller's lien see Sales § 393.

Partnership property in possession of deceased partner's representative

Property inventoried as partnership property in the possession of the representative of deceased member of the firm may be reached by execution on a judgment against the surviving partner for the purchase price.

Mo.—State v. Mason, 9 S.W. 19, 96 Mo. 127.

Innocent purchaser

(1) Under some statutes the property can be reached on an execution for the purchase price except where it is in the hands of an innocent purchaser for value without notice of the prior claim for the purchase money.

Mo.—Parker v. Rodes, 79 Mo. 88.

(2) Circumstances amounting to a waiver or an estoppel may prevent the creditor from reaching the property in the hands of a purchaser for value with knowledge of the prior claim.

Mo.—Lawrence v. Owens, 39 Mo.App. 318—Hawk v. Applegate, 37 Mo. App. 32.

43. Mo.—Straus v. Rothan, 14 S.W. 940, 102 Mo. 261.

N.D.—Corpus Juris Secundum quoted in Congress Candy Co. v. Farmer, 12 N.W.2d 796, 806, 73 N.D. 174, 150 A.L.R. 1316.

25 C.J. p 98 note 66.

General creditor, obtaining first lien by execution, attachment, or mortgage on personalty, with knowledge that purchase price is not paid by debtor, will prevail over creditor for purchase price.

Mo.—R. Williams & Co. v. Farm & Home Savings & Loan Ass'n, 272 S.W. 1006, 217 Mo.App. 554.

44. U.S.—Mullinix v. Simon, N.D., 196 F. 775, 116 C.C.A. 399.

45. U.S.—Mullinix v. Simon, *supra*.

jurisdictions,⁴⁶ although the note purports to have been given in payment and satisfaction of the claim⁴⁷ or although security has been given;⁴⁸ but the consideration of the note must have been the purchase price of the property.⁴⁹ The exception also extends to a judgment on a bill of exchange drawn for the price of the property and accepted by the debtor.⁵⁰

Where the seller, after having taken the buyer's note and indorsed it, pays a judgment thereon recovered against him and the buyer jointly by his indorsee, an action to recover the money so paid cannot be regarded as for purchase money.⁵¹ On the other hand, it has been held that the negotiation of the note by the sellers without recourse is not a waiver of the exception so as to prevent its application by the sellers after reacquiring the note on the purchaser's default.⁵²

It has been held that the fact that the judgment is only in part for the purchase price, which part is readily ascertainable, does not prevent the application of the exception.⁵³ So, where the creditor takes a judgment for the purchase money and afterward loans the debtor further money and takes another judgment for the amount of the first judgment and the amount of the loan and satisfies the first judgment, the second judgment may be regarded as pro tanto a judgment for purchase money.⁵⁴ On the other hand, it has been held that a statute providing that no exemption shall be allowed as against a judgment for the purchase price will be

construed to mean a judgment is exclusively for the purchase money or a part thereof.⁵⁵

The exempt property of a surety on a note given for the purchase price of exempt property cannot be taken under execution on a judgment on the note.⁵⁶

An agreement to assume indebtedness forming part of the consideration of the purchase of property is an obligation contracted for its purchase.⁵⁷

Money loaned to be used in purchasing the property may constitute a part of the "purchase money" of the property.⁵⁸ Where the purchaser makes a chattel mortgage of the property purchased to a third person to raise the money with which to purchase the property, the mortgagee is in the position of the original vendor and may enforce his claim against the exemption.⁵⁹ The fact that the mortgage runs to a third person other than the vendor does not change its character as a purchase-money mortgage.⁶⁰

Advances for supplies in the making of a crop have been regarded as in the nature of purchase money.⁶¹

Advances on growing crops. Where a factor makes advances and takes a statutory lien on the growing crops, such advances are in the nature of purchase money.⁶²

Rents and profits of land. Under some statutes a landlord's lien for rent or for supplies is considered in the nature of purchase money and excepted from the exception as such.⁶³ It is otherwise in a jurisdiction where there is a statute creating a lien

46. Minn.—Rogers v. Brackett, 25 N.W. 601, 34 Minn. 279.

Mo.—De Loach Mill Mfg. Co. v. Latham, 72 S.W. 1080, 99 Mo.App. 231.

47. Minn.—Rogers v. Brackett, 25 N.W. 601, 34 Minn. 279.

48. Mich.—Roberts v. McGur, 46 N.W. 370, 82 Mich. 221.

49. Ga.—Washington v. Cartwright, 65 Ga. 177.
25 C.J. p 99 note 76.

50. Man.—Canada Law Book Co. v. —, 17 Man. 345.

51. Minn.—Harley v. Davis, 16 Minn. 487.

52. Iowa.—Callaway v. Hauser Bros., 233 N.W. 506, 509, 211 Iowa 307.

Reason for rule

"The indorser of a note, who has been compelled to take up the same by default of the maker, has never been fully divested of his title . . . he has always maintained an interest in the note . . . he has al-

ways been a party to the contract . . . after reacquiring the same by payment, he holds it by his original title and not through or under the indorsee; and . . . his previous transfer of the note does not work a waiver of his rights."

Iowa.—Callaway v. Hauser Bros., supra.

Effect of judgment in favor of indorsee

That indorsee of purchase price note obtained judgment against maker before payee performed his obligation as indorser did not preclude payee from exercising rights under statute regarding exemptions.

Iowa.—Callaway v. Hauser Bros., supra.

53. No estoppel or waiver

A creditor does not, merely by including, in a judgment for purchase price of property, other items, waive his right to levy on such property under the judgment or estop himself from doing so if amount due on purchase price is readily ascertainable.

Iowa.—Wilson v. Wright, 198 N.W. 782, 197 Iowa 1300.

54. Pa.—Fox v. Delong, 1 Woodw. 137.

55. Ohio.—State v. Shook, 118 N.E. 1010, 97 Ohio St. 164.

56. N.Y.—Davis v. Peabody, 10 Barb. 91.

57. Fla.—Platt v. Platt, 39 So. 536, 50 Fla. 594.

25 C.J. p 99 note 83.

58. Wis.—Houlehan v. Rassler, 41 N.W. 720, 73 Wis. 557.

25 C.J. p 100 note 84.

59. Kan.—First Nat. Bank v. Venard, 197 P. 877, 109 Kan. 15.

25 C.J. p 100 note 85.

60. Kan.—First Nat. Bank v. Venard, supra—Dosbaugh Nat. Bank v. Jelf, 119 P. 538, 86 Kan. 41.

61. S.C.—Farmer v. Greer Fertilizer Co., 86 S.E. 639, 102 S.C. 285.
25 C.J. p 99 note 82.

62. Ga.—Tift v. Newsom, 44 Ga. 600.

63. Ga.—Moseman v. Comer, 127 S.E. 406, 160 Ga. 106.

for rent only on nonexempt property of the tenant.⁶⁴

Rents and profits of land, after their sequestration by institution of a suit to foreclose a vendor's lien and appointment of receiver, stand in the same category as the land itself and are not exempt.⁶⁵

Costs. Wherever a judgment for the purchase price of property is enforceable against the exemption right, costs of the action brought to secure the judgment are also enforceable against the right.⁶⁶

Judgment in tort. A judgment in an action against the debtor for taking personal property with the consent of the owner and converting and disposing of it cannot be regarded as a judgment for purchase money.⁶⁷ Where the seller of personal property brings an action in trover against one not the original purchaser to recover the property or its value, a money judgment therein cannot be regarded as a judgment for purchase money.⁶⁸

Estoppel. The purchaser is estopped to deny the truth of a recital in a judgment by confession that it was for the purchase price. The recital will be taken to apply to the entire judgment, and defendant cannot show that a part of the judgment was given for an individual debt of defendant.⁶⁹

e. Subjection of Other Exempt Property

The exception in favor of a claim for purchase money extends only to the property purchased, which must be identified as such, and not to other exempt property.

The right of the creditor to enforce his claim for

the purchase price of property classed as exempt as a rule extends only to the property purchased and not to other exempt property.⁷⁰

There must be an identification of the property purchased to enable the creditor to proceed against it,⁷¹ although substantial identity is said to be sufficient.⁷² However, the identification must be of the actual property purchased, and the exception will not be enforced against property of like nature mixed with it,^{72.5} or against other property of the same kind purchased with the proceeds from the sale or conversion of the original property,⁷³ or exchanged for it.⁷⁴ Under some provisions it has been said that no part of any property, whether it is represented by cash, notes, chattels, or realty, as long as it may be substantially identified, is exempt from sale for the payment of obligations contracted for the purchase price of such property.⁷⁵

§ 87. Rent and Liens for Supplies to Tenant

An exception to the right of exemption may exist in favor of a claim for rent by reason of express statutory provision or by operation of the statutes establishing liens for rent.

Where the common-law proceeding by distress for the recovery of rent has been abolished, as discussed in Landlord and Tenant § 675, a claim for rent is, in the absence of express provisions of the statute, subject to the general rules as to exempt property.⁷⁶ By express provision in the statutes, however, claims for exemptions in personalty are frequently made subordinate to claims for rent;⁷⁷ and,

64. Utah.—Ray v. Cox, 30 P.2d 1062, 83 Utah 499.

65. Ark.—Osburn v. Lindley, 259 S. W. 729, 163 Ark. 260.

66. Ky.—Woodlawn Cemetery Co. v. Stout, 97 S.W. 756, 30 Ky.L. 165. Costs of action generally see supra § 81.

67. N.Y.—Hoyt v. Van Alstyne, 15 Barb. 568.

68. Ga.—Williams v. American Slicing Mach. Co., 98 S.E. 270, 148 Ga. 770.

69. Pa.—In re Hawbicker's Estate, 6 Pa.Co. 570.

70. Pa.—Gibbons v. Gaffney, 26 A. 24, 154 Pa. 48. 25 C.J. p 99 note 69.

Early conflicting decisions

N.Y.—Hickok v. Fay, 36 Barb. 9. Craft v. Curtiss, 25 How.Pr. 163. 25 C.J. p 99 note 69 [b].

71. N.D.—Wagner v. Olson, 54 N.W. 286, 3 N.D. 69. 25 C.J. p 99 note 70.

72. Fla.—Citizens' State Bank v. Jones, 131 So. 369, 100 Fla. 1492.

Material used in building

Contractor who purchases material and uses it in the erection of a building for another cannot have an exemption in the amount due him for erecting the building as against claims for the purchase price of the materials so purchased and used.

Fla.—Giddens v. Dickenson, 53 So. 929, 60 Fla. 320.

72.5 N.D.—Congress Candy Co. v. Farmer, 12 N.W.2d 796, 73 N.D. 174, 150 A.L.R. 1316.

73. Fla.—Smith v. Gufford, 18 So. 717, 36 Fla. 481, 51 Am.S.R. 37. 25 C.J. p 99 note 71.

Prohibition of sale as against debt for purchase money see infra § 99.

74. U.S.—In re Hammonds, D.C.Ky., 198 F. 574.

75. Fla.—Citizens' State Bank v. Jones, 131 So. 369, 100 Fla. 1492.

Purchase money on deposit

Purchasers, to subject purchase money on deposit in name of vendor to execution on judgment for breach of warranty after transaction was closed, were required to prove con-

structive trust, where money would otherwise be exempt.

Fla.—Citizens' State Bank v. Jones, supra.

76. Miss.—Mason v. O'Brien, 42 Miss. 420.

Ohio.—Dean v. McMullen, 142 N.E. 683, 109 Ohio St. 309.

Exemptions from distress for rent see Landlord and Tenant § 681.

77. La.—Young v. Geter, 170 So. 240, 185 La. 709, 107 A.L.R. 608, answers to certified questions conformed to, App., 170 So. 410—Mundy v. Phillips, 102 So. 519, 157 La. 445. 25 C.J. p 100 note 1.

Exemptions limited to particular exemption

(1) A constitutional provision that exemption from seizure and sale of homestead, work horses, farm products, and farming implements did not apply to debts for rent was held to refer only to specific exemption provided therein and to be without effect on exemptions provided in statute creating lessor's pledge.

except as the lien created by the statute is limited to particular property, or to nonexempt property, or property subject to execution,⁷⁸ or except as it is provided that the statute giving a lien shall not affect the tenant's right of exemption,⁷⁹ the same result is secured in other states by the establishment, under the statute, of landlord's liens, which, although not made in express terms an exception to the exemption law, will, under the operation of the lien statute, have that effect.⁸⁰

It has even been held that the landlord's lien, al-

though existing by force of a statute only, will be enforced against a constitutional exemption in the tenant;⁸¹ but this is so only to the extent that the statute provides a landlord's lien on agricultural products raised on the land,⁸² the land in such case being regarded as such a factor in the production of the crops as to subordinate the title of the tenant to the lien given by the statute for the use of the premises,⁸³ and a statutory lien on other property of the tenant would be subordinate to the tenant's constitutional claim to exemption.⁸⁴ Under other

La.—*Young v. Geter*, 170 So. 240, 185 La. 709, 107 A.L.R. 608, answers to certified questions conformed to, App., 170 So. 410.

Fant v. Miller, App., 170 So. 412, followed in Fant v. Deville, App., 170 So. 415.

(2) Limitations within which exemption from lessor's pledge may be applied must be determined from facts of each case, depending on class of farming and extent of farming operations, the test being whether chattels claimed to be exempt by debtor are necessary for operation of farm. La.—*Young v. Geter*, supra.

Allowance in lieu of exemption to widow and children is inferior to landlord's lien.

Tex.—*Champion v. Shumate*, 40 S.W. 394, 90 Tex. 597.

Stokes v. Burney, 22 S.W. 126, 3 Tex.Civ.App. 219.

Waiver of exception

(1) If judgment for rent is entered pursuant to an agreement of the parties, the landlord is held to have waived his rights under the exception, and the tenant to be entitled to his exemption.

U.S.—*In re Lumpkin*, D.C.Va., 15 F. Cas.No.8,606, 2 Hughes 175.

25 C.J. p 100 note 99.

(2) In one case the tenant was allowed his exemption as against the landlord but the issue as to whether a landlord's right was not paramount under a statute making an action for rent an exception to the exemption law was not raised, the decision going off on the point whether the judgment was in an action of contract or tort, it being held that, while in form the action is a trespass and tort, in this case the entering of judgment was pursuant to an agreement of the parties and so founded in contract and defendant was entitled to his exemption.

Pa.—*Morris Run Coal Min. Co. v. Chrzan*, 31 Pa.Super. 184.

78. D.C.—*The Richard v. Cake*, 1 App.D.C. 447.

Tex.—*St. Louis Type Foundry v. Taylor*, Civ.App., 35 S.W. 691.

Utah.—*Ray v. Cox*, 30 P.2d 1062, 83 Utah 499.

Mortgaged property on termination of tenancy

Where property exempt from execution by reason of a mortgage to the vendor was left on the premises at the end of the term, such property did not thereby become subject to the landlord's lien since the tenancy ceased at the time of the removal of the exemption.

Iowa.—*Bacon v. Carr*, 83 N.W. 957, 112 Iowa 193.

Property excluded

(1) Under a statute providing that "a landlord shall have a lien for his rent upon all crops grown upon the demised premises, and upon any other personal property of the tenant which has been used upon the premises during the term, and not exempt from execution," the words "not exempt from execution" refer only to the "other personal property," and not to "crops grown upon the demised premises."

Iowa.—*Hipsley v. Price*, 73 N.W. 584, 104 Iowa 282.

(2) Gasoline filling station is not goods, wares, and merchandise within the statute exempting the same from the landlord's lien.

Tex.—*West Furniture Co. v. Cason*, Civ.App., 218 S.W. 774.

(3) "Tool or instrument," within a statute exempting the same from seizure for rent, includes wagon used by teamster for making his living. La.—*Schwartz v. Dennis*, 70 So. 857, 138 La. 848, Ann.Cas.1917D 94.

(4) Other property.

Ky.—*Vinson v. Hallowell*, 10 Bush 538.

La.—*Sliman v. Fish*, 147 So. 493, 177 La. 38.

79. Ky.—*Carden v. Dearing*, 14 Ky. L. 78.

Tex.—*Harris v. Townley*, Civ.App., 161 S.W. 5.

No exemptions from liens for supplies

No part of tenant's crop is exempt from landlord's lien for supplies furnished.

Ky.—*Carden v. Dearing*, 14 Ky.L. 78.

80. Ga.—*Moseman v. Comer*, 127 S. E. 406, 160 Ga. 106.

Barnett v. Culberson, 8 S.E.2d 900, 62 Ga.App. 582.

N.M.—*Tomson v. Lerner*, 25 P.2d 209, 37 N.M. 546, 96 A.L.R. 246.

Tex.—*Stephens v. Cox*, Civ.App., 255 S.W. 241, rehearing denied 256 S.W. 643.

25 C.J. p 100 note 2.

The reason for the rule is that the property to which the lien attaches belongs to the landlord until such lien is discharged, and the tenant, as against his landlord, has no property therein which he can claim as his exemption under the exemption statute.

N.C.—*Slaughter v. Winfray*, 85 N.C. 159.

Equitable lien for advances

Where landlords made advances to tenant for additional stock, supplies, feed, and other operating expenses with understanding that landlords were to be reimbursed, after which profits were to be divided, and trial court, appointing receiver, found that landlords had equitable lien on receivership fund, the tenant could not assert householder's exemption against fund, since trial court's finding was tantamount to determination that landlords' interest was superior to tenant's claim.

Ind.—*Snell v. Gresso*, 19 N.E.2d 1011, 215 Ind. 424.

Lien on crops

Ind.—*Keim v. Myers*, 89 N.E. 373, 44 Ind.App. 299.

Tenn.—*Hill v. George*, 1 Head 394.

Landlord's lien as purchase money within exception see supra § 86.

81. Fla.—*Corpus Juris Secundum* cited in *Howard v. Calhoun*, 21 So. 2d 361, 365, 155 Fla. 689—*Schofield v. Liody*, 16 So. 780, 35 Fla. 1.

25 C.J. p 101 note 4.

82. Fla.—*Schofield v. Liody*, supra—*Hodges v. Cooksey*, 15 So. 549, 33 Fla. 715, 24 L.R.A. 812.

83. Fla.—*Schofield v. Liody*, 16 So. 780, 35 Fla. 1—*Hodges v. Cooksey*, 15 So. 549, 33 Fla. 715, 24 L.R.A. 812.

84. Fla.—*Schofield v. Liody*, 16 So. 780, 35 Fla. 1—*Hodges v. Cooksey*, 15 So. 549, 33 Fla. 715, 24 L.R.A. 812.

statutes and under other constitutional provisions, the landlord's statutory lien on goods other than agricultural products raised on the land is enforced against a tenant's constitutional exemption to the extent that such property enjoyed the protection of the leased premises.⁸⁵

As discussed *infra* § 106, a lien under a chattel mortgage given by the tenant is superior to the tenant's claim to exemption, and this is also the case under the terms of a lease by which the tenant promises to execute a chattel mortgage on demand of the landlord.⁸⁶

For and against whom exception operates. A landlord's claim for rent as against his tenant's claim for exemption can be enforced only by the landlord,⁸⁷ and against his tenant only.⁸⁸ A creditor of the tenant other than the landlord is not entitled to the landlord's immunity from exemption,⁸⁹ and his wrongful seizure of the exempted articles is none the less wrongful because the landlord afterward enters claim to the proceeds of the sale;⁹⁰ nor do the landlord's rights attach as against a debtor of the tenant so as to deprive the tenant's debtor of the benefit of the exemption provisions.⁹¹

So, statutory provisions in favor of the tenant, giving him an exemption limited in amount as against the landlord's distraint of goods on the premises, confer benefits of which the tenant only can take advantage,⁹² and a third person who owns goods on the leased premises subject to distress cannot claim the tenant's right to exemption.⁹³ Under

particular provisions, however, a subtenant has been held entitled to the statutory exemption from distress.⁹⁴

Costs. In some states the landlord's lien extends to and includes the costs of such legal proceedings as are necessary to recover his rent, and, on the grounds given, the landlord's costs in establishing his lien may be enforced against the tenant's exemption.⁹⁵

Effect of attachment. It has been held that, when a tenant, whose property has been attached, has failed to make a selection of the property claimed to be exempt so that it is impossible for the court to say which specific property shall be held under the attachment as against the landlord's lien, it is proper to satisfy the judgment of the attaching creditor out of all the attached property where it appears that there will be sufficient property left to satisfy the landlord's lien.⁹⁶

§ 88. Necessaries in General

Obligations for necessities furnished the debtor are frequently excepted from the exemption; what are necessities within this rule depends on the circumstances of each case.

Under some statutes, debts due for "necessaries" furnished to the debtor or his family may be enforced against property otherwise exempt.⁹⁷ Under others, however, an obligation for necessities is as exempt as other liabilities or debts within the statute.⁹⁸

85. Ala.—*Ex parte Barnes*, 4 So. 769, 84 Ala. 540.

Mule or dray

A landlord's lien does not extend to a mule and dray used by the tenant in connection with his mercantile business.

Ala.—*McKleroy v. Cantey*, 11 So. 258, 95 Ala. 295.

86. Neb.—*Rogers v. Trumble*, 125 N.W. 600, 86 Neb. 316.

87. La.—*Duperron v. Communay*, 6 La. Ann. 789.

88. Ark.—*Swope v. Ross*, 29 Ark. 370.

89. La.—*Duperron v. Communay*, 6 La. Ann. 789.

90. La.—*Duperron v. Communay*, *supra*.

91. Ark.—*Swope v. Ross*, 29 Ark. 370.

92. N.J.—*Guest v. Opdyke*, 31 N.J. Law 552.

93. N.J.—*Guest v. Opdyke*, *supra*. 25 C.J. p 101 note 17.

Property of tenant's employer

Property on leased premises is not exempt from distraint merely because

it belongs to the tenant's employer; the exemption covering property of those with whom the tenant deals or of those who employ him applies principally to instances where a mechanic or artisan is employed to work, within the line of his known craft, on others' property.

Pa.—*Placatoris v. Michael*, 73 Pa. Dist. & Co. 428, 24 Lehigh L.J. 70, 65 York Leg. Rec. 36.

94. Ky.—*Rudd v. Ford*, 15 S.W. 179, 91 Ky. 183, 12 Ky. L. 740.

95. N.C.—*Slaughter v. Winfrey*, 85 N.C. 159.

96. Iowa.—*Stoaks v. Stoaks*, 124 N.W. 757, 146 Iowa 61.

97. Cal.—*Medical Finance Ass'n v. Short*, 92 P.2d 961, 36 C.A.2d, Supp., 745.

D.C.—*Schlaefter v. Schlaefter*, 112 F.2d 177, 71 App.D.C. 350, 130 A.L.R. 1014.

N.M.—*Hewatt v. Clark*, 103 P.2d 646, 44 N.M. 453.

Theory and construction of statute

(1) Basic theory underlying statute is that a debtor and his family, regardless of the debtor's improvi-

dence, will retain enough money to maintain a basic standard of living in order that the debtor may have a fair chance to remain a productive member of the community, and statute should be liberally construed in order to effectuate this purpose.

Cal.—*Perfection Paint Products v. Johnson*, App., 330 P.2d 829.

(2) Liberal construction of exemption statutes generally see *supra* § 4.

Effect of disability

As regards application of statute exempting disability insurance from execution, for the head of family the essentials of sustenance for his dependents remain "necessaries" as much when he is disabled as when he is well and employed, since disability does not relieve him of obligation of support, although it may affect the extent to which he can perform it.

D.C.—*Schlaefter v. Schlaefter*, 112 F.2d 177, 71 App.D.C. 350, 130 A.L.R. 1014.

98. Veteran's compensation

Estate of minor consisting entirely of compensation awarded by fed-

What may be regarded as "necessaries" within the meaning of such a statute cannot be determined by any arbitrary and inflexible rule,⁹⁹ but depends on the circumstances of each case,¹ and the determination of what is necessary for the use of the debtor's family must be largely left to the discretion of the trial court.^{1.5} The term "common necessities of life," as used in such a statute, means those things which are commonly required by persons for the sustenance of life regardless of their employment or status.^{1.10} The article must be necessary for the debtor's personal support, and that of his family,² as distinguished from that which is necessary for the maintenance of his business,³ or for the support of others than himself and his own family.⁴

Debts for legal services,⁵ medical attendance or service,⁶ farming utensils,⁷ supplies furnished the tenant by the landlord to support the tenant's family,⁸ and supplies for making a crop and cultivating the land⁹ have all been held to be within the exception to the exemption laws. On the other hand, attorney's fees^{3.5} and a gold wrist watch^{9.10} have been held not common necessities of life within the meaning of such statutory exception.

A statute which limits the exception to the exemption law to "necessaries sold" or "work performed in a family as a domestic" is construed to limit the application of the law to articles of the kind usually known as necessities sold and delivered,¹⁰ and to exclude all services other than those expressly mentioned,¹¹ and under such a statute the services of a physician,¹² and rent,¹³ are not within the scope of the statutory exception. An action on a judgment for damages caused by negligence is not an action for necessities.¹⁴

An action on a judgment recovered for necessities has been held entitled to the benefit of the exception attaching to the original claim,¹⁵ although there is authority to the contrary.¹⁶ A judgment in an action on a judgment of another state for necessities is not one recovered for necessities under the statute.¹⁷

Extent of exception. The extent to which the exception interferes with the right of exemption depends on the terms of the statutes involved.¹⁸ In some jurisdictions, as against the debtor's right to exemption for wages the claim for necessities is allowed to reach only a specified percentage of an

eral government for death of World War Veteran was not liable for necessities furnished to such minor. Ga.—Earl v. Reynolds, 176 S.E. 91, 49 Ga.App. 510.

99. Me.—Provost v. Piche, 45 A. 506, 93 Me. 455.

1. Me.—Provost v. Piche, supra. 25 C.J. p 101 note 23.

Determination solely in judicial proceeding

The question as to what constitutes articles used in the home commonly designated as the necessities of life, within statute permitting attachment of ten percent of wages to pay for such articles, is a mixed "question of law and fact" not to be determined by the plaintiff, by the garnishee, or by the constable, but solely in a judicial proceeding. Del.—Schwander v. Feeney's, 29 A. 2d 369, 3 Terry 198.

1.5 Cal.—Perfection Paint Products v. Johnson, 330 P.2d 829, 164 C.A.2d 739.

1.10 Cal.—Los Angeles Finance Co. v. Flores, 243 P.2d 139, 110 C.A.2d Supp. 850.

2. Me.—McAuley v. Tracy, 61 Me. 523.

Neb.—Lehnoff v. Fisher, 48 N.W. 821, 32 Neb. 107. 25 C.J. p 101 note 24.

3. Neb.—Lehnoff v. Fisher, supra. 25 C.J. p 101 note 25.

4. Me.—McAuley v. Tracy, 61 Me. 523.

25 C.J. p 101 note 26.

5. Miss.—Halsell v. Turner, 36 So. 531, 84 Miss. 432.

25 C.J. p 101 note 27.

6. Cal.—Medical Finance Ass'n v. Short, 92 P.2d 961, 36 C.A.2d Supp. 745.

Mass.—Darling v. Andrews, 9 Allen 106—Wood v. O'Kelley, 8 Cush. 406.

Ohio.—Kraft v. Wolf, 15 Ohio S. & C.P. 554.

7. Iowa.—Mitchell v. Joyce, 28 N. W. 473, 69 Iowa 121.

8. Fla.—Cathcart v. Turner, 18 Fla. 837.

Ky.—Connor v. Botts, 11 Ky.Op. 132.

9. Fla.—Cathcart v. Turner, 18 Fla. 837.

As within purchase-money exception see supra § 86.

Landlord's lien see supra § 87.

9.5 Cal.—Lentfoehr v. Lentfoehr, 286 P.2d 1019, 134 C.A.2d Supp. 905.

Divorce

Attorney's fees which former wife incurred in obtaining divorce were not common necessities of life within exception from statutory exemption of wages from execution, and, therefore, levy of execution on one half of former husband's wages was not justified. Cal.—Lentfoehr v. Lentfoehr, supra.

9.10 Cal.—Los Angeles Finance Co. v. Flores, 243 P.2d 139, 110 C.A.2d Supp. 850.

Ornaments and jewelry exempt as wearing apparel see supra § 53.

10. N.Y.—Abrams v. Parker, 41 N. Y.S.2d 434—Beard v. Covill, 102 N. Y.S. 204.

11. N.Y.—Taylor v. Barker, 95 N.Y. S. 474, 108 App.Div. 21.

12. N.Y.—Taylor v. Barker, supra. Beard v. Covill, 102 N.Y.S. 204. 25 C.J. p 101 note 34.

13. N.Y.—Beard v. Covill, supra.

14. N.Y.—Kelly v. Mulcahy, 116 N. Y.S. 61, 131 App.Div. 639.

15. N.H.—Garside v. Colby, 50 A. 50, 72 N.H. 544. 25 C.J. p 102 note 37.

16. Me.—Brown v. West, 73 Me. 23.

17. N.Y.—Neuman v. Mortimer, 90 N.Y.S. 524, 98 App.Div. 64, 34 N.Y. Civ.Proc. 164. 25 C.J. p 102 note 39.

18. Cal.—Medical Finance Ass'n v. Short, 92 P.2d 961, 36 C.A.2d Supp. 745.

N.M.—Hewatt v. Clark, 103 P.2d 646, 44 N.M. 453.

Effect of amendment to statute

Under amended exemption statute, a debtor is entitled to exemption of five hundred dollars in lieu of homestead for debts incurred for necessities of life in addition to exemption of portion of his earnings, amendment not taking away right of exemption in lieu of homestead where debt sued on was incurred for ne-

amount due the debtor for wages or earnings,¹⁹ or only wages in excess of a certain amount,²⁰ and under such a statute a debt for necessities cannot be enforced against the minimum amount named as exempt.²¹

Liability for alimony as a "necessary" within exception to exemption is discussed supra § 83.

§ 89. Board and Lodging

An obligation for the debtor's board or lodging, or an innkeeper's lien, may be excepted from the right of exemption.

In order that liability for board and lodging escape the exemption, there must be statutory authority for such escape.²² In some jurisdictions the statutes provide that no exemption shall be allowed against a judgment obtained for board,²³ or for board or lodging, or both.^{23.5} The statute may limit the exception to current charges for board, it not being applicable to arrears,²⁴ or it may limit the amount of wages which may be taken on execution for board for a fixed period of time.²⁵ Under the latter statute the judgment must show affirmatively that it was obtained for board for the statutory period or less.²⁶

Under a statute which provides that no exemption of property from attachment shall be allowed on a judgment obtained for board, it is necessary that the suit be brought on a judgment for board, and not merely on a claim for board, in order to secure

immunity from exemption under the statute.²⁷ The exemption may be claimed, therefore, in a suit for board under such statute, when wages are attached on original process,²⁸ and the creditor must give the debtor security for damages by reason of a false claim or failure to prosecute his action to judgment.²⁹

For whose board available. The immunity from exemption applies only to a claim for the debtor's board,³⁰ and not for the board of his wife or children.³¹ If the judgment is entered for the board of the debtor and his wife and children, the debtor's exemption will be allowed as against the entire judgment, unless the amount of the debtor's board can be separated from the rest of the judgment, in which case claim for exemption will be denied only as against that part of the judgment which is based on the claim for the debtor's board.³²

Innkeeper's lien. A statute exempting certain property from general execution has been held not to abrogate the common-law lien of an innkeeper.³³ So, the statutory lien of an innkeeper covering personal property and wearing apparel of a guest has been held to attach even though such property would otherwise be exempt.³⁴

§ 90. Wages

A claim for wages is excepted, by some statutes, from the right of exemption.

Where there is no express statutory provision for

cessities of life furnished debtor or his family.

N.M.—Hewatt v. Clark, supra.

19. Del.—Schwander v. Feeney's, 29 A.2d 369, 3 Terry 198.

Ohio.—Haas v. Haas, 25 Ohio Cir.Ct., N.S., 107—Bulla v. Kent, 15 Ohio S. & C. P. 409.

25 C.J. p 102 note 40.

20. Mass.—Sullivan v. Hadley Co., 35 N.E. 103, 160 Mass. 32.

25 C.J. p 102 note 41.

Statutory limitation held inapplicable

Under statute permitting attachment of one hundred percent of wages for board or lodging or both where claim does not exceed fifty dollars, and permitting attachment of ten percent of wages for necessities of life, attachment on claim for necessities of life need not be limited to fifty dollars.

Del.—Schwander v. Feeney's, 29 A.2d 369, 3 Terry 198.

21. Me.—Jumper v. Moore, 85 A. 485, 110 Me. 159.

Mass.—Sullivan v. Hadley Co., 35 N.E. 103, 160 Mass. 32.

22. **Order for support of wife and children**

Judgment against seaman, which

was apparently for board and lodging of daughter of seaman, was not an "order by any court regarding the payment by any seaman of any part of his wages for the support of his wife and minor children" within federal statute providing that prohibition against attachment or arrestment of seaman's wages should not interfere with such an order, since statute referred to orders such as might be made in matrimonial action or by court having jurisdiction to make similar orders, such as domestic relations court of the City of New York.

N.Y.—Cunningham v. McCullough, 22 N.Y.S.2d 739.

23. Pa.—Weisman v. Weisman, 19 A. 300, 133 Pa. 89.

25 C.J. p 102 note 43.

Prospective operation of statute

Statute disallowing the exemption as against such judgments "from and after the passage of this Act" does not apply to judgments obtained before the passage of the act.

Pa.—Brown v. Reiser, 8 Pa.Co. 416.

23.5 Del.—Schwander v. Feeney's, 29 A.2d 369, 3 Terry 198.

24. N.Y.—In re Strohm, 101 N.Y.S. 688, 51 Misc. 481, 38 N.Y.Civ.Proc. 171.

25. Pa.—Weisman v. Weisman, 19 A. 300, 133 Pa. 89.

25 C.J. p 102 note 45.

26. Pa.—Weisman v. Weisman, supra.

25 C.J. p 102 note 46.

27. Pa.—Dillon v. Treverton, 4 Pa. Dist. 266, 16 Pa.Co. 89.

25 C.J. p 102 note 47.

28. Pa.—Thomas v. Glasgow, 2 Pa. Dist. 711, 13 Pa.Co. 167, followed in McGentey v. Keefe, 8 Luz.Leg. Obs. 179.

29. Pa.—Serena v. Guilfray, 7 Pa. Dist. 141, 20 Pa.Co. 549.

30. Pa.—Wilhelm v. Mumma, 16 Pa. Dist. 463, 33 Pa.Co. 169.

31. Pa.—Donohue v. Redding, 24 Pa. Dist. 552—Wilhelm v. Mumma, 16 Pa. Dist. 463, 33 Pa.Co. 169.

32. Pa.—Wilhelm v. Mumma, supra.

33. Iowa.—Swan v. Bournes, 47 Iowa 501, 503, 29 Am.R. 492.

N.Y.—Thorn v. Whitbeck, 32 N.Y.S. 1088, 11 Misc. 171.

34. Okl.—Kelly v. Hood, 118 P.2d 1016, 189 Okl. 580.

the immunity of claims for wages from exemption, and where there is either no mechanics' lien law or no establishment by the creditor of a lien under such law where it exists, the debtor's claim for exemption as against such liabilities will be allowed.³⁵

By express provision in some states, exemption cannot be claimed as against a liability for wages or salary due to laborers, mechanics, or employees.³⁶ Under a provision of this kind, a laborer is one who performs manual labor not requiring special knowledge or skill, and a servant is one performing menial service.³⁷ One who performs services requiring professional skill,³⁸ or which are not menial in character,³⁹ is not entitled to the benefits of the exception.

Where payments for services are not in the nature of payments by an employer but rather payments by customers in a business they are not wages within the meaning of the statute,⁴⁰ and where the facts disclose a joint adventure, the profits of which are to be shared by all the coadventurers, no one of them can be said to be in the employ of either of his associates and money due from one to the other under the agreement is not wages within the meaning of the exception.⁴¹

Independent contractors. A person who makes an independent contract to do certain work, and employs laborers to do the manual labor necessary in performance of the contract, is not a laborer, and the money due him under the contract is not within an exception of debts due for clerk's, laborer's, or mechanic's wages.⁴² So, an employee who so far retains the control of the work in hand that he is not subject to the direction of his employer while engaged in it is an independent contractor, and not

within the exception.⁴³

A note given for labor does not change the character of the claim, so as to take it out of a statute excepting claims for labor, unless such was the intention of the parties.⁴⁴ However, the labor for which the note is given must be of a character to be included within the statutory exception, and if the note is in fact given for services not within the statute, the fact that it states on its face that it is given "for labor" will not avail to bring it within the exception.⁴⁵ So, under a statute providing that there shall be no exemption in personal property against a judgment for wages, a judgment on a promissory note which recites that it was given for wages, but which was in fact given for something other than wages, is not a judgment for wages within the meaning of the statute.⁴⁶ A judgment of a justice which states that it is for "the wages of a laborer" is sufficient to authorize an officer to levy execution on property otherwise exempt.⁴⁷

Compensation award. An award of compensation under the Workmen's Compensation Act is not a debt incurred for labor or service within the exception to the exemption statute.⁴⁸

Extent of the exception. Whether a laborer can enforce a claim for his own wages against the wages of his employer, otherwise exempt, depends on the particular statute involved; under some statutes, it is held that no property whatever is exempt from execution for the wages of a laborer or servant,⁴⁹ while under others, a laborer's claim for wages, enforceable against exempt property generally, cannot be enforced against exempt wages earned by his employer.⁵⁰

35. Pa.—Frutchey v. Lutz, 31 A. 638, 167 Pa. 337.

36. Ill.—Markus, for Use of Guditus v. Hart, Schaffner & Marx, 1 N.E. 2d 699, 284 Ill.App. 166.

Minn.—Aase v. Langston, 220 N.W. 421, 175 Minn. 161.
25 C.J. p 103 note 60.

Exception strictly construed

Ill.—Markus, for Use of Guditus, v. Hart, Schaffner & Marx, 1 N.E.2d 699, 284 Ill.App. 166.

37. Ill.—Dickinson v. Rahmn, 98 Ill. App. 245.

Va.—Farinholt v. Luckhard, 21 S.E. 817, 90 Va. 936, 44 Am.S.R. 953.
25 C.J. p 103 note 61.

Assistant in clinical laboratory

In case where exception provision was held unconstitutional, it was also held that services rendered in capacity of assistant in clinical laboratory and office attendant were not of character contemplated by exception.

S.D.—Harper v. Rundlett, 210 N.W. 743, 50 S.D. 450.

38. N.H.—Weymouth v. Sanborn, 43 N.H. 171, 173, 80 Am.D. 144.
25 C.J. p 103 note 62.

39. Ill.—Epps v. Epps, 17 Ill.App. 196.
25 C.J. p 103 note 63.

40. Pa.—Steininger v. Butler, 5 Pa. Dist. 43.
25 C.J. p 103 note 65.

41. Or.—Parrington v. Weinberger, 166 P. 442, 528, 86 Or. 49.

42. Neb.—Henderson v. Nott, 54 N. W. 87, 36 Neb. 154, 38 Am.S.R. 720.

43. Neb.—Fox v. McClay, 67 N.W. 888, 48 Neb. 820.
25 C.J. p 103 note 68.

44. Ill.—Graves v. Ahlgren, 87 Ill. App. 668.

Kan.—Reed v. Umbarger, 11 Kan. 206.

N.H.—Weymouth v. Sanborn, 43 N. H. 171, 80 Am.D. 144.

45. Ill.—Magers v. Dunlap, 39 Ill. App. 618.
25 C.J. p 103 note 71.

46. Ill.—Bundy v. Harris, 151 Ill. App. 461.

47. Ill.—Stroup v. Hobbs, 65 Ill.App. 296.

48. Minn.—Aase v. Langston, 220 N. W. 421, 175 Minn. 161.

49. Ill.—Bohn v. Weeks, 50 Ill.App. 286.

Kan.—Flowers v. Gray, 225 P.2d 94.
170 Kan. 266.

50. Ill.—Markus, for Use of Guditus, v. Hart, Schaffner & Marx, 1 N.E. 2d 699, 284 Ill.App. 166.
25 C.J. p 104 note 75.

Garnishment and exemption statutes distinguished

Provision of Garnishment Act creating specific exemption of wages in

Under a statute giving immunity from exemption only to a judgment which does not exceed an amount fixed by statute, an exemption may be claimed against a judgment for wages in excess of the statutory limit, even though the amount actually collected on the judgment is less than the statutory amount.⁵¹

§ 91. Other Exceptions

Other claims, such as the lien of a livery stable keeper, are, under some statutes, excepted from the exemption, but not under others.

In order that other obligations or liens be excepted from the right of exemption, there must be statutory authority.⁵² Thus, while under a statute giving a livery stable keeper a lien on all property coming into his possession, it was held that a lien may be had on exempt property,⁵³ on the other hand, under a statute specifying the particular obligations against which the exemption would not operate, it was held that the lien of a livery stable keeper not coming within the exceptions cannot be enforced against the property set aside as exempt.⁵⁴

A statute exempting benefits due veterans from the claims of creditors does not apply to debts or claims against an incompetent veteran for public assistance for his care, maintenance, or support.^{54.5}

A mechanic's lien has been held to be superior to the debtor's exemption right.⁵⁵

§ 92. Enforcement of Claims under Exceptions

One asserting the protection of an exception to exemption must bring himself clearly within its terms and satisfy any statutory requirements for its enforcement.

A person invoking the protection of an exception to the exemption law must show himself clearly within its terms.⁵⁶

The statute may require personal service of a written demand of the special creditor on the debtor in order that the debtor may comply with the demand and save himself the costs of proceedings against him.⁵⁷

Pleadings. The complaint or declaration should show that plaintiff's claim is within the exception to the exemption law.⁵⁸ If the items within the exception are clearly in excess of the value of the property claimed as exempt, the fact that the account annexed contains other items not within the exception, will be disregarded.⁵⁹

It has been held, however, that, where plaintiff declares on a note a portion only of the consideration of which consists of a demand which would be within the exception, the creditor, by declaring and taking a judgment for the price of the exempt property sold to the debtor, together with other debts, must be deemed to have elected to abandon his claim to follow the specific property, and defendant's claim to exemption will be allowed.⁶⁰ If the claim in the declaration exceeds the statutory allowance and attachment is issued for the excessive amount, this defect may be cured by a judgment entered in the case for an amount not exceeding the statutory allowance.⁶¹

Evidence. Particular evidence has been held not to show the right of the creditor to the benefit of the exception.^{61.5}

Nature of judgment. In the absence of proof to the contrary, it is not necessary that a judgment

favor of person who is head of family and residing with family held exception to Exemptions Act, so that provision of Exemptions Act that no personal property should be exempted from levy where debt or judgment is for wages of laborer or servant has no relation to specific exemption created thereby.

III.—Markus, for Use of Guditus, v. Hart, Schaffner & Marx, *supra*.

51. Pa.—Buchanan v. Wachter, 17 Pa. Dist. 438.

52. Ga.—Gray v. Higgs, 88 S.E. 709, 18 Ga. App. 709.

53. Iowa.—Munson v. Porter, 19 N. W. 290, 63 Iowa 453. 25 C.J. p 103 note 58.

54. Ga.—Gray v. Higgs, 88 S.E. 709, 18 Ga. App. 22.

54.5 Pa.—In re Grega, 7 Pa. Dist. & Co. 2d 753, 46 Luz. Leg. Reg. 89—In

re Lulis' Estate, 77 Pa. Dist. & Co. 118, 41 Luz. Leg. Reg. 479.

55. Pa.—Appeal of Laucks, 24 Pa. 426.

56. N.D.—Congress Candy Co. v. Farmer, 12 N.W. 2d 796, 73 N.D. 174, 150 A.L.R. 1316.

S.D.—Paddock v. Balgord, 48 N.W. 840, 2 S.D. 100.

Wages

(1) Before a plaintiff can obtain judgment against an employer holding in his hands attached wages of an employee, plaintiff must establish that he is entitled to such judgment, that is, he must establish that he has a claim on which those specific wages can legally be attached.

Del.—Schwander v. Feeney's, 29 A. 2d 369, 3 Terry 198.

(2) The allegation or proof that the judgment is one "for labor" is not equivalent to an allegation or proof that it was a judgment for

"laborer's or mechanic's wages" within the exception.

S.D.—Paddock v. Balgord, 48 N.W. 840, 2 S.D. 100.

57. Ohio.—Ostrander v. Norris, 30 Ohio Cir. Ct. 643—K. B. Co. v. Batie, 25 Ohio Cir. Ct. 418. 25 C.J. p 104 note 92.

58. Ga.—Pioneer Co-op. Co. v. Eagle & Phoenix Mfg. Co., 67 Ga. 38.

La.—Hollander v. His Creditors, 6 La. Ann. 668.

25 C.J. p 105 note 93.

59. Me.—Pullen v. Monk, 19 A. 909, 82 Me. 412.

25 C.J. p 105 note 94.

60. N.Y.—Hickox v. Fay, 36 Barb. 9.

61. Pa.—Wilhelm v. Mumma, 16 Pa. Dist. 463.

61.5 N.D.—Congress Candy Co. v. Farmer, 12 N.W. 2d 796, 73 N.D. 174, 150 A.L.R. 1316.

shall show the date of the contract on which it is based, or that it shall show the nature of the claim on which it is founded, as that it is for the purchase price of property, or for a tort, or for necessities, etc., in order that it may be enforced as against exempt property.⁶² Its nature may be ascertained from the pleadings in the action,⁶³ or shown by extrinsic evidence,⁶⁴ if such proof involves no contradiction or variance of matter of record;⁶⁵ and the same rule applies to the record on which the judgment is based.⁶⁶ It is otherwise if the statute requires the judgment, or the record thereof, to show its nature, or the nature of the claim on which it is based.⁶⁷ The failure of the judgment to contain such recitals does not, however, affect the validity of the judgment,⁶⁸ but simply the right of the creditor to enforce it against the debtor's claim for exemption.⁶⁹

In a jurisdiction requiring the recital to be made, a recital which substantially discloses the basis for plaintiff's claim to immunity from exemption will be sufficient;⁷⁰ but where the exception extends to a limited class, the recital must bring the judgment within the restriction,⁷¹ and a reference to the general class of which the limited class is a part is not sufficient.⁷²

Garnishment. Although, as discussed supra this section, the judgment against a debtor need not show the nature of the claim, the nature of post-judgment garnishment proceedings requires that

when wages are attached the origin of the claim supporting the attachment be clearly made known,^{72.5} and a determination as to whether the claim is for board or lodging or for the necessities of life must be inserted in the record, since they are the only bases of claim for which wages can be attached.^{72.10}

Execution. There need be no showing or recital in the execution as to the nature of the claim,⁷³ unless there is an express requirement to that effect.⁷⁴ Where there is such requirement, the recital may be made by the court's making the proper indorsement on the execution, and this may be done at a term subsequent to that at which the judgment is rendered.⁷⁵

Sale. A claim for the purchase price of goods which only constitute a part of the stock in trade will not be allowed to interfere with the sale of the entire stock on execution, or to the allowance of plaintiff's claim to exemption. In such case the purchase price of the unpaid goods will be deducted from the proceeds and the exemption will be allowed out of the balance.⁷⁶

Injunction. An injunction is not available to a married woman to prevent payment to the husband of exempt pension allowances without first paying her amounts specified in a separation agreement, where the wife's rights growing out of her marital status have never been determined by judicial decree.⁷⁷

Merchandise and fixtures

N.D.—Congress Candy Co. v. Farmer, supra.

62. Ala.—McDaniel v. Johnston, 19 So. 35, 110 Ala. 526.

Del.—Schwander v. Feeney's, 29 A.2d 369, 3 Terry 198.
25 C.J. p 105 note 97.

63. Ala.—McDaniel v. Johnston, 19 So. 35, 110 Ala. 526.
25 C.J. p 105 note 98.

64. Mo.—State v. Orahood, 27 Mo. App. 496.
25 C.J. p 105 note 99.

65. Ind.—Green v. Simon, 46 N.E. 693, 17 Ind.App. 360.
25 C.J. p 105 note 1.

66. Pa.—Weisman v. Weisman, 19 A. 300, 133 Pa. 89.
25 C.J. p 105 note 2.

67. S.D.—Paxton & Gallagher Co. v. McDonald, 99 N.W. 1107, 18 S.D. 172.
25 C.J. p 105 note 3.

Purchase-money claim

Debtor was entitled to have set off to him, in lieu of homestead, money obtained from sale of his property on execution where findings of court on which judgment was based did not

show what part of judgment, if any, was based on purchase price or part thereof of property sold.

Ohio.—State ex rel. Specht v. Walke, 53 N.E.2d 659, 72 Ohio App. 527.

68. Mo.—Buis v. Cooper, 63 Mo.App. 196.

69. Mo.—Buis v. Cooper, supra.

70. Ill.—Stroup v. Hobbs, 65 Ill.App. 296.
25 C.J. p 105 note 6.

71. Pa.—Moskovitz v. Orangers, 13 Pa.Dist. 153, 29 Pa.Co. 318.

72. Pa.—Moskovitz v. Orangers, supra.
25 C.J. p 105 note 8.

72.5 Del.—Schwander v. Feeney's, 29 A.2d 369, 3 Terry 198.

72.10 Del.—Schwander v. Feeney's, supra.

Proper place for disclosure; notice

In post-judgment garnishment proceeding against employer holding in his hands attached wages of judgment debtor, the judgment fixing liability of garnishee is a proper place for disclosure of determination of jurisdictional fact of liability of wages to attachment; the judicial determination as to whether plain-

tiff has a claim on which wages can legally be attached should be made after proper notice to plaintiff, to defendant, and to the garnishee.
Del.—Schwander v. Feeney's, supra.

73. Neb.—Shreck v. Gilbert, 73 N.W. 276, 52 Neb. 813.

74. Ill.—Hughes v. Melville, 60 Ill. App. 419.

Mo.—Buis v. Cooper, 63 Mo.App. 196.
N.Y.—In re Hogan, 118 N.Y.S. 537, 64 Misc. 302.

75. S.C.—Green v. Spann, 25 S.C. 273.

76. Va.—Edgewood Distilling Co. v. Rosser, 82 S.E. 716, 116 Va. 624.

77. N.Y.—King v. King, 285 N.Y.S. 97, 246 App.Div. 836.

Bemedy at law sufficient

Wife could not restrain payment to her husband of his monthly allowance from firemen's pension fund and compel payment to her of specified sum fixed by their separation agreement, since any right she might have to his allowance from fund could be enforced by securing judgment at law and enforcing it by execution against fund.

N.Y.—King v. King, supra.

V. TRANSFER OR ENCUMBRANCE BY DEBTOR

§ 93. Right to Transfer in General

In the absence of statutory restrictions, a debtor may alienate exempt property, but he cannot assign the right to claim property as exempt.

The legislature may lawfully restrict the transfer or alienation of any property exempt from forced sale,⁷⁸ but in the absence of such restrictions the debtor may alienate exempt property,⁷⁹ even while the writs of execution are in the hands of the proper officer.⁸⁰

The right to claim property as exempt is a personal privilege which cannot be assigned,⁸¹ but the right to select exempt property may be assigned as an incident to the power to transfer the property.⁸²

Alienation of exempt property in bankruptcy proceedings is considered in Bankruptcy § 506.

§ 94. — Assignment of Earnings

Exempt wages or earnings may be assigned, and the exemption passes to the assignee.

A debtor may assign exempt wages or earnings,⁸³ and his right to have them exempt from seizure for the payment of his debts will pass to his assignee.⁸⁴

§ 95. — Gift or Bequest

A debtor may dispose of his exempt property by gift, or, as a general rule, by will.

A debtor may not only dispose of his exempt property for a valuable consideration, but he may give it away, if he sees fit, not only to his wife or children, but also to strangers, for he has the absolute *jus disponendi*, in the absence of express restrictions.⁸⁵ As a general rule, he may dispose of such property by will,⁸⁶ but where pension money is exempt only up to the time it is received by the pensioner, see *supra* § 43, the pensioner cannot dispose of it by will to the exclusion of his creditors.⁸⁷

§ 96. — Mortgage, Pledge, or Other Liens

In the absence of statutory prohibitions or restrictions, a debtor may validly mortgage or pledge exempt property.

Some statutes prohibit the encumbrance of certain exempt property on the grounds of public policy, and mortgages and pledges within the statutory prohibition are void;⁸⁸ but in the absence of such statutory prohibitions or other restrictions imposed by statute, see *infra* §§ 98, 99, the debtor may validly mortgage or pledge exempt property,⁸⁹ and such

78. Mont.—U. S. Building & Loan Ass'n v. Stevens, 17 P.2d 62, 93 Mont. 11.

After setting apart

Under constitutional or statutory restrictions, after setting apart of exempt property it cannot be aliened or incumbered by debtor.

U.S.—In re Trammell, D.C.Ga., 5 F.2d 326, petition denied Clark v. Nirenbaum, C.C.A., 8 F.2d 451, certiorari denied Powell v. Anderson, 46 S.Ct. 349, 270 U.S. 649, 70 L.Ed. 780.

79. Ga.—Eibel v. Mechanics Loan & Savings Co., 183 S.E. 133, 52 Ga. App. 349.

Ind.—Cowan Tent Co. No. 61 v. Treesh, 155 N.E. 42, 199 Ind. 24. Perkins v. Johnson, 133 N.E. 15, 77 Ind.App. 13.

Mich.—Emerson v. Bacon, 25 N.W. 503, 58 Mich. 526.

Mont.—U. S. Building & Loan Ass'n v. Stevens, 17 P.2d 62, 93 Mont. 11.

N.D.—Congress Candy Co. v. Farmer, 12 N.W.2d 796, 73 N.D. 174, 150 A. L.R. 1316.

Pa.—Hild Floor Mach. Co. v. Rudolph, 39 A.2d 457, 156 Pa.Super. 102.

Transfer by provision in note

A transfer or assignment may be accomplished by a provision in a promissory note.

Ga.—Lyle v. Roswell Store, 200 S.E. 702, 187 Ga. 386.

80. Ind.—Cowan Tent Co. No. 61 v. Treesh, 155 N.E. 42, 199 Ind. 24.

81. U.S.—In re Gunzberger, D.C. Pa., 268 F. 673.

Pa.—Appeal of Bowyer, 21 Pa. 210. Bogert v. Batterton, 6 Pa.Super. 468.

25 C.J. p 109 note 75.

Persons who may assert claim of exemption see *infra* § 120.

Rights of transferee of property see *infra* § 100.

82. U.S.—In re National Grocer Co., Mich., 181 F. 33, 104 C.C.A. 47, 30 L.R.A., N.S., 982.

25 C.J. p 106 note 19.

83. Mo.—Houchins v. City of Louisiana, App., 26 S.W.2d 800.

25 C.J. p 108 note 50.

As affected by rules as to waiver

Ordinary rules prohibiting the waiver of the exemption as to wages do not apply to an assignment of wages.

Iowa.—Dowling v. Wood, 101 N.W. 113, 125 Iowa 244, 106 Am.S.R. 301.

84. Iowa.—Millington v. Laurer, 56 N.W. 533, 89 Iowa 322, 48 Am.S.R. 385.

25 C.J. p 108 note 51.

85. Cal.—Corpus Juris cited in Prudential Ins. Co. of America v.

Beck, 103 P.2d 241, 243, 39 C.A.2d 355.

25 C.J. p 107 note 33.

Fraudulent conveyance see *infra* § 118.

86. Fla.—In re Hawkins' Estate, 63 So.2d 313—Hinson v. Booth, 22 So. 687, 39 Fla. 333.

87. Ky.—Luthey v. Bacon, 5 Ky.L. 326.

88. Ga.—Simpson v. Robert, 35 Ga. 180.

Va.—South Hill Production Credit Ass'n v. Hudson, 6 S.E.2d 668, 174 Va. 284.

W.Va.—Taylor v. Belville, 74 S.E. 517, 70 W.Va. 484.

Statute held valid

W.Va.—Taylor v. Belville, *supra*.

Statute construed

Where one code section enumerated specific articles exempt to householder and following section provided for exemption of additional articles to a householder engaged in agriculture, subsequent section avoiding trust deeds made to give lien on property exempt under first section applied to articles embraced in following section, and trust deed conveying such articles was void.

Va.—South Hill Production Credit Ass'n v. Hudson, 6 S.E.2d 668, 174 Va. 284.

89. La.—Corpus Juris quoted in

mortgages and pledges are not within the rule prohibiting a waiver of the right of exemption by executory agreement, as discussed *infra* § 103.

As far as pension money is exempt in the different jurisdictions, a pensioner may pledge it to the same extent as he may pledge any other exempt property,⁹⁰ and he may mortgage property which has been purchased with pension moneys and which is exempt for that reason.⁹¹ Such a mortgage is not void as contrary to public policy.⁹²

Waiver of exemption by mortgage or other liens is considered *infra* § 106.

§ 97. — Sale or Exchange

In the absence of statutory restrictions, a debtor may sell or exchange exempt property; this is true even after the issue or levy of an execution or attachment, if the property is absolutely exempt or a selection has been made.

It is well settled that a debtor, in the absence of express restrictions, has the absolute power to sell or exchange, as he may set fit, property the status of which as exempt property is determined.⁹³ A contrary rule would make the exemption laws operate to the detriment rather than to the benefit of the debtor.⁹⁴

Where no selection is necessary to determine the exempt character of the property, as where the debtor's entire property is less in value than the amount allowed by the statute as exempt, the debtor may sell without first making his selection;⁹⁵ but

where specifically exempt items of personal property are transferred in fraud of creditors, together with a larger amount of property which is not exempt by an indivisible or an unapportionable act or instrument of transfer, there must also be a selection on the part of the debtor or some person authorized by him.⁹⁶ Where the status of property as exempt property is restricted to a certain period, a sale of the property at any time, within the statutory period is valid.⁹⁷

A guardian of a debtor may, under court order, sell his exempt property;⁹⁸ and the wife of an absconding debtor may sell it where a statute provides that, when a debtor absconds and leaves his family, such property as is exempt to him shall be exempt in the hands of his wife and children or either of them.⁹⁹

After levy of execution or attachment. If the property is specifically and absolutely exempt, or if it has been selected and set apart, where this is necessary, it may be sold after the issue or levy of an execution or attachment, as no lien is created by an attachment or execution on property that is exempt.¹ So, after property has been set off by the sheriff under the exemption law as exempt from sale on execution, it may be sold by the debtor free from the lien of the execution and judgment.² A sale after execution cannot be made where a selection is necessary and no selection has been made,³ except, perhaps, where all the debtor's property does not exceed the amount which he is entitled to claim.⁴

Kay v. Furlow, 152 So. 315, 316, 178 La. 637.

Mont.—U. S. Building & Loan Ass'n v. Stevens, 17 P.2d 62, 93 Mont. 11.

N.Y.—Brooklyn Loan Corporation v. Gross, 18 N.Y.S.2d 179, 259 App. Div. 165, appeal denied 20 N.Y.S.2d 409, 259 App.Div. 888, appeal denied 27 N.E.2d 818, 283 N.Y. 778.

N.D.—Congress Candy Co. v. Farmer, 12 N.W.2d 796, 73 N.D. 174, 150 A.L.R. 1316.

Ohio.—City Loan & Savings Co. v. Keenan, 24 N.E.2d 452, 136 Ohio St. 125.

Ohio Loan Co. v. Kletecka, 192 N.E. 182, 47 Ohio App. 514—Donnelly v. Lulfs, 12 Ohio App. 305.

Tenn.—Mutual Loan & Thrift Corp. v. Corn, 188 S.W.2d 345, 182 Tenn. 554.

Tex.—Sparkman v. First State Bank of Handley, Civ.App., 246 S.W. 724. 25 C.J. p 107 note 40.

Bill of sale given as security is within the rule.

Mich.—Emerson v. Bacon, 25 N.W. 503, 58 Mich. 526.

Mortgage of law library and office furniture

Attorney's execution of chattel mortgage on law library and office furniture was held not contrary to public policy.

La.—Kay v. Furlow, 152 So. 315, 178 La. 637.

90. N.Y.—Monroe v. Button, 46 N.Y.S. 637, 20 Misc. 494.

91. Ga.—Knight v. Addison, 174 S.E. 145, 49 Ga.App. 54.

N.Y.—Monroe v. Button, 46 N.Y.S. 637, 20 Misc. 494.

92. N.Y.—Monroe v. Button, *supra*.

93. Cal.—**Corpus Juris** cited in Prudential Ins. Co. of America v. Beck, 103 P.2d 241, 243, 39 C.A.2d 355.

Ind.—Cowan Tent Co. No. 61 v. Treesh, 155 N.E. 42, 199 Ind. 24. Perkins v. Johnson, 133 N.E. 15, 77 Ind.App. 13.

N.D.—Congress Candy Co. v. Farmer, 12 N.W.2d 796, 73 N.D. 174, 150 A.L.R. 1316.

25 C.J. p 106 note 17.

94. Cal.—**Corpus Juris** cited in Prudential Ins. Co. of America v.

Beck, 103 P.2d 241, 243, 39 C.A.2d 355.

25 C.J. p 106 note 18.

95. Ind.—Citizens' State Bank v. Harris, 48 N.E. 856, 149 Ind. 208.

96. Wis.—Berge v. Kittleson, 114 N.W. 125, 133 Wis. 664.

25 C.J. p 106 note 21.

97. Tenn.—Layman v. Denton, Ch. App., 42 S.W. 153.

25 C.J. p 106 note 22.

98. Iowa.—In re Brogan, 157 N.W. 952, 177 Iowa 423.

99. Iowa.—Waugh v. Bridgeford, 28 N.W. 626, 69 Iowa 334.

1. Ind.—Cowan Tent Co. No. 61 v. Treesh, 155 N.E. 42, 199 Ind. 24. 25 C.J. p 107 note 27.

2. Ind.—Moss v. Jenkins, 45 N.E. 789, 146 Ind. 589.

3. Ill.—Chapin v. Hoel, 11 Ill.App. 309.

Mo.—Stotesbury v. Kirtland, 35 Mo. App. 148. 25 C.J. p 107 note 30.

4. Ind.—Vandibur v. Love, 10 Ind. 54.

25 C.J. p 107 note 31.

§ 98. Consent of Wife or Husband

In the absence of statutory provision, the debtor may transfer or encumber exempt property without the consent of the wife or husband. If such requirement is imposed, the debtor's power to alienate and the manner in which the consent must be given are dependent on the terms of the statute.

The consent of the wife or husband, as the case may be, of the debtor is not, in the absence of an express statutory or constitutional requirement, essential to the transfer or encumbrance of exempt personal property.⁵ Where, however, such a requirement is imposed, the debtor's power to alienate is determined by the terms of the statute.⁶

Where the restriction is on the right to mortgage or to give the exempt property as security, a mortgage or pledge without the consent of the wife may be invalid,⁷ but the debtor may make an absolute sale of the property without the wife's consent.⁸

However, a statute making this restriction against mortgaging exempt property does not apply to a mortgage for the purchase price,⁹ particularly under an express statutory exception,¹⁰ even though the mortgage is not executed directly to the vendor,¹¹ or to a renewal of the purchase-price mortgage.¹² Likewise it does not apply to a mortgage which is a renewal of a former mortgage given to secure a debt before the passing of the statute.¹³

A statute requiring the wife's consent as to exempt property does not apply to a sale or mortgage of property which is not exempt,¹⁴ and a sale or mortgage of property which is exempt only in part is void without the consent of the wife only as to the part exempt, and is not void as to that part of the property, sold or mortgaged, which is not exempt.¹⁵ If the statute places the restriction on a part only of the exempt property, the rest is subject

5. Ohio.—*Corpus Juris* quoted in *Ridenour v. Scott*, 177 N.E. 926, 39 Ohio App. 529.
25 C.J. p 108 note 52.

6. Iowa.—*Brayman v. Brayman*, 247 N.W. 621, 215 Iowa 1183.
25 C.J. p 108 note 53.

Statute regulating mortgage to loan broker

*Vernon's Sayles Civ.St.Annot.*1914 art 3793, providing that a debt for rents and advances made by the landlord to a tenant may be secured by a lien on exempt personal property, was not repealed by Acts 34th Leg.1915 c 28 § 11, *Vernon's Ann.Civ.St.Annot.Supp.*1913 art 6171j, making a chattel mortgage on furniture executed by the husband without the wife's consent void, the latter statute being applicable only to mortgages to loan brokers.
Tex.—Mason v. Green, Civ.App., 226 S.W. 829.

7. Iowa.—*Reilly v. Woods*, 249 N.W. 381, 216 Iowa 419—*Whittier Nat. Trust & Savings Bank of Whittier, Cal., v. Smith*, 241 N.W. 481, 214 Iowa 171—*National Bank of Emmetsburg v. Chapman*, 234 N.W. 198, 212 Iowa 561—*Augustine v. Gold*, 174 N.W. 581, 188 Iowa 551.
Kan.—*Emporia Wholesale Coffee Co. v. Rehrig*, 252 P.2d 590, 173 Kan. 841—*Morris Plan Co. of Kan. v. Buttel*, 175 P.2d 100, 162 Kan. 228—*Foster v. Foster*, 61 P.2d 1350, 144 Kan. 528—*Lupton v. Merchants' Nat. Bank of Topeka*, 38 P. 2d 125, 140 Kan. 615—*Wickham v. Traders' State Bank*, 149 P. 433, 95 Kan. 657, rehearing denied 150 P. 513, 96 Kan. 350.

Wis.—*Mielke v. National Reserve Ins. Co.*, 256 N.W. 776, 216 Wis. 148—*Schwenker v. Johnson*, 224 N.W. 117, 198 Wis. 300.

"Family library" which one spouse cannot mortgage without consent of other may be composed of such books as family or head of family chooses to select.

Kan.—*Lupton v. Merchants' Nat. Bank of Topeka*, 38 P.2d 125, 140 Kan. 615.

Failure of consideration for consent
Where the consideration for the wife's signature fails the mortgage is void.

Iowa.—*Whittier Nat. Trust & Savings Bank of Whittier, Cal., v. Smith*, 241 N.W. 481, 214 Iowa 171.

Resale held subterfuge to avoid statute

Kan.—*White Star Machinery & Supply Co. v. Roulston*, 289 P.2d 749, 178 Kan. 481.

8. Iowa.—*Brayman v. Brayman*, 247 N.W. 621, 215 Iowa 1183.

Kan.—*White Star Machinery & Supply Co. v. Roulston*, 289 P.2d 749, 178 Kan. 481—*Beach v. Fireovid*, 114 P. 206, 84 Kan. 357, Ann.Cas. 1912A 670.

Mich.—*Parsons v. Kimmel*, 173 N.W. 539, 206 Mich. 676.

9. Colo.—*Welty v. Burks*, 231 P. 660, 76 Colo. 365.

Kan.—*White Star Machinery & Supply Co. v. Roulston*, 289 P.2d 749, 178 Kan. 481—*Emporia Wholesale Coffee Co. v. Rehrig*, 252 P.2d 590, 173 Kan. 841—*Bankers Inv. Co. v. Meeker*, 201 P.2d 117, 166 Kan. 209—*State v. Perkins*, 210 P. 1091, 112 Kan. 455—*First Nat. Bank v. Venard*, 197 P. 877, 109 Kan. 15.
25 C.J. p 108 note 61.

10. Iowa.—*Simpson v. McConnell*, 291 N.W. 862, 228 Iowa 412.

11. Kan.—*First Nat. Bank v. Venard*, 197 P. 877, 109 Kan. 15.

Minn.—*Strickland v. Minnesota Type-Foundry Co.*, 79 N.W. 674, 77 Minn. 210.

Use of part of loan to purchase property

Where part of the money received from the mortgage not signed by the wife is used for the purchase price of the exempt property, the mortgagor may be required to pay that amount; but this requirement does not entitle the mortgagee to possession of the property.
Kan.—*Foster v. Foster*, 61 P.2d 1350, 144 Kan. 528.

12. Kan.—*State v. Perkins*, 210 P. 1091, 112 Kan. 455.

13. Idaho.—*Vollmer v. Reid*, 77 P. 325, 10 Idaho 196.

14. Kan.—*Putnam Inv. Co. v. Titus*, 266 P. 55, 125 Kan. 623.

15. D.C.—*Justh v. Wilson*, 19 D.C. 529.

Idaho.—*Bruce v. Frame*, 225 P. 1024, 39 Idaho 29—*Grandview State Bank v. Torrance*, 221 P. 145, 38 Idaho 388.

Iowa.—*National Bank of Emmetsburg v. Chapman*, 234 N.W. 198, 212 Iowa 561.

Mich.—*Watson v. Mead*, 57 N.W. 181, 98 Mich. 330.

N.J.—*Green v. McCrane*, 37 A. 318, 55 N.J.Eq. 436.

Use of amount of exempt property

Where a mortgage covering a crop of hay is signed only by the husband, and not by his wife, but the mortgagor has the benefit of an amount of that hay equivalent to the amount exempt from execution, the lien of the mortgage can be enforced as to the balance.

Idaho.—*Grandview State Bank v. Torrance*, 221 P. 145, 38 Idaho 388.

to the debtor's power of alienation without the consent of his wife.¹⁶

Where, under the statute, property must be selected by the debtor before it becomes exempt, it has been held that it may be mortgaged or sold by him without the consent of his wife at any time before such selection.¹⁷ Further, where the debtor has several articles of the kind exempted, his act in mortgaging a part of them may be considered as an election to claim his exemption in the others, rendering the consent of his wife unnecessary.¹⁸

It has been held that the restriction applies only to property which is exempt at the time, and not to such as by some contingency may thereafter become exempt.¹⁹ The consent of the wife is not required for the assignment of an insurance policy to the insurance company where the right thus to deal between the insurer and the insured is reserved in the instrument by which the insurance is created.²⁰

Manner of consent. Dependent on the provisions of the statute, a verbal assent may be sufficient²¹ or insufficient.^{21.5} When written assent is necessary, the wife's signature need not be acknowledged;²² but if the signature of the wife is required by statute to be witnessed, a noncompliance with the statute renders the assent ineffective.²³

Abandonment of family. A statute which secures to a deserted wife or family the right of exemption conferred on the head of a family has been held to restrict the power of a husband to dispose of or encumber his exempt property after he has deserted his family,²⁴ but in the absence of such a statute the debtor's abandonment of his wife or family does not prevent him from disposing of the property.²⁵

§ 99. After Suit for Purchase Money

In accordance with statutory provisions, the power of a debtor to alienate property may be restricted after

steps have been taken to subject it to the payment of the purchase-money debt.

Where the statute, after declaring that property shall not be exempt from execution issued on a judgment for the purchase money, imposes restrictions on the power of the debtor to alienate property as against such a debt after steps have been taken to subject it, the restriction on the debtor's power to alienate under such circumstances does not become operative until the vendor has complied with the conditions, if any, imposed by the statute.²⁶ Such statutes have been held not to give a lien to the vendor, but merely to preclude a purchaser from the debtor from setting up the absolute right of the debtor to dispose of such property as against the vendor's execution for the purchase money, unless he bought in good faith without notice that the purchase money was unpaid.²⁷

§ 100. Transferee's Title and Rights

- a. In general
- b. Necessity for perfection of exemption rights
- c. Time of determination

a. In General

As a general rule, the transferee of exempt property may hold it free from the claims of the transferor's creditors.

Although there is some authority to the contrary,²⁸ the general rule is that the transferee of exempt property may hold it free from the claims of the transferor's creditors.²⁹ Accordingly, property which was exempt on execution in the hands of vendor cannot be garnished in the hands of a purchaser by a creditor of the vendor,³⁰ and where a mortgagor, at the time of executing the mortgage, has no property subject to execution, the mortgagee can hold the property against an execution issued against the mortgagor.³¹ The trans-

16. Ohio.—Ridenour v. Scott, 177 S. E. 926, 39 Ohio App. 529.
25 C.J. p 108 note 55.

17. Ind.—Sullivan v. Winslow, 22 Ind. 153.

18. Mich.—Harley v. Procunier, 72 N.W. 1099, 115 Mich. 53, 69 Am.S. R. 546, 40 L.R.A. 150.

19. Iowa.—Grover v. Younie, 81 N. W. 684, 110 Iowa 446.

20. Iowa.—Salvidge v. Mutual Life Ins. Co. of New York, 191 N.W. 862, 195 Iowa 156.

21. Mich.—Parsons v. Kimmel, 173 N.W. 539, 206 Mich. 676—Holman v. Gillett, 24 Mich. 414.

21.5 Kan.—Morris Plan Co. of Kan. v. Buttel, 175 P.2d 100, 162 Kan. 228, disapproving Hess-Herrington, Inc. v. State Exchange Bank of Yates Center, 122 P.2d 739, 155 Kan. 118.

22. Mo.—Brown v. Koenig, 74 S.W. 407, 99 Mo.App. 653.

23. Wis.—Lashua v. Myhre, 93 N. W. 811, 117 Wis. 18.

24. Ill.—Baker v. Baker, 69 Ill.App. 461.

25. Neb.—Farmers' Merchants' Bank v. Hoffman, 96 N.W. 1044, 5 Neb. Unoff., 9.

26. Mich.—Lillibridge v. Walsh, 56 N.W. 854, 97 Mich. 459.
25 C.J. p 108 note 72.

27. Mo.—Barton v. Sitlington, 30 S. W. 514, 128 Mo. 164—Straus v. Rothan, 14 S.W. 940, 102 Mo. 261.

28. Ala.—Simpson v. Simpson, 30 Ala. 225.

29. Ind.—Perkins v. Johnson, 133 N. E. 15, 77 Ind.App. 13.
25 C.J. p 109 note 74.

30. Mich.—Anderson v. Odell, 16 N. W. 870, 51 Mich. 492.

31. Ind.—Durbin v. Haines, 99 Ind. 463.

freee's rights are, however, subject to the lien for the purchase price.³²

The purchaser from the wife of an absconding debtor who has deserted his family has the same right to hold the property purchased, as against attaching creditors of the husband, as though he had purchased directly from the husband, where the statute provides that the wife of an absconding debtor who has left his family may hold exempt the property which was exempt in the absconding husband's hands.³³ The fact that a chattel mortgage on exempt property is ineffectual because of nonconsent of the mortgagor's wife does not deprive the mortgagee from pursuing his statutory remedy on the note given to evidence the debt.³⁴

Assignee of wages. An assignee of exempt wages or earnings takes them free from the claims of the assignor's creditors,³⁵ and free from a claim by the assignor's wife which is asserted under a statute authorizing a claim of exemption by the wife of an absconding debtor.³⁶

b. Necessity for Perfection of Exemption Rights

Under some, but not all, authorities, the validity of the title of a purchaser of exempt property is dependent on the debtor's having perfected his exemption rights.

The validity of the title of a purchaser of a debtor's exempt property is held to be dependent on the debtor's having performed all the statutory requirements in perfecting his exemption rights, such as claiming the exemption,³⁷ making his selection, where a selection by the debtor is required,³⁸ or making and filing his schedule.³⁹ Where, for instance, the debtor has not made his selection or

filed his claim for exemption before or at the time of the transfer, the property, not being exempt in the hands of the debtor, is not exempt in the hands of the transferee.⁴⁰ Where the mortgagor has not claimed an exemption, the mortgagee who is not in possession of the mortgaged property cannot claim an exemption therein, inasmuch as it is the mortgagor's, and not the mortgagee's, interest that is being attached.⁴¹

On the other hand, it has also been held that the right of a purchaser of property to claim an exemption thereof if the vendor could have done so rests on principles of equity and fairness and exists notwithstanding the vendor's failure to file the property schedule and inventory required by statute.^{41.5} Thus, the debtor-vendor's failure to file such statutory inventories and schedules is not fatal to the right of the grantees of his realty to hold it free from judgment liens under the exemption law.^{41.10}

c. Time of Determination

The validity of the purchaser's title depends on the fact of exemption at the time of the sale.

The validity of the purchaser's title to exempt property depends on the fact of exemption at the time of the sale,⁴² and is not affected by a change in the debtor's status after the sale, which would have rendered the property not exempt if the debtor had retained the title;⁴³ nor can the title of the transferee be defeated by a subsequent attempt on the part of the debtor to create a lien, in favor of a creditor, on the exempt property which he had previously conveyed.⁴⁴ An assignee is not entitled to exempt property which was not acquired by the debtor until after the assignment.⁴⁵

32. Mich.—Buckley v. Wheeler, 17 N.W. 216, 52 Mich. 1.

33. Iowa.—Waugh v. Bridgeford, 28 N.W. 626, 69 Iowa 334.

34. Ohio.—Schaub v. Welfare Finance Corporation, 29 N.E.2d 223, 65 Ohio App. 68.

35. Iowa.—Millington v. Laurer, 56 N.W. 533, 89 Iowa 322, 48 Am.S.R. 385.

25 C.J. p 108 note 51.

36. Mo.—Houchins v. City of Louisiana, App., 26 S.W.2d 800.

37. Ark.—Merchants' & Farmers' Bank v. Reel, 28 S.W.2d 725, 181 Ark. 969.

Wash.—Yakima Trust Co. v. Zintheo, 237 P. 729, 135 Wash. 389. 25 C.J. p 109 note 87.

38. Mo.—Stewart v. Stewart, 65 Mo. App. 663—Hombs v. Corbin, 20 Mo.App. 497, 507.

39. Ark.—Merchants' & Farmers' Bank v. Reel, 28 S.W.2d 725, 181 Ark. 969.

Ill.—Chapin v. Hoel, 11 Ill.App. 309.

40. Ark.—Merchants' & Farmers' Bank v. Reel, 28 S.W.2d 725, 181 Ark. 969.

Mo.—Hombs v. Corbin, 20 Mo.App. 497.

N.C.—Lane v. Richardson, 10 S.E. 189, 104 N.C. 642.

Wash.—Yakima Trust Co. v. Zintheo, 237 P. 729, 135 Wash. 389.

25 C.J. p 109 note 76.

41. R.I.—Sherrible v. Chaffee, 21 A. 103, 17 R.I. 195, 33 Am.S.R. 853.

41.5 Ind.—Tomlinson v. Miller, 58 N.E.2d 358, 115 Ind.App. 469.

41.10 Ind.—Tomlinson v. Miller, supra—Kirk v. Macy, 101 N.E. 108, 53 Ind.App. 17.

42. Ind.—Perkins v. Johnson, 133 N. E. 15, 77 Ind.App. 13.

25 C.J. p 109 note 84.

43. Conn.—Ketchum v. Allen, 46 Conn. 414.

Wis.—Carhart v. Harshaw, 45 Wis. 340, 30 Am.R. 752.

44. Ind.—Luckett v. Hammond, 124 N.E. 675, 188 Ind. 484.

25 C.J. p 109 note 86.

45. Ga.—Eibel v. Mechanics Loan & Savings Co., 183 S.E. 133, 52 Ga. App. 349.

VI. WAIVER, FORFEITURE, AND ESTOPPEL TO ASSERT

§ 101. Power to Waive

Ordinarily, and in the absence of constitutional or statutory restrictions, the debtor may waive a right of exemption.

Unless such waiver is against public policy^{45.50} or some constitutional or statutory restriction,^{45.55} it is ordinarily held that, at least at or after the time of the levy, it is within the power of the debtor to waive a right of exemption.⁴⁶ One has a right to waive an exemption in his own favor unless he also holds it for the benefit of others;^{46.5} so, it has been held that the head of a family cannot by his individual act waive an exemption created by the statute for the benefit of the family as a whole.⁴⁷

A waiver of the exemption from forced sale of a burial lot is not permitted, as this would be against good morals and contrary to public policy.⁴⁸ A debtor who may waive his exemptions may withdraw a claim of exemptions at any time before the property is set off to him or paid over to him.⁴⁹ That claimant is a pauper and a charge on the township or county does not prevent him from waiving his right of exemption, or from withdrawing a claim of exemption, so as to allow his

property to be taken by his creditors, and in such case the overseers of the poor cannot object.⁵⁰

§ 102. — Constitutional and Statutory Provisions

The power to waive an exemption may be governed or limited by express constitutional or statutory provisions.

Some constitutional or statutory provisions, while permitting a waiver of certain exemptions, render an attempted waiver as to certain other exemptions ineffectual,⁵¹ and under such provisions a general waiver of exemption is inoperative only as to the specific articles named therein,⁵² or debts not within the class excepted,⁵³ but will be valid as to other articles, or their proceeds on sale.⁵⁴ If money is not one of the specific articles named, a waiver will be operative against it, even though it can be easily exchanged for the specific articles named.⁵⁵

In accordance with particular constitutional or statutory provisions, the exemption may be waived before the property is set apart,⁵⁶ and cannot be waived afterward.⁵⁷

45.50 Iowa.—In re Kline's Estate, 24 N.W.2d 481, 237 Iowa 1086.

45.55 Iowa.—In re Kline's Estate, supra.

46. U.S.—In re Gunzberger, D.C.Pa., 268 F. 673.

Ariz.—Smith v. Phlegar, 236 P.2d 749, 73 Ariz. 11.

Ill.—McKinty v. Butts, 217 Ill.App. 234.

Iowa.—Corpus Juris Secundum cited in In re Kline's Estate, 24 N.W.2d 481, 483, 237 Iowa 1086.

La.—Kay v. Furrow, 152 So. 315, 178 La. 637.

Md.—Lawrence v. Commercial Banking Corporation, 169 A. 69, 165 Md. 559.

Mich.—Church v. First Nat. Bank, 238 N.W. 192, 255 Mich. 595, 82 A.L.R. 645.

Mont.—Corpus Juris cited in U. S. Building & Loan Ass'n v. Stevens, 17 P.2d 62, 64, 93 Mont. 11.

Ohio.—Pennsylvania R. Co. v. Bell, 153 N.E. 293, 22 Ohio App. 67.

Tex.—Bow v. Hodges, Civ.App., 101 S.W.2d 1043—McNabb v. Terminal Bldg. Corporation of Dallas, Civ. App., 93 S.W.2d 189, error refused—Sorenson v. City Nat. Bank, Civ. App., 293 S.W. 638.

25 C.J. p 109 note 92.

46.5 Iowa.—In re Kline's Estate, 24 N.W.2d 481, 237 Iowa 1086.

47. Kan.—Burke v. Finley, 31 P. 1065, 50 Kan. 424, 34 Am.S.R. 132. 25 C.J. p 110 note 93.

Restriction as restraint on creditors
While the head of a family may not waive exemption from execution, such restriction is construed not as a restriction on the absolute ownership of the head of the family, but as a restraint placed by statute on creditors seeking to collect their debts.

Tenn.—Mutual Loan & Thrift Corp. v. Corn, 188 S.W.2d 345, 182 Tenn. 554.

48. Tex.—Peterson v. Stolz, Civ. App., 269 S.W. 113.

Monument on burial lot

Execution by owner of burial lot of agreement that monument intended and erected on burial lot as permanent structure, not removable without injury to soil and disturbing dead body, shall remain property of builder until fully paid for is not enforceable so as to subject the monument to seizure for nonpayment of the debt.

Tex.—Peterson v. Stolz, supra.

49. Pa.—Appeal of Overseers of Poor, 95 Pa. 191—Appeal of Kyle, 45 Pa. 353.

50. Pa.—Appeal of Overseers of Poor, 95 Pa. 191.

51. Ga.—Posey v. Rome Oil & Fertilizer Co., 121 S.E. 205, 157 Ga.

44—Wilson v. McMillan, 6 S.E. 182, 80 Ga. 733.

25 C.J. p 110 note 6.

Cotton as "provisions"

Within Const. art 9 § 3 par 1, Civ.Code 1910 §§ 6584, 3413, relating to the right of a debtor to waive exemptions cotton is not "provisions." Ga.—Posey v. Rome Oil & Fertilizer Co., 121 S.E. 205, 157 Ga. 44. 25 C.J. p 110 note 6 [a] (5).

52. U.S.—Citizens' Bank v. Har- graves, Ga., 164 F. 613, 90 C.C.A. 523.

53. Kan.—Hoisington v. Huff, 24 Kan. 379.

25 C.J. p 110 note 8.

54. U.S.—Citizens' Bank v. Har- graves, Ga., 164 F. 613, 90 C.C.A. 523.

55. Ga.—Posey v. Rome Oil & Fer- tilizer Co., 121 S.E. 205, 157 Ga. 44 —Arnwine v. Beaver, 67 S.E. 937, 134 Ga. 377.

56. U.S.—In re Trammell, D.C.Ga., 5 F.2d 326, petition denied, C.C.A., Clark v. Nirenbaum, 8 F.2d 451, certiorari denied Powell v. Ander- son, 46 S.Ct. 349, 270 U.S. 649, 70 L.Ed. 780.

W.Va.—Taylor v. Belville, 74 S.E. 517, 70 W.Va. 484.

57. U.S.—In re Trammell, D.C.Ga., 5 F.2d 326, petition denied, C.C.A., Clark v. Nirenbaum, 8 F.2d 451, certiorari denied Powell v. Ander-

A constitutional provision authorizing the legislature to prohibit the encumbering of a homestead has been held by implication to authorize the legislature to prohibit a waiver of a personal property exemption.⁵⁸ On the other hand, a specific denial of the debtor's right to waive an exemption in real property will not be extended to personal property,⁵⁹ even though the exempt personalty is sold and proceeds invested in real property.⁶⁰ A constitutional provision allowing a debtor to waive his exemption does not bind the legislature to provide a remedy by garnishment for the collection of debts as to which exemptions are waived,⁶¹ and a statute declaring that wages of resident laborers for personal services to a fixed amount shall be exempt from garnishment, containing no exception in the case of waiver of exemption by the laborer, does not violate the constitutional provision allowing a debtor to waive his exemptions.⁶² A statute which designates certain properties on which the exemption for reasons of public policy cannot be waived in a note, bond, or other evidence of indebtedness is not invalid as a restraint on the right to waive.⁶³

A statute providing for waiver in a certain class of cases without the consent of the debtor's wife is not affected by other and different requirements contained in other statutes providing for waiver in an entirely different class of cases,⁶⁴ and, as respects the right of a husband and wife to waive exemption of household goods, a statute providing that subsequent sections dealing with homestead exemptions shall not extend to certain cases does not control a preceding section dealing with the exemption of household goods.⁶⁵

Wages. Under the express provisions of some statutes, a day laborer may not waive, or contract

to waive, the exemption of his wages from garnishment.⁶⁶ Where a statute requires the dismissal of garnishment proceedings in absolute terms if wages do not exceed a stated amount for a given period of time, a waiver is inoperative, and proceedings must be dismissed under such circumstances notwithstanding the waiver;⁶⁷ nor is such statute unconstitutional by reason of the fact that the state constitution allows a debtor to waive his exemptions, the constitutional provision relating to general exemptions only, or on the ground that it impairs the obligation of contract.⁶⁸

A law prohibiting the waiver of exemptions as to wages is not affected by the terms of a general statute permitting a waiver of exemptions generally,⁶⁹ and the special law relating to wages does not have the effect of a general law prohibiting the waiver of all exemptions.⁷⁰ Under the express provisions of some statutes an exemption to wages may be waived and in lieu thereof an exemption in personal property to a certain amount may be claimed.⁷¹

§ 103. — By Executory Contract

- a. In general
- b. Wages

a. In General

Despite some authority to the contrary, the general rule is that an exemption right cannot be waived by an executory contract.

As a general rule, based on reasons of public policy, a debtor's waiver of his exemption right by stipulation of an executory contract is absolutely void,⁷² but there is some authority to the contrary, based on the ground that a waiver of exemptions,

son, 46 S.Ct. 349, 270 U.S. 649, 70 L.Ed. 780.

58. W.Va.—Taylor v. Belville, 74 S. E. 517, 70 W.Va. 484.

59. N.Y.—Monroe v. Button, 46 N.Y. S. 637, 20 Misc. 494.

60. N.Y.—Monroe v. Button, *supra*.

61. Ala.—Richardson v. Kaufman, 39 So. 368, 143 Ala. 243.

62. Ala.—Richardson v. Kaufman, *supra*.

63. Ala.—Coffman v. Folds, 112 So. 911, 216 Ala. 133.

64. Kan.—Kroenert v. Mead, 54 P. 684, 59 Kan. 665.

65. Ohio.—Ohio Loan Co. v. Kle-tecka, 192 N.E. 182, 47 Ohio App. 514.

36. La.—Morgan Plan Co. v. Ates, 8 La.App. 806.

35 C.J. p 111 note 17.

Waiver of wages by executory contract see *infra* § 103.

67. Ala.—Ralls v. Alabama Steel & Wire Co., 39 So. 369, 143 Ala. 620.

68. Ala.—Richardson v. Kaufman, 39 So. 368, 143 Ala. 243.

69. Kan.—Burke v. Finley, 31 P. 1065, 50 Kan. 424, 34 Am.S.R. 132. 25 C.J. p 111 note 21.

70. Ala.—Adams v. Green, 14 So. 54, 100 Ala. 218. 25 C.J. p 111 note 22.

71. Miss.—First Nat. Bank v. Ellison, 99 So. 573, 135 Miss. 42.

72. Cal.—Corpus Juris cited in Industrial Loan & Investment Co. of San Francisco v. Superior Court of California in and for City and County of San Francisco, 209 P. 360, 361, 189 C. 546.

Colo.—Corpus Juris cited in Weaver v. Lynch, 246 P. 789, 79 Colo. 537, 47 A.L.R. 299.

Fla.—Lowe v. Keith, 190 So. 67, 133 Fla. 654.

La.—Succession of Onorato, 51 So.2d 804, 219 La. 1, 24 A.L.R.2d 656.

Corpus Juris quoted in Morgan Plan Co. v. Ates, 8 La.App. 806, 809.

N.Y.—Brooklyn Loan Corporation v. Gross, 18 N.Y.S.2d 179, 259 App. Div. 165, appeal denied 20 N.Y.S.2d 409, 259 App.Div. 888, appeal denied 27 N.E.2d 818, 283 N.Y. 778.

Ohio.—Dean v. McMullen, 142 N.E. 683, 109 Ohio St. 309.

Wyo.—Corpus Juris quoted in Delfelder v. Teton Land & Investment Co., 24 P.2d 702, 707, 46 Wyo. 142, rehearing denied 26 P.2d 153, 46 Wyo. 142.

25 C.J. p 111 note 25.

when made at the time the debt is created, is based on the same consideration as that on which rests the liability to pay, and is therefore irrevocable.⁷³ It has been held that, the reason for the rule being based on the existence of a family and the conservation of its means of support, it does not apply to exemptions allowed to an unmarried man, and that a waiver by him by an executory contract is valid and binding;⁷⁴ but the status of the debtor as a married or unmarried man has been held to be immaterial.⁷⁵

A waiver of exceptions contained in an executory agreement is not rendered effectual by the fact that it is under seal.⁷⁶ A bond or undertaking given in legal proceedings cannot operate as a waiver of exemption by the surety as against liability thereon.⁷⁷

A transfer or encumbrance of exempt property, by which a present right is vested, is not regarded as within the reasons for denying the power to waive the right of exemption by executory contract, and such a transaction which waives the right of the debtor to exemption in specific exempt property is valid and enforceable.⁷⁸

b. Wages

As a general rule, an exemption in wages cannot be

waived in an executory contract, but it has been held that it may be waived in a note.

The general rule, either under a statute so providing in express terms, or in the absence of statutory provisions, is that an exemption in wages cannot be waived in an executory contract;⁷⁹ and this is true even in a jurisdiction where a waiver by an executory contract is generally permitted.⁸⁰ However, it has also been held that in the absence of a statutory prohibition an exemption as to wages may be waived in a note.⁸¹

§ 104. Persons Who May Waive

Only the person who has the right of exemption, or his authorized agent, can waive it.

Only the person who has the right of exemption, or his authorized agent, can waive it.⁸² Thus, a debtor cannot waive exemptions given to his dependents,⁸³ a wife cannot waive her husband's rights without his authority,⁸⁴ and a husband cannot, without authority, waive his wife's personal exemption.⁸⁵ The husband may, however, waive exemptions on community property to pay community debts.⁸⁶ A debtor's exemption rights in personalty belonging to him may be waived by him without the consent of his wife,⁸⁷ in the absence of statutory

Agreement against public policy

Ga.—Brenau College v. Mincey, 22 S.E.2d 322, 68 Ga.App. 137.

Statutory prohibition

A statute prohibiting waiver by contract applies to executory contracts.

Ohio.—City Loan & Savings Co. v. Keenan, 24 N.E.2d 452, 136 Ohio St. 125.

Statute held not to authorize waiver

The statute providing that a chattel mortgage on household furniture then in the possession and use of a borrower shall not be valid unless in writing and signed, in person, by the borrower, does not permit borrower to waive the statutory exemption so as to authorize the creditor who holds a chattel mortgage on the property to levy on the property instead of foreclosing the mortgage.

N.Y.—Brooklyn Loan Corporation v. Gross, 18 N.Y.S.2d 179, 259 App. Div. 165, appeal denied 20 N.Y.S.2d 409, 259 App.Div. 888, appeal denied 27 N.E.2d 818, 283 N.Y. 778.

73. Pa.—Beatty v. Rankin, 21 A. 74, 139 Pa. 358.

Opportunity Building & Loan Ass'n v. Silverman, 38 Pa.Dist. & Co. 575.

25 C.J. p 111 note 26.

74. Ill.—Powell v. Daily, 45 N.E. 414, 163 Ill. 646, distinguishing

Recht v. Kelly, 82 Ill. 147, 25 Am. R. 301.

75. Tenn.—Mills v. Bennett, 30 S. W. 748, 94 Tenn. 651, 45 Am.S.R. 763.

76. N.C.—Branch v. Tomlinson, 77 N.C. 388.

77. Ind.—Maloney v. Newton, 85 Ind. 565, 44 Am.R. 46.

78. Ky.—Marquess v. Brandon, 13 Ky.L. 686.

Mont.—U. S. Building & Loan Ass'n v. Stevens, 17 P.2d 62, 93 Mont. 11.

25 C.J. p 110 note 2.

Waiver by:

Mortgage see infra § 106.

Sale see infra § 107.

79. Cal.—Industrial Loan & Investment Co. of San Francisco v. Superior Court of California in and for City and County of San Francisco, 209 P. 360, 189 C. 546.

Ga.—Brenau College v. Mincey, 22 S.E.2d 322, 68 Ga.App. 137.

La.—Corpus Juris quoted in Morgan Plan Co. v. Ates, 8 La.App. 806, 809.

25 C.J. p 111 note 37.

Waiver of wage exemptions generally under express statutory provisions see supra § 102.

80. Pa.—Firmstone v. Mack, 49 Pa. 387, 88 Am.D. 507.

81. Md.—Lawrence v. Commercial

Banking Corporation, 169 A. 69, 165 Md. 559.

82. Ala.—Consolidated Motor Co. of Alabama v. Malik, 92 So. 262, 207 Ala. 120.

Ind.—Tomlinson v. Miller, 58 N.E.2d 358, 115 Ind.App. 469.

Iowa.—In re Kline's Estate, 24 N.W. 2d 481, 237 Iowa 1086.

25 C.J. p 112 note 55.

83. Ala.—Young v. Thomason, 60 So. 272, 179 Ala. 454.

Proceeds of group insurance policy

The insured cannot waive the exemption on the proceeds of a policy of group insurance payable to his dependents.

Pa.—Burkhard v. Heilmann, 19 Pa. Dist. & Co. 503.

84. Cal.—Stanton v. French, 23 P. 355, 83 C. 194, 25 Am.S.R. 174.

N.Y.—Woodward v. Murray, 18 Johns. 400.

85. Ala.—Consolidated Motor Co. of Alabama v. Malik, 92 So. 262, 207 Ala. 120.

Ohio.—Dean v. McMullen, 142 N.E. 683, 109 Ohio St. 309.

86. Tex.—Sorenson v. City Nat. Bank, Civ.App., 293 S.W. 638.

87. Kan.—Kroenert v. Mead, 54 P. 684, 59 Kan. 665.

Mich.—Charpentier v. Bresnahan, 28 N.W. 916, 62 Mich. 360.

25 C.J. p 112 note 57.

requirements,⁸⁸ even where the statute makes necessary the consent of the wife to a waiver of exemption in a homestead.⁸⁹

A garnishee in proceedings to reach wages or any other debt cannot waive the principal defendant's right to claim the same as exempt, and a payment by him, or a judgment by default against him, without a waiver by the principal defendant, cannot impair such right.⁹⁰ In the absence of special authorization, one partner cannot waive exemptions on the individual property of another partner.⁹¹

§ 105. Waiver by Contract

- a. In general
- b. Notes and bonds

a. In General

No particular formality in a waiver by contract is necessary unless required by statute, but the intention to waive must be clearly expressed; and additional consideration is necessary if the waiver is given after the indebtedness has been incurred. The contract can be avoided only by showing fraud or mistake.

When a statute so requires, a contract which waives an exemption must be in writing and subscribed by the debtor,⁹² but in the absence of statutory requirements, no particular formality is essential to a written waiver.⁹³ A waiver of exemptions by contract is to be construed and given operation and effect as in the case of other contracts.⁹⁴ An exemption will be held to be waived

when such is the clear intention of the parties,⁹⁵ but the intention to make a waiver must be clearly expressed.⁹⁶

A mere agreement to turn over specific exempt property to the creditor,⁹⁷ or to a third person to be sold for the creditor,⁹⁸ is not a waiver of the exemption. When a waiver is intended to apply only to a part of the property exempted, it must specify the part to which it is intended to apply; but when it is of all exemptions, or of all claim of exemption, no specification of the property is necessary.⁹⁹ Inasmuch as an attachment execution must recite correctly the judgment on which it is based and its strength is measured by the judgment, if there is no waiver of exemption against the judgment there is none against the attachment.¹

A written agreement by partners that the business should be run by others and that all moneys arising therefrom should be devoted to the debts of the firm, share and share alike, and that the succeeding manager should have authority to replenish the stock, but should deposit the proceeds of the business in a bank, to be paid out ratably to the creditors, is a waiver of the exemption in the assets.²

Consideration. If the waiver is given at the time the debt is contracted, no additional consideration is necessary;³ but an agreement made after an indebtedness has been incurred must be founded on a new consideration to constitute a valid waiver of an exemption.⁴

83. Ala.—Agnew v. Walden, 10 So. 224, 95 Ala. 108.
25 C.J. p 112 note 58.

89. Ala.—Agnew v. Walden, supra.
25 C.J. p 112 note 59.

90. Ill.—Fanning v. Jacksonville First Nat. Bank, 76 Ill. 53.
Pa.—Jones v. Tracy, 75 Pa. 417.

91. Ala.—Guscott v. Roden, 21 So. 313, 112 Ala. 632.
Operation and effect of waiver by one partner see *infra* § 111.

92. Ala.—Consolidated Motor Co. of Alabama v. Malik, 92 So. 262, 207 Ala. 120.
25 C.J. p 113 note 70.

Claims for necessities and rent

Where claims for necessities and rent are subject to the exemption rights, they cannot be enforced, under such a statute, against exemption rights unless the debtor has waived his exemption as against these claims in writing.

Ala.—Adams v. Green, 14 So. 54, 100 Ala. 218.
25 C.J. p 110 note 15.

Statute held complied with

Ala.—Solomon v. David Rothschild & Co., 100 So. 230, 211 Ala. 313.

93. Ind.—Vesey v. Reynolds, 14 Ind. 444.
25 C.J. p 113 note 71.

94. Ala.—Neely v. Henry, 63 Ala. 261.

95. Pa.—Front & Huntingdon Building & Loan Ass'n v. Berzinski, 196 A. 572, 130 Pa.Super. 297.

Industrial Trust, Title & Savings Co. v. Gelman, 17 Pa.Dist. & Co. 368.

Waiver of laws preventing levy and sale

A waiver of all laws which would prevent a levy and sale is a waiver of the exemption laws.

Pa.—Smiley v. Bowman, 3 Grant 132.

96. Iowa.—Corpus Juris Secundum cited in Nolte v. Nolte, 76 N.W.2d 881, 885, 247 Iowa 868, 56 A.L.R.2d 854—Corpus Juris cited in In re Grilk's Will, 231 N.W. 327, 328, 210 Iowa 587—West Grove Sav. Bank v. Dunlavy, 181 N.W. 404, 190 Iowa 1054.

Pa.—Front & Huntingdon Building & Loan Ass'n v. Berzinski, 196 A. 572, 130 Pa.Super. 297.

Tex.—Watts v. Gibson, Civ.App., 33 S.W.2d 777.
25 C.J. p 113 note 72.

General waiver as affecting wages

A general waiver of exemption rights was held not to affect the exemption of wages of a laborer on the ground that the parties had in contemplation only exemptions of property. If wages were intended the waiver should have referred to them explicitly.

Ga.—Smith v. Johnston, 71 Ga. 748.
97. Ill.—Washburn v. Goodheart, 88 Ill. 229.

98. Cal.—Haswell v. Parsons, 15 C. 266, 76 Am.D. 480.

99. Ala.—Neely v. Henry, 63 Ala. 261.

1. Pa.—Hayes v. Lentz, 8 Pa.Dist. 628.

2. Miss.—Levy v. Rosell, 34 So. 321, 82 Miss. 527.

3. Pa.—Opportunity Building & Loan Ass'n v. Silverman, 38 Pa. Dist. & Co. 575.

4. S.D.—Mason v. Martin, 232 N.W. 29, 57 S.D. 299.

Avoidance of contract. If a person has signed a contract containing a clause waiving exemptions, he can avoid such clause only by showing fraud or mistake.⁵

b. Notes and Bonds

Under most authorities, a waiver of exemption rights in a note is void. A waiver in a bond secured by mortgage is valid.

As a general rule, a stipulation in a note, in the form of a waiver by the maker of his exemption rights, is held void on grounds of public policy and for the protection of the debtor's family;⁶ but there is other authority, in some jurisdictions under express statutes, to the effect that a waiver of exemption in a promissory note is valid.⁷ A waiver in a promissory note, under such a statute, binds the maker only, and not the indorser.⁸

The waiver, to take effect, must be clear and unambiguous.⁹ A waiver in a usurious note is void and inoperative both against the maker and indorser;¹⁰ but where suit is brought on several notes, one of which only is usurious, and all of which contain waivers, the invalidity of the usurious note will not affect recovery on the valid notes or the enforcement of a waiver contained therein.¹¹ A

stipulation in a note for the price of land reciting that the vendor retains a lien on all crops is in substance a mortgage on the crops, and not a waiver of exemption therein, and is valid on that ground.¹²

Bond. A waiver of exemption rights in a bond secured by mortgage is valid.¹³

§ 106. — Mortgage and Other Liens

- a. Mortgage or pledge
- b. Lien for rent
- c. Other liens

a. Mortgage or Pledge

An express waiver of exemption rights may properly be contained in a mortgage thereof, but a mortgage or pledge implies a waiver. A mortgage covering both exempt and nonexempt property operates as a waiver of exemption rights only in case the nonexempt property is insufficient to satisfy the debt. A debtor cannot waive his exemption by giving a mortgage without his wife's consent under statutes requiring such consent.

An express waiver of exemption rights in property may properly be contained in a mortgage thereof;¹⁴ but an express waiver is not necessary, for a mortgage or pledge implies a waiver as to the particular property,¹⁵ and the debtor cannot claim an exemption as against the mortgagee,¹⁶ even

5. Ala.—Goetter v. Pickett, 61 Ala. 387.
25 C.J. p 113 note 82.

6. Cal.—Industrial Loan & Investment Co. of San Francisco v. Superior Court of California in and for City and County of San Francisco, 209 P. 360, 189 C. 546.
Colo.—Weaver v. Lynch, 246 P. 789, 79 Colo. 537, 47 A.L.R. 299.
Ga.—Brenau College v. Mincey, 22 S. E.2d 322, 68 Ga.App. 137.
Tenn.—Sherwin-Williams Co. v. Morris, 156 S.W.2d 350, 25 Tenn.App. 272.
25 C.J. p 112 note 38.

Effect of stipulation in foreign state
A stipulation in note executed in Georgia waiving right of exemptions was not enforceable in Tennessee against a debtor who claimed exemption as head of a family since stipulation was against "public policy" of Tennessee.
Tenn.—Sherwin-Williams Co. v. Morris, supra.

7. Ala.—Scarborough v. City Nat. Bank, 48 So. 62, 157 Ala. 577, 131 Am.S.R. 71.
Md.—Lawrence v. Commercial Banking Corporation, 169 A. 69, 165 Md. 559.
25 C.J. p 112 note 42.

8. Ala.—Kennedy v. Hudson, 138 So. 282, 224 Ala. 17—Shows v. Jackson, 110 So. 273, 215 Ala. 256.
25 C.J. p 112 note 44.

9. Pa.—O'Nail v. Craig, 56 Pa. 161.
10. Ga.—Floyd v. Johnson, 83 S.E. 943, 142 Ga. 833.

11. Ga.—Floyd v. Johnson, supra.

12. Ky.—Columbia Finance & Trust Co. v. Morgan, 44 S.W. 389, 628, 45 S.W. 65, 19 Ky.L. 1761.

13. La.—Stockett v. Johnson, 22 La. Ann. 89.
Pa.—Front & Huntingdon Building & Loan Ass'n v. Berzinski, 196 A. 572, 130 Pa.Super. 297.

Waiver of individual rights by tenants by entireties

Where husband and wife, although holding mortgaged premises as tenants by entireties signed bond as joint obligors, as joint obligors it was possible for them to waive their individual rights to any and every exemption.

Pa.—Front & Huntingdon Building & Loan Ass'n v. Berzinski, supra.

14. Ga.—Flanders v. Wells, 61 Ga. 195—Allen v. Frost, 59 Ga. 558.
La.—Stockett v. Johnson, 22 La. Ann. 89.

Agreement in nature of mortgage

If a waiver of exemption is of the nature of a mortgage on the property, and not a mere executory agreement not to claim the benefit of the exemption laws, the agreement will be upheld.

Iowa.—Fejavy v. Broesch, 2 N.W. 963, 52 Iowa 88, 35 Am.R. 261.

15. La.—Corpus Juris quoted in Kay v. Furlow, 152 So. 315, 316, 178 La. 637.

Mont.—U. S. Building & Loan Ass'n v. Stevens, 17 P.2d 62, 93 Mont. 11.

Ohio.—City Loan & Savings Co. v. Keenan, 24 N.E.2d 452, 136 Ohio St. 125.

Ohio Loan Co. v. Kletecka, 192 N.E. 182, 47 Ohio App. 514.

Pa.—Nissley v. Heller, 16 Pa. Dist. & Co. 784, 34 Dauph. Co. 352.
25 C.J. p 114 note 95.

16. Iowa.—Fejavy v. Broesch, 2 N.W. 963, 52 Iowa 88, 35 Am.R. 261.
Ohio.—Donnelly v. Lulfs, 12 Ohio App. 305.

Pa.—Industrial Trust, Title & Savings Co. v. Gelman, 17 Pa. Dist. & Co. 368.

Tex.—Sparkman v. First State Bank of Handley, Civ.App., 246 S.W. 724.

Mortgage of law library

Attorney who executed chattel mortgage on law library and office furniture could not enjoin sale of mortgaged property in satisfaction of mortgage on ground that property was necessary to enable him to earn living, and therefore exempt under statute.

La.—Kay v. Furlow, 152 So. 315, 178 La. 637.

though the statute exempts property from "forced sale under any process of law."¹⁷

A statute prohibiting waiver by contract does not apply to a waiver by mortgage.¹⁸ Under particular statutes, one who obtains a mortgage lien on a certain class of property known to him to be exempt acquires his lien subject to the exemption right,¹⁹ but in the absence of notice the mortgagee acquires a lien free from all exemption claims.²⁰ Likewise, under particular statutory provisions, a mortgage lien given to a merchant for supplies to enable the mortgagor to make a crop is not superior to an exemption on the property set apart as exempt, and the property is not subject to be seized and sold under an execution issued on a foreclosure of the mortgage.²¹

Mortgage covering exempt and nonexempt property. Where a mortgage covers both exempt and nonexempt property, it operates in favor of the mortgagee as a waiver of the mortgagor's rights to the exempt property only in case the nonexempt property is insufficient to satisfy the debt,²² and the creditor must exhaust the nonexempt property before resorting to the exempt property to satisfy his lien,²³ and has a right to have the exempt property applied, only in payment of the unpaid balance, if it exists.²⁴

This rule, however, where it is recognized, is founded on mere equity, and will not be enforced where it would be inequitable to do so, and the

right is one which the mortgagor must seasonably assert for himself.²⁵

Consent of wife. As to exempt property, the debtor cannot waive his exemption by giving a mortgage without the consent of his wife under statutes which require the consent of the wife,²⁶ but he may execute a valid chattel mortgage on exempt personal property when his wife joins him.^{26.5} It has been held that, where the debtor has property from which he is entitled to claim his exemption but all of which is not exempt, a mortgage of a part of such property amounts to a waiver of the right to claim exemption therein, or rather an election to claim an exemption in the remaining property, and a mortgage of such property by the debtor without the consent of his wife passes title to the mortgagee free from any later claim of exemption in the property.²⁷

b. Lien for Rent

There is a conflict of authority as to whether a waiver of exemption in a lease is valid and binding on the tenant.

In some jurisdictions a waiver of exemption in a lease is held to be executory and not to bind the tenant;²⁸ and it is held not to be a mortgage within a statute making a mortgage lien superior to an exemption claim.²⁹ Other authority is to the effect that such a waiver of an exemption in a lease is valid,³⁰ particularly when expressly authorized by statute,³¹ and it has also been held that such a clause in a lease is in the nature of a mortgage,

17. Cal.—Peterson v. Hornblower, 33 C. 265.

Fla.—Howard v. Calhoun, 21 So.2d 361, 155 Fla. 689—Patterson v. Taylor, 15 Fla. 336.

Tex.—Rose v. Martin, Civ.App., 33 S. W. 284.

18. Ohio.—City Loan & Savings Co. v. Keenan, 24 N.E.2d 452, 136 Ohio St. 125.

19. Ga.—Johnson v. Redwine, 33 S. E. 676, 105 Ga. 449.

20. Ga.—Ford v. Fargason, 48 S.E. 180, 120 Ga. 606.

Property purchased with pension money

Mortgagee of cow purchased with pension money of Confederate soldier's widow could levy execution on cow on pensioner's default, in the absence of showing that mortgagee had notice of character of pensioner's ownership before or at time of execution of mortgage.

Ga.—Knight v. Addison, 174 S.E. 145, 49 Ga.App. 54.

21. Ga.—Bolton v. State, 159 S.E. 910, 43 Ga.App. 759—Jones v. Spillers, 71 S.E. 777, 9 Ga.App. 473.

22. Minn.—Miller v. McCarty, 50 N. W. 235, 47 Minn. 321, 28 Am.S.R. 375.

Tex.—Baughn v. Allen, Civ.App., 73 S.W. 1063.

25 C.J. p 114 note 2.

23. Vt.—Sanders v. Phillips, 20 A. 104, 62 Vt. 331.

24. Tex.—Baughn v. Allen, Civ.App., 73 S.W. 1063.

25. Minn.—Miller v. McCarty, 50 N. W. 235, 47 Minn. 321, 28 Am.S.R. 375.

26. Iowa.—Augustine v. Gold, 174 N. W. 581, 188 Iowa 551.

26.5 Tenn.—Mutual Loan & Thrift Corp. v. Corn, 188 S.W.2d 345, 182 Tenn. 554.

27. Iowa.—Grover v. Younie, 81 N. W. 684, 110 Iowa 446.

28. Ohio.—Dean v. McMullen, 142 N.E. 683, 109 Ohio St. 309.
25 C.J. p 112 note 47.

29. Ohio.—Dean v. McMullen, supra.

30. Pa.—Beatty v. Rankin, 21 A. 74, 139 Pa. 358.

Extension of lease

Waiver of exemption in lease ap-

plies to all property levied on, whether by distraint or entry of judgment on lease and continues in effect during any extension or holding over of original lease.

Pa.—Gatti v. Purcell, 30 Pa.Dist. & Co. 435, 19 Erie Co. 456, 51 York Leg.Rec. 159.

31. Kan.—Barhyte v. New Hampshire Real Estate Co., 71 P. 837, 66 Kan. 390.

As affected by statute requiring wife's consent to mortgage

A statute requiring the joint consent of the husband and wife to a mortgage of personal property does not affect the right given by another statute to a tenant to waive the benefit of exemption laws for debts contracted for rent without the consent of his wife.

Kan.—Kroenert v. Mead, 54 P. 684, 59 Kan. 665.

Effect as to assignee of lease

An assignee of the lease is bound by his assignor's waiver contained therein.

Kan.—Barhyte v. New Hampshire Real Estate Co., 71 P. 837, 66 Kan. 390.

and does not come within the rule forbidding an executory contract waiving the benefit of the exemption laws.³²

A waiver of exemption rights may be implied from the tenant's acts, such as moving his exempt property into the rented house or apartment.^{32.5}

A stipulation in a lease by an unmarried man, giving his landlord a lien on all his property for rent and waiving all exemptions, is a valid waiver, protection of the family as a reason for the rule not applying.³³ A statute permitting a waiver of exemptions in a lease has been construed to apply only to those exemptions in which the debtor's family has no interest.³⁴

A waiver of exemptions allowed under a landlord and tenant act is restricted thereto, and does not operate as a general waiver of all property exemptions;³⁵ but a waiver in a lease of all "the benefit of all laws or usages exempting any property from distress or executions for rent" applies to any property of the debtor, whether seized on a landlord's warrant or levied on by an execution for rent.³⁶ Exemptions as to property not on leased premises seized on execution under a judgment for rent are waived by a provision in the lease that all personal property upon the premises and for thirty days after removal of the same shall be liable to distress for rent in arrear, and the lessee waives the benefit of any and all law exempting property from levy and sale.³⁷

A stipulation in a lease that the landlord shall pay a lien on the crop for the rent does not operate

as a waiver of the tenant's food exemption therein,³⁸ nor is such right of exemption waived by a recital in a note given by a debtor for land that the vendor retains a lien on all crops for the price.³⁹

c. Other Liens

An exemption may be waived by a contract which creates a lien for labor performed or an equitable lien.

One who contracts for work to be performed on exempt property impliedly waives the exemption in favor of a lien for the labor performed.⁴⁰ An agreement to sell property to be paid for by the purchaser in installments, the title to remain in the vendor until all payments are made, is not in contravention of the exemption laws.⁴¹

A debtor may create an equitable lien, as by giving a note charging property with the payment of the debt.⁴² Under an agreement between a mortgagee and the mortgagor that the latter will insure the property for the benefit of the mortgagee, the latter has an equitable lien on the proceeds of the policy, even though the property itself was exempt from forced sale.⁴³

§ 107. — Sale

A conveyance of exempt property by the debtor deprives him of his exemption rights therein; but an attempt to sell the property, or a contract of sale which is afterward rescinded, does not affect his rights.

When a debtor conveys exempt property to another, he loses his exemption rights therein,⁴⁴ and cannot thereafter claim the property or the proceeds of a sale thereof on execution as exempt, for he has no title.⁴⁵ The debtor's exemption rights do

32. Iowa.—*Smith v. Dayton*, 62 N.W. 650, 94 Iowa 102.
25 C.J. p 112 note 48.

Necessity for recording

To be valid against a subsequent mortgagee without notice, the stipulation must be recorded.

Iowa.—*Sioux Valley State Bank v. Honnold*, 52 N.W. 244, 85 Iowa 352.

32.5 Landlord's lien

A tenant who voluntarily moved furniture into leased premises could not replevy the furniture from landlord who retained possession thereof to enforce lien for rent, within three-month period provided for by the statute.

Fla.—*Howard v. Calhoun*, 21 So.2d 361, 155 Fla. 689.

33. Ill.—*Powell v. Daily*, 45 N.E. 414, 163 Ill. 646.

34. Kan.—*Burke v. Finley*, 31 P. 1065, 50 Kan. 424, 34 Am.S.R. 132.
25 C.J. p 112 note 52.

35. Pa.—*Mitchell v. Coates*, 47 Pa. 202.

36. Pa.—*Beatty v. Rankin*, 21 A. 74, 139 Pa. 358.

37. Pa.—*Jenkins v. Stone*, 14 Montg. Co. 29.

38. Ky.—*Columbia Finance & Trust Co. v. Morgan*, 44 S.W. 389, 628, 45 S.W. 65, 19 Ky.L. 1761—*Moss v. Carl*, 37 S.W. 580, 18 Ky.L. 648.

39. Ky.—*Columbia Finance & Trust Co. v. Morgan*, 44 S.W. 389, 628, 45 S.W. 65, 19 Ky.L. 1761.

40. Mich.—*Rogers v. Raynor*, 60 N.W. 980, 102 Mich. 473.

41. Mass.—*Morley v. French*, 2 Cush. 130.

42. Tenn.—*Mynatt v. Magill*, 3 Lea 72.

43. Tex.—*Mosley v. Stratton*, Civ. App., 203 S.W. 397.

44. Pa.—*Hild Floor Mach. Co. v. Rudolph*, 39 A.2d 457, 156 Pa.Super. 102.

Wash.—*Yakima Trust Co. v. Zintheo*, 237 P. 729, 135 Wash. 389.
25 C.J. p 113 note 84.

Effect of fraudulent conveyance see infra § 118.

Exemption to widow ineffective

If instrument executed by deceased husband prior to his death conveyed title to personal property to secure his debt, subsequent exemption to widow, pursuant to statute, would avail nothing against such a creditor, and no proceeding in equity could strengthen widow's claim against creditor.

Ga.—*Morgan v. Community Loan & Investment Co.*, 25 S.E.2d 413, 195 Ga. 675.

45. Ga.—*Wilbanks v. Wardlaw*, 178 S.E. 466, 50 Ga.App. 495.

Wash.—*Yakima Trust Co. v. Zintheo*, 237 P. 729, 135 Wash. 389.
25 C.J. p 114 note 85.

Bill of sale foreclosed as mortgage

Debtor could not claim exemption of property conveyed by debtor's bill of sale to secure debt, notwithstanding creditor foreclosed bill of sale as mortgage.

not revive on his reacquiring title to the property,⁴⁶ but where a debtor, after a judgment has been obtained against him, sells property which was subject to the lien of an execution, he may include it in his schedule and claim it as exempt.⁴⁷

An indiscriminate sale by the debtor of property, some of which is exempt and some not, and a mingling of the proceeds operate as a waiver.⁴⁸ A bona fide intention or attempt to sell or exchange exempt property,⁴⁹ or a contract of sale or exchange which is afterward rescinded,⁵⁰ does not defeat, or in any way prejudice, the debtor's right to claim the property as exempt. A payment of a claim against him by a laborer out of his wages by bill of exchange drawn on his employer operates as a waiver of his right later to claim this sum due him for wages as exempt under the statute.⁵¹

The removal to an auction room of the goods for the purpose of having them sold at auction operates as a waiver of the debtor's exemption in the goods.⁵²

Exemption rights as to the proceeds of exempt property are considered *supra* §§ 58-61.

§ 108. Waiver by Conduct

Exemption rights may be waived by conduct of the debtor if it clearly and unmistakably shows an intention on his part to do so.

The conduct of the debtor may be such as to imply a waiver of an exemption,⁵³ but the acts relied on must be unequivocal,⁵⁴ and the conduct should be inconsistent with an intention to claim exemptions showing clearly and unmistakably that the debtor intends to waive his rights.⁵⁵ The claim may be waived by an express declaration,⁵⁶ but mere oral declarations of the debtor which tend to show that the debtor does not claim his exemption, but do not express a well defined waiver, are insufficient.⁵⁷

The giving of a delivery bond,⁵⁸ or a bond to dissolve a garnishment,⁵⁹ or receipting for the articles levied on,⁶⁰ even where done voluntarily,⁶¹ will not raise an inference of the debtor's intention to waive his exemption. A selection of other property in lieu of property specifically exempt under the terms of a statute so providing operates as a waiver to claim the articles specifically exempt, and it will have this effect even though the debtor fails in his claim to exemption in the substituted property, with the result that he will lose his entire exemption claim, not merely to the substituted property, but to the property specifically exempt.⁶²

The debtor, by transferring all his other property to creditors to pay debts, does not waive his right to claim garnished property as exempt.⁶³

Ga.—Wilbanks v. Wardlaw, 178 S.E. 466, 50 Ga.App. 495.

46. N.Y.—Omans v. Beeman, 124 N. Y.S. 166, 66 Misc. 625.

47. Ind.—Luckett v. Hammond, 124 N.E. 675, 188 Ind. 484.

48. Ky.—Rasco v. Sheet, 8 Ky.L. 703.

49. Ky.—Winstead v. Hicks, 121 S. W. 1018, 135 Ky. 154, 135 Am.S.R. 446.

25 C.J. p 114 note 90.

50. Ind.—Boesker v. Pickett, 81 Ind. 554.

Iowa.—Bevan v. Hayden, 13 Iowa 122.

N.C.—Duvall v. Rollins, 68 N.C. 220.

51. Ala.—Bibb v. Janney, 45 Ala. 329.

52. Wis.—Kennedy v. Baker, 3 Pinn. 295, 4 Chاند. 19.

53. Iowa.—In re Kline's Estate, 24 N.W.2d 481, 237 Iowa 1086.

La.—Ferrara v. Polito, App., 167 So. 120.

Miss.—Blaylock v. J. Rubel & Co., 119 So. 503.

Mo.—Parketon v. Pugsley, 121 S.W. 789, 142 Mo.App. 537.

Ohio.—Pennsylvania R. Co. v. Bell, 153 N.E. 293, 22 Ohio App. 67.

Tex.—Bow v. Hodges, Civ.App., 101 S.W.2d 1043—McNabb v. Terminal

Bldg. Corporation of Dallas, Civ. App., 93 S.W.2d 189, error refused.

54. Ala.—Street v. Dubose, 141 So. 723, 25 Ala.App. 117.

Kan.—Frey v. Butler, 35 P. 782, 52 Kan. 722.

Waiver by testamentary disposition

(1) A will which directs that all just debts be first paid out of the estate does not waive the statutory exemption of life insurance payable to the estate which is by force of statute held by the personal representatives for distribution to particular beneficiaries.

Iowa.—In re Grilk's Will, 231 N.W. 327, 210 Iowa 587.

(2) Testamentary direction that testator's just debts be paid was a mere matter of form and did not operate as a waiver of federally imposed exemption of proceeds of testator's National Service Life Policy from claims of his creditors; such proceeds were exempt from claims of insured's creditors including claims for state and federal taxes, and passed by operation of federal law to legatees designated in insured's will free and clear of such claims, notwithstanding such testamentary direction.

Pa.—In re Beall's Estate, 119 A.2d 216, 384 Pa. 14.

55. Colo.—Harrington v. Smith, 23 P. 331, 14 Colo. 376, 20 Am.S.R. 272.

Wash.—Shell v. Svensson, 159 P. 1076, 93 Wash. 40.

25 C.J. p 116 note 55.
Burden of showing waiver see *infra* § 160.

56. Tex.—McNabb v. Terminal Bldg. Corporation of Dallas, Civ.App., 93 S.W.2d 189, error refused.

57. Kan.—Frey v. Butler, 35 P. 782, 52 Kan. 722.

N.H.—Rice v. Chase, 9 N.H. 178, 32 Am.D. 346.

58. Neb.—Desmond v. State, 19 N. W. 644, 15 Neb. 438.
25 C.J. p 115 note 33.

59. Ga.—Born v. Williams, 7 S.E. 868, 81 Ga. 796.
25 C.J. p 116 note 34.

60. Mich.—Vanderhorst v. Bacon, 38 Mich. 669, 31 Am.R. 328.
Wis.—Heath v. Keyes, 35 Wis. 668.
25 C.J. p 116 note 35.

61. Ky.—Perry v. Hensley, 14 B. Mon. 474, 61 Am.D. 164.

62. Mo.—Parketon v. Pugsley, 121 S.W. 789, 142 Mo.App. 537.

63. N.D.—First Nat. Bank v. Oliver, 214 N.W. 911, 55 N.D. 741,
27 C.J. p 439 note 29.

§ 109. — Consent to Levy

A debtor's consent to a levy precludes him from maintaining an action for a wrongful levy, and has been held to preclude him from asserting the right of exemption and stopping the sale; but there is authority that a claim after levy, but before the sale, should be allowed unless prejudice will result. If the debtor asks the officer to levy on certain property, or expressly agrees to a present sale of the property, he waives his right of exemption therein.

If the debtor consents to a levy by the officer, he cannot afterward maintain an action against him on the ground that the levy was wrongful.⁶⁴ It has been held that the debtor's consent to levy will operate as a waiver of the right of exemption so as to estop the debtor from subsequently claiming such right and stopping a sale;⁶⁵ but other authority is to the effect that a claim after the levy, if made before sale, should be allowed unless prejudice will result.⁶⁶

If the debtor asks the officer to levy on a particular piece of property⁶⁷ in preference to another,⁶⁸ or if the debtor agrees expressly to a present sale of the property,⁶⁹ or to a transfer of the proceeds of exempt property to the creditor,⁷⁰ his right to his exemption in the property concerned is waived; but the giving up of property to an officer is not a waiver of the right of defendant to claim it as exempt in his hands,⁷¹ and an agreement by the debtor that the debtor himself sell specific property and turn the proceeds over to the sheriff to be held subject to order of court until exemption rights are determined does not amount to a waiver of exemption as to the proceeds of the sale.⁷²

If the statute requires the officer to levy in all cases, leaving it for the debtor afterward to claim

his exemptions, consent to a levy merely is not a waiver.⁷³ If the debtor's attorney, duly authorized, agrees expressly to the sale,⁷⁴ or delivers up property to the sheriff for sale,⁷⁵ the debtor is bound by his conduct, and is taken to have waived his exemption.

§ 110. — Failure to Assert Claim

The debtor's failure to assert a claim of exemption, or to assert it in the manner required by statute, laches in asserting the claim, or failure to select exempt property when selection is required, is a waiver of the right of exemption, unless a justifiable excuse exists or unless the debtor is under no legal obligation to assert his claim or has no knowledge of the exempt nature of the property.

Unless, under the exemption statutes, it is unnecessary for the debtor to claim an exemption in specific property in order to protect his rights therein,⁷⁶ as a general rule failure to assert or claim a right of exemption at all, or a failure to assert or claim it at the time and in the manner expressly or impliedly required by the statute which confers the right, if any such statutory requirement is made, is a waiver of the right.⁷⁷ The debtor must, however, be under a legal obligation to assert his claim,⁷⁸ and he must have knowledge of the facts on the existence of which the legal obligation rests;⁷⁹ he must also know that the property is exempt.⁸⁰

Failure to plead an exemption may waive it,⁸¹ and an appearance without asserting the claim, in proceedings in which the statute requires that the claim be asserted or otherwise be lost, waives the claim;⁸² but a general appearance by the debtor in the suit against him without at that time claiming his exemption is not an implied waiver of an exemption

64. Mich.—Rich v. French, 57 N.W. 1040, 99 Mich. 27.
Tex.—Dodge v. Knight, 16 S.W. 626. 25 C.J. p 116 note 45.

65. Iowa.—Angell v. Johnson, 2 N.W. 435, 51 Iowa 625, 33 Am.D. 152. 25 C.J. p 116 note 46.

66. Minn.—McAbe v. Thompson, 6 N.W. 479, 27 Minn. 134. 25 C.J. p 116 note 47.

67. Ill.—People v. Johnson, 4 Ill. App. 346.

68. Or.—Childers v. Brown, 158 P. 166, 81 Or. 1, Ann.Cas.1918D 170. 25 C.J. p 116 note 49.

69. Ark.—Surratt v. Young, 18 S.W. 539, 55 Ark. 447.

Mich.—Rich v. French, 57 N.W. 1040, 99 Mich. 27. 25 C.J. p 116 note 50.

70. Tex.—Westchester F. Ins. Co. v. Goggan, Civ.App., 203 S.W. 163. 25 C.J. p 116 note 51.

71. Ind.—Eltzroth v. Webster, 15 Ind. 21, 77 Am.D. 78.

72. Ark.—Wycoff v. Farmers' & Merchants' Bank, 271 S.W. 948, 168 Ark. 850.

73. Ind.—Eltzroth v. Webster, 15 Ind. 21, 77 Am.D. 78.

74. Me.—Jensen v. Cannell, 76 A. 914, 106 Me. 445.

75. Ky.—Ponder v. Webb, 10 Ky. Op. 745.

76. Or.—California Trojan Powder Co. v. Wadhams & Co., 166 P. 759, 85 Or. 307. 25 C.J. p 117 note 60, p 132 notes 24, 25.

77. Cal.—Tinsley v. Bauer, 271 P.2d 116, 125 C.A.2d 724.

La.—Ferrara v. Polito, App., 167 So. 120.

Miss.—Blaylock v. J. Rubel & Co., 119 So. 503.

Ohio.—Pennsylvania R. Co. v. Bell, 153 N.E. 293, 22 Ohio App. 67.

S.D.—Rames v. Norbraten, 272 N.W. 826, 65 S.D. 269.

25 C.J. p 117 note 62.

Compliance held mandatory

Ind.—Tomlinson v. Miller, 58 N.E.2d 358, 115 Ind.App. 469.

Failure to file schedule

Ark.—Andrews v. Briggs, 158 S.W.2d 269, 203 Ark. 714.

78. Ill.—Gibson v. People, 122 Ill. App. 217.

25 C.J. p 117 note 63.

79. Kan.—Dennis v. Benfer, 38 P. 806, 54 Kan. 527.

N.J.—Slurszberg v. Prudential Ins. Co. of America, 192 A. 451, 15 N.J. Misc. 423.

25 C.J. p 117 note 64.

80. Conn.—Flaxman v. Capitol City Press, 185 A. 417, 121 Conn. 423.

81. N.M.—New Mexico Nat. Bank v. Brooks, 49 P. 947, 9 N.M. 113.

Tex.—Bow v. Hodges, Civ.App., 101 S.W.2d 1043—McNabb v. Terminal Bldg. Corporation of Dallas, Civ. App., 93 S.W.2d 189, error refused.

82. Miss.—Blaylock v. J. Rubel & Co., 119 So. 503.

as to wages where an express waiver is not permitted.⁸³

The debtor's appearing and moving to dissolve an attachment without first having made claim to his exemption,⁸⁴ or the traverse of an attachment on other grounds before claiming the exemption,⁸⁵ is not a waiver of his right. For an exemption of specific household property to be retained as against a general waiver of homestead rights, the exemption must be set up in the manner prescribed by statute.⁸⁶

The necessity and sufficiency of a claim generally are considered *infra* §§ 129-135.

Excuses for failure to claim. Failure to make a claim for exemptions may be explained and excused on the ground of unavoidable accident or mistake,⁸⁷ an accident within the meaning of this rule meaning the happening of an event without the concurrence of the will of the person by whose agency it was caused.⁸⁸ Absence at the time of sale on account of sickness in debtor's family is a sufficient excuse for not making the claim, where the creditor is aware of the claim from its having been made in a former suit.⁸⁹ Misinformation received from the officers as to the debtor's rights may be sufficient excuse for the failure of the debtor to make his claim.⁹⁰

Where the debtor's delay to claim his exemption at the proper time is due to the fact that he is ab-

sent from the jurisdiction, no waiver can be inferred,⁹¹ unless he knew of the levy, and his absence was avoidable.⁹²

Laches. If the debtor delays unreasonably to assert his claim, so that he may be considered guilty of laches, his right to an exemption will be considered waived.⁹³ Mere lapse of time, when the rights of parties in interest have not been affected, may not of itself be a bar to the exemption claim;⁹⁴ but the court may assess against the debtor the costs which a timely filing of the exemption claims might have avoided.^{94.5}

While a delay in the assertion of the exemption right which goes beyond the time the statute provides it shall be made is laches constituting ground for adjudication that the debtor has waived his right,⁹⁵ if the delay is terminated at any time before the statutory limit, there is no laches on which the creditor can base his claim of waiver.⁹⁶

Failure to select. The rule that failure to assert claim is a waiver of the exemption is applicable where the debtor has to elect from among several articles which he is entitled to hold exempt,⁹⁷ or where he must select the amount of property allowed to him as exempt by the statute, out of a larger stock.⁹⁸

A failure to make selection in such cases is not necessarily a waiver of exemption as matter of

83. Pa.—Morris Box Board Co. v. Rossiter, 30 Pa.Super. 23.

84. Wash.—State v. Gardner, 73 P. 690, 32 Wash. 550.

85. Wis.—Ladwig v. Williams, 58 N. W. 1103, 87 Wis. 615.
25 C.J. p 116 note 38.

86. Ga.—Brown v. Scarborough, 123 S.E. 605, 158 Ga. 301—Miller v. Almon, 50 S.E. 993, 123 Ga. 104.

Wilbanks v. Wardlaw, 178 S.E. 466, 50 Ga.App. 495—Sanders v. General Motors Acceptance Corporation, 158 S.E. 646, 43 Ga.App. 374.

Proceedings under Georgia statutes

(1) Requirement that exemption of three hundred dollars worth of furniture and provisions, to be effectual against a general waiver of homestead rights, must be set apart on petition, notice, etc., was abrogated by Ga.L.1924 p 57, and thenceforward debtor could claim such exemption by merely filing schedule.

Ga.—Wilbanks v. Wardlaw, 178 S.E. 466, 50 Ga.App. 495—Kemp v. Swainsboro Ice & Fuel Co., 169 S.E. 700, 47 Ga.App. 99—Sanders v. General Motors Acceptance Corporation, 158 S.E. 646, 43 Ga.App. 374.

(2) Prior to the act of 1924, for the exemption to be effectual against the waiver it was necessary that it be set apart in the manner provided in Ga.Civ.Code 1910 § 3378.

Ga.—Brown v. Scarborough, 123 S.E. 605, 158 Ga. 301.
25 C.J. p 110 note 6 [b].

(3) After the passage of the act, to entitle the debtor to the exemption as against the general waiver, he must set up the constitutional exemption either under the Civ.Code 1910 § 3378 or under the act of 1924, and the mere setting aside of the statutory or short homestead under the Civ.Code 1910 § 3416 is no more effectual than before the passage of the act.

Ga.—Wilbanks v. Wardlaw, *supra*—Sanders v. General Motors Acceptance Corporation, *supra*.

87. Okl.—Hocker v. Carroll, 129 P. 56, 35 Okl. 290.

88. Cal.—Haswell v. Parsons, 15 C. 266, 76 Am.D. 480.

Okl.—Hocker v. Carroll, 129 P. 56, 35 Okl. 290.

89. Cal.—Haswell v. Parsons, 15 C. 266, 76 Am.D. 480.

90. Ill.—Morrissey v. Feeley, 36 Ill. App. 556.

91. Okl.—Hocker v. Carroll, 129 P. 56, 35 Okl. 290.
25 C.J. p 118 note 71.

92. Pa.—Rogers v. Waterman, 25 Pa. 182.

93. Pa.—Gibbons v. Gaffney, 26 A. 24, 154 Pa. 48.

Cross Bros. v. Abrams, 19 Pa. Dist. & Co. 689, 23 Del.Co. 560.
25 C.J. p 118 note 77.

94. Pa.—In re Fee's Estate, 18 Pa. Dist. 391.

94.5 Pa.—Bonwit Teller & Co. v. Gerstemeier, 6 Pa.Dist. & Co.2d 623, 72 Montg.Co. 159.

95. Ala.—Alley v. Daniel, 75 Ala. 403—Randolph v. Little, 62 Ala. 396.

25 C.J. p 118 note 80.

96. Ill.—Johnston v. Willey, 21 Ill. App. 354.

25 C.J. p 118 note 81.

97. Mass.—Savage v. Davis, 134 Mass. 401.

25 C.J. p 117 note 65, p 133 note 35 [a].

98. Ill.—McKinty v. Butts, 217 Ill. App. 234.

Mass.—Clapp v. Thomas, 5 Allen 158.

law;⁹⁹ the debtor must have had an opportunity to make a selection in order that his failure to select shall constitute a waiver,¹ and his failure to assert his claim to an exemption does not amount to a waiver where the statute requires the officer to make a demand on the debtor to make his selection, and on the debtor's default, to make the selection himself, and it is shown that the officer has failed to make the statutory demand.² A debtor who fails to comply with the statute prescribing the method of selecting property claimed to be exempt from execution waives his right to exemption.³ Where the debtor is present at the sale and makes no objection to the sale of a certain piece of property, his right of exemption is waived.⁴

The necessity and sufficiency of a selection generally are considered *infra* § 138.

§ 111. Operation and Effect of Waiver

- a. In general
- b. Operation as lien or pledge
- c. Waiver by husband as affecting wife and family
- d. Waiver by partner

a. In General

A waiver places the exempt property in the same position as nonexempt property, as against the creditor in whose favor the exemption is waived; and an implied waiver has the same effect as an express waiver. A waiver will not be extended beyond its ordinary meaning as to the property included, and a waiver in a lease extends no further than for the rent due.

If a debtor is authorized, expressly or impliedly, to waive his exemptions, a waiver places the property in the same situation as nonexempt property as against the particular creditor in whose favor the exemption has been waived,⁵ and, although a waiver does not give a right and title to the property,⁶ after a waiver the debtor has no right to interfere with the subjugation of the property to the pay-

ment of the debt.⁷

A waiver implied from the debtor's acts or omissions has the same legal effect as an express waiver,⁸ and creditors whose claim is based on an express waiver of the debtor have no preference over those whose claim is based on an implied waiver.⁹

A waiver will not be extended beyond its ordinary meaning as to the property included,¹⁰ and a waiver of exemptions as to certain property only cannot operate as a waiver as to any other property.¹¹ A waiver of exemptions as to personal property covers property treated by its owner as personal property.¹² When a waiver of all exemptions, incorporated in a note as a part of the consideration, is not expressly limited to property then owned by the debtor, it applies equally to property afterward acquired by him.¹³

A waiver of exemptions will be construed as having reference to exemptions under laws of the state where the waiver is made, in the absence of any reference therein to the laws of other states.¹⁴ If an agreement to submit to arbitration is accompanied by a bond containing a waiver of exemption, the waiver follows and attaches to a judgment obtained in default of abiding by the award.¹⁵

Waiver in lease. The waiver of exemption in a written lease subjects, where such waiver is allowed, the exempt property of the tenant to the satisfaction of a judgment for the rent.¹⁶ Where the waiver in the lease is restricted to exemptions in property on the premises, the tenant's exemption in property not in the premises is unaffected.¹⁷ Where the waiving clause stipulates that all property on the premises shall be liable to distress and that all right of exemption shall be waived, the waiver is construed to have reference only to all exemptions in property on the premises, and not to extend to other property not on the premises.¹⁸

99. Mass.—*Magaw v. Beals*, 136 N. E. 174, 242 Mass. 321.
25 C.J. p 117 note 67.

1. Wis.—*Wicker v. Comstock*, 9 N. W. 25, 52 Wis. 315.
25 C.J. p 117 note 68.

2. Miss.—*Gulfport Bank v. O'Neal*, 38 So. 630, 86 Miss. 45.

3. Ark.—*Andrews v. Briggs*, 158 S. W.2d 269, 203 Ark. 714.

4. Ky.—*Westerland v. Mooreland*, 3 Ky.L. 324.

5. Iowa.—*Corpus Juris Secundum cited in In re Kline's Estate*, 24 N. W.2d 481, 483, 237 Iowa 1086.

Pa.—*Provident Trust Co., for Use of State Workmen's Ins. Fund v.*

Werner, 47 A.2d 240, 354 Pa. 283—*Appeal of Kyle*, 45 Pa. 353.
25 C.J. p 118 note 82.

6. Ga.—*Massachusetts Mut. Life Ins. Co. v. Hirsch*, 192 S.E. 435, 184 Ga. 636—*Citizens' Bank & Trust Co. v. Pendergrass Banking Co.*, 138 S.E. 223, 164 Ga. 302—*Norris v. Aikens*, 117 S.E. 248, 155 Ga. 488.

7. Ga.—*Equitable Credit Co. v. Miller*, 137 S.E. 771, 164 Ga. 49.
Miller v. Equitable Credit Co., 138 S.E. 282, 36 Ga.App. 746.

8. Pa.—*Long v. Wilson*, 15 Pa.Co. 68.

9. Pa.—*Long v. Wilson*, *supra*.

10. Pa.—*Burkhard v. Heilmann*, 19 Pa.Dist. & Co. 503.

11. Ala.—*Reed Lumber Co. v. Lewis*, 10 So. 333, 94 Ala. 626.
25 C.J. p 118 note 86.

12. Ala.—*Hammer v. Freeman*, 61 So. 106, 181 Ala. 109.

13. Ala.—*Neely v. Henry*, 63 Ala. 261.

14. Ala.—*Seay v. Palmer*, 9 So. 601, 93 Ala. 381, 30 Am.S.R. 57.
25 C.J. p 118 note 85.

15. Pa.—*Quick v. Geitman*, 3 Pa.Co. 610.
25 C.J. p 119 note 89.

16. Kan.—*Hoisington v. Huff*, 24 Kan. 379.

17. Pa.—*Mitchell v. Coates*, 47 Pa. 202.

18. Pa.—*Mitchell v. Coates*, *supra*.

and to apply only to proceedings for the recovery of rent by distress,¹⁹ and not to apply generally to debts for rent without regard to the process used in collecting them.²⁰

The waiver extends no further than for the rent due, and the tenant is entitled, on the sale of the goods for the rent, to his exemption in the surplus proceeds of the sale over and above the amount of the claim for rent then due, as against an attachment by the landlord to hold such surplus for subsequently accruing rent.²¹ A landlord, by taking in payment of rent notes containing a waiver of exemption of personal property, does not thereby abandon the landlord's lien.²²

b. Operation as Lien or Pledge

A waiver of exemption does not operate as a lien or pledge on any property.

A waiver of exemption creates no lien on any property.²³ Thus, waiver by failure of a tenant to plead the exemption in a proceeding by the landlord will not impress a landlord's lien on the property.²⁴

Likewise, a waiver of exemptions in a promissory note does not amount to a lien or pledge of any of the debtor's exempt property or confer any estate or interest in it, but there must be a judgment and execution to give the waiver any operation;²⁵ and so a waiver of exemptions in a promissory note does not affect the promisor's right to insure his life for the benefit of his wife, paying annual premiums not in excess of the statutory limit, and the creditor, after reducing his debt to judgment, cannot reach and subject in equity property which the surviving wife has bought or im-

proved with the proceeds of the policy.²⁶

If the exemption is waived in a judgment, the debtor cannot divest his property from liability under the judgment by transferring it to his wife.²⁷

c. Waiver by Husband as Affecting Wife and Family

A debtor's waiver does not affect exemptions in which his wife or family has an interest; but the wife must intervene to protect her interests.

A husband's waiver, where the right to waive is recognized, binds the wife, in the absence of express restrictions,²⁸ but does not affect exemptions in which his wife or his family has an interest.²⁹ Where the wife has such interest, however, she must intervene to protect her interest, else she also will be taken to have waived her rights, and her husband's waiver under such circumstances will operate to deprive her also of her rights in the exempt property.³⁰

The rights of a married woman in her separate property cannot be affected by an attempted waiver by her husband.³¹

d. Waiver by Partner

A waiver by one partner is good against his individual property, but not against the individual property of other partners unless authorized by them. A partner acting within the scope of his authority may bind his copartners in waiving exemption on the firm's personality.

A waiver by one partner is good against his individual property, but in the absence of special authorization it is not good against the individual property of other partners.³² A waiver of exemptions on the personal property of a partnership executed by one partner within the scope of his authorization and duties is binding on the other part-

19. Pa.—Schock v. Waidelich, 27 Pa. Super. 215.

20. Pa.—Schock v. Waidelich, supra.

21. Pa.—Simes v. Steadwell, 12 Wkly.N.C. 292.

22. Ala.—Stephens v. Adams, 9 So. 529, 93 Ala. 117.

23. Ga.—Massachusetts Mut. Life Ins. Co. v. Hirsch, 192 S.E. 435, 184 Ga. 636.

Kan.—Kroenert v. Mead, 54 P. 684, 59 Kan. 665.

Authority to distrain for rents

Contract authorizing lessors to distrain for rents due on any property of lessee did not authorize them to seize exempt tools and apparatus belonging to lessee's trade as baker for it did not give a contractual mortgage on the property.

Tex.—Lopez v. Naegelin, Civ.App., 59 S.W.2d 844.

24. Tex.—Huebsch Mfg. Co. v. Cole-

man, Civ.App., 113 S.W.2d 639—McNabb v. Terminal Bldg. Corporation of Dallas, Civ.App., 93 S.W. 2d 189, error refused.

25. U.S.—In re Tune, D.C.Ala., 115 F. 906.

Ga.—Massachusetts Mut. Life Ins. Co. v. Hirsch, 192 S.E. 435, 184 Ga. 636—McWilliams-Rankin Co. v. Thompson, 69 S.E. 554, 135 Ga. 424.

26. Ala.—Craft v. Stoutz, 10 So. 647, 95 Ala. 245.

27. Ala.—Tillis v. Deam, 22 So. 804, 118 Ala. 645.

28. Ind.—Godman v. Smith, 17 Ind. 152.

Ohio.—Hoover v. Haslage, 7 Ohio S. & C.P. 98, 5 Ohio N.P. 90.

29. Ala.—Young v. Thomason, 60 So. 272, 179 Ala. 454.

25 C.J. p 119 notes 5, 6.

30. Tex.—Dodge v. Knight, 16 S.W. 626.

31. Kan.—Wickham v. Traders' State Bank, 149 P. 433, 95 Kan. 657.

25 C.J. p 119 notes 10, 11.

32. Ala.—Martin v. Campbell, 93 So. 477, 207 Ala. 505—Guscott v. Roden, 21 So. 313, 112 Ala. 632—Reed Lumber Co. v. Lewis, 10 So. 333, 94 Ala. 626—Terrell v. Hurst, 76 Ala. 588.

Ga.—Perry v. Britt-Carson Shoe Co., 59 S.E. 216, 129 Ga. 560, 121 Am. S.R. 232.

Partnership note waiving exemptions

Where one of the partners signed a partnership note in which exemption of personal property was waived, the waiver of the exemption affected only the exemption rights of the partner so signing.

Ala.—Martin v. Campbell, 93 So. 477, 207 Ala. 505—Terrell v. Hurst, 76 Ala. 588.

ners,³³ and where one partner has authority to mortgage the firm property, the implied waiver in favor of the mortgagee binds the partner not signing the mortgage.³⁴

§ 112. — Rights of Other Creditors

A waiver of exemption for the benefit of a junior judgment creditor works a waiver in favor of all judgment creditors, but a waiver by reason of a mortgage or pledge of exempt property does not result in a waiver of exemption against the claims of other creditors.

It has been held that a waiver of exemption for the benefit of a junior judgment creditor works a waiver in favor of all judgment creditors; the debtor is not allowed to determine priorities by this means.³⁵ Whatever the debtor does not claim for himself or his family goes into the general fund, to be distributed according to law,³⁶ for among creditors having existing liens on the same property, the law, and not the will of the debtor, regulates their priority.³⁷ The rule does not apply to costs.³⁸

In order for the rule to be applied at all, there must be process in the sheriff's hands whereby he can seize all defendant's property and thus take the proceeds into court for distribution before the creditors can take advantage of the waiver.³⁹ Where no debt is levied except the one against which the debtor claims exemption, and there is no fund in court to be distributed, the rule does not apply.⁴⁰

When a debtor waives his right of exemption, a provision of the exemption law that no exemption shall be allowed as against a judgment for the purchase money ceases to have any operation, and such a judgment creditor's rights are inferior to those of a prior creditor.⁴¹

Waiver by mortgage. While a mortgage or pledge of exempt property is a waiver of the ex-

emption therein as against the mortgagee or pledgee, as stated in § 106 supra, no waiver of the exemption results as against the claims of other creditors,⁴² so that a release of the mortgage by the mortgagee to the mortgagor revests the property, exempt from all claims, in the debtor, and is not a diversion of the debtor's assets in fraud of the other creditors;⁴³ and a debtor is entitled to his personal property exemption in an equity of redemption in personal property subject to mortgage.⁴⁴ The debtor may claim exemption against subsequent judgment creditors,⁴⁵ or against general judgment creditors whose liens had attached prior to its execution,⁴⁶ but, if real estate is sold under a judgment prior to a mortgage, defendant is not entitled to claim his exemption out of the proceeds.⁴⁷

A mortgagor of exempt personal property remaining in possession may maintain an action of trespass against an officer for levying on and selling such property.⁴⁸ A mortgagee may, as against an execution creditor of the mortgagor, release from his mortgage property selected by the mortgagor as exempt.⁴⁹ Where the possession of property subject to an unrecorded chattel mortgage is given to the mortgagee, with instruction to sell part of the property to pay the mortgage debt, and the property is afterward attached, and the mortgagee then withdraws his claim, the right of the owner to claim exemption therein is not defeated.⁵⁰

The statutes providing for a levy on mortgaged property do not affect the rule that a mortgage of exempt property operates as a waiver of the right of exemption only in favor of the mortgagee, but it subjects to execution or attachment the interest of a mortgagor in such property only as would have been subject to execution if he had not mortgaged it.⁵¹

33. U.S.—In re McMurren, C.C.Va., 16 F.Cas.No.8,904, 2 Hughes 207.

Ga.—Hahn v. Allen, 20 S.E. 74, 93 Ga. 612.

34. Mich.—Harvey v. Ford, 47 N.W. 242, 83 Mich. 506.

35. Pa.—Miller v. Getz, 19 A. 955, 135 Pa. 558—Hallman v. Hallman, 16 A. 871, 124 Pa. 347. 25 C.J. p 119 note 12.

36. Iowa.—In re Kline's Estate, 24 N.W.2d 481, 237 Iowa 1086. Pa.—Appeal of Bowyer, 21 Pa. 210.

Watson v. Woodson, 17 Pa.Dist. 84, 35 Pa.Co. 341.

37. Pa.—Appeal of Thomas, 69 Pa. 120.

Watson v. Woodson, 17 Pa.Dist. 84, 35 Pa.Co. 341.

38. Pa.—Kiefer v. Kiefer, 3 Pa.Dist. 471, 14 Pa.Co. 545.

25 C.J. p 120 note 18.

39. Pa.—Appeal of Thomas, 69 Pa. 120.

Temple v. Gough, 9 Pa.Co. 85.

25 C.J. p 120 note 19.

40. Pa.—Appeal of Thomas, 69 Pa. 120.

41. Pa.—Appeal of Kyle, 45 Pa. 353.

42. Okl.—Byers v. Ingraham, 151 P. 1061, 51 Okl. 440.

25 C.J. p 115 note 12.

43. U.S.—Harriman Nat. Bank v. Huilet, S.C., 249 F. 856, 162 C.C.A. 90.

25 C.J. p 115 note 13.

44. N.C.—Gaster v. Hardie, 75 N.C. 460.

45. Pa.—Appeal of Quinn, 86 Pa. 447 —Appeal of Shelly, 36 Pa. 373—Hill v. Johnston, 29 Pa. 362.

46. Pa.—Appeal of Bower, 68 Pa. 126.

Appeal of Huffort, 10 Wkly.N.C. 528.

47. Pa.—Appeal of Huffort, supra.

48. Ill.—Fitch v. Pinckard, 5 Ill. 69. 25 C.J. p 115 note 15.

49. Mich.—Ganong v. Green, 38 N. W. 661, 71 Mich. 1.

50. Mo.—Liberal Bank v. Redlinger, 68 S.W. 1073, 95 Mo.App. 279.

51. Okl.—Irwin v. Walling, 44 P. 219, 4 Okl. 128.

25 C.J. p 115 note 17.

Right to surplus. When the statute allows a debtor to claim as exempt property not exceeding a certain sum in value as against levy and sale on execution, a debtor whose property has been sold on foreclosure of a mortgage may claim it out of the surplus proceeds of the sale, as against judgment creditors.⁵² Where the statute exempts specific property only, and does not allow the debtor to claim his exemptions out of property generally, including money, a mortgagor of property so specifically exempted cannot claim his exemption out of the proceeds of a sale on foreclosure of the mortgage.⁵³

Claim less than amount of exemption. When the waiver is in favor of a claim which is less than the amount of the exemption, it does not operate as a complete abandonment of the exemption, and does not prevent a claim of the balance of the exemption as against creditors having subsequent liens.⁵⁴

Resort to exempted fund. It is settled that a waiver of exemptions as to any lien will inure to the benefit of creditors having subsequent liens, so far as to entitle them to compel the creditor in whose favor exemptions have been waived to resort first to the exempted fund;⁵⁵ but this does not mean that a creditor to whom such waiver has been given shall insist on it for the benefit of creditors who have no such waiver.⁵⁶

§ 113. Enforcement of Waiver

A person entitled to the benefit of a waiver may bring action for its enforcement and must plead the waiver; if the statute so requires, the judgment must contain the waiver. A mortgagor is entitled to have the mortgagee's claim satisfied out of nonexempt property, if no loss to the mortgagee is involved.

The person entitled to the benefit of a waiver of exemption may bring an action for its enforce-

ment.⁵⁷ If a waiver by an agreement is claimed in an action thereon, it must be pleaded and found in favor of plaintiff.⁵⁸ The mere allegation of the fact that a waiver has been made and its extent is sufficient;⁵⁹ but an allegation of a waiver of all homestead exemptions does not include personalty.⁶⁰

In accordance with statutory provisions so requiring, the judgment must contain the waiver or it cannot be taken advantage of,⁶¹ and omission of the waiver in the judgment amounts to an abandonment thereof and a consent to accept a common judgment.⁶² In other jurisdictions, where there are no such statutory requirements, it is not necessary that the judgment should contain a recital of the waiver;⁶³ and a waiver, after judgment, is provable aliunde, whether the lien of the judgment is general or special, and whether the waiver is written in the contract or obligation, or on a separate paper.⁶⁴ Where the debtor has waived the benefit of any exemption laws at the time of contracting the debt, the waiver need not be filed at the time of entry of judgment on the debt,⁶⁵ and it is held that a defendant in an execution is not entitled to his exemption, where his promissory note on which the judgment was obtained waives the exemption, although there is no reference in the transcript to the waiver.⁶⁶

Where suit is brought on a note with a waiver of exemption and on the common counts in assumpsit, and it does not appear on what count judgment is entered, plaintiff cannot avail himself of the waiver.⁶⁷

If the waiver has not been pleaded, has not been indorsed on the writ, or has not otherwise appeared in the proceedings as required by law, it cannot appear in the judgment, and if the judgment thus improperly contains a waiver it must be modified by omitting the recital thereof.⁶⁸

52. Md.—Darby v. Rouse, 22 A. 1110, 75 Md. 26.

Pa.—Hill v. Johnston, 29 Pa. 362.

53. Wis.—Roundy v. Converse, 37 N.W. 811, 71 Wis. 524, 5 Am.S.R. 240.

54. Pa.—Hallman v. Hallman, 16 A. 871, 124 Pa. 347—Appeal of Thomas, 69 Pa. 120—Appeal of Bowyer, 21 Pa. 210.

55. Pa.—Hallman v. Hallman, 16 A. 871, 124 Pa. 347.
25 C.J. p 120 note 21.

56. Pa.—Appeal of Peak, 81 Pa. 76.

57. Ind.—South Side Planing Mill Assoc. v. Cutler & Savidge Lumber Co., 64 Ind. 560.
25 C.J. p 120 note 25.

58. Ala.—Hurt v. Knox, 126 So. 110, 220 Ala. 448.
25 C.J. p 120 note 26.

59. Ala.—Story Mercantile Co. v. McClellan, 40 So. 123, 145 Ala. 629.

60. Ala.—Reed Lumber Co. v. Lewis, 10 So. 333, 94 Ala. 626.

61. Ala.—Courie v. Goodwin, 8 So. 9, 89 Ala. 569.
25 C.J. p 120 note 29.

62. Ala.—Agnew v. Walden, 10 So. 224, 95 Ala. 108.

63. Ga.—Flemister v. Phillips, 65 Ga. 676.

Kan.—Hoisington v. Huff, 24 Kan. 379.

25 C.J. p 120 note 31.

64. Ga.—Flemister v. Phillips, 65 Ga. 676.

65. Pa.—Opportunity Building & Loan Ass'n v. Silverman, 38 Pa. Dist. & Co. 575.

Calling sheriff's attention to waiver
All that is necessary is to call the waiver to the sheriff's attention at the time of execution on the judgment, in the event that the debtor asserts any claim to exemption.
Pa.—Opportunity Building & Loan Ass'n v. Silverman, supra.

66. Pa.—Zumpfe v. Schultz, 35 Pa. Super. 106.
25 C.J. p 120 note 33.

67. Pa.—Usaw v. Wenrick, 2 Chest. Co. 467.

68. Ala.—Fears v. Thompson, 2 So. 719, 82 Ala. 294.

Where the statute requires that the fact of waiver shall be indorsed on the writ by the officer issuing it, a complaint containing an averment of waiver, filed on the return of the writ, is not a compliance with the statute, in the absence of the statutory indorsement of waiver on the writ.⁶⁹

Mortgage. Although a mortgage operates as a waiver of mortgagor's exemption rights as against the mortgagee, as stated supra § 106, the mortgagor is entitled as against the mortgagee to a marshaling of the assets after sale, and to have the mortgagee's claim satisfied out of the sale of non-exempt property, if no loss to the mortgagee is involved.⁷⁰ Where there was no stipulation either in the mortgage or in the notes to secure which the mortgage was given, a personal judgment against the mortgagor for recovery of the debt, without relief from valuation or appraisal laws, is erroneous.⁷¹

Waiver by a mortgage covering exempt and non-exempt property is considered supra § 106.

Landlord's claim. Where, by law, the landlord has no lien on the tenant's property exempt from execution, it is necessary for the landlord to record a lease containing a waiver of exemptions if he wishes to claim the waiver against bona fide purchasers of the property.⁷²

§ 114. Revocation and Release of Waiver

A waiver without consideration may be revoked at any time before it is acted on, but a waiver based on consideration is irrevocable. A creditor in whose favor the debtor has waived exemptions may release him from the effect of the waiver.

A consent that exempt property may be levied on and sold may, if not supported by a consideration, be revoked at any time before it is acted on;⁷³

and where a waiver implied from the conduct of defendant is without consideration it is revocable.⁷⁴ Where the waiver is made at the time of entering into a contract, it is based on the same consideration as that on which rests the liability to pay, and is therefore irrevocable.⁷⁵

The death of a debtor, after executing and delivering a judgment note containing a waiver of exemptions, does not revoke the waiver.⁷⁶ There is a revocation in law when a deed of trust operating as a waiver of exemption is set aside by a subsequent adjudication in bankruptcy.⁷⁷

Release of waiver. A creditor in whose favor the debtor has waived exemptions may release him from the effect of the waiver or compromise the claim of exemption.⁷⁸

§ 115. Estoppel to Claim Exemption

Under general principles of estoppel, a debtor may be precluded from setting up a claim that property is exempt, as by acceptance of the proceeds of the sale, failure to claim the exemption, or a denial of ownership of the property.

Under the application of general principles of estoppel, a debtor may be precluded from setting up a claim that property is exempt,⁷⁹ although a mere waiver of his exemption, or an executory contract to waive it, might be invalid.⁸⁰ Any conduct or representations of the debtor which influence a change of acts and position of the creditor or the officer to his detriment may operate as an estoppel.⁸¹

In order that an estoppel may arise, the person claiming the exemption must actually be guilty of conduct or misrepresentations which would reasonably induce the other party to act to his detriment,⁸² and the other party must have acted to his prej-

69. Ala.—Fears v. Thompson, supra.

70. Miss.—Hays v. Barlow, 54 So. 2, 98 Miss. 487, Ann.Cas.1913B 394.

71. Ind.—Duckwall v. Kisner, 35 N. E. 697, 136 Ind. 99.

72. Iowa.—Richardson v. Kurz, 9 N.W. 104.

73. S.D.—Corpus Juris quoted in Mason v. Martin, 232 N.W. 29, 32, 57 S.D. 299.
25 C.J. p 121 note 43.

74. N.H.—Johnson v. Lang, 51 A. 908, 71 N.H. 251, 93 Am.S.R. 509.

75. U.S.—In re Pfeiffer, D.C.Pa., 155 F. 892.
25 C.J. p 121 note 45.

76. Pa.—Barrett v. Barrett, 9 Pa. Co. 454.

77. U.S.—In re Gorman, D.C.Md., 226 F. 361.

78. Pa.—Beegie v. Wentz, 55 Pa. 369, 93 Am.D. 762.

79. Mich.—Church v. First Nat. Bank, 238 N.W. 192, 255 Mich. 595, 82 A.L.R. 645.

Tex.—McMillan v. Dean, Civ.App., 174 S.W.2d 737, error refused.
25 C.J. p 121 note 50.

80. Iowa.—Dowling v. Wood, 101 N. W. 113, 125 Iowa 244, 106 Am.S.R. 301.
25 C.J. p 121 note 51.

81. N.H.—Davis v. Webster, 59 N. H. 471.
25 C.J. p 121 note 54.

82. Iowa.—Citizens' Bank of Milo v. C. F. Scott & Son, 250 N.W. 626, 217 Iowa 584.

Nev.—In re MacDonnell's Estate, 57 P.2d 695, 56 Nev. 504.

Permitting car registration in husband's name

Wife was held not estopped from denying validity of mortgage on automobile on ground that automobile was exempt property and mortgage was not joined in by wife, because she permitted husband to have automobile in his name, particularly where, before mortgage loan was made, mortgagee's agent was informed that wife had interest in automobile.

Kan.—Foster v. Foster, 61 P.2d 1350, 144 Kan. 528.

Failure to reply to allegation

The debtor is not estopped from claiming an exemption by failing to reply to an allegation that he had no exemption rights under the law of a foreign state where his rights

udice or changed his position in reliance on such misrepresentations or conduct,⁸³ this constituting the distinction between an estoppel in pais and a waiver.⁸⁴

A statement by the debtor to the mortgagee that the property is not exempt does not estop the debtor from asserting the exemption against a third person.⁸⁵ Where the debtor notifies the sheriff and creditor through his attorney of his claim to exemption, it is not necessary that he should go further and absolutely prevent the sale of the property;⁸⁶ but laches in seeking to set aside an execution sale, although exemption was claimed at the time of the sale but disregarded, may prevent the subsequent assertion of the right of exemption.⁸⁷ Where a debtor, in order to protect the surety on a replevin bond, informs the officer that he will surrender certain exempt property and the officer accepts the offer, the debtor cannot afterward withdraw the surrender by claiming his exemption, since this might subject the officer to suit;⁸⁸ but keeping possession of goods seized on execution as bailee of the sheriff, or buying them in at the execution sale, does not estop the owner from prosecuting his claim to them as exempt from execution.⁸⁹

Where the debtor directs his creditors to bring suit against himself and to garnish his employer for wages due him, he is estopped from later claiming his exemption therein;⁹⁰ but it has been held that procuring the garnishment of a debt due him does not estop the debtor from claiming exemption out of a debt which exceeds the amount of the exemption, for the debtor's conduct is not inconsistent with an intention to appropriate only the excess to the payment of the execution.⁹¹

A person who, in seeking to qualify as surety on a bail bond, represents himself as owning certain

property above his debts and exemptions will be estopped later from claiming exemption in such property when judgment is obtained against him on the bond.⁹² A person who holds himself out to a creditor as doing business as a partnership is estopped to set up that he is doing business as an individual so as to be able to claim exemption in the business property.⁹³

A wife who is entitled to exempt property is not estopped by her husband's representations or conduct as to the character or ownership of the exempt property;⁹⁴ nor is she estopped from asserting the invalidity of a mortgage executed by her husband alone, without her knowledge or consent, on exempt property, because, on learning of the mortgage after her husband's death, she inquires about it and discusses with the mortgagee the possibility of selling the mortgaged property and getting her equity out of it.^{94.5}

Acceptance of proceeds. If the debtor demands and receives a surplus from the sale of his property, it has been held that he is estopped to claim damages from the officer who seized and sold the property, although at the time of the assignment the debtor asked to have his exemption set off;⁹⁵ but there is authority to the contrary.⁹⁶

Failure to make claim. The rule that a person, who is silent when he should speak, will not be heard when he would speak is generally held to apply to a debtor who fails to make his claim at the time of the levy, and later endeavors to hold the creditor or the officer responsible for taking his goods;⁹⁷ but silence does not estop the debtor if it does not have the tendency to mislead the creditor and the latter is not prejudiced thereby.⁹⁸

If the debtor voluntarily surrenders property levied on without claiming the exemption, he is estopped from afterward asserting the claim;⁹⁹ but

under a foreign state would be immaterial in the action.

Ky.—Pinson v. Murphy, 295 S.W. 442, 220 Ky. 464.

83. Conn.—Flaxman v. Capitol City Press, 185 A. 417, 121 Conn. 423.

La.—Lafourche Ice & Shrimp Co. v. Gilbeau, App., 185 So. 310. 25 C.J. p 121 notes 52, 55.

84. Md.—Bramble v. State, 41 Md. 435.

85. La.—Lafourche Ice & Shrimp Co. v. Gilbeau, App., 185 So. 310.

86. La.—Jackson v. Hodges, 76 So. 174, 141 La. 993, L.R.A.1917F 732. 25 C.J. p 122 note 56.

87. Mich.—Church v. First Nat. Bank, 238 N.W. 192, 255 Mich. 595, 82 A.L.R. 645.

88. Ky.—Ponder v. Webb, 1 Ky.L. 335, 10 Ky.Op. 745.

89. Ark.—Parham v. McMurray, 32 Ark. 261.

90. Iowa.—Dowling v. Wood, 101 N.W. 113, 125 Iowa 244.

Mo.—Marchildon v. O'Hara, 52 Mo. App. 523.

91. Mo.—Marchildon v. O'Hara, supra.

92. N.Y.—McMahon v. Cook, 94 N.Y.S. 1018, 107 App.Div. 150.

93. Ky.—Green v. Taylor, 32 S.W. 945, 98 Ky. 330, 17 Ky.L. 897, 56 Am.S.R. 375. 25 C.J. p 122 note 62.

94. Kan.—Wickham v. Traders'

State Bank, 149 P. 433, 95 Kan. 657.

25 C.J. p 122 note 70.

94.5 Kan.—Morris Plan Co. of Kan. v. Buttel, 175 P.2d 100, 162 Kan. 228.

95. Ohio.—Merry v. Walker, 2 Ohio Dec., Reprint, 308, 2 West.L.Month. 384.

96. Cal.—Stanton v. French, 23 P. 355, 83 C. 194, 25 Am.S.R. 174.

97. Ill.—McKinty v. Butts, 217 Ill. App. 234. 25 C.J. p 122 note 63.

98. Conn.—Flaxman v. Capitol City Press, 185 A. 417, 121 Conn. 423.

99. Iowa.—Richards v. Haines, 30 Iowa 574.

property absolutely exempt, regardless of whether a claim to its exemption is made or not, may be listed as a part of a debtor's estate in bankruptcy without operating to estop him later from claiming his exemption therein.¹ Where one who is entitled to an exemption in land, on the ground that it has been purchased with pension money, fails to assert his claim or to disclose the fact in a sale of the land, he is estopped to make such claim as against the innocent purchaser.²

Disclaimer of title. If, at the time of the levy, the debtor denies ownership of the property levied on, and the creditor or officer acts on the denial to his prejudice, he is estopped from claiming the right to exemption therein at a later time;³ but, when the disclaimer of title has not influenced the conduct of the officer or been acted on by him or plaintiff in the execution, it will not estop the debtor from afterward asserting and proving his title thereto as owner, and claiming the property as exempt.⁴ A disclaimer of ownership operates as an estoppel only in the proceedings in which the disclaimer is made, so that, if they are discontinued and new proceedings started, the disclaimer made in the proceedings does not estop the person who made it from claiming his exemption in the later proceedings.⁵

§ 116. Forfeiture

A violation of law not affecting the debtor's status under the exemption law does not necessarily operate as a forfeiture of his exemption right, and, as related to the rights of others, his act, in order so to operate, must amount to a dereliction of some duty which he owes to them. The mere fact that exempt property and non-exempt property are intermingled does not destroy his right to claim his exemption.

A violation of law not affecting the debtor's status under the exemption law does not necessarily operate as a forfeiture of his exemption right.⁶ As related to the rights of others, the debtor's act, in order to operate as a forfeiture of his exemption right, must amount to a dereliction of some duty which he owes to them.⁷ The fact that the debtor

squandered money in gambling or other wasteful practices,⁸ or that he was about to use,⁹ or had contracted to use,¹⁰ his exempt property in another state does not affect his right to exemption. Where the debtor voluntarily leaves his wages with his employer until they cease to be current wages, he may lose his right of exemption therein,¹¹ but he does not lose the right by temporarily refusing to accept a part of the wages and insisting on immediate payment of the whole amount due.¹² A debtor's right of exemption is not defeated by acts of other persons, such as by an unlawful sale by the assignee in bankruptcy or insolvency,¹³ or by a garnishee's permitting a judgment by default or paying the money garnished where no notice or opportunity to protect his rights has been given to the debtor.¹⁴

Intermingling of property. The mere fact that exempt property is mingled with nonexempt does not destroy the debtor's right to claim his exemption,¹⁵ and, where property already set off as exempt is mingled with nonexempt property, the debtor's right to his exemption depends on his ability to identify the property already so designated.¹⁶ A purchaser is under no obligation to preserve the identity of purchased property in order to enable the vendor to enforce his claim against it, and, if he mingles the purchased property with other property so that the vendor is unable to identify it and enforce his claim against it, he does not thereby forfeit his rights of exemption.¹⁷

§ 117. — Failure to File Schedule; Omission from Schedule

A debtor's failure to file a schedule of property may operate as a forfeiture of his right to an exemption. The omission of property from the schedule without fraudulent intent will not defeat a claim of property included therein, but it will defeat a claim of property omitted, even though omitted by mistake.

When the statute requires a debtor claiming an exemption as against a levy to make out and file a schedule of all his property, failure to file a

1. Miss.—Dreyfus v. Barton, 54 So. 254, 98 Miss. 758.
25 C.J. p 122 note 65.

2. N.Y.—Smith v. Blood, 94 N.Y.S. 667, 106 App.Div. 317.

3. Md.—Miles v. State, 21 A. 51, 73 Md. 398.
25 C.J. p 122 note 67.

4. Neb.—*Corpus Juris* cited in Meyer v. Platt, 291 N.W. 86, 89, 137 Neb. 714.
25 C.J. p 122 note 68.

5. Idaho.—Coe v. Cleghorn, 79 P. 72, 10 Idaho 166, 109 Am.S.R. 199.

6. N.Y.—Bowman v. Quackenboss, 3 Code Rep. 17.

7. N.D.—Wagner v. Olson, 54 N.W. 286, 3 N.D. 69.

8. U.S.—In re Berman, D.C.Pa., 165 F. 383.

9. Mich.—Wood v. Bresnahan, 30 N. W. 206, 63 Mich. 614.
W.Va.—Brown v. Beckwith, 51 S.E. 977, 58 W.Va. 140, 112 Am.S.R. 955, 1 L.R.A., N.S., 778.

10. Iowa.—Whicher v. Long, 11 Iowa 48.

11. Tex.—Bell v. Indian Live-Stock Co., 11 S.W. 344.

12. Tex.—Snyder v. Galveston, App. 15 S.W. 202.

13. U.S.—In re Jones, C.C.Kan., 13 F.Cas.No.7,445, 2 Dill. 343.

14. Ill.—Fanning v. Jacksonville First Nat. Bank, 76 Ill. 53.
Pa.—Jones v. Tracy, 75 Pa. 417.

15. Mass.—Magaw v. Beals, 136 N. E. 174, 242 Mass. 321—Copp v. Williams, 135 Mass. 401.

16. Ga.—Smith v. Turnley, 44 Ga. 243.
25 C.J. p 123 note 80.

17. N.D.—Wagner v. Olson, 54 N. W. 286, 3 N.D. 69.

schedule will operate as a forfeiture of his right to an exemption.¹⁸ Although the statute may require the debtor to include all his property in the schedule, and may provide that property not included shall not be exempt, the omission of property from the schedule without fraudulent intent will not defeat a claim of property included in the schedule,¹⁹ but it will defeat a claim of property omitted, even though omitted by mistake.²⁰ An omission from a prior schedule will not defeat the right.²¹

The necessity and sufficiency of a schedule or inventory are considered *infra* § 136.

§ 118. — Fraud; Fraudulent Conveyance or Concealment

- a. In general
- b. Fraudulent conveyance
- c. Concealing or withholding property

a. In General

While there is some authority to the contrary, the general rule is that a debtor does not forfeit his right to an exemption by reason of the fact that he has acted fraudulently toward his creditors.

According to the weight of authority, a debtor does not forfeit his right to an exemption by reason of the fact that he has acted fraudulently toward his creditors;²² but there is some authority to the contrary,²³ with the qualifications, however, that fraud is not a bar to a claim for exemption where it is independent of the transaction in which the property is levied on,²⁴ and, further, that the acts which will prevent a claim of exemption must be the acts of the debtor or those for which he is responsible.²⁵ That the debt may have been fraudulently contracted will not prevent the debtor from claiming his exemption.²⁶

A debtor has been denied the right to claim an

exemption in property acquired by him in fraud of creditors.²⁷

*The mere dissolution of an insolvent firm and the division of its assets accomplished without actual fraud, even though it is done for the purpose of securing to the members of the firm the benefit of individual exemptions, is not such legal or constructive fraud as will deprive the debtors of their exemptions.*²⁸

b. Fraudulent Conveyance

Under most authorities, the fact that the debtor has attempted a fraudulent conveyance will not deprive him of his exemption rights; and the conversion of non-exempt into exempt property with the effect of hindering creditors does not prevent the debtor from claiming rights of exemption. The transferee of exempt property conveyed to place it beyond the reach of, and to defraud, creditors may sometimes retain the property against the claim of creditors.

According to the more generally accepted rule, the fact that the debtor has attempted a fraudulent conveyance of his property will not deprive him of his exemption rights therein.²⁹ Under this view, the creditors cannot claim against a sale as fraudulent and at the same time deny the debtor's right to assert an exemption in the property conveyed,³⁰ and, where a conveyance is set aside as fraudulent, the debtor may have an exemption in the proceeds.³¹

In some jurisdictions, however, it is held either that a debtor who has conveyed his property in fraud of creditors cannot, when it is seized or sold, claim his exemption from the proceeds,³² or that, where the debtor has sold property, although fraudulently, no title remains in him on which he may claim exemption,³³ and on setting aside the conveyance, the property does not again become the property of the debtor as against the claims of creditors so that he may be permitted to assert an exemption therein.³⁴

18. Ill.—Blair v. Parker, 4 Ill.App. 409.

19. Ill.—Berry v. Hanks, 28 Ill.App. 51.

Ind.—Over v. Shannon, 91 Ind. 99—Douch v. Rahner, 61 Ind. 64.

Fraudulent concealment of property see *infra* § 118.

20. Ill.—Berry v. Hanks, 28 Ill.App. 51—Blair v. Parker, 4 Ill.App. 409.

21. Ark.—Sannoner v. King, 5 S.W. 327, 49 Ark. 299, 4 Am.S.R. 49.

22. S.D.—Noyes v. Belding, 59 N.W. 1069, 5 S.D. 603.
25 C.J. p 123 note 87.

23. Pa.—Appeal of Imhoff, 13 A. 279, 119 Pa. 350.

Robinson v. Stamper, 16 Pa.Dist. & Co. 621.

In re Inglis' Estate, Orph., 4 Fiduciary 386, 55 Lack.Jur. 135.
25 C.J. p 123 note 88.

24. Pa.—Emerson v. Smith, 51 Pa. 90, 88 Am.D. 566.
25 C.J. p 124 note 89.

25. Pa.—Bixler v. Kennedy, 64 Pa. Super. 41.
25 C.J. p 124 note 90.

26. Pa.—New York & Boston Cut Sole Co. v. Zuber, 20 Pa.Co. 21.

27. U.S.—In re Majors, D.C.Or., 241 F. 538.

28. U.S.—Crawford v. Sternberg, Ark., 220 F. 73, 135 C.C.A. 641.
Dak.—Bates v. Callender, 16 N.W. 506, 3 Dak. 256, appeal dismissed 127 U.S. 781, 32 L.Ed. 326.

29. N.C.—Bristol Grocery Co. v. Bails, 98 S.E. 768, 177 N.C. 298.
25 C.J. p 124 note 95.

30. Ala.—Boylston v. Rankin, 21 So. 995, 114 Ala. 408, 62 Am.S.R. 111.
25 C.J. p 124 note 96.

31. N.C.—Bristol Grocery Co. v. Bails, 98 S.E. 768, 177 N.C. 298.
25 C.J. p 124 note 97.

32. Pa.—Appeal of Huey, 29 Pa. 219.
Brownlee v. Fox, 23 Pa.Dist. 952, 30 Montg.Co. 80.
25 C.J. p 124 note 98.

33. Mo.—State v. Freeman, 158 S.W. 726, 173 Mo.App. 294.
25 C.J. p 125 note 99.

34. Ind.—McNally v. White, 54 N.E. 794, 154 Ind. 163, petition overruled 56 N.E. 214, 154 Ind. 163—

A debtor who has made a fraudulent disposition of his property before levy cannot claim the property as his own and recover of the officer selling on the ground that it was exempt from execution.³⁵ The doctrine that the conveyance of property to defraud creditors does not deprive the grantor of the right to claim and hold such property as exempt does not apply to property to which an exempt character has not attached at the time of its conveyance.³⁶

Exempt property as subject of fraudulent conveyance is considered in Fraudulent Conveyances § 30.

Conveyance of other property. In some jurisdictions, a debtor's right to an exemption is not affected by the fact that he has conveyed other property in fraud of his creditors,³⁷ as, for example, where he has sold all his property except that which is exempt.³⁸ This is particularly true where the exemption is regarded as being in favor of the family of the debtor rather than of the debtor,³⁹ and no property fraudulently transferred or disposed of in any way to prevent its application to the payment of debts can be treated as a part of the debtor's exempt property.⁴⁰ However, in other jurisdictions where defendant has, for the purpose of defrauding, delaying, or hindering his creditors, aliened, concealed, or otherwise disposed of all of his property except such as he desires to hold as exempt, he cannot claim such property as exempt,⁴¹ and if, after a levy, he disposes of other property not levied on or places it out of the reach of process, that may be considered as an election to claim his exemption in such property.⁴²

A debtor is not precluded from claiming his exemption by the fact that he had previously owned other property which he had sold and the proceeds of which he had transferred to his wife.⁴³

Waiver of exemption by transferring all but ex-

empt property to other creditors is considered *supra* § 108.

Conversion of nonexempt into exempt property. Notwithstanding exempt property has been purchased with the proceeds of nonexempt property with the effect of hindering and delaying creditors of the debtor, it may be claimed as exempt.⁴⁴ This is particularly true where the amount of all of the property does not exceed the amount of the debtor's exemptions.⁴⁵

When the exemption provided for articles of a certain kind is absolute, one who has purchased property of the kind which is not exempt and has not paid for it may convert it into property of the kind which is exempt with the deliberate purpose of having his property in an exempt condition and hold it as against the creditor whose crediting has enabled him to acquire it.⁴⁶

Rights of transferee. According to the weight of authority, where exempt property is transferred, the transferee may retain it as against the claim of the transferor's creditors, notwithstanding the intent of the debtor was to place it beyond the reach of, and to defraud, his creditors.⁴⁷ According to some authorities, however, the fraudulent transferee is not entitled to set up the debtor's exemption rights;⁴⁸ and in jurisdictions adhering to the general rule, it has been limited to cases in which the property has been previously selected as exempt or is specifically exempt under the statute.⁴⁹

c. Concealing or Withholding Property

Under express statutory provisions, willful fraud in concealing property will forfeit the debtor's right to exemption. The authorities are not in accord as to whether, in the absence of statute, a fraudulent concealment of property by the debtor will have this effect.

By express provision of the statutes in some jurisdictions, in order to be entitled to an exemption, the debtor must make a full and fair disclosure of his property, and forfeits his right to exemption by

Phenix Ins. Co. v. Fielder, 33 N. E. 270, 133 Ind. 557.

35. Ill.—Cassell v. Williams, 12 Ill. 387.

Miss.—Williamson v. Wilkinson, 33 So. 282, 81 Miss. 503.

36. Mo.—State v. Freeman, 158 S. W. 726, 173 Mo.App. 294—Stewart v. Stewart, 65 Mo.App. 663.

37. Ind.—Doherty v. Ramsey, 27 N. E. 879, 1 Ind.App. 530, 50 Am.S.R. 223.

Miss.—Moseley v. Anderson, 40 Miss. 49.

38. Miss.—Moseley v. Anderson, *supra*.

39. Ala.—Calloway v. Carpenter, 10 Ala. 500.

40. U.S.—In re Denson, D.C.Ala., 195 F. 857.

41. Ky.—Rogers v. Allen, 105 S.W. 96, 32 Ky.L. 1. 25 C.J. p 125 note 8.

42. Ala.—Bray v. Laird, 44 Ala. 295. 25 C.J. p 125 note 9.

43. N.Y.—Wilcox v. Hawley, 31 N. Y. 648.

44. U.S.—In re Hammonds, D.C.Ky., 198 F. 574.

Wis.—Comstock v. Bechtel, 24 N.W. 465, 63 Wis. 656.

45. Mich.—O'Donnell v. Segar, 25 Mich. 367.

25 C.J. p 125 note 12.

46. U.S.—In re Hammonds, D.C.Ky., 198 F. 574.

47. Cal.—Corpus Juris quoted in Prudential Ins. Co. of America v. Beck, 103 P.2d 241, 243, 39 C.A.2d 355.

25 C.J. p 125 note 14.

48. Me.—Wyman v. Gay, 37 A. 325, 90 Me. 36, 60 Am.S.R. 238.

25 C.J. p 125 note 15.

49. Wis.—Berge v. Kittleson, 114 N.W. 125, 133 Wis. 664.

25 C.J. p 125 note 16.

willful fraud in the concealment of a part thereof.⁵⁰ In the absence of statute, it is held in some jurisdictions that the debtor does not forfeit his right to exemption by the concealment of property from the levying officer;⁵¹ and the fact that the debtor omits property from his schedule and swears falsely as to its completeness does not preclude him from claiming and holding property levied on as exempt.⁵²

In other jurisdictions, the debtor is regarded as forfeiting his right to an exemption by the fraudulent concealment of other property liable to execution for the purpose of hindering and delaying his

creditors,⁵³ and, where the debtor fraudulently conceals and withholds property from execution, he will, in some jurisdictions, be held to have claimed his exemptions therein and to the amount of the property withheld will be precluded from claiming an exemption in other property levied on.⁵⁴

In a number of cases in which the question of fraudulent conveyances was not involved, it has been held that the debtor forfeits his right to exemption if he equivocates or dissembles or denies ownership of that which he cannot hide, and embarrasses the officers of the law in the execution of their legal duties.^{54.5}

VII. ESTABLISHMENT, ENFORCEMENT, AND PROTECTION OF RIGHT

A. ESTABLISHMENT OF RIGHT OF EXEMPTION

§ 119. In General

The manner of establishing a claim to an exemption depends on the terms of the statute under which the claim is made which must be followed.

The existence, nature, and extent of the debtor's right to assert a claim to an exemption, and the procedure to be followed in establishing the right claimed, are determined by the terms of the statute under which the claim is made,⁵⁵ although the existence of the right is not affected by a failure of the statute to prescribe procedure or forms for its establishment.⁵⁶ Statutory regulations, unless abrogated,⁵⁷ as to the manner of obtaining or asserting an exemption are exclusive;⁵⁸ in order to obtain the benefits of the statute claimant must comply

with its terms⁵⁹ and constitutional provisions relating thereto,⁶⁰ and he must bring himself at least within the intent of the provisions of the statute.⁶¹ The claim that property is exempt from seizure for debt must be made in good faith and be supported by credible testimony.⁶² It is not sufficient to show that property is of the kind exempt but it must be shown to be in fact exempt.⁶³

§ 120. Persons Who May Assert Claim

The right to claim an exemption is usually personal to the one in whose favor the right exists.

The right to claim an exemption is personal to the one in whose favor the right exists,⁶⁴ and it

50. U.S.—In re Anderson, D.C.Ga., 224 F. 790.

Ga.—McNally v. Mulheim, 4 S.E. 332, 79 Ga. 614.

25 C.J. p 125 note 17.

51. Mo.—Megehe v. Draper, 21 Mo. 510, 64 Am.D. 245.

25 C.J. p 126 note 18.

52. Ind.—Over v. Shannon, 91 Ind. 99—Douch v. Rahner, 61 Ind. 64.

53. Pa.—Appeal of Imhoff, 13 A. 279, 119 Pa. 350.

25 C.J. p 126 note 20.

54. Fla.—Florida Loan & Trust Co. v. Crabb, 33 So. 523, 45 Fla. 306.

25 C.J. p 126 note 21.

Concealment not shown

Fla.—Shollar Crate & Box Co. v. Passmore, 4 So.2d 530, 148 Fla. 466.

54.5 Pa.—In re Kreider's Estate, 19 A. 1073, 135 Pa. 584.

27 C.J. p 439 note 29.

55. Pa.—Appeal of Line, 2 Grant 197. Sennickson v. Fulton, 1 Phila. 220.

Payment of taxes

Right to exemption is not dependent on payment of taxes.

U.S.—Stein v. Bostian, C.C.A.Mo., 133 F.2d 586.

56. Pa.—Hill v. Johnston, 29 Pa. 362.

57. Ga.—Wilbanks v. Wardlaw, 178 S.E. 466, 50 Ga.App. 495.

58. W.Va.—Kincaid v. Vinson, 14 S. E.2d 266, 123 W.Va. 149—Hatfield ex rel. Rose v. Cruise, 6 S.E.2d 243, 121 W.Va. 742—Hibner v. Belcher, 176 S.E. 422, 115 W.Va. 387.

59. Ark.—Griffin v. Puryear-Meyer Grocery Co., 151 S.W.2d 656, 202 Ark. 495—Merchants' & Farmers' Bank v. Reel, 28 S.W.2d 725, 181 Ark. 969.

S.C.—Southwell v. Harley, 37 S.C.L. 180.

60. N.C.—Crow v. Morgan, 185 S.E. 668, 210 N.C. 153.

Creditor and debtor have right to have constitutional provision relating to personalty exemption of debt-

or carried out as written and in compliance with statutes on subject.

N.C.—Crow v. Morgan, supra.

61. Fla.—Patten Package Co. v. Houser, 136 So. 353, 102 Fla. 603. Ga.—Morgan v. Community Loan & Investment Co., 25 S.E.2d 413, 195 Ga. 675.

Debtor's wife

Where personal property was attached, debtor's wife was not entitled to select it under statute in absence of showing that debtor was entitled to exemption of the property from execution.

Wis.—Northwest Bank & Trust Co., Davenport, Iowa v. Minor, 82 N.W. 2d 323, 275 Wis. 516.

62. Iowa.—Brooks v. Engle, 83 N. W. 805.

La.—Fallin v. Stovall, 74 So. 911, 141 La. 220.

25 C.J. p 126 note 25.

63. Vt.—Rollins v. Allison, 10 A. 201, 59 Vt. 188.

64. Iowa.—Booth v. Propp, 242 N.W. 60, 214 Iowa 208, 81 A.L.R. 919.

can, as a general rule, be pleaded or taken advantage of only by the execution or attachment debtor,⁶⁵ or by someone acting in his behalf,⁶⁶ such as his wife or a member of his family,⁶⁷ the test being whether the claim, made either by the debtor or someone for him, is being made for the benefit of the debtor or his family, or whether it is being made for the benefit of someone else not entitled to the benefit of the exemption statute.⁶⁸ So, where the judgment debtor, after giving notice of his intention to claim an exemption in property levied on, dies before he can establish his claim, the widow may assert the claim.⁶⁹ A debtor's agent may claim his exemptions for him under an express authority,⁷⁰ or under an authority implied from his being left in charge of the property during the debtor's temporary absence.⁷¹

Claimant's status is fixed at the time of the levy of the execution and not at the time he makes his claim.⁷² Under a statute exempting the proceeds of a life insurance policy, the status of the bene-

ficiary must be determined as of the time the insurance is effected, or the beneficiary named,^{72.5} rather than at the time the proceeds are payable.^{72.10} Under another statute exempting certain pensions from execution and which expressly limits such exemption to state citizens, the citizenship is to be determined as of the date the attachment is made, rather than that on which the right to the pension arose.^{72.15}

§ 121. Powers and Duties of Levying Officers

- a. In general
- b. Notice to debtor
- c. Inventory, appraisement, and setting apart

a. In General

A levying officer must comply with statutory requirements, imposed for the purpose of safeguarding the debtor's exemption rights, and must act fairly and in good faith in doing so.

An officer levying process on the property of the

Mo.—Pugh v. St. Louis Police Relief Ass'n, 179 S.W.2d 927, 237 Mo.App. 922.

Or.—*Corpus Juris Secundum* cited in Branchfield v. McCulley, 235 P.2d 334, 339, 192 Or. 270.

Pa.—In re Jekuta's Estate, 2 Pa.Dist. & Co.2d 139, 5 Fiduciary 182. 25 C.J. p 131 note 6.

Veterans' benefits

(1) Statutory exemption from creditors' claims as to disability benefits under Veterans' Compensation Act, 38 U.S.C.A. § 454, is personal to person to whom award is made.

N.Y.—In re Cerello's Estate, 281 N.Y.S. 599, 155 Misc. 709.

(2) The federal and state statutes exempting war pensions from judicial levy do not apply after death of pensioner for protection of pensioner's heirs or legatees.

Wis.—In re Buxton's Estate, 16 N.W.2d 399, 246 Wis. 97.

(3) Consequently, where estate of decedent consisted entirely of funds accumulated by decedent's guardian from proceeds of pension paid to decedent as widow of a Civil War veteran, after decedent's death such funds remaining in estate were available for payment on claim of county for care and maintenance furnished decedent during period of confinement of decedent in county insane asylum.

Wis.—In re Buxton's Estate, supra.

65. Miss.—*Corpus Juris* cited in Reid v. Halpin, 188 So. 310, 311, 185 Miss. 396.

N.C.—Edgerton v. Johnson, 10 S.E. 2d 918, 218 N.C. 300.

Or.—*Corpus Juris Secundum* cited in Branchfield v. McCulley, 235 P.2d 334, 339, 192 Or. 270.

25 C.J. p 131 note 6.
Persons entitled to exemptions see supra §§ 11-25.

Right of garnishee see Garnishment § 206.

Debtor should claim exemption, and not holder of funds belonging to debtor.

Mo.—Pugh v. St. Louis Police Relief Ass'n, 179 S.W.2d 927, 237 Mo.App. 922.

Garnishee

Code section contemplates that garnishee may suggest exemptions.

Miss.—Hunter v. Commercial Securities Co., 113 So.2d 127.

Exemption to enable merchant to carry on business is personal to him, and cannot be claimed by one who has merely bought his stock, without complying with the Bulk Sales Law.

Mich.—Hoja v. Motoc, 209 N.W. 66, 235 Mich. 258—J. L. Hudson Co. v. No-Name Hat Co., 140 N.W. 507, 174 Mich. 109.

66. Miss.—Reid v. Halpin, 188 So. 310, 185 Miss. 396.

Necessity of privity

The question of a violation of the statute with reference to mortgage of exempt property could not be raised by one who was not in privity with the mortgagor or his wife.

Kan.—Bankers Inv. Co. v. Meeker, 201 P.2d 117, 166 Kan. 209.

67. Miss.—Reid v. Halpin, 188 So. 310, 185 Miss. 396.

Okl.—Wineblood v. Payne, 263 P. 669, 129 Okl. 103.

S.D.—Goodlad v. Smejkal, 190 N.W. 1017, 46 S.D. 112. 25 C.J. p 131 note 8.

In garnishment proceedings, where defendant fails to claim exemptions, it is competent for a member of his family to proceed, under a statute, providing that, in attachment and levy of personal property, if debtor neglects or refuses to claim exemption, his wife or any member of the family over sixteen years of age may make such claim.

S.D.—Goodlad v. Smejkal, supra.

68. Mo.—Guntley v. Staed, 77 Mo. App. 155.

In a proceeding to determine the title to property claimed by a third person, a judgment debtor's son who claims the property as transferee is in no position to raise the question that a tractor is exempt from execution as an implement of husbandry.

Cal.—Grant v. Segawa, 112 P.2d 784, 44 C.A.2d Supp. 945.

69. Ark.—Thompson v. Ogle, 17 S.W. 593, 55 Ark. 101.

70. Pa.—Wilson v. McElroy, 32 Pa. 82.

71. Pa.—Wilson v. McElroy, supra—Waugh v. Burket, 3 Grant 319.

72. Mo.—Nephler v. Rowland, 191 S.W. 1033, 195 Mo.App. 386.

72.5 Wis.—Luebke v. Vonnekold, 27 N.W.2d 458, 250 Wis. 496.

72.10 Wis.—Luebke v. Vonnekold, supra.

72.15 Pa.—Croft v. Livingston, 82 Pa.Dist. & Co. 277.

debtor must, both as essential to the regularity of the levy and to his protection from personal liability, comply with the requirements, if any, imposed by statute for the purpose of safeguarding the debtor in his exemption rights.⁷³ In all cases the officer should act fairly and in good faith toward debtors who are honestly and in good faith seeking to avail themselves of the benefits of the exemption law,⁷⁴ as by calling the debtor's attention to omissions.⁷⁵ His powers are ministerial, not judicial.⁷⁶ He may disregard a claim of exemption which the statute does not authorize,⁷⁷ but he has no power to pass on the sufficiency thereof.⁷⁸

b. Notice to Debtor

It is ordinarily the duty of a levying officer to notify the debtor of his right of exemption.

It is ordinarily the duty of an officer having a writ or process in his hands to notify the debtor of his right of exemption,⁷⁹ although it has been held that such notice is not necessary, if it is not required by statute,⁸⁰ and that the officer may take and sell the debtor's property under execution, if not informed by the debtor of the exemption.⁸¹ Before summoning a garnishee it has been held that notice of his rights should be given the debtor.⁸²

The rule requiring the officer to give notice exists to give defendant an opportunity to claim his exemption⁸³ and to surrender other property not selected or exempt for satisfaction of the judgment.⁸⁴

A statute requiring the officer to give notice to

the debtor has been held to be mandatory,⁸⁵ and not complied with by a notice by the creditor to the debtor.⁸⁶ Unless required by statute, such notice need not be by advertisement in a newspaper.⁸⁷ An ambiguously worded notice by mail from which the debtor may infer that personal demand will be made of him at some time in the future is not in good faith and is insufficient.⁸⁸

Notice to the debtor may be excused by the fact that he has, in advance of the levy, notified the officer that he claims exemption for all of his property,⁸⁹ or by the fact that he has filed a schedule and claim of exemption,⁹⁰ or by the fact that he cannot be found after diligent search⁹¹ or is not in the county.⁹² If, however, the officer knows of the residence of the debtor in an adjoining county and can reach him by the exercise of reasonable diligence, it is then his duty to apprise him of his rights of exemption.⁹³ Failure to notify the debtor of his exemption rights may require a levy to be quashed where it has been made on property that could be held as exempt under any provision of the statute,⁹⁴ although it has been held not to invalidate the levy or sale of real estate.⁹⁵

c. Inventory, Appraisal, and Setting Apart

It may be the duty of the levying officer to cause an inventory and appraisal to be made, and to allow or require the debtor to select the property exempted, or, in case of the debtor's absence or neglect, to make the selection himself.

Under some statutes, it is the duty of the officer

73. Neb.—Hamilton v. Fleming, 41 N.W. 1002, 26 Neb. 240.

Pa.—National Acceptance Corporation v. Ullek, 16 Pa. Dist. & Co. 483. 25 C.J. p 129 note 78.

Liability for wrongful levy on exempt property see Sheriffs and Constables § 66.

74. Ill.—Langston v. Murphy, 31 Ill.App. 188.

25 C.J. p 130 note 79.

75. Ill.—Langston v. Murphy, supra.

25 C.J. p 130 note 79 [a] (1).

76. Ala.—Straughn v. Richards, 25 So. 700, 121 Ala. 611—Kennedy v. Smith, 11 So. 665, 99 Ala. 83.

25 C.J. p 130 note 80.

77. Ala.—Kennedy v. Smith, supra.

25 C.J. p 130 note 81.

78. Ala.—Straughn v. Richards, 25 So. 700, 121 Ala. 611—Kennedy v. Smith, 11 So. 665, 99 Ala. 83.

79. Mo.—Hyde v. Copeland, 173 S.W. 2d 684, 351 Mo. 580.

Poplar Bluff Trust Co. v. Bates, 31 S.W.2d 93, 224 Mo.App. 636—

Mason v. Wilks, App., 288 S.W. 936 —State v. Kane, 42 Mo.App. 253.

25 C.J. p 130 note 83.

All rights of exemption should be brought to the notice of the judgment debtor by the levying officer.

Mo.—Poplar Bluff Trust Co. v. Bates, 31 S.W.2d 93, 224 Mo.App. 636.

Liability of officer for failing to apprise debtor of exemption rights see Sheriffs and Constables § 66.

80. Md.—State v. Boulden, 57 Md. 314.

Okl.—Parsons v. Evans, 145 P. 1122, 44 Okl. 751, L.R.A.1915D 381.

25 C.J. p 130 note 84.

81. N.Y.—Twinam v. Swart, 4 Lans. 263.

82. Mo.—State v. Sondag, 15 Mo. App. 312.

25 C.J. p 130 note 83 [a].

83. Ill.—Johnson v. Dellas, 199 Ill. App. 576.

Mo.—Smith v. Waterson, App., 34 S.W.2d 544.

84. Ill.—Cook v. Scott, 6 Ill. 333.

Ind.—Godman v. Smith, 17 Ind. 152.

85. Mo.—Smith v. Waterson, App.,

34 S.W.2d 544—State v. Freeman, 158 S.W. 726, 173 Mo.App. 294—Irondale Bank v. Terrill, 116 S.W. 481, 135 Mo.App. 472.

86. Mo.—Irondale Bank v. Terrill, supra.

87. Mo.—Mason v. Wilks, App., 288 S.W. 936.

88. Ill.—Boggess v. Pennell, 46 Ill. App. 150.

89. Mo.—Brown v. Hoffmeister, 71 Mo. 411.

State v. Kane, 42 Mo.App. 253.

90. Ill.—Johnson v. Dellas, 199 Ill. App. 576.

91. Tex.—Dickinson v. Comstock, Civ.App., 199 S.W. 863.

92. Ill.—Foote v. People, 12 Ill. App. 94.

93. Mo.—Finke v. Craig, 57 Mo.App. 393.

94. Mo.—Smith v. Waterson, App., 34 S.W.2d 544.

95. Mo.—Dougherty v. Gangloff, 144 S.W. 434, 239 Mo. 649—Hudson v. Wright, 103 S.W. 8, 204 Mo. 412. Contra Irondale Bank v. Terrill, 116 S.W. 481, 135 Mo.App. 472.

to cause an inventory and appraisal to be made, and to allow the debtor to select the amount exempted,⁹⁶ and the officer cannot assume⁹⁷ or be compelled⁹⁸ to make the selection for the debtor, unless authorized by statute to do so,⁹⁹ as where, if the debtor neglects to do so or is absent, the officer is required to make the selection and set it apart.¹ Under other statutes the officer must require the debtor to make his selection, and at the time of the levy.²

A statute requiring the officer to make an inventory and appraisal of the debtor's property and to give to the debtor the inventory from which he is to make his selection does not require that the officer should also give the debtor the appraisal of the property, which he has made.³ Under such a statute the officer is entitled to a reasonable time within which to make and serve his inventory.⁴

§ 122. Process and Proceedings against Which Exemption May Be Claimed

Exemption statutes are generally construed as being applicable to any process or proceeding by which it is sought to subject the property, unless the statute excludes such a construction.

The tendency of the courts is to construe exemption statutes as applicable to any process or proceeding by which it is sought to subject the property, if the statute does not by its terms clearly ex-

clude such a construction.⁵ A creditor cannot, by going into a court of equity, reach and subject to the satisfaction of his claim property or credits which the debtor would be entitled to claim as exempt in an action or proceeding at law.⁶

§ 123. — Attachment and Garnishment

An exemption right may generally be claimed against an attachment or against a garnishment or trustee process as well as against an execution.

As a general rule the exemption right is held to embrace attachments as well as executions.⁷ An exemption of property from seizure and sale generally is held to include an exemption from attachment,⁸ and an exemption from execution has been extended to include an exemption from attachment,⁹ although the contrary has also been held.¹⁰ If property exempt from attachment is taken under such process, it is the duty of the court, when the fact is brought to its notice, to order the property released.¹¹

Property exempted in terms from execution and attachment, or from execution merely, is generally also held exempt from garnishment or trustee process, and, when it is sought to reach such property by this process the debtor may intervene and assert his right,¹² or the garnishee may show that the amount owing by him to the debtor is exempt;¹³ and the garnishee may also set up an

96. Mich.—Hutchinson v. Whitmore, 51 N.W. 451, 90 Mich. 255, 30 Am.S.R. 431.

25 C.J. p 130 note 98.

Appraisement generally see infra § 137.

Schedule or inventory generally see infra § 136.

97. Mich.—Bayne v. Patterson, 40 Mich. 658.

A sheriff has no right, in levying on personalty, to exclude the owner from his premises and then select and set aside the property exempt by law from execution.

Mich.—Bayne v. Patterson, supra.

98. Mo.—Parketon v. Pugsley, 121 S.W. 789, 142 Mo.App. 537.

25 C.J. p 145 note 14.

99. Mass.—Savage v. Davis, 134 Mass. 401.

25 C.J. p 145 note 15.

1. Mass.—Savage v. Davis, supra.

Mich.—Hutchinson v. Whitmore, 51 N.W. 451, 90 Mich. 255, 30 Am.S.R. 431.

25 C.J. p 130 note 99.

Selection generally see infra § 138.

2. Tenn.—Pyett v. Rhea, 6 Heisk. 136.

3. Mich.—Jones v. Peek, 59 N.W. 659, 101 Mich. 389.

4. Minn.—Tullis v. Orthwein, 5 Minn. 377.

5. Iowa.—Millington v. Laurer, 56 N.W. 533, 89 Iowa 322, 48 Am.S.R. 385.

N.Y.—Kemp & Mulligan v. Wittner, 15 N.Y.S.2d 435.

N.D.—Imperial Elevator Co. v. Warren, 217 N.W. 523, 56 N.D. 329.

Ohio.—Radford v. Kachman, 160 N.E. 875, 27 Ohio App. 86.

25 C.J. p 127 note 27.

6. N.J.—Gottlieb v. West Ridgelawn Cemetery, 158 A. 422, 109 N.J.Eq. 585.

Pa.—Appeal of Thall, 13 A. 466, 119 Pa. 425.

25 C.J. p 127 note 28.

7. Ohio.—Radford v. Kachman, 160 N.E. 875, 27 Ohio App. 86.

Pa.—Com. v. Berfield, 51 A.2d 523, 160 Pa.Super. 438.

25 C.J. p 127 note 40.

Attachment before judgment does not destroy defendant's statutory exemption rights.

Ky.—Pinson v. Murphy, 295 S.W. 442, 220 Ky. 464.

8. N.Y.—Harry Winston, Inc. v. Acheson, 144 N.Y.S.2d 472.

Ohio.—Radford v. Kachman, 160 N.E. 875, 27 Ohio App. 86.

25 C.J. p 127 note 41.

9. Tex.—Stephens v. Cox, Civ.App., 255 S.W. 241, rehearing denied 256 S.W. 643.

25 C.J. p 127 note 42.

10. Iowa.—Hannahs v. Felt, 15 Iowa 141, followed in Ryan v. Wessels, 15 Iowa 145.

25 C.J. p 127 note 43.

11. Kan.—Urquhart v. Smith, 5 Kan. 447.

Ky.—Campbell v. Mitchell, 4 Ky.Op. 629.

12. Miss.—First Nat. Bank v. Ellison, 99 So. 573, 135 Miss. 42.

N.M.—Dowling-Moody Co. v. Hyatt, 48 P.2d 776, 39 N.M. 401.

Wis.—Cavadini v. Larson, 248 N.W. 209, 211 Wis. 200.

25 C.J. p 128 note 45.

Garnishment is "provisional final process of court" within statute making money from insurance on burned property, which was exempt from execution, not subject to such process.

Wis.—Cavadini v. Larson, supra.

13. Neb.—Union Pac. Ry. Co. v. Smersh, 36 N.W. 139, 22 Neb. 751, 3 Am.S.R. 290.

exemption to which he would be personally entitled, if the execution is issued against him as if the judgment were his own private debt.¹⁴

A statute exempting property only from levy and sale on an execution or by distress for rent by implication has been held to give a right of exemption against a domestic attachment execution,¹⁵ but not against a foreign attachment, which is not an execution at all,¹⁶ or against an original attachment, to compel defendant to appear.¹⁷

An exemption of wages may be claimed in garnishment proceedings under a statute exempting from execution generally.¹⁸ Where there are successive services of garnishment, the principal defendant is entitled to, and the garnishee or trustee may reserve for the benefit of claimant of exemptions, the amount allowed by the exemption act on each service.¹⁹ Whether property in the hands of a garnishee is exempt is determinable as of the date of the garnishee summons.²⁰

§ 124. — Distress for Rent

A distress for rent has been held a process or proceeding against which exemption may be claimed.

A constitutional provision, exempting property "from attachment and sale under mesne or final process issued from any court" has been held not to exempt such property from a distress warrant for rent, the warrant not being a process issued from a court, but a proceeding which the landlord

issues by his own act and on his own responsibility.²¹ On the other hand it has been held that a provision exempting property "from forced sale or any process of law" does exempt from distress for rent,²² but the provision is not violated where the landlord merely retains possession of the property to enforce his lien for the rent.^{22.5} A statute providing expressly that "no property should be exempt from execution, when the process is for rent," applies also in the case of an attachment for rent, as its object is to abolish all exemption as against demands for rent without regard for the form of action pursued to recover them.²³ Under some statutes exemption from execution and distress for rent is restricted to particular articles, such as specified household necessities.²⁴ It has been held that, if the goods of a tenant's wife have been seized, she is not entitled to the benefit of the general exemption law,²⁵ although a constitutional provision declaring that a wife's property shall not be subject to levy and sale for her husband's debts exempts her property from liability to distress for rent due from her husband.²⁶ Joint owners of chattels levied on under distress for rent due on a lease signed by them jointly are not entitled to the benefit of the exemption law.²⁷

§ 125. — Execution

Exempt property ordinarily cannot be reached by execution.

Except for the enforcement of particular liabilities

14. Pa.—Fisher v. Elliott, 11 Phila. 344, 33 Leg.Int. 140.

15. Pa.—Strouse v. Becker, 44 Pa. 206.

Fisher v. Elliott, 11 Phila. 344, 33 Leg.Int. 140.

25 C.J. p 128 note 46.

16. Pa.—Yelverton v. Burton, 26 Pa. 351.

17. N.C.—Martindale v. Whitehead, 46 N.C. 64.

25 C.J. p 127 note 43 [b].

18. Kan.—Seymour v. Cooper, 26 Kan. 539.

Ohio.—Kleinman v. Brown, 30 Ohio N.P.,N.S., 69.

Pa.—Catlin v. Ensign, 29 Pa. 264.

19. Me.—Howard Coal Co. v. Savage, 100 A. 369, 116 Me. 115, L.R.A. 1917D 898.

Mass.—Choquette v. Ford, 59 N.E. 454, 178 Mass. 6.

25 C.J. p 128 note 49.

A judgment debtor may keep exempt the amount of earnings exempted by statute, notwithstanding the number of judgment creditors who seek to garnishee his earnings. Ohio.—Kleinman v. Brown, 30 Ohio N.P.,N.S., 69.

20. Neb.—Scottsbluff Nat. Bank v. Pfeifer, 254 N.W. 494, 126 Neb. 852—Kirk v. Beckley, 242 N.W. 358, 123 Neb. 148—Wilcox & Co. v. Deines, 230 N.W. 682, 119 Neb. 692. S.D.—Bowman v. Larsen, 220 N.W. 489, 53 S.D. 246.

21. S.C.—Harley v. Weathersbee, 21 S.C. 243.

25 C.J. p 128 note 51.

Tenant cannot claim homestead exemption in personal property against distress warrant.

S.C.—Nash v. Oliver, 142 S.E. 514, 144 S.C. 386.

Exemptions from distress generally see Landlord and Tenant § 681.

22. Fla.—Schofield v. Liody, 16 So. 780, 35 Fla. 1—Hodges v. Cooksey, 15 So. 549, 33 Fla. 715, 24 L.R.A. 812—Cathcart v. Turner, 18 Fla. 837.

Under a statute exempting a lawyer's library from forced sale, books sold lawyer and delivered by him in discharge of office rent are exempt from landlord's lien in foreclosure action under conditional sales contract.

Tex.—American Law Book Co. v.

Dykes, Civ.App., 4 S.W.2d 630—American Law Book Co. v. Dykes, Civ.App., 278 S.W. 247.

22.5 Fla.—Howard v. Calhoun, 21 So. 2d 361, 155 Fla. 689.

23. Miss.—Ransom v. Duff, 60 Miss. 901.

24. N.Y.—Van Sickler v. Jacobs, 14 Johns. 434.

S.C.—Caulfield v. McAlister, 15 S.C.L. 378.

25. Pa.—Swaney v. Doumont, 44 Pa. Super. 49.

S.C.—Wallace v. Johnson, 17 S.C. 454.

Her exemption applies only to her own debts, not to the debts of another.

S.C.—Wallace v. Johnson, supra.

She is not a defendant or a debtor within the meaning of the general exemption law.

Pa.—Swaney v. Doumont, 44 Pa. Super. 49.

26. S.C.—Wallace v. Johnson, 17 S.C. 454.

27. Pa.—Bonsall v. Comly, 44 Pa. 442.

Exemption by tenants in common see supra § 64.

ties which have already been considered supra §§ 70-92, exempt property cannot be reached by execution,²⁸ nor does an execution create a lien thereon.²⁹ Although, as stated infra § 126, exemption cannot be claimed against a foreclosure proceeding on a mortgage, if the creditor, instead of foreclosing the mortgage, obtains a judgment on the mortgage debt, and levies on the property mortgaged, the owner may claim his exemption.³⁰ A debtor may have a levy of execution on exempt property set aside,³¹ and a sale of such property under execution passes no title.³²

On the other hand, the lien of an execution may attach where the exempt property has not been selected by the debtor, if not specifically exempt by the statute and a selection is required,³³ or where the debtor has not complied with statutory requirements as to the filing of a schedule,³⁴ the obtaining of a supersedeas,³⁵ or the securing of an appraisal, as discussed infra § 137. A subsequently accruing right of exemption will not defeat the lien of an execution levied on personal property.³⁶ Under some statutes, a levy may be made on personal property claimed as exempt where the execution plaintiff makes an affidavit and gives a bond as prescribed by the statute.³⁷

Supplementary proceedings. The statutes of ex-

emption also apply, either by express provision or by implication, in proceedings supplementary to, and in aid of, execution.³⁸

§ 126. — Foreclosure Proceedings

Exemption cannot be successfully claimed against a foreclosure proceeding under a mortgage on the property.

In the absence of a statute providing otherwise,^{38.50} exemption cannot be successfully claimed against a foreclosure proceeding on a mortgage;³⁹ neither can it be claimed against a judgment on a bond accompanying the mortgage.⁴⁰ The surplus proceeds of a foreclosure sale have been held exempt against existing judgment creditors under a statute which exempts property to a certain amount.⁴¹ Where the statute exempts the property of volunteers for military service, from sale under deeds of trust, mortgages, or judgment, the appointment of a receiver to take charge of mortgaged premises after judgment for foreclosure when the mortgagor is in the military service of the United States is a violation of the statute.⁴²

§ 127. — Set-Off and Counterclaim

By the weight of authority a set-off cannot be allowed where it will defeat a debtor's exemption rights.

According to the weight of authority a set-off can-

28. Mont.—White v. Corbett, 52 P. 2d 156, 101 Mont. 1.

N.Y.—Brooklyn Loan Corporation v. Gross, 18 N.Y.S.2d 179, 259 App. Div. 165, appeal denied 20 N.Y.S. 2d 409, 259 App. Div. 888, appeal denied 27 N.E.2d 818, 283 N.Y. 778.

25 C.J. p 127 note 30.

Mortgaged property

A statute providing that a chattel mortgage on household furniture then in the possession and use of a borrower shall not be valid unless in writing and signed in person by the borrower does not authorize the levy on and sale, by virtue of an execution on a money judgment, of exempt household furniture, which has been mortgaged by householder to secure debt.

N.Y.—Brooklyn Loan Corporation v. Gross, supra.

29. Ky.—Wash v. Hendrick, 136 S. W. 883, 143 Ky. 443.

25 C.J. p 127 note 31.

30. N.Y.—Brooklyn Loan Corporation v. Gross, 18 N.Y.S.2d 179, 259 App. Div. 165, appeal denied 20 N.Y.S.2d 409, 259 App. Div. 888, appeal denied 27 N.E.2d 818, 283 N.Y. 778.

31. Mont.—White v. Corbett, 52 P. 2d 156, 101 Mont. 1.

32. Conn.—Williams v. Miller, 16 Conn. 144.

Mass.—Johnson v. Babcock, 8 Allen 583.

Gasoline station

Where tanks, warehouse, and similar equipment were exempt as apparatus necessary in conducting wholesale gasoline station, buyer at execution sale against wholesaler did not acquire title thereto.

Tex.—Moore v. Neyland, Civ. App., 180 S.W.2d 658.

33. Ind.—Moss v. Jenkins, 45 N.E. 789, 146 Ind. 589.

Ohio.—Frost v. Shaw, 3 Ohio St. 270.

25 C.J. p 127 note 33.

Selection see infra § 138.

34. Ind. Terr.—Parker v. Independence Produce Co., 53 S.W. 335, 2 Ind. Terr. 561.

Schedule see infra § 136.

35. Ind. Terr.—Parker v. Independence Produce Co., supra.

25 C.J. p 127 note 35.

36. S.C.—Pender v. Lancaster, 14 S. C. 25, 37 Am.R. 720.

37. Ala.—Totten v. Sale, 72 Ala. 488.

38. N.Y.—Cabella v. Hirschman, 277 N.Y.S. 441, 154 Misc. 532.

25 C.J. p 127 note 39.

Exempt property as subject in supplementary proceedings see Executions §§ 350, 352.

Earnings of debtor which are exempt may not be attached in a supplementary proceeding.

N.Y.—Colonial Discount Co. v. Wilhelm, 40 N.Y.S.2d 298.

38.50 Burial lands

Persons who purchased mortgages knowing that they covered cemetery lands would be required to pursue statutory means of sequestration of income irrespective of whether the process issued from a judgment at law or from a money decree, rather than a sale of lands not presently used for burial purposes.

N.J.—Abramowitz v. Washington Cemetery Ass'n, 51 A.2d 461, 139 N. J. Eq. 293.

39. N.J.—Conway v. Wilson, 11 A. 734, 44 N.J. Eq. 457.

Pa.—Fell v. Johnston, 36 A.2d 227, 154 Pa. Super. 470.

25 C.J. p 128 note 60.

Mortgage as waiver of exemption see supra § 106.

40. Pa.—Appeal of McAuley, 35 Pa. 209.

25 C.J. p 128 note 61.

41. Md.—Darbey v. Rouse, 22 A. 1110, 75 Md. 26.

Pa.—Appeal of Bower, 68 Pa. 126.

42. Iowa.—Adair v. Wright, 16 Iowa 385.

25 C.J. p 128 note 63.

not be allowed where it will defeat a debtor's exemption rights;⁴³ and, accordingly, mutual judgments cannot be set off one against the other in such a manner as to defeat the exemption laws.⁴⁴ This is particularly true where it is sought to enforce a set-off against a judgment for trespass to, or conversion of, the exempt property,⁴⁵ or against an action for replevin of the property.⁴⁶ In some states, however, the right of plaintiff to hold property exempt from execution does not impair the right of a defendant to set off a debt which plaintiff owes him against a debt which he owes plaintiff,⁴⁷ and a judgment recovered for the value of personal property, exempt from execution, converted by the judgment debtor, by a levy on and sale of it, is not itself exempt, and may be set off against a judgment held by the judgment debtor against the judgment creditor in it.⁴⁸ It has been held that an exemption "from the sale under execution, or other final process" is not enforceable before judgment so as to destroy the right of counter-claim or set-off.⁴⁹

According to some authorities where an exempt claim has been assigned, a set-off cannot be allowed against it,⁵⁰ although there is also authority to the contrary.⁵¹

§ 128. — Miscellaneous Proceedings

Other miscellaneous proceedings or writs against which a right of exemption may be claimed may include partition, accounting, administration sales, etc.

Exemption claims have been allowed against a lien of a creditor on a fund arising from a partition of land, although the lien had not arisen by an execution or distress,⁵² against a judgment in an action of account rendered by one partner against another,⁵³ against a sale by an administrator of an insolvent estate,⁵⁴ against a sale in equity,⁵⁵ against a forced sale under the process of any court,⁵⁶ against any sale by operation of law which is necessary for the payment of the debtor's debts,⁵⁷ against a writ of sequestration by which the rents and profits of a life estate may be taken and applied to the payment of a judgment until it is satisfied,⁵⁸ or against any other writ by which the debtor can be deprived of title and possession.⁵⁹ Money exempt from garnishment in the hands of the employer is exempt from seizure by other process, such as a rule against the sheriff, while passing from the employer to the employee.⁶⁰

A right of exemption, however, cannot be claimed against an exercise of the police power necessary

43. Ky.—Beattyville Co. v. Sizemore, 261 S.W. 620, 203 Ky. 7.

Neb.—**Corpus Juris** cited in State ex rel. Sorensen v. Bank of Crab Orchard, 239 N.W. 836, 838, 122 Neb. 210.

N.C.—**Corpus Juris** quoted in Edgerton v. Johnson, 10 S.E.2d 918, 919, 218 N.C. 300.

Ohio.—Gieske v. Schrakamp, 8 Ohio S. & C. P. 610, 6 Ohio N.P. 299.

Okl.—**Corpus Juris** quoted in Whiteday v. Roberts, 43 P.2d 422, 171 Okl. 466—**Corpus Juris** quoted in First Nat. Bank v. Funnell, 290 P. 177, 178, 144 Okl. 188.

Va.—**Corpus Juris** cited in Atlantic Life Ins. Co. v. Ring, 187 S.E. 449, 167 Va. 121, 106 A.L.R. 1064. 25 C.J. p 128 note 64.

Proceeds of mutual benefit policy deposited by beneficiary, being exempt, cannot be applied by bank to depositor's debt without his consent. Okl.—First Nat. Bank v. Funnell, 290 P. 177, 144 Okl. 188.

Insurer is not entitled to set off against disability benefit payments, made under supplemental agreement to life policy, debt of insured who had been adjudicated bankrupt, notwithstanding statute providing for exemption of such payments does not specifically mention set-off, since legislative intent was to exempt payments from all claims of creditors.

Va.—Atlantic Life Ins. Co. v. Ring, 187 S.E. 449, 452, 167 Va. 121, 106 A.L.R. 1064.

44. N.D.—Cleveland v. McCanna, 75 N.W. 908, 7 N.D. 455, 66 Am.S.R. 670, 41 L.R.A. 852.

Ohio.—Gieske v. Schrakamp, 8 Ohio S. & C.P. 610, 6 Ohio N.P. 299. 25 C.J. p 128 note 64 [a] (1).

On motion to offset defendant's judgment against plaintiff with judgment subsequently obtained by plaintiff against defendant and for restraint of execution, defendant may demand that his judgment be allotted to him as his personal property exemption, since motion amounts to "final process" within constitutional provision exempting from sale under execution or other final process of any court, issued for the collection of any debt, personalty to the value of five hundred dollars selected by any state resident.

N.C.—Edgerton v. Johnson, 10 S.E.2d 918, 218 N.C. 300.

45. Okl.—**Corpus Juris** quoted in Whiteday v. Roberts, 43 P.2d 422, 171 Okl. 466. 25 C.J. p 129 note 65.

46. Tenn.—Duff v. Wells, 7 Heisk. 17.

47. Ala.—Fischer v. Pope, 171 So. 752, 233 Ala. 301. 25 C.J. p 129 note 67.

48. Minn.—Temple v. Scott, 3 Minn. 419.

49. N.C.—Edgerton v. Johnson, 10 S.E.2d 918, 218 N.C. 300—Lynn v. Stanly Creek Cotton Mills, 41 S.E. 877, 130 N.C. 621.

50. Ind.—Pickrell v. Jerauld, 27 N.E. 433, 1 Ind.App. 10, 50 Am.S.R. 192.

Ohio.—Gieske v. Schrakamp, 8 Ohio S. & C.P. 610, 6 Ohio N.P. 299.

25 C.J. p 129 note 70.

51. Pa.—Ehrhart v. Esbenshade, 23 Pa.Dist. 500.

52. Pa.—Reed v. Hollibaugh, 3 Pa. Co. 20.

53. Pa.—McTague v. Rehill, 2 Montg.Co. 35.

54. S.C.—Kinard v. Moore, 34 S.C.L. 193.

55. Ohio.—Radford v. Kachman, 160 N.E. 875, 27 Ohio App. 86.

56. Fla.—Williams v. Dormany, 126 So. 117, 99 Fla. 496.

57. S.C.—Kinard v. Moore, 34 S.C.L. 193.

58. Pa.—Buchi v. Pund, 24 Pa.Co. 335—Sener v. Scherff, 10 Pa.Co. 529.

59. Ohio.—Radford v. Kachman, 160 N.E. 875, 27 Ohio App. 86.

60. Ga.—Cox v. Bearden, 10 S.E. 627, 84 Ga. 304, 20 Am.S.R. 359.

to the public in the enjoyment of personal and property rights.⁶¹

§ 129. Claim

The necessity for a claim of exemption, the time of its making, its form and sufficiency, and presentation and filing, are discussed *infra* §§ 130-133.

Examine Pocket Parts for later cases.

§ 130. — Necessity

A debtor, in order to have the benefit of an exemption, ordinarily must claim his right, unless he has no property other than that which is exempt by law, or specific articles involved are absolutely exempted by statute.

Under statutes which expressly require a claim and selection by the debtor to be made, or which by implication require a selection by the debtor, as where they exempt property not exceeding a certain sum in value or a certain number of articles or animals of a particular kind, it is the almost universal rule that the debtor in order to have the benefit of the exemption must claim his right,⁶² although there is some authority to the effect that the failure of the debtor to claim his exemption of specific property as permitted by the statute at the time of levy does not preclude him from claiming as exempt the proceeds of the sale of the items of property which he subsequently selects.⁶³ If, however, the debtor has no property except what is exempt by law, it becomes, thereby, specifically exempt, and it is unnecessary to make claim.⁶⁴

A claim of exemption under one execution may not and usually does not dispense with the necessity

of the claim under other different executions where the different executions were issued on different judgments.⁶⁵ It has even been held that a claim under the original execution will not suffice to protect the debtor on the levy of an alias;⁶⁶ but there is authority to the contrary.⁶⁷ It has been said, however, that, where several writs are in the sheriff's hands at the same time, one demand is sufficient as against them all.⁶⁸ Where other property is levied on under the other execution, a claim of exemption made after the levy of the first execution on certain property is not sufficient.⁶⁹ In garnishment, when the garnishee in his answer admits an indebtedness to defendant under a continuing contract, and a claim of exemption is made by defendant, and, on appeal, he admits a further indebtedness, which has accrued under the contract since his first answer was filed, this indebtedness is not included in the claim of exemptions already filed, and is liable to plaintiff's demand unless a new claim is interposed.⁷⁰

A *mortgagor* must claim such exemption in order to secure it in the surplus proceeds of the sale of the mortgaged property on foreclosure,⁷¹ or in order to affect the title under the mortgage.⁷²

Specific exemptions. By the weight of authority when the statute exempts specific articles absolutely, without expressly or impliedly requiring any selection by the debtor, the debtor does not lose his right to claim the articles as exempt by failure to assert the claim at the time of a levy.⁷³ Under some statutes, the rule is qualified to the effect that the debtor need not make a claim in

61. Fla.—Williams v. Dormany, 126 So. 117, 99 Fla. 496.

Parking violation

Exemption of physician's automobile from seizure and sale under legal process for payment of debt did not preclude the impounding of such automobile for violation of parking meter ordinance pursuant to city ordinance adopted under police power of the municipality.

Ariz.—Hughes v. City of Phoenix, 170 P.2d 297, 64 Ariz. 331.

62. Ark.—First State Bank of Bensenville, Ill., v. Taggart, 57 S.W. 2d 1024, 186 Ark. 1156—Merchants' & Farmers' Bank v. Reel, 28 S.W. 2d 725, 181 Ark. 969.

Iowa.—Green v. Blunt, 12 N.W. 762, 59 Iowa 79.

N.D.—Dakota Nat. Bank of Fargo v. Salzwedel, 3 N.W.2d 468, 71 N.D. 643.

Pa.—Rosenberger v. Hallowell, 3 Phila. 330.

Tex.—York v. Carlisle, 46 S.W. 257, 19 Tex.Civ.App. 269.

25 C.J. p 131 note 15.

Excuse for failure to claim see *supra* § 110.

Waiver by failure to make claim see *supra* § 110.

Creditor can subject proceeds of debtor's property to payment of debt if debtor fails to claim exemptions. Ark.—First State Bank of Bensenville, Ill., v. Taggart, 57 S.W.2d 1024, 186 Ark. 1156.

63. Miss.—Culpepper v. John B. Ellison & Sons, 114 So. 885, 148 Miss. 748—Anderson v. Dever, 68 So. 166, 109 Miss. 235.

64. Ala.—Kibbe v. Scholes, 123 So. 61, 219 Ala. 571. 25 C.J. p 132 note 17.

65. Pa.—Appeal of Krauter, 24 A. 603, 150 Pa. 47. 25 C.J. p 132 note 18, p 93 note 60.

66. Ind.—Finley v. Sly, 44 Ind. 266. Ind.Terr.—Parker v. Independence

Produce Co., 53 S.W. 335, 2 Ind. Terr. 561.

Necessity of supersedeas after alias execution see *supra* § 125.

67. Pa.—Appeal of McAfoose, 32 Pa. 276.

25 C.J. p 132 note 20.

68. Pa.—Appeal of Bechtel, 2 Grant 375.

69. Ill.—Camp v. Ganley, 6 Ill.App. 499.

70. Ala.—Craft v. Hubbard, 9 So. 328, 93 Ala. 22.

71. Pa.—Gibbons v. Gaffney, 26 A. 24, 154 Pa. 48.

Wis.—Roundy v. Converse, 37 N.W. 811, 71 Wis. 524, 5 Am.S.R. 240.

72. Wis.—Mielke v. National Reserve Ins. Co., 256 N.W. 776, 216 Wis. 148.

73. Ky.—Winstead v. Hicks, 121 S. W. 1018, 135 Ky. 154, 135 Am.S.R. 446.

25 C.J. p 132 note 24. Waiver by failure to assert see *supra* § 110.

the first instance, and does not waive his rights by failing to object to a levy unless he fails or refuses to make designation or selection of property which he claims as exempt when required to do so by the officer.⁷⁴ Other statutes, exempting specific articles absolutely, require in express terms that a claim be made,⁷⁵ the claim, in such case, serving not as an identification of the exempt articles, but as the exercise of an option.⁷⁶ Where the exempt character of an article made specifically exempt by statute depends on the nature of its use by the debtor, the debtor must at least inform the officer of the nature of the use, a fact known only to the debtor, before he is entitled to an exemption therein.⁷⁷ Where the person holding or directing the service of the writ knows at the time of the service that the property levied on is exempt,⁷⁸ or where the debtor has specific property only to the amount of exemption allowed by law, there is additional ground for holding that the debtor is not required to make a claim.⁷⁹ A statute requiring an officer to levy an execution on any personal property in the possession of, or that he has reason to believe belongs to, defendant, unless he has received notice in writing from some other person that the property belongs to him, applies only to persons other than the execution defendant, and does not require him to notify the sheriff that property levied on belongs to him, and that he claims it as exempt, before he can maintain an action to recover the property as being exempt.⁸⁰

§ 131. — Time

There must be a compliance with an express statutory designation of the time within which a claim of exemption must be made. In the absence of such an express provision, it has been held that the claim must or may be made at various times, the time, in a particular case, being controlled, to some extent, by the general provisions of the statute as to claims of exemption, the circumstances of the case, and the effect the claim, as made at the time in question, will have on the rights of the creditor.

Where the statute expressly designates the time within which a claim of exemption is to be made, such provision must be complied with,⁸¹ such as that it must be made within a specified time after levy or notice of execution,⁸² or within a reasonable time thereafter,⁸³ or at any time before sale,⁸⁴ or at any time before the property is subjected by sale or otherwise under judgment, decree, order, execution, or other legal process.⁸⁵

In the absence of an express provision as to time of making, it has been variously held that the claim must be made at the time of the levy if the debtor is present,⁸⁶ but there is also authority to the contrary;⁸⁷ that it must be made within a reasonable time,⁸⁸ or promptly,⁸⁹ or timely,^{89.5} or before the creditor has taken any step involving further costs,⁹⁰ or before advertisement and sale,⁹¹ or before sale,⁹² or within a reasonable time before sale,⁹³ or before the sale has commenced,⁹⁴ but as to the last there is also authority to the contrary.⁹⁵ However, a strict rule as to the time of making the claim will not be applied if no costs or expenses

74. Iowa.—Ellsworth v. Savre, 25 N. W. 699, 67 Iowa 449.

25 C.J. p 132 note 25.

75. N.Y.—Gilewicz v. Goldberg, 74 N.Y.S. 984, 69 App.Div. 438.

76. N.Y.—Gilewicz v. Goldberg, supra.

77. N.C.—Henson v. Edwards, 32 N. C. 43.

25 C.J. p 132 note 28.

78. Mass.—Woods v. Keyes, 14 Allen 236, 92 Am.D. 765.

25 C.J. p 132 note 29.

79. Colo.—Harrington v. Smith, 23 P. 331, 14 Colo. 376, 20 Am.S.R. 272.

25 C.J. p 132 note 30.

80. Iowa.—Parsons v. Thomas, 17 N. W. 526, 62 Iowa 319—McCoy v. Cornell, 40 Iowa 457.

81. Wash.—Corpus Juris quoted in Arbogast v. Linz, 39 P.2d 615, 180 Wash. 315.

25 C.J. p 133 note 36.

82. S.D.—Corpus Juris cited in Rames v. Norbraten, 272 N.W. 826, 828, 65 S.D. 269.

25 C.J. p 133 note 33.

83. Or.—Childers v. Brown, 158 P. 166, 81 Or. 1, Ann.Cas.1918D 170.

25 C.J. p 133 note 34.

84. Ala.—Poole v. Griffith, 112 So. 447, 216 Ala. 120.

25 C.J. p 133 note 35.

After time for direct attack on default judgment ordering sale held too late.

Ala.—Hill v. Hooper, 110 So. 323, 21 Ala.App. 584.

85. Va.—Smith v. Holland, 98 S.E. 676, 124 Va. 663.

25 C.J. p 133 note 47.

86. Iowa.—Angell v. Johnson, 2 N. W. 435, 51 Iowa 625, 33 Am.D. 152.

25 C.J. p 133 note 37.

87. Or.—Childers v. Brown, 158 P. 166, 81 Or. 1, Ann.Cas.1918D 170.

25 C.J. p 133 note 46.

88. Neb.—Scottsbluff Nat. Bank v. Pfeifer, 254 N.W. 494, 126 Neb. 852.

Wash.—Corpus Juris quoted in Arbogast v. Linz, 39 P.2d 615, 180 Wash. 315.

25 C.J. p 133 note 38.

89. Pa.—Rosenberger v. Hallowell, 3 Phila. 330.

25 C.J. p 133 note 39.

89.5 Ariz.—Smith v. Phlegar, 236 P. 2d 749, 73 Ariz. 11.

90. Pa.—Williamson v. Krumbhaar, 19 A. 281, 132 Pa. 455.

Bogar v. Chiles, Com.Pl., 3 Cumb. L.J. 52.

25 C.J. p 133 note 40.

91. Pa.—Maschke, to Use of Ehnes v. O'Brien, 17 A.2d 923, 142 Pa.Super. 559.

25 C.J. p 133 note 41.

92. Ind.—H. C. Smith Coal Co. v. Finley, 131 N.E. 5, 190 Ind. 481.

Pa.—Bonwit Teller & Co. v. Gerstemeier, 6 Pa.Dist. & Co.2d 623, 72 Montg.Co. 159.

Wash.—Arbogast v. Linz, 39 P.2d 615, 180 Wash. 315.

25 C.J. p 133 note 42, p. 134 note 52.

93. Wash.—Shell v. Svenson, 159 P. 1076, 93 Wash. 40.

25 C.J. p 133 note 43.

94. Md.—State v. Boulden, 57 Md. 314.

25 C.J. p 133 note 44.

95. Mo.—State v. Emmerson, 74 Mo. 607.

have been incurred, and the exemption can be allowed without prejudice to the rights of creditors.⁹⁶

Claim for partnership property. Where a partner is allowed to sever his interest and to claim exemptions whenever the partnership property is levied on, he is entitled to a reasonable time within which to do so.⁹⁷

What constitutes reasonable time. What is a reasonable time of course will depend on the circumstances of the particular case,⁹⁸ and one of the circumstances to be considered is whether the delay in any way prejudiced the creditor.⁹⁹

Excuse for delay. The statutory time for making a claim is not extended by the pendency of replevin proceedings against the levying officer by a third person to recover the property levied on and to which the debtor is not a party.¹ A wife claiming the exemption, as head of the family, must make her claim within the statutory period, which cannot be extended on the ground that her husband had failed to claim the exemption in the first instance.²

After sale. It has been held that a claim out of the proceeds of sale in court would be too late,³ but there are circumstances which have been held sufficient to allow a claim then made,⁴ as where perishable property is sold after attachment under statutes providing for sale under such circumstances;⁵ and, under some statutes, it has been held that the claim may be made at any time before an order of court

appropriating such proceeds,⁶ and that, if the property is levied on and sold without a demand that a claim of exemption be made, the exemption may be claimed from the proceeds of the sale at any time before payment is made to the creditor.⁷

Necessity of notice of levy. The debtor is not bound to file a claim until he has notice of levy or until a reasonable time after receiving notice,⁸ unless, as under some statutes, he must file his claim within a certain number of days after notice.⁹ Where a statute requires the filing or the making of a claim to exemption by the principal debtor within a certain number of days after notice, and also provides that, in case of the refusal or neglect of the principal debtor to make the claim, the claim to his exemption may be made by his wife or children, but does not specify in their case any limit of time within which the claim must be made, their right to the claim is not controlled by the statutory provision which has reference only to the principal debtor but may be made within a reasonable time after notice.¹⁰

Attachment. If a statute expressly or impliedly requires the right of exemption to be passed on and adjudicated in attachment proceedings, defendant cannot for the first time after final judgment in such proceedings claim the attached property or debt as exempt from process issued on the judgment.¹¹ This rule does not apply when the statute merely exempts property from execution and attachment, or from forced sale, and does not require

96. Md.—State v. Boulden, 57 Md. 314.

Pa.—Williamson v. Krumbhaar, 19 A. 281, 132 Pa. 455.

25 C.J. p 133 note 40 [a].

97. Wis.—Ladwig v. Williams, 58 N. W. 1103, 87 Wis. 615.

25 C.J. p 133 note 48.

Right of partners to claim exemptions see supra § 65.

98. S.D.—Bowman v. Larsen, 220 N. W. 489, 53 S.D. 246—Meyers v. Coleman, 192 N.W. 184, 46 S.D. 244.

Wash.—Arbogast v. Linz, 39 P.2d 615, 180 Wash. 315.

25 C.J. p 134 note 49.

As question for jury see infra § 163.

99. Pa.—Bogar v. Chiles, Com.Pl., 3 Cumb.L.J. 52.

S.D.—Bowman v. Larsen, 220 N.W. 489, 53 S.D. 246—Noyes v. Belding, 59 N.W. 1069, 5 S.D. 603.

In the absence of a showing of lack of prejudice, a debtor's delay for nine months in asserting exemptions has been held to preclude relief against levy.

S.D.—Bowman v. Larsen, 220 N.W. 489, 53 S.D. 246.

1. S.D.—Furrow v. Zollars, 67 N.W. 612, 8 S.D. 522.

2. S.D.—Rames v. Norbraten, 272 N. W. 826, 65 S.D. 269.

3. U.S.—In re Stern, D.C.Ohio, 208 F. 488.

Pa.—Lancaster Trust Co. v. Gouchenauer, 6 Pa.Super. 209.

4. N.C.—Virginia-Carolina Chemical Co. v. Sloan, 48 S.E. 577, 136 N.C. 122.

25 C.J. p 134 note 54.

5. N.C.—Virginia-Carolina Chemical Co. v. Sloan, supra.

6. N.C.—Crow v. Morgan, 185 S.E. 668, 210 N.C. 153—Befarrah v. Spell, 100 S.E. 321, 178 N.C. 231.

In attachment, defendant may claim exemptions out of attached property at any time before it is appropriated to payment of debt.

N.C.—Commissioner of Banks v. Yelverton, 168 S.E. 505, 204 N.C. 441.

7. Miss.—Culpepper v. John B. Ellison & Sons, 114 So. 885, 148 Miss. 748.

8. Mo.—Rolla State Bank v. Borgfeld, 93 Mo.App. 62.

Pa.—Howard Bldg. & Loan Ass'n v. Philadelphia & R. R. Co., 102 Pa. 220.

25 C.J. p 134 note 56.

9. S.D.—Rames v. Norbraten, 272 N.W. 826, 65 S.D. 269—Furrow v. Zollars, 67 N.W. 612, 8 S.D. 522.

10. N.D.—Portal First International Bank v. Lee, 141 N.W. 716, 25 N.D. 197.

S.D.—Bowman v. Larsen, 220 N.W. 489, 53 S.D. 246—Noyes v. Belding, 59 N.W. 1069, 5 S.D. 603.

A claim by the wife of defendant for exemption and release of property garnished, made eighteen days after service of the garnishee summons, on the ground that the principal defendant had failed to make the claim, has been held timely.

S.D.—Harper v. Rundlett, 210 N.W. 743, 50 S.D. 450.

11. Ind.—Haas v. Shaw, 91 Ind. 384, 46 Am.R. 607.

25 C.J. p 134 note 59.

the right of exemption to be claimed or adjudicated in attachment proceedings.¹²

Garnishment. The rule of liberal construction applies as to the time when a claim for exemption must be filed in a garnishment proceeding, and under this rule the claim may be made within the time for the appearance or answer in the garnishee summons.¹³ The claim must be made seasonably, otherwise it will be deemed waived.^{13.5} What is a reasonable time under this rule will depend on the circumstances of each case.^{13.10}

While under some statutes the debtor may assert his exemption as against garnishment proceedings at any time before sale,¹⁴ under other statutes a judgment against the garnishee is an adjudication of the right to exemption and the debtor's claim must be made before judgment,¹⁵ or before payment of funds in the hands of the garnishee to the creditor, pursuant to a judgment.¹⁶ The debtor may assert his exemption where the garnishee has paid the money involved into court.^{16.5}

These rules assume that the debtor had notice of the garnishment or attachment.¹⁷ It has been held that, in the case of an insurance policy, a claim to the exemption may be made at any time before the proceeds of the policy are paid over,¹⁸ and, where the statute exempts wages absolutely, while an order made by a court in a proceeding in garnishment after judgment cannot be attacked collaterally, the garnishee afterward may set up facts showing the amount owing by such garnishee to the debtor to be exempt from attachment or execution.¹⁹ After defendant in garnishment has given bond for dissolution of the garnishment and the fund has been

paid over to him by the garnishee, he may interpose his claim.²⁰

Attachment execution. In cases of attachment execution under some statutes, defendant is not bound to make claim to exemption to the officer serving the attachment, for the officer has nothing to do with the collection of the debt and cannot have it appraised, but the claim may and must be made at the term to which the attachment is returnable, and before plaintiff has taken any step in the cause to his detriment, for want of notice of the claim, as by incurring costs, counsel fees, etc., if defendant has notice of the attachment.²¹ If the claim is made at the time the garnishee files his answer,²² or before the garnishee has answered the interrogatories propounded by plaintiff, it is in time.²³ It is too late, however, if not made until after the filing of the answer to interrogatories,²⁴ or if made by plea to the scire facias,²⁵ or on the trial between the attaching creditor and the garnishee.²⁶ If the debtor has not had notice or has not been served, he may and must make his claim within a reasonable time after notice,²⁷ and if the creditor has incurred expenses or costs between the return day of the writ and the time when the debtor filed his claim, the burden of proof is on the debtor to show when he received notice of the attachment and that he filed his claim within a reasonable time after receiving notice;²⁸ but, if no costs were incurred by the creditor between the return day of the writ and the filing of the claim to exemption by the debtor, the question of reasonable time and burden of proof does not arise.²⁹ The fact that no steps are taken by plaintiff in further prosecuting his suit for a long period of time will not excuse

12. Fla.—McMichael v. Grady, 15 So. 765, 34 Fla. 219.

25 C.J. p 134 note 60.

13. N.D.—Jessen v. Schiller, 179 N. W. 372, 46 N.D. 41.

13.5 Pa.—Hild Floor Mach. Co. v. Rudolph, 39 A.2d 457, 156 Pa.Super. 102.

13.10 Pa.—Hild Floor Mach. Co. v. Rudolph, 39 A.2d 457, 156 Pa.Super. 102.

14. Ariz.—Wilson v. Lowry, 52 P. 777, 5 Ariz. 335.

25 C.J. p 134 note 61.

15. Neb.—Scottsbluff Nat. Bank v. Pfeifer, 254 N.W. 494, 126 Neb. 852.

25 C.J. p 134 note 62.

16. Ark.—McDonald v. Case, 110 S. W.2d 39, 194 Ark. 1093.

Partial exemption

Debtor's claim, seeking to exempt certain properties from payments of debt, filed after fund in hands of

garnishee had been paid in good faith to creditor pursuant to judgment of court, while properly denied as to funds paid to creditor by garnishee, should have been allowed as to other property.

Ark.—McDonald v. Case, supra.

16.5 Ohio.—Mentel v. McCammon, 13 Ohio Cir.Ct. 280, 7 Ohio Cir.Dec. 320.

17. N.M.—New Mexico Nat. Bank v. Brooks, 49 P. 947, 9 N.M. 113.

25 C.J. p 134 note 63.

18. Miss.—Dreyfus v. Barton, 54 So. 254, 98 Miss. 758.

19. Neb.—Union Pac. R. Co. v. Smersh, 36 N.W. 139, 22 Neb. 751, 3 Am.S.R. 290.

20. Ala.—Skews v. Vancleave, 24 So. 850, 119 Ala. 418.

21. Pa.—Harlan v. Haines, 17 A. 248, 125 Pa. 48—Appeal of Bittenger, 76 Pa. 105.

25 C.J. p 135 notes 67, 68.

22. Pa.—Kuhn v. Warren Sav. Bank, 11 A. 440, 7 Pa.Cas. 432.

25 C.J. p 135 note 69.

23. R.I.—McKenna v. Lucas, 45 A. 101, 21 R.I. 509.

25 C.J. p 135 note 70.

24. Pa.—Pugh v. Bresnahan, 4 Kulp 311—Malany v. Entriiken, 7 Wkly. N.C. 374.

25. Pa.—Strouse v. Becker, 44 Pa. 206.

26. Pa.—Bancord v. Parker, 65 Pa. 336—Zimmerman v. Briner, 50 Pa. 535.

27. Pa.—Howard Bldg. & Loan Ass'n v. Philadelphia & R. R. Co., 102 Pa. 220.

25 C.J. p 135 note 74.

28. Pa.—In re Behler's Estate, 2 Pa. Dist. 324.

29. Pa.—In re Behler's Estate, supra.

defendant from making his claim to exemption within a reasonable time.³⁰

Foreclosure and other proceedings. An exemption in a fund in court should be claimed by the debtor while the matter is being adjudicated and before final decree.³¹ Where the income of a life estate in realty has been sequestrated to satisfy an execution, the right to an exemption will not be considered until the distribution of the funds collected by the sequestrator.³² As against other creditors, a claim to exemption in the surplus proceeds is good, if made within a reasonable time after the sale;³³ but it has been held that, where the surplus was paid into court and an auditor appointed to make distribution and the audit allowed to proceed to its close before defendant claimed his exemption, he was too late,³⁴ and it has even been held that a claim of exemption, made after a sale in proceedings on a mortgage, is too late as against a judgment creditor claiming the balance of the fund.³⁵ Where defendant in a pending action was by the court, on the application of a creditor of plaintiff, ordered to hold subject to the court's order any sum for which plaintiff might obtain judgment, and the court ordered defendant to pay the creditor's claim when plaintiff secured a judgment, after payment it is too late to claim exemption of the judgment in lieu of homestead, although an adjustment of an excessive payment is still to be made by plaintiff's creditor.³⁶

A mortgagor should assert his claim to exemption at the hearing for the appointment of a receiver in foreclosure.³⁷ He cannot make claim after the mortgaged property has been ordered to be sold,³⁸

and is not entitled to claim his exemption out of the proceeds derived from a foreclosure sale before the entire decree has been satisfied.³⁹

In partition proceedings, a debtor who is one of the part owners should claim his exemption when the matter is being adjudicated by the court on the intervention of his judgment creditors, as the decree in the partition proceedings is final as to the rights of the parties.⁴⁰

§ 132. — Form and Sufficiency

A claim of exemption asserted substantially in the manner prescribed by the statute is ordinarily sufficient, and no particular language is necessary unless it is expressly required. These rules apply as to stating the grounds for, and existence of, the exemption, the description and ownership of the property claimed as exempt, and the disclosure of other property.

Statutory provisions as to the mode in which the claim of exemption is to be made are to be liberally construed.⁴¹ The debtor must assert the claim substantially in the manner prescribed by the statute; otherwise it is equivalent to no claim at all, and may be disregarded by the officer.⁴² It has been held that the exemption must be asserted by an answer to the writ and not by exception thereto.^{42.5} A substantial compliance with the statute is sufficient, however, and technical objections will not defeat his claim.⁴³ Where partners claim their several exemptions, it is sufficient if each informs the officer making the levy and asks that he be permitted to make his selection.⁴⁴

Necessity of writing. Under some statutes, the claim need not be in writing,⁴⁵ and a mere demand

30. Pa.—Harlan v. Haines, 4 Pa.Co. 174.

31. Ark.—Williams v. Wheeler, 199 S.W. 898, 131 Ark. 581.

32. Pa.—Darby First Nat. Bank v. Harkins, 8 Del.Co. 134.

33. Ohio.—In re Bremer, 4 Ohio S. & C.P. 80.

34. Pa.—Gibbons v. Gaffney, 26 A. 24, 154 Pa. 48.

35. Pa.—Gibbons v. Cutler, 2 Del. Co. 214.

36. Ohio.—Green v. Fischer, 6 Ohio Dec., Reprint, 1138, 10 Am.L.Rec. 570.

37. Ind.—Storm v. Ermantrout, 89 Ind. 214.

38. Ind.—Slaughter v. Detiney, 15 Ind. 49.

39. Ind.—Broeker v. Morris, 85 N.E. 982, 42 Ind.App. 417.

40. Ark.—Williams v. Wheeler, 199 S.W. 898, 131 Ark. 581.

41. Wash.—Arbogast v. Linz, 39 P. 2d 615, 180 Wash. 315. 25 C.J. p 135 note 90.

Liberal construction of exemption laws generally see supra § 4.

42. Cal.—Bertozzi v. Swisher, 81 P. 2d 1016, 27 C.A.2d 739.

Mo.—Brown v. Hoffmeister, 71 Mo. 411.

S.D.—Shriver-Johnson Co. v. Hargraves, 220 N.W. 148, 53 S.D. 86, reheard 223 N.W. 315, 54 S.D. 367. Wash.—Northern Savings & Loan Ass'n v. Kneisley, 76 P.2d 297, 193 Wash. 372.

25 C.J. p 135 note 91.

42.5 Tex.—Abendroth v. Willacy County Water Control and Imp. Dist. No. 1, Civ.App., 175 S.W.2d 90, reversed on other grounds Willacy County Water Control and Imp. Dist. No. 1 v. Abendroth, 177 S.W.2d 936, 142 Tex. 320.

43. Mich.—Youdan v. Kelley, 255 N. W. 342, 267 Mich. 616.

Mont.—Corpus Juris cited in Williams v. Sorenson, 75 P.2d 784, 786, 106 Mont. 122.

W.Va.—Town of Summersville ex rel. McCue v. Cooper, 21 S.E.2d 669, 124 W.Va. 417.

25 C.J. p 136 note 92.

44. Wis.—O'Gorman v. Fink, 15 N. W. 771, 57 Wis. 649, 46 Am.R. 58.

Partnership or individual property

Where it is uncertain how much of the property against which execution for a partnership debt has been issued is partnership property, and how much belongs to the individual partners, a rule to strike off the partners' separate claims for exemption will be discharged without prejudice to plaintiff's right to attack any appraisal which may be made on such claims.

Pa.—Vandergrift v. Waters, 16 Pa. Dist. & Co. 266, 21 Del.Co. 271.

45. Pa.—Luxton v. Warren, 26 Pa. Dist. & Co. 597, 52 Montg.Co. 191. 25 C.J. p 136 note 94.

of the benefit of the exemption laws is sufficient,⁴⁶ except that, where the execution is against real estate, a verbal notice of the claim communicated to the sheriff, but not communicated by him to plaintiff, or acted on, is insufficient.⁴⁷ Under other statutes, however, a claim in writing is required.⁴⁸

Terms and language. It is not necessary that the claim shall be in any particular language, unless so required by the statute;⁴⁹ and, if the right to the exemption has been substantially asserted, it will not be defeated by formal and technical objections.⁵⁰ If the terms and wording of the law are followed in making the claim, it is sufficient;⁵¹ but the statement must be one of facts, and not of mere conclusions of law,⁵² and, although the claim is in the language of the statute, if it states a mere conclusion of law, it is insufficient.⁵³

The claim must be a claim of an exemption in the property, and not merely an assertion of owner-

ship therein.⁵⁴ The claim should be presented in such form that the court may determine from it whether the property seized is exempt.⁵⁵ It is sufficient if the debtor indicates clearly to the court the grounds of his claim and the facts to support it,⁵⁶ and in interpreting a claim the court must define the language used in its ordinary sense.⁵⁷ In some states, the test seems to be whether the claim is in language sufficiently clear to be understood by the officer.⁵⁸

Grounds and existence of exemption. It is not necessary for the debtor to cite the law under which he makes his claim,⁵⁹ but the facts averred should be legally sufficient to establish a case of exemption within the letter or the spirit of the statute.⁶⁰ It has even been held that a claimant may be entitled to his exemption, even though he has mistaken the grounds of his claim and has based it on one section of the statute when he should have brought it under another section.⁶¹ Where the statute re-

46. Pa.—Wilson v. McElroy, 32 Pa. 82.

25 C.J. p 136 note 95.

47. Pa.—McCloskey v. Moulder, 8 Pa.Co. 156.

25 C.J. p 136 note 95 [a].

48. Ala.—Courie v. Godwin, 8 So. 9, 89 Ala. 569.

25 C.J. p 136 note 96.

49. Iowa.—Green v. Blunt, 12 N.W. 762, 59 Iowa 79.

Mont.—Corpus Juris quoted in Williams v. Sorenson, 75 P.2d 784, 786, 106 Mont. 122.

Pa.—Luxton v. Warren, 26 Pa.Dist. & Co. 597, 52 Montg.Co. 191.

25 C.J. p 136 note 97.

50. U.S.—U. S. v. Hackett, D.C.Mo., 123 F.Supp. 106.

Mich.—Youdan v. Kelley, 255 N.W. 342, 267 Mich. 616.

Mont.—Williams v. Sorenson, 75 P. 2d 784, 106 Mont. 122.

25 C.J. p 136 note 98.

51. Mont.—Williams v. Sorenson, supra.

25 C.J. p 136 note 99.

52. Cal.—Bertozzi v. Swisher, 81 P. 2d 1016, 27 C.A.2d 739—Petrich v. Francis, 256 P. 444, 83 C.A. 72.

Iowa.—First Nat. Bank v. Larson, 239 N.W. 134, 213 Iowa 468.

Mont.—Williams v. Sorenson, 75 P. 2d 784, 106 Mont. 122.

An affidavit in support of exemption claim following statutory language, but asserting ultimate facts, was sufficient to make prima facie case calling for countervailing proof, as against contention that affidavit stated mere conclusions of law. Mont.—Williams v. Sorenson, supra.

Statements held mere legal conclusions

(1) That automobile is necessary

to earn living without showing that at time of attachment or before it was so used.

Iowa.—First Nat. Bank v. Larson, 239 N.W. 134, 213 Iowa 468.

(2) That it will be essential to have tools to support affiant and family.

Iowa.—First Nat. Bank v. Larson, supra.

(3) That money garnisheed was exempt from execution as earnings of seagoing fisherman.

Cal.—Petrich v. Francis, 256 P. 444, 83 C.A. 72.

(4) Other statements.

Cal.—Le Font v. Rankin, App., 334 P. 2d 608.

53. Cal.—Le Font v. Rankin, supra—Bertozzi v. Swisher, 81 P.2d 1016, 27 C.A.2d 739.

Fay Securities Co. v. Bowering, 288 P. 41, 106 C.A.Supp. 771.

54. Mich.—McCausey v. Hoek, 124 N. W. 570, 159 Mich. 570, 18 Ann.Cas. 945.

55. Ky.—Harrison v. Kuntz, 8 Ky. Op. 688.

56. Mo.—Rolla State Bank v. Borgfelt, 93 Mo.App. 62.

25 C.J. p 136 note 2.

57. S.D.—Smith v. Miller, 237 N.W. 829, 58 S.D. 570.

Husband in claiming exemption of "wages due to my wife" admitted that wages were wife's separate property; hence they were not subject to exemption.

S.D.—Smith v. Miller, supra.

58. Pa.—Luxton v. Warren, 26 Pa. Dist. & Co. 597, 52 Montg.Co. 191.

25 C.J. p 136 note 3.

59. Mo.—Rolla State Bank v. Borgfelt, 93 Mo.App. 62.

25 C.J. p 136 note 4.

60. Cal.—Bertozzi v. Swisher, 81 P. 2d 1016, 27 C.A.2d 739.

Ga.—Tarver v. Beneficial Loan Soc. of Macon, 148 S.E. 288, 39 Ga.App. 646.

Neb.—Scottsbluff Nat. Bank v. Pfeiffer, 254 N.W. 494, 126 Neb. 852.

N.D.—Imperial Elevator Co. v. Warren, 217 N.W. 523, 56 N.D. 329.

Exemption of horse

Allegations to dissolve attachment of defendant's race horse that the horse is defendant's sole means of support, that defendant is a laborer who habitually earns his living from money earned by racing the horse, and that by the attachment defendant is precluded from training the horse and thereby deprived of earning a livelihood, are insufficient to establish an exemption under statute exempting two horses by the use of which a laborer habitually earns his living, since the horses so exempted are intended in good faith to be used as instruments of husbandry or labor and must be work horses.

Cal.—Bertozzi v. Swisher, 81 P.2d 1016, 27 C.A.2d 739.

A claim that personalty conveyed by bill of sale securing a loan is exempt does not attack the validity of the lender's security, but alleges that the exemption supersedes the security on the ground that the instrument is a mortgage, and not a bill of sale passing title to the property.

Ga.—Tarver v. Beneficial Loan Soc. of Macon, 148 S.E. 288, 39 Ga.App. 646.

61. U.S.—Nez Perce Bank v. Pindel, C.C.A.Idaho, 193 F. 917.

25 C.J. p 136 note 5.

quires that claimant be a resident, that fact must be alleged.⁶²

The claim need not state that the property was exempt at the time of service of the writ, where no such statement is required by the statute.⁶³ Where the statute exempts earnings which are necessary for the use of the family, the fact that the earnings claimed to be exempt are necessary should appear in the claim.⁶⁴ Under a statute declaring exempt sufficient provisions to sustain the family for a year, a claim for exemption must state what provisions and provender, if any, the debtor has on hand,⁶⁵ and a claim that the debtor has not sufficient provisions for himself and family for one year is not sufficient.⁶⁶ The debtor must claim only what the statute allows him to hold.⁶⁷

Description and ownership of property. If the statute does not require the application for an exemption to specify the particular property which defendant wishes to claim as exempt, it is not necessary for it to do so.⁶⁸ Such a specification is required, however, under some statutes.⁶⁹ Under some statutes where an exemption is sought by the wife, it must appear whether the property which she seeks as exempt is hers or her husband's,⁷⁰ but, where the claim is by the husband, it is not necessary for him to aver that the property is his.⁷¹ A statutory provision that notice of ownership be given by one claiming property as exempt to the officer

is for the officer's protection,⁷² and, where the officer is protected by the creditor's indemnifying bond, insufficiency of the notice becomes immaterial.⁷³

Provisions in a statute relating to cases in which a third person is claiming to be the owner of property levied on, requiring a statement of the extent and nature of claimant's interest, the consideration paid, and from whom it was acquired, are not applicable to cases in which defendant admitting his ownership seeks to have property released on the ground that it is exempt from execution.⁷⁴ In garnishment, if the garnishee's answer admits generally indebtedness to defendant, the latter's claim to the fund garnished as being exempt is insufficient unless he gives bond to dissolve the garnishment or traverses the garnishee's answer.⁷⁵

Disclosure of other property. Where a debtor is required to surrender or point out to the officer all property he owns subject to execution, other than that selected or specifically exempt, as explained supra § 8, the claim must contain a disclosure of other property liable to execution, and must furnish a description thereof,⁷⁶ and his disclosure must be full and complete,⁷⁷ and his claim must contain a statement that the schedule is a complete list of all his property.⁷⁸

Signature. A notice of a claim of exemptions signed by two persons is sufficient as a claim for either separately,⁷⁹ and the fact that a claim of

62. Neb.—Neligh First Nat. Bank v. Lancaster, 74 N.W. 858, 54 Neb. 467.

63. S.D.—Drake Marble & Tile Co. v. Bjoraas, 160 N.W. 725, 38 S.D. 88.

64. Mont.—Williams v. Sorenson, 75 P.2d 784, 106 Mont. 122.

N.Y.—Seeley v. Connors, 95 N.Y.S. 1109, 109 App.Div. 279.

An affidavit in support of claim of exemption of earnings is sufficient, notwithstanding failure to aver directly that affiant's family was supported in whole or in part by his labor, where affidavit averred that affiant was head of a family and that his earnings were necessary for support of himself and his family. Mont.—Williams v. Sorenson, 75 P.2d 784, 106 Mont. 122.

65. Ky.—Tharp v. Tharp, 119 S.W. 814.

66. Ky.—Tharp v. Tharp, supra.

67. Mo.—Brown v. Hoffmeister, 71 Mo. 411.
25 C.J. p 137 note 11.

68. Ind.—Kelley v. McFadden, 80 Ind. 536—Mark v. State, 15 Ind. 98.

Pa.—Luxton v. Warren, 26 Pa. Dist. & Co. 597, 52 Montg.Co. 191.

69. Ark.—Friedman v. Sullivan, 2 S. W. 785, 48 Ark. 213.

Proceeds of life insurance

Claim of exemption alleging that property referred to in answers of garnishees was claimant's property and was proceeds and avails of life and accident policies and exempt from liability for payment of the judgment was sufficient. Wash.—Northern Savings & Loan Ass'n v. Kneisley, 76 P.2d 297, 193 Wash. 372.

70. Ga.—Blacker v. Dunlop, 21 S.E. 135, 93 Ga. 819—Coffee v. Ababs, 65 Ga. 347.
25 C.J. p 137 note 14.

71. Ga.—Braswell v. McDaniel, 74 Ga. 319.

72. Iowa.—Blair v. Fritz, 144 N.W. 611, 162 Iowa 716.

73. Iowa.—Blair v. Fritz, supra.

74. Iowa.—Sterman v. Hann, 141 N. W. 934, 160 Iowa 356, 46 L.R.A., N.S., 287.

75. Ga.—Hamilton v. Hardwick, 170 S.E. 826, 47 Ga.App. 513—Sam Weichselbaum Co. v. Allen, 92 S.E. 1014, 20 Ga.App. 204.

Dissolution of garnishment on se-

curity by claimant generally see Garnishment § 292.

76. N.D.—Imperial Elevator Co. v. Warren, 217 N.W. 523, 56 N.D. 329.
25 C.J. p 137 note 20.

Reference to attached schedule of property held sufficient.

N.D.—Imperial Elevator Co. v. Warren, supra.

77. Wash.—U. S. Fidelity & Guaranty Co. v. Hollenshead, 98 P. 749, 51 Wash. 326.
25 C.J. p 137 note 21.

78. S.D.—Shriver-Johnson Co. v. Hargraves, 220 N.W. 148, 53 S.D. 86, reheard 223 N.W. 315, 54 S.D. 367.

Claim held insufficient

A claim for exemption of property held under garnishment, stating that, at the time of service of the garnishee summons and affidavit, the debtor had "and now has the following property," without stating that the list that followed is a schedule of all the property owned by him, is insufficient. S.D.—Shriver-Johnson Co. v. Hargraves, supra.

79. Cal.—Stanton v. French, 23 P. 355, 83 C. 194, 25 Am.S.R. 174.

exemption made and signed by a man is also signed by his wife does not invalidate his claim.⁸⁰

Verification. A claim of exemption need be under oath only where it is so required by the statute.⁸¹ An agreed statement that debtor has claimed his exemption is not a sufficient compliance with a statute requiring a verified claim.⁸²

§ 133. — Presentation and Filing

The claim of exemption should be presented and filed with the officer or court, and in the manner prescribed by the statute.

Under some statutes, the claim for exemption may be made to, or filed with, the officer,⁸³ after giving a specified notice to the opposite party,⁸⁴ and it may be made when he is absent from his office,⁸⁵ if there are no provisions to the contrary. If it is properly filed, it is not affected by the fact that the officer attaches it by mistake to an execution in another case, if no prejudice is caused thereby to the creditor.⁸⁶ Under other statutes, however, it is not necessary that the claim should be made in the first instance to the officer.⁸⁷ Under still other statutes the procedure depends on whether a property levied on is money or property other than money, in the former instance the law requiring that the claim should be filed with the court, and in the latter case lodged with the officer.⁸⁸ Where a statute requires a defendant in garnishment proceedings claiming exemption to file his claim in writing, verified by oath, in the court in which such proceedings are pending, such claim must be filed in accordance with the statute to entitle defendant to claim his exemption.⁸⁹

In Georgia the constitutional exemption is perfected by an application, provided applicant is a resident of the county,⁹⁰ to the ordinary of the county which, when approved, is recorded.⁹¹ The statutory or short homestead is procured by merely filing with the ordinary the debtor's schedule of property claimed to be exempt,⁹² which is recorded by the ordinary in a book kept by him for that purpose.⁹³ The ordinary's acts in receiving and recording the schedule are ministerial only,⁹⁴ and although a prima facie case is made by proof that the property levied on is exempt and included in the homestead, set apart,⁹⁵ if applicant fails to comply with the statute the recording of the claim is a nullity,⁹⁶ and cannot be amended,⁹⁷ and moreover a creditor may attack the exemption by showing that it was illegal.⁹⁸

§ 134. — Waiver of Objections

Objection to the manner of making a claim of exemption may be waived by the officer receiving it or by the creditor.

If the officer gives a reason for refusing a claim of exemptions, he thereby waives all other objections to the manner of making it;⁹⁹ and a creditor who appears and contests the debtor's right to exemption thereby waives a statutory requirement as to notice of the claim.¹

§ 135. — Costs

The matter of costs in proceedings to enforce and protect a claim of exemption is considered infra § 164.

Examine Pocket Parts for later cases.

80. Cal.—Stanton v. French, supra.

81. Ala.—Young v. Hubbard, 14 So. 569, 102 Ala. 373.

Iowa.—Glover v. Narey, 60 N.W. 531, 92 Iowa 286.

82. Ala.—Courie v. Goodwin, 8 So. 9, 89 Ala. 569.

83. Ark.—Griffin v. Puryear-Meyer Grocery Co., 151 S.W.2d 656, 202 Ark. 495.

Ill.—McCluskey v. McNeely, 8 Ill. 578.
25 C.J. p 137 note 27.

84. Ark.—Griffin v. Puryear-Meyer Grocery Co., 151 S.W.2d 656, 202 Ark. 495.

85. Ill.—McCluskey v. McNeely, 8 Ill. 578.

86. Pa.—Shields v. Jones, 18 Lanc.L. Rev. 350.
25 C.J. p 137 note 27 [a].

87. Ohio.—Rancourt v. Hahn, 30 Ohio Cir.Ct. 245.
25 C.J. p 137 note 29 [a].

88. Ala.—Todd v. McCravey, 77 Ala. 468.

89. Ala.—Courie v. Goodwin, 8 So. 9, 89 Ala. 569.
25 C.J. p 137 note 31.

Making of claim to garnishee was not sufficient.
Pa.—Hild Floor Mach. Co. v. Rudolph, 39 A.2d 457, 156 Pa.Super. 102.

Reverification

Where judgment debtor's claim of exemption of funds in garnishee's hands was verified in afternoon, but clerk's office was closed, claim was not void because filed next morning at 8:55 without reverification.
Ala.—Nunez v. Borden, 147 So. 166, 226 Ala. 381.

90. Ga.—Rutherford v. Wright, 41 Ga. 128.
25 C.J. p 138 note 32 [d].

91. Ga.—Carrie v. Carnes, 88 S.E. 949, 145 Ga. 184.
25 C.J. p 138 note 32.

92. Ga.—Kendall v. Parker, 91 S.E. 31, 146 Ga. 260.
25 C.J. p 138 note 33.

93. Ga.—Stinson v. Hirsch, 53 S.E. 1011, 125 Ga. 149.
25 C.J. p 138 note 34.

94. Ga.—Stinson v. Hirsch, supra—
Marcum v. Washington, 34 S.E. 585, 109 Ga. 296.

95. Ga.—Evans v. Barrett, 69 S.E. 1083, 8 Ga.App. 612.

96. Ga.—Stinson v. Hirsch, 53 S.E. 1011, 125 Ga. 149.
25 C.J. p 138 note 34 [b] (1), [c].

97. Ga.—Stinson v. Hirsch, supra.
25 C.J. p 138 note 34 [d].

98. Ga.—Piedmont Nat. Bldg. & Loan Ass'n v. Bryant, 41 S.E. 661, 115 Ga. 417.

25 C.J. p 138 note 34 [b] (2), [c].
99. Pa.—Wilson v. McElroy, 32 Pa. 82.

1. Ark.—Garrett v. Wade, 46 Ark. 493, followed in Brown v. Doneghey, 46 Ark. 497.

§ 136. Schedule or Inventory

- a. In general
- b. Time
- c. Form and sufficiency
- d. Filing or delivery
- e. Notice or record
- f. Operation and effect

a. In General

Where the statute so provides, a debtor may be required to schedule the property which he claims as exempt or to schedule all of his property.

Under the provisions of some statutes, a debtor may claim his personal property as exempt by the filing of a schedule thereof in the manner required by law,² and such a statute may apply as to particular exemptions irrespective of any prior waiver by the debtor of either homestead or exemption rights.³ A schedule by the debtor of his property in connection with the claim of exemption must be made when required by statute.⁴ Under some statutes a schedule must be filed whether the debtor has more or less than the amount of property necessary to make up the total amount exempted to him,⁵ while under other statutes a schedule need be made only where the debtor has property in excess of the amount exempt,⁶ and need not be made where the debtor has no property other than that levied on, and he so states under oath.⁷ A statute which provides for the filing of an inventory where articles of personal property or choses in action are garnished and claimed as exempt applies to personal property other than wages,⁸ but does not apply to wages.⁹

If an execution issues to one county, the inventory and appraisal need not be made in all the counties where the debtor has property.¹⁰

Effect of failure to file. If the inventory which is required by statute to be filed is not filed, plaintiff is entitled, without tendering issue, to an order subjecting the property to process.¹¹ However, if he does tender issue and proceeds to trial, he waives his right to claim a default judgment on that ground.¹²

b. Time

The inventory or schedule must, unless there is a valid excuse for the delay, be filed or presented within the time prescribed by statute, or, in the absence of a statutory requirement, within a reasonable time.

The inventory or schedule must be filed or presented within the time, if any, prescribed by statute, or within a reasonable time if no time is prescribed.¹³ In some states it must accompany the claim;¹⁴ but a supplemental schedule, if called for by the creditor, may be filed at any time before issues are formed.¹⁵

Excuses for delay; objection. A requirement that the debtor file a written schedule of property claimed to be exempt before sale may be relaxed if unavoidable casualty intervenes.¹⁶ If the officer fails to meet all the statutory requirements in giving notice of the levy to the debtor, the debtor may be excused from presenting his schedule within the statutory time.¹⁷ So, if the officer levying an execution misleads the debtor in regard to it, so that the debtor for that reason fails to file or present his schedule within the time prescribed by statute, he may file or present it after that time.¹⁸ If the officer gives the parties time to compromise their differences, and the negotiations fail, he should give the debtor a reasonable time after failure within which to file his schedule.¹⁹

2. Ark.—P. Crigler & Son v. Gire, 83 S.W.2d 529, 190 Ark. 1107.

3. Ga.—Kemp v. Swainsboro Ice & Fuel Co., 169 S.E. 700, 47 Ga.App. 99.

4. Ark.—Griffin v. Puryear-Meyer Grocery Co., 151 S.W.2d 656, 202 Ark. 495.

Ga.—Clark v. Prince, 144 S.E. 40, 38 Ga.App. 412.

N.D.—Dakota Nat. Bank of Fargo v. Salzwedel, 3 N.W.2d 468, 71 N.D. 643.

25 C.J. p 138 note 38.

Mere notice of intention

Where debtor notified judgment creditor that he intended to file schedule of claimed exemptions, and debtor's attorney who was present when debtor's personalty was sold at public sale gave oral public notice of debtor's intention to claim exemption, and schedule of exemptions was filed with the justice of the

peace more than an hour after sale had been concluded, debtor could not recover property sold, since one who claims his property is exempt must file written schedule with the justice of the peace who issued the execution before sale and mere notice is not sufficient.

Ark.—Andrews v. Briggs, 158 S.W. 2d 269, 203 Ark. 714.

5. Ark.—Settles v. Bond, 4 S.W. 286, 49 Ark. 114.

Ill.—Blair v. Parker, 4 Ill.App. 409.

6. Ark.—Griffin v. Batterall Shoe Co., 207 S.W. 439, 137 Ark. 37.

7. Ala.—Weinstein v. Yielding, 50 So. 126, 162 Ala. 259.
25 C.J. p 138 note 41.

8. Ala.—Roden v. Brown, 15 So. 598, 103 Ala. 324.
25 C.J. p 138 note 43.

9. Ala.—Courie v. Goodwin, 8 So. 9, 89 Ala. 569.

10. Mich.—Alvord v. Lent, 23 Mich. 369.

11. Ala.—Ex parte Redd, 73 Ala. 548.

12. Ala.—Pilcher v. Chaffin, 57 So. 1014, 3 Ala.App. 660.

13. Ill.—Alden v. Yeoman, 29 Ill. App. 53—Griffin v. Maxwell, 23 Ill. App. 405.

14. Ala.—Roden v. Brown, 15 So. 598, 103 Ala. 324.

Ark.—Guise v. State, 41 Ark. 249.

15. Ala.—Roden v. Brown, 15 So. 598, 103 Ala. 324.

16. Ark.—Andrews v. Briggs, 158 S.W.2d 269, 203 Ark. 714.

17. Ill.—Gibson v. People, 122 Ill. App. 217.
25 C.J. p 139 note 59.

18. Ill.—Morrissey v. Feeley, 36 Ill. App. 556.

19. Ill.—Pelkey v. People, 11 Ill. App. 82.

If the officer receives a schedule without objection, he cannot afterward escape its effect on the ground that it was not presented in time.²⁰

c. Form and Sufficiency

- (1) In general
- (2) Listing and specification of property
- (3) Disclosure of property
- (4) Claim of exemption
- (5) Right to exemption
- (6) Signature and verification
- (7) Objections and amendment

(1) In General

The schedule or inventory must comply substantially with statutory provisions as to form, although the statutes must be liberally construed and technical objections will not prevail.

The schedule or inventory must comply substantially with statutory provisions as to form.²¹ Such provisions must be liberally construed, however; technical objections will not be allowed to prevail,²² and, if the schedule is sworn to and the claim is in substantial compliance with the statutory requirements, the officer cannot refuse to set apart the property.²³ Unless the statute so requires, the inventory need not be made separately from the claim, but it may be made on the same paper and as a part of the claim verified by the same oath.²⁴

(2) Listing and Specification of Property

A schedule should list separately each article of a distinct kind, or of a distinct quality, grade, or description of the same kind, so as to enable the appraisers readily to identify and to fix the value of each article.

A schedule should list separately each article of a distinct kind, or of a distinct quality, grade, or description of the same kind,²⁵ so as to enable the appraisers readily to identify²⁶ and to fix the value of²⁷ each article. A schedule of property in distinct groups, each lumping together miscellaneous articles, is insufficient.²⁸ Where the only property owned by the debtor is money and the claim for exemption is for the full amount of the debt, however a sworn statement that the sum attached constituted all of claimant's personal property at the time the suit was brought may be a sufficient inventory.²⁹

Value. Where the statute provides for both a schedule and an appraisal, the schedule does not take the place of the appraisal as determining values, and hence it is immaterial whether it shows the debtor's property to be worth more or less than the statutory amount or whether it shows it to be of any value whatever.³⁰

Effect of defects. A schedule which does not purport to specify any particular property as exempt is, in at least one jurisdiction, void;³¹ but a mere vague and uncertain description will not be fatal if the property is later identified.³²

(3) Disclosure of Property

Statutes which require a debtor to make a schedule or inventory frequently require that it shall include all of his property, and property omitted from the schedule will not be entitled to exemption, although omission of some articles generally does not affect the debtor's right to exemption of articles actually scheduled.

Statutes which require a debtor to make a schedule or inventory frequently require that the sched-

20. Ill.—Taylor v. Beach, 14 Ill.App. 259.

21. N.D.—Pfeiffer v. Hatton, 118 N. W. 19, 18 N.D. 144.
25 C.J. p 139 note 62.

22. Ind.—Gregory v. Latchem, 53 Ind. 449.
25 C.J. p 139 note 63.

23. Neb.—Smith v. Johnson, 62 N. W. 217, 43 Neb. 754.

24. Ala.—Decatur Mercantile Co. v. Deford, 9 So. 454, 93 Ala. 347.

25. Ark.—Griffin v. Puryear-Meyer Grocery Co., 151 S.W.2d 656, 202 Ark. 495.

Ga.—Worley v. Arnold, 41 S.E.2d 568, 74 Ga.App. 772—Clark v. Prince, 144 S.E. 40, 38 Ga.App. 412.
25 C.J. p 139 note 68, p 140 note 69.

Notice to purchaser

In Georgia, in order for a statutory or short homestead to be superior to the title of a bona fide purchaser without actual notice, the schedule of the property claimed as

such homestead must contain a description sufficiently definite to impart constructive notice.

Ga.—Barfield v. Reynolds Banking Co., 149 S.E. 302, 40 Ga.App. 305.
25 C.J. p 139 note 68 [c] (2), (4).

26. Ala.—Tonsmere v. Buckland, 6 So. 904, 88 Ala. 312.
25 C.J. p 139 note 68.

27. Ark.—Farris v. Gross, 87 S.W. 633, 75 Ark. 391, 5 Ann.Cas. 616.
25 C.J. p 140 note 69.

28. Ala.—Tonsmere v. Buckland, 6 So. 904, 88 Ala. 312.
Cal.—Perfection Paint Products v. Johnson, 330 P.2d 829, 164 C.A.2d 739.
25 C.J. p 140 note 70.

29. Ala.—Johnson v. Huntsville Grocery Co., 65 So. 441, 10 Ala.App. 479.

30. Ark.—Weller v. Moore, 7 S.W. 130, 50 Ark. 253.
S.D.—Millerke v. Reiley, 141 N.W. 136, 31 S.D. 342.

31. Ga.—Kendall v. Parker, 91 S.E. 31, 146 Ga. 260.

Worley v. Arnold, 41 S.E.2d 568, 74 Ga.App. 772—Clark v. Prince, 144 S.E. 40, 38 Ga.App. 412.

32. Ill.—Keenan v. Drew, 144 Ill. App. 388.

Grouping

A grouping together of different kinds of property, such as to render the listing in some degree defective, does not render an inventory void where it appears that all the property described is found at the place designated and is appraised.

Neb.—Farquhar v. Hibben, 57 N.W. 290, 38 Neb. 556.

Schedule held not void

Schedule enumerating household effects claimed exempt has been held not void, but sufficient to identify property, on being aided by parol proof that property constituted household effects possessed by applicant as head of family.

Ga.—Clark v. Prince, 144 S.E. 40, 38 Ga.App. 412.

ule or inventory shall include all of his property,³³ and the schedule must show that this requirement has been complied with.³⁴ Under some statutes, however, the schedule need not include property other than that which he claims as exempt.³⁵ A statutory requirement that claimant file two lists, one of all property owned by him and another of property claimed as exempt, is satisfied by a single list when the debtor claims all his personalty as exempt.³⁶

The schedule need include only the property owned by the debtor at the time the schedule is signed and sworn to,³⁷ unless a statute expressly requires the inclusion of property owned by him as of some other time.³⁸

Property omitted from the schedule will not be entitled to exemption³⁹ independently of any question of fraud, inadvertency, or mistake,⁴⁰ except that of the levying officer or of some third person interested in the collection of the execution;⁴¹ and a schedule omitting part of the debtor's property has even been held to be invalid.⁴² The omission of some articles generally does not affect the debtor's right to exemption of articles actually scheduled, however,⁴³ especially where the omission is not with fraudulent intent.⁴⁴

(4) Claim of Exemption

Where the statute requires a debtor to specify the particular property which he claims as exempt, a schedule of property which does not claim it or any portion of it as exempt is fatally defective.

Where the statute requires a debtor to specify the particular property which he claims as exempt, a schedule of property which does not claim it or any portion of it as exempt is fatally defective.⁴⁵

(5) Right to Exemption

Under some statutes the inventory must be accompanied by a verified statement of the debtor showing his right to the exemption claimed, or by a statement of the capacity in which he claims an exemption.

Under some statutes the inventory must be accompanied by a verified statement of the debtor showing his right to the exemption claimed,⁴⁶ or by a statement of the capacity in which he claims an exemption.⁴⁷ The affidavit should show that the debt sued for was a debt by contract,⁴⁸ and that it was contracted subsequent to the passage of the exemption laws.⁴⁹ In some jurisdictions the affidavit must show that claimant is a resident of the state.⁵⁰ The affidavit is also sometimes required to show that claimant is the head of a family,⁵¹ although it has also been held that it need not show this fact in the absence of a statutory requirement.⁵²

(6) Signature and Verification

The schedule or inventory must, if required by statute, be properly signed and verified.

The schedule or inventory must, if required by statute, be properly signed⁵³ and verified.⁵⁴ In such case the officer may disregard a schedule that is not sworn to;⁵⁵ but, if the schedule is sworn to, and the claim is in substantial compliance with the requirements of a statute, the officer cannot refuse to

33. Ark.—Griffin v. Puryear-Meyer Grocery Co., 151 S.W.2d 656, 202 Ark. 495—Cain v. Chennault, 110 S.W.2d 1063, 195 Ark. 141.

25 C.J. p 138 note 38, p 140 note 75.

34. Ind.—Eisenhauer v. Dill, 33 N.E. 220, 6 Ind.App. 188.

N.D.—Pfeifer v. Hatton, 118 N.W. 19, 18 N.D. 144.

25 C.J. p 140 note 76.

35. N.D.—Jangula v. Bobb, 213 N.W. 27, 55 N.D. 279.

36. Wash.—Wiser v. Thomas, 80 P. 854, 39 Wash. 40.

37. Ill.—Taylor v. Beach, 14 Ill.App. 259.

38. Date of issuance of writ

By express provisions of some statutes, the inventory should include property which the debtor owned at the time of the issuance of the writ; the appointment of a receiver is an issuance of the writ within the meaning of this provision. Ind.—H. C. Smith Coal Co. v. Finley, 131 N.E. 5, 190 Ind. 481.

39. N.D.—Dakota Nat. Bank of Fargo v. Salzwedel, 3 N.W.2d 468, 71 N.D. 643.

40. Ill.—Burns v. Turner, 193 Ill. App. 172.

25 C.J. p 140 note 79.

41. Ill.—Burns v. Turner, supra—McLean v. Hunter, 192 Ill.App. 450.

42. Ark.—Ward v. Nu-Wa Laundry Cleaners, 170 S.W.2d 381, 205 Ark. 713—Cain v. Chennault, 110 S.W.2d 1063, 195 Ark. 141.

43. S.D.—Drake Marble & Tile Co. v. Bjoraas, 160 N.W. 725, 38 S.D. 88.

25 C.J. p 140 note 81.

44. Ill.—Keenan v. Drew, 144 Ill. App. 388.

N.D.—Wagner v. Olson, 54 N.W. 286, 3 N.D. 69.

45. Ark.—Guise v. State, 41 Ark. 249.

S.D.—Drake Marble & Tile Co. v. Bjoraas, 160 N.W. 725, 38 S.D. 88.

46. Neb.—Neligh First Nat. Bank

v. Lancaster, 74 N.W. 858, 54 Neb. 467.

25 C.J. p 140 note 84.

47. W.Va.—Stein v. Staats, 81 S.E. 1132, 74 W.Va. 357.

25 C.J. p 140 note 85.

48. Ark.—Huffman v. Thompson, 41 S.W. 428, 64 Ark. 196.

49. Ala.—Ely v. Blacker, 20 So. 570, 112 Ala. 311.

50. Ark.—Porter v. Navin, 12 S.W. 705, 52 Ark. 352.

25 C.J. p 141 note 88.

51. Neb.—Neligh First Nat. Bank v. Lancaster, 74 N.W. 858, 54 Neb. 467.

52. N.D.—Webster v. McGauvran, 78 N.W. 80, 8 N.D. 274.

53. Ill.—Cook v. Bohl, 8 Ill.App. 293.

25 C.J. p 141 note 91.

54. Ill.—Griffin v. Maxwell, 23 Ill. App. 405.

25 C.J. p 141 note 92.

55. Ind.—Huseman v. Sims, 4 N.E. 42, 104 Ind. 317.

25 C.J. p 141 note 93.

set apart the property on the ground of alleged perjury in the affidavit.⁵⁶

In at least one jurisdiction, the schedule must be signed and verified by the debtor himself, and a signing or verification by his attorney is insufficient.⁵⁷ The inventory should be verified at the very time it is filed, and not before.⁵⁸ The schedule may be verified by the same affidavit as the claim.⁵⁹ The verification need only state that the schedule contains a list of all the debtor's personal property on the date of the oath.⁶⁰

(7) Objections and Amendment

The officer is not bound to accept a schedule which is not in proper form, but his failure to object to its sufficiency at the time it is filed or delivered to him will not estop him from later contesting its sufficiency. The allowance of a new or amended inventory, where objection has been made to the original, after expiration of the time for filing an inventory as of right is discretionary with the court.

The officer is not bound to accept a schedule which is not in proper form,⁶¹ but it is not necessary for him to object to the sufficiency of the schedule at the time it is filed or delivered to him,⁶² and his failure to do so will not estop him from later contesting its sufficiency.⁶³ However, an officer may be estopped to raise objections to defects the existence of which may be attributed to his own dereliction of duty to the debtor.⁶⁴ The officer is bound to accept a proper schedule, and cannot dispute the truth of it.⁶⁵

Amendment. Where a defective inventory is filed and objected to, the allowance of filing of a new or amended inventory after expiration of the time within which defendant may file an inventory as of

right is discretionary with the trial court.⁶⁶ A schedule may be amended so as to include property as to which the debtor is entitled to an exemption,^{66.5} or so as to exclude property as to which the debtor is not entitled to an exemption;⁶⁷ and the fact that the debtor delivered his schedule unsigned has been held not to preclude him from enforcing his right to exemption claimed therein, where the omission was inadvertent and he subsequently offered to sign the schedule or make another.⁶⁸ A schedule has been held not amendable, however, to cure a mistake of law.⁶⁹

The refusal of an officer to allow an execution debtor to amend his schedule has been held not to render the officer liable.⁷⁰

d. Filing or Delivery

Express provisions of the statute as to filing or delivery of the schedule or inventory must be complied with.

Express provisions of the statute as to the filing or delivery of the schedule or inventory,⁷¹ as, for example, provisions as to the particular officer with whom it shall be filed or to whom it shall be delivered,⁷² must be complied with. Where the statute requires the filing of the schedule with the justice, a filing with the constable is not sufficient;⁷³ and, on the other hand, where the statute requires that the schedule shall be delivered to the officer holding the execution or process, a delivery to the justice is insufficient.⁷⁴ Leaving the schedule at a place designated by the officer,⁷⁵ or with the officer's wife, with instructions to deliver it to him,⁷⁶ has been held sufficient. A statute requiring a debtor to deliver a schedule to the officer is sufficiently

56. Ind.—Over v. Shannon, 91 Ind. 99.

57. Ark.—Cain v. Chennault, 110 S. W.2d 1063, 195 Ark. 141.

58. Ala.—Young v. Hubbard, 14 So. 569, 102 Ala. 373.

59. Ala.—Decatur Mercantile Co. v. Deford, 9 So. 454, 93 Ala. 347.

60. Ill.—Taylor v. Beach, 14 Ill.App. 259.

Omission of "all"

Under statute, claim for exemption must state that schedule of debtor's personal property is complete, although omission of word "all" from verification is not alone fatal.

S.D.—Shriver-Johnson Co. v. Hargraves, 223 N.W. 315, 54 S.D. 367.

61. Ind.—State v. Read, 94 Ind. 103 —Douch v. Rahner, 61 Ind. 64.

62. Ill.—McLean v. Hunter, 192 Ill. App. 450.

63. Ill.—McLean v. Hunter, supra —Doyle v. Hall, 86 Ill.App. 163.

64. Ill.—Cooper v. Payne, 36 Ill.App. 155.

25 C.J. p 141 note 3.

65. Ind.—State v. Read, 94 Ind. 103 —Douch v. Rahner, 61 Ind. 64.

66. Ala.—Buckland v. Tonsmere, 8 So. 68, 90 Ala. 503. 25 C.J. p 141 note 99.

On appeal from magistrate's court to circuit court, wherein property of defendant was levied on under execution and defendant filed schedule of exemptions, schedule was amendable on appeal to the circuit court.

Ark.—Williams v. Swann, 251 S.W. 2d 111, 220 Ark. 906—La Mode Garment Co. v. Moore & Co., 81 S.W. 2d 841, 190 Ark. 721.

66.5 Ark.—Williams v. Swann, 251 S.W.2d 111, 220 Ark. 906.

67. Ark.—Swift v. Cox, 212 S.W. 83, 138 Ark. 606. 25 C.J. p 141 note 1.

68. Ill.—Langston v. Murphy, 31 Ill. App. 188.

69. S.D.—Brown v. Edmonds, 59 N. W. 731, 5 S.D. 508. 25 C.J. p 141 note 2.

70. Ill.—Blair v. Parker, 4 Ill.App. 409.

71. Ark.—Griffin v. Puryear-Meyer Grocery Co., 151 S.W.2d 656, 202 Ark. 495.

72. W.Va.—State v. Staton, 126 S. E. 407, 98 W.Va. 101. 25 C.J. p 141 note 8.

73. N.D.—Burcell v. Goldstein, 136 N.W. 243, 23 N.D. 257.

74. W.Va.—State v. Staton, 126 S.E. 407, 98 W.Va. 101.

75. Ill.—Miller v. Rolan, 39 Ill.App. 350.

76. Ala.—Bryan v. Kelly, 5 So. 346, 85 Ala. 569.

complied with where the debtor delivers a proper schedule to the officer, and the latter admits service thereon by copy, and returns the original to the debtor, retaining a copy.⁷⁷

e. Notice or Record

Where the statutes so require, the opposite party must be given notice before the schedule is filed, and the schedule must be recorded.

Sometimes it is required by statute that the opposite party shall be given notice before the schedule is filed,⁷⁸ or that the schedule shall not only be filed but also recorded.⁷⁹

f. Operation and Effect

The filing of a schedule in compliance with the statute imposes a burden or encumbrance on the property. Under some statutes the exemption will be presumed to be valid, or the schedule will be deemed conclusive as to both the property and its valuation unless attacked as fraudulent or unless an appraisal of the property listed is demanded.

The filing of a schedule in compliance with the statute imposes a burden or encumbrance on the property.⁸⁰ Under some statutes an exemption thus asserted will be presumed to be a valid one,⁸¹ or the schedule will be deemed conclusive as to both the property and its valuation unless attacked as fraudulent or unless an appraisal of the property listed is demanded.⁸²

§ 137. Appraisement

- a. Necessity
- b. Duty to procure
- c. Demand
- d. Time
- e. Presence of property
- f. Appraisers

- g. Conduct of appraisal; valuation
- h. Return
- i. Objections
- j. Confirmation and setting aside
- k. Conclusiveness and effect
- l. Costs

a. Necessity

Where the statute so requires, an appraisal of the property claimed as exempt is essential to the exemption.

Where the statute so provides, it is essential to a right of exemption that the property claimed be appraised in accordance with the statute,⁸³ the purpose ordinarily being to ascertain whether the property exceeds in value the allowable exemption,⁸⁴ an appraisal ordinarily not being required as to articles made the subject of specific exemptions⁸⁵ or in case of a specific exemption of debts and wages.⁸⁶ Likewise an appraisal is not required where the debtor elects to receive his exemption in money.⁸⁷ However, where an appraisal, although required, has not been made, the debtor cannot claim an amount equal to that which he is entitled to claim as exempt from the proceeds of a sale of the property.⁸⁸ When the statute requires an appraisal, a new appraisal is necessary on each successive execution.⁸⁹

b. Duty to Procure

The duty of having the property appraised is generally imposed on the officer, and, when the debtor has complied with the statutory conditions, is mandatory and purely ministerial.

The duty of having the property appraised is generally imposed on the officer.⁹⁰ The duty of the officer to procure an appraisal when the debtor has complied with the conditions imposed by statute

77. S.D.—Swenson v. Christoferson, 72 N.W. 459, 10 S.D. 188, 66 Am. S.R. 712.

78. Ark.—Griffin v. Puryear-Meyer Grocery Co., 151 S.W.2d 656, 202 Ark. 495.

79. Ga.—Clark v. Prince, 144 S.E. 40, 38 Ga.App. 412.

Of what notice

Schedule and record of "pony" homestead are necessary to put public on notice both of exemption and of property set aside.

Ga.—Clark v. Prince, supra.

80. Ga.—Tribble v. State, 126 S.E. 272, 33 Ga.App. 370.

81. Ga.—Tribble v. State, supra.

82. W.Va.—Preston v. Hufford, 94 S. E. 960, 81 W.Va. 510.

83. N.D.—Dakota Nat. Bank of Fargo v. Salzwedel, 3 N.W.2d 468, 71 N.D. 643.
25 C.J. p 142 note 18.

84. N.D.—Dakota Nat. Bank of Fargo v. Salzwedel, supra.

Debtor may be entitled to return of property levied on if less in value than amount allowed by law.

N.D.—Dakota Nat. Bank of Fargo v. Salzwedel, supra.

Officer may retain possession until after appraisal

Where debtor claiming additional exemptions to property levied on under writ of execution delivers schedule of such property to officer having execution, officer can retain possession of property until after appraisal to determine if value was less than allowable exemption.

N.D.—Dakota Nat. Bank of Fargo v. Salzwedel, supra.

85. Neb.—Johnson v. Bartek, 76 N. W. 878, 56 Neb. 422.

86. Mo.—State v. Barada, 57 Mo. 562.

87. Pa.—Appeal of Peterman, 76 Pa. 116.

In re Riley's Estate, 13 Pa. Dist. 442, 30 Pa. Co. 416.

88. Pa.—Hammer v. Freese, 19 Pa. 255.

89. Pa.—Appeal of Line, 2 Grant 197.
25 C.J. p 142 note 19.

90. S.D.—Millerke v. Reiley, 141 N. W. 136, 31 S.D. 342.
25 C.J. p 142 note 24.
Powers and duties of officer generally see supra § 121.

Constable

A statute which provides that the sheriff or other officer making a levy shall, on demand, summon the appraisers authorizes a constable levying an execution from a justice's court likewise to summon them.

N.C.—McAuley v. Morris, 7 S.E. 883, 101 N.C. 369.

is mandatory⁹¹ and purely ministerial.⁹² The officer is not justified in refusing to have an appraisal made because of perjury by the debtor in swearing to his schedule.⁹³

Effect of refusal. A wrongful refusal of the officer to cause an appraisal to be made has been held to render the sale void,⁹⁴ although there is also authority to the contrary.⁹⁵

c. Demand

Demand of appraisal is necessary only where the statute so provides, and, when required, a failure to make it operates as waiver of the rights of the party on whom the duty is imposed.

Under some statutes the requirement of appraisal does not depend on any demand made by the creditor or the debtor but is made on delivery by the debtor of a schedule to the levying officer claiming that the property levied on is exempt.⁹⁶

Where under the statute the debtor must demand the appraisal, a failure to make the demand constitutes a waiver by the debtor of his exemption rights.⁹⁷ The demand by the debtor must be made seasonably or an appraisal may be refused.⁹⁸ In cases where the exemption is claimed in real estate, the appraisal must be demanded by the debtor before inquisition, where inquisition is required.⁹⁹

Where the demand for an appraisal is required to be made by the creditor, his failure to make a demand operates as a waiver of his rights in regard to the property. In such circumstances the court is not called on to consider the question of value,¹ and it is the duty of the officer to release to the debtor the property claimed to be exempt.² Where the debtor claims that additional exemptions should be allowed him out of his property levied on, it has been held that the appraisal required by the statute does not depend on a demand by the creditor.³

d. Time

The appraisal should be without delay or as soon as it can reasonably be had; and the debtor must hold his property in readiness for appraisal for a reasonable time.

At least where required by statute, the officer must summon appraisers without delay or as soon as it can reasonably be done;⁴ and the debtor must hold his property in readiness for a reasonable time for the purpose of appraisal.⁵ A delay in the making of an appraisal will not defeat the rights of the debtor to an exemption where not the fault of the debtor.⁶

e. Presence of Property

The property should be present when the appraisal is made; it need not be in view of the officer, however, before he appoints the appraisers.

The property should be present when the appraisal is made, and, if it is not present and the debtor is not at fault, he may complain if he has been injured.⁷ The property need not be in view of the officer, however, before he appoints the appraisers; and the fact that the property is in another county will not excuse him from appointing them.⁸

f. Appraisers

Appraisers must be legally appointed. They should not, in the absence of statutory authority, be appointed by the debtor. They should be persons who are disinterested and fitted to determine the value of the property seized, and should be of the statutory number.

The appraisers must be legally appointed, and the appraisal should show that fact.⁹ Appraisers should not be appointed by the debtor, in the absence of a statutory provision permitting such an appointment.¹⁰ Where the statute provides that the debtor and creditor each shall select an appraiser, but either or both of them fail to do so, it becomes

91. Neb.—Nelson First Nat. Bank v. Lancaster, 74 N.W. 858, 54 Neb. 467.

25 C.J. p 142 note 25.

92. S.D.—Millerke v. Reiley, 141 N. W. 136, 31 S.D. 342.

25 C.J. p 142 note 26.

93. Ind.—Over v. Shannon, 91 Ind. 99.

94. Ind.—Over v. Shannon, supra.

95. Pa.—Hatch v. Bartle, 45 Pa. 166, 84 Am.D. 484.

96. N.D.—Dakota Nat. Bank of Fargo v. Salzwedel, 3 N.W.2d 468, 71 N.D. 643.

97. Pa.—Appeal of Line, 2 Grant 137.

98. Pa.—Appeal of Line, supra. 25 C.J. p 142 note 32.

99. Pa.—McCloskey v. Moulder, 8 Pa. Co. 156.

1. Wash.—State v. McNeill, 107 P. 1028, 58 Wash. 47, 137 Am.S.R. 1038.

2. Wash.—Shell v. Svensson, 159 P. 1076, 93 Wash. 40. 25 C.J. p 142 note 34.

3. N.D.—Dakota Nat. Bank of Fargo v. Salzwedel, 3 N.W.2d 468, 71 N.D. 643.

4. Particular provisions

A statutory provision that on the delivery of the schedule to him by the debtor the officer shall summon

appraisers requires the officer to summon appraisers without delay or as soon as it can reasonably be done.

Ill.—Ehle v. Deitz, 32 Ill.App. 547—Smith v. Dauel, 29 Ill.App. 290.

5. Ill.—Smith v. Dauel, supra.

6. Pa.—Appeal of Coleman, 103 Pa. 366—Appeal of Seibert, 73 Pa. 359. 25 C.J. p 142 note 38.

7. Ill.—Smith v. Dauel, 29 Ill.App. 290.

8. Ill.—Lansden v. Hampton, 38 Ill. App. 115.

9. Ill.—Ehle v. Deitz, 32 Ill.App. 547.

10. Pa.—Halle v. Felsing, 19 Pa. Co. 330.

the duty of the officer to select the appraisers himself and to proceed with the appraisalment.¹¹

Qualifications. The appraisers should be persons who are disinterested¹² and who are fitted to determine the value of the property seized.¹³ A statutory requirement that the appraisers shall be summoned from the neighborhood does not contemplate any arbitrary rule of distance or topography; in a city in which a neighborhood covers a smaller space than in the country, a district within a radius of a mile or thereabouts may nevertheless be held to be a neighborhood.¹⁴

Number. The number of appraisers prescribed by statute should be appointed.¹⁵

g. Conduct of Appraisalment; Valuation

The appraisalment should be made in public, and the debtor and creditor and their attorneys are entitled to be present. The appraisers must value the property at its fair market value.

The appraisalment should be made in public,¹⁶ and the debtor,¹⁷ the creditor,¹⁸ and their attorneys¹⁹ are entitled to be present.

Valuation. The appraisers must value the property at its fair market value.²⁰ They have authority to fix a fair value, however, only on property which they can see and at an amount which they can ascertain by inspection and handling.²¹ They are not authorized to consider and adjust equities in the property between an execution debtor and third persons.²² Thus, where mortgaged property is included in the schedule, the appraisers must fix its value without regard to the mortgage.²³

A subsequent sale of the property for more than its appraised value will not invalidate the appraisalment,²⁴ unless the disparity is so great as to furnish

ground for presumption of fraud or incompetency on the part of the appraisers.²⁵

h. Return

The appraisers' return should be made to the officer designated in the statute. A return is sufficiently specific, in the absence of a statute to other effect, if it sets out and sufficiently enumerates the different classes of articles and the value of each.

The return of the appraisers should be made to the officer designated by statute, but a return to the wrong officer through inadvertence will not render the appraisal void.²⁶ A return is sufficiently specific if it sets out and sufficiently enumerates the different classes of articles and the value of each,²⁷ unless the statute in terms requires the appraiser to fix a fair valuation on each article, in which case an appraisalment fixing a value, not on separate articles, but on groups containing miscellaneous articles, is defective.²⁸

i. Objections

If the debtor accepts an appraisalment which he deems not to be proper, he waives all imperfections in it and cannot afterward object to it. Opportunity should be given creditors to have an appraisalment to which they object corrected.

If the appraisalment is deemed by the debtor not to be a proper one, he should seek to have it corrected.²⁹ If he accepts it, he waives all imperfections in it and cannot be heard to object to it afterward.³⁰ Opportunity should be given to creditors also to have an appraisalment to which they object corrected; and, where the hearing on the objections of one creditor is postponed by the court to a future day, it is not too late on that day for another creditor to appear and file objections to the schedule of personalty.³¹

11. Ind.—Kelley v. McFadden, 80 Ind. 536.

S.D.—Millerke v. Reiley, 141 N.W. 136, 31 S.D. 342.

12. Pa.—Strasburg First Nat. Bank v. Keen, 11 Pa.Co. 47.
25 C.J. p 143 note 46 [a]—[c].

13. Pa.—Morris v. Town, 1 Wkly.N. C. 51.
25 C.J. p 143 note 45.

14. Mo.—State v. Jungling, 22 S.W. 688, 116 Mo. 162.

15. Neb.—Johnson v. Bartek, 75 N. W. 55, 54 Neb. 787.

16. Pa.—Huddy v. Sproule, 4 Phila. 353.

17. Pa.—Halle v. Felsing, 19 Pa. Co. 330.

Huddy v. Sproule, 4 Phila. 353.

18. Pa.—Halle v. Felsing, 19 Pa. Co. 330.

25 C.J. p 143 note 59.

19. Pa.—Halle v. Felsing, supra.

20. Pa.—Sleeper v. Nicholson, 1 Phila. 348—Fisher v. Hughes, 2 Pittsb.Leg.J. 272.

21. Ark.—Parham v. McMurray, 32 Ark. 261.

Ill.—Moffett v. Sheehey, 52 Ill.App. 376.

22. Ill.—Moffett v. Sheehey, supra.

23. Ill.—Moffett v. Sheehey, supra.

Consideration for mortgage
It is not within the authority of the appraisers to ascertain whether a mortgage was given for money borrowed, for future advances, or for indemnity to the mortgagee against a liability which might or might not arise.

Ill.—Moffett v. Sheehey, supra.

24. Pa.—Norris v. Town, 1 Wkly.N. C. 62.

25 C.J. p 143 note 63.

25. Pa.—Halle v. Felsing, 19 Pa. Co. 330.

25 C.J. p 143 note 64.

26. N.C.—McAuley v. Morris, 7 S.E. 883, 101 N.C. 369.
25 C.J. p 143 note 69.

27. N.C.—Ray v. Thornton, 95 N.C. 571.

28. Ill.—Moffett v. Sheehey, 52 Ill. App. 376.

29. Ill.—Moffett v. Sheehey, 52 Ill. App. 376.

N.C.—Gardner v. McConnaughey, 73 S.E. 125, 157 N.C. 481.

30. Ill.—Moffett v. Sheehey, 52 Ill. App. 376.

Mo.—State v. Conner, 73 Mo. 572.

31. Ga.—Robson v. Lindrum, 47 Ga. 250.

Defects to which no objection was made may not be presumed on appeal.³²

j. Confirmation and Setting Aside

The court may set aside an appraisal for cause.

The court has power to set aside an appraisal for cause.³³ If the appraisers were not legally appointed,³⁴ or were not competent to act as such,³⁵ or if the appraisal is manifestly and greatly below the fair market value of the property,³⁶ the appraisal may be set aside. The court is not confined merely to ascertainment of the fairness of the appraisal, however, but may exercise the discretion of a court of equity in the light of all the circumstances of the case. Thus, if property appraised is destroyed without fault of the debtor before approval of the appraisal by the court, and the interests of creditors are not involved, the court may decline to approve the appraisal, so that other property may be retained in place of that destroyed.³⁷

k. Conclusiveness and Effect

The conclusiveness and effect of the appraisal, in the absence of fraud or collusion, rest on the terms of the statute under which it is had.

An appraisal does not necessarily determine whether the property which has been set apart as exempt is lawfully exempt, but that question remains for the determination of the court.³⁸ A creditor who acts on the appraisal as if it were a final adjudication of the debtors' right of exemption therefore runs the risk of so doing.³⁹ However, an appraisal made in the presence of the creditor under circumstances showing an acquiescence by him in the debtor's claim may operate as an estoppel of the creditor later to contest the claim.⁴⁰

The valuation of the appraisers has been held to be conclusive in the absence of fraud or collusion;⁴¹ but there is also authority to the contrary.⁴² A

debtor who, after appraisalment, replevies property claimed to be exempt is bound by the appraised value if the property is exempt; but if the property is not exempt, he cannot claim the advantage of an appraised undervaluation.⁴³

Release of property. It has been held that, if on appraisal the value of the property selected is not greater than the amount which the debtor is entitled to hold as exempt, the officer must release the property to him.⁴⁴

Subsequent execution. An appraisal is not binding on a second execution creditor whose execution did not issue until after appraisal was made; he is entitled to a second appraisal under his own execution.⁴⁵

Disclaimer of title. A disclaimer by the debtor of title to property appraised makes the appraisal inoperative.⁴⁶

l. Costs

The debtor is not required to pay the costs of appraisal unless the statute so provides.

The debtor is not required to pay the costs of appraisal unless the statute so provides.⁴⁷

§ 138. Selection

- a. In general
- b. Persons who may make
- c. Time
- d. Manner
- e. Operation and effect

a. In General

A debtor is generally required to select the property which he desires to claim as exempt where he possesses articles some part or some one of which the law exempts, or where the statute exempts property generally to a certain amount and the debtor owns property in excess of that amount, or where an exemption is claimed in lieu of homestead; but a selection is not required unless it will serve a real purpose.

A debtor is generally required to select the

32. Appraiser's incompetency

Where it does not appear that any objection was made on account of an appraiser's incompetency, no presumption of incompetency will be indulged in on appeal.
Ind.—Kelley v. McFadden, 80 Ind. 536.

33. Pa.—Halle v. Felsing, 19 Pa. Co. 330.
25 C.J. p 143 note 76.

34. Pa.—Halle v. Felsing, 19 Pa. Co. 330.
25 C.J. p 143 note 55 [a].

35. Mich.—Bayne v. Patterson, 40 Mich. 658.
25 C.J. p 143 note 55.

36. Pa.—Halle v. Felsing, 19 Pa. Co. 330.
Sleeper v. Nicholson, 1 Phila. 348
—Fisher v. Hughes, 2 Pittsb. Leg. J. 272.

37. Pa.—In re Kunkle's Estate, 4 Pa. Co. 234.
25 C.J. p 144 note 80.

38. Ark.—Parham v. McMurray, 32 Ark. 261.
25 C.J. p 144 note 82.

39. Pa.—Pierce v. Boalick, 36 Pa. Co. 353.

40. Pa.—Hershey v. Metzgar, 90 Pa. 217.
25 C.J. p 144 note 86.

41. Ohio.—Levi v. Groves, 7 Ohio Dec., Reprint, 508, 3 Cinc. L. Bul. 569.

42. Pa.—In re Kunkle's Estate, 4 Pa. Co. 234.

43. Mich.—Wood v. Bresnahan, 30 N.W. 206, 63 Mich. 614.

44. Mo.—State v. Kurtzeborn, 2 Mo. App. 335.

45. Pa.—Wisser v. Wisser, 8 Pa. Dist. 673.

46. Pa.—Gilleland v. Rhoads, 34 Pa. 187.

47. Pa.—Gross v. Pinsky, 26 Pa. Dist. 141.
25 C.J. p 144 note 94.

property which he desires to claim as exempt where he possesses articles some part or some one of which the law exempts,⁴⁸ or where the statute exempts property generally to a certain amount and the debtor owns property in excess of that amount,⁴⁹ or where an exemption is claimed in lieu of homestead;⁵⁰ and, if he has had an opportunity to make a selection, but has failed to do so, a levy may be made.⁵¹ A selection is required, however, only when it will serve a real purpose but not where it would be superfluous.⁵² Thus, where the debtor's entire property is within the statutory limit, and all of it is exempt for that reason,⁵³ or where the debtor owns articles specifically exempt only to the number or value fixed by the statute,⁵⁴ no selection is needed and none, therefore, is required.

The debtor may select any particular property seized within the amount allowed by statute,⁵⁵ subject to the condition that the selection shall not be in fraud of the rights of a bona fide creditor.⁵⁶ A selection of property which but for the selection could be subjected by the creditor to his debt, instead of property which he cannot subject to such purpose, is not in fraud of the creditor's rights.⁵⁷

b. Persons Who May Make

Generally speaking, the selection must be made by the debtor, although it may also be made by his agent, clerk, or legal representative, or by one to whom the right to select has been assigned.

Generally speaking, the selection must be made

by the debtor,⁵⁸ although it may also properly be made by his agent, clerk, or legal representative,⁵⁹ or by one to whom the right to select has been assigned.⁶⁰ The right to select cannot be conferred on a mortgagee, however, unless the property in question is designated in the mortgage as exempt property and mortgaged as such.⁶¹

c. Time

Under some statutes the debtor, if properly notified or requested, must make his selection before or at the time of levy, under other statutes it has been variously held that the selection may or should be made after summoning of the appraisers, or after filing of the schedule and an appraisal, or at any time before sale.

Under some statutes the debtor, if properly notified or requested by the sheriff, must make his selection before or at the time of the levy.⁶² If a levy is made in the debtor's absence, he may make a selection on his return;⁶³ and, if the debtor is not notified by the officer and requested to make a selection, he may make the selection at the trial⁶⁴ or at any reasonable time before the sale.⁶⁵ Under other statutes it has been variously held that the proper time to make selection is after the appraisers have been summoned,⁶⁶ or that the debtor may postpone making his selection until after the schedule is filed and the appraisal is made,⁶⁷ or that the debtor may make a selection at any time before sale,⁶⁸ but must select before sale.⁶⁹ In any event the debtor is entitled to a reasonable time after notification to make his selection,⁷⁰ and the officer may not demand an immediate selection and, on the

48. Mont.—Tetrault v. Ingraham, 171 P. 1148, 54 Mont. 524.

25 C.J. p 144 note 96.

49. Pa.—Elliott v. Flanigan, 37 Pa. 425.

25 C.J. p 145 note 97.

50. U.S.—In re Crum, D.C. Ohio, 221 F. 729—In re Stern, D.C. Ohio, 208 F. 488.

51. Me.—McKenzie v. Redman, 32 A. 962, 87 Me. 322.

25 C.J. p 145 note 5.

Waiver of right of exemption see supra § 110.

52. Minn.—Thompson v. Peterson, 142 N.W. 307, 122 Minn. 228.

25 C.J. p 145 notes 1, 2.

53. Ala.—May v. Strickland, 180 So. 93, 235 Ala. 482—Alley v. Daniel, 75 Ala. 403.

25 C.J. p 145 note 1.

54. Tenn.—Ned Maxey & Son v. Tinsley, 67 S.W.2d 139, 167 Tenn. 128.

25 C.J. p 145 note 2.

55. S.D.—Nelson v. Oium, 114 N.W. 691, 21 S.D. 541.

25 C.J. p 145 notes 99, 3.

Insurance benefits

A debtor who receives insurance benefits periodically, each of which is of less amount than the amount of property which he can claim as exempt, can select all of such benefits as exempt where he needs them for the support and comfort of himself and his family.

N.C.—Commissioner of Banks v. Yelverton, 168 S.E. 505, 204 N.C. 441.

56. Tex.—Stichter v. Southwest Nat. Bank, Civ.App., 258 S.W. 223.

57. Tex.—Stichter v. Southwest Nat. Bank, supra.

58. Mo.—Parketon v. Pugsley, 121 S.W. 789, 142 Mo.App. 537.

Wis.—Zielke v. Morgan, 7 N.W. 651, 50 Wis. 560.

25 C.J. p 145 note 12.

Selection by officer see supra § 121.

59. Neb.—State v. Cunningham, 6 Neb. 90.

60. U.S.—In re National Grocer Co., Mich., 181 F. 33, 104 C.C.A. 47, 30 L.R.A.N.S., 982.

61. U.S.—In re French, D.C.N.Y., 231 F. 255.

62. Iowa.—Grover v. Younie, 81 N.W. 684, 110 Iowa 446.

25 C.J. p 145 note 21.

63. Vt.—Haskins v. Bennett, 41 Vt. 698.

64. Tex.—Hall v. Miller, 51 S.W. 36, 21 Tex.Civ.App. 336.

65. Ill.—McCluskey v. McNeely, 8 Ill. 578.

N.Y.—Seaman v. Luce, 23 Barb. 240.

Ohio.—Frost v. Shaw, 3 Ohio St. 270.

66. Pa.—Bowman v. Smiley, 31 Pa. 225, 72 Am.D. 738.

67. Ind.—Kelley v. McFadden, 80 Ind. 536.

68. Ala.—Ross v. Hannah, 18 Ala. 125.

25 C.J. p 146 note 25.

69. U.S.—In re Crum, D.C. Ohio, 221 F. 729.

25 C.J. p 146 note 26.

Exemption of proceeds of involuntary sale see supra § 60.

70. Mass.—Savage v. Davis, 134 Mass. 401.

N.Y.—Brooks v. Hathaway, 8 Hun 290.

S.D.—Nelson v. Oium, 114 N.W. 691, 21 S.D. 541.

debtor's failure to comply immediately with the demand, proceed at once with the sale of property.⁷¹

d. Manner

No particular formalities in the selection of property are necessary unless expressly required by statute. Any method which the officer cannot or ought not misunderstand is sufficient; but it must amount to a real selection and not merely to a demand of an opportunity to select.

No particular formalities in the selection of property are necessary,⁷² unless expressly required by statute.⁷³ Any method of selection which the officer cannot, or under the circumstances ought not, misunderstand is sufficient.⁷⁴ The method adopted, however, must amount to a real selection, and not merely to a demand by the debtor of an opportunity to make a selection.⁷⁵ It has been held that the debtor must point out the property to the officer; and it is not sufficient merely to demand property to the statutory amount in general terms.⁷⁶ An objection to a levy on a particular piece of property in question,⁷⁷ a bill of sale of a particular piece of property,⁷⁸ and a motion to the court to discharge money held under a garnishment⁷⁹ have all been held sufficient to constitute a designation or selection by the debtor. Where a certain portion of a mass, the parts of which are not distinguished from each other, is claimed, it is sufficient to select an amount from the mass which will equal the value allowed by the statute.⁸⁰

Appraised values. The selection must be made at appraised values.⁸¹

e. Operation and Effect

A selection is not binding on creditors as to amount or value; and it has been held that property selected before levy may still be levied on, subject to the debtor's right to have exemptions set off if he claims and is entitled to them.

A selection is not binding on creditors as to amount or value;⁸² and it has been held that property selected before levy may still be levied on, subject to the debtor's right to have exemptions set off if he claims and is entitled to them.⁸³

§ 139. Allotment and Setting Apart

a. In general

b. Proceedings

a. In General

In some jurisdictions an allotment and setting apart to the debtor of specific articles exempt to him are required. He is entitled to have his exemption thus established up to the time of sale. Such a setting apart is not a final adjudication of exemption.

In some jurisdictions an allotment and setting apart to the debtor of specific articles exempt to him are required.⁸⁴ A setting apart has been held to be necessary in order to defeat a sale,⁸⁵ although in at least one jurisdiction in which provision for exemption is made by the constitution such provision is held to protect the debtor before there has been any allotment.⁸⁶

The debtor is entitled to have his exemption thus established up to the time the process is executed by a sale.⁸⁷ The property may be set apart after levy of the execution.⁸⁸ An allotment subsequent

71. S.D.—Nelson v. Oium, *supra*.

72. N.D.—Northrup v. Cross, 51 N. W. 718, 2 N.D. 433.

73. *Specification in schedule*

By some statutes the debtor is required to make his selection by specifying in his schedule the particular property which he claims as exempt, and a specification in general terms of property to the statutory amount is not a sufficient compliance with the statute.

Ark.—Friedman v. Sullivan, 2 S.W. 785, 48 Ark. 213.
25 C.J. p 146 note 41.

74. N.D.—Northrup v. Cross, 51 N. W. 718, 2 N.D. 433.
25 C.J. p 146 note 35.

75. Mo.—Parketon v. Pugsley, 121 S.W. 789, 142 Mo.App. 537.
25 C.J. p 146 note 37.

76. Colo.—Eisenberg v. Burchine³¹, 52 P. 220, 10 Colo.App. 457.
Concealment as forfeiture of claim of exemption see *supra* § 118.

77. N.Y.—Finnin v. Malloy, 33 N.Y. Super. 382.

Tenn.—Clark v. Bond, 7 Baxt. 288.

Vt.—Plimpton v. Sprague, 47 Vt. 467.

78. Vt.—George v. Bassett, 54 Vt. 217.

79. Ohio.—Tombow v. Haskins, 15 Ohio Cir.Ct. 656, 8 Ohio Cir.Dec. 281.

80. Ohio.—Hall v. Brown, 4 Ohio Dec., Reprint, 80, 1 Clev.L.Rep. 9.

81. Ill.—Finlen v. Howard, 18 N.E. 560, 126 Ill. 259.
Moffett v. Sheehy, 52 Ill.App. 376.

82. Mich.—McCausey v. Hoek, 124 N.W. 570, 159 Mich. 570, 18 Ann. Cas. 945.

83. Mich.—McCausey v. Hoek, *supra*.

84. U.S.—In re Trammell, D.C.Ga., 5 F.2d 326, petition denied, C.C.A., Clark v. Nirenbaum, 8 F.2d 451, certiorari denied Powell v. Anderson, 46 S.Ct. 349, 270 U.S. 649, 70 L.Ed. 780.

Ark.—Pemberton v. Bank of Eastern Arkansas, 294 S.W. 64, 173 Ark. 949.

N.C.—Gardner v. McConnaughey, 73 S.E. 125, 157 N.C. 481.

Pa.—National Acceptance Corporation v. Ulick, 16 Pa.Dist. & Co. 483.

85. U.S.—In re Trammell, D.C.Ga., 5 F.2d 326, petition denied, C.C.A., Clark v. Nirenbaum, 8 F.2d 451, certiorari denied Powell v. Anderson, 46 S.Ct. 349, 270 U.S. 649, 70 L.Ed. 780.

Ga.—Sasser v. Roberts, 68 Ga. 252.
86. N.C.—Crow v. Morgan, 185 S.E. 668, 210 N.C. 153.
25 C.J. p 146 note 52.

87. U.S.—In re Trammell, D.C.Ga., 5 F.2d 326, petition denied, C.C.A., Clark v. Nirenbaum, 8 F.2d 451, certiorari denied Powell v. Anderson, 46 S.Ct. 349, 270 U.S. 649, 70 L.Ed. 780.

N.C.—Gardner v. McConnaughey, 73 S.E. 125, 157 N.C. 481—Pate v. Harper, 94 N.C. 23.

88. U.S.—In re Trammell, D.C.Ga., 5 F.2d 326, petition denied, C.C.A., Clark v. Nirenbaum, 8 F.2d 451, certiorari denied Powell v. Anderson,

to appraisal should not include property which the debtor has consumed after appraisal,⁸⁹ and, where the property has diminished, whether by use, loss, or other cause, after an allotment, the debtor is entitled to have exempted up to the prescribed limit any other personal property which he may have.⁹⁰ On the other hand, one who takes an exemption can have set apart to him only the property owned by him at the time;⁹¹ if property which does not belong to him is wrongfully included in the allotment, property of the same kind cannot later be substituted by him therefor and held as exempt under the allotment.⁹²

Effect. The setting apart of property which the debtor claims to be exempt is a mere identification of the property to which the exemption shall be applied.⁹³ It is not a final adjudication of the debtor's right of exemption, but merely puts the debtor in a position to present his claim to the property, so that it may be awarded to him, provided it appears to the court that he is legally entitled thereto.⁹⁴

b. Proceedings

One who has a right to have property set apart in kind may ordinarily enforce his right. Indeed, the burden of procuring a setting apart is, in at least one jurisdiction, on the debtor. Statutory provisions as to the manner of proceeding should be pursued, but the debtor may waive irregularities therein.

One who has a right to have property set apart in kind may ordinarily enforce his right.⁹⁵ Indeed, the burden of procuring a setting apart is, in at least one jurisdiction, on the debtor.⁹⁶

The provisions of the statutes as to the manner of proceeding should be pursued,⁹⁷ as, for example, provisions that the persons who are to make the allotment should be sworn,⁹⁸ that there should be a descriptive list of the property allotted,⁹⁹ and that the descriptive list should be registered, so that creditors, when they desire to levy their debts, may ascertain what property is exempt.¹

If there is a lien on part of the property, the property on which there is no lien should be allotted first.² Where garnishees are numerous and the amount due from each is small, the proper method of securing the debtor's exemptions is for the officer to appraise and set apart to the debtor such or so much of the claims as he may elect to retain under his exemption.³ Where the statute provides that on appeal from an appraisal on homestead and personal property exemptions the jury shall assess the value of the property embraced therein and the court shall appoint three commissioners to set apart the exemptions in accordance with the verdict of the jury, the commissioners appointed to set apart the exemptions must be guided by the valuation of the jury, whose verdict is final.⁴

Receiver of surplus. Provision has been made by statute for the appointment of a receiver to administer property in excess of the amount of the debtor's exemption for the benefit of his creditors.⁵

Waiver of irregularities. A debtor waives irregularities in the allotment proceedings, if he accepts

46 S.Ct. 349, 270 U.S. 649, 70 L.Ed. 780.

89. N.C.—Gardner v. McConnaughey, 73 S.E. 125, 157 N.C. 481.

90. N.C.—Campbell v. White, 95 N.C. 344.

91. Ga.—Smith v. Eckles, 65 Ga. 326.

Property previously transferred

A setting aside as exempt property the title to which the debtor has previously transferred to another does not affect the title of the transferee.

Ga.—Tarver v. Beneficial Loan Soc. of Macon, 148 S.E. 288, 39 Ga.App. 646.

Property described and subsequently acquired

The rule stated in the text is true even where the property which the debtor claims to be exempt, but which he does not then own, is described in the schedule and is afterward acquired.

Ga.—Fuller v. Doyal, 129 S.E. 117, 34 Ga.App. 245.

92. Ga.—Smith v. Eckles, 65 Ga. 326.

93. U.S.—In re Trammell, D.C.Ga., 5 F.2d 326, petition denied, C.C.A., Clark v. Nirenbaum, 8 F.2d 451, certiorari denied Powell v. Anderson, 46 S.Ct. 349, 270 U.S. 649, 70 L.Ed. 780.

94. Pa.—Appeal of Imhoff, 13 A. 279, 119 Pa. 350.

95. Fla.—McMichael v. Eckman, 7 So. 365, 26 Fla. 43.
25 C.J. p 146 note 57.

96. U.S.—In re Trammell, D.C.Ga., 5 F.2d 326, petition denied, C.C.A., Clark v. Nirenbaum, 8 F.2d 451, certiorari denied Powell v. Anderson, 46 S.Ct. 349, 270 U.S. 649, 70 L.Ed. 780.

97. N.C.—Smith v. Hunt, 68 N.C. 482.

Under Georgia statutes

Since 1924, household and kitchen furniture and provisions to a specified value may not be set apart on a mere filing of a schedule thereof with the ordinary without any application or publication.

Ga.—Wilbanks v. Wardlaw, 178 S.E. 466, 50 Ga.App. 495.

Jurisdiction

The circuit court has no original jurisdiction of proceeding to set off homestead in personalty, but the statutory machinery and procedure are exclusive.

S.C.—In re Brandenburg, 162 S.E. 432, 164 S.C. 460—Gray v. Putnam, 28 S.E. 149, 51 S.C. 97.

98. N.C.—Smith v. Hunt, 68 N.C. 482.

99. N.C.—Gardner v. McConnaughey, 73 S.E. 125, 157 N.C. 481—Smith v. Hunt, 68 N.C. 482.

1. N.C.—Smith v. Hunt, supra.

2. N.C.—Crow v. Morgan, 185 S.E. 668, 210 N.C. 153—Cowan v. Phillips, 28 S.E. 961, 122 N.C. 70.

3. Pa.—Barker v. Johnson, 2 Pa.Co. 414.

4. N.C.—Shoaf v. Frost, 21 S.E. 409, 116 N.C. 675.

5. Ga.—McWilliams v. Bones, 10 S.E. 723, 84 Ga. 199.
25 C.J. p 147 note 68.

from the officer levying an execution the articles set apart by him as exempt.⁶

Appeal. In the absence of a statute providing the method in which the action of commissioners to allot an exemption may be reviewed, it may be reviewed by recordari in the nature of a writ of false judgment.⁷

§ 140. Contest and Hearing

The contest and hearing of a disputed claim for exemptions must be in accordance with the procedure, if any, established by statute.

One claiming an exemption is in general entitled to a determination of his claim, where it is disputed, before the property may be subjected to sale on execution or other process.⁸ Conversely, one who

is interested in the property is entitled to oppose a claim of exemption.⁹ The procedure, if any, prescribed by statute for the contesting of claims must be pursued,¹⁰ as, for example, with regard to the necessity of giving an answer to the writ rather than by an exception,^{10.5} with regard to the giving of a bond by the contestant,¹¹ as to the possession of the property pending the contest,¹² as to the filing of an inventory by the contestee,¹³ as to the time of hearing and notice,¹⁴ as to the formation of issues and trial of the contest,¹⁵ and as to the burden of proof.^{15.5} A petition to contest a claim of exemption will be dismissed when it comes after the claim has been approved and allowed by the court and is made merely to discover other assets held by defendant.^{15.10}

6. Mo.—State v. Conner, 73 Mo. 572.

7. N.C.—Ballard v. Waller, 52 N.C.

84.
25 C.J. p 147 note 64.

8. Ala.—Wooten v. Jordan, 96 So. 196, 209 Ala. 293.

Pa.—Rhoads v. Rhoads, 74 Pa. Dist. & Co. 405, 43 Berks Co. 99.

9. Any execution plaintiff may institute a contest of the debtor's right to the exemption.

Ala.—Tonsmere v. Buckland, 6 So. 904, 88 Ala. 312—Beckert v. Whitlock, 3 So. 545, 83 Ala. 123.

Commingleing of property

Creditor of wife would not be allowed to suffer because property of husband and wife was commingled. Cal.—Tinsley v. Bauer, 271 P.2d 116, 125 C.A.2d 724.

Effect of affidavit

When the creditor files an affidavit of contest, it may be the duty of the sheriff to make a levy; but his failure to do so does not affect the lien of the execution or put plaintiff under disability to maintain the contest.

Ala.—Beckert v. Whitlock, 3 So. 545, 83 Ala. 123.

Residuary legatee, although not of family of insured or decedent, was entitled to oppose attempt of decedent's second husband improperly to set aside nonexempt proceeds of policy on life of decedent's first husband.

Cal.—In re Crosby's Estate, 41 P.2d 928, 2 C.2d 470.

Waiver of irregular affidavit

If the debtor engages in a contest on the merits, without objection, any irregularities in the filing of the affidavit are thereby waived.

Ala.—Beckert v. Whitlock, 3 So. 545, 83 Ala. 123.

10. S.C.—In re Brandenburg, 162 S. E. 432, 164 S.C. 460.

Contest of answer of garnishee

Where answer of garnishee showed

that sums due defendants were exempt as wages, plaintiff's failure to contest answer at term in which it was filed rendered levy void.

Ala.—Tennessee Coal, Iron & R. Co. v. Warner, 153 So. 640, 228 Ala. 381.

Exception to return of appraisers

Disputed issue as to debtor's right to homestead in personalty may be brought before court only on exception to return of appraisers.

S.C.—In re Brandenburg, 162 S.E. 432, 164 S.C. 460.

10.5 Tex.—Abendroth v. Willacy County Water Control and Improvement Dist. No. 1, Civ.App., 175 S.W.2d 90, reversed on other grounds 177 S.W.2d 936, 142 Tex. 320.

11. Ala.—Totten v. Sale, 72 Ala. 488.

25 C.J. p 147 note 70.

12. Ala.—Ex parte Haralson, 75 Ala. 543.

25 C.J. p 147 note 71.

13. Ala.—Tonsmere v. Buckland, 6 So. 904, 88 Ala. 312.

25 C.J. p 147 note 72.

Objection

An objection to an inventory filed by the contestee must state in what particular the inventory does not comply with the statute.

Ala.—Yates v. Dobson, 105 So. 691, 213 Ala. 547.

Where court is dissatisfied as to the value or extent of property listed on one schedule, it may deny the claim, but without prejudice to the filing of a new and appropriate schedule.

U.S.—King v. Sweatt, D.C.Ark., 115 F.Supp. 215.

14. N.D.—Imperial Elevator Co. v. Warren, 217 N.W. 523, 56 N.D. 329.

15. Ala.—Beckert v. Whitlock, 3 So. 545, 83 Ala. 123.

Cal.—Arc Inv. Co. v. Tiffith, 330 P. 2d 305, 164 C.A.2d Supp. 853.

Pa.—Rhoads v. Rhoads, Com.Pl., 43 Berks Co. 101.

25 C.J. p 147 note 73.

Motion by garnishee

Code section contemplates that court may, on motion by garnishee, cause issue to be made up and tried between judgment debtor and judgment creditor.

Miss.—Hunter v. Commercial Securities Co., 113 So.2d 127.

Allegations held sufficient

A judgment creditor's exceptions to debtor's schedule of exemptions that debtor does not "list any household furniture, furnishings, and supplies which he owns, if he is at the head of a household," and that he "does not state for what given period of time he is claiming exemption of wages," were held sufficient on demurrer to raise the issue and place the burden on debtor to prove that he was the head of a household, and entitled to have property specified in schedule declared exempt from execution, notwithstanding failure of exceptions specifically to deny allegations contained in schedule as to being head of household.

Ark.—Pearce v. Harden, 233 S.W. 925, 150 Ark. 110.

Failure to controvert

Allegations in affidavits or pleadings will be regarded as true where they are not controverted.

Cal.—Lentfoehr v. Lentfoehr, 286 P. 2d 1019, 134 C.A.2d Supp. 905.

15.5 Debtor held to have burden of proof

Cal.—Twining v. Taylor, Super., 339 P.2d 646—Lentfoehr v. Lentfoehr, 286 P.2d 1019, 134 C.A.2d Supp. 905.

15.10 Pa.—Brunwasser v. Dessy, 8 Pa. Dist. & Co.2d 743, 105 Pittsb. Leg.J. 71.

Where the statute makes no provision as to the manner in which a claim of exemption shall be determined, it would seem that the debtor may submit himself to the jurisdiction of the court from which the writ on which it is sought to reach the property was issued and ask that it determine his claim of exemption, or he may notify the officer in possession of the property under the writ of his claim, demand a return of the property, and, in the event of sale, thereafter pursue a remedy provided by statute for such illegal sale; but the court from which the writ issued cannot determine the right to exemption in a summary manner in the absence of a request by, or consent of, the debtor to have the matter so determined.¹⁶

Jurisdiction. By express provision of some statutes a court of equity has jurisdiction to determine whether property claimed to be exempt is so exempt.¹⁷ Under such a statute, if the debtor fails to point out the whole of his personal property or to include a portion thereof in his inventory and conceals it, the jurisdiction of equity may be invoked to ascertain the property omitted, and to determine what property shall be set apart as exempt and pending the proceeding to enjoin the sheriff from setting apart as exempt any personal property which has been levied on.¹⁸

Claim of exemption after order or judgment. Where the issue as to the right of exemption has been tried by a court having jurisdiction of both the subject matter and the person, the debtor by a failure to appeal loses the right to claim exemptions in a second proceeding instituted by him.¹⁹ However, a second application for the exemption of the same property may be made by a wife where the first application made by the husband was dismissed by the court without stating grounds for the dismissal.²⁰

§ 141. Surrender of Other Property

Some statutes provide for the appointment of a

trustee to receive and distribute among creditors the portion of the debtor's earnings not exempt.

Provision is sometimes made by statute whereby a debtor whose personal earnings are sought to be subjected to garnishment may apply to the court for the appointment of a trustee to receive and distribute among his creditors the portion of his earnings which are not exempt.²¹ In order to keep the trusteeship alive the debtor must pay such earnings to the trustee as required by the statute; if he fails to do so, the trusteeship terminates without action on the part of the court, creditors whose claims had been filed with the trustee may invoke the usual remedies against such earnings, and the trusteeship can be reinstated only by action of the court on notice to the creditors.²²

§ 142. Successive Exemptions

The filing of a new schedule after the levy of a second execution is required by some statutes. The debtor is entitled ordinarily to but one selection. An exemption may be reallocated after successive executions.

The issuance of an alias writ against the same property has been held not to necessitate the filing of a new schedule.²³ However, some statutes have been held to require the filing of a new schedule after the levy of a second execution;²⁴ and others, although relieving the debtor from filing a new schedule for a fixed period of time after the return of an execution unsatisfied, the length of the period corresponding with the lifetime of the execution, require that a new schedule be filed if additional property is acquired within that period.²⁵ Where a justice's attachment levied on property is quashed, and part of the same property is levied on under the justice's execution on judgment, an exemption list delivered as required by statute has been held to suffice for both writs.²⁶

Successive selections. The debtor is entitled ordinarily to one selection only, which must embrace all the property he is entitled to as exempt,²⁷ but, where the property selected is found, on an ap-

16. Colo.—Blum v. Kasik, 10 P.2d 384, 90 Colo. 414.

Damages for sale

Where court determined, without debtor's request or consent, that debtor's automobile was not exempt, debtor could recover treble damages against sheriff for illegal sale of automobile.

Colo.—Blum v. Kasik, *supra*.

17. Fla.—Camp v. Mullen, 35 So. 399, 46 Fla. 498—McMichael v. Grady, 15 So. 765, 34 Fla. 219.

18. Fla.—Camp v. Mullen, 35 So. 399, 46 Fla. 498.

19. Ark.—Launius v. Drake, 191 S. W. 209, 127 Ark. 48.

20. Ga.—Mozley v. Fontana, 52 S.E. 443, 124 Ga. 376.

21. Ohio.—Gerlach v. Farmer, 30 N. E.2d 568, 65 Ohio App. 497. Receiver of surplus generally see *supra* § 139.

Purpose of statute is to protect indigent debtor against incessant bombardment of creditors seeking by garnishment to seize the small margin of his wages over his statutory exemptions.

Ohio.—Gerlach v. Farmer, *supra*.

22. Ohio.—Fitzgibbon v. De Chant, 16 N.E.2d 794, 58 Ohio App. 453.

23. Wyo.—Lafferty v. Sistalla, 72 P. 192, 11 Wyo. 360.

24. Ill.—Biggs v. McKenzie, 16 Ill. App. 286—Camp v. Ganley, 6 Ill. App. 499.

25 C.J. p 139 note 46.

25. Ill.—Gullett v. Conley, 81 Ill. App. 131.

26. W.Va.—Preston v. Hufford, 94 S.E. 960, 81 W.Va. 510.

27. Ill.—Johnson v. Larcade, 110 Ill. App. 611.

praisement subsequently made, to exceed the statutory allowance, a second selection should be permitted to bring the debtor's exemption within the

legal limit.²⁸

Allotment. Where successive executions are levied, the exemption may be reallocated after each.²⁹

B. REMEDIES AND PROCEDURE TO ENFORCE AND PROTECT

§ 143. Right of Action in General

Where exempt property is wrongfully seized, a right of action arises in favor of the debtor.

Where exempt property is wrongfully seized or sold, a right of action arises in favor of the debtor.³⁰ Whether the property in question is exempt, and hence whether the debtor has a cause of action, must be determined as of the time of the levy.³¹

A magistrate who states to an officer making a levy that a claim for exemption is too late does not thereby become a co-conspirator.³²

§ 144. Nature and Form of Action or Proceeding in General

The nature and form of the various remedies open to a debtor to protect his right of exemption are considered *infra* §§ 145-154.

Examine Pocket Parts for later cases.

§ 145. Motions and Summary Proceedings

In the absence of statutory authorization, where the facts are not admitted, the court cannot pass in a summary manner on the right to an exemption; such right may be determined on a motion to quash or vacate process directed against property claimed to be exempt.

The debtor may avail himself of a remedy provided by statute for the enforcement or protection, in a summary manner, of his right of exemption;³³ but such a remedy is not exclusive unless the statute so provides.³⁴ In the absence of statutory authorization, where the facts are not ad-

mitted, the court cannot assume the prerogative of a jury and pass in a summary manner on the debtor's right to an exemption.³⁵ A contention that the debtor was entitled to an exemption cannot be raised by a motion to modify a judgment in an action to set aside a fraudulent conveyance made by him.³⁶

On attachment. The question whether property is exempt from levy and sale may be determined on a motion to quash the levy of an attachment,³⁷ or to discharge the attachment.³⁸ Where, on attachment, property has been sold and the proceeds come into the custody and control of the court, before the attaching officer can lawfully set apart the property as exempt, the debtor must make his claim of exemption to the court.³⁹ An adverse ruling in an attachment proceeding on motion by defendant to have attached property released as exempt does not render the question of exemption *res judicata*,⁴⁰ the attachment being merely a provisional remedy,⁴¹ and defendant may afterward bring *replevin* against plaintiff to try the question.⁴²

Where the statutes afford the attachment debtor no opportunity to litigate the question of exemption in the attachment proceedings, it is obvious that an order for the sale of attached property is not a bar to a claim of property as exempt.⁴³ Where, however, defendant is entitled to set up his claim of exemption as a defense to attachment, he cannot claim his exemption after an order of sale of the attached property.⁴⁴ Even in the absence of statute providing for notice, it would seem that at-

28. S.D.—Nelson v. Oium, 114 N.W. 691, 21 S.D. 541.

25 C.J. p 145 note 7.

29. N.C.—Gardner v. McConaughy, 73 S.E. 125, 157 N.C. 481.

30. Kan.—Schwartzberg v. Central Ave. State Bank, 115 P. 110, 84 Kan. 581.

Minn.—Braman v. Wall, 7 N.W.2d 924, 214 Minn. 238.

Ohio.—Wilcox v. Wynn, Mun., 83 N.E. 2d 411.

25 C.J. p 148 note 81.

Action for wrongful execution see Executions §§ 457, 458.

31. N.D.—Mahon v. Fansett, 115 N.W. 79, 17 N.D. 104.

25 C.J. p 148 note 82.

32. Pa.—Cortelucci v. Benz, 54 Montg.Co. 209.

33. Iowa.—Union County Inv. Co. v. Messix, 132 N.W. 823, 152 Iowa 412.

N.D.—Oliver v. Wilson, 80 N.W. 757, 8 N.D. 590, 73 Am.S.R. 784.

The debtor need not do anything more than the statute requires in order fully to protect his rights.

Ark.—Taylor v. Tomlinson, 45 S.W. 544, 65 Ark. 544.

Ind.Terr.—Minor v. Edwards, 98 S.W. 151, 6 Ind.Terr. 438.

34. Iowa.—Wilson v. Stripe, 4 Greene 551, 61 Am.D. 138.

35. Colo.—*Corpus Juris* quoted in Blum v. Kasik, 10 P.2d 384, 90 Colo. 414.

25 C.J. p 148 note 87.

36. Ind.—Bass v. Citizens' Trust Co., 70 N.E. 400, 32 Ind.App. 583.

37. Ky.—Campbell v. Mitchell, 4 Ky. Op. 629.

38. Iowa.—Union County Inv. Co. v. Messix, 132 N.W. 823, 152 Iowa 412.

25 C.J. p 148 note 90.

39. Mo.—Linck v. Troll, 84 Mo.App. 49.

40. Iowa.—Cox v. Allen, 59 N.W. 335, 91 Iowa 462.

34 C.J. p 884 note 43 [d]—25 C.J. p 148 note 92.

41. N.C.—Gamble v. Rhyne, 80 N.C. 183.

42. Kan.—Watson v. Jackson, 24 Kan. 442.

43. Or.—Berry v. Charlton, 10 Or. 362.

44. Ind.—State v. Manly, 15 Ind. 8.

tached property should not be released on a claim of exemption by the debtor without notice to the creditor, where the question of exemption is a mixed one of law and fact.⁴⁵

On execution. If an execution is levied on exempt property, the levy may be quashed or vacated on motion in the court from which the execution issued.⁴⁶ So, a release of property as exempt may be ordered⁴⁷ although in the particular jurisdiction mandamus is regarded as a proper remedy to procure the release of such property.⁴⁸

A sale of exempt property may be set aside on motion;⁴⁹ but a levy, or intention to levy, on exempt property is no ground for quashing the writ of execution.⁵⁰

If, under a statute, the court does not have power to quash a levy, the proper remedy for the debtor is to remove the proceeding by certiorari into a court which has that power.⁵¹ A special execution against wages may be vacated on motion.⁵²

Attachment execution. Defendant's right to an exemption cannot be determined on a rule to dissolve an attachment execution.⁵³ Where, in an execution attachment proceeding, the debtor's claim of exemption has been denied at the hearing on the answer of the garnishee, the judgment cannot be questioned by a rule to show cause why the money in court should not be paid to the debtor.⁵⁴

In garnishment proceedings, defendant in the main action may set up a claim of exemption by following the procedure prescribed by statute.⁵⁵

Where money in the hands of a garnishee in which defendant is entitled to an exemption is paid into court, defendant may claim his exemption therein.⁵⁶ Under applicable statutory provisions, an execution defendant may by rule compel a constable to pay over to him exempt wages collected from a garnishee,⁵⁷ and the judgment creditor may be made a party to the rule.⁵⁸ On the other hand, where the garnishee voluntarily pays to the constable money which is exempt, it has been held that in the absence of statute a court may properly refuse to direct the constable to pay the money to the judgment debtor.⁵⁹

§ 146. Replevin or Other Possessory Action

Although there is authority to the contrary effect, as a general rule, a debtor, in the absence of a statute otherwise providing, cannot maintain replevin against an officer to recover exempt property seized by him under valid legal process, or against an execution creditor not in possession of the property; but such an action will lie against the purchaser at an execution sale, and a number of statutes authorize an action of replevin against the officer.

At common law, as shown in Replevin § 27, an execution defendant could not maintain replevin against the officer to recover property seized and held by him under a valid writ; and this principle has been held, both in cases at common law and in cases under statutes not modifying the common-law doctrine, to prevent a debtor from maintaining replevin against an officer to recover exempt property seized by him under valid legal process.⁶⁰ There is, however, authority to the contrary effect,⁶¹ and by statute in a number of jurisdictions, the rule

45. La.—Claffin v. Lisso, 31 La. Ann. 171.

46. Ariz.—Mack v. Boots, 239 P. 794, 29 Ariz. 116.
25 C.J. p 148 note 1.

Motion to modify decree properly overruled

Motion by judgment debtor, that decree ordering the sale of land owned by him to satisfy a judgment against him be modified to include exemptions provided by statute, was properly overruled in view of testimony that the property was not his homestead, that the statute relied on pertained only to personal property exemptions, and that he did not comply with procedure required by statute in claiming statutory exemptions.

Ark.—Jennings v. Tankersley Bros. Packing Co., 238 S.W.2d 625, 218 Ark. 776.

47. Wash.—American Paper Co. v. Sullivan, 75 P. 991, 34 Wash. 391.

48. Wash.—American Paper Co. v. Sullivan, supra.

25 C.J. p 149 note 3.

Mandamus to stay or quash executions see Mandamus § 97.

49. Ark.—Jacks v. Bigham, 36 Ark. 481.

Mo.—Finke v. Craig, 57 Mo. App. 393.

50. Mo.—Catron v. Lafayette County, 28 S.W. 331, 125 Mo. 67.
25 C.J. p 149 note 5.

51. Tenn.—Keen v. Alexander, 260 S.W.2d 297, 195 Tenn. 564—Jones v. Williams, 2 Swan 105.
25 C.J. p 149 note 6.

52. N.Y.—Rinschler v. Bell, 118 N. Y.S. 536.

The motion must disclose the grounds on which it is based.
N.Y.—Rinschler v. Bell, supra.
25 C.J. p 149 note 8.

53. Pa.—Tioga Cricket Club v. Horn, 19 Pa. Co. 672.

Rule to quash sustained

Pa.—First Nat. Bank v. Coveleskie, 8 Sch. Reg. 19.

54. Pa.—Boland v. Spitz, 26 A. 22, 153 Pa. 590.

55. Iowa.—Union County Inv. Co. v. Messix, 132 N.W. 823, 152 Iowa 412.

N.D.—Imperial Elevator Co. v. Warren, 217 N.W. 523, 56 N.D. 329—Jangula v. Bobb, 213 N.W. 27, 55 N.D. 279.

56. Ga.—Smith v. Johnston, 71 Ga. 748.

57. Ga.—Smith v. Johnston, supra.

58. Ga.—Steele v. Parker, 35 S.E. 167, 109 Ga. 791.

59. Or.—Opitz v. Winn, 3 Or. 9.

60. N.D.—Oliver v. Wilson, 80 N.W. 757, 8 N.D. 590, 73 Am.S.R. 784.
25 C.J. p 149 note 19.

61. Minn.—Braman v. Wall, 7 N.W. 2d 924, 214 Minn. 238.

Tenn.—Tibbs v. Zimmerman, 171 S.W. 2d 832, 26 Tenn. App. 321.

Wis.—Below v. Robbins, 45 N.W. 416, 76 Wis. 600, 20 Am.S.R. 89, 8 L.R.A. 467.

25 C.J. p 149 notes 20, 21.

of the common law, as laid down in the authorities denying the right of debtors to bring replevin, has been so far modified as to allow a debtor whose exempt property has been wrongfully seized by an officer, even under valid legal process against him, to recover possession of it by replevin,⁶² or by a proceeding in the nature of replevin known as claim and delivery,⁶³ and these statutes are ordinarily applicable to seizures on attachment as well as on execution.⁶⁴ A statute, however, modifying the common-law rule only to the extent of allowing owners other than defendants in a suit, or debtors in an execution, to bring replevin against the officer, does not impliedly change the common-law rule as to debtors and defendants.⁶⁵

The debtor's right, under the statutes, to replevy exempt property in the hands of an officer is not affected by statutes giving other remedies, in the absence of provision therein that the special remedies given are exclusive,⁶⁶ as, for example, where the statute gives power to a particular court to enjoin the sale of exempt property,⁶⁷ or provides a special remedy for the debtor who desires to retain the property seized under execution and submit his right to it as exempt to the test of a trial.⁶⁸ In any case, to entitle a debtor to maintain replevin to recover exempt property, the right of exemption must be complete, so as to give him the right to immediate possession and make the officer's possession wrongful.⁶⁹

In the absence of a statute otherwise providing, no notice to the officer at the time of the levy that it is exempt, and no demand for its return, are necessary in order to entitle the debtor to maintain replevin;⁷⁰ and a statute providing that an officer is bound to levy on any personal property in the possession of defendant, unless he has received notice in writing from some other person that the property belongs to him, does not require the execution defendant to notify the officer that property levied on belongs to him, before he can maintain

replevin to recover the property as being exempt from execution.⁷¹

Against purchaser at execution sale. The owner of exempt property seized and sold under a writ of execution may maintain replevin against the purchaser at the execution sale,⁷² provided he has not waived his rights.⁷³ It has been held, however, under statutes requiring that exempt property be appraised and set apart, that if the officer disregards the debtor's demand for an appraisal and claim of exemption, and sells the property, replevin will not lie against the purchaser, but the remedy is by an action for damages against the officer, or against both the officer and the execution plaintiff, if the latter directed or participated in the wrong.⁷⁴

Against execution creditor. As a rule, replevin will not lie against an execution creditor who is not in possession of the property, for a person can be sued in replevin only when he has actual or constructive possession and control of the property;⁷⁵ but there is authority for maintenance of such an action against the levying officer and plaintiff in execution.⁷⁶

Veteran's benefits. Benefits payable to a veteran by way of bonds may be replevined from a third party to whom they were given for some honest purpose, although delivery of such possession was by mutual voluntary delivery.^{76.5}

§ 147. Action for Damages

Violations of the debtor's right of exemption as giving rise to a cause of action for damages are considered infra §§ 148-150.

§ 148. — Right of Action in General

If a creditor wrongfully directs an officer to levy on and sell exempt property, or otherwise participates in the wrongful sale, the debtor may maintain an action for damages against him alone, or against him and the of-

62. Okl.—Taylor v. Smith, 144 P. 1028, 44 Okl. 403.
25 C.J. p 150 note 23.

63. N.D.—Oliver v. Wilson, 80 N. W. 757, 8 N.D. 590, 73 Am.S.R. 784.

25 C.J. p 150 note 24.

64. Ark.—Mills v. Pryor, 45 S.W. 350, 65 Ark. 214.

25 C.J. p 150 note 25.

65. Vt.—Prescott v. Starkey, 41 A. 1021, 71 Vt. 118.

66. Fla.—Allen v. Ingram, 22 So. 651, 39 Fla. 239.

Miss.—Ross v. Hawthorne, 55 Miss. 551.

67. Fla.—Allen v. Ingram, 22 So. 651, 39 Fla. 239.

68. Miss.—Ross v. Hawthorne, 55 Miss. 551.

69. Neb.—Mann v. Welton, 32 N.W. 599, 21 Neb. 541.

25 C.J. p 150 notes 30-35.

70. Kan.—Seip v. Tilghman, 23 Kan. 289.

71. Iowa.—Glover v. Narey, 60 N. W. 531, 92 Iowa 286—Parsons v. Thomas, 17 N.W. 526, 62 Iowa 319.

72. Md.—Cromwell v. Owings, 7 Harr. & J. 55.

25 C.J. p 151 note 40.

73. N.Y.—Twinam v. Swart, 4 Lans. 263.

Waiver, forfeiture, and estoppel to assert exemption see supra §§ 101-118.

74. Pa.—Hatch v. Bartle, 45 Pa. 166, 84 Am.D. 484—Bonsall v. Comly, 44 Pa. 442.

Action for damages see infra §§ 147-150.

75. N.H.—Mitchell v. Roberts, 50 N.H. 486.

76. Kan.—Mullaney v. Humes, 29 P. 691, 48 Kan. 368.

76.5 Ohio.—Wilcox v. Wynn, Mun., 83 N.E.2d 411.

ficer jointly, or against the purchaser if he takes and carries away the property.

If a creditor wrongfully directs an officer to levy on and sell exempt property under execution or attachment, or otherwise participates in the wrongful sale, the debtor may maintain an action for damages against him alone⁷⁷ or against him and the officer jointly.⁷⁸ The creditor, without having participated in the levy or sale, may become liable by ratifying the levy, as by receiving its benefits.⁷⁹ The creditor is not, however, liable where there is no showing that he gave the officer an indemnifying bond or directions, or that he received the property or the proceeds thereof, or in some way ratified the officer's acts.⁸⁰ Indeed, it has been said that a creditor does not become liable for the officer's wrongful levy on exempt property merely because he signed an indemnifying bond, if the bond does not direct or authorize a levy on the exempt property,⁸¹ although he is liable as a trespasser in damages if the bond directs the officer to levy on specific property.⁸²

Garnishment. A creditor is liable if he wrongfully obtains by garnishment exempt wages due his debtor and applies them to the satisfaction of his judgment.⁸³ The same rule applies to other exempt choses in action.⁸⁴ However, there is no liability against plaintiff in garnishment if the debtor had a right to assert his claim of exemption in the garnishment proceedings and failed to do so seasonably.⁸⁵

Against purchaser. When property sold on exe-

cution is exempt, so that the purchaser acquires no title or right to possession, he is liable to the debtor for damages if he takes and carries away the property.⁸⁶

§ 149. — Against Creditor Proceeding Outside State to Evade Exemption Law

According to a number of authorities, but not others, a creditor is liable for the resulting damage to the debtor where, both being residents of the state, the creditor procures suit to be instituted in a foreign state in order to evade the state exemption laws, even though such evasion is not prohibited by statute.

While there is authority to the contrary effect,⁸⁷ according to a number of authorities a creditor is liable for the resulting damage to the debtor where, both being residents of the state, the creditor procures suit to be instituted in a foreign state for the purpose of depriving the debtor of the exemptions which he would have had were he sued in the state of his residence, even where no statute exists prohibiting the sending of a claim outside the state for the purpose of evading the exemption law thereof.⁸⁸ However, by express statutory provision in some jurisdictions, a right of action is given the debtor,⁸⁹ which may be exercised unless no effort was made in the foreign state by attachment or garnishment to deprive the debtor of his statutory exemptions.^{89.5} Where the statute makes the sending of the claim out of the state a criminal offense and punishable as such, but does not in express terms give an action for damages,

77. Mass.—Magaw v. Beals, 136 N. E. 174, 242 Mass. 321.

Mich.—Church v. First Nat. Bank, 238 N.W. 192, 255 Mich. 595, 82 A. L.R. 645—Slumpff v. McGuire & Hansen, 235 N.W. 224, 253 Mich. 473.

25 C.J. p 151 note 46.

78. Tex.—Coursey v. Cornwell, Civ. App., 65 S.W. 73.

25 C.J. p 151 note 46.

Liability of sheriff or constable for: Seizure of exempt property see Sheriffs and Constables § 66. Sale of exempt property see Sheriffs and Constables § 87.

79. Ind.—Eisenhauer v. Dill, 33 N. E. 220, 6 Ind.App. 188.

25 C.J. p 151 note 48.

80. Ill.—Bessermann v. Votupal, 11 N.E.2d 45, 292 Ill.App. 355.

81. N.Y.—Pozzoni v. Henderson, 2 E.D.Smith 146.

82. N.Y.—Pozzoni v. Henderson, supra.

83. Iowa.—Nix v. Goodhill, 63 N.W. 701, 95 Iowa 282, 58 Am.S.R. 434.

Neb.—O'Connor v. Walter, 55 N.W.

867, 37 Neb. 267, 40 Am.S.R. 486, 23 L.R.A. 650.

25 C.J. p 151 note 51.

Statute giving right of action held valid

Neb.—Gordon Bros. v. Wageman, 108 N.W. 1067, 77 Neb. 185—Singer Mfg. Co. v. Fleming, 58 N.W. 226, 39 Neb. 679, 42 Am.S.R. 613, 23 L.R.A. 210.

84. Neb.—Schaller v. Kurtz, 41 N. W. 642, 25 Neb. 655.

Bank deposits constituting proceeds of war risk insurance

Ark.—Purvis v. Walls, 44 S.W.2d 353, 184 Ark. 887.

85. Ark.—First State Bank of Bensenville, Ill., v. Taggart, 57 S.W. 2d 1024, 186 Ark. 1156.

86. Mich.—Stewart v. Welton, 32 Mich. 56.

Vt.—Hart v. Hyde, 5 Vt. 328.

87. Wis.—Leeman v. McGrath, 92 N.W. 425, 116 Wis. 49.

25 C.J. p 152 note 56.

88. Kan.—Stark v. Bare, 17 P. 826, 39 Kan. 100, 7 Am.S.R. 537.

Tex.—Halls Clothing Co. v. Ramirez, Civ.App., 184 S.W.2d 296, error dismissed.

25 C.J. p 151 note 54.

Criminal liability see *infra* § 167.

Injunction against proceedings outside state see *infra* § 154.

The debtor's failure to defend the action in the foreign jurisdiction does not affect the creditor's liability.

Okl.—Anderson v. Canaday, 131 P. 697, 37 Okl. 171, L.R.A.1915A 1186, Ann.Cas.1915B 714.

25 C.J. p 151 note 55.

89. Ohio.—Hinds v. Sells, 58 N.E. 800, 63 Ohio St. 328.

25 C.J. p 152 note 57.

A nonresident cannot have the benefit of such a statute when it is restricted by its terms to residents.

Neb.—Satterlee v. Columbus First Nat. Bank, 111 N.W. 591, 78 Neb. 691—McCormack v. Tinch, 110 N.W. 547, 77 Neb. 857.

N.C.—Padgett v. Long, 35 S.E.2d 234, 225 N.C. 392.

89.5 N.C.—Padgett v. Long, *supra*.

it is held, nevertheless, that the debtor may maintain an action for damages against a creditor who violates the statute.⁹⁰

Such an action cannot be defeated on the ground that the right of exemption is *res judicata*, where plaintiff was not a party to the proceedings in the other state.⁹¹

§ 150. — Form of Action

Where the common-law forms of action have been abolished, an action to recover for the wrongful seizure and sale of exempt property is simply an action for damages; under common-law rules, trespass, case, trover, and assumpsit are appropriate forms of action.

Where the common-law forms of action have been abolished, an action to recover for the wrongful seizure and sale of exempt property is simply an action for damages.⁹²

Trespass is a proper form of action to recover damages from a creditor who directs or otherwise participates in a wrongful seizure and sale of exempt property;⁹³ and the action may be maintained against the purchaser at an execution sale for taking and carrying away the property, if it was exempt so that no title passed.⁹⁴

An action on the case will lie against a creditor for directing a levy on exempt property.⁹⁵

An action of *trover* may be maintained for the purpose of recovering damages for the seizure and sale of exempt property, on the theory that the seizure and sale amount to a conversion.⁹⁶

Possessory warrant is, in a proper case, a remedy for the recovery of property from one having unlawful possession.^{96.5}

Assumpsit. If an officer or creditor wrongfully obtains exempt wages or other exempt money due

to a debtor by garnishment proceedings, the debtor may waive the tort at common law and sue in assumpsit for money had and received.⁹⁷

Cross action; reconvention. Where exempt property has been attached, defendants may by a plea in reconvention assert the right to a judgment against the attachment plaintiff for the value of the property levied on, treating the levy as a conversion.⁹⁸ By such a cross action for conversion, defendant abandons the property to plaintiff.⁹⁹

§ 151. Action for Penalties

Under a statute so providing, a debtor may maintain an action for a penalty against any person taking or seizing exempt property; but such a statute will be applied according to its terms, and the debtor may waive his rights thereunder.

Under a statute so providing, the debtor may maintain an action to recover a penalty against any person taking or seizing exempt property.¹ The debtor, however, may waive such a statute and proceed only for simple damages.² If the debtor transfers his property after it has become subject to the lien of an execution against him, he cannot afterward claim the property as his and recover the statutory penalty.³

A statute in terms rendering the officer alone liable to such a penalty for seizing and selling exempt property does not authorize an action therefor against the execution creditor, although he may have directed the levy;⁴ and, since penal statutes are to be strictly construed, a statute imposing a penalty of triple damages for carrying off and destroying any "wood, timber, lumber, hay, grass, or other personal property" does not apply to a case in which property not of the same kind as that enumerated has been taken.⁵

90. Ind.—Markley v. Murphy, 102 N.E. 376, 180 Ind. 4, 7, 47 L.R.A., N.S., 689.

25 C.J. p 152 note 59.

91. Neb.—O'Connor v. Walter, 55 N.W. 867, 37 Neb. 267, 40 Am.S.R. 486, 23 L.R.A. 650.

92. Miss.—Evans v. Miller, 58 Miss. 120, 38 Am.R. 313—Ross v. Hawthorne, 55 Miss. 551.

93. Nev.—Elder v. Frevert, 5 P. 69, 18 Nev. 446.

25 C.J. p 152 note 65.

94. Vt.—Hart v. Hyde, 5 Vt. 328.

25 C.J. p 152 note 66.

95. S.C.—Parkerson v. Wightman, 35 S.C.L. 363.

96. Ga.—Morgan v. Community Loan & Inv. Co., 25 S.E.2d 413, 195 Ga. 675.

Tenn.—Curd's Adm'r v. Curd, 9 Humphr. 171.

25 C.J. p 152 note 70.

96.5 Ga.—Morgan v. Community Loan & Inv. Co., 25 S.E.2d 413, 195 Ga. 675.

97. Ind.—Kestler v. Kern, 28 N.E. 726, 2 Ind.App. 488.

98. Tex.—Kiggins v. Henne & Meyer Co., Civ.App., 199 S.W. 494.

99. Tex.—Kiggins v. Henne & Meyer, etc., Co., supra.

1. Ill.—Race v. Olbridge, 90 Ill. 250.

Penalty on levying officer see Sheriffs and Constables § 173.

Violation not established

Where garnishee's interrogatories merely disclosed that judgment cred-

itor, by garnishment proceeding, sought to impound commissions due debtor from renewal of insurance policies theretofore procured by debtor for garnishee, record did not establish that judgment creditor had violated penal provisions of exemption act.

Okl.—Atlas Life Ins. Co. v. Rose, 166 P.2d 1011, 166 Okl. 592.

2. Ill.—Amend v. Murphy, 69 Ill. 337.

25 C.J. p 152 note 79.

3. Ill.—Cassell v. Williams, 12 Ill. 387.

4. Ill.—Pace v. Vaughn, 6 Ill. 30.

5. Minn.—Berg v. Baldwin, 18 N.W. 821, 31 Minn. 541, 542.

25 C.J. p 153 note 82.

§ 152. Remedies in Equity

In the absence of statutory authority, an equity court will not assume jurisdiction to protect an exemption when there is a plain and adequate remedy at law.

Courts of equity may by statute be clothed with full and complete jurisdiction over the question of exemptions allowed by the constitution and laws,⁶ not only to adjudicate as to the rights of the parties thereto, but to restrain interference therewith or sale thereof under any inhibited process of law and to pass on the propriety of any exemption set apart by any officer and to rectify it if improper.⁷ In the absence of such a statute, the question of jurisdiction is governed by the general principle that equity will not assume jurisdiction when there is a plain and adequate remedy at law.⁸

A claim of exemption irregularly made cannot be enforced in equity.⁹

§ 153. — Injunction Generally

Authorities differ as to whether a debtor can maintain a bill in equity to enjoin an officer from selling his exempt property. The statute, or circumstances rendering the legal remedy inadequate, may make injunction a proper remedy.

Under some authorities, a debtor cannot maintain a bill in equity to enjoin an officer from selling his exempt property on execution or other process, for he generally has an adequate remedy

at law by motion to quash the levy or set aside the sale, or by an action to recover the property or to recover damages.¹⁰ Other authorities hold that when a debtor duly claims his exemption, and the officer is proceeding to sell in disregard of his right, injunction is a proper remedy,¹¹ and a wrongful sale of exempt property under execution will be enjoined even though the property has been returned to its owner on a delivery bond;¹² and, in some cases where the question of jurisdiction has not been raised, an injunction has been granted.¹³ This remedy may be expressly given by statute.¹⁴

Independently of statute, an injunction will be granted where the circumstances are such as to render the remedy at law inadequate;¹⁵ so, proceedings on an execution may be enjoined where, if they should result in a sale of plaintiff's real estate, an apparent cloud would be placed on the title to the property.¹⁶ Alias executions against exempt property repeatedly procured for the sole purpose of annoying a judgment debtor will be enjoined.¹⁷

Bond. The court may, in its discretion, require a bond as a condition precedent to the issuance of an injunction.¹⁸

Restitution on violation of injunction. If a creditor prosecutes an action or proceeding in violation of an injunction, and thereby obtains and ap-

6. Ala.—McGowan v. McGowan, 169 So. 232, 232 Ala. 601.

Fla.—Hillsborough Inv. Co. v. Wilcox, 13 So.2d 448, 152 Fla. 889—Shollar Crate & Box Co. v. Passmore, 4 So.2d 530, 148 Fla. 466.

Ohio.—Wilcox v. Wynn, Mun., 83 N. E.2d 411.

25 C.J. p 153 note 84.

7. Fla.—Bennet v. Bogue, 101 So. 206, 88 Fla. 109—McMichael v. Grady, 15 So. 765, 34 Fla. 219.

8. Ark.—Jacks v. Bigham, 36 Ark. 481.

Ga.—Morgan v. Community Loan & Inv. Co., 25 S.E.2d 413, 195 Ga. 675.

Ill.—Farrell v. McKee, 36 Ill. 225.

9. Ala.—Smith v. Smith, 75 So. 955, 200 Ala. 197.

25 C.J. p 153 note 90.

10. Ga.—Morgan v. Community Loan & Inv. Co., 25 S.E.2d 413, 195 Ga. 675.

Or.—Parsons v. Hartman, 37 P. 61, 25 Or. 547, 42 Am.S.R. 803, 30 L. R.A. 98.

25 C.J. p 153 note 91.

Where a wage earner has an action against his employer for paying a claim out of his wages contrary to the exemption law, the rule that injunction will not issue when

there is an adequate remedy at law applies and the employer will not be enjoined.

Pa.—Galbraith v. Rutter, 20 Pa.Super. 554.

11. Kan.—Lynch v. Warren, 199 P. 471, 109 Kan. 443.

La.—Gunn v. Credit Service Corp., App., 46 So.2d 628.

Mo.—Hyde v. Copeland, 173 S.W.2d 684, 351 Mo. 580.

Tex.—Stichter v. Southwest Nat. Bank, Civ.App., 258 S.W. 223, 25 C.J. p 153 note 93.

Replevin and action for damages are not adequate remedies to prevent a debtor, whose exempt personal property is about to be sold on execution, from obtaining an injunction against the sale.

Kan.—Wamberg v. Hart, 221 P. 547, 114 Kan. 906, 36 A.L.R. 666.

12. Tex.—Peevehouse v. Smith, Civ. App., 152 S.W. 1196.

13. Ind.—Robinson v. Hughes, 20 N. E. 220, 117 Ind. 293, 10 Am.S.R. 45, 3 L.R.A. 383.

Tex.—Nichols v. Claiborne, 39 Tex. 363.

14. Fla.—Smith v. Gufford, 18 So. 717, 36 Fla. 481, 51 Am.S.R. 37.

25 C.J. p 153 note 96.

15. Ill.—Farrell v. McKee, 36 Ill. 225.

Pa.—Zeiders v. Lewis Apparel Stores, Inc., 82 Pa.Dist. & Co. 488.

Multiplicity of proceedings

A judgment creditor will be enjoined from prosecuting a multiplicity of garnishment proceedings to reach exempt wages, as the remedy at law is inadequate.

Neb.—Siever v. Union Pac. R. Co., 93 N.W. 943, 68 Neb. 91, 110 Am.S.R. 393, 61 L.R. 319.

16. N.Y.—Buffum v. Forster, 28 N. Y.S. 285, 77 Hun 27.

25 C.J. p 153 note 98.

17. Ind.Terr.—Parker v. Independence Produce Co., 53 S.W. 335, 2 Ind. Terr. 561.

18. Fla.—Smith v. Gufford, 18 So. 717, 36 Fla. 481, 51 Am.S.R. 37.

Sufficiency of amount

It was not error to refuse to order an increase of the bond from one hundred dollars to seven hundred dollars, where the execution was for eight hundred fifty eight dollars and the property was worth from four hundred dollars to five hundred dollars.

Kan.—Wamberg v. Hart, 221 P. 547, 114 Kan. 906, 36 A.L.R. 666.

propriates exempt property or money, the court which granted the injunction has the power to render a judgment against him and in favor of the debtor for the amount so appropriated.¹⁹

§ 154. — Injunction against Proceedings in Another State

Equity will enjoin a resident creditor from instituting or prosecuting proceedings in another state for the purpose of evading the exemption laws of his state and of subjecting to the satisfaction of his claim property of the debtor which would be exempt if the proceedings were brought within the state.

It may be regarded as settled that a court of equity will enjoin a resident creditor from instituting or prosecuting an action or proceeding in another state for the purpose of evading the exemption laws of his state and of collecting his claim by subjecting to its satisfaction property or credits which the debtor could claim as exempt if the action or proceeding were brought within the state;²⁰ so, the sending of a claim out of the state in violation of a criminal statute will be enjoined.²¹ Where a person himself carries his claim into a foreign state and there sues thereon, it has been held that he thereby transfers his claim within the meaning of the statute.^{21.5}

The same doctrine applies where the debtor takes his property into another state, for a temporary purpose, and under such circumstances it is held that the creditor who also lives in the state of the debtor's domicile cannot attach property in the foreign state and thereby evade the exemption laws to the benefit of which the debtor is entitled;²² but where the attached property is temporarily in the foreign state, the court of equity will not interfere unless it appears from the relations and circumstances of the parties that it would be inequi-

table to permit the institution or continuance of the foreign action or proceeding.²³

The court, in issuing an injunction, proceeds in personam against the creditor to compel him to obey the laws of his own state,²⁴ and in so doing it does not violate the provision of the federal constitution that in each state full faith and credit shall be given to the judicial proceedings of every other state.²⁵ Such an injunction suit is not within the rule that the courts of one state cannot enjoin the proceedings of a court in another state, for the injunction merely acts on the personal conduct of the creditor who is within the jurisdiction of the court.²⁶

An injunction will not be granted in such cases on the mere showing that the property is exempt and without any showing as to the debtor's inability to pay, or his possession of none save exempt property, or as to whether the debt was, or was not, fraudulently contracted.²⁷ It is only when a creditor attempts to evade the exemption laws of his own state by resort to attachment proceedings in the court of another state against the property of a debtor who is a resident of the state of the creditor's domicile that he will be enjoined by the courts of the latter state from prosecuting his suit in the foreign jurisdiction;²⁸ and when a creditor sues in his own state to collect a claim against a nonresident debtor by garnishment, subjecting to its payment money due to such nonresident in the hands of the garnishee who is within the creditor's state, which would be exempt under the laws of the debtor's state, there cannot be said to be an attempt to evade the exemption laws of another state.²⁹ This rule is also placed on the ground that, inasmuch as equity acts only in personam, an injunction will not issue against a creditor in an-

19. Wis.—Griggs v. Docter, 61 N.W. 761, 89 Wis. 161, 46 Am.S.R. 824, 30 L.R.A. 360.

25 C.J. p 153 note 1.

20. Ark.—Greer v. Strozier, 118 S. W. 400, 90 Ark. 158.

Pa.—Zeiders v. Lewis Apparel Stores, Inc., 82 Pa.Dist. & Co. 488.

25 C.J. p 153 note 2—32 C.J. p 118 note 87.

21. Ind.—Wilson v. Joseph, 8 N.E. 616, 107 Ind. 490.

21.5 Pa.—Zeiders v. Lewis Apparel Stores, Inc., 82 Pa.Dist. & Co. 488.

22. Iowa.—Mumper v. Wilson, 33 N.W. 449, 72 Iowa 163, 2 Am.S.R. 238.

32 C.J. p 118 note 88.

23. Kan.—Cole v. Young, 24 Kan. 435.

24. N.C.—Wierse v. Thomas, 59 S. E. 58, 145 N.C. 261, 122 Am.S.R. 446, 15 L.R.A., N.S., 1008.

25. U.S.—Cole v. Cunningham, Mass., 10 S.Ct. 269, 133 U.S. 107, 33 L.Ed. 538.

N.C.—Wierse v. Thomas, 59 S.E. 58, 145 N.C. 261, 122 Am.S.R. 446, 15 L.R.A., N.S., 1008.

26. U.S.—Cole v. Cunningham, Mass., 10 S.Ct. 269, 133 U.S. 107, 33 L.Ed. 538.

25 C.J. p 154 note 7.

27. Kan.—Cole v. Young, 24 Kan. 435.

28. Ark.—Person v. Williams-Echols Dry Goods Co., 169 S.W. 223, 113 Ark. 467.

Wages for labor outside state for nonresident

A state court cannot enjoin a foreign corporation, registered to do business within the state, from proceeding to attach, in another jurisdiction, wages due a resident of the state which would be exempt from execution if the employer is a resident of the other jurisdiction, and if the labor was done there.

Pa.—Ansert v. Household Finance Corporation, 38 Pa.Dist. & Co. 98.

29. U.S.—Armour Fertilizer Works v. Sanders, C.C.A.Tex., 63 F.2d 902, affirmed 54 S.Ct. 677, 292 U.S. 190, 78 L.Ed. 1206, 91 A.L.R. 950, rehearing denied 54 S.Ct. 855, 292 U.S. 612, 78 L.Ed. 1472.

Ark.—Person v. Williams-Echols Dry Goods Co., 169 S.W. 223, 113 Ark.

other state, and the rule holds even though the creditor is found temporarily within the jurisdiction of the state of the debtor's domicile.³⁰

§ 155. Defenses

Matters involving the existence of a right of exemption, or waiver or forfeiture of such right, or estoppel to assert it, which matters may be urged as defenses to proceedings to enforce and protect such rights, are considered in appropriate preceding sections of this Title.

§ 156. — Set-Off of Debt or Judgment of Creditor

A judgment against a defendant for the value of exempt property cannot be offset by a debt owing from the plaintiff to the defendant.

A judgment against a defendant for the value of plaintiff's exempt property improperly taken cannot be offset by a debt owing from plaintiff to defendant.³¹

§ 157. Jurisdiction

Jurisdiction to hear and determine questions relating to exemption rights may be conferred on a particular court. In the absence of a statute otherwise providing, an action to replevy exempt property taken under legal process, or a bill to enjoin a sale of exempt property under such process, need not be brought in the court from which the process issued.

Jurisdiction to hear and determine all questions relating to exemption rights may be conferred by statute on a particular court.³² Whenever the jurisdiction of the court of equity attaches, it should be retained and exercised to determine finally the rights involved under the issues made.³³ Where, on a motion in a court of law to quash a levy on exempt property, the creditor relies on an equitable lien to defeat the motion and the debtor sets up matter which is cognizable only in equity, the creditor

may be allowed to elect whether to withdraw his objections to the jurisdiction of the court of law or to have the levy quashed without prejudice to his remedy in equity.³⁴

In the absence of a statute otherwise providing, an action of replevin to recover exempt property taken under legal process need not be brought in the court from which the process issued, but may be brought in any court having jurisdiction;³⁵ and a similar rule applies to a bill for an injunction to prevent a sale under legal process;³⁶ but where the statute provides that from the time of the issuance of an order of attachment the court shall be deemed to have acquired jurisdiction and have control of all subsequent proceedings under the attachment, the only court which has jurisdiction to determine whether an attachment should be discharged because of a claim that the property taken is exempt is the court from which the attachment issues.³⁷

§ 158. Parties

- a. Plaintiffs
- b. Defendants

a. Plaintiffs

Title is generally necessary to support an action for damages for seizing or selling exempt property, or to recover it; and ordinarily only the debtor may maintain such an action, although his wife may be permitted to do so, as where he fails to assert his right or the exemption right was created for her benefit.

As a general rule, title is necessary to support an action to recover property as exempt or to recover damages for wrongfully seizing or selling it,³⁸ and ordinarily, and with exceptions which will appear, no one but the debtor himself can maintain such an action.³⁹ Possession at the time of the seizure is necessary to support trespass,⁴⁰ but a constructive possession is sufficient.⁴¹

467—Griffith v. Langsdale, 13 S.W. 733, 53 Ark. 71, 73, 22 Am.S.R. 182.

30. Ark.—Griffith v. Langsdale, supra.

31. Kan.—Tally v. Palmer, 210 P. 1104, 112 Kan. 391—Treat v. Wilson, 70 P. 893, 65 Kan. 729.

Judgment as exempt property see supra § 60.

32. Neb.—Stout v. Rapp, 22 N.W. 384, 17 Neb. 462.

25 C.J. p 154 note 14.

Statutory jurisdiction of equity in exemption matters see supra § 152.

Particular courts

While the common pleas court may determine right to homestead in personalty where, in course of proceeding properly before court, it becomes necessary to adjudicate that right, it

will leave a party to enforce his right before the tribunal designated by statute.

S.C.—In re Brandenburg, 162 S.E. 432, 164 S.C. 460.

33. Tex.—Stein v. Frieberg, 64 Tex. 271.

Jurisdiction of equity generally see supra § 152.

34. Tenn.—Mynatt v. Magill, 3 Lea 72.

25 C.J. p 154 note 16.

35. Miss.—Ross v. Hawthorne, 55 Miss. 551.

36. Tex.—Cotton v. Rea, 163 S.W. 2, 106 Tex. 220.

25 C.J. p 154 note 19.

37. Kan.—Brown v. Woolwine, 191 P. 276, 107 Kan. 258.

25 C.J. p 155 note 20.

38. Mo.—State v. Springate, 51 Mo. App. 619.

25 C.J. p 155 note 25.

Title to support claim of exemption generally see supra §§ 63-65.

Equitable title sufficient

N.Y.—Frost v. Mott, 34 N.Y. 253.

39. Mo.—Osborne v. Schutt, 67 Mo. 712.

25 C.J. p 155 note 24.

Persons entitled to exemption see supra §§ 11-25.

40. Vt.—Bourne v. Merritt, 22 Vt. 429.

25 C.J. p 155 note 27.

41. Mass.—Walcot v. Pomeroy, 2 Pick. 121.

25 C.J. p 155 note 28.

Action by husband. A debtor may sue in his own name to recover his exempt property, or damages for its seizure or sale, without joining his wife as a plaintiff, although the statute may give the exemption for the benefit of both,⁴² and he holds the recovery, if any, for the use of his wife and children.^{42.5}

Action by wife. The wife of an execution or attachment debtor may bring an action to enforce a right of exemption created for her benefit⁴³ or for the benefit of the family.⁴⁴ Under a statute so providing, an action may be brought by the wife of an execution or attachment defendant, if he is absent, or if he fails or refuses to assert his right,⁴⁵ or if he has died.⁴⁶

Where the action is given to the wife by statute, even though it is her husband's exemption which she claims, her right is not defeated by her husband's waiver.⁴⁷ In a statutory proceeding limited to the trial of title or right of possession, a wife cannot assert her right of exemption in community property levied on by attachment in a suit against the husband.⁴⁸

Under a statute allowing a firm, as such, to claim an exemption out of the partnership property, and a statute allowing the wife of a debtor to claim his exemptions when he fails or refuses to do so, the wife of a partner may assert his right to the partnership exemption, if he fails or refuses to do so.⁴⁹

Husband and wife may sue jointly for damages for seizure of the exempt property.⁵⁰

Action by partner. Where exemptions are allowed to the partners in partnership property, one partner may maintain trover against the officer for the seizure of exempt property of the firm under an execution against all, since the exemption is

held to be an individual right.⁵¹

A mortgagor of exempt personal property who is rightfully in possession when it is wrongfully attached or taken on execution may maintain an action for damages,⁵² notwithstanding an attachment constitutes a breach of the condition of the mortgage,⁵³ or although the mortgage is to secure a debt payable on demand, if it contains a clause giving the mortgagor the right to possession until default in payment, and there has been no demand for payment, and therefore no default.⁵⁴ It has been held that the mortgagee should be joined as a party in an action against the officer for damages, lest the officer be subjected to a double liability.⁵⁵

A purchaser of exempt property from an execution defendant may maintain an action for a subsequent levy and sale.⁵⁶ The grantor and grantee of land which the former was entitled to claim as exempt from execution may join in a complaint against creditors of the former, the former to have his right to exemption established and the latter to have his title quieted.⁵⁷

Intervention. In particular circumstances, a petition for leave to intervene as an interested party has been denied.^{57.5}

b. Defendants

The creditor is a proper party defendant, and may be sued separately or jointly with the officer where the latter is also liable; and the purchaser of property sold subject to the right of exemption, subsequently allowed, is a proper party defendant in an action for damages.

While the sheriff, as appears in Sheriffs and Constables §§ 66, 87, may be held liable in an action for the wrongful seizure or sale of exempt property, he is not a proper party defendant to a bill in equity brought to restrain the sale of exempt

42. Ga.—McDuffie v. Irvine, 17 S. E. 1028, 91 Ga. 748—Braswell & Son v. McDaniel, 74 Ga. 319.
Alexander v. Holmes, 68 S.E.2d 242, 85 Ga.App. 124.

The declaration is amendable to add his representative character. Ga.—Braswell & Son v. McDaniel, 74 Ga. 319.

42.5 Ga.—Alexander v. Holmes, 68 S. E.2d 242, 85 Ga.App. 124.

43. Ga.—Wood v. Wood, 155 S.E. 678, 171 Ga. 389.

44. Okl.—Binion v. Lyle, 114 P. 618, 28 Okl. 430.

45. Ky.—Baum v. Turner, 76 S.W. 129, 25 Ky.L. 600.
25 C.J. p 155 note 31.

Only where property is taken by some process adversary to the hus-

band does the wife have a right to sue under the statute.

Mich.—Singer Mfg. Co. v. Cullaton, 51 N.W. 687, 90 Mich. 639.

46. Ky.—Myers v. Forsythe, 10 Bush 394.

47. Ga.—Tucker v. Edwards, 71 Ga. 602.

Mich.—King v. Moore, 10 Mich. 538.

48. Tex.—Brokaw v. Collett, Com. App., 1 S.W.2d 1090, rehearing denied 3 S.W.2d xx.

49. S.D.—Noyes v. Belding, 59 N. W. 1069, 5 S.D. 603.

50. Tex.—Neep v. Irons, 3 Tex. A.Civ.Cas. § 180—Cunningham v. Coyle, 2 Tex.A.Civ.Cas. § 422.

51. Mich.—McCoy v. Brennan, 28 N. W. 129, 61 Mich. 362, 1 Am.S.R. 589.

Exemption in partnership property see supra § 65.

52. Iowa.—Evans v. St. Paul Harvester Works, 18 N.W. 881, 63 Iowa 204.

25 C.J. p 155 note 38.

Mortgage as waiver of exemption see supra § 106.

53. Mass.—Copp v. Williams, 135 Mass. 401.

54. N.Y.—Livor v. Orser, 12 N.Y. Super. 501.

55. Iowa.—Evans v. St. Paul Harvester Works, 18 N.W. 881, 63 Iowa 204.

56. Ala.—Cook v. Baine, 37 Ala. 350.

57. Ind.—Barnard v. Brown, 13 N. E. 401, 112 Ind. 53.

57.5 Pa.—In re Lulis' Estate, 77 Pa. Dist. & Co. 126, 41 Luz.L.Reg. 482.

property.⁵⁸ The creditor is a proper party defendant and may be sued either separately⁵⁹ or jointly with the officer in those cases where the officer also is liable.⁶⁰ The purchaser of exempt property sold at a judicial sale subject to the right of exemption, pending an application by the debtor for an exemption which is subsequently allowed, is a proper party defendant in an action to recover damages.⁶¹

§ 159. Pleading

A debtor seeking to enforce or protect his right to exemption must plead facts which entitle him to relief. Facts constituting a defense must be pleaded by answer.

A debtor seeking to enforce or protect his right to exemption must show by his pleadings facts which entitle him to relief,⁶² and ownership in the property must be averred.⁶³ The debtor must show by his pleadings that he has taken all the steps required of him by the statute for claiming and defining his rights;⁶⁴ he is not, however, required to set forth his schedule,⁶⁵ and need not anticipate defenses.⁶⁶

While it has been held that in replevin to recover

exempt property taken under legal process it is not necessary to designate specifically the character of the property as exempt, any more than in an action of trespass or trover,⁶⁷ it has also been held, in a suit to enjoin the seizure or sale of exempt property, that the debtor must plead his right of exemption.⁶⁸ Whenever it is necessary to plead a right of exemption the facts and conditions fulfilling the statutory requirements for the existence of an exemption must be distinctly alleged,⁶⁹ and a mere allegation that property is exempt is insufficient;⁷⁰ but it is not necessary to make the allegations more specific than required by statute, or to carry the statement of facts beyond the statutory requirements.⁷¹

If residence within the jurisdiction is a condition of the exemption right, the residence must be pleaded.⁷² An averment of residence is a sufficient averment of citizenship.⁷³

If the exemption is given by statute to a householder or housekeeper,⁷⁴ or to the head of a family,⁷⁵ or to a member of the family,⁷⁶ the allegations must cover this prerequisite.

Damages or penalty. The usual rule that special

58. N.C.—Stout v. McNeill, 3 S.E. 915, 98 N.C. 1.

59. Ga.—Alexander v. Holmes, 68 S. E.2d 242, 85 Ga.App. 124.
Tex.—Faroux v. Cornwell, 90 S.W. 537, 40 Tex.Civ.App. 529.

60. Ga.—Alexander v. Holmes, 68 S. E.2d 242, 85 Ga.App. 124.
Mo.—Parketon v. Pugsley, 121 S.W. 789, 142 Mo.App. 537.

25 C.J. p 156 note 49.
61. Ga.—Harrell v. Harrell, 75 Ga. 697.

62. La.—Holmes v. Bordelon, App., 40 So.2d 816.

Mich.—McCoy v. Brennan, 28 N.W. 129, 61 Mich. 362, 1 Am.S.R. 539.
N.C.—Padgett v. Long, 35 S.E.2d 234, 225 N.C. 392.

25 C.J. p 156 note 53.

Amendment introducing claim of exemption

Where defendant verified plea of intervention by claimant of attached property and made no plea of exemption, denial of leave to defendant, after trial and failure of intervenor's claim, to amend his answer so as to claim exemption held not error, since such amendment would constitute a complete change of defense.

Okl.—Tucker v. Housel, 66 P.2d 28, 179 Okl. 397.

63. Ark.—Donnelly v. Wheeler, 34 Ark. 111.

Ky.—Taylor v. Bertram, 55 S.W. 553, 31 Ky.L. 1402.

64. Ind.—Newcomer v. Alexander, 96 Ind. 453.

25 C.J. p 157 note 64.

65. Ind.—State v. Read, 94 Ind. 103.
Coppage v. Gregg, 27 N.E. 570, 1 Ind.App. 112.

66. Ark.—Ray v. Gregory, 178 S.W. 405, 120 Ark. 50.

67. Mich.—Elliott v. Whitmore, 5 Mich. 532.

Or.—Krause v. Herbert, 18 P. 852, 16 Or. 429.

68. La.—McLeod v. Noble, 48 So. 161, 122 La. 714.

69. La.—McLeod v. Noble, supra.
Tenn.—Wolfenbarger v. Standifer, 3 Sneed 659.

25 C.J. p 156 note 55.

70. Ky.—Oldham v. Oldham, 133 S. W. 232, 141 Ky. 526.

25 C.J. p 156 note 54.

71. Iowa.—Augustine v. Gold, 174 N.W. 581, 188 Iowa 551.

25 C.J. p 156 note 56.

Allegations which by reasonable intentment implied that property taken was exempt held sufficient.

N.Y.—Conklin v. McCauley, 58 N.Y.S. 879, 41 App.Div. 452.

Petition held not fatally defective

A petition to restrain a sale of exempt property was not fatally defective because it did not in so many words say that the articles seized were exempt, or that they were necessary to plaintiff's business, but said that defendant levied on the

furniture and implements which were used by plaintiff in his business, over his objection that they were exempt.
Kan.—Wamberg v. Hart, 221 P. 547, 114 Kan. 906, 36 A.L.R. 666.

72. Fla.—Tracy v. Lucik, 189 So. 430, 133 Fla. 188—Loring v. Wittich, 16 Fla. 498.

Mont.—White v. Corbett, 52 P.2d 156, 101 Mont. 1.

If it is alleged that the debtor is head of a family, no allegation that he resides in the state or that he resides in the jurisdiction is necessary.
Mo.—State v. Hussey, 7 Mo.App. 597.

73. Colo.—Sandberg v. Borstadt, 109 P. 419, 48 Colo. 96.

74. Ky.—Prewit v. Walker, 7 J.J. Marsh. 332.

25 C.J. p 157 note 61.

75. Fla.—Tracy v. Lucik, 189 So. 430, 133 Fla. 188.

Tenn.—Wolfenbarger v. Standifer, 3 Sneed 659.

25 C.J. p 157 note 62.

Allegations held sufficient

La.—Newman v. Vella, 119 So. 728, 9 La.App. 504.

Allegations held insufficient

La.—Holmes v. Bordelon, App., 40 So.2d 816.

Tenn.—Keen v. Alexander, 260 S.W. 2d 297, 195 Tenn. 564.

76. Tex.—Attoaway v. Still, 2 Tex. Unrep.Cas. 697.

25 C.J. p 157 note 63.

damages must be alleged obtains.⁷⁷ A debtor seeking to recover a statutory penalty in double the amount of the property seized for the seizure of exempt property must declare specially on the statute,⁷⁸ and if he declares only in the common form of an action of trespass, without reference to the statute, he thereby waives the penalty and can recover single damages only.⁷⁹

Election between exemptions. Where a claimant is in reasonable doubt as to which of two exemptions he is entitled, or in what capacity he should claim, he may plead both exemptions, although he can have only one, and he cannot be required by the court to allege on which exemption he will stand.⁸⁰

Defenses. Facts constituting a defense must be pleaded by answer and not by demurrer;⁸¹ thus, if a waiver of exemption is relied on as a defense, it must be pleaded.⁸²

An admission by the creditor's pleadings, to be conclusive against him on the issue of the validity of the debtor's claim to exemptions, must be an admission of the existence of all of the necessary elements of the exemption right.⁸³

Departure. The general rule that, where a plaintiff declares at common law and later in his replication takes his position on a statute, there is a departure has no application to a case where plaintiff declares in trespass for an illegal seizure of his property and defendant sets up as a defense that he was an officer and seized the goods under execution and plaintiff replies that he was entitled to a claim of exemption under the provisions of the ex-

emption statute.⁸⁴

On motion to quash attachment. To present the question of exemption on motion to quash the levy of an attachment, no pleadings are ordinarily necessary other than the notice stating the grounds on which the motion to quash the levy is based.⁸⁵ It has been held that no answer or other pleading is required or allowed controverting the motion.⁸⁶

A petition for certiorari attacking the levy of execution on purported exempt property must allege a state of facts which, if proved to be true, will entitle the petitioner to the relief sought.^{86.5} So, where there is a levy on property not expressly exempt by statute, it must be alleged that the officer making the levy has been informed of the debtor's election to include such property as a part of the aggregate exemption authorized by the statute; and if the exemption is given by statute to the head of a family, the allegations must cover this prerequisite.^{86.10}

§ 160. Presumptions and Burden of Proof

Generally, the burden is on him who seeks to enforce or establish an exemption; so, he has the burden of showing, among other things, that he is within the classes entitled to the exemption, that the property is of the type exempted, and that he has taken the required steps to establish his right.

As a general rule, in an action or proceeding to enforce or establish an exemption right, the burden is on him who seeks to enforce or establish it,⁸⁷ although there is authority, in some cases based on statute, to the effect that, if the debtor's claim to exemption is duly made and filed, it is

77. Ala.—Boggan v. Bennett, 14 So. 742, 102 Ala. 400.

Tex.—Morris v. Williford, Civ.App., 70 S.W. 278.

78. Ill.—Race v. Olbridge, 90 Ill. 250, 32 Am.R. 27.

25 C.J. p 157 note 68.

79. Ill.—Race v. Olbridge, supra.

25 C.J. p 157 note 69.

80. Cal.—Van Lue v. Wahrlich-Cornett Co., 108 P. 717, 12 C.A. 749.

81. Minn.—Keegan v. Peterson, 24 Minn. 1.

25 C.J. p 157 note 72.

Reply held necessary

In attachment execution where the garnishee by his answers admits a sum to be due defendant in the judgment, and defendant files a plea that the sum is due for wages, plaintiff is not entitled to an issue to determine the matter, but must reply to the plea.

Pa.—Cunningham v. O'Keefe, 3 Pa. Co. 471, 19 Wkly.N.C. 575.

82. Minn.—Murphy v. Sherman, 25 Minn. 196.

25 C.J. p 157 note 73.

83. Iowa.—Dolan v. Simmons, 115 N.W. 479, 139 Iowa 64.

25 C.J. p 157 note 74.

84. Mo.—Duncan v. Frank, 8 Mo. App. 286.

25 C.J. p 157 note 76.

85. Ky.—Campbell v. Mitchell, 4 Ky. Op. 629.

86. Iowa.—Joyce v. Miller, 13 N.W. 664, 59 Iowa 761.

86.5 Tenn.—Keen v. Alexander, 260 S.W.2d 297, 195 Tenn. 564.

Allegations held insufficient

Tenn.—Keen v. Alexander, supra.

86.10 Tenn.—Keen v. Alexander, supra.

Allegations held insufficient

Tenn.—Keen v. Alexander, supra.

87. Ark.—Ward v. Nu-Wa Laundry Cleaners, 170 S.W.2d 381, 205 Ark.

713—Griffin v. Puryear-Meyer Gro-

cery Co., 151 S.W.2d 656, 202 Ark. 495—Pettus v. Boatright, 102 S.W. 2d 545, 193 Ark. 1179.

Cal.—Le Font v. Rankin, App., 334 P. 2d 608—Perfection Paint Products v. Johnson, 330 P.2d 829, 164 C.A. 2d 739—Carter v. Carter, 130 P.2d 186, 55 C.A.2d 13—Petrich v. Francis, 256 P. 444, 83 C.A. 72.

Fay Securities Co. v. Bowering, 288 P. 41, 106 C.A.Supp. 771.

D.C.—Williams v. U. S. Fidelity & Guaranty Co., 107 F.2d 210, 71 App. D.C. 9.

Iowa.—Citizens' Bank of Milo v. C. F. Scott & Son, 250 N.W. 626, 217 Iowa 584—First Nat. Bank v. Larson, 239 N.W. 134, 213 Iowa 468—Weaver v. Florke, 192 N.W. 23, 195 Iowa 1085—Hays v. Berry, 73 N.W. 1028, 104 Iowa 455.

Kan.—Corpus Juris Secundum cited in Clubb v. Hetzel, 198 P.2d 142, 147, 165 Kan. 594.

Ky.—Thomson v. Dennis' Ex'x, 138 S.W.2d 490, 282 Ky. 352.

prima facie correct, and the onus of establishing the contrary is on the creditor.⁸⁸ The burden is on claimant to show any requisite ownership of the property in question.⁸⁹

On a motion to discharge an attachment levy, the party making the motion must establish the existence of the grounds for exemption by competent evidence,⁹⁰ and show that the property was claimed as exempt at the time of the levy.⁹¹ Where the attaching creditor, in his affidavit for an attachment, sets up facts which if not controverted would entitle the debtor to an exemption in the property attached and alleges further facts depriving debtor of such exemption, the burden is on him, if such facts are denied, to show that they exist.⁹²

In garnishment proceedings, the burden has been held to be on the garnishee or the debtor to establish that the amount due from the garnishee is exempt from liability for the obligations of the debtor;⁹³ but there is authority, in some cases based on statute, to the effect that the burden of proving the absence of exemption is on the creditor.⁹⁴ Where the amount reached in the hands of an employer as wages due the debtor is less than the amount spe-

cifically exempt to him as earnings within a specified time prior to the levy, there is no presumption that sums previously paid the debtor by his employer within the statutory period are in his possession or that they have been used, or are still available, for the support of his family.⁹⁵

It is presumed that a guardian made disbursements from nonexempt, rather than from exempt, funds.⁹⁶ It will not be presumed that the property of a debtor was the same before and after bankruptcy.⁹⁷

Status of claimant as person entitled to exemption. The burden is on claimant to show that he is within one of the classes of persons protected by the statute,⁹⁸ as, for example, that he is head of a family or a householder,⁹⁹ or one engaged in an occupation protected by the statute,¹ or a resident, where the statute requires residence,² or a citizen, where it requires citizenship,³ or, if the statute so requires, that he is not the owner of a homestead.⁴

When a person claiming the benefit of the exemption laws shows that he was a resident of the state at a certain time, it will be presumed that his residence therein continued until the opposite party

N.C.—**Corpus Juris Secundum** quoted in *Williams v. Sossoman's Funeral Home, Inc.*, 103 S.E.2d 714, 717, 248 N.C. 524.

Okl.—*Williamson v. Cornett*, 225 P. 358, 101 Okl. 250.

Pa.—*Wartella v. Osick*, 165 A. 660, 108 Pa.Super. 589.
25 C.J. p 158 note 80.

Evidence and facts

One who contends for an exemption must establish his right by evidence and facts.

Cal.—*Bertozzi v. Swisher*, 81 P.2d 1016, 27 C.A.2d 739.

Identity of property exempted

Debtor claiming exemption had burden of proving facts entitling him thereto and of identifying property on which exemption operated.

Ohio.—*Baxter v. Old National-City Bank*, 189 N.E. 514, 46 Ohio App. 533.

Persons claiming through debtor, on the ground that property owned by him was exempt, have the burden of affirmatively showing such fact.

Ark.—*Blythe v. Jett*, 13 S.W. 137, 52 Ark. 547.

25 C.J. p 158 note 88.

Abuse of process by creditor

In an action for damages for violation of the debtor's exemption, the burden is on the debtor to prove that the creditor advised, directed, or encouraged the abuse of process com-

plained of, or, knowing of its abuse, and for his own benefit, ratified it. Ill.—*Bessermann v. Votupal*, 11 N.E. 2d 45, 292 Ill.App. 355.

88. Ala.—*J. A. Sloan & Co. v. Fields*, 127 So. 816, 221 Ala. 54—*Todd v. McCravey*, 77 Ala. 468.

Miss.—*Reid v. Halpin*, 188 So. 310, 185 Miss. 396.

89. Ga.—*Sheppard v. Davis*, 97 S.E. 262, 22 Ga.App. 733.
25 C.J. p 159 note 12.

90. Okl.—*Williamson v. Cornett*, 225 P. 358, 101 Okl. 250.
25 C.J. p 158 note 82.

91. Iowa.—*Joyce v. Miller*, 13 N.W. 664, 59 Iowa 761.

Okl.—*Williamson v. Cornett*, 225 P. 358, 101 Okl. 250.

92. Ohio.—*Young v. Clark*, 32 Ohio Cir.Ct. 374.

93. Ill.—*Harris v. Montag*, 247 Ill. App. 89.
25 C.J. p 158 notes 84, 86.

94. Ala.—*Stickney v. L. & E. Lamar*, 78 So. 903, 201 Ala. 549.
S.D.—*Farmers' State Bank of Turton v. Van Houten*, 219 N.W. 206, 52 S.D. 528.

Tex.—*Smith v. Merchants' & Planters' Nat. Bank*, Civ.App., 40 S.W. 1038.

Wis.—*Eastlund v. Armstrong*, 94 N. W. 301, 117 Wis. 394.

95. Or.—*Crites v. Bede*, 168 P. 941, 86 Or. 460.

96. Iowa.—*Appanoose County v. Henke*, 223 N.W. 876, 207 Iowa 835.

97. S.D.—*Bowman v. Larsen*, 220 N. W. 489, 53 S.D. 246.

98. Ark.—*Griffin v. Puryear-Meyer Grocery Co.*, 151 S.W.2d 656.

Cal.—*Petrich v. Francis*, 256 P. 444, 83 C.A. 72.

D.C.—*Williams v. U. S. Fidelity & Guaranty Co.*, 107 F.2d 210, 71 App. D.C. 9.

Mont.—*White v. Corbett*, 52 P.2d 156, 101 Mont. 1—*In re Metcalf's Estate*, 19 P.2d 905, 93 Mont. 542—*Swanz v. Clark*, 229 P. 1108, 71 Mont. 385.

25 C.J. p 158 note 90.

Persons entitled to exemption see supra §§ 11-25.

99. Okl.—*Riley v. Riley*, 88 P.2d 358, 184 Okl. 473.

Tenn.—*Keen v. Alexander*, 260 S.W. 2d 297, 195 Tenn. 564.

Forehand v. Forehand, 187 S.W. 2d 635, 28 Tenn.App. 131.

25 C.J. p 158 note 91.

1. Cal.—*Murphy v. Harris*, 19 P. 377, 77 C. 194.

25 C.J. p 158 note 92.

2. Ark.—*Blythe v. Jett*, 13 S.W. 137, 52 Ark. 547.

Fla.—*Post v. Bird*, 9 So. 888, 28 Fla. 1.

3. Colo.—*Sandberg v. Borstadt*, 109 P. 419, 48 Colo. 96.

4. Ohio.—*Voight Sons & Co. v. Lafkin*, 12 Ohio Cir.Ct. 751, 6 Ohio Cir. Dec. 124.

shows that it has been lost;⁵ the mere fact that he has gone to another state and engaged in business there is not alone sufficient to rebut the presumption.⁶ Under a statute restricting exemption rights to citizens, a presumption of citizenship arises when the fact of residence is pleaded and proved.⁷

The presumption is that the husband is the head of the family,⁸ and if the wife claims an exemption as such head, she must show the circumstances entitling her to the benefit of the law.⁹

Nature, character, and value of property. The burden is on the debtor to prove that the property claimed as exempt is within the statute;¹⁰ thus, the burden is on the debtor to prove that the articles claimed as exempt are necessary for a stated purpose, where the exemption is so limited,¹¹ unless the article is of such character as to give rise to a presumption of necessity.¹²

When it is necessary, under the statute, that furniture and household goods, or other property shall, to be exempt, be kept and used by the debtor and his family, or used by the debtor in his business or for a particular purpose, the burden is on the debtor to show affirmatively that they were so kept and used,¹³ and the debtor must go further and prove that the property taken was used habitually for earning his living, where a statutory requirement of habitual use is imposed.¹⁴ No presumption of loss of exemption arises against the owner of tools or instruments necessary to conduct his trade, business,

or profession by which he earns his living because of the temporary nonuse of such chattel for any reason.^{14.5}

In order to maintain a claim to chattels which is founded solely on the contention that they are the product or increment of duly exempted personalty, it is incumbent on claimant to prove affirmatively that the subject matter of the claim was obtained in exchange for exempted property or the proceeds thereof or by labor exerted in connection with the use or consumption of such property, so that the newly acquired personalty might with fairness and reason be said to take the place of that which has been set apart.¹⁵ Where money due under a policy of insurance on exempt property is claimed as exempt, the burden is on the debtor to show that the property insured was exempt.¹⁶ Where pension money, when converted into other property, is to a certain extent exempt, the fact of investment and the values of purchased and exchanged properties must be established by the person asserting the exemption.¹⁷ A person claiming real estate as exempt, because bought with pension money, must prove the right claimed, as inspection of the property or of the records will not determine whether it is exempt or not.¹⁸

Where the statute limits the value of the property that may be claimed as exempt, the debtor must show affirmatively that property claimed by him as exempt does not exceed such value.¹⁹ The

5. Mich.—Freehling v. Bresnahan, 28 N.W. 531, 61 Mich. 540, 1 Am.S.R. 617.
25 C.J. p 158 note 96.

6. Ala.—Caldwell v. Pollak, 8 So. 546, 91 Ala. 353.
25 C.J. p 159 note 97.

7. Colo.—Sandberg v. Borstadt, 109 P. 419, 48 Colo. 96.

8. Ill.—Clinton v. Kidwell, 82 Ill. 427.
John V. Farwell Co. v. Martin, 65 Ill.App. 55.

Circumstances not rebutting presumption

(1) The presumption that, where the husband, wife, and children are living together, the husband is the head of the family is not rebutted by proof that the wife is the owner of the premises on which they live.
Ill.—Clinton v. Kidwell, 82 Ill. 427.

(2) It is not enough to show that she carries on business on her own account, and that her husband works for her therein, but it must be shown that he has abdicated or forfeited his headship and control of the family, and that she has assumed it.

Ill.—John V. Farwell Co. v. Martin, 65 Ill.App. 55.

9. Ill.—Clinton v. Kidwell, 82 Ill. 427.

25 C.J. p 159 note 1.
10. Ark.—Griffin v. Puryear-Meyer Grocery Co., 151 S.W.2d 656, 202 Ark. 495.

Cal.—Fay Securities Co. v. Bowering, 288 P. 41, 106 C.A., Supp., 771.
N.Y.—Herbach v. Herbach, 265 N.Y. S. 144, 148 Misc. 33.

Okl.—Williamson v. Cornett, 225 P. 358, 101 Okl. 250.
Tex.—Jensen v. Wilkinson, Civ.App., 133 S.W.2d 982, error dismissed, judgment correct.

25 C.J. p 159 note 5.
Property exempt see supra §§ 26-69.

Proceeds of insurance

Cal.—Prudential Ins. Co. of America v. Beck, 103 P.2d 241, 39 C.A.2d 355.

Ohio.—Hoffman v. Weiland, 29 N.E. 2d 33, 60 Ohio App. 467.

Tex.—Watts v. Gibson, Civ.App., 33 S.W.2d 777.

11. N.Y.—Van Sickler v. Jacobs, 14 Johns. 434.

25 C.J. p 159 note 6.

12. Wis.—Heath v. Keyes, 35 Wis. 668.

25 C.J. p 159 note 7.

13. Colo.—Hurst v. Bruin, 219 P. 779, 74 Colo. 157.

Ky.—Thomson v. Dennis' Ex'x, 138 S.W.2d 490, 282 Ky. 352.
25 C.J. p 159 note 8.

14. Iowa.—Blair v. Fritz, 144 N.W. 611, 162 Iowa 716.

14.5 La.—Skelley v. Accounts Supervision Co., App., 53 So.2d 520.

15. Ga.—Culver v. Tappan, 38 S.E. 944, 113 Ga. 525.
Vaughn v. Bank of Toccoa, 135 S.E. 111, 36 Ga.App. 45.

16. Minn.—Fletcher v. Staples, 64 N.W. 1150, 62 Minn. 471.
25 C.J. p 159 note 11.

17. Iowa.—Lee v. Teeter, 75 N.W. 655, 106 Iowa 37.

18. N.Y.—Benedict v. Higgins, 151 N.Y.S. 42, 165 App.Div. 611—Shull v. King, 49 N.Y.S. 1, 24 App.Div. 605.

19. Ark.—Griffin v. Puryear-Meyer Grocery Co., 151 S.W.2d 656, 202 Ark. 495.

burden is on plaintiff to prove that the value of all his tools, including the one for the seizure of which he brings trover, does not exceed the statutory limit.²⁰ It has been held, however, that, where the debtor has a specific exemption on household goods to a certain amount, he needs to prove, in an action to recover such property, which has been levied on, only that it is not worth more than the statutory limit, and that it is not necessary for him to show that he does not own any other property.²¹

Nature of claim against which exemption is asserted. The burden is on the debtor to show that the debt against which the claim of exemption is made is a debt as against which an exemption may be claimed.²² According to one view, the claimant of an exemption must show that the debt against which it is claimed arose subsequently to the enactment of the constitutional or statutory provision conferring the right to the exemption;²³ according to another, where the creditor claims the right to seize the property on the ground that the debt accrued prior to the enactment of the exemption law, he must show such fact.²⁴

Where the debt sued on is for the purchase price, the burden is on the creditor to show this fact, in order to take the case out of the exemption.²⁵ Where the debt is for the purchase price of goods which have been mingled with other goods, according to one view it is incumbent on the creditor to separate those goods against which an exemption cannot be claimed,²⁶ while a contrary view imposes the duty of selection on the debtor.²⁷

Waiver or forfeiture of exemption; laches. A waiver by a debtor of his right of exemption will not be presumed, but must be affirmatively proved,²⁸ and the burden rests on the creditor to establish the

fact of waiver²⁹ or forfeiture,³⁰ or of laches in making the claim.³¹ Where there is no evidence that any harm was caused by delay in making the claim, it is the duty of the creditor to show that the delay alleged by him was unreasonable,³² and where it does not appear that the debtor was notified of his rights of exemption by the officer levying on the property, it will not be presumed that he waived his rights, although he did not assert them until long after the levy.³³

A written waiver "of all rights of exemption and homestead" contained in a promissory note will be presumed to refer only to exemptions allowed by the law of the state where the note was made.³⁴ If one draws a bill of exchange on his employer, who owes him only for wages, the presumption is that he waives his right of exemption before acceptance.³⁵

An agreement or special contract whereby the proceeds of life insurance policies may, under a statute, be made subject to creditors' claims must be shown by clear and satisfactory evidence.³⁶

Proceedings to protect exemption right. Claimant has the burden of showing that he has fulfilled statutory requirements as to steps to be taken to obtain his exemption, such as demand and furnishing a schedule.³⁷ The burden is on the debtor to show a claim and selection of the property as exempt, when required;³⁸ but a claim may be presumed under proper circumstances.³⁹ Presumptions may be indulged as to jurisdiction of the ordinary granting the exemption,⁴⁰ and of the regularity of proceedings.⁴¹

The creditor has the burden of showing that property which he seeks to reach has been acquired subsequently to the filing of a schedule.⁴² Where the statute provides the mode of contest to a claim of exemption and provides that the claim shall be

Tenn.—Forehand v. Forehand, 187 S. W.2d 635, 28 Tenn.App. 131.

25 C.J. p 159 note 13.

20. N.Y.—Chambers v. Halsted, Lallor 384.

21. N.Y.—Reinecke v. Flecke, 35 N. Y.Super. 491.

22. Ind.—Thompson v. Ross, 87 Ind. 156.

25 C.J. p 160 note 16.

23. Ala.—Ely v. Blacker, 20 So. 570, 112 Ala. 311.

25 C.J. p 160 note 17.

24. N.Y.—Wheeler v. Cropsey, 5 How.Pr. 288.

25. N.D.—Congress Candy Co. v. Farmer, 12 N.W.2d 796, 73 N.D. 174, 150 A.L.R. 1316—Wagner v. Olson, 54 N.W. 286, 3 N.D. 69.

26. N.D.—Congress Candy Co. v.

Farmer, 12 N.W.2d 796, 73 N.D. 174, 150 A.L.R. 1316—Wagner v. Olson, 54 N.W. 286, 3 N.D. 69.

27. Va.—Rose v. Sharpless, 33 Gratt. 153, 74 Va. 153.

28. Tenn.—State v. Haggard, 1 Humphr. 390.

29. Tenn.—State v. Haggard, supra.

30. Pa.—Pierce v. Boalick, 42 Pa.Super. 218.

Martin v. Kohr, 19 Pa.Co. 513.

31. Pa.—Hayes v. Lentz, 8 Pa.Dist. 628.

32. Pa.—Kee v. Hobensack, 2 Phila. 82.

33. Mo.—Holliday v. Mansker, 44 Mo.App. 465.

34. Ala.—Seay v. Palmer, 9 So. 601, 93 Ala. 381, 30 Am.S.R. 57.

35. Ala.—Bibb v. Janney, 45 Ala. 329.

36. Iowa.—In re Hazeldine's Estate, 280 N.W. 568, 225 Iowa 369.

37. Ind.—Graham v. Crockett, 18 Ind. 119.

38. Mo.—Hombs v. Corbin, 34 Mo. App. 393.

39. Ind.—Vandibur v. Love, 10 Ind. 54.

25 C.J. p 160 note 35.

40. Ga.—Gamble v. Cent. R. & Banking Co., 7 S.E. 315, 80 Ga. 595, 12 Am.S.R. 276.

41. Ga.—Chalker v. Thompson, 72 Ga. 478.

42. Ill.—Herschbach v. Cassout, 197 Ill.App. 188.

prima facie evidence of its correctness, the burden is on the contestant.⁴³

Evasion of exemption law. In an action for damages for the sending of a claim out of the state to evade the exemption law, the right of exemption, if controverted, must be established by plaintiff.⁴⁴

§ 161. Admissibility of Evidence

Any relevant, competent, and material evidence is admissible in a proceeding to enforce the exemption right.

Subject to the rules applicable in civil proceedings generally, any relevant, competent, and material evidence is admissible in a proceeding to enforce the exemption right,⁴⁵ as, for example, evidence as to the possession of other property by claimant,⁴⁶ admissions by the debtor on a former examination,⁴⁷ the status of the debtor,⁴⁸ the value of the property,⁴⁹ or as to a waiver.⁵⁰ Incompetent, irrelevant, or immaterial evidence is not admissible.⁵¹

Evidence to justify the suing out of the attachment is inadmissible where the issue is as to any legal levy on exempt property.⁵² A debtor who before sale demands the return of his property as exempt and objects at the sale on the same ground and sues the sheriff and the purchaser for its return cannot show at the trial that the sale is void on other grounds.⁵³

The transfer of the claim to a resident of another state and circumstances attendant on the transfer are evidence tending to show the intent with which the transfer was made.⁵⁴

§ 162. Weight and Sufficiency of Evidence

General rules as to the weight and sufficiency of evidence have been applied in proceedings to enforce an exemption right.

General rules as to the weight and sufficiency of evidence have been applied in proceedings to enforce an exemption right.⁵⁵ Positive evidence as

43. Ala.—Kolsky v. Loveman, 12 So. 720, 97 Ala. 543.

44. Kan.—Atchison, T. & S. F. R. Co. v. Hamilton, 50 P. 102, 6 Kan. App. 447.

Neb.—Stull v. Miller, 75 N.W. 239, 55 Neb. 30.

45. Kan.—Foster v. Foster, 61 P.2d 1350, 144 Kan. 528.
25 C.J. p 160 note 42.

46. Ky.—Miller v. Mahoney, 29 S.W. 879, 16 Ky.L. 799.

47. Ohio.—Haslage v. Hoover, 16 Ohio Cir.Ct. 570, 9 Ohio Cir.Dec. 404.

48. Tex.—Burris v. Booth, Civ.App., 40 S.W. 186.

25 C.J. p 160 note 45.

Nature of proof

The status of the debtor with reference to his qualifications as claimant under the exemption law must be shown by direct proof wherever possible, and not by reputation.

N.Y.—Eastman v. Caswell, 8 How.Pr. 75.

25 C.J. p 161 notes 48, 50.

49. Colo.—Sandberg v. Borstadt, 109 P. 419, 48 Colo. 96.

25 C.J. p 160 note 46.

50. Tex.—Westchester Fire Ins. Co. v. Goggan, Civ.App., 203 S.W. 163.
25 C.J. p 161 note 47.

51. Okl.—Barlow v. Ritchie, 232 P. 391, 105 Okl. 257.

Testimony that levy caused wife's illness

Okl.—Barlow v. Ritchie, supra.

52. Okl.—State v. Collins, 174 P. 568, 70 Okl. 323, 6 A.L.R. 603.
25 C.J. p 161 note 52.

53. Kan.—Redinger v. Jones, 73 P. 997, 68 Kan. 627.

54. Iowa.—Haines v. Welker, 165 N. W. 1027, 182 Iowa 431.

55. Kan.—Lupton v. Merchants' Nat. Bank of Topeka, 38 P.2d 125, 140 Kan. 615—Hoxie State Bank of Hoxie v. Vaughn, 21 P.2d 356, 137 Kan. 648.

Mo.—Scott v. Levan, App., 286 S.W. 407.

Okl.—Pendergraph v. Edwards, 283 P.2d 823.

Evidence held to establish exemption

Ark.—W. T. Rawleigh Co. v. Castleberry, 147 S.W.2d 734, 201 Ark. 980.

Iowa.—Staton v. Vernon, 229 N.W. 763, 209 Iowa 1123, 67 A.L.R. 1200.
Mont.—Williams v. Sorenson, 75 P.2d 784, 106 Mont. 122.

N.D.—Congress Candy Co. v. Farmer, 12 N.W.2d 796, 73 N.D. 174, 150 A. L.R. 1316.

Okl.—Allen v. Clawson, 108 P.2d 121, 188 Okl. 278—Riley v. Riley, 88 P. 2d 358, 184 Okl. 473.

R.I.—Arch Lumber Co. v. Dohm, 98 A.2d 840, 81 R.I. 69.

Tex.—Hickman v. Hickman, Civ.App., 228 S.W.2d 565, affirmed 234 S.W. 2d 410, 149 Tex. 439—Laning v. Langford Inv. Co., Civ.App., 36 S. W.2d 1079.

Evidence held not to establish exemption

Ark.—Ward v. Nu-Wa Laundry Cleaners, 170 S.W.2d 381, 205 Ark. 713.

Cal.—Carter v. Carter, 130 P.2d 186, 55 C.A.2d 13.

Colo.—Law v. Simon, 136 P.2d 520, 110 Colo. 545.

Ga.—Barfield v. Reynolds Banking Co., 149 S.E. 302, 40 Ga.App. 305.

Kan.—Putnam Inv. Co. v. Titus, 266

P. 55, 125 Kan. 623—Manhattan Chamber of Commerce v. Gallagher, 254 P. 345, 123 Kan. 155.

Ky.—Thomson v. Dennis' Ex'x, 138 S. W.2d 490, 282 Ky. 352.

Miss.—Walton v. Walter Fisher Co., 111 So. 364, 146 Miss. 291.

Evidence held to show waiver of exemption

Pa.—Michael v. Rae, 91 Pa.Super. 281.

Evidence held sufficient to establish other facts

Ark.—Bank of Atkins v. Wirth, 190 S.W.2d 445, 209 Ark. 360.

Ind.—Tomlinson v. Miller, 58 N.E.2d 358, 115 Ind.App. 469.

Evidence held insufficient to establish other facts

Iowa.—In re Harding's Estate, 16 N. W.2d 585, 235 Iowa 337.

Ohio.—Wilcox v. Wynn, Mun., 83 N. E.2d 411.

Okl.—Crosby v. Fred F. Fox Co., 233 P.2d 974, 204 Okl. 691.

Property bought with pension money

A declaration by a pensioner to the effect that land was paid for by him out of his pension money, if uncontrolled by evidence in the case, is sufficient to justify a finding that it was so paid for and is exempt.

N.Y.—Benedict v. Higgins, 151 N.Y. S. 42, 165 App.Div. 611.

Record or estimate of expenditures

Defendant's testimony on direct examination as to amounts spent by him for food and other necessities was not sufficiently shaken by his admissions, on cross-examination, that he kept no exact book account of his expenditures and that such amounts were based on best estimates he could make, to require re-

to the character of property is not necessary where, by the evidence adduced and the inferences which the jury is entitled to draw therefrom, its character is shown.⁵⁶ Where the only evidence in the case is that all property was included in the schedule, exemption cannot be denied on mere suspicion that the schedule was incomplete.⁵⁷ The institution of a suit in another state has been declared only prima facie evidence of evasion of the exemption laws of the state of the forum.⁵⁸

If a party's testimony is in conflict with his affidavit, his testimony will control the affidavit.⁵⁹

§ 163. Trial and Hearing

In the adjudication of a debtor's efforts to enforce and protect his right to exemption, controverted questions of fact, such as the status of the debtor and the character or use of the property, are for the jury; but the construction of the statute under which the exemption is claimed is a question of law for the court.

A mere question of law as to the right of a party to an exemption should not be made the subject of a jury trial.⁶⁰ On exceptions to the appraisal, an execution creditor cannot, where the facts are not admitted, have the right of the debtor to an exemption summarily determined without the intervention of a jury unless the statute so provides.⁶¹ Where no specific method of procedure is fixed by statute, it would seem that the judge may hear the

issue arising on a traverse of defendant's affidavit claiming property in the hands of a garnishee as exempt without the intervention of a jury.⁶² When an applicant for exemption presents a schedule, the creditor who attacks it is entitled to open and close before a jury.⁶³

Where no evidence to support the exemption claim is presented, a verdict for the creditor should be directed or the claim should be nonsuited.⁶⁴ The court may postpone to the final hearing an application by one claiming an exemption in a judgment in his favor as to which a writ of garnishment has issued and as to a claim for personal property not actually levied on.⁶⁵ An issue as to whether property is exempt should be determined at a hearing on the merits and not on a motion to dissolve an order restraining the execution sale of the property.⁶⁶

Instructions should follow strictly the requirements of the statute,⁶⁷ and must be based on evidence in the case.⁶⁸ The court should grant properly requested instructions where their submission is justified.^{68.5}

Questions of law and fact. Where a trial is to a jury, questions of fact on which there is conflicting evidence are for the jury.⁶⁹ The construction of the statute under which the exemption is

jection of such direct testimony by trial court as trier of facts.
Cal.—Sanker v. Humborg, 119 P.2d 433, 48 C.A.2d 205.

Averments of affidavit

(1) In absence of countervailing evidence, averment of affidavit in attachment that property sought to be attached was not exempt from execution was sufficient to sustain plaintiff's burden of sustaining attachment by greater weight of evidence.

Ohio.—Ahlgren & Son v. Wolf, 29 N.E.2d 436, 65 Ohio App. 172.

(2) Where the statute provides that the personal earnings of the debtor cannot in garnishment be applied to the payment of his debts when it is made to appear by the debtor's affidavit or otherwise that such earnings are necessary for the maintenance of his family, the debtor's affidavit is sufficient evidence prima facie of all of the facts properly set forth therein.

Kan.—Muzzy v. Lantry, 2 P. 102, 30 Kan. 49.

56. Miss.—Matthews v. Redwine, 25 Miss. 99.

25 C.J. p 161 note 55.

57. Cal.—People v. McKamy, 151 P. 743, 28 C.A. 196.

58. Neb.—Satterlee v. Columbus First Nat. Bank, 111 N.W. 591, 78 Neb. 691.

59. Mont.—Williams v. Sorenson, 75 P.2d 784, 106 Mont. 122.

60. Ark.—Swope v. Ross, 29 Ark. 370.

Mich.—Fischer v. McIntyre, 33 N.W. 762, 66 Mich. 681.

61. Pa.—Tasker v. Sheldon, 7 A. 762, 115 Pa. 107.
25 C.J. p 161 note 60.

62. N.M.—New Mexico Nat. Bank v. Brookes, 49 P. 947, 9 N.M. 113.

63. Ga.—McNally v. Mulherin, 4 S.E. 332, 79 Ga. 614.

64. Ga.—Gibbs v. Gibbs, 199 S.E. 342, 58 Ga.App. 547.

Wis.—Hesse v. Hargraves, 43 N.W. 736, 74 Wis. 648.

Evidence held not to warrant directed verdict

Ga.—Merriman v. Citizens Bank & Trust Co., 200 S.E. 714, 59 Ga.App. 216.

65. Fla.—Hancock v. State Exch. Bank, 70 So. 211, 70 Fla. 243.

66. Tex.—Hinckley-Tandy Leather Co. v. Hazelwood, Civ.App., 35 S.W.2d 209.

67. Ala.—Coffman v. Folds, 112 So. 911, 216 Ala. 133.

Ga.—Alexander v. Holmes, 68 S.E.2d 242, 85 Ga.App. 124.
25 C.J. p 161 note 66.

68. N.Y.—Tuttle v. Buck, 41 Barb. 417.

25 C.J. p 161 note 67.

68.5 Ga.—Alexander v. Holmes, 68 S.E.2d 242, 85 Ga.App. 124.

Refusal held error

Ga.—Alexander v. Holmes, supra.

69. Iowa.—Brown v. Heising, 282 N.W. 345.

25 C.J. p 129 note 64 [d], p 161 note 70.

Possession of property and selection as exempt

Ala.—Coffman v. Folds, 112 So. 911, 216 Ala. 133.

Value of allegedly exempt property
Iowa.—Bradley v. Silvius, 2 N.W.2d 285.

Exemplary damages

In action to recover personal property in which plaintiff pleaded exemption as one of grounds for recovery, evidence was held insufficient to submit question of exemplary damages to jury.

Okl.—Barlow v. Ritchie, 232 P. 391, 105 Okl. 257.

claimed is clearly a question of law for the court,⁷⁰ and a court cannot delegate this duty to the jury by instructing them that it is their duty, under the law, to construe the exemption law liberally toward the debtor.⁷¹ So, where the question whether the occupation or status of a debtor is such as to entitle him to the benefit of the statute depends merely on a construction of the statute, the question is one of law for the court;⁷² but where his status or occupation is disputed, and the question is as to what is his status or occupation, it is one of fact for the jury.⁷³

Questions as to whether a person claiming an exemption is engaged in a particular occupation,⁷⁴ whether he "habitually" earns his living by a particular occupation,⁷⁵ and whether the occupation in which the debtor is engaged is his principal occupation,⁷⁶ are questions of fact for the jury. Whether the debtor is a wage earner within the meaning of the exemption law,⁷⁷ whether the relations between the members of a group are such as to make it a family within the meaning of the statute,⁷⁸ and whether the debtor bears such a relation to the family as to make him its head,⁷⁹ are mixed questions of law and fact, and should be submitted to the jury under proper instructions.

The character of particular articles, when in dispute, is ordinarily a question of fact for the jury.⁸⁰ Whether particular articles are such as may be regarded as "necessary" is ordinarily a question of fact;⁸¹ so, whether tools are necessary for upholding life or to carry on a trade or business may be a question of fact for the jury,⁸² but whether they are exempt is generally a mixed question of law and

fact,⁸³ although it has been held that when the facts are undisputed the court may decide whether a particular implement is a necessary tool of a trade.⁸⁴

Except in a clear case, it is a question of fact for the jury whether property claimed as exempt is "suitable" to the debtor's "condition or occupation in life," under a statute exempting property in those terms.⁸⁵ If a particular article is such that it could not under any circumstances be regarded as requisite for the comfort or convenience of the debtor, or if it clearly does not come within the class exempted by the statute, the court may hold as a matter of law that it is not exempt;⁸⁶ on the other hand, if an article comes within the class exempted by the statute, it is to be held as a matter of law that it is exempt, and it is not for the jury to say whether it is necessary in the particular case or not.⁸⁷

Where an exemption depends on use made of property claimed to be exempt, whether such use has been made is a question for the jury;⁸⁸ what constitutes actual use is a question of fact to be determined on competent evidence,⁸⁹ as is the question whether a debtor uses particular property, such as tools, or a team, etc., or habitually uses them, to earn his living.⁹⁰

The question whether an exemption has been waived, being one of intention, has been held to be a question of fact for the jury, where the facts are not conclusive on the question of intention.⁹¹ It is for the jury to determine what is a reasonable time within which to claim exemption,⁹² or to select

70. Conn.—Patten v. Smith, 4 Conn. 450, 10 Am.D. 166.

Minn.—Wildner v. Ferguson, 43 N.W. 794, 42 Minn. 112, 18 Am.S.R. 495, 6 L.R.A. 338.

71. Ill.—Amend v. Smith, 87 Ill. 198.

72. Minn.—Wildner v. Ferguson, 43 N.W. 794, 42 Minn. 112, 18 Am.S.R. 495, 6 L.R.A. 338.

25 C.J. p 162 note 74.

73. Iowa.—Root v. Gay, 20 N.W. 489, 64 Iowa 399.

25 C.J. p 162 note 75.

74. Iowa.—Hickman v. Cruise, 34 N.W. 316, 72 Iowa 528, 2 Am.S.R. 256.

75. Cal.—Stanton v. French, 27 P. 657, 91 C. 274, 25 Am.S.R. 174.

76. Mich.—Morrill v. Seymour, 3 Mich. 65.

77. Ga.—Etowah Monument Co. v. Portal Naval Stores Co., 149 S.E. 317, 40 Ga.App. 257.

Ill.—Sheehan v. Union Stock Yard & Transit Co., 172 Ill.App. 528.

Pa.—Huck-Gerhardt Co. v. Davies, 3 A.2d 963, 134 Pa.Super. 430.

78. Iowa.—Blair v. Fritz, 144 N.W. 611, 162 Iowa 716.

79. Iowa.—Blair v. Fritz, supra.

Question of fact

Fla.—Tracy v. Lucik, 189 So. 430, 138 Fla. 188.

80. Tex.—Ward v. Gibbs, 30 S.W. 1125, 10 Tex.Civ.App. 287.

25 C.J. p 162 note 83.

81. Ark.—Atkinson v. Gatcher, 23 Ark. 101.

25 C.J. p 162 note 82.

82. Cal.—Twining v. Taylor, Super., 339 P.2d 646.

Iowa.—Hoyer v. McBride, 211 N.W. 847, 202 Iowa 1278.

25 C.J. p 162 note 84.

83. Cal.—In re Mitchell, 36 P. 840, 102 C. 534.

Del.—Schwander v. Feeney's, 29 A.2d 369, 3 Terry 198.

25 C.J. p 162 note 85.

84. Mich.—Fischer v. McIntyre, 33 N.W. 762, 66 Mich. 681.

Pa.—McDowell v. Shotwell, 2 Whart. 26.

85. Ill.—Cornelia v. Ellis, 11 Ill. 584.

86. Vt.—Dunlap v. Edgerton, 30 Vt. 224.

25 C.J. p 162 note 88.

87. Mich.—Fischer v. McIntyre, 33 N.W. 762, 66 Mich. 681.

Vt.—Dunlap v. Edgerton, 30 Vt. 224.

88. Me.—Walker v. Carlin, 34 A. 29, 88 Me. 302.

25 C.J. p 162 note 90.

89. N.H.—Cutting v. Tappan, 59 N.H. 562.

90. Iowa.—Wertz v. Hale, 221 N.W. 504, 206 Iowa 1018.

25 C.J. p 163 note 92.

91. Pa.—Tasker v. Sheldon, 7 A. 762, 115 Pa. 107.

25 C.J. p 163 note 93.

92. Ill.—Johnston v. Willey, 21 Ill. App. 354.

property,⁹³ or to reinvest the proceeds of property,⁹⁴ and whether a transfer by claimant of property claimed to be exempt is in fact a sale which would operate to defeat claimant's right, or a mortgage as a pledge for borrowed money, which would not operate to defeat claimant's exemption right.⁹⁵

Forfeiture of exemption by abandonment of trade⁹⁶ or by fraudulent transfer or concealment, in jurisdictions in which it is held that fraud operates as a forfeiture,⁹⁷ is a mixed question of law and fact.

The good faith of the creditor in assigning his claim to a person in another state is a question for the jury.⁹⁸

Verdict and findings. A special finding as to the value of property claimed as exempt should contain facts which would make the aggregate value of the specific property a matter of computation and not of conjecture.⁹⁹ In a state where the term "homestead" includes both realty and personalty, on an issue before the jury as to whether applicant is entitled to a homestead and exemption, a finding of "homestead" for applicant means the entire realty and personalty in issue.¹

An order enjoining a sale of exempt property is not defective because it does not have a seal attached,² or is based on an application with which the supporting affidavit was combined in one document.³ An exception to an order sustaining the debtor's claim to an exemption is not a prerequisite to a motion to vacate the order.⁴

Rehearing. A creditor's motion to rehear a claim of exemption in a suit granted by default is within the discretion of the court,^{4,5} which can prescribe such terms as are just.^{4,10} Where a judgment

debtor's claim to an exemption was established by default and the creditor had, by fraud, obtained possession of attached wages from the employer of the judgment debtor, it was held that the court could properly refuse to entertain the creditor's motion for a rehearing on the exemption claim until the creditor had restored the money to the employer.^{4,15}

§ 164. Judgment, Review, and Costs

General rules as to judgments and review in civil actions have been applied in actions for the enforcement or protection of the right to exemption.

A particular exemption statute has been said to contemplate that in determining a claim of exemption a judgment shall be made.^{4,50}

The court cannot render judgment on facts not pleaded,⁵ but in this connection pleadings are not to be strictly or literally interpreted.⁶ Where plaintiff's property is exempt from execution on defendant's judgment, a judgment in an action to enforce the exemption may properly direct that the recovery of defendant's judgment against plaintiff be indorsed to the effect that it is not a lien on the property of plaintiff which is found to be exempt.⁷ When goods levied on to satisfy a judgment are claimed as exempt and replevied on that ground, defendant in replevin is entitled to a judgment from the excess of the value of the goods over the amount exempt by law, not exceeding the amount of his judgment and costs.⁸

The trial court authorizing the release of exempted property from attachment has the obligation to supervise recovery of the property by the debtor.^{8,5}

Review. A particular exemption statute has been held to contemplate that an appeal will lie from

N.Y.—Brooks v. Hathaway, 8 Hun 290.

93. N.Y.—Brooks v. Hathaway, supra.

94. Or.—Blackford v. Boak, 143 P. 1136, 73 Or. 61.

95. Ill.—Murphy v. Mulconnery, 183 Ill.App. 500.

96. Cal.—Van Lue v. Wahrlich-Cor-nett Co., 108 P. 717, 12 C.A. 749. 25 C.J. p 163 note 98.

97. N.Y.—Brackett v. Watkins, 21 Wend. 68.

98. Iowa.—Haines v. Welker, 165 N. W. 1027, 182 Iowa 431.

Neb.—Karnes v. Dovey, 74 N.W. 311, 53 Neb. 725.

99. Ind.—Emerson & Fisher Co. v. Marshall, 30 N.E. 1099, 4 Ind.App. 265.

1. Ga.—Brand v. Kennedy, 71 Ga. 707.

2. Kan.—Wamberg v. Hart, 221 P. 547, 114 Kan. 906, 36 A.L.R. 666.

3. Kan.—Wamberg v. Hart, supra.

4. Ind.—H. C. Smith Coal Co. v. Finley, 131 N.E. 5, 190 Ind. 481.

4.5 D.C.—Marvins Credit, Inc. v. Westinghouse Elec. Supply Co., Mun.App., 130 A.2d 777.

4.10 D.C.—Marvins Credit, Inc. v. Westinghouse Elec. Supply Co., supra.

4.15 D.C.—Marvins Credit, Inc. v. Westinghouse Elec. Supply Co., supra.

4.50 Cal.—Bowman v. Wilkinson, 314 P.2d 574, 153 C.A.2d 391.

Judgment rather than order

In statute regarding hearings on claims for exemption from execution after levy, wherein it is provided that court shall give judgment determining whether claim shall be

allowed and copy of judgment shall be forwarded to levying officer, who shall hold goods until judgment becomes final, use of term "judgment" is precise rather than general, and determination of adverse claim is in fact a judgment rather than an order. Cal.—Freese v. Freese, 292 P.2d 547, 138 C.A.2d 867.

5. Mo.—Paddock v. Lance, 6 S.W. 241, 94 Mo. 283.

25 C.J. p 163 note 6.

6. Wash.—Wiser v. Thomas, 80 P. 854, 39 Wash. 40. 25 C.J. p 163 note 7.

7. N.Y.—Benedict v. Higgins, 151 N. Y.S. 42, 165 App.Div. 611.

8. Ohio.—Poelking v. Eldridge & Higgins Co., 16 Ohio Cir.Ct., N.S., 10.

8.5 R.I.—Arch Lumber Co. v. Dohm, 98 A.2d 840, 81 R.I. 69.

judgments determining a claim of exemption.^{8.10} After a cause has reached the appellate court, it is too late either to urge⁹ or to attack¹⁰ a claim of exemption, for the first time; and an exemption cannot be attacked in the appellate court on grounds not presented at the trial.¹¹ An exception must have been taken to the court's ruling on a claim for exemption in order that an assignment of error on that ground may be sustained;¹² and an objection to the form of the judgment cannot be made for the first time on appeal, for the judgment is amendable in the court which rendered it.¹³

The rule that an appellate court will not disturb a finding on conflicting testimony¹⁴ or for harmless error¹⁵ obtains. Where a justice denies the debtor's claim of exemption, and the debtor appeals to the circuit court without bond, the creditors may sell the property and, if it is shown to be exempt, they are bound to reimburse the debtor.¹⁶

§ 165. Damages

The measure of damages for a wrongful interference with exempt property is the actual injury sustained; it is the value of the property if it is sold, or the value of its use while detained, if it is restored to the debtor available for use. In proper circumstances, damages for injury to plaintiff's business, or exemplary damages, may be allowed.

As a general rule, the actual injury sustained from a wrongful interference with exempt property constitutes the measure of damages thereon;¹⁷ and in the absence of evidence of actual damage plain-

tiff's recovery is confined to nominal damages.¹⁸ So, when such property has been wrongfully levied on and sold or otherwise converted, as a general rule the damages are measured by the value of the property,¹⁹ with interest from the time when it was taken.²⁰

The amount received by an officer on a sale of exempt property on execution is not a proper standard of the value of the property in an action for damages for seizing and selling it, for property does not generally bring its full value at a forced sale.²¹ There can be no recovery for consequences which might have been avoided by plaintiff.²²

If a creditor wrongfully procures the exempt wages of his debtor to be subjected to garnishment and applied in payment of his claim, the measure of damages is the amount of the exempt wages so appropriated, with interest.²³

Where the exempt property is mortgaged, the measure of the amount of damages cannot, it has been held, exceed the value of the property after deducting the amount of the mortgage;²⁴ so, where the property has been sold and the proceeds have been applied to the payment of a mortgage debt, the amount of such payment should go in mitigation of damages.²⁵ According to another view, the amount of the mortgage is not to be taken into consideration, except as against the mortgagee.²⁶

Damages for injury to plaintiff's business through the seizure of exempt property may, when estab-

8.10 Cal.—Bowman v. Wilkinson, 314 P.2d 574, 153 C.A.2d 391.

9. Iowa.—Richardson v. Woodring, 37 N.W. 122, 74 Iowa 149.

10. Colo.—Weil v. Nevitt, 31 P. 487, 18 Colo. 10.—Bassett v. Inman, 3 P. 383, 7 Colo. 270.

11. Ark.—La Mode Garment Co. v. Moore & Co., 81 S.W.2d 841, 190 Ark. 721.

Colo.—Weil v. Nevitt, 31 P. 487, 18 Colo. 10.

12. Ala.—Chamberlain v. Mobile Fish & Oyster Co., 37 So. 690, 141 Ala. 464.

13. Iowa.—Joyce v. Miller, 13 N.W. 664, 59 Iowa 761.
25 C.J. p 163 note 15.

14. Ark.—Corpus Juris Secundum cited in Bank of Atkins v. Wirth, 190 S.W.2d 445, 447, 209 Ark. 360.—Corpus Juris Secundum cited in Ward v. Nu-Wa Laundry Cleaners, 170 S.W.2d 381, 383, 205 Ark. 713.

Okl.—Milburn v. Milburn, 12 P.2d 518, 158 Okl. 69.

Pa.—In re Andrew's Estate, 30 Pa. Dist. & Co. 271.

25 C.J. p 163 note 16.

15. Minn.—Cronfeldt v. Arrol, 52 N. W. 857, 50 Minn. 327.

16. Ark.—Ray v. Gregory, 178 S.W. 405, 120 Ark. 50.

17. Mich.—Stilson v. Gibbs, 18 N.W. 815, 53 Mich. 280.
25 C.J. p 163 note 20.

Damages in action against levying officer see Sheriffs and Constables §§ 73-77.

Damages held not inadequate

Iowa.—Bradley v. Silvius, 2 N.W.2d 285.

Interest on money impounded

Damages assessed on dissolution of garnishment on bank deposit were properly six per cent on money while it was wrongfully impounded.

Ark.—Purvis v. Walls, 44 S.W.2d 353, 184 Ark. 887.

Issuance of second execution

Where personal property has been taken under execution, and by a restraining order its sale is stayed until a claim of exemption can be passed on, no right to additional damages arises from the return of the first execution and issuance of a second,

and the continued holding of possession by the sheriff.

Kan.—Wamberg v. Hart, 221 P. 547, 114 Kan. 906, 36 A.L.R. 666.

18. N.H.—Cooper v. Newman, 45 N. H. 339.

19. Mich.—McGuire v. Galligan, 23: N.W. 479, 57 Mich. 38.
25 C.J. p 164 note 21.

20. Tex.—Low v. Tandy, 8 S.W. 620, 70 Tex. 745.

25 C.J. p 164 note 22.

21. N.Y.—Pozzoni v. Henderson, 2: E.D.Smith 146.

22. Mich.—McGuire v. Galligan, 23: N.W. 479, 57 Mich. 38.

25 C.J. p 164 note 25.

23. Iowa.—Haines v. Welker, 165 N. W. 1027, 182 Iowa 431.
25 C.J. p 164 note 26.

24. Mich.—McGuire v. Galligan, 23: N.W. 479, 57 Mich. 38.

25. N.H.—Cooper v. Newman, 45 N. H. 339.

26. N.Y.—Livor v. Orser, 12 N.Y. Super. 501.

25 C.J. p 164 note 29.

lished, be recovered.²⁷ In any case, to authorize the allowance of such damages the loss of business must be shown.²⁸

Mental distress is not an element of actual damage for seizure and sale of property exempt from execution.²⁹

If the property is returned or recovered, and is available for present use, the measure of damages is the value of the use during the time of detention,³⁰ or in lieu thereof any special damage which the debtor may have sustained as the proximate and natural result of the wrong.³¹ If the property is not of value for use, interest on its value should be allowed.³² There should always be an allowance for any deterioration in value by reason of the seizure.³³

Attorney's fees incurred in the successful repossession of the property are not an element of damages in the absence of fraud, willful wrong, oppression, or malice.³⁴ However, attorney's fees have been allowed where a debtor was compelled to obtain legal counsel to enjoin the sale of exempt property.^{34.5}

Exemplary damages may be awarded, where circumstances justify, in an action for the wrongful seizure of, or interference with, exempt property.³⁵ It is not sufficient, however, that the seizure or sale of the property was wrongful, but it must have been wanton and malicious;³⁶ so, an execution plaintiff is not liable for exemplary damages for

the seizure and sale of exempt property if he directed it to be made under the honest belief that the property was not exempt, and the evidence rebuts any reasonable inference of an improper motive or oppressive conduct,³⁷ but he is equally liable with the officer if he acts oppressively or maliciously or with knowledge that the property is exempt.³⁸ Exemplary damages, when justified by the circumstances, must not be excessive.³⁹

In an action for a penalty of double or triple damages, as discussed supra § 151, any credit to which defendant is entitled is to be deducted after, not before, the damages are doubled or trebled, in computing the amount of the judgment.⁴⁰ If plaintiff brings his action to recover the penalty provided by statute, he cannot have exemplary damages, but is confined to the penalty.⁴¹

Forfeiture of debt. Under a statute so providing, a creditor who secures the issuance of process to reach more than a certain percentage of the debtor's earnings forfeits the debt.⁴² Such a statute applies only where the creditor intentionally undertakes to subject an undue percentage of the debtor's earnings to the satisfaction of the debt;⁴³ the issuance of process against earnings which the debtor has represented as not exempt does not forfeit the debt.⁴⁴ An affidavit for garnishment is not "process" within the meaning of such statute, and the failure of the affidavit specifically to exempt the stated proportion of the debtor's earnings does not forfeit the debt.⁴⁵

VIII. OFFENSES AGAINST EXEMPTION LAWS

§ 166. In General

The criminal responsibility of sheriffs and constables as involving exempt property is considered in Sheriffs and Constables §§ 209-210.

Examine Pocket Parts for later cases.

§ 167. Evasion of Exemption Law

It may be made an offense for a creditor to transfer or prosecute his claim for the purpose of avoiding the effect of the exemption laws.

Under statutes so providing, it is an offense for creditors residing in the state to transfer their

27. Nev.—Hammersmith v. Avery, 2 P. 55, 18 Nev. 225.

25 C.J. p 164 note 30.

28. Mich.—McGuire v. Galligan, 23 N.W. 479, 57 Mich. 38.

29. Tex.—Morris v. Williford, Civ. App., 70 S.W. 228.

30. Neb.—Castile v. Ford, 73 N.W. 945, 53 Neb. 507.

25 C.J. p 164 note 33.

31. Tex.—Wilson v. Manning, Civ. App., 35 S.W. 1079.

25 C.J. p 164 note 34.

32. N.Y.—Twinam v. Swart, 4 Lans. 263.

33. Ala.—Alley v. Daniel, 75 Ala. 403.

Ky.—Winsted v. Hicks, 121 S.W. 1018, 135 Ky. 154.

34. Miss.—Clayton-Hughes Co. v. Glass, 103 So. 501, 138 Miss. 839.

34.5 La.—Skelley v. Accounts Supervision Co., App., 53 So.2d 520.

35. N.D.—Stringer v. Elsaas, 163 N.W. 558, 37 N.D. 20.

25 C.J. p 165 note 38.

36. Minn.—Matteson v. Monroe, 83 N.W. 153, 80 Minn. 340.

25 C.J. p 165 note 39.

37. Tex.—Burris v. Booth, Civ.App., 40 S.W. 186.

38. Minn.—Cronfeldt v. Arrol, 52 N.W. 857, 50 Minn. 327, 36 Am.S.R. 648.

39. Iowa.—Haines v. Welker, 165 N.W. 1027, 182 Iowa 431.

22 C.J. p 165 note 42.

40. Colo.—Penrose v. Stevens, 65 P. 2d 697, 100 Colo. 83.

41. Ill.—Johnson v. Laroude, 110 Ill.App. 611.

42. Okl.—First Nat. Bank v. Halback, 15 P.2d 586, 160 Okl. 82.

43. Okl.—Davies v. Sutherland, 8 P.2d 59, 155 Okl. 111.

44. Okl.—Archer v. Johnson, 252 P. 1092, 122 Okl. 178.

45. Okl.—Emerson v. Emerson, 265 P. 1078, 130 Okl. 140.

claims or institute or prosecute proceedings in the state or elsewhere for the purpose of avoiding the effect of the exemption laws.⁴⁶

EXENCIÓN. In Spanish law, exemption; freedom from some obligation.¹

EXENNIIUM. See the C.J.S. definition Ex.

EXEQUATUR. Literally, "Let it be executed."²

As the official recognition of a consul see Ambassadors and Consuls § 6 b.

EXERCISE. The word has an established legal meaning,³ and, as a noun, has been defined as meaning voluntary action of the body or mind, exertion of any faculty, practice in the employment of the

physical or mental powers.⁴ The noun "exercise" has been distinguished from "labor."^{4.5}

As a verb, "exercise" is defined as to put in action, to put in practice, to do or carry on something, or to transact.⁵ It has by context also been held to be equivalent in meaning to "usurp."⁶

"Exercised" has been held synonymous with "employed", see the C.J.S. definition of that word.

Phrases employing the word "exercise" as a noun,⁷ or as a verb,^{7.5} and phrases employing the word "exercising,"^{7.10} are set out in the note.

46. Ind.—Anderson v. State, 104 N. E. 974, 181 Ind. 502.

25 C.J. p 165 note 46.

1. Escriche Diccionario.

2. Black L.D.

"In French practice, this term is subscribed by judicial authority upon a transcript of a judgment from a foreign country, or from another part of France, and authorizes the execution of the judgment within the jurisdiction where it is so indorsed."

Black L.D.

3. Pa.—Cleaver v. Commonwealth, 34 Pa. 283, 284.

4. Century D.

4.5 N.M.—Territory v. Davenport, 124 P. 795, 798, 17 N.M. 214, 17 L. R.A., N.S., 407.

Ohio.—Bloom v. Richards, 2 Ohio St. 387, 400.

5. Or.—Corpus Juris quoted in Salway v. Multnomah Lumber & Box Co., 293 P. 420, 421, 422, 134 Or. 428.

25 C.J. p 165 notes 4-7.

6. Or.—Corpus Juris quoted in Salway v. Multnomah Lumber & Box Co., 293 P. 420, 421, 422, 134 Or. 428.

Pa.—Cleaver v. Commonwealth, 34 Pa. 283, 284.

7. Phrases using the noun

(1) "Exercise" of a corporate right, privilege, or franchise" as subject to injunction after insolvency of corporation.

Wis.—Milwaukee Mut. F. Ins. Co. v. Sentinel Co., 51 N.W. 440, 81 Wis. 207, 211, 15 L.R.A. 627.

See also Corporations § 1447.

(2) "Exercise of discretion" and "exercise of judicial discretion" see the C.J.S. definition Discretion.

(3) "Exercise of dominion over land," as meaning such open acts and conduct as evidence the claim of the

right of absolute possession, use, and ownership thereof.

Tex.—Whelan v. Henderson, Civ. App., 137 S.W.2d 150, 153.

(4) "Exercise of judicial functions," "exercise of judgment" and "exercise of power" as applied to judicial action see Judges §§ 41-49.

(5) "Exercise of option."

Ga.—Floyd v. Morgan, 4 S.E.2d 91, 60 Ga.App. 496.

N.Y.—Drake v. Gaffney, 171 N.Y.S. 131, 133, 183 App.Div. 577.

See also Vendor and Purchaser §§ 9-13.

(6) "Exercise of ordinary care," as inconsistent with negligence.

Md.—Holler v. Lowery, 200 A. 353, 357, 175 Md. 149.

See generally Negligence §§ 1, 11.

(7) "Exercise of power by the city" see Municipal Corporations § 138 et seq.

(8) "Exercise of powers not conferred by law," as justifying proceeding by quo warranto see Quo Warranto § 13.

(9) "Exercise of protective power," illustrated by aid to an educational institution.

N.H.—Trustees of Phillips Exeter Academy v. Exeter, 11 A.2d 569, 579—In re Opinion of the Justices, 138 A. 284, 290, 82 N.H. 561.

See generally Taxation §§ 283-288.

(10) "Exercise of servitude," as including the taking of riparian land for levee purposes.

La.—Wilson v. Aetna Ins. Co., App., 161 So. 650, 652.

See also Eminent Domain § 450 note 98.

7.5 Phrases using the verb

(1) "Exercise and enjoy the rights hereby granted."

Or.—Salway v. Multnomah Lumber & Box Co., 293 P. 420, 421, 134 Or. 428.

(2) "Exercise . . . corporate powers."

Conn.—Middletown Ferry Co. v. Middletown, 40 Conn. 65, 69.

Ill.—Alpena Portland Cement Co. v. Jenkins & Reynolds Co., 91 N.E. 480, 481, 244 Ill. 354.

See also Corporations § 960.

(3) "Exercise discretion" see the C.J.S. definition Discretion.

(4) "Exercise due care to ascertain" as not requiring that fact be actually ascertained but only that reasonable care be used.

Ill.—Chicago & W. I. R. Co. v. Calumet & S. C. Ry. Co., 222 Ill.App. 578, 589.

(5) "Exercise his calling or business" see the C.J.S. definition Business.

(6) "Exercise or attempt to exercise any power," as equivalent to "carry on the business" of the corporation and "doing business."

W.Va.—Comstock v. J. R. Droney Lumber Co., 71 S.E. 255, 256, 69 W. Va. 100.

(7) "Exercise the law making power" must mean to make rules for the government of men's actions.

Mo.—State v. Fry, 4 Mo. 120, 190.

See also Constitutional Law § 106.

(8) "Exercise the privileges conferred by the charter" refers to the right of the corporation to transact the business for which it was chartered.

Ga.—Branch v. Augusta Glass Works, 23 S.E. 128, 129, 95 Ga. 573.

See also Corporations § 960.

(9) "Pretending to exercise correctional power," as a statutory phrase descriptive of lynching.

Ohio.—Zmunt v. Lexa, 175 N.E. 458, 460, 37 Ohio App. 479.

7.10 Phrases using "exercising"

(1) "Exercising a business or trade" is carrying it on.

EXERCITALIS. See the C.J.S. definition Ex.

EXERCITATIO OPTIMUS EST MAGISTER.⁸

EXERCITATIO POTEST OMNIA.⁹

EXERCITOR. In maritime law, the person to whom the daily profits of a ship belong;¹⁰ the person who receives the earnings of a vessel.¹¹

In a particular connection, the term may be used synonymously with "employer" see the C.J.S. definition of that word.

EXERCITORIA ACTIO. See the C.J.S. definition Ex.

EXERCITORIAL POWER. The trust given to a shipmaster.¹²

EXERCITUAL. In old English law, a heriot, or customary tribute, paid only in arms, horses, or military accoutrements.¹³

EXERCITUS. See the C.J.S. definition Ex.

EXETER DOMESDAY. The name given to a record preserved among the muniments and charters belonging to the dean and chapter of Exeter Cathedral, which contains a description of the western parts of the kingdom, comprising the counties of Wilts, Dorset, Somerset, Devon, and Cornwall.¹⁴

EX FACTO ILLICITO NON ORITUR ACTIO.¹⁵

EX FACTO JUS ORITUR.¹⁶

EXFESTUCARE and **EXFREDIARE.** See the C.J.S. definition Ex.

EX FREQUENTI DELICTO AUGETUR PENA.¹⁷

EX GRAVI QUERELA. Literally "From or on the grievous complaint." In old English practice, the name of a writ (so called from its initial words) which lay for a person to whom any lands or tenements in fee were devised by will (within any city, town, or borough wherein lands were devisable by custom) and the heir of the devisor entered and detained them from him.¹⁸

EXHÆREDATIO and **EXHÆRES.** See the C.J.S. definition Ex.

EXHAUST. The word "exhaust" is defined as meaning to use up,¹⁹ and it has been held to be synonymous with, or equivalent to, "consume," see the C.J.S. definition of that word.

In a particular connection, "exhausted" has been said not to indicate complete exhaustion, but rather near exhaustion or a condition practically equivalent thereto;²⁰ and in another connection not to relate to obsolescence of a device.²¹

Phrases employing the word "exhaust" or its cognate terms are set out in the subjoined note.²²

W.Va.—Comstock v. J. R. Droney Lumber Co., 71 S.E. 255, 256, 69 W. Va. 100.

25 C.J. p 165 note 6 [a].

(2) "Exercising a controlling influence" as meaning "subject to a controlling influence."

D.C.—Koppers United Co. v. Securities and Exchange Commission, 138 F.2d 577, 581, 78 U.S.App.D.C. 151.

(3) "Exercising judicial functions."

Mont.—State v. Teton County, 134 P. 291, 293, 47 Mont. 531.

(4) "Exercising the right of suffrage" is voting.

U.S.—U. S. v. Souders, D.C.N.J., 27 F. Cas.No.16,358, 2 Abb. 456, 461.

See also Elections § 1 i.

8. A maxim meaning "Practice is the best master [teacher]." Adams Gloss.

9. A maxim meaning "Practice can accomplish every thing." Adams Gloss.

10. Trayner Leg.Max.

11. U.S.—The Phebe, D.C.Me., 19 F. Cas.No.11,064, 1 Ware 263, 265.

"Exercitor navis"

The temporary owner or charterer of a ship.

Black L.D.

12. Black L.D.

13. Black L.D.

14. Black L.D.

Publication

"The Exeter Domesday was published with several other surveys nearly contemporary, by order of the commissioners of the public records, under the direction of Sir Henry Ellis, in a volume supplementary to the Great Domesday, folio, London, 1816."

Black L.D.

15. A maxim meaning "From an illegal fact no action arises."

Ohio.—Brinkerhoff v. Tracy, 45 N.E. 1100, 1102, 55 Ohio St. 558—McCortle v. Bates, 29 Ohio St. 419, 422, 23 Am.R. 758.

16. A maxim meaning "The law arises out of the fact."

Broom Leg.Max.

Applied in.

Wash.—Keefe v. Seattle Electric Co., 104 P. 774, 775, 55 Wash. 448.

25 C.J. p 166 note 15 [b].

17. A maxim meaning "Punishment increases with increasing crime." Wharton L.Lex.

18. Black L.D.

19. Webster Int.D.

20. Eng.—Ellway v. Davis, L.R. 16 Eq. 294, 297.

21. "Exhausted" as not importing obsolescence

"If . . . the patent discloses a useful invention which is capable of producing the results claimed for it, it cannot be said to have been exhausted merely because some other more convenient device has taken its place in public favor."

U.S.—Hazelton Corporation v. Commissioner of Internal Revenue, C. C.A., 89 F.2d 513, 521.

22. Phrases containing "exhausted"

(1) "Assets . . . exhausted." Neb.—Hoffman v. Geiger, 281 N.W. 625, 627, 135 Neb. 349.

(2) "Cutting privilege . . . exhausted."

Fla.—West Yellow Pine Co. v. Sinclair, 90 So. 828, 831, 83 Fla. 118.

(3) "Exhausted by judicial proceedings," as meaning that executions issued on judgments or decrees

EXHAUSTER. An aspirator, exhaust fan, suction fan, known by many names according to construction or purpose.²³

EXHAUSTION. Defined generally as the act of exhausting, or of drawing out or draining off, the act of emptying completely of the contents; also the state of being exhausted or emptied, or of being deprived of strength or energy.²⁴

In a specific application, it may contemplate loss from such causes as aging, natural deterioration, or wear;²⁵ but not destruction or termination of a business by prohibition legislation,²⁶ or loss to timber occasioned by forces of nature, or by insects or worms.²⁷

Phrases employing the word are set out in the subjoined note.²⁸

EXHEREDATE. In Scotch law, to disinherit, to exclude from an inheritance.²⁹

EXHIBERE. See the C.J.S. definition *Ex*.

EXHIBICIÓN. In Spanish law, the production or presentation of something before a judge or some-

one designated by him.³⁰

EXHIBIT.

As a Noun

A paper or document produced and exhibited to a court during a trial or hearing, or to a commissioner taking depositions, or to auditors, arbitrators, etc., as a voucher, or in proof of facts, or as otherwise connected with the subject matter, and which, on being accepted, is marked for identification and annexed to the deposition, report, or other principal document, or filed of record, or otherwise made a part of the case;³¹ a paper referred to in, and filed with, the bill or answer in a suit in equity.³² In the subjoined note examples are given of what, under particular circumstances, the term has been held to include and not to include.³³

As stated in Evidence § 607, the term is applicable to various articles as well as to documents or other papers. For other references to specific uses see 25 C.J. p 166 note 22.

As a Verb

—Present Tense. Primarily, to display,³⁴ to

rendered have been returned unsatisfied.

Neb.—Globe Pub. Co. v. State Bank, 59 N.W. 683, 689, 41 Neb. 175, 27 L.R.A. 854.

(4) "Exhausted in the payment of claims."

U.S.—Zeig v. Massachusetts Bonding & Insurance Co., C.C.A.N.Y., 23 F. 2d 665, 666.

(5) "Exhausted leaves," as applied to tea, defined to include any tea which had been deprived of its proper quality, strength, or virtue by steeping, infusion, decoction, or other means.

U.S.—Buttfield v. Stranahan, N.Y., 24 S.Ct. 349, 355, 192 U.S. 470, 48 L. Ed. 525.

N.D.—State v. Turner, 164 N.W. 924, 932, 37 N.D. 635.

(6) "First exhausted."

Neb.—Hoffman v. Geiger, 279 N.W. 350, 355, 134 Neb. 643.

(7) "Security . . . exhausted." Idaho.—Warner v. Bookstahler, 282 P. 862, 863, 48 Idaho 419.

Phrases containing "exhausting"

(1) "Exhausting jury panel" as ground for ordering special venire, see *Juries* § 176.

(2) "Exhausting the security." N.J.—Guardian Life Ins. Co. of America v. Lowenthal, 181 A. 897, 898, 13 N.J.Misc. 849.

23. U.S.—Williams v. Barnard, C.C. N.Y., 41 F. 358, 362.

24. Century D.

25. U.S.—Pugh v. Commissioner of Internal Revenue, C.C.A., 49 F.2d 76, 78.

26. U.S.—Clarke v. Haberle Crystal Springs Brewing Co., N.Y., 50 S. Ct. 155, 156, 280 U.S. 384, 74 L.Ed. 498.

27. U.S.—Pioneer Cooperage Co. v. Commissioner of Internal Revenue, C.C.A., 53 F.2d 43, 44.

28. Phrases construed

(1) "Exhaustion of administrative remedies," as the doctrine that, where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.

U.S.—Board of Directors of St. Francis Levee Dist. v. St. Louis-San Francisco Ry. Co., C.C.A.Ark., 74 F.2d 183, 188.

Cal.—Abelleira v. District Court of Appeal, Third Dist., 109 P.2d 942, 949, 17 C.2d 280, 132 A.L.R. 715. Hill v. Brisbane, 151 P.2d 578, 582, 66 C.A.2d 15.

(2) "Exhaustion of ore" see the C.J.S. title *Mines and Minerals* § 3.

(3) "Heat exhaustion" and "heat prostration," which are identical, are heat strokes which occur usually among workers in furnace rooms, in bakeries, foundries, etc., and also in those exposed to the sun's heat, the temperature becoming subnormal, accompanied by depression or collapse. Tenn.—Milstead v. Kaylor, 212 S.W. 2d 610, 613, 186 Tenn. 642.

"Heat stroke" see the C.J.S. definition *Heat*.

29. Black L.D.

30. *Escriche Dictionario*.

31. Black L.D.

Exhibit in fact

"The production and proof of a paper before an examiner makes it an exhibit in fact." N.Y.—Commercial Bank v. State Bank, 4 Hill, 516, 519.

32. Ga.—Brown v. Redwyne, 16 Ga. 67, 72.

See also *Equity* §§ 202, 333.

33. Held to include

(1) A coupon taken from a town bond. Vt.—Concord v. Derby Line Nat. Bank, 51 Vt. 144, 147.

(2) A knife.

Nev.—State v. Casey, 117 P. 5, 12, 34 Nev. 154.

See also *Criminal Law* § 712.

(3) Blood-stained garments.

N.Y.—People v. Hughson, 47 N.E. 1092, 1096, 154 N.Y. 153.

See also *Criminal Law* § 713.

(4) A revolver found in glove compartment of defendant's automobile. Kan.—State v. Myers, 121 P.2d 286, 289, 154 Kan. 647.

Held not to include

Depositions read in a case.

Del.—Gray v. Pennsylvania R. Co., 139 A. 66, 69, 3 W.W.Harr. 450.

34. Ark.—Furrow v. State, 185 S. W. 788, 123 Ark. 471, 473.

show;³⁵ and, derivatively, to present,³⁶ to present for consideration,^{36.5} to show the contents of,³⁷ to offer or propose in a formal and public manner, to present or show in legal form, to present to a court;³⁸ to submit, as a document, to a court or officer in course of proceedings; also to present or offer officially or in legal form; to bring, as a charge; to file of record.³⁹

In particular connections, to "exhibit" does not mean merely filing a petition or claim, but presupposes both filing and causing it to be set for hearing.⁴⁰ The word generally implies affirmative action or at least some conduct on the part of the person who exhibits a thing or who is charged with the duty of exhibiting it.⁴¹

As applied to a complaint, or information, in a criminal case see Criminal Law § 303 note 65; and as employed in gaming statutes to describe the elements of the offense see Gaming §§ 1, 97-104.

Phrases employing the word are set out in the subjoined note.⁴²

—**Exhibited.** Displayed for a particular pur-

pose.⁴³ A reference to what has been exhibited has been said to relate to what was to be looked at for the impression it was to produce, as contradistinguished from what had been read.⁴⁴

Phrases employing the word are set out in the subjoined note.⁴⁵

—**Exhibiting.** In a particular connection, the term has been distinguished from "keeping."⁴⁶

Phrases employing the word are set out in the subjoined note.⁴⁷

EXHIBITANT. In English practice, a complainant in articles of the peace.⁴⁸

EXHIBITIO BILLÆ. See the C.J.S. definition **Ex.**

EXHIBITION. A common word in general use; it is not a word of art with legalistic implications.^{48.5} It is defined as meaning the act of exhibiting or displaying for inspection, a showing or presenting to view; also the producing or showing of titles, authorities, or papers of any kind before a tribunal, in proof of facts;⁴⁹ hence that which is exhibited, held forth, or displayed; any public show; a dis-

Conn.—Freda v. Smith, 111 A.2d 679, 682, 142 Conn. 126.

Tex.—Callison v. State, Civ.App., 146 S.W.2d 468, 469.
25 C.J. p 167 note 30.

35. Cal.—Pecht v. Colby Management Corporation, 20 P.2d 768, 769, 131 C.A. 2.

36. N.Y.—In re Wiltse, 25 N.Y.S. 733, 737, 5 Misc. 105.
Vt.—Batchelder v. White, 71 A. 1111, 1112, 82 Vt. 132.

36.5 Conn.—Freda v. Smith, 111 A. 2d 679, 682, 142 Conn. 126.

37. N.Y.—Brouwer v. Cotheal, 10 Barb. 216, 218.

38. Pa.—Commonwealth v. Alsop, 1 Brewst. 328, 345.

Similarly expressed

To present in a public or official manner, to produce a thing publicly, so that it may be taken possession of, or seized; also to file of record. Pa.—Commonwealth v. Anspach, 15 Wkly.N.C. 414.

39. Neb.—In re Edwards' Estate, 294 N.W. 422, 425, 138 Neb. 671.

40. Kan.—In re Dotson's Estate, 119 P.2d 518, 522, 154 Kan. 561.

41. Cal.—Pecht v. Colby Management Corporation, 20 P.2d 768, 769, 131 C.A. 2.

42. Phrases construed

(1) "Exhibit the books." N.Y.—Brouwer v. Cotheal, 10 Barb. 216, 218.

(2) "Exhibit" the permit," as meaning show the permit.

Cal.—Pecht v. Colby Management Corporation, 20 P.2d 768, 769, 131 C.A. 2.

(3) "Present or exhibit" his claim or demand to the court or commissioners.

Neb.—Fitzgerald v. Union Sav. Bank, 90 N.W. 994, 995, 65 Neb. 97.

43. Tex.—Callison v. State, Civ.App., 146 S.W.2d 468, 469.

44. U.S.—Craig v. Smith, Kan., 100 U.S. 226, 232, 25 L.Ed. 577.

45. Phrases construed

(1) "Claim against an estate must be exhibited" as requiring presentation of claim in writing and service of a notice of rejection.

N.Y.—Diehl v. Becker, 125 N.E. 533, 534, 227 N.Y. 318.

(2) "Exhibited as required by this act," as referring solely to method provided in other sections of the code for exhibiting demands.

Kan.—Hurst v. Hammel, 113 P.2d 1045, 1047, 153 Kan. 827.

(3) "Without having exhibited his powers," as meaning without having explained or made known by what authority he claims right to act.

La.—A. Lorenze Co. v. Wilbert, 115 So. 475, 478, 165 La. 247.

46. Tex.—Kain v. State, 16 Tex.App. 282, 306.

47. Phrases construed

(1) "Exhibiting a claim for classification," as distinguished from "presenting a claim for allowance."

Mo.—Pfeiffer v. Suss, 73 Mo. 245, 255.

(2) "Exhibiting to examiner of false papers by officer of bank," as including mailing of report of state bank after signing by cashier.

Mont.—State v. Asal, 256 P. 1071, 1077, 79 Mont. 385.

See also Banks and Banking § 149 a.

(3) "Exhibiting fire works" as constituting nuisance see Nuisances § 75.

(4) "Exhibiting of the bill," as equivalent in English practice to "commencement of the suit."

Eng.—Rees v. Morgan, 5 B. & Ad. 1035, 1039, 27 E.C.L. 434, 110 Reprint 1075.

(5) "Exhibiting the rights of the parties," a statutory phrase referring to the transfer of stock.

Ont.—Re Montgomery & Wrights, Ltd., 38 Ont.L. 335, 336, 11 Ont.W. N. 283.

48. Black L.D.

Exemplified in

Eng.—Rex v. Stanhope, 12 A. & E. 619 note, 40 E.C.L. 310, 113 Reprint 949—Reg. v. Dunn, 12 A. & E. 599, 40 E.C.L. 299, 113 Reprint 939.

48.5 N.Y.—A. M. Levinson Furs, Inc. v. Centennial Ins. Co., 146 N.Y.S. 2d 531, 533, 286 App.Div. 788.

49. Century D.

Similarly defined

"Exhibition" means to hold up or display for public inspection.

N.Y.—A. M. Levinson Furs, Inc. v. Centennial Ins. Co., 146 N.Y.S.2d 531, 533, 286 App.Div. 788.

play of works of art or of feats of skill or of oratorical or dramatic ability.⁵⁰ It has been said that an article on exhibition is not necessarily being offered for sale.^{50,5}

As used in connection with the sale of works of art, the word has a well-defined meaning, indicating a special showing, the date and place of which are given advance publicity among persons believed to be interested in such goods.⁵¹

In Scotch law, an action for compelling the production of writings.⁵²

In ecclesiastical law, an allowance for meat and drink, usually made by religious appropriators of churches to the vicar; also the benefaction settled for the maintaining of scholars in the universities, not depending on the foundation.⁵³

Phrases employing the word are set out in the subjoined note.⁵⁴

EXHORT. To address or appeal to earnestly, to incite to some good deed or course of conduct by appeal or argument, to urge; hence to admonish, advise, or warn; also to deliver or practice exhortation, or to strive to incite some person or persons by exhortation.⁵⁵

EXHORTATION. The act or practice of exhorting; attempt to arouse or incite, as by appeal, argument, or admonition; also that which is spoken in exhorting; admonition; earnest advice; as, an exhortation to be faithful.⁵⁶

EXHORTO. In Spanish law, the request which one judge issues to another for an order directing the performance of some act.⁵⁷

EXHUMACIÓN. In Spanish law, exhumation, the disinterment of a corpse, an act which is subject to numerous regulations.⁵⁸

EXHUMATION. Disinterment, the removal from the earth of anything previously buried therein, particularly a human corpse.⁵⁹

EXIGENCY. The word "exigency" is defined to mean the state of being urgent or exigent; pressing need or demand.^{59,5} It is further defined as meaning a case demanding immediate action or remedy;⁶⁰ an occasion of urgency and suddenness, where something helpful needs to be done at once;⁶¹ something arising suddenly out of circumstances calling for immediate action or remedy, or where something

50. Mo.—Longwell v. Kansas City, 203 S.W. 657, 659, 199 Mo.App. 480.

Held to include

(1) An exhibition of animals, of pictures, statues, etc., and an industrial exhibition.

Mo.—Longwell v. Kansas City, supra.

(2) Motion pictures.

R.I.—Thayer Amusement Corporation v. Moulton, 7 A.2d 682, 686, 63 R.I. 182, 124 A.L.R. 236.

Playing or showing of motion picture as exhibition of picture in theater see Theaters and Shows § 1 f.

50.5 N.Y.—A. M. Levinson Furs, Inc. v. Centennial Ins. Co., 146 N.Y.S. 2d 531, 533, 286 App.Div. 788.

51. N.Y.—Lion v. Lilienfeld, 30 N.Y. S.2d 866, 869.

52. Black L.D.

53. Black L.D.

54. "Public exhibition"

(1) An exhibition to which the public is invited and admitted upon complying with the terms of admission, the most usual condition being the payment of a small sum of money.

Mass.—Commonwealth v. Mack, 73 N.E. 534, 535, 187 Mass. 441.

(2) Distinguished from a "private exhibition."

U.S.—Kalisthenic Exhibition Co., Inc., v. Emmons, D.C.Me., 225 F. 902, 904.

(3) An entertainment provided by the management of a restaurant, consisting of dancing, singing, etc., does not constitute a public exhibition.

N.Y.—People v. Martin, 137 N.Y.S. 677, 678.

(4) A skating rink to which persons are admitted on the payment of a fee which entitles them to skate as well as to watch others skating is not a public exhibition.

Va.—Harris v. Commonwealth, 81 Va. 240, 243, 59 Am.R. 666.

Other phrases construed

(1) "Exhibition of an indictment," as meaning a public presentation in court by the grand jury.

Pa.—Commonwealth v. Anspach, 15 Wkly.N.C. 414.

See also Indictments and Informations § 28.

(2) "Exhibition or fair," as equivalent to "fairground."

Conn.—State v. Reynolds, 58 A. 755, 756, 77 Conn. 131.

See generally Agriculture § 14.

(3) "Exhibition value," interchangeably used with terms "minimum sale" and "price expectancy" in moving picture industry, as denoting minimum receipts which distributors expect to realize from exhibition of pictures.

N.Y.—Export & Import Film Co. v. B. P. Schulberg Productions, 211 N.Y.S. 838, 839, 125 Misc. 756.

(4) "Legal exhibition of a claim against an estate."

Mo.—Pfeiffer v. Suss, 73 Mo. 245, 254. See generally Executors and Administrators §§ 414, 415.

(5) "Private exhibition," as distinguished from "public exhibition" see supra this note.

55. N.Y.—People v. Smith, 255 N.Y. S. 528, 531, 142 Misc. 769.

56. N.Y.—People v. Smith, supra.

Collecting assemblage without permit for public "worship" or "exhortation."

N.Y.—People v. Smith, supra.

57. Escriche Diccionario.

58. Escriche Diccionario.

59. Black L.D.

See also Dead Bodies § 4.

59.5 Tex.—State v. Rubion, Civ.App., 292 S.W.2d 650, 657.

60. Cal.—Los Angeles County v. Payne, 66 P.2d 658, 663, 8 C.2d 563.

Similarly defined

A case requiring immediate attention, assistance, or remedy.

Tex.—State v. Rubion, Civ.App., 292 S.W.2d 650, 657.

61. Ky.—City of Marion v. Haynes, 164 S.W. 79, 84, 157 Ky. 687.

helpful needs to be done at once, yet not so pressing as an emergency;⁶² also command, requirement.⁶³

"Exigency" also means a critical period or condition;^{63.5} a pressing necessity.^{63.10}

"Exigency" and "emergency" have been held to be synonymous, and the terms have also been distinguished, see the C.J.S. definition Emergency. "Exigency" has also been distinguished from "crisis", see the C.J.S. definition Crisis.

EXIGENDARY. In English law, an officer who makes out exigents.⁶⁴

EXIGENT or **EXIGI FACIAS.** The English word, "exigent," is defined primarily as exacting or urgently requiring.⁶⁵

The Latin words mean literally "That you cause to be demanded," and are the emphatic words of the Latin form of a writ. Both terms are employed as the name of the English judicial writ made use of in the process of outlawry, commanding the sheriff to demand the defendant, (or cause him to be demanded, *exigi faciat*), from county court to county court, until he be outlawed; or, if he appear, then to take and have him before the court on a day certain in term, to answer to the plaintiff's action; the practice is now regulated by Statute 2 William IV c 39.⁶⁶

EXIGENTER. An officer of the English court of

common pleas, whose duty it was to make out the exigents and proclamations in the process of outlawry.⁶⁷

EXIGIBLE. That may be exacted;⁶⁸ demandable, or requirable.⁶⁹

In Spanish law, enforceable.⁷⁰

Phrases employing the word are set out in the subjoined note.⁷¹

EXIGI FACIAS. See Exigent or Exigi Facias ante.

EXILE. Banishment;⁷² also the person banished.⁷³

The word has been distinguished from "deportation" see the C.J.S. definition of that term.

EXILIUM. See the C.J.S. definition Ex.

EXILIUM EST PATRIÆ PRIVATIO, NATALIS SOLI MUTATIO, LEGUM NATIVARUM AMISSIO.⁷⁴

EX INDUSTRIA. See the C.J.S. definition Ex.

EXIST.

Present Tense

To live, to have life or animation;⁷⁵ also to be or continue to be, in fact;^{75.5} having actual being;^{75.10}

62. Mont.—State ex rel. Odenwald v. District Court of Tenth Judicial Dist. in and for Fergus County, 38 P.2d 269, 271, 98 Mont. 1.

N.Y.—De Angelis v. Laino, 252 N.Y.S. 871, 885, 141 Misc. 518.

"Exigency" held to exist

Where the danger of fire hazard in certain buildings was no worse than it had been for many years past and had existed since their construction but report of survey focused attention on the danger.

N.Y.—De Angelis v. Laino, supra.

63. Century D.

Phrases

(1) "Exigency of a bond," defined as that which the bond demands or exacts, that is, the act, performance, or event upon which it is conditioned. Black L.D.

(2) "Exigency of a writ," defined as the command or imperativeness of a writ, the directing part of a writ, or the act or performance which it commands. Black L.D.

63.5 Tex.—State v. Rubion, Civ.App., 292 S.W.2d 650, 657.

63.10 Tex.—State v. Rubion, supra.

64. Black L.D.

65. Century D.

"Exigent list"

A list of cases set down for hearing upon various incidental and ancillary motions and rules.

Black L.D.

66. Black L.D., citing 3 Blackstone Comm. pp 283, 284.

67. Office abolished by Statutes 7 Wm. IV and 1 Vict. c 30. Black L.D.

68. Webster New Int.D.

69. Black L.D.

70. Escriche Diccionario.

71. Phrases construed

(1) "Exigible and executory."

La.—Cotton v. Wright, 190 So. 665, 670, 193 La. 520.

(2) "Exigible by foreclosure," as including an ordinary suit to foreclose the mortgage as well as executory process.

La.—Robson v. Beasley, 43 So. 391, 392, 118 La. 738.

(3) "Exigible debt" is a liquidated and demandable or matured claim.

La.—Gulf Refining Co. of Louisiana v. Glassell, 171 So. 846, 853, 186 La. 190.

72. U.S.—U. S. v. Ju Toy, 25 S.Ct. 644, 649, 198 U.S. 253, 270, 49 L. Ed. 1040.

73. Black L.D.

74. A maxim meaning "Exile is a privation of country, a change of natal soil, a loss of native laws." Black L.D.

75. Idaho.—State v. Sawtooth Men's Club, 85 P.2d 695, 698, 59 Idaho 616. Iowa.—Merritt v. Grover, 10 N.W. 879, 880, 57 Iowa 493.

Neb.—In re Harrington's Estate, 36 N.W.2d 577, 582, 151 Neb. 81.

N.J.—Corpus Juris Secundum quoted in Camden Trust Co. v. Christ's Home of Warminster, Pa., 101 A. 2d 84, 87, 28 N.J.Super. 466.

75.5 Idaho.—State v. Sawtooth Men's Club, 85 P.2d 695, 698, 59 Idaho 616.

Neb.—Corpus Juris Secundum cited in In re Harrington's Estate, 36 N.W.2d 577, 582, 151 Neb. 81.

N.J.—Corpus Juris Secundum quoted in Camden Trust Co. v. Christ's Home of Warminster, Pa., 101 A.2d 84, 87, 28 N.J.Super. 466.

Simply "to be."

Can.—Rex v. Nugent, 9 Can.Cr.Cas. 1, 4.

75.10 Idaho.—State v. Sawtooth Men's Club, 85 P.2d 695, 698, 59 Idaho 616.

to be in present force, activity, or effect^{75.15} at a given time,^{75.20} as in speaking of existing contracts, creditors, debts, laws, rights, or liens.⁷⁶

Depending on the circumstances, it may imply completion for intended use, as in the case of a building,⁷⁷ or a continuing, when applied to a condition or situation⁷⁸ at a given time.^{78.5}

The word has been held equivalent to "occur."⁷⁹ It has also been distinguished therefrom,⁸⁰ and compared with "right to be."⁸¹

Phrases employing the word are set out in the

subjoined note.⁸²

Existing

The word "existing" has an ordinary meaning of the fact, or state, of being or living,^{82.5} and carries the implication of having existence now.⁸³ However, the force of this word is not necessarily confined to the present.⁸⁴

It has been distinguished from "available."⁸⁵

Phrases employing the word are listed in the subjoined note.⁸⁶ Other phrases as to which more re-

(3) "Any existing debts or obligations."

N.Y.—City of New York v. New York & South Brooklyn Ferry & Steam Transp. Co., 172 N.Y.S. 495, 497, 104 Misc. 438.

(4) "Existing and established," as inapplicable to an organization prior to its actual incorporation.

N.J.—Camden Branch No. 57, Fleet Reserve Ass'n v. City of Camden, 19 A.2d 31, 32, 19 N.J.Misc. 291.

(5) "Existing at the time."

Iowa.—Wilson v. City of Cedar Rapids, 231 N.W. 495, 496, 210 Iowa 790.

(6) "Existing business."

U.S.—U. S. v. B. F. Sturtevant Co., C.C.A.Mass., 99 F.2d 72, 74.

(7) "Existing claim," as meaning claim which has arisen.

N.M.—Great Western Oil Co. v. Bailey, 295 P. 298, 299, 35 N.M. 277.

(8) "Existing contract."

Kan.—McCandliss Const. Co. v. Board of Com'rs of Neosho County, 296 P. 720, 722, 132 Kan. 651.

Minn.—Whitaker v. Rice, 9 Minn. 13, 86 Am.D. 78.

Mo.—Young v. Lanyon, App., 242 S. W. 685, 686.

(9) "Existing creditor" see the C. J.S. definition Creditor, and as entitled to attack conveyance, see Fraudulent Conveyances § 64.

(10) "Existing debt" see the C.J.S. definition Debt.

(11) "Existing demand" see the C. J.S. definition Demand.

(12) "Existing equity" see the C. J.S. definition Equity.

(13) "Existing estates" see the C. J.S. definition Estates.

(14) "Existing indebtedness."

Fla.—Hamrick v. Special Tax School Dist. No. 1 of Jefferson County, 178 So. 406, 410, 130 Fla. 453.

La.—Laterriere v. Board of Levee Com'rs of Orleans Levee Dist., 162 So. 773, 775, 182 La. 1060.

N.Y.—Del Rio v. Prudential Ins. Co. of America, 199 N.E. 32, 35, 269 N.Y. 135.

Okl.—State ex rel. City of Shawnee v. Williamson, 97 P.2d 74, 76, 186 Okl. 278, 125 A.L.R. 1389—Kansas

Neb.—*Corpus Juris Secundum* cited in *In re Harrington's Estate*, 36 N.W.2d 577, 582, 151 Neb. 81.

N.J.—*Corpus Juris Secundum* quoted in *Camden Trust Co. v. Christ's Home of Warminster, Pa.*, 101 A. 2d 84, 87, 28 N.J.Super. 466.

75.15 Ga.—*State v. State Toll Bridge Authority*, 82 S.E.2d 626, 634, 210 Ga. 690.

Idaho.—*State v. Sawtooth Men's Club*, 85 P.2d 695, 698, 59 Idaho 616.

Neb.—*Corpus Juris Secundum* cited in *In re Harrington's Estate*, 36 N.W.2d 577, 582, 151 Neb. 81.

N.J.—*Corpus Juris Secundum* quoted in *Camden Trust Co. v. Christ's Home of Warminster, Pa.*, 101 A. 2d 84, 87, 28 N.J.Super. 466.

75.20 Ga.—*State v. State Toll Bridge Authority*, 82 S.E.2d 626, 634, 210 Ga. 690.

Idaho.—*State v. Sawtooth Men's Club*, 85 P.2d 695, 698, 59 Idaho 616.

N.J.—*Corpus Juris Secundum* quoted in *Camden Trust Co. v. Christ's Home of Warminster, Pa.*, 101 A. 2d 84, 87, 28 N.J.Super. 466.

76. Idaho.—*State v. Sawtooth Men's Club*, 85 P.2d 695, 698, 59 Idaho 616.

N.J.—*Corpus Juris Secundum* quoted in *Camden Trust Co. v. Christ's Home of Warminster, Pa.*, 101 A. 2d 84, 87, 28 N.J.Super. 466.

As legal assumption

The law "assumes the objectivity of external nature; and, for the purpose of judicial investigation, a thing perceived by the tribunal as existing does 'exist.'"

Kan.—*Moorhead v. Arnold*, 84 P. 742, 746, 73 Kan. 132, 141, quoting 2 Wigmore Evid. p 1345.

77. N.J.—*Corpus Juris Secundum* quoted in *Camden Trust Co. v. Christ's Home of Warminster, Pa.*, 101 A.2d 84, 87, 28 N.J.Super. 466.

N.Y.—*People ex rel. Hyman v. Leo*, 177 N.Y.S. 503, 504, 108 Misc. 39.

78. Ark.—*Wickliff v. Wickliff*, 86 S. W.2d 553, 554, 191 Ark. 411.

Neb.—*Corpus Juris Secundum* cited in *In re Harrington's Estate*, 36 N. W.2d 577, 582, 151 Neb. 81.

N.J.—*Corpus Juris Secundum* quoted

in *Camden Trust Co. v. Christ's Home of Warminster, Pa.*, 101 A. 2d 84, 87, 28 N.J.Super. 466.

78.5 Neb.—*In re Harrington's Estate*, 36 N.W.2d 577, 582, 151 Neb. 81.

79. Kan.—*Koehler v. Beggs*, 250 P. 268, 269, 121 Kan. 897.

46 C.J. p 900 note 9 [al.].

80. Colo.—*Murphy v. People*, 242 P. 57, 59, 78 Colo. 276.

Not synonymous

"I cannot agree with the plaintiff's contention that the word [occurring] . . . is synonymous with 'exist.' Such a construction is strained and unnatural and finds support only in one authority, . . . so far as I have been able to ascertain."

N.Y.—*Creighton v. Metropolitan Life Ins. Co.*, 42 N.Y.S.2d 213, 215, 181 Misc. 847.

81. Ky.—*Commonwealth v. Ledman*, 106 S.W. 247, 251, 127 Ky. 603.

82. Phrases construed

(1) "Carried on or continued or exists."

Idaho.—*State v. Sawtooth Men's Club*, 85 P.2d 695, 698, 59 Idaho 616.

(2) "Exists, or is kept or maintained," as applying to an actual being; to something in fact in existence; something continuing and not failing.

Va.—*McCarron v. Commonwealth*, 193 S.E. 509, 512, 169 Va. 387.

82.5 U.S.—*Central Nat. Bank in Chicago v. Continental Cas. Co.*, C.A. Ill., 182 F.2d 407, 409.

83. Pa.—*McCullough v. National Bank of Union City*, 193 A. 65, 66, 127 Pa.Super. 452.

84. Black L.D.

85. Ont.—*Devitt v. Mutual L. Ins. Co.*, 33 Ont.L. 473, 8 Ont.W.N. 210, 22 Dom.L.R. 183, 187.

86. Phrases construed

(1) "All existing railroad corporations," as applying to railroads subsequently chartered.

Ill.—*Indianapolis & S. L. R. Co. v. Blackman*, 63 Ill. 117, 118.

(2) "Any existing cause" see the C.J.S. definition Any.

cent adjudications have not been found see 25 C.J. p 167 note 56—p 168 note 85.

EXISTENCE. That which exists, that which ac-

tually is an individual thing; an actuality.⁸⁷

*Phrases employing the word are set out in the subjoined note.*⁸⁸

City Southern Ry. Co. v. City of Heavener, 54 P.2d 165, 166, 175 Okl. 517—Kansas City Southern Ry. Co. v. Board of Education of Poteau, 13 P.2d 115, 116, 158 Okl. 274—Faught v. City of Sapulpa, 292 P. 15, 25, 145 Okl. 164—School Dist. No. 2, Consolidated, Pushmataha County v. Gossett, 283 P. 249, 252, 140 Okl. 243.

Tenn.—Trotter v. Peterson, 60 S.W. 2d 149, 151, 166 Tenn. 142.

Tex.—Occidental Life Ins. Co. v. Jamora, Civ.App., 44 S.W.2d 808, 812.

25 C.J. p 168 note 64.

(15) "Existing law" or "existing laws."

U.S.—John Lysaght, Limited, v. Lehigh Valley R. Co., D.C.N.Y., 254 F. 351, 353.

D.C.—District of Columbia v. Georgetown & T. Ry. Co., 41 F.2d 424, 425, 59 App.D.C. 335.

N.Y.—In re White Plains Road in City of New York, 192 N.Y.S. 356, 357, 199 App.Div. 894.

N.C.—M. V. Moore & Co. v. Southern R. Co., 111 S.E. 166, 168, 183 N.C. 213.

Pa.—Buttorff v. Cumberland County, 167 A. 588, 589, 312 Pa. 503.

Tenn.—Chester v. Turner, 284 S.W. 365, 367, 153 Tenn. 451.

Tex.—Fort Worth & Denver City Ry. Co. v. Motley, Civ.App., 87 S.W.2d 551, 554.

25 C.J. p 168 note 67.

(16) "Existing legal or equitable rights," as not including contingent interests.

Ill.—Citizens Nat. Bank of Alton v. Glassbrenner, 36 N.E.2d 364, 369, 377 Ill. 270.

(17) "Existing liabilities" or "existing liability."

U.S.—Shepard v. Commissioner of Internal Revenue, C.C.A., 101 F.2d 595, 598.

Cal.—Department of Water and Power of City of Los Angeles v. Inyo Chemical Co., 108 P.2d 410, 415, 16 C.2d 744.

Ky.—Daniels v. Goff, 232 S.W. 66, 67, 192 Ky. 15.

N.C.—Graeber v. Sides, 66 S.E. 600, 601, 151 N.C. 596.

(18) "Existing office."

Conn.—Kelly v. City of Bridgeport, 151 A. 268, 271, 111 Conn. 667.

(19) "Existing person," as including a posthumous child.

Cal.—Daubert v. Western Meat Co., 69 P. 297, 73 P. 244, 245, 139 C. 480, 96 Am.S.R. 154.

Okl.—Herndon v. St. Louis & S. F. R. Co., 128 P. 727, 730, 37 Okl. 256.

(20) "Existing public institution," as not including a desired municipal auditorium, for construction of which city electors had authorized bond issue.

S.D.—State ex rel. Saylor v. Walt, 278 N.W. 12, 15, 66 S.D. 14.

(21) "Existing public school," as including the building and grounds.

Fla.—State ex rel. Fronton Exhibition Co. v. Stein, 198 So. 82, 87, 144 Fla. 387.

(22) "Existing rights," as referring only to such rights as exist under general laws.

Wash.—Funk v. Inland Power & Light Co., 1 P.2d 872, 874, 164 Wash. 110.

25 C.J. p 168 note 75.

(23) "Existing rule."

Cal.—Johnson v. Superior Court of San Bernardino County, 250 P. 686, 687, 79 C.A. 650.

(24) "Existing street railways."

N.J.—Jersey City v. North Jersey St. R. Co., 67 A. 113, 114, 74 N.J. Law 774.

N.Y.—Merkamer v. Garrison, 181 N. Y.S. 197, 199, 111 Misc. 195.

(25) "Existing structures," as not applying to excavation and engineering work and forms constructed.

Mass.—Brett v. Building Commissioner of Brookline, 145 N.E. 269, 272, 250 Mass. 73.

(26) "Existing terms of office."

Ohio.—State v. Smith, 140 N.E. 737, 738, 107 Ohio St. 1—State v. Pattison, 76 N.E. 946, 948, 73 Ohio St. 305.

(27) "Existing under the law of this state."

Wis.—State v. Circuit Court of Dodge County, 186 N.W. 732, 733, 176 Wis. 198.

(28) "Existing use," see the index to the title Zoning.

(29) "Existing values."

Iowa.—Andrew v. Savings Bank of Larchwood, 242 N.W. 80, 81, 214 Iowa 204.

(30) "Known, existing liabilities."

Pa.—McCullough v. National Bank of Union City, 193 A. 65, 66, 127 Pa.Super. 452.

(31) "Misstatement of 'existing fact,'" as including false and fraudulent representation of present intent as to future use of property.

Tex.—Whitcomb v. Moody, Civ.App., 49 S.W.2d 513, 514.

(32) "Under existing laws."

Pa.—Appeal of Free, 151 A. 583, 584, 301 Pa. 82.

87. Century D.

Neb.—**Corpus Juris Secundum** quoted in In re Harrington's Estate, 36 N. W.2d 577, 582, 151 Neb. 81.

N.J.—**Corpus Juris Secundum** quoted in Camden Trust Co. v. Christ's Home of Warminster, Pa., 101 A.2d 84, 87, 28 N.J.Super. 466—**Corpus Juris Secundum** quoted in Fidelity Union Trust Co. v. Ackerman, 87 A. 2d 47, 49, 18 N.J.Super. 314.

88. Phrases construed

(1) "Actual existence" see the C. J.S. definition Actual; see also (8) infra this note.

(2) "Corporate existence" and "existence of the corporation."

Mo.—Hurt v. Salisbury, 55 Mo. 310, 314.

Wis.—State ex rel. Sheldon v. Dahl, 135 N.W. 474, 477, 150 Wis. 73.

See generally Corporations §§ 3, 23, 69–79.

(3) "Existence and location," as implying a greater extent of knowledge as to exact location than either alone.

Wis.—Dorsey v. Phillips & Colby Constr. Co., 42 Wis. 583, 603.

(4) "Doctrine of potential existence" see the C.J.S. definition Doctrine.

(5) "Existence by actual birth."

Tex.—Wallace v. State, 10 Tex.App. 255, 270.

(6) "Existence of such theory must be established . . . conclusively," as meaning that the correctness of the theory must be so established.

Nev.—Silver Min. Co. v. Fall, 6 Nev. 116, 121.

(7) "In existence at the time of the testator's death."

Colo.—In re Eder's Estate, 29 P.2d 631, 634, 94 Colo. 173.

Minn.—In re Havel's Estate, 194 N. W. 633, 634, 156 Minn. 253, 34 A. L.R. 1300.

See also Wills § 336.

(8) "Potential existence," as distinguished from "actual existence," and referring to the natural product or expected increase of something already in existence, means merely that the thing may be in existence at some time.

Mich.—Dickey v. Waldo, 56 N.W. 608, 610, 97 Mich. 255.

Okl.—Carter v. Rector, 210 P. 1035, 1037, 88 Okl. 12.

(9) "Whose existence is not known," as referring to one whose absence has been so long prolonged, and under such circumstances as to throw great doubt upon his existence.

EXISTENT. Having being; existing; especially at present.^{88.50}

EXISTIMATIO. See the C.J.S. definition Ex.

EXIT. Latin, literally "It goes forth."⁸⁹ Defined as meaning a way of departure, a passage out.⁹⁰

In the plural, the term may mean doors, or gates, or passages, or a mere right of way.⁹¹

Used in docket entries as a brief mention of the issue of process. Thus, "exit fi. fa." denotes that a writ of fieri facias has been issued in the particular case. The "exit of a writ" is the fact of its issuance.⁹²

EXITUS. See the C.J.S. definition Ex.

EXITUS ACTA PROBAT; FINIS, NON PUGNA, CORONAT.⁹³

EX JUDICORUM PUBLICORUM ADMISSIS, NON ALIAS TRANSEUNT ADVERSUS HÆREDES PÆNÆ BONORUM ADEPTIONIS QUAM SI LIS CONTESTAT ET CONDEMNATIO FUERIT SECUTA; EXCEPTO MAJESTATIS JUDICIO.⁹⁴

EX JUSTIS NUPTIIS PROCREATUS. See the C.J.S. definition Ex.

EXLEGALITAS, EXLEGALITUS, EXLEGARE, and EXLEX. See the C.J.S. definition Ex.

EX MALEFICIO NON ORITUR CONTRACTUS.⁹⁵

EX MALIS MORIBUS BONÆ LEGES NATÆ SUNT.⁹⁶

EX MALITIA. See the C.J.S. definition Ex.

EX MULTITUDINE SIGNORUM, COLLIGITUR IDENTITAS VERA.⁹⁷

EX NIHILO NIHIL FIT.⁹⁸

EX NUDA SUBMISSIONE NON ORITUR ACTIO.⁹⁹

EX NUDO PACTO NON ORITUR ACTIO.¹

EX OFFICER and EX OFFICIO. See the C.J.S. definition Ex.

EXOGENOUS. A medical term meaning externally caused.^{1.50}

EXOINE. In French law, an act or instrument in writing which contains the reasons why a party in

La.—Martinez v. Wall, 31 So. 1023, 1025, 107 La. 737.
See also Death § 6.

88.50 N.J.—Fidelity Union Trust Co. v. Ackerman, 87 A.2d 47, 49, 18 N.J. Super. 314.

89. Black L.D.

90. Century D.

Cal.—Marshall v. Lyon, 177 P.2d 44, 46, 77 C.A.2d 905.

"Exit wound"

A term used in medical jurisprudence to denote the wound made by a weapon on the side where it emerges, after it has passed completely through the body, or through any part of it.
Black L.D.

91. N.M.—Roberts v. Trujillo, 1 P. 855, 856, 3 N.M. 50.

Phrase construed

"Certain entrances and exits."
N.M.—Roberts v. Trujillo, supra.

92. Black L.D.

93. A maxim meaning "The conclusion or result proves or justifies the acts; the termination, not the trial, crowns the victory."
Adams Gloss.

94. A maxim meaning "On account of admissions made at public trials, the punishment of confiscation of goods or property does not otherwise pass against heirs than if a contested

suit and condemnation followed; excepting in the case of high treason."
Adams Gloss.

95. A maxim meaning "A contract cannot arise out of an act radically vicious and illegal."
Broom Leg.Max.

Applied in

N.C.—Gaylord v. Gaylord, 63 S.E. 1028, 1034, 150 N.C. 222.
25 C.J. p 169 note 91 [a].

96. A maxim meaning "Good laws arise from evil manners."
Wharton L.Lex.

Applied in

Eng.—Townsend v. Hughes, 2 Mod. 150, 161, 86 Reprint 850—Townsend v. Hughes, 1 Mod. 232, 233, 86 Reprint 994.

97. A maxim meaning "From the great number of signs true identity is ascertained."
Bouvier L.D.

98. A maxim meaning "From nothing nothing comes."
Black L.D.

Applied in

Mo.—State ex rel. Crandall v. McIntosh, 103 S.W. 1078, 1083, 205 Mo. 589.
25 C.J. p 169 note 95 [a].

99. A maxim meaning "From a bare or naked submission [i. e. to arbitration] no action can arise."

Adams Gloss, citing Broom Leg.Max.

1. A maxim meaning "No cause of action arises from a bare promise."
Broom Leg.Max.

Applied in

Conn.—Cook v. Bradley, 7 Conn. 54, 62, 18 Am.D. 79.
25 C.J. p 169 note 97 [b].

Similarly rendered

(1) "Out of a nude or naked pact [that is, a bare parol agreement without consideration] no action arises."
Black L.D.

(2) "Out of a promise neither attended with particular solemnity (such as belongs to a specialty) nor with any consideration no legal liability can arise."
Black L.D.

(3) "A parol agreement, without a valid consideration, cannot be made the foundation of an action."
Black L.D.

Described as

(1) "The maxim of the civil law."
N.Y.—Van der Volgen v. Yates, 9 N. Y. 219, 222.

(2) A leading maxim both of the civil and common law.
Black L.D., citing 2 Blackstone Comm. p. 445.

1.50 Minn.—Hush v. Ancker Hospital of St. Paul, Minn., 70 N.W.2d 850, 852, 245 Minn. 22.

a civil suit, or a person accused, who has been summoned, agreeably to the requisitions of a decree, does not appear. The same as "Essoin."²

EXONERATE. To exculpate, to relieve.³ In the past tense, to be relieved of as a charge, to be discharged or exempted.⁴

EXONERATION. The removal of a burden, charge, or duty; particularly, the act of relieving a person or estate from a charge or liability by casting the same upon another person or estate;⁵ the state of being disburdened or freed from a charge; something that is supposed to take place after a charge has been made.⁶

Also the right to be reimbursed which a person has who has been compelled to pay what another should be forced to pay in full;⁷ a right which exists between those who are successively liable for the same debt, by which, when a party who is secondarily liable has paid or satisfied the principal's obligation or any part thereof, he is entitled to be reimbursed by the principal debtor, and can bring a bill in equity for that purpose;⁸ and, more specifically, a right to have a particular fund applied to the payment of guaranteed claims.⁹

In Scotch law, a discharge; or the act of being legally disburdened of, or liberated from, the performance of a duty or obligation.¹⁰

As used with reference to a surety's rights and liabilities see Principal and Surety § 303. For some other references to specific uses of the term see 25 C.J. p 169 note 7.

EXONERATIONE SECTÆ. A writ that lay for

the crown's ward, to be free from all suit to the county court, hundred court, leet, etc., during wardship.¹¹

EXONERATIONE SECTÆ AD CURIAM BARON. A writ of the same nature as that last above described, issued by the guardian of the crown's ward, and addressed to the sheriffs or stewards of the courts, forbidding them to distrain him, etc., for not doing suit of court, etc.¹²

EXONERETUR. Literally "Let him be relieved or discharged." An entry made on a bailpiece, whereby the surety is relieved or discharged from further obligation, when the condition is fulfilled by the surrender of the principal or otherwise.¹³

EXOPHORIA. A term meaning that the visual lines tend outward.^{13.50}

EXOPHTHALMIC GOITER. A disease characterized by exophthalmia, a protrusion of the eyeball, enlargement of the thyroid gland, and frequent pulse. Also called Graves' or Basedow's disease.¹⁴

EXORBITANT. Deviating from the normal or customary course; going beyond the rule or established limits of right or propriety.¹⁵

EXORDIUM. The beginning or introductory part of a speech.¹⁶

EXOTHERMIC. Noting a chemical compound the formation of which is attended with the development of heat; relating to the external warmth of the body.^{16.50}

2. Black L.D.

3. Vt.—Standard Oil Co. of New York v. Stevens, 151 A. 507, 508, 103 Vt. 1.

Phrase construed

"Exonerate and save harmless." Vt.—Standard Oil Co. of New York v. Stevens, supra.

4. U.S.—Bannon v. Burnes, C.C.Mo., 39 F. 892, 897, 898.

Phrase construed

"Exonerated from all taxes, assessments, and other charges." U.S.—Bannon v. Burnes, supra.

5. Black L.D.

Phrases construed

(1) "In exoneration of my other real estate." Eng.—In re Newmarch, 9 Ch.D. 12, 18.

(2) "In exoneration" of real estate. Eng.—In re Rossiter, 13 Ch.D. 355, 356.

6. Ky.—Louisville & N. R. Co. v. Commonwealth, 71 S.W. 910, 916, 114 Ky. 787, 24 Ky.L. 1593, 1779.

7. Conn.—Fidelity & Casualty Ins. Co. of New York v. Sears, Roebuck & Co., 199 A. 93, 94, 124 Conn. 227.

8. U.S.—Maryland Casualty Co. v. Charleston Lead Works, D.C.S.C., 24 F.2d 836, 839.

Mich.—Comstock v. Corbin, 153 N. W. 106, 107, 191 Mich. 639.

Similarly expressed

"A right or equity which exists between those who are successively liable for the same debt." Black L.D.

9. N.J.—Stulz-Sickles Co. v. Fredburn Const. Corporation, 169 A. 27, 28, 114 N.J.Eq. 475.

10. Black L.D.

11. Black L.D.

12. Black L.D.

13. Black L.D.

See also Bail § 21 e note 94.

13.50 Md.—Jackson v. Bethlehem Sparrows Point Shipyard, 56 A.2d 702, 703, 189 Md. 583.

14. Century D.

"A disease injurious to health, poisoning the system, the only relief for which is a major surgical operation, and, if not operated on in its early stages, is likely to produce death."

Ala.—First Nat. Life Ins. Co. of America v. Maxey, 145 So. 589, 590, 25 Ala.App. 289.

15. U.S.—U. S. v. Oglesby Grocery Co., D.C.Ga., 264 F. 691, 695.

La.—Waldington v. Barron, App., 91 So.2d 448, 451.

16. Black L.D.

16.50 Steadman Med.D.

Exothermic condition. In the artificial incubation of eggs, a heat-generating condition, in contrast with an "endothermic condition."^{16.55}

EX P. See Abbreviations 1 C.J.S. p 276 note 5, see also the C.J.S. definition *Ex*.

EX PACTO ILLICITO NON ORITUR ACTIO.¹⁷

EXPAND. To spread or stretch out; to increase in extent, size, bulk, or amount; inflate; distend;¹⁸ to extend; to enlarge.^{18.5} The term has been held synonymous with "extend."¹⁹

EXPANSION. A much-used and well-understood word.^{19.50} It is defined to mean the act of expanding, in any sense; the condition or state of being expanded; increase of amount, size, scope, or the like; development.^{19.55} It has been held to be synonymous with "enlargement," see the C.J.S. definition of that term.

Expansion tank. The term, as used in connection with a heating system, means a vessel to maintain a reserve supply of water in constant communication with both branches of the circulating system, having a safety valve and means for filling the system with water; it has been specifically applied in the heating of railway cars.²⁰

EX PARTE; EX PARTE MATERNA or EX PARTE PATERNA. See the C.J.S. definition *Ex*.

EX PARTE PROCEEDING. See Actions § 1 h (3).

EX PARTE TALIS. A writ that lay for a bailiff or receiver, who, having auditors appointed to take his accounts, cannot obtain of them reasonable allowance, but is cast into prison.²¹

EXPATRIACIÓN. In Spanish law, loss of nationality, which may be voluntary, as where a Spaniard is naturalized by a foreign power, or involuntary, when it is imposed as a punishment for crime, especially of a political character.²²

EXPATRIATION. See Citizens §§ 13-17.

EX PAUCIS DICTIS INTENDERE PLURIMA POSSIS.²³

EX PAUCIS PLURIMA CONCIPIT INGENIUM.²⁴

EXPECT. To look for (mentally); to look forward to, as to something that is believed to be about to happen or come;²⁵ to have a previous apprehension of, whether good or evil;²⁶ to look forward to as certain or probable.²⁷

Also, in what may be called a secondary sense, to demand, to look for with some confidence, or to require,²⁸ in this sense implying a demand,²⁹ something more than hope or desire,³⁰ although ordinarily it does not imply a warranty.³¹

16.55 U.S.—Petersime Incubator Co. v. Bundy Incubator Co., D.C.Ohio, 43 F.Supp. 446, 451.

17. A maxim meaning "From an illicit contract no action arises." Bouvier L.D., citing Broom Leg.Max.

Applied in
Ohio.—McCortle v. Bates, 29 Ohio St. 419, 422, 23 Am.R. 758.
25 C.J. p 170 note 14 [a].

18. Century D.

Phrases construed

(1) "Expanded metal," described as metal openwork, held together by uncut portions of the metal, and constructed by making cuts or slashes in metal and then opening them so as to form a series of meshes or latticework.

U.S.—Expanded Metal Co. v. Bradford, Pa., 29 S.Ct. 652, 653, 214 U.S. 386, 53 L.Ed. 1034.

(2) "Expanded sheet metal," described as sheet metal expanded by making a series of cuts or slits in the metal in such relation to each other as to break joints, so that the metal, when opened or stretched, will present an open mesh appearance.

U.S.—Expanded Metal Co. v. Bradford, supra.

18.5 Ill.—Federal Elec. Co. v. Zoning Bd. of Appeals of Village of Mt. Prospect, 75 N.E.2d 359, 362, 398 Ill. 142.

19. Mo.—Meyering v. Miller, 51 S.W.2d 65, 66, 330 Mo. 885.

19.50 S.D.—State ex rel. Dunker v. Spink Hutterian Brethren, 90 N.W.2d 365, 378.

19.55 New Standard D.

20. U.S.—Safety Car Heating & Lighting Co. v. Consolidated Car Heating Co., C.C.N.Y., 160 F. 476, 481.

21. Black L.D.

22. Escriche Diccionario.

See also Citizens §§ 13-17.

23. A maxim meaning "You can imply many things from few expressions."

Black L.D.

24. A maxim meaning "From a few words or hints the understanding conceives many things."

Black L.D.

25. Kan.—Atchison, T. & S. F. R. Co. v. Hamlin, 73 P. 58, 60, 67 Kan. 476.

Miss.—Holcomb v. Holcomb, 159 So. 564, 566, 173 Miss. 192.

Ohio.—Kronenberg v. Whale, 153 N.E. 302, 308, 21 Ohio App. 322.

Similarly defined

To look forward to something about to happen.

Ill.—Wattjes v. Faeth, 40 N.E.2d 521, 524, 379 Ill. 290.

26. Miss.—Holcomb v. Holcomb, 159 So. 564, 566, 173 Miss. 192.

27. U.S.—Petroleum Export Corporation v. Kerr S. S. Co., C.C.A. Cal., 32 F.2d 969, 970.

N.Y.—Isbrandtsen Co. v. Lyncroft Grain Corp., 166 N.Y.S.2d 721, 725, 8 Misc.2d 521.

28. Miss.—Holcomb v. Holcomb, 159 So. 564, 566, 173 Miss. 192.

29. Wash.—Sillman v. Spokane Savings & Loan Soc., 175 P. 296, 297, 103 Wash. 619.

30. La.—Osborne v. McWilliams Dredging Co., App. 176 So. 410, 412.

31. U.S.—Petroleum Export Corporation v. Kerr S. S. Co., C.C.A. Cal., 32 F.2d 969, 970.

Mo.—Johnson v. McCune, 27 Mo. 171, 173.

"Expect" has been distinguished from "promise."³²

Phrases employing the word are collected in the subjoined note.³³

EXPECTANCY. The condition of being referred to a future time, or of dependence on an expected event;³⁴ also that which is expected or hoped for.³⁵

Applied to property, the word has been described or defined as meaning contingency as to possession or enjoyment;³⁶ a bare hope of succession to the property of another such as may be entertained by an heir apparent;³⁷ a mere hope unfounded in any limitation, provision, trust or legal act whatever.³⁸

Specifically, the term has been held to include the

interest of a beneficiary under the terms of a life insurance policy which reserves the right to change the beneficiary or assign the policy³⁹ or which requires the beneficiary to survive the insured.⁴⁰

The term has been compared with "possibility,"⁴¹ and contrasted with, or distinguished from, "vested interest."⁴²

For references to some specific uses of the word see 25 C.J. p 171 note 32.

Naked possibility or expectancy. With reference to a potential future estate, words importing hope to succession, but not a certainty; not founded upon a right, or coupled with an interest.⁴³

As to the assignment or release of expectancies see Assignments § 14.

32. Ga.—Atlantic Coast Line R. Co. v. Wells, 60 S.E. 170, 171, 130 Ga. 55.

33. Phrases containing "expect" or "expects"

(1) "Expect same to be repaid or deducted."

Miss.—Holcomb v. Holcomb, 159 So. 564, 566, 173 Miss. 192.

(2) "Expects to be absent," as equivalent to "is absent."

Tex.—Wood v. State ex rel. Lee, 126 S.W.2d 4, 7, 133 Tex. 110, 121 A.L.R. 931.

(3) "Expects to be a party to an action."

N.Y.—In re Darling, 64 N.Y.S. 793, 794, 31 Misc. 543.

(4) "Expects to settle all bills," as not necessarily meaning payment. Ind.—Cleveland, C. C. & St. L. Ry. Co. v. Shea, 91 N.E. 1081, 1083, 174 Ind. 303.

(5) "Expect to pay," as being nothing more than a mere desire or intention to pay.

Wash.—Coe v. Rosene, 118 P. 881, 882, 66 Wash. 73, 38 L.R.A., N.S., 577, Ann.Cas.1913C 741.

(6) "We will expect to write at least one-half of the fire insurance." Wash.—Sillman v. Spokane Savings & Loan Soc., 175 P. 296, 103 Wash. 619.

Phrases containing "expected"

(1) "Expected service," as a service approved by the employer, but not a required duty. Wis.—Severson v. Industrial Commission, 266 N.W. 235, 237, 221 Wis. 169.

(2) "Expected time of loading." U.S.—Petroleum Export Corporation v. Kerr S. S. Co., C.C.A.Cal., 32 F.2d 969, 970.

(3) "Expected to arrive." N.Y.—Abe Stein Co. v. Robertson, 60 N.E. 329, 330, 167 N.Y. 101. 25 C.J. p 170 note 31 [c].

(4) "Expected to stay on the . . . dredge."

La.—Osborne v. McWilliams Dredging Co., App., 176 So. 410, 412.

(5) "Reasonably be expected to suffer in the future," as substantially equivalent to "reasonably certain to follow."

Ohio.—Kronenberg v. Whale, 153 N. E. 302, 308, 21 Ohio App. 322.

(6) "Reasonably expected," as synonymous with "reasonably certain."

Mo.—Garard v. Manufacturers' Coal & Coke Co., 105 S.W. 767, 771, 207 Mo. 242.

34. Ill.—Ayers v. Chicago Title & Trust Co., 58 N.E. 318, 324, 187 Ill. 42.

35. Kan.—Robinson v. Eagle-Picher Lead Co., 297 P. 697, 698, 132 Kan. 860, 75 A.L.R. 840.

36. Ill.—Ayers v. Chicago Title & Trust Co., 58 N.E. 318, 324, 187 Ill. 42, 58.

Kan.—Robinson v. Eagle-Picher Lead Co., 297 P. 697, 698, 132 Kan. 860, 75 A.L.R. 840.

37. Tenn.—Johnson v. Breeding, 190 S.W. 545, 136 Tenn. 528, L.R.A. 1917C 266.

Tex.—Clark v. Gauntt, 161 S.W.2d 270, 272, 138 Tex. 558.

Utah.—Latimer v. Holladay, 134 P.2d 183, 186, 103 Utah 152.

25 C.J. p 171 note 36.

Similarly expressed

"Chance of succession of an heir." U.S.—In re Barnett, D.C.N.Y., 37 F. Supp. 531, 532.

Until death of ancestor, heir's right of inheritance is a mere "expectancy." Cal.—In re Perkins' Estate, 134 P.2d 231, 236, 21 C.2d 561.

"At most it is a mere hope or expectation, contingent upon the will and pleasure of the landowner, and hardly reaches the height of a property right, much less a vested right,

because where there is no obligation, there is no right. It is a possibility for which a party may under certain circumstances properly hope."

Kan.—Robinson v. Eagle-Picher Lead Co., 297 P. 697, 698, 132 Kan. 860, 75 A.L.R. 840.

38. Ky.—Elliott v. Leslie, 99 S.W. 619, 621, 124 Ky. 553, 30 Ky.L. 743, 124 Am.S.R. 418.

25 C.J. p 171 note 35.

39. Ala.—Corpus Juris cited in Sovereign Camp, W. O. W. v. Feltman, 147 So. 396, 398, 226 Ala. 390.

Cal.—Page v. Washington Mut. Life Ass'n, 125 P.2d 20, 24, 20 C.2d 234. Mahony v. Crocker, 136 P.2d 810, 814, 58 C.A.2d 196.

Ky.—McKenty v. Caldwell, 155 S.W. 2d 193, 194, 287 Ky. 750.

Pa.—In re Bayer's Estate, 26 A.2d 202, 205, 345 Pa. 308.

Tex.—McNeil v. Chinn, 101 S.W. 465, 467, 45 Tex.Civ.App. 551.

More than "expectancy"

The right of a beneficiary under a life policy is more than a mere "expectancy," and is a right subject to being defeated by insured's exercise of a reserved power to change beneficiaries or the lapsing of policy.

Ky.—Parks' Ex'rs v. Parks, 156 S.W. 2d 480, 483, 288 Ky. 435.

40. Ind.—McKinney v. Depoy, 12 N. E.2d 250, 253, 213 Ind. 361.

41. Iowa.—McDonald v. Bayard Savings Bank, 98 N.W. 1025, 1026, 123 Iowa 413.

Ky.—Elliott v. Leslie, 99 S.W. 619, 621, 124 Ky. 553, 30 Ky.L. 743, 124 Am.S.R. 418.

Ohio.—Needles v. Needles, 7 Ohio St. 432, 443, 70 Am.D. 85.

42. U.S.—Zolintakis v. Orfanos, C.C. A.Utah, 119 F.2d 571, 575.

Ky.—McKenty v. Caldwell, 155 S.W. 2d 193, 194, 287 Ky. 750.

43. Ky.—McCall v. Hampton, 32 S. W. 406, 408, 98 Ky. 166, 17 Ky.L. 713, 56 Am.S.R. 335, 33 L.R.A. 266.

Phrases employing the word are set out in the note.⁴⁴

EXPECTANT. Contingent as to enjoyment; having relation to, or dependent on, a contingency.⁴⁵

"Expectant right." A right which depends on the continued existence of the present condition of things until the happening of some future event.⁴⁶ A right which depends on the continuation of existing circumstances, such as the right of an heir to inherit, provided he survives his ancestor and the ancestor dies seized and intestate.⁴⁷

It has been distinguished from "contingent right" see the C.J.S. definition Contingent, and "vested right."⁴⁸

EXPECTATION. The act or state of waiting or awaiting with confident anticipation,⁴⁹ implying an ability to think and reason.⁵⁰

An "expectation" is more than a bare hope; it implies a high degree of certainty that a future event will occur.^{50.5}

It has been compared with "apprehension," see the definition of that term.

The word is sometimes used as referring to an implied contract warranted from the facts and circumstances surrounding the transaction,⁵¹ and as implying, under particular circumstances, a mutual agreement for the rendering of services and payment therefor.⁵²

Phrases employing the word are set out in the note.⁵³

EXPECTATIVA. In Spanish law, expectant, as a right or interest.⁵⁴

EXPEDICIÓN. In Spanish ecclesiastical law, a paper issuing from the Roman Curia, as a bull, dispensation, indulgence, etc.; also the act of issuing the same.⁵⁵

EXPEDICIONERO. In Spanish ecclesiastical law, one who has charge of expediciones.⁵⁶

EXPEDIENCY. A word of large import, comprehending whatever is suitable and appropriate in reason for the accomplishment of the specified object.⁵⁷

As applied to public welfare legislation, the term involves utility,⁵⁸ and has reference to matters

44. "Expectancy of patronage" arises from the favorable disposition of intending purchasers to buy one's goods, and from the probability that customers will continue to buy goods which they have been accustomed to buy.

Minn.—Winston & Newell Co. v. Piggly Wiggly Northwest, 22 N.W.2d 11, 15, 221 Minn. 287.

Other phrases.

(1) "Expectancy of an heir apparent," as having no attribute of property, the interest to which it relates being at the time nonexistent. Tenn.—Johnson v. Breeding, 190 S. W. 545, 136 Tenn. 528, L.R.A.1917C 266.

(2) "Expectancy of a renewal," as a species of property in the lessee under particular circumstances.

N.Y.—Crittenden & Cowler Co. v. Cowler, 72 N.Y.S. 701, 702, 66 App. Div. 95.

(3) "Expectancy tables" or "life expectancy tables" as experience tables of mortality see the C.J.S. definition Mortality Tables.

(4) "Price expectancy" as interchangeable with "exhibition value" see the definition "Exhibition" ante.

(5) "Probable expectancy" or "probable expectation" as applied to the common-law right to a reasonably free labor market.

Mass.—L. D. Willcutt & Sons Co. v. Bricklayers' Benevolent & Protec-

tive Union No. 3, 85 N.E. 897, 900, 200 Mass. 110, 23 L.R.A., N.S., 1236. N.J.—Jersey City Printing Co. v. Cassidy, 53 A. 230, 233, 63 N.J. Eq. 759.

50 C.J. p 421 note 97-p 422 note 99.

45. Black L.D.

"Expectant estate" see Estates § 15.

"Expectant heir" see Descent and Distribution § 19.

46. U.S.—Western Pac. R. Co. v. Southern Pac. R. Co., Cal., 151 F. 376, 399, 80 C.C.A. 606.

N.D.—Wirtz v. Nestos, 200 N.W. 524, 530, 51 N.D. 603.

Okl.—Avery v. Curtiss, 235 P. 195, 197, 103 Okl. 154.

Wash.—Adams v. Ernst, 95 P.2d 799, 804, 1 Wash.2d 254.

25 C.J. p 171 note 38.

47. Or.—McCleery v. Woodmen of the World, 299 P. 1004, 1005, 136 Or. 407.

48. U.S.—Pearsall v. Great Northern R. Co., Minn., 16 S.Ct. 705, 713, 161 U.S. 646, 40 L.Ed. 838.

49. Century D.

50. N.J.—Kobylakiewicz v. Prudential Ins. Co. of America, 180 A. 491, 492, 115 N.J.Law 382.

50.5 Pa.—Reed v. Philadelphia Transp. Co., 90 A.2d 371, 373, 171 Pa.Super. 60, 33 A.L.R.2d 1166.

51. Iowa.—Wragg v. Wragg, 226 N. W. 99, 102, 208 Iowa 939, 64 A.L.R. 1292.

See also Contracts § 4 b.

52. Mo.—Shock v. Price, App., 207 S.W. 834, 835.

53. Phrases construed

(1) "Expectation . . . to make compensation."

Mo.—Shock v. Price, supra.

(2) "Expectation . . . to receive payment therefor."

Mo.—Shock v. Price, supra.

(3) "In expectation," as distinguished from "in possession."

Ill.—People v. McCormick, 70 N.E. 350, 353, 208 Ill. 437, 64 L.R.A. 775.

(4) "Probable expectation" see ante note 44(5).

(5) "Reasonable expectation."

Md.—Edelhoff v. Horner-Miller Mfg. Co., 39 A. 314, 318, 86 Md. 595.

54. Eseriche Diccionario.

55. Eseriche Diccionario.

56. Eseriche Diccionario.

57. Mass.—Eustace v. Dickey, 132 N.E. 852, 862, 240 Mass. 55.

Ohio.—Werner v. Biederman, 28 N.E. 2d 957, 959, 64 Ohio App. 423.

Applied to administration of church trust

"In this connection, it includes whatever may rationally be thought to conduce to the welfare of the trust."

Mass.—Eustace v. Dickey, 132 N.E. 852, 862, 240 Mass. 55.

58. N.H.—Woolf v. Fuller, 174 A. 193, 196, 87 N.H. 64, 94 A.L.R. 1067.

which are wholly for legislative cognizance.⁵⁹

The term is said to be nearly synonymous with "necessity" where that term is used in a sense not importing an absolute necessity, as in the case of governmental interference with private property when necessary for the public good.⁶⁰

"Expediency" has been distinguished from "emergency," see the C.J.S. definition of that term, and has also been distinguished from "reasonable,"^{60.5} and "reasonableness."⁶¹

EXPEDIENT. Apt and suitable to the end in view; furthering, or adapted to further, what is purposed; practical and efficient; as, an expedient change of policy; an expedient solution of a difficulty; hence, advantageous.⁶²

The term may be analogous to, but is not convertible with, "necessary,"⁶³ although in a particular connection it is given as one of the meanings of "necessary."⁶⁴

It has been compared with, and distinguished from, "impracticable."⁶⁵

EXPEDIENTE. In Spanish law, a matter which is prosecuted in the courts at the instance of an interested party or official; also the record of a cause containing all the papers filed therein.⁶⁶

The term is also employed to denote an historical record of proceedings had and done in connection

with the grant of land by the sovereign,^{66.5} and in Mexican law signifies all the papers or documents constituting a grant or title to land from the government.^{66.10} The word is sometimes, although with less technical correctness, written "espediente" which is said to be a familiar term in Mexican law, meaning the collection or the junction of all the separate papers made in the course of any one proceeding, and which remains in the office at the close of it.⁶⁷

EXPEDIMENT and **EXPEDITATÆ ARBORES.** See the C.J.S. definition Ex.

EXPEDIR. In Spanish law, to prosecute a cause; also to issue documents, or to render an order or judgment.⁶⁸

EXPEDITATION. In old forest law, a cutting off the claws or ball of the forefeet of mastiffs or other dogs, to prevent their running after deer; a practice for the preservation of the royal forests.⁶⁹

EXPEDITE. To hasten;⁷⁰ to make haste, to speed.⁷¹

EXPEDITER. An employee whose duty it is to see that shortage in material at one point in a plant is remedied by delivery of the needed material from another part of the plant where it is stacked or stored.^{71.50}

59. Cal.—Ex parte Hall, 195 P. 975, 976, 50 C.A. 786.

60. N.Y.—Stuyvesant v. City of New York, 7 Cow. 588, 606.

60.5 "Reasonable" not synonymous Wis.—Bennett v. Vallier, 116 N.W. 885, 888, 136 Wis. 193, 128 Am.S.R. 1061, 17 L.R.A., N.S., 486.

61. "Reasonableness" held not synonymous Cal.—Carroll v. California Horse Racing Board, App., 93 P.2d 266, 275—Ex parte Hall, 195 P. 975, 976, 50 C.A. 786.

62. Ohio.—Werner v. Biederman, 28 N.E.2d 957, 959, 64 Ohio App. 423. Tex.—Corpus Juris Secundum cited in Jones v. Dumas Development Co., Civ.App., 229 S.W.2d 936, 940. Va.—Norfolk County v. City of Portsmouth, 45 S.E.2d 136, 142, 143, 186 Va. 1032.

Similarly expressed

"Pertaining to whatever is suitable and appropriate in reason for the accomplishment of a specified object." Black L.D.

Suited to the circumstances

Cal.—Portman v. Clementina Co., 305 P.2d 963, 966, 147 C.A.2d 651.

Phrases construed

(1) "For such reasons as to them may seem expedient," referred to as a broad phrase.

Mass.—Eustace v. Dickey, 132 N.E. 852, 862, 240 Mass. 55.

(2) "Pay 'such amounts and execute such agreements as may be necessary and expedient.'"

Ohio.—Werner v. Biederman, 28 N.E.2d 957, 959, 64 Ohio App. 423.

63. Iowa.—Myers v. Stratmann, 65 N.W.2d 356, 358, 245 Iowa 1060.

Somewhat analogous to "necessary"

Iowa.—Getchell & Martin Lumber & Mfg. Co. v. Des Moines Union Ry. Co., 87 N.W. 670, 671, 115 Iowa 734.

Not convertible with "necessary"

Ky.—Commonwealth v. Morrison, 2 A.K.Marsh. 75, 84.

"Necessary" imports greater urgency

Mo.—St. Louis Gunning Advertising Co. v. Wanamaker & Brown, 90 S.W. 737, 743, 115 Mo.App. 270.

64. Ill.—Russell v. Chicago & Milwaukee Electric Ry. Co., 98 Ill. App. 347, 351.

65. Mo.—State ex rel. St. Paul & Kansas City Short Line R. Co. v. Public Service Commission, 98 S.W.2d 699, 703, 339 Mo. 641.

66. Escriche Diccionario.

"Instruir un expediente"

To assemble all the documents necessary for the disposition of a case.

Escriche Diccionario.

Historic record of proceedings

Tex.—State v. Sals, 47 Tex. 307, 315.

66.5 Tex.—State v. Balli, Civ.App., 173 S.W.2d 522, 526, 527.

66.10 Cal.—Vanderslice v. Hanks, 3 C. 27, 38.

67. U.S.—Castillero v. U. S., Cal., 2 Black 17, 110, 17 L.Ed. 360.

68. Escriche Diccionario.

69. Black L.D.

70. Black L.D.

71. Okl.—Atchison, T. & S. F. Ry. Co. v. Ridley, 249 P. 289, 290, 119 Okl. 138.

71.50 Ala.—American Mut. Liability Ins. Co. v. Louisville & N. R. Co., 34 So.2d 474, 476, 250 Ala. 354.

EXPEDITION. Primarily, a sending forth or setting forth for the execution of some object of consequence; also progress;⁷² more specifically, an excursion, journey, or voyage made by a company or body of persons for a specific purpose; an important journey or excursion for a specific purpose, as a military or exploring expedition; a journey, march, or voyage, generally of several or many persons, for a definite purpose;⁷³ a march or voyage with martial or hostile intentions.⁷⁴ In this sense it does not mean the body which marches, but rather the march itself;⁷⁵ although the term is sometimes employed to designate the armament itself, as well as the movement of that armament,⁷⁶ and also the body of persons making such an excursion.⁷⁷

It has been said that, while in a wide sense the word may be used to include any journey or voyage, its usually accepted meaning carries a notion of exploratory or warlike enterprise,⁷⁸ that is, of a military exploit or of an exploration into remote regions or over new routes.⁷⁹ It requires more than one person, and hazard or danger is not necessarily involved.^{79.5}

The term has been compared with, and distinguished from, "enterprise" see the C.J.S. definition

of that term, "hazardous event,"⁸⁰ "journey" or "trip,"⁸¹ and "operation."⁸²

EXPEDITIOUS. Possessed of, or characterized by, expedition or efficiency and rapidity in action; performed with, or acting with, expedition; hence, quick, or speedy, as an expeditious march or messenger.⁸³

It has been held to be synonymous with "prompt."^{83.5}

EXPEDITIOUSLY. In an expeditious manner, speedily, with celerity or dispatch.⁸⁴

The term has been distinguished from "with reasonable dispatch."⁸⁵

EXPEDITO. See the C.J.S. definition Ex.

EXPEDIT REIPUBLICÆ NE QUIS RE SUA MALE UTATUR.⁸⁶

EXPEDIT REIPUBLICÆ UT SIT FINIS LITUM.⁸⁷

72. Ark.—Equitable Life Assur. Soc. of U. S. v. Dyess, 109 S.W.2d 1263, 1265, 194 Ark. 1023.

73. U.S.—Day v. Equitable Life Assur. Soc. of U. S., C.C.A.Colo., 83 F.2d 147, 148.

Ark.—Equitable Life Assur. Soc. of United States v. Dyess, 109 S.W.2d 1263, 1265, 194 Ark. 1023.

Iowa.—King v. Equitable Life Assur. Soc. of U. S., 5 N.W.2d 845, 846, 232 Iowa 541, 155 A.L.R. 1022.

Phrases

(1) "Aeronautic expeditions" see the C.J.S. definition Aeronautic.

(2) "Fishing expedition" see the C.J.S. definition Fish.

(3) "Hostile expedition." U.S.—The City of Mexico, D.C.Fla., 28 F. 148, 151—The Mary N. Hogan, D.C.N.Y., 18 F. 529, 534.

(4) "Military expedition" see generally Neutrality Laws § 3 d.

(5) "Military expedition or enterprise" see the C.J.S. definition Enterprise.

74. U.S.—Wiborg v. U. S., Pa., 16 S. Ct. 1127, 1134, 163 U.S. 632, 37 L. Ed. 237.
25 C.J. p 171 note 48.

The term is not to be confined to that movement of the troops which immediately precedes the actual conflict and shock of battle.

Me.—Leathers v. Greenacre, 53 Me. 561, 573.

75. U.S.—U. S. v. Burr, C.C.Va., 25 F.Cas.No.14,694,

76. U.S.—U. S. v. Burr, supra.

77. Ark.—Equitable Life Assur. Soc. of U. S. v. Dyess, 109 S.W.2d 1263, 1265, 194 Ark. 1023.

Iowa.—King v. Equitable Life Assur. Soc. of U. S., 5 N.W.2d 845, 846, 232 Iowa 541, 155 A.L.R. 1022.

78. N.Y.—Gibbs v. Equitable Life Assur. Soc. of U. S., 246 N.Y.S. 560, 561, 231 App.Div. 119.

79. U.S.—Day v. Equitable Life Assur. Soc. of U. S., C.C.A.Colo., 83 F.2d 147, 148.

79.5 The word connotes a journey by several persons or body of persons, and does not ordinarily comprehend an excursion by one person, nor does the fact that a journey may be hazardous or unusual ripen it into an expedition.

Iowa.—King v. Equitable Life Assur. Soc. of U. S., 5 N.W.2d 845, 846, 232 Iowa 541, 155 A.L.R. 1022.

80. Ark.—Equitable Life Assur. Soc. of U. S. v. Dyess, 109 S.W.2d 1263, 1265, 1266, 194 Ark. 1023.

81. Ark.—Equitable Life Assur. Soc. of U. S. v. Dyess, supra.
N.Y.—Gibbs v. Equitable Life Assur. Soc. of U. S., 246 N.Y.S. 560, 561, 231 App.Div. 119.

82. U.S.—Goldsmith v. New York Life Ins. Co., C.C.A.Mo., 69 F.2d 273, 275.

83. Okl.—Atchison, T. & S. F. Ry. Co. v. Ridley, 249 P. 289, 290, 119 Okl. 138.

83.5 D.C.—Pearson v. Washington

Pub. Co., 98 F.2d 245, 248, 68 App. D.C. 373.

84. Century D.

85. Okl.—Atchison, T. & S. F. Ry. Co. v. Ridley, 249 P. 289, 290, 119 Okl. 138.

86. A maxim meaning "It concerns the public good that no one should misuse his own property."
Trayner Leg.Max.

Applied in

Mass.—Belcher v. Farrar, 8 Allen 325, 329.

25 C.J. p 171 note 52 [a].

Similarly rendered

"It is for the interest of the state that a man should not enjoy his own property improperly (to the injury of others)."
Black L.D.

87. A maxim meaning "It is to the advantage of the state that there should be an end of litigation."
Bouvier L.D.

Applied in

N.Y.—French v. Shotwell, 5 Johns. Ch. 555, 568.
25 C.J. p 171 note 53 [a].

Similarly rendered

"It is for the advantage of the state that there be an end of suits; it is for the public good that actions be brought to a close."
Black L.D.

Broad application

This maxim belongs to the law of all countries.
Black L.D.

EXPUL. To drive or force out, to eject.⁸⁸ The term may imply force.⁸⁹

As applied to membership in an association, "expel" means to dismiss or exclude,⁹⁰ or to cut off from membership in or the privileges of.^{90.5}

"Expel" has been held to be synonymous with "exile," "oust," and "dispossess."^{90.10}

"Expel" and "resign" have opposite meanings,^{90.15} and it has been held that "expel" and "retire" are not synonymous terms.^{90.20}

EXPEND. The word is derived from the Latin words "ex," meaning out, and "pendere," to weigh, referring to the ancient custom of payment by weight of cereals and other products.⁹¹

It is defined as meaning to weigh out;⁹² to disburse;⁹³ to dispose of;⁹⁴ to pay out, lay out, or to use up;⁹⁵ to consume by use in any way; to spend, to expend time, labor and thought;⁹⁶ and particular uses of the word may carry the implication of receiving something in return.⁹⁷

"Expend" has been held equivalent to, or synonymous with, "consume" see the C.J.S. definition Consume. It has been compared with "spend."⁹⁸ In a

particular connection, "expended" has been held equivalent to "incurred."⁹⁹

Phrases employing the word are set out in the subjoined note.¹

EXPENDEDOR. In Spanish law, the secret purveyor of the fruits of a crime, as counterfeit money, stolen goods, etc. He is an aider and abettor of the crime when his possession is the result of a conspiracy formed before its commission; if his first connection arises thereafter he is an accessory.²

EXPENDITORS. Paymasters, those who expend or disburse certain taxes. Formerly the sworn officer who supervised the repairs of the banks of the canals in Romney Marsh.³

EXPENDITURE. In its broader sense the word "expenditure" is any laying out or disbursement of money;^{3.50} and the term is defined as meaning the act of expending; disbursement, expense, money expended, a laying out, as of money, or the spending of money;⁴ also, sometimes, payment;⁵ an outlay of money.^{5.5} The term does, however, often connote the using up or consumption of property.^{5.10} The meaning of the word is particularly governed by its context.⁶

88. Del.—Bigger v. Unemployment Compensation Commission, 46 A.2d 137, 143, 4 Terry 274.

N.Y.—Aaron v. Ward, 121 N.Y.S. 673, 676, 136 App.Div. 818.

Smith v. Leo, 36 N.Y.S. 949, 950, 92 Hun 242.

89. N.Y.—Smith v. Leo, supra.

90. R.I.—Macauley v. Tierney, 33 A. 1, 4, 19 R.I. 255, 61 Am.S.R. 770, 37 L.R.A. 455.

See generally Associations § 25.

90.5 Del.—Bigger v. Unemployment Compensation Commission, 46 A.2d 137, 143, 4 Terry 274.

90.10 Del.—Bigger v. Unemployment Compensation Commission, supra.

90.15 Del.—Bigger v. Unemployment Compensation Commission, supra.

90.20 Mass.—Brown v. Little, Brown & Co., 168 N.E. 521, 526, 269 Mass. 102, 66 A.L.R. 1284.

91. N.Y.—In re Hooker's Estate, 18 N.Y.S.2d 107, 112, 193 Misc. 515.

92. Ill.—Mercer County v. New Boston, 13 Ill.App. 274, 278.

93. Cal.—Adams v. Prather, 167 P. 534, 538, 176 C. 33.
25 C.J. p 172 note 57.

94. Ky.—Norman v. Central Kentucky Lunatic Asylum, 17 S.W. 150, 152, 92 Ky. 10, 13 Ky.L. 310.

95. Cal.—Adams v. Prather, 167 P. 534, 538, 176 C. 33.

Wis.—In re Holmes' Estate, 289 N. W. 638, 641, 233 Wis. 274.
25 C.J. p 172 note 59.

96. Fla.—State v. DeWitt C. Jones Co., 147 So. 230, 232, 108 Fla. 613.

Possession essential

"What do you 'expend'? You 'expend' that which you have. A man cannot spend what he has not got—he can mortgage or pledge, but he cannot actually spend."

Eng.—In re Bristol, [1893] 3 Ch. 161, 166.

97. Wis.—In re Holmes' Estate, 289 N.W. 638, 641, 233 Wis. 274.

98. Wis.—In re Holmes' Estate, supra.

99. Cal.—Capuccio v. Caire, 11 P.2d 1097, 1102, 215 C. 518.

1. Phrases construed

(1) "'Amount expended' during the preceding year," as not including interest on amount previously invested.

Or.—Marion County School Dist. No. 24 v. Smith, 161 P. 706, 708, 82 Or. 443.

(2) "Apportionment of costs expended."

Cal.—Capuccio v. Caire, 11 P.2d 1097, 1102, 215 C. 518.

(3) "Expended necessarily," as meaning actually paid.

Eng.—Reg. v. Marsham, [1892] 1 Q.B. 371, 379.

(4) "Expending money."

Tex.—Taxpayers' Ass'n of Harris County v. City of Houston, 105 S. W.2d 655, 659, 129 Tex. 627.

(5) "Moneys expended."

Me.—Littlefield v. Winslow, 19 Me. 394, 397.

2. Escribche Diccionario.

3. Black L.D.

3.50 Cal.—In re Toler's Estate, 319 P.2d 337, 340, 49 C.2d 460.

4. Cal.—Corpus Juris quoted in Crow v. Board of Sup'rs of Stanislaus County, 27 P.2d 655, 659, 135 C.A. 451.

N.H.—Ainsworth v. Dean, 21 N.H. 400, 408.

5. Cal.—Corpus Juris quoted in Crow v. Board of Sup'rs of Stanislaus County, 27 P.2d 655, 135 C.A. 451.

N.Y.—People v. Kane, 61 N.Y.S. 195, 632, 43 App.Div. 472, 482.

5.5 Kan.—Natural Gas Pipe Line Co. of America v. State Commission of Revenue and Taxation, 125 P.2d 397, 399, 155 Kan. 416, 140 A.L.R. 1341.

5.10 Cal.—In re Toler's Estate, 319 P.2d 337, 340, 49 C.A.2d 460.

6. Particular constructions

(1) As used in a statute permitting the state to retake the right and privilege of the corporation in a railroad, paying to the corporation

"Expenditure" has been held synonymous with "disbursement" see the C.J.S. definition of that word, and it has been held that the plural "expenditures" may be synonymous with "expenses."^{6.5}

For references to some specific uses of the term see 25 C.J. p 172 note 64.

Phrases employing the word are collected in the note.⁷

EXPENSÆ LITIS. See the C.J.S. definition *Ex.*

EXPENSAS. In Spanish law, the amount paid

out, as in litigation; the term is broader than "costs."⁸

EXPENSE or EXPENSES. The substantive form of the verb "expend,"⁹ having its origin in the Latin word "expendere," "ex" meaning "out," and "pendere" meaning "to weigh."¹⁰

While the word is one of somewhat varying significance,¹¹ depending on the connection in which it is used,¹² its meanings, in both popular speech and law, are well established,¹³ although the two may differ.¹⁴

all it may not have received of its expenditures, the term does not mean cost of construction, but what had been expended by the stockholders.

N.H.—*State v. Manchester & L. R. Co.*, 48 A. 1103, 1105, 70 N.H. 421.

(2) With reference to the raising of money by a town for the "expenditures" of a given year, the term may be entirely equivocal and, in its natural sense, is not necessarily restricted to purposes authorized by law, but may apply as well to purposes for which the town does not have legal authority.

N.H.—*Ainsworth v. Dean*, 21 N.H. 400, 407, 408—*Adams v. Mack*, 3 N.H. 493, 501.

6.5 Kan.—*Natural Gas Pipe Line Co. of America v. State Commission of Revenue and Taxation*, 125 P.2d 397, 399, 155 Kan. 416, 140 A.L.R. 1341.

7. Phrases

(1) "Advertising expenditure," as distinguished from "capital expenditure" see the C.J.S. definition *Advertise*.

(2) "Annual expenditures" see the C.J.S. definition *Annual*.

(3) "Capital expenditure" see the C.J.S. definition *Capital*.

(4) "Deducting cost of his own living and expenditures."

N.C.—*Purnell v. Rockingham R. Co.*, 130 S.E. 313, 314, 190 N.C. 573.

(5) "Expenditure for municipal purpose," as including the payment of expense of primary election.

Fla.—*State ex rel. Landis v. Dyer*, 148 So. 201, 202, 109 Fla. 33.

(6) "Expenditure of government funds."

U.S.—*In re T. N. Wilson, Inc.*, D.C.N.Y., 24 F.Supp. 651, 652.

(7) "Expenditure of money."

Tex.—*City of Richmond v. Allred*, 71 S.W.2d 233, 234, 123 Tex. 365.

(8) "Expenditure of the income of the school fund."

N.J.—*State v. Borough of Rutherford*, 120 A. 202, 203, 98 N.J.Law 465.

(9) "Expenditures actually made."

Conn.—*Berlin Iron Bridge Co. v. American Bridge Co.*, 55 A. 573, 576, 76 Conn. 1.

(10) "Expenditures contemplated."

Fla.—*Adams v. Lott*, 150 So. 596, 597, 112 Fla. 489.

(11) "Expenditures for compensation."

Cal.—*Jacobsen v. State Industrial Accident Commission*, 299 P. 66, 69, 212 C. 440.

Lidberg v. E. T. Leiter & Son, 2 P.2d 526, 528, 116 C.A. 312.

(12) "Expenditures provided for in this act."

Iowa.—*Jones v. Dunkelberg*, 265 N.W. 157, 159, 221 Iowa 1031.

(13) "Expenditures . . . shall not in any year exceed."

Cal.—*Holmes Inv. Co. v. Board of Sup'rs of City and County of San Francisco*, 35 P.2d 542, 1 C.2d 482.

(14) "Extraordinary expenditure."

N.Y.—*Burns v. City of Watertown*, 213 N.Y.S. 90, 101, 126 Misc. 140.

S.C.—*Robertson v. Tillman*, 17 S.E. 678, 679, 39 S.C. 298.

25 C.J. p 297 note 44.

See also *Municipal Corporations* § 1860 d.

(15) "Involve an expenditure."

U.S.—*Potts v. Village of Haverstraw*, C.C.A.N.Y., 79 F.2d 102, 104.

(16) "Maintenance expenditure," as distinguished from "capital outlay" see the C.J.S. definition *Capital*.

(17) "Making of expenditures," as distinguished from "appropriating public money" see the C.J.S. definition *Appropriate*.

(18) "Ordinary expenditure."

N.Y.—*Arverne-by-the-Sea v. Shepard*, 46 N.Y.S. 653, 655, 20 App.Div. 12.

46 C.J. p 1133 note 80.

(19) "Shall not be required to account for the expenditure."

Mo.—*Boden v. Johnson*, 47 S.W.2d 155, 159, 226 Mo.App. 787.

8. *Escriche Diccionario*.

9. N.Y.—*In re Hooker's Estate*, 18 N.Y.S.2d 107, 112, 173 Misc. 515.

10. Fla.—*State v. DeWitt C. Jones Co.*, 147 So. 230, 232, 108 Fla. 613.

N.Y.—*In re Hooker's Estate*, 18 N.Y.S.2d 107, 112, 173 Misc. 515.

Derivation

"Expense" is derived from perfect passive participle of Latin verb which, in its infinitive form, signifies "to hang out, to put out, to weigh out, to lay out, or to pay out" and, in relation to money, means simply "to pay out."

U.S.—*U. S. v. St. Paul Mercury Indem. Co.*, D.C.Neb., 133 F.Supp. 726, 732.

11. Mass.—*Haczela v. Krupa*, 106 N.E. 1004, 219 Mass. 261.

Mo.—*In re Mason*, App., 203 S.W.2d 750, 756.

12. Del.—*Pike v. Satterthwaite*, 15 A.2d 430, 432, 1 Terry 595.

Mass.—*Wiggin v. National Fire Ins. Co.*, 170 N.E. 795, 796, 271 Mass. 34.

N.Y.—*Triple Cities Const. Corporation v. Byers Machine Co., Inc.*, 15 N.Y.S.2d 89, 91, 172 Misc. 519.

W.Va.—*De Stubner v. United Carbon Co.*, 28 S.E.2d 593, 600, 126 W.Va. 363.

A word of broad import

"It has no fixed definition. It is of varying signification and is dependent for its precise meaning upon its connection and the purpose to be accomplished by its use. It is comprehensive enough to include a wide range of disbursements. Standing alone it is ambiguous."

Mass.—*Pittsfield & N. A. R. Corporation v. Boston & A. R. Co.*, 157 N.E. 611, 614, 260 Mass. 390.

Mo.—*Corpus Juris Secundum* quoted in *In re Mason*, App., 203 S.W.2d 750, 756.

13. N.Y.—*In re Hooker's Estate*, 18 N.Y.S.2d 107, 112, 173 Misc. 515.

14. **Legal and popular senses compared**

It is apparent that the popular significance of "expenses" would far transcend the technical legal connotation of the term.

N.Y.—*In re Bates' Will*, 274 N.Y.S. 93, 96, 152 Misc. 627.

The term is variously defined as the act of expending; disbursement, or expenditure;¹⁵ disbursement of money, or the laying out or expending of money or other resources;¹⁶ outlay of money;^{16.5} expenditure, outlay, or disbursement of money;^{16.10} an actual and honest disbursement;¹⁷ but the term is not limited to expenditure of money, or to pecuniary expense,¹⁸ for it may mean the employment and consumption of time, labor, strength, or thought.¹⁹

The term is further defined as meaning the habit of expending;²⁰ also that which is spent;²¹ that which is expended, laid out, or consumed;^{21.5} charge, as expenses for the journey, or cost;²² money expended or actually paid out;²³ outlay;²⁴ the payment of a price.²⁵ Also burden of expenditure,

consumption, or a using-up;²⁶ drain on resources; detriment, or loss, as at the expense of health or time.²⁷

It has been said that the expenditure necessary to maintain property and protect it from attack or loss is expense,^{27.5} and it further has been said that the word "expense," as used in a legal sense, is the expense of the suit; the costs which are generally allowed to the successful party; all the expenses which the property owner is put to by the litigation.^{27.10}

In particular connections, the term may be interchangeable or synonymous with "costs,"²⁸ and "disbursement," see the C.J.S. definition Disbursement.

15. Fla.—State v. DeWitt C. Jones Co., 147 So. 230, 232, 108 Fla. 613.
N.Y.—In re McMurray, 227 N.Y.S. 115, 117, 131 Misc. 182.

25 C.J. p 172 note 75.

16. N.Y.—In re Hooker's Estate, 18 N.Y.S.2d 107, 112, 173 Misc. 515—In re Bates' Will, 274 N.Y.S. 93, 96, 152 Misc. 627—In re McMurray, 227 N.Y.S. 115, 117, 131 Misc. 182.
25 C.J. p 172 notes 76, 77.

16.5 Kan.—Natural Gas Pipe Line Co. of America v. State Commission of Revenue and Taxation, 125 P.2d 397, 399, 155 Kan. 416, 140 A.L.R. 1341.

16.10 Mo.—In re Mason, App., 203 S. W.2d 750, 756.

N.J.—Guaranty Trust Co. v. Blume, 114 A. 423, 424, 92 N.J.Eq. 538.

17. Mass.—H. B. Humphrey Co. v. Pollack Roller Runner Sled Co., 180 N.E. 164, 166, 278 Mass. 350.

18. U.S.—Matthews & Willard Mfg. Co. v. Trenton Lamp Co., C.C.N.J., 73 F. 212, 215.

19. U.S.—Matthews & Willard Mfg. Co. v. Trenton Lamp Co., supra.
Fla.—State v. DeWitt C. Jones Co., 147 So. 230, 232, 108 Fla. 613.

N.Y.—In re Hooker's Estate, 18 N.Y.S.2d 107, 112, 113, 173 Misc. 515.

20. N.Y.—In re Hooker's Estate, supra—In re Bates' Will, 274 N.Y.S. 93, 96, 152 Misc. 627.

21. N.Y.—People v. Saratoga County, 60 N.Y.S. 1122, 1127, 45 App.Div. 42.

In re Hooker's Estate, 18 N.Y.S.2d 107, 112, 173 Misc. 515—In re Bates' Will, 274 N.Y.S. 93, 96, 152 Misc. 627.

Similarly expressed

"That which is expended, laid out, or consumed."

Colo.—Mooney v. Van Kleeck Mortgage Co., 245 P. 348, 349, 79 Colo. 252.

21.5 N.Y.—Municipal Housing Authority of City of Schenectady v. Levine, 136 N.Y.S.2d 197, 198.

Ohio.—State ex rel. Leis v. Ferguson, 80 N.E.2d 118, 120, 149 Ohio St. 555.

22. Colo.—Mooney v. Van Kleeck Mortgage Co., 245 P. 348, 349, 79 Colo. 252.

N.Y.—People v. Saratoga County, 60 N.Y.S. 1122, 45 App.Div. 42, 50.

Charge; cost; price

Ohio.—State ex rel. Leis v. Ferguson, 80 N.E.2d 118, 120, 149 Ohio St. 555.

Costs; charge

N.Y.—Municipal Housing Authority of City of Schenectady v. Levine, 136 N.Y.S.2d 197, 198.

What term includes

(1) "Expenses" may be broad enough to include costs involved in a chancery case.

Ill.—People's Gaslight & Coke Co. v. Gibbons, 219 Ill.App. 383, 398.

(2) In common speech and in contracts, the term signifies not only the cost of contemplated services, materials, etc., but also the charges for such as have been performed or furnished.

Cal.—Sullivan v. The Triunfo Gold & Silver Mining Co., 39 C. 459, 466.

Mo.—Booker v. Southwest Missouri R. Co., 128 S.W. 1012, 1018, 144 Mo.App. 273.

(3) In a provision in a contract between a building contractor and a subcontractor, the "expenses" included a commission allowed the contractor for his services in making the arrangements and supervising the carrying on of the work after default of the subcontractor.

Mass.—White v. Abbott, 74 N.E. 305, 188 Mass. 99.

(4) A reasonable attorney's fee, if incurred in collecting the amount due.

Ga.—Rattray v. Banks, 121 S.E. 516, 517, 31 Ga.App. 589.

(5) Interest.

U.S.—Alabama Power Co. v. Federal Power Commission, C.C.A., 134 F.2d 602, 608, 609.

(6) Taxes.

U.S.—Alabama Power Co. v. Federal Power Commission, supra.

Not included

When employed in a statute the term ordinarily does not include attorneys' fees.

Mont.—Hardware Mut. Casualty Co. v. Butler, 148 P.2d 563, 568, 116 Mont. 73.

23. Idaho.—Mombert v. Bannock County, 75 P. 239, 243, 9 Idaho 470.
N.Y.—People v. Saratoga County, 60 N.Y.S. 1122, 1127, 45 App.Div. 42.

24. Colo.—Mooney v. Van Kleeck Mortgage Co., 245 P. 348, 349, 79 Colo. 252.

N.Y.—In re Hooker's Estate, 18 N.Y.S.2d 107, 112, 173 Misc. 515—In re Bates' Will, 274 N.Y.S. 93, 96, 152 Misc. 627—In re McMurray, 227 N.Y.S. 115, 117, 131 Misc. 182.

Municipal Housing Authority of City of Schenectady v. Levine, 136 N.Y.S.2d 197, 198.

Ohio.—State ex rel. Leis v. Ferguson, 80 N.E.2d 118, 120, 149 Ohio St. 555.

25 C.J. p 173 note 80.

25. U.S.—Williams v. U. S., 12 Ct. Cl. 192, 199.

26. Colo.—Mooney v. Van Kleeck Mortgage Co., 245 P. 348, 349, 79 Colo. 252.

27. Colo.—Mooney v. Van Kleeck Mortgage Co., supra.

N.Y.—In re Hooker's Estate, 18 N.Y.S.2d 107, 112, 173 Misc. 515—In re Bates' Will, 274 N.Y.S. 93, 96, 152 Misc. 627.

27.5 U.S.—All States Freight v. U. S., D.C. Ohio, 72 F.Supp. 673, 674.

27.10 N.Y.—Municipal Housing Authority of City of Schenectady v. Levine, 136 N.Y.S.2d 197, 198.

28. In Scotch practice

"Expenses" . . . is a word frequently used in the Scotch Courts where the English Courts would use the word "costs."

Can.—Regina v. Vantassel, 5 Can.Cr. Cas. 128, 132.

It has been compared with, or distinguished from, "costs" see Costs § 1 note 27, "debts" see the C.J.S. definition Debts, "fees,"²⁹ "liability,"³⁰ and "value."³¹

It has been contrasted with "investment."^{31.5}

Expenses are treated in various connections throughout this work, and particularly in connection with the levy and collection of taxes, and for specific references in these connections see the indexes to the titles Internal Revenue and Taxation.

Extraordinary expense. The term, applied to government expenses, has been defined as such as must be incurred by the state for the promotion of the general welfare, compelled by some unforeseen condition which is not regularly provided for by law,

such as flood, famine, fire, earthquake, pestilence, war, or any other condition that will compel the state to put forward its highest endeavors to protect the people, their property, liberty, or lives.³² Under particular circumstances, such expenses may be "necessary expenses."³³

The term has been contrasted with "current and legislative expenses,"³⁴ "ordinary expenses,"³⁵ and "ordinary current expenses."³⁶

Necessary expense. An expense necessarily incurred in discharging a duty imposed by law;³⁷ an expense required to effect a particular purpose.³⁸ In the subjoined note some examples are given of various items which, under particular circumstances, have been held to be, or not to be, "necessary expenses."³⁹ The phrase is sometimes used with other

29. Ky.—Harlan County v. Blair, 49 S.W.2d 1028, 1029, 243 Ky. 777.

N.Y.—People v. Brooklyn Garden Apartments, 15 N.Y.S.2d 890, 893, 258 App.Div. 151.

People v. Brooklyn Garden Apartments, 10 N.Y.S.2d 63, 66, 169 Misc. 610.

Or.—Burrows v. Balfour, 65 P. 1062, 1063, 39 Or. 488.

25 C.J. p 1009 note 23 [a].

30. "Liability" broader term

Tex.—International-Great Northern R. Co. v. Texas Co., Civ.App., 280 S.W. 282, 285.

31. Wis.—Voelz v. Breitenfeld, 32 N.W. 757, 759, 68 Wis. 491.

31.5 U.S.—Alabama Power Co. v. Federal Power Commission, C.C.A., 134 F.2d 602, 609.

32. Kan.—State v. Davis, 213 P. 171, 172, 113 Kan. 4.

33. Ark.—State v. Moore, 88 S.W. 881, 883, 76 Ark. 197, 70 L.R.A. 671.

34. Kan.—State ex rel. Boynton v. Atherton, 30 P.2d 291, 296, 139 Kan. 197.

35. Kan.—State v. Davis, 213 P. 171, 172, 113 Kan. 4.

36. Ga.—Rome v. McWilliams, 67 Ga. 106, 112.

37. U.S.—Dexter Horton Trust & Savings Bank v. Clearwater County, D.C.Idaho, 235 F. 743, 752.

When referring to government expenses, the term is not given a fixed or arbitrary meaning, but more especially refers to the ordinary and usual expenditures reasonably required for the performance of governmental duties.

N.C.—Keith v. Lockhart, 88 S.E. 640, 642, 171 N.C. 451.

38. N.C.—Henderson v. City of Wilmington, 132 S.E. 25, 30, 191 N.C. 269.

Test of a necessary expense

"The decisions . . . make the test of a 'necessary expense' the pur-

pose for which the expense is to be incurred. If the purpose is the maintenance of the public peace or the administration of justice, if it partakes of a governmental nature or purports to be an exercise . . . of a portion of the state's delegated sovereignty, if, in brief, it involves a necessary governmental expense—in these cases the expense required to effect the purpose is necessary." N.C.—Henderson v. City of Wilmington, supra. See generally Municipal Corporations §§ 1027-1034.

39. Held to constitute "necessary expenses"

(1) Acquisition of a place or home by a building and loan association for the conduct of its business.

Ky.—Home Savings Funds Co. Bldg. Ass'n v. Driver, 112 S.W. 864, 866, 129 Ky. 754.

(2) Amounts paid in settlement of employees' claims for injuries.

U.S.—Chase Nat. Bank of City of New York v. Mobile & O. R. Co., D.C.Ala., 30 F.Supp. 565, 570.

(3) Construction and maintenance of various facilities or utilities for use of the public, such as abattoirs, market houses, streets or boardwalks, electric lights, sewers, and waterworks.

U.S.—Hill v. Elizabeth City, C.C.A.N.C., 298 F. 67, 70—Merchants' Nat. Bank of Dayton, Ohio, v. Yancey County, D.C.N.C., 270 F. 834, 839.

N.C.—Angelo v. City of Winston-Salem, 136 S.E. 489, 492, 193 N.C. 207, 52 A.L.R. 663—Moore v. City of Greensboro, 132 S.E. 565, 191 N.C. 592—Storm v. Town of Wrightsville Beach, 128 S.E. 17, 19, 189 N.C. 679—Reed v. Howerton Engineering Co., 123 S.E. 479, 480, 188 N.C. 39—Davis v. Lenoir County, 101 S.E. 260, 178 N.C. 668—Parvin v. Board of Com'rs of Beaufort County, 99 S.E. 432, 433, 177 N.C. 508—Guire v. Board of Commis-

sioners of Caldwell County, 99 S. E. 430, 431, 177 N.C. 516—Woodall v. Western Wake Highway Commission, 97 S.E. 226, 228, 176 N.C. 377—Swindell v. Town of Belhaven, 91 S.E. 369, 370, 173 N.C. 1—Moose v. Board of Com'rs of Alexander County, 90 S.E. 441, 443, 172 N.C. 419—Commissioners of Yancey County v. Road Com'rs of Yancey County, 81 S.E. 1001, 1002, 165 N. C. 632—Asbury v. Town of Albemarle, 78 S.E. 146, 149, 162 N. C. 247, 44 L.R.A., N.S., 773—Town of Murphy v. C. A. Webb & Co., 72 S.E. 460, 461, 156 N.C. 402—Underwood v. Town of Asheboro, 68 S.E. 147, 152 N.C. 641—Town of Hendersonville v. Jordan, 63 S.E. 167, 168, 150 N.C. 35—Crocker v. Moore, 53 S.E. 229, 230, 140 N.C. 429—Fawcett v. Town of Mt. Airy, 45 S.E. 1029, 1030, 134 N.C. 125, 63 L.R.A. 870, 101 Am.S.R. 825—Wadsworth v. City of Concord, 45 S.E. 948, 950, 133 N.C. 587—Herring v. Dixon, 29 S.E. 368, 369, 122 N.C. 420.

(4) Establishment and maintenance of schools under a special authorizing act.

N.C.—Owens v. Wake County, 141 S.E. 546, 548, 195 N.C. 132.

(5) Expense of a suit against the agents or servants of a town, in which its interests are directly involved.

Mass.—Babbitt v. Selectmen of Savoy, 3 Cush. 530, 533.

(6) Expenses necessarily incurred by the district attorney in criminal actions or proceedings arising in his own county.

N.Y.—People ex rel. Koetteritz v. Board of Sup'rs of Herkimer County, 132 N.Y.S. 808, 810, 148 App. Div. 392.

(7) Office expenses in conducting a business.

U.S.—O'Neal v. U. S., D.C.Ga., 32 F. Supp. 799, 801.

words to form additional phrases, as indicated in the subjoined note.⁴⁰

Under particular circumstances, the term may be equivalent to "extraordinary expenses" see *supra* note 33.

For references to specific applications within the purview of particular charter, constitutional, or statutory provisions, see such C.J.S. titles as Bank-

ruptcy § 327; Corporations §§ 1583, 1589, on reorganization; Counties § 226 a note 68; Executors and Administrators §§ 217, 223-238; Municipal Corporations §§ 1835-1845, 1860; Officers § 91; Schools and School Districts § 324; States §§ 141-153; Taxation § 1099e; and Towns §§ 113, 114.

Other phrases are listed in the subjoined note.⁴¹ Still other phrases as to which more recent adju-

(8) Procuring a site for building a new county home.

N.C.—Board of Commissioners for Caldwell County v. Sidney Spitzer & Co., 91 S.E. 707, 708, 173 N.C. 147.

(9) Rental of road building equipment by contractors in their business.

Wash.—Coluccio v. Hansen & Rowland, 85 P.2d 1078, 1082, 197 Wash. 417.

(10) Salaries and wages of officers and employees.

La.—State ex rel. Parish Board of Health of Calcasieu Parish v. Police Jury of Calcasieu Parish, 108 So. 104, 105, 161 La. 1.

Mont.—Gallatin Farmers Co. v. Shannon, 93 P.2d 953, 955, 109 Mont. 155.

Held not to constitute "necessary expenses"

(1) Appropriation to be disbursed under the direction of a chamber of commerce.

N.C.—Ketchie v. Hedrick, 119 S.E. 767, 768, 186 N.C. 392.

(2) Assessment under the stock law for fences between township lines.

N.C.—Archer v. Joyner, 91 S.E. 699, 700, 173 N.C. 75.

(3) Construction or maintenance of such facilities as public hospitals or schools, electric light plants or waterworks, in construing limitations or restrictions upon the contracting of debts or levying of taxes for a purpose other than the payment of "necessary expenses."

N.C.—Sessions v. Columbus County, 200 S.E. 418, 420, 214 N.C. 634—Burleson v. Board of Aldermen of Town of Spruce Pines, 156 S.E. 241, 242, 200 N.C. 30—Frazier v. Board of Com'rs of Guilford County, 138 S.E. 433, 439, 194 N.C. 49—Williams v. Polk County Com'rs and Board of Education, 97 S.E. 478, 479, 176 N.C. 554—Stephens Company v. City of Charlotte, 90 S.E. 588, 172 N.C. 564—Sprague v. Board of Com'rs of Wake County, 81 S.E. 915, 165 N.C. 603—Mayo v. Town of Washington Com'rs, 29 S.E. 343, 346, 122 N.C. 5, 40 L.R.A. 163—City of Charlotte v. Shepard, 27 S.E. 109, 111, 120 N.C. 411.

(4) Daily mileage for travel between home and work, under statute allowing actual and necessary expenses while traveling in interest of commission.

Ariz.—Thompson v. Frohmler, 107 P.2d 375, 377, 56 Ariz. 313.

(5) Employment of counsel by a recording officer, whenever in his fancy he might deem it desirable to consult counsel.

N.Y.—People ex rel. Frost v. Woodbury, 106 N.E. 932, 935, 213 N.Y. 51.

(6) Operation of a ferry during a strike.

Wash.—Raynor v. King County, 97 P.2d 696, 712, 2 Wash.2d 199.

40. Used with other words

(1) "Necessary current expenses of a city," as including only the reasonable salary allowed by law to the mayor, council, assessor, marshal, constable, attorney, and a reasonable police force of the city, and not expenses for keeping streets in repair, publishing city ordinances, expenses of city elections, removing nuisance, etc.

Mo.—Webb City & C. Waterworks Co. v. City of Cartersville, 43 S.W. 625, 629, 142 Mo. 101.

(2) "Necessary expenses for the purposes of this article."

N.Y.—People v. Woodbury, 106 N.E. 932, 934, 213 N.Y. 51.

(3) "Necessary expenses incurred by him in his office," as not including expenses incurred by a sheriff for gasoline and lubricating oil and in making repairs upon his automobile, although the automobile was used by him exclusively in the discharge of his duties as sheriff.

Tex.—Hammond v. Harris County, Civ.App., 243 S.W. 1002, 1004.

(4) "Necessary expenses of the company," as meaning the expenses incurred by the directors in the exercise of the powers specifically conferred on them.

U.S.—Knowles v. Beaty, C.C.Ohio, 14 F.Cas.No.7,896, 1 McLean 41.

(5) "Necessary expenses of the family."

Iowa.—Capitol Hill Monument Co. v. Welch, 185 N.W. 20, 21, 192 Iowa 418.

(6) "Necessary expenses of the town health officer."

Conn.—Keefe v. Town of Union, 56 A. 571, 574, 76 Conn. 160.

(7) "Necessary traveling expense," as contemplating the ordinary method of travel.

N.Y.—In re Benschel, 124 N.Y.S. 716, 723.

(8) "Ten dollars a day . . . and necessary expenses."

S.C.—Banks v. Columbia Ry. Gas & Electric Co., 101 S.E. 285, 113 S.C. 99.

41. Operating expenses

(1) The phrase "operating expenses" usually covers physical maintenance and may include administration, labor, interest, taxes, rent, insurance, claims, litigation expenses, etc., depending upon how the phrase is used in a particular case.

Cal.—Powell v. City and County of San Francisco, 144 P.2d 617, 621, 62 C.A.2d 291.

(2) The cost of producing service.

U.S.—Lindheimer v. Illinois Bell Telephone Co., Ill., 54 S.Ct. 658, 665, 292 U.S. 151, 78 L.Ed. 1182.

(3) "Operating expense" would include clerical salaries, travel, and purchase of supplies and printing, but not the purchase of typewriters, desks, chairs, or other equipment.

Ill.—People ex rel. Schlaeger v. Reilly Tar & Chemical Corp., 59 N.E.2d 843, 846, 389 Ill. 434.

(4) Bad debts are ordinarily treated as "operating expense" of business in arriving at net operating gain or loss.

U.S.—Helvering v. State-Planters Bank & Trust Co., C.C.A.4, 130 F. 2d 44, 46, 143 A.L.R. 333.

(5) Other particular items which have been held to be included or not included within the meaning of the term see 46 C.J. p 1113 note 54.

(6) "Cost of operation" held interchangeable see the C.J.S. definition Cost.

Traveling expenses

(1) Strictly speaking, traveling expenses are expenditures made in going from one place to another at a distance. However, as commonly understood and accepted, the expression "traveling expenses," has a broader meaning and generally comprehends transportation costs and other charges reasonably incident thereto while on a journey, including lodging,

cations have not been found see 25 C.J. p 173 note | 86-p 175 note 72.

meals, and kindred expenses incurred during the trip.

Ohio.—State ex rel. Leis v. Ferguson, 80 N.E.2d 118, 120, 149 Ohio St. 555.

(2) "It can hardly be said with confidence that the phrase 'traveling expenses,' standing alone and unexplained, includes expenditures and subsistence, lodging, telephone calls, local transportation, etc., made by one, after arriving at his destination for the transaction of the business in which he is regularly engaged on a full-time basis at the principal establishment maintained for such purpose."

Ohio.—State ex rel. Leis v. Ferguson, supra.

Additional phrases using "expense" as a noun

(1) "All expenses" and similar phrases see the C.J.S. definition All.

(2) "Annual expenses" see the C. J.S. definition Annual.

(3) "Any and all other expenses." N.Y.—In re Bates' Will, 274 N.Y.S. 93, 96, 152 Misc. 627.

(4) "Any expenses which they might properly incur."

Ark.—McNeill v. Percy, 145 S.W.2d 32, 33, 201 Ark. 454.

(5) "Borrow money to meet . . . expenses."

Pa.—Commonwealth v. Spring Garden Mut. Fire Ins. Co. of York, 156 A. 342, 343, 305 Pa. 27.

(6) "Costs and expenses" see Costs § 1 b note 27.

(7) "Current and legislative expenses," as contrasted with "extraordinary expenses" see supra note 34.

(8) "Current expenses" and similar phrases employing these words see the C.J.S. definition Current.

(9) "Customary and usual operating expenses of the theatre."

N.Y.—O'Connor v. La Hay Theatre Corporation, 11 N.Y.S.2d 8, 9, 256 App.Div. 1037.

(10) "Damage or expense."

Tex.—Employers' Indemnity Corporation v. Southwest Nat. Bank, Civ. App., 299 S.W. 676, 678.

(11) "Expense connected therewith."

Pa.—Strassburger v. Joseph S. Finch & Co., 22 A.2d 641, 643, 343 Pa. 259.

(12) "Expense incurred."

Ga.—Murphey v. Northeastern Const. Co., 121 S.E. 848, 31 Ga.App. 715. 25 C.J. p 174 note 14.

(13) "Expense of administration" or "expenses of administration."

U.S.—In re Michel, Maksik & Feldman, D.C.N.Y., 48 F.Supp. 23, 24—In re Gelardin, Inc., D.C.N.Y., 41

F.Supp. 17, 18—In re Irving Electrical Supply Co., D.C.N.Y., 41 F. Supp. 16.

Ill.—In re Berry's Estate, 53 N.E.2d 149, 321 Ill.App. 365.

Kan.—Schul v. Clapp, 118 P.2d 570, 574, 154 Kan. 372.

Minn.—Butler v. Builders Trust Co., 282 N.W. 462, 466, 203 Minn. 555. 25 C.J. p 174 note 22.

See also Bankruptcy §§ 278, 455, 872, 947, 956, and Executors and Administrators §§ 217–238, 388.

(14) "Expense of business" and similar phrases see the C.J.S. definition Business.

(15) "Expense of collection."

Ark.—State v. Desha County, 99 S.W. 1108, 1109, 82 Ark. 360.

Wyo.—Conway v. Skidmore, 41 P.2d 1049, 1053, 48 Wyo. 73.

(16) "Expense of family" or "family expenses."

U.S.—Channing v. U. S., D.C.Mass., 4 F.Supp. 33, 34.

Colo.—Wall v. Crawford, 82 P.2d 749, 750, 103 Colo. 66.

Ill.—Kellman v. Tilton, 29 N.E.2d 32, 306 Ill.App. 504—Northwestern Military & Naval Academy v. Wadleigh, 267 Ill.App. 1, 9—Whitney, Inc. v. Mandel, 218 Ill.App. 316, 318

—Lederer v. Blair, 212 Ill.App. 141, 143—Mandel v. Ringstrom, 189 Ill. App. 564, 565.

Or.—Chamberlain v. Townsend, 142 P. 782, 784, 143 P. 924, 72 Or. 207, 211.

Wash.—In re De Nilsson's Guardianship, 84 P.2d 1024, 1027, 197 Wash. 265—Bush & Lane Piano Co. v. Woodard, 175 P. 329, 330, 103 Wash. 612.

25 C.J. p 669 note 20.

(17) "Expense of litigation."

Miss.—National Box Co. v. New Amsterdam Casualty Co., 105 So. 539, 540, 140 Miss. 257.

25 C.J. p 174 note 32.

(18) "Expense of lying-in."

Ga.—Cawthorn v. State, 185 S.E. 838, 53 Ga.App. 357.

(19) "Expense of operation."

U.S.—Dulberg v. Zankel, C.C.A.N.Y., 67 F.2d 534, 537.

(20) "Expense of winding up unfinished business."

N.Y.—Mooney v. Shaw, 4 N.Y.S.2d 563, 570.

(21) "Expense or cost of defense" see the C.J.S. definition Cost.

(22) "Expenses . . . attending management of my estate."

Wash.—Samuel and Jessie Kenney Presbyterian Home v. State, 24 P. 2d 403, 416, 174 Wash. 19.

(23) "Expenses incident to the issuance of bonds."

Tex.—Stokes v. Paschall, Civ.App., 243 S.W. 611, 614.

(24) "Expenses incurred in execution of his trust."

Mass.—Mealey v. Fegan, 175 N.E. 43, 274 Mass. 599.

(25) "Expenses incurred . . . in the liquidation."

Ohio.—Farkas v. Fulton, 199 N.E. 850, 852, 130 Ohio St. 390.

(26) "Expenses incurred or sustained by reason of default of condition of mortgage."

Mass.—Wiggin v. Lowell Five Cent Sav. Bank, 13 N.E.2d 433, 436, 299 Mass. 518.

(27) "Expenses in the care . . . of the estate."

Cal.—Eastwood v. Stewart, 222 P. 369, 370, 64 C.A. 614.

Wash.—Hansen v. Stanton, 31 P.2d 903, 905, 177 Wash. 257, 92 A.L.R. 1037.

(28) "Expenses necessarily incidental to such services."

Mass.—In re Haggerty's Case, 11 N. E.2d 583, 584, 298 Mass. 466.

(29) "Expenses necessarily incurred in discharge of official duties."

Pa.—In re Annual Statement of Receipts and Disbursements and Report of County Audit of Susquehanna County for 1931, 180 A. 148, 150, 118 Pa.Super. 47.

(30) "Expenses of both sides."

N.J.—Guaranty Trust Co. v. Blume, 114 A. 423, 92 N.J.Eq. 538.

(31) "Expenses of contest."

N.Y.—In re Staiger's Will, 164 N.E. 33, 34, 249 N.Y. 229.

(32) "Expenses of extraordinary session."

Ohio.—State ex rel. Boyd v. Tracy, 190 N.E. 463, 466, 128 Ohio St. 242.

(33) "Expenses of liquidation."

Ga.—Tharpe v. Gormley, 192 S.E. 211, 214, 215, 184 Ga. 605.

Ohio.—Farkas v. Fulton, 199 N.E. 850, 852, 130 Ohio St. 390.

(34) "Expenses of operating lease."

Tex.—Leonard v. Prater, Com.App., 36 S.W.2d 216, 219, 86 A.L.R. 499.

Leonard v. Prater, Civ.App., 18 S.W.2d 681, 683.

(35) "Expenses of production."

U.S.—Standard Oil Co. of California v. U. S., C.C.A.Cal., 107 F.2d 402, 416.

(36) "Expenses of public officers" as distinguished from "compensation" see the C.J.S. definition Compensation.

(37) "Expenses of receivership."

D.C.—Hardee v. American Security & Trust Co., 77 F.2d 382, 384, 64 App. D.C. 259.

Ill.—Sneeden v. Industrial Commission, 10 N.E.2d 327, 331, 366 Ill. 552, 113 A.L.R. 1447.

EXPENSIS MILITUM NON LEVANDIS. An ancient writ to prohibit the sheriff from levying any allowance for knights of the shire upon those who held lands in ancient demesne.⁴²

EXPENSIVE. In its popular sense, that which would involve or require expense.⁴³ In a particular connection involving custody of live stock belonging to another, the term has reference to required outlays by the custodian in keeping the animals.⁴⁴

EXPERIENCE. Primarily, the noun, as commonly understood, means knowledge gained by observation

or trial;⁴⁵ knowledge derived from proof furnished by one's own faculties instead of by reason;⁴⁶ hence, derivatively, the state, extent, or duration of being engaged in a particular study or work; the real life as contrasted with the ideal or imaginary, as in the expression "There is no school like experience."⁴⁷

The term generally implies skill, facility, or practical wisdom, gained by personal knowledge, feeling, or action,⁴⁸ but in a particular connection may refer to experience derived from a knowledge of the financial responsibility of customers proved by the

N.J.—Philadelphia Dairy Products Co. v. Summit Sweets Shoppe, 167 A. 667, 113 N.J.Eq. 458.
See also Receivers § 379.

(38) "Expenses of the estate."

U.S.—U. S. v. Security-First Nat. Bank of Los Angeles, D.C.Cal., 30 F.Supp. 113, 119.

(39) "Expenses of the last sickness" see Executors and Administrators § 229.

(40) "Expenses of the state," as having reference to the general operating expenses of the state government for fiscal year.

N.D.—State ex rel. Conrad v. Langer, 277 N.W. 504, 509, 68 N.D. 167.

(41) "Expenses or costs of improvements" see the C.J.S. definition Cost.

(42) "Expenses paid or incurred during taxable years."

U.S.—Air-Way Electric Appliance Corporation v. Guitteau, D.C.Ohio, 29 F.Supp. 379, 381.

(43) "Expenses required for carrying . . . real property."
N.J.—Hudson County Nat. Bank v. Flora, 168 A. 241, 242, 114 N.J.Eq. 135.

(44) "Extraordinary and personal expense," as contrasted with "ordinary and necessary expense."
U.S.—Tinkoff v. Commissioner of Internal Revenue, C.C.A., 120 F.2d 564, 566.

(45) "Extraordinary necessary expense."
Iowa.—Dunham v. Dunham, 178 N. W. 551, 561, 189 Iowa 802.

(46) "Fees and expenses."
Ariz.—In re Nolan's Estate, 108 P.2d 385, 388, 56 Ariz. 353.

(47) "For services or expenses."
Mass.—H. B. Humphrey Co. v. Pollock Roller Runner Sled Co., 180 N.E. 164, 166, 278 Mass. 350.

(48) "General county expense."
N.C.—Southern Ry. Co. v. Cherokee County, 10 S.E.2d 607, 218 N.C. 169.

(49) "General expense."
U.S.—Commissioner of Internal Rev-

enue v. Volunteer State Life Ins. Co., C.C.A.6, 110 F.2d 879, 882.

New World Life Ins. Co. v. U. S., Ct.Cl., 26 F.Supp. 444, 458.

N.C.—Nantahala Power & Light Co. v. Clay County, 197 S.E. 603, 608, 213 N.C. 698.

(50) "Individual expenses."

U.S.—Withers v. Withers, D.C., 8 Pet. 355, 357, 8 L.Ed. 972.

Pa.—Mansel v. Nicely, 34 A. 793, 794, 175 Pa. 367.

Appeal of Devlin, 38 Pa.Co. 73, 75.

(51) "Joint expense."

Ga.—Rome v. McWilliams, 67 Ga. 106, 111.

N.Y.—Lapham v. Rice, 55 N.Y. 472, 479.

(52) "Miscellaneous expenses."

U.S.—Dunwoody v. U. S., 22 Ct.Cl. 269, 280.

(53) "Mortgages and expenses."

Conn.—Simmons v. Simmons, 121 A. 819, 822, 99 Conn. 562.

(54) "My debts and expenses," construed as meaning all debts and expenses, and not merely a part thereof.

Ariz.—Hill v. Hill, 294 P. 831, 833, 37 Ariz. 406.

(55) "No expense or obligation."

Kan.—State v. School Board of Tecumseh Rural High School Dist. No. 4, 204 P. 742, 744, 110 Kan. 779.

(56) "Ordinary expenses" and "ordinary current expenses," as contrasted with "extraordinary expenses" see supra notes 35, 36.

(57) "Private expenses."

N.Y.—Stoughton v. Lynch, 1 Johns. Ch. 467, 469.

(58) "Put to expense."

Mo.—Booker v. Southwest Missouri R. Co., 128 S.W. 1012, 1018, 144 Mo. App. 273.

(59) "Railroad fare, time, and expenses."

Mo.—Stoedter v. Turner, App., 237 S.W. 141, 143.

(60) "Reasonable expense" or "reasonable expenses."

Mo.—Ross v. St. Louis, I. M. & S. Ry. Co., 170 S.W. 920, 922, 185 Mo.App. 154.

52 C.J. p 1186 note 94.

(61) "Reasonable expenses of the action."

N.Y.—In re Ehret's Estate, 285 N.Y. S. 570, 573, 158 Misc. 308.

(62) "Support and expenses at such asylum."

Wyo.—State v. Thompson, 18 P.2d 619, 622, 45 Wyo. 350.

(63) "Traveling expenses or mileage."

Pa.—Lenhart v. Cambria County, 64 A. 876, 877, 216 Pa. 25.

Phrases using "expense" as adjective

(1) "Expense allowance."

S.C.—Godfrey v. Hunter, 180 S.E. 468, 176 S.C. 442.

(2) "Expense bill," described as a form of a receipt given by a railroad station agent for all freight charges collected by him.

Ala.—Willis v. State, 33 So. 226, 228, 134 Ala. 429.

See also Carriers § 121.

(3) "Expense fund," as meaning a fund set apart and dedicated to expense purposes.

Iowa.—Wood v. Iowa Bldg. & Loan Assoc., 102 N.W. 410, 412, 126 Iowa 464.

42. Black L.D.

43. Conn.—Webster v. Peck, 31 Conn. 495, 499.

44. Conn.—Webster v. Peck, supra.

45. N.Y.—Pringle v. Philadelphia Casualty Co., 112 N.E. 465, 467, 218 N.Y. 1.

Steinwender v. Philadelphia Casualty Co., 126 N.Y.S. 271, 274, 141 App.Div. 432.

46. Ill.—Lake Erie & W. R. Co. v. Klinkrath, 81 N.E. 377, 378, 227 Ill. 439.

47. Pa.—Arthur v. City of Pittsburgh, 198 A. 637, 638, 330 Pa. 202.

48. Ind.—Chicago, I. & L. Ry. Co. v. Gorman, 106 N.E. 897, 899, 58 Ind.App. 381.

amount of indebtedness that they have shown themselves able to meet and pay,⁴⁹ and, so specifically applied, has been defined as a business transaction which is closed.⁵⁰

"Experience" may affect, or be related to, "capacity" see the C.J.S. definition of that term; has been compared with, and, in a particular connection, held substantially equivalent to, "knowledge" and "wisdom,"⁵¹ and has been distinguished from "art" see the C.J.S. definition Art.

As a verb, it has been defined as meaning to have practical acquaintance with.⁵²

Phrases employing the word are set out in the subjoined note.⁵³

EXPERIENTIA PER VARIOS ACTUS LEGEM FACIT.⁵⁴

EXPERIMENT. In general, a trial, a test;⁵⁵ a trial or special test made to confirm or disprove something doubtful;^{55.5} a trial or special observation, made to confirm or disprove something doubtful, especially one made under conditions determined

by the experimenter.^{55.10} It is the action of trying or testing.^{55.15}

In chemistry, the bringing together of two organic substances and the noting of the result.⁵⁶

The term has been compared with, and distinguished from, "invention" see Patents §§ 30, 70.

For references to some specific uses of the term see 25 C.J. p 176 note 82.

EXPERIMENTAL. Pertaining to, derived from, founded on, or known by, experiment.⁵⁷

EXPERT. In a general sense, a person of peculiar knowledge or skill, a man of science, or a person conversant with the subject matter;⁵⁸ one who can see all sides of a subject and whose knowledge may be derived from experience or from study and direct mental application;⁵⁹ one who by his habits of life and business has a peculiar skill in forming an opinion on some subject;⁶⁰ one who has become skilled through use, practice, or experience, or who has been instructed thereby;⁶¹ one who has had ex-

49. N.Y.—Pringle v. Philadelphia Casualty Co., 112 N.E. 465, 467, 218 N.Y. 1.

50. Ky.—Philadelphia Casualty Co. v. Cannon & Byers Millinery Co., 118 S.W. 1004, 1006, 133 Ky. 745.

51. Ind.—Chicago, I. & L. R. Co. v. Gorman, 106 N.E. 897, 899, 58 Ind. App. 381.

Mo.—Stanley v. Chicago, M. & St. P. R. Co., 87 S.W. 112, 113, 112 Mo. App. 601.

"While, strictly speaking, it may be true that 'experience' may mean the course or process by which one attains knowledge and wisdom, yet the former term is frequently used as the equivalent of the latter terms."

Ind.—Chicago, I. & L. R. Co. v. Gorman, 106 N.E. 897, 899, 58 Ind. App. 381.

52. Mo.—Stanley v. Chicago, M. & St. P. R. Co., 87 S.W. 112, 113, 112 Mo. App. 601.

53. *Phrases construed*

(1) "Age and experience."

Mo.—Stanley v. Chicago, M. & St. P. R. Co., *supra*.

(2) "Experience rate" as meaning the rate finally made applicable after a full investigation of the particular business or risk, and so distinguished from "basic rate."

N.Y.—Metropolitan Casualty Ins. Co. of New York v. Rochester Fruit & Vegetable Co., 249 N.Y.S. 572, 575, 232 App.Div. 321.

(3) "Experience tables," see the C. J.S. definition American. See also

the C.J.S. definitions Carlisle Table, and Mortality Tables. See also Evidence § 719.

54. A maxim meaning "Experience by various acts makes laws." Black L.D.

55. Century D.

55.5 S.C.—Stone v. City of Florence, 28 S.E.2d 409, 410, 203 S.C. 527, 150 A.L.R. 953.

55.10 Mo.—Bragg v. Ohio Chemical & Manufacturing Co., 162 S.W.2d 832, 837, 349 Mo. 577.

55.15 S.C.—Stone v. City of Florence, 28 S.E.2d 409, 410, 203 S.C. 527, 150 A.L.R. 953.

56. N.H.—State v. Biddle, 54 N.H. 379, 380.

57. Century D.

Phrases construed

(1) "Experimental sales" see Patents § 78.

(2) "Experimental testimony" see Criminal Law § 887, Trial § 46, and Witnesses §§ 639, 648.

(3) "Experimental use" see Patents §§ 78, 288.

58. N.C.—Pridgen v. Gibson, 139 S. E. 443, 445, 194 N.C. 289.

25 C.J. p 176 note 85, p 177 notes 98, 99.

Similarly expressed

(1) A man of science, a person of skill, an experienced person, or person possessed of some peculiar science or skill.

Tex.—U. S. Fidelity & Guaranty Co. v. Rochester, Civ.App., 281 S.W. 306, 311.

(2) A person versed in the knowledge either of a science, an art, or a profession.

La.—Crichton v. Krouse, App., 150 So. 443, 445.

59. Ky.—Kentucky & West Virginia Power Co. v. Howes, 56 S.W.2d 539, 246 Ky. 843.

60. Ga.—White v. Clements, 39 Ga. 232, 242.

Sims v. State, 148 S.E. 769, 771 40 Ga.App. 10—Robertson v. Aetna Life Ins. Co., 141 S.E. 504, 505, 37 Ga.App. 703—Hines v. Hendricks, 104 S.E. 520, 523, 25 Ga.App. 682.

61. Tex.—Wehner v. Lagerfelt, 66 S. W. 221, 222, 27 Tex.Civ.App. 520, 522.

25 C.J. p 177 note 2.

Similarly expressed

(1) A person instructed by experience.

Iowa.—State v. Wickett, 300 N.W. 268, 272, 230 Iowa 1182.

Tex.—U. S. Fidelity & Guaranty Co. v. Rochester, Civ.App., 281 S.W. 306, 311.

(2) One who by practice or observation has become experienced in any science, art, or trade.

Mo.—Turner v. Haar, 21 S.W. 737, 738, 114 Mo. 335.

Goins v. Chicago, R. I. & P. R. Co., 47 Mo.App. 173, 181.

(3) "One who has skilled experience, or extensive knowledge in his calling, or in any special branch of learning."

Tex.—King v. State, 3 S.W.2d 802, 804, 109 Tex.Cr. 173, 57 A.L.R. 407.

perience;⁶² a person who has made the subject on which he gives his opinion a matter of particular study, practice, or observation,⁶³ more particularly one who has peculiar knowledge or skill as to some particular subject, such as any art or science, or particular trade, or profession, or any special branch of learning,⁶⁴ and is professionally or peculiarly acquainted with its practices and usages;⁶⁵ one possessing, with regard to a particular subject or department of human activity, knowledge not acquired by ordinary persons.⁶⁶

The term implies both knowledge from study and practical experience in the art or profession,⁶⁷ but the highest degree of skill is not necessary.⁶⁸

Under particular circumstances "expert" has been

distinguished from "skilled witness" see Evidence § 472.

As an adjective, "expert" means possessing skill and facility resulting from experience and practice;^{68.5} and in this sense "expert" has been distinguished from "competent."⁶⁹

Phrases employing the word are set out in the subjoined note.⁷⁰

EXPERTORUM DICTUM NUNQUAM TRANSIT IN REM JUDICATAM.⁷¹

EXPERTOS. In Spanish law, experts, who act as appraisers or witnesses in accordance with law or by wish of a party.⁷²

(4) A person experienced, trained, skilled in some particular business or subject.

Pa.—Potter v. Glosser Bros. Department Store, 22 A.2d 28, 29, 146 Pa. Super. 129.

(5) A skillful or experienced person.

Me.—Heald v. Thing, 45 Me. 392, 394.

(6) An "expert" is one who qualifies as such by reason of special knowledge and experience, whether or not he is authorized to practice in his special field under licensing requirement imposed by statute.

U.S.—Paradise Prairie Land Co. v. U. S., C.A.Fla., 212 F.2d 170, 173.

62. Mo.—Graney v. St. Louis, I. M. & S. R. Co., 57 S.W. 276, 280, 157 Mo. 666, 50 L.R.A. 153.

25 C.J. p 177 note 1.

63. N.C.—Hardy v. Dahl, 187 S.E. 788, 790, 210 N.C. 530—Pridgen v. Gibson, 139 S.E. 443, 445, 194 N.C. 289.

25 C.J. p 177 note 8.

64. U.S.—Corpus Juris Secundum quoted in Standard Brands v. Bateman, C.A.Mo., 184 F.2d 1002, 1009.

Mo.—Turner v. Haar, 21 S.W. 737, 738, 114 Mo. 335, 344.

N.H.—Dole v. Johnson, 50 N.H. 452, 454.

N.C.—Yates v. Yates, 76 N.C. 142, 149.

Tex.—Wehner v. Lagerfelt, 66 S.W. 221, 222, 27 Tex.Civ.App. 520, 522.

25 C.J. p 176 notes 86, 89, 90.

Similarly expressed

(1) One having superior knowledge of a subject acquired by professional, scientific, or technical training or by practical experience, which gives him knowledge not had by persons generally.

Colo.—Ausmus v. People, 107 P. 204, 212, 47 Colo. 167, 19 Ann.Cas. 491.

(2) One qualified by study or experience or both, to understand and explain the subject under consideration.

N.M.—Miera v. Territory, 81 P. 586, 588, 13 N.M. 192.

(3) One who by study or practical experience, has acquired a knowledge or skill or understanding of certain facts beyond that of the average man.

U.S.—Farris v. Interstate Circuit, C. C.A.Tex., 116 F.2d 409, 412.

(4) One who has some special, particular or practical knowledge with relation to some special department of the affairs of men as would qualify him to stand as an expert, skilled enough to teach others.

N.Y.—Ellis v. Thomas, 82 N.Y.S. 1064, 1066, 84 App.Div. 626.

(5) One who is skilled in any particular art, trade, or profession, being possessed of peculiar knowledge concerning the same.

N.C.—Hardy v. Dahl, 187 S.E. 788, 790, 210 N.C. 530.

(6) One who possesses peculiar knowledge, wisdom, skill, or information regarding a particular subject matter, which is acquired by study, investigation, observation, practice, or experience, and is not likely to be possessed by the ordinary layman or any inexperienced person or one who is incapable of understanding the subject without the aid or opinion of some person who possesses such knowledge or experience.

Miss.—King v. King, 134 So. 827, 829, 161 Miss. 51.

(7) A person who has technical and peculiar knowledge with relation to matters with which the mass of mankind are supposed not to be acquainted.

Md.—Baltimore & Liberty Turnp. Co. v. Cassell, 7 A. 805, 806, 66 Md. 419, 59 Am.R. 175.

65. U.S.—Corpus Juris Secundum quoted in Standard Brands v. Bateman, C.A.Mo., 184 F.2d 1002, 1009.

N.H.—Dole v. Johnson, 50 N.H. 452, 454—Jones v. Tucker, 41 N.H. 546, 547.

66. Ky.—Kentucky & West Virginia Power Co. v. Howes, 56 S.W.2d 539, 541, 246 Ky. 843.

Okl.—Oklahoma Natural Gas Corporation v. Schwartz, 293 P. 1087, 1090, 146 Okl. 250—Cook v. First Nat. Bank, 236 P. 883, 885, 110 Okl. 111.

25 C.J. p 176 note 94.

67. N.C.—Hardy v. Dahl, 187 S.E. 788, 790, 210 N.C. 530.

68. Tex.—Bratt v. State, 41 S.W. 622, 623, 38 Tex.Cr. 121, 123.

25 C.J. p 177 note 5.

68.5 New Standard D.

69. Tex.—Home Ins. Co. v. Walther, Civ.App., 230 S.W. 723, 725.

70. Phrases construed

(1) "Expert evidence" see Criminal Law §§ 858, 860-878, and Evidence §§ 457, 472-484, 518-546, 549-560, 566, 569.

(2) "Expert judgment," or "judgment of experts" and subject matter thereof see Evidence §§ 520-546, 566.

(3) "Expert opinion" see Criminal Law §§ 860-878, and Evidence §§ 472-484, 518, 519.

(4) "Expert testimony" as susceptible of two different meanings, one of which, that a witness is to testify to matters already within his knowledge, and the other, that he is to make an examination of facts and then testify.

Mo.—Barnes v. Boatmen's Nat. Bank of St. Louis, 156 S.W.2d 597, 601, 348 Mo. 1032.

See also Evidence §§ 456, 457.

(5) "Expert witness" see Criminal Law §§ 862-890, and Evidence §§ 456, 457, 518, 519.

71. A maxim meaning "The testimony of experts should not be disregarded in judicial proceedings." Peloubet Leg.Max.

72. Escriche Diccionario.

EXPILACIÓN. In Spanish law, the misappropriation or malicious concealment of an unaccepted share in an inheritance.⁷³

EXPILARE, EXPILATIO, and EXPILATOR. See the C.J.S. definition *Ex.*

EXPIRATION. A particular word, peculiarly appropriated to effluxion of time,⁷⁴ and defined as meaning a coming to a close;⁷⁵ cessation or end.⁷⁶

The term has been compared with, or distinguished from, "termination."⁷⁷

For references to some specific uses of the term see 25 C.J. p 177 note 13.

Phrases employing the word are set out in the subjoined note.⁷⁸

EXPIRE. Primarily, to emit the last breath; to perish, hence to cease, to come to an end, to conclude, to terminate;⁷⁹ to cease to exist.⁸⁰

The term has been held equivalent to "elapse" and "intervene,"⁸¹ and has been distinguished from "terminate."^{81.5}

Expired. Ended by lapse of time or by limitation.⁸²

The term has been distinguished from "canceled," see the C.J.S. definition of that word, and it has also been distinguished from "terminated."^{82.5}

EXPIRY OF THE LEGAL. In Scotch law and practice, expiration of the period within which an adjudication may be redeemed by paying the debt in the decree of adjudication.⁸³

EXPLAIN. A word of indefinite meaning, signifying to make plain, manifest, or intelligible; to clear of obscurity; to expound; to illustrate by discourse or by notes.^{83.50}

EXPLANATION. When used in connection with charges against a person in office, it may consist either in excusing any delinquency or apparent neglect or incapacity, that is, explaining the favorable appearances, or disapproving the charges.⁸⁴

In particular connections the term has been held synonymous with "description" see the C.J.S. definition of that term; and has been distinguished from "complaint"⁸⁵ and from "hearing."⁸⁶

73. Escriche Diccionario.

74. Eng.—Wrotesley v. Adams, 1 Plowd. 187, 198, 75 Reprint 287.

As referring to lapse of time

"We can see no distinction to be drawn between the word 'expiration' and the word 'elapse' or 'intervene.'" Ill.—Logsdon v. Logsdon, 109 Ill. App. 194, 196.

75. Ind.—Clevenger v. Kern, 197 N. E. 731, 737, 100 Ind.App. 581.

76. Wyo.—Marshall v. Rugg, 44 P. 700, 45 P. 486, 487, 6 Wyo. 270, 33 L.R.A. 679.

77. N.Y.—Kramer v. Amberg, 4 N. Y.S. 613, 15 Daly 205, 207, 16 N. Y.Civ.Proc. 445.

25 C.J. p 177 note 13 [a]—62 C.J. p 734 note 70.

78. *Phrases construed*

(1) "After the expiration of such credit."

Or.—Fleshman v. Whiteside, 34 P.2d 648, 650, 148 Or. 73, 93 A.L.R. 1456.

(2) "After the expiration of this lease."

Pa.—Sloan v. Longcope, 135 A. 717, 718, 288 Pa. 196.

25 C.J. p 177 note 15 [d].

(3) "Expiration of a leave of absence," as not equivalent to "termination of employment."

Pa.—Grove v. Equitable Life Assur. Soc. of United States, 9 A.2d 723, 726, 336 Pa. 519.

(4) "Expiration of charter."

Mass.—Crease v. Babcock, 23 Pick. 334, 346, 34 Am.D. 61.

(5) "Expiration of grant."

U.S.—St. Paul, M. & M. R. Co. v. Greenhalgh, C.C.Minn., 26 F. 563, 568.

(6) "Expiration of policy."

U.S.—Hanson v. Royal Ins. Co., C. C.A.Tenn., 257 F. 715, 716.

Mass.—Sullivan v. Massachusetts Mut. F. Ins. Co., 2 Mass. 318, 328.

N.Y.—Beha v. Breger, 223 N.Y.S. 726, 731, 130 Misc. 235.

As distinguished from "cancellation of the policy," see the C.J.S. definition *Cancellation.*

(7) "Expiration of the license period."

N.Y.—American Employers' Ins. Co. v. Radzeweluk, 4 N.Y.S.2d 74, 76, 167 Misc. 447.

(8) "Expiration of the term."

Cal.—Pringle v. Wilson, 104 P. 316, 318, 156 C. 313, 24 L.R.A., N.S., 1090.

N.Y.—Koss v. Aaront, 260 N.Y.S. 387, 388, 145 Misc. 462—Harris v. Goldberg, 182 N.Y.S. 262, 263, 111 Misc. 600.

25 C.J. p 177 note 15 [a].

(9) "Expiration of the time fixed by law for the continuance of the term."

Ind.—Clevenger v. Kern, 197 N.E. 731, 737, 100 Ind.App. 581.

(10) "Expiration register" see Insurance § 148 b.

79. Ill.—Stuart v. Hamilton, 66 Ill. 253, 255.

80. U.S.—Bonsack Mach. Co. v. Smith, C.C.N.C., 70 F. 383, 392.

Phrases

(1) "Expire and terminate."

Conn.—Bowman v. Foot, 29 Conn. 331, 339.

(2) "Shall expire" means nothing more than void.

U.S.—City of Corbin, Ky., v. Joseph Greenspon's Sons Iron & Steel Co., C.C.A.Ky., 52 F.2d 939, 942.

81. Ill.—Logsdon v. Logsdon, 109 Ill.App. 194, 196.

81.5 N.Y.—In re Guaranty Building Co., 64 N.Y.S. 1056, 1057, 52 App. Div. 140.

62 C.J. p 732 note 47.

82. N.Y.—Burnee Corporation v. Uneeda Pure Orange Drink Co., 230 N.Y.S. 239, 246, 255, 132 Misc. 435.

82.5 N.Y.—Burnee Corporation v. Uneeda Pure Orange Drink Co., supra.

62 C.J. p 732 note 53.

83. Black L.D.

83.50 U.S.—Davis v. Schnell, D.C. Ala., 81 F.Supp. 872, 877.

84. N.Y.—People v. New York, 72 N. Y. 445, 449.

25 C.J. p 177 notes 24, 25.

Phrase construed

"Opportunity for explanation," as distinguished from an opportunity to be heard.

N.Y.—People v. Thompson, 94 N.Y. 451, 459, 465.

85. Iowa.—State v. Bebb, 101 N.W. 189, 190, 125 Iowa 494.

86. N.Y.—People v. Thompson, 94 N. Y. 451, 465.

EXPLETA, EXPLETIA, or EXPLECIA. See the C.J.S. definition Ex.

EXPLETIVO. In Spanish law, appropriate, as a penalty or judgment.⁸⁷

EXPLICATIO. See the C.J.S. definition Ex.

EXPLICIT. Having no disguised meaning or reservation, not obscure or ambiguous;⁸⁸ not implied merely, or conveyed by implication; distinctly stated; plain in language; clear; express; unequivocal.^{88.5}

It has been said that the term is sometimes used as not synonymous with "express."⁸⁹

EXPLODE. To burst forth, as sound; to burst and expand with force and a violent report, as an electric fluid;⁹⁰ to cause to explode or burst noisily;^{90.5} to decompose or change in violent manner so as to generate force.⁹¹

The term has been held practically synonymous with "burst" see the C.J.S. definition of that term.

Exploded. As applied to an argument, decisively rejected.⁹²

EXPLOIT. To bring into play, to cultivate, to make complete use of, to utilize, or to work up.⁹³

EXPLOITATION. This word is of somewhat recent importation into the English from the French,⁹⁴ and it has been defined as meaning the act or process of exploiting, making use of, or working up; utilization by the application of industry, argument, or other means of turning to account, as the exploitation of a mine or forest, of public opinion, etc.⁹⁵

It has been distinguished from "improvement."⁹⁶

EXPLORATION. The act of exploring; examination, investigation, or search.⁹⁷ The term has been held not to include the sinking of a shaft on private land by a railroad company to aid in the construction of a railroad tunnel under the land.⁹⁸

As a mining term, including the phrase "explore for," see Mines and Minerals § 3 h.

EXPLORATOR. See the C.J.S. definition Ex.

EXPLOSION. The word is variously used and is not one that admits of exact definition, having no fixed and definite meaning either in ordinary speech or in law;⁹⁹ but is said to be a general term, unlimited in its application.¹

87. Escriche Diccionario.

88. Iowa.—Eclipse Lumber Co. v. Bitler, 241 N.W. 696, 698, 213 Iowa 1313.

Mont.—Eastman v. School Dist. No. 1 of Lewis and Clark County, Mont., 180 P.2d 472, 475, 120 Mont. 63.

Not ambiguous

N.D.—Hvidsten v. Northern Pac. Ry. Co., 33 N.W.2d 615, 619, 76 N.D. 111.

Phrase construed

"Explicit powers," as necessarily including "implicit powers" or those reasonably necessary and incidental to exercise of "explicit powers." Ky.—Edwards v. Logan County, 50 S.W.2d 83, 85, 244 Ky. 296.

88.5 N.D.—Hvidsten v. Northern Pac. Ry. Co., 33 N.W.2d 615, 619, 76 N.D. 111.

89. Iowa.—Eclipse Lumber Co. v. Bitler, 241 N.W. 696, 698, 213 Iowa 1313.

90. N.Y.—Evans v. Columbian Ins. Co., 44 N.Y. 146, 151, 4 Am.R. 650.

90.5 Ill.—Collins v. City of Chicago, 52 N.E.2d 473, 481, 321 Ill.App. 73.

91. Ill.—Cada v. The Fair, 187 Ill. App. 111, 117.

92. N.J.—Evans v. Griscom, 42 N.J.Law 579, 592, 37 Am.R. 542.

93. U.S.—Morton Trust Co. v. American Salt Co., C.C.La., 149 F. 540, 542.

Phrase construed

"Exploit the vice," as referring to violations of law by sellers of opium for the purpose of gain.

Philippine.—U. S. v. Castaneda, 18 Philippine 58, 60.

94. U.S.—Morton Trust Co. v. American Salt Co., C.C.La., 149 F. 540, 542.

95. U.S.—Morton Trust Co. v. American Salt Co., supra.

Wash.—Corpus Juris quoted in State Finance Co. v. Hamacher, 17 P.2d 610, 612, 613, 171 Wash. 15.

Phrase construed

"Thorough exploitation."

Wash.—State Finance Co. v. Hamacher, 17 P.2d 610, 612, 613, 171 Wash. 15.

96. U.S.—Morton Trust Co. v. American Salt Co., C.C.La., 149 F. 540, 542.

97. Century D.

98. N.J.—Morris & E. R. Co. v. Hudson Tunnel R. Co., 25 N.J.Eq. 384, 388.

99. U.S.—Corpus Juris Secundum quoted in Bower v. Aetna Ins. Co., D.C.Tex., 54 F.Supp. 897, 898.

Iowa.—Sargent v. Mechanics' Ins. Co. of Philadelphia, 247 N.W. 267, 269, 216 Iowa 688.

N.J.—Corpus Juris Secundum cited in Morie v. New Jersey Manufacturers Indem. Ins. Co., 137 A.2d 41, 45, 48 N.J.Super. 70.

N.C.—Corpus Juris quoted in Standard Accident Ins. Co. v. Harrison-Wright Co., 178 S.E. 235, 239, 207 N.C. 661—Corpus Juris quoted in Bolich v. Provident Life & Accident Ins. Co., 169 S.E. 826, 828, 205 N.C. 43.

Tex.—Corpus Juris Secundum cited in Millers Mutual Fire Insurance Co. of Tex. v. Schwartz, Civ.App., 312 S.W.2d 313, 314—Corpus Juris Secundum quoted in Crombie & Co. v. Employers' Fire Ins. Co. of Boston, Mass., Civ.App., 250 S.W.2d 472, 474.

25 C.J. p 178 notes 43, 44.

No definite meaning in ordinary speech or in law

Kan.—Chicago, R. I. and P. R. Co. v. Aetna Ins. Co., 308 P.2d 119, 124, 125, 180 Kan. 730.

1. U.S.—Westchester Fire Ins. Co. of New York v. Chester-Cambridge Bank & Trust Co., C.C.A.Pa., 91 F. 2d 609, 611.

Corpus Juris Secundum quoted in Bower v. Aetna Ins. Co., D.C.Tex., 54 F.Supp. 897, 898.

N.J.—Corpus Juris Secundum cited in Morie v. New Jersey Manufacturers Indem. Ins. Co., 137 A.2d 41, 45, 48 N.J.Super. 70.

Tex.—Corpus Juris Secundum cited in Millers Mutual Fire Insurance Co. of Tex. v. Schwartz, Civ.App., 312 S.W.2d 313, 314—Corpus Juris Secundum quoted in Crombie & Co.

Its general characteristics may be described, but the exact facts which constitute what we call by that name are not susceptible of such statement as will always distinguish the occurrences.² It may, and often does, vary in degree of intensity and in the vehemence of the report, and it is not always due to the presence of fire; indeed, it may result from decomposition or chemical action,³ and an explosion may be caused by an instantaneous build-up of pressure caused by a sudden stoppage of the flow of water,^{3,5} and it may occur by reason of the creation, expansion, and resulting pressure of steam as well as by ignition or combustion.^{3,10}

It must be conceded, however, that every combustion of an explosive substance whereby other property is ignited and consumed would not be an "explosion" within the ordinary meaning of the

term, and the rapidity of the combustion, the violence of the expansion, and the vehemence of the report vary in intensity as often as the occurrences multiply; hence an explosion is an idea of degrees, and the true meaning of the word in each particular case must be settled, not by any fixed standard or accurate measurement, but by the common experience and notions of men in matters of that sort.⁴ It has been said that the term is to be construed in its popular sense, and as understood by ordinary men, and not by scientific men.⁵

The word "explosion" is defined in a general way as meaning a sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report;⁶ a rapid, sudden, and violent expansion of air, or a release or relinquishment of energy causing a rupture and accompanied by a loud noise.^{6,5}

- v. Employers' Fire Ins. Co. of Boston, Mass., Civ.App., 250 S.W.2d 472, 474.
2. U.S.—*Corpus Juris Secundum* quoted in *Bower v. Aetna Ins. Co.*, D.C.Tex., 54 F.Supp. 897, 898.
- Mo.—*Corpus Juris Secundum* cited in *Hart-Bartlett-Sturtevant Grain Co. v. Aetna Ins. Co.*, 293 S.W.2d 913, 918, 365 Mo. 1134.
- Ohio.—*United Life, Fire and Marine Ins. Co. v. Foote*, 22 Ohio St. 340, 347, 10 Am.R. 735.
- 25 C.J. p 178 note 45.
3. U.S.—*Corpus Juris Secundum* cited in *Heffron v. Jersey Ins. Co. of N. Y.*, D.C.S.C., 144 F.Supp. 5, 11, affirmed, C.A., 242 F.2d 136.
- Ill.—*Sargent v. Mechanics' Ins. Co. of Philadelphia*, 247 N.W. 267, 269, 216 Ill. 688.
- Iowa.—*Vorse v. Jersey Plate Glass Ins. Co.*, 93 N.W. 569, 570, 119 Iowa 555, 97 Am.S.R. 330, 60 L.R.A. 838.
- Kan.—*Corpus Juris Secundum* cited in *Chicago, R. I. & P. R. Co. v. Aetna Ins. Co.*, 308 P.2d 119, 124, 180 Kan. 730.
- Mo.—*American Paper Products Co. v. Continental Ins. Co.*, 225 S.W. 1029, 1031, 208 Mo.App. 87.
- Pa.—*Tannenbaum v. Connecticut Fire Ins. Co.*, 193 A. 305, 308, 127 Pa. Super. 278.
- Similarly expressed
- U.S.—*Corpus Juris Secundum* cited in *Bower v. Aetna Ins. Co.*, D.C.Tex., 54 F.Supp. 897, 898.
- Combustion not only cause
- An explosion may be caused by combustion, and frequently is, but combustion is not necessarily the only cause of such an occurrence; there need not be a fire or combustion before it may be said that an explosion has occurred, since an explosion may take place by reason of the creation and transmission of pressure (as of air, gas, or liquid), as well as by ignition or combustion.
- N.J.—*Morie v. N. J. Manufacturers Indem. Ins. Co.*, 137 A.2d 41, 45, 48 N.J.Super. 70.
- Variety of causes
- While fire is perhaps their principal efficient cause, explosions may be produced without the aid of heat or fire, as by the sudden liberation of air from an air gun; by the expansion of gas in a balloon caused by the rising of the balloon into a higher atmosphere; by the expansive force of any gas or vapor bursting its environment; by the contact or mixture of some chemicals; or by the concussion of nitro-glycerine or dynamite, and even severe frost often causes trees to explode.
- U.S.—*Corpus Juris Secundum* cited in *Commercial Union Fire Ins. Co. of N. Y. v. Bank of Ga.*, C.A.Ga., 197 F.2d 455, 456.
- Ont.—*Hobbs v. Northern Assur. Co.*, 8 Ont. 343, 347.
- 3.5 A "water-hammer," that is, an instantaneous build-up of pressure caused by sudden stoppage of flow of water, which caused underground rupture of fire hydrant, was an explosion.
- U.S.—*Commercial Union Fire Ins. Co. of N. Y. v. Bank of Ga.*, C.A.Ga., 197 F.2d 455, 456, 457.
- 3.10 U.S.—*Lever Bros. Co. v. Atlas Assur. Co.*, C.C.A.Ind., 131 F.2d 770, 775.
4. U.S.—*Lever Bros. Co. v. Atlas Assur. Co.*, C.C.A.Ind., 131 F.2d 770, 775.
- Corpus Juris Secundum* quoted in *Bower v. Aetna Ins. Co.*, D.C.Tex., 54 F.Supp. 897, 898.
- N.J.—*Corpus Juris Secundum* cited in *Morie v. N. J. Manufacturers Indem. Ins. Co.*, 137 A.2d 41, 45, 48 N.J.Super. 70.
- Ohio.—*United Life, Fire and Marine Ins. Co. v. Foote*, 22 Ohio St. 340, 347, 10 Am.R. 735.
- Tex.—*Corpus Juris Secundum* cited in *Millers Mutual Fire Insurance Co. of Tex. v. Schwartz*, Civ.App., 312 S.W.2d 313, 314—*Crombie & Co. v. Employers' Fire Ins. Co. of Boston, Mass.*, Civ.App., 250 S.W.2d 472, 474.
- 25 C.J. p 178 notes 48–50.
5. U.S.—*Mitchell v. Potomac Ins. Co.*, D.C., 22 S.Ct. 22, 25, 183 U.S. 42, 46 L.Ed. 74.
- Lever Bros. Co. v. Atlas Assur. Co.*, C.C.A.Ind., 131 F.2d 770, 775.
- Corpus Juris Secundum* cited in *Bower v. Aetna Ins. Co.*, D.C.Tex., 54 F.Supp. 897, 898.
- Cal.—*Roma Wine Co. v. Hardware Mut. Fire Ins. Co. of Minnesota*, 88 P.2d 260, 262, 31 C.A.2d 455.
- Mo.—*American Paper Products Co. v. Continental Ins. Co.*, 225 S.W. 1029, 1031, 208 Mo.App. 87.
- N.J.—*Corpus Juris Secundum* cited in *Morie v. N. J. Manufacturers Indem. Ins. Co.*, 137 A.2d 41, 45, 48 N.J.Super. 70.
- N.C.—*Corpus Juris* cited in *Standard Accident Ins. Co. v. Harrison-Wright Co.*, 178 S.E. 235, 239, 207 N.C. 661—*Corpus Juris* cited in *Bolich v. Provident Life & Accident Ins. Co.*, 169 S.E. 826, 828, 205 N.C. 43.
- Tex.—*Crombie & Co. v. Employers' Fire Ins. Co. of Boston, Mass.*, Civ. App., 250 S.W.2d 472, 474.
6. Iowa.—*Sargent v. Mechanics' Ins. Co. of Philadelphia*, 247 N.W. 267, 269, 216 Iowa 688.
- 25 C.J. p 178 note 52.
- 6.5 U.S.—*Jersey Ins. Co. of N. Y. v. Heffron*, C.A.S.C., 242 F.2d 136, 139, 140—*Commercial Union Fire Ins. Co. of N. Y. v. Bank of Ga.*, C.A. Ga., 197 F.2d 455, 456, 457.

although it is not necessary that the noise be extremely loud;^{6,10} a violent bursting or expansion, with great noise, following the sudden production of great pressure or a sudden release of pressure;^{6,15} the noise made by such bursting.^{6,20}

In a broad sense, apart from combustion, the term has been defined as meaning the act of exploding, bursting with a loud noise, or detonation; a shattering by a sudden and immense pressure, in distinction from rupture; a sudden bursting or breaking up or in pieces, from an internal or other force;⁷ a blowing up or tearing apart;⁸ a sudden and violent expansion of the parts of a body, by its component parts acquiring a great increase of bulk;⁹ a sudden expansion of a liquid substance, with the result that

the gas generated by the expansion escapes with violence, usually causing a loud noise;¹⁰ the result due to the conversion of a solid or liquid into a gas, or the expansion of a gas, which is accompanied by a loud report and the shattering of the material about it.¹¹

Used in the narrower sense as referring to explosion by combustion, it has been said that when produced by ignition, according to common understanding, it may be accurately enough described for practical purposes as a sudden and rapid combustion causing a violent expansion of the air and producing a report more or less loud according to the resistance offered;¹² a sudden inflaming with force

- Heffron v. Jersey Ins. Co. of N. Y., D.C.S.C., 144 F.Supp. 5, 13.
Mo.—Hart-Bartlett-Sturtevant Grain Co. v. Aetna Ins. Co., 293 S.W.2d 913, 918, 365 Mo. 1134.
- Explosion the cause, rupture the effect**
U.S.—Commercial Union Fire Ins. Co. of N. Y. v. Bank of Ga., C.A.Ga., 197 F.2d 455, 456.
Heffron v. Jersey Ins. Co. of N. Y., D.C.S.C., 144 F.Supp. 5, 13.
Mo.—Hart-Bartlett-Sturtevant Grain Co. v. Aetna Ins. Co., 293 S.W.2d 913, 918, 365 Mo. 1134.
- 6.10 U.S.—Commercial Union Fire Ins. Co. of N. Y. v. Bank of Ga., C.A.Ga., 197 F.2d 455, 456.**
Heffron v. Jersey Ins. Co. of N. Y., D.C.S.C., 144 F.Supp. 5, 13.
Mo.—Hart-Bartlett-Sturtevant Grain Co. v. Aetna Ins. Co., 293 S.W.2d 913, 918, 365 Mo. 1134.
- 6.15 U.S.—Lever Bros. Co. v. Atlas Assur. Co., C.C.A.Ind., 131 F.2d 770, 775.**
Kan.—Chicago, R. I. & P. R. Co. v. Aetna Ins. Co., 308 P.2d 119, 124, 180 Kan. 730.
N.J.—**Corpus Juris Secundum** cited in Morie v. N. J. Manufacturers Indem. Ins. Co., 137 A.2d 41, 45, 48 N.J.Super. 70.
- Similarly defined**
(1) A violent bursting, or expansion, with noise, following the sudden production of great pressure, as in the case of explosions, or a sudden release of pressure as in the disruption of a steam boiler.
U.S.—Julius Hyman & Co. v. American Motorists Ins. Co., D.C.Colo., 136 F.Supp. 830, 833.
Mo.—Hart-Bartlett-Sturtevant Grain Co. v. Aetna Ins. Co., 293 S.W.2d 913, 917, 918, 365 Mo. 1134.
- (2) A violent bursting or expansion with noise.
Pa.—Allen v. Insurance Co. of North America, 104 A.2d 191, 193, 175 Pa. Super. 281.
- 6.20 U.S.—Julius Hyman & Co. v. American Motorists Ins. Co., D.C.Colo., 136 F.Supp. 830, 833.**
Mo.—Hart-Bartlett-Sturtevant Grain Co. v. Aetna Ins. Co., 293 S.W.2d 913, 917, 365 Mo. 1134.
- 7. U.S.—Corpus Juris Secundum** cited in Bower v. Aetna Ins. Co., D.C.Tex., 54 F.Supp. 897, 898.
Mo.—American Paper Products Co. v. Continental Ins. Co., 225 S.W. 1029, 1031, 208 Mo.App. 87.
Tex.—**Corpus Juris Secundum** cited in Millers Mutual Fire Insurance Co. of Tex. v. Schwartz, Civ.App., 312 S.W.2d 313, 314.
25 C.J. p 178 notes 53, 55, 57.
- Similarly expressed**
(1) A sudden release of pressure such as disruption of steam boiler.
Ky.—Travellers' Indemnity Co. v. B. & B. Ice & Coal Co., 58 S.W.2d 640, 641, 248 Ky. 443.
(2) A bursting with violence and loud noise, because of internal pressure.
Me.—Wadsworth v. Marshall, 34 A. 30, 31, 88 Me. 263, 269, 32 L.R.A. 588.
(3) A sudden bursting or breaking up from an internal force.
Ark.—Little Rock Ice Co. v. Consumers' Ice Co., 170 S.W. 241, 244, 114 Ark. 532.
(4) A sudden bursting with noise.
Mo.—St. Louis Gaslight Co. v. Philadelphia American F. Ins. Co., 33 Mo.App. 348, 385.
- "Explosion" connotes a violent expansion of some force, accompanied by noise.**
U.S.—Lever Bros. Co. v. Atlas Assur. Co., C.C.A.Ind., 131 F.2d 770, 775.
Pa.—Sweeney v. Blue Anchor Beverage Co., 189 A. 331, 335, 325 Pa. 216.
- 8. Ind.—Louisville Underwriters v. Durland, 24 N.E. 221, 223, 123 Ind. 544, 7 L.R.A. 399.**
Mo.—American Paper Products Co. v. Continental Ins. Co., 225 S.W. 1029, 1031, 208 Mo.App. 87.
- 9. N.Y.—Evans v. Columbian Ins. Co., 44 N.Y. 146, 152, 4 Am.R. 650.**
- 10. N.C.—Corpus Juris** cited in Standard Accident Ins. Co. v. Harrison-Wright Co., 178 S.E. 235, 239, 207 N.C. 661—**Corpus Juris** cited in Bolich v. Provident Life & Accident Ins. Co., 169 S.E. 826, 828, 205 N.C. 43.
- Similarly expressed**
"The sudden or extremely rapid conversion of a solid or liquid body of small bulk into gas or vapor occupying many times the volume of the original substance, and, in addition, highly expanded by the heat generated during the transformation."
Ont.—Hobbs v. Northern Assur. Co., 8 Ont. 343, 346.
- 11. D.C.—Mitchell v. Potomac Ins. Co., 16 App.D.C. 241, 269.**
- 12. U.S.—Corpus Juris** quoted in Hartford Fire Ins. Co. v. Empire Coal Mining Co., C.C.A.Colo., 30 F. 2d 794, 798.
Pa.—Tannenbaum v. Connecticut Fire Ins. Co., 193 A. 305, 308, 127 Pa.Super. 278.
25 C.J. p 178 note 52 [a], p 179 note 66.
- Relation of explosion and fire**
(1) "All explosions caused by combustion are preceded by fire."
Mo.—Renshaw v. Missouri State Mutual F. & M. Ins. Co., 15 S.W. 945, 949, 103 Mo. 595, 23 Am.S.R. 904.
25 C.J. p 178 note 52 [c].
(2) The scientist may demonstrate in a case where gunpowder is destroyed by fire, or in any case where the explosion is caused by or accompanies combustion, that ignition and combustion precede explosion; but they occur in such rapid succession that the combustion and explosion would be popularly understood as an explosion, not fire.

and a loud report, as the explosion of gunpowder.¹³

"Explosion" has been held to be synonymous with "bursting," see the C.J.S. definition Burst, and has been compared with, or distinguished from, "blasting," see the C.J.S. definition Blast, "collapse," see the C.J.S. definition Collapse, "combustion,"¹⁴

and "rupture".¹⁵

The word "explosion" is treated in various connections with respect to insurance, and for specific references see the index to the title Insurance.

Phrases employing the word are set out in the subjoined note.¹⁶

Mo.—Renshaw v. Missouri State Mutual F. & M. Ins. Co., *supra*.

13. Ind.—Louisville Underwriters v. Durland, 24 N.E. 221, 223, 123 Ind. 544, 7 L.R.A. 399.

Mo.—American Paper Products Co. v. Continental Ins. Co., 225 S.W. 1029, 1031, 208 Mo.App. 87.

14. Ohio.—United Life, Fire and Marine Ins. Co. v. Foote, 22 Ohio St. 340, 347, 10 Am.R. 735.

25 C.J. p 178 note 52 [b], [c].

15. Ky.—Travellers' Indemnity Co. v. B. & B. Ice and Coal Co., 58 S.W.2d 640, 641, 248 Ky. 443.

16. "Explosion of a boiler"

(1) Defined generally as the bursting of a boiler; the shattering of a boiler by a sudden and immense pressure in distinction from rupture.

Ark.—Little Rock Ice Co. v. Consumers' Ice Co., 170 S.W. 241, 244, 114 Ark. 532.

Ind.—Louisville Underwriters v. Durland, 24 N.E. 221, 223, 123 Ind. 544, 7 L.R.A. 399.

(2) "Explosion of a steam boiler," as meaning a sudden and substantial rupture of the flues of the boilers caused by the action of steam, resulting usually in breaking and rendering the building in which the boiler is contained, and the movable property therein.

U.S.—Chicago Sugar-Refining Co. v. American Steam-Boiler Co., C.C. Ill., 48 F. 198, 199.

(3) As distinguished from "rupture of a steam boiler."

N.Y.—Evans v. Columbian Ins. Co., 44 N.Y. 146, 151, 4 Am.R. 650—St. John v. American Mut. F. & M. Ins. Co., 11 N.Y. 516, 518.

Other phrases construed

(1) "Explosion of an automobile." Iowa.—Field v. Southern Surety Co. of New York, 235 N.W. 571, 573, 211 Iowa 1239.

N.C.—Bolich v. Provident Life & Accident Ins. Co., 169 S.E. 826, 827, 828, 205 N.C. 43.

(2) "Explosion of any character," as distinguished from "blasting."

N.C.—Standard Accident Ins. Co. v. Harrison-Wright Co., 178 S.E. 235, 239, 207 N.C. 661.

(3) "Explosion of any kind."

Mont.—McDonald v. Royal Ins. Co., 40 P.2d 1005, 1006, 98 Mont. 572.

EXPLOSIVES

This Title includes regulation of manufacture, dealing in, and use of explosive substances, and liabilities for injuries therefrom caused by negligence.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

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See also descriptive word index in the back of this Volume

§ 1. Definition

An "explosive" is a substance or combination of substances which upon rapid decomposition or combustion causes an explosion, that is, a violent bursting or expansion with noise.

An "explosive" may be defined as any substance by whose decomposition or combustion gas is generated with such rapidity that it can be used for blasting or in firearms,¹ or as a substance or as the

1. U.S.—**Corpus Juris** quoted in Schwartz v. Northern Life Ins. Co., C.C.A.Cal., 25 F.2d 555, 559.
Ind.—Anchor Life Ins. Co. v. Meyer, 111 N.E. 436, 437, 61 Ind.App. 35.
Mo.—**Corpus Juris** quoted in Hender-son v. Massachusetts Bonding & Ins. Co., 84 S.W.2d 922, 926, 337 Mo. 1.
25 C.J. p 181 note 1.

Held "explosive"

(1) Blasting caps filled with highly explosive compound.
Ohio.—Wilson v. State, 159 N.E. 585, 587, 26 Ohio App. 7.
(2) Dynamite caps.
Pa.—City of McKeesport v. Standard Surety & Casualty Co. of New York, 191 A. 588, 590, 326 Pa. 167.

(3) Electrical exploder to discharge dynamite.
Cal.—Miller v. Cookson, 265 P. 374, 377, 89 C.A. 602.
(4) Gasoline.
La.—Smith v. Marine Oil Co., 121 So. 782, 783, 10 La.App. 674.
Mo.—Huckleberry v. Missouri Pac. R. Co., 26 S.W.2d 980, 986, 324 Mo. 1025.

combination of substances which upon rapid decomposition or combustion causes an explosion, that is, a violent bursting or expansion with noise.^{1,5} However, not every substance which may cause an explosion may be termed an explosive, as, for example, steam which causes a boiler to burst or explode.^{1,10}

The word is also used as a general term indicating a substance which, by a certain treatment, explodes, that is, decomposes or changes in a violent manner so as to generate force.² In this sense explosives may be divided into two classes, "propellants" and "detonators."³ Before the invention of gunpowder or blasting powder, the term "Greek fire" was applied to explosives.⁴

"Dynamite" is an explosive made by combining nitroglycerin, which is its active explosive element, with an absorbent solid material,⁵ or a mixture of nitroglycerin with some solid and inert absorbent substance, containing no other explosive ingredient.⁶

Gun cotton is a general name for the nitrates of cellulose either wet or dry.^{6,5} Gun cotton, also known as pyrocellulose,^{6,10} or nitrocellulose,^{6,15} is an

explosive obtained by immersing vegetable fibre in nitric and sulphuric acids, and subsequent drying,^{6,20} or by digesting clean cotton in a mixture of nitric and sulphuric acid.^{6,25}

"Pitch" is a carbonaceous substance more than ninety-nine per cent combustible and more than fifty per cent volatile,⁷ and "pitch dust" is merely pitch in a fine state of subdivision.⁸

§ 2. Power to Regulate

- a. In general
- b. Regulation by municipal corporation

a. In General

The storing, handling, and use of inflammable and explosive substances may be regulated under the police power.

The storing, handling, and use of inflammable and explosive substances, being attended with danger, may be regulated under the police power.⁹ Thus the explosion of fireworks may be prohibited;¹⁰ and a law prohibiting, except, in certain cases, the sale, offering, or exposing for sale and use, of fireworks must be interpreted in the light of its

N.Y.—Village of Attica v. Day, 236 N.Y.S. 607, 613, affirmed 243 N.Y.S. 915, 230 App.Div. 776.
25 C.J. p 181 note 1 [b] (7).

(5) Wet picric acid sold for military purposes.

U.S.—Bolles v. Edwards, C.C.A.N.Y., 299 F. 504, 505.

American Synthetic Dyes v. Edwards, D.C.N.Y., 290 F. 1018, 1019.

(6) Fireworks.

Tex.—Cannon v. City of Dallas, Civ. App., 263 S.W.2d 288, 292.

(7) Other illustrations see 25 C.J. p 181 note 1 [b].

Held not "explosive" within particular statute

(1) Cartridges.

Ohio.—Wechsler v. State, 179 N.E. 356, 358, 124 Ohio St. 461.

(2) Fireworks.

Mo.—Henderson v. Massachusetts Bonding & Ins. Co., 84 S.W.2d 922, 337 Mo. 1.

(3) Gasoline.

Mont.—Purcell v. Davis, 50 P.2d 255, 259, 100 Mont. 480.

N.Y.—Morse v. Buffalo Tank Corporation, 19 N.E.2d 981, 280 N.Y. 110.

Village of Attica v. Day, 236 N.Y.S. 607, 614, affirmed 243 N.Y.S. 915, 230 App.Div. 776.

(4) Unfinished product of gasoline.

Okl.—Patterson v. Roxana Petroleum Co. of Oklahoma, 234 P. 713, 717, 109 Okl. 89.

1.5 Pa.—Commonwealth v. Bristow, 138 A.2d 156, 159, 185 Pa.Super. 448.

1.10 Pa.—Commonwealth v. Bristow, supra.

2. Ill.—Cada v. The Fair, 187 Ill. App. 111.

3. Ill.—Cada v. The Fair, supra.
25 C.J. p 181 note 3.

4. U.S.—St. Paul F. & M. Ins. Co. v. Penman, Pa., 151 F. 961, 963, 81 C.C.A. 151, affirmed 30 S.Ct. 312, 216 U.S. 311, 54 L.Ed. 493.

5. U.S.—Sperry v. Springfield F. & M. Ins. Co., C.C.Colo., 26 F. 234, 235.

19 C.J. p 849 note 1.

Similar definition

Pa.—Sinkiewicz v. Susquehanna Collieries Co., 175 A. 757, 758, 115 Pa. Super. 377.

6. U.S.—U. S. v. Saul, D.C.N.C., 58 F. 763, 764.

6.5 Pa.—In re Gun Cotton Shipment, 38 Pa.Co. 552.

6.10 U.S.—Celluloid Mfg. Co. v. American Zylonite Co., C.C.N.Y., 26 F. 692.

6.15 U.S.—Wolff v. Du Pont de Nemours, C.C.Del., 122 F. 944, 945, affirmed 134 F. 862, 67 C.C.A. 488.
46 C.J. p 481 note 23.

6.20 U.S.—Celluloid Mfg. Co. v. American Zylonite Co., C.C.N.Y., 26 F. 692.

6.25 U.S.—Wolff v. Du Pont de Nemours & Co., C.C.Del., 122 F. 944,

945, affirmed 134 F. 862, 67 C.C.A. 488.

28 C.J. p 1321 note 33.

7. U.S.—Cornec v. Baltimore & O. R. Co., C.C.A.Md., 48 F.2d 497, 500, certiorari denied Baltimore & O. R. Co. v. Cornec, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530.

8. U.S.—Cornec v. Baltimore & O. R. Co., C.C.A.Md., 48 F.2d 497, 500, certiorari denied Baltimore & O. R. Co. v. Cornec, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530.

"Dust explosion" defined see 28 C.J. S. p 595 note 56.

9. Fla.—City of Miami v. Direct Distributors, 183 So. 841, 134 Fla. 430.

Iowa.—Cecil v. Toenjes, 228 N.W. 874, 210 Iowa 407.

Me.—Boothby v. City of Westbrook, 23 A.2d 316, 138 Me. 117.

Mass.—Fallon v. Board of Street Com'rs of Boston, 34 N.E.2d 689, 309 Mass. 244.

N.J.—Morgan v. Board of Com'rs of Borough of Collingswood, 139 A. 718, 104 N.J.Law 13.

Okl.—Waters-Pierce Oil Co. v. Deselms, 89 P. 212, 18 Okl. 107.

Tex.—Ex parte Townsend, 144 S.W. 2d 266, 140 Tex.Cr. 314.

W.Va.—State v. Stark, 122 S.E. 533, 96 W.Va. 176.

12 C.J. p 917 note 1.

10. Mo.—Centralia v. Smith, 77 S. W. 488, 103 Mo.App. 438.

general purpose, which is the protection of the health, safety, and general welfare of the public.^{10.5} The legislature may require an application for a permit to use an explosive in blasting.¹¹ The legislature has power to enact laws that will protect the people from the dangers of gasoline by prescribing rules and regulations for its distribution,¹² and owners of gasoline have no inherent or natural right to sell or dispose of it like other property and thereby be immune from regulation.¹³

Subject to the usual rules as to the delegation of authority to an administrative officer, the legislature may authorize a state officer to issue reasonable rules and regulations for the keeping and transporting of explosives.^{13.5}

b. Regulation by Municipal Corporation

A municipality may regulate the keeping, using, and selling of explosives within its corporate limits.

A municipal corporation may regulate the keep-

ing, using, and selling of explosives within its corporate limits¹⁴ under its general powers as to public safety, welfare, health, etc.,¹⁵ or under an express or implied grant of power for the purpose.¹⁶

The legislature may vest municipalities with the power to protect themselves against the hazards of fire and explosion arising from the storage of all combustible or explosive materials;^{16.5} but, where the delegated power is resumed by the state through legislative action, a municipal corporation cannot by its own action reacquire such power and pass valid regulatory ordinances.^{16.10} Moreover, where the state has preëempted the regulation of a particular industry, operation, or occupation, a local municipality may not impose the same or similar regulations.^{16.15}

When acting within its powers, a municipal corporation may provide for the examination and inspection of explosives,¹⁷ or of places,¹⁸ instrumen-

10.5 Pa.—Commonwealth v. Bristow, 138 A.2d 156, 185 Pa.Super. 448.

Toy cannons in which an explosion of acetylene gas is produced are "fireworks," within meaning of statute defining fireworks as any article prepared for purpose of producing a visible or audible effect by explosion, including toy cannons in which explosives are used; fireworks law, prohibiting sale of such toy cannons, as applied to toy cannons in which acetylene gas is produced by mixing calcium carbide with water and air, such gas exploding when a spark is introduced, was a proper exercise of police power and constitutional. Pa.—Commonwealth v. Bristow, supra.

11. Mass.—Jenkins v. A. G. Tomassello & Son, 189 N.E. 817, 286 Mass. 180.

12. Fla.—Mayo v. Texas Co., 188 So. 206, 137 Fla. 218.

13. Fla.—Mayo v. Texas Co., supra.

13.5 **Regulations held not unreasonable**

Rules of insurance commissioner prohibiting storage in frame buildings of certain inflammable liquids and requiring that portable containers of such liquids should be painted red and be conspicuously lettered with certain warning notice were not unreasonable or unintelligible.

U.S.—Apanovich v. Wright, C.A.Me., 226 F.2d 656.

14. Fla.—City of Miami Beach v. Texas Co., 194 So. 368, 141 Fla. 616, 128 A.L.R. 350.

Iowa.—Cecil v. Toenjes, 228 N.W. 874, 210 Iowa 407.

La.—City of Shreveport v. Nelson, 115 So. 469, 165 La. 229, 58 A.L.R. 856.

N.J.—Morgan v. Board of Com'rs of Borough of Collingswood, 139 A. 718, 104 N.J.Law 13.

N.Y.—Larkin Co. v. Schwab, 151 N. E. 637, 242 N.Y. 330.

N.C.—Stone v. Texas Co., 105 S.E. 425, 180 N.C. 546, 12 A.L.R. 1297.

Pa.—Sun Oil Co. v. City of York, 38 Pa.Dist. & Co. 678, 54 York Leg. Rec. 26.

Tex.—Ex parte Townsend, 144 S.W. 2d 266, 140 Tex.Cr. 314.

Wash.—Chief Petroleum Corporation v. City of Walla Walla, 116 P.2d 560, 10 Wash.2d 297.

W.Va.—State v. Stark, 122 S.E. 533, 96 W.Va. 176.

43 C.J. p 367 note 36.

Cosmetics

Since petroleum products, alcohol and other inflammable or explosive substances and at times toxic substances are used in the manufacture of cosmetics, the city of Chicago had the implied power to regulate and license the manufacture of cosmetics under its chemical or paint factories ordinance.

Ill.—Chicago Cosmetic Co. v. City of Chicago, 29 N.E.2d 495, 374 Ill. 384.

"Products of petroleum"

Gasoline is a "product of petroleum" within statute authorizing cities and villages to regulate and prevent storage of petroleum or any products thereof and other combustible or explosive material.

Ill.—City of Ottawa v. Brown, 24 N. E.2d 363, 372 Ill. 468.

15. La.—City of Shreveport v. Nelson, 115 So. 469, 165 La. 229, 58 A. L.R. 856.

N.J.—Morgan v. Board of Com'rs of Borough of Collingswood, 139 A. 718, 104 N.J.Law 13.

Pa.—Sun Oil Co. v. City of York, 38 Pa.Dist. & Co. 678, 54 York Leg.Rec. 26.

Wash.—Chief Petroleum Corporation v. City of Walla Walla, 116 P.2d 560, 10 Wash.2d 297.

43 C.J. p 367 note 34.

Fire prevention was the only legitimate purpose for which the city could enact ordinance prohibiting sale of explosives within three hundred feet of a schoolhouse where school is regularly maintained.

Me.—Boothby v. City of Westbrook, 23 A.2d 316, 138 Me. 117.

16. Ill.—Kizer v. City of Mattoon, 164 N.E. 20, 332 Ill. 545.

Mo.—Kansas City ex rel. Barlow v. Robinson, 17 S.W.2d 977, 32 S.W. 2d 1075, 322 Mo. 1050.

N.J.—Morgan v. Board of Com'rs of Borough of Collingswood, 139 A. 718, 104 N.J.Law 13.

43 C.J. p 367 note 35.

16.5 Ill.—Edward R. Bacon Grain Co. v. City of Chicago, 59 N.E.2d 689, 325 Ill.App. 245.

16.10 Ill.—Kizer v. City of Mattoon, 164 N.E. 20, 332 Ill. 545.

16.15 Pa.—Morrow v. Springfield Tp., 2 Pa.Dist. & Co.2d 620, 41 Del.Co. 217, 47 Mun.L.R. 87.

17. Ill.—Edward R. Bacon Grain Co. v. City of Chicago, 59 N.E.2d 689, 325 Ill.App. 245.

Utah.—Salt Lake City v. Bennion Gas & Oil Co., 15 P.2d 648, 80 Utah 530, followed in Salt Lake City v. Bennion, 15 P.2d 651, 80 Utah 539.

18. Ill.—Klever Shampay Karpel Kleaners v. City of Chicago, 154 N.E. 131, 323 Ill. 368, 49 A.L.R. 103.

talities,¹⁹ and methods²⁰ of storing. It may prescribe the maximum quantity of gunpowder, dynamite, nitroglycerin, grain, hay, excelsior, gasoline, or other combustible or inflammable material which may be stored in one place or kept in one house within the municipal boundaries²¹ or transported along the streets in one vehicle.²² It may require that the tanks for storage of kerosene and gasoline therefor shall be placed underground.²³

A municipal corporation cannot absolutely prohibit the use of gasoline, naphtha, etc.,²⁴ but as to some explosives it may have the absolute power to prohibit their storage and transportation within the municipal limits.²⁵ The drilling of oil wells within the municipal boundaries, if it endangers the lives and property of the inhabitants, may be prohibited,²⁶ and it is within the police power of a municipality, when it is deemed necessary for public safety, to prohibit the blasting of rocks with gunpowder within the city limits without the written consent of the board of aldermen.²⁷

Fireworks. The regulation of the use and sale of fireworks in a city,²⁸ including the prohibition of the explosion of fire crackers without the written consent of a designated official or board,²⁹ is a legitimate exercise of the police power. In the exercise of their police powers, municipalities may also prohibit the sale of fireworks;^{29.5} but where the

statute grants only the power to regulate the storage of fireworks, a municipal corporation cannot prohibit the possession, sale, or control of fireworks.^{29.10}

§ 3. Statutory and Municipal Regulation

Reasonable statutory and municipal regulations, including a statute creating a presumption of guilt from possession of high explosives by persons not regularly engaged in the manufacture or legitimate use thereof, may be sustained and will be construed under general rules.

The purpose of a statute relating to storage, transportation, and use of explosives is to minimize danger to persons and property from improper storage of explosives,³⁰ and to protect life and property.³¹ A statute contemplating the importation of explosives into the state is not intended to prohibit the transportation and possession necessary thereto, where its avowed purpose is to regulate the use and sale of explosives in the interest of safety.^{31.5} A statute declaring that a person not regularly engaged in the manufacture, sale, transportation, or legitimate use of high explosives who is discovered in possession thereof shall be presumed guilty of reckless and malicious possession is not unconstitutional.³²

Municipal regulations of the keeping, using, and selling of explosives must be reasonable,³³ and not

19. Ill.—Klever Shampay Karpel Kleaners v. City of Chicago, supra.

20. Ill.—Klever Shampay Karpel Kleaners v. City of Chicago, supra.

21. Fla.—City of Miami v. Direct Distributors, 183 So. 841, 134 Fla. 430.

Ill.—City of Monmouth v. Lawson, 102 N.E.2d 188, 345 Ill.App. 44.

Ohio.—State ex rel. Olentangy Oil Co. v. City of Lorain, App., 31 N.E.2d 235, appeal dismissed 17 N.E.2d 644, 134 Ohio St. 386.

43 C.J. p 367 note 40.

Fire prevention was the only legitimate purpose for which the city could enact ordinance prohibiting sale of explosives within three hundred feet of a schoolhouse where school is regularly maintained.

Me.—Boothby v. City of Westbrook, 23 A.2d 316, 138 Me. 117.

Grain

Under statute empowering municipalities to regulate storage of turpentine, tar, pitch, resin, hemp, cotton, etc., and "other similar combustible or explosive material," a municipality had authority to regulate and license storage of grain.

Ill.—Edward R. Bacon Grain Co. v. City of Chicago, 59 N.E.2d 689, 325 Ill.App. 245.

22. Kan.—Ash v. Gibson, 67 P.2d 1101, 145 Kan. 825, modified on other grounds 74 P.2d 136, 146 Kan. 756.

23. Kan.—Cities Service Oil Co. v. Marysville, 231 P. 1031, 117 Kan. 514.

24. Ala.—Standard Oil Co. v. Birmingham, 79 So. 489, 202 Ala. 97.

25. N.Y.—Beckmann v. Talbot, 300 N.Y.S. 6, 252 App.Div. 870, reversed on other grounds 15 N.E.2d 556, 278 N.Y. 146, reargument denied 16 N.E.2d 849, 278 N.Y. 700.

Ohio.—Walter v. Bowling Green, 26 Ohio Cir.Ct. 756.

26. Pa.—Agnew v. Washington Borough, 7 Pa.Co. 180.

27. Mass.—Commonwealth v. Parks, 30 N.E. 174, 155 Mass. 531.

28. Ala.—Chappel v. City of Birmingham, 181 So. 906, 236 Ala. 363.

Tex.—Cannon v. City of Dallas, Civ. App., 263 S.W.2d 288, refused no reversible error.

Ex parte Clark, 140 S.W.2d 854, 139 Tex.Cr. 385.

29. Mo.—Centralia v. Smith, 77 S.W. 488, 103 Mo.App. 438.

29.5 Tex.—Treadgill v. State, 275 S.W.2d 658, 160 Tex.Cr. 658.

29.10 **Prohibition** is not regulation but destruction, since prohibition eliminates the practice to be regulated.

Miss.—King v. Louisville, 42 So.2d 813, 207 Miss. 612.

30. Conn.—Murphy v. Ossola, 199 A. 648, 124 Conn. 366.

31. Cal.—People v. Buyle, 68 P.2d 268, 20 C.A.2d 650.

31.5 U.S.—Bruskas v. Railway Exp. Agency, C.A.N.M., 172 F.2d 915.

32. Cal.—People v. Buyle, 68 P.2d 268, 20 C.A.2d 650—People v. Fitzgerald, 58 P.2d 718, 14 C.A.2d 180, certiorari denied Fitzgerald v. People of State of California, 57 S.Ct. 115, 299 U.S. 593, 81 L.Ed. 437.

33. U.S.—Standard Oil Co. of New Jersey v. City of Charlottesville, C.C.A.Va., 42 F.2d 88.

Fla.—City of Miami Beach v. Texas Co., 194 So. 363, 141 Fla. 616, 128 A.L.R. 350.

N.Y.—Town of Greenburgh v. Westchester Lighting Co., 216 N.Y.S. 677, 217 App.Div. 263, affirmed 157 N.E. 889, 245 N.Y. 637.

Wis.—City of Juneau v. Badger Co-

inconsistent with state regulations.^{33.5} The aim of an ordinance prohibiting the sale, use, or possession of explosives within the city is to prevent fire and other damage resulting therefrom.^{33.10}

Such regulations are subject to the general rules

as to statutory construction.³⁴ Unless they have some technical or special meaning different from their usual and accepted import, words used therein are to be taken and construed in the sense in which they are understood in common language.³⁵ A

op. Oil Co., 279 N.W. 666, 227 Wis. 620.

43 C.J. p 367 note 42.

Ordinances held void

(1) Ordinance held void for lack of sufficient rules and specifications. Iowa.—*Edwards & Browne Coal Co. v. Sioux City*, 240 N.W. 711, 213 Iowa 1027.

(2) Where the township supervisors adopted a resolution limiting the size of tanks for the storage of crude oil and its volatile products to seventy-five thousand gallons, there being no relation between the size of storage tanks and the danger involved, the court, noting that the resolution simply limited the size of tanks but not the quantity of inflammables to be stored in one location, held the resolution void and of no effect.

Pa.—*Kelechava v. Hanover Tp.*, 82 Pa. Dist. & Co. 587, 25 Lehl.J. 43.

Ordinances held not invalid

(1) Prohibiting the keeping, use, manufacturing, sale or handling of fireworks within the city's extended police jurisdiction except by persons using signaling devices for current daily consumption.

Ala.—*Chappel v. City of Birmingham*, 181 So. 906, 236 Ala. 363.

(2) Prohibiting sale of fireworks beyond limits of the city but within five thousand feet thereof.

Tex.—*Treadgill v. State*, 275 S.W.2d 658, 160 Tex.Cr. 658.

(3) Regulating the use and sale of fireworks in a city, but exempting from its provisions railroad flares and flashlight materials for use in photographic work, and providing that under certain circumstances the fire chief of the city might give permission for fireworks display.

Tex.—*Ex parte Clark*, 140 S.W.2d 854, 139 Tex.Cr. 335.

(4) Providing that oil storage tanks be vapor-proof, provided with check valves, permanently connected with a foam generator, and that no storage tank shall be constructed within fifty feet of any building or street.

Tex.—*Tex-Jersey Oil Corp. v. Beck*, Civ.App., 292 S.W.2d 803, affirmed in part and reversed in part on other grounds, Sup., 305 S.W.2d 162.

(5) Regulating storage, transportation and sale of gasoline and similar explosive liquids.

U.S.—*City of Marysville v. Standard*

Oil Co., C.C.A.Kan., 27 F.2d 478, affirmed 49 S.Ct. 430, 279 U.S. 582, 73 L.Ed. 856, rehearing denied 50 S.Ct. 79, and interpretation of decision denied 51 S.Ct. 38, 282 U.S. 797, 75 L.Ed. 718.

Iowa.—*Cecil v. Toenjes*, 228 N.W. 874, 210 Iowa 407.

Kan.—*Ash v. Gibson*, 67 P.2d 1101, 145 Kan. 825, modified on other grounds 74 P.2d 136, 146 Kan. 756.

La.—*City of Shreveport v. Nelson*, 115 So. 469, 165 La. 229, 58 A.L.R. 856.

Me.—*Boothby v. City of Westbrook*, 23 A.2d 316, 138 Me. 117.

N.J.—*Morgan v. Board of Com'rs of Borough of Collingswood*, 139 A. 718, 104 N.J.Law 13—*Independent Pennsylvania Oil Co. v. City of Gloucester*, 134 A. 554, 102 N.J. Law 502.

N.Y.—*Larkin Co. v. Schwab*, 151 N. E. 637, 242 N.Y. 330.

Ohio.—*State ex rel. Olentangy Oil Co. v. City of Lorain*, App., 31 N.E. 2d 235, appeal dismissed 17 N.E.2d 644, 134 Ohio St. 386.

Tex.—*Ex parte Townsend*, 144 S.W. 2d 266, 140 Tex.Cr. 314.

(6) Providing for annual inspection fee of twenty-five dollars for retail and two hundred fifty dollars for wholesale, gasoline dealers.

Utah.—*Salt Lake City v. Bennion Gas & Oil Co.*, 15 P.2d 648, 80 Utah 530, followed in *Salt Lake City v. Bennion*, 15 P.2d 651, 80 Utah 539.

Requirement of license held reasonable

Mass.—*Commonwealth v. Willcutt*, 156 N.E. 540, 259 Mass. 406.

Ordinance held not unconstitutional

Ordinance requiring bond for blasting operations, and giving right of action thereon to persons injured by use of explosives.

Mo.—*Kansas City ex rel. Barlow v. Robinson*, 17 S.W.2d 977, 32 S.W.2d 1075, 322 Mo. 1050.

33.5 Pa.—*Kelechava v. Hanover Tp.*, 82 Pa. Dist. & Co. 587, 25 Lehl.J. 43.

Determination of inconsistency

The provisions of a township ordinance seeking to regulate the use, storage, and transportation of explosives and the carrying on of blasting operations within the township will be declared invalid, since such operations are already well and sufficiently covered by state regulation in the form of regulations; however, a provision prohibiting the manufacture of

explosives within the township is valid.

Pa.—*Morrow v. Springfield Tp.*, 2 Pa. Dist. & Co.2d 620, 41 Del.Co. 217, 47 Mun.L.R. 87.

33.10 Tex.—*Cannon v. City of Dallas*, Civ.App., 263 S.W.2d 288, refused no reversible error.

34. Ejusdem generis

Under statute providing that no person or corporation should keep petroleum in any "building or in or on any property" in any city of the first class without a permit, the rule of ejusdem generis required that the phrase "or in or on any property" be limited to real property and hence no permit was required for the delivery of petroleum in tanks, wagons or trucks.

N.J.—*Studerus Oil Co. v. Jersey City*, 25 A.2d 502, 128 N.J.Law 286.

Incorporation by reference

The "Regulations for the Storage, Handling and Use of Explosives" issued by the Pennsylvania Department of Labor and Industry are not applicable to the "operation of stone or rock quarries," except in so far as the regulations for the construction of magazines are incorporated by reference into the "Regulations for Pits and Quarries."

Pa.—*Morrow v. Springfield Tp.*, 2 Pa. Dist. & Co.2d 620, 41 Del.Co. 217, 47 Mun.L.R. 87.

Fire prevention commissioner's regulations as to disposition of inflammable motion picture film have force of law, and motion picture distributor was bound by regulations to see that scrap film was safely disposed of. Requirement that scrap film be "safely disposed of," was sufficiently certain and definite, and required safe removal of scrap film from building as well as repair room.

Mass.—*Guinan v. Famous Players-Lasky Corporation*, 167 N.E. 235, 267 Mass. 501.

Quality of gasoline

Under Florida statute the commissioner of agriculture had power through inspectors, to determine that seller of gasoline was offering for sale gasoline not conforming to prescribed standard adopted by commissioner under statutory authority.

Fla.—*Mayo v. Texas Co.*, 188 So. 206, 137 Fla. 218.

35. "Reliable and efficient shut-off valve"

Tex.—*Ex parte Townsend*, 144 S.W. 2d 266, 267, 140 Tex.Cr. 314.

superfluous negative may be omitted.³⁶ The context may be considered,³⁷ but, where the wording of the statute is plain and not ambiguous, other words cannot be read into it.³⁸ The history of the legislation and the course it has taken are proper matters to be considered in ascertaining the intent of the legislature, when construing an amendment, unless the amendment eliminates all doubts.^{38.5}

If the ordinance bears a reasonable relation to public safety, the court is not concerned with any other motives which may have helped to promote its adoption.^{38.10} The fact that the necessarily general form of an ordinance prohibiting the storing

of explosives embraces an innocent object is not in itself sufficient to prevent the applicability of the ordinance to such object.³⁹

Repeals by implication are not favored,⁴⁰ and a general ordinance is not repealed by an ordinance amounting only to a permit.⁴¹ An ordinance granting permission for storage of explosives by a particular person is repealed by a subsequent general ordinance, applicable to all persons alike, prohibiting such storage.⁴²

Permits. Under some statutes or ordinances permits or licenses must be obtained for the keeping or use⁴³ of explosives, and must also be obtained

36. U.S.—Waters-Pierce Oil Co. v. Deselms, Okl., 29 S.Ct. 270, 212 U. S. 159, 53 L.Ed. 453.
25 C.J. p 182 note 20.

37. U.S.—Waters-Pierce Oil Co. v. Deselms, supra.
25 C.J. p 182 note 21.

38. Ala.—Standard Oil Co. v. Birmingham, 79 So. 489, 202 Ala. 97.
25 C.J. p 183 note 22.

38.5 Sale of sparklers not prohibited
Ill.—Acme Fireworks Corp. v. Bibb,
126 N.E.2d 688, 6 Ill.2d 112, 127 N.
E.2d 444, 6 Ill.2d 112.

38.10 Pa.—Kelechava v. Hanover
Tp., 82 Pa.Dist. & Co. 587, 25 Leh.
L.J. 43.

39. U.S.—Pierce Oil Corp. v. City of Hope, Ark., 39 S.Ct. 172, 248 U. S. 498, 63 L.Ed. 381.

40. Cal.—Harley v. Heyl, 2 C. 477.
Minn.—State v. Northwest Linseed Co., 297 N.W. 635, 201 Minn. 422, appeal dismissed Northwest Linseed Co. v. State of Minnesota, 61 S.Ct. 960, 313 U.S. 544, 85 L.Ed. 1511.

41. Ill.—City of Ottawa v. Brown, 24 N.E.2d 363, 372 Ill. 468.

42. La.—Crowley v. Ellsworth, 38 So. 199, 114 La. 308, 108 Am.S.R. 353, 69 L.R.A. 276.

43. Mass.—City of Newton v. Reiss Associates, Inc., 117 N.E.2d 294, 331 Mass. 114.

N.Y.—Tralow Realty Corporation v. Murdock, 24 N.Y.S.2d 561, 261 App. Div. 173.

Purpose of provision requiring permit is to minimize danger and to protect life and property.

Cal.—Reid & Sibell, Inc. v. Gilmore & Edwards Co., 283 P.2d 364, 134 C.A.2d 60.

Who may apply

"Applicant" for license to erect tanks for petroleum products need not be owner of land whereon tanks were to be erected.

Mass.—Morrison v. Selectmen of Town of Weymouth, 181 N.E. 786, 279 Mass. 486.

Notice of hearing

(1) Abutting owner filing protest at town selectmen's hearing to granting oil company license to erect storage tanks could not thereafter object to want of notice of hearing, in the absence of such objection at hearing, nor could he object that commonwealth did not have notice of proceedings. Further, the voluntary appearance of party entitled to notice dispenses with necessity of formal notice.

Mass.—Morrison v. Selectmen of Town of Weymouth, supra.

(2) License for keeping, storage, and sale of petroleum products in city was valid as against contention that insufficient notice was given, where, although there was no sufficient notice by publication before date first set for hearing, there was such notice before actual hearing; notice being given by clerk of board of street commissioners.

Mass.—White Fuel Co. v. Board of Street Com'rs of City of Boston, 194 N.E. 130, 289 Mass. 337.

(3) Nonresidents of a village were not entitled to notice of a hearing by board of trustees permitting the installation and erection of oil storage tanks on property adjacent to that of the nonresidents, but within the village and no interest of theirs could be the subject of adjudication by the board.

N.Y.—Browning v. Bryant, 34 N.Y.S. 2d 280, 178 Misc. 576, affirmed 34 N. Y.S.2d 729, 264 App.Div. 777.

Existence of tanks held not prerequisite to town selectmen's granting license for erection of petroleum storage tanks.

Mass.—Morrison v. Selectmen of Town of Weymouth, 181 N.E. 786, 279 Mass. 486.

Held not improper influence

Oil company's offer of ten thousand dollars toward rebuilding street, made after hearing on, but before granting of, petition for license to erect petroleum storage tanks.

Mass.—Morrison v. Selectmen of Town of Weymouth, supra.

Omission of condition

Selectmen's omission from license granted oil company to erect petroleum storage tanks of condition upon which license was granted did not invalidate license nor condition.

Mass.—Morrison v. Selectmen of Town of Weymouth, supra.

Extension or renewal

(1) The official or board clothed with the authority to issue or grant the permit for the keeping of explosives may insist on new requirements not inconsistent with the terms of the ordinance, as a prerequisite to the renewal of the permit, when riper experience and added knowledge suggest newer safeguards for the protection of the public.

N.Y.—People v. Walsh, 196 N.Y.S. 536, 119 Misc. 510.

(2) Under statute providing that structure "once used" under license for storing petroleum products may be continued in such use from year to year if occupant, while such use continues, annually files, on or before April 30, certificate reciting such use, licensee intending to apply license to structure not yet erected takes risk of being unable to use structure for purposes of license before next succeeding April 30, and, in such case, of being unable to renew license as of that date. Certificate of use and occupancy of structure under license for storage cannot extend rights granted by license beyond April 30 next following issue of license as to any structure not built by that time, although license may be granted to apply to structures not yet erected. License does not entitle licensee to use or erect any structure not in existence on April 30 following grant of license, although construction work was delayed by appeals to state fire marshal, by litigation arising out of attempted revocation of license, and by risk created by uncertainty as to permanency of license. Time for per-

for the sale or delivery^{43.5} of explosives; but an ordinance cannot require permits for the sale of articles or forbid the issuance of such permits where a statute provides that the sale of such articles shall be permitted.^{43.10} The legislative body of a municipal corporation may be vested with a wide

discretion whether to issue or withhold a permit,^{43.15} and, as long as it does not act arbitrarily, the court will not interfere with the exercise of its discretion;^{43.20} but the grant or refusal of such permits cannot be left to arbitrary discretion.⁴⁴

forming acts necessary to entitle licensee to extension of license for storage of petroleum products is not extended by appeal to state fire marshal, since license is in existence pending appeal.

Mass.—City of Boston v. White Fuel Corporation, 1 N.E.2d 186, 294 Mass. 258.

Restoration

Where a building resting on piles, and used for storing petroleum, the cost of which building was three thousand dollars, burned down, and the value of the remaining material for use in a new building was one thousand four hundred fifty dollars, the owners were entitled to restore it without obtaining a license, under statute providing that no "building" for the storage of petroleum shall be "erected" without license.

Mass.—City of Somerville v. Walker, 47 N.E. 127, 168 Mass. 388.

Permit held not required

(1) An ordinance controlling the storing of oil and gasoline did not require the taking out of permit to store gasoline when done in the manner prescribed.

Neb.—Brown v. Easterday, 194 N.W. 798, 110 Neb. 729.

(2) Ordinances requiring permit to manufacture, store, or keep for sale paints, varnishes, or lacquers in quantities greater than twenty gallons, and providing that no permit shall issue for manufacture or mixing of paints in tenement houses, dwellings, hotels, workshops, or factories, do not prohibit ordinary painter from mixing paints while working in tenement house or hotel, but seek occupants' safety by preventing storing of more than twenty gallons of paint without a permit and mixing paint in connection therewith.

N.Y.—Maloney v. Hearst Hotels Corporation, 8 N.E.2d 296, 274 N.Y. 106.

43.5 N.Y.—Wilmart Products Corp. v. Keshner, 135 N.Y.S.2d 35.

43.10 N.Y.—Schrantz & Bieher Co. v. Quayle, 106 N.Y.S.2d 887, 201 Misc. 516.

43.15 N.Y.—Krumenacker v. Town Board of North Hempstead Nassau County, 85 N.Y.S.2d 250.

Power of town board

When town exercises statutory power to enact precise and detailed ordinance regulating use, sale, storage and transportation of explosives and inflammables, no further power

is left in town board except that which it reserves to itself to administer ordinance.

N.Y.—Fucigna v. Sahn, 179 N.Y.S.2d 64, 15 Misc.2d 304.

43.20 N.Y.—Krumenacker v. Town Board of North Hempstead Nassau County, 85 N.Y.S.2d 250.

44. Ind.—Richmond v. Dudley, 28 N.E. 312, 129 Ind. 112, 28 Am.S.R. 180, 13 L.R.A. 587.

N.Y.—Fucigna v. Sahn, 179 N.Y.S.2d 64, 15 Misc.2d 304.

Discrimination

Grant of consent to install gasoline tanks to owners of premises similarly situated does not in itself show consent was arbitrarily refused to applicant.

N.Y.—Larkin Co. v. Schwab, 151 N.E. 637, 242 N.Y. 330.

Danger to traffic

(1) Council could consider whether consent for storage of gasoline would interfere with or be dangerous to traffic.

N.Y.—Larkin Co. v. Schwab, supra.

(2) In ordinance authorizing township committee to grant or refuse permit for storage and sale of gasoline and other inflammables, as committee shall deem proper for protection of life and property from fire, explosions and other dangers, the phrase "other dangers" does not permit committee to refuse permit on theory that gasoline station will increase traffic hazards and thereby endanger life and property.

N.J.—Denbo v. Moorestown Tp., Burlington County, 129 A.2d 710, 23 N.J. 476.

Appeals

(1) Where property of petitioner located in industrial district of village was bounded by a private right of way, railroad tracks, a deep water channel, and industrial property, and it did not appear that village ordinances prohibited storage of petroleum products, village board of zoning appeals was authorized to entertain appeal from building committee denying petitioner's application for permit to erect petroleum storage tanks and to grant variation of regulation in zoning ordinance prohibiting erection of buildings for storage of petroleum.

N.Y.—Beckmann v. Talbot, 15 N.E.2d 556, 278 N.Y. 146, reargument denied 16 N.E.2d 849, 278 N.Y. 700.

(2) Nonresidents of a village could not maintain a proceeding in the na-

ture of certiorari to review a determination of the board of trustees of the village permitting installation and erection of oil storage tanks on property adjacent to that of petitioners but within the village.

N.Y.—Browning v. Bryant, 34 N.Y.S. 2d 280, 178 Misc. 576, affirmed 34 N.Y.S.2d 729, 264 App.Div. 777.

(3) Statutory right of appeal to fire marshal after granting of license is for sole purpose of having marshal pass on question whether exercise of license would constitute fire or explosion hazard, which depends on circumstances of each case, particularly where inquiry concerns structures not erected, final responsibility of deciding in particular case whether exercise of license issued under statute would result in fire hazard being placed on fire marshal.

Mass.—Leach v. State Fire Marshal, 179 N.E. 616, 278 Mass. 159.

(4) Property of landowner need not abut that to which license for storage of petroleum products applies in order that owner be a "person aggrieved" within statute permitting appeal to the fire marshal.

Mass.—N. V. Handel Industrie Transport Maatschappij v. State Fire Marshal, 26 N.E.2d 304, 305 Mass. 482—Standard Oil Co. of New York v. Commissioner of Public Safety, 174 N.E. 213, 274 Mass. 155.

(5) But a nearby resident who does not own the property upon which he lives is not an aggrieved person within the meaning of the statute.

Mass.—N. V. Handel Industrie Transport Maatschappij v. State Fire Marshal, supra—Barnard v. Metropolitan Ice Co., 180 N.E. 308, 278 Mass. 441.

(6) Evidence as to action of fire marshal's predecessor in office concerning licenses previously granted was immaterial as to whether exercise of licenses would constitute fire or explosion hazard.

Mass.—Leach v. State Fire Marshal, supra.

(7) That persons other than licensees expected to operate under licenses was no reason why fire marshal should not proceed with hearing to determine fire or explosion hazard.

Mass.—Leach v. State Fire Marshal, supra.

(8) Fire marshal's return was conclusive against licensee as to the

Such a license or permit is a personal privilege which does not attach and run with the land until the privilege conferred has been exercised,⁴⁵ although as soon as the rights conferred by it are exercised it becomes a grant which attaches and thereafter runs with the land.⁴⁶ It is not a contract, but is the means adopted to supervise and control a certain use of private property which, unless regulated, might result in a serious fire hazard threatening the safety of the community.⁴⁷

Subject to rules covering the revocation of permits generally, which rules are treated in Municipal Corporations § 173, a permit for the storage of ex-

plosives may subsequently be revoked,⁴⁸ but the exercise of the power to revoke is dependent on the existence of legal cause, and arbitrary action by the licensing authorities is not justified.⁴⁹

Acceptance of the license imposes on the holder the duty to comply with the requirements of the statute⁵⁰ or the conditions of the license,⁵¹ and failure to do so is sufficient cause for revoking the license.⁵² The power to revoke being measured by statute, compliance with the statute is essential to the validity of revocation,⁵³ and the function of the licensing board in revoking a license is of a quasi judicial character.⁵⁴

ground upon which marshal entertained jurisdiction.

Mass.—*N. V. Handel Industrie Transport Maatschappij v. State Fire Marshal*, 26 N.E.2d 304, 305 Mass. 482—*New York v. Commissioner of Public Safety*, 174 N.E. 213, 274 Mass. 155, 305 Mass. 482—*Standard Oil Co. of New York v. Commissioner of Public Safety*, 174 N.E. 213, 274 Mass. 155.

(9) Fire marshal's failure to refer in terms to explosion hazard in decision may be interpreted to mean that if restrictions mentioned are observed neither fire nor explosion hazard would result from exercise of licenses.

Mass.—*Leach v. State Fire Marshal*, supra.

(10) Fire marshal should so perform duties as to hamper conduct of a legitimate business licensed by proper authority as little as possible, consistent with elimination of fire or explosion hazard. In practical administration of office, he may state in advance conditions under which license might be exercised so as to be free from fire hazard, and in submitting schedule of restrictions for exercise of license so as not to create fire hazard, he did not invade province of department authorized to make rules and regulations for storage and sale of petroleum products. Whether conditions imposed may be specifically enforced is immaterial in view of marshal's undoubted power to revoke licenses if fire or explosion hazard exists.

Mass.—*Leach v. State Fire Marshal*, supra.

(11) A finding by the fire marshal that a fire or explosion hazard would result from the exercise of the license, and notice thereof to the local licensing authority amounts to a revocation of the license.

Mass.—*N. V. Handel Industrie Transport Maatschappij v. State Fire Marshal*, supra.

45. Mass.—*Fallon v. Board of Street Com'rs of Boston*, 34 N.E.2d 689, 309 Mass. 244.

46. Mass.—*Higgins v. Board of License Commissioners of City of Quincy*, 31 N.E.2d 526, 308 Mass. 142.

47. Mass.—*Higgins v. Board of License Commissioners of City of Quincy*, supra.

48. U.S.—*Corpus Juris Secundum* cited in *Bruska's v. Railway Exp. Agency*, C.A.N.M., 172 F.2d 915, 918—*Standard Oil Co. v. Lyons*, C.C.A. Iowa, 130 F.2d 965.

Mass.—*Fallon v. Board of Street Com'rs of Boston*, 34 N.E.2d 689, 309 Mass. 244—*Higgins v. Board of License Commissioners of City of Quincy*, 31 N.E.2d 526, 308 Mass. 142.

N.Y.—*Tralow Realty Corporation v. Murdock*, 24 N.Y.S.2d 561, 261 App. Div. 173.

Va.—*Davenport v. Richmond City*, 81 Va. 636, 59 Am.R. 694.

49. Ky.—*Glenmore Distilleries Co. v. Fiorella*, 117 S.W.2d 173, 273 Ky. 549.

Mass.—*Fallon v. Board of Street Com'rs of Boston*, 34 N.E.2d 689, 309 Mass. 244.

Ground not alleged in notice

Revocation cannot be based on ground not alleged in the notice of hearing to revoke.

Mass.—*Higgins v. Board of License Commissioners of City of Quincy*, 31 N.E.2d 526, 308 Mass. 142.

50. Certificate of registration which the owner or occupant of land which is licensed for the storage and sale of gasoline is required to file with the fire commissioner is the means employed to enable the authorities to learn who is operating under the outstanding license and to deal with him as the person responsible for conduct of a business which might, without proper supervision, become a menace to public safety; and the acceptance of license imposed on holder the duty to file such certificate.

Mass.—*Fallon v. Board of Street*

Com'rs of Boston, 34 N.E.2d 689, 309 Mass. 244.

51. Mass.—*Commonwealth v. Willcutt*, 156 N.E. 540, 259 Mass. 406.

52. Mass.—*Fallon v. Board of Street Com'rs of Boston*, 34 N.E.2d 689, 309 Mass. 244.

53. Notice

Requirement that local licensing authority give licensee notice of grounds on which it intends to revoke license to store and sell petroleum products is not a matter of procedure alone, but is one of substantive right, and, although the notice need not be drafted with the certainty of a criminal pleading, due regard must be had to the nature of the proceeding and the character of the rights that may be affected. The grounds on which the licensing authority proposes to revoke the license should be stated with reasonable particularity so that the notice fairly apprises licensee of charge which he must be prepared to meet. The notice is not invalidated by mere defect in matter of form if enough remains for licensee reasonably to understand the substance and nature of ground which he is called on to answer, but the notice must, in conjunction with the hearing, be sufficient to accomplish substantial justice in accordance with general aim of similar statutory proceedings. Breach of conditions of license within notice would be construed to mean existing violations of the terms of the license and to refer to some conduct of licensee inconsistent with provisions of the license but would not be construed to relate to conduct of licensee as an applicant or to his action antecedent to issuance of the license.

Mass.—*Higgins v. Board of License Commissioners of City of Quincy*, 31 N.E.2d 526, 308 Mass. 142.

54. Mass.—*Higgins v. Board of License Commissioners of City of Quincy*, supra.

§ 4. Civil Liability for Injuries

- a. In general
- b. Effect of violation of statutory or municipal regulation generally

a. In General

A liability in tort for injuries resulting from explosives must be based on nuisance or negligence, and the proximate cause of the injury must have been defendant's wrongful act, the degree of care required being commensurate with the apparent danger.

A liability in tort for injuries arising from explosives must be based on either the theory of a nuisance or of the existence of negligence,⁵⁵ and, as shown infra § 11, the imputation of negligence will not always arise from the fact of an explosion.

In accordance with the general rules governing torts, the proximate cause of the injury and of the

damage must have been defendant's wrongful act.⁵⁶ Where, in the sequence of events between the original default and the final result, an entirely independent unforeseen cause intervenes sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause.^{56.5} The degree of care required as to explosives, as in the case of other dangerous agencies, must be commensurate with the apparent danger,⁵⁷ particularly to children and those of immature judgment;^{57.5} in order to prove negligence in the case of an explosive, it is ordinarily necessary to show a standard of safety and a departure therefrom.^{57.10}

One delivering an article which he knows, or ought to know, to be peculiarly dangerous must give notice of its character, or bear the natural consequences of his failure to do so;⁵⁸ and in other cir-

55. Ala.—Whaley v. Sloss-Sheffield Steel & Iron Co., 51 So. 419, 164 Ala. 216, 224, 20 Ann.Cas. 822.
N.Y.—Fillo v. Jones, 2 Abb.Dec. 121, 4 Keyes 328.
25 C.J. p 182 note 5.

Mere ownership of explosives was held insufficient to make United States liable.

U.S.—Voytas v. U. S., C.A.III., 256 F.2d 786.

56. N.Y.—Richman v. Follman, 23 N.Y.S.2d 917, 260 App.Div. 1009, affirmed 36 N.E.2d 908, 286 N.Y. 669.

Utah.—Madsen v. East Jordan Irr. Co., 125 P.2d 794, 101 Utah 552.
25 C.J. p 182 note 9.

Injuries arising from:

Sale of explosives see infra § 6.
Storage of explosives see infra § 5 b.

Use of explosive see infra § 7.

State held not liable

N.Y.—Horoch v. State, 176 N.Y.S.2d 181, 6 A.D.2d 915.

Negligence

(1) Judgment for damages for burns sustained by fourteen year old girl would be affirmed, where defendant had sent her into a cellar to fix fire in heater without any warning that fire had been banked and that gases were likely to accumulate, and, where, when girl opened door of heater, explosion occurred.

N.Y.—Lukin v. Freed, 300 N.Y.S. 141, 252 App.Div. 889, reargument and motion denied 1 N.Y.S.2d 1019, 253 App.Div. 813, affirmed 16 N.E.2d 305, 278 N.Y. 655.

(2) A city was not liable in negligence for injuries sustained by plaintiff who deposited a truck load of rubbish on a city dump where a dresser about fifty feet from the place where he had dumped his rubbish

contained a grenade which exploded injuring plaintiff.

Ohio.—Beebe v. City of Toledo, 151 N.E.2d 738, 168 Ohio St. 203.

(3) Negligent installation of oil-burning furnace.

Wash.—Lewis v. Scott, 341 P.2d 488.

Failure to inspect and clean oil burner

Mere failure of one employed by owner of building to inspect and clean oil burner to make any inspection of or clean burner would not subject him to liability to owner on ground of negligence for damages resulting from explosion of burner.

N.Y.—Weisberg v. Brogan, 144 N.Y. S.2d 255, 208 Misc. 524.

Truckload of gasoline leaking and emitting gas vapors near exhaust from motor is dangerous instrumentality, and operator acts at his peril in taking it on others' property. So a garage owner, permitting such truckload to be brought into garage, without knowing its dangerous condition, and permitting it to remain, and allowing his tools and light to be used in repairing truck without compensation to owner, was not precluded from recovering for damages sustained when garage was set on fire because of negligence of operator of truck.

Okl.—Ramsey Oil Co. v. Dunbar, 46 P.2d 535, 172 Okl. 571.

56.5 U.S.—Schmidt v. U. S., C.A. Kan., 179 F.2d 724, certiorari denied 70 S.Ct. 1007, 339 U.S. 986, 94 L.Ed. 1388.

Held not intervening cause

Fact that a soldier employed by contractor to assist in collection of scrap metal from strafing range pursuant to contract with the United States handed or tossed to contractor the dud which exploded, injuring contractor, did not constitute an intervening cause which would relieve

the United States from liability for negligent failure to furnish a reasonably safe place in which to perform contract or warn contractor of dangers.

U.S.—White v. U. S., D.C.Cal., 97 F. Supp. 12.

57. Mass.—Guinan v. Famous Players-Lasky Corporation, 167 N.E. 235, 267 Mass. 501.

Va.—Braxton v. Filippo, 33 S.E.2d 757, 183 Va. 839.
25 C.J. p 182 note 11.

Care required as to:

Manufacture see infra § 5 a.

Sale see infra § 6 a.

Storage see infra § 5 b (3) (b).

Transportation see infra § 9.

Use see infra § 7.

Warning of danger

Intelligence to be applied in handling nitroglycerin increases with warning that another or his property may be endangered.

Tex.—Comanche Duke Oil Co. v. Texas Pac. Coal & Oil Co., Com.App., 298 S.W. 554.

Duty not absolute and unqualified

Even if government was under duty to exercise high degree of care in its attempt to remove or neutralize all unexploded dud shells from firing range before returning it to owner for use as ranch, such duty was not absolute and unqualified.

U.S.—Iokepa v. U. S., D.C.Hawaii, 158 F.Supp. 394.

57.5 U.S.—U. S. v. Stoppelman, C.A. Mo., 266 F.2d 13.

57.10 Tex.—Dellinger v. Skelly Oil Co., Civ.App., 236 S.W.2d 675, error refused no reversible error.

58. Conn.—Reciprocal Exchange v. Althorn, Inc., 115 A.2d 460, 122 Conn. 545.

Mass.—Guinan v. Famous Players-Lasky Corporation, 167 N.E. 235, 267 Mass. 501.

cumstances also there may be a duty to give warning.^{58.5} One negligently instituting the cause resulting in ultimate injury is liable for damages ensuing although the injured person, without negligence, was handling an explosive substance.⁵⁹

b. Effect of Violation of Statutory or Municipal Regulation Generally

The violation of statutes or ordinances regulating the manufacture, storage, or disposition of explosives may be held to constitute negligence per se.

As in other cases of a violation of statutes, or ordinances imposed under the police power of the state, see Negligence § 19, the violation of statutes and ordinances regulating the manufacture, storage, or disposition of explosives is by some authorities held to constitute negligence per se.⁶⁰ However, in order to warrant a recovery, it must be shown that there was a causal connection between the violation of the provisions and the injuries complained of.⁶¹

Where the duty imposed by the statute is manifestly intended for the protection and benefit of individuals, the common law, when an individual is injured by a breach of such duty, will supply a remedy if the statute gives none,⁶² but the individual must have been placed in a position which gave him particular occasion to insist on the duty imposed by the statute.⁶³ Where the statute does not provide therefor, a civil action will not lie directly in consequence of a violation without specific allegations sufficient to support an action at law as for negligence or willful tort.⁶⁴

§ 5. — Manufacture, Storage, or Keeping

a. Manufacture

b. Storage or keeping

a. Manufacture

The manufacturer of an explosive is liable to anyone injured by an explosion thereof if the manufacture was under circumstances creating a public nuisance or if the manufacturer was negligent.

As shown in Negligence § 100, a manufacturer or seller of an article which is inherently and imminently dangerous to human life or health is liable to any person who, without fault on his part, sustains an injury which is the natural and proximate result of negligence in the manufacture or sale of the article. Explosives are generally recognized as being inherently and imminently dangerous within the meaning of the rule.⁶⁵ The manufacture of an explosive under such circumstances or in such places as to constitute a public nuisance will authorize a recovery by anyone injured by an explosion of such explosive without proof of negligence on the part of the manufacturer,⁶⁶ but in the absence of the creation of such a nuisance, negligence on the part of the manufacturer must be shown in order to warrant a recovery.⁶⁷ So, a company mining coal for its own use and not engaged generally in the sale of coal to the public or to retailers for distribution to the public, the transaction in question being an isolated one, is not liable for an injury to another from an explosive concealed, without its knowledge, in a lump of coal.⁶⁸

It is the duty of a manufacturer of high explosives to exercise proper care commensurate with the dangerous character of the business,⁶⁹ to protect from injury those who consume or have occa-

58.5 Mass.—*DeMartin v. New York, N. H. & H. R. Co.*, 143 N.E.2d 542, 336 Mass. 261.

Return of ranch used as firing range
Where government returned to owner a ranch which had been used as firing range, government had duty to give warning of danger that it was likely that some unexploded shells might remain on ranch lands. U.S.—*Iokepa v. U. S.*, D.C.Hawaii, 158 F.Supp. 394.

59. Cal.—*Harrison v. Harter*, 18 P.2d 436, 129 C.A. 22.

60. Pa.—*Shaffer v. Mowery*, 108 A. 654, 265 Pa. 300.

Utah.—*Smith v. Mine & Smelter Supply Co.*, 88 P. 683, 32 Utah 21.

Violation of regulation as to:

Sale see infra § 6 c.

Storage or keeping see infra § 5 b (2).

Uses see infra §§ 7, 8 b.

61. N.Y.—*Richman v. Follman*, 23 N. Y.S.2d 917, 260 App.Div. 1009, affirmed 36 N.E.2d 908, 286 N.Y. 669.

62. Mich.—*Molin v. Wisconsin Land & Lumber Co.*, 143 N.W. 624, 177 Mich. 524, 48 L.R.A., N.S., 876.

Minn.—*Farrell v. G. O. Miller Co.*, 179 N.W. 566, 147 Minn. 52. 25 C.J. p 182 note 16.

63. Mich.—*Molin v. Wisconsin Land & Lumber Co.*, 143 N.W. 624, 177 Mich. 524, 48 L.R.A., N.S., 876.

N.Y.—*Wilmart Products Corp. v. Keshner*, 135 N.Y.S.2d 35. 25 C.J. p 182 note 17.

64. U.S.—*Wyman, Partridge & Co. v. Boston Blacking Co.*, C.C.Me., 175 F. 834.

65. Pa.—*Eby v. Sidor*, Com.Pl., 27 Lehigh 160.

Wis.—*Beznor v. Howell*, 233 N.W. 758, 203 Wis. 1.

45 C.J. p 890 note 26.

66. W.Va.—*Huntington & Kenova Land Dev. Co. v. Phoenix Powder Mfg. Co.*, 21 S.E. 1037, 40 W.Va. 711—*Wilson v. Phoenix Powder Mfg. Co.*, 21 S.E. 1035, 40 W.Va. 413, 52 Am.S.R. 890.

Sale by manufacturer see infra § 6. Gas explosions see Gas §§ 40-48. Steam boiler explosions see Steam § 16.

67. Ala.—*Jones v. Gulf States Steel Co.*, 88 So. 21, 205 Ala. 291. 25 C.J. p 183 note 26.

68. Ala.—*Jones v. Gulf States Steel Co.*, supra.

69. U.S.—*Atlas Powder Co. v. Benson*, C.C.A.N.J., 287 F. 797.

High degree of care

(1) "One manufacturing highly explosive powder must exercise a high degree of care."

N.J.—*Herz v. E. I. Du Pont de Ne-*

sion otherwise to have contact therewith,^{69.5} and he is liable for failure to do so;⁷⁰ and the same rule has been applied to other possibly explosive substances.^{70.5} Liability extends to injuries from concussion as well as from flying material thrown by an explosion.⁷¹

The manufacturer of a fuse to be used in blasting is not an insurer of the product, since the fuse is not itself dangerous to life or limb, but is merely required to use the care in making and inspecting it which is commensurate with the dangers involved in its intended use.⁷²

b. Storage or Keeping

(1) In general

(2) Violation of statute or ordinance

mours & Co., 123 A. 878, 99 N.J. Law 407.

(2) A manufacturer of a very dangerous substance, such as dynamite, is held to a high degree of care in guarding against injury to those to whom the substance is supplied.

U.S.—Hopkins v. E. I. Du Pont De Nemours & Co., C.A.Pa., 212 F.2d 623.

Warning of danger

(1) Duty of manufacturer of shells of great force, for use in testing of guns, to use due care to see that shells come to rest in position of apparent safety extended only to persons whom normal prudent man might reasonably have anticipated would be exposed to danger. So, where such shells were manufactured for use by arms manufacturers, notices printed on container and shells that they were "Proof Loads" and of "7.5 Tons Pressure" was held sufficient notice to arms manufacturers and dealers in shells for arms manufacturers of dangerous character of the shells, and manufacturer was not liable to hunter, to whom a friend had given an unopened box of the shells, sustaining injury when one of the shells exploded his gun barrel. N.Y.—Harper v. Remington Arms Co., 280 N.Y.S. 862, 156 Misc. 53, affirmed 290 N.Y.S. 130, 248 App. Div. 713.

(2) Where waterproofing compound purchased for use as a primer coat on circular water tanks was inherently dangerous in that it was a highly volatile substance, seller who was also manufacturer thereof had duty of giving adequate warning with respect to its use in the tanks. U.S.—Standard Oil Co. v. Lyons, C.C. A.Iowa, 130 F.2d 965.

(3) Where blasting foreman had knowledge of danger of premature explosion of dynamite placed in newly drilled hole before allowing heat caused by drilling to escape, manu-

facturer of dynamite was not negligent in failing to warn of such danger.

U.S.—Hopkins v. E. I. Du Pont De Nemours & Co., C.A.Pa., 212 F.2d 623, certiorari denied 75 S.Ct. 108, 348 U.S. 872, 99 L.Ed. 686.

69.5 La.—Frazier v. Ayres, App., 20 So.2d 754.

70. U.S.—Atlas Powder Co. v. Benson, C.C.A.N.J., 287 F. 797.

Agent of government

Owner, although government's agent, would be liable for explosion in munitions plant, unless government had exclusive control.

N.Y.—Home Ins. Co. v. T. A. Gillespie Loading Co., 225 N.Y.S. 276, 222 App.Div. 67.

Contributing cause

If mining company's act in distributing defective dynamite to miners was a contributing or intervening cause of injuries sustained by miner from premature explosion of stick of dynamite used in mining clay, such act would not relieve dynamite manufacturer of liability where its prior negligence was the efficient cause and injury the natural and probable consequence of original negligence and was such as might reasonably have been foreseen as probable.

Mo.—Morris v. E. I. Du Pont de Nemours & Co., 109 S.W.2d 1222, 341 Mo. 821.

Wanton and reckless misconduct

Where manufacturer produced cleaner composed of sodium hydroxide, powdered metal aluminum, and a supposedly inert substance which produced great heat and formed sodium aluminate and free hydrogen when water was added, and batch was sold in which formula was not followed and more aluminum than usual was added, and label contained no warning of product's dangerous nature, manufacturer was almost, if

(3) Negligence

(4) Injuries to children

(1) In General

One who stores explosives under circumstances rendering him guilty of maintaining a nuisance is liable, irrespective of negligence, for damages resulting from an explosion thereof; but generally where the storing is not a nuisance or in violation of law, liability does not arise in the absence of negligence.

One who stores and keeps gunpowder, dynamite, or other explosives on his premises, under circumstances rendering him guilty of maintaining a nuisance in so doing, is liable for all damages resulting from an explosion of such explosives whether he is chargeable with negligence or not.⁷³ He is bound to take every possible precaution to pre-

not wholly, guilty of wanton and reckless misconduct.

U.S.—Kieffer v. Blue Seal Chemical Co., C.A.N.J., 196 F.2d 614.

70.5 Bleaching solution

Cal.—Saporito v. Purex Corp., 255 P.2d 7, 40 C.2d 608.

71. Mo.—Liggett v. Excelsior Powder Mfg. Co., 202 S.W. 372, 274 Mo. 115.

Schnitzer v. Excelsior Powder Mfg. Co., App., 160 S.W. 282.

25 C.J. p 183 note 27.

72. U.S.—Ensign-Bickford Co. v. Reeves, C.C.A.Mo., 95 F.2d 190.

73. U.S.—Corpus Juris Secundum cited in Smith v. U. S., D.C.Va., 155 F.Supp. 605, 609.

Conn.—Murphy v. Ossola, 199 A. 648, 124 Conn. 366.

Del.—Corpus Juris Secundum cited in Fritz v. E. I. Du Pont De Nemours & Co., 75 A.2d 256, 260, 6 Terry 427.

N.Y.—Vincent v. Hercules Powder Co., 239 N.Y.S. 47, 228 App.Div. 118.

25 C.J. p 183 note 30.

Blasting as nuisance see Nuisances § 47.

Fireworks as nuisance see Nuisances § 75.

Keeping and storing explosives as ground of forfeiture of fire insurance policy see Insurance § 558.

Oil and gas wells and tanks as nuisances see Nuisances § 65.

Storage of explosives as nuisance see Nuisances § 47.

Attractive nuisance

Tenn.—Nashville Ry. & Light Co. v. Williams, 11 Tenn.App. 1.

Builder of storage facilities held not liable

Contractors who supplied the material and built tank for storage of liquefied gas could not be held liable for death caused by explosion on theory of nuisance or ultra-hazardous activity, because gas liquefaction

vent injury, the only exceptions being a possible explosion precipitated by an unanticipated natural force and the wrongful acts of persons over whom he has no control and which reasonably could not be anticipated.⁷⁴ Although the immediate cause of the explosion of a powder magazine or storehouse is lightning, this constitutes no defense as an intervening cause, since the occurrence and effect of lightning can reasonably be anticipated.⁷⁵ However, the wrong charged must be the proximate cause of the injury.⁷⁶ Liability is not limited to the premises adjacent to those on which the explosive is stored.⁷⁷

Where, however, the storing of explosives is not a nuisance or in violation of the law, it is generally held that liability does not arise for injuries occasioned by an explosion in the absence of negligence on the part of defendant,⁷⁸ although there is authority to the effect that one storing high explosives such as dynamite in such a locality, or under such circumstances as to cause likelihood of risk to others, stores at his peril, and is an insurer absolutely liable if damage results to third persons either from the direct impact of objects such as rocks thrown out by the explosion or from concussion, such liability existing even though the storer was not negligent or the storage was not illegal.⁷⁹ Those who handle carbide should anticipate that

when exposed to the elements it will generate gas, and cannot escape liability to others to whom they owe a duty on the ground that they did not have an opportunity after such exposure to ascertain whether or not gas was being generated.⁸⁰

Notwithstanding the nuisance is legalized, as where it is created in doing work pursuant to legislative authority, liability may exist toward a private individual damaged thereby.⁸¹ A mere permissive statute will not authorize the storage of explosives in such a manner as to constitute a nuisance.⁸²

(2) Violation of Statute or Ordinance

The violation of a statute or ordinance regulating the storage of dangerous explosives constitutes negligence per se, and, apart from negligence, one who keeps explosives in violation of a statute or ordinance is liable for damages proximately caused by an explosion thereof.

The violation of a statute or ordinance regulating the storage of dangerous explosives, designed for the safety of life, limb, and property, constitutes negligence per se, or as a matter of law.⁸³ Apart from the question of negligence, one who keeps explosives in violation of a statute or ordinance is, according to the weight of authority, liable for damages proximately caused by an explosion thereof;⁸⁴ but in order for such liability to exist there must be a causal connection between violation of

and storage enterprise was not under their control, although they supervised first filling of tank and were called on from time to time for advice and service.

U.S.—*Moran v. Pittsburgh-Des Moines Steel Co.*, C.C.A.Pa., 166 F. 2d 908, certiorari denied 68 S.Ct. 1516, 334 U.S. 846, 92 L.Ed. 1770.

74. Mass.—*Flynn v. Butler*, 75 N.E. 730, 189 Mass. 377.

75. N.Y.—*Prussak v. Hutton*, 51 N.Y.S. 761, 30 App.Div. 66.

Tenn.—*Cheatham v. Shearon*, 1 Swan 213, 55 Am.D. 734.

76. N.Y.—*Perry v. Rochester Lime Co.*, 113 N.E. 529, 219 N.Y. 60, L.R.A.1917B 1058.

25 C.J. p 184 note 35.

77. Ohio.—*Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co.*, 54 N.E. 528, 60 Ohio St. 560, 71 Am.S.R. 740, 45 L.R.A. 658.

25 C.J. p 184 note 36.

78. U.S.—*Henry H. Cross Co. v. Simmons*, C.C.A.Ark., 96 F.2d 482.

La.—*Galloway v. Texas Const. Co.*, App., 150 So. 103.

N.Y.—*Jenkins v. 313-321 W. 37th Street Corporation*, 12 N.Y.S.2d 739, 257 App.Div. 228, motion denied 25 N.E.2d 148, 282 N.Y. 595, modified on other grounds 31 N.E.2d 503, 284 N.Y. 397, reargument denied 33

N.E.2d 547, 285 N.Y. 614—*Hayes v. Borup*, 279 N.Y.S. 563, 244 App. Div. 807.

W.Va.—*Corpus Juris Secundum* cited in *Pope v. Edward M. Rude Carrier Corp.*, 75 S.E.2d 584, 594, 138 W.Va. 218.

25 C.J. p 184 note 37.

Negligence in keeping or storing explosives see *infra* § 5 b (3).

Rule of absolute liability inapplicable

In the storage and use of explosives, the rule of absolute liability does not prevail in Texas, but liability must be predicated on negligence.

Tex.—*McKay v. Kelly*, Civ.App., 229 S.W.2d 117, affirmed *Kelly v. McKay*, 233 S.W.2d 121, 149 Tex. 343.

79. U.S.—*Exner v. Sherman Power Const. Co.*, C.C.A.Vt., 54 F.2d 510, 80 A.L.R. 686.

Britton v. Harrison Const. Co., D. C.W.Va., 87 F.Supp. 405.

80. Ky.—*W. A. Wickliffe Coal Co. v. Ryan*, 44 S.W.2d 525, 241 Ky. 537.

81. N.J.—*McAndrews v. Colliery*, 42 N.J.Law 189, 36 Am.R. 508.

Damage from legalized nuisance generally see *Nuisances* § 17.

82. N.Y.—*Ricker v. McDonald*, 85 N.Y.S. 825, 89 App.Div. 300.

25 C.J. p 184 note 39.

Statutes fixing relative location of powder magazines do not relieve

owner of such plant from liability for maintaining private nuisance.

N.Y.—*Vincent v. Hercules Powder Co.*, 239 N.Y.S. 47, 228 App.Div. 118.

83. Conn.—*Murphy v. Ossola*, 199 A. 648, 124 Conn. 366.

N.C.—*Reynolds v. Murph*, 84 S.E.2d 273, 241 N.C. 60.

Tex.—*Jersey Oil Corp. v. Beck*, Civ. App., 292 S.W.2d 803, affirmed in part and reversed in part on other grounds, Sup., 305 S.W.2d 162.

Utah.—*Skerl v. Willow Creek Coal Co.*, 69 P.2d 502, 92 Utah 474.

25 C.J. p 184 note 40.

84. Ill.—*Bandosch v. A. Daigger & Co.*, 255 Ill.App. 494.

N.Y.—*Savage v. Mathieson Alkali Works*, 22 N.Y.S.2d 692, 174 Misc. 1022, affirmed 27 N.Y.S.2d 454, 261 App.Div. 1053.

N.C.—*Stone v. Texas Co.*, 105 S.E. 425, 180 N.C. 546, 12 A.L.R. 1297.

Wis.—*Knecht v. Kenyon*, 192 N.W. 82, 179 Wis. 523.

25 C.J. p 184 note 41.

Held no violation

N.Y.—*Beickert v. G. M. Laboratories*, 151 N.E. 195, 242 N.Y. 168.

Pa.—*Fritsch v. Atlantic Refining Co.*, 160 A. 699, 307 Pa. 71.

Wis.—*Kowalke v. Schindler*, 215 N.W. 894, 194 Wis. 175.

the statute and the injury.⁸⁵ The failure of a person storing explosives to secure a permit therefor cannot be considered as contributing to the injury of a boy in an explosion where the storer was not within the class of persons required by the statute to secure a permit.⁸⁶

A license or permit will not protect one from a violation of a positive prohibition of a statute or an ordinance⁸⁷ or excuse the leaving of a requisite duty unperformed.⁸⁸ A regulation prohibiting the storage of explosives beyond a certain amount has been held to be violated, even though the storage was only temporary or in due course of transportation,⁸⁹ and although no damage resulted therefrom.⁹⁰ An ordinance making it unlawful to have or keep explosives except in licensed magazines applies only to explosives to be taken out and used elsewhere, and not to explosives left temporarily along the line of work for immediate use.⁹¹ A brick structure entirely open on one side cannot be a vault or safe, within the meaning of an ordinance regulating the

storage of dangerous explosives.⁹²

Only members of a class to be benefited can invoke a civil remedy by reason of a penal statute regulating the storage of explosives.⁹³

(3) Negligence

- (a) In general
- (b) Degree of care required
- (c) Proximate cause

(a) In General

Irrespective of whether such conduct would constitute a nuisance, one who negligently handles or stores explosives on his premises or elsewhere is liable for resulting injuries.

One who negligently handles or stores explosives on his premises⁹⁴ or elsewhere⁹⁵ is liable for injuries resulting to others by reason of such negligence, and this without regard to the question whether the storing or handling without negligence under the circumstances would constitute a nuisance.⁹⁶

85. N.Y.—*Richman v. Follman*, 23 N.Y.S.2d 917, 260 App.Div. 1009, affirmed 36 N.E.2d 908, 286 N.Y. 669—*Flaherty v. Metro Stations*, 196 N.Y.S. 2, 202 App.Div. 583, affirmed 139 N.E. 753, 235 N.Y. 605.

Coöperation of third person

If an oil company violated an ordinance concerning the obtaining of approval of city board concerning the construction of buildings and structures for the storing of gasoline, and there was an explosion, resulting in damage to third person, the oil company was liable, although another's act coöperated in producing the damage.

N.C.—*Stone v. Texas Co.*, 105 S.E. 425, 180 N.C. 546, 12 A.L.R. 1297.

Violation of exposure of poison statute

A violation of the statute providing that whoever shall, except in a safe place on his own premises, lay out strychnine or other poison is guilty of a misdemeanor did not render one who laid out poison contrary to statute negligent per se, so as to render him liable to one who was injured and burned by an explosion of the poison when she attempted to light gas burner. In order to recover for such injuries, it was not enough for plaintiff to show that defendant neglected a duty imposed by the statute, but she was required to go further and show that injuries were caused by exposure to hazard from which it was the purpose of the statute to protect her.

Okl.—*Larrimore v. American Nat. Ins. Co.*, 89 P.2d 340, 184 Okl. 614.

86. Conn.—*Murphy v. Ossola*, 199 A. 648, 124 Conn. 366.

87. N.C.—*Fox v. Texas Co.*, 105 S.E. 437, 180 N.C. 543—*Newton v. Texas Co.*, 105 S.E. 433, 180 N.C. 561.

88. N.C.—*Fox v. Texas Co.*, 105 S.E. 437, 180 N.C. 543.

89. Ill.—*Bandosz v. A. Daigger & Co.*, 255 Ill.App. 494, 25 C.J. p 185 note 42.

90. N.Y.—*Foot v. New York Fire Dept.*, 5 Hill 99.

91. N.Y.—*Hall v. New York, N. H. & H. R. Co.*, 106 N.Y.S. 106, 121 App.Div. 488, 25 C.J. p 185 note 45.

92. Utah.—*Smith v. Mine & Smelter Supply Co.*, 88 P. 683, 32 Utah 21.

93. U.S.—*Exner v. Sherman Power Const. Co.*, C.C.A.Vt., 54 F.2d 510, 80 A.L.R. 686.

City fireman held entitled to benefit

Ill.—*Bandosz v. A. Daigger & Co.*, 255 Ill.App. 494.

N.Y.—*Maloney v. Hearst Hotels Corporation*, 8 N.E.2d 296, 274 N.Y. 106.

94. Ark.—*Gibson Oil Co. v. Sherry*, 291 S.W. 66, 172 Ark. 947.

Ky.—*Fourseam Coal Corporation v. Hatfield*, 130 S.W.2d 73, 279 Ky. 132.

Mo.—*Combs v. Standard Oil Co. of Indiana*, 296 S.W. 817, 222 Mo.App. 180—*Buchholz v. Standard Oil Co. of Indiana*, 244 S.W. 973, 211 Mo. App. 397.

N.C.—*Rushing v. Texas Co.*, 154 S.E. 1, 199 N.C. 173.

25 C.J. p 185 note 47.

95. U.S.—*Corpus Juris Secundum* cited in *Smith v. U. S.*, D.C.Va., 155 F.Supp. 605, 609.

La.—*Varnado v. State*, 136 So. 771, 18 La.App. 624.

Liability of person rendering financial aid to contractor

Under the provisions of the contract for construction of the rapid transit subway in New York City, requiring the contractor sufficiently to maintain the traffic on the streets, and to take necessary precautions and erect proper guards to prevent accidents, and to be responsible for damages to abutting property, etc., the contractor is liable for damage to abutting property, caused by explosion of dynamite negligently stored by a subcontractor; but a company organized to render financial aid to the contractor in executing the contract is not liable.

N.Y.—*Smyth v. City of New York*, 96 N.E. 409, 203 N.Y. 106.

Delegation of duty to remove

Where failure to remove drum, containing paint used in constructing natural gas pipe line, from farm through which line passed, constituted negligence, construction company could not relieve itself of liability by delegating duty of removal to independent contractor.

Minn.—*Reichert v. Minnesota Northern Natural Gas Co.*, 263 N.W. 297, 195 Minn. 387.

96. Ala.—*Whaley v. Sloss-Sheffield Steel & Iron Co.*, 51 So. 419, 164 Ala. 216, 20 Ann.Cas. 822.

Tex.—*McGuffey v. Pierce-Fordyce Oil Assoc.*, Civ.App., 211 S.W. 335, 25 C.J. p 185 note 48.

(b) Degree of Care Required

One keeping or storing dangerous explosives must exercise care commensurate with the apparent danger; so, a high, or the highest, degree of care is required.

One who keeps or stores dangerous explosives must exercise reasonable care,⁹⁷ which is such care as is commensurate with, or in proportion to, the

97. *Ariz.*—Southwest Cotton Co. v. Clements, 213 P. 1005, 25 *Ariz.* 124, rehearing denied 215 P. 156, 25 *Ariz.* 169.

III.—*Corpus Juris* cited in *Bunyan v. American Glycerin Co.*, 230 Ill. App. 351, 357.

N.Y.—*Corpus Juris Secundum* cited in *Kingsland v. Erie County Agr. Soc.*, 84 N.E.2d 38, 45, 298 N.Y. 409, 10 A.L.R.2d 1.

Corpus Juris Secundum cited in *Hallenbeck v. Lone Star Cement Corp.*, 77 N.Y.S.2d 807, 810, 273 App.Div. 327, amended on other grounds 87 N.Y.S.2d 140, 275 App. Div. 728, affirmed 87 N.E.2d 679, 299 N.Y. 777—*Underhill v. Major*, 221 N.Y.S. 123, 220 App.Div. 173, affirmed 161 N.E. 168, 247 N.Y. 525.

N.C.—*Broughton v. Standard Oil Co. of New Jersey*, 159 S.E. 321, 201 N.C. 282.

Pa.—*Griffith v. Atlantic Refining Co.*, 157 A. 791, 305 Pa. 386.

Tex.—*Burton Const. & Shipbuilding Co. v. Broussard*, 273 S.W.2d 598, 154 Tex. 50.

W.Va.—*Bryant v. Guyan Valley Oil Co.*, 163 S.E. 773, 111 W.Va. 662, 25 C.J. p 185 note 49.

Duty to invitee

(1) Owner of premises owed invitee no duty relative to selection of storage place for dynamite, but was required to give invitee notice of attending danger, unless danger was obvious.

Mo.—*Goetz v. Hydraulic Press Brick Co.*, 9 S.W.2d 606, 330 Mo. 586, 60 A.L.R. 1064.

(2) An acetylene welder who was induced to leave his work on tanks which he was reconditioning under contract with oil company, to repair certain other tanks a couple of miles away, was an invitee to whom oil company owed duty to furnish a reasonably safe place to work and to warn against dangers of explosion which caused welder's death.

U.S.—*Crow v. Continental Oil Co.*, C. C.A.Tex., 115 F.2d 740—*Crow v. Continental Oil Co.*, C.C.A.Tex., 100 F.2d 292.

(3) If plaintiff who was injured in explosion of gasoline fumes which occurred in pit located on premises of waterworks plant was upon premises for common interest of himself and municipal waterworks corporation which owned the plant and town which leased and operated the plant, an invitation to plaintiff to enter the premises was implied, and if he was told to go to waterworks plant, for purpose of discussing employment, and entered pit housing gasoline en-

gine, which was located at the plant and, at suggestion of manager, ignited match which caused explosion and resulted in injury to plaintiff, plaintiff was an "invitee" of town even though he voluntarily entered the premises only for purpose of seeking employment.

Ind.—*Town of Kirklin v. Everman*, 28 N.E.2d 73, 217 Ind. 683, modified on other grounds 29 N.E.2d 206, 217 Ind. 683.

(4) A contractor entering strafing range to collect scrap metal pursuant to contract with the United States was a "business invitee" to whom the United States owed a duty to disclose the fact that unknown hazards existed on range by reason of the probable presence of unexploded shells.

U.S.—*White v. U. S.*, D.C.Cal., 97 F. Supp. 12.

Duty to licensee

(1) One sitting with others at filling station in front of store and post office where people were accustomed to assemble on Sunday when station, store, and post office were closed, and who was injured by explosion of underground tank, was mere "licensee," to whom owner of tank owed duty not willfully or intentionally or by acts of gross negligence to create situation resulting in injury; but the fact that no warning sign had been posted did not constitute gross negligence making owner of tank liable where match was accidentally dropped into filler pipe and explosion occurred.

Tenn.—*Texas Co. v. Haggard*, 134 S. W.2d 880, 23 Tenn.App. 475.

(2) Owner of shower bath room, erected for use of its employees, was not liable for injury from gas explosion therein to one on such premises as mere licensee, if not as trespasser.

Tex.—*Wimberly v. Gulf Production Co.*, Civ.App., 274 S.W. 986.

(3) Statute providing that "a person injured" by explosion of certain articles in possession of any person contrary to regulations has action for damages against such possessor imposed duty to gratuitous licensee, even if duty did not extend to trespassers.

U.S.—*Apanovich v. Wright*, C.A.Me., 226 F.2d 656.

(4) The duties owed by possessor of land to a licensee include the duty to warn him of the presence of harmful chemicals, explosives, or other inherently dangerous substances involving unusual hazard, especially when there is a fire on the premises, at least under circumstances where

licensees could not be expected to know of presence or effect of such substances.

Mo.—*Anderson v. Cinnamon*, 282 S.W. 2d 445, 365 Mo. 304.

City fireman

(1) Oil company was liable for injuries sustained by fireman in explosion of vapors remaining in recently opened gasoline tank while fireman was engaged in attempting to help put out a fire close to open manhole near bottom of tank, if the open manhole constituted a hidden danger of which the fireman was ignorant, if he had no opportunity of knowing of the hidden danger before the explosion, and if the oil company's agents knew of the hidden danger but failed to exercise reasonable care to warn the fireman thereof.

Ohio.—*James v. Cities Service Oil Co.*, 31 N.E.2d 872, 66 Ohio App. 87, affirmed 43 N.E.2d 276, 140 Ohio St. 314.

(2) Occupant of building which city fireman entered following benzol explosion owed fireman duty not limited to time when it knew of his presence.

Ill.—*Bandosch v. A. Daigger & Co.*, 255 Ill.App. 494.

Junk yard proprietor must keep his yard free and clear of dangerous explosives which might be brought by persons hauling shrapnel and other junk and depositing it in yard, for the reason that the proprietor should realize that such dangerous explosives remaining undisposed of on his premises are apt to be picked up by persons entering on the premises for lawful purposes, or by children having access to the premises and attracted thereby.

Miss.—*Shemper v. Cleveland*, 51 So.2d 770, suggestion of error overruled 54 So.2d 215, 212 Miss. 113.

Employee of independent contractor

Where, at the time of the accident in an explosion of gasoline which injured plaintiff, plaintiff was in the employ of an independent contractor to install a gasoline pump for defendant refining company and was on defendant refining company's premises by its invitation, it owed him the duty it owed to its own employees to warn him of the dangers incident to the work which he did not know or appreciate and could not reasonably have discovered, and which defendant refining company knew, or should have known, a duty which defendant could not delegate.

Mass.—*Carpenter v. Sinclair Refining Co.*, 129 N.E. 383, 237 Mass. 230.

Warning to mere fellow servant is insufficient to free third person from

apparent danger,⁹⁸ and the status of the injured person does not necessarily control under all the circumstances.^{98.5}

Accordingly, it is said that the utmost caution and highest degree of care must be used in the care

and custody of dangerous explosives, such as powder and dynamite,⁹⁹ and a high degree of care is required in the possession and storage of explosives generally,¹ and a high degree of care is required in the possession and storage of explosives es-

liability for negligent injury to employee.

R.I.—McArthur v. Dutee W. Flint Oil Co., 146 A. 484, 50 R.I. 226.

Held negligence

(1) Constructing filling station so that gasoline tank discharged vapors into restroom, causing explosion when customer entered smoking cigar.

N.C.—Rushing v. Texas Co., 154 S.E. 1, 199 N.C. 173.

(2) Leaving dynamite caps in abandoned shed about six hundred feet from school.

Mich.—Butrick v. Snyder, 210 N.W. 311, 236 Mich. 300.

(3) Allowing waste oil or gasoline to accumulate under barrel of gasoline for some time prior to fire which occasioned an explosion, in a built-up district, where the result could have been foreseen in exercise of due care.

Mass.—Pascucci v. A. G. Tomasello & Son, 200 N.E. 367, 293 Mass. 552.

Held not negligence

(1) Failure to warn of danger of explosion of powder magazine where danger was known.

S.C.—Atlantic Coast Line R. Co. v. Columbia Salvage Corporation, 135 S.E. 877, 138 S.C. 113.

(2) Leaving pieces of motion picture films, which are not inherently dangerous, accessible to child.

N.Y.—Beickert v. G. M. Laboratories, 151 N.E. 195, 242 N.Y. 168.

(3) Storing dynamite caps in stove on lot.

Wis.—Kowalke v. Schindler, 215 N.W. 894, 194 Wis. 175.

(4) Mere leaving of unexploded artillery shells on artillery range of the United States in isolated area, with result that seventeen-year-old high school boy of above average intelligence tampered with unexploded shell and was killed in explosion, was not negligence on the part of the United States as a matter of law.

U.S.—Denney v. U. S., C.A.N.M., 185 F.2d 108.

Willful or wanton negligence

If premises are inherently dangerous or if there is a dangerous instrumentality thereon such as highly dangerous explosives, failure to exercise ordinary care to prevent injury to a person reasonably expected to be within range of such danger is usually willful or wanton negligence.

Okl.—Ferguson-Beese, Inc. v. Young, 240 P.2d 780, 205 Okl. 579—Patsy Oil & Gas Co. v. Odom, 96 P.2d 302, 186 Okl. 116.

98. U.S.—Stewart v. U. S., C.A.Ill., 186 F.2d 627, certiorari denied U. S. v. Stewart, 71 S.Ct. 1000, 341 U.S. 940, 95 L.Ed. 1367.

Smith v. U. S., D.C.Va., 155 F. Supp. 605.

Ariz.—Southwest Cotton Co. v. Clements, 213 P. 1005, 25 Ariz. 124, rehearing denied 215 P. 156, 25 Ariz. 169.

Ark.—Sinclair Refining Co. v. Gray, 83 S.W.2d 820, 191 Ark. 175—Phillips Petroleum Co. v. Berry, 65 S.W.2d 533, 188 Ark. 431—Gibson Oil Co. v. Sherry, 291 S.W. 66, 172 Ark. 947.

Idaho.—Splinter v. City of Nampa, 215 P.2d 999, 70 Idaho 287, 17 A.L.R.2d 665—Miller v. Gooding Highway Dist., 41 P.2d 625, 55 Idaho 258.

Ill.—Corpus Juris cited in Dabrowski v. Illinois Cent. R. Co., 24 N.E.2d 382, 387, 303 Ill.App. 31—Corpus Juris cited in Bunyan v. American Glycerin Co., 230 Ill.App. 351, 357.

Ky.—Eastern Carbon Black Co. v. Stephens Adm'r, 287 S.W. 215, 216 Ky. 85.

La.—Hunt v. Rundle, 120 So. 696, 10 La.App. 604.

Mo.—Boyer v. Guidicy Marble Terrazzo & Tile Co., 246 S.W.2d 742.

N.Y.—Corpus Juris Secundum cited in Hallenbeck v. Lone Star Cement Co., 77 N.Y.S.2d 807, 810, 273 App. Div. 327, amended on other grounds 87 N.Y.S.2d 140, 275 App.Div. 728, affirmed 87 N.E.2d 679, 299 N.Y. 777.

N.C.—Stephens v. Blackwood Lumber Co., 131 S.E. 314, 191 N.C. 23, 43 A.L.R. 426.

Okl.—Cherry v. Arnwine, 259 P. 232, 126 Okl. 285, followed in Cherry v. Arnwine, 259 P. 233, 126 Okl. 287.

Pa.—Pryor v. Chambersburg Oil & Gas Co., 103 A.2d 425, 376 Pa. 521—Griffith v. Atlantic Refining Co., 157 A. 791, 305 Pa. 386.

Taylor v. Di Sandro, 156 A. 569, 102 Pa.Super. 258.

Tenn.—Corpus Juris cited in Nashville Ry. & Light Co. v. Williams, 11 Tenn.App. 1, 6.

Tex.—Corpus Juris Secundum cited in Robert R. Walker, Inc. v. Burgdorf, 244 S.W.2d 506, 509, 150 Tex. 603.

Va.—Daugherty v. Hippchen, 7 S.E.2d 119, 175 Va. 62.

Wash.—Bogges v. King County, 274 P. 188, 150 Wash. 578.

W.Va.—Bryant v. Guyan Valley Oil Co., 163 S.E. 773, 111 W.Va. 662, 25 C.J. p 185 note 50.

Master's duty toward servant see Master and Servant § 214.

98.5 Mo.—Boyer v. Guidicy Marble, Terrazzo & Tile Co., 246 S.W.2d 742.

99. U.S.—Stewart v. U. S., C.A.Ill., 186 F.2d 627, certiorari denied U. S. v. Stewart, 71 S.Ct. 1000, 341 U.S. 940, 95 L.Ed. 1367—Bridges v. Dahl, C.C.A.Mich., 108 F.2d 228.

Ariz.—Southwest Cotton Co. v. Clements, 213 P. 1005, 25 Ariz. 124, rehearing denied 215 P. 156, 25 Ariz. 169.

Cal.—Corpus Juris cited in People v. Fitzgerald, 58 P.2d 718, 725, 14 C.A.2d 180, certiorari denied Fitzgerald v. People of State of California, 57 S.Ct. 115, 299 U.S. 593, 81 L.Ed. 437.

Ill.—Corpus Juris cited in Haas v. Herdman, 1 N.E.2d 568, 570, 284 Ill. App. 103—Corpus Juris cited in Bunyan v. American Glycerin Co., 230 Ill.App. 351, 357.

Ky.—Fourseam Coal Corporation v. Hatfield, 130 S.W.2d 73, 279 Ky. 132.

Miss.—Hercules Powder Co. v. Williamson, 110 So. 244, 145 Miss. 172.

N.J.—Campbell v. Pure Oil Co., 194 A. 873, 15 N.J.Misc. 723.

N.C.—Luttrell v. Carolina Mineral Co., 18 S.E.2d 412, 220 N.C. 782—Beal v. Carolina Coal Co., 120 S.E. 333, 186 N.C. 744.

Ohio.—Byrnes v. Hewston, 13 Ohio App. 13.

Okl.—Cherry v. Arnwine, 259 P. 232, 126 Okl. 285, followed in Cherry v. Arnwine, 259 P. 233, 126 Okl. 287—Town of Depew, Creek County, v. Kilgore, 246 P. 606, 117 Okl. 263.

Pa.—Fritsch v. Atlantic Refining Co., 160 A. 699, 307 Pa. 71.

Taylor v. Di Sandro, 156 A. 569, 102 Pa.Super. 258.

Wash.—Bogges v. King County, 274 P. 188, 150 Wash. 578.

W.Va.—Wellman v. Fordson Coal Co., 143 S.E. 160, 105 W.Va. 463, 25 C.J. p 185 note 51.

1. U.S.—Voytas v. U. S., C.A.Ill., 256 F.2d 786.

Kan.—Branstetter v. Robbins, 283 P. 2d 455, 178 Kan. 8.

N.Y.—Kingsland v. Erie County Agr. Soc., 84 N.E.2d 38, 298 N.Y. 409, 10 A.L.R.2d 1.

Okl.—Lone Star Gas Co. v. Parsons, 14 P.2d 369, 159 Okl. 52.

Tenn.—Texas Co. v. Haggard, 134 S.W.2d 880, 23 Tenn.App. 475.

Va.—Daugherty v. Hippchen, 7 S.E.2d 119, 175 Va. 62.

25 C.J. p 185 note 52.

pecially where children are involved;² and the fact that defendant might have intended to return shortly to the scene of the explosion did not justify his leaving the explosives unguarded during the interval, however short.³

The rule requiring one who has the control of dangerous explosives or permits them to be upon his premises to exercise a degree of care in guarding them against injury to others, commensurate with the danger to be apprehended, applies, however, only where the person whom it is sought to hold responsible for resulting injuries is chargeable with notice of the existence and presence of the explosives.⁴ Moreover, the rule is inapplicable to trespassers except as to infants of tender years,⁵ although it has been said that one storing explosives owes to a trespasser a duty of higher degree than merely not willfully to harm him,⁶ and plaintiff's age, without regard to other facts which may be shown in evidence, has been held to be immaterial.^{6.5}

Effect of compliance with statutes or ordinances.
One complying with a municipal ordinance prescribing regulations for the storing of explosives is not relieved from liability for failure to comply with the obligation arising under the general rules of law to use such care in the maintenance and management of one's property as will be ordinarily used by a reasonably prudent man similarly placed.⁷

(c) Proximate Cause

The negligence alleged in keeping an explosive must be the proximate cause of the injury, but courts will not look too narrowly for intervening independent causes.

In order to establish liability, the negligence alleged in keeping or storing an explosive must be the proximate cause of the injury;⁸ but, since disastrous results from negligence in the care of high explosives may reasonably be anticipated, courts will not look too narrowly for independent causes intervening between the injury and the original negligence in keeping,⁹ and will hold an owner liable for

2. U.S.—*Bridges v. Dahl*, C.C.A. Mich., 108 F.2d 228.

Ariz.—*Buckeye Irr. Co. v. Askren*, 46 P.2d 1068, 45 Ariz. 566—*Southwest Cotton Co. v. Clements*, 213 P. 1005, 25 Ariz. 124, rehearing denied 215 P. 156, 25 Ariz. 169.

Idaho.—*Miller v. Gooding Highway Dist.*, 41 P.2d 625, 55 Idaho 258.

Ill.—*Haas v. Herdman*, 1 N.E.2d 568, 284 Ill.App. 103.

Ky.—*Fourseam Coal Corporation v. Hatfield*, 130 S.W.2d 73, 279 Ky. 132.

N.Y.—*Corpus Juris Secundum* cited in *Hallenbeck v. Lone Star Cement Corp.*, 77 N.Y.S.2d 807, 810, 273 App.Div. 327, amended on other grounds 87 N.Y.S.2d 140, 275 App. Div. 728, affirmed 87 N.E.2d 679, 299 N.Y. 777.

N.C.—*Luttrell v. Carolina Mineral Co.*, 18 S.E.2d 412, 220 N.C. 782.

Okl.—*Lone Star Gas Co. v. Parsons*, 14 P.2d 369, 159 Okl. 52—*Cherry v. Arnwine*, 259 P. 232, 126 Okl. 285, followed in *Cherry v. Arnwine*, 259 P. 233, 126 Okl. 287—*Town of Depew, Creek County, v. Kilgore*, 246 P. 606, 117 Okl. 263.

Pa.—*Taylor v. Di Sandro*, 156 A. 569, 102 Pa.Super. 258.

Tenn.—*Lawrence v. King*, 197 S.W.2d 548, 184 Tenn. 151.

Va.—*Daugherty v. Hippchen*, 7 S.E. 2d 119, 175 Va. 62.

Wash.—*Bogges v. King County*, 274 P. 188, 150 Wash. 578.

W.Va.—*Wellman v. Fordson Coal Co.*, 143 S.E. 160, 105 W.Va. 463.

25 C.J. p 185 note 53.
Liability for injuries to children generally see *infra* subdivision (4) of this section.

3. Ga.—*Lee v. Georgia Forest Prod-*

ucts Co., 163 S.E. 267, 44 Ga.App. 850.

4. U.S.—*Ford v. U. S.*, C.A.Okl., 200 F.2d 272.

Ala.—*Corpus Juris* cited in *Ragland v. Duke*, 137 So. 397, 223 Ala. 574.
Minn.—*Larson v. Duluth, M. & N. R. Co.*, 172 N.W. 762, 142 Minn. 366.
Pa.—*Doyle v. Atlantic Refining Co.*, 53 A.2d 68, 357 Pa. 92.

5. Ky.—*Commonwealth v. Henderson's Guardian*, 53 S.W.2d 694, 245 Ky. 328.

Okl.—*Ferguson-Beese, Inc., v. Young*, 240 P.2d 780, 205 Okl. 579.

6. N.C.—*Stephens v. Blackwood Lumber Co.*, 131 S.E. 314, 191 N.C. 23, 43 A.L.R. 426.

6.5 Mo.—*Boyer v. Guidicy Marble, Terrazzo & Tile Co.*, 246 S.W.2d 742.

7. Cal.—*Rathbun v. White*, 107 P. 309, 157 C. 248.

8. Ill.—*Corpus Juris* cited in *Haas v. Herdman*, 1 N.E.2d 568, 570, 284 Ill.App. 103—*Corpus Juris* cited in *Bunyan v. American Glycerin Co.*, 230 Ill.App. 351, 358.

Iowa.—*Pierce v. Liberty Oil Co.*, 183 N.W. 437, 191 Iowa 1013.

La.—*Bruchis v. Victory Oil Co.*, 153 So. 828, 179 La. 242.

N.Y.—*Baillargeon v. Chazy Lime & Stone Co.*, 123 N.Y.S.2d 823, 204 Misc. 407.

25 C.J. p 186 note 56.

Proximate cause of injuries to children see *infra* § 5 b (4).

Held not proximate cause

(1) Leaving dynamite caps in quarry from which plaintiff's companion, a trespasser, took them.

Mo.—*Kennedy v. Independent Quar-*

ry & Construction Co., 291 S.W. 475, 316 Mo. 782.

(2) Other illustrations.

Neb.—*Wax v. Co-operative Refinery Ass'n*, 46 N.W.2d 769, 154 Neb. 42.
Tenn.—*Casetty v. Mixon*, 245 S.W. 2d 636, 35 Tenn.App. 339.
25 C.J. p 186 note 56 [a].

9. Ill.—*Corpus Juris* cited in *Haas v. Herdman*, 1 N.E.2d 568, 570, 284 Ill.App. 103—*Bandos v. A. Daigler & Co.*, 255 Ill.App. 494—*Corpus Juris* cited in *Bunyan v. American Glycerin Co.*, 230 Ill.App. 351, 358.

Tex.—*Corpus Juris Secundum* cited in *Robert R. Walker, Inc. v. Burgdorf*, 244 S.W.2d 506, 509, 150 Tex. 603.

Wash.—*Mathis v. Granger Brick & Tile Co.*, 149 P. 3, 85 Wash. 634.

W.Va.—*Corpus Juris* cited in *Wellman v. Fordson Coal Co.*, 143 S.E. 160, 161, 105 W.Va. 463.

25 C.J. p 186 note 57.

Held not independent intervening proximate cause

(1) Where a fire at a gasoline filling station was caused by a static spark due to defendant's negligence in failing to provide a safety chain or device, it was no defense that the local fire department, responding to an alarm, directed a stream of water on the flowing gasoline which spread over the ground, such act of the fire department not being an independent intervening proximate cause of the injury to plaintiffs' goods stored in a nearby building.

U.S.—*Standard Oil Co. of New York v. R. L. Pitcher Co.*, C.C.A.Me., 289 F. 678.

(2) If an oil company allowed gasoline to escape from its warehouse

all natural and probable consequences which flow from the breach of the owner's duty to exert the proper degree of care.^{9,5} There is responsibility whether or not the results could have been anticipated, but the negligence must be such that a person of ordinary caution and prudence would have foreseen that some injury would likely result therefrom, although the specific injury need not have been foreseen.^{9,10}

Although explosives negligently kept are ignited by an incendiary, the party guilty of negligent keeping has been held liable for the death or injury of a person in attempting to extinguish the resulting fire.¹⁰

and run down the street, where it would probably come in contact with fire, sparks from a passing engine, or live ashes from a lighted cigar or cigarette dropped by a passer-by, and an explosion occurred, the oil company would be liable although it had no connection with the conduct of third person who caused the fire, or control over him.

N.C.—Newton v. Texas Co., 105 S.E. 433, 180 N.C. 561.

(3) So negligence in allowing gasoline to stream from automobile was held proximate cause of fire from match igniting stream.

Ark.—Gibson Oil Co. v. Sherry, 291 S.W. 66, 172 Ark. 947.

Fire transmitted across street

Where defendant's gasoline tank exploded, through negligence, and fire was transmitted directly to plaintiff's buildings across street, defendant was liable.

N.Y.—Homac Corporation v. Sun Oil Co., 180 N.E. 172, 258 N.Y. 462.

9.5 U.S.—Stewart v. U. S., C.A.III., 186 F.2d 627, certiorari denied U. S. v. Stewart, 71 S.Ct. 1000, 341 U.S. 940, 95 L.Ed. 1367.

Kan.—Feger v. Concrete Materials & Const. Co., 238 P.2d 708, 172 Kan. 75.

Injury held natural and probable consequence of explosion

Mo.—Combs v. Standard Oil Co. of Indiana, 296 S.W. 817, 222 Mo.App. 180.

9.10 Kan.—Feger v. Concrete Materials & Const. Co., 238 P.2d 708, 172 Kan. 75.

10. Colo.—Willson v. Colorado & S. R. Co., 142 P. 174, 57 Colo. 303. 25 C.J. p 186 note 58.

10.50 U.S.—Hollinghead v. Carter Oil Co., C.A.Miss., 221 F.2d 920, stating Alabama law.

Ga.—Hornsby v. Henry, 22 S.E.2d 326, 68 Ga.App. 171.

Okl.—Sidwell v. McVay, 282 P.2d 756.

Tex.—Hamrick v. Wilhite, Civ.App., 278 S.W.2d 578, error refused no reversible error.

11. U.S.—Alligator Co. v. Dutton, C. C.A.Mo., 109 F.2d 900.

Meara v. U. S., D.C.Ky., 119 F. Supp. 662.

Ariz.—Southwest Cotton Co. v. Clements, 213 P. 1005, 25 Ariz. 124, rehearing denied 215 P. 156, 25 Ariz. 169.

Conn.—Murphy v. Ossola, 199 A. 648, 124 Conn. 366.

Idaho.—Miller v. Gooding Highway Dist., 41 P.2d 625, 55 Idaho 258.

Kan.—Serviss v. Cloud, 246 P. 509, 121 Kan. 251.

Ky.—Fourseam Coal Corporation v. Hatfield, 130 S.W.2d 73, 279 Ky. 132—Sutton Const. Co. v. Lemaster's Adm'r, 3 S.W.2d 613, 223 Ky. 296—Eastern Carbon Black Co. v. Stephens' Adm'r, 287 S.W. 215, 216 Ky. 85.

La.—Hunt v. Rundle, 120 So. 696, 10 La.App. 604.

Miss.—Golden Saw Mill Co. v. Jourdan, 127 So. 287, 156 Miss. 813.

Mo.—Kansas City ex rel. Barlow v. Robinson, 17 S.W.2d 977, 32 S.W.2d 1075, 322 Mo. 1050—Diehl v. A. P. Green Fire Brick Co., 253 S.W. 984, 299 Mo. 641.

Ohio.—Vaughan v. Industrial Silica Corp., 42 N.E.2d 156, 140 Ohio St. 17.

Okl.—Ferguson-Beese, Inc. v. Young, 240 P.2d 780, 205 Okl. 579—Town of Depew, Creek County, v. Kilgore, 246 P. 606, 117 Okl. 263.

Pa.—Loughlin v. Pennsylvania R. Co., 87 A. 294, 240 Pa. 174.

Tenn.—Nashville Ry. & Light Co. v. Williams, 11 Tenn.App. 1.

25 C.J. p 186 note 60.

Degree of care required as to young children generally see supra subdivision 3 (b) of this section.

Particular explosives

(1) Explosive or dynamite caps. U.S.—Bridges v. Dahl, C.C.A.Mich., 108 F.2d 228—Luhman v. Hoover, C.C.A.Mich., 100 F.2d 127.

Ariz.—MacNeil v. Perkins, 324 P.2d 211, 84 Ariz. 74.

Ark.—Missouri Pac. R. Co. v. Slatton, 100 S.W.2d 86, 193 Ark. 356.

(4) Injuries to Children

One storing, keeping, or leaving explosives in a place to which children may have access must exercise a corresponding degree of care to protect them from injury, and his failure to do so will impose liability for injuries proximately resulting therefrom.

Although under some circumstances the doctrine of attractive nuisance has been held not to apply,^{10,50} one keeping, storing, or leaving explosives in a place to which children may have access will generally, since such articles are naturally attractive to children, be held to a corresponding degree of care to protect them from injury, and a failure to exercise such care will impose liability¹¹ for results

Mich.—Butrick v. Snyder, 210 N.W. 311, 236 Mich. 300.

Miss.—Corpus Juris cited in Hercules Powder Co. v. Wolf, 110 So. 842, 843, 145 Miss. 388.

Nev.—Smith v. Smith-Peterson Co., 45 P.2d 785, 56 Nev. 79, 100 A.L.R. 440, rehearing denied 48 P.2d 760, 56 Nev. 449, 100 A.L.R. 449.

Okl.—Patsy Oil & Gas Co. v. Odom, 96 P.2d 302, 186 Okl. 116—City of Tulsa v. McIntosh, 215 P. 624, 90 Okl. 50.

Pa.—Taylor v. Di Sandro, 156 A. 569, 102 Pa.Super. 258.

Va.—Daugherty v. Hippchen, 7 S.E. 2d 119, 175 Va. 62.

25 C.J. p 186 note 60 [a] (1).

(2) Powder.

W.Va.—Corpus Juris cited in Wellman v. Fordson Coal Co., 143 S.E. 160, 162, 105 W.Va. 463.

(3) Other explosives.

Ill.—Featherstone v. Freeding, 110 N.E.2d 535, 349 Ill.App. 359.

25 C.J. p 186 note 60 [a].

Highest care

Person handling dynamite has constant duty to exercise highest care not to leave dynamite or caps where children or others may be exposed to injury, and is liable for all natural or probable consequences from breach of that duty.

Or.—Corpus Juris cited in Fisher v.

Burrell, 241 P. 40, 42, 116 Or. 317.

25 C.J. p 186 note 60 [d].

Liability for acts of independent contractor

Boy injured by dynamite cap found on highway had absolute public right to use of highway, and where contractor's employee left dynamite caps in public highway and boy found them and was injured, county cannot escape liability by having made independent contract for construction work.

Wash.—Bogges v. King County, 274 P. 188, 150 Wash. 578.

Persons placing explosive in street should anticipate proximity of children.

which he should have foreseen and prevented.^{11.5} So, where the place of storage is readily accessible to the children, corresponding care must be exercised, although they may not have been in the habit of frequenting the place,¹² nor need liability rest on the doctrine of attractive nuisance.¹³

No liability arises, however, for injuries to children where there is no duty owed to them,^{13.5} or

where reasonable care has been exercised, or proper precautions taken,¹⁴ as where the explosives have been guarded with reasonable care, or left where there was no reason to anticipate meddling,¹⁵ or where there is sufficient notice.^{15.5} Some courts apply the same rule to children as toward other trespassers, at least until such time as their presence has been discovered and where they have not been invited or enticed by defendant.¹⁶ The attractive

Ala.—Ragland v. Duke, 137 So. 397, 223 Ala. 574.

Injury not on defendant's premises

In action for injuries sustained by a boy from discharge of dynamite cap found on defendant's premises, fact that boy was not injured on defendant's premises did not preclude recovery.

Conn.—Magaraci v. Santa Marie, 33 A.2d 424, 130 Conn. 323.

11.5 U.S.—Beasley v. U. S., D.C.S.C., 81 F.Supp. 518.

Duty to anticipate injury

(1) Owner permitting door of powder house to remain open and powder to be exposed in cans, with knowledge that children invited to premises by owner's agents had discovered powder, should have anticipated that children might take powder, ignite it, and thereby sustain injury.

Ariz.—Buckeye Irr. Co. v. Askren, 46 P.2d 1068, 45 Ariz. 566.
25 C.J. p 186 note 60 [c].

(2) A junk yard maintained with scrap iron, automobile parts, airplane parts, anti-aircraft shells, and other kinds of shells stacked on yard in heart of city and extending along side and over into public street was attractive to children, and proprietor could have reasonably anticipated that thirteen-and-one-half-year-old boy, injured in explosion of anti-aircraft shell carried from yard by boy, would be attracted to yard.
Miss.—Shemper v. Cleveland, 51 So. 2d 770, 212 Miss. 113, suggestion of error overruled 54 So.2d 215, 212 Miss. 113.

Material question

In determining whether twelve-year-old boy, who was injured when he and his companion removed powder from paper tubes found in city's park after fireworks display and placed it in brass tube and then ignited it, could recover from city, material question was whether city could have reasonably anticipated that tubes left apparently abandoned at place where children were accustomed to playing would be appropriated by the children and used for very purpose for which such powder was intended.
Mo.—Lottes v. Pessina, App., 174 S. W.2d 893.

12. Ky.—Carter Coal Co. v. Smith, 191 S.W. 631, 173 Ky. 843.

Nev.—Smith v. Smith-Peterson Co., 48 P.2d 760, 56 Nev. 449, 100 A.L.R. 449.

Or.—**Corpus Juris** cited in Fisher v. Burrell, 241 P. 40, 42, 116 Or. 317. 25 C.J. p 187 note 61.

13. U.S.—Alligator Co. v. Dutton, C. C.A.Mo., 109 F.2d 900—Luhman v. Hoover, C.C.A.Mich., 100 F.2d 127.

Kan.—Goehenour v. Brown, 180 P. 776, 104 Kan. 808.

Or.—**Corpus Juris** cited in Fisher v. Burrell, 241 P. 40, 42, 116 Or. 317. 25 C.J. p 187 note 62.

13.5 Okl.—Sidwell v. McVay, 282 P. 2d 756.

Dry ice

Defendant could not be charged with foreseeability that children playing with dry ice might be injured by an explosion, and could not be held liable for negligence in making dry ice available to plaintiff.

Ky.—Scott v. Oscar Ewing Dairy Co., 317 S.W.2d 477.

14. U.S.—Mason v. G. & W. H. Corson, Inc., C.A.Pa., 230 F.2d 393—U. S. v. Inmon, C.A.Tex., 205 F.2d 681.

Smith v. U. S., D.C.Va., 155 F. Supp. 605.

Kan.—Reece v. Wrightsman, 46 P. 2d 620, 142 Kan. 262.

Ky.—General Refractories Co. v. Mozier, 30 S.W.2d 952, 235 Ky. 252—Sparks v. Maeschal, 289 S.W. 308, 217 Ky. 235.

Ohio.—Berchtold v. Martin, 177 N.E. 57, 38 Ohio App. 556.

Tenn.—Lawrence v. King, 197 S.W.2d 548, 184 Tenn. 151.

15. Colo.—Burley v. McDowell, 298 P.2d 399, 133 Colo. 566.

Ky.—Bates v. Caudill, 255 S.W.2d 487—General Refractories Co. v. Mozier, 30 S.W.2d 952, 235 Ky. 252.

La.—**Corpus Juris** quoted in Mire v. Ziegler Co., 8 La.App. 640, 642.

Mich.—Thornton v. Ionia Fair Ass'n, 200 N.W. 958, 229 Mich. 1.

N.C.—Luttrell v. Carolina Mineral Co., 18 S.E.2d 412, 220 N.C. 782.

Or.—**Corpus Juris** cited in Fisher v. Burrell, 241 P. 40, 42, 116 Or. 317.

Tenn.—**Corpus Juris Secundum** quoted in Lawrence v. King, 197 S.W.2d 548, 550, 184 Tenn. 151.

Va.—Rieder v. Garfield Manor Corporation, 178 S.E. 677, 164 Va. 192. 25 C.J. p 187 note 63.

Mere licensee

Thirteen-year-old boy, injured by powder explosion, using exposition grounds as playground with owner's passive acquiescence, was held mere licensee, and owner was not bound to anticipate that boy would find powder on premises and pour it over lighted paper causing explosion.

Mass.—Bruso v. Eastern States Exposition, 168 N.E. 206, 269 Mass. 21.

15.5 U.S.—Smith v. U. S., D.C.Va., 155 F.Supp. 605.

16. N.Y.—Flaherty v. Metro Stations, 196 N.Y.S. 2, 202 App.Div. 583, affirmed 139 N.E. 753, 235 N. Y. 605.

Vt.—Chicoine v. James E. Cashman, Inc., 183 A. 487, 108 Vt. 133.

Wis.—Kowalke v. Schindler, 215 N. W. 894, 194 Wis. 175.

25 C.J. p 187 note 64.
Care required toward children as trespassers generally see Negligence §§ 27-29.

Held trespasser

Where fifteen-year-old boy climbed up side of oil tank on property leased by oil company, forcibly opened hatchway on tank, and peered into opening with light in his hand, such act was one of trespasser, and not that of invitee or licensee.

U.S.—Hollinghead v. Carter Oil Co., C.A.Miss., 221 F.2d 920.

Held not trespasser

(1) Boy finding dynamite caps while walking along bank of highway was held not trespasser.

Iowa.—Eves v. Littig Const. Co., 212 N.W. 154, 202 Iowa 1338.

(2) That boy was using cemented area contiguous to sidewalk and apparently a part of it for play at time of injury by exploding gas in underground tank was held not to prevent his having legal status of traveler.
Conn.—Sedita v. Steinberg, 134 A. 243, 105 Conn. 1, 49 A.L.R. 154.

(3) Recovery of damages from junk yard operator for injuries to boy by explosion of anti-aircraft shell picked up by him on street adjacent to junk yard, was not barred on ground that he was a trespasser or guilty of willful wrong in remov-

nuisance doctrine is not applicable where the child knows that he is doing wrong when he takes explosives while trespassing.^{16.5}

The children of a tenant, rightfully upon the leased premises or a way of necessity thereto, are not trespassers, and a landlord leaving attractive explosives exposed and accessible to them is liable for any resulting injury,¹⁷ but he is not liable where he leaves the explosives in a comparatively inaccessible place, such as the loft of a tool house used by his tenant, outside of the tenant's inclosure,¹⁸ nor is defendant liable where he had no knowledge

of the presence of the explosives.¹⁹

The extent of care to be taken is affected by the child's knowledge and understanding of the dangers.²⁰ Liability cannot be avoided by the fact that warning has been given to young children.²¹

Proximate cause. Notwithstanding the person injured is a child, to impose liability defendant's act or omission must have been the proximate cause of the injury.²² Thus, there can be no liability where there has been a break in the causal chain between the negligence and the injury,^{22.5} as by an intervening cause,^{22.10} unless such break was itself

ing shell from where he found it to his home, as he was entitled to assume that shell was thrown onto street and abandoned by operator. Miss.—Shemper v. Cleveland, 54 So. 2d 215, 212 Miss. 113.

Rule held inapplicable

Rule that property owner is liable to trespasser only for willfully or wantonly injuring him or proximately causing him to be injured was inapplicable in action for injuries to boy by explosion of shell picked up by him on street adjacent to defendant's junk yard, since he was not on defendant's premises as trespasser or otherwise.

Miss.—Shemper v. Cleveland, supra.

16.5 Tex.—Missouri Pac. R. Co. v. Hance, Civ.App., 310 S.W.2d 374, error refused no reversible error.

17. Mich.—Powers v. Harlow, 19 N. W. 257, 53 Mich. 507, 51 Am.R. 154.

18. Ky.—Miller v. Chandler, 173 S. W. 779, 163 Ky. 301.

19. Ky.—Sparks v. Maeschal, 289 S. W. 308, 217 Ky. 235.

20. U.S.—Bridges v. Dahl, C.C.A. Mich., 108 F.2d 228.

Idaho.—Miller v. Gooding Highway Dist., 41 P.2d 625, 55 Idaho 258.

Boy held not expected to know deadly character of dynamite caps.

Iowa.—Eves v. Littig Const. Co., 212 N.W. 154, 202 Iowa 1338.

21. Ky.—Cumberland River Oil Co. v. Dicken, 131 S.W.2d 927, 279 Ky. 700—Sutton Const. Co. v. Lemaster's Adm'r, 3 S.W.2d 613, 223 Ky. 296—Miller v. Chandler, 182 S.W. 833, 168 Ky. 606.

Or.—**Corpus Juris cited in** Fisher v. Burrell, 241 P. 40, 43, 116 Or. 317. 25 C.J. p 187 note 67.

Contributory negligence of children see Negligence §§ 144-149.

22. Kan.—Reece v. Wrightsman, 46 P.2d 620, 142 Kan. 262.

La.—**Corpus Juris cited in** Mire v. Ziegler Co., 8 La.App. 640, 643.

N.Y.—**Corpus Juris Secundum quoted at length in** Kingsland v. Erie County Agr. Soc., 84 N.E.2d 38, 45,

298 N.Y. 409, 10 A.L.R.2d 1—Morse v. Buffalo Tank Corporation, 19 N. E.2d 981, 280 N.Y. 110.

Kukkonen v. Cameron, 30 N.Y.S. 2d 927, 263 App.Div. 760.

N.C.—**Corpus Juris quoted in** Luttrell v. Carolina Mineral Co., 18 S.E.2d 412, 418, 220 N.C. 782—**Corpus Juris quoted in** Stephens v. Blackwood Lumber Co., 131 S.E. 314, 318, 191 N.C. 23, 43 A.L.R. 426.

Tenn.—Gatlinburg Const. Co. v. McKinney, 263 S.W.2d 765, 37 Tenn. App. 343.

25 C.J. p 187 note 68.

Proximate cause construed

In action under the attractive nuisance doctrine, court properly charged that "proximate cause" means that cause which in a natural and continuous sequence, unbroken by any new or independent cause, produces injury, and without which injury would not have occurred, and for which it ought to have been foreseen or reasonably anticipated by person in exercise of ordinary care that injuries complained of, or some similar injury, would result naturally and probably in light of attending circumstances.

Tex.—Hamrick v. Wilhite, Civ.App., 278 S.W.2d 578, error refused no reversible error.

Held proximate cause

(1) Leaving powder unguarded on highway.

Ky.—Sutton Const. Co. v. Lemaster's Adm'r, 3 S.W.2d 613, 223 Ky. 296.

(2) Leaving dynamite caps, when abandoning construction camp, in pasture in populous rural community where third person allegedly buried them.

Tex.—Atex Const. Co. v. Farrow, Civ. App., 71 S.W.2d 323, error refused.

Concurring cause

(1) Where ten year old boy sustained injuries caused by burning naphtha or other substance procured from container which laundry company maintained on its premises in a location accessible to children, company could not rely on another boy's action in throwing some of the same

substance on fire which was communicated to ten year old boy's clothing as a new, independent, efficient and intervening cause, or sole proximate cause of the injuries, in order to avoid liability.

Tex.—Natatorium Laundry Co. v. Saylors, Civ.App., 131 S.W.2d 790, error dismissed, judgment correct.

(2) Where nine year old boy was burned while playing on vacant lot when inflammable waste product which his companion had procured in a small can from a bucket standing near defendant's incinerator adjacent to lot came in contact with open fire which children had built, there was direct connection between defendant's negligence in leaving product available to children and boy's injury, and if can was blown into fire by wind, the wind was not an "intervening cause" but was a "concurring cause."

U.S.—Alligator Co. v. Dutton, C.C.A. Mo., 109 F.2d 900.

(3) Act of adult third party in attaching dynamite cap taken by children from basement to magneto and placing it in plaintiff's hands was held not to break causal connection between negligence of defendant leaving caps exposed and plaintiff's injury.

Mo.—Kansas City ex rel. Barlow v. Robinson, 17 S.W.2d 977, 32 S.W.2d 1075, 322 Mo. 1050.

22.5 W.Va.—McKinney v. Miller, 75 S.E.2d 854, 138 W.Va. 324.

22.10 W.Va.—McKinney v. Miller, supra.

Held no intervening cause

(1) Act of a child causing explosion or ignition of inherently dangerous commodity which is left in a place accessible to children or where they are wont to congregate is not such an intervening cause as will relieve owner of such commodity from liability for a breach of his duty. Ill.—Zazkowski v. Choyce, 59 N.E.2d 324, 324 Ill.App. 582.

(2) Acts of a 17-year-old trespasser in removing from defendant's premises apparently abandoned dynamite

of such character as to have been reasonably expected or foreseeable.^{22,15} Where explosives are wrongfully carried away from the place in which they are stored by children capable of understanding the wrongful nature of their act, the negligence in keeping or storing cannot be regarded as the proximate cause of a subsequent injury to the child or other children by their use, where defendant has done nothing to invite or provoke the act of the child and there is nothing in the circumstances which would cause it to be foreseen.²³ So, likewise, the maintenance of a nuisance in the storage of explosives cannot be regarded as the proximate cause of an injury to a child occurring after explosives have been wrongfully taken by him from the premises.²⁴

These rules apply as well where the child originally taking the explosives gives them to other children who injure themselves;²⁵ but where defendant knowingly permits children to take dangerous dynamite caps from its premises, it must anticipate the probable result that they will be exploded by them or their playmates, causing injury.²⁶

An act by a child too young to know what he is doing will not constitute an intervening cause.²⁷ Where a child, through defendant's original negligent act, has obtained possession of explosives and his parent, with knowledge of their character and of the fact that he has them in his possession, fails to take them away from him, the causal connection between defendant's act and a subsequent injury to the child is broken,²⁸ but the parent must have had knowledge of the character of the article.²⁹

§ 6. — Sale

- a. In general
- b. Failure to give notice, misrepresentation, or concealment of character
- c. Statutes regulating sale and notice
- d. Liability to subsequent purchasers
- e. Selling to infant or incapable person

a. In General

One who sells explosives, including the manufacturer thereof, is liable for injuries resulting from his negligence.

One who sells explosive substances is not liable

mite cap, the character and identity of which were unknown to finder, and probing cap with a nail, did not constitute, as a matter of law, such an intervening cause as would relieve defendant from liability for injuries sustained by finder in explosion of cap.

Mo.—Boyer v. Guidicy Marble, Terrazzo & Tile Co., 246 S.W.2d 742.

(3) Other circumstances.

U.S.—Stewart v. U. S., C.A.III., 186 F.2d 627, certiorari denied U. S. v. Stewart, 71 S.Ct. 1000, 341 U.S. 940, 95 L.Ed. 1367.

Beasley v. U. S., D.C.S.C., 81 F. Supp. 518.

Tenn.—Gatlinburg Const. Co. v. McKinney, 263 S.W.2d 765, 37 Tenn. App. 343.

22.15 W.Va.—McKinney v. Miller, 75 S.E.2d 854, 138 W.Va. 324.

23. Ky.—Codell Const. Co. v. Campbell's Guardian, 57 S.W.2d 1010, 248 Ky. 1.

Mo.—Kennedy v. Independent Quarry & Construction Co., 291 S.W. 475, 316 Mo. 782.

N.Y.—Morse v. Buffalo Tank Corporation, 19 N.E.2d 981, 280 N.Y. 110.

Babcock v. Fitzpatrick, 225 N.Y. S. 30, 221 App.Div. 638, affirmed 162 N.E. 543, 248 N.Y. 608.

N.C.—Corpus Juris quoted in Luttrell v. Carolina Mineral Co., 18 S.E.2d 412, 418, 220 N.C. 782—Corpus Juris quoted in Stephens v. Blackwood Lumber Co., 131 S.E. 314, 318, 191 N.C. 23, 43 A.L.R. 426.

Ohio.—Berchtold v. Martin, 177 N.E. 57, 38 Ohio App. 556.

Tex.—Corpus Juris cited in Murphy v. City of Rotan, Civ.App., 139 S.W. 2d 134, 139, error dismissed, judgment correct.

25 C.J. p 188 note 69.

24. N.H.—Bennett v. Odell Mfg. Co., 80 A. 642, 76 N.H. 180.

N.Y.—Babcock v. Fitzpatrick, 225 N.Y.S. 30, 221 App.Div. 638, affirmed 162 N.E. 543, 248 N.Y. 608.

25. N.Y.—Babcock v. Fitzpatrick, supra.

N.C.—Luttrell v. Carolina Mineral Co., 18 S.E.2d 412, 220 N.C. 782.

Tex.—Corpus Juris cited in Murphy v. City of Rotan, Civ.App., 139 S.W.2d 134, 139, error dismissed, judgment correct.

W.Va.—McKinney v. Miller, 75 S.E.2d 854, 138 W.Va. 324.

25 C.J. p 188 note 71.

26. Cal.—Hale v. Pacific Tel. & Tel. Co., 183 P. 280, 42 C.A. 55.

27. U.S.—Luhman v. Hoover, C.C.A. Mich., 100 F.2d 127.

Ariz.—Buckeye Irr. Co. v. Askren, 46 P.2d 1068, 45 Ariz. 566.

Iowa.—Eves v. Littig Const. Co., 212 N.W. 154, 202 Iowa 1338.

Ky.—Sutton Const. Co. v. Lemaster's Adm'r, 3 S.W.2d 613, 223 Ky. 296.

Mich.—Butrick v. Snyder, 210 N.W. 311, 236 Mich. 300.

Nev.—Smith v. Smith-Peterson Co., 45 P.2d 785, 56 Nev. 79, 100 A.L.R. 440, rehearing denied 48 P.2d 760, 56 Nev. 449, 100 A.L.R. 449.

N.J.—Valency v. Rigillo, 102 A. 348, 91 N.J.Law 307.

Okl.—City of Tulsa v. McIntosh, 215 P. 624, 90 Okl. 50.

W.Va.—Wellman v. Fordson Coal Co., 143 S.E. 160, 105 W.Va. 463.

Negligence

Where highway contractor had permitted dynamite caps used in highway construction work to be stored in open garage building around which children customarily played, negligence of fifteen year old boy in attempting to explode dynamite caps found on shelf in garage was not sole proximate cause as a matter of law of his injuries caused by explosion.

U.S.—Bridges v. Dahl, C.C.A.Mich., 108 F.2d 228.

28. Ark.—Pittsburg Reduction Co. v. Horton, 113 S.W. 647, 87 Ark. 576, 18 L.R.A.N.S. 905.

Minn.—Peterson v. Martin, 164 N.W. 813, 138 Minn. 195.

25 C.J. p 188 note 74.

29. Wash.—Mathis v. Granger Brick & Tile Co., 149 P. 3, 85 Wash. 634. 25 C.J. p 188 note 75.

Concurring negligence

Where unexploded dynamite caps were found by plaintiff and his brother, and one exploded, causing injury, after an examination of a cap by his mother, who, apparently without knowledge of its dangerous character, handed it back to the boys, the mother's act was one of concurring negligence, and did not break the causal connection between the defendant's negligence and the injury.

Mo.—Diehl v. A. P. Green Fire Brick Co., 253 S.W. 984, 299 Mo. 641.

for an injury resulting therefrom in the absence of negligence on his part,³⁰ and, conversely, he is liable for injuries resulting from his negligence.³¹ The liability for negligence extends not only to the purchaser, but also to those who are handling the article in the usual and necessary course of the purchaser's business.³²

A manufacturer is held to a higher degree of care than a dealer in putting dangerous compounds on the market, since he knows, and the dealer is not presumed to know, the formula by which the com-

pound is made, or whether it is inherently dangerous,³³ the dealer, or seller, being under no obligation to test articles manufactured or packed by others for the purpose of discovering latent dangers or defects.³⁴ So the manufacturer of an explosive is responsible to one injured by its use without a showing that he knew it to be unsafe and dangerous and either concealed the defects or represented them as safe and sound,³⁵ although this rule does not apply where the article is not inherently dangerous;³⁶ nor is it any defense that he procured it from an-

30. U.S.—Sierocinski v. E. I. Du Pont De Nemours & Co., C.C.A.Pa., 118 F.2d 531—McLamb v. E. I. Du Pont De Nemours & Co., C.C.A.N.C., 79 F.2d 966.

Roettig v. Westinghouse Electric & Manufacturing Co., D.C.Mo., 53 F.Supp. 588.

Ill.—Gaw v. Lake Erie Chemical Co., 11 N.E.2d 982, 293 Ill.App. 123.

La.—Hardware Dealers Mut. Fire Ins. Co. v. Standard Oil Co. of Louisiana, App., 15 So.2d 155.

Miss.—Gordy v. Pan American Petroleum Corporation, 193 So. 29, 188 Miss. 313—Hercules Powder Co. v. Calcote, 138 So. 583, 161 Miss. 860.

S.C.—Guyton v. S. H. Kress & Co., 5 S.E.2d 295, 191 S.C. 530.

Wis.—Barnes v. Murray, 10 N.W.2d 123, 243 Wis. 297.

25 C.J. p 183 note 77.

Fire extinguisher

Defendant company to which laundry company sent fire extinguisher for refilling, if refilling extinguisher with chemicals usually used, was held not negligent merely because extinguisher was unsound, in absence of patent defect, precluding recovery for death of laundry company's employee resulting from explosion during attempt to use extinguisher.

Pa.—Cantner v. James M. Castle, Inc., 185 A. 264, 322 Pa. 166.

Presence of foreign matter

In absence of proof that coal dealer had knowledge of presence of dangerous foreign matter in coal or should have discovered it by reasonable inspection, dealer is not liable to consumer for injuries resulting thereby.

La.—Strother v. Villere Coal Co., App., 15 So.2d 383.

Held not insurers

Tex.—Erwin v. Dunn, Civ.App., 201 S.W.2d 240, error refused no reversible error.

31. U.S.—Roettig v. Westinghouse Elec. & Mfg. Co., D.C.Mo., 53 F. Supp. 588.

Ariz.—Barker v. General Petroleum Corp., 232 P.2d 390, 72 Ariz. 187, modified on other grounds 233 P.2d 449, 72 Ariz. 238.

Cal.—Northwestern Nat. Ins. Co. of Milwaukee, Wis., v. Rogers Pattern & Aluminum Foundry, 166 P.2d 401, 73 C.A.2d 442—Feeney v. Standard Oil Co., 209 P. 85, 58 C.A. 587.

Ga.—Fleming v. E. I. Du Pont De Nemours & Co., 81 S.E.2d 529, 89 Ga. App. 337.

La.—Moore v. Jefferson Distilling & Denaturing Co., 123 So. 384, 12 La.App. 405, reversed on other grounds 126 So. 691, 169 La. 1156.

Mich.—Grinnell v. Carbide & Carbon Chemicals Corporation, 276 N. W. 535, 282 Mich. 509.

25 C.J. p 183 note 78.

Illegal or negligent sale of ammunition see Weapons §§ 30-32.

Acid

(1) Party selling sulphuric acid is required to use degree of care commensurate with the dangers thereof, and, where the purchaser and its employee did not know the specific gravity or the degrees of heat of the sulphuric acid delivered, they had a right to presume that the acid would be delivered to them in a safe condition. So, where a truck driver received a steel drum of sulphuric acid from defendant and hauled it a distance of about a mile which consumed about ten minutes and it was unloaded and moved and then exploded, there was no intervening cause which would relieve defendant of liability for its negligence, but defendant's act in placing hot acid in a metal drum and closing it up was the proximate cause of the accident.

Tenn.—Read Phosphate Co. v. Vickers, 11 Tenn.App. 146.

(2) That buyer of hydrofluoric acid furnished jugs did not relieve seller of duty of ascertaining that jugs were suitable.

N.J.—Hopper v. Charles Cooper & Co., 139 A. 19, 104 N.J.Law 93, 55 A.L.R. 187.

Cigarettes

Under rule making manufacturer liable where the article made by manufacturer is reasonably certain, if negligently made, to be a thing of danger to user, a cigarette containing an explosive substance may be considered "a thing of danger."

N.Y.—Meditz v. Liggett & Myers Tobacco Co., 3 N.Y.S.2d 357, 167 Misc. 176, affirmed 25 N.Y.S.2d 315.

Theory of recovery

Where deceased contracted with purchaser to fill steel drums and one exploded, vendor could not be held for wrongful death on theory of contract or agency.

La.—Moore v. Jefferson Distilling & Denaturing Co., 126 So. 691, 169 La. 1156.

Lack of safety valves on cylinders

Even though seller of gas-filled cylinders may have been negligent in failing to equip cylinders with proper safety valves, seller was not liable for fire damage to buyers' buildings because risk protected by valves was not from damage caused by fire, but from explosive propensities of gas.

Ky.—Verkamp Corp. of Ky. v. Hubbard, 296 S.W.2d 740.

32. Ark.—Colyar v. Little Rock Bottling Works, 169 S.W. 810, 114 Ark. 140.

Miss.—Gulf Refining Co. v. Williams, 185 So. 234, 183 Miss. 723.

25 C.J. p 183 note 80.

33. Fla.—Craig v. Baker & Holmes Co., 96 So. 93, 85 Fla. 373.

Manufacture and sale of articles intrinsically or inherently dangerous generally see Negligence § 100.

Vendor of steel drums was not held to duty and liability of manufacturer, in action for wrongful death from explosion of drum, and was held not liable to strangers for negligence, evidence not showing them intrinsically or inherently dangerous, although they could be exploded by reckless act.

La.—Moore v. Jefferson Distilling & Denaturing Co., 126 So. 691, 169 La. 1156.

34. Fla.—Craig v. Baker & Holmes Co., 96 So. 93, 85 Fla. 373.

Pa.—Kratz v. American Stores Co., 59 A.2d 138, 359 Pa. 335.

35. Mass.—Thornhill v. Carpenter-Morton Co., 108 N.E. 474, 220 Mass. 593.

36. Ky.—Stone v. Van Noy R. News Co., 154 S.W. 1092, 153 Ky. 240.

other, instead of having it compounded on his own premises, where he represented himself as the manufacturer.³⁷ However, a dynamite and cap manufacturer is not responsible as manufacturer as to another manufacturer's fuse sold because dynamite, caps, and fuse form an essential combination for blasting work.³⁸

One who sells gasoline or other explosive oil must use ordinary care,³⁹ as in distributing it in reasonably safe containers,⁴⁰ or in transferring it from one receptacle to another.⁴¹ The care required is such care as is commensurate with the danger.⁴² If the seller fails to exercise the required care, he is liable for resulting injuries;⁴³ but there can be no re-

covery unless such negligence was the proximate cause of the injury.⁴⁴

It has been held that the driver of a fuel oil or gasoline truck has no duty to anticipate and guard against any negligence of the customer or his employees,⁴⁵ or to go upon a customer's premises to inspect its pipes, storage tank, or other facilities without the invitation, license, or permission of the owner,⁴⁶ and that a fuel oil dealer is not liable for damages from an explosion caused during the pumping of oil into a customer's tank by the clogging of a vent pipe.⁴⁷

Negligence in giving instructions. If a manufacturer, by its agent, gives instructions for the use of any of its explosive products, it is liable for its neg-

La.—Strother v. Villere Coal Co., App., 15 So.2d 383.

Mass.—Kusick v. Thorndike, 112 N. E. 1025, 224 Mass. 413. 25 C.J. p 189 note 83.

37. U.S.—Green v. Equitable Powder Mfg. Co., D.C.Ark., 95 F.Supp. 127.

Mass.—Thornhill v. Carpenter-Morton Co., 108 N.E. 474, 220 Mass. 593.

Miss.—Gordy v. Pan American Petroleum Corporation, 193 So. 29, 188 Miss. 313.

38. Miss.—Hercules Powder Co. v. Calcutt, 138 So. 583, 161 Miss. 860.

39. Ill.—Loverde v. Consumers Petroleum Co., 63 N.E.2d 673, 327 Ill. App. 210.

Illuminating oils

Reasonable care is required of seller of illuminating oils for resale. Ala.—Merchants' Bank v. Sherman, 110 So. 805, 215 Ala. 370.

Propane gas

Ky.—Verkamp Corp. of Ky. v. Hubbard, 296 S.W.2d 740.

40. U.S.—E. I. Du Pont De Nemours & Co. v. Wright, C.C.A.Ky., 146 F. 2d 765, certiorari denied 65 S.Ct. 1017, 324 U.S. 873, 89 L.Ed. 1426.

Miss.—Gulf Refining Co. v. Williams, 185 So. 234, 183 Miss. 723.

Tanks and pumps furnished free

One engaged in sale and distribution of gasoline is not, as to tanks and pumps furnished and installed free to retail dealers, a manufacturer or vendor.

Okl.—Palacine Oil Co. v. Philpot, 289 P. 281, 144 Okl. 123.

41. Ark.—Waters-Pierce Oil Co. v. Knisel, 96 S.W. 342, 79 Ark. 608.

Cal.—Feeney v. Standard Oil Co., 209 P. 85, 58 C.A. 587.

Neb.—Bacon v. A. B. A. Independent Oil & Gasoline Co., 198 N.W. 143, 111 Neb. 830, 33 A.L.R. 769.

Pa.—Konchar v. Cebular, 3 A.2d 913, 333 Pa. 499.

Gasoline dealer held charged with knowledge that gasoline is highly volatile and that it gives off fumes or gases that readily ignite when in proximity to a flame.

Utah.—Vadner v. Rozzelle, 45 P.2d 561, 88 Utah 162, rehearing denied 54 P.2d 1214, 88 Utah 172.

42. Ill.—Loverde v. Consumers Petroleum Co., 63 N.E.2d 673, 327 Ill. App. 210—Bellomy v. Bruce, 25 N. E.2d 428, 303 Ill.App. 349.

Miss.—Gulf Refining Co. v. Williams, 185 So. 234, 183 Miss. 723.

43. Ark.—Waters-Pierce Oil Co. v. Knisel, 96 S.W. 342, 79 Ark. 608.

Ill.—Bellomy v. Bruce, 25 N.E.2d 428, 303 Ill.App. 349.

Minn.—Childs v. Standard Oil Co., 182 N.W. 1000, 149 Minn. 166.

Defective container

Where defect in threads of bung cap on gasoline drum, known to employees of seller of gasoline, caused outburst of fire when buyer's employee tried to remove the cap, seller should have foreseen probability of the accident, and hence was liable for injuries to buyer's employee.

Miss.—Gulf Refining Co. v. Williams, 185 So. 234, 183 Miss. 723.

Demonstration of delivery truck

In action for death from explosion caused by driver's negligence in emptying gasoline truck tank, truck dealer furnishing driver for demonstration and prospective buyer for whom driver was delivering gasoline were liable as joint tort-feasors.

Pa.—Gordon v. S. M. Byers Motor Car Co., 164 A. 334, 309 Pa. 453.

44. Minn.—Childs v. Standard Oil Co., 182 N.W. 1000, 149 Minn. 166.

Tenn.—McKinnon v. Michaud, 260 S. W.2d 721, 37 Tenn.App. 148.

Reasonably foreseeable injury

Whether seller's negligence in overflowing tank of automobile with gasoline was proximate cause of fire depended on whether seller should

reasonably have foreseen some injury might result. Seller was charged with knowledge that gasoline is highly inflammable and that persons around automobile strike matches when smoking and that automobile parts become so heated as to ignite inflammable substances.

Miss.—Standard Oil Co. of Kentucky v. Evans, 122 So. 735, 154 Miss. 475.

Held not proximate cause

Where defendant's agent, in delivering gasoline into underground tank, spilled a small quantity thereof, and another threw a lighted match in proximity to inlet pipe of tank at time gasoline was being poured into it, act of defendant's agent, even if negligence, was only remote cause of resultant fire, and direct and proximate cause was throwing of lighted match, and hence defendant was not liable for loss caused by fire.

La.—Globe & Rutgers Fire Ins. Co. of New York v. Standard Oil Co. of Louisiana, 104 So. 707, 153 La. 763.

45. Pa.—Fritsch v. Atlantic Refining Co., 160 A. 699, 307 Pa. 71.

46. Ill.—Allegretti v. Murphy-Miles Oil Co., 1 N.E.2d 389, 363 Ill. 137.

Pa.—Doyle v. Atlantic Refining Co., 53 A.2d 68, 357 Pa. 92—Fritsch v. Atlantic Refining Co., 160 A. 699, 307 Pa. 71.

Wash.—Peterson v. Betts, 165 P.2d 95, 24 Wash.2d 376.

Assumption as to equipment

Vendor delivering gasoline to filling station had right to assume that owner and operator of station had properly constructed, and was properly maintaining, the equipment necessary and usual in the operation of the station.

La.—Gerald v. Standard Oil Co. of Louisiana, App., 10 So.2d 409, reversed on other grounds 16 So.2d 233, 204 La. 690.

47. Ill.—Allegretti v. Murphy-Miles Oil Co., 1 N.E.2d 389, 363 Ill. 137.

ligence in giving such instructions in connection with the sale of its products.^{47.5}

b. Failure to Give Notice, Misrepresentation, or Concealment of Character

The seller of an explosive substance, knowing its nature, must give the purchaser notice of its dangerous character or he will be liable, irrespective of contract, for injuries proximately resulting to innocent persons not themselves at fault.

The seller of an explosive substance, knowing its nature, must give the purchaser notice of its dangerous character, by a proper label or otherwise, or he will be liable for injuries resulting to innocent persons who are not themselves at fault.⁴⁸ A dealer may be liable under an implied warranty that articles sold by him are fit for the particular purpose, on condition that the specific instructions on the containers are complied with,^{48.5} and where a dealer gives instructions differing from those given by the manufacturer, he cannot escape liability because the manufacturer's instructions were not followed.^{48.10}

Thus, one who sells gasoline or a mixture con-

taining a high explosive, under the label, guise, or name of kerosene, illuminating oil, or other low explosive, is liable for injuries resulting from its explosion in ordinary use according to its appearance;⁴⁹ and one who sells or places on the market explosive or highly inflammable stove polish, without any warning on the label or other notice of its dangerous character, is liable for any injuries resulting from such negligence.⁵⁰

There can be no recovery, in such cases, unless the negligence of the vendor was the proximate cause of the injury,⁵¹ and he had knowledge of the danger or defect,⁵² or should have had such knowledge if ordinary prudence had been exercised by him or his servants;⁵³ but there need not be any contractual relation between the vendor and the person injured in consequence of his negligence,⁵⁴ especially where there is an affirmative misrepresentation of safety.⁵⁵

c. Statutes Regulating Sale and Notice

The vendor's liability may be controlled by express statutes defining his duties and imposing liability inde-

47.5 Ga.—Fleming v. E. I. Du Pont De Nemours & Co., 81 S.E.2d 529, 89 Ga.App. 837.

48. U.S.—Standard Oil Co. v. Lyons, C.C.A.Iowa, 130 F.2d 965.

Ark.—Corpus Juris cited in Gibson Oil Co. v. Bush, 1 S.W.2d 88, 93, 175 Ark. 944.

Cal.—Northwestern Nat. Ins. Co. of Milwaukee, Wis. v. Rogers Pattern & Aluminum Foundry, 166 P.2d 401, 73 C.A.2d 442.

La.—Frazier v. Ayres, App., 20 So.2d 754.

N.Y.—Genesee County Patrons Fire Relief Ass'n v. L. Sonneborn Sons, 189 N.E. 551, 263 N.Y. 463.

Moss v. Fred Perlberg, Inc., 29 N.Y.S.2d 922.

Okl.—Spencer v. Bolt, 200 P. 187, 82 Okl. 280.

Tenn.—Corpus Juris cited in Read Phosphate Co. v. Vickers, 11 Tenn. App. 146, 154.

Va.—American Oil Co. v. Nicholas, 157 S.E. 754, 156 Va. 1.

Wis.—Beznor v. Howell, 233 N.W. 758, 203 Wis. 1.

25 C.J. p 189 note 86.

Fireworks

Sellers of fireworks were under the common-law duty not to sell an article capable of injuring the buyer, if the buyer did not know or could not reasonably be assumed to know the dangerous character of the article.

Tex.—Erwin v. Dunn, Civ.App., 201 S.W.2d 240, refused no reversible error.

Adequate warning held given

La.—Crochet v. DeLuca, App., 53 So. 2d 203—Richardson v. DeLuca, App., 53 So.2d 199.

Store held not liable

Where store had purchased stove polish from a manufacturer and label contained a warning against exposing polish to heat or fire, the store was not liable to purchaser for damages resulting from explosion or catching fire of stove polish when allegedly used according to directions. Pa.—Kratz v. American Stores Co., 59 A.2d 138, 359 Pa. 335.

48.5 Fla.—Southern Pine Extracts Co. v. Bailey, 75 So.2d 774.

48.10 Fla.—Southern Pine Extracts Co. v. Bailey, supra.

49. Ala.—Merchants' Bank v. Sherman, 110 So. 805, 215 Ala. 370.

Ark.—Corpus Juris cited in Gibson Oil Co. v. Bush, 1 S.W.2d 88, 93, 175 Ark. 944.

Ind.—Ft. Wayne Drug Co. v. Fleming, 175 N.E. 670, 93 Ind.App. 40.

Va.—American Oil Co. v. Nicholas, 157 S.E. 754, 156 Va. 1.

25 C.J. p 189 note 87.

50. Conn.—Wolcho v. Rosenbluth, 71 A. 566, 81 Conn. 358, 21 L.R.A., N.S., 571.

25 C.J. p 189 note 88.

51. U.S.—Louisiana Oil Refining Corporation v. Reed, C.C.A.La., 26 F.2d 14, certiorari denied Reed v. Louisiana Oil Refining Corporation, 49 S.Ct. 31, 278 U.S. 632, 73 L.Ed. 549.

25 C.J. p 190 note 90.

Knowledge of danger

Where men examining steel drums had knowledge of situation and were warned of danger of explosion, it was immaterial that drums were not labeled.

La.—Moore v. Jefferson Distilling & Denaturing Co., 126 So. 691, 169 La. 1156.

Vendor's negligence held not proximate cause of death

La.—Moore v. Jefferson Distilling & Denaturing Co., supra.

52. Mich.—Pickens v. Crowley-Milner & Co., 241 N.W. 838, 258 Mich. 102—Pesavento v. E. I. Dupont de Nemours & Co., 215 N.W. 330, 240 Mich. 434.

Miss.—Hercules Powder Co. v. Cal-cote, 138 So. 583, 161 Miss. 850.

Mo.—Corpus Juris Secundum cited in Winkler v. Macon Gas Co., 238 S.W. 2d 386, 391, 392, 361 Mo. 1017.

S.C.—Guyton v. S. H. Kress & Co., 5 S.E.2d 295, 191 S.C. 530.

Va.—Belcher v. Goff Bros., 134 S.E. 588, 145 Va. 448.

25 C.J. p 190 note 91.

53. Mich.—McLawson v. Paragon Refining Co., 164 N.W. 668, 198 Mich. 222.

54. Tenn.—Corpus Juris cited in Read Phosphate Co. v. Vickers, 11 Tenn.App. 146, 154.

25 C.J. p 190 note 93.

55. Wash.—Marsh v. Usk Hardware Co., 132 P. 241, 73 Wash. 543.

pendent of negligence or making a violation negligence per se. The statutory requirements are to be construed according to the ordinary meaning of the language employed.

The liability of a vendor of explosives may be controlled by express provisions of statutes which define his duty toward a purchaser, in using proper brands and labels, and maintaining proper standards of explosives,⁵⁶ and which may impose liability independent of negligence,⁵⁷ or make a violation negligence per se.⁵⁸ Under at least one statute, for liability to be imposed for injuries sustained as a result of a violation of the statute, there must be a recognizably practical or reasonable connection between the violation and the accident.^{58.5}

Where a statute requires oils to be inspected or tested before sale, the duty to test and inspect cannot be delegated to an undisclosed manufacturer residing outside of the state,⁵⁹ and a vendor selling in violation thereof is liable to the purchaser for

any damages caused by the use of such oils.⁶⁰ A statute prohibiting the sale or the offering for sale of oils below test is not violated by the keeping of such oils for illumination or other use.⁶¹ Compliance with such statutes by proper inspection, tests, and branding, as required, will relieve from liability, unless negligence otherwise is shown.⁶² Ignorance of the dangerous character of oil, sold in violation of statute, is no defense.⁶³

Where, in violation of statute, one sells gasoline in an unmarked container, and the gasoline explodes when a blowtorch is placed near it, it cannot be said, as a matter of law, that the injury resulting to one standing nearby was unforeseeable.^{63.5} A statute making it unlawful to sell any kerosene in a receptacle painted red does not make it unlawful to deliver kerosene to a purchaser who furnishes a red can as a receptacle therefor.⁶⁴

The statutory requirements constitute a legislative declaration of the minimum of care necessary un-

56. Mass.—Killam v. Standard Oil Co. of New York, 143 N.E. 698, 248 Mass. 575.

Mich.—Stone v. Sinclair Refining Co., 196 N.W. 339, 225 Mich. 344.

Wis.—Beckman v. Bemis-Hooper-Hays Co., 250 N.W. 420, 212 Wis. 565.

25 C.J. p 190 note 95.

Privity of contract

One who dispenses thing made by law inherently dangerous is liable in tort, although there is no privity of contract between seller and injured person.

Okl.—La Fayette v. Bass, 252 P. 1101, 122 Okl. 182.

Concurring negligence

U.S.—Willoughby v. Sinclair Oil & Gas Co., D.C.Okl., 89 F.Supp. 994.

Statute held not applicable

Act applying to sale or disposition of coal oil, burning oil, or any fluid derived wholly or in part from coal or petroleum used for illuminating purposes would have no application to case involving personal injuries arising out of explosion of net preservative solution containing Benzol, where such solution was being used for dipping trawl nets at time of explosion.

La.—Richardson v. DeLuca, App., 53 So.2d 199.

57. U.S.—Manning Mfg. Co. v. Hartol Products Corporation of New England, C.C.A.Vt., 99 F.2d 813.

Mass.—Killam v. Standard Oil Co. of New York, 143 N.E. 698, 248 Mass. 575.

Minn.—Dart v. Pure Oil Co., 27 N.W. 2d 555, 223 Minn. 526, 171 A.L.R. 885.

N.H.—Olena v. Standard Oil Co., 135 A. 27, 82 N.H. 408.

Okl.—La Fayette v. Bass, 252 P. 1101, 122 Okl. 182.
25 C.J. p 190 note 96.

Ordinance held not "statute"

Ordinance forbidding sale of fireworks within city was held not "statute" within statutory provision authorizing one injured by violation of statute to recover from offender.

Ky.—Baker v. White, 65 S.W.2d 1022, 251 Ky. 691.

58. Iowa.—Ives v. Welden, 87 N.W. 408, 114 Iowa 476, 89 Am.S.R. 379, 54 L.R.A. 854.

Minn.—Dart v. Pure Oil Co., 27 N.W. 2d 555, 223 Minn. 526, 171 A.L.R. 885.

Or.—Peterson v. Standard Oil Co., 106 P. 337, 55 Or. 511, Ann.Cas. 1912A 625.

25 C.J. p 190 note 97.

Failure to have products tested

Fact that oil company had violated the statute in failing to have its products tested by the state oil inspector did not make it liable per se for damages resulting from explosion of a product sold by it, but that fact, coupled with fact that none of the product sold was available for testing after explosion, could be considered by the jury in reaching their verdict for persons damaged by the explosion.

Ill.—Chapman v. Deep Rock Oil Corp., 77 N.E.2d 883, 333 Ill.App. 529.

Held not negligence per se

Wis.—Barnes v. Murray, 10 N.W.2d 123, 243 Wis. 297.

58.5 N.Y.—Daggett v. Keshner, 134 N.Y.S.2d 524, 284 App.Div. 733.

59. Miss.—Gordy v. Pan American Petroleum Corporation, 193 So. 29, 188 Miss. 313.

60. Kan.—National Oil Co. v. Rankin, 75 P. 1013, 68 Kan. 679.

Mich.—Stowell v. Standard Oil Co., 102 N.W. 227, 139 Mich. 18.
25 C.J. p 191 note 1.

Purpose of statute

The statutes regulating sale of petroleum products, prohibiting the sale of gasoline or other similar products under any other than true name, and requiring certificate showing that product has been tested, are not mere taxation statutes, but manifest an intention to protect lives and property of citizens of state.

Miss.—Gordy v. Pan American Petroleum Corporation, 193 So. 29, 188 Miss. 313.

Negligence in mixture

Statute requiring all oils to be tested before being put on the market does not relieve a distributor of petroleum products from consequences of negligent action in mixing kerosene and gasoline after he has purchased such product for purposes of sale.

Kan.—Phillips v. Doyle, 207 P.2d 465, 167 Kan. 376.

61. Pa.—Donahue v. Kelly, 37 A. 186, 181 Pa. 93, 59 Am.S.R. 632.
25 C.J. p 191 note 2.

62. Iowa.—Chapman v. Pfarr, 123 N.W. 992, 145 Iowa 196.
25 C.J. p 191 note 3.

63. Okl.—La Fayette v. Bass, 252 P. 1101, 122 Okl. 182.
25 C.J. p 191 note 4.

63.5 N.C.—Reynolds v. Murph, 84 S.E.2d 273, 241 N.C. 60.

64. Ind.—Barnett v. Sinclair Refining Co., 145 N.E. 894, 82 Ind.App. 372.

der the circumstances, and a lesser degree is negligence as a matter of law.⁶⁵ Such requirements are to be construed according to the ordinary meaning of the language employed.⁶⁶ The statutes do not abrogate the defense of contributory negligence of the person injured, where such negligence is the proximate cause of the injury.⁶⁷ Where the failure to comply with the statutory requirements was not the proximate cause of the injury complained of, however, it has been held that the vendor was not liable.⁶⁸

d. Liability to Subsequent Purchasers

The liability of a wholesale dealer or manufacturer who sells explosives in violation of statute or with knowledge, and without warning, of their dangerous character is not confined to the immediate purchaser, but extends to subsequent purchasers.

Where a wholesaler dealer or manufacturer sells oil or other explosives in violation of statute, or with knowledge, and without warning, of their dangerous character, his liability is not confined to the immediate purchaser, but extends to subsequent purchasers;⁶⁹ nor is he absolved from such liability by negligence of the retail dealer in selling such explosive or failing to warn his customers after discovering the dangerous character thereof.⁷⁰

It may be shown that the adulteration of oil was the result of improper manufacture, as well as of ad-

mixture after manufacture.⁷¹ The manufacturer or wholesaler is not liable, however, unless there is proof that the adulteration of the oil, or other negligence charged, occurred before its delivery to the retailer;⁷² and, although a manufacturer has been accustomed to supply a merchant with petroleum for sale to his customers, he is under no obligation to such customers to continue furnishing it, but may, with the consent of such merchant, supply gasoline instead.⁷³

A retail dealer in illuminating oils, or a consumer purchasing from him, is not chargeable, as a matter of law, with knowledge that naphtha is highly explosive, so as to relieve the original seller from liability.⁷⁴

e. Selling to Infant or Incapable Person

The seller of explosives, including intrinsically dangerous fireworks, to children, or others, whom he knows to be incapable of taking proper care of them, is liable for injuries resulting from their improper use by such persons as the natural and probable consequence of the sale.

If one sells gunpowder or other explosives to children, or to others whom he knows to be incapable of taking proper care of them, he is liable for injuries resulting from their improper use by such persons;⁷⁵ and a license to sell explosives is no defense for selling to an infant or one incapable of proper care.⁷⁶ The seller will not be liable, how-

65. Or.—Peterson v. Standard Oil Co., 106 P. 337, 55 Or. 511, Ann. Cas.1912A 625.

66. Minn.—Schmidt v. Capital Candy Co., 166 N.W. 502, 139 Minn. 378.

25 C.J. p 191 note 5.

67. N.D.—Morrison v. Lee, 133 N.W. 548, 22 N.D. 251, 38 L.R.A., N.S., 412.

25 C.J. p 191 note 99.

Contributory negligence as defense see infra § 11 (2) b.

68. Miss.—Gordy v. Pan American Petroleum Corporation, 193 So. 29, 188 Miss. 313.

N.Y.—Richman v. Follman, 23 N.Y.S.2d 917, 260 App.Div. 1009, affirmed 36 N.E.2d 908, 286 N.Y. 669.

Held not intervening cause

Minn.—Farrell v. G. O. Miller Co., 179 N.W. 566, 147 Minn. 52.

25 C.J. p 190 note 96 [b].

69. U.S.—W. T. Rawleigh Co. v. Shoultz, C.C.A.Pa., 56 F.2d 148—Gulf Refining Co. of Louisiana v. Jinright, C.C.A.Ala., 10 F.2d 306.

Ala.—Merchants' Bank v. Sherman, 110 So. 805, 215 Ala. 370.

Ind.—Standard Oil Co. of Indiana v. Robb, 149 N.E. 567, 85 Ind.App. 21.

Ky.—Kentucky Independent Oil Co.

v. Schnitzler, 271 S.W. 570, 208 Ky. 507, 39 A.L.R. 979.

La.—**Corpus Juris Secundum** cited in Frazier v. Ayres, App., 20 So.2d 754, 757.

Mich.—Stone v. Sinclair Refining Co., 196 N.W. 339, 225 Mich. 344.

Neb.—Tegler v. Farmers' Union Gas & Coal Co., 246 N.W. 721, 124 Neb. 336.

N.H.—Olena v. Standard Oil Co., 135 A. 27, 82 N.H. 408.

N.Y.—Hallenbeck v. S. Wander & Sons Chemical Co., 189 N.Y.S. 334, 197 App.Div. 855.

N.C.—Ramsey v. Standard Oil Co., 120 S.E. 331, 186 N.C. 739.

Va.—American Oil Co. v. Nicholas, 157 S.E. 754, 156 Va. 1.

25 C.J. p 191 note 6.

70. Ky.—Kentucky Independent Oil Co. v. Schnitzler, 271 S.W. 570, 208 Ky. 507, 39 A.L.R. 979.

La.—**Corpus Juris Secundum** quoted at length in Frazier v. Ayres, App., 20 So.2d 754, 757.

Va.—American Oil Co. v. Nicholas, 157 S.E. 754, 156 Va. 1.

71. Mich.—Stowell v. Standard Oil Co., 102 N.W. 227, 139 Mich. 18.

72. U.S.—Riggs v. Standard Oil Co., C.C.Minn., 130 F. 199.

Cal.—Catlin v. Union Oil Co., 161 P. 29, 31 C.A. 597.

25 C.J. p 191 note 8.

73. N.J.—Marples v. Standard Oil Co., 59 A. 32, 71 N.J.Law 352.

74. Mass.—Wellington v. Downer Kerosene Oil Co., 104 Mass. 64.

75. Conn.—**Corpus Juris** cited in Burbee v. McFarland, 157 A. 538, 539, 114 Conn. 56.

Tex.—A. J. Anderson Co. v. Reich, Civ.App., 249 S.W. 298, reversed on other grounds, Com.App., 260 S.W. 162.

25 C.J. p 191 note 11.

Sale of firearms to children see Weapons §§ 30-32.

Violation of statute

The sale of any cartridge, gunpowder, or other dangerous and explosive substance to a person under sixteen years of age in violation of statute is "negligence per se" and renders seller liable for any natural or probable harmful result which might follow in wake of his wrongful acts.

Pa.—Mautino v. Piercedale Supply Co., 13 A.2d 51, 338 Pa. 435.

25 C.J. p 191 note 11 [a].

76. Mass.—Carter v. Towne, 98 Mass. 567, 96 Am.D. 682.

ever, unless the injury is the natural and probable consequence of the sale;⁷⁷ but the mere fact that there was an intervening agency between the original wrong of selling an explosive to a child and the injury does not exonerate the seller, if the injury was the natural and probable result of the sale.⁷⁸

Fireworks. The sale to a child of tender years of fireworks which are intrinsically dangerous is an actionable wrong for which the seller will be held liable in case damage results to the child as a proximate consequence thereof,⁷⁹ the duty of the dealer being measured not only by what he actually knew of the nature of the fireworks, but by what he should have known in the exercise of due care.⁸⁰ While a "sparkler," intended for the use of children, and consisting in part of a substance or chemical mixture which gives off sparks when lighted, is a mild explosive,⁸¹ it is not inherently or imminently dangerous,⁸² and a person, other than a manufacturer, selling such an article is not liable for an injury to a child from its use in the absence of proof of knowledge on his part of some concealed danger, not apparent from mere inspection.⁸³ While this rule has been extended to the manufacturer or wholesaler of such an article,⁸⁴ it has been held that the manufacturer is charged with the duty

of giving a reasonable warning of the dangers which would naturally follow, and which a person of ordinary sense and understanding would apprehend as likely to follow, the use of the article for fireworks, and is liable for an injury resulting from a failure to give the necessary instructions and warning as to the use of the article.⁸⁵

§ 7. — Use in General

While the rule of absolute liability has been laid down in some cases, the general rule is that one whose business requires the use of explosives must exercise care commensurate with the danger, or the highest degree of care, and is liable for injuries proximately caused by his negligence.

There is authority to the effect that one using explosives, such as dynamite, under such circumstances as to cause a likelihood of risk to others does so at his peril and is an insurer absolutely liable if damage results to third persons either from the direct impact of objects thrown out by the explosion or from concussion, and irrespective of negligence in, or illegality of, use;⁸⁶ but the more general rule is that one whose business requires the use of explosives must use such care and caution in handling or guarding them as reasonably prudent and careful persons whose business requires the use of such explosives ordinarily exercise,⁸⁷ and

77. Ill.—Mondt v. Ehrenwerth, 251 Ill.App. 226.
Mass.—Carter v. Towne, 103 Mass. 507.
Pa.—Panetti v. Williams, 41 Lack. Jur. 25.
25 C.J. p 192 note 13.

Cigarette-lighter fluid was not a dangerous substance within doctrine that one who puts a dangerous implement in hands of a person incompetent to use it can be chargeable with knowledge of consequences.
N.Y.—Traynor v. United Cigar-Wheeler Stores Corp., 79 N.Y.S.2d 329, 274 App.Div. 800.

78. Ind.—Binford v. Johnston, 82 Ind. 426, 42 Am.R. 508.
Pa.—Mautino v. Piercedale Supply Co., 13 A.2d 51, 338 Pa. 435.

79. "Mine"

To sell a so-called "mine," which is a form of fireworks that explodes with violence and sends a flame to a great height, to children about eight years old, is an actionable wrong for which the seller will be held liable in case damage results to a child as the proximate consequence, particularly where the clerk of the seller informs children purchasing the same that it is a harmless, familiar form of red fire. So, where the sale is made to a young girl whom plaintiff accompanied, the two being under nine years of age, and plaintiff is in-

jured, making the sale to the girl does not free defendant from liability.

Mo.—Bosserman v. Smith, 226 S.W. 608, 205 Mo.App. 657.

"Flash salutes" consisting of an explosive compound, contained in a covering of hard composition, which when exploded would cause pieces of the covering to fly with great force in all directions have been held to be intrinsically dangerous as respects liability of a seller for injuries resulting to an infant purchaser.

Conn.—Burbree v. McFarland, 157 A. 538, 114 Conn. 56.

80. Conn.—Burbree v. McFarland, supra.

Injuries resulting from discharge of fireworks generally see *infra* § 10.

81. Minn.—Schmidt v. Capital Candy Co., 166 N.W. 502, 139 Minn. 378.

82. Wis.—Beznor v. Howell, 233 N. W. 758, 203 Wis. 1.
45 C.J. p 891 note 38.

83. Minn.—Schmidt v. Capital Candy Co., 166 N.W. 502, 139 Minn. 378.

84. Wis.—Beznor v. Howell, 233 N. W. 758, 203 Wis. 1.

85. N.Y.—Henry v. Crook, 195 N. Y.S. 642, 202 App.Div. 19.

86. U.S.—Ekner v. Sherman Power

Const. Co., C.C.A.Vt., 54 F.2d 510, 80 A.L.R. 686.

Conn.—Welz v. Manzillo, 155 A. 841, 113 Conn. 674.

Okla.—Smith v. Yoho, 324 P.2d 531—Seismograph Service Corp. v. Buchanan, 316 P.2d 185.

Or.—Bedell v. Goulter, 261 P.2d 842, 199 Or. 344.

One contracting for work requiring intrinsically dangerous agency, such as dynamite, is liable for injury resulting from failure to see that means are adopted to prevent it.

Conn.—Welz v. Manzillo, 155 A. 841, 113 Conn. 674.

87. Ill.—Siniarski v. Hudson, 87 N. E.2d 137, 338 Ill.App. 137.

Iowa.—Eves v. Littig Const. Co., 212 N.W. 154, 202 Iowa 1338.

Mo.—Boyer v. Guidicy Marble, Terrazzo & Tile Co., 246 S.W.2d 742—**Corpus Juris cited in Kansas City ex rel. Barlow v. Robinson**, 17 S.W. 2d 977, 981, 32 S.W.2d 1075, 322 Mo. 1050.

Okla.—Phillips Petroleum Co. v. Price, 298 P.2d 772.

Or.—**Corpus Juris cited in Fisher v. Burrell**, 241 P. 40, 44, 116 Or. 317.
Tex.—Liner v. U. S. Torpedo Co., Com.App., 12 S.W.2d 552, reheard 16 S.W.2d 519.

Va.—Braxton v. Flippo, 33 S.E.2d 757, 183 Va. 839.

25 C.J. p 192 note 16.

is liable for injuries caused by his negligence.⁸⁸

The care is greater than is required with respect to articles not commonly considered dangerous,⁸⁹ and will vary according to the more or less dangerous character of the explosives,⁹⁰ the duty being to use such care as is commensurate with

the danger involved.⁹¹ A high, or the highest, degree of care, has been required,^{91.5} and the required standard of care has been held to be so great that a slight deviation therefrom will constitute negligence.^{91.10} What might be reasonable care in respect of grown persons of experience may be negligence as applied to youths and children.⁹²

Persons to whom duty runs

Duty to exercise ordinary care in the handling of tanks of ammonia gas runs to those who the handler should anticipate might lawfully come within the orbit of the danger arising from negligence in the handling thereof.

Ga.—Atlantic Co. v. Taylor, 54 S.E. 2d 910, 80 Ga.App. 25.

Trespasser or licensee can claim benefit of rule.

Mo.—Boyer v. Guidicy Marble, Terrazzo & Tile Co., 246 S.W.2d 742.

Consumer held not negligent

U.S.—Panther Oil & Grease Mfg. Co. v. Segerstrom, C.A.Wash., 224 F. 2d 216.

88. U.S.—Bullock v. U. S., D.C.Utah, 133 F.Supp. 885—White v. U. S., D.C.Cal., 97 F.Supp. 12.

Cal.—Warner v. Santa Catalina Island Co., 282 P.2d 12, 44 C.2d 310.

Conn.—Reciprocal Exchange v. Altherm, Inc., 115 A.2d 460, 142 Conn. 545.

Kan.—Feger v. Concrete Materials & Const. Co., 238 P.2d 708, 172 Kan. 75.

Md.—Frenkil v. Johnson, to Use of National Retailers Mut. Ins. Co., 3 A.2d 479, 175 Md. 592.

Tenn.—McKinnon v. Michaud, 260 S.W.2d 721, 137 Tenn.App. 148.

No liability in absence of negligence
U.S.—Ford v. U. S., C.A.Okl., 200 F. 2d 272.

Hopson v. U. S., D.C.Ark., 136 F. Supp. 804—Flores v. U. S., D.C.N.M., 105 F.Supp. 640.

Cal.—Zanardi v. Pacific Tel. & Tel. Co., 284 P.2d 851, 134 C.A.2d 3—Biddlecomb v. Haydon, 40 P.2d 873, 4 C.A.2d 361.

Miss.—Burnside v. Gulf Refining Co., 148 So. 219, 166 Miss. 460.

Tex.—McKay v. Kelly, Civ.App., 229 S.W.2d 117, affirmed Kelly v. McKay, 233 S.W.2d 121, 149 Tex. 343.

W.Va.—Redman v. Community Hotel Corp., 76 S.E.2d 759, 138 W.Va. 456.

Wis.—Hadjenian v. Sears, Roebuck & Co., 90 N.W.2d 786, 4 Wis.2d 298.

Knowledge or notice

(1) Persons using powerful explosives such as dynamite are charged with knowledge, which by reasonable diligence they could have acquired, as to probable consequences of their action.

Kan.—Feger v. Concrete Materials & Const. Co., 238 P.2d 708, 172 Kan. 75.

(2) Ordinance making it misdemeanor to permit automobile to stand on street with gasoline dripping did not create liability, where automobilist had no notice of any defect in gasoline tank, from nozzle of which gasoline leaked onto street, and where no act or omission of his brought about explosion which injured child.

Miss.—Burnside v. Gulf Refining Co., 148 So. 219, 166 Miss. 460.

(3) The fact that defendant who furnished rat poison knew that it was dangerous as a poison because it contained a small percentage of phosphorus did not charge him with knowledge that it was explosive, so as to render him liable for injuries sustained by plaintiff when a can of rat poison near a gas burner exploded and burned her hand as she was attempting to light the gas burner.

Okl.—Larrimore v. American Nat. Ins. Co., 89 P.2d 340, 184 Okl. 614.

Negligence of independent contractor

(1) An independent contractor may be held liable for his negligence even after the work has been accepted by the contractee.

Ill.—Paul Harris Furniture Co. v. Morse, 139 N.E.2d 275, 10 Ill.2d 28.

(2) Ice cream manufacturer was not liable for injuries caused by explosion after escape of ammonia from refrigeration system as alleged result of negligence of independent contractor's employee in repairing valve.

Cal.—Biddlecomb v. Haydon, 40 P.2d 873, 4 C.A.2d 361.

Violation of statute

(1) Violation of statute relating to use of explosives, requiring a certain course of conduct for the protection of third persons, is negligence of itself, and when it is the proximate cause of injury, is actionable negligence.

Conn.—Murphy v. Ossola, 199 A. 648, 124 Conn. 366.

(2) A violation of any of the statutes regulating use of butane gas or of rules promulgated thereunder by Boiler Inspection Department for installation and use of butane gas tanks is evidence of negligence.

Ark.—Rice v. King, 218 S.W.2d 91, 214 Ark. 813.

89. Ky.—Louisville & N. R. Co. v. Smith's Adm'r, 263 S.W. 29, 203 Ky. 513, 35 A.L.R. 1238.

Okl.—Corpus Juris Secundum cited in Independent-Eastern Torpedo Co. v. Price, 258 P.2d 189, 198, 208 Okl. 633.

25 C.J. p 192 note 17.

Degree of care in blasting see infra § 8.

90. Iowa.—Eves v. Littig Const. Co., 212 N.W. 154, 202 Iowa 1338—Lanza v. Le Grand Quarry Co., 100 N.W. 448, 124 Iowa 659.

91. U.S.—White v. U. S., D.C.Cal., 97 F.Supp. 12.

Ky.—Sutton Const. Co. v. Lemaster's Adm'r, 3 S.W.2d 613, 223 Ky. 296.

La.—Norton v. Louisiana Ice & Utilities, 135 So. 717, 18 La.App. 564.

Mo.—Stumpf v. Panhandle Eastern Pipeline Co., 189 S.W.2d 223, 354 Mo. 208.

Okl.—Phillips Petroleum Co. v. Price, 298 P.2d 772.

Pa.—Taylor v. Di Sandro, 156 A. 569, 102 Pa.Super. 258.

Tenn.—Gannon v. Crichlow, 13 Tenn. App. 281.

Tex.—Robert R. Walker, Inc. v. Burgdoy, 244 S.W.2d 506, 150 Tex. 603.

Master's duty toward servant see Master and Servant § 214.

91.5 U.S.—Ford v. U. S., C.A.Okl., 200 F.2d 272.

Bullock v. U. S., D.C.Utah, 133 F.Supp. 885—Pure Oil Co. v. Geotechnical Corp. of Del., D.C.La., 94 F.Supp. 866, affirmed, C.C.A., Geotechnical Corp. of Del. v. Pure Oil Co., 196 F.2d 199, certiorari denied 73 S.Ct. 165, 344 U.S. 874, 97 L.Ed. 681, and Pizzo v. Geotechnical Corp. of Del., 73 S.Ct. 175, 344 U.S. 879, 97 L.Ed. 676.

Cal.—Warner v. Santa Catalina Island Co., 282 P.2d 12, 44 C.2d 310.

D.C.—Crumph v. Browning, Mun.App., 110 A.2d 695, 46 A.L.R.2d 1212.

Vt.—Thompson v. Green Mountain Power Corp., 144 A.2d 786, 120 Vt. 478.

Degree of care in blasting see infra § 8.

91.10 Cal.—Warner v. Santa Catalina Island Co., 282 P.2d 12, 44 C.2d 310.

92. Mo.—Boyer v. Guidicy Marble, Terrazzo & Tile Co., 246 S.W.2d 742.

N.C.—Wood v. McCabe, 66 S.E. 433, 151 N.C. 457.

Ohio.—Vaughan v. Industrial Silica Corp., 42 N.E.2d 156, 140 Ohio St. 17.

A duty is imposed to take every proper precaution to prevent personal injury to those lawfully on the user's premises.⁹³ A bare licensee, however, is not entitled to the care due to an owner or tenant, but only to notice of concealed explosives or hidden dangers.⁹⁴ Although an individual or corporation using or storing explosives owes no duty of active vigilance to anticipate danger and warn a trespasser,⁹⁵ when his presence and danger are known, liability for negligence or an intentional explosion cannot be avoided on the ground that he is a trespasser.⁹⁶

Whether gasoline is considered as not an inherently dangerous material,⁹⁷ or is considered as a dangerous substance,^{97.5} great care must be exercised in its use and handling,⁹⁸ particularly in the prox-

imity of a light or fire.⁹⁹ Great care must also be exercised in the use and handling of combustible gases and petroleum.^{99.5} It has been held that pouring kerosene directly from a can upon a fire constitutes negligence per se;^{99.10} but other authorities have held that the use of kerosene to start a fire is not negligence^{99.15} or negligence per se.^{99.20} It is negligence for an unskilled and uninformed man to use a quantity of disinfectant which produces an explosive mixture, under certain circumstances liable to explode, where it would not be used by a man familiar with its qualities.¹

The negligence alleged in the improper use of the explosive, or failure to instruct concerning its use, must be the proximate cause of the injury, in order to warrant recovery.²

Okl.—Ferguson-Beese, Inc. v. Young, 240 P.2d 780, 205 Okl. 579.

Tenn.—Tidwell v. Kay's of Nashville, Inc., 250 S.W.2d 75, 194 Tenn. 205. 25 C.J. p 192 note 19.

Occupancy of premises immaterial

One handling and disposing of dangerous explosives in places where children congregate has a duty to use care, irrespective of whether he has or has had possession or occupancy of the premises.

Ohio.—Vaughan v. Wilkof, 28 N.E.2d 942, 64 Ohio App. 446.

93. Mass.—Jacobs v. New York, N. H. & H. R. Co., 98 N.E. 688, 212 Mass. 96, 40 L.R.A.N.S., 41.

Minn.—Clarkin v. Biwabik-Bessemer Co., 67 N.W. 1020, 65 Minn. 483.

Cost of taking proper precautions held no excuse for failure to do so. U.S.—White v. U. S., D.C.Cal., 97 F. Supp. 12.

User has duty to warn invitee of dangerous condition.

U.S.—White v. U. S., supra.
Cal.—Freeman v. Nickerson, 174 P. 2d 688, 77 C.A.2d 40.

94. Ky.—Brown v. Thomas Blackwell Coal & Mining Co., 99 S.W. 299, 124 Ky. 324.
25 C.J. p 192 note 21.

95. N.Y.—Holmes v. Delaware & H. Co., 112 N.Y.S. 421, 128 App.Div. 24.

N.C.—McGehee v. Norfolk & S. R. Co., 60 S.E. 912, 147 N.C. 142, 24 L.R.A.N.S., 119.

Tex.—Burton Const. & Shipbuilding Co. v. Broussard, 273 S.W.2d 598, 154 Tex. 50.

25 C.J. p 192 note 22.
Duty and liability to trespassers generally see Negligence § 24.

96. Mich.—Herrick v. Wixom, 80 N. W. 117, 81 N.W. 333, 121 Mich. 384.

97. N.Y.—Morse v. Buffalo Tank

Corporation, 19 N.E.2d 981, 280 N. Y. 110.

Carrying gasoline in open container is not negligence as a matter of law.

Pa.—Saladukas v. McKerns, 7 Sch. Reg. 97.

97.5 Pa.—Fryor v. Chambersburg Oil & Gas Co., 103 A.2d 425, 376 Pa. 521.

W. B. Girvin, Inc., v. Ewell, Com. Pl., 52 Lanc.Rev. 359.

Tex.—Robert R. Walker, Inc. v. Burgdorf, 244 S.W.2d 506, 150 Tex. 603.

98. U.S.—Taormina Corp. v. Escobedo, C.A.Tex., 254 F.2d 171, certiorari denied 79 S.Ct. 44, 358 U.S. 827, 3 L. Ed.2d 66—Hardware Mut. Ins. Co. of Minn. v. C. A. Snyder, Inc., C.A. Pa., 242 F.2d 64.

Kan.—Evans v. Hoggatt, 59 P. 381, 9 Kan.App. 540.

Mont.—Harding v. H. F. Johnson, Inc., 244 P.2d 111, 126 Mont. 70.

Pa.—Fryor v. Chambersburg Oil & Gas Co., 103 A.2d 425, 376 Pa. 521.

W. B. Girvin, Inc., v. Ewell, Com. Pl., 52 Lanc.Rev. 359.

Tex.—Robert R. Walker, Inc. v. Burgdorf, 244 S.W.2d 506, 150 Tex. 603.

Waters-Pierce Oil Co. v. Snell, 106 S.W. 170, 47 Tex.Civ.App. 413.

Va.—Braxton v. Filippo, 33 S.E.2d 757, 183 Va. 839.

25 C.J. p 192 note 24.

No liability in absence of negligence U.S.—Brooks v. U. S., C.A.N.C., 194 F.2d 185.

Delivery of tank truck for repair

A person who delivers to another for repair a tank truck which explodes during repair is negligent if he performs or fails to perform some act which a reasonably prudent person would or would not have done under the same or similar circumstances.

Wash.—Fink v. Dixon, 285 P.2d 557, 46 Wash.2d 794.

Statutory prohibition against use

of gasoline underground was held limited to mining operations, and, therefore, inapplicable to use of trucks in underground excavations in connection with constructing dam. U.S.—Six Cos. v. Stinson, D.C.Nev., 2 F.Supp. 689.

99. Tenn.—Grigsby v. Bratton, 163 S.W. 804, 128 Tenn. 597.

25 C.J. p 192 note 25.

Humanitarian rule

One standing by gasoline from overturned tank cars so near hoisting engine that sparks could reach it was in imminent peril within humanitarian rule.

Mo.—Huckleberry v. Missouri Pac. R. Co., 26 S.W.2d 980, 324 Mo. 1025.

99.5 Tex.—Robert R. Walker, Inc. v. Burgdorf, 244 S.W.2d 506, 150 Tex. 603.

99.10 Me.—Lyle v. Bangor & A. R. Co., 110 A.2d 584, 150 Me. 327.

99.15 La.—Frazier v. Ayres, App., 20 So.2d 754.

99.20 S.C.—Bradley v. Fowler, 42 S.E.2d 234, 210 S.C. 231.

1. N.Y.—Fitzgerald v. Brooklyn Inst. of Arts & Sciences, 162 N.Y.S. 625, 175 App.Div. 554.

2. R.I.—Prue v. Goodrich Oil Co., 140 A. 665, 49 R.I. 120.
25 C.J. p 192 note 27.

Negligence held proximate cause of injury

Cal.—Johnson v. Nicholson, 324 P. 2d 307, 159 C.A.2d 395—Raich v. Aldon Const. Co., 276 P.2d 822, 129 C.A.2d 278.

Kan.—Trapp v. Standard Oil Co., 269 P.2d 469, 176 Kan. 39.

Pa.—Fehrs v. City of McKeesport, 178 A. 380, 318 Pa. 279.

Tenn.—Gannon v. Crichtow, 13 Tenn. App. 281.

Wis.—Hadjenian v. Sears, Roebuck & Co., 90 N.W.2d 786, 4 Wis.2d 298.

One is under no duty to warn an independent contractor, hired to do blasting, of dangers incident to the work.³ One is not liable for an injury to an independent contractor because he furnished frozen dynamite, or directed the making and use of an iron loading pole, where the accident was not caused by a defect in either, but was caused by the negligent manner in which they were used.⁴

Atomic tests. The persons charged with security provisions in connection with atomic tests have a duty to use reasonable care to ascertain the whereabouts of anyone within the area of substantial radioactive fallout and to give them timely warning so that they may protect themselves and their property.^{4.5}

§ 8. — Blasting

- a. In general
- b. Violation of statute or ordinance
- c. Conduct of nuisance
- d. Negligence
- e. Blasting by independent contractor

a. In General

As blasting is considered intrinsically dangerous and ultrahazardous, where it is negligently done, the person responsible is liable for ensuing injury to the person or property of another; and as a general rule, although there is some authority to the contrary, one lawfully engaged

in blasting is liable, irrespective of negligence, for personal injuries or property damage sustained either as a result of casting material on adjoining land or as the result of concussion.

Blasting is considered intrinsically dangerous;^{4.50} it is an ultrahazardous activity,^{4.55} at least in populated surroundings, or in the vicinity of dwelling places or places of business,^{4.60} since it requires the use of high explosives and since it is impossible to predict with certainty the extent or severity of its consequences.^{4.65} Nevertheless, it is not, under all circumstances, condemned as being negligence as a matter of law,⁵ and may be lawfully done,⁶ provided injury to persons or property is avoided,⁷ and subject to the obligation to pay damages for any injury inflicted by the blasting.⁸ Where blasting is negligently carried on, the person responsible therefor is liable for ensuing injury to the person⁹ or property¹⁰ of others.

There is a conflict of authority as to whether negligence must be present so as to impute liability on the person doing the blasting.^{10.5} Under what has been called the rule of absolute or strict liability, one lawfully engaged in blasting operations is, according to the weight of authority, liable without regard to the question of whether or not he has been negligent, where by his acts in casting rocks or other debris on adjoining or neighboring premises or highways he causes direct damage to prop-

3. Ky.—Louisville & N. R. Co. v. Newland, 195 S.W. 415, 176 Ky. 166.

4. Ky.—Louisville & N. R. Co. v. Newland, supra.

4.5 U.S.—Bulloch v. U. S., D.C.Utah, 145 F.Supp. 824.

4.50 U.S.—Boyce v. U. S., D.C.Iowa, 93 F.Supp. 866.

Conn.—Starkel v. Edward Balf Co., 114 A.2d 199, 142 Conn. 336—Whitman Hotel Corp. v. Elliott & Watrous Engineering Co., 79 A.2d 591, 137 Conn. 562.

Blasting by adjoining landowners see Adjoining Landowners § 45 c.

4.55 U.S.—Richard v. Kaufman, D. C.Pa., 47 F.Supp. 337.

Conn.—Antinozzi v. D. V. Frione & Co., 79 A.2d 598, 137 Conn. 577.

Or.—Bedell v. Goulter, 261 P.2d 842, 199 Or. 344.

Vt.—Thompson v. Green Mountain Power Corp., 144 A.2d 786, 120 Vt. 478.

4.60 Cal.—Alonso v. Hills, 214 P.2d 50, 95 C.A.2d 778.

4.65 Or.—Bedell v. Goulter, 261 P.2d 842, 199 Or. 344.

Vt.—Thompson v. Green Mountain Power Corp., 144 A.2d 786, 120 Vt. 478.

5. Mo.—Schaefer v. Frazier-Davis Const. Co., App., 125 S.W.2d 897.

6. Mo.—Summers v. Tavern Rock Sand Co., 315 S.W.2d 201.

Schaefer v. Frazier-Davis Const. Co., App., 125 S.W.2d 897.

Tenn.—Marion Const. Co. v. Steepleton, 14 Tenn.App. 127.

7. Mo.—Summers v. Tavern Rock Sand Co., 315 S.W.2d 201.

Schaefer v. Frazier-Davis Const. Co., App., 125 S.W.2d 897.

Direct damage; trespass to realty
Wrongful damage to real property caused by concussion from blasting with dynamite is direct and constitutes a trespass to realty.

Ga.—Ready-Mix Concrete Co. v. Rape, 106 S.E.2d 429, 98 Ga.App. 503—

Brooks v. Ready Mix Concrete Co., 96 S.E.2d 213, 94 Ga.App. 791.

8. Mo.—Summers v. Tavern Rock Sand Co., 315 S.W.2d 201.

Schaefer v. Frazier-Davis Const. Co., App., 125 S.W.2d 897.

Independent liability of each of two defendants

Pa.—Kerstien v. Nardulli & Sons Co., Com.Pl., 106 Pittsb.Leg.J. 234.

9. Mont.—Cashin v. Northern Pac. Ry. Co., 28 P.2d 862, 96 Mont. 92.

Tenn.—Marion Const. Co. v. Steepleton, 14 Tenn.App. 127.

25 C.J. p 192 note 31.
Injuries to servant see Master and Servant § 214.

Injuries caused by frightened horse
Cal.—Peterson v. General Geophysical Co., App., 185 P.2d 56.

Mo.—Bassett v. Moberly Paving Brick Co., 268 S.W. 645, 219 Mo. App. 81.

That plaintiff was not actually struck by one of flying rocks did not necessarily preclude recovery for injuries sustained when she suffered nervous shock because of rocks being hurled through roof and windows of her house during defendant's blasting operations.

N.C.—Sparks v. Tennessee Mineral Products Corporation, 193 S.E. 31, 212 N.C. 211.

10. Mo.—Herod v. St. Louis-San Francisco Ry. Co., App., 299 S.W. 74.

Okl.—Stowell v. Engelson, 201 P.2d 919, 201 Okl. 105.
25 C.J. p 192 note 32.

10.5 Ark.—**Corpus Juris Secundum** cited in Benton Gravel Co. v. Wright, 175 S.W.2d 208, 209, 206 Ark. 930.

erty¹¹ or causes direct injury to persons¹² thereon. | liable for consequential injuries occasioned by con-
He is also, under the rule more generally adopted, | cussion or vibration to property¹³ or for conse-

11. U.S.—**Corpus Juris Secundum** cited in *E. I. Du Pont De Nemours & Co. v. Cudd*, C.A.Colo., 176 F.2d 855, 860—*Exner v. Sherman Power Const. Co.*, C.C.A.Vt., 54 F.2d 510, 80 A.L.R. 686—*Asheville Const. Co. v. Southern Ry. Co.*, C.C.A.N.C., 19 F.2d 32.
- Bulloch v. U. S.*, D.C.Utah, 133 F.Supp. 885—*Boyce v. U. S.*, D.C. Iowa, 93 F.Supp. 866—**Corpus Juris** cited in *Litton v. Travelers Ins. Co., General Acc. Fire & Life Assur. Corp., Intervenor*, D.C.La., 88 F.Supp. 76, 82—*Britton v. Harrison Const. Co.*, D.C.W.Va., 87 F.Supp. 405—*Richard v. Kaufman*, D.C.Pa., 47 F.Supp. 337.
- Colo.—**Corpus Juris** cited in *Garden of the Gods Village v. Hellman*, 294 P.2d 597, 601, 133 Colo. 286.
- Conn.—*Antinozzi v. D. V. Frione & Co.*, 79 A.2d 598, 137 Conn. 577—*Whitman Hotel Corp. v. Elliott & Watrous Engineering Co.*, 79 A.2d 591, 137 Conn. 562.
- Hawaii.—*Beckstrom v. Hawaiian Dredging Co., Ltd.*, 42 Hawaii 353.
- Ky.—*Aldridge-Poage, Inc. v. Parks*, 297 S.W.2d 632—*Williams v. Codell Const. Co.*, 69 S.W.2d 20, 253 Ky. 166, 92 A.L.R. 737—*Combs v. Codell Const. Co.*, 52 S.W.2d 719, 244 Ky. 772—*Campbell v. Adams*, 14 S.W.2d 418, 228 Ky. 156.
- La.—*Fontenot v. Magnolia Petroleum Co.*, 80 So.2d 845, 227 La. 886.
- Mass.—*Coughlan v. Grande & Son, Inc.*, 125 N.E.2d 778, 332 Mass. 464—*Dolham v. Peterson*, 9 N.E.2d 406, 297 Mass. 479—*Jenkins v. A. G. Tomasello & Son*, 189 N.E. 817, 286 Mass. 180.
- Miss.—*Central Exploration Co. v. Gray*, 70 So.2d 33, 219 Miss. 757.
- Mo.—*Summers v. Tavern Rock Sand Co.*, 315 S.W. 201.
- Schaefer v. Frazier-Davis Const. Co., App.*, 125 S.W.2d 897.
- N.J.—*Thompson v. Jannarone Contracting Co.*, 141 A. 25, 6 N.J.Misc. 320.
- N.M.—*Thigpen v. Skousen & Hise*, 327 P.2d 802, 64 N.M. 290.
- N.Y.—*Moore v. Newport Quarries*, 140 N.Y.S.2d 202, 288 App.Div. 640.
- Whitmore v. Fago*, 93 N.Y.S.2d 672.
- Okl.—*Superior Oil Co. v. King*, 324 P.2d 847.
- Or.—**Corpus Juris Secundum** cited in *Bedell v. Goulter*, 261 P.2d 842, 843, 199 Or. 344.
- Pa.—*Federoff v. Harrison Const. Co.*, 60 A.2d 334, 163 Pa.Super. 53, affirmed 66 A.2d 817, 362 Pa. 181.
- Keefer v. Lombardi*, 89 Pa.Dist. & Co. 406, affirmed 102 A.2d 695, 376 Pa. 367.
- Landis v. Franklin Quarry and Supply Co., Com.Pl.*, 68 Montg.Co. 280, 66 York Leg.Rec. 109—*Maciulesky v. Stoltzfus*, 26 North.Co. 331—*Hershkovitz v. Parker*, Com.Pl., 102 Pittsb.Leg.J. 351—*Jeffrey v. Coal Corporation*, 18 Wash.Co. 50.
- Tex.—**Corpus Juris** cited in *Universal Atlas Cement Co. v. Oswald*, Civ. App., 135 S.W.2d 591, 593, affirmed 157 S.W.2d 636, 138 Tex. 159—*Cisco & N. E. R. Co. v. Texas Pipe Line Co., Civ.App.*, 240 S.W. 990, error refused.
- Utah.—**Corpus Juris** cited in *Madsen v. East Jordan Irr. Co.*, 125 P.2d 794, 795, 101 Utah 552.
- Wash.—*Foster v. Preston Mill Co.*, 268 P.2d 645, 44 Wash.2d 440.
- W.Va.—**Corpus Juris Secundum** cited in *Pope v. Edward M. Rude Carrier Corp.*, 75 S.E.2d 584, 595, 138 W.Va. 218.
- Wis.—*Brown v. L. S. Lunder Const. Co.*, 2 N.W.2d 859, 240 Wis. 122.
- 25 C.J. p 193 note 33.
- Sic utere doctrine applicable**
Cal.—*McGrath v. Basich Bros. Const. Co.*, 46 P.2d 981, 7 C.A.2d 573.
- Permit authorizing defendant to use explosives in blasting did not confer right to blast rock, so as to throw stones on others' land.**
Mass.—*Hakkila v. Old Colony Broken Stone & Concrete Co.*, 162 N.E. 895, 264 Mass. 447.
- Insurer's liability**
A person carrying on blasting operations is held to an insurer's liability and proceeds at his own risk.
Tenn.—*Jones v. Oman*, 184 S.W.2d 568, 28 Tenn.App. 1.
- Duty to clear debris**
The user of explosives owes a duty to remove rock debris cast on adjoining land by the blasting within the shortest time possible and with the least injury to such land.
Tenn.—*East Tennessee Natural Gas Co. v. Peltz*, 270 S.W.2d 591, 38 Tenn. 100.
- Privilege granted to go upon land**
Fact that property owner granted to defendants privilege of entering upon his property for purpose of conducting geophysical operations did not absolve defendants from liability for damages to owner's residence resulting from blasting operations carried on by defendants.
La.—*Fontenot v. Magnolia Petroleum Co.*, 80 So.2d 845, 227 La. 886.
- Ohio law recognized in West Virginia**
In West Virginia the rule of the text has been recognized as the law of Ohio in a suit for damage to property in Ohio resulting from blasting done in West Virginia.
W.Va.—*Dallas v. Whitney*, 188 S.E. 766, 118 W.Va. 106.
12. U.S.—**Corpus Juris Secundum** cited in *E. I. Du Pont De Nemours & Co. v. Cudd*, C.A.Colo., 176 F.2d 855, 860.
- Corpus Juris** cited in *Litton v. Travelers Ins. Co., General Acc. Fire & Life Assur. Corp., Intervenor*, D.C.La., 88 F.Supp. 76, 82.
- Conn.—*Whitman Hotel Corp. v. Elliott & Watrous Engineering Co.*, 79 A.2d 591, 137 Conn. 562—*Worth v. Dunn*, 118 A. 467, 198 Conn. 51.
- Ky.—*Adams' Adm'r v. Callis & Hughes*, 69 S.W.2d 711, 253 Ky. 382.
- Mass.—*Dolham v. Peterson*, 9 N.E. 2d 406, 297 Mass. 479—*Jenkins v. A. G. Tomasello & Son*, 189 N.E. 817, 286 Mass. 180.
- Pa.—*McGowan v. William Steele & Sons Co.*, 171 A. 903, 112 Pa.Super. 552, followed in *Ballard v. William Steele & Sons Co.*, 171 A. 906, 112 Pa.Super. 558.
- W.Va.—**Corpus Juris Secundum** cited in *Pope v. Edward M. Rude Carrier Corp.*, 75 S.E.2d 584, 595, 138 W.Va. 218.
- 25 C.J. p 193 note 34.
- Roping off area as dangerous**
Where railroad employees, dynamiting a bridge, put up rope around place and directed crowd to stand back of line, they impliedly assured crowd that territory beyond rope was safe, and crowd had right to assume that employees understood nature of business in which they were engaged and extent of dangerous area.
Ky.—*Louisville & N. R. Co. v. Smith's Adm'r*, 263 S.W. 29, 203 Ky. 513, 35 A.L.R. 1238.
13. U.S.—*Exner v. Sherman Power Const. Co.*, C.C.A.Vt., 54 F.2d 510, 80 A.L.R. 686.
- Fairfax Inn v. Sunnyhill Min. Co.*, D.C.W.Va., 97 F.Supp. 991—*Britton v. Harrison Const. Co.*, D.C.W.Va., 87 F.Supp. 405—*Richard v. Kaufman*, D.C.Pa., 47 F.Supp. 337.
- Cal.—**Corpus Juris Secundum** cited in *McNeill v. Redington*, 154 P.2d 428, 430, 67 C.A.2d 315—*McGrath v. Basich Bros. Const. Co.*, 46 P.2d 981, 7 C.A.2d 573—*McKenna v. Pacific Electric Ry. Co.*, 286 P. 445, 104 C.A. 538.
- Colo.—*Garden of the Gods Village v. Hellman*, 294 P.2d 597, 133 Colo. 286.
- Conn.—*Scranton v. L. G. De Felice & Son*, 79 A.2d 600, 137 Conn. 580—*Antinozzi v. D. V. Frione & Co.*, 79 A.2d 598, 137 Conn. 577—*Whitman Hotel Corp. v. Elliott & Watrous Engineering Co.*, 79 A.2d 591, 137 Conn. 562.
- Ga.—*Brooks v. Ready Mix Concrete Co.*, 96 S.E.2d 213, 94 Ga.App. 791.

quential injuries occasioned by concussion or vibration to persons,¹⁴ without the actual casting of material; nor is the rule restricted in application to instances where the blasting is a nuisance per se¹⁵ or where the property is contiguous or adjoining.¹⁶

The rule of strict liability has been limited, however, to consequences which lie within the extraordinary risk whose existence calls for such responsibility^{16.5} or are directly attributable to it;^{16.10} and a user is thus not liable for every occurrence

following an explosion which has a semblance of connection with it.^{16.15} Likewise, an owner is not liable for injuries caused by the improper blasting on his land by a trespasser who was taking property without authority.^{16.20} By some authorities the rule imposing liability for injuries occasioned without negligence is limited to cases of direct injury, and negligence must be established to impose liability for consequential injuries, as by concussion or vibration, to property¹⁷ or persons.¹⁸

Hawaii.—Beckstrom v. Hawaiian Dredging Co., Ltd., 42 Hawaii 353.

Ill.—Baker v. S. A. Healy Co., 24 N.E.2d 228, 302 Ill.App. 634.

Miss.—Central Exploration Co. v. Gray, 70 So.2d 33, 219 Miss. 757.

Mo.—Summers v. Tavern Rock Sand Co., 315 S.W. 201.

Stock v. City of Richmond Heights, 132 S.W.2d 1116, 235 Mo. App. 277.

Neb.—**Corpus Juris cited in** Wendt v. Yant Const. Co., 249 N.W. 599, 600, 125 Neb. 277.

N.M.—Thigpen v. Skousen & Hise, 327 P.2d 802, 64 N.M. 290.

Ohio.—Bluhm v. Blanck & Gargaro, 24 N.E.2d 615, 62 Ohio App. 451.

Or.—Bedell v. Goulter, 261 P.2d 842, 199 Or. 344.

Pa.—Federoff v. Harrison Const. Co., 66 A.2d 817, 362 Pa. 181.

Baier v. Glen Alden Coal Co., 200 A. 190, 131 Pa.Super. 309, affirmed 3 A.2d 349, 332 Pa. 561.

Glassmeyer v. Kessler, Inc., Com. Pl., 47 Mun.L.R. 133.

Tenn.—Aycock v. Nashville, C. & St. L. Ry. Co., 4 Tenn.App. 655.

Utah.—Madsen v. East Jordan Irr. Co., 125 P.2d 794, 101 Utah 552.

W.Va.—**Corpus Juris Secundum cited in** Pope v. Edward M. Rude Carrier Corp., 75 S.E.2d 584, 595, 138 W.Va. 218.

Wis.—Brown v. L. S. Lunder Const. Co., 2 N.W.2d 859, 240 Wis. 122.

25 C.J. p 193 note 35.

In West Virginia the rule of the text has been recognized as the law of Ohio in a suit for damage to property in Ohio resulting from blasting done in West Virginia.

W.Va.—Dallas v. Whitney, 188 S.E. 766, 118 W.Va. 106.

14. Conn.—Whitman Hotel Corp. v. Elliott & Watrous Engineering Co., 79 A.2d 591, 137 Conn. 562.

R.I.—Wells v. Knight, 80 A. 16, 32 R.I. 432.

W.Va.—**Corpus Juris Secundum cited in** Pope v. Edward M. Rude Carrier Corp., 75 S.E.2d 584, 595, 138 W.Va. 218.

25 C.J. p 194 note 36.

15. Cal.—McGrath v. Basich Bros. Const. Co., 46 P.2d 981, 7 C.A.2d 573.

Blasting as nuisance see Nuisances § 75.

16. Cal.—McGrath v. Basich Bros. Const. Co., supra.

"Circle of danger" is to be determined by the event, not by judicial appraisal of "likelihood," subjective or objective, that particular damage complained of would result, and right of all within circle of danger should be equal.

Or.—Bedell v. Goulter, 261 P.2d 842, 199 Or. 344.

16.5 Wash.—Foster v. Preston Mill Co., 268 P.2d 645, 44 Wash.2d 440.

Rule inapplicable under circumstances

Wash.—Foster v. Preston Mill Co., supra.

16.10 Utah.—Madsen v. East Jordan Irr. Co., 125 P.2d 794, 101 Utah 552.

Explosion held not proximate cause of injury

Tex.—Uvalde Const. Co. v. Hill, 175 S.W.2d 247, 142 Tex. 19.

Utah.—Madsen v. East Jordan Irr. Co., 125 P.2d 794, 101 Utah 552.

16.15 Conn.—Starkel v. Edward Balf Co., 114 A.2d 199, 142 Conn. 336.

Utah.—Madsen v. East Jordan Irr. Co., 125 P.2d 794, 101 Utah 552.

16.20 Ala.—Tennessee Coal, Iron & R. Co. v. Hartline, 11 So.2d 833, 244 Ala. 116.

17. Ky.—Marlowe Const. Co. v. Jacobs, 302 S.W.2d 612—Aldridge-Poage, Inc. v. Parks, 297 S.W.2d 632—Williams v. Codell Const. Co., 69 S.W.2d 20, 253 Ky. 166, 92 A.L.R. 737—Combs v. Codell Const. Co., 52 S.W.2d 719, 244 Ky. 772—Jefferson County v. Pohlman, 49 S.W.2d 344, 243 Ky. 556—Brooks-Calloway Co. v. Carroll, 29 S.W.2d 592, 235 Ky. 41—Campbell v. Adams, 14 S.W.2d 418, 228 Ky. 156—Gibson v. Womack, 291 S.W. 1021, 218 Ky. 626, 51 A.L.R. 773.

Mass.—Dalton v. Demos Bros. General Contractors, Inc., 135 N.E.2d 646, 334 Mass. 377—Coughlan v. Grande & Son, Inc., 125 N.E.2d 778, 332 Mass. 464—Dolham v. Peterson, 9 N.E.2d 406, 297 Mass. 479—Jenkins v. A. G. Tomasello & Son, 189 N.E. 817, 286 Mass. 180.

N.H.—Wadleigh v. City of Manchester, 123 A.2d 831, 100 N.H. 277.

N.Y.—Coley v. Cohen, 45 N.E.2d 913, 289 N.Y. 365, motion denied 49 N.E.2d 1007, 290 N.Y. 739.

Shemin v. City of New York, 180 N.Y.S.2d 360, 6 A.D.2d 668, appeal denied 182 N.Y.S.2d 330, 7 A.D.2d 846—Nordone v. Mondo, 56 N.Y.S.2d 606, 269 App.Div. 896.

Lewis v. Dunbar & Sullivan Dredging Co., 36 N.Y.S.2d 897, 178 Misc. 980.

Flinn v. Gull Contracting Co., 183 N.Y.S.2d 806—Whitmore v. Fargo, 93 N.Y.S.2d 672—Hirt v. Miceli Bros. Const. Co., 80 N.Y.S.2d 798.

Tex.—**Corpus Juris Secundum cited in** Dellinger v. Skelly Oil Co., Civ. App., 236 S.W.2d 675, 677, error refused no reversible error—**Corpus Juris Secundum** quoted in Kennedy v. General Geophysical Co., Civ. App., 213 S.W.2d 707, 711, error refused no reversible error—Standard Paving Co. v. McClinton, Civ.App., 146 S.W.2d 466—**Corpus Juris cited in** Universal Atlas Cement Co. v. Oswald, Civ.App., 135 S.W.2d 591, 593, affirmed 157 S.W.2d 636, 138 Tex. 159—Indian Territory Illuminating Oil Co. v. Rainwater, Civ. App., 140 S.W.2d 491, error dismissed.

25 C.J. p 194 note 37.

"Liability for damages produced through shock and vibrations turns upon the use or omission of due care in starting the vibrations or concussive waves."

Tex.—Sinclair Oil & Gas Co. v. Gordon, Civ.App., 319 S.W.2d 170, 172.

Violation of standard procedure

In establishing liability for damages produced through shock and vibrations, there must be some expert, or other evidence by one acquainted with, or having knowledge of, the technique used to establish a standard procedure and a violation thereof.

Tex.—Sinclair Oil & Gas Co. v. Gordon, supra.

18. Ala.—Bessemer Coal, Iron & Land Co. v. Doak, 44 So. 627, 152 Ala. 166, 12 L.R.A.N.S. 389.

Ky.—Hieber v. Central Kentucky

By some authorities the rule is apparently laid down that negligence must be present in all cases, even where there is direct injury to property¹⁹ or persons.²⁰ However, it has also been held, to the contrary, that the use of explosives for blasting on a lot located in a large city is such an unusual, unreasonable, and unnatural use of the property that no degree of care or skill can excuse the owner from damages proximately caused to the property of another, whether caused by falling debris²¹ or by concussion,²² and, further, that, where a death was caused by an explosion of a blast in a thickly settled portion of the city, no degree of care will relieve defendant from liability;²³ but as to the last point there is authority to the contrary effect.^{23.5} Where the injury to the person, although direct, is not occasioned while he is in his own home, it is held that the person injured must show either that the blasting was being carried on in a thickly populated portion of the city²⁴ or, if elsewhere, that there was a failure to give reasonable warning of the blast.²⁵

Defendant is not liable for personal injuries sustained by plaintiff as a result of glass falling out of a window several days after the window was broken by rocks blasted by defendant, where defendant was not authorized by the property owner

to repair the window.²⁶ Mere concussion of the air without other injury will not impose liability where blasting is lawfully conducted.²⁷

As to persons on his premises and rightfully so, the person using explosives in blasting in a lawful and proper manner is liable only in case of negligence,²⁸ and need exercise only ordinary care.²⁹ The rule that one who, by blasting, throws rock and material on the adjacent land of his neighbor is liable for the damage resulting from such act without regard to the question of negligence, has no application where the person blasting has the right to the use of the land on which the blasted material is thrown.³⁰

Existence of easement. Where defendant has, by law or contract, acquired an easement as against plaintiff's premises, which expressly or impliedly authorizes the operation of blasting, either directly or as a reasonably necessary incident to some other lawful purpose, liability arises only as the result of some proximate negligence on the part of defendant;³¹ but this rule does not apply to persons rightfully on the land subject to the easement with the permission of the owner thereof and the knowledge of defendant.³²

Bond. The fact that, as a condition precedent to

Tract. Co., 140 S.W. 54, 145 Ky. 108, 36 L.R.A.N.S., 54.
25 C.J. p 194 note 38.

19. U.S.—Bennett v. Texas-Illinois Gas Pipeline Co., D.C.Ark., 113 F. Supp. 788.

Me.—Cratty v. Samuel Aceto & Co., 116 A.2d 623, 151 Me. 126—Albison v. Robbins & White, Inc., 116 A.2d 608, 151 Me. 114.

Mont.—Cashin v. Northern Pac. Ry. Co., 28 P.2d 862, 96 Mont. 92.

Vt.—Thompson v. Green Mountain Power Corp., 144 A.2d 786, 120 Vt. 478.

25 C.J. p 194 note 39.

20. U.S.—Cary Bros. & Hannon v. Morrison, Ark., 129 F. 177, 63 C.C. A. 267, 65 L.R.A. 659.

Ga.—Moross v. Burke, 24 S.E. 969, 99 Ga. 110.

Vt.—Thompson v. Green Mountain Power Corp., 144 A.2d 786, 120 Vt. 478.

25 C.J. p 194 note 40.

21. Cal.—Colton v. Onderdonk, 10 P. 395, 69 C. 155, 58 Am.R. 556.
Alonso v. Hills, 214 P.2d 50, 95 C.A.2d 778.

Experimental blasting by state held unreasonable

N.Y.—Scully v. State, 175 N.Y.S.2d 512, 12 Misc.2d 298.

In Washington if place where explosives are used is not in business

section, one seeking to recover damages caused by blasting from property owner has burden to show negligence on part of owner in choosing independent contractor to do blasting.

Wash.—Thompson-Cadillac Co. v. Matthews, 23 P.2d 399, 173 Wash. 353.

22. Cal.—Colton v. Onderdonk, 10 P. 395, 69 C. 155, 58 Am.R. 556.

23. Cal.—Munro v. Pacific Coast Dredging & Reclamation Co., 24 P. 303, 84 C. 515, 18 Am.S.R. 248.

23.5 Ohio.—Mercer v. White, 30 Ohio Cir.Ct. 487.

24. Ky.—Allegheny Coke Co. v. Massey, 174 S.W. 499, 163 Ky. 792.

25. Ky.—Allegheny Coke Co. v. Massey, supra.
25 C.J. p 195 note 45.

26. Mo.—Badock v. J. J. Dunnegan Const. Co., 59 S.W.2d 631, 332 Mo. 877.

27. Ky.—Hieber v. Central Kentucky Tract. Co., 140 S.W. 54, 145 Ky. 108, 36 L.R.A.N.S., 54.

Tex.—**Corpus Juris Secundum** quoted in Kennedy v. General Geophysical Co., Civ.App., 213 S.W.2d 707, 711.

At common law, a blast of air, caused by an explosion, rushing over

distant real property is not a trespass.

U.S.—Bartholomae Corp. v. U. S., C. A.Cal., 253 F.2d 716.

28. U.S.—E. I. Du Pont De Nemours & Co. v. Cudd, C.A.Colo., 176 F.2d 855.

Ala.—Ex parte Birmingham Realty Co., 63 So. 67, 183 Ala. 444.

N.Y.—Driscoll v. Newark & Rosendale Lime & Cement Co., 37 N.Y. 637, 5 Transcr.A. 82, 97 Am.D. 761.
25 C.J. p 195 note 47.

29. U.S.—Smith v. Day, Or., 100 F. 244, 40 C.C.A. 366, 49 L.R.A. 108.
Va.—Valz v. Goodykoontz, 72 S.E. 730, 112 Va. 853.

25 C.J. p 195 note 48.

30. N.Y.—Miller v. Twiname, 114 N.Y.S. 151, 129 App.Div. 623.
25 C.J. p 195 note 49.

31. Ky.—Adams' Adm'r v. Callis & Hughes, 69 S.W.2d 711, 253 Ky. 382.

25 C.J. p 195 note 50.

Deed to quarry was held to exempt purchaser from liability for damage from blasting as well as from slides caused by excavating.

Ky.—Olive Hill Limestone Co. v. Paynter, 291 S.W. 375, 218 Ky. 286.

32. Mich.—Beauchamp v. Saginaw Min. Co., 15 N.W. 65, 50 Mich. 163, 45 Am.R. 30.

the issuance of a permit to blast, a bond, indemnifying the city against any losses occasioned by the blasting operation, is required does not give a property owner, as a third party beneficiary, any rights against the user of the explosives,^{32.5} in the absence of consideration.^{32.10} The existence of a bond does not alter the rule that the property owner has to show negligence on the part of the user before liability will arise.^{32.15}

Legislative authority. Whether liability will attach for injuries occasioned by blasting without negligence under legislative authority is a matter as to which there is some conflict of authority, liability having been imposed³³ and denied,³⁴ in accordance with general principles considered in Actions § 15 b (5).

What law governs. As respects liability for damages done to property in one state by blasting done in another state without negligence, the law of the former state governs.³⁵

Dynamite caps are dangerous per se.^{35.5}

b. Violation of Statute or Ordinance

Failure to comply with applicable municipal and statutory regulations as to blasting is evidence of negligence, or may be actionable.

Failure to comply with municipal or statutory regulations as to blasting³⁶ as, for example, requirements of notice³⁷ or that blasts shall be covered,³⁸ is evidence of negligence. A statute defining the offense of recklessly using blasting powder whereby any human being is endangered refers to neglectful, indifferent, or rashly negligent acts,³⁹ and is applicable to civil actions to recover damages for injuries resulting from blasting operations.⁴⁰

A violation of a provision of an administrative code requiring the use of at least a specified number

of timbers in blasting operations may be shown to have had no causal relation to plaintiff's damage.^{40.5}

A statute prohibiting the discharge of firecrackers and other explosives within a town without a local permit does not apply to the use of explosives in the course of business, such as dynamite in construction work,⁴¹ and a statute providing that a proprietor may not do work on land causing damage to his neighbor does not apply where defendant exploded dynamite nine miles from plaintiff's residence.⁴² A statute requiring a permit to use explosives for blasting does not enlarge the common-law duty to prosecute the operations with due care.⁴³

c. Conduct of Nuisance

Where blasting constitutes a nuisance, damages may be recovered, although negligence is not shown.

Where blasting operations are conducted in such a manner as to constitute a nuisance, a recovery may be had for damages occasioned, although negligence is not established.⁴⁴

d. Negligence

(1) In general

(2) Duty to warn or to cover blast

(1) In General

One engaged in blasting must, to avoid liability based on negligence, use reasonable care and skill with regard to the nature of the work and local conditions, and must have the most cautious regard for his neighbors' rights.

The degree of care required of one engaged in blasting to avoid liability based on negligence is reasonable care and skill with regard to the nature of the work and local conditions.⁴⁵ One may conduct on his own premises blasting operations from which injury may be apprehended to the property

32.5 N.Y.—Hirt v. Miceli Bros. Const. Co., 80 N.Y.S.2d 798.

32.10 N.Y.—Juliano v. Circle Const. Corp., 95 N.Y.S.2d 824, 276 App. Div. 1086.

32.15 N.Y.—Hirt v. Miceli Bros. Const. Co., 80 N.Y.S.2d 798.

33. N.Y.—St. Peter v. Denison, 58 N. Y. 416, 17 Am.R. 258.

34. N.J.—Deubel v. Millard Constr. Co., 77 A. 611, 80 N.J.Law 98, affirmed 81 A. 1133, 82 N.J.Law 523. Pa.—Postal Tel. Cable Co. v. Keystone State Constr. Co., 63 Pa.Super. 486.

35. W.Va.—Dallas v. Whitney, 188 S.E. 766, 118 W.Va. 106.

35.5 Ky.—Dick v. Higgason, 322 S. W.2d 92.

36. N.Y.—Koster v. Noonan, 8 Daly

231—Devlin v. Gallagher, 6 Daly 494.

25 C.J. p 195 note 55.

37. Me.—Wadsworth v. Marshall, 34 A. 30, 88 Me. 263, 32 L.R.A. 588.

25 C.J. p 195 note 56.

38. Iowa.—Mahoney v. Dankwart, 79 N.W. 134, 108 Iowa 321.

25 C.J. p 195 note 57.

39. Mont.—Cashin v. Northern Pac. Ry. Co., 28 P.2d 862, 96 Mont. 92.

40. Mont.—Cashin v. Northern Pac. Ry. Co., supra.

40.5 N.Y.—Shemin v. City of New York, 180 N.Y.S.2d 360, 6 A.D.2d 668, appeal denied 182 N.Y.S.2d 330, 7 A.D.2d 846.

41. N.H.—Hannon v. Kerr, 159 A. 121, 85 N.H. 386.

42. La.—McIlhenny v. Roxana Pe-

troleum Corporation, 122 So. 165, 10 La.App. 692.

43. Mass.—Jenkins v. A. G. Tomasello & Son, 189 N.E. 817, 286 Mass. 180.

44. Conn.—Corpus Juris cited in Worth v. Dunn, 118 A. 467, 470, 198 Conn. 51.

N.Y.—Moore v. Newport Quarries, 140 N.Y.S.2d 202, 285 App.Div. 640. W.Va.—Corpus Juris Secundum cited in Pope v. Edward M. Rude Carrier Corp., 75 S.E.2d 584, 594, 138 W.Va. 218.

25 C.J. p 195 note 59.

Blasting as nuisance see Nuisances § 47.

45. U.S.—Cleveland-Cliffs Iron Co. v. Metzner, C.C.A.Mich., 150 F.2d 206. Ark.—McGeorge v. Henry, 101 S.W. 2d 440, 193 Ark. 443.

of the neighbors only with the most cautious regard for their rights.⁴⁶

In determining whether or not there has been negligence, the question of the expense required to take proper precautions is not material.⁴⁷ Negligence may be inferred from the fact that the explosion is attended with a violent and unusual result.⁴⁸ Where one, in doing certain blasting within a city, injures property of another, the fact that the former has fully complied with the regulations of the city authorities as to the manner in which the blasting should be done will not relieve him of liability if the blasting was done without due care.⁴⁹

Excessive amount of explosives. Whether an ex-

cessive amount of explosives is used constitutes one test of negligence in the use of explosives;^{49,5} and the use of excessive explosives when blasting is actionable negligence when it results in injury to adjoining property.^{49,10}

(2) Duty to Warn or to Cover Blast

Persons engaged in blasting should give timely warning to all those who may reasonably be expected to be within the range; and, according to the surrounding circumstances, failure to cover a blast may or may not be negligence.

It is the duty of persons engaged in blasting to give notice in season to those who may reasonably be expected to be within the range of an explosion,⁵⁰ and this rule applies to persons on their

Ky.—Gibson v. Womack, 291 S.W. 1021, 218 Ky. 626, 51 A.L.R. 773.

Mass.—Stevens v. Town of Dedham, 131 N.E. 171, 238 Mass. 487.

N.H.—Crocker v. W. W. Wyman, Inc., 110 A.2d 271, 99 N.H. 330.

25 C.J. p 195 note 60.

Extreme care required

Ark.—Corpus Juris cited in Holden v. Carmean, 10 S.W.2d 865, 866, 178 Ark. 375.

25 C.J. p 195 note 60 [b].

High degree of care

Defendant who was in charge of blasting operation was bound to furnish plaintiff who operated battery with a reasonably safe place to work, and it was also defendant's duty to instruct and caution plaintiff concerning a danger of which plaintiff was excusably ignorant. Nothing short of a high degree of care, gauged by the care and prudence that careful and prudent men would exercise in like circumstances, would be commensurate with the dangerous character of the explosive, since dynamite is as a matter of law a dangerous agency.

Vt.—Tinney v. Crosby, 22 A.2d 145, 112 Vt. 95.

Highest degree of care required

U.S.—Continental Ins. Co. v. Harrison County, Miss., C.C.A.Miss., 153 F.2d 671.

Miss.—Evans v. Brown, 106 So. 281, 141 Miss. 346.

Pa.—Long v. Frock, 156 A. 88, 304 Pa. 355.

Federoff v. Harrison Const. Co., 60 A.2d 334, 163 Pa.Super. 53, affirmed 66 A.2d 817, 362 Pa. 181—Baier v. Glen Alden Coal Co., 200 A. 190, 131 Pa.Super. 309, affirmed 3 A.2d 349, 332 Pa. 561.

Indifference to probable consequences of blasting is the highest form of negligence.

Me.—Albison v. Robbins & White, Inc., 116 A.2d 608, 151 Me. 114.

Duty to investigate or inspect

(1) Exploder of dynamite was under duty to investigate adjacent property where force of explosion might be spent.

Vt.—Thompson v. Green Mountain Power Corp., 144 A.2d 786, 120 Vt. 478.

(2) Where it was contemplated that following blasting in slush pit, work should be done in pit that presence of unexploded dynamite therein would render highly dangerous, ordinary care would entail of those doing the blasting an immediate inspection to ascertain whether all dynamite was exploded.

Tex.—Humble Oil & Refining Co. v. Bell, Civ.App., 180 S.W.2d 970, error refused 181 S.W.2d 569, 142 Tex. 645.

Use of standard, modern methods

Sewer contractor, constructing sewer for city, was liable for damage to building from blasting in street, where he did not use a standard, modern method of doing such work.

N.J.—Whitla v. Ippolito, 131 A. 873, 102 N.J.Law 354.

Less dangerous forces compared

Greater care must be exercised by those who use dynamite or other high explosive than is required in the use of less dangerous forces.

Tenn.—Marion Const. Co. v. Steepleton, 14 Tenn.App. 127.

Knowledge

That defendant's agent did not know he was using more dynamite than was reasonably necessary would not relieve defendant from liability if agent knew quantity used would probably injure plaintiffs' property. Ala.—Birmingham Gas Co. v. Sanford, 145 So. 485, 226 Ala. 129.

Defendants held not negligent

La.—McIlhenny v. Roxana Petroleum Corporation, 122 So. 165, 10 La.App. 692.

46. Tex.—Universal Atlas Cement

Co. v. Oswald, Civ.App., 135 S.W. 2d 591, affirmed 157 S.W.2d 636, 138 Tex. 159.

25 C.J. p 196 note 61.

47. Mich.—Beauchamp v. Saginaw Min. Co., 15 N.W. 65, 50 Mich. 163, 45 Am.R. 30.

N.Y.—Hill v. Schneider, 43 N.Y.S. 1, 13 App.Div. 299.

25 C.J. p 196 note 62.

Defense

In action for damages to property, the fact that use of proper care or smaller quantities of explosives would have caused extra labor and expense was not a defense.

Ky.—Brooks-Calloway Co. v. Carroll, 29 S.W.2d 592, 235 Ky. 41.

25 C.J. p 196 note 62 [a].

48. N.Y.—Corpus Juris cited in Peterson v. State, 2 N.Y.S.2d 921, 926. Pa.—Rafferty v. Davis, 103 A. 951, 260 Pa. 563.

Federoff v. Harrison Const. Co., 60 A.2d 334, 163 Pa.Super. 53, affirmed 66 A.2d 817, 362 Pa. 181.

Tex.—Corpus Juris cited in Universal Atlas Cement Co. v. Oswald, Civ. App., 135 S.W.2d 591, 594, affirmed 157 S.W.2d 636, 138 Tex. 159.

49. Ga.—Central of Georgia R. Co. v. Bernstein, 38 S.E. 394, 113 Ga. 175.

49.5 Tex.—Kelly v. McKay, 233 S.W. 2d 121, 149 Tex. 343.

What is excessive amount

An excessive amount of explosives means a quantity greater than is reasonably necessary in blasting operations and greater than would be used by a person under the same or similar circumstances in the exercise of ordinary care in operating a pit or quarry.

Tex.—Kelly v. McKay, supra.

49.10 Ark.—Benton Gravel Co. v. Wright, 175 S.W.2d 208, 206 Ark. 930.

50. U.S.—Cleveland-Cliffs Iron Co. v. Metzner, C.C.A.Mich., 150 F.2d 206.

premises,⁵¹ and to all persons within the circle of danger,⁵² even though such persons were on a road which had been closed by the state highway department.⁵³

Where only ordinary care is owed to plaintiff, he cannot complain of the fact that notice was not given to him that blasts were about to be fired where, at the time he went on the premises, he had heard blasting and understood that it was being carried on.⁵⁴ It is not the duty of one blasting on his own premises to inform all of the adjoining proprietors when he is about to set off a blast in order to avoid consequential injury.⁵⁵

Covering blast. Where persons blasting know, or by reasonable diligence may know, that injury will probably result, they should protect the persons exposed to danger by covering the blasts or warning them so that they may seek a place of safety.⁵⁶ Failure to cover a blast may or may not be negligence as a matter of law, according to the sur-

rounding circumstances.⁵⁷ Where one engaged in blasting has not been in the custom of covering blasts, he is not required to do so by the fact that he allows persons to come on the premises where the blasting is being done, they having knowledge of the circumstances and manner of conducting the work.⁵⁸ Failure to fill a trench in order to lessen the noise of an explosion cannot be held to be negligent where it is not shown to be a proper, usual, or reasonable thing to do.⁵⁹

e. Blasting by Independent Contractor

Generally, both the independent contractor and his employer are liable for injuries resulting from blasting operations conducted by an independent contractor.

An independent contractor employed to conduct blasting operations is liable for injuries resulting therefrom, since it is the effect of the use of an instrumentality irrespective of ownership that determines the character of the injury and liability therefor.⁶⁰ While he must act with due regard

Tenn.—Marion Const. Co. v. Steepleton, 14 Tenn.App. 127.

Vt.—*Corpus Juris Secundum* cited in Thompson v. Green Mountain Power Corp., 144 A.2d 786, 789.
25 C.J. p 196 note 65.

51. Ala.—Birmingham Ore. Mining Co. v. Glover, 48 So. 682, 159 Ala. 276.

Cal.—Peterson v. General Geophysical Co., App., 185 P.2d 56.
25 C.J. p 196 note 66.

52. U.S.—Cleveland-Cliffs Iron Co. v. Metzner, C.C.A.Mich., 150 F.2d 206.
Tenn.—Marion Const. Co. v. Steepleton, 14 Tenn.App. 127.
25 C.J. p 196 note 67.

Rock on track

Contractors blasting were bound to exercise highest degree of care to notify trainmen of rock present on railroad track as result of blasting operations.

Ky.—Gibson v. Womack, 291 S.W. 1021, 218 Ky. 626, 51 A.L.R. 773.

53. Tenn.—Marion Const. Co. v. Steepleton, 14 Tenn.App. 127.

54. U.S.—Smith v. Day, C.C.Or., 117 F. 956.

55. Ky.—Hieber v. Central Kentucky Tract. Co., 140 S.W. 54, 145 Ky. 108, 36 L.R.A., N.S., 54.

Mich.—Mitchell v. Prange, 67 N.W. 1096, 110 Mich. 78, 64 Am.S.R. 329, 34 L.R.A. 182.
25 C.J. p 196 note 69.

56. U.S.—Cleveland-Cliffs Iron Co. v. Metzner, C.C.A.Mich., 150 F.2d 206.

N.C.—Blackwell v. Lynchburg & D. R. Co., 16 S.E. 12, 111 N.C. 151, 32 Am.S.R. 786, 17 L.R.A. 729.
25 C.J. p 196 note 70.

"Blasting is a dangerous business when carried on close to city street in a neighborhood where many are at work within the range of missiles from an uncovered or negligently covered blast."

Mass.—McConnon v. Charles H. Hodgate Co., 185 N.E. 483, 486, 282 Mass. 584.

57. Conn.—Worth v. Dunn, 118 A. 467, 198 Conn. 51.
25 C.J. p 197 note 71.

58. U.S.—Smith v. Day, C.C.Or., 86 F. 62, reversed on other grounds 100 F. 244, 40 C.C.A. 366, 49 L.R.A. 108.

59. Mich.—Mitchell v. Prange, 67 N.W. 1096, 110 Mich. 78, 64 Am.S.R. 329, 34 L.R.A. 182.

60. Cal.—McGrath v. Basich Bros. Const. Co., 46 P.2d 981, 7 C.A.2d 573.

Pa.—Keefer v. Lombardi, 89 Pa.Dist. & Co. 406, affirmed 102 A.2d 695, 376 Pa. 367.

Agreement to pay damages

(1) A contractor performing municipal work is not liable, without proof of negligence, in an action of trespass for damage caused by concussion and vibrations of blasting operations, unless he has voluntarily assumed the liability, but, where contract between municipality and contractor provided that latter should make good any damage caused by blasting, landowners would be entitled to recover against him in action of trespass for damage to buildings caused by blasting without pleading negligence. In such action, however, where contract between city and contractor should have been excluded on objection thereto because

not pleaded, recovery could not be had on the theory of a direct trespass without proving negligence.

Pa.—Del Pizzo v. Middle West Const. Co., 22 A.2d 79, 146 Pa.Super. 345.

(2) Where a contractor, by terms of a contract with municipal sanitary district for construction of an intercepting sewer, agreed to pay, at contractor's own expense, for all injury to persons or property arising in connection with construction work, a showing of negligence by contractor was not necessary to support a cause of action against contractor for personal injuries and property damage allegedly sustained by plaintiffs from explosions and subsidence of soil in connection with construction work.

Ill.—Baker v. S. A. Healy Co., 24 N.E.2d 228, 302 Ill.App. 634.

Performance of government duty

(1) Contractor blasting on highway or in river and damaging adjoining land could not avoid liability on ground that he was performing government duty.

Conn.—Scranton v. L. G. De Felice & Son, 79 A.2d 600, 137 Conn. 580—Whitman Hotel Corp. v. Elliott Engineering Co., 79 A.2d 591, 137 Conn. 562.

N.J.—Thompson v. Jannarone Contracting Co., 141 A. 25, 6 N.J.Misc. 320.

Ohio.—Bluhm v. Blanck & Gargaro, 24 N.E.2d 615, 62 Ohio App. 451.

(2) However, where independent contractors were engaged in blasting operations for United States government under contract and used blasting methods approved by government, they were entitled to same immunity from suit as the United States itself

for others,^{60.5} it has been held that an independent contractor will not be held liable in the absence of negligence,^{60.10} unless there is an agreement that he shall be responsible for such damage without fault.^{60.15} The refusal of an adjoining landowner to allow an inspection of his premises before and during the blasting does not affect the contractor's liability.^{60.20}

There is authority, based on the general rule as to nonliability of the contractee stated in Master and Servant § 584, to the effect that a principal is not liable for the negligence of an independent contractor, although the work to be done is intrinsically dangerous, as long as no negligence can be imputed to him in employing such contractor, and the work itself is lawful and will not necessarily result in injury to another;⁶¹ but the well recognized exception to the general rule, which is stated in Master and Servant § 590, has been applied in cases of injuries resulting from blasting operations, and, accordingly, it has been frequently held that a city or other employer cannot delegate its duty of care in work intrinsically dangerous, such as blast-

ing, or by contract escape liability for the negligence of its independent contractor.⁶² So, where the work is done as contemplated, the employer is held liable⁶³ as a joint wrongdoer, in some jurisdictions;⁶⁴ and, particularly, where the injury results from defective plans or methods of using explosives, or from blasting in a manner expressly authorized by the employer or from acts necessary to the performance of the contract, or from carrying on blasting where the work required is intrinsically dangerous, the employer is responsible.⁶⁵ An employer also incurs liability where he contracts for blasting with one whom he knows to be unskilled or negligent or in the habit of blasting in violation of an ordinance.⁶⁶ So, too, where the blasting is unlawful, or constitutes a nuisance, the employer is liable for the acts of an independent contractor.⁶⁷

An assistant to a contractor personally directing an explosion or preparations therefor may be liable as a joint tort-feasor.⁶⁸ Where the parties conducting the blasting are master and servant, instead of employer and independent contractor, and the em-

with respect to injuries caused on nearby lands from vibrations resulting from blasting operations conducted without any negligence on part of contractors.

Iowa.—Pumphrey v. J. A. Jones Const. Co., 94 N.W.2d 737.

Statute providing method of recovery against sanitary districts for damages caused by erection of public works does not relieve an independent contractor under contract with a sanitary district from common-law liability for injuries to real property caused by the negligent use of explosives.

Ill.—Kosicki v. S. A. Healy Co., 38 N.E.2d 525, 312 Ill.App. 307, affirmed 44 N.E.2d 27, 330 Ill. 298.

60.5 Cal.—Pascoe v. Southern Cal. Edison Co., 227 P.2d 555, 102 C.A. 2d 254.

N.J.—Balinski v. A. Capone & Sons, 63 A.2d 810, 1 N.J.Super. 215.

60.10 N.Y.—Weinbaum v. Algonquin Gas Transmission Co., 132 N.Y.S. 2d 128, affirmed 136 N.Y.S.2d 423, 285 App.Div. 818.

Contractor held negligent

N.J.—Balinski v. A. Capone & Sons, 63 A.2d 810, 1 N.J.Super. 215.

60.15 N.Y.—Weinbaum v. Algonquin Gas Transmission Co., 132 N.Y.S. 2d 128, affirmed 136 N.Y.S.2d 423, 285 App.Div. 818.

60.20 Pa.—Keefer v. Lombardi, 89 Pa.Dist. & Co. 406, affirmed 102 A. 2d 695, 376 Pa. 367.

61. Cal.—McGrath v. Basich Bros.

Const. Co., 46 P.2d 981, 7 C.A.2d 573.

25 C.J. p 197 note 75.

62. U.S.—Asheville Const. Co. v. Southern Ry. Co., C.C.A.N.C., 19 F. 2d 32.

N.C.—Watson v. Black Mountain Ry. Co., 80 S.E. 175, 164 N.C. 176.

Pa.—Hershkovitz v. Parker, Com.Pl., 102 Pittsb.Leg.J. 351.

Tex.—Cisco & N. E. Ry. Co. v. Texas Pipe Line Co., Civ.App., 240 S.W. 990, error refused.

Wash.—Freebury v. Chicago, M. & P. S. R. Co., 137 P. 1044, 77 Wash. 464.

25 C.J. p 197 note 76.

Lease

Where an owner of a quarry began blasting in operating it, and thereby threw stones on the premises of the adjacent owner, who complained and gave notice of the danger to him, and the owner then leased the quarry to a third person for the purpose of having the operations continued, and the third person agreed to indemnify the owner against damages, it was held that the owner was liable for the acts of the lessee in the operation of the quarry.

N.C.—Arthur v. Henry, 73 S.E. 206, 157 N.C. 393.

In New York

(1) The rule of the text has been recognized.

N.Y.—Petluck v. McGolrick Realty Co., 268 N.Y.S. 782, 240 App.Div. 61.

25 C.J. p 197 note 75.

(2) However, there is authority apparently to the contrary.

N.Y.—Berg v. Parsons, 50 N.E. 957, 156 N.Y. 109, 66 Am.S.R. 542, 41 L. R.A. 391.

25 C.J. p 197 note 75.

Rule held applicable notwithstanding ordinance

Ill.—Baker v. S. A. Healy Co., 24 N. E.2d 228, 302 Ill.App. 634.

Wash.—Thompson-Cadillac Co. v. Matthews, 23 P.2d 399, 173 Wash. 353.

63. Iowa.—Watson v. Mississippi River Power Co., 156 N.W. 188, 174 Iowa 23, L.R.A.1916D 101.

Ky.—Lexington & E. Ry. Co. v. Baker, 161 S.W. 228, 156 Ky. 431.

25 C.J. p 197 note 77.

64. Ohio.—Carman v. Steubenville & I. R. Co., 4 Ohio St. 399.

Tenn.—Cumberland Tel. & Tel. Co. v. Stoneking, 1 Tenn.Civ.App. 241.

25 C.J. p 197 note 78.

65. Iowa.—Watson v. Mississippi River Power Co., 156 N.W. 188, 174 Iowa 23, L.R.A.1916D 101.

Wash.—Thompson-Cadillac Co. v. Matthews, 23 P.2d 399, 173 Wash. 353.

25 C.J. p 197 note 79.

66. Mo.—Brannock v. Elmore, 21 S. W. 451, 114 Mo. 55.

67. Ky.—James v. McMinimy, 20 S. W. 435, 93 Ky. 471, 14 Ky.L. 486, 40 Am.S.R. 200.

25 C.J. p 198 note 81.

68. N.Y.—Page v. Dempsey, 77 N. E. 9, 184 N.Y. 245.

ployer or master controls the manner or details of the work, he is responsible for injuries.⁶⁹

§ 9. — Transportation

Common carriers and others who transport explosives must use care commensurate with the danger, and are liable to those injured through their negligence or where the shipment has become a nuisance. Shippers are liable for injuries resulting from their own negligence.

In the absence of negligence on its part, a common carrier is not liable to third persons injured through its transportation of explosives in the performance of its duty to receive and transport freight of such character.⁷⁰ It is, however, liable to those injured through its negligence⁷¹ or where it has so handled the shipment that it has become a nuisance.⁷²

The carrier is bound to exercise reasonable and ordinary care for the safety of the persons and property of the general public,⁷³ that is, care commensurate with the danger,⁷⁴ or such care and prudence as prudent and careful persons whose business it is to deal in such articles ordinarily exercise;⁷⁵ but, if a carrier is uninformed as to the dangerous character of an explosive package, it is not negligence to handle it as similar looking packages are handled.⁷⁶

Statutory regulations as to the manner in which explosives shall be handled and transported do not impliedly absolve the carrier from the necessity of employing care commensurate with the risk of danger.⁷⁷ Rules of the interstate commerce commission governing the handling and marking of

69. Ohio.—*Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am.R. 408. 25 C.J. p 198 note 83.

Master's liability to servant for injury in use of dynamite or other explosive see *Master and Servant* § 214.

70. U.S.—*Bruskas v. Railway Exp. Agency*, C.A.N.M., 172 F.2d 915—*Actiesselskabet Ingrid v. Central R. Co. of New Jersey*, N.Y., 216 F. 72, 132 C.C.A. 316, L.R.A.1916B 716, rehearing denied 216 F. 991, 132 C.C.A. 665, L.R.A.1916B 716, certiorari denied 35 S.Ct. 284, 238 U.S. 615, 59 L.Ed. 1490.

N.J.—*Republic of France v. Lehigh Valley R. Co.*, 114 A. 242, 96 N.J. Law 25.

W.Va.—*Corpus Juris Secundum* cited in *Pope v. Edward M. Rude Carrier Corp.*, 75 S.E.2d 584, 595, 138 W.Va. 218.

25 C.J. p 198 note 85.

Duty of:

Carrier to accept explosives for transportation see *Carriers* § 28 b.

Shipper to notify carrier of explosive character of goods see *Carriers* § 78 b.

Liability of carrier to shipper for loss of goods through explosion see *Carriers* §§ 78 b, 79 a.

Transportation on passenger vessels or vehicles see *infra* § 12.

Carrier neither insurer nor absolutely liable

Contract carrier is not an insurer nor is it absolutely liable for injuries caused by an explosion which occurred during transportation, where the transportation did not constitute a nuisance and there was no negligence.

W.Va.—*Pope v. Edward M. Rude Carrier Corp.*, 75 S.E.2d 584, 138 W.Va. 218.

Powder left in car by consignee

A railroad, which had transported powder in its usual course of business

in a car which was unloaded by the consignee, who had received numerous consignments of powder, and always handled them without accident, could assume that the consignee in unloading the particular car would not leave any powder therein, so that it was not required to inspect the car after unloading, and was not liable for injuries to a boy from the explosion of powder which the railroad company did not know was in the car.

Utah.—*Bogdon v. Los Angeles & S. L. R. Co.*, 205 P. 571, 59 Utah 505.

71. U.S.—*U. S. v. Marshall*, C.A.Idaho, 230 F.2d 183—*Cornec v. Baltimore & O. R. Co.*, C.C.A.Md., 48 F. 2d 497, certiorari denied *Baltimore & O. R. Co. v. Cornec*, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530.

Ga.—*Corpus Juris Secundum* cited in *Atlantic Co. v. Taylor*, 54 S.E. 2d 910, 913, 80 Ga.App. 25.

Tex.—*Houston Belt & Terminal Ry. Co. v. O'Leary*, Civ.App., 136 S.W. 601.

W.Va.—*Corpus Juris Secundum* cited in *Pope v. Edward M. Rude Carrier Corp.*, 75 S.E.2d 584, 595, 138 W.Va. 218.

25 C.J. p 198 note 86.

Intervening cause

Participation of a nonmember of volunteer fire department in fighting a fire which had developed during delivery by defendant of gasoline and tractor fuel constituted such an intervening cause as would remove any negligence of defendant as the proximate cause of death of such participant from injuries sustained in explosion of fuel tank of defendant's truck.

Neb.—*Wax v. Co-operative Refinery Ass'n*, 46 N.W.2d 769, 154 Neb. 42.

72. Colo.—*Willson v. Colorado & S. Ry. Co.*, 142 P. 174, 57 Colo. 303.

W.Va.—*Corpus Juris Secundum* cited in *Pope v. Edward M. Rude Carrier*

Corp., 75 S.E.2d 584, 595, 138 W.Va. 218.

25 C.J. p 198 note 87.

Keeping and storage of explosives as nuisance see *Nuisances* § 47.

73. U.S.—*Cornec v. Baltimore & O. R. Co.*, C.C.A.Md., 48 F.2d 497, certiorari denied *Baltimore & O. R. Co. v. Cornec*, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530—*Fidelity & Deposit Co. of Maryland v. Lehigh Valley R. Co.*, C.C.A.N.J., 275 F. 922.

25 C.J. p 198 note 88.

74. U.S.—*Fidelity & Deposit Co. of Maryland v. Lehigh Valley R. Co.*, *supra*.

75. Ill.—*Hertz v. Chicago I. & S. R. Co.*, 154 Ill.App. 80.

25 C.J. p 198 note 89.

Maintenance of separate pier not required

In the absence of any statute on the subject, a railroad company cannot be required to establish and maintain a separate and isolated pier for the transference of explosives from its line to vessels.

U.S.—*The Ingrid*, D.C.N.Y., 195 F. 596, affirmed *Actiesselskabet Ingrid v. Central R. Co. of New Jersey*, 216 F. 72, 132 C.C.A. 316, L.R.A.1916B 716, rehearing denied 216 F. 991, 132 C.C.A. 665, L.R.A.1916B 716, certiorari denied 35 S.Ct. 284, 238 U.S. 615, 59 L.Ed. 1490.

76. U.S.—*Parrot v. Wells Fargo & Co.*, Cal., 15 Wall. 524, 21 L.Ed. 206.

Hamburg-American Line v. Atlantic Transport Co., Pa., 236 F. 505, 149 C.C.A. 557. 25 C.J. p 198 note 90.

77. N.J.—*Republic of France v. Lehigh Valley R. Co.*, 117 A. 598, 97 N.J.Law 474—*Howell v. Lehigh Valley R. Co.*, 109 A. 309, 94 N.J. Law 213, certiorari denied 40 S.Ct. 482, 253 U.S. 482, 64 L.Ed. 1024. 25 C.J. p 198 note 91.

shipments of explosives have been held to be designed for the protection and safety of railway employees and the public,⁷⁸ and their violation to give the consignee no right of action for damages sustained from an explosion after delivery of the shipment,⁷⁹ particularly where the act of congress empowered the commission to formulate rules and regulations governing shipments "in transit," which means in course of passage from one point to another, so that after delivery of the shipment to the consignee the rules of the commission cease to have any application.⁸⁰ Where a tanker is having its tanks cleaned and gas-freed by a professional tank cleaning company, the Coast Guard regulation requiring all vessels with combustible liquid cargo on board to have flame screens on when hatches are open is inapplicable, since the vessel has already discharged its cargo.^{80.5}

The shipper is not liable for the negligence of the carrier, as against the contention that the transportation of explosives is so ultrahazardous that the shipper cannot delegate to an independent contractor his duty to protect the public.^{80.10} A carrier is not required to ascertain the competency of a minor consignee to receive a shipment unless it has reason to believe that it would be dangerous to deliver the shipment, so that it is not liable for injuries subsequently sustained.^{80.15}

One who transports gasoline on the public highways must exercise that degree of care which an ordinarily prudent and cautious person would exercise under like or similar circumstances; that is to say, he must use care commensurate with the dan-

ger, but he is not liable for injuries in the absence of negligence.⁸¹ It is not actionable negligence for one driving an automobile loaded with explosives, who discovers that the automobile is on fire through no fault of his, to abandon it on a steep hill which he cannot surmount.⁸²

Acts of shipper. To impose liability on a shipper because of the transportation of explosives, it must be shown that it was done negligently or under such circumstances as to create a public nuisance.^{82.5} Where a shipper fails so to mark explosives as to notify those who handle them of their dangerous character, he is liable to those injured by his negligence by reason of such failure,⁸³ and this is true even though the failure properly to mark the goods is in accordance with an agreement between the shipper and the carrier.⁸⁴ Violation of a statute requiring proper marking, however, will not create an absolute liability on the part of the person who violates it.^{84.5} A statute requiring the shipper to mark and give notice of the dangerous character of explosive or inflammable goods which imposes only a criminal penalty will not support a civil action without specific allegation of matter giving rise to a cause of action at common law.⁸⁵

One who is both manufacturer and shipper is not liable to third persons injured in the transportation of explosives where the transportation did not constitute a nuisance and the manufacturer and shipper was not negligent;^{85.5} but one who is both manufacturer and shipper is liable for injury resulting from the inadequacy of the container.^{85.10} Where explosives are shipped in tank cars furnished by the

78. Ga.—Davis v. A. F. Gossett & Sons, 118 S.E. 773, 30 Ga.App. 576, affirmed A. F. Gossett & Sons v. Davis, 124 S.E. 529, 158 Ga. 886.

Mo.—Huckleberry v. Missouri Pac. R. Co., 26 S.W.2d 980, 324 Mo. 1025.

Regulations held inapplicable

Section 1643 of the regulations of the interstate commerce commission for the transportation of explosives, providing that "suitable provision must be made, outside the station when practicable, for the safe storage of explosives," does not apply to explosives in carload lots which had reached their destination and were awaiting unloading for transshipment on vessels.

U.S.—Fidelity & Deposit Co. of Maryland v. Lehigh Valley R. Co., C.C.A. N.J., 275 F. 922.

79. Ga.—Davis v. A. F. Gossett & Sons, 118 S.E. 773, 30 Ga.App. 576, affirmed A. F. Gossett & Sons v. Davis, 124 S.E. 529, 158 Ga. 886.

80. Ga.—Davis v. A. F. Gossett & Sons, 118 S.E. 773, 30 Ga.App. 576,

affirmed A. F. Gossett & Sons v. Davis, 124 S.E. 529, 158 Ga. 886.

80.5 U.S.—Universe Tankships, Inc. v. Pyrate Tank Cleaners, Inc., D.C. N.Y., 152 F.Supp. 903.

80.10 Ky.—Collins v. Liquid Transporters, 262 S.W.2d 382.

80.15 U.S.—Bruskas v. Railway Exp. Agency, C.A.N.M., 172 F.2d 915.

81. Wash.—Ringgaard v. Allen Lubricating Co., 267 P. 43, 147 Wash. 653.

82. Kan.—Barnhardt v. American Glycerine Co., 213 P. 663, 113 Kan. 136, 31 A.L.R. 721.

82.5 U.S.—Smith v. U. S., D.C.Va., 155 F.Supp. 605.

83. U.S.—U. S. v. Marshall, C.A.Idaho, 230 F.2d 183.

Ky.—Standard Oil Co. v. Tierney, 17 S.W. 1025, 92 Ky. 367, 13 Ky.L. 626, 36 Am.S.R. 595, 14 L.R.A. 677.

Mass.—Boston & A. R. Co. v. Shanly, 107 Mass. 568.

Shipper held not negligent in failing to warn carrier of danger of pitch dust explosion.

U.S.—Cornec v. Baltimore & O. R. Co., C.C.A.Md., 48 F.2d 497, certiorari denied Baltimore & O. R. Co. v. Cornec, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530.

84. Ky.—Standard Oil Co. v. Tierney, 17 S.W. 1025, 92 Ky. 367, 13 Ky.L. 626, 36 Am.S.R. 595, 14 L.R.A. 677.

84.5 N.J.—Carlo v. Okonite-Callender Cable Co., 69 A.2d 734, 3 N.J. 253.

85. U.S.—Wyman, Partridge & Co. v. Boston Blacking Co., C.C.Me., 175 F. 834.

85.5 W.Va.—Pope v. Edward M. Rude Carrier Corp., 75 S.E.2d 584, 138 W.Va. 218.

85.10 U.S.—E. I. Dupont De Nemours & Co. v. Wright, C.C.A.Ky., 146 F.2d 765, certiorari denied 65 S.Ct. 1017, 324 U.S. 873, 89 L.Ed. 1426.

shipper, it is the duty of the shipper under its contract with the purchaser or consignee so to equip its cars that their contents may be safely discharged in the ordinary way by the exercise of due care, and this duty extends to employees of the consignee who may be required to unload the cars.⁸⁶ Defendant may be liable for his noncompliance with a statute of the state imposing requirements as to the packing and shipping of explosive and inflammable material⁸⁷ notwithstanding the injury results in another state.⁸⁸

A shipper is required to exercise care in unloading a carrier's truck, not only in the selection of the method to be used, but also in the fitness of the appliances provided and used by it.^{88.5}

§ 10. — Discharge of Fireworks

- a. In general
- b. Negligence

a. In general

One who discharges fireworks unlawfully or in a manner constituting a nuisance is liable, without regard to negligence, for injuries proximately resulting therefrom; and one who negligently discharges fireworks is likewise liable, although his act is not in itself unlawful or a nuisance.

One who unlawfully discharges fireworks,⁸⁹ or discharges them in such a manner as to amount to a nuisance,⁹⁰ is liable for ensuing injury without regard to the question of his negligence. Where, however, the act is not in itself unlawful or a nuisance, liability must be predicated on negligence.⁹¹ So, although the discharge of fireworks at suitable places, when not prohibited by statute or municipal

regulations, cannot be said to be unlawful,⁹² the circumstances may be such as to make the act of discharging them actionable negligence.⁹³

One who unlawfully discharges fireworks on a public highway is responsible for all injury to persons or property occasioned thereby to those traveling thereon.⁹⁴ A distinction, however, has been drawn between voluntary spectators present merely for the purpose of witnessing the display of fireworks and travelers on the highway, it being held that the spectators can recover only on proof of negligence, although the discharge was unauthorized.⁹⁵

The promoters of a fireworks display, which may become a nuisance by reason of the place where and the manner in which it is conducted, may be held personally liable for damages for resulting personal injuries.⁹⁶ Where premises commonly used as a playground for children are leased by defendant for an exhibition of fireworks, defendant is under a duty to use reasonable care to have the grounds cleared of unexploded bombs after the exhibition.⁹⁷

Private parks and places of amusement. It is not unlawful or a nuisance per se to give a fireworks exhibition and shoot off skyrockets, bombs, and other explosives in a careful and suitable manner on one's own premises.⁹⁸ The owner or manager of a park or other place of amusement who gives an exhibition of fireworks therein must use the care and prudence exercised by an ordinarily prudent and intelligent man to protect not only his guests and patrons,⁹⁹ but all others,¹ from unneces-

86. Va.—Standard Oil Co. v. Wakefield, 47 S.E. 830, 102 Va. 824, 66 L.R.A. 792.

25 C.J. p 199 note 96.

87. U.S.—Hansen v. E. I. Du Pont de Nemours & Co., D.C.Md., 8 F.2d 552, reversed on other grounds, C.C.A., 33 F.2d 94, certiorari denied 50 S.Ct. 37, 280 U.S. 589, 74 L.Ed. 638.

88. U.S.—Wyman, Partridge & Co. v. Boston Blacking Co., C.C.Me., 175 F. 834.

25 C.J. p 199 note 97.

88.5 Okl.—Cosden v. Wright, 211 P. 2d 523, 202 Okl. 211.

89. Ill.—Gerrard v. Porcheddu, 243 Ill.App. 562.

N.J.—Doughty v. Atlantic City Business League, 80 A. 473.

Liability of municipality for failure: To enact or enforce ordinances as to the setting off of fireworks see Municipal Corporations § 769.

To prevent improper use of streets for display of fireworks see Municipal Corporations § 800.

Regulation of use and sale of fireworks see supra § 2.

Sale of fireworks to infants see supra § 6 e.

90. N.J.—Doughty v. Atlantic City Business League, supra.

25 C.J. p 199 note 99 [a].
Fireworks as nuisance see Nuisances § 75.

91. N.Y.—Crowley v. Rochester Fireworks Co., 76 N.E. 470, 183 N. Y. 353, 3 L.R.A., N.S., 330, 5 Ann. Cas. 538.

92. Mo.—Dowell v. Guthrie, 12 S.W. 900, 99 Mo. 653, 17 Am.S.R. 598.

93. Me.—Shannon v. Dow, 175 A. 766, 133 Me. 235.

25 C.J. p 199 note 3.

94. N.J.—Jenne v. Sutton, 43 N.J. Law 257, 39 Am.R. 578.

25 C.J. p 199 note 4.

95. Mass.—Frost v. Josselyn, 62 N. E. 469, 180 Mass. 389.

25 C.J. p 199 note 5.

96. R.I.—Sroka v. Halliday, 97 A. 965, 39 R.I. 119, Ann.Cas.1918D 961.

97. N.J.—Spenzierato v. Our Lady Monte Virgine Soc. of Mut. Ben. of East Orange, N. J., 169 A. 831, 112 N.J.Law 93.

98. Neb.—Bianki v. Greater American Exposition Co., 92 N.W. 615, 3 Neb. Unoff., 656.

Fireworks company can legally contract to exhibit fireworks at a place of amusement and is not limited to a sale of fireworks to a fair company.

N.Y.—Kingsland v. Erie County Agr. Soc., 84 N.E.2d 38, 298 N.Y. 409, 10 A.L.R.2d 1.

99. U.S.—Sebeck v. Plattdeutsche Volksfest Verein, N.Y., 124 F. 11, 59 C.C.A. 531, certiorari denied 24 S.Ct. 858, 194 U.S. 634, 48 L.Ed. 1160.

25 C.J. p 199 note 8.

1. Neb.—Bianki v. Greater American Exposition Co., 92 N.W. 615, 3 Neb. Unoff., 656.

25 C.J. p 199 note 9.

sary risks from the discharge or attempted discharge of such fireworks, and he must provide a reasonably safe place for spectators, at a proper distance;² but he is liable only in case of negligence or failure to use reasonable care in regard to such matters as are known or should reasonably be known.³ An individual or corporation, giving a fireworks exhibition on its own grounds, is liable for negligence where bombs or other explosives fall outside of its grounds and there cause injury to others.⁴ There may also be liability for injuries sustained when children take unguarded fireworks from the premises and explode them.^{4,5}

Proximate cause. There can be no recovery for injuries from fireworks unless the act of defendant was the proximate cause of the injury.⁵ One who merely permits the display of fireworks on his private grounds, but who does not procure or explode them is not liable for an injury caused by them to one who complains only of their quality and the manner in which they are handled.⁶

Liability on bond. A bond given by a licensed exhibitor of fireworks, as required by statute, conditioned for the payment of all damages caused either to persons or property by reason of the display and arising from any acts of the licensee or his agents, is not limited to liability caused by negligence, but is, in effect, an accident insurance policy, and, where a wife was injured by the display and her husband incurred medical expenses and other kindred damages, both the husband and wife can recover on the bond without proving negligence on the part of the licensee, and without proceeding against the licensee.⁷

b. Negligence

Negligence may lie in the character of the fireworks used, as well as in the method of their discharge. One having no control over the details of a display is not liable for the negligence of an independent contractor exhibiting fireworks; but a parent may be liable for injuries resulting from a negligent use of fireworks by a child.

Negligence in the discharge of fireworks may lie in the character of the fireworks used on the particular occasion, as well as in the method of their discharge.⁸ So, where rockets of large size are employed, they should be used only in such places, and under such circumstances, as to involve no reasonable chance that their heavy cases will fall on human beings.⁹ It is actionable negligence so to fire bombs that they will fall on a spectator standing where he is expected to stand to view a display of fireworks.¹⁰

Negligence of independent contractor. The owner or manager of an amusement park, having no control over the details of a display, is not liable for the negligence of an independent contractor hired to exhibit fireworks.¹¹

Liability for negligence of infants. Where a parent, through lack of care or watchfulness, permits an infant of tender age to discharge fireworks, he is liable for injuries resulting from a negligent use of them.¹²

§ 11(1). — Actions

Actions to recover damages for injuries by explosives may be in case; trespass may be brought when the injury is direct and immediate.

Case has been held the proper action to recover damages for injuries caused by an explosion;¹³ but an action of trespass may be brought when the

2. U.S.—Sebeck v. Plattdeutsche Volksfest Verein, N.Y., 124 F. 11, 59 C.C.A. 531, certiorari denied 24 S.Ct. 858, 194 U.S. 634, 48 L.Ed. 1160.

3. U.S.—Sebeck v. Plattdeutsche Volksfest Verein, supra. 25 C.J. p 199 note 11.

4. Neb.—Blanki v. Greater American Exposition Co., 92 N.W. 615, 3 Neb., Unoff., 656. 25 C.J. p 199 note 12.

4.5 N.Y.—Kingsland v. Erie County Agr. Soc., 84 N.E.2d 38, 298 N.Y. 409, 10 A.L.R.2d 1.

Trespasser

Fact that the child may have been a trespasser does not preclude recovery.

N.Y.—Kingsland v. Erie County Agr. Soc., supra.

5. Ill.—Consolidated Fireworks Co. of America v. Koehl, 60 N.E. 87, 190 Ill. 145. 25 C.J. p 200 notes 13, 14.

Defendant's negligence held proximate cause

Mo.—Lottes v. Pessina, App., 174 S. W.2d 893.

6. Ill.—Waixel v. Harrison, 37 Ill. App. 323.

7. N.J.—McBride v. Maryland Casualty Co., 23 A.2d 596, 128 N.J.Law 64, 138 A.L.R. 932.

8. N.Y.—Crowley v. Rochester Fireworks Co., 76 N.E. 470, 183 N.Y. 353, 3 L.R.A., N.S., 330, 5 Ann.Cas. 538.

9. N.Y.—Crowley v. Rochester Fireworks Co., supra.

10. R.I.—Sroka v. Halliday, 97 A. 965, 39 R.I. 119, Ann.Cas.1918D 961.

11. N.Y.—Deyo v. Kingston Cons. R. Co., 88 N.Y.S. 487, 94 App.Div. 578. 25 C.J. p 200 note 19.

12. La.—Mullins v. Blaise, 37 La. Ann. 92.

Injuries resulting from sale of fireworks to children see supra § 6 e. Liability of infant for torts see Infants §§ 87-92.

Liability of parents for tort of child generally see Parent and Child §§ 65-69.

13. Pa.—Tissue v. Baltimore & O. R. Co., 3 A. 667, 112 Pa. 91, 56 Am. R. 310.

25 C.J. p 200 note 23.

injury is direct and immediate,¹⁴ as in throwing blasted rocks or debris on adjoining premises,¹⁵ regardless of what extraordinary precautions are taken to prevent their escape.^{15.5} Under a constitutional provision that municipal and other corporations and individuals shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, the appropriate remedy is a proceeding before viewers, and an action for trespass will not lie if the injury is the direct, immediate, necessary and unavoidable consequence of the act of eminent domain itself, irrespective of care or negligence in doing it;^{15.10} but trespass will lie for injury caused by the negligent performance of the work.^{15.15}

An action for damages resting upon erroneous information given by the sellers as to the nature and safety of the explosives, which misstatement is the proximate cause of an injury, may be based either on deceit or negligence.¹⁶

§ 11(2). — — — Defenses

- a. In general
- b. Contributory negligence

a. In General

In actions for injuries from explosives, the defense of assumption of risk has been held recognized where

applicable. Facts and circumstances held not to constitute defenses include the fact that no similar accident has occurred under like conditions, the unreasonableness of regulations governing the handling of explosives, and ignorance of such regulations or of the character of material.

A number of matters involving defenses to actions for injuries from explosives have already been considered, *supra* §§ 4-10, in connection with the question of the existence of a cause of action.

The defense of assumption of risk has been recognized in an action for injuries resulting from an explosion.¹⁷ It is available when there has been a voluntary acceptance of a risk and such acceptance, express or implied, has been made with knowledge and appreciation of the risk;^{17.5} if there is no knowledge of the risks, the doctrine is not applicable.^{17.10} Defenses based on a theory of assumption of risk have been unavailable in the absence of a relation of master and servant,¹⁸ and even notwithstanding such relation, where it appears that the employer has been negligent;¹⁹ but the master's negligence does not bar the defense of assumption of risk if the servant continues in the employment with knowledge of the employer's negligence,^{19.5} or if the servant, in the exercise of ordinary care could have known of the unsafe condition of the premises or the appliances.^{19.10} Moreover, the defense is unavailable if the employer

14. Ala.—*Ex parte Birmingham Realty Co.*, 63 So. 67, 183 Ala. 444. 25 C.J. p 200 note 24.

15. U.S.—*Clark v. U. S.*, D.C.Or., 109 F.Supp. 213, affirmed, C.A., 218 F.2d 446.

Ala.—*Ex parte Birmingham Realty Co.*, 63 So. 67, 183 Ala. 444. 25 C.J. p 200 note 25.

15.5 U.S.—*Clark v. U. S.*, D.C.Or., 109 F.Supp. 213, affirmed, C.A., 218 F.2d 446.

15.10 Pa.—*Dumbaugh v. DeFelice & Son*, 82 Pa.Dist. & Co. 294, 14 Beaver 79.

Kiselak v. Middle West Const., Com.Pl., 92 Pittsb.Leg.J. 511.

15.15 Pa.—*Dumbaugh v. DeFelice & Son*, 82 Pa.Dist. & Co. 294, 14 Beaver 79.

16. Wash.—*Marsh v. Usk Hardware Co.*, 132 P. 241, 73 Wash. 543.

17. Conn.—*Murphy v. Ossola*, 199 A. 648, 124 Conn. 366.

Storage

The text rule has been applied in action for personal injuries sustained by a boy in explosion of dynamite caps by reason of alleged negligence in storing such caps contrary to statute.

Conn.—*Murphy v. Ossola*, *supra*.

Machinist removing rifle cartridge
La.—*Drummond v. Seal*, App., 71 So. 2d 381.

Risk held not assumed
Conn.—*Starkel v. Edward Balf Co.*, 114 A.2d 199, 142 Conn. 336.

Minors taking gunpowder

Where two boys fifteen years of age entered cottage, ascertained that substance in some cans found therein was gunpowder, took several cans from cottage to quarry in neighborhood, and produced an explosion which injured them, even assuming an ultrahazardous condition in cottage, minors' voluntary assumption of risk precluded recovery for injuries sustained.

Conn.—*Parzych v. Town of Branford*, 136 A.2d 223, 20 Conn.Sup. 378.

17.5 Cal.—*Raich v. Aldon Const. Co.*, 276 P.2d 822, 129 C.A.2d 278.

17.10 U.S.—*Moran v. Pittsburgh-Des Moines Steel Co.*, C.C.A.Pa., 166 F.2d 908, certiorari denied 68 S.Ct. 1516, 334 U.S. 846, 92 L.Ed. 1770.

18. Ill.—*Lafin-Rand Powder Co. v. Tearney*, 23 N.E. 389, 131 Ill. 322, 19 Am.S.R. 34, 7 L.R.A. 262.

N.C.—*Broughton v. Standard Oil Co.*

of New Jersey, 159 S.E. 321, 201 N.C. 282.

Motorist did not assume risk of gasoline seller's negligence in overflowing tank of automobile.

Miss.—*Standard Oil Co. of Kentucky v. Evans*, 122 So. 735, 154 Miss. 475.

Custom in shooting oil wells

A custom among torpedo companies of shooting oil wells only at the owner's risk is no defense to a claim for damages resulting from the negligence of a torpedo company or its agent in setting off a premature explosion in such shooting process.

Tex.—*Southwestern Oil Development Co. v. Illinois Torpedo Co.*, Civ. App., 252 S.W. 334, error dismissed *Illinois Torpedo Co. v. Southwestern Oil Development Co.*, 278 S.W. 1115, 114 Tex. 582.

19. Vt.—*Tinney v. Crosby*, 22 A.2d 145, 112 Vt. 95.

Blasting operations

Vt.—*Tinney v. Crosby*, *supra*.

19.5 Ky.—*Jump v. Ashland Oil Co.*, 259 S.W.2d 12.

Discovery of gasoline

Employees of independent contractor engaged to clean gasoline stor-

fails to disclose unknown extraordinary hazards to an independent contractor in the absence of the latter's familiarity with the risks likely to be encountered. 19.15

The statute of limitation applicable to negligence actions based on reckless or wanton misconduct is not a defense where the action is based on absolute liability for blasting. 19.20

The fact that no similar accident has occurred under like conditions is not in itself a defense. 20

The alleged unreasonableness of regulations governing the handling of explosive material has been held not available as a defense to an action for injuries resulting from an explosion of such material; 21 nor does ignorance of such regulations constitute a defense. 22 Violation of regulations is not a defense where they are not intended to protect the person who relies on them. 22.5 So, violation of the private safety rules promulgated by an employer for the purpose of protecting its own employees is not a defense in an action against an independent contractor who, through its own negligence, causes an explosion, especially if the contractor was unaware of their existence and did not rely on them. 22.10

Ignorance of the character of material is not an excuse from liability where there is a duty to know its character as far as possible. 23

The fact that the premises on which an explo-

sion occurs formerly belonged to plaintiff and were sold by him with knowledge that explosive material was to be handled thereon does not constitute a defense in an action for injuries resulting from such explosion; 24 nor is it a defense that plaintiff leased or sold a portion of his property to another for the purpose of manufacturing powder, 25 or that other powder magazines were located in the vicinity at the time plaintiff purchased property which was subsequently injured by the explosion of a magazine. 26 The fact that the injured property was not adjacent to the premises on which the explosives were stored will not in itself defeat a recovery. 27

The owner of a munitions plant, in order to be absolved from liability for injuries from an explosion on the ground of government control, must show that such control is absolute. 28

In an action for injuries resulting from negligence in the storage of explosives, a defense that they must be kept accessible for use in defendant's business is not available where it appears that they were not being so used. 29

Claims for property damage from blasting are not barred by a refusal to allow inspection of the interior of plaintiff's building on the ground that such refusal constitutes fraud. 29.5

Failure to comply with the conditions precedent to direct action on the part of the third party bene-

age tanks would be held to have assumed risk of explosion occurring more than one hour after they had arrived at tank and observed that leaky pump had deposited considerable quantity of gasoline on ground surrounding tank and had filled air with gaseous fumes.

Ky.—Jump v. Ashland Oil Co., supra.

19.15 U.S.—White v. U. S., D.C. Cal., 97 F.Supp. 12.

19.20 Conn.—Antinozzi v. D. V. Fri-one & Co., 79 A.2d 598, 137 Conn. 577.

20. Va.—Simmons v. McConnell, 10 S.E. 838, 86 Va. 494.
25 C.J. p 200 note 29.

Loading pitch and coal

In an action based on negligence in using electrical machinery and open lights in loading pitch, resulting in explosion of pitch dust, it is no defense that defendant previously loaded coal with the same machinery without explosion.

U.S.—Cornec v. Baltimore & O. R. Co., C.C.A.Md., 48 F.2d 497, certiorari denied Baltimore & O. R. Co. v. Cornec, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530.

21. Mo.—Huckleberry v. Missouri Pac. R. Co., 26 S.W.2d 980, 324 Mo. 1025.

Regulations of interstate commerce commission

Railroad company cannot plead unreasonableness of interstate commerce commission's regulations respecting explosives certified by secretary of commission and reciting that paragraphs were numbered to correspond to American Railway Association's regulations.

Mo.—Huckleberry v. Missouri Pac. R. Co., supra.

22. Mo.—Huckleberry v. Missouri Pac. R. Co., supra.

22.5 Coast Guard regulations

U.S.—Universe Tankships, Inc. v. Pyrate Tank Cleaners, Inc., D.C.N.Y., 152 F.Supp. 903.

22.10 U.S.—Universe Tankships, Inc. v. Pyrate Tank Cleaners, Inc., supra.

23. U.S.—Cornec v. Baltimore & O. R. Co., C.C.A.Md., 48 F.2d 497, certiorari denied Baltimore & O. R. Co. v. Cornec, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530.

Ind.—Standard Oil Co. of Indiana v.

Robb, 149 N.E. 567, 85 Ind.App. 21.

25 C.J. p 200 note 30.

Manufacturer

Tenn.—Read Phosphate Co. v. Vickers, 11 Tenn.App. 146.

24. Ark.—Phillips Petroleum Co. v. Berry, 65 S.W.2d 533, 188 Ark. 431.

25. Cal.—Judson v. Giant Powder Co., 40 P. 1020, 107 C. 549, 48 Am. S.R. 146, 29 L.R.A. 718.

Ill.—Lafin-Rand Powder Co. v. Tearney, 30 Ill.App. 321, affirmed 23 N.E. 389, 131 Ill. 322, 19 Am.S.R. 34, 7 L.R.A. 262.

26. Ill.—Lafin-Rand Powder Co. v. Tearney, 23 N.E. 389, 131 Ill. 322, 19 Am.S.R. 34, 7 L.R.A. 262.

27. Ohio.—Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co., 54 N. E. 528, 60 Ohio St. 560, 71 Am.S.R. 740, 45 L.R.A. 658.

28. N.Y.—Home Ins. Co. v. T. A. Gillespie Loading Co., 225 N.Y.S. 276, 222 App.Div. 67.

29. Ariz.—Buckeye Irr. Co. v. Askren, 46 P.2d 1068, 45 Ariz. 566.

29.5 Pa.—Keefer v. Lombardi, 89 Pa.Dist. & Co. 406, affirmed 102 A.2d 695, 376 Pa. 367.

ficiaries under a contract, obligating the contractor to restore or repair such property as was damaged during the prosecution of the work, is not a defense for the contractor.^{29.10}

b. Contributory Negligence

Contributory negligence may be available as a defense to an action involving explosives and based on the negligence of defendant.

Where an action for an injury resulting from explosives is based on a theory of defendant's negligence, contributory negligence on the part of plaintiff will constitute a defense,³⁰ provided plaintiff's negligence proximately and appreciably contributed to such injury,³¹ such defense being available, for example, where a recovery is sought for an injury

from blasting,³² or for injuries to children by attractive explosives.³³

It has been said, however, that generally contributory negligence is no defense to an action for injuries from the use of an intrinsically dangerous agency, such as an explosive in blasting operations, necessarily exposing plaintiff to probable injury,³⁴ and that it is not available as a defense against a child who is too young to be guilty of contributory negligence,³⁵ or where an action for injuries is based on a violation of statute,³⁶ but as to the last point there is authority to the contrary effect.^{36.5}

Excusable ignorance of the explosive qualities of a substance may preclude one's being guilty of contributory negligence,³⁷ and the fact that acts

29.10 N.Y.—Griffiths v. Yonkers Contracting Co., 151 N.Y.S.2d 468, 1 A.D.2d 1020, appeal denied 153 N.Y.S.2d 601, 2 A.D.2d 706.

30. U.S.—Crow v. Continental Oil Co., C.C.A.Tex., 115 F.2d 740. Conn.—Murphy v. Ossola, 199 A. 648, 124 Conn. 366.

Ky.—Crouch v. Noland, 38 S.W.2d 471, 238 Ky. 575.

Mich.—Gust v. Muskegon Co-op. Oil Co., 198 N.W. 175, 226 Mich. 532, 33 A.L.R. 772.

N.Y.—Darmstadt v. Fischler, 79 N.Y.S.2d 288, 191 Misc. 1.

Tex.—Nesmith v. Magnolia Petroleum Co., Civ.App., 82 S.W.2d 721. 25 C.J. p 201 note 37.

Test of whether wife who received fatal injuries from explosion of kerosene contributed to her injuries by her own negligence was whether she used that degree of care for her own safety as would be exercised by an ordinarily prudent person under the same or similar circumstances.

N.M.—Rivera v. Ancient City Oil Corp., 302 P.2d 953, 61 N.M. 473.

Using bomb fuse as cane

Even if United States was negligent, man who went looking for scrap metal on private property knowing it had been former bombing range and who picked up metal marked with words "nose bomb fuse" and who used it as cane as he walked in area, was contributorily negligent. U.S.—Flores v. U. S., D.C.N.M., 105 F.Supp. 640.

31. U.S.—U. S. v. Coffey, C.A.Wash., 233 F.2d 41.

Me.—Lyle v. Bangor & A. R. Co., 110 A.2d 584, 150 Me. 327.

Mo.—Buchholz v. Standard Oil Co. of Indiana, 244 S.W. 973, 211 Mo.App. 397.

Wash.—Seattle Taxicab Co. v. Texas Co., 57 P.2d 1237, 186 Wash. 363.

32. U.S.—Cary Bros. & Hannon v.

Morrison, Ark., 129 F. 177, 63 C.C. A. 267, 65 L.R.A. 659. 25 C.J. p 201 note 38.

33. Conn.—Parzych v. Town of Branford, 136 A.2d 223, 20 Conn. Sup. 378.

Mo.—Shields v. Costello, App., 229 S.W. 411. 25 C.J. p 201 note 39.

Fireworks

Cal.—Mathews v. City of Albany, 97 P.2d 266, 36 C.A.2d 147, hearing denied 98 P.2d 1025, 36 C.A.2d 147.

Mont.—Jackson v. Lomas, 198 P. 434, 60 Mont. 8.

Dynamite cap

(1) Where intelligent boy over seventeen years old knew that what his companion had found was a dynamite cap and that it was an explosive, and he threw it into fire to explode it, and when explosion did not occur promptly he moved closer to fire, and explosion occurred and he was blinded in one eye, he was guilty of contributory negligence as a matter of law.

U.S.—E. I. Du Pont De Nemours & Co. v. Edgerton, C.A.Minn., 231 F. 2d 430.

(2) When boy knows that he is doing something hazardous, fact that the danger proves to be more serious than anticipated does not make his act, which contributed to the causing of the accident, any the less negligence on his part.

Ill.—Matijevich v. Dolese & Shepard Co., 261 Ill.App. 498.

Gunpowder

Fifteen-year-old boy, who bought gunpowder from defendant and secretly planned mounting and loading of cannon, has been held contributorily negligent as matter of law as to injuries received after igniting fuse. Cal.—Bolar v. Maxwell Hardware Co., 271 P. 97, 205 C. 396, 60 A.L.R. 429.

34. Conn.—Welz v. Manzillo, 155 A. 841, 113 Conn. 674.

35. Ark.—Sinclair Refining Co. v. Gray, 83 S.W.2d 820, 191 Ark. 175.

Four-year-old boy

Ark.—Sinclair Refining Co. v. Gray, supra.

Six-year-old boy

Ky.—Cumberland River Oil Co. v. Dicken, 131 S.W.2d 927, 279 Ky. 700.

Seven-year-old boy

La.—Hunt v. Rundle, 120 So. 696, 10 La.App. 604.

Wash.—Bogges v. King County, 274 P. 188, 150 Wash. 578.

Eight-year-old boy

Ill.—Featherstone v. Freeding, 110 N.E.2d 535, 349 Ill.App. 359.

Tenn.—Gatlinburg Const. Co. v. McKinney, 263 S.W.2d 765, 37 Tenn. App. 343.

Nine-year-old boy

Ky.—Sutton Const. Co. v. Lemaster's Adm'r, 3 S.W.2d 613, 223 Ky. 296.

Eleven-year-old boy

Wash.—Akin v. Bradley Engineering, etc., Co., 92 P. 903, 48 Wash. 97, 14 L.R.A., N.S., 586.

36. Wis.—Knecht v. Kenyon, 192 N.W. 82, 179 Wis. 523.

36.5 Minn.—Dart v. Pure Oil Co., 27 N.W.2d 555, 223 Minn. 526, 171 A.L.R. 885.

37. N.J.—Hopper v. Charles Cooper & Co., 139 A. 19, 104 N.J.Law 93, 55 A.L.R. 187.

Mine sold as flare

Notwithstanding a city ordinance prohibiting the shooting off of explosive fireworks or other substances, a young boy who is injured by a so-called mine is not guilty of contributory negligence as a matter of law where he is ignorant of the explosive qualities of the object which has been sold by defendant's servant as merely a flare.

are done in reliance on statements of defendant that they are safe may prevent them from constituting contributory negligence.³⁸

The handling of gasoline in the proximity of a light or fire may constitute contributory negligence,³⁹ as may lighting a match and throwing it down in the vicinity of an explosive,⁴⁰ or conducting a business in violation of ordinance regulating it.⁴¹ The mere fact that one handles or transports an explosive substance does not, however, constitute contributory negligence;⁴² nor does the fact that the owner of premises strikes a match in a place where he keeps no inflammable material,⁴³ or the failure of the operator to extinguish acetylene lamps on a motor truck while its gas tank is being filled,⁴⁴ or the use of an open flame in thawing a water pipe, near an abandoned gasoline tank,⁴⁵ necessarily constitute contributory negligence. The

mere fact that one has noticed gasoline fumes does not as a matter of law establish his contributory negligence in failing to remove his property.⁴⁶

One driving a traction engine from a highway across an exposed pipe line at the side of the highway is not as a matter of law guilty of contributory negligence precluding a recovery for damages resulting from the breaking of the pipe line and the ignition of escaping oil or gas;⁴⁷ and one injured by the explosion of stove polish while applying it to a heated stove is not guilty of contributory negligence as a matter of law.⁴⁸

Approaching or remaining near danger. Voluntarily approaching or entering into a place of danger may constitute contributory negligence,⁴⁹ as may an employee's sleeping in a gasoline filling station in violation of his employer's express orders.⁵⁰ It is not, however, per se contributory negligence

Mo.—Borserman v. Smith, 226 S.W. 608, 205 Mo.App. 657.

Purchaser of jug of hydrofluoric acid which explodes is not guilty of contributory negligence, where he has no knowledge of the explosive qualities of such substance.

N.J.—Hopper v. Charles Cooper & Co., 139 A. 19, 104 N.J.Law 93, 55 A.L.R. 187.

User of artificial gas

A yacht owner who had no special knowledge of dangers of artificial gas used in stove installed on yacht by representative of chemical company which furnished the gas was not barred, on ground of contributory negligence, from recovering for injuries sustained in explosion as result of defective installation of stove. Mich.—Grinnell v. Carbide & Carbon Chemicals Corporation, 276 N.W. 535, 282 Mich. 509.

38. Tex.—Desdemona Gasoline Co. of Texas v. Garrett, Civ.App., 90 S.W.2d 636, error dismissed. 25 C.J. p 201 note 40.

Gasoline tank

Plaintiff, who was injured by explosion of a gasoline tank which he was attempting to weld, after being assured by defendant's agent who had prepared tank for welding and who had previously prepared tanks for welding by plaintiff, that it was ready to weld, was not contributorily negligent in failing to ascertain whether tank contained explosive substances.

Tex.—Desdemona Gasoline Co. of Texas v. Garrett, supra.

39. Tenn.—Grigsby v. Bratton, 163 S.W. 804, 128 Tenn. 597.

Operator of popcorn wagon in permitting filling station attendant to put gasoline into tank in wagon while taper in rear was in open flame

and burner was being used, resulting in explosion when tank overflowed, has been held contributorily negligent.

Minn.—Nick v. Standard Oil Co. of Indiana, 237 N.W. 607, 183 Minn. 573.

40. Cal.—Smith v. Associated Oil Co., 199 P. 879, 53 C.A. 142.

41. Tex.—Magnolia Petroleum Co. v. Beck, Civ.App., 41 S.W.2d 488, error dismissed.

Improper ventilation of dry-cleaning plant

Violation of ordinance requiring proper ventilation of dry-cleaning establishment constituted contributory negligence as matter of law precluding recovery for damages caused by explosion, even if dealer was negligent in delivering gasoline and "naphtha" when only naphtha had been ordered.

Tex.—Magnolia Petroleum Co. v. Beck, supra.

42. Cal.—Harrison v. Harter, 18 P. 2d 436, 129 C.A. 22.

Auxiliary gasoline tank

Plaintiffs burned by exploding gasoline in collision resulting from defendant's negligence were not guilty of contributory negligence in that they were carrying such gasoline in an auxiliary supply tank fastened securely to the back of the cab on a truck.

Cal.—Harrison v. Harter, supra.

43. Mich.—Lynn v. Roberts, 241 N.W. 214, 257 Mich. 116.

Basement

Where benzol spilled near filling station allegedly percolated into basement, wherein nothing inflammable was kept, owner was not contributorily negligent in striking match therein.

Mich.—Lynn v. Roberts, supra.

44. Pa.—Fredericks v. Atlantic Refining Co., 127 A. 615, 282 Pa. 8, 38 A.L.R. 666.

45. Md.—American Oil Co. v. Wells, 165 A. 298, 164 Md. 422.

46. Mich.—Woods v. Chalmers Motor Co., 175 N.W. 449, 207 Mich. 556.

25 C.J. p 201 note 41.

47. Kan.—Thompson v. Union Tract Co., 191 P. 278, 107 Kan. 238—Murphy v. Ludowici Gas & Oil Co., 150 P. 581, 96 Kan. 321.

48. Conn.—Wolcho v. Rosenbluth, 71 A. 566, 81 Conn. 358, 21 L.R.A., N.S., 571.

Mass.—Gately v. Taylor, 97 N.E. 619, 211 Mass. 60, 39 L.R.A., N.S., 472.

49. Md.—Yockel v. Gerstadt, 140 A. 40, 154 Md. 188.

Mich.—Thornton v. Ionia Fair Ass'n, 200 N.W. 958, 229 Mich. 1.

Burning truck

One injured by exploding gasoline tank on burning truck was contributorily negligent as matter of law in approaching near such truck.

Md.—Yockel v. Gerstadt, 140 A. 40, 154 Md. 188.

Place set aside for fireworks

Where fourteen-year-old boy of ordinary intelligence and experience with fireworks, at early hour in morning, climbed fences and went into inclosure in fair ground set aside for fireworks and was injured while trying to set off explosives picked up there, knowing them to be dangerous, his negligence was such as to bar recovery.

Mich.—Thornton v. Ionia Fair Ass'n, 200 N.W. 958, 229 Mich. 1.

50. N.C.—Broughton v. Standard Oil Co. of New Jersey, 159 S.E. 321, 201 N.C. 282.

for one to go on premises where a fire is likely to cause an explosion, if he does so in good faith, intending to save life or property,⁵¹ particularly where the injured person enters the dangerous area in pursuance of the duties of his employment.⁵² It is not contributory negligence per se for one to attempt to return to his usual working place after an explosion;⁵³ but the rule is otherwise where one goes voluntarily toward the danger, or through mere curiosity, although he renders some service.⁵⁴

One is not guilty of contributory negligence in living in his home near a magazine, although he has knowledge of its dangerous character,⁵⁵ or in continuing to carry on business nearby after an explosion has occurred.⁵⁶ The mere presence of a person in a crowd that has gathered to see a display of fireworks, in a place where they were expected or invited to stand, is not contributory negligence which deprives him of his right to recover if injured by the negligent or wrongful discharge of fireworks.⁵⁷

One who is entitled to personal and timely notice

of blasting is not bound to watch and listen, or exercise any care or vigilance to escape until warned.⁵⁸

Kindling fire with oil or gasoline. The use of kerosene, or other oil which appears to be kerosene, to start a fire, is not in itself contributory negligence, as a matter of law,⁵⁹ and the use of a liquid supposed to be fuel oil in kindling a fire has been held not to constitute contributory negligence, notwithstanding such liquid is poured on an open flame;⁶⁰ but an attempt to revive a dying fire by pouring kerosene from a can,⁶¹ or to kindle a new fire without ascertaining that there is no fire present,⁶² is usually held to be negligence per se.

Disregard of warning. Failure to exercise reasonable care and due diligence to escape injury, after warning of the danger, generally constitutes contributory negligence.⁶³ Thus, where one has been properly warned of a blast or impending danger, and disregards it, or fails to avail himself of means for his own protection, he cannot recover.⁶⁴

51. N.J.—Campbell v. Pure Oil Co., 194 A. 873, 15 N.J.Misc. 723. 25 C.J. p 201 note 45.

52. N.J.—Campbell v. Pure Oil Co., supra.

Member of fire department

N.J.—Campbell v. Pure Oil Co., supra.

25 C.J. p 201 note 45 [b].

53. U.S.—American Glycerin Co. v. Hill, Okl., 255 F. 841, 167 C.C.A. 169.

25 C.J. p 201 note 46-47.

54. U.S.—Cleveland, C. & St. L. R. Co. v. Ballentine, Ill., 84 F. 935, 28 C.C.A. 572.

55. U.S.—Hazard Powder Co. v. Volger, Wyo., 58 F. 152, 7 C.C.A. 130. 25 C.J. p 201 note 49.

56. Cal.—Judson v. Giant Powder Co., 40 P. 1020, 107 C. 549, 48 Am. S.R. 146, 29 L.R.A. 718.

57. Mass.—Colvin v. Peabody, 29 N.E. 59, 155 Mass. 104. 25 C.J. p 201 note 51.

58. N.Y.—St. Peter v. Denison, 58 N. Y. 416, 17 Am.R. 258.

59. Ga.—Shermer v. Crowe, 186 S.E. 224, 53 Ga.App. 418.

La.—Dronette v. Meaux Bros., 100 So. 411, 156 La. 239.

Mich.—Peplinski v. Kleinke, 299 N. W. 818, 299 Mich. 86.

Minn.—Farrell v. G. O. Miller Co., 179 N.W. 566, 147 Minn. 52.

Mo.—Parton v. Phillips Petroleum Co., 107 S.W.2d 167, 231 Mo.App. 585.

Ohio.—Douglas v. Daniels Bros. Coal Co., 22 N.E.2d 195, 135 Ohio St. 641, 123 A.L.R. 761.

Paragon Refining Co. v. Higbee, 153 N.E. 860, 22 Ohio App. 440.

W.Va.—Tofano v. McIntyre, 155 S.E. 653, 109 W.Va. 550.

25 C.J. p 202 note 53.

60. Ohio.—Douglas v. Daniels, 22 N. E.2d 1003, 62 Ohio App. 1, affirmed Douglas v. Daniels Bros. Coal Co., 22 N.E.2d 195, 135 Ohio St. 641, 123 A.L.R. 761.

Fuel oil mixed with gasoline or naphtha

Use of fuel oil mixed with gasoline or naphtha which exploded has been held not to constitute contributory negligence as a matter of law where such mixture has been purchased from defendant as fuel oil, and believed to be such.

Ohio.—Douglas v. Daniels, 22 N.E.2d 1003, 62 Ohio App. 1, affirmed Douglas v. Daniels Bros. Coal Co., 22 N.E.2d 195, 135 Ohio St. 641, 123 A.L.R. 761.

61. U.S.—Riggs v. Standard Oil Co., C.C.Minn., 130 F. 199.

Mo.—Parton v. Phillips Petroleum Co., 107 S.W.2d 167, 231 Mo.App. 585.

62. U.S.—Sinclair Refining Co. v. Tompkins, C.C.A.Miss., 117 F.2d 596.

Ark.—Corpus Juris cited in Goode v. Pierce Oil Corporation, 286 S. W. 1009, 1010, 171 Ark. 863.

Ky.—Corpus Juris cited in Crouch v. Noland, 38 S.W.2d 471, 472, 238 Ky. 575.

Mich.—McLawson v. Paragon Refining Co., 164 N.W. 668, 198 Mich. 222.

Mo.—Parton v. Phillips Petroleum

Co., 107 S.W.2d 167, 231 Mo.App. 585.

63. U.S.—U. S. v. Inmon, C.A.Tex., 205 F.2d 681.

Porter v. U. S., D.C.S.C., 128 F. Supp. 590, affirmed, C.A., 228 F.2d 389.

Ariz.—Twohy Bros. Co. v. Kepon, 193 P. 296, 21 Ariz. 606.

25 C.J. p 202 note 56.

Warning on label on container

La.—Richardson v. DeLuca, App., 53 So.2d 199.

Abandonment of position of safety

Where warning of an impending blast was given to a pedestrian on a street before it occurred, and he was advised to take a place of safety along the wall of a building, the fact that he was seized with a sudden panic when the crash came, and rushed into the building, where he was killed by a stone hurled through the window, will not render the persons exploding the blast liable.

Wash.—Graetz v. McKenzie, 35 P. 377, 9 Wash. 696.

Mere carelessness of person injured by blasting operations not amounting to intentional, wanton, or reckless misconduct in failure to heed warning may not amount to contributory negligence barring recovery.

Conn.—Loethscher v. Campo, 141 A. 652, 107 Conn. 568.

64. Ariz.—Twohy Bros. Co. v. Kepon, 193 P. 296, 21 Ariz. 606.

Ky.—Adams' Adm'r v. Callis & Hughes, 69 S.W.2d 711, 253 Ky. 382.

However, attendant circumstances may excuse a failure to heed a warning.⁶⁵

§ 11(3). — — Jurisdiction and Venue

A cause of action for injury by negligent blasting accrues in the jurisdiction where the injury occurred. An action for damage to personalty and realty is transitory.

Where one is injured by negligent blasting, the cause of action accrues in the jurisdiction where the injury occurred, although the work is conducted within another jurisdiction.⁶⁶

Where an explosion causes damage to both personalty and realty, the action is transitory in its nature, and defendant may be sued wherever found and served.⁶⁷

§ 11(4). — — Parties

General rules govern questions as to parties in actions involving explosives.

The owners of realty are the real party in interest and may maintain an action for the full amount of damages from blasting, even though a portion of the repair bill has been paid by the owner's insurer.^{67,50} A specific mention, in a statute relating to explosives, of the class of persons to whom the right of action is given for its breach excludes by implication any other class.^{67,55}

Where work is so negligently and improperly performed as to cause injury to adjoining property, a volunteer superintendent in charge of blasting, be-

ing a joint tort-feasor with the other persons engaged in the work, may be sued alone.⁶⁸ In an action for injuries resulting from blasting on adjoining land, one who is not shown to be an owner of such land, a contractor doing work thereon, or the person firing or directing the blast is not a proper party defendant;⁶⁹ nor may the consignor be sued for damages caused by explosion of a consignment of gunpowder, to be sold on commission, where the consignee has exclusive control as to storage.⁷⁰ In an action for damage from blasting, brought by plaintiff as the owner of the property, a statute providing that the bare possession of land shall authorize the possessor to recover damages from any person wrongfully interfering with such possession is inapplicable.^{70.5}

In appropriate circumstances, joint liability for damages caused by an explosion may be imputed to a company and its employee,⁷¹ a lessor and his lessee,⁷² a railroad company and a terminal company,⁷³ or two manufacturers⁷⁴ or partners;⁷⁵ and each of those concerned in the maintenance of a powder house or magazine which constitutes a nuisance is liable for damage from its explosion,⁷⁶ whether he acts in the capacity of principal or agent,⁷⁷ owner or lessee,⁷⁸ or consignee using the explosive.⁷⁹ A statute providing for joinder of parties in cases presenting "common questions of law and fact" and "in respect of or arising out of the same transaction or series of transactions," has been applied so as to permit the joinder, as plaintiffs, of a number of persons claiming per-

Tenn.—Marion Const. Co. v. Steepleton, 14 Tenn.App. 127.
25 C.J. p 202 note 57.

65. Minn.—Clarkin v. Biwabik-Bessemer Co., 67 N.W. 1020, 65 Minn. 483.
25 C.J. p 202 note 58.

Material penetrating roof and ceiling

A woman injured while in her house by rocks thrown on the house by a blast, which penetrated the roof and the ceiling, is not precluded from recovering for such injuries on the ground of contributory negligence because the house was badly constructed and the roof weak, and because she did not leave the house when the warning of "Fire" was given before the blast was exploded.
Ky.—Eureka Elkhorn Coal Co. v. Lawson, 241 S.W. 335, 195 Ky. 14.

66. Ark.—Cameron v. Vandegriff, 13 S.W. 1092, 53 Ark. 381.

67. N.Y.—Barney v. Burstenbinder, 7 Lans. 210.

67.50 Okl.—Smith v. Yoho, 324 P. 2d 531.

Insurer not necessary party

In houseowner's action for blasting damage, houseowner's insurer was not necessary party, although it had made settlement with owner.
N.Y.—Beasley v. Huntley Estates at Ardsley, 137 N.Y.S.2d 787, 285 App. Div. 887.

67.55 N.Y.—Wilmart Products Corp. v. Keshner, 135 N.Y.S.2d 35.

Corporation could not maintain action for property damage under code prohibiting sale and delivery of volatile inflammable oil in quantities exceeding one gallon unless buyer has permit and permitting persons receiving bodily injuries as result of violation of code to maintain action for damage.

N.Y.—Wilmart Products Corp. v. Keshner, supra.

68. N.Y.—Page v. Dempsey, 77 N.E. 9, 184 N.Y. 245.

69. Wash.—Thompson-Cadillac Co. v. Matthews, 23 P.2d 399, 173 Wash. 353.

70. N.M.—Abrahams v. California Powder Works, 23 P. 785, 5 N.M. 479, 8 L.R.A. 378.

70.5 Ga.—Florence v. Lovell, 43 S.E. 2d 728, 75 Ga.App. 401.

71. Ark.—Pine Bluff Water & Light Co. v. McCain, 34 S.W. 549, 62 Ark. 118.

72. Ohio.—Langabaugh v. Anderson, 67 N.E. 286, 68 Ohio St. 131, 62 L.R.A. 948.

25 C.J. p 202 note 66.

73. Tex.—Houston Belt & Terminal R. Co. v. O'Leary, Civ.App., 136 S. W. 601.

74. Mass.—Boston & A R. Co. v. Shanly, 107 Mass. 568.
25 C.J. p 202 note 68.

75. Tenn.—Cumberland Tel. & Tel. Co. v. Stoneking, 1 Tenn.Civ.App. 241.

76. N.Y.—Prussak v. Hutton, 51 N. Y.S. 761, 30 App.Div. 66.

Tex.—Cumminge v. Stevenson, 13 S. W. 556, 76 Tex. 642.

77. Tex.—Cumminge v. Stevenson, supra.

78. N.Y.—Prussak v. Hutton, 51 N. Y.S. 761, 30 App.Div. 66.

79. N.Y.—Prussak v. Hutton, supra.

sonal injuries and damage to different properties as a result of explosions occurring in the course of the same construction job.⁸⁰ A plaintiff in doubt as to which, if any, of several persons are liable has been permitted to join them as parties defendant.⁸¹

§ 11(5). — — — Pleading

- a. In general
- b. Issues, proof, and variance

a. In General

In an action for injuries from explosives, whether based on the theory of negligence, nuisance, or trespass, plaintiff's pleading must contain allegations of fact sufficient to constitute a cause of action.

Under the view that liability in tort for injuries

arising from explosives must be predicated on either a theory of nuisance or the existence of negligence, see *supra* § 4, the pleadings in an action for damages resulting from explosives must allege facts showing either a nuisance or negligence.⁸²

If a nuisance is alleged, the facts establishing it must be set forth,^{82.5} such as the quantity and kind of explosives kept, the locality endangered, the protection given, and kind of magazine used;⁸³ but an allegation of negligence is unnecessary.⁸⁴

Where, in an action involving explosives, a recovery is sought on the theory of negligence, negligence must be charged;⁸⁵ the elements of negligence should be stated^{85.5} and the facts constituting it must be pleaded;⁸⁶ but there is no need to

80. Ill.—Baker v. S. A. Healy Co., 24 N.E.2d 228, 302 Ill.App. 634.

81. N.Y.—First Const. Co. of Brooklyn v. Rapid Transit Subway Const. Co., 203 N.Y.S. 359, 122 Misc. 145, affirmed 206 N.Y.S. 822, 211 App. Div. 184.

82. Ala.—Whaley v. Sloss-Sheffield Steel & Iron Co., 51 So. 419, 164 Ala. 216, 20 Ann.Cas. 822.

N.Y.—Hirt v. Miceli Bros. Const. Co., 80 N.Y.S.2d 798.

Storing of explosives

Ala.—Whaley v. Sloss-Sheffield Steel & Iron Co., 51 So. 419, 164 Ala. 216, 20 Ann.Cas. 822.

Community of interest; direct and consequential injuries

Under a statute requiring a permit for the use of explosives in blasting, without enlarging the common-law liability for direct or consequential injuries, a complaint in a suit brought by persons some of whom suffered direct and others consequential injuries has been held insufficient for failure to set out a community of interest in the subject matter of the controversy or that there is a common right or title involved.

Mass.—Jenkins v. A. G. Tomasello & Son, 189 N.E. 817, 286 Mass. 180.

Complaint held insufficient

Ala.—Tennessee Coal, Iron & R. Co. v. Hartline, 11 So.2d 833, 244 Ala. 116.

82.5 Ala.—Whaley v. Sloss-Sheffield Steel & Iron Co., 51 So. 419, 164 Ala. 216, 20 Ann.Cas. 822.

83. Ala.—Whaley v. Sloss-Sheffield Steel & Iron Co., *supra*.

84. Ala.—Rudder v. Koopman, 22 So. 601, 116 Ala. 332, 37 L.R.A. 489.

Cal.—Alonso v. Hills, 214 P.2d 50, 95 C.A.2d 778.

25 C.J. p 203 note 77.

85. Ala.—Ragland v. Duke, 137 So. 397, 223 Ala. 574.

Fla.—Craig v. Baker & Holmes Co., 96 So. 93, 85 Fla. 373.

Me.—Cratty v. Samuel Aceto & Co., 116 A.2d 623, 151 Me. 126.

Nev.—Smith v. Smith-Peterson Co., 45 P.2d 785, 56 Nev. 79, 100 A.L.R. 440, rehearing denied 48 P.2d 760, 56 Nev. 449, 100 A.L.R. 449.

N.Y.—Lofgren v. Protane Corporation, 18 N.Y.S.2d 571, 259 App.Div. 785, affirmed 31 N.E.2d 46, 284 N. Y. 709.

Tex.—Crain v. West Tex. Utilities Co., Civ.App., 218 S.W.2d 512, error refused no reversible error.

25 C.J. p 203 note 78.

Blasting

Me.—Cratty v. Samuel Aceto & Co., 116 A.2d 623, 151 Me. 126.

Concerted action; conspiracy

In an action for negligence, based on the joint liability of several defendants, the complaint is not insufficient merely because of failure to allege concerted action, collusion, conspiracy, or agreement.

S.C.—Cabe v. Ligon, 105 S.E. 739, 115 S.C. 376.

85.5 Ill.—Fazkowski v. Choyce, 59 N.E.2d 324, 324 Ill.App. 582.

Knowledge of defect or danger

Ga.—Kelley v. Black, 47 S.E.2d 802, 203 Ga. 589.

Ky.—Jump v. Ashland Oil Co., 259 S. W.2d 12.

Duty to person injured

Ga.—Kelley v. Black, 47 S.E.2d 802, 203 Ga. 589.

86. Kan.—Phillips v. Doyle, 207 P. 2d 465, 167 Kan. 376.

Nev.—Smith v. Smith-Peterson Co., 48 P.2d 760, 56 Nev. 449, 100 A.L. R. 449.

N.Y.—Lofgren v. Protane Corporation, 18 N.Y.S.2d 571, 259 App.Div. 785, affirmed 31 N.E.2d 46, 284 N. Y. 709.

25 C.J. p 203 note 79.

Allegations held sufficient

U.S.—Pabellon v. Grace Lines, Inc., C.A.N.Y., 191 F.2d 169, certiorari denied Coston Supply Co. v. Pabellon, 72 S.Ct. 201, 342 U.S. 893, 96 L. Ed. 669—Sierocinski v. E. I. Du Pont De Nemours & Co., C.C.A.Pa., 103 F.2d 843—Gulf Refining Co. of Louisiana v. Jinright, C.C.A.Ala., 10 F.2d 306.

Green v. Equitable Powder Mfg. Co., D.C.Ark., 94 F.Supp. 126.

Ala.—Merchants' Bank v. Sherman, 110 So. 805, 215 Ala. 370—Atlas Portland Cement Co. v. Sharpe, 96 So. 632, 209 Ala. 464.

Ga.—Reed Oil Co. v. Smith, 114 S.E. 56, 154 Ga. 183, conformed to 114 S.E. 721, 29 Ga.App. 236.

State Park Marina v. Muller, 89 S.E.2d 826, 92 Ga.App. 639—Flint Explosive Co. v. Edwards, 66 S.E. 2d 368, 84 Ga.App. 376—Atlantic Co. v. Taylor, 54 S.E.2d 910, 80 Ga. App. 25—Milton Bradley Co. of Ga. v. Cooper, 53 S.E.2d 761, 79 Ga.App. 302—McCarthy v. Gulf Refining Co., 107 S.E. 92, 26 Ga.App. 665.

Ill.—Fazkowski v. Choyce, 59 N.E.2d 324, 324 Ill.App. 582—Baker v. S. A. Healy Co., 24 N.E.2d 228, 302 Ill. App. 634.

Kan.—McLaughlin v. Rapp, 334 P.2d 431, 184 Kan. 58—Steele v. Rapp, 327 P.2d 1053, 183 Kan. 371—Vitt v. McDowell Motors, Inc., 308 P. 2d 115, 180 Kan. 800—Foster v. Humburg, 299 P.2d 46, 180 Kan. 64—Feger v. Concrete Materials & Const. Co., 238 P.2d 708, 172 Kan. 75—Hotel Kansan Operating Co. v. Olson, 232 P.2d 417, 171 Kan. 295.

Ky.—Fourseam Coal Corporation v. Hatfield, 130 S.W.2d 73, 279 Ky. 132.

La.—Dronette v. Meaux Bros., 100 So. 411, 156 La. 239.

Mo.—St. Mary's Mill Co. v. Illinois Oil Co., App., 254 S.W. 735.

plead with particularity every detail of the process involved by which the ultimate damage was caused.^{86.5}

Plaintiff's pleading must also show that the injury complained of was proximately caused by defendant's negligence.⁸⁷ If plaintiff's pleading does not show on its face an independent and efficient intervening cause which, as a matter of law, would prevent the negligence of defendant from being the proximate cause of plaintiff's injuries, the pleading sufficiently states a cause of action.^{87.5} When the duty to act is shown, the negligent performance of

that duty may be alleged in the most general terms.⁸⁸

As stated in Negligence § 187, a petition based on the *res ipsa loquitur* doctrine, in order to be sufficient, must contain allegations of fact which, if proved, would warrant application of the doctrine; and, accordingly, petitions have been held sufficient^{88.5} or insufficient^{88.10} for that purpose.

In accordance with rules imposing on one engaged in blasting operations liability for direct injury regardless of his negligence, see *supra* § 8, allegations charging wantonness on the part of defendant in blasting may be sufficient;⁸⁹ where tres-

Nev.—Smith v. Smith-Peterson Co., 45 P.2d 785, 56 Nev. 79, 100 A.L.R. 440, rehearing denied 48 P.2d 760, 56 Nev. 449, 100 A.L.R. 449.
N.J.—Campbell v. Pure Oil Co., 194 A. 873, 15 N.J.Misc. 723.
N.Y.—Langhoop v. Richfield Oil Corporation of New York, 21 N.Y.S.2d 416, 259 App.Div. 964.
Baillargeon v. Chazy Lime & Stone Co., 123 N.Y.S.2d 823, 204 Misc. 407.
Moss v. Fred Perlberg, Inc., 29 N.Y.S.2d 922, reversed on other grounds Noone v. Fred Perlberg, Inc., 49 N.Y.S.2d 460, 268 App.Div. 149, affirmed 60 N.E.2d 839, 294 N.Y. 680—Lindner v. Liggett-Myers Tobacco Co., 23 N.Y.S.2d 923.
N.C.—Smith v. Shell Union Oil Corporation, 198 S.E. 622, 214 N.C. 824.
Okl.—Palacine Oil Co. v. Philpot, 289 P. 281, 144 Okl. 123—Shaffer Oil & Refining Co. v. Thomas, 252 P. 41, 120 Okl. 253.
W.Va.—Pope v. Edward M. Rude Carrier Corp., 75 S.E.2d 584, 138 W.Va. 218—Tofano v. McIntyre, 155 S.E. 653, 109 W.Va. 550—Colebank v. Nellie Coal & Coke Co., 136 S.E. 512, 103 W.Va. 15.
Wis.—O'Brien v. Fred Kroner Hardware Co., 185 N.W. 205, 175 Wis. 238.
25 C.J. p 203 note 79 [a].
Allegations held insufficient
Fla.—Craig v. Baker & Holmes Co., 96 So. 93, 85 Fla. 373.
Ga.—Chitty v. Jones, 80 S.E.2d 694, 210 Ga. 439.
Ill.—Zazkowski v. Choyce, 59 N.E.2d 324, 324 Ill.App. 582—City of Detroit v. Wabash Refining Co., 223 Ill.App. 246.
Ind.—Barnett v. Sinclair Refining Co., 145 N.E. 894, 82 Ind.App. 372.
Kan.—Hotel Kansan Operating Co. v. Olson, 232 P.2d 417, 171 Kan. 295.
Me.—Reynolds v. W. H. Hinman Co., 75 A.2d 802, 145 Me. 343, 20 A.L.R. 2d 1360.
N.Y.—Lofgren v. Protane Corporation, 18 N.Y.S.2d 571, 259 App.Div.

785, affirmed 31 N.E.2d 46, 284 N.Y. 709.
Goldman v. Masters, Inc., 169 N.Y.S.2d 723, 10 Misc.2d 741.
N.C.—Reynolds v. Murph, 84 S.E.2d 273, 241 N.C. 60.
Pa.—Rehm v. Eberly, Com.Pl., 1 Lebanon 118—Johnson v. Independent Explosives Co., Com.Pl., 43 Luz. Leg.Reg. 81, 15 Monroe L.R. 39.
25 C.J. p 203 note 79 [b].
86.5 Kan.—Hotel Kansan Operating Co. v. Olson, 232 P.2d 417, 171 Kan. 295.
Mo.—Buckner v. Knutson-Gould Const. Co., App., 305 S.W.2d 709.
Pa.—Ephrata Community Hospital v. Keesey, Com.Pl., 53 Lanc.L.Rev. 1.
87. Nev.—Smith v. Smith-Peterson Co., 45 P.2d 785, 56 Nev. 79, 100 A.L.R. 440, rehearing denied 48 P.2d 760, 56 Nev. 449, 100 A.L.R. 449.
Pleading held sufficient
Ala.—Merchants' Bank v. Sherman, 110 So. 805, 215 Ala. 370.
Ga.—Milton Bradley Co. of Ga. v. Cooper, 53 S.E.2d 761, 79 Ga.App. 302.
Kan.—Foster v. Humburg, 299 P.2d 46, 180 Kan. 64.
Md.—Bohlen v. Glenn L. Martin Co., 67 A.2d 251, 193 Md. 454.
Mo.—Buchholz v. Standard Oil Co. of Indiana, 244 S.W. 973, 211 Mo. App. 397.
Nev.—Smith v. Smith-Peterson Co., 45 P.2d 785, 56 Nev. 79, 100 A.L.R. 440, rehearing denied 48 P.2d 760, 56 Nev. 449, 100 A.L.R. 449.
N.Y.—Nelson v. Town of Smyrna, 160 N.Y.S.2d 312, 3 A.D.2d 794, appeal denied 163 N.Y.S.2d 312, 3 A.D.2d 948—Daggett v. Keshmer, 134 N.Y.S.2d 524, 284 App.Div. 733.
Pleading held insufficient
Ga.—Gamble v. Davis, 106 S.E.2d 89, 98 Ga.App. 470.
Ill.—City of Detroit v. Wabash Refining Co., 223 Ill.App. 246.
Md.—Bohlen v. Glenn L. Martin Co., 67 A.2d 251, 193 Md. 454.
87.5 Kan.—Steele v. Rapp, 327 P.2d 1053, 183 Kan. 371.
88. Ala.—Sloss-Sheffield Steel & Iron

Co. v. Prosch, 67 So. 516, 190 Ala. 290.
25 C.J. p 203 note 80.
"Negligently" placing explosives
Complaint for child's injuries alleging defendants "negligently" placed explosive substance in highway sufficiently showed defendants knew, or should have known, of explosive character.
Ala.—Ragland v. Duke, 137 So. 397, 223 Ala. 574.
88.5 La.—Gerald v. Standard Oil Co. of Louisiana, 16 So.2d 233, 204 La. 690.
Mo.—Carter v. Skelly Oil Co., 252 S.W.2d 306, 363 Mo. 570.
General and specific allegations
A general allegation that defendant set off blast of explosives and that claimed damages to plaintiffs' land proximately resulted therefrom, leaving negligence to be inferred from fact of the blast, would make doctrine applicable; but where plaintiffs followed up the general allegation with an allegation of the specific acts of negligence, the doctrine did not apply.
Tex.—Universal Atlas Cement Co. v. Oswald, 157 S.W.2d 636, 138 Tex. 159.
88.10 U.S.—Leeper v. National Lead Co., D.C.Mo., 42 F.Supp. 121.
Kan.—Starks Food Markets v. El Dorado Refining Co., 134 P.2d 1102, 156 Kan. 577, followed in Boone v. El Dorado Refining Co., 134 P.2d 1106, 156 Kan. 584.
Me.—Reynolds v. W. H. Hinman Co., 75 A.2d 802, 145 Me. 343, 20 A.L.R. 2d 1360.
Md.—Bohlen v. Glenn L. Martin Co., 67 A.2d 251, 193 Md. 454.
89. Ala.—Birmingham Gas Co. v. Sanford, 145 So. 485, 226 Ala. 129.
Allegations held sufficient
Ala.—Birmingham Gas Co. v. Sanford, *supra*.
Pa.—Loy v. Kough, Com.Pl., 4 Cumb. L.J. 149—River Park Gardens, Inc. v. Martin, Com.Pl., 54 Lanc.L.Rev. 341—Kiselak v. Middle West Const., Com.Pl., 92 Pittsb.Leg.J. 511.
25 C.J. p 203 note 88.

pass is alleged, allegations of negligence are not required⁹⁰ and will be treated as surplusage.⁹¹ In addition, it has been said that in case of liability for direct injury from blasting operations regardless of negligence, plaintiff need not plead negligence.^{91.5}

Nature of explosive. The kind of explosive should be alleged, without an indefinite alternative such as dynamite "or other explosive,"⁹² although a petition designating the explosive in question "as gasoline or some other highly explosive substance similar to gasoline" has been sustained.⁹³ At any rate, the explosive and its combustion need not be described in technical terms with scientific accuracy, a statement that the substance was dangerous, and likely to ignite with a blaze in the nature of an explosion being sufficient.⁹⁴

Warning; notice. The duty of care or warning must be alleged if it is sought to hold defendant for a negligent breach of such duty,⁹⁵ and not only must a duty be alleged, but specific facts must be set out which raise a legal duty;⁹⁶ but it has been held that where the law implies a duty it is not necessary to aver it in terms.⁹⁷ A complaint alleging that defendant negligently failed to give plaintiff

notice of the blast, so as to enable him to escape, has been held sufficient without alleging that defendant knew, or could by reasonable care have known, of plaintiff's presence,⁹⁸ although an allegation of knowledge or reason to believe that plaintiff was within range of missiles has been required.⁹⁹

Attractive nuisance. Where the action is based on the theory that defendant maintained a nuisance attractive to children, it must be alleged that he permitted or induced them to come and play on the premises,¹ that some act or omission of his was the proximate cause of the injury for which the action is brought,² and that he was on notice that children were attracted.³ Where, in addition to the technical trespass on defendant's premises, the injured child commits thereon an act of moral turpitude contributing to his injury, it must be alleged that he was ignorant of the moral culpability of such act.⁴

Contributory negligence. In an action based on negligence, plaintiff may not be required to plead the absence of contributory negligence;⁵ on the other hand, a complaint is not insufficient for dis-

90. Ga.—Brooks v. Ready Mix Concrete Co., 96 S.E.2d 213, 94 Ga.App. 791.

Mo.—Stocker v. City of Richmond Heights, 132 S.W.2d 1116, 235 Mo. App. 277.—Schaefer v. Frazier-Davis Const. Co., App., 125 S.W.2d 897.

S.D.—Feinberg v. Wisconsin Granite Co., 224 N.W. 184, 54 S.D. 643, followed in Gerber v. Wisconsin Granite Co., 225 N.W. 57, 55 S.D. 100.

91. N.Y.—Henry Hall Sons Co. v. Sundstrom & Stratton Co., 123 N.Y.S. 390, 138 App.Div. 548, affirmed 97 N.E. 1106, 204 N.Y. 660.

Pa.—River Park Gardens, Inc. v. Martin, Com.Pl., 54 Lanc.L.Rev. 341.

91.5 U.S.—Boyce v. U. S., D.C.Iowa, 93 F.Supp. 866.

Colo.—Garden of the Gods Village v. Hellman, 294 P.2d 597, 133 Colo. 286.

Or.—Bedell v. Goulter, 261 P.2d 842, 199 Or. 344.

92. Ala.—Whaley v. Sloss-Sheffield Steel & Iron Co., 51 So. 419, 164 Ala. 216, 20 Ann.Cas. 322.

Ill.—Zaskowski v. Choyce, 59 N.E.2d 324, 324 Ill.App. 582.

93. Tex.—Cohn v. Saenz, Civ.App., 211 S.W. 492.

94. Conn.—Wolcho v. Rosenbluth, 71 A. 566, 81 Conn. 358, 21 L.R.A., N.S., 571.

95. Ga.—Hill v. Callahan, 8 S.E. 730, 82 Ga. 109.

25 C.J. p 203 note 81.

Allegations as to notice held sufficient as against special demurrer.
Ga.—Ready-Mix Concrete Co. v. Rape, 106 S.E.2d 429, 98 Ga.App. 503.

96. N.J.—Marples v. Standard Oil Co., 59 A. 32, 71 N.J.Law 352, 25 C.J. p 203 note 82.

97. Ala.—Wells v. Gallagher, 39 So. 747, 144 Ala. 363, 113 Am.S.R. 50, 3 L.R.A., N.S., 759, 25 C.J. p 203 note 83.

98. Ala.—Sloss-Sheffield Steel & Iron Co. v. Salser, 48 So. 374, 158 Ala. 511.

99. Ala.—Birmingham Ore & Mining Co. v. Grover, 48 So. 682, 159 Ala. 276.

1. Ohio.—Case v. Miami Chevrolet Co., 175 N.E. 224, 38 Ohio App. 41.

Pleading held sufficient

Cal.—Lambert v. Western Pac. R. Co., 26 P.2d 824, 135 C.A. 81.

Ill.—Zaskowski v. Choyce, 59 N.E.2d 324, 324 Ill.App. 582.

Ohio.—Vaughan v. Wilkof, 28 N.E. 2d 942, 64 Ohio App. 446.

Or.—Fisher v. Burrell, 241 P. 40, 116 Or. 317.

Pleading held insufficient

Ga.—Sewell v. City of Atlanta, 164 S.E. 70, 45 Ga.App. 166.

Nev.—Smith v. Smith-Peterson Co., 45 P.2d 785, 56 Nev. 79, 100 A.L.R. 440, rehearing denied 48 P.2d 760, 56 Nev. 449, 100 A.L.R. 449.

Ohio.—Case v. Miami Chevrolet Co., 175 N.E. 224, 38 Ohio App. 41.

2. Ky.—Fourseam Coal Corporation v. Hatfield, 130 S.W.2d 73, 279 Ky. 132.

Nev.—Smith v. Smith-Peterson Co., 45 P.2d 785, 56 Nev. 79, 100 A.L.R. 440, rehearing denied 48 P.2d 760, 56 Nev. 449, 100 A.L.R. 449.

Ohio.—Case v. Miami Chevrolet Co., 175 N.E. 224, 38 Ohio App. 41.

Petition held insufficient

Ohio.—Case v. Miami Chevrolet Co., supra.

3. Cal.—Bradley v. Thompson, 223 P. 572, 65 C.A. 226.

Mo.—Boyer v. Guidicy Marble, Terrazzo & Tile Co., 246 S.W.2d 742.

Pleading held insufficient

Complaint held insufficient for failure to allege that defendant railroad had notice that children were attracted on its tracks for purpose of obtaining gasoline.

N.C.—Jackson v. Standard Oil Co. of New Jersey, 182 S.E. 490, 208 N. C. 766.

4. Cal.—Bradley v. Thompson, 223 P. 572, 65 C.A. 226.

5. U.S.—Sierocinski v. E. I. Du Pont De Nemours & Co., D.C.Pa., 25 F. Supp. 706.

Ala.—Merchants' Bank v. Sherman, 110 So. 805, 215 Ala. 370.

Mo.—Carter v. Skelly Oil Co., 252 S.W.2d 306, 363 Mo. 570.

closing on its face contributory negligence,^{5,5} even where the facts alleged do not constitute such negligence as a matter of law.⁶

Damages. In an action of trespass on the case for damages resulting from blasting, plaintiff's initial pleading must clearly aver that damage resulted to him.⁷ Special damages, such as damages for loss of time, must be alleged,⁸ but one can recover for suffering and anxiety of mind, caused by an injury from negligent blasting, without such special allegation in the complaint.⁹

Supplemental petition. A plaintiff suing for injuries resulting from an explosion allegedly caused by defendant's negligence may properly plead by supplemental petition a defense to contracts set up by defendants in their answer.¹⁰

b. Issues, Proof, and Variance

General rules governing issues, proof, and variance have been applied in actions involving explosives; so, where such an action is based on one theory, evidence is inadmissible to prove another theory.

Under general rules of pleading, matters of inducement are admitted by a plea of the general issue.¹¹ In an action for injuries resulting from an

explosion allegedly caused by defendant's negligence, an answer affirmatively alleging that the injuries were proximately caused by plaintiff's own negligence is sufficient to put in issue plaintiff's contributory negligence.¹²

The general rule that the proof must substantially correspond with the allegation applies in actions involving explosives, and if the variance between the cause of action alleged and proved is material, it is fatal to recovery;¹³ but there is no variance if the evidence can be reasonably construed to support the allegations.^{13,5} Recovery is not defeated by a variance in unessential matters, immaterial to the gist of the action;¹⁴ and a variance is immaterial where defendant could not have been misled to his detriment.¹⁵

Where a public nuisance is pleaded, as resulting in special damage to plaintiff, recovery must be on that ground and not on negligence.¹⁶ A plaintiff alleging negligence must prove it in order to recover,¹⁷ and in an action based on negligence, with no averment of trespass, evidence of trespass is inadmissible.¹⁸ Where, however, as discussed supra § 8, one engaged in blasting operations is liable for

5.5 La.—Gerald v. Standard Oil Co. of Louisiana, 16 So.2d 233, 204 La. 690.

6. S.C.—Cabe v. Ligon, 105 S.E. 739, 115 S.C. 376.

7. W.Va.—Dallas v. Whitney, 188 S.E. 766, 118 W.Va. 106.

Declaration held insufficient

W.Va.—Dallas v. Whitney, supra.

8. Mass.—Hunter v. Farren, 127 Mass. 481, 34 Am.R. 423.
25 C.J. p 204 note 94.

9. Ind.—Wright v. Compton, 53 Ind. 337.

10. Tex.—Cox v. Shannon, Civ.App., 141 S.W.2d 412, error dismissed, judgment correct.

11. Ill.—Bunyan v. American Glycerin Co., 230 Ill.App. 351.

12. Cal.—Strand v. Everett, 258 P. 115, 84 C.A. 358.

13. Ky.—Fourseam Coal Corporation v. Hatfield, 130 S.W.2d 73, 279 Ky. 132.

La.—Bruchis v. Victory Oil Co., 153 So. 828, 179 La. 242.

Pa.—Glassmeyer v. Kessler, Inc., Com.Pl., 47 Mun.L.R. 133.
25 C.J. p 204 note 97.

Defense not pleaded

Violation of statute not appearing in plaintiff's evidence cannot be shown as defense when not pleaded by defendant.

Or.—Nickopolous v. Frank, 276 P. 695, 129 Or. 118.

Absence of allegation of negligence

Where plaintiff's pleading does not allege that explosion in blasting operations was negligently produced, as was essential to recovery, evidence regarding damage to property from concussion is held improperly admitted.

Ky.—Jefferson County v. Pohlman, 49 S.W.2d 344, 243 Ky. 556.

Cause of explosion

Under a declaration alleging negligent use and operation of a tank or other apparatus containing explosive gases or liquids, evidence is admissible that the explosion was caused by a mixture of certain gases or liquids.

Ill.—Mueller Bros. Art & Manufacturing Co. v. Fulton St. Wholesale Market Co., 181 Ill.App. 685.

13.5 Mo.—Buckner v. Knutson-Gould Const. Co., App., 305 S.W.2d 709.

14. Pa.—Pierson v. London, 156 A. 719, 102 Pa.Super. 176.
25 C.J. p 204 note 98.

"Flame;" fire

In action for burning of blacksmith shop, alleged to have occurred by gasoline vapors coming in contact with "flame" in forge, proof that there was fire, which might, or might not, amount to a flame, in forge which had been banked is not fatal variance.

Mo.—Wingfield v. Moberly Oil Co., App., 269 S.W. 644.

Identity of actual seller

Failure, if any, to prove allegation that defendant's daughter was one who sold torpedo to minor plaintiff is not a fatal variance where the gist of the action as alleged is the sale of such explosive by defendant's employee in violation of statute.

Pa.—Pierson v. London, 156 A. 719, 102 Pa.Super. 176.

15. Cal.—Alonso v. Hills, 214 P.2d 50, 95 C.A.2d 778.

Pa.—Pierson v. London, 156 A. 719, 102 Pa.Super. 176.
25 C.J. p 204 note 99.

16. Mo.—Schnitzer v. Excelsior Powder Mfg. Co., App., 160 S.W. 282.
N.Y.—Hirt v. Miceli Bros. Const. Co., 80 N.Y.S.2d 798.

17. Ga.—Chitty v. Jones, 80 S.E.2d 694, 210 Ga. 439.

Kan.—Phillips v. Doyle, 207 P.2d 465, 167 Kan. 376.

Me.—Cratty v. Samuel Aceto & Co., 116 A.2d 623, 151 Me. 126.

N.Y.—Hirt v. Miceli Bros. Const. Co., 80 N.Y.S.2d 798.

Okl.—Gulf Pipe Line Co. of Oklahoma v. Sims, 32 P.2d 902, 168 Okl. 209.

Tex.—Crain v. West Tex. Utilities Co., Civ.App., 218 S.W.2d 512, error refused no reversible error.

18. Ky.—States Corporation v. Shull, 287 S.W. 210, 216 Ky. 57.

direct injuries regardless of negligence, plaintiff need not prove negligence.^{18.5}

Where an action for negligent blasting is purely in tort, and not in contract, testimony is not admissible concerning a promise of defendant or his agent not to blast during a certain time;¹⁹ and, in an action against a construction company for injury from blasting, a contract between the municipality and the company that the latter should make good any damage caused by blasting is not admissible if not pleaded;²⁰ but an ordinance has been held admissible even though not pleaded.²¹ Other evidence has been held admissible under the pleadings and not to have the effect of enlarging them.^{21.5}

Title to property; possession. In an action to recover for damages to property caused by an explosion, the title is not involved; proof of actual and peaceable possession by the tenant is sufficient to maintain the action.²²

§ 11(6). — — Presumptions and Burden of Proof

a. In general

18.5 U.S.—*Boyce v. U. S.*, D.C.Iowa, 93 F.Supp. 866.

Colo.—*Garden of the Gods Village v. Hellman*, 294 P.2d 597, 133 Colo. 286.

Or.—*Bedell v. Goulter*, 261 P.2d 842, 199 Or. 344.

19. Or.—*Salmi v. Columbia & N. R. Co.*, 146 P. 819, 75 Or. 200, L.R.A.1915D 834.

20. Pa.—*Del Pizzo v. Middle West Const. Co.*, 22 A.2d 79, 146 Pa.Super. 345.

21. Mo.—*St. Mary's Mill Co. v. Illinois Oil Co.*, App., 254 S.W. 735.

21.5 La.—*Roy O. Martin Lumber Co. v. Scalfi*, App., 92 So.2d 500.

22. U.S.—*Hazard Powder Co. v. Volger*, Wyo., 58 F. 152, 7 C.C.A. 130, 25 C.J. p 202 note 64.

23. U.S.—*U. S. v. Stoppelmann*, C.A. Mo., 266 F.2d 13—*Crow v. Continental Oil Co.*, C.C.A.Tex., 115 F.2d 740—*The Richelieu*, D.C.Md., 27 F. 2d 960, modified on other grounds, C.C.A., *Cornec v. Baltimore & O. R. Co.*, 48 F.2d 497, certiorari denied *Baltimore & O. R. Co. v. Cornec*, 52 S.Ct. 9, 284 U.S. 621, 76 L. Ed. 530—*Louisiana Oil Refining Corporation v. Reed*, C.C.A.La., 26 F.2d 14, certiorari denied *Reed v. Louisiana Oil Refining Corporation*, 49 S.Ct. 31, 278 U.S. 632, 73 L. Ed. 549.

Alaska.—*Simpson v. Standard Oil Co. of California*, 8 Alaska 275.

La.—*Le Bleu v. Shell Petroleum Corporation*, App., 161 So. 214.

Me.—*Shannon v. Dow*, 175 A. 766, 133 Me. 235.

Mo.—*Diehl v. A. P. Green Fire Brick Co.*, 253 S.W. 984, 299 Mo. 641.

N.Y.—*Savage v. Mathieson Alkali Works*, 22 N.Y.S.2d 692, 174 Misc. 1022, affirmed 27 N.Y.S.2d 454, 261 App.Div. 1053.

Wis.—*Delap v. Liebensohn*, 208 N.W. 937, 190 Wis. 73, 25 C.J. p 204 note 4.

Judicial notice of character of explosives see Evidence § 75.

No burden to prove condition of property

U.S.—*Chicago, R. I. & P. R. Co. v. Goodson*, *Trinity Universal Ins. Co.*, Intervener, C.A.Tex., 242 F.2d 203.

23.5 Okl.—*Cosden v. Wright*, 211 P. 2d 523, 202 Okl. 211.

23.10 U.S.—*U. S. v. Stoppelmann*, C.A.Mo., 266 F.2d 13.

Okl.—*Cosden v. Wright*, 211 P.2d 523, 202 Okl. 211.

24. Mich.—*Butrick v. Snyder*, 210 N. W. 311, 236 Mich. 300.

Employees of corporation as employees of government

U.S.—*Hopson v. U. S.*, D.C.Ark., 136 F.Supp. 804.

25. U.S.—*Altrichter v. Shell Oil Co.*, C.A.Minn., 263 F.2d 377.

Hall v. E. I. Du Pont De Nemours & Co., D.C.Ky., 142 F.Supp. 737—*Hopson v. U. S.*, D.C.Ark., 136 F. Supp. 804—*Cardinale v. Union Oil Co. of Cal.*, D.C.Cal., 136 F.Supp. 487.

b. Blasting; fireworks

c. Manufacture; sale

d. Storage; transportation

a. In General

The burden is on plaintiff to establish the elements of his cause of action, and defendant may have the burden of establishing contributory negligence. The doctrine of *res ipsa loquitur* is applicable in some circumstances, but not in others.

In an action to recover for injury resulting from explosives, the burden is on plaintiff to establish the elements of his cause of action,²³ including the burden* of proving a legal duty and the violation thereof,^{23.5} as well as an injury suffered by reason of such violation,^{23.10} and the burden of proving that the act relied on is that of defendant or of persons for whose acts he is responsible.²⁴ Accordingly the burden is on the party alleging negligence, or failure to exercise reasonable care, to establish it,²⁵ and, at least where the explosion occurs on premises over which defendant has no control,^{25.5} to prove that such negligence was the proximate cause of the injury for which suit is brought.²⁶

Ark.—*Gibson Oil Co. v. Bush*, 1 S.W. 2d 88, 175 Ark. 944.

Cal.—*Hubbert v. Aztec Brewing Co.*, 80 P.2d 185, 26 C.A.2d 664, followed in *Cerezo v. Aztec Brewing Co.*, 80 P.2d 198, 26 C.A.2d 754, rehearing denied *Hubbert v. Aztec Brewing Co.*, 80 P.2d 1016, 26 C.A.2d 664.

Ga.—*Taylor v. Atlantic Co.*, 70 S.E. 2d 391, 85 Ga.App. 863.

Mich.—*Young v. Lee*, 16 N.W.2d 659, 310 Mich. 42—*Sward v. Megan*, 279 N.W. 886, 284 Mich. 421.

N.C.—*Modlin v. Chandler Sales Co.*, 110 S.E. 661, 183 N.C. 63.

Pa.—*Kiselak v. Middle West Const.*, Com.Pl., 92 Pittsb.Leg.J. 511—*Jeffrey v. Coal Corporation*, 18 Wash. Co. 50.

Tenn.—*Read Phosphate Co. v. Vickers*, 11 Tenn.App. 146.

25 C.J. p 204 note 7.

Proof of specific negligence alleged
Mo.—*Craddock v. Greenberg Mercantile, Inc.*, 297 S.W.2d 541.

25.5 La.—*Gerald v. Standard Oil Co. of Louisiana*, 16 So.2d 233, 204 La. 690.

26. U.S.—*The Richelieu*, D.C.Md., 27 F.2d 960, modified on other grounds, C.C.A., *Cornec v. Baltimore & O. R. Co.*, 48 F.2d 497, certiorari denied *Baltimore & O. R. Co. v. Cornec*, 52 S.Ct. 9, 284 U.S. 621, 76 L. Ed. 530.

Hall v. E. I. Du Pont De Nemours & Co., D.C.Ky., 142 F.Supp. 737.

Cal.—*Hubbert v. Aztec Brewing Co.*, 80 P.2d 185, 26 C.A.2d 664, followed in *Cerezo v. Aztec Brewing Co.*

Plaintiff has the burden of showing that the explosion occurred from a cause for which defendant would be liable;^{26.5} and if plaintiff has violated an applicable Coast Guard regulation, he has the burden of proving that by no possibility could the violation have contributed to the accident.^{26.10}

It has been held that the mere happening of an explosion, without more, furnishes no basis for a

presumption of negligence,^{26.15} and does not set the doctrine of *res ipsa loquitur* in operation.^{26.20} However, the fact of an explosion may, in particular circumstances, call for the application of the doctrine of *res ipsa loquitur*, or raise a presumption of negligence.²⁷ In other circumstances, the doctrine may be inapplicable, or the presumption not raised.²⁸ So, the doctrine of *res ipsa loquitur* is not applica-

80 P.2d 198, 26 C.A.2d 754, rehearing denied *Hubbert v. Aztec Brewing Co.*, 80 P.2d 1016, 26 C.A.2d 664.

Mich.—*Young v. Lee*, 16 N.W.2d 659, 310 Mich. 42.

N.Y.—*Savage v. Mathiesen Alkali Works*, 22 N.Y.S.2d 692, 174 Misc. 1022, affirmed 27 N.Y.S.2d 454, 261 App.Div. 1053.

25 C.J. p 204 note 5.

26.5 U.S.—*Soso v. Atlas Powder Co.*, C.A.Mo., 238 F.2d 388.

Universe Tankships, Inc. v. Pyrate Tank Cleaners, Inc., D.C.N.Y., 152 F.Supp. 903.

26.10 U.S.—*Universe Tankships, Inc. v. Pyrate Tank Cleaners, Inc.*, supra.

26.15 W.Va.—*Pope v. Edward M. Rude Carrier Corp.*, 75 S.E.2d 584, 138 W.Va. 218—*State ex rel. Bennett v. Sims*, 48 S.E.2d 13, 131 W. Va. 312.

Other circumstances; control of instrumentality

Mere fact of explosion, without more, does not bespeak negligence, but if there are other facts and circumstances from which jury may reasonably infer that explosion was caused by a flame or spark emanating from an instrumentality under management and control of the defendants, then their negligence may be inferred.

Mo.—*Carter v. Skelly Oil Co.*, 252 S. W.2d 306, 363 Mo. 570.

26.20 N.J.—*Kramer v. R. M. Hollingshead Corp.*, 75 A.2d 861, 5 N.J. 386.

27. U.S.—*Corpus Juris Secundum* cited in *Highland Golf Club of Iowa Falls, Iowa, v. Sinclair Refining Co.*, D.C.Iowa, 59 F.Supp. 911, 919. Cal.—*Hercules Powder Co. v. Automatic Sprinkler Corp. of America*, 311 P.2d 907, 151 C.A.2d 387—*Sloboden v. Time Oil Co.*, 302 P.2d 34, 145 C.A.2d 197.

Ill.—*Siniarski v. Hudson*, 87 N.E.2d 137, 338 Ill.App. 137.

La.—*Horrell v. Gulf & Valley Cotton Oil Co.*, 131 So. 709, 15 La.App. 603.

N.Y.—*Pulvin v. Hudson Auto Lamp Works*, 172 N.Y.S. 340.

N.C.—*Newton v. Texas Co.*, 105 S.E. 433, 180 N.C. 561.

Ohio.—*Hiehl v. Golco Oil Co.*, 28 N. E.2d 561, 137 Ohio St. 180.

Pa.—*Spear v. Philadelphia, W. & B. R. Co.*, 5 Pa.Co. 393.

Tex.—*Tyreco Refining Co. v. Cook*, Civ.App., 110 S.W.2d 219, error dismissed—*Chapman v. Warden*, 110 S.W. 533, 50 Tex.Civ.App. 282.

W.Va.—*State ex rel. Bennett v. Sims*, 48 S.E.2d 13, 131 W.Va. 312. 25 C.J. p 205 note 9.

Requirements for application of doctrine

To entitle plaintiff to recover damages under *res ipsa loquitur* doctrine, circumstances must not only warrant inference that explosion was result of negligence, but also that such negligence was that of defendants, who must be shown to have been solely responsible for performance of all duties, breach of which by someone must have been proximate cause of explosion.

Okl.—*Cosden v. Wright*, 211 P.2d 523, 202 Okl. 211.

Specific negligence directly provable

Res ipsa loquitur rule has been held applicable as to cause of gasoline explosion although specific negligence was provable by direct evidence.

Okl.—*Guilford v. Foster & Davis*, 268 P. 299, 131 Okl. 148.

Knowledge of explosive quality

Defendant's agent, who, after repairing defendant's refrigerating equipment, left ammonia water solution on a lunchroom counter where it exploded, injuring customer, is presumed to know that such solution was explosive.

La.—*Norton v. Louisiana Ice & Utilities*, 135 So. 717, 18 La.App. 564.

Text rule held applicable to explosion of:

(1) Bottled beverage in bottling plant.

Mo.—*Riecke v. Anheuser-Busch Brewing Ass'n*, 227 S.W. 631, 206 Mo.App. 246.

(2) Deodorizing tank.

La.—*Horrell v. Gulf & Valley Cotton Oil Co.*, 131 So. 709, 15 La.App. 603.

(3) Gas at pumphouse of oil refinery.

N.J.—*Gilroy v. Standard Oil Co.*, 151 A. 598, 107 N.J.Law 170.

(4) Gasoline in mine.

Idaho.—*Warner v. Pittsburgh-Idaho Co.*, 220 P. 492, 38 Idaho 54.

(5) Oil heater in refinery.

Cal.—*Meloy v. Texas Co.*, 263 P.2d 897, 121 C.A.2d 691.

(6) Steam boilers.

U.S.—*Rose v. Stephens & Condit Transp. Co.*, C.C.N.Y., 11 F. 438, 20 Blatchf. 411—*Posey v. Scoville*, C.C.La., 10 F. 140—*The Reliance*, C.C.Ga., 2 F. 249, 4 Woods 420.

La.—*Lykiardopoulo v. New Orleans & C. R. Light & Power Co.*, 53 So. 575, 127 La. 309, Ann.Cas.1912A 976. Minn.—*Mathews v. Chicago & N. R. Co.*, 202 N.W. 896, 162 Minn. 313. N.C.—*Harris v. Mangum*, 111 S.E. 177, 183 N.C. 235.

(7) Tear gas system in bank.

Wis.—*Koehler v. Thiensville State Bank*, 14 N.W.2d 15, 245 Wis. 281.

28. N.J.—*Levendusky v. Empire Rubber Mfg. Co.*, 87 A. 338, 84 N. J.Law 698, Ann.Cas.1914D 969.

N.Y.—*Meibohm v. Horton Pilsener Brewing Co.*, 18 N.Y.S.2d 878, 259 App.Div. 236.

Okl.—*Champlin Refining Co. v. George*, 76 P.2d 895, 182 Okl. 118. 25 C.J. p 205 note 10.

Circumstances in which doctrine is inapplicable

Where, from the nature of facts alleged, it is reasonable to assume that an explosion injuring plaintiff may have been caused by the negligence of another than defendant, or through the instrumentality or agency of another, the doctrine of *res ipsa loquitur* is without application, nor can the doctrine be invoked when the accident might have happened as a result of two or more causes with some of which defendant had no causal connection.

La.—*Shields v. United Gas Pipe Line Co.*, App., 110 So.2d 881.

Rule of *res ipsa loquitur* held inapplicable

(1) Generally.

N.C.—*Hopkins v. Comer*, 81 S.E.2d 368, 240 N.C. 143.

Okl.—*Cosden v. Wright*, 211 P.2d 523, 202 Okl. 211.

(2) Explosion of oil-fueled heater. Cal.—*Zanardi v. Pacific Tel. & Tel. Co.*, 284 P.2d 851, 134 C.A.2d 3.

(3) In action for injuries sustained by employee of a service station working on defendant's truck when an explosion occurred when the employee attempted to lift a wire from

ble where the explosive or instrumentality causing the accident is not under the exclusive control or management of defendant,²⁹ or where he has no control at all,^{29.5} where the cause of, or the instrumentality producing, the explosion is unknown, or is conjectural,^{29.10} or where, assuming that all evidence favorable to plaintiff is true, it cannot be said that it is more probable that the injury was caused by defendant's negligence than by any other cause.^{29.15}

The presumption of negligence arising under the doctrine of *res ipsa loquitur* is rebuttable, and it is incumbent upon defendant to furnish an explanation of the occurrence, consistent with due care on his part, if he can.^{29.20} It has been said that the

courts have seemed less reluctant to apply the doctrine of *res ipsa loquitur* in explosion cases than in cases of fire.^{29.25}

The capacity, knowledge, experience, and discretion of the injured person appear to be evidentiary matters as to which the parties may adduce evidence, no conclusive presumption being indulged.^{29.30}

Contributory negligence. Subject to the rules prevailing in the particular jurisdiction as to the proof of negligence generally, a presumption has been indulged that the party injured exercised due care, where there are no witnesses on the subject,³⁰ or that he was free from fault;³¹ and defendant may have the burden of proving contributory negligence,

the battery of the truck, petition was insufficient to justify the application of the doctrine of *res ipsa loquitur*; where plaintiff neither designated any agency or instrumentality in possession of defendant nor showed that defendant was better informed as to the cause of the accident than plaintiff, the doctrine could not be invoked. *La.—Shields v. United Gas Pipe Line Co., App., 110 So.2d 881.*

Presumption of negligence held inapplicable to explosions:

- (1) In a mill.
Wis.—Dahl v. Charles A. Krause Milling Co., 289 N.W. 626, 234 Wis. 231.
- (2) Of gas escaping from a broken pipe while defendant's employee was locating the leak.
N.Y.—Littman v. New York, 55 N.Y. S. 383, 36 App.Div. 189, affirmed 54 N.E. 1093, 159 N.Y. 559.
- (3) Of gasoline prickly pear burner.
Tex.—Talley v. Beever, 78 S.W. 23, 33 Tex.Civ.App. 675.
- (4) Of hot water heating apparatus.
N.Y.—Kirby v. Delaware & H. Canal Co., 62 N.Y.S. 1110, 48 App.Div. 636, affirmed 61 N.E. 1131, 169 N.Y. 575.
- (5) Of steam boilers.
Colo.—Bishop v. Brown, 61 P. 50, 14 Colo.App. 535.
Minn.—Kleinman v. Banner Laundry Co., 186 N.W. 123, 150 Minn. 515, 23 A.L.R. 479.
N.Y.—Losee v. Buchanan, 51 N.Y. 476, 10 Am.R. 623.
W.Va.—Vieth v. Hope Salt & Coal Co., 41 S.E. 187, 51 W.Va. 96, 57 L.R.A. 410.

29. U.S.—*U. S. v. Coffey, C.A.Wash., 233 F.2d 41*—*E. I. Du Pont De Nemours & Co. v. Cudd, C.A.Colo., 176 F.2d 855*—*Sierocinski v. E. I. Du Pont De Nemours & Co., C.C.A.Pa., 118 F.2d 531.*

Hall v. E. I. Du Pont De Nemours & Co., D.C.Ky., 142 F.Supp. 737—*Brooks v. U. S., D.C.N.C., 98 F.Supp. 679, affirmed, C.A., 194 F.2d 185*—*Highland Golf Club of Iowa Falls, Iowa, v. Sinclair Refining Co., D.C.Iowa, 59 F.Supp. 911*—*Leeper v. National Lead Co., D.C.Mo., 42 F.Supp. 121*—*Sierocinski v. E. I. Du Pont De Nemours & Co., D.C.Pa., 25 F.Supp. 706.*

Cal.—Biddlecomb v. Haydon, 40 P.2d 873, 4 C.A.2d 361.

Ky.—Verkamp Corp. of Ky. v. Hubbard, 296 S.W.2d 740.

La.—Bruchis v. Victory Oil Co., 153 So. 828, 179 La. 242.

Mo.—Corpus Juris Secundum quoted in *Maybach v. Falstaff Brewing Corporation, 222 S.W.2d 87, 90, 359 Mo. 446.*

Clark v. Granby Mining & Smelting Co., App., 183 S.W. 1099.

N.J.—Kramer v. R. M. Hollingshead Corp., 75 A.2d 861, 5 N.J. 386—*Menth v. Breeze Corp., 73 A.2d 183, 4 N.J. 428, 18 A.L.R.2d 1071.*

N.Y.—Robinson v. Empire City Subway Co., 103 N.Y.S. 717, 53 Misc. 593.

N.C.—Hopkins v. Comer, 81 S.E.2d 368, 240 N.C. 143.

Pa.—Saldukas v. McKerns, 16 A.2d 30, 340 Pa. 113.

Utah.—Matievitch v. Hercules Powder Co., 282 P.2d 1044, 3 Utah 2d 283.

W.Va.—Pope v. Edward M. Rude Carrier Corp., 75 S.E.2d 584, 138 W.Va. 218.

25 C.J. p 205 note 11.

Explosion of electric light bulb

Mo.—Russell v. St. Louis & S. F. R. Co., App., 245 S.W. 590.

Elimination of every other possibility of control than that by defendant is not required of plaintiff.

Cal.—Hercules Powder Co. v. Automatic Sprinkler Corp., of America, 311 P.2d 907, 151 C.A.2d 387.

29.5 U.S.—*U. S. v. Coffey, C.A.Wash., 233 F.2d 41.*

29.10 U.S.—*Hall v. E. I. Du Pont De Nemours & Co., D.C.Ky., 142 F. Supp. 737.*

N.C.—Hopkins v. Comer, 81 S.E.2d 368, 240 N.C. 143.

Tex.—McBride v. Paluxy Asphalt Co., Civ.App., 164 S.W.2d 32.

Proximate cause

Where guest, injured when boat exploded, was unable to show, in personal injury action against owner, with any degree of definiteness the negligent act causing the explosion, and any inference of negligence as to the proximate cause of the explosion was required to be based on conjecture, surmise, and guesswork, guest could not recover under *res ipsa loquitur* doctrine.

Ky.—Caplinger v. Werner, 311 S.W. 2d 201.

29.15 *Tex.—Blassingame v. Halliburton Oil Well Cementing Co., Civ. App., 317 S.W.2d 111.*

29.20 Ill.—*Siniarski v. Hudson, 87 N.E.2d 137, 338 Ill.App. 137.*

29.25 U.S.—*Highland Golf Club of Iowa Falls, Iowa v. Sinclair Refining Co., D.C.Iowa, 59 F.Supp. 911.*

Reason for this is presumably that an explosion is more unusual than a fire, and generally so much more localized as to cause as to be regarded as speaking more clearly for itself. *U.S.—Highland Golf Club of Iowa Falls, Iowa, v. Sinclair Refining Co., supra.*

29.30 Mo.—*Boyer v. Guidicy Marble, Terrazzo & Tile Co., 246 S.W.2d 742.*

30. Iowa.—*Nelson v. Republic Oil Co., 110 N.W. 24*—*Ellis v. Republic Oil Co., 110 N.W. 20, 133 Iowa 11.*

31. Ark.—*Houston Oil Co. of Texas v. McGuire, 59 S.W.2d 593, 187 Ark. 293.*

or failure to exercise reasonable care, on the part of plaintiff or the person injured.³²

b. Blasting; Fireworks

One suing for injury from blasting generally has the burden of proving negligence, although the doctrine of *res ipsa loquitur* may be invoked in a proper case.

Persons suing for injury resulting from blasting have, in general, the burden of proving negligence,³³ and that the injuries or damages complained of are the result of such negligence,^{33.5} or that the negligence directly contributed to the damage;^{33.10} but there is authority for the view that plaintiff is not required to prove negligence in order to recover for property damage caused by blasting, the liability of the user of the explosives being absolute and not predicated on his negligence.^{33.15}

The mere fact that blasting causes injury on adjacent premises gives rise to no presumption that the blasting was negligently done, and does not re-

quire the application of the doctrine of *res ipsa loquitur*.³⁴ However, the doctrine may be invoked in a proper case;³⁵ and, where the evidence of the results and surrounding circumstances of a blast shows that under ordinary circumstances such a result could not have occurred unless the blast was negligently performed, a *prima facie* case of negligence is made out.³⁶

A violent and unusual result from blasting may constitute evidence from which may be inferred a lack of proper care as to the amount of explosive used³⁷ or the manner in which the explosive was placed and discharged,³⁸ this being particularly true where rocks or debris are thrown by the blast.³⁹

The doctrine of *res ipsa loquitur* is not applicable to a delayed explosion of dynamite used in blasting, where workmen were ordered back to work before the final explosion, and negligence is not presumed;⁴⁰ and the doctrine may be excluded

32. U.S.—Crow v. Continental Oil Co., C.C.A.Tex., 115 F.2d 740.
Ark.—Houston Oil Co. of Texas v. McGuire, 59 S.W.2d 593, 187 Ark. 293.

La.—Armour Packing Co. v. Walker Price Oil Co., 1 La.App. 477.
N.M.—Rivera v. Ancient City Oil Corp., 302 P.2d 953, 61 N.M. 473. 25 C.J. p 205 note 8.

33. U.S.—Caramagno v. U. S., D.C. Mass., 37 F.Supp. 741.

Ky.—Aldridge-Poage, Inc. v. Parks, 297 S.W.2d 632.

Me.—Cratty v. Samuel Aceto & Co., 116 A.2d 623, 151 Me. 126.

Mass.—Dolham v. Peterson, 9 N.E. 2d 406, 297 Mass. 479—Goldman v. Regan, 142 N.E. 701, 247 Mass. 492.

N.Y.—Stadium Realty Corp. v. Slatery Rock Corp., 183 N.Y.S.2d 916—Flinn v. Gull Contracting Co., 183 N.Y.S.2d 806.

Tex.—Corpus Juris Secundum quoted in Standard Oil & Gas Co. v. Lambert, Civ.App., 222 S.W.2d 125, 126.

Specific act or acts of negligence

U.S.—Republic Steel Corp. v. Peoples, C.A.Ala., 217 F.2d 236.

Lack of adequate information as to hazard

U.S.—Hopkins v. El. I. Du Pont De Nemours & Co., C.A.Pa., 212 F.2d 623, certiorari denied 75 S.Ct. 108, 348 U.S. 872, 99 L.Ed. 686.

33.5 Ky.—Aldridge-Poage, Inc. v. Parks, 297 S.W.2d 632.

N.Y.—Stadium Realty Corp. v. Slatery Rock Corp., 183 N.Y.S.2d 916.

Consequential damage from vibrations

Where plaintiff did not contend that his house was damaged directly by stones or debris cast on it by defendant's nearby blasting, and con-

tended that damage sustained was consequential in sense that it was due to vibrations generated by blasting, plaintiff had burden of showing that damage resulted from defendant's negligence.

Mass.—O'Regan v. Verrochi, 90 N.E. 2d 671, 325 Mass. 391.

33.10 U.S.—Republic Steel Corp. v. Peoples, C.A.Ala., 217 F.2d 236.

33.15 Okl.—Smith v. Yoho, 324 P.2d 531.

34. U.S.—Republic Steel Corp. v. Peoples, C.A.Ala., 217 F.2d 236.

Caramagno v. U. S., D.C.Mass., 37 F.Supp. 741.

N.H.—Crocker v. W. W. Wyman, Inc., 110 A.2d 271, 99 N.H. 330.

N.Y.—Kaninsky v. Purcell & Gilfeather, 158 N.Y.S. 165.

Tex.—Corpus Juris Secundum quoted in Standard Oil & Gas Co. v. Lambert, Civ.App., 222 S.W.2d 125, 126.

Shift of burden of proof

Where defendant in action for damages to house allegedly caused by blasting proved that he was not negligent and court found no negligence on his part, burden shifted to plaintiff to prove negligence of defendant, and doctrine of *res ipsa loquitur* was inapplicable.

Ariz.—Drumm v. Simer, 205 P.2d 592, 68 Ariz. 319.

35. Ky.—Marlowe Const. Co. v. Jacobs, 302 S.W.2d 612.

La.—Langlains v. Geophysical Service, Inc., 111 So.2d 781, 237 La. 585.

Mont.—Cashin v. Northern Pac. R. Co., 28 P.2d 862, 96 Mont. 92.

N.Y.—Ulrich v. McCabe, 1 Hilt. 251.

Tex.—Universal Atlas Cement Co. v. Oswald, 157 S.W.2d 636, 138 Tex. 159.

McKay v. Kelly, Civ.App., 229 S.W.2d 117, affirmed Kelly v. McKay,

233 S.W.2d 121, 149 Tex. 343—Corpus Juris Secundum quoted in Standard Oil & Gas Co. v. Lambert, Civ.App., 222 S.W.2d 125, 126.

Explanation called for

Where owners of house employed contractor to blast rock for a cellar, and blasting took place while they were absent, and when they returned they found house seriously damaged, doctrine of *res ipsa loquitur* entitled owners to call on contractor for explanation.

N.J.—Philpot v. Rhinesmith, 71 A. 2d 219, 6 N.J.Super. 324.

Unusual damage

Where damage to dwelling located on slate ledge formation was caused by defendant's blasting on the same formation, owner of dwelling had no control or knowledge of acts of defendant, and damage was unusual and would not have occurred had due care been used, *res ipsa loquitur* doctrine applied.

Me.—Cratty v. Samuel Aceto & Co., 116 A.2d 623, 151 Me. 126.

36. Mass.—Coffey v. West Roxbury Trap Rock Co., 118 N.E. 235, 229 Mass. 211.

N.Y.—Kaninsky v. Purcell & Gilfeather, 158 N.Y.S. 165.

Tex.—Corpus Juris Secundum quoted in Standard Oil & Gas Co. v. Lambert, Civ.App., 222 S.W.2d 125, 126.

37. Ga.—Georgia Granite Co. v. Sims, 75 S.E. 143, 11 Ga.App. 295.
Pa.—Rafferty v. Davis, 103 A. 951, 260 Pa. 563.

38. Mont.—Cashin v. Northern Pac. R. Co., 28 P.2d 862, 96 Mont. 92. 25 C.J. p 206 note 28.

39. Mont.—Cashin v. Northern Pac. Ry. Co., supra.

40. N.Y.—Riggs v. New York Tunnel Co., 119 N.Y.S. 548, 134 App.

from the case by plaintiff's proceeding to allege specific acts of negligence in addition to the fact of the blast.⁴¹

A written notice of intention to blast rock at a certain place,⁴² or giving orders and superintending the blasting,⁴³ is prima facie evidence that the parties are themselves the actors. A foreman or contractor blasting with dynamite or other high explosive is presumed to know the dangers attending its use.⁴⁴

In an action by an invitee against a landowner for personal injuries from blasting operations conducted by independent contractors, their mere presence on the premises does not cast on them the burden of negating plaintiff's case.⁴⁵

Fireworks. Evidence of the dangerous qualities of fireworks, their discharge by defendant, and the injury therefrom raises a presumption of negligence.⁴⁶

c. Manufacture; Sale

One suing for injury from the manufacture or sale of explosives generally has the burden of proving negligence, although the doctrine of *res ipsa loquitur* may be invoked in a proper case.

According to some authorities, the mere explosion

of a factory in which explosives are in the process of manufacture raises a presumption of negligence, or renders applicable the doctrine of *res ipsa loquitur* so as to remove the necessity for proving negligence,⁴⁷ while others deny that the mere fact of such explosion has such effect.⁴⁸ It is to be presumed that an explosion which occurred in a factory originated there, so that the owner has the burden of proving its inception elsewhere,⁴⁹ and it has been held that negligence will be presumed unless the owner of the factory offers a sufficient explanation.⁵⁰

The mere fact of the explosion of an article not inherently dangerous does not show negligence on the part of the seller who is not a manufacturer and is not shown to have known, or to have had any means of ascertaining, that it contained any substance of an explosive nature not commonly present in such articles,⁵¹ and a similar rule has been applied in an action against a bottling works for injury resulting from the explosion of an article sold as a bottled beverage.⁵² However, an inference of negligence on the part of the manufacturer has been held to arise, or the doctrine of *res ipsa loquitur* to apply, in cases involving the explosion of apparently harmless articles,⁵³ partic-

Div. 672, reversed on other grounds 95 N.E. 701, 202 N.Y. 129.

41. Tex.—Universal Atlas Cement Co. v. Oswald, 157 S.W.2d 636, 138 Tex. 159.

42. N.Y.—Gourdier v. Cormack, 2 E.D.Smith 200.

43. N.Y.—Hardrop v. Gallagher, 2 E.D.Smith 523.

44. Va.—Valz v. Goodykoontz, 72 S.E. 730, 112 Va. 853.

45. N.Y.—Petluck v. McGolrick Realty Co., 268 N.Y.S. 782, 240 App.Div. 61.

46. Mo.—Dowell v. Guthrie, 12 S.W. 900, 99 Mo. 653, 17 Am.S.R. 598.

47. U.S.—Atlas Powder Co. v. Benson, C.C.A.N.J., 287 F. 797. 25 C.J. p 205 note 18.

Necessity and legitimacy of business

That high explosives have become a commercial necessity, and their manufacture a legitimate business, does not relieve a manufacturer from application of the doctrine of *res ipsa loquitur*, where it would otherwise be applicable.

U.S.—Atlas Powder Co. v. Benson, supra.

48. Pa.—Amsterdam v. E. I. Dupont de Nemours Powder Co., 62 Pa.Super. 314.

Johnson v. Independent Explosives Co., Com.Pl., 43 Luz.Leg.Reg.

81, 15 Monroe L.R. 39.

25 C.J. p 205 note 19.

Explosion of powder mill

Kan.—Byland v. E. I. DuPont De-Nemours Powder Co., 144 P. 251, 93 Kan. 288, L.R.A.1915F 1000, rehearing denied 144 P. 282, 93 Kan. 668.

49. R.I.—Kearner v. Charles S. Tanner Co., 76 A. 833, 31 R.I. 562, 29 L.R.A., N.S., 537.

50. U.S.—Warn v. Davis Oil Co., D.C.N.Y., 61 F. 631.

51. N.Y.—Glaser v. Seitz, 71 N.Y.S. 942, 35 Misc. 341. 25 C.J. p 205 note 23.

Combs

In action to recover from retailer for injuries sustained from ignition and explosion of water-waving combs, purchaser had burden of showing that retailer knew, or by exercise of ordinary care could have known, that combs were made from inflammable material and were dangerous.

U.S.—Smith v. S. S. Kresge Co., C.C.A.Mo., 79 F.2d 361.

Fingernail polish

In action against a store for injuries received when a bottle of fingernail polish exploded after it had been purchased from store, plaintiff, in order to recover, was bound to show that the store knew, or by the

exercise of ordinary care should have known, that merchandise in question was inherently dangerous. S.C.—Guyton v. S. H. Kress & Co., 5 S.E.2d 295, 191 S.C. 530.

Ginger ale

Negligence of retail dealer is not inferable from explosion of bottle of ginger ale being placed in customer's receptacle.

N.J.—Noonan v. Great Atlantic & Pacific Tea Co., 139 A. 9, 104 N.J.Law 136, 56 A.L.R. 590.

52. Miss.—Wheeler v. Laurel Bottling Works, 71 So. 743, 111 Miss. 442, L.R.A.1916E 1074.

Coca-Cola

The doctrine of *res ipsa loquitur* has been held not to apply where a bottle of Coca-Cola exploded when the vendee was removing it from the ice chest.

Miss.—Wheeler v. Laurel Bottling Works, supra.

53. U.S.—Liggett & Myers Tobacco Co. v. De Lape, C.C.A.Cal., 109 F.2d 598.

Bottled beverages

Ga.—Atlanta Coca-Cola Bottling Co. v. Danneman, 102 S.E. 542, 25 Ga. App. 43.

Mo.—Stolle v. Anheuser-Busch, Inc., 271 S.W. 497, 307 Mo. 520, 39 A.L.R. 1001.

Cigarettes

U.S.—Liggett & Myers Tobacco Co.

ularly when it is shown that all persons through whose hands such articles subsequently passed were free from fault.⁵⁴ In other circumstances, the doctrine has been held not to apply as against a manufacturer.^{54.5} The fact that a shotgun shell, purchased from a retailer, failed to discharge in the shotgun, but, after being ejected and put back in the barrel, exploded while the breach was still open, and injured plaintiff, is insufficient to invoke the doctrine of *res ipsa loquitur* in plaintiff's action for injuries against the manufacturer of the shell.^{54.10}

The mere explosion of dynamite caps carries with it no presumption of negligence on the part of the manufacturer or seller, and the injured person has the burden of proving that the manufacturer or seller was guilty of the negligence charged,⁵⁵ particularly where such explosive is not under the exclusive control of defendant.⁵⁶ Similarly, in an action against the manufacturer of a powder fuse for injuries resulting to a purchaser from a delayed explosion, plaintiff has the burden of proving defendant's negligence.⁵⁷ However, in a minor plaintiff's action based on defendant's unlawful sale of a torpedo to him, he is not required to prove that the torpedo contained a dangerous and explosive

substance, within the statute.⁵⁸ In an employee's action against the seller for injuries received from the delayed explosion of dynamite caps sold to his employer, whether the doctrine of *res ipsa loquitur* is applicable can be determined only as a matter of law after the evidence is heard.^{58.5}

Where the cause of an explosion may have been gas generated from lubricating oil or the presence of gasoline vapor, the mere fact of the explosion does not raise a presumption of negligence in the manufacture of the oil,⁵⁹ nor does the doctrine of *res ipsa loquitur* apply in an action for injury resulting from the ignition of gasoline purchased by plaintiff under circumstances which gave him an equal opportunity with defendant the refiner and seller, to observe the cause of the fire,⁶⁰ nor, in the absence of evidence showing that an explosion would not have occurred if the cleaning solvent sold by defendant had been of the represented flash point, is there a presumption of negligence on the part of defendant for selling a substance with a lower flash point.⁶¹ Moreover, the doctrine of *res ipsa loquitur* has been held inapplicable, or proof of negligence required, in an action for injuries resulting from the explosion of oil sold as kerosene or fuel oil, brought against an oil refiner,⁶² a whole-

v. De Lape, C.C.A.Cal., 109 F.2d 598.

N.Y.—Meditz v. Liggett & Myers Tobacco Co., 3 N.Y.S.2d 357, 167 Misc. 176, affirmed 25 N.Y.S.2d 315.

Evidence as to conditions not required

Where cleaning fluid was manufactured and packaged to meet normal conditions of handling, plaintiff injured by explosion of bottle containing the fluid was not required to adduce evidence as to the atmospheric conditions in which the bottle was handled after it left manufacturer's possession or to prove absence of unusual, unexpected conditions that might have exposed the bottle to excessive heat.

Cal.—De Corsey v. Purex Corp., 207 P.2d 616, 92 C.A.2d 669.

54. Ga.—Payne v. Bottling Co., 73 S.E. 1087, 10 Ga.App. 762. 25 C.J. p 205 note 22.

54.5 Explosion of oil

U.S.—Altrichter v. Shell Oil Co., C.A.Minn., 263 F.2d 377.

Explosion of automobile motor after solvent poured in

N.J.—Kramer v. R. M. Hollingshead Corp., 75 A.2d 861, 5 N.J. 386.

54.10 Del.—Sheing v. Remington Arms Co., 108 A.2d 364, 9 Terry 591.

55. U.S.—Sierocinski v. E. I. Du Pont De Nemours & Co., C.C.A. Pa., 118 F.2d 531.

Corpus Juris cited in Sierocinski v. E. I. Du Pont De Nemours & Co., D.C.Pa., 25 F.Supp. 706, 707.

E. I. Dupont de Nemours Powder Co. v. Duboise, Ala., 236 F. 690, 150 C.C.A. 22.

Knowledge of dangerous defect

In employee's suit against corporate seller for injuries sustained as result of delayed explosion of dynamite cap sold to his employer, one could not permissibly infer from explosion itself that seller knew, or had reason to know, of a dangerous defect of explosive which it did not manufacture.

U.S.—Green v. Equitable Powder Mfg. Co., D.C.Ark., 95 F.Supp. 127.

Doctrine of *res ipsa loquitur* was not applicable where plaintiff employed as powder man was injured when cap of and stick of dynamite of defendant's manufacture exploded as he placed them in drilled hole, where there was no evidence as to how or why they exploded, as to when or how either of them was manufactured, or to how or by whom they had been handled or treated prior to their use, except as plaintiff himself handled them in manner other than as recommended by instructions which accompanied containers in which they were packaged.

Utah.—Matievitch v. Hercules Powder Co., 282 P.2d 1044, 3 Utah 2d 283.

56. U.S.—Sierocinski v. E. I. Du Pont De Nemours & Co., D.C.Pa., 25 F.Supp. 706.

57. U.S.—Ensign-Bickford Co. v. Reeves, C.C.A.Mo., 95 F.2d 190.

58. Pa.—Pierson v. London, 156 A. 719, 102 Pa.Super. 176.

Reason for rule

It is a matter of common knowledge that torpedoes contain explosive and dangerous substances. Pa.—Pierson v. London, supra.

58.5 U.S.—Green v. Equitable Powder Mfg. Co., D.C.Ark., 95 F.Supp. 127.

59. U.S.—Standard Oil Co. v. Murray, Ill., 119 F. 572, 57 C.C.A. 1.

60. La.—Gershner v. Gulf Refining Co., App., 171 So. 399.

61. U.S.—Louisiana Oil Refining Corporation v. Reed, C.C.A.La., 26 F.2d 14, certiorari denied Reed v. Louisiana Oil Refining Corporation, 49 S.Ct. 31, 278 U.S. 632, 73 L.Ed. 549.

62. Ark.—Pierce Oil Corporation v. Taylor, 227 S.W. 420, 147 Ark. 100. Wis.—Pazdernik v. Pride, 291 N.W. 798, 235 Wis. 391.

Agency of distributor

In an action against a refiner for the alleged negligence of its agent, a distributor, causing an explosion of oil sold to plaintiff as kerosene by

saler,⁶³ or a retailer.⁶⁴

Where injury results from the explosion of illegally sold gasoline, it has been held not necessary to prove that the illegal sale was the proximate cause of the injury.^{64.5}

d. Storage; Transportation

In actions for injuries from the storage or transportation of explosives, the doctrine of *res ipsa loquitur* has been held applicable in some circumstances, but not in others.

According to some authorities, the mere explosion of explosives in store does not raise a presumption of negligence, or call for the application of the doctrine of *res ipsa loquitur*,⁶⁵ particularly where such explosives are not, at the time of the explosion, within the exclusive control of the person sought to be charged with negligence.⁶⁶ According to other authorities, the doctrine of *res ipsa loquitur* applies in actions involving the explosion of stored explosives,⁶⁷ particularly where they are under the exclusive control and manage-

ment of defendant,⁶⁸ where they have been stored in dangerous quantities,⁶⁹ or where they escape.⁷⁰ Evidence by plaintiff that defendant did not use reasonable care in storing an explosive substance casts on defendant the burden of proving that he was not negligent.⁷¹

In an action for injuries sustained by children from stored explosives, there may be a presumption that such children lack sufficient understanding to form a criminal intent.⁷² The presumption which, under the attractive nuisance doctrine, favors trespassing children is, however, inapplicable, in an action for injuries resulting from the explosion of stored explosives, to a child of fifteen not shown to be of subnormal intelligence.⁷³

One attacking the validity of an ordinance requiring that storage containers for explosive substances be buried has the burden of overcoming the presumption in favor of the validity of such ordinance.⁷⁴

a retailer, plaintiff is required to prove such agency.

Ill.—Black v. Texas Co., 247 Ill.App. 301.

63. Va.—American Oil Co. v. Nicholas, 157 S.E. 754, 156 Va. 1.

Knowledge that fluid was gasoline

Consumer, injured by explosion of gasoline purchased from retailer as kerosene, had burden of proving that defendant wholesaler knew, or should have known, fluid was gasoline.

Va.—American Oil Co. v. Nicholas, supra.

64. Wis.—Pazdernik v. Pride, 291 N.W. 798, 235 Wis. 391—Delap v. Liebensohn, 208 N.W. 937, 190 Wis. 73.

Tossing lighted match into stove

In action against store owner by person injured by flashing out of supposed kerosene or fuel oil when he tossed lighted match into oil burner stove to start fire, doctrine of *res ipsa loquitur* has been held inapplicable.

N.C.—Jennings v. Standard Oil Co. of New Jersey, 173 S.E. 582, 206 N.C. 261.

Unlabeled gasoline

Burden is on buyer injured by explosion to establish by preponderance of evidence that she was sold unlabeled gasoline by defendant retailer instead of kerosene.

La.—Green v. Pfeffer, App., 146 So. 171.

64.5 N.Y.—Daggett v. Keshner, 179 N.Y.S.2d 428, 6 A.D.2d 503.

65. U.S.—Crow v. Continental Oil Co., C.C.A.Tex., 115 F.2d 740.

Pa.—Amsterdam v. E. I. Dupont de

Nemours Powder Co., 62 Pa.Super. 314.

Tenn.—Texas Co. v. Haggard, 134 S.W.2d 880, 23 Tenn.App. 475.

66. Cal.—Peters v. Pioneer Laundry Co., 90 P.2d 146, 32 C.A.2d 494.

Control of independent contractor

In action against owner of laundry for death of employee of independent contractor when tank, which had contained cleaning solvent, exploded, "*res ipsa loquitur* doctrine" was not applicable where tank, when it exploded, was no longer under exclusive management of defendant owner, but was under management of independent contractor.

Cal.—Peters v. Pioneer Laundry Co., supra.

67. Cal.—Sistrunk v. Texas Holding Co., 264 P. 259, 88 C.A. 698.

N.Y.—Levin v. New York Cent. & H.R.R. Co., 133 N.Y.S. 467.

Filling station

Minn.—Nelson v. Zamboni, 204 N.W. 943, 164 Minn. 314.

N.C.—Howard v. Texas Co., 169 S.E. 832, 205 N.C. 20.

Static spark

In an action for damages against the owner of a gasoline filling station for fire alleged to have been caused by the generation of static electricity by reason of defendant's failure to use a safety chain or device to ground any flow of static current in transferring gasoline from one of its tanks to another, it was not necessary that plaintiff show that a static spark was actually produced, but it was sufficient to show conditions and circumstances from which the inference could be reason-

ably drawn that a static spark was produced.

U.S.—Standard Oil Co. of New York v. R. L. Pitcher Co., C.C.A.Me., 289 F. 678.

68. N.C.—Newton v. Texas Co., 105 S.E. 433, 180 N.C. 561.

69. Cal.—Rathbun v. White, 107 P. 309, 157 C. 248.
25 C.J. p 205 note 17.

70. N.C.—Newton v. Texas Co., 105 S.E. 433, 180 N.C. 561.

Gasoline

The rule *res ipsa loquitur* has been applied as against an oil company, where gasoline escaped from the company's warehouse, ran down a street, and caught fire, causing an explosion.

N.C.—Newton v. Texas Co., supra.

71. Or.—Olds v. Von der Hellen, 263 P. 907, 127 Or. 276, modified on other grounds 270 P. 497, 127 Or. 276.

72. Wis.—O'Brien v. Fred Kroner Hardware Co., 185 N.W. 205, 175 Wis. 238.

Removing explosives from defendant's premises

In an action for injuries to a thirteen year old boy from the explosion of fulminating caps which he took from defendant's premises, the text rule was applied in negating criminal intent to violate a penal statute prohibiting removal of explosives.

Wis.—O'Brien v. Fred Kroner Hardware Co., supra.

73. Ky.—Commonwealth v. Henderson's Guardian, 53 S.W.2d 694, 245 Ky. 328.

74. Kan.—Cities Service Oil Co. v. City of Marysville, 231 P. 1031, 117

Transportation. In an action to recover for injuries resulting from an explosion occurring while explosive substances were being transported by defendant, the doctrine of *res ipsa loquitur* may apply.⁷⁵

§ 11(7). — — — Admissibility of Evidence

- a. In general
- b. Blasting; fireworks
- c. Manufacture, sale, or use
- d. Storage and keeping; transportation

a. In General

General rules governing the admissibility of evidence in civil actions have been applied in actions involving explosives. Evidence of defendant's caution and good faith is admissible only where the exercise of proper care constitutes a defense or exemplary damages are sought.

General rules governing the admissibility of evidence in civil actions have been applied to the admissibility of declarations by persons injured⁷⁶ or

killed⁷⁷ by explosions, documentary evidence,⁷⁸ evidence as to other injuries,⁷⁹ other explosions⁸⁰ or other explosives,⁸¹ evidence as to the financial condition of the parties,⁸² opinion evidence,⁸³ evidence as to the quantum of damages,⁸⁴ and evidence as to customs and usages,⁸⁵ and as to other matters,^{85.5} as well as to the admissibility of positive and negative testimony.⁸⁶

Intent or good faith. Where the exercise of proper care constitutes a valid defense, full opportunity should be given defendant to show acts of caution and good faith on his part;⁸⁷ but where the exercise of care would not be a defense, and no claim is made for exemplary damages, evidence of such care is inadmissible.⁸⁸

b. Blasting; Fireworks

Negligence in a blasting case may be proved by any relevant and material evidence. Evidence of damage to other property is to be received with extreme caution and only after a proper foundation is laid.

Kan. 514, 43 A.L.R. 854, error dismissed 46 S.Ct. 207, 270 U.S. 665, 70 L.Ed. 788.

Burden not sustained

Where tanks used for storage of kerosene and gasoline could be placed underground, and so doing would only be matter of expense and inconvenience to owner, burden of such owner has been held not met.

Kan.—Cities Service Oil Co. v. City of Marysville, *supra*.

75. Okl.—Selby v. Osage Torpedo Co., 241 P. 130, 112 Okl. 303, 44 A.L.R. 120.

Motor vehicle

(1) Rule of *res ipsa loquitur* is applicable where nitroglycerine being transported by automobile truck along road near dwelling place exploded and injured person on his own premises.

Okl.—Selby v. Osage Torpedo Co., *supra*.

(2) Doctrine of *res ipsa loquitur* applied where dynamite, transported in motor vehicle on public highway by licensed contract carrier as agent of manufacturer and shipper, exploded while in carrier's exclusive control and management, injuring dwelling and person of one who lived near highway.

W.Va.—Pope v. Edward M. Rude Carrier Corp., 75 S.E.2d 584, 138 W.Va. 218.

76. Colo.—Davis v. Graham, 29 P. 1007, 2 Colo.App. 210. 25 C.J. p 206 note 35.

77. Cal.—Munro v. Pacific Coast Dredging & Reclamation Co., 24 P. 303, 84 C. 515, 18 Am.S.R. 248. 25 C.J. p 206 note 36.

78. Ill.—Mahlstedt v. Ideal Lighting Co., 110 N.E. 795, 271 Ill. 154, Ann. Cas.1917D 209.

Booklet

Ill.—Mahlstedt v. Ideal Lighting Co., *supra*.

79. Ill.—Gerrard v. Parcheddu, 243 Ill.App. 562. 25 C.J. p 206 note 37.

80. N.Y.—Fillo v. Jones, 2 Abb.Dec. 121, 4 Keyes 328. 25 C.J. p 206 note 38.

81. Ala.—Williams v. Bolding, 124 So. 892, 220 Ala. 328.

Dynamite caps

Father of child was properly permitted to testify as to finding dynamite and caps in a certain culvert on morning following injury to child from explosion of dynamite cap found there by latter.

Ala.—Williams v. Bolding, *supra*.

82. Held admissible

Va.—Simmons v. McConnell, 10 S.E. 838, 86 Va. 494. 25 C.J. p 206 note 39 [a].

Held inadmissible

R.I.—Sroka v. Halliday, 97 A. 965, 39 R.I. 119, Ann.Cas.1918D 961. 25 C.J. p 206 note 39 [b].

83. U.S.—Epperson v. Midwest Refining Co., C.C.A.Wyo., 22 F.2d 622.

Flow of gas

In absence of evidence that gas which exploded flowed into oil-refinery still, expert testimony as to means of preventing such flow was immaterial.

U.S.—Epperson v. Midwest Refining Co., *supra*.

84. N.Y.—Gourdier v. Cormack, 2 E. D.Smith 200.

Va.—Simmons v. McConnell, 10 S.E. 838, 86 Va. 494.

85. Tex.—Southwestern Oil Development Co. v. Illinois Torpedo Co., Civ.App., 252 S.W. 334, error dismissed Illinois Torpedo Co. v. Southwestern Oil Development Co., 278 S.W. 1115, 114 Tex. 582. 25 C.J. p 206 note 41.

85.5 Knowledge and authority of superintendent

In action for injuries alleged to have been sustained by explosion of dynamite cap resulting from negligent acts of defendant while acting through employee, testimony that defendant's general superintendent had objected to storing of dynamite and caps in building within town was admissible to show knowledge of superintendent of dangerous qualities thereof and sufficient authority to determine where such dynamite and caps should be stored.

Tex.—Lloyd v. Herrington, Civ.App., 178 S.W.2d 694, reversed on other grounds 182 S.W.2d 1003, 143 Tex. 135.

86. Mich.—Beauchamp v. Saginaw Min. Co., 5 N.W. 65, 50 Mich. 163, 45 Am.R. 30. 25 C.J. p 206 note 42.

87. Ky.—Weeks v. McDonald Constr. Co., 156 S.W. 127, 153 Ky. 691. 25 C.J. p 206 note 44.

88. Iowa.—Carter v. Marshall Oil Co., 170 N.W. 798, 185 Iowa 416. N.Y.—Tremain v. Cohoes Co., 2 N.Y. 163, 51 Am.D. 284.

Negligence in a blasting case may be proved by any evidence that is relevant and material.^{88,50} In blast-damage cases, the fact that causation is often impossible of proof, except through circumstantial evidence, justifies a rather liberal attitude in judg-

ing the relevance of a particular circumstance.^{88,55} In actions for injuries resulting from blasting, particular evidence, or evidence as to various particular matters involved, has been held admissible, as being relevant, material, and competent,⁸⁹ while

88.50 Me.—Cratty v. Samuel Aceto & Co., 116 A.2d 623, 151 Me. 126.

88.55 Tex.—Weaver v. Benson, 254 S.W.2d 95, 152 Tex. 50.

89. Cal.—Peterson v. General Geophysical Co., App., 185 P.2d 56.

Want of reasonable care

Evidence as to defendant's want of reasonable care in the use of explosives in blasting operations by which dirt and rock were cast on plaintiffs' premises is admissible to show negligence.

Ky.—States Corporation v. Shull, 287 S.W. 210, 216 Ky. 57.

Great force of blast

In suit for crack in wall of building, allegedly caused by nearby blasting operations, evidence indicating great force of the blast was relevant to issue of causation and to issue of whether crack existed before blast, and exclusion of such evidence was improper.

Tex.—Weaver v. Benson, 254 S.W.2d 95, 152 Tex. 50.

Contract

In action by owner of dwelling house to recover for damage allegedly caused by negligent blasting by defendant under a contract which required that every blast should be by use of delays and that blasting should be done with explosives of such power and in such quantities and positions as would not damage any existing structures, contract was admissible as evidence of negligence.

Mass.—Kushner v. Dravo Corp., 158 N.E.2d 858.

Letters from plaintiff's attorney to defendant

Conn.—Whitman Hotel Corp. v. Elliott & Watrous Engineering Co., 79 A.2d 591, 137 Conn. 562.

Quantity of explosive; manner of blasting

In an action for damages to property from blasting, evidence of the quantity of explosive used and manner of blasting is competent.

N.Y.—Cebrelli v. Church Constr. Co., 84 N.Y.S. 919.

25 C.J. p 208 note 73.

Conditions after blast; effect of blasting

(1) Testimony is admissible concerning the deposit of debris by a blast, and the condition of the damaged premises soon after.

Or.—Salmi v. Columbia & N. R. R. Co., 146 P. 819, 75 Or. 200, L.R.A. 1915D 834.

(2) Testimony of an architect and engineer as to the condition of plain-

tiff's house several years after the blast alleged to have caused the injury has been held admissible over objection that it was too remote.

Mass.—Goldman v. Regan, 142 N.E. 701, 247 Mass. 492.

(3) In landowners' action for damage to buildings allegedly caused by blasting, the testimony of landowners, who occupied buildings throughout blasting operations, as to what they observed to be effect of blasting has been held admissible.

Pa.—Del Pizzo v. Middle West Const. Co., 22 A.2d 79, 146 Pa.Super. 345.

Failure to heed warning

Evidence that plaintiff failed to heed the warning given, or exposed himself to danger, such as proof that cries of fire were heard in his direction, is competent.

N.Y.—Sullivan v. Dunham, 41 N.Y.S. 1083, 10 App.Div. 438, 3 N.Y. Ann. Cas. 324.

Financial condition

Where defendants claimed that their son owned lot where explosion occurred, evidence of son's financial condition was admissible as showing what beneficial interest son had in property being improved; and financial standing of the independent contractor performing the building operations during which the blast occurred is admissible, where lot owners testified that they considered contractor's financial standing in awarding contract.

Wash.—Thompson-Cadillac Co. v. Matthews, 23 P.2d 399, 173 Wash. 353.

Notice to blaster

Testimony of plaintiff's husband disclosing notice to district claim agent of railroad of effect of previous blasting on his wife and requesting notice and warning of blasting in future is admissible as against contention that notice to district claim agent was not notice to railroad.

Mont.—Cashin v. Northern Pac. Ry. Co., 28 P.2d 862, 96 Mont. 92.

Opinion

(1) An expert witness may properly testify whether the blasting was heavier than was reasonably necessary for the purpose.

Ala.—Harbison-Walker Refractories Co. v. Scott, 64 So. 547, 185 Ala. 641.

(2) Testimony of an expert as to whether a blast covered as prescribed by ordinance could have thrown rocks a certain distance equal to that

at which the injury was done is competent.

N.Y.—Koster v. Noonan, 8 Daly 231.

Ordinance

(1) Where the damage alleged was that loose fragments of rock were thrown against plaintiff's house by negligent blasting, a city ordinance requiring covering of the blast so as to prevent fragments of rock from being thrown into the air is admissible.

Iowa.—Mahoney v. Dankwart, 79 N. W. 134, 108 Iowa 321.

(2) Plaintiff's knowledge that blasting was done in disregard of ordinance, requiring the rock to be covered, may be shown in determining what would be due care on the part of plaintiff.

Mo.—Brannock v. Elmore, 21 S.W. 451, 114 Mo. 55.

Other blasts

(1) Evidence of negligent blasting by defendant, before and after the blast causing the injury, is admissible to determine the character of the blast in question.

Ga.—Central of Georgia R. Co. v. Bernstein, 38 S.E. 394, 113 Ga. 175.

(2) Where injuries were received from a piece of flying steel thrown out by a blast from a plant for breaking steel by explosives, evidence of previous emissions of pieces of steel from the plant was held admissible.

Pa.—Baker v. Hagey, 35 A. 705, 177 Pa. 128, 55 Am.S.R. 712.

(3) Where plaintiff was struck by a stone from a blast in a neighboring quarry, while he was on his own premises, evidence of stones being thrown on plaintiff's land in previous instances is admissible to show whence the stone came that struck plaintiff, and the distance it might be thrown.

Ohio.—Newburgh Brick & Clay Co. v. Chojnicki, 33 Ohio Cir.Ct. 356, affirmed 94 N.E. 1112, 83 Ohio St. 450.

(4) Evidence that rock suitable for quarrying, situated on plaintiff's land, was shattered by defendant's blasting on adjoining land is admissible on the question of damage.

Mass.—White v. Medford, 39 N.E. 997, 163 Mass. 164.

(5) In an action for damage to property caused by large quantities of high explosive, where defendant's testimony tended to show that other charges of explosives as great as or greater than, the charge from which plaintiff claimed injury had

other evidence has been held inadmissible, or properly excluded.⁹⁰

Evidence of damage to other property in the vicinity is to be received with extreme caution and only where a proper foundation is laid.^{90.5}

With respect to the propriety of excluding particular evidence, the true question is the relevance

of the excluded evidence to the finding which is claimed to render the excluded evidence unimportant.^{90.10}

Fireworks. In actions arising out of the explosion of fireworks, particular evidence has been held admissible as relevant, material, and competent,⁹¹ while other evidence has been held inadmissible.⁹²

been fired without damage to property, testimony of defendant's superintendent that it was part of his duty at the quarry where the explosive was used to look around and have reports made whether injury had been done is admissible.

Ala.—Atlas Portland Cement Co. v. Sharpe, 96 So. 632, 209 Ala. 464.

Reputation

Evidence that contractor had reputation for being careless on jobs requiring use of high explosives has been held admissible.

Wash.—Thompson-Cadillac Co. v. Matthews, 23 P.2d 399, 173 Wash. 353.

Ages of plaintiff's children

Where the complaint alleges annoyance by blasting, and interference with plaintiff's enjoyment of his residence, evidence of the ages of his children is admissible to show the nature and extent of the violation of his right.

Ala.—Birmingham Realty Co. v. Thomason, 63 So. 65, 8 Ala.App. 535.

90. Ala.—Tennessee Coal, Iron & R. Co. v. Hartline, 11 So.2d 833, 244 Ala. 116.

Ga.—Ready-Mix Concrete Co. v. Rape, 106 S.E.2d 429, 98 Ga.App. 503.

Miss.—Central Exploration Co. v. Gray, 70 So.2d 33, 219 Miss. 757.

Previous or subsequent acts

(1) Evidence of the effect of blasting rock near a house a long time previous to the blasts complained of is not admissible, where the former blasts were not shown to have been of equal force and kind.

Tex.—Mt. Franklin Lime & Stone Co. v. May, Civ.App., 150 S.W. 756.

(2) In action by corporation engaged in transportation of natural gas, for damages to pipeline allegedly caused by negligent explosion of a charge of dynamite by defendant's employees, following which explosion gas came from plaintiff's pipeline and caused fire, proof by defendant that there were three gas explosions on plaintiff's extensive pipeline over seven-year period was inadmissible as being so remote as to be wholly irrelevant and immaterial.

U.S.—Consolidated Elec. Cooperative v. Panhandle Eastern Pipeline Co., C.A.Mo., 189 F.2d 777.

(3) Evidence showing the manner in which defendant conducted blast-

ing operations some weeks after the injury to plaintiff's building is inadmissible.

N.Y.—Luria v. Cusick, 93 N.Y.S. 507, 47 Misc. 126, 16 N.Y. Ann. Cas. 226.

Compensation payments

Evidence as to whether payments were made plaintiff for permanent disability and whether plaintiff took appeal when compensation payments ceased has been held inadmissible in action for personal injuries resulting from a blast.

Conn.—Loethscher v. Campo, 141 A. 652, 107 Conn. 568.

Conformity of building material to specifications

Evidence that brick used in a house damaged by blasting was different from that called for in building specifications is immaterial.

Tex.—Mt. Franklin Lime & Stone Co. v. May, Civ.App., 150 S.W. 756.

Value of use and occupancy

Evidence regarding difference in value of use and occupancy of house as dwelling before and during blasting, based on possibility that plaintiff could have taken in boarders, is incompetent and inadmissible.

Ky.—Jefferson County v. Pohlman, 49 S.W.2d 344, 243 Ky. 556.

Laughter of defendant's servants

In action for damages to property from blasting, evidence that defendant's laborers laughed regarding plaintiff's fright when blasts were discharged is incompetent.

Ky.—Vincennes Bridge Co. v. Poulos, 15 S.W.2d 271, 228 Ky. 446.

Duty of defendant to owner of house

In action by owner of dwelling house to recover for damage allegedly caused by negligent blasting by defendant under a contract which required that every blast should be exploded by use of delays to avoid damage to any existing structures, evidence of requirement of delays was not admissible to establish a duty owing by defendant to owner.

Mass.—Kushner v. Dravo Corp., 158 N.E.2d 858.

90.5 N.J.—Corpus Juris Secundum cited in Stanley Co. of America v. Hercules Powder Co., 108 A.2d 616, 625, 16 N.J. 295.

Evidence held admissible

(1) In an action for injury from negligent blasting, evidence is admissible showing the effect of the explosion on adjoining property and

other buildings in the neighborhood, as bearing on the character and extent of the explosion.

Ala.—Louisville & N. R. Co. v. Lynne, 75 So. 14, 199 Ala. 631—Harbison-Walker Refractories Co. v. Scott, 64 So. 547, 185 Ala. 641. Conn.—Whitman Hotel Corp. v. Elliott & Watrous Engineering Co., 79 A.2d 591, 137 Conn. 562.

Tex.—Corpus Juris Secundum cited in Benson v. Weaver, Civ.App., 250 S.W.2d 770, 771, affirmed 254 S.W. 2d 95, 152 Tex. 50. 25 C.J. p 208 note 77.

(2) This is true as to other buildings or property in neighborhood more distant from place of blasting than plaintiff's.

Ala.—Ledbetter-Johnson Co. v. Hawkins, 103 So.2d 748, 267 Ala. 458.

Conn.—Whitman Hotel Corp. v. Elliott & Watrous Engineering Co., 79 A.2d 591, 137 Conn. 562.

Evidence held inadmissible

The exclusion of evidence that other property at various distances from that injured was not affected by the particular explosion is not error.

Ill.—Fitzsimons, etc., Co. v. Braun, 94 Ill.App. 533, affirmed 65 N.E. 249, 199 Ill. 390, 59 L.R.A. 421.

90.10 Tex.—Weaver v. Benson, 254 S.W.2d 95, 152 Tex. 50.

Finding pleaded as special defense

In suit for crack in building allegedly caused by dynamite explosion, mere fact that finding that crack existed in building prior to explosion, relied on to render exclusion of evidence offered to show unusual force of blast immaterial to correctness of judgment for defendant, was pleaded as special defense, was immaterial in determining whether evidence was properly excluded, since true question was relevance of excluded evidence to finding.

Tex.—Weaver v. Benson, supra.

91. Other fires and places

Evidence of other fires at other places in the community from the same cause may be admissible on behalf of plaintiff suing defendant for setting fire to house in setting off fireworks.

Ill.—Gerrard v. Porcheddu, 243 Ill. App. 562.

92. Absence of license

Where a voluntary spectator was injured while watching the discharge

c. Manufacture, Sale, or Use

In actions involving the manufacture, sale, or use of explosives, evidence, to be admissible, must be competent, relevant, and material.

of fireworks, evidence that defendants had no license to discharge the fireworks, and that their acts were unlawful, was held immaterial.

Mass.—Frost v. Josselyn, 62 N.E. 469, 180 Mass. 389.

Club membership; request for illumination

Evidence that plaintiff, who was injured by fireworks during a parade, was a member of the club which organized the procession and requested illumination along the line of march was held immaterial and incompetent.

Mass.—Fisk v. Wait, 104 Mass. 71.

Other fires and places

(1) Where one is injured by an explosion of fireworks alleged to have been wrongfully kept, it is not permissible to show that other fires caused by fireworks had occurred at other times on the premises of other persons, at least without proof that the fireworks and the conditions of ignition were similar.

N.Y.—Fillo v. Jones, 2 Abb.Dec. 121, 4 Keyes 328.

(2) In action for injuries to a child from explosion of fireworks found unexploded on defendant's premises after fireworks display, evidence regarding what defendant's superintendent knew about what took place as to explosions of powder at other fairs or fairgrounds after display of fireworks is inadmissible.

Mass.—Bruso v. Eastern States Exposition, 168 N.E. 206, 269 Mass. 21.

93. Idaho.—Big Springs Land & Live Stock Co. v. Beck, 263 P. 477, 45 Idaho 509.

Neb.—Clay v. Butane Gas Corp., 39 N.W.2d 813, 151 Neb. 876.

Tex.—Independent-Eastern Torpedo Co. v. Herrington, Civ.App., 59 S.W.2d 222, 1108, reversed on other grounds 95 S.W.2d 377, 128 Tex. 17.

25 C.J. p 207 note 58.

Quality and tests of substance

(1) Tests made by public inspectors of oil sold as kerosene may be admissible in actions based on the explosion of such oil.

Mich.—Rife v. Gaffill Oil Co., 209 N.W. 172, 235 Mich. 15.

Minn.—St. Paul Fire & Marine Ins. Co. v. Standard Oil Co., 210 N.W. 80, 168 Minn. 353—Getz v. Standard Oil Co., 210 N.W. 78, 168 Minn. 347.

(2) In action, for injuries from the explosion of oil sold by defendant wholesaler as coal oil, testimony

of defendant's superintendent, tending to show the quality of the mixture at the time it was sold and sent out for delivery to the retailer from whom it was purchased by plaintiff is admissible.

Kan.—Patterson v. Uncle Sam Oil Co., 191 P. 258, 107 Kan. 221.

Custom

(1) Evidence of custom of starting fires with kerosene is admissible in actions based on explosion of oil purchased as kerosene.

Ark.—Houston Oil Co. of Texas v. McGuire, 59 S.W.2d 593, 187 Ark. 293.

Ky.—Kentucky Independent Oil Co. v. Schnitzler, 271 S.W. 570, 208 Ky. 507, 39 A.L.R. 979.

(2) Where injuries resulted from the explosion of gasoline which leaked from an engine used to pump water, evidence that others than plaintiff had been allowed to use the pump, and had to start the engine, and prime the pump, is admissible on the question of invitation and custom.

Iowa.—Snipps v. Minneapolis & St. L. R. Co., 146 N.W. 468, 164 Iowa 530.

(3) Where city, as tenant of a privately owned garage, engaged refining company to relocate a pipe connecting a gasoline pump with gasoline storage tank, evidence of custom imposing duty on refining company to air-test entire installation before delivery of gasoline was relevant in an action for injury to one, and death to another, city employee in an explosion of gasoline fumes.

Pa.—Doyle v. Atlantic Refining Co., 53 A.2d 68, 357 Pa. 92.

(4) In action against manufacturer and seller of dynamite, caps, and allegedly defective fuse for injuries to buyer as result of premature explosion, evidence of seller's inability to qualify for license to own, possess, and control explosives, manufacturer's knowledge of such fact, and defendants' continuance of use of seller's unqualified personnel in distributing explosives would be relevant to show manufacturer's knowledge of personnel's incompetence and malice or intent, in support of plaintiff's allegations of manufacturer's willful and wanton misconduct in turning over distribution of explosives to unqualified personnel in violation of trade custom, if seller's negligence proximately resulting in injuries is proved.

Ga.—Flint Explosive Co. v. Edwards, 66 S.E.2d 368, 84 Ga.App. 376.

In actions to recover for injuries resulting from the manufacture, sale, or use of explosives, evidence which is relevant, material, and competent is admissible,⁹³ while on the other hand evidence not of that

Opinion

(1) In an action for damages resulting from adulterated kerosene sold by defendant, it is proper to allow an expert witness to describe the process of producing kerosene from petroleum, in order to show that gasoline is the lighter product, and to prove what the substance sold was; and it is also proper to show by an expert that gasoline or a mixture containing gasoline would throw off a vapor and ignite at a lower temperature than pure kerosene.

Mich.—Stowell v. Standard Oil Co., 102 N.W. 227, 139 Mich. 18.

(2) In action against bottler of soda water for injury to buyer when bottle exploded, evidence by persons familiar with bottling business that defective bottle would break in bottling machine, and explosion thereafter would be caused by improper amount of pressure from carbonic gas in bottle, is admissible.

R.I.—Douglas v. First Nat. Stores, 172 A. 723, 54 R.I. 278.

Letters of complaint; notice

In plumber's action against manufacturer of chemical mixture for cleaning drains for injuries sustained in explosion, evidence of manufacturer's president concerning letters of complaint received by other users of product was admissible on question of notice to manufacturer of danger in using solvent.

U.S.—Kieffer v. Blue Seal Chemical Co., C.A.N.J., 196 F.2d 614.

Time of purchase

In action against seller of celluloid water-waving combs for injuries incurred when they exploded while buyer was drying her hair with electric lamp, where complaint alleged that combs were bought of defendant on certain date, evidence that combs or part thereof were bought of defendant in prior years was admissible.

N.Y.—Treacy v. F. W. Woolworth Co., 1 N.Y.S.2d 919, 253 App.Div. 899.

Acts of purchaser at time of purchase

In action for delivering gasoline instead of kerosene, resulting in fire, evidence concerning acts of purchaser at time of purchase is admissible on issue whether he called for coal oil and as affecting his credibility.

Tex.—Cabaniss v. Grayburg Oil Co., Civ.App., 50 S.W.2d 437, error refused.

character or nature is inadmissible in such actions.⁹⁴ | Particular evidence may be admissible on one ques-

Failure to warn buyer

Testimony of storekeeper ordering kerosene that oil company's employees failed to warn him of danger of using matches near by is admissible in an action for damage resulting to such storekeeper when the oil which was delivered exploded. Ark.—Gibson Oil Co. v. Bush, 1 S.W. 2d 88, 175 Ark. 944.

Advertisement

In an action for injuries from the explosion of stove polish sold by defendant, his advertisement of such polish was held admissible, where the answer put in issue all material allegations of the complaint. Mass.—Gately v. Taylor, 97 N.E. 619, 211 Mass. 60, 39 L.R.A., N.S., 472.

Conversations between buyer and seller's agent

In action for injuries resulting from explosion of refrigerating coil and tank unit which had been sold as junk by defendant, proof of conversation had by buyer with seller's service manager respecting the dismantling of old refrigerating units was held admissible. N.Y.—Delisa v. Arthur F. Schmidt, Inc., 34 N.E.2d 336, 285 N.Y. 314.

Representations by defendant's salesman made in employee's presence in connection with sale of cleaning fluid are admissible in such employee's action for personal injury caused by explosion.

U.S.—Louisiana Oil Refining Corporation v. Reed, C.C.A.La., 38 F.2d 159, certiorari denied 50 S.Ct. 355, 281 U.S. 751, 74 L.Ed. 1162.

Certificate of an oil inspector containing statutory data and delivered to defendant, a wholesale dealer in kerosene, after kerosene had been tested while in tank car, was, in suit by customer for injuries due to explosion, admissible as against objection that inspector's record was the best evidence.

Iowa.—Way v. S. L. Collins Oil Co., 173 N.W. 20, 187 Iowa 1375.

Booklet issued by defendant, who installed a gasoline light plant in deceased's house, by explosion of gasoline from which he was killed, was admissible as tending to the belief that precaution was unnecessary.

Ill.—Mahlstedt v. Ideal Lighting Co., 110 N.E. 795, 271 Ill. 154, Ann.Cas. 1917D 209.

Other persons, places, or things

(1) Testimony that the witness had used kerosene for many years in a certain manner is admissible as tending to indicate that the person injured from an explosion of kerosene in starting a fire was not guilty of gross negligence.

Ga.—Standard Oil Co. v. Reagan, 84 S.E. 69, 15 Ga.App. 571.

(2) In view of proof tending to show that the ingredients of a disinfectant manufactured and sold by defendant to plaintiff were such that unless careful steps were taken to exclude pent-up gas it was likely to accumulate and cause explosions, evidence of neighbors as to explosion of same disinfectant bought by them about same time as that which exploded, injuring plaintiff, is admissible.

U.S.—W. T. Rawleigh Co. v. Shoulitz, C.C.A.Pa., 56 F.2d 148.

(3) In an action for injuries from gasoline, alleged to have been improperly labeled, or delivered as kerosene, it may be shown that, on the morning after the accident, children of the family of the person injured were seen in possession of a gasoline can properly labeled.

Iowa.—Dubois v. Luthmers, 126 N.W. 147, 147 Iowa 315.

Previous or subsequent acts

(1) In action against company selling oil for death of child in school fire, admitting testimony respecting pilfering of articles from the school before such fire was held not error.

Ky.—Ray's Adm'r v. Standard Oil Co., 61 S.W.2d 1067, 250 Ky. 111.

(2) Evidence that defendant threw away a large quantity of the same kind of oil as that which exploded may be admissible on the question of negligence.

La.—Reed v. Nelson, 63 So. 484, 133 La. 968.

94. U.S.—E. I. Dupont de Nemours Powder Co. v. DuBoise, Ala., 236 F. 690, 150 C.C.A. 22. 25 C.J. p 207 note 58.

Immaterial provisions of contract

In an action for death resulting from the alleged negligence of defendant oil company, with respect to oil sold by it, where the contract of sale includes provisions, immaterial to any issue in the case, as to oil containers, the entire contract is not admissible.

Ky.—Ray's Adm'r v. Standard Oil Co., 61 S.W.2d 1067, 250 Ky. 111.

Events before and after accident

(1) In an action for injuries from the explosion of stove polish sold by defendant, evidence that the stove polish was generally sold in the market before and after the accident was inadmissible.

Mass.—Gately v. Taylor, 97 N.E. 619, 211 Mass. 60, 39 L.R.A., N.S., 472.

(2) Where the injury was caused by ignition and explosion of a certain oil stain, by a match lit while applying it, evidence that such stain

had not ignited before in manufacture or use is immaterial.

Mass.—Thornhill v. Carpenter-Morton Co., 108 N.E. 474, 220 Mass. 593.

(3) Evidence as to temporary mental affliction of defendant seller's employee some time after the accident which resulted in the injuries for which suit is brought, is inadmissible.

Ky.—Ray's Adm'r v. Standard Oil Co., 61 S.W.2d 1067, 250 Ky. 111.

Other sales or substances; sample

(1) Negligence in the sale of coal oil containing gasoline cannot be proved by proof of negligence on another occasion in a sale of gasoline containing coal oil.

Kan.—Patterson v. Uncle Sam Oil Co., 191 P. 258, 107 Kan. 221.

(2) In an action for injury resulting from explosion of stove polish without proper warning, the warning contained on other polishes, which are not shown to be similar, is immaterial.

Conn.—Wolcho v. Rosenbluth, 71 A. 566, 81 Conn. 358, 21 L.R.A., N.S., 571.

(3) In action to recover for injuries received on explosion of oil purchased as kerosene, evidence that analysis of sample of kerosene drawn from container in store where kerosene was purchased showed that the liquid analyzed was dangerous for use in lamps or for starting fires is inadmissible, in absence of proof that liquid sold was same or had same contents as sample which was analyzed.

Va.—Standard Oil Co. of New Jersey v. Cox, 181 S.E. 375, 165 Va. 128.

(4) In action against oil company and its retailer for injury to consumer from explosion of illuminating oil purchased from retailer whom the company supplied, where there was evidence that retailer also kept for sale oil purchased from another oil company, testimony as to the quality of the oil purchased from defendant retailer by persons other than plaintiff at the time he purchased, without showing that the oil so testified to was supplied by defendant oil company, is inadmissible.

Ind.—Standard Oil Co. of Indiana v. Robb, 149 N.E. 567, 85 Ind.App. 21.

Employee's orders

Evidence that an employee of defendant company had been ordered to keep all but employees away from the place where gasoline or other explosives were used is inadmissible, where such order was not shown to have been known to plaintiff.

Iowa.—Snips v. Minneapolis & St. L. R. Co., 146 N.W. 468, 164 Iowa 530.

tion, but not on another.^{94.5}

d. Storage and Keeping; Transportation

In actions for injuries resulting from the storage, keeping, or transportation of explosives, evidence, to be admissible, must be competent, relevant, and material.

Custom as showing agency

In an action against a torpedo company and one furnished by it to shoot charges of nitroglycerine in an oil well for damages for a premature explosion, evidence of a custom among torpedo companies to shoot wells only at the risk of the owner was held immaterial on the issue of the relation of agency between the codefendants.

Tex.—Southwestern Oil Development Co. v. Illinois Torpedo Co., Civ. App., 252 S.W. 334, error dismissed Illinois Torpedo Co. v. Southwestern Oil Development Co., 278 S.W. 1115, 114 Tex. 582.

Temperature

In an action for injury from explosion of oil sold by defendants, testimony as to temperature of room wherein such explosion and injury occurred is inadmissible without proof that temperature was taken near date of accident.

U.S.—Louisiana Oil Refining Corporation v. Reed, C.C.A.La., 26 F.2d 14, certiorari denied Reed v. Louisiana Oil Refining Corporation, 49 S.Ct. 31, 278 U.S. 632, 73 L.Ed. 549.

Test of fuse

Evidence as to whether mining company made test of fuse it bought from defendant manufacturer was held immaterial on question of manufacturer's liability for injuries to miner when dynamite was prematurely discharged due to defective fuse.

Conn.—Jump v. Ensign-Bickford Co., 167 A. 90, 117 Conn. 110.

94.5 Ga.—Flint Explosive Co. v. Edwards, 66 S.E.2d 368, 84 Ga.App. 376.

Malice or misconduct proximate cause

In action for injuries caused by premature dynamite explosion, evidence supporting allegations that defendant corporations, which manufactured and sold to plaintiff dynamite, caps, and allegedly defective fuse, knew from previous experience that their negligence in violating customs of industry by turning over sale to untrained and incompetent personnel would probably result in injuries to plaintiff because it had resulted in similar injuries to others, but, in utter indifference to consequences, continued blindly in such course of conduct, was admissible on question of defendants' malice or wanton misconduct, but not on question whether sale of articles to plain-

tiff was negligence proximately causing injuries.

Ga.—Flint Explosive Co. v. Edwards, supra.

95. Neb.—Clay v. Butane Gas Corp., 39 N.W.2d 813, 151 Neb. 876.

Contract to carry explosives may be admissible, notwithstanding contractor had not received municipal license to transport explosives.

U.S.—Lehigh Valley R. Co. v. State of Russia, C.C.A.N.Y., 21 F.2d 406, certiorari denied 48 S.Ct. 159, 275 U.S. 571, 72 L.Ed. 432.

Custom or usage

(1) Evidence as to general custom and usage in regard to keeping explosives may be admitted.

Tex.—Barnes v. Zettlemoyer, Civ. App., 62 S.W. 111.
25 C.J. p 206 note 41.

(2) Evidence of custom or usage of cutting off the motors of motor vehicles while filling their gasoline tanks is admissible on issue of negligence in filling gasoline tank while motor was running.

Ala.—Walker v. Stephens, 127 So. 668, 221 Ala. 18.

(3) Evidence of custom of cleaning gasoline tanks before sending them for repairs, and employer's assumption that tanks sent him were so cleaned, is admissible in action for injuries to employee by explosion.

R.I.—McArthur v. Dutee W. Flint Oil Co., 146 A. 484, 50 R.I. 226.

Manner of storage of explosives may be shown.

U.S.—Kerbaugh v. Caldwell, Pa., 151 F. 194, 80 C.C.A. 470, 10 Ann.Cas. 453.

25 C.J. p 207 note 47.

Mode of construction of magazine

(1) In an action based on theory that storage was a nuisance, evidence as to defective construction of the magazine was inadmissible.

Cal.—Fernandez v. Western Fuse & Explosives Co., 167 P. 900, 34 C.A. 420.

(2) In an action against one for the alleged negligent construction and maintenance of a magazine, it has been held that evidence of the manner of construction of other magazines is admissible.

Ark.—Waters-Pierce Oil Co. v. Burrows, 96 S.W. 336, 77 Ark. 74.
S.C.—Emory v. Hazard Powder Co., 22 S.C. 476, 53 Am.R. 730.

Nature, power, and quantity of explosives

(1) The nature, character, and rel-

General rules of evidence govern the admissibility of evidence in actions involving the storage and keeping, or the transportation, of explosives, evidence which is relevant, material, and competent being proper and admissible,⁹⁵ but not evidence which

ative power of explosives stored or kept may be shown.

Utah.—Smith v. Mine & Smelter Supply Co., 88 P. 683, 32 Utah 21.

(2) So, in action for injuries from explosion of flare, manufactured by defendant, allegation of complaint that it was highly and dangerously explosive made determination of its explosiveness a material element, and evidence of its composition relevant and admissible.

Cal.—Willson v. Superior Court of California, in and for Los Angeles County, 225 P. 881, 66 C.A. 275.

(3) In an action for injuries by the explosion of a powder magazine, evidence is admissible concerning the quantity of explosives kept.

U.S.—Kerbaugh v. Caldwell, Pa., 151 F. 194, 80 C.C.A. 470, 10 Ann.Cas. 453.

25 C.J. p 207 note 46.

Opinion

(1) An expert on methods of removing explosive dust from mills and thus preventing explosions may testify concerning the various systems, and their practicable application to the mill where the explosion occurred.

U.S.—Quaker Oats v. Grice, Vt., 195 F. 441, 115 C.C.A. 343.

(2) Evidence by one who installed an oil plant that certain apparatus was safer than other apparatus which he had tested and found impracticable was admissible.

Ark.—Waters-Pierce Oil Co. v. Burrows, 96 S.W. 336, 77 Ark. 74.

Previous or subsequent conduct or situation

(1) In an action for damages to property caused by the explosion of dust in a mill, caused by gradual overheating, evidence was held admissible that grain in the bins was very hot fifteen days before the explosion.

U.S.—Quaker Oats v. Grice, Vt., 195 F. 441, 115 C.C.A. 343.

(2) In an action against an oil company to recover for damages suffered by reason of an explosion of gasoline at defendant's warehouse, evidence as to prevention of such an accident as the one in question on previous occasions by defendant's exercise of ordinary care has been held admissible for the purpose of determining, in connection with the other facts and circumstances, whether defendant was careful at the time in question.

N.C.—Fox v. Texas Co., 105 S.E. 437, 180 N.C. 543.

is irrelevant, immaterial, or incompetent.⁹⁶ Regulations of the Interstate Commerce Commission may

(3) In an action for injuries sustained by plaintiff through explosion of nitroglycerin transported in an automobile by defendant, evidence that after the accident defendant removed a load of nitroglycerin from another car similarly equipped and placed it in a car properly equipped is competent and admissible to show the defective equipment of the car in which the explosion occurred.

Kan.—Ladlie v. American Glycerin Co., 223 P. 272, 115 Kan. 507.

(4) In action for injury to a child from explosion of dynamite cap found in school basement, evidence showing that basement was cleaned next day is admissible to show that defendant was in possession of the basement at time cap was found.

Ky.—Jones Savage Lumber Co. v. Thompson, 25 S.W.2d 373, 233 Ky. 198.

Knowledge of gases or danger therefrom

Evidence of plaintiff, a country merchant, suing for personal injuries sustained in explosion of gasoline, that he had no knowledge of presence of, or danger from, gases arising through uncapped pipe leading from defendant's abandoned gasoline tank is properly admitted.

Md.—American Oil Co. v. Wells, 165 A. 298, 164 Md. 422.

Rules of carriers

In an action against carriers for death by explosion of dynamite in their yard, their rules were admissible to show negligence.

Ky.—Southern Ry. Co. v. Adkins' Adm'r, 117 S.W. 321, 133 Ky. 219, modified on other grounds and motion for rehearing and oral argument denied 119 S.W. 820, 133 Ky. 219.

Other evidence held admissible

(1) Testimony that gasoline is very inflammable and must be handled carefully is admissible in action for injuries by explosion of gasoline fumes.

R.I.—McArthur v. Dutee W. Flint Oil Co., 146 A. 484, 50 R.I. 226.

(2) Where injuries result from the explosion of a powder magazine, alleged to constitute a nuisance, evidence of the density of population and proximity of dwellings and highways in the vicinity is admissible.

Mass.—Flynn v. Butler, 75 N.E. 730, 189 Mass. 377.

Mo.—Liggett v. Excelsior Powder Mfg. Co., 202 S.W. 372, 274 Mo. 115.

(3) In suit for injuries from fire and resulting explosion of defendant's kerosene tank, testimony that there was no fire-fighting department in city was held to be admissible as circumstance tending to show

whether defendant negligently maintained and operated petroleum products storage station.

Ark.—Phillips Petroleum Co. v. Berry, 65 S.W.2d 533, 188 Ark. 431.

(4) Where a filling station had been leased by plaintiff owner to defendant refiner and operated by a third party under an authorized dealer agency agreement with defendant, in an action for negligent destruction by fire of garage and filling station as a result of an explosion of gasoline while being delivered from defendant's truck to tank of filling station, evidence held competent and admissible included lease agreement between plaintiff and defendant, authorized dealer agency agreement between defendant lessee and the third party in possession, and courtesy card given by defendant to plaintiff to purchase gasoline, for which collection was made by defendant's distributor.

S.C.—Tate v. Claussen-Lawrence Const. Co., 167 S.E. 826, 168 S.C. 481.

96. Conditions subsequent to accident

(1) In action for injury to a child from explosion of dynamite cap found in school basement, evidence concerning condition of basement on next day is inadmissible, in the absence of a showing that condition was same.

Ky.—Jones Savage Lumber Co. v. Thompson, 25 S.W.2d 373, 233 Ky. 198.

(2) In an action against an oil company to recover for damage caused by an explosion of gasoline at defendant's warehouse, the finding of a piece of wire near the warehouse after the explosion, offered to prove that defendant's plant was dynamited, was held inadmissible as too remote and conjectural, especially in the presence of strong evidence that the gasoline was exploded from internal causes of defendant's own making.

N.C.—Fox v. Texas Co., 105 S.E. 437, 180 N.C. 543.

Custom or usage

(1) In an action for damages by fire alleged to have been caused at a gasoline filling station by a static spark due to defendant's negligence in not providing a safety chain or device, evidence as to the system in use at another filling station, or by another company owning such station, was properly excluded as relating to the custom or practice of a single company, and not tending to show any general custom or practice in the use or nonuse of safety devices at filling stations.

U.S.—Standard Oil Co. of New York v. R. L. Pitcher Co., C.C.A.Me., 289 F. 678.

(2) Certain customs or usages relating to the storage or keeping of explosives have been held inadmissible.

U.S.—Standard Oil Co. v. Parrish, Ill., 145 F. 829, 76 C.C.A. 405. 25 C.J. p 206 note 41.

Carrier's and manufacturer's rules

(1) One whose dwelling near a railroad yard was injured by explosion of a car of dynamite in the yard may not introduce in evidence rules of the railroad company governing the conduct of its employees in handling cars of dynamite, or rules of the company which manufactured the dynamite.

Ky.—Southern Ry. Co. v. Stewart, 132 S.W. 435, 141 Ky. 270.

(2) Street railway company's rule against carriage of explosive articles on its cars is inadmissible to show intervening negligence, absolving motion picture distributor from liability for injuries to passenger by explosion of film on car, where the carrier was not aware of the presence of such explosive.

Mass.—Guinan v. Famous Players-Lasky Corporation, 167 N.E. 235, 267 Mass. 501.

Ordinance

(1) Where an action is founded on the wrongful storage of dynamite or other explosives, so as to constitute a nuisance, an ordinance not relating to the storage of explosives is inadmissible, although it relates to explosives, or to building restrictions.

Pa.—Forster v. Rogers, 93 A. 26, 247 Pa. 54.

(2) Where the proximate cause of the injury was the leaving of dynamite exposed after blasting, rather than the explosion of fireworks, an ordinance forbidding the explosion of fireworks was properly excluded.

Mo.—Moore v. Jefferson City Light, etc., Co., 146 S.W. 825, 163 Mo.App. 266.

(3) In action for death by explosion of dynamite in freight car due to a fire in the freight yards, city ordinance relative to the storage and carriage of dynamite was held properly excluded, as not applicable to the facts.

Colo.—Willson v. Colorado & S. Ry. Co., 142 P. 174, 57 Colo. 303.

Other accidents, persons, or places

(1) In an action for damages alleged to have been caused at a gasoline filling station by a static spark, due to defendant's negligence in not providing a safety device, testimony as to other fires was properly excluded, where the circumstances of such other fires were not shown to

be admissible,^{96.5} but not where the shipment involved is wholly intra-state in character.^{96.10}

On the issue as to whether the improper storage of explosives was the proximate cause of a child's injuries, proof may properly be adduced as to whether, within the actual or constructive knowledge of defendant, children played at location of the storage, and if so, in what numbers and how frequently.^{96.15}

§ 11(8). — Weight and Sufficiency

a. In general

be the same as those in the fire at issue.

U.S.—Standard Oil Co. of New York v. R. L. Pitcher Co., C.C.A.Me., 289 F. 678.

"(2) Evidence on behalf of defendant as to how other persons maintained oil storage tanks similarly situated is inadmissible.

Cal.—Phoenix Assur. Co., Limited, of London, v. Texas Holding Co., 252 P. 1082, 81 C.A. 61.

(3) Evidence of other acts in which defendant was negligent in leaving dynamite caps in places accessible to children is inadmissible in an action to recover for injuries resulting to child plaintiff from caps which he found belonging to defendant.

Miss.—Hercules Powder Co. v. Wolf, 110 So. 842, 145 Miss. 388.

(4) In actions for injuries resulting to the owner of well when he dropped lighted match into it igniting combustible gases causing explosion, evidence concerning the condition of a well on adjoining premises is inadmissible.

Ky.—Maise v. Imperial Oil Co., 137 S.W.2d 1104, 282 Ky. 124.

(5) In an action based on the negligent construction and maintenance of a magazine, it has been held that evidence of the manner of construction of other magazines is inadmissible.

N.Y.—Bradley v. People, 56 Barb. 72.

(6) Other cases have held evidence as to the construction of other magazines admissible.

Ark.—Waters-Pierce Oil Co. v. Burrows, 96 S.W. 336, 77 Ark. 74.

S.C.—Emory v. Hazard Powder Co., 22 S.C. 476, 53 Am.R. 730.

Warnings

In an action for wrongful death from an explosion of stored gasoline during a fire, testimony of warnings of danger is properly excluded where it is not shown that deceased was in a position to hear them.

Mo.—Buchholz v. Standard Oil Co. of

Indiana, 244 S.W. 973, 211 Mo.App. 397.

Other evidence held inadmissible

(1) Truck driver's testimony as to his employer's instructions relative to driving truck was improperly admitted in action for death from injuries by explosion of gasoline while filling truck, being res inter alios acta as to plaintiff's cause of action. Ala.—Stephens v. Walker, 117 So. 22, 217 Ala. 466.

(2) In action against oil company for death of acetylene welder who was induced to leave his work on tanks which he was reconditioning under contract with oil company, to repair certain other tanks of the company, and who was killed in explosion which occurred when he applied torch to leak in one of such other tanks, evidence as to whether a welder on premises of defendant was given free rein, and whether witness suspected anything dangerous around tank, was held inadmissible. U.S.—Crow v. Continental Oil Co., C. C.A.Tex., 115 F.2d 740.

(3) Board of fire prevention regulations as to licensing of buildings or structures used for storage of inflammable fluids and permits for maintenance and use of tanks of over ten thousand gallons capacity were erroneously admitted in evidence over defendant's objection, although it conceded that it had no license or permit for tank cars from which oil was pumped to diesel engines, as such cars were not buildings or structures within purview of license requirements and only evidence of their capacity was a photograph showing label "8,111 gallons" on one of cars.

Mass.—DeMartin v. New York, N. H. & H. R. Co., 143 N.E.2d 542, 336 Mass. 261.

(4) In action to recover for destruction of articles in apartment house occupied by plaintiff on lot adjoining shed in which defendant stored inflammable materials when explosion occurred in shed and fire spread to apartment house, where

b. Blasting; fireworks

c. Manufacture; sale

d. Storage; abandonment; transportation

a. In General

Plaintiff must establish his case by a preponderance of the evidence; matters in issue may be proved by circumstantial or indirect evidence.

Plaintiff in an action involving explosives must establish his case by a preponderance of the evidence,⁹⁷ and defendant cannot be held liable on mere

plaintiffs failed to show that storage of oil-soaked burlap bags in shed came within contemplation of city fire prevention code, or that purported violation of the code was proximate cause of the fire, trial court did not err in excluding certain sections of the code requiring a permit to keep, sell, use, or handle certain types of explosive or highly combustible substances.

N.J.—Menth v. Breeze Corp., 73 A.2d 183, 4 N.J. 428, 18 A.L.R.2d 1071.

96.5 Explosion of gasoline

Interstate Commerce Commission's regulation, requiring that inflammable liquids spilled from tank cars be covered, is admissible in action against railroad company for death by explosion of gasoline so spilled, notwithstanding such regulations have been promulgated under act concerning transportation of explosives only.

Mo.—Huckleberry v. Missouri Pac. R. Co., 26 S.W.2d 980, 324 Mo. 1025.

Explosion of motion picture film

Testimony of defendant's employees as to their knowledge of Interstate Commerce Commission's regulations concerning transportation of motion picture film is admissible in action for injuries by explosion of such film while being transported.

Mass.—Guinan v. Famous Players-Lasky Corporation, 167 N.E. 235, 267 Mass. 501.

96.10 N.J.—Carlo v. Okonite-Callender Cable Co., 69 A.2d 734, 3 N.J. 253.

96.15 N.Y.—Baillargeon v. Chazy Lime & Stone Co., 123 N.Y.S.2d 823, 204 Misc. 407.

97. U.S.—Universe Tankships, Inc. v. Pyrate Tank Cleaners, Inc., D.C. N.Y., 152 F.Supp. 903.

La.—Green v. Pfeffer, App., 146 So. 171.

25 C.J. p 209 note 99.

Fair preponderance

Utah.—Matievich v. Hercules Powder Co., 282 P.2d 1044, 3 Utah 2d 283.

conjecture or speculation.⁹⁸ Where plaintiff's evidence shows two or more equally possible causes of an explosion, for one of which defendant would be liable, but for the other or others of which defendant would not be liable, plaintiff is deemed to have failed to carry his burden of proof.^{98.5}

Positive testimony on a given point, such as the branding of explosives, predominates over negative or uncertain testimony on the same point;⁹⁹ but matters in issue may be proved by circumstantial¹ or indirect² evidence, and it is sufficient to show that certain fireworks were set in motion by

defendant's negligence without pointing out the particular negligent act that caused the injury.³ To overcome the presumption of insufficient understanding to form an intent as to willful trespass, on the part of a child injured by the explosion of explosives taken by him from defendant's property, a clear and satisfactory preponderance of the evidence has been required.⁴

The weight and sufficiency of particular evidence have been considered in various actions relating to explosives.⁵ So, in such actions particular evidence

98. Mich.—Paul v. McBride, 263 N. W. 877, 273 Mich. 661.

N.J.—Stanley Co. of America v. Hercules Powder Co., 108 A.2d 616, 16 N.J. 295.

Pa.—Cain v. Booth & Flinn, 144 A. 286, 294 Pa. 334.

Verdict held not based on conjecture or speculation

Ark.—Sinclair Refining Co. v. Piles, 221 S.W.2d 12, 215 Ark. 469.

98.5 U.S.—Soso v. Atlas Powder Co., C.A.Mo., 238 F.2d 388.

Universe Tankships, Inc. v. Pyrate Tank Cleaners, Inc., D.C.N.Y., 152 F.Supp. 903.

99. La.—Socola v. Chess-Carley Co., 1 So. 824, 39 La. Ann. 344.

1. Me.—Cratty v. Samuel Aceto & Co., 116 A.2d 623, 151 Me. 126.

N.J.—Menth v. Breeze Corp., 73 A.2d 183, 4 N.J. 428, 18 A.L.R.2d 1071.

N.C.—Newton v. Texas Co., 105 S.E. 433, 180 N.C. 561—Stone v. Texas Co., 105 S.E. 425, 180 N.C. 546, 12 A.L.R. 1297.

Okl.—Smith v. Clark, 315 P.2d 960.

S.D.—Hjermstad v. Petroleum Carriers, 53 N.W.2d 839, 74 S.D. 406.

Tex.—Weaver v. Benson, 254 S.W.2d 95, 152 Tex. 50.

Negligence

Ark.—Pierce Oil Corporation v. Taylor, 227 S.W. 420, 147 Ark. 100.

Cal.—Hubbert v. Aztec Brewing Co., 80 P.2d 185, 26 C.A.2d 664, followed in Cerezo v. Aztec Brewing Co., 80 P.2d 198, 26 C.A.2d 754, rehearing denied Hubbert v. Aztec Brewing Co., 80 P.2d 1016, 26 C.A.2d 664.

Proximate cause

Cal.—Hubbert v. Aztec Brewing Co., 80 P.2d 185, 26 C.A.2d 664, followed in Cerezo v. Aztec Brewing Co., 80 P.2d 198, 26 C.A.2d 754, and rehearing denied Hubbert v. Aztec Brewing Co., 80 P.2d 1016, 26 C.A.2d 664.

Rule limited

In action by owner of filling station against owner of gasoline transport and driver for fire damage to station when tank which was being filled with gasoline from transport, overflowed and explosion occurred,

origin of the fire could be established by circumstantial evidence, the limitation being that the circumstances must be such as will produce conviction to a reasonable certainty in an unprejudiced mind.

S.D.—Hjermstad v. Petroleum Carriers, 53 N.W.2d 839, 74 S.D. 406.

2. Me.—Cratty v. Samuel Aceto & Co., 116 A.2d 623, 151 Me. 126.

Mass.—Coffey v. West Roxbury Trap Rock Co., 118 N.E. 235, 229 Mass. 211.

25 C.J. p 209 note 2.

3. Mo.—Dowell v. Guthrie, 12 S.W. 900, 99 Mo. 653, 17 Am.S.R. 598.

4. Wis.—O'Brien v. Fred Kroner Hardware Co., 185 N.W. 205, 175 Wis. 238.

5. Evidence held sufficient

(1) Generally.

U.S.—U. S. v. Stoppelman, C.A.Mo., 266 F.2d 13—Phillips Petroleum Co. v. Hooper, C.C.A.Tex., 164 F.2d 743—Cornec v. Baltimore & O. R. Co., C.C.A.Md., 48 F.2d 497, certiorari denied Baltimore & O. R. Co. v. Cornec, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530.

Iokepa v. U. S., D.C.Hawaii, 158 F.Supp. 394.

Conn.—Killian v. Grandahl, 127 A.2d 72, 144 Conn. 92.

Okl.—Cosden v. Wright, 211 P.2d 523, 202 Okl. 211.

Tex.—Waggoner's Estate v. Gleg-horn, Civ.App., 199 S.W.2d 225—Lloyd v. Herrington, Civ.App., 178 S.W.2d 694, reversed on other grounds 182 S.W.2d 1003, 143 Tex. 135.

25 C.J. p 209 note 98 [a].

(2) To show that negligence was proximate cause of injuries, death, or damages.

U.S.—U. S. v. Stoppelman, C.A.Mo., 266 F.2d 13.

San Felice v. U. S., D.C.Pa., 162 F.Supp. 261—Universe Tankships, Inc. v. Pyrate Tank Cleaners, Inc., D.C.N.Y., 152 F.Supp. 903—Patrick v. U. S., D.C.Cal., 90 F.Supp. 340—Brown v. U. S., D.C.S.C., 87 F. Supp. 99.

Cal.—Raich v. Aldon Const. Co., 276 P.2d 822, 129 C.A.2d 278.

N.Y.—Sossner Tap & Tool Corp. v. Hempstead Cesspool Co., 185 N.Y. S.2d 306.

(3) To establish that plaintiff was eleven, rather than fifteen years old, and hence could not be charged with knowledge of the dangerous character of dynamite caps.

Tenn.—Lawrence v. King, 197 S.W. 2d 548, 184 Tenn. 151.

(4) To disclose that plaintiff's violation of Coast Guard regulations by no possibility had contributed to explosion.

U.S.—Universe Tankships, Inc. v. Pyrate Tank Cleaners, Inc., supra.

(5) To establish necessary causal connection between defendants' statutory violations and disaster which ensued.

N.Y.—Daggett v. Keshner, 179 N.Y.S. 2d 428, 6 A.D.2d 503.

(6) To establish that accident was caused by negligent operation of tear-gas system by bank, and not by negligent maintenance or inspection, so as to warrant holding defendant bank, but not company which installed the system, liable for plaintiff's injuries.

Wis.—Koehler v. Thiensville State Bank, 14 N.W.2d 15, 245 Wis. 281.

Evidence held insufficient

(1) Generally.

U.S.—The Richelieu, D.C.Md., 27 F. 2d 960, modified on other grounds, C.C.A., Cornec v. Baltimore & O. R. Co., 48 F.2d 497, certiorari denied Baltimore & O. R. Co. v. Cornec, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530.

Cardinale v. Union Oil Co. of Cal., D.C.Cal., 136 F.Supp. 487.

Wis.—Dahl v. Charles A. Krause Milling Co., 289 N.W. 626, 234 Wis. 231.

25 C.J. p 209 note 98 [c].

(2) To establish defense of assumption of risk.

U.S.—Universe Tankships, Inc. v. Pyrate Tank Cleaners, Inc., D.C.N.Y., 152 F.Supp. 903.

has been held sufficient to support a verdict or judgment for plaintiff,^{5.5} to establish negligence^{5.10} or the absence thereof,^{5.15} or to establish contributory negligence^{5.20} or plaintiff's freedom therefrom.^{5.25} Other evidence has been held insufficient to support a judgment or verdict for plaintiff,^{5.30} or to establish negligence^{5.35} or contributory negligence.^{5.40} The sufficiency of evidence has been determined in actions involving nuclear detonations or the explo-

sion of an atomic device.^{5.45}

b. Blasting; Fireworks

In actions involving blasting or fireworks, particular evidence has been held sufficient or insufficient on various issues.

The weight and sufficiency of particular evidence have been determined in actions based on injuries claimed to result from blasting.⁶ So, in such actions

(3) To warrant finding that injury was direct and proximate result of negligence of agents of defendant. U.S.—U. S. v. Coffey, C.A.Wash., 233 F.2d 41.

(4) To support finding that plaintiff was an invitee. Tex.—Burton Const. & Shipbuilding Co. v. Broussard, 273 S.W.2d 598, 154 Tex. 50.

(5) To establish that the person responsible for the location of the object was an employee of the United States, acting within the scope of his employment. U.S.—Ferrer v. U. S., D.C.Puerto Rico, 163 F.Supp. 769.

5.5 U.S.—Brown v. U. S., D.C.S.C., 87 F.Supp. 99.

Cal.—Home Fire Ins. Co. v. Southwestern Engineering Corporation, 299 P. 771, 114 C.A. 235.

Ga.—Sinclair Refining Co. v. Seagraves, 24 S.E.2d 709, 69 Ga.App. 61.

Ill.—Siniarski v. Hudson, 87 N.E.2d 137, 338 Ill.App. 137.

Or.—Nickopolous v. Frank, 276 P. 695, 129 Or. 118.

Pa.—Battistone v. Benedetti, 122 A. 2d 536, 385 Pa. 163.

Saar v. Saar, 17 A.2d 745, 143 Pa. Super. 528.

5.10 U.S.—U. S. v. Stoppelmann, C. A.Mo., 266 F.2d 13.

San Felice v. U. S., D.C.Pa., 162 F.Supp. 261—Universe Tankships, Inc. v. Pyrate Tank Cleaners, Inc., D.C.N.Y., 152 F.Supp. 903—Patrick v. U. S., D.C.Cal., 90 F.Supp. 340—Brown v. U. S., D.C.S.C., 87 F. Supp. 99—Roettig v. Westinghouse Elec. & Mfg. Co., D.C.Mo., 53 F. Supp. 588.

Cal.—Raich v. Aldon Const. Co., 276 P.2d 822, 129 C.A.2d 278—Freeman v. Nickerson, 174 P.2d 688, 77 C.A. 2d 40.

Conn.—Killian v. Grandahl, 127 A.2d 72, 144 Conn. 92.

Ind.—Refiners' Oil Co. v. Grocutt, 162 N.E. 59, 87 Ind.App. 594.

N.Y.—Mayfield v. John Van Benschoten, Inc., 33 N.Y.S.2d 307, 263 App.Div. 993, appeal denied 34 N. Y.S.2d 524, 264 App.Div. 722.

Sossner Tap & Tool Corp. v. Hempstead Cesspool Co., 185 N.Y. S.2d 306.

25 C.J. p 209 note 98 [d].

5.15 U.S.—Villarreal v. U. S., C.A. Tex., 254 F.2d 595.

5.20 Ky.—Adams' Adm'r v. Callis & Hughes, 69 S.W.2d 711, 253 Ky. 382. 25 C.J. p 209 note 98 [h].

5.25 U.S.—Brown v. U. S., D.C.S.C., 87 F.Supp. 99.

N.Y.—Mayfield v. John Van Benschoten, Inc., 33 N.Y.S.2d 307, 263 App.Div. 993, appeal denied 34 N. Y.S.2d 524, 264 App.Div. 722.

5.30 U.S.—Maisonet v. U. S., D.C. N.Y., 159 F.Supp. 869—Hall v. E. I. Du Pont De Nemours & Co., D.C. Ky., 142 F.Supp. 737.

Cal.—Hubbert v. Aztec Brewing Co., 80 P.2d 185, 26 C.A.2d 664, followed in Cerezo v. Aztec Brewing Co., 80 P.2d 198, 26 C.A.2d 754, rehearing denied Hubbert v. Aztec Brewing Co., 80 P.2d 1016, 26 C.A.2d 664.

La.—Le Bleu v. Shell Petroleum Corporation, App., 161 So. 214.

5.35 U.S.—Voytas v. U. S., C.A.Ill., 256 F.2d 786—Deal v. Thrasher, C. A.Va., 182 F.2d 739.

Ferrer v. U. S., D.C.Puerto Rico, 163 F.Supp. 769—Hall v. E. I. Du Pont De Nemours & Co., D.C.Ky., 142 F.Supp. 737—Cardinale v. Union Oil Co. of Cal., D.C.Cal., 136 F. Supp. 487.

Cal.—Reynolds v. Salmonson, 307 P. 2d 672, 148 C.A.2d 895—Zanardi v. Pacific Tel. & Tel. Co., 284 P.2d 851, 134 C.A.2d 3.

Neb.—Tegler v. Farmers' Union Gas & Coal Co., 246 N.W. 721, 124 Neb. 336.

25 C.J. p 209 note 98 [f], [g].

5.40 U.S.—San Felice v. U. S., D.C. Pa., 162 F.Supp. 261—Universe Tankships, Inc. v. Pyrate Tank Cleaners, Inc., D.C.N.Y., 152 F.Supp. 903—Brooks v. U. S., D.C.N.C., 98 F.Supp. 679, affirmed, C.A., 194 F.2d 185.

N.Y.—Mayfield v. John Van Benschoten Inc., 33 N.Y.S.2d 307, 263 App. Div. 993.

Sossner Tap & Tool Corp. v. Hempstead Cesspool Co., 185 N.Y. S.2d 306.

Tenn.—Read Phosphate Co. v. Vickers, 11 Tenn.App. 146.

25 C.J. p 209 note 98 [i].

5.45 Damages to buildings

In action by corporation for damages to buildings allegedly caused

by atomic energy and nuclear detonations conducted by employees of United States, evidence sustained finding that there was no negligence on part of employees of United States. U.S.—Bartholomae Corp. v. U. S., C.A. Cal., 253 F.2d 716.

Injuries to sheep from fallout

In action against the United States for injuries to sheep allegedly as a result of radioactive fallout resulting from negligence of government in exploding atomic device in vicinity where sheep were located, evidence was sufficient to show that maximum radioactivity to which they could have been subjected, whether as a result of direct fallout, residuals therefrom, ingestion of plants or water, or through other means, was substantially less than would have caused damage.

U.S.—Bullock v. U. S., D.C.Utah, 145 F.Supp. 824.

6. Evidence held sufficient

(1) Generally.

U.S.—Consolidated Elec. Cooperative v. Panhandle Eastern Pipeline Co., C.A.Mo., 189 F.2d 777.

Ky.—Louisville & N. R. Co. v. Smith's Adm'r, 263 S.W. 29, 203 Ky. 513, 35 A.L.R. 1238.

Mo.—Ingram v. Great Lakes Pipe Line Co., App., 153 S.W.2d 547.

Tenn.—East Tennessee Natural Gas Co. v. Peltz, 270 S.W.2d 591, 38 Tenn.App. 100.

(2) To show that injury was caused by defendant's negligence.

Kan.—Bacon v. Kansas City Terminal Ry. Co., 198 P. 942, 109 Kan. 234.

N.H.—Crocker v. W. W. Wyman, Inc., 110 A.2d 271, 99 N.H. 330.

N.Y.—Meuser v. Louis Petrossi & Sons, 5 N.Y.S.2d 950, 254 App.Div. 418.

(3) To show that damage was caused by blasting.

U.S.—Oman Const. Co. v. Cambridge Mut. Fire Ins. Co., C.A.Tenn., 254 F.2d 387.

Ga.—Ready-Mix Concrete Co. v. Rape, 106 S.E.2d 429, 98 Ga.App. 503.

La.—Langlinais v. Geophysical Service, Inc., 111 So.2d 781, 237 La. 585—Fontenot v. Magnolia Petroleum Co., 80 So.2d 845, 227 La. 866.

Pate v. Western Geophysical Co. of America, App., 91 So.2d 431.

particular evidence has been held sufficient to support a verdict or judgment for plaintiff,^{6.5} or for defendant,^{6.10} or to show negligence;^{6.15} other evidence has been held insufficient to show negligence,^{6.20} or to overcome the inference of negligence on defendant's part, arising under the doctrine of *res ipsa loquitur*.^{6.25}

Expert testimony is not, as a matter of law, essential to prove injury to plaintiff's property from

blasting,^{6.30} nor is the court compelled to credit expert testimony offered by defendant.^{6.35}

The weight and sufficiency of particular evidence have also been considered in actions involving fireworks.⁷ As stated *supra* subdivision a of this section, it is sufficient to show that certain fireworks were set in motion by defendant's negligence without pointing out the particular negligent act that caused the injury.

N.M.—Thigpen v. Skousen & Hise, 327 P.2d 802, 64 N.M. 290.

Okl.—Smith v. Yoho, 324 P.2d 531—Smith v. Clark, 315 P.2d 960.

Pa.—Federoff v. Harrison Const. Co., Com.Pl., 13 Som.Leg.J. 345, 28 Wash.Co. 11.

Wis.—Engel v. Dunn County, 77 N.W.2d 408, 273 Wis. 218.

(4) To sustain finding that blasting operations were proximate cause of damage sustained by plaintiff.

Conn.—Whitman Hotel Corp. v. Elliott & Watrous Engineering Co., 79 A.2d 591, 137 Conn. 562.

Miss.—Magnolia Petroleum Co. v. McCollum, 51 So.2d 217, 211 Miss. 166.

(5) To support allegation that damage was direct and proximate result of blasting.

Mo.—Buckner v. Knutson-Gould Const. Co., App., 305 S.W.2d 709.

(6) To sustain finding of jury that damage to plaintiff's property was not caused by blasting.

U.S.—Gunter v. E. I. Du Pont De Nemours & Co., D.C.W.Va., 157 F. Supp. 25, appeal dismissed, C.A., 255 F.2d 710.

Va.—Pope v. Overbay, 83 S.E.2d 365, 196 Va. 288.

(7) To show that sufficient warning was given.

Ky.—Adams' Adm'r v. Callis & Hughes, 69 S.W.2d 711, 253 Ky. 382.

(8) To support verdict for exemplary damages.

Mont.—Cashin v. Northern Pac. Ry. Co., 28 P.2d 862, 96 Mont. 92.

(9) To sustain finding that police officer did not assume risk of injury from flying stones, and that his death was not caused by his own wanton, willful and reckless misconduct.

Conn.—Starkel v. Edward Balf Co., 114 A.2d 199, 142 Conn. 336.

Evidence held insufficient

(1) Generally.

La.—Thistlethwaite v. Shell Petroleum Corporation, 133 So. 356, 172 La. 43.

Tex.—Kennedy v. General Geophys-

ical Co., Civ.App., 213 S.W.2d 707, error refused no reversible error. 25 C.J. p 209 note 98 [e] (7).

(2) To establish that damage was proximately caused by explosions. Miss.—Humble Oil & Refining Co. v. Pittman, 49 So.2d 408, 210 Miss. 314.

N.Y.—Stadium Realty Corp. v. Slatery Rock Corp., 183 N.Y.S.2d 916.

(3) To authorize a finding that defendant was chargeable with reckless indifference to consequences, intentional wrong, or omission to discharge some known duty which produced the injurious effect.

U.S.—Republic Steel Corp. v. Peoples, C.A.Ala., 217 F.2d 236.

6.5 Ga.—Ready-Mix Concrete Co. v. Rape, 106 S.E.2d 429, 98 Ga.App. 503—Florence v. Lovell, 43 S.E.2d 728, 75 Ga.App. 401.

N.J.—Hackensack Water Co. v. Public Service Gas & Electric Co., 142 A. 563, 6 N.J.Misc. 707.

N.M.—Thigpen v. Skousen & Hise, 327 P.2d 802, 64 N.M. 290.

Pa.—Glassmeyer v. Kessler, Inc., Com.Pl., 47 Mun.L.R. 133.

Tenn.—East Tennessee Natural Gas Co. v. Peltz, 270 S.W.2d 591, 38 Tenn.App. 100—City of Knoxville v. Peebles, 87 S.W.2d 1022, 19 Tenn. App. 340.

Tex.—Universal Atlas Cement Co. v. Oswald, 157 S.W.2d 636, 138 Tex. 159.

6.10 Ala.—Mulkin v. McDonough Const. Co. of Ga., 95 So.2d 921, 266 Ala. 281.

Ky.—Adams' Adm'r v. Callis & Hughes, 69 S.W.2d 711, 253 Ky. 382.

6.15 Cal.—Peterson v. General Geophysical Co., App., 185 P.2d 56—McGrath v. Basich Bros. Const. Co., 46 P.2d 981, 7 C.A.2d 573.

Me.—Albison v. Robbins & White, Inc., 116 A.2d 608, 151 Me. 114.

Mont.—Cashin v. Northern Pac. Ry. Co., 28 P.2d 862, 96 Mont. 92.

N.J.—Philpot v. Rhinesmith, 71 A.2d 219, 6 N.J.Super. 324.

Pa.—Federoff v. Harrison Const. Co., 60 A.2d 334, 163 Pa.Super. 53, affirmed 66 A.2d 817, 362 Pa. 181.

Federoff v. Harrison Const. Co., Com.Pl., 13 Som.Leg.J. 345, 28

Wash.Co. 11—Jeffrey v. Coal Corporation, 18 Wash.Co. 50. 25 C.J. p 209 note 98 [d] (3).

6.20 Ariz.—Drumm v. Simer, 205 P.2d 592, 68 Ariz. 319.

La.—Roy O. Martin Lumber Co. v. Scalfi, App., 92 So.2d 500.

Mass.—MacGinnis v. Marlborough-Hudson Gas Co., 108 N.E. 364, 220 Mass. 575, L.R.A.1915D 1080.

N.Y.—Shemin v. City of New York, 180 N.Y.S.2d 360, 6 A.D.2d 688, appeal denied 182 N.Y.S.2d 330, 7 A.D. 2d 846.

Flinn v. Gull Contracting Co., 183 N.Y.S.2d 806.

Pa.—Hirsh v. Patrick McGovern, Inc., 100 Pa.Super. 1.

25 C.J. p 209 note 98 [f] (1).

6.25 La.—Langlinais v. Geophysical Service, Inc., 111 So.2d 781, 237 La. 585.

6.30 Conn.—King v. New Haven Trap Rock Co., 152 A.2d 503.

6.35 Conn.—King v. New Haven Trap Rock Co., *supra*.

7. Evidence held sufficient

(1) Generally.

Conn.—Burbie v. McFarland, 157 A. 538, 114 Conn. 56.

25 C.J. p 209 note 98 [d] (5).

(2) To support verdict or judgment.

Ind.—Goldblatt Bros. v. Parish, App., 38 N.E.2d 255, 110 Ind.App. 368.

Me.—Shannon v. Dow, 175 A. 766, 133 Me. 235.

(3) To support finding that predominating cause of injuries to boy was city's negligence, and that act of boy and his companion did not constitute an intervening independent cause.

Mo.—Lottes v. Pessina, App., 174 S.W.2d 893.

Evidence held insufficient

(1) To show negligence.

N.C.—O'Neil v. Braswell, 8 S.E.2d 817, 217 N.C. 561.

Tenn.—Hutchens v. Nat. Fireworks Distributing Co., 7 Tenn.App. 575.

(2) To warrant application of doctrine of *res ipsa loquitur*.

Ohio.—Koktavy v. United Fireworks Mfg. Co., 117 N.E.2d 16, 160 Ohio St. 461.

c. Manufacture; Sale

In actions involving the manufacture or sale of explosives, particular evidence has been held sufficient or insufficient on various issues.

The weight and sufficiency of particular evidence

have been determined in actions for injuries claimed to result from the manufacture⁸ or sale⁹ of explosives generally, or the sale of kerosene, gasoline, or substitutes therefor.¹⁰ So, with respect to the

8. Evidence held sufficient

(1) To show manufacturer had knowledge of dangers of the product.

Tenn.—Read Phosphate Co. v. Vickers, 11 Tenn.App. 146.

(2) To afford basis for inference of negligence under res ipsa loquitur doctrine.

Conn.—Jump v. Ensign-Bickford Co., 167 A. 90, 117 Conn. 110.

(3) To establish a prima facie case in favor of plaintiff under the res ipsa loquitur doctrine.

Okl.—Independent Eastern Torpedo Co. v. Gage, 240 P.2d 1119, 206 Okl. 108.

(4) To sustain finding that defendant was negligent and that its negligence was proximate cause of plaintiff's injuries.

Cal.—Saporito v. Purex Corp., 255 P.2d 7, 40 C.2d 608.

(5) To warrant conclusion that there was no negligence.

U.S.—Dalehite v. U. S., Tex., 73 S.Ct. 956, 346 U.S. 15, 97 L.Ed. 1427, rehearing denied 74 S.Ct. 13, 346 U.S. 841, 98 L.Ed. 362, rehearing denied 74 S.Ct. 117, 346 U.S. 880, 98 L.Ed. 386, and 74 S.Ct. 511, 347 U.S. 924, 98 L.Ed. 1078.

(6) To sustain verdict for defendant.

U.S.—Altrichter v. Shell Oil Co., D. C.Minn., 161 F.Supp. 46.

(7) To support finding that article, when shipped, contained impurities which defendant should have discovered and that explosions resulted from contamination by some foreign substance.

Cal.—Tingey v. E. F. Houghton & Co., 179 P.2d 807, 30 C. 97.

Evidence held insufficient

(1) To overcome inference of manufacturer's negligence.

N.Y.—Meditz v. Liggett & Myers Tobacco Co., 3 N.Y.S.2d 357, 167 Misc. 176, affirmed 25 N.Y.S.2d 315.

(2) To establish any negligence on part of manufacturer.

U.S.—Jones v. Chubb, C.A.Kan., 216 F.2d 869.

(3) To sustain finding of willful or wanton misconduct on the part of the manufacturer of the explosives in not properly instructing buyer in the proper use of the explosives.

Ga.—Flint Explosive Co. v. Edwards, 71 S.E.2d 747, 86 Ga.App. 404.

9. Evidence held sufficient

(1) Generally.

Ky.—Coca-Cola Bottling Works v.

Shelton, 282 S.W. 778, 214 Ky. 118.

N.Y.—Hallenbeck v. S. Wander & Sons Chemical Co., 189 N.Y.S. 334, 197 App.Div. 855.

Pa.—Pierson v. London, 156 A. 719, 102 Pa.Super. 176.

25 C.J. p 209 note 98 [a] (1).

(2) To establish prima facie case.

Ark.—Goode v. Pierce Oil Corporation, 286 S.W. 1009, 171 Ark. 863. N.Y.—Delisa v. Arthur F. Schmidt, Inc., 34 N.E.2d 336, 285 N.Y. 314.

(3) To sustain finding that seller was guilty of negligence in sale of benzol instead of crude oil as ordered.

Ind.—Ft. Wayne Drug Co. v. Fleming, 175 N.E. 670, 93 Ind.App. 40.

(4) To show that parties were warned of danger.

La.—Moore v. Jefferson Distilling & Denaturing Co., 126 So. 691, 169 La. 1156.

(5) To support finding of jury that defendant gas company had notice of dangerous condition.

Neb.—Clay v. Butane Gas Corp., 39 N.W.2d 813, 151 Neb. 876.

Evidence held insufficient

(1) Generally.

Ga.—Atlanta Coca-Cola Bottling Co. v. Danneman, 102 S.E. 542, 25 Ga. App. 43.

25 C.J. p 209 note 98 [f] (5).

(2) To show that defendants misrepresented a substance as not explosive.

Cal.—Fidelity & Casualty Co. of New York v. Paraffine Paint Co., 204 P. 1076, 188 C. 184.

(3) To sustain finding of willful or wanton misconduct on part of dealer in explosives in not properly instructing buyer in proper use thereof.

Ga.—Flint Explosive Co. v. Edwards, 71 S.E.2d 747, 86 Ga.App. 404.

10. Inspector's certificate not conclusive

State inspector's certificate of test and approval of kerosene is not conclusive evidence that kerosene would continue to be up to legal standard. Mich.—Rife v. Gaffill Oil Co., 209 N.W. 172, 235 Mich. 15.

Affidavit as some evidence of notice

N.Y.—Commissioners of State Ins. Fund v. City Chemical Corp., 48 N.E.2d 262, 290 N.Y. 64.

Evidence held sufficient

(1) Generally.

U.S.—Gulf Refining Co. v. Brown, C.C.A.Va., 93 F.2d 870, 116 A.L.R. 449.

La.—Machen v. Standard Oil Co. of Louisiana, 94 So. 902, 152 La. 971. Neb.—Bacon v. A. B. A. Independent Oil & Gasoline Co., 198 N.W. 143, 111 Neb. 830, 33 A.L.R. 769.

Ohio.—Standard Oil Co. v. Armbruster, 177 N.E. 524, 39 Ohio App. 451.

Okl.—Magnolia Petroleum Co. v. Angelly, 306 P.2d 309.

(2) To establish prima facie case. Ark.—Goode v. Pierce Oil Corporation, 286 S.W. 1009, 171 Ark. 863.

(3) To show sale of gasoline for kerosene.

Ky.—Gatliff Coal Co. v. Hohlman, 164 S.W. 76, 157 Ky. 778.

Va.—American Oil Co. v. Nicholas, 157 S.E. 754, 156 Va. 1.

(4) To sustain finding that mixture used by purchaser was more inflammable than kerosene.

Minn.—St. Paul Fire & Marine Ins. Co. v. Standard Oil Co., 210 N.W. 80, 168 Minn. 353—Getz v. Standard Oil Co., 210 N.W. 78, 168 Minn. 347.

(5) To show that admixture occurred while kerosene was in distributor's possession.

Va.—American Oil Co. v. Doyle, 183 S.E. 259, 166 Va. 1.

(6) To show that defendant's negligence was proximate cause.

R.I.—Morris v. Texas Co., 115 A. 643. Va.—American Oil Co. v. Doyle, supra.

25 C.J. p 209 note 98 [a] (5).

(7) To justify finding that defendant's violation of statute was proximate cause of injury.

Minn.—Farrell v. G. O. Miller Co., 179 N.W. 566, 147 Minn. 52.

(8) To show that defendant was negligent in furnishing oil that was dangerous and unfit for use, and not in fact kerosene of the standard required by law.

Ark.—Pierce Oil Corporation v. Taylor, 227 S.W. 420, 147 Ark. 100.

(9) To justify finding that contamination of kerosene resulted from inadvertence of oil company on delivery rather than overflow from filling station's defective venting system.

Wis.—Nygaard v. Wadhams Oil Co., 284 N.W. 577, 231 Wis. 236.

(10) To warrant finding that the gas was inherently dangerous and that distributor was required to use a high degree of care in all its conduct with reference to the supply system of customer.

latter class of cases, particular evidence has been held sufficient to support a verdict or judgment for plaintiff, or the buyer,^{10.5} or for defendant, or the seller,^{10.10} or to warrant, or support, a finding of negligence;^{10.15} other evidence has been held insufficient to support a judgment for plaintiff,^{10.20} or to establish negligence^{10.25} or contributory negligence.^{10.30}

d. Storage; Abandonment; Transportation

In actions for injuries claimed to result from the storage, abandonment, or transportation of explosives, particular evidence has been held sufficient or insufficient on various issues.

The weight and sufficiency of particular evidence have been determined in actions for injuries claimed to result from the storage or keeping of explosives.¹¹ So, particular evidence has been held suf-

Neb.—Clay v. Butane Gas Corp., 39 N.W.2d 813, 151 Neb. 876.

(11) To sustain finding that plaintiff had no actual knowledge of danger and that he was not contributorily negligent.

Wash.—Peterson v. Betts, 165 P.2d 95, 24 Wash.2d 376.

(12) To warrant finding that there was no negligence on part of plaintiff or her mother.

Ark.—Sinclair Refining Co. v. Piles, 221 S.W.2d 12, 215 Ark. 469.

Evidence held insufficient

(1) Generally.

Ga.—Gulf Refining Co. v. Miller, 114 S.E. 227, 29 Ga.App. 71.

La.—Gershner v. Gulf Refining Co., App., 171 So. 399—Green v. Pfeffer, App., 146 So. 171.

25 C.J. p 209 note 98 [c] (6).

(2) To sustain verdict against defendant for negligence in selling, as kerosene, mixture of gasoline and kerosene.

Ark.—Magnolia Petroleum Co. v. Bell, 55 S.W.2d 782, 186 Ark. 723.

Wis.—Pazdernik v. Pride, 291 N.W. 798, 235 Wis. 391.

(3) To show that defendant's negligence proximately caused explosion.

Ill.—Black v. Texas Co., 247 Ill.App. 301.

(4) To prove kerosene sold was of grade required by law.

Ark.—Gibson Oil Co. v. Bush, 1 S.W. 2d 88, 175 Ark. 944.

(5) To show that distributor of kerosene was defendant's agent.

Ill.—Black v. Texas Co., supra.

10.5 Ark.—Sinclair Refining Co. v. Piles, 221 S.W.2d 12, 215 Ark. 469 —Nolan v. Haskett, 53 S.W.2d 996, 186 Ark. 455.

Ga.—Shermer v. Crowe, 186 S.E. 224, 53 Ga.App. 418.

Mich.—Grinnell v. Carbide & Carbon Chemicals Corporation, 276 N.W. 535, 282 Mich. 509.

Minn.—Powell v. Standard Oil Co., 210 N.W. 55, 168 Minn. 248—Farnham v. Lilly, 180 N.W. 775, 148 Minn. 472.

Okl.—Marland Refining Co. v. Snider, 257 P. 797, 125 Okl. 260.

10.10 Ga.—Hodges v. Ashurst, 3 S. E.2d 99, 60 Ga.App. 157.

Ky.—Ray's Adm'r v. Standard Oil Co., 61 S.W.2d 1067, 250 Ky. 111.

Okl.—Magnolia Petroleum Co. v. McDonald, 32 P.2d 909, 168 Okl. 255.

Va.—Belcher v. Goff Bros., 134 S.E. 588, 145 Va. 448.

10.15 U.S.—Becksted v. Skelly Oil Co., D.C.Minn., 131 F.Supp. 940.

Neb.—Clay v. Butane Gas Corp., 39 N.W.2d 813, 151 Neb. 876.

N.M.—Rivera v. Ancient City Oil Corp., 302 P.2d 953, 61 N.M. 473.

R.I.—Morris v. Texas Co., 115 A. 643.

10.20 Ill.—Black v. Texas Co., 247 Ill.App. 301.

Mich.—Paull v. McBride, 263 N.W. 877, 273 Mich. 661.

10.25 Neb.—Tegler v. Farmers' Union Gas & Coal Co., 246 N.W. 721, 124 Neb. 336.

Va.—Standard Oil Co. of New Jersey v. Cox, 181 S.E. 375, 165 Va. 128.

Wash.—Peterson v. Betts, 165 P.2d 95, 24 Wash.2d 376.

10.30 La.—Frazier v. Ayres, App., 20 So.2d 754.

Mich.—Peplinski v. Kleinke, 299 N. W. 818, 299 Mich. 86.

Minn.—St. Paul Fire & Marine Ins. Co. v. Standard Oil Co., 210 N.W. 80, 168 Minn. 353—Getz v. Standard Oil Co., 210 N.W. 78, 168 Minn. 347—Farrell v. G. O. Miller Co., 179 N.W. 566, 147 Minn. 52.

11. Absence of evidence of proper care did not preclude finding of negligence in storing explosives.

Cal.—Phoenix Assur. Co., Limited, of London, v. Texas Holding Co., 252 P. 1082, 81 C.A. 61.

Evidence held sufficient

(1) Generally.

Mass.—Carpenter v. Sinclair Refining Co., 129 N.E. 383, 237 Mass. 230.

Mo.—St. Mary's Mill Co. v. Illinois Oil Co., App., 254 S.W. 735.

N.C.—Stone v. Texas Co., 105 S.E. 425, 180 N.C. 546, 12 A.L.R. 1297.

Tex.—Jersey Oil Corp. v. Beck, 305 S.W.2d 162.

Wis.—Wadzinski v. Cities Service Oil Co., 80 N.W.2d 816, 275 Wis. 84.

(2) To support finding that defendant's negligence was the proximate cause of the injuries.

U.S.—Standard Oil Co. of New York v. R. L. Pitcher Co., C.C.A.Me., 289 F. 678.

Cal.—Marino v. Valenti, 259 P.2d 84, 118 C.A.2d 830.

Pa.—Griffith v. Atlantic Refining Co., 157 A. 791, 305 Pa. 386.

Tex.—Jersey Oil Corp. v. Beck, supra.

(3) To justify application of res ipsa loquitur doctrine.

U.S.—Standard Oil Co. of New Jersey v. Midgett, C.C.A.N.C., 116 F.2d 562.

(4) To warrant application of attractive nuisance doctrine.

Ill.—Featherstone v. Freeding, 110 N. E.2d 535, 349 Ill.App. 359.

Ky.—Cumberland River Oil Co. v. Dicken, 131 S.W.2d 927, 279 Ky. 700.

(5) To show prima facie case of violation by building owners of duty of care to warn children.

Cal.—Marino v. Valenti, supra.

(6) To show violation of statute.

Utah.—Skerl v. Willow Creek Coal Co., 69 P.2d 502, 92 Utah 474.

(7) To sustain finding that defendant failed to comply with safe place statute.

Wis.—Mickelson v. Cities Service Oil Co., 26 N.W.2d 264, 250 Wis. 1.

(8) To warrant finding that unusual hazard existed.

N.Y.—Jenkins v. 313-321 W. 37th Street Corporation, 31 N.E.2d 503, 284 N.Y. 397, reargument denied 33 N.E.2d 547, 285 N.Y. 614.

(9) To establish as matter of law that defendant was not negligent in failing to ascertain leaky condition of tank prior to explosion.

Wis.—Wadzinski v. Cities Service Oil Co., 80 N.W.2d 816, 275 Wis. 84.

(10) To sustain finding, in action for death of subcontractor's welder caused by explosion of gasoline in oil tank on which deceased was welding, that contractor was not negligent in making statements to subcontractor that there was, and had been, no gasoline in the tanks.

Wis.—Mickelson v. Cities Service Oil Co., supra.

Evidence held insufficient

(1) Generally.

Cal.—Salas v. Whittington, 174 P.2d 886, 77 C.A.2d 90.

Ky.—Commonwealth v. Henderson's Guardian, 53 S.W.2d 694, 245 Ky. 328.

La.—Bruchis v. Victory Oil Co., 153 So. 828, 179 La. 242.

ficient to support a verdict or judgment for plaintiff,^{11.5} or to show negligence^{11.10} or contributory negligence;^{11.15} other evidence has been held insufficient to support a verdict or judgment for plaintiff,^{11.20} or to show negligence^{11.25} or contributory

negligence.^{11.30}

The weight and sufficiency of evidence have also been adjudicated in actions involving the leaving or abandoning of explosives,¹² or the transportation thereof.¹³

Okl.—Empire Gas & Fuel Co. v. Powell, 300 P. 788, 150 Okl. 39.
(2) To present prima facie case against defendant under doctrine of res ipsa loquitur.

N.J.—Menth v. Breeze Corp., 73 A.2d 183, 4 N.J. 428, 18 A.L.R.2d 1071.

(3) To support finding that tanks could not be operated underground.
U.S.—City of Marysville v. Standard Oil Co., C.C.A.Kan., 27 F.2d 478, affirmed 49 S.Ct. 430, 279 U.S. 582, 73 L.Ed. 856, rehearing denied 50 S.Ct. 79 and interpretation of decision denied 51 S.Ct. 38, 282 U.S. 797, 75 L.Ed. 718.

11.5 Cal.—Salas v. Whittington, 174 P.2d 886, 77 C.A.2d 90—Sistrunk v. Texas Holding Co., 264 P. 259, 88 C.A. 698.

Ind.—Town of Kirklin v. Everman, 28 N.E.2d 73, 217 Ind. 683, modified on other grounds 29 N.E.2d 206, 217 Ind. 683.

Ky.—Fourseam Coal Corporation v. Hatfield, 130 S.W.2d 73, 279 Ky. 132.

N.Y.—Jenkins v. 313-321 W. 37th Street Corporation, 31 N.E.2d 503, 284 N.Y. 397, reargument denied 33 N.E.2d 547, 285 N.Y. 614.

Okl.—Cherry v. Arnwine, 259 P. 233, 126 Okl. 287—Cherry v. Arnwine, 259 P. 232, 126 Okl. 285.

Or.—Olds v. Von der Hellen, 263 P. 907, 127 Or. 276, modified on other grounds 270 P. 497, 127 Or. 276.

Va.—Daugherty v. Hippchen, 7 S.E. 2d 119, 175 Va. 62.

11.10 U.S.—Stewart v. U. S., C.A.III., 186 F.2d 627, certiorari denied U. S. v. Stewart, 71 S.Ct. 1000, 341 U.S. 940, 95 L.Ed. 1367.

Cal.—Salas v. Whittington, 174 P.2d 886, 77 C.A.2d 90—Sistrunk v. Texas Holding Co., 264 P. 259, 88 C.A. 698—Phoenix Assur. Co., Limited, of London, v. Texas Holding Co., 252 P. 1082, 81 C.A. 61.

Mass.—Carpenter v. Sinclair Refining Co., 129 N.E. 383, 237 Mass. 230.

Miss.—Shemper v. Cleveland, 54 So. 2d 215, 212 Miss. 113.

Okl.—Ferguson-Beese, Inc. v. Young, 240 P.2d 780, 205 Okl. 579.

Tenn.—Gannon v. Crichlow, 13 Tenn. App. 281.

Tex.—Tex-Jersey Oil Corp. v. Beck, 305 S.W.2d 162.

25 C.J. p 209 note 98 [d] (12), (13).

11.15 Tenn.—Cassetty v. Mixon, 245 S.W.2d 636, 35 Tenn.App. 339.

11.20 Ky.—Maise v. Imperial Oil Co., 137 S.W.2d 1104, 282 Ky. 124.

Mass.—Lione v. Hudson Chester

Granite Co., 149 N.E. 147, 253 Mass. 497.

Utah.—Bogdon v. Los Angeles & S. L. R. Co., 205 P. 571, 59 Utah 505.

11.25 U.S.—Smith v. U. S., D.C.Va., 155 F.Supp. 605.

Colo.—Burley v. McDowell, 298 P.2d 399, 133 Colo. 566.

Md.—Texas Co. v. Pecora, 118 A.2d 377, 208 Md. 281.

N.Y.—Jenkins v. 313-321 W. 37th Street Corporation, 31 N.E.2d 503, 284 N.Y. 397, reargument denied 33 N.E.2d 547, 285 N.Y. 614.

N.C.—Luttrell v. Carolina Mineral Co., 18 S.E.2d 412, 220 N.C. 782.

Okl.—Empire Gas & Fuel Co. v. Powell, 300 P. 788, 150 Okl. 39.

Tenn.—Cassetty v. Mixon, 245 S.W. 2d 636, 35 Tenn.App. 339.

Wis.—Wadzinski v. Cities Service Oil Co., 80 N.W.2d 816, 275 Wis. 84—Lu May v. Van Drisse Motors, 226 N.W. 301, 199 Wis. 310.

11.30 Cal.—Salas v. Whittington, 174 P.2d 886, 77 C.A.2d 90.

N.Y.—Sossner Tap & Tool Corp. v. Hempstead Cesspool Co., 185 N.Y. S.2d 306.

12. Evidence held sufficient

(1) To sustain a verdict or judgment for plaintiff.

Tenn.—Nashville Ry. & Light Co. v. Williams, 11 Tenn.App. 1.

(2) To show that defendant left explosives where they were found by others.

Mich.—Butrick v. Snyder, 210 N.W. 311, 236 Mich. 300.

Ohio.—Byrnes v. Hewston, 13 Ohio App. 13.

Tenn.—Nashville Ry. & Light Co. v. Williams, supra.

(3) To show that defendant's negligence was the proximate cause of the injury.

Ill.—Bunyan v. American Glycerin Co., 230 Ill.App. 351.

Minn.—Reichert v. Minnesota Northern Natural Gas Co., 263 N.W. 297, 195 Minn. 387.

Tex.—Houston Transp. Co. v. Grimm, Civ.App., 168 S.W.2d 892, error refused.

(4) To show absence of negligence on part of defendant.

U.S.—U. S. v. Inmon, C.A.Tex., 20 F.2d 681.

Iokepa v. U. S., D.C.Hawaii, 158 F.Supp. 394.

(5) To sustain finding that there was no nuisance in fact, and that the

rule of strict or absolute liability was not applicable.

U.S.—Denney v. U. S., C.A.N.M., 185 F.2d 108.

(6) To show contributory negligence on part of plaintiff.
U.S.—U. S. v. Inmon, supra.

Evidence held insufficient

(1) Generally.

Mich.—Sward v. Megan, 279 N.W. 886, 284 Mich. 421.

(2) To show that explosives belonged to defendant or were left or abandoned by him.

Ill.—Prochaska v. De Costa, 63 N.E. 2d 794, 327 Ill.App. 209.

Pa.—Long v. Frock, 156 A. 88, 304 Pa. 355—Cain v. Booth & Flinn, 144 A. 286, 294 Pa. 334.

W.Va.—Justice v. Amherst Coal Co., 101 S.E.2d 860.

(3) To show negligence of defendant.

U.S.—U. S. v. Inmon, C.A.Tex., 205 F.2d 681.

Iokepa v. U. S., D.C.Hawaii, 158 F.Supp. 394.

13. U.S.—The Richelieu, D.C.Md., 27 F.2d 960, modified on other grounds, C.C.A., Cornec v. Baltimore & O. R. Co., 48 F.2d 497, certiorari denied Baltimore & O. R. Co. v. Cornec, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530—Joseph R. Foard Co. of Baltimore City v. State of Maryland, Md., 219 F. 827, 135 C. C.A. 497.

Ky.—Southern Ry. Co. v. Adkins' Adm'r, 117 S.W. 321, 133 Ky. 219, modified on other grounds and motion denied 119 S.W. 820, 133 Ky. 219.

Tex.—Amberson v. Paramount Famous Lasky Corporation, Civ.App., 59 S.W.2d 875.

Tank truck

(1) Evidence held sufficient to sustain finding of negligence on part of owner of tank truck in preparing or cleaning it for welding.

Wash.—System Tank Lines v. Dixon, 286 P.2d 704, 47 Wash.2d 147—Fink v. Dixon, 285 P.2d 557, 46 Wash.2d 794.

(2) In action against owner of gasoline tank and trailer for damages sustained when trailer, while in plaintiffs' shop, for repairs, exploded, evidence was sufficient to sustain finding that men working at shop were actually owner's employees and that trailer had not been under exclusive control of plaintiffs.

Wash.—Fink v. Dixon, supra.

§ 11(9). — Questions of Law and Fact

- a. Questions of law
- b. Questions of fact

a. Questions of Law

In actions involving explosives, questions of law are to be determined by the court, and where the evidence is clear and undisputed, the matter is for the court.

In actions involving explosives, questions of law are to be determined by the court;¹⁴ and the legal sufficiency of the evidence to afford an inference of defendant's negligence is a question for the court to determine before submission of such issue to the jury.^{14.5}

Where the evidence is clear and undisputed, the matter is for the court, and should not be submitted to the jury.¹⁵ Thus, in particular cases a directed verdict for defendant may be held proper or required,^{15.5} as may a nonsuit,^{15.10} an affirmative instruction,^{15.15} or an instructed verdict;^{15.20} or de-

fendant may be held entitled to a peremptory instruction.^{15.25}

On the other hand, a directed verdict, nonsuit, or dismissal may be held not proper,^{15.30} and the overruling of a demurrer to plaintiff's evidence may be held proper or not erroneous.^{15.35}

b. Questions of Fact

- (a) In general
- (b) Particular questions

(a) In General

Controverted questions of fact are to be determined by the jury, if there is evidence warranting submission of the issue to them.

Where the record presents any evidence which would cause fair-minded men to differ as to whether there was a reasonably probable relation of cause and effect, that issue is required to be submitted to the jury for determination.^{15.50} Thus, controverted questions of fact are to be determined by the jury,¹⁶ if there is evidence warranting submission of the

Evidence held sufficient

(1) Generally.

S.D.—Hjermstad v. Petroleum Carriers, 53 N.W.2d 839, 74 S.D. 406.

(2) To sustain finding of negligence on part of government and railroad company.

U.S.—U. S. v. Marshall, C.A.Idaho, 230 F.2d 183.

(3) To sustain finding that negligence of railroad company was direct and proximate cause of injury.

U.S.—U. S. v. Marshall, supra.

Evidence held insufficient to show negligence

U.S.—Smith v. U. S., D.C.Va., 155 F. Supp. 605.

Ga.—Taylor v. Atlantic Co., 70 S.E. 2d 391, 85 Ga.App. 863.

14. Iowa.—Johannsen v. Mid-Continent Petroleum Corp., 5 N.W.2d 20, 232 Iowa 805.

Ky.—Verkamp Corp. of Ky. v. Hubbard, 296 S.W.2d 740.

Pa.—Mautino v. Piercedale Supply Co., 13 A.2d 51, 338 Pa. 435.

14.5 Okl.—Cosden v. Wright, 211 P. 2d 523, 203 Okl. 211.

15. Pa.—Mautino v. Piercedale Supply Co., 13 A.2d 51, 338 Pa. 435. 25 C.J. p 211 note 13.

15.5 Mich.—Belisle v. Jones, 194 N. W. 414, 224 Mich. 191.

Tex.—Williams v. Gulf Refining Co., Civ.App., 229 S.W. 959, error reversed.

Wis.—Dahl v. Charles A. Krause Milling Co., 289 N.W. 626, 234 Wis. 231.

25 C.J. p 211 note 13 [a] (2), [b].

15.10 Pa.—Panetti v. Williams, 41 LackJur. 25—Villiers v. Middle-

West Const. Co., Com.Pl., 91 Pittsb. Leg.J. 293.

Wis.—Pinter v. Wenzel, 180 N.W. 120, 173 Wis. 84.

15.15 Ala.—Tennessee Coal, Iron & R. Co. v. Hartline, 11 So.2d 833, 244 Ala. 116.

15.20 U.S.—Phillips Petroleum Co. v. Gibson, Traders & General Ins. Co., Intervenor, C.A.Tex., 232 F.2d 13, vacated without opinion Gibson v. Phillips Petroleum Co., 77 S.Ct. 16, 352 U.S. 874, 1 L.Ed.2d 77, rehearing denied 77 S.Ct. 220, 352 U.S. 937, 1 L.Ed.2d 169.

15.25 Ky.—Campbell v. Adams, 14 S. W.2d 418, 228 Ky. 156.

15.30 Ky.—Sutton Const. Co. v. Lemaster's Adm'r, 3 S.W.2d 613, 223 Ky. 296.

La.—Gerald v. Standard Oil Co. of Louisiana, App., 10 So.2d 409, reversed on other grounds 16 So.2d 233, 204 La. 690.

N.H.—Olona v. Standard Oil Co., 135 A. 27, 82 N.H. 408.

N.C.—Ramsey v. Standard Oil Co., 120 S.E. 331, 186 N.C. 739.

Pa.—Tumola v. DiFrancesco, Com. Pl., 41 Del.Co. 129—Peters v. Mitchell, Com.Pl., 38 Del.Co. 178.

Evidence held not to require a finding as a matter of law that defendant's negligence had not been proximate cause of explosion, or that plaintiff had assumed risk of consequences.

U.S.—Harris v. Gulf Refining Co., C. A.Miss., 240 F.2d 249.

Record held not to establish assumption of risk as matter of law.

Cal.—Johnson v. Nicholson, 324 P.2d 307, 159 C.A.2d 395.

15.35 Kan.—Thompson v. Union Traction Co., 191 P. 278, 107 Kan. 238.

Mo.—St. Mary's Mill Co. v. Illinois Oil Co., App., 254 S.W. 735.

25 C.J. p 209 note 7 [a].

15.50 N.J.—Stanley Co. of America v. Hercules Powder Co., 103 A.2d 33, 29 N.J.Super. 545, reversed on other grounds 108 A.2d 616, 16 N.J. 295.

16. U.S.—Alligator Co. v. Dutton, C.C.A.Mo., 109 F.2d 900.

Ga.—Hodges v. Ashurst, 3 S.E.2d 99, 60 Ga.App. 157.

Ill.—Chapman v. Deep Rock Oil Corp., 77 N.E.2d 883, 333 Ill.App. 529—Haas v. Herdman, 1 N.E.2d 568, 284 Ill.App. 103.

Ky.—Standard Oil Co. v. Tierney, 17 S.W. 1025, 92 Ky. 367, 13 Ky.L. 626, 36 Am.S.R. 595, 14 L.R.A. 677.

Md.—American Oil Co. v. Wells, 165 A. 298, 164 Md. 422.

Mass.—Guinan v. Famous Players-Lasky Corporation, 167 N.E. 235, 267 Mass. 501.

Mich.—Zook v. Theisen-Clemens Co., 263 N.W. 875, 273 Mich. 536—Sunday v. Wolverine Service Stations, 251 N.W. 402, 265 Mich. 19.

Miss.—Golden Saw Mill Co. v. Jourdan, 127 So. 287, 156 Miss. 813.

Mo.—Kennedy v. Independent Quarry & Construction Co., 291 S.W. 475, 316 Mo. 782.

Helton v. Hawkins, 290 S.W. 91, 221 Mo.App. 93.

Okl.—Magnolia Petroleum Co. v. Sutton, 257 P.2d 307, 208 Okl. 488.

Pa.—Mautino v. Piercedale Supply Co., 13 A.2d 51, 338 Pa. 435.

Taylor v. Di Sandro, 156 A. 569, 102 Pa.Super. 258.

issue to them,¹⁷ or by the court trying the case without a jury.¹⁸

So, particular evidence has been held to warrant

the submission, to the jury, of questions or issues,^{18.5} such as the question or issue of the negligence of defendant,^{18.10} or of contributory negli-

Tenn.—East Tennessee Natural Gas Co. v. Peltz, 270 S.W.2d 591, 38 Tenn.App. 100—Read Phosphate Co. v. Vickers, 11 Tenn.App. 146.
Tex.—Ratliff v. Nau, Civ.App., 36 S.W.2d 254, error dismissed.
25 C.J. p 209 note 7.

17. Expert testimony

(1) In the absence of direct evidence as to the cause of an explosion, expert testimony as to its probable cause is sufficient to warrant its submission to the jury.

Ont.—Badcock v. Freeman, 21 Ont. App. 633.

(2) Testimony of explosives expert held to justify submission of issue to jury.

Mo.—Riggin v. Federal Cartridge Corp., 204 S.W.2d 94, 240 Mo.App. 206.

Direct proof held not essential to make case for jury as to ownership of box containing dynamite caps.

Iowa.—Eves v. Littig Const. Co., 212 N.W. 154, 202 Iowa 1338.

18. Ariz.—Buckeye Irr. Co. v. Askren, 46 P.2d 1068, 45 Ariz. 566.

Pa.—McGowan v. William Steele & Sons Co., 171 A. 903, 112 Pa.Super. 552, followed in Ballard v. William Steele & Sons Co., 171 A. 906, 112 Pa.Super. 558.

18.5 U.S.—Chicago, R. I. & P. R. Co. v. Goodson, Trinity Universal Ins. Co., Intervener, C.A.Tex., 242 F.2d 203—Panther Oil & Grease Mfg. Co. v. Segerstrom, C.A.Wash., 224 F.2d 216—Hopkins v. E. I. Du Pont De Nemours & Co., C.A.Pa., 199 F.2d 930—Crow v. Continental Oil Co., C.C.A.Tex., 115 F.2d 740—Crow v. Continental Oil Co., C.C.A.Tex., 100 F.2d 292.

Dutton v. Alligator Co., D.C.Mo., 25 F.Supp. 736, affirmed, C.C.A., Alligator Co. v. Dutton, 109 F.2d 900.

Ariz.—Borrow v. El Dorado Lodge, 252 P.2d 791, 75 Ariz. 139, opinion supplemented on other grounds 254 P.2d 1027, 75 Ariz. 218.

Cal.—Sloboden v. Time Oil Co., 302 P.2d 34, 145 C.A.2d 197—Sloboden v. Time Oil Co., 281 P.2d 85, 131 C.A.2d 557—De Corsey v. Purex Corp., 207 P.2d 616, 92 C.A.2d 669.

Colo.—Willson v. Colorado & S. Ry. Co., 142 P. 174, 57 Colo. 303.

Ill.—Chapman v. Deep Rock Oil Corp., 77 N.E.2d 883, 333 Ill.App. 529.

Kan.—Phillips v. Doyle, 207 P.2d 465, 167 Kan. 376.

Ky.—Olive Hill Limestone Co. v. Paynter, 291 S.W. 375, 218 Ky. 286—Blue Grass Fair Ass'n v. Bunnell, 267 S.W. 237, 206 Ky. 462.

Mass.—Killam v. Standard Oil Co.

of New York, 143 N.E. 698, 248 Mass. 575.

Miss.—Magnolia Petroleum Co. v. McCollum, 51 So.2d 217, 211 Miss. 166.
Mo.—Morris v. E. I. Du Pont De Nemours & Co., 139 S.W.2d 984, 346 Mo. 126, 129 A.L.R. 352.

Riggin v. Federal Cartridge Corp., 204 S.W.2d 94, 240 Mo.App. 206—St. Mary's Mill Co. v. Illinois Oil Co., App., 254 S.W. 735.

N.J.—Bergquist v. Penterman, 134 A.2d 20, 46 N.J.Super. 74—Stanley Co. of America v. Hercules Powder Co., 103 A.2d 33, 29 N.J.Super. 545, reversed on other grounds 108 A.2d 616, 16 N.J. 295—Balinski v. A. Capone & Sons, 63 A.2d 810, 1 N.J. Super. 215.

N.Y.—Commissioners of State Ins. Fund v. City Chemical Corp., 48 N.E.2d 262, 290 N.Y. 64.

Massie v. Crescent Dry Cleaning Co., 271 N.Y.S. 189, 241 App.Div. 831.

Ohio.—Taylor v. Sidwell, Com.Pl., 155 N.E.2d 726.

Pa.—Fredericks v. Atlantic Refining Co., 127 A. 615, 282 Pa. 8, 38 A.L.R. 666.

Tenn.—East Tennessee Natural Gas Co. v. Peltz, 270 S.W.2d 591, 38 Tenn.App. 100—Jones v. Oman, 184 S.W.2d 568, 28 Tenn.App. 1—Read Phosphate Co. v. Vickers, 11 Tenn. App. 146.

25 C.J. p 209 note 98 [b].

Particular questions or issues

(1) Proximate cause.

U.S.—Apanovich v. Wright, C.A.Me., 226 F.2d 656—Moran v. Pittsburgh-Des Moines Steel Co., C.C.A.Pa., 166 F.2d 908, certiorari denied 68 S.Ct. 1516, 334 U.S. 846, 92 L.Ed. 1770.
Cal.—Hercules Powder Co. v. Automatic Sprinkler Corp. of America, 311 P.2d 907, 151 C.A.2d 387.

Ill.—Loverde v. Consumers Petroleum Co., 63 N.E.2d 673, 327 Ill.App. 210.

Md.—Scott Wilson & Son v. Blaustein, 124 A. 886, 144 Md. 289.

Mass.—O'Regan v. Verrochi, 90 N.E.2d 671, 325 Mass. 391.

Miss.—Shemper v. Cleveland, 51 So.2d 770, 212 Miss. 113, suggestion of error overruled 54 So.2d 215, 212 Miss. 113.

N.J.—Menth v. Breeze Corp., 73 A.2d 183, 4 N.J. 428, 18 A.L.R.2d 1071.

Okl.—Superior Oil Co. v. King, 324 P.2d 847.

S.C.—Bradley v. Fowler, 42 S.E.2d 234, 210 S.C. 231.

Tex.—Dellinger v. Skelly Oil Co., Civ. App., 236 S.W.2d 675, error refused no reversible error—Lloyd v. Herrington, Civ.App., 178 S.W.2d 694,

reversed on other grounds 182 S.W.2d 1003, 143 Tex. 135.

(2) Assumption of risk.

Cal.—Meloy v. Texas Co., 263 P.2d 897, 121 C.A.2d 691.

Tex.—City of El Paso v. Parish, Civ. App., 293 S.W.2d 201, error refused no reversible error.

(3) Failure to give warning or notice.

U.S.—Hopkins v. E. I. Du Pont De Nemours & Co., C.A.Pa., 199 F.2d 930—Cleveland-Cliffs Iron Co. v. Metzner, C.C.A.Mich., 150 F.2d 206—E. I. Dupont De Nemours & Co. v. Wright, C.C.A.Ky., 146 F.2d 765, certiorari denied 65 S.Ct. 1017, 324 U.S. 873, 89 L.Ed. 1426—Standard Oil Co. v. Lyons, C.C.A.Iowa, 130 F.2d 965.

Tenn.—Read Phosphate Co. v. Vickers, 11 Tenn.App. 146.

Vt.—Thompson v. Green Mountain Power Corp., 144 A.2d 786.

(4) Cause of explosion.

U.S.—Gilbert v. Gulf Oil Corp., C.A.Va., 175 F.2d 705.

Okl.—Magnolia Petroleum Co. v. Angelly, 306 P.2d 309.

Tenn.—Read Phosphate Co. v. Vickers, 11 Tenn.App. 146.

25 C.J. p 209 note 98 [b] (1), (2), (4).

(5) Ownership of instrumentality.

U.S.—Phillips Petroleum Co. v. Hooper, C.C.A.Tex., 164 F.2d 743.
W.Va.—Bryant v. Guyan Valley Oil Co., 163 S.E. 773, 111 W.Va. 662.

(6) Issue as to whether party in charge of mining operations was independent contractor or servant.

Mo.—Diehl v. A. P. Green Fire Brick Co., 253 S.W. 984, 299 Mo. 641.

18.10 U.S.—Panther Oil & Grease Mfg. Co. v. Segerstrom, C.A.Wash., 224 F.2d 216—Hopkins v. E. I. Du Pont De Nemours & Co., C.A.Pa., 199 F.2d 930—Moran v. Pittsburgh-Des Moines Steel Co., C.A.Pa., 183 F.2d 467—Moran v. Pittsburgh-Des Moines Steel Co., C.C.A.Pa., 166 F.2d 908, certiorari denied 68 S.Ct. 1516, 334 U.S. 846, 92 L.Ed. 1770—Standard Oil Co. v. Lyons, C.C.A.Iowa, 130 F.2d 965—Standard Oil Co. of New Jersey v. Midgett, C.C.A.N.C., 116 F.2d 562—Bridges v. Dahl, C.C.A.Mich., 108 F.2d 228—Henry H. Cross Co. v. Simmons, C.C.A.Ark., 96 F.2d 482.

Kieffer v. Blue Seal Chemical Co., D.C.N.J., 107 F.Supp. 288, affirmed, C.A., 196 F.2d 614.

Ariz.—Barker v. General Petroleum Corp., 233 P.2d 449, 72 Ariz. 238.

Ark.—McGeorge v. Henry, 101 S.W.2d 440, 193 Ark. 443.

gence on the part of plaintiff,^{18.15} while other evidence has been held insufficient to warrant the submission, to the jury, of questions or issues,^{18.20}

such as the question or issue of the negligence of defendant.^{18.25}

Cal.—Johnson v. Nicholson, 324 P.2d 307, 159 C.A.2d 395—Seaford v. Smith, 194 P.2d 792, 86 C.A.2d 339.
Ill.—Chapman v. Deep Rock Oil Corp., 77 N.E.2d 883, 333 Ill.App. 529.
Ky.—Marlowe Const. Co. v. Jacobs, 302 S.W.2d 612.
Md.—Texas Co. v. Pecora, 118 A.2d 377, 208 Md. 281.
Miss.—Johnston v. Canton Flying Services, 46 So.2d 533, 209 Miss. 226.
Mo.—Executive Bd. of Missouri Baptist General Ass'n v. Campbell, App., 275 S.W.2d 388—Wingfield v. Moberly Oil Co., App., 269 S.W. 644—Owens v. Moberly Oil Co., App., 245 S.W. 369.
N.H.—Glidden v. Brown, 110 A.2d 277, 99 N.H. 323.
N.J.—Bergquist v. Penterman, 134 A.2d 20, 46 N.J.Super. 74.
Kalajian v. Victor Celidonia, Inc., 176 A. 672, 13 N.J.Misc. 164.
N.C.—Sparks v. Tennessee Mineral Products Corporation, 193 S.E. 31, 212 N.C. 211—Rushing v. Texas Co., 154 S.E. 1, 199 N.C. 173—Modlin v. Chandler Sales Co., 110 S.E. 661, 183 N.C. 63.
Okla.—Texas Co. v. Robb, 212 P. 318, 88 Okl. 150.
Pa.—Pryor v. Chambersburg Oil & Gas Co., 103 A.2d 425, 376 Pa. 521—Fredericks v. Atlantic Refining Co., 127 A. 615, 282 Pa. 8, 38 A.L.R. 666.
S.C.—Bradley v. Fowler, 42 S.E.2d 234, 210 S.C. 231.
S.D.—Hjermstad v. Petroleum Carriers, 53 N.W.2d 839, 74 S.D. 406.
25 C.J. p 209 note 98 [e].

Negligence in blasting

Ark.—McGeorge v. Henry, 101 S.W. 2d 440, 193 Ark. 443.
Ky.—Vincennes Bridge Co. v. Poulos, 27 S.W.2d 952, 234 Ky. 243.
Mass.—O'Regan v. Verrochi, 90 N.E. 2d 671, 325 Mass. 391.
N.J.—Kalajian v. Victor Celidonia, Inc., 176 A. 672, 13 N.J.Misc. 164.
N.C.—Sparks v. Tennessee Mineral Products Corporation, 193 S.E. 31, 212 N.C. 211.
Tex.—Kelly v. McKay, 233 S.W.2d 121, 149 Tex. 343.
25 C.J. p 209 note 98 [e] (1).

Negligence in installing and maintaining tanks and pump.

Okla.—Palacine Oil Co. v. Philpot, 289 P. 281, 144 Okl. 123.

Concurrent or intervening cause

Cal.—Sloboden v. Time Oil Co., 281 P.2d 85, 131 C.A.2d 557.
18.15 U.S.—Consolidated Elec. Cooperative v. Panhandle Eastern Pipeline Co., C.A.Mo., 189 F.2d 777—Cleveland-Cliffs Iron Co. v. Metzner, C.C.A.Mich., 150 F.2d 206—

Standard Oil Co. v. Lyons, C.C.A. Iowa, 130 F.2d 965.
Cal.—Meloy v. Texas Co., 263 P.2d 897, 121 C.A.2d 691—Freeman v. Nickerson, 174 P.2d 688, 77 C.A.2d 40.
Fla.—Redwing Carriers, Inc. v. Helwig, App., 108 So.2d 620.
N.M.—Rivera v. Ancient City Oil Corp., 302 P.2d 953, 61 N.M. 473.
18.20 U.S.—American Oil Co. v. Frederick, C.C.A.Ohio, 64 F.2d 403.
Alaska.—Simpson v. Standard Oil Co. of California, 8 Alaska 275.
Ky.—Codell Const. Co. v. Campbell's Guardian, 57 S.W.2d 1010, 248 Ky. 1.
La.—Strother v. Villere Coal Co., App., 15 So.2d 383.
Md.—Martin v. Arundel Corp., 140 A.2d 146, 216 Md. 184.
Mo.—Wilson v. Phillips Petroleum Co., 262 S.W.2d 604.
Porter Oil Refining Co. v. Pierce, App., 287 S.W. 780.
N.Y.—Hallenbeck v. Lone Star Cement Corp., 77 N.Y.S.2d 807, 273 App.Div. 327, amended on other grounds 87 N.Y.S.2d 140, 275 App. Div. 728, affirmed 87 N.E.2d 679, 299 N.Y. 777.
N.C.—Marler v. Pearlman's R. R. Salvage Co., 52 S.E.2d 3, 230 N.C. 121.
Okla.—Empire Gas & Fuel Co. v. Powell, 300 P. 788, 150 Okl. 39.
Pa.—McGrellis v. Welsbach St. Lighting Co. of America, 158 A. 570, 306 Pa. 58.

Particular questions or issues

(1) Contributory negligence.
Tex.—Liner v. U. S. Torpedo Co., Com.App., 12 S.W.2d 552, reheard 16 S.W.2d 519.
(2) Sale of substitute for kerosene.
Tenn.—Standard Oil Co. of Louisiana v. Roach, 94 S.W.2d 63, 19 Tenn. App. 661.
(3) Cause of explosion.
U.S.—Epperson v. Midwest Refining Co., C.C.A.Wyo., 22 F.2d 622.
(4) Creation of dangerous condition of premises.
Mass.—Bruso v. Eastern States Exposition, 168 N.E. 206, 269 Mass. 21.
(5) Creation and maintenance of attractive nuisance.
Mo.—Huckleberry v. Missouri Pac. R. Co., 26 S.W.2d 980, 324 Mo. 1025.
(6) Failure properly to install and inspect equipment.
Mo.—Executive Bd. of Missouri Baptist General Ass'n v. Campbell, App., 275 S.W.2d 388.
N.C.—Broughton v. Standard Oil Co.

of New Jersey, 159 S.E. 321, 201 N. C. 282.

(7) Violation of duty to give warning.

U.S.—Independent-Eastern Torpedo Co. v. Ackerman, C.A.N.M., 214 F. 2d 775.

Mass.—DeMartin v. New York, N. H. & H. R. Co., 143 N.E.2d 542, 336 Mass. 261—Bruso v. Eastern States Exposition, 168 N.E. 206, 269 Mass. 21.

(8) Ownership of tank.

U.S.—American Oil Co. v. Frederick, C.C.A.Ohio, 47 F.2d 54.

(9) Issue as to whether injured person was on premises as invitee.
U.S.—Henry H. Cross Co. v. Simmons, C.C.A.Ark., 96 F.2d 482.

Mass.—Bruso v. Eastern States Exposition, supra.

(10) Res ipsa loquitur theory.

N.Y.—Bailey v. Bethlehem Steel Co., 97 N.Y.S.2d 632, 277 App.Div. 798, affirmed 98 N.E.2d 589, 302 N.Y. 717.

18.25 U.S.—Independent - Eastern Torpedo Co. v. Ackerman, C.A.N. M., 214 F.2d 775—E. I. Du Pont De Nemours & Co. v. Cudd, C.A. Colo., 176 F.2d 855.

Smith v. U. S., D.C.Va., 155 F. Supp. 605.

Alaska.—Simpson v. Standard Oil Co. of California, 8 Alaska 275.

Cal.—Peters v. Pioneer Laundry Co., 90 P.2d 146, 32 C.A.2d 494—Alexander v. Hal Roach Studio, 44 P.2d 366, 6 C.A.2d 405.

Ky.—Eastern Carbon Black Co. v. Stephens' Adm'r, 287 S.W. 215, 216 Ky. 85.

Mich.—Sward v. Megan, 279 N.W. 886, 284 Mich. 421.

Miss.—Mississippi Butane Gas Systems v. Welch, 45 So.2d 262, 208 Miss. 637.

Mo.—Craddock v. Greenberg Mercantile, Inc., 297 S.W.2d 541.

N.Y.—Gallagher v. Citizens Water Works of Town of Highlands, 104 N.Y.S.2d 195, 278 App.Div. 792, affirmed 104 N.E.2d 363, 303 N.Y. 805.

N.C.—Hopkins v. Comer, 81 S.E.2d 368, 240 N.C. 143—Jennings v. Standard Oil Co. of New Jersey, 173 S.E. 582, 206 N.C. 261.

S.C.—Guyton v. S. H. Kress & Co., 5 S.E.2d 295, 191 S.C. 530.

Tex.—Liner v. U. S. Torpedo Co., Com.App., 12 S.W.2d 552, reheard 16 S.W.2d 519.

Va.—Rieder v. Garfield Manor Corporation, 178 S.E. 677, 164 Va. 192.

Gross negligence

Tenn.—Texas Co. v. Haggard, 134 S. W.2d 880, 23 Tenn.App. 475.

(b) Particular Questions

Various questions involved in actions for injuries from explosives have been held for the jury, such as the questions of proximate cause and the presence or absence of negligence.

Particular questions held to be for the jury or the

trier of facts include questions as to the credibility of witnesses,¹⁹ the probability of their testimony,^{19,5} the weight of evidence,²⁰ proximate cause,²¹ the presence or absence of an intervening cause,^{21,5} and the presence or absence of negligence,²² as with respect to particular actions for in-

Negligence in blasting

U.S.—Hopkins v. E. I. Du Pont de Nemours & Co., C.A.Pa., 212 F.2d 623, certiorari denied 75 S.Ct. 108, 348 U.S. 872, 99 L.Ed. 686.

Ky.—Aldridge-Poage, Inc. v. Parks, 297 S.W.2d 632—Gibson v. Womack, 291 S.W. 1021, 218 Ky. 626, 51 A.L.R. 773.

Tex.—Indian Territory Illuminating Oil Co. v. Rainwater, Civ.App., 140 S.W.2d 491, error dismissed.

Negligence of carrier

Ga.—Smith v. Payne, 107 S.E. 70, 26 Ga.App. 685.

Ky.—Chesapeake & O. Ry. Co. v. Rogers, 237 S.W. 18, 193 Ky. 571.

Negligence of filling station owner

Miss.—Burnside v. Gulf Refining Co., 148 So. 219, 166 Miss. 460.

Negligence of manufacturer

U.S.—Soso v. Atlas Powder Co., C.A. Mo., 238 F.2d 338—Ensign-Bickford Co. v. Reeves, C.C.A.Mo., 95 F.2d 190.

Mich.—Pickens v. Crowley-Milner & Co., 241 N.W. 838, 258 Mich. 102.

Negligence of seller

Mich.—Pickens v. Crowley-Milner & Co., supra.

19. Ill.—Siniarski v. Hudson, 87 N.E.2d 137, 338 Ill.App. 137.

Mo.—Morris v. E. I. Du Pont de Nemours & Co., 109 S.W.2d 1222, 341 Mo. 821.

Utah.—Skerl v. Willow Creek Coal Co., 69 P.2d 502, 92 Utah 474.

Blasting

Va.—Pope v. Overbay, 83 S.E.2d 365, 196 Va. 288.

19.5 Ill.—Siniarski v. Hudson, 87 N.E.2d 137, 338 Ill.App. 137.

20. U.S.—Bartholomae Corp. v. U.S., C.A.Cal., 253 F.2d 716.

Utah.—Skerl v. Willow Creek Coal Co., 69 P.2d 502, 92 Utah 474.

Blasting

Va.—Pope v. Overbay, 83 S.E.2d 365, 196 Va. 288.

21. U.S.—Louisiana Oil Refining Corporation v. Reed, C.C.A.La., 38 F.2d 159, certiorari denied 50 S.Ct. 355, 281 U.S. 751, 74 L.Ed. 1162.

Cal.—Tingey v. E. F. Houghton & Co., 179 P.2d 807, 30 C.2d 97.

Conn.—Magaraci v. Santa Marie, 33 A.2d 424, 130 Conn. 323.

Idaho.—Miller v. Gooding Highway Dist., 41 P.2d 625, 55 Idaho 258.

Iowa.—Johannsen v. Mid-Continent Petroleum Corp., 5 N.W.2d 20, 232 Iowa 805—Eves v. Littig Const. Co., 212 N.W. 154, 202 Iowa 1338.

Kan.—Phillips v. Doyle, 207 P.2d 465, 167 Kan. 376.

Mass.—Guinan v. Famous Players-Lasky Corporation, 167 N.E. 235, 267 Mass. 501.

Mich.—Young v. Lee, 16 N.W.2d 659, 310 Mich. 42.

Mo.—Morris v. E. I. Du Pont de Nemours & Co., 109 S.W.2d 1222, 341 Mo. 821—Huckleberry v. Missouri Pac. R. Co., 26 S.W.2d 980, 324 Mo. 1025.

Helton v. Hawkins, 290 S.W. 91, 221 Mo.App. 93.

N.J.—Bergquist v. Penterman, 134 A.2d 20, 46 N.J.Super. 74.

Republic of France v. Lehigh Valley R. Co., 117 A. 593, 97 N.J. Law 474.

N.Y.—Kingsland v. Erie County Agr. Soc., 84 N.E.2d 38, 298 N.Y. 409, 10 A.L.R.2d 1—Genesee County Patrons Fire Relief Ass'n v. L. Sonneborn Sons, 189 N.E. 551, 263 N.Y. 463.

Noone v. Fred Perlberg, Inc., 49 N.Y.S.2d 460, 268 App.Div. 149, affirmed 60 N.E.2d 839, 294 N.Y. 680.

N.C.—Stone v. Texas Co., 105 S.E. 425, 180 N.C. 546, 12 A.L.R. 1297.

Ohio.—Lamb v. Sebach, 3 N.E.2d 686, 52 Ohio App. 362.

Okl.—Magnolia Petroleum Co. v. Sutton, 257 P.2d 307, 208 Okl. 488.

Pa.—Gallivan v. Wark Co., 136 A.2d 223, 288 Pa. 443.

Tex.—Erwin v. Dunn, Civ.App., 201 S.W.2d 240, error refused no reversible error.

Vt.—Thompson v. Green Mountain Power Corp., 144 A.2d 786.

25 C.J. p 210 note 8.

Blasting

Ark.—McGeorge v. Henry, 101 S.W.2d 440, 193 Ark. 443.

Miss.—Central Exploration Co. v. Gray, 70 So.2d 33, 219 Miss. 757.

N.H.—Crocker v. W. W. Wyman, Inc., 110 A.2d 271, 99 N.H. 330.

Or.—Bedell v. Goulter, 261 P.2d 842, 199 Or. 344.

Keeping or storing explosives

U.S.—Apanovich v. Wright, C.A.Me., 226 F.2d 656—Bridges v. Dahl, C.C.A.Mich., 108 F.2d 228.

Dutton v. Alligator Co., D.C.Mo., 25 F.Supp. 736, affirmed, C.C.A., Alligator Co. v. Dutton, 109 F.2d 900.

Ariz.—Buckeye Irr. Co. v. Askren, 46 P.2d 1068, 45 Ariz. 566.

Ga.—Lee v. Georgia Forest Products Co., 163 S.E. 267, 44 Ga.App. 850.

N.Y.—Parnell v. Holland Furnace Co., 256 N.Y.S. 939, 235 App.Div.

756, affirmed 184 N.E. 112, 260 N.Y. 604, reargument denied 185 N.E. 735, 261 N.Y. 553—Parnell v.

Holland Furnace Co., 256 N.Y.S. 323, 234 App.Div. 567, affirmed 184 N.E. 112, 260 N.Y. 604, reargument denied 185 N.E. 735, 261 N.Y. 553.

W.Va.—Colebank v. Nellie Coal & Coke Co., 145 S.E. 748, 106 W.Va. 402.

Leaving dynamite caps or other explosives on the highway or in other places.

Ga.—Terrell v. J. F. Giddings & Son, 112 S.E. 914, 28 Ga.App. 697.

Pa.—Taylor v. Di Sandro, 156 A. 569, 102 Pa.Super. 258.

Tex.—Ratliff v. Nau, Civ.App., 36 S.W.2d 254, error dismissed.

Negligent sale of explosives

Ark.—Nolan v. Haskett, 53 S.W.2d 996, 186 Ark. 455.

Ind.—Ft. Wayne Drug Co. v. Flemington, 175 N.E. 670, 93 Ind.App. 40.

Miss.—Gordy v. Pan American Petroleum Corporation, 193 So. 29, 188 Miss. 313.

N.H.—Olena v. Standard Oil Co., 135 A. 27, 82 N.H. 408.

21.5 Ariz.—MacNeil v. Perkins, 324 P.2d 211, 84 Ariz. 74.

N.Y.—Kingsland v. Erie County Agr. Soc., 84 N.E.2d 38, 298 N.Y. 409, 10 A.L.R.2d 1.

S.C.—Bradley v. Fowler, 42 S.E.2d 234, 210 S.C. 231.

S.D.—Hjermstad v. Petroleum Carriers, 53 N.W.2d 839, 74 S.D. 406.

22. U.S.—Kieffer v. Blue Seal Chemical Co., C.A.N.J., 196 F.2d 614—Pease v. Sinclair Refining Co., C.C.A.N.Y., 104 F.2d 183, 123 A.L.R. 933.

Ark.—Magnolia Petroleum Co. v. Johnson, 233 S.W. 680, 149 Ark. 553.

Cal.—Tingey v. E. F. Houghton & Co., 179 P.2d 807, 30 C.2d 97.

De Corsey v. Purex Corp., 207 P.2d 616, 92 C.A.2d 669.

Conn.—Welz v. Manzillo, 155 A. 841, 113 Conn. 674.

Ga.—Flint Explosive Co. v. Edwards, 66 S.E.2d 368, 84 Ga.App. 376—Reed Oil Co. v. Smith, 109 S.E. 171, 27 Ga.App. 470, reversed on other grounds 114 S.E. 56, 154 Ga. 183, conformed to 114 S.E. 721, 29 Ga.App. 236.

Kan.—Phillips v. Doyle, 207 P.2d 465, 167 Kan. 376.

Ky.—Maise v. Imperial Oil Co., 137 S.W.2d 1104, 282 Ky. 124.

Mass.—Tengberg v. Trimount Oil Co., 197 N.E. 441, 292 Mass. 129—

juries from explosives involving blasting,^{22.5} the sale or display of fireworks,^{22.10} the keeping or storing of explosives,^{22.15} the leaving of explosives, such as dynamite caps, on the highway or in other places

- Guinan v. Famous Players-Lasky Corporation, 167 N.E. 235, 267 Mass. 501.
- Mich.—Young v. Lee, 16 N.W.2d 659, 310 Mich. 42.
- Miss.—Crane v. Adams, 84 So.2d 530, 226 Miss. 436.
- Mo.—Huckleberry v. Missouri Pac. R. Co., 26 S.W.2d 980, 324 Mo. 1025.
- Combs v. Standard Oil Co. of Indiana, 296 S.W. 817, 222 Mo.App. 180.
- Neb.—Clay v. Butane Gas Corp., 39 N.W.2d 813, 151 Neb. 876.
- N.J.—Republic of France v. Lehigh Valley R. Co., 117 A. 598, 97 N.J. Law 474.
- N.M.—Rivera v. Ancient City Oil Corp., 302 P.2d 953, 61 N.M. 473.
- N.Y.—Bailey v. Bethlehem Steel Co., 97 N.Y.S.2d 632, 277 App.Div. 798, affirmed 98 N.E.2d 589, 302 N.Y. 717.
- Hallenbeck v. Lone Star Cement Corp., 77 N.Y.S.2d 807, 273 App. Div. 322, amended on other grounds 87 N.Y.S.2d 140, 275 App.Div. 728, affirmed 87 N.E.2d 679, 299 N.Y. 777.
- N.D.—National Petroleum Mut. Fire Ins. Co. v. Payne, 187 N.W. 138, 48 N.D. 789.
- Okl.—Southwestern Bell Tel. Co. v. Ward, 193 P.2d 569, 200 Okl. 315.
- Ramsey Oil Co. v. Dunbar, 46 P.2d 535, 172 Okl. 571—Guilford v. Foster & Davis, 268 P. 299, 131 Okl. 148.
- Or.—Nickopolous v. Frank, 276 P. 695, 129 Or. 118.
- Pa.—Gallivan v. Wark Co., 136 A. 223, 288 Pa. 443.
- Taylor v. Di Sandro, 156 A. 569, 102 Pa.Super. 258.
- Tex.—Ratliff v. Nau, Civ.App., 36 S.W.2d 254, error dismissed.
- Utah.—Skerl v. Willow Creek Coal Co., 69 P.2d 502, 92 Utah 474.
- Va.—Braxton v. Flippo, 33 S.E.2d 757, 183 Va. 839.
- 25 C.J. p 210 note 9.
- 22.5 U.S.—Geophysical Exploration Co. v. Klodginski, C.C.A.Tex., 61 F.2d 849, certiorari denied 53 S.Ct. 400, 288 U.S. 608, 77 L.Ed. 983.**
- Ala.—Ledbetter-Johnson Co. v. Hawkins, 103 So.2d 748, 267 Ala. 458.
- Ark.—Giem v. Williams, 222 S.W.2d 800, 275 Ark. 105—Benton Gravel Co. v. Wright, 175 S.W.2d 208, 206 Ark. 930—McGeorge v. Henry, 101 S.W.2d 440, 193 Ark. 443.
- Cal.—Peterson v. General Geophysical Co., App., 185 P.2d 56.
- Conn.—Welz v. Manzillo, 155 A. 841, 113 Conn. 674.
- Ga.—Fleming v. E. I. Du Pont De Nemours & Co., 81 S.E.2d 529, 89 Ga.App. 837.
- Kan.—Feger v. Concrete Materials & Const. Co., 238 P.2d 708, 172 Kan. 75.
- Ky.—Hunt-Forbes Const. Co. v. Martt, 57 S.W.2d 37, 247 Ky. 376.
- Brooks-Calloway Co. v. Carroll, 29 S.W.2d 592, 235 Ky. 41.
- Mass.—Goldman v. Regan, 142 N.E. 701, 247 Mass. 492.
- N.H.—Crocker v. W. W. Wyman, Inc., 110 A.2d 271, 99 N.H. 330.
- N.J.—Whitla v. Ippolito, 131 A. 873, 102 N.J.Law 354.
- Kalajian v. Victor Celidonia, Inc., 176 A. 672, 13 N.J.Misc. 164.
- N.Y.—Panagiotou v. Worlock Stone Co., 15 N.Y.S.2d 153, 258 App.Div. 822.
- Gehn v. Cincotti Trucking & Contracting Co., 2 N.Y.S.2d 502.
- N.C.—Sparks v. Tennessee Mineral Products Corporation, 193 S.E. 31, 212 N.C. 211.
- Tenn.—East Tennessee Natural Gas Co. v. Peltz, 270 S.W.2d 591, 38 Tenn.App. 100.
- Tex.—Universal Atlas Cement Co. v. Oswald, 157 S.W.2d 636, 138 Tex. 159.
- Dellinger v. Skelly Oil Co., Civ. App., 236 S.W.2d 675, error refused no reversible error.
- Vt.—Tinney v. Crosby, 22 A.2d 145, 112 Vt. 95.
- 25 C.J. p 210 note 9 [a] (1).
- Causal connection**
- Mo.—Buckner v. Knutson-Gould Const. Co., App., 305 S.W.2d 709.
- Covering or otherwise protecting blast**
- Conn.—Worth v. Dunn, 118 A. 467, 198 Conn. 51.
- 25 C.J. p 210 note 9 [a] (2).
- Giving of warning; sufficiency of warning**
- N.C.—Sparks v. Tennessee Mineral Products Corporation, 193 S.E. 31, 212 N.C. 211.
- Tenn.—Read Phosphate Co. v. Vickers, 11 Tenn.App. 146.
- 25 C.J. p 210 note 9 [a] (3), (4).
- 22.10 Conn.—Burbie v. McFarland, 157 A. 538, 114 Conn. 56.**
- Ky.—Blue Grass Fair Ass'n v. Bunell, 267 S.W. 237, 206 Ky. 462.
- N.J.—Spenzierato v. Our Lady Monte Virgine Soc. of Mut. Ben. of East Orange, N. J., 169 A. 831, 112 N.J.Law 93—Robinson v. Unexcelled Mfg. Co., 141 A. 802, 104 N.J. Law 589.
- N.Y.—Kingsland v. Erie County Agr. Soc., 84 N.E.2d 38, 298 N.Y. 409, 10 A.L.R.2d 1.
- Tex.—Erwin v. Dunn, Civ.App., 201 S.W.2d 240, error refused no reversible error.
- 25 C.J. p 210 note 9 [d].
- 22.15 U.S.—Alligator Co. v. Dutton, C.C.A.Mo., 109 F.2d 900.**
- Ala.—Stephens v. Walker, 117 So. 22, 217 Ala. 466.
- Ariz.—MacNeil v. Perkins, 324 P.2d 211, 84 Ariz. 74.
- Ark.—Missouri Pac. R. Co. v. Slatton, 100 S.W.2d 86, 193 Ark. 356.
- Conn.—Magaraci v. Santa Marie, 33 A.2d 424, 130 Conn. 323.
- Idaho.—Miller v. Gooding Highway Dist., 41 P.2d 625, 55 Idaho 258.
- Ky.—General Refractories Co. v. Mozier, 30 S.W.2d 952, 235 Ky. 252.
- N.C.—Stephens v. Blackwood Lumber Co., 131 S.E. 314, 191 N.C. 23, 43 A.L.R. 426—Stone v. Texas Co., 105 S.E. 425, 180 N.C. 546, 12 A.L.R. 1297.
- Pa.—Peters v. Mitchell, Com.Pl., 38 Del.Co. 178.
- Tex.—Natatorium Laundry Co. v. Saylor, Civ.App., 131 S.W.2d 790, error dismissed, judgment correct.
- 25 C.J. p 210 note 9 [b].
- Fuel, petroleum, gasoline, etc.**
- U.S.—Standard Oil Co. of New Jersey v. Midgett, C.C.A.N.C., 116 F. 2d 562—Henry H. Cross Co. v. Simmons, C.C.A.Ark., 96 F.2d 482.
- Ark.—Sinclair Refining Co. v. Gray, 83 S.W.2d 820, 191 Ark. 175—Phillips Petroleum Co. v. Berry, 65 S.W.2d 533, 188 Ark. 431.
- Ky.—Cumberland River Oil Co. v. Dicken, 131 S.W.2d 927, 279 Ky. 700.
- N.J.—Gilroy v. Standard Oil Co., 151 A. 598, 107 N.J.Law 170.
- N.Y.—Parnell v. Holland Furnace Co., 256 N.Y.S. 939, 235 App.Div. 756, affirmed 184 N.E. 112, 260 N.Y. 604, reargument denied 185 N.E. 735, 261 N.Y. 553—Parnell v. Holland Furnace Co., 256 N.Y.S. 323, 234 App.Div. 567, affirmed 184 N.E. 112, 260 N.Y. 604, reargument denied 185 N.E. 735, 261 N.Y. 553.
- Ohio.—James v. Cities Service Oil Co., 31 N.E.2d 872, 66 Ohio App. 87.
- Okl.—Texas Co. v. Robb, 212 P. 318, 88 Okl. 150.
- Tex.—Tyreco Refining Co. v. Cook, Civ.App., 110 S.W.2d 219, error dismissed.
- W.Va.—Bryant v. Guyan Valley Oil Co., 163 S.E. 773, 111 W.Va. 662.
- Dynamite or dynamite caps**
- U.S.—Bridges v. Dahl, C.C.A.Mich., 108 F.2d 228.
- Ariz.—MacNeil v. Perkins, 324 P.2d 211, 84 Ariz. 74.
- Conn.—Magaraci v. Santa Marie, 33 A.2d 424, 130 Conn. 323.
- Mo.—Kansas City ex rel. Barlow v. Robinson, 32 S.W.2d 1075, 322 Mo. 1050.
- Tenn.—Ridgway Sprinkle Co. v. Carter, 143 S.W.2d 527, 176 Tenn. 442.
- Gannon v. Crichlow, 13 Tenn. App. 281.
- Paint**
- Minn.—Reichert v. Minnesota Northern Natural Gas Co., 263 N.W. 297, 195 Minn. 387.

accessible to children,^{22.20} and the manufacture^{22.25} or sale^{22.30} of explosives.

Other questions held to be for the jury include questions of contributory negligence,²³ and likewise

- 22.20** U.S.—Luhman v. Hoover, C. C.A.Mich., 100 F.2d 127.
 Ariz.—Southwest Cotton Co. v. Clements, 213 P. 1005, 25 Ariz. 124, rehearing denied 215 P. 156, 25 Ariz. 169.
 Ark.—Kansas City Southern Ry. Co. v. McKenzie, 269 S.W.2d 326, 223 Ark. 890.
 Ga.—Lee v. Georgia Forest Products Co., 163 S.E. 267, 44 Ga.App. 850—Terrell v. J. F. Giddings & Son, 112 S.E. 914, 28 Ga.App. 697.
 Iowa.—Eves v. Littig Const. Co., 212 N.W. 154, 202 Iowa 1338.
 Ky.—Sparks v. Maeschal, 289 S.W. 308, 217 Ky. 235.
 Mo.—Kansas City ex rel. Barlow v. Robinson, 17 S.W.2d 977, 322 Mo. 1050—Gerber v. Kansas City, 263 S.W. 432, 304 Mo. 157—Diehl v. A. P. Green Fire Brick Co., 253 S.W. 984, 299 Mo. 641.
 N.J.—Spenzierato v. Our Lady Monte Virgine Soc. of Mut. Ben. of East Orange, N.J., 169 A. 831, 112 N.J. Law 93.
 N.Y.—Nelson v. Town of Smyrna, 160 N.Y.S.2d 312, 3 A.D.2d 794, appeal denied 163 N.Y.S.2d 384, 3 A.D.2d 948.
 Pa.—Tomasak v. Borough of Court-dale, 98 Pa.Super. 473.
22.25 U.S.—Morris v. E. I. Du Pont de Nemours & Co., C.C.A.Mo., 68 F.2d 788.
 Mass.—Guinan v. Famous Players-Lasky Corporation, 167 N.E. 235, 267 Mass. 501.
 Mich.—Genack v. Gorman, 194 N.W. 575, 224 Mich. 79.
 Mo.—Morris v. E. I. Du Pont de Nemours & Co., 109 S.W.2d 1222, 341 Mo. 821.
 Riffin v. Federal Cartridge Corp., 204 S.W.2d 94, 240 Mo.App. 206.
 N.J.—Herz v. E. I. Du Pont de Nemours & Co., 123 A. 878, 99 N.J. Law 407.
 N.Y.—Commissioners of State Ins. Fund v. City Chemical Corp., 48 N.E.2d 262, 290 N.Y. 64.
22.30 Ark.—Nolan v. Haskett, 53 S.W.2d 996, 186 Ark. 455.
 Cal.—Mondine v. Sarlin, 81 P.2d 903, 11 C.2d 593.
 Conn.—Burbree v. McFarland, 157 A. 538, 114 Conn. 56.
 Ga.—Flint Explosive Co. v. Edwards, 66 S.E.2d 368, 84 Ga.App. 376—Hodges v. Ashurst, 3 S.E.2d 99, 60 Ga.App. 157.
 N.H.—Olena v. Standard Oil Co., 135 A. 27, 82 N.H. 408.
 N.J.—Hopper v. Charles Cooper & Co., 139 A. 19, 104 N.J.Law 93, 55 A.L.R. 187.
 N.Y.—Hallenbeck v. S. Wander & Sons Chemical Co., 189 N.Y.S. 334, 197 App.Div. 855.
 Pa.—Konchar v. Cebular, 3 A.2d 913, 333 Pa. 499.
 R.I.—Douglas v. First Nat. Stores, 172 A. 723, 54 R.I. 278.
 25 C.J. p 210 note 9 [c].
Negligence of seller of kerosene, as by sale of gasoline, or mixture of kerosene and gasoline, for kerosene.
 U.S.—Gulf Refining Co. of Louisiana v. Jinright, C.C.A.Ala., 10 F.2d 306.
 Ark.—Sinclair Refining Co. v. Henderson, 122 S.W.2d 580, 197 Ark. 319—Houston Oil Co. of Texas v. McGuire, 59 S.W.2d 593, 187 Ark. 293—Gibson Oil Co. v. Bush, 1 S.W.2d 88, 175 Ark. 944—Goode v. Pierce Oil Corporation, 286 S.W. 1009, 171 Ark. 863.
 Kan.—Phillips v. Doyle, 207 P.2d 465, 167 Kan. 376.
 Mass.—Killam v. Standard Oil Co. of New York, 143 N.E. 698, 248 Mass. 575.
 Mich.—Peplinski v. Kleinke, 299 N.W. 818, 299 Mich. 86—Rife v. Gaffill Oil Co., 209 N.W. 172, 235 Mich. 15.
 Miss.—Gordy v. Pan American Petroleum Corporation, 193 So. 29, 188 Miss. 313.
 N.C.—Ramsey v. Standard Oil Co., 120 S.E. 331, 186 N.C. 739.
 Va.—American Oil Co. v. Nicholas, 157 S.E. 754, 156 Va. 1.
 Wis.—Warrichalet v. Standard Oil Co., 252 N.W. 187, 213 Wis. 619.
 25 C.J. p 210 note 9 [c] (3), (4).
Negligence of filling station operator
 Conn.—King v. Haynes, 158 A. 915, 114 Conn. 396.
 Pa.—Fredericks v. Atlantic Refining Co., 127 A. 615, 282 Pa. 8, 38 A.L.R. 666.
Sale of gunpowder or cartridges to minor
 N.H.—Cote v. Sears, Roebuck & Co., 166 A. 279, 86 N.H. 238.
 Tex.—A. J. Anderson & Co. v. Reich, Com.App., 260 S.W. 162.
23. U.S.—U. S. v. Stoppelman, C.A. Mo., 266 F.2d 13—Apanovich v. Wright, C.A.Me., 226 F.2d 656—Phillips Petroleum Co. v. Hooper, C.C.A.Tex., 164 F.2d 743—Standard Oil Co. v. Lyons, C.C.A.Iowa, 130 F.2d 965—Crow v. Continental Oil Co., C.C.A.Tex., 115 F.2d 740—Pease v. Sinclair Refining Co., C.C.A.N.Y., 104 F.2d 183, 123 A.L.R. 933—Geophysical Exploration Co. v. Klodginski, C.C.A.Tex., 61 F.2d 849, certiorari denied 53 S.Ct. 400, 288 U.S. 608, 77 L.Ed. 983.
 Ark.—Gibson Oil Co. v. Bush, 1 S.W.2d 88, 175 Ark. 944—Gibson Oil Co. v. Sherry, 291 S.W. 66, 172 Ark. 947—Magnolia Petroleum Co. v. Johnson, 233 S.W. 680, 149 Ark. 553.
 Cal.—Johnson v. Nicholson, 324 P.2d 307, 159 C.A.2d 395—Raich v. Aldon Const. Co., 276 P.2d 822, 129 C.A.2d 278.
 Idaho.—Hansen v. Standard Oil Co. of California, 44 P.2d 709, 55 Idaho 483—Miller v. Gooding Highway Dist., 41 P.2d 625, 55 Idaho 258.
 Iowa.—Johannsen v. Mid-Continent Petroleum Corp., 5 N.W.2d 20, 232 Iowa 805.
 Kan.—Phillips v. Doyle, 207 P.2d 465, 167 Kan. 376.
 Ky.—Maise v. Imperial Oil Co., 137 S.W.2d 1104, 282 Ky. 124.
 Md.—American Oil Co. v. Wells, 165 A. 298, 164 Md. 422.
 Mass.—Carpenter v. Sinclair Refining Co., 129 N.E. 383, 237 Mass. 230.
 Mich.—Rife v. Gaffill Oil Co., 209 N.W. 172, 235 Mich. 15.
 Mo.—Morris v. E. I. Du Pont de Nemours & Co., 109 S.W.2d 1222, 341 Mo. 821.
 N.J.—Bergquist v. Penterman, 134 A.2d 20, 46 N.J.Super. 74.
 N.Y.—Bailey v. Bethlehem Steel Co., 97 N.Y.S.2d 632, 277 App.Div. 798, affirmed 98 N.E.2d 589, 302 N.Y. 717—Underhill v. Major, 221 N.Y.S. 123, 220 App.Div. 173, affirmed 161 N.E. 168, 247 N.Y. 525.
 N.C.—Rushing v. Texas Co., 154 S.E. 1, 199 N.C. 173.
 N.D.—National Petroleum Mut. Fire Ins. Co. v. Payne, 187 N.W. 138, 48 N.D. 789.
 Ohio.—James v. Cities Service Oil Co., 31 N.E.2d 872, 66 Ohio App. 87.
 Okl.—Magnolia Petroleum Co. v. Sutton, 257 P.2d 307, 208 Okl. 488.
 Pa.—Pryor v. Chambersburg Oil & Gas Co., 103 A.2d 425, 376 Pa. 521—Gallivan v. Wark Co., 136 A. 223, 288 Pa. 443.
 R.I.—McArthur v. Dutee W. Flint Oil Co., 146 A. 484, 50 R.I. 226.
 Tex.—Independent-Eastern Torpedo Co. v. Herrington, Civ.App., 59 S.W.2d 222, 1108, reversed on other grounds 95 S.W.2d 377, 128 Tex. 17.
 Va.—Braxton v. Filippo, 33 S.E.2d 757, 183 Va. 839—Standard Oil Co. v. Wakefield's Adm'r., 47 S.E. 830, 102 Va. 824, 66 L.R.A. 792.
 Wash.—System Tank Lines v. Dixon, 286 P.2d 704, 47 Wash.2d 147—Seattle Taxicab Co. v. Texas Co., 57 P.2d 1237, 186 Wash. 363.
 25 C.J. p 210 note 10.
Minor's contributory negligence or knowledge of danger.
 U.S.—Luhman v. Hoover, C.C.A. Mich., 100 F.2d 127.
 Ala.—Walker v. Stephens, 127 So. 668, 221 Ala. 18.
 Ariz.—Southwest Cotton Co. v. Clements, 215 P. 156, 25 Ariz. 169.

include questions of assumption of risk,²⁴ cause of the explosion²⁵ or fire,²⁶ whether plaintiffs sustained damage,²⁷ the extent of the injury,²⁸ the explosive properties of a substance,²⁹ whether a substance or object was inherently or intrinsically dangerous,³⁰ the force and effect of blasting,³¹ a person's knowledge of relevant facts,³² and ownership.³³

It is also for the jury to determine whether the person injured was properly on the premises³⁴ or was a trespasser,³⁵ whether the explosion alone or flying debris caused the injury,³⁶ willful or wanton conduct,³⁷ the standard of care required,³⁸ whether defendant violated a statute relating to custody of explosives,^{38.5} whether defendant made a proper inspection and repairs,^{38.10} and whether the pre-

Conn.—Magaraci v. Santa Marie, 33 A.2d 424, 130 Conn. 323—Burbree v. McFarland, 157 A. 538, 114 Conn. 56—Sedita v. Steinberg, 134 A. 243, 105 Conn. 1, 49 A.L.R. 154.
Mich.—Butrick v. Snyder, 210 N.W. 311, 236 Mich. 300.
Pa.—Tomasak v. Borough of Court-dale, 98 Pa.Super. 473.
Tex.—Nataatorium Laundry Co. v. Saylor, Civ.App., 131 S.W.2d 790, error dismissed, judgment correct. 25 C.J. p 210 note 10 [a] (3), (4).

Buyer's contributory negligence

(1) Generally.
U.S.—Gulf Refining Co. of Louisiana v. Jinright, C.C.A.Ala., 10 F.2d 306.
Ark.—Nolan v. Haskett, 53 S.W.2d 996, 186 Ark. 455.
Cal.—Mondine v. Sarlin, 81 P.2d 903, 11 C.2d 593.
Ga.—Hodges v. Ashurst, 3 S.E.2d 99, 60 Ga.App. 157.
Pa.—Konchar v. Cebular, 3 A.2d 913, 333 Pa. 499.
Wyo.—J. J. Mayou Mfg. Co. v. Consumers Oil & Refining Co., 146 P. 2d 738, 60 Wyo. 75, 151 A.L.R. 1243.

(2) Starting or building fire with kerosene or fuel believed to be kerosene.

Ark.—Houston Oil Co. of Texas v. McGuire, 59 S.W.2d 593, 187 Ark. 293—Pierce Oil Corporation v. Taylor, 227 S.W. 420, 147 Ark. 100.
Ky.—Kentucky Independent Oil Co. v. Schnitzler, 271 S.W. 570, 208 Ky. 507, 39 A.L.R. 979.
Mich.—Peplinski v. Kleinke, 299 N. W. 818, 299 Mich. 86—Paull v. McBride, 263 N.W. 877, 273 Mich. 661.
Ohio.—Paragon Refining Co. v. Higbea, 153 N.E. 860, 22 Ohio App. 440.
W.Va.—Cabell v. Standard Oil Co. of New Jersey, 159 S.E. 49, 110 W. Va. 609.

(3) Using fuel to fill a lamp or lantern.

Ohio.—Standard Oil Co. v. Armbruster, 177 N.E. 524, 39 Ohio App. 451.
25 C.J. p 210 note 10 [a] (1).

Blasting

Ark.—Giem v. Williams, 222 S.W.2d 800, 275 Ark. 105.
Conn.—Worth v. Dunn, 118 A. 467, 198 Conn. 51.
Vt.—Tinney v. Crosby, 22 A.2d 145, 112 Vt. 95.

Fireworks

Conn.—Burbree v. McFarland, 157 A. 538, 114 Conn. 56.

24. Mass.—Carpenter v. Sinclair Refining Co., 129 N.E. 383, 237 Mass. 230.
Vt.—Tinney v. Crosby, 22 A.2d 145, 112 Vt. 95.

Assumption of risk as matter of law held not shown

N.J.—Bergquist v. Penterman, 134 A. 2d 20, 46 N.J.Super. 74.
Pa.—Pryor v. Chambersburg Oil & Gas Co., 103 A.2d 425, 376 Pa. 521.
25. Ala.—Stephens v. Walker, 117 So. 22, 217 Ala. 466.
Ga.—Hodges v. Ashurst, 3 S.E.2d 99, 60 Ga.App. 157.
Ill.—Siniarski v. Hudson, 87 N.E.2d 137, 338 Ill.App. 137.
Mich.—Lynn v. Roberts, 241 N.W. 214, 257 Mich. 116.
N.J.—Hopper v. Charles Cooper & Co., 139 A. 19, 104 N.J.Law 93, 55 A.L.R. 187.
S.C.—Bradley v. Fowler, 42 S.E.2d 234, 210 S.C. 231.

26. U.S.—Standard Oil Co. of New York v. R. L. Pitcher Co., C.C.A. Me., 289 F. 678.
Ark.—Standard Oil Co. of Louisiana v. Hydrick, 296 S.W. 708, 174 Ark. 813.
Mo.—St. Mary's Mill Co. v. Illinois Oil Co., App., 254 S.W. 735.
Negligence as to fires generally see C.J.S. Negligence.

27. N.Y.—Gehn v. Cincotti Trucking & Contracting Co., 2 N.Y.S.2d 502.

28. Ky.—Hunt-Forbes Const. Co. v. Martt, 57 S.W.2d 37, 247 Ky. 376.

29. Neolite

Mo.—Combs v. Standard Oil Co. of Indiana, 296 S.W. 817, 222 Mo.App. 180.

30. Conn.—Jump v. Ensign-Bickford Co., 167 A. 90, 117 Conn. 110.
Ky.—Blue Grass Fair Ass'n v. Bunnell, 267 S.W. 237, 206 Ky. 462.
Mass.—Guinan v. Famous Players-Lasky Corporation, 167 N.E. 235, 267 Mass. 501.
Tenn.—Read Phosphate Co. v. Vickers, 11 Tenn.App. 146.

31. Mo.—Ingram v. Great Lakes Pipe Line Co., App., 153 S.W.2d 547.
Tenn.—East Tennessee Natural Gas Co. v. Peltz, 270 S.W.2d 591, 38 Tenn.App. 100.

32. Cal.—Tingey v. E. F. Houghton & Co., 179 P.2d 807, 30 C.2d 97.
Ky.—Bates v. Caudill, 255 S.W.2d 487.

Mass.—Guinan v. Famous Players-Lasky Corporation, 167 N.E. 235, 267 Mass. 501.

Mo.—Morris v. E. I. Du Pont de Nemours & Co., 109 S.W.2d 1222, 341 Mo. 821.

N.Y.—Petluck v. McGolrick Realty Co., 268 N.Y.S. 782, 240 App.Div. 61.

Tenn.—Read Phosphate Co. v. Vickers, 11 Tenn.App. 146.

Vt.—Tinney v. Crosby, 22 A.2d 145, 112 Vt. 95.

33. U.S.—Moran v. Pittsburgh-Des Moines Steel Co., C.C.A.Pa., 166 F. 2d 908, certiorari denied 68 S.Ct. 1516, 384 U.S. 846, 92 L.Ed. 1770.
Iowa.—Eves v. Littig Const. Co., 212 N.W. 154, 202 Iowa 1338.

Wash.—Thompson-Cadillac Co. v. Matthews, 23 P.2d 399, 173 Wash. 353.

34. Ala.—Stephens v. Walker, 117 So. 22, 217 Ala. 466.

Invitee or licensee

N.C.—Stephens v. Blackwood Lumber Co., 131 S.E. 314, 191 N.C. 23, 43 A.L.R. 426.
25 C.J. p 209 note 7 [b].

35. Conn.—Sedita v. Steinberg, 134 A. 243, 105 Conn. 1, 49 A.L.R. 154.

36. Mo.—Bassett v. Moberly Paving Brick Co., 268 S.W. 645, 219 Mo.App. 81.

37. Ill.—Bellomy v. Bruce, 25 N.E. 2d 428, 303 Ill.App. 349—Bandosz v. A. Daigger & Co., 255 Ill.App. 494.

38. Ark.—Giem v. Williams, 222 S.W.2d 800, 275 Ark. 105.

Ga.—Flint Explosive Co. v. Edwards, 66 S.E.2d 368, 84 Ga.App. 376.

Mass.—Guinan v. Famous Players-Lasky Corporation, 167 N.E. 235, 267 Mass. 501.

38.5 Conn.—Magaraci v. Santa Marie, 33 A.2d 424, 130 Conn. 323.

Proximate cause

Whether or not a violation of ordinance proximately contributed to an accident is a question of fact.
Cal.—Reid & Sibell, Inc. v. Gilmore & Edwards Co., 285 P.2d 364, 134 C.A.2d 60.

38.10 Neb.—Clay v. Butane Gas Corp., 39 N.W.2d 813, 151 Neb. 876.

sumption of negligence arising under the doctrine of *res ipsa loquitur* was rebutted.^{38,15}

§ 11(10). — — — Instructions

Instructions in an action relating to explosives should fully and correctly state the applicable law, and conform to the general requirements of instructions in civil cases.

Instructions in an action relating to explosives should fully and correctly state the law applicable to the case.³⁹ Thus, instructions should not ignore matters in evidence and material to the issue;⁴⁰ they must be based on some evidence⁴¹ and be consistent,⁴² and must be confined to the issues raised on the pleadings and facts in evidence,⁴³

33.15 Ill.—Siniarski v. Hudson, 87 N.E.2d 137, 338 Ill.App. 137.

39. Ga.—Reed Oil Co. v. Smith, 114 S.E. 56, 154 Ga. 183, conformed to 114 S.E. 721, 29 Ga.App. 236.

Kan.—Thompson v. Union Traction Co., 191 P. 278, 107 Kan. 238.

Mo.—Diehl v. A. P. Green Fire Brick Co., 253 S.W. 984, 299 Mo. 641.

Neb.—Clay v. Butane Gas Corp., 39 N.W.2d 813, 151 Neb. 876.

Instructions held proper or not erroneous

(1) As to burden of proof.

Ark.—Phillips Petroleum Co. v. Berry, 65 S.W.2d 533, 188 Ark. 431.

Md.—Texas Co. v. Pecora, 118 A.2d 377, 208 Md. 281.

Okl.—Seismograph Service Corp. v. Buchanan, 316 P.2d 185.

(2) As to proximate cause.

Ala.—Whaley v. Sloss-Sheffield Steel & Iron Co., 51 So. 419, 164 Ala. 216, 20 Ann.Cas. 822.

Cal.—Burger v. Burger, 288 P.2d 926, 136 C.A.2d 360.

Ky.—Ray's Adm'r v. Standard Oil Co., 61 S.W.2d 1067, 250 Ky. 111.

N.H.—Glidden v. Brown, 110 A.2d 277, 99 N.H. 323.

N.J.—Stanley Co. of America v. Hercules Powder Co., 103 A.2d 33, 29 N.J.Super. 545, reversed on other grounds 108 A.2d 616, 16 N.J. 295.

Tex.—Tex-Jersey Oil Corp. v. Beck, 305 S.W.2d 162.

(3) As to degree of care.

Ga.—Atlantic Co. v. Taylor, 61 S.E.2d 204, 82 Ga.App. 361.

Miss.—Crane v. Adams, 84 So.2d 530, 226 Miss. 436.

Mont.—Harding v. H. F. Johnson, Inc., 244 P.2d 111, 126 Mont. 70.

N.H.—Glidden v. Brown, 110 A.2d 277, 99 N.H. 323.

(4) As to contributory negligence.

Fla.—Redwing Carriers, Inc. v. Helwig, App., 108 So.2d 620.

N.H.—Glidden v. Brown, 110 A.2d 277, 99 N.H. 323.

(5) As to *res ipsa loquitur* doctrine.

Cal.—Rohar v. Osborne, 284 P.2d 125, 133 C.A.2d 345.

(6) As to violation of statute.

Cal.—Burger v. Burger, 288 P.2d 926, 136 C.A.2d 360.

(7) Other instructions.

Ariz.—MacNeil v. Perkins, 324 P.2d 211, 84 Ariz. 74.

Ark.—Sinclair Refining Co. v. Gray, 83 S.W.2d 820, 191 Ark. 175.

Ga.—Atlantic Co. v. Taylor, 61 S.E. 2d 204, 82 Ga.App. 361.

Md.—Texas Co. v. Pecora, 118 A.2d 377, 208 Md. 281.

Mont.—Harding v. H. F. Johnson, Inc., 244 P.2d 111, 126 Mont. 70.

Okl.—Magnolia Petroleum Co. v. Angelly, 306 P.2d 309—Shaffer Oil & Refining Co. v. Thomas, 252 P. 41, 120 Okl. 253.

Instructions held erroneous or properly refused

(1) As to burden of proof.

Mo.—Morris v. E. I. Du Pont de Nemours & Co., 109 S.W.2d 1222, 341 Mo. 821.

(2) As to proximate cause.

Ark.—Missouri Pac. R. Co. v. Slatton, 100 S.W.2d 86, 193 Ark. 356—Phillips Petroleum Co. v. Berry, 65 S.W.2d 533, 188 Ark. 431.

N.J.—Stanley Co. of America v. Hercules Powder Co., 108 A.2d 616, 16 N.J. 295.

Okl.—Bacon v. Wass, 198 P.2d 423, 200 Okl. 581.

(3) As to definition of "inherently dangerous instrumentality."

Conn.—Burbree v. McFarland, 157 A. 538, 114 Conn. 56.

(4) As to applicability of attractive nuisance doctrine.

Cal.—Barth v. San Juan Development Co., App., 336 P.2d 203.

(5) In an action for damages from an explosion caused by defendant's sale of a dangerous mixture as kerosene oil, a requested instruction that the jury, in determining defendant's alleged negligence, could not give any weight to the fact that the oil contained twenty-one per cent gasoline, or to the fact of injury resulting therefrom, or to the fact that an examination by an expert inspector might or would have revealed the actual nature of the mixture, is properly refused.

Iowa.—Chapman v. Pfarr, 132 N.W. 957, 153 Iowa 20.

(6) Other instructions.

U.S.—Crow v. Continental Oil Co., C.C.A.Tex., 115 F.2d 740.

Ind.—Town of Kirklin v. Everman, 29 N.E.2d 206, 217 Ind. 683.

Mont.—Harding v. H. F. Johnson, Inc., 244 P.2d 111, 126 Mont. 70.

N.H.—Glidden v. Brown, 110 A.2d 277, 99 N.H. 323.

40. Mo.—Hill v. Meyer Bros. Drug Co., 31 S.W. 909, 140 Mo. 433.

25 C.J. p 211 note 15.

41. Cal.—Weaver v. Shell Co. of California, 94 P.2d 364, 34 C.A.2d 713.

N.Y.—Morse v. Buffalo Tank Corporation, 19 N.E.2d 981, 280 N.Y. 110.

25 C.J. p 211 note 16.

42. Mass.—Leahy v. Standard Oil Co., 107 N.E. 458, 220 Mass. 90.

25 C.J. p 211 note 17.

43. Ky.—Ray's Adm'r v. Standard Oil Co., 61 S.W.2d 1067, 250 Ky. 111.

Or.—Fisher v. Burrell, 241 P. 40, 116 Or. 317.

Tex.—Southwestern Oil Development Co. v. Illinois Torpedo Co., Civ. App., 252 S.W. 334, error dismissed Illinois Torpedo Co. v. Southwestern Oil Development Co., 278 S.W. 1115, 114 Tex. 582.

41. Cal.—Weaver v. Shell Co. of California, 94 P.2d 364, 34 C.A.2d 713.

N.Y.—Morse v. Buffalo Tank Corporation, 19 N.E.2d 981, 280 N.Y. 110.

25 C.J. p 211 note 16.

Instructions held warranted by evidence

(1) Instruction permitting recovery for injuries due to explosion if defendant should have known premises were attractive to children.

Mo.—Kansas City ex rel. Barlow v. Robinson, 17 S.W.2d 977, 322 Mo. 1050, dissenting opinion 32 S.W.2d 1075, 322 Mo. 1050.

(2) Instruction on negligence of person in charge of filling station that one "must not shut his eyes."

S.C.—Williamson v. Pike, 138 S.E. 831, 140 S.C. 376.

(3) Instruction under *res ipsa loquitur* doctrine.

Cal.—Hercules Powder Co. v. Automatic Sprinkler Corp. of America, 311 P.2d 907, 151 C.A.2d 387.

(4) Instruction on law of attractive nuisance.

Ariz.—MacNeil v. Perkins, 324 P.2d 211, 84 Ariz. 74.

(5) Other instructions.

Ky.—Jones Savage Lumber Co. v. Thompson, 25 S.W.2d 373, 233 Ky. 198.

Mo.—Morris v. E. I. Du Pont de Nemours & Co., 173 S.W.2d 39, 351 Mo. 479.

Evidence held not to warrant instructions

Ill.—Featherstone v. Freeding, 110 N.E.2d 535, 349 Ill.App. 359.

Wash.—Seattle Taxicab Co. v. Texas Co., 57 P.2d 1237, 186 Wash. 363.

42. Mass.—Leahy v. Standard Oil Co., 107 N.E. 458, 220 Mass. 90.

25 C.J. p 211 note 17.

43. Ky.—Ray's Adm'r v. Standard Oil Co., 61 S.W.2d 1067, 250 Ky. 111.

Or.—Fisher v. Burrell, 241 P. 40, 116 Or. 317.

Tex.—Southwestern Oil Development Co. v. Illinois Torpedo Co., Civ. App., 252 S.W. 334, error dismissed Illinois Torpedo Co. v. Southwestern Oil Development Co., 278 S.W. 1115, 114 Tex. 582.

Where there was no allegation or issue made as to particular matter, trial court improperly charged jury

should not be confusing or misleading,⁴⁴ or prejudicial to a party,^{44,5} and must not enlarge the legal duty of defendant.⁴⁵

Where the instructions given wholly cover the rules of law and questions of fact involved, additional instructions need not be given.⁴⁶ When a case is submitted for a special verdict, it is error to inform the jury under what circumstances plaintiff can or cannot recover;⁴⁷ and where the doctrine of res ipsa loquitur does not apply, it is error to instruct that it is incumbent on defendant to explain the circumstances of the explosion.⁴⁸ Where several causes of the explosion are alleged, the court may instruct to find for defendant if from all the evidence the jury find that the cause of the explosion lies wholly within the realm of conjecture and doubt;⁴⁹ and an instruction making a verdict for plaintiff dependent on actual injury or damage from

the explosion is proper.⁵⁰ Where negligence is clearly shown, the court may give an instruction which in effect limits the jury's consideration to the sufficiency of the warning and contributory negligence.⁵¹

Blasting. In accordance with the rules discussed supra § 8, in a case where absolute liability is imposed for damages caused by blasting, it is proper to instruct that defendant is liable even though he was not negligent,⁵² even for injuries caused by concussion or vibration;⁵³ but, where absolute liability is not imposed, the instruction must make recovery dependent on negligence.⁵⁴

Particular instructions relating to blasting have been held proper,⁵⁵ such as instructions relating to defendant's negligence,⁵⁶ and instructions requiring him to exercise extraordinary diligence and care, and to give proper warning,⁵⁷ submitting to the

in such manner as to indicate that such was an issue in case.
Ga.—Atlantic Co. v. Taylor, 61 S.E. 2d 204, 82 Ga.App. 361.

Charge held not error

Ga.—Atlantic Co. v. Taylor, supra.

Refusal of instruction on res ipsa loquitur doctrine held not error.
Ark.—Reece v. Webster, 256 S.W.2d 345, 221 Ark. 826.

44. Ga.—Reed Oil Co. v. Smith, 114 S.E. 56, 154 Ga. 183, conformed to 114 S.E. 721, 29 Ga.App. 236.

Mo.—Morris v. E. I. Du Pont de Nemours & Co., 109 S.W.2d 1222, 341 Mo. 821.

R.I.—McArthur v. Dutee W. Flint Oil Co., 146 A. 484, 50 R.I. 226—Morris v. Texas Co., 115 A. 643.
25 C.J. p 211 note 18.

Instructions held misleading or confusing

U.S.—Nelson v. Grimes, C.A.Neb., 256 F.2d 816.

Ill.—Loverde v. Consumers Petroleum Co., 63 N.E.2d 673, 327 Ill.App. 210.

Instruction or charge held not misleading or confusing

Conn.—Killian v. Grandahl, 127 A.2d 72, 144 Conn. 92.

Ga.—Atlantic Co. v. Taylor, 61 S.E.2d 204, 82 Ga.App. 361.

44.5 Mass.—Kushner v. Dravo Corp., 158 N.E.2d 858.

45. U.S.—Fidelity & Deposit Co. of Maryland v. Lehigh Valley R. Co., C.C.A.N.J., 275 F. 922.
25 C.J. p 211 note 19.

Insurer

(1) Charge making defendants practically insurer of plaintiff held erroneous.

Ohio.—Vaughan v. Industrial Silica Corp., 42 N.E.2d 156, 140 Ohio St. 17.

(2) Instructions making carriers insurers held erroneous or properly refused.

U.S.—Fidelity & Deposit Co. of Maryland v. Lehigh Valley R. Co., C.C.A.N.J., 275 F. 922.

Ill.—Hertz v. Chicago, I. & S. R. Co., 154 Ill.App. 80.

Instructions held proper or not erroneous

(1) Instruction that defendant loaning and installing filling station equipment was bound to install reasonably safe equipment.

Pa.—Griffith v. Atlantic Refining Co., 157 A. 791, 305 Pa. 386.

(2) Instruction that defendant was required to take notice and knowledge of the dangerous and inflammable nature of crude oil.

Okl.—Texas Co. v. Robb, 212 P. 318, 88 Okl. 150.

(3) Instructions that defendant was under no legal duty to maintain fire hydrants or provide men and equipment to fight fire in its yards in addition to those furnished by the city.

U.S.—Fidelity & Deposit Co. of Maryland v. Lehigh Valley R. Co., C.C.A.N.J., 275 F. 922.

(4) Instruction that defendant's duty to keep secluded powder magazine locked or guarded depended entirely on the surrounding circumstances in evidence.

Ala.—Chambers v. Milner Coal & Ry. Co., 39 So. 170, 143 Ala. 255.

Instructions held erroneous

Okl.—Phillips Petroleum Co. v. Price, 298 P.2d 772.

46. U.S.—Sebeck v. Plattdeutsche Volksfest Verein, N.Y., 124 F. 11, 59 C.C.A. 531.

47. N.D.—Morrison v. Lee, 102 N.W. 223, 13 N.D. 591.

25 C.J. p 212 note 21.

48. N.Y.—Wetsell v. Relly, 145 N. Y.S. 167, 159 App.Div. 688.

49. Ala.—Whaley v. Sloss-Sheffield Steel, etc., Co., 51 So. 419, 164 Ala. 216, 20 Ann.Cas. 822.

50. Mo.—Thurmond v. Ash Grove White Lime Assoc., 102 S.W. 619, 125 Mo.App. 57.

51. R.I.—Wells v. Knight, 80 A. 16, 32 R.I. 432.

52. Cal.—Munro v. Pacific Coast Dredging & R. Co., 24 P. 303, 84 C. 515, 18 Am.S.R. 248.
25 C.J. p 212 note 30.

53. Tenn.—City of Knoxville v. Peebles, 87 S.W.2d 1022, 19 Tenn. App. 340.

54. U.S.—Bennett v. Texas-Illinois Gas Pipeline Co., D.C.Ark., 113 F. Supp. 788.

N.Y.—Wiener v. Hammell, 14 N.Y.S. 365.

55. Tex.—Universal Atlas Cement Co. v. Oswald, 157 S.W.2d 636, 138 Tex. 159.

Instruction based on statute defining offense of recklessly using blasting powder was held not improper.
Mont.—Cashin v. Northern Pac. Ry. Co., 28 P.2d 862, 96 Mont. 92.

Where woman was injured in falling or rising from her chair, at the time of a blast, it was held proper to instruct that if she was injured in attempting to arise from her chair at the time of the blast, she could recover.

Mass.—Cameron v. New England Tel. & Tel. Co., 65 N.E. 385, 182 Mass. 310.

56. Ky.—Louisville & N. R. Co. v. Smith's Adm'r, 263 S.W. 29, 203 Ky. 513, 35 A.L.R. 1238.

57. Ind.—Wright v. Compton, 53 Ind. 337.

jury the issue whether the methods used by defendant were reasonable under the circumstances,⁵⁸ authorizing recovery only on the hypothesis that the blast was exploded without reasonable notice or proper warning of the danger, which would have enabled plaintiff to have avoided it by the exercise of proper care,⁵⁹ or requiring a finding for defendant unless he used larger quantities of explosives than was reasonably necessary.⁶⁰

Instructions relating to the conduct or knowledge of the person injured,⁶¹ such as an instruction that plaintiff may recover if he had no notice of the blast in question, and did not know of the custom of giving notice of the blasts,⁶² have also been held proper, as has an instruction that defendant is responsible only for damages proximately and naturally resulting from the use of high explosives.⁶³

Other instructions have been held improper,⁶⁴ such as an instruction stating the penalty for a misdemeanor based on the reckless use of explosives,⁶⁵ and an instruction that the jury could not consider

any conduct of plaintiff as regards care for his own safety in connection with the blasting.⁶⁶ Where plaintiff is entitled to compensatory or nominal damages, a general charge for defendant should be refused in an action for trespass by blasting, although there is no evidence of aggravation justifying exemplary damages.⁶⁷

Where a case is tried on the theory that charges were exploded too close to plaintiff's well, it may be held error for the court to refuse to give the jury an appropriate definition of the term "too close."^{67.5}

Sale of explosives. In an action for injuries resulting from the sale of explosives, the instructions should fully and correctly state the law applicable to the case,⁶⁸ fairly and reasonably present the issues,⁶⁹ and be supported by the evidence;⁷⁰ they should not be prejudicial⁷¹ or misleading.⁷²

Particular instructions have been held proper or improper as relating to negligence,⁷³ the effect of

58. Ky.—Williams v. Codell Const. Co., 69 S.W.2d 20, 253 Ky. 166, 92 A.L.R. 737.

59. Ky.—Louisville, etc., R. Co. v. Hofgesang, 13 Ky.L. 829.

60. Ky.—Brooks-Calloway Co. v. Carroll, 29 S.W.2d 592, 235 Ky. 41.

61. Assumption of risk

Instruction that quarry owner killed by rock blasted from another nearby quarry assumed risk if he was warned in time to seek protection, but voluntarily remained in open, was held authorized by pleadings and evidence.

Ky.—Adams' Adm'r v. Callis & Hughes, 69 S.W.2d 711, 253 Ky. 382.

62. Pa.—Stephens v. Martins, 17 A. 242, 1 Mon. 376.

63. Tenn.—City of Knoxville v. Peebles, 87 S.W.2d 1022, 19 Tenn.App. 340.

64. **Peremptory instruction** for defendants held properly denied in an action for damages caused by blasting.

Ky.—Vincennes Bridge Co. v. Poulos, 15 S.W.2d 271, 228 Ky. 446.

65. Mont.—Cashin v. Northern Pac. Ry. Co., 28 P.2d 862, 96 Mont. 92.

66. Conn.—Worth v. Dunn, 118 A. 467, 198 Conn. 51.

67. Ala.—Ex parte Birmingham Realty Co., 63 So. 67, 183 Ala. 444.

67.5 Tex.—Sinclair Oil & Gas Co. v. Gordon, Civ.App., 319 S.W.2d 170.

68. Cal.—Fidelity & Casualty Co. of New York v. Paraffine Paint Co., 204 P. 1076, 188 C. 184.

Mich.—Sunday v. Wolverine Service Stations, 251 N.W. 402, 265 Mich. 19.

N.Y.—Treacy v. F. W. Woolworth Co., 1 N.Y.S.2d 919, 253 App.Div. 899.

Instructions held fairly and clearly to present law

U.S.—Altrichter v. Shell Oil Co., D. C. Minn., 161 F.Supp. 46.

Instructions held proper or not erroneous

(1) Charge respecting standard of kerosene required by law for cooking purposes.

Ga.—Hodges v. Ashurst, 3 S.E.2d 99, 60 Ga.App. 157.

(2) Instruction permitting jury to consider size of revolver and shells in determining whether use of revolver in vacant lot was in compact part of town.

N.H.—Cote v. Sears, Roebuck & Co., 166 A. 279, 86 N.H. 233.

(3) In an action against a wholesaler and retailers, it was error to refuse instructions requested by wholesaler that retailers were not its agents and that it was not liable for their acts; that proof that oil was defective when sold to plaintiff was not proof that it was defective when sold to retailer; that defendant corporation was entitled to same fair and impartial trial as if it were individual; that if accident was purely unavoidable, verdict should be for defendant; that verdict should not be based on mere guess, speculation, or conjecture.

Ind.—Standard Oil Co. of Indiana v. Robb, 149 N.E. 567, 85 Ind.App. 21.

69. Okl.—Spencer v. Bolt, 200 P. 187, 82 Okl. 280.

70. Cal.—Fidelity & Casualty Co. of New York v. Paraffine Paint Co., 204 P. 1076, 188 C. 184.

71. Tenn.—Read Phosphate Co. v. Vickers, 11 Tenn.App. 146.

72. Cal.—Fidelity & Casualty Co. of New York v. Paraffine Paint Co., 204 P. 1076, 188 C. 184.

Ga.—General Oil Co. v. Crowe, 187 S.E. 221, 54 Ga.App. 139—Shermer v. Crowe, 186 S.E. 224, 53 Ga.App. 418.

73. Instructions held proper or not erroneous

(1) Instruction that a dealer selling oils must discover their explosive character, by proper tests, at all hazards, or be held liable for resulting damages.

Iowa.—Chapman v. Pfarr, 132 N.W. 957, 153 Iowa 20.

(2) Instructions relieving seller of duty to inspect subject matter of sale.

Ga.—General Oil Co. v. Crowe, 187 S.E. 221, 54 Ga.App. 139.

(3) In action for death of housewife killed when kerosene exploded, charge that defendants contended that housewife failed to exercise ordinary care to protect herself against defendants' negligence was not erroneous as instructing jury that defendants admitted guilt of negligence.

Ga.—General Oil Co. v. Crowe, supra.

(4) Other instructions.

Mich.—Zook v. Theisen-Clemens Co., 263 N.W. 875, 273 Mich. 536.

violation of a statute,⁷⁴ proximate cause,⁷⁵ and contributory negligence.⁷⁶

§ 11(11). — — — Verdict, Findings, Judgment, and Review

General rules governing verdicts, findings, judgments, and review in civil actions apply in actions relating to explosives.

The verdict in an action relating to explosives should be responsive to the evidence or instructions,⁷⁷ and should be consistent.⁷⁸ A particular verdict for defendant has been held not to disclose that the jury had been confused and influenced by passion and prejudice or had fallen into plain mistake.^{78.5}

Instructions held erroneous or properly refused

N.Y.—Treacy v. F. W. Woolworth Co., 1 N.Y.S.2d 919, 253 App.Div. 899.

74. Negligence per se

Charge that defendant's sale of kerosene which was below standard for ordinary use would constitute violation of law and render dealer guilty of negligence per se was not error.

Ga.—Shermer v. Crowe, 186 S.E. 224, 53 Ga.App. 418.

75. Instructions held proper or not erroneous

Ga.—Shermer v. Crowe, supra.
Mich.—Zook v. Theisen-Clemens Co., 263 N.W. 875, 273 Mich. 536.

76. Instructions held proper or not erroneous

(1) Instruction that, if explosion occurred while decedent was pouring oil on fire in stove, recovery was barred.
N.H.—Olena v. Standard Oil Co., 135 A. 27, 82 N.H. 408.

(2) Instruction that plaintiff, who threw kerosene on fire which had been started, was contributorily negligent as a matter of law.
U.S.—Sinclair Refining Co. v. Tompkins, C.C.A.Miss., 117 F.2d 596.

(3) In an action for death resulting from explosion of paint, an instruction that, if decedent could have seen the warning notice and notwithstanding it he applied a lighted match to the paint, and in so doing did something which a reasonable and prudent man would not have done, he was contributorily negligent, was not erroneous for using the word "could" instead of "should" with reference to seeing the label, since the finding as to whether his striking the match under such circumstances was the act of a reasonable man involved the question whether he should have seen the label.

Cal.—Fidelity & Casualty Co. of New York v. Paraffine Paint Co., 204 P. 1076, 188 C. 184.

(4) Other instructions.

Mich.—Zook v. Theisen-Clemens Co., 263 N.W. 875, 273 Mich. 536.

Instruction held objectionable

Instruction that, if oil can exploded while standing on floor near fire, decedent was not careless.

N.H.—Olena v. Standard Oil Co., 135 A. 27, 82 N.H. 408.

77. Pa.—Villiers v. Middle-West Const. Co., Com.Pl., 91 Pittsb.Leg. J. 293—Jeffrey v. Coal Corporation, 18 Wash.Co. 50.

Verdict held supported by substantial evidence

U.S.—St. Joseph Lead Co. v. Prather, C.A.Mo., 238 F.2d 301.

Verdict held not manifestly against evidence

Ill.—Bunyan v. American Glycerin Co., 230 Ill.App. 351.

78. Ind.—Standard Oil Co. of Indiana v. Robb, 149 N.E. 567, 85 Ind.App. 21.

78.5 N.H.—Glidden v. Brown, 110 A. 2d 277, 99 N.H. 323.

78.10 Findings held supported by credible evidence

Wis.—Hadjenian v. Sears, Roebuck & Co., 90 N.W.2d 786, 4 Wis.2d 298.

Finding held to justify conclusion that cracks in building resulted from blast

Conn.—Scranton v. L. G. De Felice & Son, 79 A.2d 600, 137 Conn. 580.

78.15 Irreconcilable conflict

Where jury gave affirmative answer to question whether welder knew or should have known of danger, if any, in attempting to weld on pump attached to tank, and negative answer to question whether welder knew or should have known of danger, if any, to his safety in welding pulley on pump on tank, answers were in irreconcilable conflict

Findings in civil suits based on negligence with respect to explosives should be construed and given effect according to their intentment.^{78.10} The findings should not be contradictory and inconsistent with each other,^{78.15} and where a special finding is inconsistent with the general verdict, the special finding ordinarily controls.^{78.20}

The judgment in such an action must conform to, and be supported by, the verdict or findings.⁷⁹

Review. The general rules as to appeal and error apply to appeals in actions relating to explosives.^{79.5} The reviewing court will not declare that there was a failure of evidence that an explosion was caused by the dangerous character of the oil or other ex-

and left court without an essential finding on defense of assumed risk.
Tex.—City of El Paso v. Parish, Civ. App., 293 S.W.2d 201, error refused no reversible error.

78.20 Ill.—Prochaska v. De Costa, 63 N.E.2d 794, 327 Ill.App. 209.

79. Judgment held proper

N.Y.—Griffiths v. Yonkers Contracting Co., 151 N.Y.S.2d 468, 1 A.D.2d 1020, appeal denied 153 N.Y.S.2d 601, 2 A.D.2d 706.

Pa.—Federoff v. Harrison Const. Co., 66 A.2d 817, 362 Pa. 181.

Findings held to sustain judgment
Cal.—Raich v. Aldon Const. Co., 276 P.2d 822, 129 C.A.2d 278.

Judgment in excess of verdict

It is error to enter a judgment for damages caused by unlawful blasting, in excess of the verdict, and such error will be remedied on appeal.

Cal.—Colton v. Onderdonk, 10 P. 395, 69 C. 155, 58 Am.R. 556.

Express finding of negligence held unnecessary to support judgment.

Cal.—Feeney v. Standard Oil Co., 209 P. 85, 58 C.A. 587.

Special findings held not to require judgment for defendant

Kan.—Ladlie v. American Glycerin Co., 223 P. 272, 115 Kan. 507—Thompson v. Union Traction Co., 191 P. 278, 107 Kan. 238.

79.5 Abuse of discretion held not shown

Mo.—Cole v. Uhlmann Grain Co., 100 S.W.2d 311, 340 Mo. 277.

Prejudicial error held shown

Mo.—Morris v. E. I. Du Pont De Nemours & Co., 139 S.W.2d 984, 346 Mo. 126, 129 A.L.R. 352.

Vt.—Tinney v. Crosby, 22 A.2d 145, 112 Vt. 95.

Prejudicial error held not shown

Mo.—Cole v. Uhlmann Grain Co., 100 S.W.2d 311, 340 Mo. 277.

N.J.—Stanley Co. of America v. Hercules Powder Co., 108 A.2d 616, 16 N.J. 295.

plosive, where the physical exhibits connected with the explosion are not brought up with the other evidence.⁸⁰ Where the appellate court is equally divided as to whether the judgment should be affirmed or reversed, the judgment is affirmed by operation of law.^{80.5}

§ 11(12). — — — Damages

In actions relating to explosives, recovery may be had for all elements of damage which are the natural and proximate consequences of the wrong. The measure of damage for injury to property is an amount which would fairly compensate for the injury, such as the resulting difference in value or the cost of repair.

In actions relating to explosives, damages, to be recoverable, must be the natural and proximate consequences of the wrong suffered by plaintiff.⁸¹ Where some part of the damages caused by blasting is the result of vibration or concussion and not the result of trespass, there can be no recovery for such damage in the absence of a finding of negligence.^{81.5} Claims are limited to personal injury or physical property damage, and the claims of one who has suffered an economic loss based on contract will not be recognized.^{81.10}

A recovery may be had for physical pain and suffering,⁸² physical injury,⁸³ loss of earnings or services,⁸⁴ deterioration in the value of property,⁸⁵ loss of rents and profits,⁸⁶ or interruption of busi-

ness.⁸⁷

Mental suffering from fright and anxiety may properly be considered in assessing damages, in connection with physical injury;⁸⁸ but it has been held that damages cannot be awarded for fright independent of any physical injury,⁸⁹ and no damages can be recovered for imaginary suffering or fanciful anxiety of mind.⁹⁰

The penal sum of a bond to pay damages caused by the use of explosives need not be apportioned among persons suing thereon before judgment.⁹¹

A question as to damages may be properly submitted to the jury, even though not pleaded, when evidence with respect thereto is introduced without objection on such ground.^{91.5}

The measure of damage for injury to property caused by an explosion is an amount which would fairly compensate for the injury,⁹² such as the difference between the value of the injured property before the explosion and its value thereafter,⁹³ or the cost of repairing and restoring it to its former condition,⁹⁴ provided the cost of restoration is less than the depreciation in value.⁹⁵

Exemplary damages may be recovered only where the elements authorizing their award under general rules are present.⁹⁶ Thus, plaintiff is not entitled to

80. U.S.—Standard Oil Co. v. Parrish, Ill., 145 F. 829, 76 C.C.A. 405.

80.5 Ohio.—James v. Cities Service Oil Co., 43 N.E.2d 276, 140 Ohio St. 314.

81. Pa.—Racker v. Lawrence Portland Cement Co., Com.Pl., 29 North. Co. 118.

Tenn.—Aycock v. Nashville, Chattanooga & St. Louis Ry. Co., 4 Tenn. App. 655.

25 C.J. p 212 note 41.

Buyer held not entitled to damages from seller of butane gas tank because of leak in tank on theory of negligence based on alleged violation of compressed gas equipment inspection acts, in absence of showing of any violation.

Miss.—Mississippi Butane Gas Systems v. Welch, 45 So.2d 262, 208 Miss. 637.

81.5 N.Y.—Coley v. Cohen, 45 N.E.2d 913, 289 N.Y. 365, motion denied 49 N.E.2d 1007, 290 N.Y. 739. Nordone v. Mondo, 56 N.Y.S.2d 606, 269 App.Div. 896.

Lewis v. Dunbar & Sullivan Dredging Co., 36 N.Y.S.2d 897, 178 Misc. 980.

Liability as a result of negligence in blasting generally see supra § 8.

81.10 Ohio.—Stevenson v. East Ohio Gas Co., App., 73 N.E.2d 200.

82. Del.—Mills v. Wilmington City R. Co., 40 A. 1114, 15 Del. 269.

83. Del.—Mills v. Wilmington City R. Co., supra.

84. U.S.—Hazard Powder Co. v. Volger, Wyo., 58 F. 152, 7 C.C.A. 130. 25 C.J. p 213 note 44.

85. Ky.—Jefferson County v. Pohlman, 49 S.W.2d 344, 243 Ky. 556. Mo.—Iven v. Winston Bros. Co., App., 48 S.W.2d 125.

Pa.—Forster v. Rogers, 93 A. 26, 247 Pa. 54.

Tenn.—Aycock v. Nashville, Chattanooga & St. Louis Ry. Co., 4 Tenn. App. 655.

86. Colo.—G. B. & L. R. Co. v. Eagles, 13 P. 696, 9 Colo. 544.

87. Mass.—Hunter v. Farren, 127 Mass. 481, 34 Am.R. 423. 25 C.J. p 213 note 47.

88. Ala.—Birmingham Realty Co. v. Thomason, 63 So. 65, 8 Ala.App. 535. 25 C.J. p 213 note 48.

89. Pa.—Hess v. American Pipe Mfg. Co., 70 A. 294, 221 Pa. 67. 25 C.J. p 213 note 49.

90. Ind.—Wright v. Compton, 53 Ind. 337.

Mass.—Driscoll v. Gaffey, 92 N.E. 1010, 207 Mass. 102.

91. Mass.—Jenkins v. A. G. Tomasello & Son, 189 N.E. 817, 286 Mass. 180.

91.5 Ky.—Marlowe Const. Co. v. Jacobs, 302 S.W.2d 612.

92. Mo.—Iven v. Winston Bros. Co., App., 48 S.W.2d 125.

Pa.—Villiers v. Middle-West Const. Co., Com.Pl., 91 Pittsb.Leg.J. 293.

93. Ky.—Jefferson County v. Pohlman, 49 S.W.2d 344, 243 Ky. 556. Mo.—Iven v. Winston Bros. Co., App., 48 S.W.2d 125.

Pa.—Racker v. Lawrence Portland Cement Co., Com.Pl., 29 North. Co. 118.

Tenn.—Aycock v. Nashville, Chattanooga & St. Louis Ry. Co., 4 Tenn. App. 655.

94. Ill.—Fitzsimons & Connell Co. v. Braun, 65 N.E. 249, 199 Ill. 390, 59 L.R.A. 421.

Pa.—Racker v. Lawrence Portland Cement Co., Com.Pl., 29 North. Co. 118.

1 C.J. p 1207 note 43.

95. Tenn.—Aycock v. Nashville, Chattanooga & St. Louis Ry. Co., 4 Tenn.App. 655.

96. N.C.—Cobb v. Atlantic Coast

exemplary damages where defendants did not act with malice and were not prompted by malice.^{96.5}

§ 12. Criminal Responsibility

- a. In general
- b. Construction and operation of statutes
- c. Indictment, information, or complaint
- d. Evidence
- e. Trial

a. In General

Reasonable and enforceable statutes or ordinances making it an offense to use, keep, sell, or transport explosives otherwise than in conformity with prescribed regulations are ordinarily upheld.

The validity of statutes or municipal ordinances which make it unlawful to use, keep, sell, or transport explosives otherwise than in conformity with

prescribed regulations has ordinarily been sustained,⁹⁷ provided they are not uncertain,⁹⁸ unreasonable,⁹⁹ or unenforceable,¹ and even though the necessarily general form of the law may embrace some innocent objects.²

Fireworks. The possession, sale, or use of fireworks, other than under specified statutory requirements, may constitute an offense.^{2.5}

b. Construction and Operation of Statutes

Statutes making punishable acts or omissions as to explosives are construed strictly and in favor of accused, but they must also be construed reasonably and with a view to the object sought to be accomplished.

In determining the construction of a statute making punishable acts or omissions with reference to explosives, the object sought to be accomplished by the statute must be considered.³ Such statutes, be-

Line R. Co., 95 S.E. 92, 175 N.C. 139.

25 C.J. p 213 note 52.

Evidence held to justify verdict for exemplary damages

Colo.—Garden of the Gods Village v. Hellman, 294 P.2d 597, 133 Colo. 286.

96.5 Tex.—Kennedy v. Geophysical Co., Civ.App., 213 S.W.2d 707, error refused no reversible error.

97. U.S.—Pierce Oil Corp. v. Hope, Ark., 39 S.Ct. 172, 248 U.S. 498, 63 L.Ed. 381.

25 C.J. p 213 notes 54, 56.

98. Iowa.—Edwards & Browne Coal Co. v. Sioux City, 240 N.W. 711, 213 Iowa 1027.

25 C.J. p 213 note 54 [b].

99. Ala.—Standard Oil Co. v. Birmingham, 79 So. 489, 202 Ala. 97.

1. Iowa.—Edwards & Browne Coal Co. v. Sioux City, 240 N.W. 711, 213 Iowa 1027.

25 C.J. p 213 note 54 [b].

2. U.S.—Pierce Oil Corp. v. Hope, Ark., 39 S.Ct. 172, 248 U.S. 498, 63 L.Ed. 381.

2.5 N.Y.—Caldwell v. Village of Island Park, 107 N.E.2d 441, 304 N.Y. 268.

Pa.—Commonwealth v. Bristow, 138 A.2d 156, 185 Pa.Super. 448.

3. N.M.—State v. Ornelas, 74 P.2d 723, 42 N.M. 17.

Ohio.—Wilson v. State, 159 N.E. 585, 26 Ohio App. 7.

25 C.J. p 214 note 58.

Particular terms defined or construed

(1) Meaning of word "explosives," in statute prohibiting possession of certain explosives for unlawful purposes, is determined by statutory,

rather than lexicographers', definition.

Ohio.—Wechsler v. State, 179 N.E. 356, 124 Ohio St. 401.

(2) Word "within," in statute denouncing crime of exploding dynamite within building, means in the inner or interior part of the building, and does not mean near, about, or adjacent to.

Ky.—Commonwealth v. Becknell, 84 S.W.2d 24, 260 Ky. 207.

(3) A water tank used to supply a town and mining operations therein is a "building" within a statute penalizing the explosion of explosives in, under, or near any building, etc., or other place where human beings usually frequent, inhabit, assemble, or pass, and such statute does not require that an explosion or attempted explosion at or near buildings shall be at a place where human beings usually frequent, inhabit, assemble, or pass.

N.M.—State v. Ornelas, 74 P.2d 723, 42 N.M. 17.

(4) Where the word "explosives" is not defined in the statute, it must be presumed to have been used by the legislature in its ordinary sense, that is, according to common understanding.

Pa.—Commonwealth v. Bristow, 138 A.2d 156, 185 Pa.Super. 448.

(5) Statute defining "fireworks" was held not so vague, indefinite, uncertain, or ambiguous as to render it void and unenforceable, and was not unconstitutional.

Colo.—People v. Young, 339 P.2d 672.

Actual damage unnecessary

(1) Statute making it unlawful to use dynamite to injure property held not to require that actual damage be done to constitute offense.

Hawaii.—Territory v. Palai, 23 Hawaii 133.

(2) One causing explosion, with intent to do damage to property or injury to person, is guilty of complete offense under statute, regardless of whether damage or injury results.

Pa.—Commonwealth v. Kocher, 60 A. 2d 385, 162 Pa.Super. 605.

Possession

Under statutes permitting prosecution, as principals, of all persons concerned in commission of offense, automobile occupant who had knowledge that dynamite was in automobile could be convicted for statutory offense of malicious and reckless possession of dynamite, regardless of whether any portion of dynamite was actually on person of occupant, or on persons of any other people in automobile.

Cal.—People v. Buyle, 68 P.2d 268, 20 C.A.2d 650.

Buyer's intention

(1) Under a statute punishing the sale of explosives with intent that they be used for injury to, and destruction of, life and property, a sale of bombs, with reasonable grounds to believe buyer intended unlawful use, completes offense, although buyer's intention be lawful.

Ill.—People v. Ficke, 175 N.E. 543, 343 Ill. 367.

(2) However, where the statute punishes the selling or giving of explosives to another, knowing that such explosives are intended to be used for the injury or destruction of property or of persons, a fictitious intent on the part of the person to whom the explosives are given will not sustain a conviction.

Wis.—Koscak v. State, 152 N.W. 181, 160 Wis. 255.

ing penal, are construed strictly⁴ and in favor of accused;⁵ but they must also be construed reasonably and not with undue technicality so as to defeat their purpose.⁶ The criminal section of a statute relating to explosives controls, in cases falling within such section, over general provisions in other sections of the statute,⁷ and a statutory provision defining certain offenses with reference to explosives is not repealed by a subsequent statute regulating the manufacture and sale of explosives.⁸

Under a statute punishing the procuring of explosives with intent to use them for the unlawful injury to, or destruction of, life or property, going to a place where stolen explosives have been concealed in order to get them for an unlawful use constitutes a procuring of them within the meaning of the statute,⁹ and the possession of explosives is proof of the procurement thereof, although not of the requisite intent.¹⁰ A statute punishing persons who shall "keep for sale" particular substances regarded as explosive is applicable, without regard to the question of ownership, to one who as agent for another keeps and sells such property.¹¹

Elements of offense. The elements constituting the crime of violating a statute dealing with the malicious use of explosives are the intent to injure, terrify, or intimidate a human being and the placing or depositing, or attempting to deposit, an ex-

plosive in a place normally used by human beings.^{11.5}

A criminal intent is a necessary element of the offense of using, exploding, or having in possession any fireworks in violation of a statute.^{11.10}

Placing explosives. Where the statute punishes the preparation of combustible matter or explosive substances and putting them in any place with the intent to set fire or blow up or destroy any house, etc., there must be both a preparation and a placing in order to constitute an offense,¹² but it is not necessary that the explosive or combustible shall have been set afire.¹³ The explosive must have been placed in the place to be destroyed or at least in a place near by.¹⁴

Bombing statute. The particular evil sought to be curbed by the enactment of a bombing statute is violence to persons or property through the use of bombs or other explosives in, on, or near certain vehicles and designated places.^{14.5} In order to justify a conviction under such a statute for bombing a vehicle, it is not necessary to show that the bomb was hurled, thrown, or dropped into the vehicle;^{14.10} and so long as the letter and spirit of the statute are violated, it is immaterial that the statute, at the time of its original enactment, was intended to cover treason and sabotage or violence in connection with strikes.^{14.15}

Whether person was placed in danger of bodily injury as result of defendant's act would not be determined, in prosecution for bombing, from results alone, but would also embrace manner, method and means employed by defendant.

Mo.—State v. Londe, 132 S.W.2d 501, 345 Mo. 185.

4. U.S.—Petition of Boat Demand, Inc., D.C.Mass., 160 F.Supp. 833.

Ohio.—Wechsler v. State, 179 N.E. 356, 124 Ohio St. 461.

List of exceptions in fireworks statute is to be strictly construed and cannot be enlarged.

Colo.—People v. Young, 339 P.2d 672.

5. Ohio.—Wilson v. State, 159 N.E. 585, 26 Ohio App. 7.

6. Ohio.—Wilson v. State, *supra*.

7. Ohio.—Wilson v. State, *supra*.

Careless use of explosives

The sections of act relating to explosives covering careless use of explosives and penalty to be imposed in case of death caused by violation of act were special provisions to be regarded as exceptions to general provision relating to penalty, and therefore offense of careless use of

explosives was a misdemeanor as stated in that particular section.

Mont.—State v. Williams, 79 P.2d 314, 106 Mont. 516, followed in State v. Larson, 79 P.2d 316, 106 Mont. 525.

8. Mont.—Cashin v. Northern Pac. Ry. Co., 28 P.2d 862, 96 Mont. 92.

9. Ill.—People v. Robertson, 120 N.E. 539, 284 Ill. 620.

10. Ill.—People v. Catuara, 193 N.E. 199, 358 Ill. 414.

11. Conn.—State v. Boylan, 65 A. 595, 79 Conn. 463.

25 C.J. p 214 note 59.

11.5 Cal.—People v. Grant, 233 P.2d 660, 105 C.A.2d 347.

11.10 N.Y.—People v. Armstrong, 114 N.Y.S.2d 871, 203 Misc. 105.

12. La.—State v. Helle, 68 So. 735, 137 La. 388.

13. La.—State v. Helle, *supra*.

14. La.—State v. Helle, *supra*.
25 C.J. p 214 note 64.

14.5 Miss.—Rogers v. State, 89 So. 2d 860, 228 Miss. 373.

Bomb defined

(1) Noun "bomb" was intended to designate an infernal machine employing explosives contrived by crim-

inals to accomplish bodily injury or destruction of property.

Miss.—Rogers v. State, *supra*.

(2) Under statute making bombing a criminal offense, term "bomb" is not restricted to its military significance, but is used in broader sense to include a device or object containing an explosive connected with a fuse.

Mo.—State v. Londe, 132 S.W.2d 501, 345 Mo. 185.

14.10 Miss.—Rogers v. State, 89 So. 2d 860, 228 Miss. 373.

Acts held within statute

Placing dynamite in bus, while it was empty and parked near residence of bus driver, so that the dynamite would explode when ignition was turned on by bus driver when he boarded the bus to begin his morning run, was clearly within bombing statutes.

Miss.—Rogers v. State, *supra*.

Requirement that vehicle be occupied

Where bus driver was in bus when dynamite exploded, presence of bus driver in bus when bomb exploded was sufficient to satisfy requirements of bombing statute that bus be occupied.

Miss.—Rogers v. State, *supra*.

14.15 Miss.—Rogers v. State, *supra*.

Sale of oil or gasoline below test or standard. In the absence of any express statutory provision as to the instrument to be used in determining the temperature at which oil is inflammable, and of any facts showing that it was intended that any particular instrument or method should be used in ascertaining the point of inflammability, those reasonably accessible instruments and methods by which that point can be most accurately ascertained should be used for the purpose.¹⁵ Under a statute punishing the keeping for sale of illuminating oils inflammable at less than a specified temperature, the oil is "inflammable" at the "fire" point as distinguishable from the "flash" point.¹⁶ A wholesale dealer may be liable where he sells oil below the requisite standard, and with knowledge that it is purchased to be retailed for the ordinary purposes of heating and illuminating, to one who retails it in the course of his business.¹⁷ Although the statute makes it unlawful to sell or offer for sale illuminating oils, including naphtha, below a standard fixed by law, it is not unlawful to generate gas from naphtha from a stationary gas machine.¹⁸

Transportation. The acts of congress making it unlawful to transport explosives upon any vessel or vehicle operated by a common carrier in interstate commerce and carrying passengers are applicable to passengers or persons traveling upon the trains as well as to the carrier,¹⁹ and have been said, by way of dictum, to apply to intra-state, as well as interstate, shipments.²⁰ The person who sends the

explosive violates the statute, as does the person who receives it.²¹ The prohibition against transporting nitroglycerine upon vehicles engaged in interstate passenger traffic extends also to dynamite made by mixing nitroglycerine with some solid and inert absorbent substance;²² and a statute regulating the shipment of gun cotton is applicable to nitro cellulose, either wet or dry.²³

Where the character of goods is discovered before their actual shipment, which is thereby prevented, the person offering the goods for shipment is not liable for a penalty imposed for shipping them.²⁴

The failure of those transporting explosives or highly inflammable material to stop before a railroad crossing may be made a statutory offense;^{24,5} and it has been stated that the power of the legislature to enact such a statute cannot be doubted.^{24,10} The purpose of such a statute is to prevent collisions between trains and vehicles transporting dangerous materials.^{24,15}

The violation of regulations of the Interstate Commerce Commission promulgated under a statute dealing with the transportation of explosives is also an offense.^{24,20}

Defenses. The fact that a wholesale dealer had no personal knowledge of the quality of the oil sold by him is not a defense.²⁵ In a prosecution for the carrying of explosives upon a train carrying passengers, it is no defense that accused was an officer

15. Conn.—*State v. Boylan*, 65 A. 595, 79 Conn. 463.
25 C.J. p 214 note 65.

16. Conn.—*State v. Boylan*, *supra*.
25 C.J. p 214 note 66.

17. N.Y.—*People v. Nobles*, 1 N.Y. Cr. 459.

18. Ga.—*Anderson v. Savannah*, 69 Ga. 472.

19. U.S.—*Ryan v. U. S. Ind.*, 216 F. 13, 132 C.C.A. 257, certiorari denied 34 S.Ct. 603, 232 U.S. 726, 58 L.Ed. 816.

"These statutes are important regulations of commerce, designed for the protection of the lives of passengers and others, and must also be regarded as an important safeguard for the prevention of the use of instrumentalities of interstate and foreign commerce in aid of crimes which involve the use of high explosives."

U.S.—*Horn v. Mitchell*, Mass., 232 F. 819, 820, 147 C.C.A. 13, appeal dismissed 37 S.Ct. 293, 243 U.S. 247, 61 L.Ed. 700.

Freight train

For purposes of such statute, a freight train may be regarded as a

passenger train when passengers are conveyed for compensation in any kind of cars by authority of the railway company.

U.S.—*U. S. v. Saul*, D.C.N.C., 58 F. 763.

20. U.S.—*Watson v. St. Louis, I. M. & S. R. Co.*, C.C.Ark., 169 F. 942, affirmed 32 S.Ct. 533, 223 U.S. 745, 56 L.Ed. 639.

21. U.S.—*U. S. v. Saul*, D.C.N.C., 58 F. 763.

22. U.S.—*U. S. v. Saul*, *supra*.

23. Pa.—*Gun Cotton Shipment*, 38 Pa.Co. 552.

24. U.S.—*U. S. v. Chenoweth*, C.C. Ohio, 25 F.Cas.No.14,792, 6 McLean 139.

24.5 Ind.—*New York Cent. Ry. Co. v. Powell*, 47 N.E.2d 615, 221 Ind. 321—*Heiny v. Pennsylvania R. Co.*, 47 N.E.2d 145, 221 Ind. 367.

24.10 Ind.—*Heiny v. Pennsylvania R. Co.*, *supra*.

24.15 Ind.—*New York Cent. Ry. Co. v. Powell*, 47 N.E.2d 615, 221 Ind. 321.

24.20 U.S.—*U. S. v. Boyce Motor Lines, Inc.*, C.A.N.J., 188 F.2d 889,

affirmed 72 S.Ct. 329, 342 U.S. 337, 96 L.Ed. 367.

Regulations held valid

U.S.—*Boyce Motor Lines, Inc. v. U. S.*, N.J., 72 S.Ct. 329, 342 U.S. 337, 90 L.Ed. 367.

U. S. v. A. & P. Trucking Corp., D.C.N.J., 113 F.Supp. 549.

Regulations construed

(1) Particular regulations.

U.S.—*U. S. v. Boyce Motor Lines, Inc.*, C.A.N.J., 188 F.2d 889, affirmed 72 S.Ct. 329, 342 U.S. 337, 96 L.Ed. 367.

(2) Canons of statutory construction applicable.

U.S.—*U. S. v. A. & P. Trucking Corp.*, D.C.N.J., 113 F.Supp. 549.

(3) Strict construction in favor of accused.

U.S.—*U. S. v. A. & P. Trucking Corp.*, *supra*.

Regulation specifying test to determine flammable liquids held mandatory

U.S.—*U. S. v. A. & P. Trucking Corp.*, *supra*.

25. N.Y.—*People v. Nobles*, 1 N.Y. Cr. 459.

in the army of a foreign country engaged in war and that the explosive was so carried for the purpose of being used in an alleged act of war in the enemy territory.²⁶

c. Indictment, Information, or Complaint

An indictment or information charging violation of a statute punishing acts involving explosives must set forth all the facts necessary to bring accused within the applicable statutory provisions; but the statutory form need not be followed.

An indictment or information charging a violation of a statute or regulation punishing acts with reference to explosives must set forth all the constituent facts and circumstances necessary to bring accused within the applicable statutory provisions;²⁷ and where the indictment is otherwise sufficient, words which are merely surplusage may be eliminated, and such elimination does not affect the validity of the indictment.^{27.5} Thus, a charge of carrying nitroglycerine does not show a violation of a statute prohibiting the carrying of a cartridge containing dynamite,²⁸ nor does a charge of carrying and depositing dynamite caps show a violation of a statute as to shells or bombs containing dynamite.²⁹

An indictment charging a manufacturer of explosives with a failure to obey an order issued by an officer of the state as to the conditions in and about the factory must charge that the order was issued by an officer vested with authority under the law.³⁰ An indictment charging possession and control of cartridges and bombs sufficiently charges the offense of unlawful possession or use of explosives;³¹ but an indictment charging possession of a bomb without naming the type, kind, or nature of the bomb is insufficient.^{31.5} However, an indictment which charges accused with unlawfully possessing and having in his control a bomb, which is described as a collection of nitroglycerine, capable by its ignition and explosion of causing damage to persons and property, is sufficient to describe a bomb within a statute making possession or control of a bomb un-

lawful.^{31.10}

A statute making it a crime to make, procure, etc., explosives, with intent to injure or unlawfully destroy life or property, is for the protection of property generally, and an indictment charging such crime need not name the person injured or the owner of the property to be destroyed.³² Under a statute making it unlawful to manufacture or procure explosives with the intent to use them for the unlawful destruction of life or property, and providing that any person abetting or in any way assisting in making, manufacturing, buying, procuring, etc., such explosives knowing or having reason to believe that they are intended to be used by any person or persons in any way for the unlawful injury to or destruction of life or property, shall be deemed a principal, one guilty as accessory before the fact is to be indicted and punished as a principal.³³

An indictment has been held not defective for not following the statutory form,³⁴ or for not alleging the date of the crime, so as to show its commission after the amendment of the statute defining the offense;³⁵ but, a complaint charging a violation of an ordinance prohibiting the sale of fireworks within a specified distance of the corporate limits of a city may be fatally defective under a statute requiring that in a prosecution for such unlawful sale, the state's pleading must name the purchaser.^{35.5}

There is no variance between an indictment charging an intent to use explosives for unlawful injury to, or unlawful destruction of, life or property and evidence to prove that the property of a particular corporation was destroyed, since such evidence did not establish that only the property of that corporation was destroyed or that the purpose of defendants was to destroy only that property.³⁶

d. Evidence

General principles governing the presumption of innocence, burden of proof, and admissibility and weight and sufficiency of evidence in criminal prosecutions apply in prosecutions for offenses as to explosives.

26. U.S.—Horn v. Mitchell, Mass., 232 F. 819, 147 C.C.A. 13, appeal dismissed 37 S.Ct. 293, 243 U.S. 247, 61 L.Ed. 700.
25 C.J. p 215 note 79.

27. Ind.—Smith v. State, 150 N.E. 49, 197 Ind. 189.
25 C.J. p 214 notes 58 [a] (1), 64 [a], p 215 note 81.

27.5 U.S.—U. S. v. Boyce Motor Lines, Inc., C.A.N.J., 188 F.2d 889, affirmed 72 S.Ct. 329, 342 U.S. 337, 96 L.Ed. 367.

Pa.—Commonwealth v. Bristow, 138 A.2d 156, 185 Pa.Super. 448.

28. Ind.—Smith v. State, 150 N.E. 49, 197 Ind. 189.

29. Ind.—Smith v. State, supra.

30. Ohio.—Corthell v. State, 18 Ohio Cir.Ct. 598, 8 Ohio Cir.Dec. 49.
25 C.J. p 215 note 82.

31. Ohio.—State v. Lindway, 2 N.E. 2d 490, 131 Ohio St. 166, appeal dismissed Lindway v. State of Ohio, 57 S.Ct. 36, 299 U.S. 506, 81 L.Ed. 375.

31.5 Tex.—Hill v. State, 261 S.W. 2d 849, 159 Tex.Cr. 150—Roach v. State, 261 S.W.2d 847, 159 Tex. Cr. 157.

31.10 Tex.—Roach v. State, 269 S. W.2d 379, 160 Tex.Cr. 347.

32. Ill.—People v. Robertson, 120 N. E. 539, 284 Ill. 620.

33. Ill.—Hronek v. People, 24 N.E. 861, 134 Ill. 139, 23 Am.S.R. 652, 8 L.R.A. 837.

34. Ala.—Hardwick v. State, 164 So. 107, 26 Ala.App. 536, certiorari denied 164 So. 112, 231 Ala. 151.

35. Ala.—Hardwick v. State, supra.

35.5 Tex.—Treadgill v. State, 292 S. W.2d 121, 163 Tex.Cr. 426.

36. Ill.—People v. Robertson, 120 N. E. 539, 284 Ill. 620.

A person accused of violation of a statute, ordinance, or regulation punishing acts involving explosives is favored by the usual presumption of innocence, and the burden of proving all the essential elements of the offense rests on the prosecution.³⁷ However, where the prosecution has made a prima facie case, as by proving facts which give rise to a presumption in its favor,³⁸ it is incumbent on accused to produce evidence in denial or explanation of the incriminating circumstances.³⁹

Admissibility. The issue of intent is said to allow a wider range of evidence in support thereof than is allowed in the support of other issues;⁴⁰ so,

on a trial for the unlawful manufacture of an explosive, the nature of the substance itself, the concealment of it, the fact that it is unnecessary in accused's lawful business, and contemporaneous declarations may all be considered in determining accused's unlawful intent.⁴¹ Other evidence that has been held admissible is set out in the note.⁴²

Testimony as to the ordinary mode of constructing powder magazines has been held incompetent.^{42.5}

Weight and sufficiency. The evidence in such prosecutions must be sufficient to prove every essential of the offense charged.⁴³

37. Cal.—People v. Fitzgerald, 58 P. 2d 718, 14 C.A.2d 180, certiorari denied Fitzgerald v. People of State of California, 57 S.Ct. 115, 299 U.S. 593, 81 L.Ed. 437.

Interstate Commerce Commission regulation

U.S.—Boyce Motor Lines, Inc. v. U. S., N.J., 72 S.Ct. 329, 342 U.S. 337, 90 L.Ed. 367.

City's power to pass regulation

In prosecution by city for transporting oil without a permit, city was obliged to prove the charge as made and to sustain its power to pass the regulation allegedly violated.

N.J.—Studerus Oil Co. v. Jersey City, 25 A.2d 502, 128 N.J.Law 286.

Date of procurement

Where indictment charged that on specified date defendants procured dynamite bomb with intent to use it for unlawful injury and destruction of property, date was material, and proof beyond a reasonable doubt of procurement on some date within statute of limitations was essential. Ill.—People v. Catuara, 193 N.E. 199, 358 Ill. 414.

38. Cal.—People v. Fitzgerald, 58 P. 2d 718, 14 C.A.2d 180, certiorari denied Fitzgerald v. People of State of California, 57 S.Ct. 115, 299 U.S. 593, 81 L.Ed. 437.

Ill.—People v. Catuara, 193 N.E. 199, 358 Ill. 414.

Improper possession or procurement

(1) Where accused is shown to have been in possession of dynamite and is not engaged in an occupation calling for its possession, he is presumed to be guilty of reckless and malicious possession.

Cal.—People v. Fitzgerald, 58 P.2d 718, 14 C.A.2d 180, certiorari denied Fitzgerald v. People of State of California, 57 S.Ct. 115, 299 U.S. 593, 81 L.Ed. 437.

(2) Where accused is shown to have been in possession of explosives with intent to use them for unlawful purposes, he is presumed to

have procured them for that purpose.

Ill.—People v. Catuara, 193 N.E. 199, 358 Ill. 414—Hronek v. People, 24 N.E. 861, 134 Ill. 139, 23 Am.S.R. 652, 8 L.R.A. 837.

39. Cal.—People v. Fitzgerald, 58 P. 2d 718, 14 C.A.2d 180, certiorari denied Fitzgerald v. People of State of California, 57 S.Ct. 115, 299 U.S. 593, 81 L.Ed. 437.

40. Ill.—People v. McDonald, 6 N.E.2d 182, 365 Ill. 233—People v. Catuara, 193 N.E. 199, 358 Ill. 414.

41. Ill.—Hronek v. People, 24 N.E. 861, 134 Ill. 139, 23 Am.S.R. 652, 8 L.R.A. 837.

42. Evidence held admissible

(1) In a prosecution for maliciously exploding dynamite near a dwelling house with intent to destroy the prosecuting witness, evidence that the prosecuting witness had borne accused an illegitimate child was admissible to show motive.

Cal.—People v. Burke, 122 P. 435, 18 C.A. 72.

(2) In a prosecution for destroying a building by means of dynamite, evidence concerning the extent of the injury to the building was admissible.

Ark.—Spurgeon v. State, 254 S.W. 376, 160 Ark. 112.

(3) In a prosecution for the improper use of explosives, evidence that defendant produced a newspaper with headlines, "2 Bombs Rock West Side; Laundries Wrecked in Labor War; Police Guard Area; Mysterious Third Blast is Heard," was admissible, where there was testimony that newspaper reports were to constitute proof to defendant's employers that instructions as to blowing up buildings had been carried out.

Ill.—People v. Sweeney, 136 N.E. 687, 304 Ill. 502.

42.5 N.Y.—Bradley v. People, 56 Barb. 72.

43. Ga.—Henderson v. State, 116 S.E. 913, 30 Ga.App. 5.
25 C.J. p 215 note 87.

Evidence held sufficient

(1) To sustain conviction generally.

U.S.—Horton v. U. S., C.A.Tenn., 256 F.2d 138.

Cal.—People v. Robinson, 308 P.2d 442, 149 C.A.2d 342.

Ill.—People v. Ficke, 175 N.E. 543, 343 Ill. 367.

N.Y.—People v. Armstrong, 114 N.Y. S.2d 871, 203 Misc. 105.

Tenn.—Nelson v. State, 292 S.W.2d 727, 200 Tenn. 462, certiorari dismissed 78 S.Ct. 327, 355 U.S. 271, 2 L.Ed. 257.

Tex.—Hill v. State, 278 S.W.2d 842, 161 Tex.Cr. 540, certiorari denied 75 S.Ct. 773, 349 U.S. 930, 99 L.Ed. 1261—Barnes v. State, 278 S.W.2d 305, 161 Tex.Cr. 510, certiorari denied 75 S.Ct. 658, 349 U.S. 919, 99 L.Ed.2d 1252—Pinkston v. State, 276 S.W.2d 259, 161 Tex.Cr. 310, followed in Stephens v. State, 276 S.W.2d 260.

25 C.J. p 215 note 87 [c] (1), (4).

(2) To sustain conviction for, or finding of, reckless or malicious use or possession of explosives.

Cal.—People v. Kynette, 104 P.2d 794, 15 C.2d 731, certiorari denied Kynette v. People of State of California, 61 S.Ct. 806, 312 U.S. 703, 85 L.Ed. 1136.

People v. Buyle, 68 P.2d 268, 20 C.A.2d 650—People v. Fitzgerald, 58 P.2d 718, 14 C.A.2d 180, certiorari denied Fitzgerald v. People of State of California, 57 S.Ct. 115, 299 U.S. 593, 81 L.Ed. 437.

(3) To sustain conviction for bombing.

Mo.—State v. Londe, 132 S.W.2d 501, 345 Mo. 185.

(4) To sustain conviction for procuring explosives with unlawful intent.

Ill.—People v. McDonald, 6 N.E.2d 182, 365 Ill. 233—People v. Catuara, 193 N.E. 199, 358 Ill. 414—

e. Trial

Disputed questions of fact are for the jury under proper instruction by the court.

In criminal prosecutions involving explosives, disputed questions of fact are for the jury⁴⁴ under proper instructions by the court.⁴⁵

Verdict. Where the indictment charges two offenses and the evidence is sufficient to establish one and not the other, a general verdict of guilty cannot be sustained.⁴⁶

EXPORT. The noun "export" or "exports" and its correlative "import" or "imports" as technical legal terms used in the tariff acts are defined and discussed in Customs Duties §§ 2-4.

The verb, etymologically, signifies "to carry out,"¹ and in its primary, general, or essential meaning, to

§ 13. Forfeitures and Penalties

A forfeiture of explosives unlawfully kept, with a penalty for their keeping, may be imposed by statute.

Some statutes have imposed a forfeiture of explosives unlawfully kept, together with a penalty for their keeping.⁴⁷ Under a city ordinance prohibiting the sale of fireworks and fixing a fine in a stated amount as the only punishment assessable thereunder, a punishment of a fine of less than the stated amount is not authorized.^{47.5}

carry or send out of a place; but in its secondary, specific, or especial meaning, to send out from one country to another;² to carry from a state or country, as wares in commerce;³ to carry or send abroad;^{3.5} and in a particular connection, to send or carry out of the state, for the purpose of sale,

People v. Sweeney, 136 N.E. 687, 304 Ill. 502.

25 C.J. p 215 note 87 [c] (3).

(5) To prove corpus delicti.

Hawaii—Territory v. Palai, 23 Hawaii 133.

25 C.J. p 215 note 87 [c] (2).

(6) To authorize application of statutory presumption of malicious and reckless possession of explosive. Cal.—People v. Fitzgerald, 58 P.2d 718, 14 C.A.2d 180, certiorari denied Fitzgerald v. People of State of California, 57 S.Ct. 115, 299 U.S. 593, 81 L.Ed. 437.

(7) To show other matters.

Pa.—Commonwealth v. Bristow, 138 A.2d 156, 185 Pa.Super. 448.

Evidence held insufficient to sustain conviction.

U.S.—Eiban v. Government of Guam, D.C.Guam, 115 F.Supp. 519.

Ohio.—Wechsler v. State, 179 N.E. 356, 124 Ohio St. 461.

City of Columbus v. Hohman, App., 144 N.E.2d 296.

44. Ill.—People v. Catuara, 193 N.E. 199, 358 Ill. 414.

25 C.J. p 214 note 65 [a].

Evidence held sufficient to warrant submission to jury

Pa.—Commonwealth v. Kocher, 60 A.2d 385, 162 Pa.Super. 605.

Evidence held insufficient to make out prima facie case for trier of facts.

Ohio.—City of Columbus v. Hohman, App., 144 N.E.2d 296.

Question of veracity of testimony.

Ill.—People v. Ficke, 175 N.E. 543, 343 Ill. 367.

Intent

Whether defendants in possession of dynamite bomb had procured it

with intent to use it for unlawful injury or destruction of life or property held for jury.

Ill.—People v. Catuara, 193 N.E. 199, 358 Ill. 414.

Circumstantial evidence of criminal intent of coal miner found carrying bomb late at night near coal company's office during labor troubles held sufficient for jury.

Ill.—People v. Beacham, 193 N.E. 205, 358 Ill. 373.

Direction of verdict for plaintiff held properly refused.

Pa.—Commonwealth v. Gray, 77 Pa. Super. 315.

45. Ill.—People v. Ficke, 175 N.E. 543, 343 Ill. 367.

25 C.J. p 214 note 66 [a].

Instruction held proper

Where an information charged that defendant placed dynamite on the porch of a dwelling house with intent to endanger, intimidate, and terrify certain individuals, the court properly charged that the evidence was sufficient to sustain a conviction if it showed that defendant intended either to endanger, to intimidate, or to terrify either of the persons designated.

Cal.—People v. Swalle, 107 P. 134, 12 C.A. 192.

Instructions held erroneous or properly refused

(1) Instruction requiring acquittal, on theory of entrapment, of defendant charged with selling bombs, regardless of whether defendant had previously been engaged in such business, held properly refused.

Ill.—People v. Ficke, 175 N.E. 543, 343 Ill. 367.

(2) Instruction that proof beyond reasonable doubt of possession of dynamite bomb at time and place

charged in indictment with intent to destroy property was sufficient to warrant conviction for procuring dynamite bomb on specified date with intent to use it for unlawful injury and destruction of property held misleading.

Ill.—People v. Catuara, 193 N.E. 199, 358 Ill. 414.

46. Wis.—Koscak v. State, 152 N.W. 181, 160 Wis. 255.

25 C.J. p 215 note 84.

47. N.Y.—Cathcart v. New York City Fire Dept., 26 N.Y. 529.

25 C.J. p 216 note 91.

47.5 Tex.—Treadgill v. State, 275 S.W.2d 658, 160 Tex.Cr. 658.

1. U.S.—U. S. v. The Forrester, D. C.Mich., 25 F.Cas.No.15,132, Newb. Adm. 81, 94.

2. U.S.—Swan & Finch Co. v. U. S., Ct.Cl., 23 S.Ct. 702, 703, 190 U.S. 143, 47 L.Ed. 984.

Cal.—Corpus Juris quoted in McKesson & Robbins v. Collins, 64 P.2d 469, 470, 18 C.A.2d 648.

3. U.S.—Kidd v. Flagler, C.C.N.Y., 54 F. 367, 369.

See also Customs Duties § 3 notes 12, 21, 22.

Export price is the price being paid in United States for goods to be exported, and is not the price which could have been secured in country of its destination.

U.S.—Sudametal Sociedad Anonima Sud Americana De Metales Y Minerales v. U. S., Ct.Cl., 88 F.Supp. 293, 294.

3.5 U.S.—Canton R. Co. v. Rogan, Md., 71 S.Ct. 447, 449, 340 U.S. 511, 95 L.Ed. 488, 20 A.L.R.2d 145.

Tenn.—Tennessee Oil Co. v. McCannless, 157 S.W.2d 267, 271, 272, 178 Tenn. 683.

trade or disposition, rather than for one's own use or convenience.⁴

The term is directly contrary in meaning to "import,"⁵ and has been distinguished from "transport."⁶

Exported. In its ordinary sense, carried out of the port.⁷ A term applied to merchandise when it is unloaded at a foreign port.⁸

EXPORTATION. See Customs Duties § 3 notes 16-20.

EXPORTERS. A term applied to cattle which are supposed to weigh about one thousand four hundred pounds and which are intended for export rather than for the retail trade.^{8.50}

The term has been distinguished from "market-ers."^{8.55}

EXPOSE. To bring into view, display, or exhibit; to point out or show to the bystanders;⁹ to submit or subject to any action or influence;^{9.5} to lay open;¹⁰ to deprive of concealment;^{10.5} to place in a situation to be affected or acted on;¹¹ to disclose or unmask something criminal, shameful, or the

like;^{11.5} to render accessible to something that may prove detrimental.^{11.10}

With reference to pain, to make liable, or to subject.¹²

With reference to a child or children, to abandon, to turn or cast out, to place or leave in a probably fatal position;¹³ to cast out to chance, to place abroad, or in a situation unprotected, or to remove from shelter.¹⁴

It has been said that it would be very difficult to find any single word in the English language that is used in a wider sense, and is more flexible, than the word "expose,"^{14.5} and this word, and more particularly the past tense or past participle, "exposed," may have different meanings according to the circumstances of the different cases in which it is used; in each case one must look to the surrounding circumstances in order to ascertain what the word means.¹⁵

"Expose" has been distinguished from "deposit" see the C.J.S. definition Deposit.

Phrases employing the word are set out in the subjoined note.¹⁶

4. Must be as an article of trade

In construing a statute making a slave free if he were unlawfully exported from the state it was held that "the true meaning of the term 'export' in this connection, is the taking or carrying out as an article of trade or merchandise. It is a mercantile term. If a man carry his slave as a body servant, for his own use, and bring him back, it is not exporting."

Del.—State v. Turner, 5 Del. 501, 502.

5. U.S.—Kidd v. Flagler, C.C.N.Y., 54 F. 367, 369.

U. S. v. The Forrester, D.C.Mich., 25 F.Cas.No.15,132.

6. Mont.—State v. Redmond, 237 P. 486, 489, 73 Mont. 376.

7. Eng.—Muller v. Baldwin, L.R. 9 Q.B. 457, 461.

8. U.S.—Kidd v. Flagler, C.C.N.Y., 54 F. 367, 370.

8.50 Md.—Western Union Telegraph Co. v. N. Lehman & Bro., 67 A. 241, 242, 106 Md. 318, 14 Ann.Cas. 736.

8.55 Md.—Western Union Telegraph Co. v. N. Lehman & Bro., supra. "Marketers" as a term applied to cattle see the C.J.S. definition Market-ers.

9. Pa.—Adams Express Co. v. Schlessinger, 75 Pa. 246, 256.

9.5 Tex.—Miller v. State, 243 S.W. 2d 175, 176, 156 Tex.Cr. 389.

10. Ala.—City of Birmingham v.

Chambless, 132 So. 313, 222 Ala. 249.

10.5 Tex.—Miller v. State, 243 S.W. 2d 175, 176, 156 Tex.Cr. 389.

11. Mich.—Shannon v. People, 5 Mich. 71, 90.

11.5 Tex.—Miller v. State, 243 S.W. 2d 175, 176, 156 Tex.Cr. 389.

11.10 Tex.—Miller v. State, supra.

12. Mich.—Shannon v. People, 5 Mich. 71, 90.

13. Mo.—State v. Eckhardt, 133 S. W. 321, 322, 232 Mo. 49.

14. Mich.—Shannon v. People, 5 Mich. 71, 90.

To expose to the inclemency of the weather as cruelty to children see Infants § 14.

14.5 Tex.—Miller v. State, 243 S.W. 2d 175, 176, 156 Tex.Cr. 389.

15. Eng.—Crane v. Lawrence, 25 Q. B.D. 152, 154.

16. Expose for sale

(1) Defined generally as the keeping and showing for the purpose of selling; to place in view with the purpose and intention of selling.

Mo.—State v. Hogan, 252 S.W. 90, 91, 212 Mo.App. 473.

(2) Specifically defined in a particular connection as to have in stock, not requiring physical exhibition to the buyer.

N.Y.—People ex rel. Goldstein v. Glass, 278 N.Y.S. 764, 766, 154 Misc. 569—People on Complaint of

Waller v. Jacob Branfman & Son, 263 N.Y.S. 629, 634, 147 Misc. 290.

Exposed for sale

(1) As meaning exposed to view. Mass.—Commonwealth v. Byrnes, 33 N.E. 343, 344, 158 Mass. 172. 25 C.J. p 217 note 31 [a].

(2) As referring to stock in trade. N.Y.—People v. Jacob Branfman & Son, 263 N.Y.S. 629, 635, 147 Misc. 290.

Other phrases

(1) "Exposed and unprotected." Ala.—City of Birmingham v. Chambless, 132 So. 313, 222 Ala. 249.

La.—Gershner v. Gulf Refining Co., App., 171 So. 399.

(2) "Exposed places in the streets," as meaning dangerous places.

N.Y.—Hubbell v. Yonkers, 10 N.E. 858, 860, 104 N.Y. 434, 58 Am.R. 522.

(3) "Exposed to contact." Wis.—Eau Claire Sand & Gravel Co. v. Industrial Commission of Wisconsin, 181 N.W. 718, 719, 173 Wis. 561.

(4) "Exposed to contagious disease."

N.Y.—In re Smith, 40 N.E. 497, 498, 146 N.Y. 68, 48 Am.S.R. 769, 28 L. R.A. 820.

(5) "Exposed to injury." Conn.—Appeal of Treat, 40 Conn. 288, 291.

EXPOSÉ. French; a statement, account, recital, or explanation. The term is used in diplomatic language as descriptive of a written explanation of the reasons for a certain act or course of conduct.¹⁷

EXPOSICIÓN DE PARTO. In Spanish law, the abandonment or exposure of persons, as of children.¹⁸

EXPOSITIO. See the C.J.S. definition Ex.

EXPOSITIO CONTEMPORANEA EST FORTISSIMA IN LEGE.¹⁹

EXPOSITION. Explanation or interpretation.²⁰

EXPOSITION DE PART. In French law, the abandonment, either in a public or private place, of a child, unable to take care of itself.²¹

EXPOSITIO, QUÆ EX VISCERIBUS CAUSÆ NASCITUR, EST APTISSIMA ET FORTISSIMA IN LEGE.²²

EXPÓSITO. In Spanish law, a child left exposed or abandoned at the door of a church, hospital, institution or private home; hence a foundling.²³

EXPOSITORY STATUTE. See Statutes § 431.

EX POST FACTO. See the C.J.S. definition Ex.

EX POST FACTO LAW.²⁴

EX POST FACTO NON CONVALESCET.²⁵

EXPOSURE. The state of being exposed; openness to danger; accessibility to anything that may affect, especially detrimentally.²⁶

It has been said that the word is much used, in the business of insurance, to indicate danger of destruction or injury by fire from causes external to the insured property itself.²⁷

In the plural as a fire insurance term, relating to buildings, see Insurance § 49. For other references to specific uses see 25 C.J. p. 218 note 41.

Phrases employing the word are set out in the subjoined note.²⁸

EXPRESS.

As a Verb

Primarily, to force out by pressure, to press or squeeze out, as the juice of a fruit; hence to empty

(6) "Exposed to sale."
Pa.—Adams Express Co. v. Schlesinger, 75 Pa. 246, 256.
25 C.J. p 217 note 31 [e].

(7) "Exposed to view," as meaning, in a particular connection, exposed to the view of travelers passing the gate.
Vt.—Centre Turnp. Co. v. Smith, 12 Vt. 212, 216.

(8) "Expose to obloquy," as meaning to expose to censure, reproach, blame, or reprehension.
Cal.—Bates v. Campbell, 2 P.2d 383, 386, 213 C. 438.

(9) "Exposing and offering for sale," as applied to the act of peddling or offering for sale.
N.Y.—People v. Hills, 72 N.Y.S. 340, 341, 64 App.Div. 584.

(10) "Exposing buildings" see Insurance § 49.

17. Black L.D.

18. Escriche Diccionario.

19. A maxim meaning "A contemporaneous exposition is the most powerful in law."
Conn.—Sage v. Wilcox, 6 Conn. 81, 89
—Williams v. Brace, 5 Conn. 190, 195.

Basis of maxim

"The maxim rests on this unquestionable truth, that the persons living at the time when a law is enacted, are better able to ascertain the mischief at which it was aimed,

and consequently, the legislative intent, than those persons are, who come into existence at a period remotely subsequent. Hence, if the language in ancient charters has become obscure from antiquity, or the construction is doubtful, the constant and immemorial usage under the instrument, may be resorted to, for the purpose of explanation; and in the case of an act of parliament, universal usage is a proper expositor, where the language is, in any respect, ambiguous."
Conn.—Sage v. Wilcox, 6 Conn. 81, 89.

20. Black L.D.

21. Black L.D.

22. A maxim meaning "An exposition, which springs from the vitals of a cause, is the fittest and most powerful in law."
Adams Gloss.

Applied in

Eng.—Sutton's Hospital Case, 10 Coke 23a, 24b.

Similarly rendered

"That kind of interpretation which is born [or drawn] from the bowels [or vitals] of a cause is the aptest and most forcible in law."
Black L.D.

23. Escriche Diccionario.

24. See Constitutional Law §§ 435-438.

25. A maxim meaning "It shall not

acquire validity from a subsequent act."
Adams Gloss.

26. Iowa.—Davis v. Western Home Ins. Co., 46 N.W. 1073, 1074, 81 Iowa 496, 25 Am.S.R. 509, 10 L.R.A. 359.

Similarly expressed

The act or state of exposing or being exposed.
Black L.D.

27. Iowa.—Davis v. Western Home Ins. Co., supra.

28. Phrases construed

(1) "Dangerous exposure" see the C.J.S. definition Dangerous.

(2) "Exposure for sale," said to mean "having in stock."

N.Y.—People v. Glass, 278 N.Y.S. 764, 766, 154 Misc. 569—People v. Jacob Branfman & Son, 263 N.Y.S. 629, 635, 147 Misc. 290.

(3) "Exposure of child" see Parent and Child § 92.

(4) "Exposure or occupation classed . . . as more hazardous."
Minn.—Miller v. Travelers' Ins. Co., 40 N.W. 839, 840, 39 Minn. 548.

(5) "Exposure to obvious danger" and "exposure to unnecessary danger" see the C.J.S. definition Danger.

(6) "Indecent exposure" see Lewdness § 2 and Obscenity § 5.

(7) "'Situation of actual exposure' to danger" and "voluntary exposure to unnecessary danger" see the C.J.S. definition Danger.

by pressure or squeezing;²⁹ and, derivatively, to cause to appear, to declare to represent and make known, or to utter;³⁰ to designate;³¹ to set forth in words.³²

The term carries the implication of explicitness,³³ and has been held synonymous with "designate" see the C.J.S. definition Designate, and "publish."³⁴

Expressed. Primarily, pressed out or extorted by force;³⁵ and, derivatively, stated or declared in direct terms;³⁶ declared in terms, set forth in words, or stated directly and distinctly;³⁷ hence, exact, precise, not left to inference.³⁸

The term has been distinguished from "embraced" see the C.J.S. definition of that term.

As an Adjective

Clearly made known, declared in terms, distinctly expressed or indicated, set forth in words, unambiguous;³⁹ direct, directly stated, distinctly and pointedly given, given in direct terms, made unambiguous by special intention;⁴⁰ hence clear, definite, explicit, manifest, plain, not ambiguous or dubious;⁴¹ and, likewise, unmistakable.⁴²

In the sense that something is expressed rather than implied,⁴³ the term has been specifically defined as meaning directly and distinctly stated, not merely implied or left to inference;⁴⁴ made known and not left to implication;⁴⁵ made known distinctly and explicitly, and not left to inference or implication; manifested by direct appropriate language, as distinguished from that which is inferred from

29. Minn.—Strommen v. Prudential Ins. Co., 245 N.W. 632, 634, 187 Minn. 381.

30. Cal.—People v. Pechar, 279 P.2d 570, 571, 130 C.A.2d 616.
Ga.—Graham v. State, 65 S.E. 167, 168, 6 Ga.App. 436.

"Express dissatisfaction with"
"Dissatisfaction" is legally "expressed" when beneficiary contests or objects in legal proceeding to enforcement of any provision of will.
Pa.—In re Hickman's Estate, 162 A. 168, 169, 308 Pa. 230.

"Express the subject"
Wis.—Durkee v. Janesville, 26 Wis. 697, 700.
See generally Statutes § 220.

31. U.S.—Scipio v. Wright, N.Y., 101 U.S. 665, 670, 25 L.Ed. 1037.

32. Ind.—State v. Hyde, 22 N.E. 644, 649, 121 Ind. 20—Evansville v. State, 21 N.E. 267, 272, 118 Ind. 426, 4 L.R.A. 93.

Similar statement

To represent in words, to exhibit by language, to show or make known in any manner.

Eng.—Halford v. Cameron's Coalbrook Steam Coal, etc., Co., 16 Q.B. 442, 445, 71 E.C.L. 442, 117 Reprint 948.

33. W.Va.—Elliott v. Hudson, 185 S.E. 465, 467, 117 W.Va. 345.

34. Ga.—Graham v. State, 65 S.E. 167, 168, 6 Ga.App. 436.

35. Standard D.

Phrases construed

(1) "Expressed oils."

U.S.—Hartman v. Oliver, Pa., 8 S. Ct. 958, 960, 125 U.S. 525, 31 L.Ed. 813.

See also Customs Duties § 32.

(2) "Pus was expressed."

Minn.—Strommen v. Prudential Ins. Co., 245 N.W. 632, 634, 187 Minn. 381.

36. Ill.—Corpus Juris Secundum quoted in Anderson v. Board of Ed. of School Dist. No. 91, 61 N.E.2d 562, 567, 390 Ill. 412.

Mont.—Bullard v. Smith, 72 P. 761, 767, 28 Mont. 387.

Phrases

(1) "Briefly expressed by the title," "expressed in the title," and similar expressions relating to statutes see Statutes §§ 219, 220.

(2) "Plainly expressed."
Ky.—Fidelity Mut. Ins. Co. v. Preusser, 242 S.W. 608, 609, 195 Ky. 271. 48 C.J. p 1218 note 22.

37. Ill.—Corpus Juris Secundum quoted in Anderson v. Board of Ed. of School Dist. No. 91, 61 N.E.2d 562, 567, 390 Ill. 412.

Mo.—State ex rel. Ashauer v. Hostetter, 127 S.W.2d 697, 699, 344 Mo. 665 —St. Louis v. Kellman, 139 S.W. 443, 446, 235 Mo. 687.

38. Ill.—Corpus Juris Secundum quoted in Anderson v. Board of Ed. of School Dist. No. 91, 61 N.E.2d 562, 567, 390 Ill. 412.

Mo.—St. Louis v. Kellman, 139 S.W. 443, 446, 235 Mo. 687.

Similar statements

(1) Expressed, not merely implied or left to inference.

Mo.—State ex rel. Ashauer v. Hostetter, 127 S.W.2d 697, 699, 344 Mo. 665.

(2) Made definitely known in direct terms, and not left to implication.

Mont.—Bullard v. Smith, 72 P. 761, 767, 28 Mont. 387.

(3) Made known distinctly and explicitly, and not left to inference or implication.

Mo.—St. Louis v. Kellman, 139 S.W. 443, 445, 235 Mo. 687.

39. U.S.—Minneapolis Steel & Ma-

chinery Co. v. Federal Surety Co., C.C.A.Minn., 34 F.2d 270, 274.

U. S. v. Chicago, St. P., M. & O. R. Co., D.C.Minn., 151 F. 84, 92.

40. U.S.—Minneapolis Steel & Machinery Co. v. Federal Surety Co., C.C.A.Minn., 34 F.2d 270, 274.

Ind.—Evansville v. State, 21 N.E. 267, 272, 118 Ind. 426, 443, 4 L.R.A. 93.

25 C.J. p 218 notes 47–51, p 219 note 68.

Directly and distinctly stated

Vt.—In re Moon's Will, 176 A. 410, 412, 107 Vt. 92.

Va.—City of Richmond v. Sutherland, 77 S.E. 470, 473, 114 Va. 688.

41. U.S.—Minneapolis Steel & Machinery Co. v. Federal Surety Co., C.C.A.Minn., 34 F.2d 270, 274, 275.

Vt.—In re Moon's Will, 176 A. 410, 412, 107 Vt. 92.

Va.—City of Richmond v. Sutherland, 77 S.E. 470, 473, 114 Va. 688.

25 C.J. p 218 notes 52–57, p 219 notes 62, 63.

42. Va.—City of Richmond v. Sutherland, supra.

43. Va.—City of Richmond v. Sutherland, supra.

44. U.S.—Solomon v. Neisner Bros., D.C.Pa., 93 F.Supp. 310, 316, affirmed, C.A., 187 F.2d 735.

Vt.—In re Moon's Will, 176 A. 410, 412, 107 Vt. 92.

Va.—City of Richmond v. Sutherland, 77 S.E. 470, 473, 114 Va. 688.

45. U.S.—Minneapolis Steel & Machinery Co. v. Federal Surety Co., C.C.A.Minn., 34 F.2d 270, 274.

U. S. v. Chicago, St. P., M. & O. R. Co., D.C.Minn., 151 F. 84, 92.

Ind.—State v. Denny, 21 N.E. 274, 279, 118 Ind. 449, 4 L.R.A. 65.

Va.—City of Richmond v. Sutherland, 77 S.E. 470, 473, 114 Va. 688.

conduct;⁴⁶ not implied or left to inference;⁴⁷ stated or declared, as opposed to implied.⁴⁸

"Express" is also used in another sense as pertaining to quick or special delivery.⁴⁹

The word has been said not to be synonymous with "explicit" see ante, is commonly used in contradistinction to "implied,"⁵⁰ and sometimes it is

used not only in contrast to the word "implied," but to some extent by way of emphasis.⁵¹

For references to some specific uses see 25 C.J. p 218 note 46.

Phrases employing the word are listed in the subjoined note.⁵² Other phrases as to which more re-

46. U.S.—Minneapolis Steel & Machinery Co. v. Federal Surety Co., C.C.A.Minn., 34 F.2d 270, 274.

U. S. v. Chicago, St. P., M. & O. R. Co., D.C.Minn., 151 F. 84, 92.

Similar statement

In direct terms, not implied.

Va.—City of Richmond v. Sutherland, 77 S.E. 470, 473, 114 Va. 688.

47. U.S.—Minneapolis Steel & Machinery Co. v. Federal Surety Co., C.C.A.Minn., 34 F.2d 270, 274.

Va.—City of Richmond v. Sutherland, 77 S.E. 470, 473, 114 Va. 688.
25 C.J. p 219 notes 64, 65.

48. U.S.—Minneapolis Steel & Machinery Co. v. Federal Surety Co., C.C.A.Minn., 34 F.2d 270, 274.

Vt.—In re Moon's Will, 176 A. 410, 412, 107 Vt. 92.

Va.—City of Richmond v. Sutherland, 77 S.E. 470, 473, 114 Va. 688.
25 C.J. p 219 note 69.

49. Cal.—Pfister v. Central Pac. R. Co., 11 P. 686, 691, 70 C. 169, 59 Am. R. 404.

25 C.J. p 219 note 71.

See also Carriers § 7.

50. U.S.—Minneapolis Steel & Machinery Co. v. Federal Surety Co., C.C.A.Minn., 34 F.2d 270, 274, 275.

Cal.—Burford v. Huesby, 96 P.2d 380, 381, 35 C.A.2d 643.

Neb.—Goldfein v. Continental Ins. Co. of City of New York, 249 N.W. 78, 80, 125 Neb. 112.

Vt.—In re Moon's Will, 176 A. 410, 412, 107 Vt. 92.

Va.—City of Richmond v. Sutherland, 77 S.E. 470, 473, 114 Va. 688.
25 C.J. p 219 note 70.

51. Vt.—In re Moon's Will, 176 A. 410, 412, 107 Vt. 92.

52. Express promise

(1) Defined as the express stipulation of the party making it, to do or not to do a particular thing.

Miss.—Foute v. Bacon, 24 Miss. 156, 164, 165.

(2) Distinguished from "acknowledgment" and "implied promise."

Me.—Shaw v. Oliver, 92 A. 652, 653, 112 Me. 512.

Miss.—Foute v. Bacon, 24 Miss. 156, 164, 165.

Other phrases

(1) "Conferred in express terms."
Va.—City of Richmond v. Sutherland, 77 S.E. 470, 473, 114 Va. 688.

(2) "Express agreement."
Cal.—Lane v. Superior Court in and

for Fresno County, 285 P. 560, 863, 104 C.A. 340.

(3) "Express agreement to the contrary."

N.Y.—Coast Delicatessen Co. v. Cox's Baths, 24 N.Y.S.2d 893, 895.

(4) "Express and continuing trust."
Ind.—McCabe v. Grantham, 31 N.E. 2d 658, 662, 108 Ind.App. 695.

(5) "Express and special," as distinguished from "implied and general."

Ind.—State v. Denny, 21 N.E. 274, 279, 118 Ind. 449, 4 L.R.A. 65.
25 C.J. p 219 note 70 [a].

(6) "Express authority."

Cal.—Hassell v. City and County of San Francisco, 78 P.2d 1021, 1022, 11 C.2d 168.

Siskin v. Dembroff, 9 P.2d 908, 913, 121 C.A. 730.

Ky.—Dr. Pepper Bottling Co. of Kentucky v. Hazelip, 144 S.W.2d 798, 800, 284 Ky. 333.

Wyo.—Ulen v. Knechtel, 58 P.2d 446, 449, 50 Wyo. 94, 111 A.L.R. 565.

See also Agency § 97.

(7) "Express color," defined as an evasive form of special pleading in a case where the defendant ought to plead the general issue. Abolished by the common law procedure act of 1852 (15 & 16 Vict. c 76 § 64).
Black L.D.

(8) "Express or implied consent."
Mass.—O'Roak v. Lloyds Casualty Co., 189 N.E. 571, 572, 285 Mass. 532.

(9) "Express private passive trust," described as existing where land is conveyed to or held by A in trust for B, without any power expressly or impliedly given to A to take the actual possession of the land, or to exercise acts of ownership over it, except by the direction of B.

Fla.—Elvins v. Seestedt, 193 So. 54, 57, 141 Fla. 266, 126 A.L.R. 1001.
See also Trusts §§ 11, 17, 19.

(10) "Express request," as occurring when one person commands or asks another to do or give something, or answers affirmatively when asked whether another shall do certain thing.

Wis.—Zeidler v. Goelzer, 211 N.W. 140, 144, 191 Wis. 378.

(11) "Express terms," as meaning clear, unambiguous, definite, certain,

and unequivocal, leaving nothing to inference, conjecture, or supposition.
Pa.—International Finance Corp. v. Philadelphia Wholesale Drug Co., 167 A. 790, 792, 312 Pa. 280.

(12) "Express waiver," as meaning voluntary, intentional relinquishment of a known right.

U.S.—Globe Indemnity Co. v. Cohen, C.C.A.Pa., 106 F.2d 687, 691.

Ind.—Travelers Ins. Co. v. Eviston, 37 N.E.2d 310, 313, 110 Ind.App. 143.

S.C.—Dickert v. Aetna Life Ins. Co., 180 S.E. 462, 466, 176 S.C. 476.

Tenn.—Baird v. Fidelity-Phoenix Fire Ins. Co., 162 S.W.2d 384, 388, 389, 178 Tenn. 653, 140 A.L.R. 1226.

67 C.J. p 304 note 71—p 306 note 93.

(13) "With the permission, express or implied."

Cal.—Burford v. Huesby, 96 P.2d 380, 381, 35 C.A.2d 643.

Phrases discussed elsewhere

(1) "By his express direction," see the C.J.S. definition Direction.

(2) "Express adoption" see the C.J. S. definition Adoption.

(3) "Express agreement for delivery of stock" see the C.J.S. definition Agreement.

(4) "Express assent" see the C.J. S. definition Assent.

(5) "Express assumpsit" see Assumpsit, Action of § 1 note 1 (2), also §§ 3, 9.

(6) "Express business" and "express company" see Carriers § 7.

(7) "Express condition" see Estates § 20 b notes 32-37, also the C.J.S. definition Conditional.

(8) "Express confession" see Criminal Law § 816 a.

(9) "Express consent" see the C.J. S. definition Consent.

(10) "Express contract" see Contracts § 3.

(11) "Express corporation" see Corporations § 14 note 49.

(12) "Express dedication" see Dedication § 3 notes 29, 30, and § 14.

(13) "Express direction" see the C.J.S. definition Direction.

(14) "Express emancipation," as arising from the parent's voluntary act and distinguished from "constructive or implied emancipation," see Parent and Child §§ 88, 89.

(15) "Express invitation" and "express invitee" see Negligence § 43.

cent adjudications have not been found see 25 C.J. p 219 note 72—p 220 note 93.

EXPRESSA NOCENT, NON EXPRESSA NON NOCENT.⁵³

EXPRESSA NON PROSUNT, QUÆ NON EXPRESSA PRODERUNT.⁵⁴

(16) "Express license" with reference to a patent see Patents § 245.

(17) "Express malice" see the C.J. S. definition Malice, and the titles Criminal Law, § 31 b, Homicide § 16, Libel and Slander §§ 76, 100.

(18) "Express notice" see Notice § 4.

(19) "Express permission" as element of family car or family purpose doctrine see Motor Vehicles § 433.

(20) "Express repeal" see Statutes §§ 282-285.

(21) "Express republication" of will see Wills § 298.

(22) "Express surrender" see Landlord and Tenant §§ 120-123.

(23) "Express trust" see Trusts §§ 11, 12, 22 et seq.

(24) "Express trustee" see Executors and Administrators § 142, and Trusts § 3.

(25) "Express warranty" see Bills and Notes § 244, Corporations § 46 a, and Sales § 307.

53. A maxim meaning "Things expressed are [may be] prejudicial; things not expressed are not." Adams Gloss.

Applied in
Pa.—Cromelien v. Mauger, 17 Pa. 169, 172.

Similarly rendered

"Express words are sometimes prejudicial, which, if omitted, had done no harm."
Black L.D.

54. A maxim meaning "Things expressed do no good, which, not expressed, do no harm."
Adams Gloss.

Applied in
Eng.—Borough's Case, 4 Coke 72b, 73b.

Similarly rendered

"The expression of things of which, if unexpressed, one would have the benefit, is useless. Thing expressed may be prejudicial which when not expressed will be profit."
Black L.D.

55. A maxim meaning "The expression of what is tacitly implied is inoperative."
Broom Leg.Max.

Applied in
Ark.—Spencer v. Halpern, 37 S.W.

711, 712, 62 Ark. 595, 36 L.R.A. 120.

25 C.J. p 220 note 16 [a].

Similarly rendered

(1) "The expression or express mention of those things which are tacitly implied avails nothing."
Black L.D.

(2) "A man's own words are void when the law speaketh as much."
Black L.D.

(3) "Words used to express what the law will imply without them are mere words of abundance."
Black L.D.

56. Century D.

Phrases construed

(1) "Expression of opinion" see Criminal Law § 1152, and Trial § 284, as to expression of opinion on facts by trial judge; Fraud § 10, as element of fraud generally; Sales § 310, as not constituting warranty. As equivalent to "comment" see the C.J.S. definition Comment.

(2) "Formation or expression of opinion," as affecting competency to act as juror, see Juries §§ 232-241; and Trial § 460, by juror during progress of trial.

(3) "Free expression of opinions" by jurors see Criminal Law § 1374 notes 51, 52.

57. A maxim meaning "The expression of one thing is the exclusion of another."

Ill.—Lehman v. Hill, 111 N.E.2d 120, 121, 414 Ill. 173.

Iowa.—**Corpus Juris** cited in Dickson v. Fidelity & Casualty Co. of New York, 273 N.W. 102, 106, 223 Iowa 518.

Ky.—Burgin v. Forbes, 169 S.W.2d 321, 325, 293 Ky. 456.

Mo.—State ex rel. Jensen v. Sestric, App., 216 S.W.2d 152, 154.

Neb.—Hafeman v. Gem Oil Co., 80 N.W.2d 139, 155, 163 Neb. 438.

Nev.—**Corpus Juris Secundum** cited in Flyge v. Flynn, 166 P.2d 539, 558, 63 Nev. 201.

Okl.—Newblock v. Bowles, 40 P.2d 1097, 1100, 170 Okl. 487—Cornell v. McAllister, 249 P. 959, 961, 121 Okl. 285.

W.Va.—Buskirk v. State-Planters' Bank & Trust Co., 169 S.E. 738, 740, 113 W.Va. 764.

25 C.J. p 220 note 17.

EXPRESSIO EORUM QUÆ TACITE INSUNT NIHIL OPERATUR.⁵⁵

EXPRESSION. The act of expressing, or embodying or representing in speech, writing, or action; hence declaration, manifestation, representation, or utterance, as, an expression of the public will.⁵⁶

EXPRESSIO UNIUS EST EXCLUSIO ALTERI.
US.⁵⁷

Applied or explained in

U.S.—Southern Coast Corp. v. Sinclair Refining Co., C.A.Tex., 181 F. 2d 960, 961—Midland Co-op. Wholesale v. Ickes, C.C.A., 125 F.2d 618, 625—U. S. ex rel. and for Use of Tennessee Valley Authority v. Powelson, C.C.A.N.C., 118 F.2d 79, 88—National Labor Relations Board v. West Kentucky Coal Co., C.C.A., 116 F.2d 816, 822—**Corpus Juris** cited in Jones v. H. D. & J. K. Crosswell, Inc., C.C.A.S.C., 60 F. 2d 827, 828—Guaranty Trust Co. of New York v. Minneapolis & St. L. R. Co., C.C.A.Minn., 36 F.2d 747, 757.

Black v. Richfield Oil Corporation, D.C.Cal., 41 F.Supp. 988, 995. Ala.—Weill v. State ex rel. Gaillard, 34 So.2d 132, 137, 250 Ala. 328—**Corpus Juris** cited in Federal Land Bank v. Mulkey, 153 So. 775, 779, 228 Ala. 500.

Ark.—Hackney v. Southwest Hotels, 195 S.W.2d 55, 59, 210 Ark. 234.

Cal.—Ainsworth v. Bryant, 211 P.2d 564, 568, 34 C.2d 465.

Jones v. Robertson, 180 P.2d 929, 931, 79 C.A.2d 813—Ex parte Ramirez, 122 P.2d 361, 362, 49 C.A.2d 709—Marin County v. Messner, 112 P.2d 731, 737, 44 C.A.2d 577.

Conn.—State ex rel. McNamara v. Civil Service Commission of City of Bridgeport, 24 A.2d 846, 848, 128 Conn. 585.

Fla.—Dobbs v. Sea Isle Hotel, 56 So. 2d 341, 342—Ideal Farms Drainage Dist. v. Certain Lands, 19 So.2d 234, 239, 154 Fla. 554.

Ga.—**Corpus Juris Secundum** cited in City of Macon v. Walker, 51 S.E. 2d 633, 635, 204 Ga. 810—**Corpus Juris** cited in Sovereign Camp, W. O. W. v. Heflin, 3 S.E.2d 559, 560, 561, 188 Ga. 234.

Corpus Juris cited in Sovereign Camp, W. O. W. v. Muller, 11 S.E. 2d 92, 99, 63 Ga.App. 327.

Idaho.—Clayton v. Barnes, 16 P.2d 1056, 1059, 52 Idaho 418.

Ill.—Dick v. Roberts, 133 N.E.2d 305, 308, 8 Ill.2d 215—Illinois Cent. R. Co. v. Franklin County, 56 N.E.2d 775, 781, 387 Ill. 301.

Town of Aroma Park, Kankakee County v. Town of Papineau, Iroquois County, 39 N.E.2d 396, 397, 313 Ill.App. 135—**Corpus Juris** cited in Dorris v. Center, 1 N.E.2d 794, 795, 244 Ill.App. 344.

Ind.—Nash Engineering Co. v. Marcy Realty Corp., 54 N.E.2d 263, 269, 222 Ind. 396—Tucker v. State, 35 N.E.2d 270, 285, 218 Ind. 614.

Iowa.—**Corpus Juris cited in** Dickson v. Fidelity & Casualty Co. of New York, 273 N.W. 102, 106, 223 Iowa 518.

Kan.—Tresner v. Rees, 119 P.2d 511, 513, 154 Kan. 580.

Ky.—Steinfeld v. Jefferson County Fiscal Court, 229 S.W.2d 319, 320, 312 Ky. 614.

La.—Gulf Coast Rental Tool Service, Inc. v. Collector of Revenue, App., 98 So.2d 704, 707.

Mass.—Boston Elevated Ry. Co. v. Commonwealth, 39 N.E.2d 87, 114, 310 Mass. 528.

Mich.—Ex parte Bourne, 2 N.W.2d 439, 300 Mich. 398.

Miss.—U. S. Fidelity & Guaranty Co. v. Maryland Casualty Co., 199 So. 278, 281, 191 Miss. 103.

Mo.—Arkansas-Missouri Power Corporation v. City of Kennett, 156 S.W.2d 913, 917, 348 Mo. 1108—**Corpus Juris cited in** Kansas City, Mo. v. J. I. Case Threshing Mach. Co., 87 S.W.2d 195, 205, 337 Mo. 913—Keane v. Strodman, 18 S.W.2d 896, 898, 323 Mo. 161.

Hoover v. National Casualty Co., 162 S.W.2d 363, 365, 236 Mo.App. 1093—City of Hannibal v. Minor, App., 224 S.W.2d 598, 605.

Neb.—In re Shirley's Estate, 76 N.W.2d 749, 753, 162 Neb. 613—Ledwith v. Bankers Life Ins. Co., 54 N.W.2d 409, 418, 156 Neb. 107—School Dist. of Omaha v. Adams, 39 N.W.2d 550, 556, 151 Neb. 741.

Nev.—State Bar v. Sexton, 184 P.2d 356, 360, 64 Nev. 459—In re Taylor's Estate, 114 P.2d 1086, 1089, 61 Nev. 68, 135 A.L.R. 580.

N.J.—Dillema v. Efinger, 20 A.2d 435, 436, 126 N.J.Law 579.

N.Y.—In re Heafy, 285 N.Y.S. 188, 193, 247 App.Div. 277.

N.C.—In re Sharpe's Land, 53 S.E.2d 302, 306, 230 N.C. 412—Town of Old Fort v. Harmon, 13 S.E.2d 423, 425, 219 N.C. 241.

Ohio.—Standard Oil Co. v. Zangerle, 49 N.E.2d 406, 411, 141 Ohio St. 505—State ex rel. Cooper v. Roth, 44 N.E.2d 456, 458, 140 Ohio St. 377—Shuster v. North American Mortg. Loan Co., 40 N.E.2d 130, 143, 139 Ohio St. 315—Black-Clawson Co. v. Evatt, 38 N.E.2d 403, 406, 139 Ohio St. 100.

Okl.—Spiers v. Magnolia Petroleum Co., 244 P.2d 852, 856, 206 Okl. 510—Cummings v. Board of Education of Oklahoma City, 125 P.2d 989, 993, 190 Okl. 533.

Or.—In re Hattrem's Estate, 135 P.2d 777, 786, 170 Or. 613—Union Pac. R. Co. v. Bean, 119 P.2d 575, 580, 167 Or. 535.

Pa.—Fidelity Trust Co. v. Kirk, 25 A.2d 825, 827, 344 Pa. 455.

Appeal of Dixon, 11 A.2d 169, 172, 138 Pa.Super. 385.

Tex.—American Indemnity Co. v. City of Austin, 246 S.W. 1019, 1023, 112 Tex. 239.

City of Brownsville v. West, Civ. App., 149 S.W.2d 1034, 1038.

Wash.—Bradley v. Department of Labor, and Industries, 329 P.2d 196, 199—State ex rel. Todd v. Yelle, 110 P.2d 162, 168, 7 Wash.2d 443—State ex rel. Port of Seattle v. Department of Public Service, 95 P.2d 1007, 1012, 1 Wash.2d 102.

W.Va.—Bischoff v. Francesa, 56 S.E.2d 865, 873, 133 W.Va. 474.

25 C.J. p 220 note 17 [f].

See also Contracts § 312; Deeds § 86 b (5); Internal Revenue § 52; Statutes § 333, and Stipulations § 11.

More freely translated

(1) "The express mention of one thing implies the exclusion of another."

Ohio.—Saslaw v. Weiss, 14 N.E.2d 930, 932, 133 Ohio St. 496.

Okl.—Natural Gas Development Corporation of Delaware v. Oklahoma Tax Commission, 111 P.2d 483, 484, 188 Okl. 557—Ramsey v. Leeper, 31 P.2d 852, 858, 168 Okl. 43.

Pa.—Fazio v. Pittsburgh Rys. Co., 182 A. 696, 698, 321 Pa. 7.

(2) When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred.

S.C.—Little v. Town of Conway, 170 S.E. 447, 448, 171 S.C. 27.

(3) The mention of one thing in a law implies the exclusion of the things not mentioned.

Pa.—Commonwealth ex rel. Maurer v. Witkin, 25 A.2d 317, 319, 344 Pa. 191.

Application discussed

(1) It has been said on the one hand that "No maxim of the law is of more general uniform application, and it is never more applicable than in the construction of a statute."

Vt.—San Martin v. E. N. Rock & Sons Co., 172 A. 635, 637, 106 Vt. 301.

25 C.J. p 220 note 17 [d].

(2) On the other hand, however, it has been stated that the maxim is not one of universal application, but is to be applied only as an aid in arriving at intention and should not be followed to the extent of overriding a different intent.

U.S.—Crancer v. Lowden, C.C.A.Mo., 121 F.2d 645, 649—Bland v. Commissioner of Internal Revenue, C. C.A., 102 F.2d 157, 159.

Okl.—Branson v. Branson, 123 P.2d 643, 648, 190 Okl. 347.

Pa.—Fazio v. Pittsburgh Rys. Co., 182 A. 696, 698, 321 Pa. 7.

Commonwealth v. Kramer, 22 A.2d 46, 51, 146 Pa.Super. 91—Hooks

v. Hooks, 187 A. 245, 247, 123 Pa. Super. 507.

25 C.J. p 220 note 17 [e].

(3) It is a well-settled principle of statutory construction that the expression of one thing excludes others not expressed.

U.S.—**Corpus Juris cited in** Jones v. H. D. & J. K. Crosswell, Inc., C.C. A.S.C., 60 F.2d 827, 828.

Mo.—**Corpus Juris cited in** Kansas City, Mo. v. J. I. Case Threshing Mach. Co., 87 S.W.2d 195, 205, 337 Mo. 913.

(4) Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, namely, that the thing shall not be done otherwise.

U.S.—**Corpus Juris cited in** Jones v. H. D. & J. K. Crosswell, Inc., C.C. A.S.C., 60 F.2d 827, 828.

Ala.—Weil Bros. v. Southern Ry. Co., 107 So. 38, 39, 21 Ala.App. 245.

N.J.—Absecon Land Co. v. Keernes, 137 A. 429, 431, 101 N.J.Eq. 227.

N.D.—Divide County v. Baird, 212 N.W. 236, 242, 55 N.D. 45, 51 A.L.R. 296.

Vt.—Grout v. Gates, 124 A. 76, 79, 97 Vt. 434.

25 C.J. p 220 note 17 [c].

(5) The maxim has been applied in innumerable cases and rejected in as many, which illustrates the fact that it is not a rule of thumb, but only one of many guides to construction.

Or.—Sunshine Dairy v. Peterson, 193 P.2d 543, 551, 183 Or. 305.

(6) The maxim applies only when in the natural association of ideas that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces affirmative inference that that which is omitted must be intended to have opposite and contrary treatment.

Ky.—Wade v. Commonwealth, 303 S.W.2d 905, 907.

(7) The maxim is nothing but an aid to interpretation of the statute, and as an aid is weak when applied to acts of Congress enacted at widely separated times.

U.S.—Moreno Rios v. U. S., C.A.Puerto Rico, 256 F.2d 68, 71.

(8) The maxim is usually applied in cases involving the interpretation of statutes, but it is also applicable in the field of wills.

Tex.—Ellis v. First Nat. Bank in Dallas, Civ.App., 311 S.W.2d 916, 921.

Various characterizations of the maxim

(1) "The maxim is sensible and useful in logic and law."

N.Y.—In re Connor, 1 N.Y.St. 144, 148.

Tenn.—**Corpus Juris Secundum** quoted in Smith v. Lincoln Memorial University, 304 S.W.2d 70, 72.

EXPRESSIO UNIUS PERSONÆ EST EXCLUSIO ALTERIUS.⁵⁸**EXPRESSIO UNIUS PERSONÆ, VEL REI, EST EXCLUSIO ALTERIUS.⁵⁹****EXPRESSIO VEL DESIGNATIO PERSONÆ EST EXCLUSIO ALTERIUS.⁶⁰**

EXPRESSLY. The adverb has been said to have a definite meaning in law, being the same as that of the adjective "express;"⁶¹ and it has been defined as meaning in a clear or distinct,⁶² a direct or pointed,⁶³ or an express⁶⁴ manner; definitely, explicitly,

in direct or unmistakable terms;⁶⁵ directly,⁶⁶ distinctly,⁶⁷ in direct terms,⁶⁸ not by implication;⁶⁹ particularly,⁷⁰ plainly,⁷¹ pointedly;⁷² with distinct purpose.⁷³

While, in its primary meaning, the term denotes precision of statement, as opposed to ambiguity, implication, or inference, and is equivalent to "in an express manner," or "in direct terms," it is also commonly used to designate purpose, and as equivalent to "especially," or "particularly," or "for a distinct purpose or object."⁷⁴

Phrases employing the word are collected in the subjoined note.⁷⁵ Other phrases as to which more

(2) "An aid to construction, not a rule of law."

U.S.—Neuberger v. Commissioner of Internal Revenue, 61 S.Ct. 97, 101, 311 U.S. 83, 85 L.Ed. 58.

Ky.—City of Lexington v. Edgerton, 159 S.W.2d 1015, 1017, 289 Ky. 815, 151 A.L.R. 1207.

Mo.—City of Caruthersville v. Faris, App., 146 S.W.2d 80, 86.

(3) "A primary rule of statutory construction."

Ky.—Bloemer v. Turner, 137 S.W.2d 387, 390, 281 Ky. 832.

(4) "A rule of interpretation, not a constitutional command."

Mont.—State ex rel. Normile v. Cooney, 47 P.2d 637, 646, 100 Mont. 391.

(5) "Well-recognized rule of statutory interpretation."

Ohio.—Priest v. City of Wapakoneta, App., 32 N.E.2d 869, 877.

(6) Other statements see 25 C.J. p 220 note 17 [b].

Maxim held inapplicable

U.S.—Schoellkopf v. U. S., C.C.A.N. Y., 124 F.2d 982, 985.

Md.—Claus v. Board of Education of Anne Arundel County, 30 A.2d 779, 781, 181 Md. 513.

Tenn.—Haynes v. Sanford, 206 S.W. 2d 796, 799, 185 Tenn. 576.

58. A maxim meaning "The mention of one person is the exclusion of another." Black L.D.

59. A maxim meaning "The express mention of one person or thing is the exclusion of another." Peloubet Leg.Max.

Applied in

N.Y.—Zbarazer Realty Co. v. Brandstein, 113 N.Y.S. 1078, 1079, 61 Misc. 623.

60. A maxim meaning "The express mention or designation of one person is the exclusion of another." Pa.—Appeal of Hartranft, 5 Wkly. N.C. 105, 118.

61. U.S.—Minneapolis Steel & Machinery Co. v. Federal Surety Co., C.C.A.Minn., 34 F.2d 270, 274. Mo.—State ex rel. Ashauer v. Hostet-

ter, 127 S.W.2d 697, 699, 344 Mo. 665.

62. Ind.—State v. Denny, 21 N.E. 274, 279, 118 Ind. 449, 4 L.R.A. 65.

63. Ind.—Evansville v. State, 21 N. E. 267, 272, 118 Ind. 426, 4 L.R.A. 93.

25 C.J. p 223 note 25.

64. Cal.—Le Ballister v. Redwood Theatres, 36 P.2d 827, 1 C.A.2d 447. Mo.—St. Louis Union Trust Co. v. Hill, 76 S.W.2d 685, 689, 336 Mo. 17.

Okl.—Hawkins v. Mattes, 41 P.2d 880, 891, 171 Okl. 186.

Va.—City of Richmond v. Sutherland, 77 S.E. 470, 473, 114 Va. 688.

25 C.J. p 223 note 23.

65. Cal.—Le Ballister v. Redwood Theatres, 36 P.2d 827, 1 C.A.2d 447. Mo.—St. Louis Union Trust Co. v. Hill, 76 S.W.2d 685, 689, 336 Mo. 17.

Va.—City of Richmond v. Sutherland, 77 S.E. 470, 473, 114 Va. 688.

66. Cal.—Le Ballister v. Redwood Theatres, 36 P.2d 827, 1 C.A.2d 447. 25 C.J. p 223 note 29.

67. Ind.—Evansville v. State, 21 N. E. 267, 272, 118 Ind. 426, 4 L.R.A. 93.

68. Mont.—McKeever v. Oregon Mortgage Co., 198 P. 752, 753, 60 Mont. 270.

Okl.—Hawkins v. Mattes, 41 P.2d 880, 891, 171 Okl. 186.

25 C.J. p 223 note 27.

69. Ind.—Evansville v. State, 21 N. E. 267, 272, 118 Ind. 426, 4 L.R.A. 93.

70. U.S.—Magone v. Heller, N.Y., 14 S.Ct. 18, 19, 150 U.S. 70, 37 L.Ed. 1001.

Okl.—Hawkins v. Mattes, 41 P.2d 880, 891, 171 Okl. 186.

71. Ind.—Evansville v. State, 21 N. E. 267, 272, 118 Ind. 426, 4 L.R.A. 93.

25 C.J. p 223 note 33.

72. Ind.—State ex rel. Holt v. Denny, 21 N.E. 274, 279, 118 Ind. 449, 4 L.R.A. 65.

73. U.S.—Magone v. Heller, N.Y., 14 S.Ct. 18, 19, 150 U.S. 70, 37 L.Ed. 1001.

Okl.—Hawkins v. Mattes, 41 P.2d 880, 891, 171 Okl. 186.

74. U.S.—Magone v. Heller, N.Y., 14 S.Ct. 18, 19, 150 U.S. 70, 37 L.Ed. 1001.

75. Phrases

(1) "Expressly assumed such continuing liability." U.S.—Fidelity-Philadelphia Trust Co. v. Hale & Kilburn Corporation, D.C. Pa., 24 F.Supp. 3, 7.

(2) "Expressly declared." Mo.—State ex rel. Ashauer v. Hostetter, 127 S.W.2d 697, 699, 344 Mo. 665.

(3) "Expressly enjoined" see the C. J.S. definition Enjoin.

(4) "Expressly enumerates other charges" see the C.J.S. definition Enumerate.

(5) "Expressly for the benefit of a third person."

U.S.—Minneapolis Steel & Machinery Co. v. Federal Surety Co., C.C. A.Minn., 34 F.2d 270, 274.

Cal.—Le Ballister v. Redwood Theatres, 36 P.2d 827, 1 C.A.2d 447—Montgomery v. Dorn, 145 P. 148, 150, 25 C.A. 666.

Mont.—McKeever v. Oregon Mortgage Co., 198 P. 752, 753, 60 Mont. 270.

(6) "Expressly limited to heirs of the body."

Mo.—St. Louis Union Trust Co. v. Hill, 76 S.W.2d 685, 689, 336 Mo. 17.

(7) "Expressly named or granted" as equivalent to "enumerated" see the C.J.S. definition Enumerate.

(8) "Expressly state," as synonymous with "designate" see the C.J.S. definition Designate.

(9) "Unless expressly authorized by law." Ariz.—State v. Angle, 91 P.2d 705, 707, 54 Ariz. 13.

recent adjudications have not been found see 25 C.J. p 223 note 38—p 224 note 54.

EXPRESSUM FACIT CESSARE TACITUM.⁷⁶

EXPRESSUM SERVITIUM REGAT VEL DECLARET TACITUM.⁷⁷

EX PROCEDENTIBUS ET CONSEQUENTIBUS OPTIMA FIT INTERPRETATIO.⁷⁸

EXPROMISSIO, EXPROMISSOR, and EXPROMITTERE. See the C.J.S. definition *Ex*.

EXPROPIACIÓN. In Spanish law, condemnation, or expropriation; the taking of property, especially for public use.⁷⁹

EXPROPRIATION. In Eminent Domain § 1 it is stated that a meaning has been attached to the term "expropriation" imported from its use in foreign jurisprudence, which makes it synonymous with "the exercise of the power of eminent domain."

EXPULSION. A putting out;⁸⁰ more specifically, disfranchisement, severing the connection between an expelled member and any organized body such as an association;⁸¹ ejecting, banishing, or cutting off from the privileges of an institution or society permanently.⁸²

The term has been distinguished from "suspension"⁸³ and "voluntary withdrawal."⁸⁴

Expulsion from an association see *Associations* § 25, and from a college see *Colleges and Universities* § 26 notes 45—47. For some other references to specific uses see 25 C.J. p 224 note 60.

EXPUNGE. The word "expunge" is described as a term expressive of cancellation or deletion,⁸⁵ implying not a legal act, but a physical annihilation.^{85.5}

It is defined as meaning to blot out, as with a pen; to rub out, obliterate, strike out, or cancel; hence, to destroy or annihilate;⁸⁶ to destroy or obliterate;^{86.5} to blot out, efface, obliterate, or cancel.^{86.10}

In a particular connection, the word has been used as meaning rescind or revoke.⁸⁷

It has been held synonymous with "cancel" see the C.J.S. definition of that term.

EXPURGATION. The act of purging or cleansing, as where a book is published without its obscene passages.⁸⁸

EXPURGATOR. One who corrects by expurgating.⁸⁹

EXPURGATORIO. In Spanish law, an index or catalogue of prohibited books, or of those ordered to be expurgated.⁹⁰

EXQUÆSTOR. See the C.J.S. definition *Ex*.

(10) "Unless expressly prohibited."

Del.—Petition of Equitable Trust Co., 147 A. 231, 232, 17 Del.Ch. 21.

(11) "Unless expressly otherwise provided."

Ohio.—State v. Zangerle, 128 N.E. 165, 166, 101 Ohio St. 235.

76. A maxim meaning "A thing expressed puts an end to tacit implication."

Del.—Hart v. Deshong, 8 A.2d 85, 87, 1 Terry 218.

Applied or explained in

U.S.—U. S. v. Fuller, D.C.N.Y., 51 F. Supp. 951, 953.

U. S. v. Molloy, N.Y., 144 F. 321, 329, 75 C.C.A. 283, 11 L.R.A., N.S., 487.

Mo.—Caldwell v. Ryan, 108 S.W. 533, 537, 210 Mo. 17, 124 Am.S.R. 717, 16 L.R.A., N.S., 494, 14 Ann.Cas. 314.

25 C.J. p 224 note 55 [a].

More freely translated

(1) "Where a law giver sets down plainly his whole meaning, we are prevented from making him mean what we please ourselves."

N.M.—Munro v. City of Albuquerque, 150 P.2d 733, 743, 48 N.M. 306.

(2) Maxim "expressum facit cessare tacitum" means that that which is expressed makes that which is implied to cease.

N.C.—Howell v. Travelers Indem. Co., 74 S.E.2d 610, 614, 237 N.C. 227.

77. A maxim of Lord Bacon, which literally translated means "Let service expressed rule or declare what is silent." Adams Gloss.

78. A maxim meaning "The best interpretation is made from things proceeding and following (i. e. the context)."

Bouvier L.D.

Applied in

N.J.—Griscom v. Evens, 40 N.J.Law 402, 415, 29 Am.R. 251.

79. Escriche Diccionario.

80. N.Y.—Vanderpool v. Smith, 4 Abb.Dec. 461, 464.

81. S.C.—Palmetto Lodge No. 5, I. O. O. F. v. Hubbell, 33 S.C.L. 458, 462, 49 Am.D. 604.

82. Fla.—John B. Stetson University v. Hunt, 102 So. 637, 639, 88 Fla. 510.

83. Fla.—John B. Stetson University v. Hunt, supra.

S.C.—Palmetto Lodge No. 5, I. O. O. F. v. Hubbell, 33 S.C.L. 457, 462, 49 Am.D. 604.

84. N.Y.—New York Protective Assoc. v. McGrath, 5 N.Y.S. 8, 10.

85. N.Y.—In re Parson's Will, 195 N.Y.S. 742, 745, 119 Misc. 26.

85.5 Cal.—Andrews v. Police Court of City of Stockton, App., 123 P.2d 128, 129.

N.Y.—Application of Brandon, 131 N.Y.S.2d 204, 206.

86. Webster New Int.D.

86.5 Cal.—Andrews v. Police Court of City of Stockton, App., 123 P.2d 128, 129.

N.Y.—Application of Brandon, 131 N.Y.S.2d 204, 206.

86.10 R.I.—Natalizia v. Atlantic Tubing & Rubber Co., 105 A.2d 190, 192, 81 R.I. 515.

87. Pa.—Ickes v. Costlow, 193 A. 287, 290, 127 Pa.Super. 180.

88. Black L.D.

89. Black L.D.

90. Escriche Diccionario.

EX QUA PERSONA QUIS LUCRUM CAPIT, EJUS FACTUM PRÆSTARE DEBET.⁹¹

EXROGARE. See the C.J.S. definition Ex.

EXSCINDED. Cut off or expelled.⁹²

EX-SERVICEMEN. A term which has no single, precise definition which permits it to be read and applied without help from the context in which it appears.^{92,50}

EX SHIP. See the C.J.S. definition Ex.

EXTEMPORE DISCOURSE. An expression used as the antipode of a premeditated discourse.⁹³

EXTEND.

In General

The term is derived from "ex," from or out of, and "tendere," to stretch or stretch out,⁹⁴ and, when employed transitively, requiring an object, it is used in the sense of to stretch out or to draw out or to enlarge a thing, and implies something in existence,⁹⁵ and something to be extended.⁹⁶

It is, both by etymology and by common usage, exceedingly flexible, lending itself to a great variety of meanings, which must in each case be gathered from the context owing to the fact that it is essentially a relative term, referring to something already begun,⁹⁷ and implying its continuation;⁹⁸ hence, in a concrete sense, it has no persistent meaning, although abstractly it always implies increase or amplification as distinguished from inception, as, for instance, to extend a man's business, or his line of credit, or the due time of his debts.⁹⁹

It is not confined to mere linear prolongation,¹ although in its primary sense, when applied to a line, the word may import a continuation of the line without a break, but it is not always used in this restricted sense.²

When applied to streets, "extend" may mean more than linear prolongation and may involve the acquisition of necessary lands for such public use.³

Present Tense

In its primary sense, the word has been defined as meaning to stretch or draw out,⁴ to stretch or reach,⁵ to stretch or to stretch out,⁶ to stretch out

91. A maxim meaning "One who takes gain, profit or advantage on account of a person, ought to be answerable for his act or deed." Adams Gloss.

92. Pa.—Robinson v. Floyd, 28 A. 258, 260, 159 Pa. 165.

92.50 Meaning of the term

Ex-servicemen are those who have performed military service, and the term may be applicable to those who served on active duty only part-time and without compensation, but this designation may also be confined to a more definite and narrow class of individuals who performed military service, to those whose full time and efforts were at the disposal of military authorities and whose compensation included military pay and allowances. Such ex-servicemen are those who completely disassociated themselves from their civilian status and their civilian employment during the period of their military service, suffering in many cases financial hardship and separation from home and family. They formed the great bulk of the regular armed forces during World War II. In the popular mind, they were typified by the full-fledged soldier, sailor, marine, or coast guardsman.

U.S.—Mitchell v. Cohen, App.D.C., 68 S.Ct. 518, 522, 333 U.S. 411, 92 L. Ed. 774.

93. N.Y.—People v. Clark, 11 N.Y. Leg. Obs. 4, 13.

94. Okl.—Thomas v. Westheimer & Daube, 209 P. 327, 329, 87 Okl. 130.

Wis.—Wisconsin Cent. R. Co. v. Comstock, 36 N.W. 843, 844, 71 Wis. 88.

95. Tenn.—Crane Enamelware Co. v. Smith, 76 S.W.2d 644, 168 Tenn. 203 —Schlosser Leather Co. v. Gillespie, 6 S.W.2d 328, 157 Tenn. 166.

96. Fla.—State v. Jacksonville Terminal Co., 71 So. 474, 482, 71 Fla. 295.

25 C.J. p 225 note 71 [b].

97. Conn.—Antenucci v. Hartford Roman Catholic Diocesan Corp., 114 A.2d 216, 219, 142 Conn. 349 —Corpus Juris quoted in State v. Zazzaro, 20 A.2d 737, 742, 128 Conn. 160.

Me.—Cushing v. Inhabitants of Town of Bluehill, 92 A.2d 330, 335, 148 Me. 243.

N.J.—Corpus Juris quoted in Blouch v. Stevens, 150 A. 581, 583, 106 N.J. Law 488—Middlesex & S. Tract. Co. v. Metlar, 56 A. 142, 143, 70 N. J. Law 98.

98. U.S.—Clement's Executors v. Dickey, C.C.N.Y., 5 F.Cas.No.2,883, 1 Paine 377, 385.

Conn.—Antenucci v. Hartford Roman Catholic Diocesan Corp., 114 A.2d 216, 219, 142 Conn. 349 —Corpus Juris quoted in State v. Zazzaro, 20 A.2d 737, 742, 128 Conn. 160.

99. Conn.—Antenucci v. Hartford Roman Catholic Diocesan Corp., 114 A.2d 216, 219, 142 Conn. 349.

Me.—Cushing v. Inhabitants of Town of Bluehill, 92 A.2d 330, 335, 148 Me. 243.

N.J.—Middlesex & S. Tract. Co. v. Metlar, 56 A. 142, 143, 70 N.J. Law 98.

1. Me.—Cushing v. Inhabitants of Town of Bluehill, 92 A.2d 330, 335, 148 Me. 243.

N.J.—Middlesex & S. Tract. Co. v. Metlar, 56 A. 142, 143, 70 N.J. Law 98.

2. Mass.—South Boston R. Co. v. Middlesex R. Co., 121 Mass. 485, 489.

N.J.—Corpus Juris cited in Blouch v. Stevens, 150 A. 581, 583, 106 N. J. Law 488.

3. Iowa.—Royal v. City of Des Moines, 191 N.W. 377, 383, 195 Iowa 23.

4. Okl.—Thomas v. Westheimer & Daube, 209 P. 327, 329, 87 Okl. 130.

Tenn.—Crane Enamelware Co. v. Smith, 76 S.W.2d 644, 168 Tenn. 203 —Schlosser Leather Co. v. Gillespie, 6 S.W.2d 328, 157 Tenn. 166.

W.Va.—Henderson Development Co. v. United Fuel Gas Co., 3 S.E.2d 217, 219, 121 W.Va. 284.

Similarly expressed

"To draw forth or stretch."

III.—West Madison State Bank v. Mudd, 250 Ill.App. 258, 264.

25 C.J. p 226 note 87.

5. Ohio.—Piqua Branch State Bank v. Knoup, 6 Ohio St. 342, 356.

6. Kan.—Rossville State Bank v. Heslet, 113 P. 1052, 84 Kan. 315, 317, 33 L.R.A., N.S., 738. 25 C.J. p 226 note 1.

in any direction or in all directions,⁷ to stretch over.⁸

So, derivatively, to carry forward,⁹ to carry forward or continue in length or enlarge in area; to carry out farther than the original point or limit.¹⁰

The term "extend" is further defined as meaning to cause to reach or continue as from point to point;¹¹ to continue;¹² to continue in any particular direction;¹³ to lengthen;¹⁴ to lengthen or prolong either in space or time;¹⁵ to prolong,¹⁶ especially in a single direction, as a line;¹⁷ to prolong in space;¹⁸ to project;¹⁹ to protract,²⁰ as to extend a line in surveying.²¹

The word "extend" has also been defined to mean to dilate, to enlarge, to enlarge as a surface or volume; to enlarge or lengthen the bounds or dimensions of, as to extend roads, limits, or boundaries, or the territories of a kingdom;²² to enlarge in any sense;²³ to expand, to expand or dilate;²⁴ to give

wider range;²⁵ to make larger in space, time, or scope;²⁶ to make more comprehensive or capacious;²⁷ to widen;²⁸ to widen or enlarge;²⁹ and also to broaden the application or action of.³⁰

It has been said that "extend" has no such meaning as "transfer."^{30.5}

In English practice, to value the lands or tenements of a person bound by a statute or recognizance which has become forfeited, to their full extended value; also to execute the writ of extent or *extendi facias*.³¹

Depending on its use, the term has been held equivalent to, or synonymous with, "continue," "continue or stretch over."³² "Extend" has also been held to be equivalent to, or synonymous with, "enlarge," "exceed," and "expand," as stated in the C.J.S. definitions of these terms. "Extend" may

7. Ind.—Cooper v. Harmon, 83 N.E. 704, 170 Ind. 113.

Iowa.—Boone County School Dist. v. Jones, 120 N.W. 315, 317, 142 Iowa 8.

8. N.Y.—Campbell v. Jimenes, 27 N.Y.S. 351, 352, 7 Misc. 77.

9. Okl.—Thomas v. Westheimer & Daube, 209 P. 327, 329, 87 Okl. 130.

10. Ind.—Cooper v. Harmon, 83 N.E. 704, 170 Ind. 113.

Iowa.—Independent School Dist. v. Jones, 120 N.W. 315, 317, 142 Iowa 8.

11. W.Va.—Henderson Development Co. v. United Fuel Gas Co., 3 S.E. 2d 217, 219, 121 W.Va. 284.

12. Ill.—West Madison State Bank v. Mudd, 250 Ill.App. 258, 264.

13. Ohio.—Piqua Branch State Bank v. Knoup, 6 Ohio St. 342, 356.

14. Iowa.—Independent School Dist. v. Jones, 120 N.W. 315, 317, 142 Iowa 8.

N.Y.—Flagler v. Hearst, 70 N.Y.S. 956, 961, 62 App.Div. 18.

15. Conn.—State v. Tomczyk, 123 A. 2d 283, 285, 20 Conn.Sup. 67.

Okl.—Thomas v. Westheimer & Daube, 209 P. 327, 329, 87 Okl. 130.

Utah.—Keetch v. Corder, 62 P.2d 273, 277, 90 Utah 423, 108 A.L.R. 52.

16. Ill.—West Madison State Bank v. Mudd, 250 Ill.App. 258, 264.

Iowa.—Independent School Dist. v. Jones, 120 N.W. 315, 317, 142 Iowa 8.

25 C.J. p 225 note 77.

17. Iowa.—Boone County School Dist. v. Jones, 120 N.W. 315, 317, 142 Iowa 8.

Restricted in direction

"It may be assumed that, in a comprehensive and unrestricted

sense, the phrase 'to extend' means to enlarge or to expand in any direction. But when used in conjunction with the phrases 'to open' and 'to widen,' they can only mean a prolongation of the street from one of its termini and in its same general direction."

Cal.—O. T. Johnson Corporation v. City of Los Angeles, 245 P. 164, 169, 198 C. 308.

18. N.J.—McAndrews & Forbes Co. v. Camden Nat. Bank, 94 A. 627, 629, 87 N.J.Law 231, Ann.Cas.1917C 146.

19. Wash.—Seattle & M. R. Co. v. State, 34 P. 551, 553, 7 Wash. 150, 38 Am.S.R. 866, 22 L.R.A. 217.

20. Ill.—West Madison State Bank v. Mudd, 250 Ill.App. 258, 264.

25 C.J. p 225 note 81.

21. Iowa.—Independent School Dist. v. Jones, 120 N.W. 315, 317, 142 Iowa 8.

22. Iowa.—Independent School Dist. v. Jones, supra.

25 C.J. p 226 notes 92-95.

23. Conn.—State v. Tomczyk, 123 A. 2d 283, 285, 20 Conn.Sup. 67.

Iowa.—Northwestern Light & Power Co. v. Town of Grundy Center, 261 N.W. 604, 607, 220 Iowa 108.

Mo.—Meyering v. Miller, 51 S.W.2d 65, 66, 330 Mo. 885.

Utah.—Keetch v. Corder, 62 P.2d 273, 277, 90 Utah 423, 108 A.L.R. 52.

Similarly expressed

(1) "To enlarge a thing."

Tenn.—Crane Enamelware Co. v. Smith, 76 S.W.2d 644, 168 Tenn. 203—Schlosser Leather Co. v. Gillespie, 6 S.W.2d 328, 157 Tenn. 166.

(2) "To 'extend' means 'to . . . enlarge the scope of.'"

Mont.—State ex rel. Berthot v. Gal-

latin County High School Dist., 58 P.2d 264, 269, 102 Mont. 356.

24. Iowa.—Independent School Dist. v. Jones, 120 N.W. 315, 317, 142 Iowa 8.

25 C.J. p 226 notes 89, 90.

25. Mont.—State ex rel. Berthot v. Gallatin County High School Dist., 58 P.2d 264, 269, 102 Mont. 356.

N.M.—State v. Armstrong, 243 P. 333, 345, 31 N.M. 220.

26. Iowa.—Boone County School Dist. v. Jones, 120 N.W. 315, 317, 142 Iowa 8.

N.Y.—Flagler v. Hearst, 70 N.Y.S. 956, 961, 62 App.Div. 18.

27. Mo.—Meyering v. Miller, 51 S.W.2d 65, 66, 330 Mo. 885.

Mont.—State ex rel. Berthot v. Gallatin County High School Dist., 58 P.2d 264, 269, 102 Mont. 356.

N.M.—State v. Armstrong, 243 P. 333, 345, 31 N.M. 220.

Utah.—Keetch v. Corder, 62 P.2d 273, 277, 90 Utah 423, 108 A.L.R. 52.

28. Iowa.—Boone County School Dist. v. Jones, 120 N.W. 315, 317, 142 Iowa 8.

25 C.J. p 226 note 97.

29. Va.—Hunter v. Martin, 4 Munf. (18 Va.) 1, 37.

To widen or spread

Md.—Insley v. Myers, 64 A.2d 126, 129, 192 Md. 292.

30. Mo.—Meyering v. Miller, 51 S.W.2d 65, 66, 330 Mo. 885.

30.5 Md.—Insley v. Myers, 64 A.2d 126, 129, 192 Md. 292.

31. Black L.D.

32. N.Y.—Campbell v. Jimenes, 27 N.Y.S. 351, 352, 7 Misc. 77.

Wis.—Orton v. Noonan, 27 Wis. 272, 282.

also be synonymous with, or equivalent to, "increase,"³³ "renew,"³⁴ and "widen."³⁵

It has been compared with, or distinguished from, "create,"³⁶ "postpone," "put off,"³⁷ and "renew."³⁸

Phrases employing the word are set out in the subjoined note.³⁹

Extended

It has been said that the most common usage of the word "extended," especially in legal connotation, is along the line of its derivation, to stretch out.^{39.5} The term is defined as meaning stretched; spread or drawn out;⁴⁰ prolonged.⁴¹

The word is peculiarly applicable when the ques-

tion of time is being considered,⁴² and, in a particular connection, implies action within the time originally fixed,⁴³ and a lengthening out of the time previously fixed and not the arbitrary setting of a new date.⁴⁴

At other times and in other connections, it has no relation to time of payment, but to the inclusion of other or additional property in an instrument.⁴⁵

The term has been held equivalent to "given;"⁴⁶ and has been compared with, or distinguished from, "enlarged" see the C.J.S. definition Enlarge, and "renewed."⁴⁷

Phrases employing the word are set out in the subjoined note.⁴⁸

33. Mo.—Meyering v. Miller, 51 S. W.2d 65, 66, 330 Mo. 885.

34. Del.—Appon v. Belle Isle Corp., 46 A.2d 749, 759, 29 Del.Ch. 122.

Ga.—Candler v. Smyth, 147 S.E. 552, 554, 168 Ga. 276.

Ky.—Klein v. Auto Parcel Delivery Co., 234 S.W. 213, 216, 192 Ky. 583. See also Landlord and Tenant §§ 54, 58.

35. Mo.—Meyering v. Miller, 51 S.W. 2d 65, 66, 330 Mo. 885.

36. Pa.—Moers v. Reading, 21 Pa. 188, 201.

37. U.S.—Goulding v. Hammond, Ga., 54 F. 639, 642, 4 C.C.A. 533.

38. Ill.—West Madison State Bank v. Mudd, 250 Ill.App. 258, 264.

Ky.—Sanders v. Wender, 265 S.W. 939, 941, 205 Ky. 422.

Vt.—Quinn v. Valiquette, 68 A. 515, 518, 80 Vt. 434, 14 L.R.A.N.S., 962.

39. "Extend a charter"

(1) As meaning to give one which now exists greater or longer time to operate in than that to which it was originally limited.

Ky.—Fidelity & Columbia Trust Co. v. Louisville Ry. Co., 81 S.W.2d 896, 900, 258 Ky. 817.

Pa.—Moers v. Reading, 21 Pa. 188, 201.

See also Corporations § 79.

(2) Distinguished from "create a charter" see the C.J.S. definition Create.

Other phrases construed

(1) "Create, renew, or extend." Pa.—Cooper v. Oriental Sav. & Loan Assoc., 100 Pa. 402, 406.

(2) "Extend a street" see Municipal Corporations §§ 1043, 1044.

(3) "Extend indefinitely the time of payment." Pa.—Lanahan v. Clark, 123 A. 798, 799, 279 Pa. 297.

(4) "Extend its line or road" see Railroads § 53.

(5) "Extend over division where employed."

Or.—Burton v. Oregon-Washington R. & Nav. Co., 38 P.2d 72, 74, 148 Or. 648.

(6) "Extend such time" or "extend the time."

Mass.—Dolan v. Boott Cotton Mills, 70 N.E. 1025, 1026, 185 Mass. 576.

Tenn.—Schlosser Leather Co. v. Gillespie, 6 S.W.2d 328, 157 Tenn. 166.

39.5 Conn.—Corpus Juris cited in State v. Zazzaro, 20 A.2d 737, 742, 128 Conn. 160.

Antenucci v. Hartford Roman Catholic Diocesan Corp., 110 A.2d 495, 498, 19 Conn.Sup. 131.

Me.—Cushing v. Inhabitants of Town of Bluehill, 92 A.2d 330, 335, 148 Me. 243.

40. Cal.—Lang v. Pacific Brewing & Malting Co., 187 P. 81, 84, 44 C.A. 618.

Mont.—Rathbone v. State Board of Land Com'rs of Montana, 47 P.2d 47, 49, 100 Mont. 109.

41. Mo.—State v. Scott, 20 S.W. 1076, 1077, 113 Mo. 559.

42. Ky.—Fidelity & Columbia Trust Co. v. Louisville Ry. Co., 81 S.W.2d 896, 900, 258 Ky. 817.

43. Mo.—State v. Scott, 20 S.W. 1076, 1077, 113 Mo. 559, 561.

Wyo.—Coffee v. Harris, 197 P. 649, 650, 27 Wyo. 394.

44. U.S.—In re Parent, D.C.N.H., 30 F.Supp. 943, 945.

45. Ariz.—Button v. Wakelin, 15 P. 2d 956, 958, 41 Ariz. 84.

S.D.—Zastrow v. Knight, 229 N.W. 925, 929, 56 S.D. 554, 72 A.L.R. 379.

46. N.J.—Tantum v. Keller, 123 A. 299, 300, 95 N.J.Eq. 466.

47. Mont.—Rathbone v. State Board of Land Com'rs of Montana, 47 P. 2d 47, 49, 100 Mont. 109.

48. "Extended to"

(1) As applied to judicial power, defined as meaning to take jurisdic-

tion over a particular subject, whenever it is invoked by the commencement of a suit or other proceeding, but not to give any exclusive character to the power granted so as to exclude the concurrent jurisdiction of the ordinary tribunals.

Ohio.—Piqua State Bank v. Knoup, 6 Ohio St. 342, 356.

(2) As applied to criminal jurisdiction under the federal Constitution, construed as meaning that the judicial power of the Union clearly extends to all cases under the constitution and that no concurrent power is retained by the states, because the subject matter derives its existence from the constitution.

U.S.—Houston v. Moore, 5 Wheat. 1, 74, 5 L.Ed. 9.

25 C.J. p 227 note 11.

See also Courts §§ 522-525 for jurisdiction, concurrent and exclusive, of state and federal courts.

Other phrases

(1) "Actually extended," as distinguished from "theoretically or mathematically extended."

N.C.—Sugg v. Greenville, 86 S.E. 695, 699, 169 N.C. 606.

(2) "Extended coverage clause" see Insurance §§ 638, 839.

(3) "Extended from time to time." N.M.—Albuquerque First Nat. Bank v. Stover, 155 P. 905, 906, 21 N.M. 453, L.R.A.1916D 1280.

(4) "Extended insurance" see Insurance §§ 27, 638.

(5) "Extended lease," construed in a particular connection, as meaning that certain leases issued under an earlier statute, which did not conform to the intention of the legislature, must be "extended" to meet the new statutory requirements, that is enlarged, "stretched," upon all the terms and conditions of the instrument.

Mont.—Rathbone v. State Board of Land Commissioners of Montana, 47 P.2d 47, 49, 100 Mont. 109.

Extending

It has been said that where the context deals with land, not with mathematical lines, the natural meaning is "reaching" or "stretching," as distinguished from "produced" or "protracted;"⁴⁹ and where the term is used in connection with construction of streets it refers to lengthening, not widening, the street,⁵⁰ and not to the construction of a tunnel thereunder.⁵¹

Phrases employing the word are set out in the subjoined note.⁵²

EXTENDER. In Spanish law, to commit to writing at length; as equivalent to the English "extended;"⁵³ also to give greater extent, when used of rights, jurisdiction, authority, etc.; to apply to new cases, when used of laws.⁵⁴

EXTENDI FACIAS. Latin, literally "You cause to be extended."⁵⁵

In English practice, the name of a writ of execution,—derived from its two emphatic words,—more commonly called an "extent."⁵⁶

EXTENSION. The word is not a word of art, and, having no legal or technical significance, may mean whatever the parties intended when contracting.⁵⁷

It is defined generally as meaning the act of extending or state of being extended;⁵⁸ a stretching out;^{58.5} enlargement in dimension, area, duration, or scope;^{58.10} a stretching or expanding, a reaching or stretching out as in space, time, or scope;^{58.15} prolongation or enlargement;^{58.20} an enlargement in breadth, or continuation of length;^{58.25} increase;^{58.30} augmentation;^{58.35} expansion;^{58.40} en-

(6) "Extended limits."
Iowa.—Perkins v. Burlington, 42 N. W. 441, 442, 77 Iowa 553.

(7) "Extended line."
N.J.—McAndrews & Forbes Co. v. Camden Nat. Bank, 94 A. 627, 629, 87 N.J.Law 231, Ann.Cas.1917C 146.
W.Va.—Henderson Development Co. v. United Fuel Gas Co., 3 S.E.2d 217, 219, 121 W.Va. 284.

(8) "Extended or abridged."
Wis.—State v. Pabst, 121 N.W. 351, 369, 139 Wis. 561.

(9) "Mortgage . . . extended."
Ariz.—Button v. Wakelin, 15 P.2d 956, 958, 41 Ariz. 84.
S.D.—Zastrow v. Knight, 229 N.W. 925, 928, 56 S.D. 554, 72 A.L.R. 379.

25 C.J. p 226 note § [b].
See generally Mortgages § 178.

(10) "Privilege . . . extended."
N.J.—Tantum v. Keller, 123 A. 299, 300, 95 N.J.Eq. 466.

(11) "Time of payment . . . extended," as meaning a reasonable extension for a definite time, and not a series of extensions indefinite in number and endless in repetition."
N.H.—Rochester Sav. Bank v. Chick, 13 A. 872, 873, 64 N.H. 410, 411.

(12) "Within such extended time."
U.S.—In re Parent, D.C.N.H., 30 F. Supp. 943, 945.

49. N.J.—Steelman v. Atlantic City Sewerage Co., 38 A. 742, 743, 60 N.J.Law 461.

50. Del.—Kittenger v. Rossman, 112 A. 388, 392, 12 Del.Ch. 276.

51. Pa.—In re Locust St. Subway, 179 A. 741, 744, 319 Pa. 161.

52. Phrases construed

(1) "Extending a nonconforming use."
N.Y.—Pisicchio v. Board of Appeals

of Village of Freeport, 300 N.Y.S. 368, 165 Misc. 156.

(2) "Extending a tax" see Taxation § 471.

(3) "Extending into two or more counties."

Ind.—Cooper v. Harmon, 83 N.E. 704, 170 Ind. 113, 114.

(4) "Extending to the thoroughfare."

N.J.—Steelman v. Atlantic City Sewerage Co. 38 A. 742, 743, 60 N.J. Law 461.

(5) "Extending, widening, or deepening ditches."

Ark.—Lesser-Goldman Cotton Co. v. Cache River Drainage Dist. 294 S.W. 711, 713, 174 Ark. 160.

See also Drains § 45.

53. Cal.—Beach v. Gabriel, 29 C. 580, 584.

54. Escriche Diccionario.

55. Black L.D.

More freely rendered

"That you cause to be appraised at their full or extended value."
Wharton L.Lex.

56. Black L.D.

See also Executions §§ 12, 403.

57. Mo.—Corpus Juris quoted in Meyering v. Miller, 51 S.W.2d 65, 66, 330 Mo. 885.

Wash.—Guie v. Byers, 164 P. 75, 77, 95 Wash. 492.

58. Conn.—Antenucci v. Hartford Roman Catholic Diocesan Corp., 110 A.2d 495, 498, 18 Conn.Sup. 131.

Me.—Cushing v. Inhabitants of Town of Bluehill, 92 A.2d 330, 335, 148 Me. 243.

Mo.—Corpus Juris cited in Meyering v. Miller, 51 S.W.2d 65, 66, 330 Mo. 885.

Similarly expressed

"The act of extending or stretching out."

Ohio.—Cincinnati Gas-Light & Coke Co. v. Avondale, 1 N.E. 527, 531, 43 Ohio St. 257.

58.5 U.S.—Missouri, K. & T. R. Co. of Tex. v. Texas & N. O. R. Co., C. A.Tex., 172 F.2d 768, 769.

Conn.—Antenucci v. Hartford Roman Catholic Diocesan Corp., 110 A.2d 495, 498, 18 Conn.Sup. 131.

Me.—Cushing v. Inhabitants of Town of Bluehill, 92 A.2d 330, 335, 148 Me. 243.

Mo.—Corpus Juris cited in Meyering v. Miller, 51 S.W.2d 65, 66, 330 Mo. 885.

58.10 Conn.—Antenucci v. Hartford Roman Catholic Diocesan Corp., 110 A.2d 495, 498, 18 Conn.Sup. 131.

58.15 Me.—Cushing v. Inhabitants of Town of Bluehill, 92 A.2d 330, 335, 148 Me. 243.

Mo.—Corpus Juris cited in Meyering v. Miller, 51 S.W.2d 65, 66, 330 Mo. 885.

58.20 Me.—Cushing v. Inhabitants of Town of Bluehill, 92 A.2d 330, 335, 148 Me. 243.

Mo.—Corpus Juris cited in Meyering v. Miller, 51 S.W.2d 65, 66, 330 Mo. 885.

58.25 U.S.—Missouri, K. & T. R. Co. of Tex. v. Texas & N. O. R. Co., C. A.Tex., 172 F.2d 768, 769.

58.30 Conn.—Antenucci v. Hartford Roman Catholic Diocesan Corp., 110 A.2d 495, 498, 19 Conn.Sup. 131.

58.35 Conn.—Antenucci v. Hartford Roman Catholic Diocesan Corp., supra.

58.40 Conn.—Antenucci v. Hartford Roman Catholic Diocesan Corp., supra.

largement in any direction, in length, breadth, or circumference.⁵⁹

"Extension" is further defined as meaning an enlargement of the main body; the addition of something smaller, or of less import, than that to which it is attached;⁶⁰ that property of a body by which it occupies a portion of space;⁶¹ and, more specifically, as an addition to existing facilities,⁶² the continuance of an existing thing;⁶³ involving the idea of something preëxisting with which it is connected and which is thereby enlarged;⁶⁴ a part constituting an addition or enlargement,⁶⁵ and the prolongation of a previous estate.⁶⁶

In a particular connection, the term has been held to denote an intention to extend the benefits of a contract to others than those originally named therein.⁶⁷

In commercial law, an indulgence by giving time to pay a debt, or perform an obligation;⁶⁸ the al-

lowance on the part of the creditor to a debtor of further time to pay a debt, the granting of further time in which to do something which has been set down for a particular day, a postponement by agreement of the parties of the time set for acting;⁶⁹ an agreement made between a debtor and his creditors, by which the latter, in order to enable the former, embarrassed in his circumstances, to retrieve his standing, agrees to wait for a definite length of time after their several claims should become due and payable, before they will demand payment.⁷⁰

In one or another of the senses above indicated, the term has been held equivalent to, or synonymous with, "construction" see the C.J.S. definition of that term, and "renewal;"⁷¹ and has been compared with, or distinguished from, "improvement"⁷² and "renewal."⁷³

For references to some specific uses see 25 C.J. p 227 note 15.

59. La.—Monroe v. Ouachita Parish Police Jury, 17 So. 498, 499, 47 La. Ann. 1061.

Me.—Cushing v. Inhabitants of Town of Bluehill, 92 A.2d 330, 335, 148 Me. 243.

Mass.—South Boston R. Co. v. Middlesex R. Co., 121 Mass. 485, 489.

In any direction

Extension in space may be in any direction; it is not confined to mere linear direction.

Conn.—Antenucci v. Hartford Roman Catholic Diocesan Corp., 114 A.2d 216, 219, 142 Conn. 349.

60. Conn.—Antenucci v. Hartford Roman Catholic Diocesan Corp., 110 A.2d 495, 498, 499, 19 Conn. Sup. 131.

N.Y.—New York Central & H. R. R. Co. v. Buffalo & W. E. Electric R. Co., 89 N.Y.S. 418, 421, 96 App.Div. 471.

Pa.—City of Lancaster v. Public Service Commission, 182 A. 781, 783, 120 Pa.Super. 597.

61. U.S.—Newark Stove Co. v. Gray & Dudley Co., D.C.Tenn., 39 F. Supp. 992, 993.

62. Ill.—People ex rel. Anderson v. Baltimore & O. S. W. R. Co., 194 N.E. 568, 570, 359 Ill. 301.

63. Eng.—Brooke v. Clarke, 1 B. & Ald. 396, 403, 106 Reprint 146.

Unbroken continuation

The word "extension" connotes a subordinate or lesser part next to the principal or larger part and it implies a physical connection, and unbroken continuation.

Conn.—Antenucci v. Hartford Roman Catholic Diocesan Corp., 110 A.2d 495, 498, 19 Conn.Supp. 131.

64. N.Y.—People v. Steers, 143 N. Y.S. 52, 55, 158 App.Div. 153.

Existence of that to be extended

The word "extension" ordinarily implies the existence of something to be extended.

Mo.—State v. Graves, 182 S.W.2d 46, 51, 352 Mo. 1102.

65. Conn.—Antenucci v. Hartford Roman Catholic Diocesan Corp., 110 A.2d 495, 498, 19 Conn.Supp. 131.

Iowa.—Northwestern Light & Power Co. v. Town of Grundy Center, 261 N.W. 604, 607, 220 Iowa 108.

66. Mass.—Talbot v. Rednalloh Co., 186 N.E. 273, 276, 283 Mass. 225.

67. Cal.—Norton v. Farmers Automobile Inter-Insurance Exchange, 105 P.2d 136, 140, 40 C.A.2d 556.

68. U.S.—Corpus Juris quoted in Fidelity & Deposit Co. of Maryland v. Arenz, C.C.A.Or., 61 F.2d 607, 610.

Colo.—Brewer v. Harrison, 62 P. 224, 225, 27 Colo. 349.

La.—State v. Mestayer, 80 So. 891, 892, 144 La. 601.

As to effect of extension of a negotiable instrument see Bills and Notes §§ 265-289.

69. U.S.—Corpus Juris quoted in Fidelity & Deposit Co. of Maryland v. Arenz, C.C.A.Or., 61 F.2d 607, 610.

Wash.—Guie v. Byers, 164 P. 75, 76, 95 Wash. 492.

70. Md.—Strouse v. American Credit Indemn. Co., 46 A. 328, 1063, 91 Md. 244, 276.

71. U.S.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Rothensies, C.C.A.Pa.,

146 F.2d 148, 152—Campbell River Timber Co. v. Vierhus, C.C.A.Wash., 86 F.2d 673, 675, 108 A.L.R. 763—Sheldon v. Mississippi Cottonseed Products Co., C.C.A.Miss., 81 F.2d 169, 171—McRoberts v. Spaulding, D.C.Iowa, 32 F.2d 315, 318.

Kelly v. Central Hanover Bank & Trust Co., D.C.N.Y., 11 F.Supp. 497, 505.

Del.—Appon v. Belle Isle Corp., 46 A. 2d 749, 759, 29 Del.Ch. 122, affirmed 49 A.2d 1, 29 Del.Ch. 554.

Mass.—Mutual Paper Co. v. Hoague Sprague Corporation, 8 N.E.2d 802, 806, 297 Mass. 294.

Miss.—Economy Stores v. Moran, 172 So. 865, 867, 178 Miss. 62—State v. Love, 150 So. 196, 197, 170 Miss. 666, 90 A.L.R. 506.

54 C.J. p 381 notes 55, 56.

With reference to leases see Landlord and Tenant § 69.

72. U.S.—City of Hamlin v. Brown-Crummer Inv. Co., C.C.A.Tex., 93 F.2d 680, 684.

73. Cal.—Gray v. Maier & Zobelein Brewery, 84 P. 280, 282, 2 C.A. 653. Conn.—Carrano v. Shoor, 171 A. 17, 20, 118 Conn. 86.

Fla.—Corpus Juris cited in Lee v. Quincy State Bank, 173 So. 909, 910, 127 Fla. 765.

Mont.—Rathbone v. State Board of Land Commissioners of Montana, 47 P.2d 47, 49, 100 Mont. 109.

N.H.—Maybury Shoe Co. v. Rochester Factory Holding Co., 185 A. 654, 655, 88 N.H. 172.

Tex.—American Surety Co. of New York v. State, Civ.App., 277 S.W. 790, 793.

54 C.J. p 381 notes 57, 58.

See also Landlord and Tenant § 69, as applied to leases.

Extension of credit. The term ordinarily means a giving or an allowance of credit;⁷⁴ an indulgence by giving time to pay a debt, the allowance on the part of the creditor to a debtor of further time to pay a debt;⁷⁵ and when applied to a credit already obtained it may mean, according to the context, either an increase in the amount of the credit or an extension of the time for payment of the debt.⁷⁶

Extension of credit as affecting liability of surety see Principal and Surety § 127; and forbearance of suit as not constituting extension of credit so as to release indemnitor see Indemnity § 40.

Other phrases are listed in the subjoined note.⁷⁷

EXTENSIVE. Primarily, extended widely in space,

time, or scope; great, or wide; and secondarily, capable of being extended.⁷⁸

The term has been held to be an equivalent of "general,"⁷⁹ but not synonymous with "extraordinary."⁸⁰

EXTENSORES. See the C.J.S. definition Ex.

EXTENT. The word in common use varies somewhat in meaning, according to the subject to which it is applied, and as that changes it may as well refer to time as to space, or proportion, and more especially so when applied to interests, as in patents, for a particular term of years.⁸¹

The word "extent" is defined as meaning space or degree to which a thing is stretched or extended; hence bulk, compass, length, as an extent of line, and

74. La.—State v. Mestayer, 80 So. 891, 892, 144 La. 601.

The indorsement of notes whereby credit was extended for more than thirty days, through banks, held to constitute "extension of credit." Conn.—State v. Zazzaro, 20 A.2d 737, 741, 128 Conn. 160.

75. U.S.—Corpus Juris quoted in Fidelity & Deposit Co. of Maryland v. Arenz, C.C.A.Or., 61 F.2d 607, 610.

76. La.—State v. Mestayer, 80 So. 891, 892, 144 La. 601.

77. Phrases construed

(1) "All extensions and partial payments."

Wis.—Kline v. Fritsch, 250 N.W. 837, 838, 213 Wis. 51.

(2) "Enlargement or extension of cemetery" see the C.J.S. definition Enlargement, also Cemeteries § 17 note 78.

(3) "Extension agreement." N.Y.—Tuttle v. Metropolitan Sav. Bank, 30 N.Y.S.2d 347, 353.

(4) "Extension of an existing utility," as distinguished from "acquisition of a public utility."

Mich.—White v. Welsh, 289 N.W. 279, 280, 291 Mich. 636.

(5) "Extension of any indebtedness."

Colo.—Brewer v. Harrison, 62 P. 224, 225, 27 Colo. 349.

(6) "Extension of line" or "extension of railroad" see Railroads §§ 53, 54, and Street Railroads §§ 21, 22.

(7) "Extension of mining location or claim" see Mines and Minerals § 44.

(8) "Extension of municipal bonds" see Municipal Corporations § 1954.

(9) "Extension of payment."

La.—O'Banion v. Willis, 129 So. 440, 441, 14 La.App. 638.

(10) "Extension of public utility," as distinguished from "construction of public utility."

Ohio.—Priest v. City of Wapakoneta, App., 32 N.E.2d 869, 871.

(11) "Extension of service" by various public utilities see Electricity § 25, Gas § 20, Public Utilities § 44, Railroads §§ 390, 395-397, Street Railroads §§ 163, 164, and Waters § 257.

(12) "Extension of streets" see Municipal Corporations § 1043.

(13) "Extension of the bond."

Okl.—Luke v. American Surety Co. of New York, 114 P.2d 950, 953, 189 Okl. 220.

(14) "Extension of the school term."

Ky.—Shanklin v. Boyd, 142 S.W. 1041, 1043, 146 Ky. 460, 38 L.R.A., N.S., 710.

(15) "Extension of time."

Del.—McCrery v. Nivin, 67 A. 452, 457.

Mass.—Worster v. Perry, 170 N.E. 115, 116, 270 Mass. 371.

N.Y.—Buffalo Forge Co. v. Fidelity & Casualty Co. of New York, 256 N.Y.S. 329, 334, 142 Misc. 647.

See also Bills and Notes § 284, Guaranty §§ 75, 76, Indemnity § 40, and Principal and Surety §§ 162-172, as affecting the liability of persons secondarily liable.

(16) "Extension of time by note or otherwise."

Pa.—Pure Oil Co. v. Shlifer, 175 A. 895, 897, 115 Pa.Super. 319.

(17) "Extension or addition" see the C.J.S. definition Addition.

(18) "Extension or renewal of city's contract for a water supply" see Waters § 268.

(19) "Extension or renewal of note."

Ark.—Elk Horn Bank & Trust Co. v. Spraggins, 30 S.W.2d 858, 859, 182 Ark. 27.

(20) "Extension or renewal of present lease."

N.Y.—Feig v. Hart, 247 N.Y.S. 818, 138 Misc. 749.

(21) "Extension proposal" see Bankruptcy §§ 699, 702.

(22) "Extensions and additions" see the C.J.S. definition Addition.

(23) "Extension telephone" see Telegraphs, Telephones, Radio and Television § 4.

(24) "Extension thereto."

N.Y.—Alterman v. Home Ins. Co., 183 N.Y.S. 62, 63, 112 Misc. 445.

(25) "Option of extension," as distinguished from "option of renewal." Nev.—Nenzel v. Rochester Silver Corp., 226 P. 1102, 1105, 48 Nev. 41.

(26) "Renewal or extension."

U.S.—Indian Territory Illuminating Oil Co. v. Bartlesville Zinc Co., C. C.A.N.J., 288 F. 273, 276, 280.

(27) "Sewerage extension," as equivalent to "sewerage construction."

Ala.—Graymont v. Stott, 49 So. 683, 684, 160 Ala. 570.

78. Ind.—American Cannel Coal Co. v. Indiana Cotton Mills, 134 N.E. 891, 893, 78 Ind.App. 115.

79. Wash.—Times Printing Co. v. Star Pub. Co., 99 P. 1040, 1042, 51 Wash. 667, 16 Ann.Cas. 414.

80. "A thing which is merely extensive is not necessarily out of the ordinary, but, if it is extraordinary, it is always out of the ordinary." Ky.—Johnson v. Ratliff, 25 S.W.2d 355, 356, 233 Ky. 187.

"Extensive rainfall," as not synonymous with "extraordinary rainfall."

Ky.—Johnson v. Ratliff, supra.

81. U.S.—Wilson v. Rousseau, N.Y., 4 How. 646, 698, 11 L.Ed. 1141.

size, as a great extent of country or of body;⁸² nature and amount;⁸³ nature or character;⁸⁴ also communication or distribution.⁸⁵

In American practice, as an "extendi facias," or writ of execution see Executions §§ 12, 403 and Extendi Facias ante.

In English practice, a writ of execution issuing from the exchequer upon a debt due the crown, or upon a debt due a private person, if upon recognizance or statute merchant or staple, by which the sheriff is directed to appraise the debtor's lands, and, instead of selling them, to set them off to the creditor for a term during which the rental will satisfy the judgment.⁸⁶ It is sometimes referred to as the crown's writ of extent, a summary writ in the nature of an execution.⁸⁷

In Scotch practice, the value or valuation of lands; the rents, profits, and issues of lands.⁸⁸

"Extent" has been compared with, or distinguished from, "duration" see the C.J.S. definition of that word, and "manner."⁸⁹

Phrases employing the word are set out in the subjoined note.⁹⁰

EXTENTA MANERII. See the C.J.S. definition *Ex*.

EXTENUATE. To lessen, palliate, or mitigate.⁹¹ The term has been held synonymous with "mitigate."⁹²

EXTENUATION. That which renders a crime or tort less heinous than it would be without it. It is opposed to "aggravation."⁹³

EXTERIOR. The word is not one of defined technical meaning in law, and the lexical definitions are of scant assistance, for beyond the adjective impression of something outside, external, or outward, it has a definite meaning only as associated words may disclose.⁹⁴

As a noun, it has been defined as meaning that which is external, the outside, or the outward surface or part of anything.⁹⁵ Applied to buildings, it has been said that the word clearly means all of the outer surfaces thereof as distinguished from its interior or the portion enclosed by the outer

82. U.S.—Wilson v. Rousseau, N.Y., 30 F.Cas.No.17,832, 1 Blatchf. 3, 108.

83. Ga.—Macon v. Stringfield, 85 S. E. 684, 685, 16 Ga.App. 480.

Amount

Or.—Cox v. State Industrial Accident Commission, 121 P.2d 919, 921, 168 Or. 508, 159 A.L.R. 899.

84. Iowa.—Bennett v. Emmetsburg, 115 N.W. 582, 586, 138 Iowa 67.

Mich.—Ridgeway v. Escanaba, 117 N. W. 550, 551, 154 Mich. 68.

85. U.S.—Wilson v. Rousseau, N.Y., 30 F.Cas.No.17,832, 1 Blatchf. 3, 108.

86. Black L.D.

It is so called because the sheriff is to cause the lands to be appraised at their full extended value before he delivers them to plaintiff.

Vt.—Town of Mt. Holly v. French, 52 A. 1038, 1039, 75 Vt. 1.

87. Ill.—Corpus Juris cited in Smith v. Toman, 14 N.E.2d 478, 480, 368 Ill. 414.

88. Black L.D.

89. Or.—Cox v. State Industrial Accident Commission, 121 P.2d 919, 921, 168 Or. 508, 159 A.L.R. 899.

Tex.—Adams v. Terrell, 107 S.W. 537, 538, 101 Tex. 331.

90. Phrases construed

(1) "Extent in aid," defined as that kind of writ of extent which issues at the instance and for the benefit of a debtor to the crown, for

the recovery of a debt due to himself.

Vt.—Hackett v. Amsden, 56 Vt. 201, 206.

(2) "Extent in chief," defined as the principal kind of writ of extent, issuing at the suit of the crown, for the recovery of the crown's debt; an adverse proceeding by the king, for the recovery of his own debt.

Vt.—Hackett v. Amsden, supra.

(3) "Extent of dependency" see

Workmen's Compensation Acts §§ 322, 323.

(4) "Extent of each county."

Mass.—Commonwealth v. Costley, 118 Mass. 1, 25.

(5) "Extent of mining claim" see

Mines and Minerals § 44.

(6) "Extent of such injury."

Ga.—Maryon v. City of Atlanta, 99 S.E. 116, 117, 149 Ga. 35.

25 C.J. p 228 note 41 [a].

(7) "Extent of the work."

Iowa.—Bennett v. Emmetsburg, 115 N.W. 582, 586, 138 Iowa 67.

(8) "Manorial extent," defined as a survey of a manor made by a jury of tenants, often of unfree men sworn to sit for the particulars of each tenancy, and containing the smallest details as to the nature of the service due. "The 'extents' of manors are descriptions which give the numbers and names of the tenants, the size of their holdings, the

legal kind of their tenure and the kind and amount of their service." Black L.D.

(9) "To the extent of decedent's interest."

U.S.—First Trust Co. of Omaha v. Allen, D.C.Neb., 51 F.2d 1069, 1070.

(10) "To the extent of their lawful priority."

N.M.—Maxwell Lumber Co. v. Connolly, 287 P. 64, 67, 34 N.M. 562.

91. Black L.D.

Phrases construed

(1) "Justify, excuse, or extenuate."

Tex.—Connell v. State, 81 S.W. 746, 748, 46 Tex.Cr. 259.

(2) "Extenuating circumstances" defined as circumstances such as render a delict or crime less aggravated, heinous, or reprehensible than it would otherwise be, or tend to palliate or lessen its guilt.

Black L.D.

See also Criminal Law § 1983 b; Damages §§ 96-99; Homicide § 435.

92. Tex.—Connell v. State, supra.

93. Black L.D.

See also Criminal Law § 1983 b; Damages §§ 96-99.

94. Mich.—B. Siegel Co. v. Wayne Cir. Judge, 149 N.W. 1015, 1018, 183 Mich. 145.

95. Miss.—Jackson Steam Laundry v. Aetna Casualty & Surety Co., 126 So. 478, 479, 156 Miss. 649.

surfaces,⁹⁶ and is not limited so as to include only the front portion of the building.^{96.5}

As an adjective, it has been defined as external, on the outside, pertaining to the outside part, as the exterior part of a sphere.⁹⁷

Both as a noun and as an adjective, it has been contrasted with, or distinguished from, "inside"⁹⁸ and "interior."⁹⁹

Phrases employing the word are set out in the subjoined note.¹

EXTERNAL. It has been said that the word can apply only to something which has an outside and an inside;² and it has been defined as meaning acting from without, really being without, or relating to the outside, as the external surface of the body;³ exterior or outward;⁴ outwardly perceptible, visible; physical or corporeal, as distinguished from mental or moral;⁵ visible from the outside; hence, apparent, or capable of being perceived.⁶

As applied to a house, it means everything external to the house, or, as it is popularly called, "out of doors."⁷

When used in connection with a personal injury, it has been said that it is not always necessary that the word shall be interpreted as related to a blow or fall, but that it is given a wider sweep as an element of causation where bodily injuries follow, as in the case of an accident resulting from a drug taken exercising a force external to its natural effects.⁸

The term is used in contradistinction to "internal."⁹

External damage refers to the condition of a particular part of a thing which has an inside and an outside, and, specifically, to the outer or exterior part thereof.^{9.5} There is a distinction between "external damage" and external cause."^{9.10}

Other phrases employing the word are set out in the subjoined note.¹⁰

96. La.—City of New Orleans v. Impastato, 3 So.2d 559, 561, 198 La. 206.

N.M.—Lommori v. Milner Hotels, Inc., 319 P.2d 949, 952, 63 N.M. 342.

96.5 La.—City of New Orleans v. Impastato, 3 So.2d 559, 561, 198 La. 206.

Held to include

(1) A platform attached to a building partly roofed, and all open to the air.

N.Y.—May v. Ennis, 79 N.Y.S. 896, 897, 78 App.Div. 552.

(2) The four walls.

Mich.—B. Siegel Co. v. Wayne Cir. Judge, 149 N.W. 1015, 1018, 183 Mich. 145.

97. Tex.—Northwestern Casualty & Surety Co. v. Barzune, Civ.App., 42 S.W.2d 100, 103.

98. Miss.—Jackson Steam Laundry v. Aetna Casualty & Surety Co., 126 So. 478, 156 Miss. 649.

99. La.—City of New Orleans v. Impastato, 3 So.2d 559, 561, 198 La. 206.

Miss.—Jackson Steam Laundry v. Aetna Casualty & Surety Co., 126 So. 478, 156 Miss. 649.

1. Phrases

(1) "Directly upon the exterior thereof."

Miss.—Jackson Steam Laundry v. Aetna Casualty & Surety Co., 126 So. 478, 156 Miss. 649.

Tex.—Northwestern Casualty & Surety Co. v. Barzune, Civ.App., 42 S.W.2d 100, 103.

Wis.—Vaudreuil Lumber Co. v. Aetna Casualty & Surety Co., 230 N.W. 704, 201 Wis. 518.

(2) "Exterior boundaries."

Colo.—Montclair v. Thomas, 73 P. 48, 50, 31 Colo. 327.

(3) "Exterior end."

U.S.—The Allemanina, D.C.N.Y., 224 F. 633, 637.

(4) "Exterior of the safe," as meaning the outside surface of the safe itself, and not the outer surface of the inner door.

Tex.—National Surety Co. v. Volk Bros. Co., 82 S.W.2d 622, 623, 125 Tex. 398.

(5) "Exterior walls."

Mo.—Ittner v. St. Louis Exposition & Music Hall Assoc., 11 S.W. 58, 59, 97 Mo. 561.

(6) "Exterior water line."

N.Y.—People v. John H. Ireland Realty Co., 160 N.Y.S. 988, 992, 96 Misc. 18.

2. Eng.—Perry v. Davis, 3 C.B., N.S., 769, 775, 91 E.C.L. 769, 140 Reprint 945.

3. Tenn.—Provident Life & Accident Ins. Co. v. Campbell, 79 S.W.2d 292, 296, 18 Tenn.App. 452.

4. U.S.—Petroleum Iron Works Co. v. Boyle, Ohio, 179 F. 433, 438, 102 C.C.A. 579.

Mo.—Corpus Juris quoted in Toliver v. Massachusetts Bonding & Insurance Co., App., 47 S.W.2d 140, 141. Tenn.—Provident Life & Accident Ins. Co. v. Campbell, 79 S.W.2d 292, 296, 18 Tenn.App. 452.

5. Tenn.—Provident Life & Accident Ins. Co. v. Campbell, supra.

6. U.S.—Petroleum Iron Works Co. v. Boyle, Ohio, 179 F. 433, 438, 102 C.C.A. 579.

Mo.—Corpus Juris quoted in Toliver

v. Massachusetts Bonding & Insurance Co., App., 47 S.W.2d 140, 141.

7. Eng.—Perry v. Davis, 3 C.B., N.S., 769, 777, 91 E.C.L. 769, 140 Reprint 945.

8. N.Y.—Meyer v. New York Life Ins. Co., 291 N.Y.S. 912, 917, 249 App.Div. 243.

9. Eng.—Hamlyn v. Crown Accidental Ins. Co., 1893, 1 Q.B. 750, 753—Perry v. Davis, 3 C.B., N.S., 769, 777, 91 E.C.L. 769, 140 Reprint 945.

9.5 U.S.—Corpus Juris Secundum cited in Dubuque Fire and Marine Insurance Co. v. Caylor, C.A.Kan., 249 F.2d 162, 164.

9.10 U.S.—Dubuque Fire and Marine Insurance Co. v. Caylor, supra.

10. Phrases

(1) "External and visible marks," "external and visible signs" and "external evidence of accidental injury" see Insurance § 755.

(2) "External, bodily, accidental injury."

Mo.—Marvin v. Yeomen Mut. Life Ins. Co., 91 S.W.2d 176, 177, 230 Mo.App. 380.

(3) "External examination." U.S.—Petroleum Iron Works Co. v. Boyle, Ohio, 179 F. 433, 438, 102 C.C.A. 579.

(4) "External means." U.S.—Jensma v. Sun Life Assur. Co. of Canada, C.C.A.Idaho, 64 F.2d 457, 459—Order of United Commercial Travelers of America v. Shane, C.C.A.S.D., 64 F.2d 55, 59.

EXTRATERRITORIALITY. See Extraterritoriality post.

EXTERUS. See the C.J.S. definition Ex.

EXTERUS NON HABET TERRAS.¹¹

EXTERUS NON HABET TERRAS; HABET RES SUAS, ET VITAM ET LIBERTATEM.¹²

EXTINCT. The word is derived from the verb *extinguere*, to destroy or cut off,¹³ and is defined as meaning extinguished.¹⁴

EXTINCTION. A bringing or coming to an end, a putting out of existence, suppression, destruction.¹⁵

In a particular connection, the term has been held synonymous with "ademption."¹⁶

EXTINCTO SUBJECTO, TOLLITUR ADJUNCTUM.¹⁷

EXTINCTUM EST MANDATUM, FINITA VOLUNTATE.¹⁸

(5) "External or visible evidence on vehicle of accident."

Ga.—Life & Casualty Ins. Co. of Tennessee v. Roland, 165 S.E. 293, 294, 45 Ga.App. 467.

(6) "External or visible injury." Ga.—Life & Casualty Ins. Co. of Tennessee v. Yarbrough, 186 S.E. 434, 435, 53 Ga.App. 458.

(7) "External peroneal nerve," described as a nerve which "runs down the side of the leg below the knee and affects the muscles which raise the foot."

Cal.—Engelking v. Carlson, 88 P.2d 695, 696, 13 C.2d 216.

(8) "External violence." U.S.—Tschudi v. Metropolitan Life Ins. Co., C.C.A.Iowa, 72 F.2d 306, 308.

N.J.—Lower v. Metropolitan Life Ins. Co., 168 A. 592, 595, 111 N.J. Law 426.

25 C.J. p 229 note 67.

(9) "External, violent and accidental means" see Insurance § 754.

(10) "External visible injury." N.C.—Higgins v. Life & Casualty Ins. Co. of Tennessee, 17 S.E.2d 5, 6, 220 N.C. 243.

11. A maxim meaning "An alien holds no lands." Black L.D.

12. A maxim meaning "A foreigner has no lands; he has his personal effects, and life, and liberty." Adams Gloss.

13. S.C.—Taylor v. Hampton, 15 S.C. L. 96, 101, 17 Am.D. 710. 25 C.J. p 229 note 74.

14. Century D.

15. Century D.

16. Va.—King v. Sheffey, 8 Leigh (35 Va.) 614, 617. See also the C.J.S. definition Ademption, and Wills §§ 1172-1181.

17. A maxim meaning "When the substance [subject] is gone, the adjuncts disappear." Adams Gloss.

Applied in N.Y.—Griswold v. Waddington, 16 Johns. 438, 492.

18. A maxim meaning "An action of mandate ceases, extinguished by the prescribed will of the mandator." Adams Gloss.

Applied in N.Y.—Williams v. Birbeck, 1 Hoffm., 359, 363.

19. N.Y.—Onondaga Water Service Corporation v. Crown Mills, Inc., 230 N.Y.S. 691, 700, 132 Misc. 848.

20. Cal.—Gally v. Wynne, 273 P. 825, 826, 96 C.A. 145.

21. Webster Int.D.

"Extinguish the right"

Wis.—Eingartner v. Illinois Steel Co., 79 N.W. 433, 434, 103 Wis. 373, 74 Am.S.R. 871.

22. N.J.—Worthley v. Steen, 43 N.J. Law 542, 543—Tiger v. Morris, 42 N.J.Law 631, 633.

23. Del.—Commercial Bank v. Lockwood, 2 Del. 8, 14.

Mont.—Corpus Juris Secundum quoted in Hampton v. Commercial Credit Corp., 176 P.2d 270, 279, 119 Mont. 476.

EXTINGUISH. To put an end to;¹⁹ to put out, quench, stifle, as to extinguish fire or flame;²⁰ to render legally nonexistent; to nullify; to avoid, as by payment, set-off, limitation of actions, merger of an interest in a greater one, etc.²¹

The term has been distinguished from "regulate."²²

Extinguished. When the law speaks of a right or obligation as extinguished, it means that it is put out; taken away, destroyed;²³ completely destroyed or annihilated.^{23.5}

"Released" and "remitted" have been held to be convertible terms.^{23.10}

EXTINGUISHMENT. The term has, in the law, no fixed, uniform and universal meaning, but varies with the subject matter to which it is applied;²⁴ but usually it connotes the end of a thing, precluding the existence of future life therein,²⁵ and has been defined generally as meaning a complete wiping out, destruction, or annihilation, and not a mere suspension;²⁶ the destruction or cancellation of a

Phrases construed

(1) "Authority is extinguished." Cal.—In re Allen, 21 P. 426, 427, 78 C. 581—Schroeder v. San Mateo County Super. Ct., 11 P. 651, 652, 70 C. 343.

(2) "Extinguished entity." N.Y.—Metropolitan Tel. & Tel. Co. v. Metropolitan Tel. & Tel. Co., 141 N.Y.S. 598, 603, 156 App.Div. 577.

(3) "No obligation . . . shall be . . . extinguished." Mont.—Custer County v. Story, 69 P. 56, 58, 26 Mont. 517.

(4) "Remitted, released, or extinguished." Mont.—Custer County v. Story, supra.

23.5 Ga.—Corpus Juris Secundum cited in Franklin v. Mobley, 42 S. E.2d 755, 759, 202 Ga. 212.

23.10 Mont.—Board of Com'rs of Custer County v. Story, 69 P. 56, 58, 26 Mont. 517.

24. Ga.—Moultrie v. Smiley, 16 Ga. 289, 302.

25. Okl.—McRoberts v. McRoberts, 57 P.2d 1175, 1177, 177 Okl. 156.

Similarly expressed

"A right of this sort (that is, an incorporeal hereditament,) once extinguished is forever gone, and cannot revive. An extinguishment therefore for one moment is an extinguishment forever."

S.C.—Taylor v. Hampton, 15 S.C.L. 96, 101, 17 Am.D. 710.

26. S.C.—Taylor v. Hampton, supra. 25 C.J. p 230 note 90.

right, power, contract, or estate;²⁷ a discharge by operation of law;²⁸ a termination;²⁹ and, more specifically, as the annihilation or extinction of a right by its being consolidated with a greater or more extensive right;³⁰ the extinction of a charge or equity by its passing into the hands of the owner of the lands charged;³¹ and it has been sometimes used in the sense of payment.³²

The term has been applied to causes of action,³³ contracts, rights, titles, and interests,³⁴ debts,³⁵ or other obligations,³⁶ whether the effect produced is by the act of God, by operation of law,³⁷ or by

an act of a person.³⁸

The term has sometimes been used as equivalent to, or synonymous with, "liquidation,"³⁹ "merger,"⁴⁰ and "suspension."⁴¹

It has also been compared with, or distinguished from, "abatement," "merger," "suspension,"⁴² "release" see Release § 2, and "transfer."^{42.5}

For references to some specific uses see 25 C.J. p 230 note 82.

Phrases employing the word are set out in the subjoined note.⁴³

27. Black L.D.

28. Neb.—Woodrough v. Douglas County, 98 N.W. 1092, 1095, 71 Neb. 354.

N.J.—Baker v. Baker, 28 N.J.Law 13, 20, 75 Am.D. 243.

29. Eng.—Barlow v. Ross, 24 Q.B.D. 381, 386.

30. Miss.—Planters' Bank of State v. Calvit, 11 Miss. 143, 194, 41 Am. D. 616.

31. "It takes place when the same hand that is to receive is to pay." Pa.—Henderson v. Stryker, 30 A. 386, 387, 164 Pa. 170.

Tex.—Fisher v. First Nat. of Throckmorton, Civ.App., 171 S.W.2d 223, 224.

32. U.S.—Louisville Trust Co. v. Kentucky Nat. Bank, C.C.Ky., 102 F. 442, 445.

33. U.S.—Eberle v. Sinclair Prairie Oil Co., C.C.A.Okl., 120 F.2d 746, 749.

34. Ga.—Moultrie v. Smiley, 16 Ga. 289, 343. S.C.—Taylor v. Hampton, 15 S.C.L. 96, 101, 17 Am.D. 710.

35. In its application to debts

(1) An extinguishment takes place only when the original debt is destroyed, as if a feme sole marries her debtor, or if a debtor is made executor at common law, etc. So taking a security of a higher nature extinguishes the first security, but a security of an inferior or equal degree does not extinguish the first security.

Miss.—Planters' Bank of State v. Calvit, 11 Miss. 143, 195, 41 Am.D. 616.

(2) Presumably, acceptance of new note does not constitute "extinguishment" of the original instrument, and unless there is proof of a special agreement to the contrary, the assumption is that the precedent debt remains in effect, the new obligation being accepted only by way of collateral security or conditional payment.

Pa.—First Nat. Bank of Mount Hol-

ly Springs v. Cumblor, 21 A.2d 120, 121, 145 Pa.Super. 595.

36. Del.—Commercial Bank v. Lockwood, 2 Del. 8, 14.

37. N.J.—Baker v. Baker, 28 N.J. Law 13, 20, 75 Am.D. 243.

38. Ga.—Moultrie v. Smiley, 16 Ga. 289, 343.

S.C.—Taylor v. Hampton, 15 S.C.L. 96, 101, 17 Am.D. 710.

39. Pa.—Aliquippa Nat. Bank, to Use of Woodlawn Trust Co., v. Harvey, 16 A.2d 409, 411, 340 Pa. 223.

40. Ill.—Donk v. Alexander, 7 N.E. 672, 676, 117 Ill. 330.

41. Ga.—Moultrie v. Smiley, 16 Ga. 289, 302, 304. 25 C.J. p 230 note 91 [a].

42. Ga.—Moultrie v. Smiley, supra. Ill.—Donk v. Alexander, 7 N.E. 672, 676, 117 Ill. 330.

Home Bldg. & Loan Ass'n of Paris, Ill. v. Gaumer, 269 Ill.App. 196, 205.

Okl.—McRoberts v. McRoberts, 57 P. 2d 1175, 1177, 177 Okl. 156.

25 C.J. p 231 note 99 [a]—40 C.J. p 650 note 24.

Inaccurate use of the term

The words "merger," "suspension," and "abatement," would, in many instances where "extinguishment" is used, much more accurately and felicitously express the idea intended to be conveyed.

Ga.—Moultrie v. Smiley, 16 Ga. 289, 302.

42.5 N.Y.—Sands v. Hill, 55 N.Y. 18, 22.

Lane v. Albertson, 79 N.Y.S. 947, 954, 78 App.Div. 607.

Or.—Miles v. Bowers, 90 P. 905, 907, 49 Or. 429.

43. Phrases construed

(1) "Extinguishment of common" see Common Lands § 16.

(2) "Extinguishment of copyhold," defined as the uniting of the freehold and copyhold interests in the same person and in the same

right, which may be either by the copyhold interest coming to the freehold or by the freehold interest coming to the copyhold. Black L.D.

(3) "Extinguishment of debts," as taking place by payment; by accord and satisfaction; by novation, or the substitution of a new debtor; by merger, when the creditor recovers a judgment or accepts a security of a higher nature than the original obligation; by a release; by the marriage of the feme sole creditor with the debtor, or of an obligee with one of two obligors; and by one of the parties, debtor or creditor, making the other his executor. Black L.D.

(4) "Extinguishment of indebtedness for taxes."

Tex.—State v. Cage, Civ.App., 176 S. W. 928, 931.

(5) "Extinguishment of rent," as taking place by purchase of the lands, thus acquiring as good an estate in the land as in the rent; also by conjunction of estates, by confirmation, by grant, by release, and by surrender. Black L.D.

See also the C.J.S. title Ground Rents § 9, and 28 C.J. p 850 note 32—p 851 note 51.

(6) "Extinguishment of the state debt."

Mich.—Auditor General v. State Treasurer, 7 N.W. 716, 45 Mich. 161.

(7) "Extinguishment of ways," as usually effected by unity of possession. Black L.D.

See also Easements § 57 a.

(8) "Release or extinguishment of his interest."

U.S.—Alexander v. Fidelity Trust Co., D.C.Pa., 238 F. 938, 942.

Pa.—Darragh v. Stevenson, 39 A. 37, 38, 183 Pa. 397, 402.

Distinguished from "assignment" see Assignments § 2 b (10) note 78.

EXTINGUITUR OBLIGATIO QUÆ RITE CONSTITIBET SI IN EUM CASUM INCIDERIT A QUO INCIPERE NON POTUIT.⁴⁴

EXTIRPATION. In English law, a species of destruction or waste, analogous to estrepement.⁴⁵

EXTIRPATIONE. A judicial writ, either before or after judgment, that lay against a person who, when a verdict was found against him for land, etc., maliciously overthrew any house or extirpated any trees upon it.⁴⁶

EXTOCARE. See the C.J.S. definition Ex.

EXTORSIÓN. In Spanish law, the act of taking by force what does not belong to the taker.⁴⁷

EXTORSIVELY. As a term descriptive of the crime of extortion and used to aver the corrupt intent necessary for the crime see Extortion § 10.

EXTORT. To obtain by violence, threats, compulsion, or the subjection of another to some necessity;⁴⁸ to obtain from a holder desired possessions or knowledge by force or compulsion; to wrest from another by force, menace, duress, etc.;⁴⁹ to exact wrongfully money or property; to take or obtain anything from another by compulsion or oppressive exaction, whether by an officer or otherwise;⁵⁰ to obtain money or other valuable thing either by compulsion, by actual force, or by the force of motives

applied to the will, and offer more overpowering and irresistible than physical force.⁵¹ Also, to gain by wrongful methods; to obtain in an unlawful manner; to compel a payment by means of threats of injury to person, property, or reputation.⁵²

The term does not imply necessarily a wrongful obtaining of property of another in the sense that the guilty party be not lawfully entitled to the possession thereof, but in the sense that the means used to obtain the property be wrongful.⁵³ It does necessarily imply the adoption of illegal means, or moral compulsion;⁵⁴ the result of exposing, or threatening to expose, the person addressed to the ridicule or contempt of society.⁵⁵

As used in a particular connection, the term has been held synonymous with "gain."⁵⁶

Extorting. Inducing an unwilling or involuntary giving of.⁵⁷ While the term may, by implication, be given a meaning that would include a result attained by violence, the word is also used in the sense of compelling or coercing by the use of any means that would serve to overcome one's power of resistance or would produce a result other than a voluntary one.⁵⁸

EXTORTIO EST CRIMEN QUANDO QUIS COLORE OFFICII EXTORQUET QUOD NON EST DEBITUM, VEL SUPRA DEBITUM, VEL ANTE TEMPUS QUOD EST DEBITUM.⁵⁹

44. A maxim meaning "An obligation which has been sealed in due form is extinguished if it fall into that state from which it cannot rise."

Adams Gloss.—Halkerston Max. p 6.

45. Black L.D.

See also the C.J.S. definition Estrepement.

46. Black L.D.

47. Escriche Diccionario.

48. Pa.—Commonwealth v. Chan-ning, 55 Pa.Super. 510, 516.

49. Tex.—Cohen v. State, 38 S.W. 1005, 1006, 37 Tex.Cr. 118.

50. U.S.—U. S. v. Dunkley, D.C.Cal., 235 F. 1000, 1002.

Similarly expressed

(1) "To exact something wrongfully from a party by threats, or putting in fear; to take from unlawfully."

Del.—State v. Adams, 106 A. 287, 288, 7 Boyce 335.

(2) "To wrest from, to exact, to take under a claim of protection, or the exercise of influence contrary to good morals and common honesty." Pa.—Commonwealth v. Neubauer, 16 A.2d 450, 452, 142 Pa.Super. 528.

51. Mass.—Commonwealth v. O'Brien, 12 Cush. 84, 90.

52. Neb.—McKenzie v. State, 204 N. W. 60, 61, 113 Neb. 576.

Wash.—State v. Richards, 167 P. 47, 48, 97 Wash. 587.

Phrases

(1) "Extort a confession" means to wrest it by force, menace, duress, torture, etc.

Ark.—Needham v. State, 224 S.W.2d 785, 790, 215 Ark. 935.

(2) "Extort or gain."

Ohio.—Mann v. State, 26 N.E. 226, 228, 47 Ohio St. 556, 11 L.R.A. 656.

53. S.D.—In re Sherin, 210 N.W. 507, 508, 50 S.D. 428.

54. Eng.—Rex v. Hollinsberry, 4 B. & C. 329, 10 E.C.L. 601, 107 Reprint 1081, 6 D. & R. 345, 16 E.C.L. 262.

55. D.C.—Slater v. Taylor, 31 App. D.C. 100, 103, 18 L.R.A., N.S., 77.

56. N.Y.—People v. Griffin, 2 Barb. 427, 430.

57. Ky.—Commonwealth v. McClanahan, 155 S.W. 1131, 1133, 153 Ky. 412, Ann.Cas.1915C 132.

58. Ky.—Sutton v. Commonwealth, 269 S.W. 754, 757, 207 Ky. 597.

59. A maxim meaning "Extortion is a crime when, by colour of office, any person extorts that which is not due, or more than is due, or before the time when it is due."

Black L.D.

Applied in

Eng.—Beawfage's Case, 10 Coke pp 99 b, 102 a.

EXTORTION

This Title includes obtaining or attempting to obtain from another, under color of official or other right, money or other property, more particularly by the taking or claiming, by a public officer, of illegal or excessive fees or compensation for official services, and acts of oppression or other injuries to person, property, or rights, committed by such officer under color of official authority; nature and elements of the crimes of extortion under color of office or right, oppression, etc.; nature and extent of criminal responsibility therefor; and prosecution and punishment of such acts as public offenses.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

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See also descriptive word index in the back of this volume

§ 1. Definitions and Nature of Offense in General

"Extortion" means the taking or obtaining of anything from another by means of illegal compulsion or oppressive exaction. At common law, and under statutes declaratory thereof, "extortion" is a crime committed by an officer who, under cover of office, unlawfully takes any money or thing of value not due him, or more than is due, or before it is due; but under other statutes it includes any obtaining of property from another through a wrongful use of force or fear.

The ordinary meaning of the word "extortion" is the taking or obtaining of anything from another

by means of illegal compulsion or oppressive exaction.¹

As common-law offense. Extortion is a well known common-law crime;^{1,5} in the common law the term "extortion" has acquired a technical meaning, and designates a crime committed by an officer of the law who, under cover or color of his office, unlawfully and corruptly takes any money or thing of value that is not due to him, or more than is due, or before it is due.² In a more enlarged sense,

1. U.S.—*Daniels v. U. S.*, C.C.A.Cal., 17 F.2d 339, 342, certiorari denied *Appell v. U. S.*, 47 S.Ct. 591, 274 U. S. 744, 71 L.Ed. 1325.
Del.—*State v. Kramer*, 115 A. 8, 11, 1 W.W.Harr. 454.

Wash.—*Corpus Juris* quoted in *State v. Burns*, 1 P.2d 229, 161 Wash. 362.

25 C.J. p 233 note 2.

"Extortion in its broad sense is a wrongful exaction of money or other valuable thing, either by compul-

sion, by actual force, or by the force of motives applied at will."

Ky.—*Commonwealth v. Donoghue*, 63 S.W.2d 3, 8, 250 Ky. 343, 89 A.L.R. 819.

1.5 U.S.—*U. S. v. Altmeyer*, D.C.Pa., 113 F.Supp. 854.

2. U.S.—*U. S. v. Laudani*, C.C.A.N.J., 134 F.2d 847, reversed on other grounds 64 S.Ct. 315, 320 U.S. 543, 83 L.Ed. 300, 149 A.L.R. 492.

Corpus Juris Secundum cited in *U. S. v. Altmeyer*, D.C.Pa., 113 F. Supp. 854, 856.

Corpus Juris cited in *Martin v. U. S.*, C.C.A.N.Y., 278 F. 913, 917.
Fla.—*La Tour v. Stone*, 190 So. 704, 709, 139 Fla. 681.

Me.—*State v. Vallee*, 12 A.2d 421, 427, 136 Me. 432.

N.J.—*State v. Weleck*, 91 A.2d 751, 10 N.J. 355.

State v. Matule, 148 A.2d 848, 54 N.J.Super. 326.

it signifies any oppression under color or pretense of right.³

As statutory offense. In many jurisdictions, under statutes penalizing extortion and containing no contradictory provisions, the common-law definition of extortion is applicable,⁴ and the statute must be considered with reference to the common law.^{4.5} Under other statutes, the definition includes any obtaining of property from another through a wrongful use of force or fear, thus including acts not done under color of official right.⁵ It has also been held that extortion consists in demanding an illegal fee or gift to influence official conduct.⁶ Where one does not occupy any official position but obtains money through a false representation that he is the agent of an officer, he is guilty of obtaining money under false pretenses and not of extortion under a statute punishing extortion by any person "under color of his official right."⁷

A statute punishing persons holding offices in the several departments of the government who, in addition to their salaries, appropriate and receive compensation beyond their salaries has no application to the crime of extorting money under color of office;⁸ and a statute providing for the punish-

ment of a government employee who uses his position of employment with the government to extort does not purport to punish a federal employee for soliciting and receiving money which he appropriates to his own use or to punish a federal employee who is guilty of fraud.^{8.5} The term "extortion," as used in an act to safeguard the public against fraud, extortion, and similar abuses in the resale of theatre tickets by brokers, means the exaction of money made possible because of oppressive conditions or circumstances, as distinguished from the receipt of money as a result of free negotiations and willingly paid for a service or commodity.⁹

Extortion by force or fear otherwise than under color of official or other right is considered in Threats and Unlawful Communications § 10.

Character and grade of offense. Extortion is an abuse of public justice,¹⁰ and a misuse by oppression of the power with which the law clothes a public officer.^{10.5} It has been said to be an offense of a particularly odious character,¹¹ and abhorrent to all who believe in decent government, and the broad statutory proscription thereof is rightly applied to public officers whatever be the nature of their duties.^{11.5}

State v. Barts, 38 A.2d 838, 132 N.J.Law 74, affirmed 40 A.2d 639, 132 N.J.Law 420.
N.D.—State v. Anderson, 267 N.W. 121, 123, 66 N.D. 522.
Pa.—Commonwealth v. Lawton, 84 A. 2d 384, 170 Pa.Super. 9—Commonwealth v. Gettis, 72 A.2d 619, 166 Pa.Super. 515—Commonwealth v. Norris, 87 Pa.Super. 61, 63.
Commonwealth ex rel. Sickler v. Yaukey, 11 Pa.Dist. & Co.2d 11.
Tex.—Murray v. State, 67 S.W.2d 274, 275, 125 Tex.Cr. 252.
25 C.J. p 233 note 3.

Other statements

(1) "At common law, extortion was offense committed by officer under color of office."
Pa.—Commonwealth v. Mann, 170 A. 381, 382, 111 Pa.Super. 371—Commonwealth v. Nathan, 93 Pa.Super. 193, 195.

(2) Extortion at common law signified the taking of money, beyond that allowed by law, by any officer under color of his office.
N.J.—State v. Goodman, 89 A.2d 243, 9 N.J. 569.

(3) At common law, if a public employee under color of his office demanded and received money or a thing of value to which he was not entitled, he was guilty of extortion.
U.S.—U. S. v. Sutter, C.C.A.III., 160 F.2d 754.

3. Fla.—La Tour v. Stone, 190 So. 704, 709, 139 Fla. 681.

Me.—State v. Vallee, 12 A.2d 421, 427, 136 Me. 432.
N.J.—State v. Barts, 38 A.2d 838, 132 N.J.Law 74, affirmed 40 A.2d 639, 132 N.J.Law 420.
25 C.J. p 233 note 4.

4. N.J.—State v. Weleck, 91 A.2d 751, 10 N.J. 355.
Okla.—Finley v. State, 181 P.2d 849, 84 Okl.Cr. 309.
Wis.—Hanley v. State, 104 N.W. 57, 125 Wis. 396.
25 C.J. p 233 note 3.

Statute held to have adopted common-law meaning of extortion.

U.S.—U. S. v. Altmeyer, D.C.Pa., 113 F.Supp. 354.
N.J.—State v. Goodman, 89 A.2d 243, 9 N.J. 569.
State v. Matule, 148 A.2d 848, 54 N.J.Super. 326.

Regarded as three offenses

A statute penalizing any officer who shall collect fees not allowed by law, or any money as a purported fee for a service or act not done, or fees due him by law in excess of the fees allowed by law for such service, has been held to define three separate offenses rather than three ways of committing one offense.
Tex.—Lewis v. State, 64 S.W.2d 972, 124 Tex.Cr. 582.

4.5 N.J.—State v. Weleck, 91 A.2d 751, 10 N.J. 355.

5. Cal.—People v. Goodman, 323 P. 2d 536, 159 C.A.2d 54—People v.

Powell, 195 P. 456, 458, 50 C.A. 436.
25 C.J. p 234 note 9.

6. Fla.—Richards v. State, 197 So. 772, 774, 144 Fla. 177, certiorari dismissed Richards v. State of Florida, 61 S.Ct. 737, 312 U.S. 662, 85 L.Ed. 1109.

7. Okla.—Drake v. State, 103 P. 878, 2 Okl.Cr. 643.

8. La.—State v. Schuermann, 83 So. 426, 146 La. 110.

8.5 U.S.—U. S. v. Sutter, C.C.A.III., 160 F.2d 754.

Word "extortion," in such statute, is used in its common, ordinary sense as distinguished from the sense in which it was known at common law.
U.S.—U. S. v. Sutter, supra.

9. N.Y.—People v. Weller, 143 N.E. 205, 208, 237 N.Y. 316, 38 A.L.R. 613.

10. N.J.—State v. Barts, 38 A.2d 838, 132 N.J.Law 74, affirmed 40 A.2d 639, 132 N.J.Law 420.

Pa.—Commonwealth v. Hagan, 9 Phila. 574.

10.5 N.J.—State v. Barts, 38 A.2d 838, 132 N.J.Law 74, affirmed 40 A. 2d 639, 132 N.J.Law 420.

11. Fla.—La Tour v. Stone, 190 So. 704, 709, 139 Fla. 681.
25 C.J. p 234 note 14.

11.5 N.J.—State v. Goodman, 89 A. 2d 243, 9 N.J. 569.

It was regarded as a misdemeanor at common law,¹² and is, under statutory definitions, also ordinarily an offense of that grade,¹³ it being a form of malfeasance in office,^{13.5} although under some statutes it is a felony.¹⁴

"Blackmail" defined and compared. In common parlance and general acceptance, the term "blackmail" is equivalent to, or synonymous with, extortion,¹⁵ and is defined as the exaction of money for the performance of a duty, the prevention of an injury, or the exercise of influence;¹⁶ the wrongful exaction of money;¹⁷ the extortion of money from a person by threats of accusation or exposure;¹⁸ the extortion of money from a person by threats of accusation, or exposure, or opposition in the public prints;¹⁹ an extortion of hush money;²⁰ obtaining value from a person as a condition of refraining from making an accusation against him, or disclosing some secret calculated to operate to his prejudice;²¹ a bribe to keep silence;²² hush money.²³

The statutory crime of blackmail is considered in Threats and Unlawful Communications.

Bribery is distinguished from extortion in Bribery § 1 b.

Fraudulent conversion. There is no connection between extortion and fraudulent conversion.^{23.5}

"Oppression" defined and compared. The word "oppression" is a word of more extensive signification than "extortion" and will embrace many other acts of official malfeasance and misfeasance,²⁴ and in its ordinary sense indicates an act of cruelty, severity, unlawful exaction, domination, or excessive use of authority.²⁵ The statutory crime of oppression has been described as an unlawful use of authority, and it is not committed by threats, but by an unlawful act of the accused.²⁶

Robbery and extortion by force or fear are distinguished in Robbery § 1.

Theft does not include extortion,^{26.5} and they are not the same offense.^{26.10}

§ 2. Elements of Offense

In general, for the taking of fees to constitute the crime of extortion it is sufficient, if the other requisite elements are present, that the fees taken were not allowed by law, or were greater than those allowed by law, or were exacted before they were due, or were for services not performed.

At common law, a taking, to constitute extortion need not have been as a fee or compensation for some official duty for which a fee is prescribed;²⁷

12. Pa.—Commonwealth v. Hagan, 9 Phila. 574.

13. N.J.—State v. Weleck, 91 A.2d 751, 10 N.J. 355.

State v. Barts, 38 A.2d 838, 132 N.J.Law 74, affirmed 40 A.2d 639, 132 N.J.Law 420—Kitby v. State, 31 A. 213, 57 N.J.Law 320.
25 C.J. p 234 note 16.

13.5 N.J.—State v. Barts, 38 A.2d 838, 132 N.J.Law 74, affirmed 40 A.2d 639, 132 N.J.Law 420.

14. N.Y.—People v. Clark, 151 N.E. 631, 242 N.Y. 313.
25 C.J. p 234 note 17.

15. Ill.—Heck v. Schupp, 68 N.E. 2d 464, 394 Ill. 296, 167 A.L.R. 232 —People v. Mahumed, 44 N.E.2d 911, 381 Ill. 81.
Nev.—Greenspun v. Gandolfo, 320 P.2d 628.

N.Y.—Guenther v. Ridgway Co., 156 N.Y.S. 534, 170 App.Div. 725.
Pa.—Commonwealth ex rel. Sickler v. Yaukey, 11 Pa.Dist. & Co.2d 11.
8 C.J. p 1114 note 3.

16. U.S.—Mitchell v. Sharon, C.C. Cal., 51 F. 424, 425, affirmed 59 F. 980, 8 C.C.A. 429.
8 C.J. p 1115 note 4.

17. U.S.—Mitchell v. Sharon, supra.
8 C.J. p 1115 note 5.

18. U.S.—Mitchell v. Sharon, supra.

Blackmail as scheme to defraud by threats

U.S.—U. S. v. Horman, D.C.Ohio, 118 F. 780, 781, affirmed 116 F. 350, 53 C.C.A. 570, certiorari denied 23 S. Ct. 841, 187 U.S. 641, 47 L.Ed. 345.

Threats as not essential

The meaning of blackmailing is not legally confined to extortion by threats or other morally compulsory measures; the influence arising out of previous dependency and superfluous gratitude to a public officer for merely doing his duty arising out of the recovery of property expected to be lost, accompanied by the power of playing on the hopes and fears of the party injured, may be as effective as any moral compulsion.
N.Y.—Edsall v. Brooks, 26 N.Y.Super. 284, 294.

19. Kan.—Hess v. Sparks, 24 P. 979, 980, 44 Kan. 465, 21 Am.S.R. 300.
Pa.—Commonwealth ex rel. Sickler v. Yaukey, 11 Pa.Dist. & Co.2d 11.
8 C.J. p 1115 note 8.

20. Ill.—People v. Mahumed, 44 N.E. 2d 911, 381 Ill. 81.
Kan.—Hess v. Sparks, 24 P. 979, 980, 44 Kan. 465, 21 Am.S.R. 300.
Pa.—Commonwealth ex rel. Sickler v. Yaukey, 11 Pa.Dist. & Co.2d 11.

21. Kan.—Hess v. Sparks, 24 P. 979, 980, 44 Kan. 465, 21 Am.S.R. 300.

Neb.—In re Algae, 104 N.W. 751, 74 Neb. 353, 355.

Pa.—Commonwealth ex rel. Sickler v. Yaukey, 11 Pa.Dist. & Co.2d 11.

22. Kan.—Hess v. Sparks, 24 P. 979, 980, 44 Kan. 465, 21 Am.S.R. 300.
Pa.—Commonwealth ex rel. Sickler v. Yaukey, 11 Pa.Dist. & Co.2d 11.

23. Miss.—In re Marshall, 138 So. 298, 304, 162 Miss. 364.
Pa.—Commonwealth ex rel. Sickler v. Yaukey, 11 Pa.Dist. & Co.2d 11.
8 C.J. p 1115 note 13.

23.5 Pa.—Commonwealth v. Tarilla, 74 Pa.Dist. & Co. 527, 41 Luz.Leg. Reg. 317.

24. U.S.—U. S. v. Deaver, D.C.N.C., 14 F. 595.
25 C.J. p 233 note 5.

25. U.S.—U. S. v. Deaver, supra.

26. N.Y.—People v. Learman, 28 N. Y.S.2d 360, 365, 261 App.Div. 748.
Unity Contract Bridge Club v. Wallander, 63 N.Y.S.2d 455, 187 Misc. 23.

26.5 U.S.—Bonney v. C. I. R., C.A., 247 F.2d 237, certiorari denied 78 S.Ct. 333, 355 U.S. 906, 2 L.Ed.2d 261.

26.10 Cal.—People v. Goodman, 323 P.2d 536, 159 C.A.2d 54.

27. Wis.—Hanley v. State, 104 N.W. 57, 125 Wis. 396.

but under some statutes this is an essential element of the offense.²⁸

Fees not allowed by law. An officer who demands fees not allowed by law is, at common law and under statutes embodying the common-law rule, guilty of extortion.²⁹ If the money is accepted for the performance of official duties, the offense is committed regardless of whether the transaction is disguised as a tip or gratuity,^{29.5} or whether the money is paid before or after performance.^{29.10} A salaried officer who has the power to do certain things which another officer may do, and who, in addition to his salary, demands the fees to which such officer would have been entitled, may be guilty of extortion.³⁰ Under a statutory definition restricting extortion to the willful demand and reception by any officer of higher fees than are allowed by law, it has been held that the willful demand and reception of fees not allowed by law are not extortion.³¹

Fees greater than allowed by law. It is extortion at common law for an officer to take more than the prescribed amount for particular services for which

fees fixed in amount are given by law.³² Where a statute defines extortion as the corrupt exaction of greater fees for official services than are allowed by law, the exaction must be for real or pretended official services demanded of one who at least believes himself to be under legal obligation to pay something.³³ The presentation of an account for fees to the body authorized to allow it is sufficient to amount to a demand within the meaning of a statute punishing an officer who shall "wilfully demand or receive higher fees than are allowed by law."³⁴

Fees exacted before due. It is extortion at the common law, and, in some states, by express provision of statute, for a public officer to receive, by power of office, a fee before it is due, although no more is taken than will in all probability soon become due.³⁵ It is equally criminal for a public officer to refuse to perform a public duty until paid.³⁶ Statutes which relate to this offense and which contain no provision prohibiting the collection of a lawful fee before it is due, have been construed not to alter the common law in this particular.³⁷

28. Ind.—State v. Oden, 37 N.E. 731, 10 Ind.App. 136.

Mass.—Commonwealth v. Dennie, Thach.Cr. 165.

29. N.J.—State v. Weleck, 91 A.2d 751, 10 N.J. 355.

State v. Matule, 148 A.2d 848, 54 N.J.Super. 326.

State v. Barts, 38 A.2d 838, 132 N.J.Law 74, affirmed 40 A.2d 639, 132 N.J.Law 420.

Pa.—Commonwealth v. Hopkins, 70 Pa.Dist. & Co. 166, affirmed 69 A.2d 428, 165 Pa.Super. 561.—Commonwealth v. Wyatt, 6 Pa.Dist. & Co. 497.

25 C.J. p 236 note 55.

Fees held unauthorized

(1) A violation of statute prohibiting an officer from accepting unauthorized compensation for the performance or nonperformance of a duty may occur by the officer demanding or receiving unlawful compensation or by the officer accepting unlawful compensation voluntarily offered him in consideration for which he agrees to perform or execute or not to perform or execute any law, rule, or regulation that it is incumbent on him to respect, execute, or to have executed.

Fla.—State ex rel. Grady v. Coleman, 183 So. 25, 133 Fla. 400—State ex rel. Williams v. Coleman, 180 So. 360, 131 Fla. 872.

(2) A special agent of the department of justice, who falsely informed one who applied for a visa on a passport to permit an alien to visit

the United States, that to get the matter attended to promptly a man must be sent to Washington and that the expenses incidental thereto would be three hundred dollars, and required the applicant to pay the three hundred dollars after the application had been granted at Washington, was guilty of extortion. U.S.—Martin v. U. S., C.C.A.N.Y., 278 F. 913.

(3) Where a justice of the peace collected and appropriated a fine from a young man who, with a young lady, was in an automobile parked by the side of the road, but not violating the law, he was guilty of extortion.

Tex.—Phillips v. State, 280 S.W. 1065, 103 Tex.Cr. 358.

Fees held authorized

Indictments of tax collectors for collecting fees from delinquent taxpayers for receiving and paying over money paid after levy without sale was held, in view of statute authorizing such fees, not to charge an offense, notwithstanding such fees were not justified by prior statute as matter of law.

Pa.—Commonwealth v. Scott, 135 A. 225, 287 Pa. 392.

29.5 Pa.—Commonwealth v. Hopkins, 69 A.2d 428, 165 Pa.Super. 561.

29.10 N.J.—State v. Weleck, 91 A.2d 751, 10 N.J. 355.

State v. Matule, 148 A.2d 848, 54 N.J.Super. 326.

Pa.—Commonwealth v. Hopkins, 69 A.2d 428, 165 Pa.Super. 561.

30. Pa.—Commonwealth v. Ansell, 40 Pa.Co. 577.

25 C.J. p 237 note 58.

31. Tex.—Smith v. State, 10 Tex. App. 413.

32. N.J.—Loftus v. State, 19 A. 183. 25 C.J. p 237 note 60.

33. Wash.—State v. Wainwright, 97 F. 51, 50 Wash. 225.

34. Tex.—Brackenridge v. State, 11 S.W. 630, 27 Tex.App. 513, 4 L.R.A. 360.

35. Tenn.—State v. Cooper, 113 S.W. 1048, 120 Tenn. 549, 15 Ann.Cas. 1116.

25 C.J. p 237 note 62.

36. N.J.—State v. Maires, 33 N.J. Law 142.

25 C.J. p 237 note 63.

Condition precedent

A statute prohibiting an officer from accepting unauthorized compensation for the performance or nonperformance of duty applies in cases where reward, compensation, or other remuneration is made a condition precedent to the performance or nonperformance of a legal duty.

Fla.—State ex rel. Grady v. Coleman, 183 So. 25, 133 Fla. 400—State ex rel. Williams v. Coleman, 180 So. 360, 131 Fla. 872.

37. Ala.—Brewer v. State, 3 So.2d 433, 241 Ala. 145, certiorari denied 3 So.2d 434, 241 Ala. 480. 25 C.J. p 237 note 64.

It has been held, however, that receiving fees before they are due, at the instance, and for the accommodation of the person paying them, is not extortion.³⁸ With respect to the question as to when a fee becomes due, the general rule, in the absence of statutory provisions to the contrary, is that the officer may demand his fee upon the rendition of his official service.³⁹

Fees for services not performed. At common law, and under statutes fixing fees for stated services, an officer who takes fees for official services which he has not performed is guilty of extortion.⁴⁰ However, an officer cannot be guilty of demanding and receiving money as a fee for a service or act not done, unless the service or act which he did not do, and for which he accepted a fee, is within his official duty.⁴¹

Oppression. A public officer is guilty of oppression where he unlawfully arrests another, or detains him against his will, or seizes or levies on another's property, or dispossesses another of any lands or tenements, or does any other act whereby another person is injured in his person, property, or rights.⁴²

Demand of loan. Under some statutes, extortion may be in the form of a demand of a loan.⁴³

Conspiracy. In order that the crime of extortion be committed, all of the necessary elements must be present; and a conspiracy or confederation to commit the crime does not satisfy these requirements where steps are taken only to promote the conspiracy.⁴⁴

Federal employee. Under a statute providing for

the punishment of an employee who uses his position of employment with the United States to extort, the two essential elements are that the employee uses his position with the United States and that he be guilty of extortion.^{44.5}

§ 3. — Intent

Generally, to constitute extortion, the act must have been done with corrupt intent, that is, with design to collect fees to which the officer is not entitled. Mistake or ignorance of law has been held not to free the officer from criminal intent, except where the law is unsettled; but mistake of fact, inadvertence, or miscalculation is a valid defense.

The common meaning of the word "willful" is intentional, and the common meaning of the word "fraudulent" is dishonest, and presumably such words are inserted in a statute defining the offense of extortion by a public officer to relieve from criminality one who mistakenly believes that he is entitled to a fee.^{44.50} At common law and under statutes declaratory thereof, in order to constitute extortion, the act must have been done with a corrupt intent,⁴⁵ although under statutes so providing the unlawful taking by an officer, under color of his office, of money not due to him is criminal without a specific intent.⁴⁶ The fact that the officer was subsequently willing to pay over the money claimed to have been extorted to whomever was the proper authority does not affect his liability.⁴⁷

The corrupt intent lies in the design on the part of the officer to collect fees to which he is not legally entitled.⁴⁸ Thus, the fact that the money

38. Ohio.—State v. Reynolds, Tapp. 213.

39. N.J.—Lane v. State, 10 A. 360, 49 N.J.Law 673.
25 C.J. p 237 note 66.

40. Ind.—State v. Burton, 3 Ind. 93.
25 C.J. p 237 note 67.

41. Act held not within duty

Constable who demanded and received eight dollars from eight young people who were singing and telling stories around bonfire which they had built near a road at night, as fee for not arresting such young people on vagrancy charge, was not guilty of extortion in that he willfully collected money as purported fee for service or act not done, where young people had not violated any law and no duty rested on constable to arrest any of them or take them before a magistrate.

Tex.—Chancellor v. State, 101 S.W. 2d 570, 131 Tex.Cr. 617.

42. N.Y.—People v. Learman, 28 N. Y.S.2d 360, 261 App.Div. 748.

43. Philippine.—U. S. v. Cauas, 10 Philippine 131.

44. Fla.—State ex rel. Grady v. Coleman, 183 So. 25, 133 Fla. 400.

44.5 U.S.—U. S. v. Sutter, C.C.A. Ill., 160 F.2d 754.

44.50 Pa.—Commonwealth v. Gallagher, 69 A.2d 432, 165 Pa.Super. 553.

45. Ark.—McCourtney v. Morrow, 229 S.W.2d 124, 216 Ark. 959—Hood v. State, 245 S.W. 176, 156 Ark. 92.

Fla.—La Tour v. Stone, 190 So. 704, 139 Fla. 681.

N.Y.—People v. Clark, 151 N.E. 631, 242 N.Y. 313.

Wash.—Corpus Juris cited in State v. Burns, 1 P.2d 229, 161 Wash. 362.

25 C.J. p 238 note 74.

46. Ga.—Levar v. State, 29 S.E. 467, 103 Ga. 42.

Tenn.—State v. Critchett, 1 Lea 271.

47. At time of trial

Tex.—Phillips v. State, 280 S.W. 1065, 103 Tex.Cr. 358.

48. Ala.—Cleaveland v. State, 34 Ala. 254.

"Willful"

(1) Under statute penalizing an officer's "willful" collection of unlawful fees, unless officer knew that account for fees was incorrect and willfully intended to profit therefrom, he could not be convicted of extortion.

Tex.—Townsend v. State, 51 S.W.2d 696, 121 Tex.Cr. 79.

(2) As used in such a statute, "willful" means demanding and receiving fees without reasonable grounds to believe such charge to be lawful and not merely officer's intentional collection thereof.

Tex.—Lewis v. State, 64 S.W.2d 972, 124 Tex.Cr. 582.

is not taken for the officer's own use may be of evidential value as showing the absence of intent,⁴⁹ as may be the fact that the aggregate of the officer's fees is less than the total amount which he has a right to demand,⁵⁰ or that the payment was voluntary;⁵¹ and where the officer accepts a cash bond for the appearance of a person arrested and released by him, he is not guilty of extortion.⁵² So, a custom or usage in the community as to the fees demanded may be shown as contradicting a corrupt intent,⁵³ although, as appears *infra* § 8, such custom will not in itself constitute a defense.

While a contrary rule prevails in some jurisdictions,⁵⁴ it is generally held that notwithstanding the officer has acted in good faith and under mistake or ignorance of the law he cannot on that account be held free from a criminal intent,⁵⁵ except, it has been held, where the law is not settled or is obscure,⁵⁶ or where the officer has acted after the advice of, and consultation with, counsel,⁵⁷ although it has also been held to be immaterial that accused acted on the advice of counsel where the law was clear and settled.⁵⁸ However, an officer cannot be convicted for collecting an unlawful fee where he did so by mistake of fact, inadvertence, or miscalculation.⁵⁹

Under statutes making the act criminal without regard to specific intent, an honest belief on the part of the officer that he was entitled to the fee will not protect him.⁶⁰

§ 4. — Duress or Exaction

The taking, to constitute extortion, need not be by duress.

The taking, in order to constitute extortion, need not be under circumstances amounting to actual duress.⁶¹ The word "exact," as used in a statute prohibiting officers from exacting unauthorized compensation is not synonymous with the word "demand."⁶²

§ 5. — Color of Office or Right

The oppressive use of official position is the essence of extortion, and to constitute extortion the taking by the officer must be in his official capacity and by color of his office; that is, the person paying must have been yielding to official authority.

The oppressive use of official position is the essence of the offense of extortion.^{62.50} Thus, to constitute extortion the taking must be by the officer in his official capacity,⁶³ and by color of his office,⁶⁴ and activity beyond the scope of his em-

(3) "Willful" means doing of forbidden acts with evil intent, or legal malice, or without reasonable ground for believing acts to be lawful.

Tex.—Burns v. State, 61 S.W.2d 512, 123 Tex.Cr. 611—Christian v. State, 59 S.W.2d 166, 123 Tex.Cr. 375.

(4) "Legal malice" refers to wrongful act done intentionally without just cause or excuse.

Tex.—Christian v. State, *supra*.

(5) Officer who intentionally and under cover of office exacted fees was guilty of "willfully and fraudulently" taking such fees within statute defining extortion by a public officer.

Pa.—Commonwealth v. Gallagher, 69 A.2d 432, 165 Pa.Super. 553—Commonwealth v. Hopkins, 69 A.2d 428, 165 Pa.Super. 561.

49. Pa.—Commonwealth v. Wickenheiser, 45 Dauph.Co. 415.

Wash.—Corpus Juris cited in State v. Burns, 1 P.2d 229, 161 Wash. 362.

25 C.J. p 238 note 77.

50. Ala.—Cleveland v. State, 34 Ala. 254.

51. Ga.—White v. State, 56 Ga. 385. Pa.—Respublica v. Hannum, 1 Yeates 71.

Voluntary payment as constituting extortion see *infra* § 5.

52. Ala.—Ingram v. State, 3 So.2d

426, 30 Ala.App. 218, certiorari denied 3 So.2d 434, 241 Ala. 455.

25 C.J. p 238 note 77 [a].

53. Mass.—Commonwealth v. Shed, 1 Mass. 227.

54. Fla.—La Tour v. Stone, 190 So. 704, 139 Fla. 681.

N.Y.—People v. Clark, 151 N.E. 631, 242 N.Y. 313.

55. Ga.—Levar v. State, 29 S.E. 467, 103 Ga. 42.

25 C.J. p 238 note 82.

56. N.J.—State v. Cutter, 36 N.J.Law 125.

Law held unsettled

Where statutes fixing sheriff's fees for service of process were susceptible of more than one reasonable construction, charge in good faith for fifty miles on account of twenty-five-mile fruitless travel from county seat to serve criminal witness and subsequent service at county seat did not render sheriff guilty of extortion.

Tex.—Burns v. State, 61 S.W.2d 512, 123 Tex.Cr. 611.

57. Pa.—Commonwealth v. Linderman, 25 Pa.Co. 94.

58. Tex.—Lewis v. State, 64 S.W.2d 972, 124 Tex.Cr. 582.

59. Tex.—Christian v. State, 59 S.W.2d 166, 123 Tex.Cr. 375.

25 C.J. p 238 note 87.

A bona fide belief that services had been rendered and that the fee

was legally due may constitute a defense under a statute punishing one who knowingly takes for services not actually rendered, or other or greater fees than are by law allowed for any services done by him. Ala.—Cleveland v. State, 34 Ala. 254.

60. Tenn.—State v. Critchett, 1 Lea 271.

25 C.J. p 238 note 86.

61. Pa.—Commonwealth v. Brown, 23 Pa.Super. 470.

25 C.J. p 235 note 39.

62. Fla.—State ex rel. Williams v. Coleman, 180 So. 360, 131 Fla. 872.

62.50 U.S.—U. S. v. Sutter, C.C.A. Ill., 160 F.2d 754.

63. N.J.—State v. Weleck, 91 A.2d 751, 10 N.J. 355.

N.Y.—People v. Samuels, 71 N.Y.S. 2d 562, 188 Misc. 607.

Pa.—Commonwealth v. Channing, 55 Pa.Super. 510.

64. Ark.—Hood v. State, 245 S.W. 176, 156 Ark. 92.

Fla.—La Tour v. Stone, 190 So. 704, 139 Fla. 681.

25 C.J. p 236 note 45.

Money not due for performing duties

The element of "color of office" in crime of extortion means that the officer must have taken money not due him for the performance of his official duties.

ployment is not dealt with.^{64.5} This does not necessarily imply that the taking must be for an act or service which the officer is under a duty or has a discretionary power to perform;⁶⁵ it does imply, however, an exercise of official power possessed, or pretended to be possessed, by the officer as distinguished from an act which could have been performed by any other person.⁶⁶

In other words, the person paying must have been yielding to official authority,⁶⁷ and not acting voluntarily,⁶⁸ although it has also been held that consent, induced under color of official right, is one of the elements of the offense.⁶⁹ It has been held, however, that if a public officer could not lawfully act in his private capacity, it is no defense to a prosecution by indictment that money was taken for services so rendered.⁷⁰

Where charges for official services and services rendered by the officer in his individual capacity are lumped, but in such a way that a separation can be made, the charge for individual services is not thereby converted into a criminal demand for a gratuity for doing an official act.⁷¹ Under a statute defining extortion as the obtaining by an officer, under color of his office, of money or other things of value which are not due him, the offense may be committed without regard to whether he is executing or pretending to execute a legal paper, or al-

though he exacts money on a promise not to execute process.⁷² Under a statute punishing the demand of a greater fee than is allowed by statute, it has been held that it is not extortion to demand fees of a person who is not liable to pay them.⁷³

§ 6. — Money or Thing of Value Extorted

To constitute extortion, money or some other thing of value must have been received.

To constitute extortion at common law, there must be the receipt of money or some other thing of value.⁷⁴ The obtaining of a mere promise or agreement to pay which is unenforceable because of its illegality, see Contracts § 220, will not, in the absence of payment, support an indictment for extortion;⁷⁵ but on its payment to the officer the offense of extortion would seem to be made out.⁷⁶ However, a check or writing by which a claim against a bank or the drawer could have been made has a real value within the meaning of the law.⁷⁷

A statute penalizing an officer's exaction or acceptance of unauthorized compensation is violated if the officer demands the money and there is a meeting of the minds on the part of the officer and the party from whom the money is exacted.⁷⁸

It is immaterial whether the person of whom the unlawful fee is demanded pays it or whether he

N.J.—State v. Weleck, 91 A.2d 751, 10 N.J. 355.

State v. Matule, 148 A.2d 848, 54 N.J.Super. 326.

64.5 N.Y.—People v. Samuels, 71 N.Y.S.2d 562, 188 Misc. 607.

65. Pa.—Commonwealth v. Wilson, 30 Pa.Super. 26.

66. Fla.—La Tour v. Stone, 190 So. 704, 139 Fla. 681. 25 C.J. p 236 note 47.

Facts held sufficient

(1) For enforcement officer of highway department to collect from delinquent automobile owner under guise of collecting fine and costs, money in excess of legal license taxes, is extortion under color of office.

Okl.—Cox v. State, 244 P. 206, 33 Okl.Cr. 436.

(2) Police officer, demanding and receiving by color of his office money to which he was not legally entitled, was guilty of extortion in demanding and receiving payment not allowed by law for doing his office, as against contention that he performed no duty and was paid for not doing his office.

N.J.—State v. Barts, 38 A.2d 838, 132

N.J.Law 74, affirmed 40 A.2d 639, 132 N.J.Law 420.

67. U.S.—U. S. v. Sutter, C.C.A.III., 160 F.2d 754.

Fla.—La Tour v. Stone, 190 So. 704, 139 Fla. 681. 25 C.J. p 236 note 48.

Use of void process

One knowingly using summons, writ of attachment, or similar process, which is void because not completely filled out by justice by whom it purports to have been issued, as required by statute, to collect money, is guilty of extortion.

Mont.—In re Frederick, 227 P. 999, 71 Mont. 205.

68. U.S.—U. S. v. Sutter, C.C.A.III., 160 F.2d 754—Daniels v. U. S., C.C.A.Cal., 17 F.2d 339.

25 C.J. p 236 note 49.

69. N.Y.—People v. Hagen, 208 N.Y.S. 235, 212 App.Div. 879.

Okl.—State v. Sowards, 82 P.2d 324, 64 Okl.Cr. 430.

70. U.S.—U. S. v. Waitz, D.C.Nev., 28 F.Cas.No.16,631, 3 Sawy. 473. 25 C.J. p 236 note 51.

71. N.D.—State v. Bauer, 47 N.W. 378, 1 N.D. 273.

72. Ga.—Dean v. State, 71 S.E. 597, 9 Ga.App. 303.

73. Mass.—Commonwealth v. Denie, Thach.Cr. 165.

74. Fla.—La Tour v. Stone, 190 So. 704, 139 Fla. 681.

N.J.—State v. Weleck, 91 A.2d 751, 10 N.J. 355.

State v. Matule, 148 A.2d 848, 54 N.J.Super. 326.

Pa.—Commonwealth v. Wickenheiser, 45 Dauph.Co. 415.

25 C.J. p 237 note 69.

75. Fla.—La Tour v. Stone, 190 So. 704, 139 Fla. 681.

25 C.J. p 238 note 72.

76. Mass.—Commonwealth v. Denie, Thach.Cr. 165.

Payment as affecting merger of attempt into completed crime see *infra* § 7.

The taking of a note, and the receipt of the amount of it when due, are sufficient to constitute the offense.

Fla.—La Tour v. Stone, 190 So. 704, 139 Fla. 681.

77. Wash.—State v. Barr, 120 P. 509, 67 Wash. 87.

78. **The gravamen of the offense** is the exacting by the officer of compensation or extortion practiced by demanding the sum required.

Fla.—State ex rel. Grady v. Coleman, 183 So. 25, 133 Fla. 400.

procures another to pay it on his behalf.⁷⁹ Under a statute so providing, it is immaterial whether the fee was collected by defendant for himself or for another.⁸⁰

§ 7. Attempts

Whether an act constitutes attempted extortion depends on the officer's intent, and not on the result of his act.

Whether a particular act constitutes an attempt to commit extortion depends on the mind and intent of the officer, and not on the result of his act,⁸¹ and a demand for money by an officer is the overt act which constitutes the attempt.^{81.5} If, as a result of a demand, payment is actually made to an officer, the intended crime of extortion is committed and the attempt is merged in the completed crime; but if no payment is made and demand for payment is repeated, the officer is guilty of a second and separate attempt to extort.^{81.10}

Where an officer's demand for payment of money does not purport to be a claim for fees, but is rather a claim pursuant to contract, he is not guilty of an attempt to collect illegal fees.⁸² An attempt to exact fees after having received them from another is not extortion.⁸³

§ 8. Defenses

Various matters, such as custom, nonliability under special statute, or unconstitutionality of the statute, may or may not constitute defenses to a charge of extortion, in accordance with whether or not they show the absence of an element of the offense.

A custom or usage of demanding fees of the amount or nature demanded by the officer will not

in itself constitute a defense,⁸⁴ although, as appears in § 3 supra, it may evidence an absence of the necessary intent. Whether ignorance or mistake of fact or law may constitute a defense because of lack of the necessary intent is also considered supra § 3.

In jurisdictions where it is held that the statute does not abrogate the common law, nonliability under the statute is no defense to an indictment at common law,⁸⁵ although it constitutes a defense to an indictment based on a statute;⁸⁶ and it is no defense to a prosecution against an officer for extortion that certain preliminary steps necessary in civil actions had not been taken.⁸⁷

The unconstitutionality of the statute on which the prosecution is founded is a defense.⁸⁸ Under a general statutory saving clause applicable to all repealing acts, the repeal of the statute relating to extortion is not a defense to a prosecution under it, pending at the time of the repeal, unless the contrary is expressly provided in the repealing act.⁸⁹

§ 9. Persons Liable

At common law and under statutes conforming thereto, only an officer can commit extortion, although, except under statutes designating specific officers, any person occupying an official or quasi-official position, or any officer, whether de facto or de jure, can be guilty of the crime. An officer is not indictable for extortion by his agent unless express authority is shown; but two or more persons may be jointly responsible.

At common law and under statutory definitions of the offense conforming thereto, the crime of extortion can be committed only by an officer.⁹⁰ In general, it may be said that any officer, whether he

79. Ohio.—Gould v. State, 152 N.E. 788, 21 Ohio App. 26.

80. Tex.—Townsend v. State, 51 S.W.2d 696, 121 Tex.Cr. 79.

81. N.Y.—People v. Gardner, 38 N.E. 1003, 144 N.Y. 119, 43 Am.S.R. 741, 28 L.R.A. 699.

81.5 N.J.—State v. Weleck, 91 A.2d 751, 10 N.J. 355.

81.10 N.J.—State v. Weleck, supra.

82. Costs received by city

Where justice of peace transferred case to city's police court, and submitted bill for costs received by city, in accordance with previous arrangement by city to turn over such costs, such submission of bill did not constitute an attempt to collect illegal fees.

Ky.—Howard v. Commonwealth, 20 S.W.2d 1011, 231 Ky. 54.

83. U.S.—U. S. v. Chenault, D.C., 25 F.Cas.No.14,791, 2 Cranch C.C. 70.

84. Tex.—Lewis v. State, 64 S.W.2d 972, 124 Tex.Cr. 582—Phillips v. State, 280 S.W. 1065, 103 Tex.Cr. 358.

25 C.J. p 239 note 91.

85. Mass.—Commonwealth v. Den-
nie, Thach.Cr. 165.

Pa.—Commonwealth v. Saulsbury, 25 A. 610, 152 Pa. 554.

86. Mass.—Commonwealth v. Den-
nie, Thach.Cr. 165.

Pa.—Commonwealth v. Saulsbury, 25 A. 610, 152 Pa. 554.

87. Demand of warrant

In prosecution against constable for extortion under color of office, based on illegal arrests and improper institution of criminal proceedings in which costs were obtained from defendants, the failure to comply with statute providing that no action should be brought against a constable for anything done in obedience to a warrant until warrant has been demanded constituted no de-

fense, since statute applied to civil actions only.

Pa.—Commonwealth v. Dempsey, 22 A.2d 76, 146 Pa.Super. 124.

88. N.J.—Kirby v. State, 31 A. 213, 57 N.J.Law 320.

89. U.S.—U. S. v. Mathews, C.C. Ohio, 23 F. 74.

90. Fla.—La Tour v. Stone, 190 So. 704, 139 Fla. 681.

Tex.—Corpus Juris cited in Murray v. State, 67 S.W.2d 274, 276, 125 Tex.Cr. 252.
25 C.J. p 234 note 18.

Persons held not capable of offense
(1) Road commissioners.

Ark.—Hood v. State, 245 S.W. 176, 156 Ark. 92.

(2) Superintendent of schools of an independent school district is a mere employee hired under contract and cannot be guilty of extortion.

Okl.—Ray v. Stevenson, 111 P.2d 824, 71 Okl.Cr. 339.

is a federal, state, municipal, or judicial officer, and every person occupying an official or quasi-official position, may be guilty of this offense;⁹¹ and it is immaterial that the accused is an officer from another state at the time of the alleged extortion.^{91.5} One may be guilty of extortion where he occupies an official or quasi-official position, although he is compensated through private sources.⁹²

At any rate a legally existing office giving to the incumbent an official character, either *de facto* or *de jure*, is essential.⁹³ The facts that the office is of recent origin, and that no precedent can be found of the conviction of such an officer of the offense of extortion, are not conclusive as against liability.⁹⁴

Statutory provisions. Where the statute defining the offense restricts its application to specific officers, the accused must fall within the statutory designation.⁹⁵ In those jurisdictions in which common-law offenses are not abrogated, see Criminal Law § 20, an officer who does not fall within the terms of a statute relating to specific officers may nevertheless be guilty of extortion at common law.⁹⁶ Under some statutes the offense can be committed only by an officer authorized to charge fees.⁹⁷

A statute designating the offense of extortion by officers does not include offenders specifically designated in other statutes.⁹⁸ Other agencies rendering a public service and receiving compensation therefor have been subjected by statutes to restrictions and liabilities similar to those imposed on public officers.⁹⁹

Whether an officer's statutory liability for extortion under a statute imposing a penalty affects his criminal liability is considered *infra* § 15 a.

De facto or de jure officers. One is a public officer within the meaning of the law of extortion who exercises the powers generally of the office.¹ The offense may be committed by a *de facto* officer² and defendant cannot set up the irregularity of his appointment³ or his failure to take the oath of office.⁴

Liability of officer or agent. A public officer is not subject to indictment for extortion practiced by his official agent,⁵ except if express authority or direction is shown; that is, if an officer authorizes another to receive property under such circumstances as would constitute extortion if such receiving had been done by the officer himself, then both such officer and such other person would be guilty of extortion.⁶ Thus, the fact that the defendant may

91. Fla.—*La Tour v. Stone*, 190 So. 704, 139 Fla. 681.

Pa.—*Commonwealth v. Lawton*, 84 A. 2d 384, 170 Pa.Super. 9.—**Corpus Juris Secundum** cited in *Commonwealth v. Gettis*, 72 A.2d 619, 620, 116 Pa.Super. 515. 25 C.J. p 234 note 19.

Particular persons held officers

(1) Fire marshal of city.

Pa.—*Commonwealth v. Gallagher*, 69 A.2d 432, 165 Pa.Super. 553.

(2) Chief assistant fire marshal of city.

Pa.—*Commonwealth v. Hopkins*, 69 A.2d 428, 165 Pa.Super. 561.

(3) Deputy Director of City Department of Public Affairs and an inspector in City Department of Health, were officers, within extortion statute, notwithstanding they were not officers connected with the judicial process.

N.J.—*State v. Goodman*, 89 A.2d 243, 9 N.J. 569.

91.5 N.J.—*State v. Barts*, 38 A.2d 838, 132 N.J.Law 74, affirmed 40 A.2d 639, 132 N.J.Law 420.

92. Pa.—*Commonwealth v. Saulsbury*, 25 A. 610, 152 Pa. 554. 25 C.J. p 235 note 20.

93. N.J.—*Kirby v. State*, 31 A. 213, 57 N.J.Law 320. 25 C.J. p 235 note 21.

94. Pa.—*Commonwealth v. Brown*, 23 Pa.Super. 470.

95. U.S.—*Williams v. U. S.*, Cal., 18 S.Ct. 92, 168 U.S. 382, 42 L.Ed. 509. 25 C.J. p 235 note 23.

Special master, appointed in single case, is not "officer" of United States within act defining offense of extortion by such officers.

U.S.—*U. S. ex rel. Lotsch v. Kelly*, C.C.A.N.Y., 86 F.2d 613.

Municipal officers

The statute providing for punishment of "any officer of this state" who is guilty of malpractice in office applies only to state and county officers, and does not include municipal officers.

Fla.—*La Tour v. Stone*, 190 So. 704, 139 Fla. 681.

96. Fla.—*La Tour v. Stone*, *supra*. 25 C.J. p 235 note 25.

97. Ill.—*Ferkel v. People*, 16 Ill.App. 310. 25 C.J. p 235 note 26.

Deputy constable is person holding an "office to which fees are attached," within statute authorizing penalties for demanding or receiving fees for service not done or excessive fees.

Tex.—*Murray v. State*, 67 S.W.2d 274, 125 Tex.Cr. 252.

98. Judicial officers

Since bribery by a judicial officer of the United States is specifically

designated an offense by a statute, a judicial officer, such as a special master, does not come within the scope of the statute penalizing extortion by "officers of the United States."

U.S.—*U. S. ex rel. Lotsch v. Kelly*, C.C.A.N.Y., 86 F.2d 613.

99. Ky.—*Illinois Cent. R. Co. v. Paducah Brewery Co.*, 163 S.W. 239, 157 Ky. 357. 25 C.J. p 235 note 27.

1. Pa.—*Commonwealth v. Saulsbury*, 25 A. 610, 152 Pa. 554.

Commonwealth v. Lawton, 84 A. 2d 384, 170 Pa.Super. 9. 25 C.J. p 235 note 28.

2. Pa.—*Commonwealth v. Gettis*, 72 A.2d 619, 166 Pa.Super. 515.

Tex.—*Brackenridge v. State*, 11 S.W. 630, 27 Tex.App. 513, 4 L.R.A. 360. 25 C.J. p 235 note 29.

3. Pa.—*Commonwealth v. Saulsbury*, 25 A. 610, 152 Pa. 554.

Commonwealth v. Lawton, 84 A. 2d 384, 170 Pa.Super. 9.—*Commonwealth v. Gettis*, 72 A.2d 619, 166 Pa.Super. 515.

4. N.C.—*State v. Cansler*, 75 N.C. 442.

5. Pa.—*Overholtzer v. McMichael*, 10 Pa. 139.

6. Okl.—*Drake v. State*, 103 P. 878, 2 Okl.Cr. 643.

have been acting as agent for his superiors or in concert with them will not excuse him from liability for extortion.^{6.5}

Joint responsibility. Two or more persons may be jointly indicted and convicted of extortion when they act together and concur in the demand.⁷

Presence of accused. A person charged with extortion need not have been present when each and every act was committed, and he may be shown to have advised or procured its commission.^{7.5}

§ 10. Indictment or Information

An indictment or information for extortion must charge the essential elements of the offense, in accordance with the general rules governing indictments or informations.

Under the general rules applicable to indictments and informations, an indictment or information for extortion must charge the essential elements of the offense,⁸ in the form of facts and not of conclusions.⁹ It must contain a definite description of the offense charged and a statement of the facts in the case at bar which constitute it,¹⁰ with such certainty as to be pleadable in bar of another prosecution.¹¹

Thus, the substance of the threats allegedly made may properly be set forth in some detail.^{11.5}

Where the offense is designated by statute, an indictment or information which charges the offense in the language of the statute is sufficient.¹² It is not necessary to allege the section of the statute violated.¹³

In a proper case unnecessary words in the indictment may be disregarded.¹⁴

The technical charging words in an indictment for extortion at common law were "extort,"¹⁵ or "extorsively,"¹⁶ and "by color of office."¹⁷

Allegations as to official capacity. The official capacity in which defendant acted must be alleged,¹⁸ as must the authority to charge fees where made an element of the offense by statute.¹⁹ Where the statute requires it, an averment that the accused officer took the oath of office required by law becomes necessary.²⁰ where a statute is applicable by its terms to a specified class of public officers, facts must be alleged bringing defendant within the statutory limitations;²¹ but substantial ac-

6.5 Pa.—Commonwealth v. Hansell, 137 A.2d 816, 185 Pa.Super. 443.

7. Okl.—Drake v. State, 103 P. 878, 2 Okl.Cr. 643.

25 C.J. p 235 note 36.

7.5 N.Y.—People v. Keohane, 115 N. Y.S.2d 492, 201 Misc. 597.

8. Ark.—Hood v. State, 245 S.W. 176, 156 Ark. 92.

Fla.—La Tour v. Stone, 190 So. 704, 139 Fla. 681—Callaway v. State, 152 So. 429, 112 Fla. 599.

N.J.—State v. Weleck, 91 A.2d 751, 10 N.J. 355.

25 C.J. p 239 note 97.

Bribery, and not extortion, held charged

Okl.—Finley v. State, 181 P.2d 849, 84 Okl.Cr. 309.

Indictments or informations held sufficient

(1) Generally.

U.S.—U. S. v. Altmeyer, D.C.Pa., 113 F.Supp. 854.

N.J.—Conway v. State, 150 A. 253, 8 N.J.Misc. 406.

25 C.J. p 239 note 99 [b].

(2) To charge attempt.

N.J.—State v. Weleck, 91 A.2d 751, 10 N.J. 355.

Indictment for oppression held insufficient

Facts stated in count of indictment charging oppression that defendant police officer obtained specified sum from person driving automobile while intoxicated when arrested by threatening to report certain facts to bureau of motor vehicles, thereby caus-

ing him to fear loss of his operator's license, were insufficient to constitute crime of "oppression."

N.Y.—People v. Learman, 28 N.Y.S. 2d 360, 261 App.Div. 748.

9. Or.—State v. Packard, 4 Or. 157. 25 C.J. p 239 note 98.

10. Fla.—La Tour v. Stone, 190 So. 704, 139 Fla. 681.

N.J.—Corpus Juris cited in Conway v. State, 150 A. 253, 254, 8 N.J.Misc. 406.

25 C.J. p 239 note 99.

11. U.S.—U. S. v. Altmeyer, D.C. Pa., 113 F.Supp. 854.

Ind.—Seany v. State, 6 Blackf. 403. 25 C.J. p 239 note 1.

11.5 N.Y.—People v. Keohane, 115 N.Y.S.2d 492, 201 Misc. 597.

12. U.S.—U. S. v. Altmeyer, D.C.Pa., 113 F.Supp. 854.

Ga.—Dean v. State, 71 S.E. 597, 9 Ga. App. 303.

Mo.—State v. Cummins, App., 288 S. W. 792.

N.J.—State v. Barts, 38 A.2d 838, 132 N.J.Law 74, affirmed 40 A.2d 639, 132 N.J.Law 420.

Position of employment

Indictment charging offense of using position of employment with United States to extort, substantially in words of statute, held sufficient. U.S.—U. S. v. Sutter, C.C.A.Ill., 160 F.2d 754.

13. U.S.—Williams v. U. S., Cal., 18 S.Ct. 92, 168 U.S. 382, 42 L.Ed. 509. 25 C.J. p 239 note 6.

14. Conformity with statute

Where the statute prohibits the "extorting" of compensation by officers and the indictment stated that the officer had "demanded and exacted" unlawful compensation, the word "demanded" may be disregarded for the purpose of disposing of a petition for a writ of habeas corpus, Fla.—State ex rel. Williams v. Coleman, 180 So. 360, 131 Fla. 872.

15. Fla.—La Tour v. Stone, 190 So. 704, 139 Fla. 681.

25 C.J. p 239 note 3.

16. Fla.—La Tour v. Stone, supra. 25 C.J. p 239 note 4.

17. Ark.—Leeman v. State, 35 Ark. 438, 37 Am.R. 44.

Fla.—La Tour v. Stone, 190 So. 704, 139 Fla. 681.

18. Okl.—Drake v. State, 103 P. 878, 2 Okl.Cr. 643.

25 C.J. p 239 note 7.

Formal defect, curable by amendment

Pa.—Commonwealth v. Fickes, 160 A. 142, 105 Pa.Super. 199.

19. Ill.—Ferkel v. People, 16 Ill.App. 310.

20. N.C.—State v. Pritchard, 12 S.E. 50, 107 N.C. 921.

21. Pa.—Commonwealth v. Brown, 23 Pa.Super. 470.

Allegations held insufficient

An information against city building inspector and commissioner cannot be upheld under statute providing for punishment of any state offi-

curacy, not technical accuracy, is required in these averments.²²

Allegations as to color of office. An allegation that fees were taken "by color of office" is necessary.²³ This allegation must not be merely in the words "by color of office" without more, but should show further by color of what office the extortionate act was committed,²⁴ and by express terms, not by implication from the averment of defendant's official capacity.²⁵ It is not necessary, in charging the offense at common law, to allege that defendant took the money "as fees," or "to his own use," it being sufficient to allege that he extorted it by color of office.²⁶ Under statutory requirements, it has been held necessary to allege that the sum extorted was demanded²⁷ as a fee for some official duty.²⁸

Allegations as to nature of services. An allegation of the services for which fees were charged is necessary,²⁹ and the offense, if statutory, must be charged in terms bringing the rendition of the services within the statutory definition.³⁰ The allegation must be made with sufficient certainty to enable the court to conclude from facts stated whether or not the compensation received was other than that authorized or permitted by law.³¹

Allegation of fee or reward due accused. An indictment for extortion under a statute declaring any officer taking a fee or reward not allowed by law for doing his office guilty of a misdemeanor need not set forth the fact that no fee or reward

was due accused.^{31.5}

Allegations as to excessiveness or illegality of charge. It is not sufficient to allege generally that defendant took a certain sum, or that he took more than was due, but an allegation should be made of what he ought to have taken and what was the excess.³² However, the amount of the legal charge need not be averred where fixed by law and not varying according to circumstances.³³ Where the fee fixed by law is not certain and unchangeable by circumstances, it is necessary to allege not merely the amount taken, but also the facts by which its legality can be ascertained.³⁴

Where the taking of illegal fees is for services for which no statutory allowance is made, the fact that no statutory allowance is made must be alleged.³⁵ Where the amount taken is an aggregate of charges for several items of service, an allegation of the items of service and of the aggregate amount taken, but omitting the items of illegal fees taken, would seem to be open to the objection that it does not inform accused as to what items were overcharges and what he must prepare himself to meet.³⁶

Allegations as to taking of money or thing of value. The indictment must allege that accused actually received something of value,³⁷ and must allege that the money or property was obtained with the consent of the complaining witness.³⁸ If a statute specifies the thing forbidden to be taken, the indictment must specify the particular thing taken;³⁹ and the amount taken must be alleged specifically.⁴⁰

cer guilty of malpractice in office, as allegations of information show that persons charged are not "state officers."

Fla.—*La Tour v. Stone*, 190 So. 704, 139 Fla. 681.

22. Pa.—*Commonwealth v. Brown*, 23 Pa.Super. 470.

23. Ark.—*Hood v. State*, 245 S.W. 176, 156 Ark. 92.
25 C.J. p 240 note 14.

24. Minn.—*State v. Brown*, 12 Minn. 490.
25 C.J. p 240 note 15.

25. Minn.—*State v. Brown*, supra.

26. Wis.—*Hanley v. State*, 104 N.W. 57, 125 Wis. 396.
25 C.J. p 240 note 17.

27. Ind.—*State v. Oden*, 37 N.E. 731, 10 Ind.App. 136.

28. Ind.—*State v. Oden*, supra.

29. Or.—*State v. Perham*, 4 Or. 188.
25 C.J. p 240 note 21.

30. Tex.—*State v. Smythe*, 33 Tex. 546.

Smith v. State, 10 Tex.App. 413.

31. Or.—*State v. Perham*, 4 Or. 188, 190.

31.5 N.J.—*State v. Barts*, 38 A.2d 838, 132 N.J.Law 74, affirmed 40 A.2d 639, 132 N.J.Law 420.

32. Fla.—*La Tour v. Stone*, 190 So. 704, 139 Fla. 681.
25 C.J. p 240 note 24.

33. N.J.—*Loftus v. State*, 19 A. 183.
25 C.J. p 240 note 25.

34. N.J.—*Loftus v. State*, supra.
State v. Maires, 33 N.J.Law 142.

35. Fla.—*La Tour v. Stone*, 190 So. 704, 139 Fla. 681.
25 C.J. p 240 note 27.

36. Ga.—*Oliveira v. State*, 45 Ga. 555.

37. Fla.—*State ex rel. Grady v. Coleman*, 183 So. 25, 133 Fla. 400.

Allegation held sufficient

In indictment for extortion, allegation that accused "demanded and received" fee was good, because equivalent to allegation that he "collected" fee; and the indictment was held to allege that accused collected fee for himself.

Tex.—*Townsend v. State*, 51 S.W.2d 696, 121 Tex.Cr. 79.

Allegation held insufficient

An indictment, alleging a conspiracy and confederation on part of city commissioner as member of committee appointed to compromise dispute with power company to exact unauthorized compensation from president of power company in consideration for adjustment of differences between city and power company on terms satisfactory to power company, was insufficient to charge a crime under statute penalizing officer's acceptance or exaction of unauthorized compensation for performance or nonperformance of duty as against attack on proceeding for writ of habeas corpus.

Fla.—*State ex rel. Grady v. Coleman*, 183 So. 25, 133 Fla. 400.

38. Okl.—*State v. Sowards*, 82 P.2d 324, 64 Okl.Cr. 430.

39. Tenn.—*Garner v. State*, 5 Yerg. 160.

40. Mo.—*State v. Couch*, 40 Mo.App. 325.

N.J.—*Loftus v. State*, 19 A. 183.

and with substantial accuracy.⁴¹

Allegations as to time and place of extortionate act. The time and place of the extortionate act are material averments in an indictment and must be specifically alleged.⁴² The words "then and there", without further allegation of time and place, are not sufficient.⁴³

Allegations as to intent. An indictment at common law or under a statute adopting the common-law rule with reference to intent must allege a corrupt purpose.⁴⁴ The words "extort" and "extorsively" are descriptive of the crime and are generally used to charge the corrupt purpose in the approved precedents of common-law indictments for extortion.⁴⁵ The word "knowingly," when employed in the statute, should be used in an indictment on the statute,⁴⁶ although it need not be employed in a common-law indictment.⁴⁷ The word "willfully" has been held to be not indispensable.⁴⁸

§ 11. — Issues, Proof, and Variance

General rules governing matters to be proved, and variance between the indictment and proof, in criminal prosecutions, are applicable to prosecutions for extortion.

General rules governing matters to be proved in criminal prosecutions, as discussed in Indictments and Informations §§ 244-252, are applicable to prosecutions for extortion.⁴⁹

Similarly, general rules as to variance between an indictment and the proof, see Indictments and Informations, §§ 254-270, are applicable to prosecutions for extortion.⁵⁰ Thus, a variance between allegation and proof as to material facts or circum-

stances surrounding the extortionate act is fatal;⁵¹ but a variance as to an immaterial fact is not fatal.⁵² Accordingly it has been held to be fatal that there is a variance between an indictment charging extortion in the terms of the statute and proof of an offense not within its terms,⁵³ or between the allegation and the proof as to official capacity of defendant;⁵⁴ and it has been held that if, because of the unconstitutionality of the statute creating the office alleged to be held by defendant, it appears in the proof that there is no such office in existence, the variance is fatal, even though the finding of the indictment antedates the decision declaring the statute unconstitutional.⁵⁵

A variance between allegation and proof as to the amount of money taken is not material;⁵⁶ but it has been held that a variance between allegation and proof as to the character of the money taken,⁵⁷ or as to the purpose for which it is taken,⁵⁸ is material and fatal. Proof that extortionate fees were taken from a person other than the person alleged to be the party injured will not support a conviction;⁵⁹ but an indictment alleging that money was extorted from one person is well supported by evidence that, when the extortionate demand was made on such person, he obtained the money from another, in defendant's presence, and then handed it to defendant.⁶⁰

§ 12. Evidence

Rules governing the presumptions and burden of proof, the admissibility of evidence, and the weight and sufficiency of evidence in criminal prosecutions generally are applicable to prosecutions for extortion.

41. Ind.—Emory v. State, 6 Blackf. 106.

25 C.J. p 240 note 31.

42. N.J.—State v. Maires, 33 N.J. Law 142.

25 C.J. p 240 note 32.

43. Minn.—State v. Brown, 12 Minn. 490.

25 C.J. p 240 note 33.

44. Ark.—Hood v. State, 245 S.W. 176, 156 Ark. 92.

25 C.J. p 241 note 34.

Allegation of attempt sufficient

Allegation that defendant did attempt to extort was equivalent to allegation that he acted with intent to extort.

N.J.—State v. Weleck, 91 A.2d 751, 10 N.J. 355.

45. N.J.—Loftus v. State, 19 A. 183.

25 C.J. p 241 note 35.

46. U.S.—U. S. v. Williams, D.C. Cal., 76 F. 223, reversed on other grounds Williams v. U. S., 18 S. Ct. 92, 168 U.S. 382, 42 L.Ed. 509.

47. Miss.—State v. Jones, 15 So. 237, 71 Miss. 872.

25 C.J. p 241 note 37.

48. N.C.—State v. Cansler, 75 N.C. 442.

25 C.J. p 241 note 39.

49. Charge not contained in indictment

In prosecution for extortion under indictment charging that defendant deputy sheriff took a fee for making an arrest, whether accused, as such officer, was without legal authority to accept a cash bond was immaterial since accused was called on to answer and defend only the specific charge contained in the indictment.

Ala.—Ingram v. State, 3 So.2d 426, 30 Ala.App. 218, certiorari denied, 3 So.2d 434, 241 Ala. 455.

50. Wis.—Hanley v. State, 104 N.W. 57, 125 Wis. 396.

25 C.J. p 241 note 41.

51. Ga.—Hicks v. State, 114 S.E. 911, 29 Ga.App. 272.

25 C.J. p 241 note 42.

52. Wis.—Hanley v. State, 104 N.W. 57, 125 Wis. 396.

25 C.J. p 241 note 43.

53. Tex.—State v. Smythe, 33 Tex. 546.

25 C.J. p 241 note 44.

54. N.C.—State v. Bisaner, 2 S.E. 368, 97 N.C. 503.

25 C.J. p 241 note 45.

55. N.J.—Kirby v. State, 31 A. 213, 57 N.J.Law 320.

56. Mass.—Commonwealth v. Den- nie, Thach.Cr. 165.

25 C.J. p 241 note 47.

57. Tenn.—Garner v. State, 5 Yerg. 160.

25 C.J. p 241 note 48.

58. N.C.—State v. Bisaner, 2 S.E. 368, 97 N.C. 503.

25 C.J. p 241 note 49.

59. Ga.—Hicks v. State, 114 S.E. 911, 29 Ga.App. 272.

25 C.J. p 241 note 50.

60. U.S.—Williams v. U. S., Cal., 93 F. 396, 35 C.C.A. 369.

In accordance with the rules governing the burden of proof and presumptions in criminal prosecutions generally, see Criminal Law §§ 566-599, the burden is on the state to establish the guilt of accused;⁶¹ but the burden is on accused to adduce proof of his defense.⁶² However, matters of which judicial notice is taken need not be proved.⁶³

The presumption of knowledge of the law is applicable.⁶⁴ An officer's return of his official actions on process is presumed to be correct, but its truth is put directly in issue by an indictment for extortion, and the presumption may be overthrown by proof.⁶⁵ When an itemized bill is not rendered, but merely a single charge for services is made, the presumption is that it is made for the services at that time rendered, unless it otherwise appears in

the evidence.⁶⁶

Admissibility. Under the rules applicable in criminal prosecutions generally, which are applicable in prosecutions for extortion,⁶⁷ various evidence offered in prosecutions for extortion has been held admissible⁶⁸ or inadmissible.⁶⁹

Applying these rules to the question of intent, matters offered in evidence which have been held competent and material, and therefore admissible, include threats,⁷⁰ the officer's experience and acquaintance with his duties,⁷¹ a prior indictment against accused for a like offense,⁷² although the effect of such an indictment should be limited by the court to its bearing on this issue only,⁷³ the purpose for which payment was intended,⁷⁴ and other matters.⁷⁵

61. U.S.—U. S. v. Harned, D.C. Wash., 43 F. 376.

Wash.—State v. Wainwright, 97 P. 51, 50 Wash. 225.

Involuntary payment

It must be shown that the payment was not voluntary.

U.S.—U. S. v. Harned, D.C. Wash., 43 F. 376.

Mass.—Commonwealth v. Dennie, Thach.Cr. 165.

Federal employee

Under a statute providing for the punishment of an employee who uses his position of employment with the United States to extort, the government must prove the essential elements of the offense.

U.S.—U. S. v. Sutter, C.C.A.III., 160 F.2d 754.

62. Mistake of fact

The burden is on accused to maintain by proof his defense that the fees were taken through a mistake of fact.

Mass.—Commonwealth v. Dennie, Thach.Cr. 165.

Utah.—People v. Monk, 28 P. 1115, 8 Utah 35.

63. N.J.—State v. Maires, 33 N.J.

Law 42.
25 C.J. p 241 note 58.

64. Ga.—Levar v. State, 29 S.E. 467, 103 Ga. 42.

25 C.J. p 241 note 56.

65. Tenn.—Williams v. State, 2 Sneed 160.

25 C.J. p 242 note 59.

66. Pa.—Commonwealth v. Hagan, 9 Phila. 574.

67. U.S.—Williams v. U. S., Cal., 18 S.Ct. 92, 168 U.S. 382, 42 L.Ed. 509.

Ambiguity of memorandum

A memorandum, to be admissible as independent evidence of the payment of an illegal fee, must be free from ambiguity or uncertainty.

N.Y.—People v. McLaughlin, 44 N.E. 1017, 150 N.Y. 365.

Connection with crime

Evidence as to bank deposits by accused in order to be admissible must be connected with the extortion.

U.S.—Williams v. U. S., Cal., 18 S.Ct. 92, 168 U.S. 382, 42 L.Ed. 509.

68. Pa.—Commonwealth v. Gallagher, 70 Pa.Dist. & Co. 177, affirmed 69 A.2d 432, 165 Pa.Super. 553.

Tex.—Christian v. State, 59 S.W.2d 166, 123 Tex.Cr. 375.

Part of res gestæ

Circumstances and statements by the officer at the time of taking the illegal fee may be admitted against him as constituting a part of the res gestæ.

Ga.—White v. State, 56 Ga. 385.
25 C.J. p 242 note 64.

Inducing complaint

Evidence that justice and constable, jointly indicted for illegally receiving fee, had induced girl to sign complaint falsely charging rape was relevant and admissible, where fee was paid officers for abandonment of prosecution.

N.J.—State v. Seidman, 152 A. 861, 107 N.J.Law 204, affirmed State v. Fischman, 156 A. 678, 108 N.J.Law 550.

69. Pa.—Commonwealth v. Flowers, 49 Dauph.Co. 441.

Testimony as to other transactions without extortion

Pa.—Commonwealth v. Hopkins, 70 Pa.Dist. & Co. 166, affirmed 69 A.2d 428, 165 Pa.Super. 561.

Accuracy of transcript

Where "speak-o-phone" records secretly made of defendant's conversation were introduced in evidence, whether stenographer with earphones in adjoining room with "speak-o-phone" took down conversation correctly in shorthand or transcribed shorthand notes correctly

was immaterial, in prosecution for attempted extortion, where neither notes nor transcript was offered in evidence or read to jury.

Pa.—Commonwealth v. Clark, 187 A. 237, 123 Pa.Super. 277.

Contract previously drawn

In prosecution of corporation counsel for city for taking unlawful fee, evidence that defendant had previously drawn certain contract which may have been illegal or dishonest was inadmissible.

N.Y.—People v. Clark, 151 N.E. 631, 242 N.Y. 313.

Evidence to prove alibi

Where defendant, for the purpose of establishing an alibi, claimed that at time of alleged extortion he was giving automobile driver a citation slip for speeding, exclusion of citation slip not showing time was not error.

Cal.—People v. Ryan, 250 P. 164, 199 C. 513.

70. N.Y.—People v. Vitusky, 140 N. Y.S. 19, 155 App.Div. 139.

71. Ga.—White v. State, 56 Ga. 385.

Tex.—Cohen v. State, 38 S.W. 1005, 37 Tex.Cr. 118.

25 C.J. p 242 note 69.

72. Tex.—Brackenridge v. State, 11 S.W. 630, 27 Tex.App. 513, 4 L.R.A. 360.

73. Tex.—Brackenridge v. State, supra.

74. N.Y.—People v. Clark, 151 N.E. 631, 242 N.Y. 313.

75. Tex.—Townsend v. State, 51 S. W.2d 696, 121 Tex.Cr. 79.

Exclusion held error

In prosecution for collection of illegal fees, exclusion of testimony that sheriff was at place with subpoena for witness not served was held error, although such testimony would not entitle sheriff to fee, where it tended to show good faith in charging for making such trip.

On the other hand, items offered in evidence which have been held immaterial include evidence of a custom to collect fees or fines in a particular manner⁷⁶ or of previous acts by accused of a similar nature,⁷⁷ that accused acted on advice of counsel,⁷⁸ and other items of evidence.⁷⁹

Weight and sufficiency. Rules applicable to criminal prosecutions generally as to the weight and sufficiency of evidence are applicable to prosecutions for extortion.⁸⁰

§ 13. Trial and Review

Rules governing trials in criminal prosecutions generally have been applied to prosecutions for extortion, as with regard to the province of the court and the jury, and the necessity and sufficiency of instructions. General rules governing review in criminal proceedings have likewise been applied.

Under the rules governing trials in criminal cases generally, it is ordinarily held that it is for the jury to determine the character of the transaction⁸¹ and the intent of accused.⁸² The nature of the pow-

ers determining the official capacity of accused is a question partly of law and partly of fact.⁸³ Where the evidence shows that no money has been paid to defendant but merely a note or due bill which has not been paid, it has been held that a direction of a verdict for defendant is correct.⁸⁴

Instructions. In accordance with the rules governing instructions in criminal trials generally, the court should properly instruct the jury with regard to the issues in the case.⁸⁵ Common words, used in the statute in their ordinary sense, need not be defined to the jury,⁸⁶ but, where it is necessary, words in the statute should be defined.⁸⁷ Where a court allowance is a condition precedent to the legality of a charge for official services, an instruction based on the theory that its illegality also depends on a court's finding of its excessiveness has been held to be erroneous.⁸⁸

When the legality of compensation for services rendered by an officer in his individual capacity is in issue, instructions should state the distinction be-

Tex.—Burns v. State, 61 S.W.2d 512, 123 Tex.Cr. 611.

76. Tex.—Phillips v. State, 280 S. W. 1065, 103 Tex.Cr. 358.

77. Tex.—Phillips v. State, supra.

78. Tex.—Lewis v. State, 64 S.W.2d 972, 124 Tex.Cr. 582.

79. Tex.—Phillips v. State, 280 S.W. 1065, 103 Tex.Cr. 358.

80. Ga.—Holt v. State, 74 S.E. 560, 11 Ga.App. 34.

25 C.J. p 242 note 73.

Evidence held sufficient

To sustain conviction.

Del.—State v. Trabbold, 91 A.2d 537, 3 Terry 391.

Pa.—Commonwealth v. Hansell, 137 A.2d 816, 185 Pa.Super. 443—Commonwealth v. Ackerman, 106 A.2d 886, 176 Pa.Super. 80, certiorari denied Ackerman v. Commonwealth of Pa., 75 S.Ct. 438, 348 U.S. 951, 99 L.Ed. 743—Commonwealth v. Gallagher, 69 A.2d 432, 165 Pa.Super. 553—Commonwealth v. Hopkins, 69 A.2d 428, 165 Pa.Super. 561—Commonwealth v. Fickes, 160 A. 142, 105 Pa.Super. 199—Commonwealth v. Norris, 87 Pa.Super. 61.

Commonwealth v. Axe, 51 Lanc. Rev. 359.

Tex.—Murray v. State, 67 S.W.2d 274, 125 Tex.Cr. 252—Phillips v. State, 280 S.W. 1065, 103 Tex.Cr. 358.

Evidence held insufficient

To sustain conviction.

U.S.—U. S. v. Sutter, C.C.A.III, 160 F.2d 754.

Ala.—Ingram v. State, 3 So.2d 426, 30 Ala.App. 213, certiorari denied 3 So.2d 434, 241 Ala. 455.

N.Y.—People v. Rollek, 114 N.Y.S. 2d 85, 280 App.Div. 437, affirmed 110 N.E.2d 734, 304 N.Y. 905, motion denied 111 N.E.2d 738, 305 N. Y. 626.

81. U.S.—U. S. v. Moore, C.C.Ky., 18 F. 686.

Evidence held sufficient to take case to jury or to present question of fact.

N.J.—State v. Matule, 148 A.2d 848, 54 N.J.Super. 326.

State v. Barts, 38 A.2d 838, 132 N.J.Law 74, affirmed 40 A.2d 639, 132 N.J.Law 420.

N.Y.—People v. Rudolph, 100 N.E.2d 142, 303 N.Y. 73.

Pa.—Commonwealth v. Gallagher, 70 Pa.Dist. & Co. 177, affirmed 69 A.2d 432, 165 Pa.Super. 553.

82. N.C.—State v. Pritchard, 12 S. E. 50, 107 N.C. 921.

25 C.J. p 242 note 76.

Truth or falsity of statement

Evidence in prosecution for extortion as to whether deputy sheriff falsely stated mileage traveled in making service was for jury.

Tex.—Townsend v. State, 51 S.W.2d 696, 121 Tex.Cr. 79.

83. Ga.—White v. State, 56 Ga. 385.

84. Mass.—Commonwealth v. Denie, Thach.Cr. 165.

Instructions held proper

(1) An instruction, defining defendant's liability at common law or in terms of the statute, as the case may be, not omitting any essential element of the offense as defined at common law or in the statute, is correct.

85. Instructions held proper

(1) An instruction, defining defendant's liability at common law or in terms of the statute, as the case may be, not omitting any essential element of the offense as defined at common law or in the statute, is correct.

86. Vt.—State v. Louanis, 65 A. 532, 79 Vt. 463, 9 Ann.Cas. 194.

25 C.J. p 242 note 81.

87. Tex.—Townsend v. State, 51 S. W.2d 696, 121 Tex.Cr. 79.

88. Mo.—State v. Vasek, 47 Mo. 416.

U.S.—U. S. v. Deaver, D.C.N.C., 14 F. 595.

N.Y.—People v. Whaley, 6 Cow. 661.

(2) Where state senator charged with attempted extortion admitted conversation, but contended that he merely sought to determine how far administration officials would go in attempt to influence senators corruptly, in instruction that if defendant went to conference not for purpose of corruptly soliciting something for himself, but merely to see how far other side would go, then it "may" offer such explanation as would at least raise reasonable doubt, use of word "may" instead of "must" was held not reversible error.

Pa.—Commonwealth v. Clark, 187 A. 237, 123 Pa.Super. 277.

(3) Instructions that if taking is intentional, it is willful and that willful taking of money by a public officer in plain violation of the statute is at least a fraud on the government, and that accused is not guilty of extortion merely by reason of taking money and that the commonwealth must show that he took money for performance of his official duties, sufficiently defined elements of the crime.

Pa.—Commonwealth v. Hopkins, 69 A.2d 428, 165 Pa.Super. 561.

(4) Other instructions.

Pa.—Commonwealth v. Eckel, Quar. Sess., 5 Lycoming 250.

86. Vt.—State v. Louanis, 65 A. 532, 79 Vt. 463, 9 Ann.Cas. 194.

25 C.J. p 242 note 81.

87. Tex.—Townsend v. State, 51 S. W.2d 696, 121 Tex.Cr. 79.

88. Mo.—State v. Vasek, 47 Mo. 416.

tween official and unofficial services, and the law applicable to the circumstances;⁸⁹ and, when the facts of the case require it, they should state the rule as to the legal effect of taking a gross sum including fees for official services and compensation for disbursements or services rendered in his individual capacity.⁹⁰

Where a corrupt intent is an essential element of the offense, see *supra* § 3, the instructions should state, in words that will meet the statutory requirements,⁹¹ that such intent must be established.⁹² If such words are used, it is not necessary for the court to use other phrasing requested by the parties, even though the requested instruction also may conform to statutory requirements.⁹³ Where necessary, words in the statute describing the nature of the intent required must be defined.⁹⁴

Review. Rules governing the review of proceedings in criminal prosecutions generally have been applied to the review of prosecutions for extortion.⁹⁵

§ 14. Sentence and Punishment

At common law and under some statutes, extortion is punishable by fine, imprisonment, and removal from office.

Extortion was punished at common law by fine and imprisonment, and also by removal from office.⁹⁶

and under statutes to that effect the same punishments may be imposed.⁹⁷ Where the penalty for the offense is provided for by statute, a greater penalty cannot be imposed, even though the prosecution was based on common-law counts which charged only attempted extortion.⁹⁸

§ 15. Penalties and Actions Therefor

- a. In general
- b. Acts imposing liability
- c. Defenses
- d. Persons entitled to enforce
- e. Persons liable
- f. Actions to enforce

a. In General

Under statutes so providing, an officer guilty of extortion may be liable to the aggrieved party for a penalty. Such statutes are strictly construed, and do not render the surety on the officer's bond liable for the penalty. Ordinarily, liability for the penalty does not affect, and is not affected by, criminal liability.

Under statutes to that effect in many jurisdictions, an officer guilty of extortion is liable to the aggrieved party in a civil action for a penalty.⁹⁹ These statutes are generally regarded as penal in their nature,¹ and subject to a strict construction.² The primary object of such legislation is to prevent the exaction of illegal fees by public officers.³ In some jurisdictions, questions have arisen concern-

89. Ala.—Collier v. State, 55 Ala. 125.

90. U.S.—U. S. v. Waitz, D.C.Nev., 28 F.Cas.No.16,631, 3 Sawy. 473.

91. Ga.—Ridenhour v. State, 75 Ga. 382.
25 C.J. p 242 note 87.

92. Ark.—Leeman v. State, 35 Ark. 438, 37 Am.R. 44.

93. Ga.—Ridenhour v. State, 75 Ga. 382.

94. "Willfully"

(1) In prosecution for extortion, it was error for the court not to define the word "willfully" as used in the statute, the indictment, and the instructions.

Tex.—Christian v. State, 59 S.W.2d 166, 123 Tex.Cr. 375—Townsend v. State, 51 S.W.2d 696, 121 Tex.Cr. 79.

(2) In prosecution for extortion, instruction defining "willful" as proceeding from a conscious motion of the will intending result which actually comes to pass; design; intentional; malicious, was held error. Tex.—Burns v. State, 61 S.W.2d 512, 123 Tex.Cr. 611.

(3) Definition in instruction conveying impression that if money

were intentionally demanded and received by sheriff, it was "willfully" done, was held error.

Tex.—Lewis v. State, 64 S.W.2d 972, 124 Tex.Cr. 582.

95. Description of offense in recognition

Where extortion is not regarded as an offense, *eo nomine*, the recognition on appeal must recite the constituent elements of the offense as charged in the indictment, and a recital that appellant was convicted of "extortion" is not sufficient.

Tex.—Johnson v. State, 40 S.W. 982, 38 Tex.Cr. 26—Schoonmaker v. State, 35 S.W. 969, 37 Tex.Cr. 424.

Dismissal of information held erroneous

N.Y.—People v. Rudolph, 100 N.E.2d 142, 303 N.Y. 73.

96. Fla.—La Tour v. Stone, 190 So. 704, 139 Fla. 681.

97. Tex.—Brackenridge v. State, 11 S.W. 630, 27 Tex.App. 513, 4 L.R.A. 360.

25 C.J. p 243 note 95.

98. Pa.—Commonwealth v. Clark, 187 A. 237, 123 Pa.Super. 277.

99. Pa.—Damian v. Hernon, 157 A. 520, 102 Pa.Super. 539.

25 C.J. p 243 note 3.

Extortion defined see *supra* § 1.

Definition and nature of penalties generally see Penalties § 1.

Civil actions for recovery of excess compensation generally see Officers § 101.

Recovery back of money paid to or collected by sheriff see Sheriffs and Constables § 259.

1. Ark.—McCourtney v. Morrow, 229 S.W.2d 124, 216 Ark. 959.

Pa.—Damian v. Hernon, 157 A. 520, 102 Pa.Super. 539.
25 C.J. p 243 note 4.

2. Ark.—McCourtney v. Morrow, 229 S.W.2d 124, 216 Ark. 959.

Neb.—Sheibley v. Cooper, 112 N.W. 363, 79 Neb. 232, motion overruled 113 N.W. 626, 79 Neb. 236.

Pa.—Irons v. Allen, 32 A. 655, 169 Pa. 633.

Damian v. Hernon, 157 A. 520, 102 Pa.Super. 539.

25 C.J. p 243 note 5.

This rule means merely that nothing is to be taken by indictment against the party charged.

Pa.—Bartolett v. Achey, 38 Pa. 273.
Wilson v. Barrett, 24 Pa.Super. 68.

3. Neb.—Lydick v. Palmquist, 47 N. W. 918, 31 Neb. 300.

25 C.J. p 243 note 6.

ing the constitutionality of these statutes, but they have been uniformly upheld.⁴

Liability of sureties on officer's bond. Sureties on the official bond of a public officer cannot be subjected to the penalty incurred by the officer's extortionate act, in the absence of provisions in the statute and the bond creating such liability.⁵ Such liability is never extended by implication.⁶

Criminal liability as affected by, or affecting, liability for penalty. Notwithstanding a statute imposing a penalty, a common-law remedy by indictment is ordinarily held to remain,⁷ except where the statute imposing the penalty provides that no other penalty shall be inflicted.⁸ Similarly, a statute providing a penalty for extortion in demanding and receiving illegal fees is not repealed or suspended, by implication, by a statute imposing a fine on conviction for the misdemeanor.⁹ An officer may be guilty of extortion and liable to indictment at common law, although not subject to the penalty.¹⁰

b. Acts Imposing Liability

- (1) In general
- (2) Duress or compulsion
- (3) Nature of fees taken
- (4) Intent

(1) In General

It is generally essential to liability for the penalty that the extorsive act have been done under color of office or official right. It is immaterial that the fees were not paid directly to the officer.

As in the case of criminal prosecutions, see *supra* § 5, it is, as a general rule, regarded as an essential

to the liability for the statutory penalty that the act constituting the alleged extortion have been done under color of office or official right.¹¹ The sum alleged to have been extorted must have been demanded as a fee for some official duty,¹² and must have been demanded of a person liable therefor;¹³ fees voluntarily paid by a person not liable, although improperly and unjustly taken, are not obtained by color of office.¹⁴

While it has been held that in order to subject an officer to the statutory penalty for taking illegal fees it must appear that he was an officer at the time of taking, charging, or demanding them,¹⁵ and that a penalty cannot be imposed against one who takes fees for services rendered while he is in office after his office has expired,¹⁶ there is also authority to the contrary.¹⁷

To whom payment made. It is immaterial that the fees were not paid directly to the officer, where he subsequently receives the money.¹⁸

(2) Duress or Compulsion

It is generally essential to liability for the statutory penalty that the payment be involuntary.

An action for a penalty cannot, as a rule, be maintained where the payment was voluntary on the part of plaintiff,¹⁹ although it has been held that the voluntary character of the payment is immaterial when the penalty is imposed on any officer "who shall receive" any fee not specifically provided for by law.²⁰ Where the other elements of the offense have been proved, the payment, although made without protest, is generally held to be under constraint, and voluntary payment not available as a defense.²¹

4. Cal.—*Ryan v. Johnson*, 5 C. 86.
Neb.—*Graham v. Kibble*, 2 N.W. 455,
9 Neb. 182.

5. Neb.—*Sheibley v. Cooper*, 112 N.
W. 363, 79 Neb. 232, motion over-
ruled 113 N.W. 626, 79 Neb. 236.
25 C.J. p 243 note 8—46 C.J. p 1071
note 51 [a].

6. Neb.—*Sheibley v. Cooper*, *supra*.
25 C.J. p 243 note 9.

7. Ark.—*Levy v. English*, 4 Ark. 65.
25 C.J. p 243 note 10.

8. Pa.—*Mevay v. Edmiston*, 1 Rawle
457—*Commonwealth v. Evans*, 13
Serg. & R. 426.

9. Pa.—*Ross v. Palmer*, 4 Pa. 517.
Tenn.—*Plyley v. Allison*, 82 S.W.
475, 113 Tenn. 500.

10. Pa.—*Garber v. Conner*, 98 Pa.
551.
25 C.J. p 244 note 13.

11. Tenn.—*Kerr v. Raines*, 256 S.W.
246, 148 Tenn. 501.
25 C.J. p 245 note 42.

A charge of two cents for a post-
age stamp paid directly to a con-
stable and used by the latter for
mailing to a defendant a notice, in-
stead of subjecting him to the ex-
pense of a warrant, is not an illegal
fee, such as will subject a justice
of the peace to a penalty under a
statute providing a penalty for
charging any fee by a public officer
other than the one provided by law.
Pa.—*Templeton v. Williams*, 39 Pa.
Super. 272.

12. Mass.—*Vogel v. Brown*, 87 N.E.
686, 201 Mass. 261.
25 C.J. p 245 note 43.

13. Ky.—*Marshal v. Byram*, 1 Bibb
341.
25 C.J. p 245 note 44.

14. Mass.—*Dunlap v. Curtis*, 10
Mass. 210.

15. Neb.—*Sheibley v. Cooper*, 112 N.
W. 363, 79 Neb. 232, motion over-
ruled 113 N.W. 626, 79 Neb. 236.

16. Neb.—*Sheibley v. Cooper*, *supra*.
Pa.—*Gallagher v. Neal*, 3 Penr. &
W. 183.

17. Mo.—*Jackman v. Bentley*, 10
Mo. 293.

18. Fees paid to justice as part of
costs of action.
Tenn.—*Henderson v. Scott*, 1 Tenn.
App. 451.

19. N.Y.—*Keener v. Kidd*, 130 N.Y.
S. 207, 71 Misc. 321, reversed on
other grounds 132 N.Y.S. 1134, 148
App.Div. 925.
25 C.J. p 245 note 48.

20. Mont.—*Leggatt v. Prideaux*, 40
P. 377, 16 Mont. 205, 50 Am.S.R.
498.
Tenn.—*Marr v. Murphy*, 5 Tenn.Civ.
App. 159.

21. Mont.—*Leggatt v. Prideaux*, 40
P. 377, 16 Mont. 205, 50 Am.S.R.
498.
25 C.J. p 245 note 50.

(3) Nature of Fees Taken

Whether the taking of a fee for services for which no fee is provided by law, or a fee greater than that allowed, or a fee for services not performed, or the receipt of a fee before it is due, will render an officer liable for a penalty depends on the statute imposing the penalty.

Where the statute imposes a penalty for the taking of fees for compensation for official services other than as allowed by law, it is generally held that a penalty may be imposed where compensation is taken for services for which no compensation is expressly provided,²² although there is some authority to the contrary;²³ and a similar rule prevails under statutes expressly prohibiting fees not specified therein.²⁴ Under statutes prescribing fixed fees for certain enumerated services and providing a penalty for taking more than the fixed amount for performance of those services, it has been held that there may be extraordinary services not expressly provided for in the fee bill for which an officer may be entitled to a reasonable compensation;²⁵ and it has even been held in such cases that, since the fee is not fixed by law, he will not be liable for the penalty if he receives more than reasonable compensation.²⁶

Under an express statutory provision that officers who perform services for which no fee is especially allowed by statute are entitled to a reasonable compensation, it has been held that an officer is not guilty of extortion unless he takes a fee which he knows to be unreasonable.²⁷

Fees greater than allowed. Under the express terms of the statute to that effect, a penalty is ordinarily imposed for the taking of fees greater in amount than provided by law.²⁸ A penalty imposed for receiving higher fees than allowed cannot be recovered where only the legal fee has been exacted for the protest of the note, although the protest was premature.²⁹

Fees received before due. Under statutes imposing a penalty for the receipt of a fee before it is due, the penalty may be imposed even though no more is taken than will in probability soon be due.³⁰ It is equally criminal for a public officer to refuse to perform a public duty until paid.³¹ Statutes relating to this offense which contain no provision prohibiting the collection of a lawful fee before it is due have been construed not to alter the common law in this particular.³²

Charges for services not performed. Under a strict construction of a statute providing for a penalty where the officer demands and receives any greater fees for any of the services specified than are allowed by statute, the penalty will not be imposed where the officer has in fact performed no services, although he has exacted a fee;³³ but a contrary conclusion has been reached under a statute imposing a forfeiture on any officer making improper charges for official services.³⁴

(4) Intent

Whether an evil or corrupt intent is essential to liability for a penalty for extortion depends on the language of the statute imposing the penalty.

Statutes imposing a penalty where an officer "takes," "receives or takes," or "demands or receives" fees not authorized by law make the gist of the offense depend on the taking without the necessity of proof of an evil or corrupt intent.³⁵ Under such statutes, an agreement by the person injured furnishes no justification for doing what the law forbids;³⁶ nor is it a defense that defendant acted under a mistake or ignorance of the law,³⁷ or in good faith,³⁸ or under the direction of a state officer,³⁹ or under the authority of an execution,⁴⁰ or without claim of personal benefit or gain,⁴¹ or that, if the officer had included certain other legitimate fees to which he was entitled, his charges would have amounted to as much or more.⁴²

22. Tenn.—Henderson v. Scott, 1 Tenn.App. 451.

25 C.J. p 245 note 51.

23. Wis.—Musback v. Schaefer, 91 N.W. 966, 115 Wis. 357.

24. Conn.—Preston v. Bacon, 4 Conn. 471.

Pa.—Simmons v. Kelly, 33 Pa. 190.

25. Ala.—Chenualt v. Walker, 15 Ala. 605.

N.H.—Walker v. Ham, 2 N.H. 238, 239.

26. Ala.—Chenault v. Walker, 15 Ala. 605.

27. Vt.—Henry v. Tilson, 17 Vt. 479.

28. Neb.—Lydick v. Palmquist, 47 N.W. 918, 31 Neb. 300.

29. Tex.—Hirshfield v. Ft. Worth Nat. Bank, 18 S.W. 743, 83 Tex. 452, 29 Am.S.R. 660, 15 L.R.A. 639.

30. Ark.—Levy v. Inglish, 4 Ark. 65.

31. Ark.—Levy v. Inglish, supra.

32. Tenn.—Marr v. Murphy, 5 Tenn. Civ.App. 159.

33. Mass.—Shattuck v. Woods, 1 Pick. 171.

Tex.—Hays v. Stewart, 8 Tex. 358.

34. S.C.—Dean v. Todd, 27 S.E. 471, 49 S.C. 461.

35. N.Y.—Willett v. Devoy, 155 N.Y.S. 920, 170 App.Div. 203.

25 C.J. p 244 note 14.

36. Pa.—Coates v. Wallace, 17 Serg. & R. 75.

37. Mont.—Leggatt v. Prideaux, 40 P. 377, 16 Mont. 205, 50 Am.S.R. 498.

25 C.J. p 244 note 18.

38. Tenn.—Plyley v. Allison, 82 S.W. 475, 113 Tenn. 500.

Henderson v. Scott, 1 Tenn.App. 451.

39. Tenn.—Plyley v. Allison, 82 S.W. 475, 113 Tenn. 500.

40. S.C.—Tinsley v. Kirby, 8 S.C. 113.

41. N.Y.—Willett v. Devoy, 155 N.Y.S. 920, 170 App.Div. 203.

25 C.J. p 244 note 22.

42. Ark.—Turner v. Blount, 5 S.W. 589, 49 Ark. 361.

On the other hand, under statutes employing such words as "willfully takes," "willfully and corruptly takes," "knowingly takes," or "unlawfully takes," or stating that the officer shall have been "guilty of extortion," a corrupt intent has been held essential.⁴³ However, it has been held that it is not essential that the taking by the officer should have been for his own use and benefit.⁴⁴

Where it is essential that defendant shall have acted willfully and corruptly, he must have acted knowingly;⁴⁵ and this is likewise true where the statute punishes one who shall knowingly demand more or greater sums than are authorized,⁴⁶ the word "knowingly" being used in the sense of intentionally.⁴⁷ Hence, a penalty cannot be recovered where the officer has acted under an honest mistake,⁴⁸ or in ignorance of the law,⁴⁹ although as to the latter point there is contrary authority.⁵⁰ Where it is regarded as essential that the act has been done with knowledge of its illegality, a uniform and universal custom among officers in the county on which defendant acted in good faith may constitute a defense;⁵¹ but it has been held, to the contrary, that the practice of other officers is not a defense, even though a corrupt intent is an element of the cause of action.⁵²

c. Defenses

Unconstitutionality of the basic statute is a defense; but the previous failure of the party injured to raise the question of the illegal fee is not ordinarily a defense. Except where statute provides otherwise, a tender back of the overcharge is no defense.

The unconstitutionality of the statute on which the prosecution is founded is a defense.⁵³ However, it is not a defense that the party injured

failed to bring the illegal charge to the attention of the court in a motion to retax costs,⁵⁴ or failed to make a demand for return of the fee illegally charged before bringing action,⁵⁵ or did not inform defendant that his fee was excessive.⁵⁶

Failure to give notice of intention to sue, as defense in some jurisdictions, is considered *infra* subdivision f (3) of this section.

Tender of overcharge. In the absence of statutory provision, it is no defense that before the action was commenced the officer tendered back to plaintiff the amount of the overcharge;⁵⁷ and nothing less than tender of the full amount of the penalty is available as a defense.⁵⁸ However, the statute may enable an officer to protect himself from prosecution by tender of amends, and the jury are made judges of the sufficiency of the tender.⁵⁹ Under a statute so providing, it has been held that the defense of tender may be available, even though it has not been made in a regular manner, provided the other party has dispensed with it, either by a previous refusal to accept it or by conduct tantamount to a refusal.⁶⁰

d. Persons Entitled to Enforce

Unless the statute provides otherwise, only the person injured or aggrieved has the right to sue for the penalty.

As a general rule, under statutes to that effect, only the person injured or aggrieved has the right to maintain an action for the penalty.⁶¹ A person aggrieved is ordinarily one whose money is withheld.⁶² However, under other statutes so providing, the action for the penalty may be maintained by any person who will sue for it.⁶³

43. Ark.—*McCourtney v. Morrow*, 229 S.W.2d 124, 216 Ark. 959.

Mass.—*Vogel v. Brown*, 87 N.E. 686, 201 Mass. 261.

25 C.J. p 244 note 15.

44. Ala.—*Spence v. Thompson*, 11 Ala. 746.

45. Mass.—*Vogel v. Brown*, 87 N.E. 686, 201 Mass. 261.

25 C.J. p 244 note 27.

46. Tex.—*Millar v. Douglass*, 42 Tex. 238.

47. Vt.—*Crawford v. Joslyn*, 76 A. 108, 83 Vt. 361, Ann.Cas.1912A 428.

48. Tex.—*Hays v. Stewart*, 8 Tex. 358.

49. Mass.—*Vogel v. Brown*, 87 N.E. 686, 201 Mass. 261.

Tex.—*Hays v. Stewart*, 8 Tex. 358. 25 C.J. p 244 note 31.

50. Ala.—*Lee v. Lide*, 20 So. 410, 111 Ala. 126.

51. Vt.—*Crawford v. Joslyn*, 76 A. 108, 83 Vt. 361, Ann.Cas.1912A 428 —*Haynes v. Hall*, 37 Vt. 20.

52. Mass.—*Shattuck v. Woods*, 1 Pick. 171—*Lincoln v. Shaw*, 17 Mass. 410.

53. Cal.—*Ryan v. Johnson*, 5 C. 86. 25 C.J. p 247 note 88.

54. Neb.—*O'Shea v. Kavanaugh*, 91 N.W. 578, 65 Neb. 639. N.J.—*Tanner v. Croxall*, 17 N.J.Law 332.

55. Ala.—*Spence v. Thompson*, 11 Ala. 746.

56. Mont.—*Leggatt v. Prideaux*, 40 P. 377, 16 Mont. 205, 50 Am.S.R. 498.

57. Mont.—*Leggatt v. Prideaux*, *supra*. 25 C.J. p 247 note 93.

58. Pa.—*McConahy v. Courtney*, 7 Watts 491. 25 C.J. p 247 note 94.

59. Pa.—*Jackson v. Purdue*, 3 Penn. & W. 519.

60. Pa.—*Jackson v. Purdue*, *supra*.

61. Neb.—*Iler v. Cronin*, 51 N.W. 970, 34 Neb. 424. 25 C.J. p 247 note 4.

62. Attorney

A "party aggrieved," within a statute declaring an officer demanding fees greater than that allowed by law to be liable to an action in behalf of the person aggrieved, is the one whose money is withheld, who is thus directly injured by the excess taken, and may be the attorney himself, instead of his principal.

N.Y.—*Hale v. McDermott*, 137 N.Y.S. 975, 78 Misc. 52.

63. Cal.—*In re Marks*, 45 C. 199. 25 C.J. p 247 note 5.

e. Persons Liable

In general, any person occupying an official or quasi-official position may be liable for the penalty. An officer will be liable for a penalty for the acts of his deputy where the deputy acts in the line of his official duty or the officer ratifies his acts.

As in the case of criminal prosecutions, see *supra* § 9, in general, any officer or person occupying an official or quasi-official position may be liable for the penalty provided.⁶⁴ However, under statutes restricting their operations to particular classes of officers, only officers within such classes may be so liable.⁶⁵

Liability for acts of deputy or agent. An officer is liable for a penalty incurred by the official misconduct of his deputy.⁶⁶ It is not necessary to show that the officer has recognized or adopted the acts of his deputy in order to fix his liability therefor, provided the acts are performed in the line of the agent's official duty;⁶⁷ and it is no objection that the act is of a criminal nature, for which the deputy might be prosecuted criminally.⁶⁸

On the other hand, where the officer ratifies the illegal acts of his deputy, it is immaterial that the acts were outside the line of the deputy's official duty.⁶⁹ Ratification, however, to be available in a suit against the officer, must be shown to have been made with knowledge of the facts, and before the suit was brought.⁷⁰

The liability attaches even though the money taken by the agent has not been paid over to his principal.⁷¹

f. Actions to Enforce

- (1) In general
- (2) Jurisdiction
- (3) Conditions precedent and time to sue
- (4) Process
- (5) Pleading
- (6) Evidence

(7) Trial, judgment, new trial, and review

(1) In General

The nature of an action for the penalty is *ex contractu*, and debt is the proper action; but the party aggrieved may sue for the penalty or for the recovery of the money paid. The action does not survive his death.

The nature of an action to enforce a penalty for extortion is essentially *ex contractu*, and not *ex delicto*;⁷² and debt is the proper action to enforce such liability, unless the statute otherwise provides.⁷³ The nature and form of action to enforce penalties generally are considered in Penalties § 8.

Abatement and revival. The action, being purely personal, and by way of punishment, does not survive to the administrators of the party injured.⁷⁴ However, where the injured party is a partnership, the cause of action does not abate by the dissolution of the partnership, but survives to the individual members.⁷⁵

Election of remedies. The party aggrieved may have an election between an action on the statute for a penalty and remedy by an ordinary action at law for the recovery of the money paid against the officer or the officer and his sureties.⁷⁶

(2) Jurisdiction

What court has jurisdiction in actions for penalties for extortion generally depends on the amount sued for, except in so far as specific provision regarding jurisdiction is made by statute.

In general, the amount of the penalty sued for determines the jurisdiction of the court, so that, if the sum of the charges against an officer for the taking of illegal fees amounts to enough to give a particular court jurisdiction, the demand may be sued for in that court.⁷⁷ However, where the applicable statute contains provisions regarding jurisdiction, jurisdiction is determined by such statute.⁷⁸ Thus, where a statute provides that a particular court has jurisdiction to determine the correctness

64. Ga.—Lancaster v. Hill, 71 S.E. 731, 136 Ga. 405, Ann.Cas.1912C 272.

25 C.J. p 244 note 37.

A salaried official is amenable to the law, as well as an official who himself takes the fees.

N.Y.—Willet v. Devoy, 155 N.Y.S. 920, 170 App.Div. 203.

65. N.H.—Scammon v. Tilton, 23 N.H. 434.

25 C.J. p 244 note 38.

Officers who may charge fees for their services

Pa.—Garber v. Conner, 98 Pa. 551.

66. Ala.—Lee v. Lide, 20 So. 410, 111 Ala. 126.

25 C.J. p 246 note 68.

67. N.Y.—McIntyre v. Trumbull, 7 Johns. 35.

68. N.Y.—McIntyre v. Trumbull, *supra*.

69. N.H.—Fowler v. Tuttle, 24 N.H. 9.

70. N.Y.—Gorham v. Gale, 7 Cow. 739, 17 Am.D. 549.

71. Pa.—Jackson v. Purdue, 3 Penr. & W. 519.

72. Pa.—Damian v. Hernon, 157 A. 520, 102 Pa.Super. 539.

73. Miss.—State v. Baker, 47 Miss. 88.

25 C.J. p 246 note 79.

74. Pa.—Reed v. Cist, 7 Serg. & R. 183.

75. Neb.—O'Shea v. Kavanaugh, 31 N.W. 578, 65 Neb. 639.

76. Miss.—State v. Baker, 47 Miss. 88.

25 C.J. p 246 note 75.

77. Ind.—Jones v. Buntin, 1 Blackf. 322.

78. U.S.—U. S. v. Carr, D.C.Or., 25 F.Cas.No.14,730, 3 Sawy. 302.

25 C.J. p 247 note 99.

of any charge or charges for costs in cases pending in that court, the amount involved becomes immaterial.⁷⁹

State courts can entertain suits against federal officers for acts done by virtue of their office.⁸⁰

If a court wrongfully refuses to exercise its jurisdiction, it may be compelled so to do by mandamus.⁸¹

(3) Conditions Precedent and Time to Sue

Under statute to that effect, notice to the officer of intention to sue is a condition precedent to an action for a penalty for extortion. The action must be brought within the time specified by statute.

Under statute to that effect, in at least one jurisdiction, notice to the officer of intention to sue must be served before suing out the writ,⁸² and failure to give such notice will constitute a defense.⁸³ Such a statute has been held not to be repealed by subsequent statutes omitting this requirement.⁸⁴ The required notice to the officer need not specify what fees the officer was entitled to receive;⁸⁵ nor need it give notice that plaintiff was proceeding under any particular statute;⁸⁶ it is sufficient if it states substantially plaintiff's cause of complaint.⁸⁷

The statutory requirement of notice applies only to an action for a penalty, and is not extended to an action of assumpsit, to recover back the fees illegally taken.⁸⁸

It is not necessary that an officer who is subject to the penalty shall be first convicted in a criminal action as a condition precedent to the bringing of a civil suit against him to recover the penalty.⁸⁹

Time to sue and limitations. Where, by statute, an action for the recovery of any penalty must be commenced within a specified limit of time, an action

to recover a penalty for the extortionate act of a public officer comes within the terms of the statute, and failure to bring the action within the statutory period is a defense.⁹⁰

(4) Process

Statutory requirements regarding process must be observed.

In an action for the penalty, statutory requirements regarding process must be observed.⁹¹

(5) Pleading

The complaint in an action to enforce a penalty for extortion must state the statutory requirements with certainty, although the exact phrasing of the statute need not be used. A defective complaint may be cured by the verdict where it shows a good cause of action. A variance between allegation and proof is fatal only where it is as to material facts.

As in other actions for the recovery of penalties, see Penalties § 15, the complaint in an action to enforce a penalty for extortion must state the statutory requirements with the same degree of certainty as is required in an indictment in a criminal case;⁹² and it will be construed with the same strictness.⁹³ However, the allegation need not be in the exact phrasing of the statute.⁹⁴

Particular allegations. Under a statute providing a penalty for extortionate acts to be recovered by the party injured, an allegation that plaintiff is the party injured is necessary;⁹⁵ but an allegation in the exact phrasing of the statute is not necessary, an allegation of facts showing the plaintiff to be the party injured being sufficient.⁹⁶

Where, by statute, an action for the recovery of a penalty must be commenced within a limit of time, although it is usual to aver that the offense by which the penalty was incurred was committed within such time, such allegation is not necessary.⁹⁷

79. Fla.—State v. Reeves, 32 So. 314, 44 Fla. 179.

80. Pa.—American S. S. Co. v. Young, 89 Pa. 186, 33 Am.R. 748, affirmed Young v. American S. S. Co., 105 U.S. 41, 26 L.Ed. 966.

81. Fla.—State v. Reeves, 32 So. 314, 44 Fla. 179.

82. Pa.—Damian v. Hernon, 157 A. 520, 102 Pa.Super. 539.

83. Pa.—Prior v. Craig, 5 Serg. & R. 44.
25 C.J. p 246 note 81.

84. Pa.—Prior v. Craig, supra.

85. Pa.—Coates v. Wallace, 17 Serg. & R. 75.

86. Pa.—Damian v. Hernon, 157 A. 520, 102 Pa.Super. 539.

87. Pa.—Damian v. Hernon, supra.
25 C.J. p 246 note 84.

88. Pa.—Prior v. Craig, 5 Serg. & R. 44.

89. Mont.—Ming v. Truett, 1 Mont. 322, 327.

90. N.H.—Fowler v. Tuttle, 24 N. H. 9.

Vt.—Wheelock v. Sears, 19 Vt. 559.

91. Record of date

A statutory requirement that a minute be made upon the writ of the day, month, and year when it was signed, must be observed.

Vt.—Wheelock v. Sears, 19 Vt. 559.

92. Tex.—Redus v. Blucher, Civ. App., 207 S.W. 613.

25 C.J. p 248 note 9.

93. Tex.—Redus v. Blucher, supra.

94. Pa.—Miller v. Lockwood, 17 Pa. 248.

95. Pa.—Miller v. Lockwood, supra.

96. Pa.—Miller v. Lockwood, supra.

Party making payment

"It is a mistake of fact to allege that the declaration 'does not set forth that the plaintiff is the party injured.' It appears that he was the grantee in the deed which was recorded; that he was the person for whose benefit the service was rendered; that he was the party liable for the legal fees, and that he was the person who paid the sum illegally taken. He is, therefore, 'the party injured.'"

Pa.—Miller v. Lockwood, supra.

97. N.H.—Fowler v. Tuttle, 24 N.H. 9.

An allegation of the services for which fees were charged is necessary,⁹⁸ in terms bringing the rendition of the services within the statutory definition,⁹⁹ and with sufficient certainty to enable the court to conclude from facts stated whether or not the compensation received was other than that authorized or permitted by law.¹

The amount taken must be specifically alleged;² but it is sufficient, where a number of fees are involved, that the allegation state the aggregate sum taken.³

Where the statute provides a penalty for the charging for services not actually performed, it is not necessary that it be averred that the charges were knowingly or willfully made.⁴

Aider by verdict. Where a complaint, although defective, is sufficient to show a good cause of action, it may be cured by the verdict;⁵ but a verdict will not so operate with respect to a bad cause of action.⁶ So declarations have been held sufficient, after verdict, which in an untechnical manner alleged that the fees received exceeded the legal fees,⁷ or which omitted the items of illegal fees taken and merely alleged the items of service and the aggregate amount taken,⁸ or stated the circumstances and the amount but did not allege the illegal fee and the excess charged,⁹ or merely alleged that for levying and collecting a certain sum defendant received a certain amount greater than allowed by law.¹⁰

In an action to recover a penalty for the receipt of illegal fees for service of execution, the failure of the declaration to state from what court execution issued or to what court it was returnable is cured by verdict where the declaration states the

parties and the date of the execution so that the charges may be pleadable in bar to another action for the same extortion.¹¹ A declaration which contains no allegation that any person received any fees for the service of an execution is not cured by verdict.¹²

Issues, proof, and variance. Proof that extortionate fees were taken from a person other than the person alleged to be the party injured will not support a conviction.¹³ A variance between allegation and proof as to material facts or circumstances surrounding the extortionate act is fatal;¹⁴ but a variance as to some immaterial fact is not fatal.¹⁵ A variance between allegation and proof as to the amount of money taken is not material.¹⁶

Joinder of counts. A count in debt for the statutory penalties may be joined with one for money had and received where the entire recovery goes to the party aggrieved.¹⁷

(6) Evidence

The plaintiff has the burden of proving facts entitling him to the penalty, such as the existence of corrupt intent, where such intent is an element of the offense; but the defendant has the burden as to matters of defense.

In an action to enforce a penalty for extortion, plaintiff has the burden of proving the existence of facts entitling him to the penalty.¹⁸ Thus, the burden of establishing corrupt intent, where such intent is essential to liability for a penalty, is on plaintiff;¹⁹ and, where defendant must have acted willfully and corruptly, it must be shown that he knew of a statutory provision for compensation.²⁰ Where, however, intent is not an element of the cause of action, the burden does not rest on plaintiff to prove a corrupt intent.²¹

98. Tex.—Orton v. Engledow, 8 Tex. 206.

25 C.J. p 248 note 16.

99. Colo.—Mitchell v. Wheeler, 77 P. 361, 20 Colo.App. 159.
25 C.J. p 248 note 17.

Official duty

So, where it is a statutory essential, it must be alleged that the sum extorted was demanded as a fee for some official duty.

Mass.—Runnells v. Fletcher, 15 Mass. 525.

Allegation held sufficient

If the action is to recover the penalty for taking fees for services for which no fees are allowed by law, it is sufficient to aver that they were taken for services not allowed to be compensated for, without specifying the services for which they were demanded.

Pa.—Overholtzer v. McMichael, 10 Pa. 139.

1. Pa.—Aechternacht v. Watmough, 8 Watts & S. 162.

2. Ala.—Spence v. Thompson, 11 Ala. 746.
25 C.J. p 248 note 21.

3. Ala.—Spence v. Thompson, supra.
25 C.J. p 248 note 22.

4. N.J.—Tanner v. Croxall, 17 N.J. Law 332.

5. Mass.—Stilson v. Tobey, 2 Mass. 521.

6. Mass.—Stilson v. Tobey, supra.

7. Mass.—Stilson v. Tobey, supra.

8. Vt.—Henry v. Tilson, 17 Vt. 479.

9. Pa.—Miller v. Lockwood, 17 Pa. 248.

10. Mass.—Livermore v. Boswell, 4 Mass. 437.

11. Mass.—Livermore v. Boswell, supra.

12. Mass.—Stilson v. Tobey, 2 Mass. 521.

13. Ky.—Bristow v. Sullivan, 6 B. Mon. 143.
25 C.J. p 249 note 33.

14. Mo.—Jackman v. Bentley, 10 Mo. 293.

15. Mo.—Jackman v. Bentley, supra.

16. N.H.—Fowler v. Tuttle, 24 N.H. 9.
25 C.J. p 249 note 36.

17. Ala.—Spence v. Thompson, 11 Ala. 746.

18. Mass.—Vogel v. Brown, 87 N.E. 686, 201 Mass. 261.

19. Mass.—Vogel v. Brown, supra.

20. Mass.—Vogel v. Brown, supra.
25 C.J. p 249 note 41.

21. Pa.—Wilson v. Barrett, 24 Pa. Super. 68.

On the other hand, the burden is on defendant to show that he acted under a mistake or a misapprehension of fact;²² and where good faith is regarded as a defense, it must be established by defendant.²³

The admissibility of evidence in actions for a penalty for extortion depends on the materiality of the evidence.²⁴

(7) Trial, Judgment, New Trial, and Review

Rules governing trials and the proceedings after trial in civil actions generally apply in actions for a penalty for extortion. An officer is subject to one penalty for one collection, even though several illegal charges are included therein.

Rules governing trials in civil actions generally have been applied in actions for a penalty for extortion.²⁵ Thus, in a jurisdiction where it is held that evil intent is in issue as an element of the offense, it is a question of fact for the jury to determine whether defendant was acting willfully and corruptly, or innocently and fairly, under the circumstances disclosed by the evidence;²⁶ but under a statute making the taking of an illegal fee the

gist of the offense, it is reversible error for the court to submit to the jury the question whether or not the law has been violated where the illegal charge is proved by plaintiff and admitted by defendant.²⁷

Judgment and amount of recovery. Where a public officer makes out a fee bill containing several illegal charges, he is liable to only one penalty and not a separate penalty for each item.²⁸ A statute making an officer liable if he "shall charge in his bill of costs for services not done, etc.," is construed to be in affirmance of this rule.²⁹

New trial and arrest of judgment. A motion in arrest of judgment will be sustained because of the lack of essential allegations affecting plaintiff's title to his action,³⁰ such as a failure to allege that anyone received the fees;³¹ but judgment will not be arrested when the defect is not in the title, but in the form of declaring it.³²

Appeal and error. The verdict of the jury on issues of fact is final where there is sufficient evidence in the case to support it.³³

EX TOTA MATERIA EMERGAT RESOLUTIO.¹

EXTRA (Latin). Literally "Without," or "outside of." A Latin preposition, occurring in many legal phrases. In its simple form, it has been but lately admitted in English dictionaries; but its compound use is ancient, "extraordinary" being a familiar in-

stance of such use.²

It has been defined as meaning beyond, except, out of, outside, or without.³

Phrases employing the word are set out in the subjoined note.⁴

22. N.H.—Fowler v. Tuttle, 24 N.H. 9.

23. Cal.—Triplett v. Munter, 50 C. 644.

24. Where the motive, belief, or intention of defendant is in issue he may be allowed to testify directly as to it.

Vt.—Crawford v. Joslyn, 76 A. 108, 83 Vt. 361, Ann.Cas.1912A 428.

25. Colo.—Hurd v. Atkins, 29 P. 528, 1 Colo.App. 449.

26. Colo.—Hurd v. Atkins, supra. 25 C.J. p 249 note 49.

27. Pa.—Wilson v. Barrett, 24 Pa. Super. 68.

28. Neb.—Phoenix Ins. Co. v. Bohman, 44 N.W. 111, 28 Neb. 251.

Pa.—Damian v. Hernon, 157 A. 520, 102 Pa.Super. 539.

25 C.J. p 249 note 53.

29. N.J.—Tanner v. Croxall, 17 N. J.Law 332.

30. Pa.—Aechternacht v. Watmough, 8 Watts & S. 162.

Tex.—Orton v. Engledow, 8 Tex. 206.

31. Mass.—Stilson v. Tobey, 2 Mass. 521.

32. Mass.—Moor v. Boswell, 5 Mass. 306.

25 C.J. p 249 note 58.

33. Colo.—Hurd v. Atkins, 29 P. 528, 1 Colo.App. 449.

Evidence held to support verdict
Tenn.—Kerr v. Raines, 256 S.W. 246, 148 Tenn. 501.

1. A maxim meaning "The explanation, construction or resolution should arise out of the whole subject matter."
Adams Gloss.

Applied in
Eng.—In re Lincoln College Case, 3 Coke pp 58a, 59b, 76 Reprint 764.

2. Wis.—Carpenter v. State, 39 Wis. 271, 284.

3. Black L.D.

4. **Extra territorium**
(1) Beyond or without the territory.
Black L.D.

(2) Outside the territorial limits of a state.

Pa.—Milne v. Moreton, 6 Binn. 349, 353, 6 Am.D. 466.

Other phrases

(1) "Extra commercia," as applied to property once dedicated to public use.

U.S.—J. B. McCrary Co. v. Town of Winnfield, D.C.La., 40 F.Supp. 427, 435.

(2) "Extra fœdum," as meaning out of his fee; out of the seignior, or not holden of him that claims it.
Black L.D.

(3) "Extra judicium," defined as beyond the jurisdiction, extrajudicial, out of the proper cause, or out of court.
Black L.D.

(4) "Extra jus," as meaning beyond the law; more than the law requires.
Black L.D.

(5) "Extra legem," defined as out of the law; out of the protection of the law.
Black L.D.

(6) "Extra præsentiæ mariti," as meaning out of her husband's presence.
Black L.D.

EXTRA (English).**As a Noun**

In general, something beyond, in addition to, or in excess of what is due, usual, or necessary;⁵ something in addition to what is due, expected, or customary, an added charge or fee.⁶

More specifically, something done or furnished in addition to, or in excess of, the requirement of a contract; something not required in the performance of a contract;⁷ labor or materials not called for by the original contract.⁸

As an Adjective

Beyond, or greater than, what is due, usual, expected, or necessary; being over and above what is required, due, expected, or usual; more than what is usual, or than what is due, appointed, or expect-

ed; hence additional, extraordinary, supernumerary, supplementary, as, extra pay or work.⁹

Phrases employing the word are set out in the subjoined note.¹⁰

EXTRACT. As a noun, primarily anything drawn from a substance by heat, solution, distillation, or chemical process, as essences, tinctures, and the like;¹¹ also, in a derived sense, a portion or fragment of a writing.¹²

In this latter sense, it has been distinguished from "transcript,"¹³ and, in its primary sense, it has been held not synonymous with "flavor" see Food § 45.

As a verb, to draw out or forth; to pull out from a fixed position;¹⁴ and when used as a mining term see Mines and Minerals § 3 h.

EXTRACTA CURIÆ. See the C.J.S. definition Ex.

(7) "Extra quatuor maria," literally "Beyond, or outside, the four seas," used as the equivalent of "beyond the seas," and compared with "extra regnum."
Ont.—Forsyth v. Hall, Draper (U.C.) 291, 298.

25 C.J. p 298 note 78.

See also the C.J.S. definition Beyond.

(8) "Extra regnum," defined as out of the kingdom, and compared with "extra quatuor maria."
Ont.—Forsyth v. Hall, supra.

(9) "Extra viam," defined as outside the way. Where the defendant in trespass pleaded a right of way in justification, and the replication alleged that the trespass was committed outside the limits of the way claimed, these were the technical words to be used.
Black L.D.

(10) "Extra vires," defined as beyond powers.
Black L.D.

See also Corporations § 970.

5. Iowa.—Fullerton v. City of Des Moines, 115 N.W. 607, 611, 140 Iowa 272, 126 N.W. 159, 163, 147 Iowa 254.

6. Tex.—Dallas County v. Lively, 167 S.W. 219, 223, 106 Tex. 364.

7. Iowa.—Fullerton v. City of Des Moines, 115 N.W. 607, 611, 140 Iowa 272, 126 N.W. 159, 163, 147 Iowa 254.

Similarly expressed

Something outside of or in addition to that exacted by the contract.
Iowa.—Chicago Lumber & Coal Co. v. Garmer, 109 N.W. 780, 782, 132 Iowa 282.

8. Wis.—Casgrain v. Milwaukee, 51 N.W. 88, 89, 81 Wis. 113.

See also Contracts § 371 f.

9. Tex.—Dallas County v. Lively, 167 S.W. 219, 223, 106 Tex. 364.

10. Phrases

(1) "Extra fancy flour," contrasted with "blended flour."

Ark.—Bunch v. Weil, 80 S.W. 582, 72 Ark. 343, 65 L.R.A. 80.

(2) "Extra poles," described as poles used in constructing a double line of wires for carrying an electric current.

Mass.—Foster v. Connecticut River Transmission Co., 112 N.E. 226, 228, 223 Mass. 528.

(3) "Extra port charges," such charges as tonnage dues, custom-house fees, levee dues, quarantine fees, and cost of fumigating, wharfage, watching, and outward pilotage, other than those enumerated or provided for in the charter party.

U.S.—Wilkens v. Trafikaktiebolaget Grangesberg Okelosund, C.C.A.Tex., 10 F.2d 129, 132.

(4) "Granting of extra compensation."

N.Y.—Swift v. State, 26 Hun 508, 510.

Phrases elsewhere discussed

(1) "Extra allowance" see Costs § 201.

(2) "Extra brakeman" and "extra conductor" defined and distinguished see Railroads § 1 g.

(3) "Extra compensation" see the C.J.S. definition Compensation, and Officers §§ 88, 96.

(4) "Extra good ore" see Mines and Minerals § 2 b (5).

(5) "Extra or wild train" see Railroads § 1 q (2).

(6) "Extra services" see Officers, § 88.

(7) "Extra work" as construed in building and construction contracts generally see Contracts § 371 f; as ground or measure of recovery of extra compensation generally see Work and Labor §§ 36, 66; and, more specifically, see such C.J.S. titles as Bridges § 20 e, Canals § 11 note 56, Drains § 43 g (3), and i note 8, Highways § 209, Municipal Corporations § 1202, Schools and School Districts § 314, States § 124, and United States § 94.

11. U.S.—Sykes v. Magone, C.C.N.Y., 38 F. 494, 497.

Phrases

(1) "Extract of annatto," is a product obtained by soaking annatto seeds in a mixture of oils, and is used for coloring butter.

U.S.—Roeller-Struss Co. v. U. S., 12 Ct.Cust.App. 189.

(2) "Extract of Coca and Kola," as compared with "Coca-Cola" see the C.J.S. definition Coca-Cola.

(3) "Extract of licorice."

U.S.—U. S. v. Andrews & Co., 12 Ct. Cust.App. 258, 259.

(4) "Extract of nutgalls," described as made by grinding nutgalls, digesting the powder, water, and filtering to remove impurities, a chemical being added as a preservative, without working any chemical change.

U.S.—Procter v. U. S., C.C.Mass., 139 F. 586, 588.

12. Black L.D.

13. Pa.—McCracken v. Graham, 14 Pa. 209, 210.

14. Black L.D.

EXTRACTO. In Spanish law, an extract from a document or an abstract of it.¹⁵ | **EXTRADICIÓN.** In Spanish law, extradition, the delivery of an accused to a foreign state for trial.¹⁶

15. Escriche Diccionario.

| 16. Escriche Diccionario and Sup-
plemento. |

EXTRADITION

This Title includes delivery, by one country or state to another, of persons charged with the commission of crime within the jurisdiction of such other country or state, either as matter of comity or under provisions of treaties, constitutions, or other compacts; nature and scope of the remedy in general; constitutional, treaty, and statutory provisions relating thereto; in what cases, and as to what persons, and for what offenses extradition is allowed; jurisdiction over and proceedings to obtain extradition; issuance, requisites, and validity of demands, requisitions, warrants, etc.; arrest and delivery of persons accused; their rights and liabilities after extradition; review of proceedings; and costs and expenses of such proceedings.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. IN GENERAL

§ 1. Definition and Distinctions

Extradition is the surrender by one state or nation to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which, being competent to try, and punish him, demands the surrender.

Extradition may be sufficiently defined as the surrender by one state or nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent

to try and punish him, demands the surrender.¹ Extradition involves a demand by one sovereign upon another sovereign for the surrender of a fugitive for trial and the surrender of such person to the demanding sovereign.^{1.5} It is to be distinguished from transportation and from deportation, which also result in the removal of a person from the country,² and from banishment.³

Extradition proceedings are no part of the trial,^{3.5} and are somewhat analogous to the original warrant in an ordinary prosecution.^{3.10}

1. U.S.—*Terlinden v. Ames*, Ill., 22 S.Ct. 484, 184 U.S. 270, 289, 46 L. Ed. 534.

U. S. v. *Godwin*, D.C.Ark., 97 F. Supp. 252, affirmed, C.A., *Godwin v. U. S.*, 191 F.2d 932.

Ariz.—*Corpus Juris* quoted in *Waller v. Jordan*, 118 P.2d 450, 451, 58 Ariz. 169, 143 A.L.R. 1349.

1.5 U.S.—*U. S. v. Godwin*, D.C.Ark., 97 F.Supp. 252, affirmed, C.A., *Godwin v. U. S.*, 191 F.2d 932.

2. U.S.—*Fong Yue Ting v. U. S.*, N. Y., 13 S.Ct. 1016, 149 U.S. 698, 37 L.Ed. 905.

25 C.J. p 254 note 2.

Deportation under:

Chinese exclusion laws see *Aliens* §§ 48-62.

Immigration laws see *Aliens* §§ 94-105.

Transportation see *Criminal Law* § 1978 b (2).

3. U.S.—*Fong Yue Ting v. U. S.*, *supra*.

Banishment see the definition Banishment 8 C.J.S. p 385, and Criminal Law § 1978 b (2).

3.5 Kan.—*Yaws v. Warden of N. M. State Penitentiary*, 203 P.2d 742, 166 Kan. 685.

3.10 Kan.—*Yaws v. Warden of N. M. State Penitentiary*, *supra*.

II. INTERSTATE EXTRADITION

§ 2. Foundation and Nature of Right

The right of interstate extradition is founded on, and controlled by, the federal Constitution and effectuating federal statutes. Proceedings for interstate extradition are *sui generis*, and the right can be exercised only by a government at the request of a government, and only in criminal cases.

The right of a state to demand the extradition or rendition by another state of a person who has committed an offense against its laws and has thereafter fled to the other state is founded on, and controlled by, the Constitution of the United States⁴ and effectuating federal statutes.⁵ The right cre-

ated by the federal Constitution is a guarantee of which a state may avail itself to secure the return of an offender against its laws.^{5,5} It is not dependent on interstate comity, courtesy, or contract,⁶ nor is it governed by the same principles as are applicable to international extradition,⁷ although some authorities have regarded it as in the nature of a treaty stipulation between the states of the Union.⁸

Proceedings for interstate extradition or rendition are *sui generis*⁹ and constitute an executive function.¹⁰ The proceedings are summary,^{10,5} rath-

4. U.S.—U. S. ex rel. McCline v. Meyering, C.C.A.III., 75 F.2d 716—Day v. Keim, C.C.A.W.Va., 2 F.2d 966.

Ala.—State v. Parrish, 5 So.2d 828, 242 Ala. 7, second case.

Ariz.—*Corpus Juris Secundum* cited in Ex parte Rubens, 238 P.2d 402, 405, 73 Ariz. 101, certiorari denied Rubens v. Boies, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

Cal.—Ex parte Tenner, 128 P.2d 338, 20 C.2d 670.

Ill.—People ex rel. Millet v. Babb, 115 N.E.2d 241, 1 Ill.2d 191—People ex rel. Flowers v. Gruenewald, 60 N.E.2d 225, 390 Ill. 79—People ex rel. Guidotti v. Bell, 25 N.E.2d 45, 372 Ill. 572—People ex rel. Le Rue v. Meyering, 191 N.E. 318, 357 Ill. 166.

Iowa.—*Corpus Juris Secundum* cited in Allen v. Wild, 86 N.W.2d 839, 842.

Mo.—Keeton v. Gaiser, 55 S.W.2d 302, 331 Mo. 499.

Neb.—*Corpus Juris Secundum* cited in Ex parte Campbell, 23 N.W.2d 698, 699, 147 Neb. 382.

N.J.—Ex parte Cohen, 96 A.2d 794, 12 N.J. 362.

Passalacqua v. Biehler, 133 A.2d 667, 46 N.J.Super. 63.

Ohio.—In re Sanders, App., 31 N.E.2d 246.

Okl.—Boston v. Causey, 242 P.2d 712, 206 Okl. 251.

Tenn.—State ex rel. Brown v. Grosch, 152 S.W.2d 239, 177 Tenn. 619.

Utah.—Moreaux v. Ferrin, 100 P.2d 560, 98 Utah 450.

Va.—*Corpus Juris Secundum* cited in Spiak v. Seay, 40 S.E.2d 250, 252, 185 Va. 710.

Wash.—Ex parte Roberts, 56 P.2d 703, 186 Wash. 13.

25 C.J. p 254 note 3.

Application to federal government

Extradition clause of the federal Constitution does not apply in its mandatory requirements to the federal government, but only to the states.

N.J.—Powell v. Meyer, 43 A.2d 175,

23 N.J.Misc. 222, certiorari denied 46 A.2d 671, 134 N.J.Law 169.

5. U.S.—U. S. ex rel. McCline v. Meyering, C.C.A.III., 75 F.2d 716—Day v. Keim, C.C.A.W.Va., 2 F.2d 966.

Ex parte Morgan, D.C.Ark., 20 F. 298.

Fla.—State v. Chase, 107 So. 541, 91 Fla. 413—State v. Quigg, 107 So. 409, 91 Fla. 197—Kuney v. State, 102 So. 547, 88 Fla. 354.

Ill.—People ex rel. Millet v. Babb, 115 N.E.2d 241, 1 Ill.2d 191—People ex rel. Flowers v. Gruenewald, 60 N.E.2d 225, 390 Ill. 79—People ex rel. Guidotti v. Bell, 25 N.E.2d 45, 372 Ill. 572—People ex rel. La Rue v. Meyering, 191 N.E. 318, 357 Ill. 166—People v. Klinger, 149 N.E. 799, 319 Ill. 275, 42 A.L.R. 581.

Miss.—Loper v. Dees, 49 So.2d 718, 210 Miss. 402.

Mo.—Keeton v. Gaiser, 55 S.W.2d 302, 331 Mo. 499—Ex parte Hagan, 245 S.W. 336, 295 Mo. 435.

N.J.—Ex parte Cohen, 96 A.2d 794, 12 N.J. 362.

Okl.—Boston v. Causey, 242 P.2d 712, 206 Okl. 251.

Tenn.—State ex rel. Brown v. Grosch, 152 S.W.2d 239, 177 Tenn. 619.

Tex.—Ex parte Holt, 244 S.W. 1016, 92 Tex.Cr. 614.

Utah.—Moreaux v. Ferrin, 100 P.2d 560, 98 Utah 450.

Va.—*Corpus Juris Secundum* cited in Spiak v. Seay, 40 S.E.2d 250, 252, 185 Va. 710.

Wash.—Ex parte Roberts, 56 P.2d 703, 186 Wash. 13.

5.5 Ala.—Woods v. State, 87 So.2d 633, 264 Ala. 315.

Ark.—Gulley v. Apple, 210 S.W.2d 514, 213 Ark. 350.

Cal.—Ex parte Tenner, 128 P.2d 338, 20 C.2d 670.

6. Mo.—Williams v. Robertson, 95 S.W.2d 79, 339 Mo. 34—State ex rel. Gaines v. Westhues, 2 S.W.2d 612, 318 Mo. 928.

25 C.J. p 255 note 4.

Constitutional comity

The very purpose of the extradi-

tion clause of the federal Constitution was to assure co-operation by one state with another in the enforcement of each other's laws, and essence of clause is constitutional comity.

N.J.—Powell v. Meyer, 43 A.2d 175, 23 N.J.Misc. 222, certiorari denied 46 A.2d 671, 134 N.J.Law 169.

7. U.S.—Biddinger v. New York City Police Com'r, N.Y., 38 S.Ct. 41, 245 U.S. 128, 62 L.Ed. 193.

25 C.J. p 255 note 5.

International extradition see *infra* §§ 24-47.

8. Ala.—State v. Parrish, 5 So.2d 828, 242 Ala. 7, second case.

25 C.J. p 255 note 6.

Compact between states

(1) The federal constitutional provision that a person charged in any state with a crime who shall flee from justice and be found in another state shall on demand of executive authority of state from which he fled be delivered up and removed to state having jurisdiction of the crime is in the nature of a compact between all the states and is a provision that the state must recognize. N.Y.—People ex rel. Rankin v. Ruthazer, 98 N.Y.S.2d 104, 198 Misc. 276, affirmed 104 N.Y.S.2d 622, 278 App. Div. 762.

(2) "The constitutional provision relating to fugitives from justice may be regarded as a solemn compact between the states."

Wash.—Ex parte Anthony, 87 P.2d 302, 304, 198 Wash. 106.

9. Fla.—State v. Chase, 107 So. 541, 91 Fla. 413—State v. Quigg, 107 So. 409, 91 Fla. 197.

10. U.S.—Day v. Keim, C.C.A.W.Va., 2 F.2d 966.

10.5 U.S.—Biddinger v. New York City Police Com'r, N.Y., 38 S.Ct. 41, 245 U.S. 128, 62 L.Ed. 193.

Ill.—People ex rel. Millet v. Babb, 115 N.E.2d 241, 1 Ill.2d 191.

Ind.—Waggoner v. Feeney, 44 N.E.2d 499, 220 Ind. 543.

N.Y.—People ex rel. Johnson v. Ru-

er than judicial to inquire into the merits of the charge,^{10.10} and are to be kept within narrow bounds, not less for the protection of the liberty of the citizen than in the public interest,^{10.15} which is affected by extradition proceedings.^{10.20}

Their purpose is to prevent the successful escape of any person who has been accused of crime, whether or not convicted;¹¹ and extradition provides the regular and only course for returning one arrested for crime in a sister state, unless the prisoner voluntarily consents to return.¹² It can be exercised only by a government at the request of a government,¹³ and it will not be permitted to be used for the collection of debt,¹⁴ or the gratifica-

tion of personal malice,^{14.5} or made subservient to purely private interests.^{14.10}

The scheme of interstate rendition contemplates a prompt return of the fugitive as soon as the state from which he fled demands him.^{14.15} The right of extradition gives no extraterritorial force to the laws of the demanding state, but merely provides a means by which to secure the return of a prisoner to that state, so that within its own confines its laws may be executed.¹⁵ Since the purpose of extradition is the return of a fugitive, none of his constitutional rights, other than his right to personal liberty, are involved.^{15.5}

thazer, 102 N.Y.S.2d 39, 198 Misc. 1044, affirmed 105 N.Y.S.2d 344, 278 App.Div. 905.

Summary executive proceeding

Constitutional provision for interstate extradition is intended to provide a summary executive proceeding by which states can promptly aid one another in bringing to trial persons accused of crime by preventing their finding in one state an asylum against processes of justice of another.

U.S.—*Ex Parte Morgan*, D.C.Cal., 78 F.Supp. 756, affirmed, C.A., *Morgan v. Horrall*, 175 F.2d 404, certiorari denied 70 S.Ct. 76, 338 U.S. 827, 94 L.Ed. 503.

10.10 Ill.—*People ex rel. Millet v. Babb*, 115 N.E.2d 241, 1 Ill.2d 191.

10.15 U.S.—*Biddinger v. New York City Police Com'r*, N.Y., 38 S.Ct. 41, 245 U.S. 128, 62 L.Ed. 193.

Ind.—*Waggoner v. Feeney*, 44 N.E.2d 499, 220 Ind. 543.

N.Y.—*People ex rel. Johnson v. Ruthazer*, 102 N.Y.S.2d 39, 198 Misc. 1044, affirmed 105 N.Y.S.2d 344, 278 App.Div. 905.

10.20 Fla.—*Schrivver v. Tucker*, 42 So.2d 707.

11. Cal.—*Application of Fedder*, 299 P.2d 881, 143 C.A.2d 103.

Ohio.—*Ex parte Quilliam*, App., 89 N.E.2d 493, 88 Ohio App. 202, appeal dismissed *Quilliam v. Sweeney*, 89 N.E.2d 494, 152 Ohio St. 368, certiorari denied 70 S.Ct. 790, 339 U.S. 945, 94 L.Ed. 1360, and *Woodall v. Sweeney*, 79 S.Ct. 790, 339 U.S. 945, 94 L.Ed. 1360.

Wash.—*Ex parte Anthony*, 87 P.2d 302, 198 Wash. 106.

Mischief sought to be cured by provision of federal Constitution with respect to extradition was that of preventing one state from becoming an asylum for those accused of crime in another state.

Neb.—*Ex parte Campbell*, 23 N.W.2d 698, 147 Neb. 382.

Scheme of interstate rendition contemplates prompt return of a fugi-

tive as soon as state from which he fled demands him.

Pa.—*Commonwealth ex rel. Henderson v. Baldi*, 93 A.2d 458, 372 Pa. 463.

12. Mont.—*Brannin v. Sweet Grass County*, 293 P. 970, 88 Mont. 412.

Surety's right of seizure and surrender not available

"If the state desires to reclaim a fugitive from its justice, in another jurisdiction, it must proceed by way of extradition in default of a voluntary return. It cannot invoke the right of a surety to seize and surrender his principal, for this is a private and not a governmental remedy."

U.S.—*Fitzpatrick v. Williams*, C.C.A. La., 46 F.2d 40, 73 A.L.R. 1365.

Statute not authorizing surrender

Where petitioner was arrested by Denver police officers on a telegraphic request from Wyoming officers and a copy of a Wyoming warrant, the interstate compact for the more efficient enforcement of penal laws and to facilitate the suppression, detection and punishment of crimes, which had been enacted in law both by Colorado and Wyoming, was not applicable and would not authorize turning over of petitioner to Wyoming officers without complying with existing extradition laws.

Colo.—*In re Austjford*, 121 P.2d 891, 109 Colo. 47.

13. U.S.—*Fitzpatrick v. Williams*, C. C.A.La., 46 F.2d 40, 73 A.L.R. 1365. Okl.—*Boston v. Causey*, 242 P.2d 712, 206 Okl. 251.

14. Ala.—*Bishop v. State*, 92 So.2d 323, 38 Ala.App. 667—*Harris v. State*, 82 So.2d 439, 38 Ala.App. 284—*Stubblefield v. State*, 47 So.2d 662, 35 Ala.App. 419—*Corpus Juris Secundum* cited in *Russell v. State*, 37 So.2d 233, 234, 251 Ala. 268—*Scott v. State*, 33 So.2d 390, 33 Ala. App. 328—*Hobbs v. State of Tennessee ex rel. State of Alabama*, 8 So.2d 595, 30 Ala.App. 412, certiora-

ri denied *Ex parte State*, 8 So.2d 596, 243 Ala. 102.

Okl.—*Ex parte Maddox*, 25 P.2d 1111, 55 Okl.Cr. 114—*Ex parte Owens*, 245 P. 68, 34 Okl.Cr. 128.

Tenn.—*State ex rel. Hourigan v. Robinson*, 257 S.W.2d 9, 195 Tenn. 101.

Check is a "debt, demand or claim" with respect to drawer within statute prohibiting extradition of any person where extradition proceedings are sought to aid in collection of "debt, demand, or claim" against party sought to be extradited.

Ala.—*Scott v. State*, 33 So.2d 390, 33 Ala.App. 328.

14.5 Okl.—*Ex parte Owens*, 245 P. 68, 34 Okl.Cr. 128.

14.10 N.J.—*Klaiber v. Frank*, 86 A. 2d 679, 9 N.J. 1.

14.15 U.S.—*Sweeney v. Woodall*, Ohio, 73 S.Ct. 139, 344 U.S. 86, 97 L.Ed. 114, rehearing denied 73 S.Ct. 332, 344 U.S. 916, 97 L.Ed. 706.

15. Conn.—*Von Walden v. Geddes*, 135 A. 396, 105 Conn. 374.

Powers of state courts not affected

A request for the extradition of a person charged with a crime by a sister state or the return of a fugitive from a prison does not deprive or affect the powers conferred on the New York courts, whether it be by the constitution or legislative act.

N.Y.—*In re Cotton*, 30 N.Y.S.2d 421.

15.5 Ill.—*People ex rel. Millet v. Babb*, 115 N.E.2d 241, 1 Ill.2d 191—*People ex rel. Gilbert v. Babb*, 114 N.E.2d 358, 415 Ill. 349.

Substantive rights unaffected

Extradition clause of federal Constitution is a procedural provision which does not impinge on any substantive right of any individual and does not affect any provisions of the Constitution or its amendments protecting such rights.

D.C.—*Johnson v. Matthews*, 182 F. 2d 677, 86 U.S.App.D.C. 376, certiorari denied 71 S.Ct. 65, 340 U.S. 828, 95 L.Ed. 608.

No question of extradition is involved where a prisoner in the custody of the United States government is turned over to a state for prosecution.¹⁶

§ 3. Constitutional and Statutory Provisions

While constitutional and statutory provisions relating to interstate extradition should be liberally construed to effect their purposes, their essential elements and requirements must be strictly followed. State legislation, to the extent to which it aids and is not inconsistent with the federal Constitution and statutes, is valid and proper.

As is stated supra § 2, the right of interstate extradition or rendition is founded on, and controlled

by, the Constitution of the United States and effectuating federal statutes, which have been declared constitutional.¹⁷ Extradition being a federal and not a state matter,¹⁸ the federal law, and not the state law, is supreme,¹⁹ and any state legislation which conflicts with the federal law on the subject, as embodied in the constitution and effectuating statutes, is unconstitutional and void.²⁰ However, to the extent that it aids and facilitates the operation of federal constitutional and statutory provisions, and is not inconsistent therewith, state legislation is proper,²¹ and hence, state legislation which aids

16. *Tex.*—*Gaines v. State*, 251 S.W. 245, 95 Tex.Cr. 363, petition dismissed *Gaines v. State of Texas*, 44 S.Ct. 132, 263 U.S. 728, 68 L.Ed. 528.

Kan.—*Corpus Juris Secundum* quoted in *Davis v. Rhyne*, 312 P.2d 626, 630, 181 Kan. 443.

17. *U.S.*—*Prigg v. Commonwealth of Pennsylvania*, Pa., 16 Pet. 539, 10 L.Ed. 1060.

Ex parte Morgan, D.C.Ark., 20 F. 298.

Ariz.—*Corpus Juris Secundum* quoted in *Ex parte Riccardi*, 203 P.2d 627, 630, 68 Ariz. 180.

Idaho.—*Corpus Juris Secundum* quoted in *Application of Williams*, 279 P.2d 882, 883, 76 Idaho 173.

Ill.—*People ex rel. Holmes v. Babb*, 111 N.E.2d 316, 414 Ill. 490.

Miss.—*Loper v. Dees*, 49 So.2d 718, 210 Miss. 402—*Bishop v. Jones*, 42 So.2d 421, 207 Miss. 423.

Federal Fugitive Act

Purpose of the Federal Fugitive Act is neither to deny nor interfere with state extradition but merely to assist in the apprehension of fugitives.

U.S.—*U. S. v. Brandenburg*, C.C.A. N.J., 144 F.2d 656, 154 A.L.R. 1160—*U. S. v. Miller*, D.C.Ky., 17 F. Supp. 65.

Mont.—*State ex rel. Middlemas v. District Court of First Judicial Dist. in and for Lewis and Clark County*, 233 P.2d 1038, 125 Mont. 310.

Statutes as congressional duty

The provisions of the federal constitution for extradition being general only, the duty of providing by law the regulations necessary to carry the provisions into execution, devolved upon congress.

U.S.—*Commonwealth of Kentucky v. Dennison*, Ky., 24 How. 66, 16 L. Ed. 717.

No invasion of fugitive's rights

"As between states, there is no invasion of the fugitive's rights to remove him to another state to be there tried for an alleged offense for which he might have been required

to undergo trial had he never left it."

U.S.—*U. S. ex rel. Jackson v. Meyer*, C.C.A.Ill., 54 F.2d 621, 622, certiorari denied 52 S.Ct. 498, 286 U.S. 542, 76 L.Ed. 1280.

18. *U.S.*—*Day v. Keim*, C.C.A.W.Va., 2 F.2d 966.

Ariz.—*Corpus Juris Secundum* quoted in *Ex parte Riccardi*, 203 P.2d 627, 630, 68 Ariz. 180.

Idaho.—*Corpus Juris Secundum* quoted in *Application of Williams*, 279 P.2d 882, 883, 76 Idaho 173.

Ill.—*People ex rel. Guidotti v. Bell*, 25 N.E.2d 45, 372 Ill. 572—*People ex rel. Carr v. Murray*, 192 N.E. 198, 357 Ill. 326, 94 A.L.R. 1487.

Mo.—*Corpus Juris Secundum* quoted in *Ex parte Arrington*, 270 S.W.2d 39, 42.

N.J.—*Foley v. State*, 108 A.2d 24, 32 N.J.Super. 154—*Ex parte Cohen*, 92 A.2d 837, 23 N.J.Super. 209, affirmed 96 A.2d 794, 12 N.J. 362.

19. *Ariz.*—*Corpus Juris Secundum* quoted in *Ex parte Riccardi*, 203 P.2d 627, 630, 68 Ariz. 180.

Idaho.—*Corpus Juris Secundum* quoted in *Application of Williams*, 279 P.2d 882, 883, 76 Idaho 173.

Mo.—*Corpus Juris Secundum* quoted in *Ex parte Arrington*, 270 S.W.2d 39, 42.

N.Y.—*People ex rel. Lipshitz v. Bes-senger*, 75 N.Y.S.2d 392, 273 App. Div. 19.

Ohio.—*In re Sanders*, App., 31 N.E.2d 246.

20. *U.S.*—*Application of Middlebrooks*, D.C.Cal., 88 F.Supp. 943, reversed on other grounds, C.A., *Ross v. Middlebrooks*, 188 F.2d 308, certiorari denied *Middlebrooks v. Ross*, 72 S.Ct. 90, 342 U.S. 862, 96 L.Ed. 649.

Ala.—*State v. Parrish*, 5 So.2d 828, 242 Ala. 7, second case.

State v. Shelton, 8 So.2d 216, 30 Ala.App. 484.

Ariz.—*Corpus Juris Secundum* quoted in *Ex parte Riccardi*, 203 P.2d 627, 630, 68 Ariz. 180.

Idaho.—*Corpus Juris Secundum* quoted in *Application of Williams*, 279 P.2d 882, 883, 76 Idaho 173.

Ill.—*People ex rel. Carr v. Murray*, 192 N.E. 198, 357 Ill. 326, 94 A.L.R. 1487.

Mo.—*Corpus Juris Secundum* quoted in *Ex parte Arrington*, 270 S.W.2d 39, 42.

N.H.—*Koch v. O'Brien*, 131 A.2d 63, 101 N.H. 11.

"The state by legislation has no power to limit the right of the chief executive to grant warrants of extradition."

Tenn.—*State ex rel. Brown v. Grosch*, 152 S.W.2d 239, 245, 177 Tenn. 619.

21. *U.S.*—*U. S. ex rel. Simmons on Behalf of Gray v. Lohman*, C.A.Ill., 228 F.2d 824.

Corpus Juris Secundum cited in *Ex parte Morgan*, D.C.Cal., 78 F. Supp. 756, affirmed, C.A., *Morgan v. Horrall*, 175 F.2d 404, certiorari denied 70 S.Ct. 76, 338 U.S. 827, 94 L.Ed. 503.

Ariz.—*Corpus Juris Secundum* quoted in *Ex parte Riccardi*, 203 P.2d 627, 630, 68 Ariz. 180—*Waller v. Jordan*, 118 P.2d 450, 58 Ariz. 169.

Ark.—*Lindley v. Crider*, 265 S.W.2d 498, 223 Ark. 200.

Cal.—*Application of Fedder*, 299 P. 2d 881, 143 C.A.2d 103—*Ex parte Morgan*, 194 P.2d 800, 86 C.A.2d 217.

Idaho.—*Corpus Juris Secundum* quoted in *Application of Williams*, 279 P.2d 882, 883, 76 Idaho 173.

Ill.—*People ex rel. Millet v. Babb*, 115 N.E.2d 241, 1 Ill.2d 191—*People ex rel. Holmes v. Babb*, 111 N.E. 2d 316, 414 Ill. 490.

Ind.—*Cook v. Rodgers*, 20 N.E.2d 933, 215 Ind. 500.

Iowa.—*Corpus Juris Secundum* cited in *McLarnan v. Hasson*, 49 N.W.2d 887, 888, 243 Iowa 379.

Md.—*State ex rel. Gildar v. Kriss*, 62 A.2d 568, 191 Md. 568.

Mass.—*In re Harris*, 34 N.E.2d 504, 309 Mass. 180, 135 A.L.R. 969.

Mo.—*Corpus Juris Secundum* quoted in *Ex parte Arrington*, 270 S.W.2d 39, 42.

N.J.—*Stark v. Livermore*, 65 A.2d 625, 3 N.J.Super. 94.

N.M.—*Ex parte Dalton*, 244 P.2d 790, 56 N.M. 407.

and is not inconsistent with the federal constitution and statutes must be followed.²²

State legislation as to extradition is for the benefit of the state enacting it, rather than for the benefit of the fugitive whose extradition is being

sought.^{22.5} As the constitution applies only to fugitives from justice,²³ a state may in the exercise of its reserved sovereign power provide for the surrender of persons who are indictable for crime in another state, but who have never fled from it.²⁴

N.Y.—*People ex rel. Matochik v. Baker*, 114 N.E.2d 194, 306 N.Y. 32.

People ex rel. Rankin v. Ruthazer, 98 N.Y.S.2d 104, 198 Misc. 276, affirmed 104 N.Y.S.2d 622, 278 App.Div. 762—*People ex rel. Hollander v. Britt*, 92 N.Y.S.2d 662, 195 Misc. 722, affirmed 93 N.Y.S.2d 704, 276 App.Div. 815.

People ex rel. Faulds v. Herberich, 59 N.Y.S.2d 24, affirmed 93 N.Y.S.2d 272, 276 App.Div. 852, affirmed 93 N.E.2d 913, 301 N.Y. 614. Ohio.—*Culbertson v. Sweeney*, 44 N.E.2d 807, 70 Ohio App. 344, appeal dismissed 45 N.E.2d 118, 140 Ohio St. 426.

Tex.—*Ex parte Peairs*, 283 S.W.2d 755, 162 Tex.Cr. 243, appeal dismissed *Peairs v. State of Tex.*, 76 S.Ct. 104, 350 U.S. 858, 100 L.Ed. 762.

Va.—*Spiak v. Seay*, 40 S.E.2d 250, 185 Va. 710.

W.Va.—*Cassis v. Fair*, 29 S.E.2d 245, 126 W.Va. 557, 151 A.L.R. 233. 25 C.J. p 255 note 13.

Contrary dicta

There are dicta in some cases to the effect that all state legislation on this subject is unconstitutional. U.S.—*Prigg v. Commonwealth of Pennsylvania*, Pa., 16 Pet. 539, 10 L.Ed. 1060.

Ind.—*Degant v. Michael*, 2 Ind. 396.

Federal procedure not exclusive

U.S.—*U. S. ex rel. Moulthrop v. Matus*, C.A.Conn., 218 F.2d 466.

Ala.—*Woods v. State*, 87 So.2d 633, 264 Ala. 315.

Ark.—*Gulley v. Apple*, 210 S.W.2d 514, 213 Ark. 350.

Cal.—*Ex parte Tenner*, 128 P.2d 338, 20 C.2d 670.

Ind.—*Johnson v. Burke*, 148 N.E.2d 413.

N.Y.—*People ex rel. Matochik v. Baker*, 114 N.E.2d 194, 306 N.Y. 32.

Tex.—*Ex parte Peairs*, 283 S.W.2d 755, 162 Tex.Cr. 243, appeal dismissed *Peairs v. State of Tex.*, 76 S.Ct. 104, 350 U.S. 858, 100 L.Ed. 762.

Less exacting terms

Asylum state may require its governor to surrender fugitive from another state thereto on terms less exacting than those imposed by federal statute prescribing procedure to render such provision effective. Ala.—*Woods v. State*, 87 So.2d 633, 264 Ala. 315.

Uniform Act for Out-of-State Parolee Supervision has been held valid.

Cal.—*Ex parte Tenner*, 128 P.2d 338, 20 C.2d 670.

N.Y.—*People ex rel. Rankin v. Ruthazer*, 107 N.E.2d 458, 304 N.Y. 302. Wash.—*Pierce v. Smith*, 195 P.2d 112, 31 Wash.2d 52, certiorari denied 69 S.Ct. 24, 335 U.S. 834, 93 L.Ed. 387.

Police power

Extradition of persons charged with crime, under statute providing therefor, bears directly upon the public safety, morals, and welfare, and is within the state's lawful exercise of its police power and is not violative of federal extradition constitutional provision.

Ind.—*Johnson v. Burke*, 148 N.E.2d 413.

22 Ariz.—*Corpus Juris Secundum* quoted in *Ex parte Riccardi*, 203 P.2d 627, 630, 68 Ariz. 180—*Waller v. Jordan*, 118 P.2d 450, 58 Ariz. 169.

Idaho.—*Corpus Juris Secundum* quoted in *Application of Williams*, 279 P.2d 882, 833, 76 Idaho 173.

Mo.—*Corpus Juris Secundum* quoted in *Ex parte Arrington*, 270 S.W.2d 39, 42.

Neb.—*Chapman v. Hayward*, 71 N.W. 2d 201, 160 Neb. 664.

N.Y.—*People ex rel. Sidran v. Warden of City Prison*, 220 N.Y.S. 529, 129 Misc. 327.

25 C.J. p 255 note 14.

If conflict exists between extradition statute providing for matters warranting discharge of prisoner and statute providing for his detention to await extradition, latter statute must prevail.

La.—*State v. Rutledge*, 155 So. 392, 179 La. 897.

Primary question

In all interstate extradition cases the first question must be as to whether the federal Constitution and the statutes enacted thereunder have been given effect under the liberal construction given them by the United States supreme court, and, after that question is answered affirmatively, the question of conformity of procedure with state statutes is pertinent.

Ala.—*State v. Parrish*, 5 So.2d 828, 242 Ala. 7, second case.

22.5 Ala.—*Woods v. State*, 87 So. 2d 633, 264 Ala. 315.

N.J.—*Rau v. McCorkle*, 131 A.2d 895, 45 N.J.Super. 191, affirmed 135 A. 2d 224, 47 N.J.Super. 36.

Ohio.—*State ex rel. Cutshaw v. Smith*, App., 127 N.E.2d 633, appeal dis-

missed 115 N.E.2d 689, 160 Ohio St. 262.

23. U.S.—*Ex parte Hoffstot*, C.C.N.Y., 180 F. 240, affirmed 31 S.Ct. 222, 218 U.S. 665, 54 L.Ed. 1201. 25 C.J. p 255 note 7.

24. U.S.—*Innes v. Tobin*, Tex., 36 S.Ct. 290, 240 U.S. 127, 60 L.Ed. 562.

Ala.—*Corpus Juris Secundum* cited in *Harrison v. State*, 77 So.2d 384, 387, 38 Ala.App. 60, certiorari denied 77 So.2d 387, 262 Ala. 701.

Cal.—*Ex parte Hayes*, 225 P.2d 272, 101 C.A.2d 416—*Ex parte Morgan*, 194 P.2d 800, 86 C.A.2d 217.

Fla.—*Ennist v. Baden*, 28 So.2d 160, 158 Fla. 141.

Iowa.—*McLarnan v. Hasson*, 49 N.W. 2d 837, 243 Iowa 379.

Md.—*State ex rel. Gildar v. Kriss*, 62 A.2d 568, 191 Md. 568.

Neb.—*Chapman v. Hayward*, 71 N.W. 2d 201, 160 Neb. 664—*Corpus Juris Secundum* cited in *Ex parte Campbell*, 25 N.W.2d 419, 423, 147 Neb. 820.

N.J.—*Application of Waterfront Commission of New York Harbor*, 120 A.2d 504, 39 N.J.Super. 33.

N.M.—*Ex parte Dalton*, 244 P.2d 790, 56 N.M. 407.

N.Y.—*People ex rel. Kaufman v. O'Brien*, 96 N.Y.S.2d 401, 197 Misc. 1019.

Ohio.—*English v. Matowitz*, 72 N.E. 2d 898, 148 Ohio St. 39.

In re *Acton*, 103 N.E.2d 577, 90 Ohio App. 100—In re *Roma*, 81 N.E. 2d 612, 82 Ohio App. 414—*Culbertson v. Sweeney*, 44 N.E.2d 807, 70 Ohio App. 344, appeal dismissed 45 N.E.2d 118, 140 Ohio St. 426.

Okl.—*Ex parte Bledsoe*, 227 P.2d 680, 93 Okl.Cr. 302.

Tenn.—*State ex rel. Bryant v. Fleming*, 260 S.W.2d 161, 195 Tenn. 419.

Tex.—*Ex parte Borom*, 252 S.W.2d 158, 157 Tex.Cr. 633—*Corpus Juris Secundum* cited in *Ex parte Coleman*, 245 S.W.2d 712, 716, 157 Tex. Cr. 37.

25 C.J. p 255 note 8.

Discretion

In exercise of the residuum of sovereignty of state in field of extradition, legislature was competent to vest governor with discretion in extradition matters pertaining to those persons who are not fugitives from justice.

N.Y.—*People ex rel. Waldman v. Ruthazer*, 144 N.Y.S.2d 428, 2 Misc.2d 297.

Exercise of executive right under uniform criminal extradition law to

Constitutional and statutory provisions relating to interstate extradition should be liberally construed to effectuate their purposes;²⁵ but, since such provisions involve the substantial rights of citizens,²⁶ their essential elements and requirements

have been required to be strictly followed.²⁷

The federal Constitution guarantees no right of asylum to a person who has committed a crime in one state and fled to another.²⁸

grant or refuse rendition of a fugitive does not violate separation of powers provision of state constitution.

N.H.—Koch v. O'Brien, 131 A.2d 63, 101 N.H. 11.

Accessory after fact

Where alleged fugitive was not in demanding state when burglary was committed but evidence indicated that he had received property procured in burglary and was accessory after fact to burglary under law of that state, he was subject to extradition.

Ohio.—Nagie v. Langley, App., 121 N.E.2d 201.

Uniform Criminal Extradition Act has application only between the states which adopted it and cannot be invoked to regulate the procedure by which a person is surrendered by a state to jurisdiction of federal court, there to answer criminal charges against him.

Pa.—Commonwealth ex rel. Patton v. Tees, 118 A.2d 585, 179 Pa.Super. 605.

Uniform Support of Dependents Act

(1) Uniform Support of Dependents Act was designed to facilitate rather than to prevent extradition. Ohio.—Sands v. Sands, Com.Pl., 136 N.E.2d 747.

(2) Provisions of Support Act authorizing extradition of a person for the crime of nonsupport although he was not present in demanding state at time of commission of crime charged and had not fled therefrom are valid and enforceable.

Ala.—Harrison v. State, 77 So.2d 384, 38 Ala.App. 60, certiorari denied 77 So.2d 387, 262 Ala. 701.

Fla.—State v. Bennett, 90 So.2d 43. Tex.—Ex parte Coleman, 245 S.W.2d 712, 157 Tex.Cr. 37.

(3) Legislature, by using the words "failing to provide for the support of a person" in a provision of the Uniform Enforcement of Support Act providing for extradition of a person charged in a demanding state with the crime of failing to provide for the support of a person in such other state, intended, by this language, to encompass all forms of criminal nonsupport with a view to facilitate extradition of persons seeking to evade their obligations by flight, and therefore, the crime of abandonment of minor children fell within the terms of such statute.

Fla.—State v. Bennett, 90 So.2d 43.

(4) A person who is about to be extradited under criminal enforcement

provisions of Uniform Reciprocal Enforcement of Support Law may relieve himself from such extradition by voluntarily submitting himself to a court of competent jurisdiction in state of his residence and complying with such court's order as to the amount of support he should pay to obligee, even though the obligee-resident of the demanding state has not initiated proceedings under the civil enforcement provisions of the act.

Fla.—Jackson v. Hall, 97 So.2d 1.

(5) Father could not avoid extradition to another state to answer charge of child desertion, by procuring in state of forum an order for support under the Uniform Support of Dependents Act.

Cal.—Ex parte Floyd, 273 P.2d 820, 43 C.2d 379.

Ex parte Susman, 254 P.2d 161, 116 C.A.2d 698.

Ohio.—Sands v. Sands, Com.Pl., 136 N.E.2d 747.

(6) Reciprocal Enforcement of Support Act contemplates two distinct courses of action in the enforcement of support duties, namely, extradition and initiation of civil proceedings in demanding state, with an opportunity thereafter given obligor to submit to subsequently assumed jurisdiction of court in responding state, and while either or both courses of action may be pursued, the election lies wholly with the demanding state and the obligee. Cal.—Ex parte Floyd, 273 P.2d 820, 43 C.2d 379.

25. U.S.—Biddinger v. New York City Police Com'r, N.Y., 38 S.Ct. 41, 245 U.S. 128, 62 L.Ed. 193.

Brewer v. Goff, C.C.A.Okl., 138 F.2d 710—U. S. ex rel. Jackson v. Meyerling, C.C.A.Ill., 54 F.2d 621, certiorari denied 52 S.Ct. 498, 286 U.S. 542, 76 L.Ed. 1280—U. S. v. Williams, D.C.La., 6 F.2d 13.

Ex parte Morgan, D.C.Cal., 78 F. Supp. 756, affirmed, C.A., Morgan v. Horrall, 175 F.2d 404, certiorari denied 70 S.Ct. 76, 338 U.S. 827, 94 L.Ed. 503.

Cal.—Application of Fedder, 299 P.2d 881, 143 C.A.2d 103.

Ill.—People ex rel. Millet v. Babb, 115 N.E.2d 241, 1 Ill.2d 191.

N.J.—Stark v. Livermore, 65 A.2d 625, 3 N.J.Super. 94.

N.Y.—People ex rel. Gellis v. Sheriff of Westchester County, 232 N.Y.S. 217, 225 App.Div. 156, affirmed 166 N.E. 795, 251 N.Y. 33, reargument denied 168 N.E. 426, 251 N.Y. 556.

People ex rel. Robert v. Warden of New York City Prison, 114 N.Y. S.2d 13.

State law must be considered in construing and applying interstate extradition act for purpose of effecting object of constitutional provision.

U.S.—Ex parte Nash, D.C.Ark., 44 F.2d 403.

26. U.S.—U. S. ex rel. McCline v. Meyering, C.C.A.Ill., 75 F.2d 716.

27. U.S.—U. S. ex rel. McCline v. Meyering, supra.

Colo.—Matthews v. People, 314 P.2d 906, 136 Colo. 102—Henry v. McArthur, 223 P.2d 631, 122 Colo. 474.

Ill.—People ex rel. Gardner v. Mulcahy, 62 N.E.2d 418, 390 Ill. 511.

Mo.—State ex rel. Gaines v. Westhues, 2 S.W.2d 612, 318 Mo. 928.

Ex parte Ellis, 9 S.W.2d 544, 223 Mo.App. 125.

N.Y.—People ex rel. Waldman v. Ruthazer, 144 N.Y.S.2d 428, 2 Misc.2d 297.

Pa.—Commonwealth ex rel. Faison v. Watkins, 9 Pa.Dist. & Co.2d 571, 73 Montg.Co., 44.

Tex.—Ex parte Anderson, 120 S.W.2d 259, 135 Tex.Cr. 291.

25 C.J. p 255 note 18.

Power of governor in extradition proceedings is statutory and statutes must be strictly construed.

Ohio.—Ex parte Bell, Com.Pl., 75 N.E.2d 186.

Statute applicable to nonfugitives

Provisions of statute authorizing issuance of warrants of extradition in cases where accused is not a fugitive must be strictly interpreted.

Pa.—Commonwealth ex rel. Spivak v. Heinz, 14 A.2d 875, 141 Pa.Super. 158.

28. U.S.—N. L. R. B. ex rel. Kohler Co. v. Gunaca, D.C.Wis., 135 F. Supp. 790, affirmed, C.A., 230 F.2d 542, vacated on other grounds 77 S.Ct. 660, 353 U.S. 902, 1 L.Ed.2d 660—Leahy v. Kunkel, D.C.Ind., 4 F.Supp. 849.

Bramwell v. Owen, D.C.Or., 276 F. 36.

Cal.—Application of Fedder, 299 P.2d 881, 143 C.A.2d 103.

Colo.—Cutting v. Geer, 313 P.2d 314, 135 Colo. 503.

S.C.—State v. Waitus, 83 S.E.2d 629, 226 S.C. 44, certiorari denied Waitus v. State of S. C., 75 S.Ct. 439, 348 U.S. 951, 99 L.Ed. 743.

No shield for malefactors

Constitutional provision requiring extradition from one state to another was adopted to promote justice

§ 4. Authority or Duty to Demand or Deliver Persons Accused

The authority to demand the extradition of a person charged with crime, and the correlative duty to deliver up such a person on proper demand, rest with the executive authorities of the respective states. While the duty has been said to be imperative, there is no power, in the absence of state statute, to compel the executive of the asylum state to act.

The authority to demand the extradition or rendition of a person charged with crime, and the correlative duty to deliver up such a person on proper demand, rest with the executive authorities of the respective states.²⁹ The authority and duty rest

on the Constitution and laws of the United States and not on the principle of comity, and are not dependent on the existence of any state statute.³⁰ Since the constitutional and statutory requirements are jurisdictional,³¹ if any of them are wanting the executive of the asylum state has no authority to deliver up the person demanded.³² Where, however, a compliance with all constitutional and statutory prerequisites is shown, it is the duty of the executive to whom the demand is presented to cause the arrest and surrender of the fugitive,³³ irrespective of the nature of the crime or the policy or laws of the demanding state.³⁴

and to aid states in enforcing their laws and not to shield malefactors. Okl.—Ex parte Chase, 180 P.2d 199, 84 Okl.Cr. 159.

29. Ark.—Pellegrini v. Wolfe, 283 S.W.2d 162, 225 Ark. 459.

Ill.—People v. Meyering, 178 N.E. 122, 345 Ill. 598—People v. Klinger, 149 N.E. 799, 319 Ill. 275, 42 A.L.R. 581.

Mo.—Cockburn v. Willman, 257 S.W. 458, 301 Mo. 575.

Right of governor of asylum state to decline to honor a demand for extradition is a right of the state, not based on the personal right of the fugitive.

Ill.—People ex rel. Barrett v. Bartley, 50 N.E.2d 517, 383 Ill. 437, 147 A.L.R. 935.

Federal government, under constitution as now written, has no power over interstate extradition.

U.S.—U. S. v. Flegenheimer, D.C.N.J., 14 F.Supp. 584, appeal dismissed, C.C.A., Flegenheimer v. U. S., 110 F. 2d 379.

A private person cannot arrest and deliver up a fugitive without a warrant from the governor.

Ky.—Botts v. Williams, 17 B.Mon. 687.

30. U.S.—U. S. ex rel. Moulthrop v. Matus, C.A.Conn., 218 F.2d 466.

Mo.—Williams v. Robertson, 95 S.W.2d 79, 339 Mo. 34—State ex rel. Gaines v. Westhues, 2 S.W.2d 612, 318 Mo. 928.

Ohio.—In re Sanders, App., 31 N.E. 2d 246.

Tex.—Ex parte Holt, 244 S.W. 1016, 92 Tex.Cr. 614.

25 C.J. p 255 note 17.

Comity between states

(1) State statute on subject of extradition is unconstitutional only when it seeks to abridge or lessen duty placed by Constitution on part of chief executive of asylum state, and any state statute which facilitates rendition of persons charged with crime is not in conflict with federal Constitution and rests rather upon comity between states and not upon federal Constitution.

Tex.—Ex parte Peairs, 263 S.W.2d 755, 162 Tex.Cr. 243, appeal dismissed Peairs v. State of Tex., 76 S.Ct. 104, 350 U.S. 858, 100 L.Ed. 762.

(2) States have power, in area not covered by constitutional and federal statutory enactments covering fugitives, to render up as matter of comity those within their borders against whom valid charge of crime lies in sister state, and if such waiver is intended, it should be given effect but it should not be imposed as legal fiction in order to make prompt trial in both jurisdictions possible. U.S.—U. S. ex rel. Moulthrop v. Matus, D.C.Conn., 127 F.Supp. 282.

Federal law as recognition and not grant of power

The United States constitution and statutes, while not constituting a grant of power, are in express recognition of the authority theretofore existing in the governor of a state to demand of the executive of another state the extradition of a fugitive from justice.

Mo.—Cockburn v. Willman, 257 S.W. 458, 301 Mo. 575.

31. Mo.—Rummerfield v. Watson, 70 S.W.2d 895, 335 Mo. 71.

32. U.S.—Ex parte Morgan, D.C.Cal., 78 F.Supp. 756, affirmed, C.A., Morgan v. Horrall, 175 F.2d 404, certiorari denied 70 S.Ct. 76, 338 U.S. 827, 94 L.Ed. 503.

Cal.—Ex parte Brewer, 143 P.2d 33, 61 C.A.2d 388.

Colo.—Wigbert v. Lockhart, 166 P. 2d 988, 114 Colo. 485.

Ill.—**Corpus Juris cited in** Lacondra v. Hermann, 175 N.E. 820, 822, 343 Ill. 608.

Mo.—Williams v. Robertson, 95 S.W. 2d 79, 339 Mo. 34—Rummerfield v. Watson, 70 S.W.2d 895, 335 Mo. 71—State ex rel. Gaines v. Westhues, 2 S.W.2d 612, 318 Mo. 928.

Ex parte Ellis, 9 S.W.2d 544, 223 Mo.App. 125.

N.J.—Klaiber v. Frank, 86 A.2d 679, 9 N.J. 1.

Ex parte Cohen, 92 A.2d 837, 23 N.J.Super. 209, affirmed 96 A.2d 794, 12 N.J. 362.

Tenn.—State v. Selman, 12 S.W.2d 368, 157 Tenn. 641.

25 C.J. p 265 note 77.

33. U.S.—Ex parte Crowley, D.C. Mass., 268 F. 1016, appeal granted, C.C.A., In re Graves, 270 F. 181.

Ala.—State v. Rogers, 9 So.2d 758, 30 Ala.App. 515, certiorari denied 9 So.2d 761, 243 Ala. 272.

Ga.—Hart v. Mount, 26 S.E.2d 453, 196 Ga. 452.

Ill.—People ex rel. Millet v. Babb, 115 N.E.2d 241, 1 Ill.2d 191—People v. Meyering, 181 N.E. 300, 348 Ill. 486—People v. Meyering, 178 N.E. 122, 345 Ill. 598.

Nev.—Application of Stricker, 284 P. 2d 383, 71 Nev. 193.

N.J.—Ex parte Paramore, 123 A. 246, 95 N.J.Eq. 386, affirmed In re Paramore, 125 A. 926, 96 N.J.Eq. 397.

N.Y.—People ex rel. Higley v. Mills-paw, 12 N.Y.S.2d 435, 257 App.Div. 40.

People ex rel. Waldman v. Ruthazer, 144 N.Y.S.2d 428, 2 Misc. 2d 297—People ex rel. Hauptmann v. Hanley, 274 N.Y.S. 813, 153 Misc. 61, affirmed 274 N.Y.S. 824, 242 App. Div. 257—People ex rel. Whitfield v. Enright, 191 N.Y.S. 491, 117 Misc. 448, 39 N.Y.Cr. 377.

N.C.—In re Veasey, 146 S.E. 599, 196 N.C. 662.

Ohio.—Ex parte Bell, Com.Pl., 75 N.E.2d 186.

Pa.—Commonwealth ex rel. Spivak v. Heinz, 14 A.2d 875, 141 Pa.Super. 158.

Commonwealth ex rel. Reynolds v. Fluck, 57 Montg.Co. 317.

Tenn.—State v. Selman, 12 S.W.2d 368, 157 Tenn. 641.

Tex.—Ex parte Brower, 218 S.W.2d 463, 153 Tex.Cr. 175.

25 C.J. p 265 note 79.

Absolute obligation

Extradition clause of federal Constitution creates absolute obligation on each state to surrender criminals fleeing from justice of another state. N.J.—Powell v. Meyer, 43 A.2d 175, 23 N.J.Misc. 222, certiorari denied 46 A.2d 671, 134 N.J.Law 169.

34. N.C.—Ex parte Hubbard, 160 S.E. 569, 201 N.C. 472, 81 A.L.R. 547.

This duty is ministerial³⁵ and not discretionary,³⁶ and should be faithfully discharged.³⁷ It has been said, however, not to be an absolute or unqualified duty, but to be dependent on the circumstances of each particular case;³⁸ and, while it has been said to be imperative in every case in which it arises,³⁹ in the absence of statute there is no power to compel the executive of the asylum state to act.⁴⁰

While it is the duty of a state to see that the rights of its citizens are protected against illegal action arising in another state,⁴¹ it is of equal importance to the entire people that the courts avoid in extradition proceedings a view of their duties so narrow as to afford within its borders permanent asylum to offenders against the laws of another state.⁴²

Effect of delay. Where a state is entitled to return of a person, its postponement of the exercise of such right is not a waiver thereof.^{42.5}

Operation of extradition law. The right of the governor to surrender a person to the authorities of a sister state depends on the status of the law on the

date of the demand, rather than at the date alleged as that of the commission of the crime.^{42.10}

§ 5. — To or from Territories

Extradition to or from territories has been upheld under the federal statute and the law of nations.

Although the United States Constitution is silent as to extradition to or from territories, the extradition of fugitives from justice to or from a territory, as well as to or from a state, has been upheld by the courts under the federal statute⁴³ and under the law of nations.⁴⁴ The federal statute has been held applicable to Puerto Rico⁴⁵ and to the former Indian territory.⁴⁶ Extradition statutes of territories have been held to afford an adequate remedy for returning a prisoner from one territory to another.^{46.5}

§ 6. — To or from District of Columbia

The chief justice of the district court of the United States for the District of Columbia acts for the District in extradition proceedings.

Under federal statute, the chief justice of the dis-

Matters to be considered see *infra* § 15.

Adoption of Uniform Act

Uniform Criminal Extradition Act is enforceable within any state that adopts it, whether or not the state requisitioning a person charged with crime has a similar extradition act. Cal.—*Ex parte Morgan*, 194 P.2d 800, 86 C.A.2d 217.

35. U.S.—*Corpus Juris cited in* Downey v. Schmidt, D.C.Tex., 4 F. Supp. 1, 3.

Utah.—*Moreaux v. Ferrin*, 100 P.2d 560, 98 Utah 450.
25 C.J. p 265 note 80.

36. U.S.—*Corpus Juris cited in* Downey v. Schmidt, D.C.Tex., 4 F. Supp. 1, 3.

Utah.—*Moreaux v. Ferrin*, 100 P.2d 560, 98 Utah 450.
25 C.J. p 265 note 81.

37. Ill.—*People v. Baldwin*, 174 N. E. 51, 341 Ill. 604.

38. Mo.—*State v. Wynne*, 204 S.W. 2d 927, 356 Mo. 1095—*State v. Saunders*, 232 S.W. 973, 288 Mo. 640.
Right of asylum state to retain fugitive held in custody on criminal charge see *infra* § 11.

39. Mass.—*Ex parte Graves*, 128 N. E. 867, 236 Mass. 493.

N.Y.—*People ex rel. Whitfield v. Enright*, 191 N.Y.S. 491, 117 Misc. 448, 39 N.Y.Cr. 377.
25 C.J. p 265 note 82.

40. U.S.—*Application of Middlebrooks*, D.C.Cal., 88 F.Supp. 943, reversed on other grounds, C.A., Ross v. Middlebrooks, 188 F.2d 308,

certiorari denied *Middlebrooks v. Ross*, 72 S.Ct. 90, 342 U.S. 862, 96 L.Ed. 649—*Corpus Juris cited in* Downey v. Schmidt, 4 F.Supp. 1, 3. N.Y.—*People ex rel. Higley v. Millspaw*, 12 N.Y.S.2d 435, 257 App.Div. 40.

Utah.—*Moreaux v. Ferrin*, 100 P.2d 560, 98 Utah 450.
25 C.J. p 265 note 83.

41. Ill.—*People v. Baldwin*, 174 N. E. 51, 341 Ill. 604.

Pa.—*Commonwealth ex rel. Spivak v. Heinz*, 14 A.2d 875, 141 Pa. Super. 158.

Wash.—*Ex parte Anthony*, 87 P.2d 302, 198 Wash. 106.

42. U.S.—*Appleyard v. Massachusetts*, 27 S.Ct. 122, 203 U.S. 223, 51 L.Ed. 161, 7 Ann.Cas. 1073. Ill.—*People v. Baldwin*, 174 N.E. 51, 341 Ill. 604.

N.Y.—*People ex rel. MacSherry v. Enright*, 184 N.Y.S. 248, 112 Misc. 568, 38 N.Y.Cr. 479, affirmed 188 N. Y.S. 945, 196 App.Div. 964.

People ex rel. Robert v. Warden of New York City Prison, 114 N. Y.S.2d 13.

Wash.—*Ex parte Anthony*, 87 P.2d 302, 198 Wash. 106.
25 C.J. p 255 note 19.

42.5 Cal.—*Ex parte McBride*, 254 P. 2d 117, 115 C.A.2d 528.

Kan.—*Benton v. Rhyne*, 302 P.2d 540, 180 Kan. 176.

42.10 Tenn.—*State ex rel. Bryant v. Fleming*, 260 S.W.2d 161, 195 Tenn. 419.

Tex.—*Ex parte Coleman*, 245 S.W.2d 712, 157 Tex.Cr. 37.

43. U.S.—*Ex parte Reggel*, Utah, 5 S.Ct. 1148, 114 U.S. 642, 29 L.Ed. 250.

Colo.—*Cutting v. Geer*, 313 P.2d 314, 135 Colo. 503.

25 C.J. p 255 note 23.
Change from territorial to state government see *infra* § 7.

44. Cal.—*In re Romaine*, 23 C. 585. Ga.—*State v. Loper*, 2 Ga.Dec.Pt. II, 33.

45. U.S.—*New York v. Bingham*, N. Y., 29 S.Ct. 190, 211 U.S. 468, 53 L.Ed. 286.

46. Under *Ind.T.St.Annot.* 1899 p 13 § 41, the authority to extradite, or issue requisitions for the extradition of fugitives from justice was in the judge of the United States court in the Indian Territory.

Ind.Terr.—*Ex parte Dickson*, 69 S.W. 943, 4 Ind.Terr. 481.

Cherokee Nation as neither state nor territory

In an early case it was decided that the Cherokee Nation was neither a state nor territory, in the sense to be attached to the words as used in the clause of the constitution and in the act of congress relating to interstate extradition, and that, therefore, the governor of Arkansas could not issue a warrant for the arrest of a fugitive on the demand of the chief of the Cherokee Nation.

U.S.—*Ex parte Morgan*, D.C.Ark., 20 F. 298.

46.5 U.S.—*U. S. v. Wright*, D.C.Hawaii, 15 F.R.D. 184.

strict court of the United States for the District of Columbia [formerly the supreme court of the District of Columbia] acts for the District in extradition or requisition proceedings,⁴⁷ his duties in this respect being executive and not judicial.⁴⁸

§ 7. Extraditable Offenses

The offenses for which a person may be extradited include every offense made punishable by the law of the state in which it was committed, from the highest to the lowest in the grade of offenses, including misdemeanors and statutory crimes, whether or not the offense charged is a crime under the laws of the state of asylum.

The words of the Constitution "treason, felony or other crime," in referring to extraditable offenses, include every offense made punishable by

the law of the state in which it was committed, from the highest to the lowest in the grade of offenses,⁴⁹ including misdemeanors⁵⁰ and statutory crimes,⁵¹ and including acts which have been made crimes by statute since the adoption of the Constitution and the passage of the federal extradition statute.⁵² Under the rules adopted by the Interstate Extradition Conference of 1877 demands for the extradition of persons charged with petty offenses are not to be made or honored except in special cases under aggravating circumstances.⁵³

The offense must be definite and specific,⁵⁴ and must be of a strictly criminal public character.⁵⁵ It is immaterial whether the offense charged is a

47. D.C.—*Maktos v. Matthews*, 194 F.2d 354, 90 U.S.App.D.C. 183—*Reed v. Colpoys*, 99 F.2d 396, 69 App.D.C. 163, certiorari denied 59 S.Ct. 97, 305 U.S. 598, 83 L.Ed. 379—*Hill v. Dorsey*, 22 F.2d 1003, 57 App.D.C. 305—*Hayes v. Palmer*, 21 App.D.C. 450.

48. D.C.—*Lee Won Sing v. Cottone*, 123 F.2d 169, 74 App.D.C. 374.

49. Ala.—*Tingley v. State*, 63 So.2d 712, 36 Ala.App. 665, certiorari denied 63 So.2d 722, 258 Ala. 436, certiorari denied *Tingley v. McDowell*, 74 S.Ct. 55, 346 U.S. 837, 98 L.Ed. 358.

Fla.—*Corpus Juris Secundum* cited in *Gatewood v. Culbreath*, 47 So.2d 725.

Ill.—*People ex rel. Gilbert v. Babb*, 114 N.E.2d 358, 415 Ill. 349—*People v. Meyering*, 181 N.E. 300, 348 Ill. 486.

Ind.—*Guetling v. State*, 158 N.E. 593, 199 Ind. 630.

N.H.—*Bracco v. Wooster*, 20 A.2d 640, 91 N.H. 413.

N.J.—*In re Voorhees*, 32 N.J.Law 141.

N.Y.—*People ex rel. Robert v. Warden of New York City Prison*, 114 N.Y.S.2d 13.

N.C.—*Ex parte Hubbard*, 160 S.E. 569, 201 N.C. 472, 81 A.L.R. 547.

Pa.—*Extradition Case*, 9 Pa.Co. 27. *Commonwealth v. Sheriff of Erie County*, Com.Pl., 28 Erie Co. 25.

Tenn.—*Corpus Juris* cited in *State v. Taylor*, 22 S.W.2d 222, 224, 160 Tenn. 44.

Tex.—*Ex parte Bergman*, 130 S.W. 174, 60 Tex.Cr. 8.

25 C.J. p 256 note 29.

Parole violation

(1) A parole violation is extraditable offense.

U.S.—*Brewer v. Goff*, C.C.A.Okla., 138 F.2d 710.

Ill.—*People ex rel. Ross v. Becker*, 47 N.E.2d 475, 382 Ill. 404.

Pa.—*Commonwealth ex rel. Rushkowsky v. Burke*, 89 A.2d 899, 171 Pa.Super. 1, certiorari denied *Rush-*

kowski v. Burke, 73 S.Ct. 730, 345 U.S. 919, 97 L.Ed. 1352, rehearing denied 73 S.Ct. 798, 345 U.S. 937, 97 L.Ed. 1364, rehearing denied 73 S.Ct. 942, 345 U.S. 961, 97 L.Ed. 1381.

Tenn.—*State ex rel. Daugherty v. Payne*, 174 S.W.2d 457, 180 Tenn. 268.

Wash.—*Ex parte Summers*, 243 P.2d 494, 40 Wash.2d 419.

(2) Parole violator as fugitive from justice see *infra* § 10.

Conspiracy to escape from confinement in a hospital for the criminal insane may be an extraditable offense, where the statute makes an agreement to commit any act for the perversion or destruction of justice or the due administration of the laws a misdemeanor if an overt act beside the agreement is done to effect the object.

U.S.—*Drew v. Thaw*, N.H., 35 S.Ct. 137, 235 U.S. 432, 59 L.Ed. 302.

Distribution or sale of libelous books

One who merely distributes or sells in Pennsylvania books alleged to contain a criminal libel cannot be charged with "committing an act in this state, intentionally resulting in a crime in such other state," within meaning of quoted words as used in statute concerning extradition where accused is not a fugitive.

Pa.—*Commonwealth ex rel. Spivak v. Heinz*, 14 A.2d 875, 141 Pa.Super. 158.

Nonsupport as felony

Where California indictment charged that prisoner had been out of state for more than thirty days while willfully omitting, without lawful excuse, to provide for his minor child, in violation of statute, prisoner was charged with felony under California's statutes and was subject to extradition.

Ky.—*Commonwealth v. Hays*, 267 S.W.2d 931.

50. Ind.—*Guetling v. State*, 158 N.E. 593, 199 Ind. 630.

N.H.—*Bracco v. Wooster*, 20 A.2d 640, 91 N.H. 413.

Pa.—*Commonwealth v. Steele*, 78 Pa. Super. 352.

Tenn.—*Corpus Juris* cited in *State v. Taylor*, 22 S.W.2d 222, 224, 160 Tenn. 44.

Tex.—*Ex parte Estep*, 276 S.W.2d 284, 161 Tex.Cr. 247, followed in 276 S.W.2d 285—*Ex parte Wells*, 298 S.W. 904, 108 Tex.Cr. 57—*Ex parte Mendell*, 244 S.W. 146, 92 Tex. Cr. 321.

25 C.J. p 256 note 30.

Desertion and nonsupport

Where the offense of desertion and nonsupport is considered a misdemeanor under laws of foreign state, it is an extraditable crime.

Fla.—*Gatewood v. Culbreath*, 47 So. 2d 725.

51. Ala.—*Tingley v. State*, 63 So.2d 712, 36 Ala.App. 665, certiorari denied 63 So.2d 722, 258 Ala. 436, certiorari denied *Tingley v. McDowell*, 74 S.Ct. 55, 346 U.S. 837, 98 L.Ed. 358.

Md.—*State ex rel. Gildar v. Kriss*, 62 A.2d 568, 191 Md. 568.

Tenn.—*Corpus Juris* cited in *State v. Taylor*, 22 S.W.2d 222, 224, 160 Tenn. 44.

25 C.J. p 256 note 31.

52. U.S.—*In re Leary*, D.C., 15 F. Cas.No.8,162, 10 Ben. 197, 6 Abb.N. Cas., N.Y., 43.

N.J.—*In re Voorhees*, 32 N.J.Law 141.

53. Pa.—*Opinion of Attorney-General*, 28 Pa.Dist. 1030.

25 C.J. p 256 note 34.

54. U.S.—*Ex parte Slauson*, C.C.Va., 73 F. 666.

25 C.J. p 256 notes 35-37.

Sufficiency of indictment or affidavit see *infra* §§ 14(6)-14(9).

55. U.S.—*Ex parte Thaw*, D.C.N.H., 214 F. 423, reversed on other grounds *Drew v. Thaw*, 35 S.Ct. 137, 235 U.S. 432, 59 L.Ed. 302.

25 C.J. p 256 note 36.

crime under the laws of the state on which the demand is made.⁵⁶

Where the prisoner has broken his parole and escaped to another state, the basis of extradition has been held to be the crime for which he was originally committed and not the breaking of his parole.⁵⁷

The mere transition from territorial to state government is insufficient of itself to preclude the state from obtaining the return of a fugitive by extradition proceedings to answer for a crime committed by him against the territorial law; to prevent such return it must appear that the offense no longer exists in the demanding state.⁵⁸

§ 8. Persons Who May Be Extradited

Only persons falling within the constitutional and statutory description may be extradited.

In order that a person may be extradited he must fall within the description contained in the constitutional and statutory provisions under which his extradition is sought.⁵⁹ Thus it must appear he has been formally charged with a crime in the demanding state, as discussed *infra* § 9, that he has

fled therefrom,⁶⁰ and that he has been found within the state or territory from which his extradition is sought.⁶¹

A person may be extradited although he has escaped from confinement in a hospital for the insane,⁶² but the governor of the asylum state may refuse to surrender as a fugitive from justice one who is a citizen of that state and has duly been adjudged a lunatic and detained as such in a place designated by the court of the asylum state.⁶³

§ 9. — Charge of Crime

No person is subject to extradition until a criminal charge has been regularly made against him in the state which demands jurisdiction of him. A person remains "charged" with crime even after conviction if the judgment of conviction remains unsatisfied.

No person is subject to extradition until a criminal charge has been made against him by regular judicial proceedings in the state which demands jurisdiction of him.⁶⁴ The charge must be of a specific crime and not of an indefinite wrong.⁶⁵ The offense alleged must be a crime by the law of the demanding state,⁶⁶ but it is immaterial that the charge would be insufficient in the state on which

56. Md.—State ex rel. Gildar v. Kriss, 62 A.2d 568, 191 Md. 568.

N.Y.—People v. Brady, 56 N.Y. 182. People ex rel. Shurburt v. Ward- en of City Prison, 157 N.Y.S.2d 219, reversed on other grounds 169 N.Y.S.2d 181, 4 A.D.2d 649.

Tex.—Ex parte Brower, 218 S.W.2d 463, 153 Tex.Cr. 175. 25 C.J. p 256 note 39.

Early executive opinions to contrary Opinions of Gov. Seward, 2 Seward Works 452—Opinion of Gov. Dennison in Lago's Case, 18 Alb.Law J. 149.

57. Hawaii.—In re Gertz, 21 Hawaii 526.

Mo.—Albright v. Clinger, 234 S.W. 57, 290 Mo. 83.

58. Tex.—Ex parte McCarty, 119 S.W. 682, 56 Tex.Cr. 209, 133 Am.S.R. 964.

59. U.S.—Reichman v. Harris, Tenn., 252 F. 371, 164 C.C.A. 295.

N.Y.—Ex parte Mayfield, 99 N.Y.S.2d 98.

Domicile or residence within demanding state not required

Pa.—Commonwealth ex rel. Reynolds v. Fluck, 57 Montg.Co. 317.

60. Fla.—Freeman v. Blackburn, 92 So.2d 262.

Mo.—Keeton v. Gaiser, 55 S.W.2d 302, 331 Mo. 499.

N.Y.—People ex rel. Tyrian v. Adam, 74 N.Y.S.2d 57.

Pa.—Commonwealth ex rel. Houser v. Seip, 124 A.2d 110, 385 Pa. 545—

Commonwealth ex rel. Henderson v. Baldi, 93 A.2d 458, 372 Pa. 463. Status as fugitive from justice see *infra* § 10.

61. Cal.—In re Jones, 201 P. 944, 54 C.A. 423.

Irregularities in deportation

Person convicted of felony in other state and arrested in the state of the forum immediately after being placed across Mexican boundary line by Mexican officials with authority to deport him, after having escaped into Mexico, was "found within this state" within provisions of the statute and the federal constitution relating to extradition, regardless of irregularities committed by Mexican officials in deporting him, in the absence of conspiracy between United States officials and Mexican officials to have him illegally brought into United States from Mexico. Cal.—In re Jones, *supra*.

62. U.S.—Drew v. Thaw, N.H., 35 S.Ct. 137, 235 U.S. 432, 59 L.Ed. 302.

63. Pa.—Opinion of Attorney-General, 26 Pa.Dist. 477.

64. U.S.—Brewer v. Goff, C.C.A.Okl., 138 F.2d 710.

Cal.—Ex parte Katcher, 243 P.2d 785, 39 C.2d 30.

Mo.—Keeton v. Gaiser, 55 S.W.2d 302, 331 Mo. 499.

Okl.—Ex parte Langley, 325 P.2d 1094.

Pa.—Commonwealth ex rel. Houser v. Seip, 124 A.2d 110, 385 Pa. 545—

Commonwealth ex rel. Henderson v. Baldi, 93 A.2d 458, 372 Pa. 4

Commonwealth ex rel. Katz Superintendent of Philadelphia County Prison, 58 A.2d 366, 1 Pa.Super. 459.

Wash.—Ex parte Summers, 243 P. 494, 40 Wash.2d 419—Application of Varona, 232 P.2d 923, 38 Wash.2d 833.

25 C.J. p 256 note 48.

"One who, being within the state committed treason, a felony, or other crime, and has fled the jurisdiction when he is there wanted to answer does not become a fugitive from justice unless and until he is formally charged therewith."

N.J.—Renner v. Renner, 181 A. 1 198, 13 N.J.Misc. 749.

65. U.S.—Ex parte Slauson, C.C.V. 73 F. 666.

Neb.—Smith v. State, 32 N.W. 5 21 Neb. 552.

66. N.J.—Ex parte Kelsey, 21 A. 676, 19 N.J.Misc. 488.

Tex.—Ex parte Burns, Cr., 322 S.W. 289.

Wis.—State ex rel. Kojis v. Barcz, 58 N.W.2d 420, 264 Wis. 136, followed in 58 N.W.2d 424, 264 W 142.

25 C.J. p 257 note 51.

Presumption is that statute crime apparently set forth in indictment or warrant submitted with requisition is offense in demanding state.

demand is made,⁶⁷ although as to this there is also authority to the contrary.^{67.5}

When person "charged" with crime. As used in constitutional and statutory provisions relating to extradition, the term "charged" is construed in its broad signification to cover any proceeding which a state may see fit to adopt by which a formal accusation is made against an alleged criminal.⁶⁸ In a stricter sense, however, a person is "charged" with crime when an affidavit is filed alleging the commission of the offense and a warrant is issued for his arrest.⁶⁹ A person remains charged with crime within the meaning of the constitutional and statutory provisions although he has been convicted, while the judgment of conviction remains unsatisfied,⁷⁰ and, after a charge of crime has culminated in a conviction, the record of such conviction

is sufficient evidence in extradition proceedings, the question of the sufficiency of the preliminary affidavits in the proceeding in which he was convicted becoming immaterial.⁷¹

§ 10. — Status as Fugitive from Justice

- a. Necessity
- b. Who are fugitives from justice

a. Necessity

A person is not subject to extradition under the federal Constitution and statutes unless he is a fugitive from justice, but the right to resist extradition on this ground may be waived.

Under the provisions of the federal Constitution and statutes enacted in aid thereof, it is essential that the person whose return is sought be a fugitive from justice,⁷² and in the absence of a

Tenn.—State v. Taylor, 22 S.W.2d 222, 160 Tenn. 44.

Legal crime

To be subject to extradition, accused must be charged with a crime in the demanding state, and this means that the charge standing against him must legally constitute a crime.

W.Va.—Cassis v. Fair, 29 S.E.2d 245, 126 W.Va. 557, 151 A.L.R. 233.

67. Mo.—Flournoy v. Owens, 275 S.W. 923, 310 Mo. 355.

25 C.J. p 257 note 51.

67.5 N.Y.—People ex rel. Burtman v. Silbergliitt, 182 N.Y.S.2d 536, 15 Misc.2d 847.

People ex rel. Albert v. Commissioner of Correction of New York City, 111 N.Y.S.2d 307.

68. U.S.—Pierce v. Creecy, Mo., 28 S.Ct. 714, 210 U.S. 387, 52 L.Ed. 1113.

11 C.J. p 294 note 5 [a] (1).

Person held charged with crime

N.Y.—People ex rel. Butts v. Morehead, 18 N.Y.S.2d 696, 173 Misc. 1061.

Kan.—Tines v. Hudspeth, 190 P.2d 867, 164 Kan. 471.

Wash.—Ex parte Nerreter, 183 P.2d 799, 28 Wash.2d 520.

Person held not charged with crime

N.Y.—People v. Butts, 14 N.Y.S.2d 881.

69. U.S.—In re Strauss, N.Y., 25 S.Ct. 535, 197 U.S. 324, 49 L.Ed. 774.

Finding of indictment or making of affidavit

Word "charged," as used in federal Constitution, means that an indictment has been found or an affidavit has been made before a magistrate alleging commission of such offense or offenses.

N.J.—Renner v. Renner, 181 A. 191, 13 N.J.Misc. 749.

Indictment, and not warrant, as charge

It is the indictment or affidavit, and not the issuance of a warrant, which constitutes the charge against the fugitive.

Ind.—Tullis v. Fleming, 69 Ind. 15.
La.—State ex rel. Covington v. Hughes, 102 So. 324, 157 La. 652.

Charge on suspicion

One is not charged with a crime authorizing his extradition where the charge is on suspicion.

U.S.—Ex parte Smith, C.C.Ill., 22 F. Cas.No.12,968, 3 McLean 121.

70. U.S.—U. S. ex rel. Faris v. McClain, D.C.Pa., 42 F.Supp. 429.

Hughes v. Pfanz, Ky., 138 F. 980, 71 C.C.A. 234.

Colo.—Tinsley v. Woods, 313 P.2d 1006, 135 Colo. 590.

D.C.—Fowler v. Ross, 196 F.2d 25, 90 U.S.App.D.C. 305.

Ill.—People ex rel. Holmes v. Babb, 111 N.E.2d 316, 414 Ill. 490—People ex rel. Hesley v. Ragen, 72 N.E.2d 311, 396 Ill. 554.

Kan.—Corpus Juris Secundum cited in Smith v. Nye, 272 P.2d 1079, 1081,

176 Kan. 679—Tines v. Hudspeth, 190 P.2d 867, 164 Kan. 471.

Mo.—Rummerfield v. Watson, 70 S.W.2d 895, 335 Mo. 71—Albright v. Clinger, 234 S.W. 57, 290 Mo. 83.

N.Y.—People ex rel. Hutchings v. Mallon, 218 N.Y.S. 432, 218 App. Div. 461, affirmed 157 N.E. 842, 245 N.Y. 521.

Okl.—Ex parte Burnett, 144 P.2d 126, 78 Okl.Cr. 93—Ex parte Foster, 61 P.2d 37, 60 Okl.Cr. 50.

Tex.—Ex parte Haynes, 267 S.W. 490, 98 Tex.Cr. 609.

Wash.—State v. Remann, 4 P.2d 866, 165 Wash. 92, 78 A.L.R. 412.

A person paroled or placed on probation, but still subject to the imposition of a penalty for the offense committed, is charged with crime.

U.S.—U. S. ex rel. Jackson v. Ragen, C.C.A.Ill., 150 F.2d 190.

Conn.—Cappola v. Platt, 192 A. 156, 123 Conn. 38, certiorari denied 58 S.Ct. 47, 302 U.S. 726, 82 L.Ed. 560.

D.C.—Reed v. Colpoys, 99 F.2d 396, 69 App.D.C. 163, certiorari denied 59 S.Ct. 97, 305 U.S. 598, 83 L.Ed. 379.

Ga.—Mathews v. Foster, 75 S.E.2d 427, 209 Ga. 699—Deering v. Mount, 22 S.E.2d 828, 194 Ga. 833.

Ill.—People ex rel. Barrett v. Dixon, 56 N.E.2d 816, 387 Ill. 420—People ex rel. Ross v. Becker, 47 N.E.2d 475, 382 Ill. 404—People ex rel. Westbrook v. O'Neill, 38 N.E.2d 174, 378 Ill. 324.

71. U.S.—Hughes v. Pfanz, Ky., 138 F. 980, 71 C.C.A. 234.

Colo.—Travis v. People, 308 P.2d 997, 135 Colo. 141.

72. U.S.—Brewer v. Goff, C.C.A.Okl., 138 F.2d 710.

Cal.—Ex parte McBride, 254 P.2d 117, 115 C.A.2d 528.

Conn.—Stenz v. Sandstrom, 118 A.2d 900, 143 Conn. 72.

Fla.—Kuney v. State, 102 So. 547, 88 Fla. 354.

Kan.—Smith v. Nye, 272 P.2d 1079, 176 Kan. 679.

N.J.—Ex parte Kelsey, 21 A.2d 676, 19 N.J.Misc. 488.

N.Y.—People ex rel. Plate v. Enright, 196 N.Y.S. 403, 119 Misc. 319.

Ohio.—Culbertson v. Sweeney, 44 N.E.2d 807, 70 Ohio App. 344, appeal dismissed 45 N.E.2d 118, 140 Ohio St. 426.

Okl.—Ex parte Langley, Cr., 325 P.2d 1094—Ex parte Johnson, 232 P.452, 29 Okl.Cr. 41.

Pa.—Commonwealth ex rel. Houser v. Seip, 124 A.2d 110, 385 Pa. 545—Commonwealth ex rel. Henderson v. Baldi, 93 A.2d 458, 372 Pa. 463.

Commonwealth ex rel. Katz v. Superintendent of Philadelphia

statute requiring him to do so, a governor may not surrender one who is charged with crime in, but is not an actual fugitive from, another state.⁷³

Waiver. A person may waive any right he may have to resist extradition on the ground that he is not a fugitive from justice.⁷⁴

b. Who Are Fugitives from Justice

- (1) In general
- (2) Escaped or paroled prisoners

(1) In General

A fugitive from justice, in the law of extradition, is one who, having committed or been charged with a crime in one state, has left its jurisdiction, and is found

within the territory of another when it is sought to subject him to the criminal process of the former state. The purpose, motive, or manner of his flight is usually held immaterial, as is the fact that the state authorities or the complainant knew of, or consented to, his departure.

Quoted in: *Kan.—Justice v. Lockett*, 259 P.2d 152, 157, 175 Kan. 25.

Within the meaning of constitutional and statutory provisions governing interstate extradition, a "fugitive from justice" may be defined as a person who, having committed or been charged with a crime in one state, has left its jurisdiction and is found within the territory of another when it is sought to subject him to the criminal process of the former state.⁷⁵ To constitute one a fugitive from

County Prison, 58 A.2d 366, 162 Pa.Super. 459.

Commonwealth v. Edeburn, 11 Pa.Dist. & Co. 356, 76 Pittsb.Leg. J. 253.

Wash.—Ex parte Summers, 243 P.2d 494, 40 Wash.2d 419—Application of Varona, 232 P.2d 923, 38 Wash. 2d 833.

W.Va.—State v. Doepppe, 124 S.E. 667, 97 W.Va. 203.

25 C.J. p 257 note 55.

Showing as prerequisite to issuance of warrant see *infra* § 16.

73. *Ind.—O'Malley v. Quigg*, 88 N. E. 611, 172 Ind. 350.

N.C.—State v. Hall, 20 S.E. 729, 115 N.C. 811, 44 Am.S.R. 501, 28 L.R.A. 289.

Pa.—Commonwealth ex rel. Kutz v. Weills, Com.Pl., 59 Dauph.Co. 418.

74. *Tenn.—State ex rel. Lea v. Brown*, 64 S.W.2d 841, 166 Tenn. 669, 91 A.L.R. 1246, certiorari denied State of Tennessee ex rel. Lea v. Brown, 54 S.Ct. 717, 292 U. S. 638, 78 L.Ed. 1491.

Voluntary appearance as waiver

(1) Where petitioners voluntarily appeared in foreign state to answer criminal charges of conspiracy, were tried and convicted, and, after release on bail pending appeal, left foreign state and failed to appear on affirmance of conviction, petitioners waived right to resist subsequent extradition as fugitives from justice.

Tenn.—State ex rel. Lea v. Brown, 64 S.W.2d 841, 166 Tenn. 669, 91 A.L.R. 1246, certiorari denied State of Tennessee ex rel. Lea v. Brown, 54 S.Ct. 717, 292 U.S. 638, 78 L.Ed. 1491.

(2) Where relator voluntarily appeared in foreign state to answer criminal charges and, after entering into an appearance bond, was released pending trial, and left foreign state and failed to appear for trial, relator thereby submitted himself to jurisdiction of court and waived any right he originally had to resist extradition.

Tex.—Ex parte Taylor, 101 S.W.2d 579, 132 Tex.Cr. 29.

Voluntary return

Where petitioner was arrested in Alabama on warrant issued in Illinois charging child abandonment, and petitioner voluntarily returned to Illinois, and there made bail, and petitioner's wife did not appear as a witness on date case was called and petitioner returned to Alabama, petitioner waived any right he had originally to resist extradition on ground that petitioner was not present in Illinois at time of commission of alleged offense, and by such action submitted himself to the jurisdiction of Illinois.

Ala.—Kay v. State, 37 So.2d 525, 34 Ala.App. 8, certiorari denied 37 So. 2d 529, 251 Ala. 419.

Agreement not to resist extradition

(1) An agreement signed by prisoner as condition of being paroled from custody in Pennsylvania that prisoner waived extradition to Pennsylvania and that he would not contest any effort to return him to Pennsylvania was binding, as against contention that prisoner could not waive his constitutional rights in advance, since constitutional rights can be waived.

N.J.—Ex parte Casemento, 49 A.2d 437, 24 N.J.Misc. 345.

(2) Where prisoner was permitted to leave Pennsylvania on parole to live in New York under Interstate Compact for the Supervision of Out-of-State Parolees and Probationers upon prisoner's execution of waiver of extradition and agreement not to contest "any" effort to return him to Pennsylvania, and prisoner violated agreement by going to New Jersey where he was arrested on a new charge, prisoner was precluded from contesting application of Pennsylvania authorities joined in by New York authorities to have New Jersey authorities return prisoner to Pennsylvania.

N.J.—Ex parte Casemento, *supra*.

75. *U.S.—Hogan v. O'Neill*, N.J., 41 S.Ct. 222, 255 U.S. 52, 65 L.Ed. 497.

U. S. ex rel. Goldstein v. Lohman, C.A.Ill., 251 F.2d 259, certiorari denied 78 S.Ct. 702, 356 U.S. 918, 2 L.Ed.2d 714—*U. S. ex rel. Jackson v. Meyering*, C.C.A.Ill., 54 F.2d 621, certiorari denied 52 S.Ct. 498, 286 U.S. 542, 76 L.Ed. 1280.

Ex parte Morgan, D.C.Cal., 78 F. Supp. 756, affirmed, C.A., *Morgan v. Horrall*, 175 F.2d 404, certiorari denied 70 S.Ct. 76, 338 U.S. 827, 94 L.Ed. 503—*U. S. ex rel. Faris v. McClain*, D.C.Pa., 42 F.Supp. 429.

Ala.—State v. Parrish, 5 So.2d 828, 242 Ala. 7, second case.

State v. Whitlock, 28 So.2d 172, 32 Ala.App. 560.

Ariz.—Corpus Juris Secundum quoted in *Ex parte Riccardi*, 203 P.2d 627, 631, 68 Ariz. 180.

Ark.—State ex rel. Lewis v. Allen, 109 S.W.2d 952, 194 Ark. 688.

Cal.—Ex parte Murdock, 55 P.2d 843, 5 C.2d 644.

In *re Scott's Estate*, 310 P.2d 46, 150 C.A.2d 590.

Colo.—Corpus Juris Secundum cited in *Stobie v. Barger*, 268 P.2d 409, 410, 129 Colo. 222.

D.C.—Lee Won Sing v. Cottone, 123 F.2d 169, 74 App.D.C. 374—*Barrett v. Bigger*, 17 F.2d 669, 57 App.D.C. 81, certiorari denied 47 S.Ct. 765, 274 U.S. 752, 71 L.Ed. 1332.

Fla.—Chase v. State, 113 So. 103, 93 Fla. 963, 54 A.L.R. 271.

Ill.—People ex rel. McGee v. Fischer, 81 N.E.2d 483, 401 Ill. 95—*People ex rel. Parkinson v. Martin*, 191 N. E. 275, 357 Ill. 109—*People ex rel. Wortman v. Munie*, 188 N.E. 545, 354 Ill. 490—*People ex rel. Lyman v. Smith*, 186 N.E. 159, 352 Ill. 496—*People v. Meyering*, 181 N.E. 300, 348 Ill. 486—*People v. Meyering*, 180 N.E. 560, 348 Ill. 17—*People v. Meyering*, 178 N.E. 122, 345 Ill. 598—*People v. Baldwin*, 174 N.E. 51, 341 Ill. 604—*People v. Traeger*, 172 N.E. 168, 340 Ill. 147.

Iowa.—Bicknell v. Farley, 5 N.W.2d 831, 232 Iowa 464—*Drumm v. Ped-*

justice from a given state, it is essential to show that at the time of the commission of the alleged crime in the demanding state he was bodily present, or incurred guilt, therein, and that he left it and is within the jurisdiction of the state from which his return is demanded,⁷⁶ and that he refuses to

- erson, 259 N.W. 208, 219 Iowa 642—Seely v. Beardsley, 190 N.W. 498, 194 Iowa 863.
- Kan.—Justice v. Lockett, 259 P.2d 152, 175 Kan. 25—Times v. Huds-peth, 190 P.2d 867, 164 Kan. 471—Perry v. Gwartney, 178 P.2d 185, 162 Kan. 607—Ex parte Martin, 52 P.2d 1196, 142 Kan. 907.
- Ky.—Oakley v. Franks, 159 S.W.2d 415, 289 Ky. 605.
- La.—State v. Stanton, 24 So.2d 819, 209 La. 457—State v. Berryhill, 177 So. 663, 667, 188 La. 549.
- Me.—Ex parte King, 28 A.2d 562, 139 Me. 203.
- Mich.—People v. Kuhn, 35 N.W. 88, 89, 67 Mich. 463.
- Mo.—Ex parte Arrington, 270 S.W.2d 39—Keeton v. Gaiser, 55 S.W.2d 302, 331 Mo. 499—Cockburn v. Will-man, 257 S.W. 458, 301 Mo. 575—Albright v. Clinger, 234 S.W. 57, 290 Mo. 83.
- Neb.—Colling v. State, 217 N.W. 87, 116 Neb. 308.
- N.H.—Pearson v. Campbell, 91 A.2d 453, 97 N.H. 444.
- N.J.—Ex parte Paramore, 123 A. 246, 95 N.J.Eq. 386, affirmed In re Pan-more, 125 A. 926, 96 N.J.Eq. 397.
- N.Y.—People ex rel. Higley v. Mills-paw, 24 N.E.2d 117, 281 N.Y. 441—People ex rel. Gottschalk v. Brown, 143 N.E. 653, 237 N.Y. 483, 32 A.L.R. 1164.
- People ex rel. Hutchings v. Mal-lon, 218 N.Y.S. 432, 218 App.Div. 461, affirmed 157 N.E. 842, 245 N.Y. 521.
- People ex rel. Hauptmann v. Hanley, 274 N.Y.S. 813, 153 Misc. 61.
- N.D.—Corpus Juris cited in Ex parte Quint, 209 N.W. 1006, 1007, 54 N.D. 515.
- Okl.—Ex parte Beam, 252 P.2d 179, 96 Okl.Cr. 207—Ex parte Deere, 227 P.2d 420, 93 Okl.Cr. 291—Ex parte Scott, 219 P.2d 249, 91 Okl.Cr. 345—Ex parte Ayers, 213 P.2d 297, 90 Okl.Cr. 255—Ex parte Birch, 209 P.2d 510, 89 Okl.Cr. 417—Ex parte Patrick, 189 P.2d 420, 86 Okl.Cr. 61—Ex parte Cassel, 184 P.2d 467, 85 Okl.Cr. 4—Ex parte Chase, 180 P.2d 199, 84 Okl.Cr. 159—Ex parte George, 73 P.2d 471, 63 Okl.Cr. 115—Ex parte Hamilton, 273 P. 286, 287, 41 Okl.Cr. 322—Ex parte Bak-er, 244 P. 459, 33 Okl.Cr. 413—In re Gundy, 236 P. 440, 30 Okl.Cr. 390.
- Or.—Ex parte Montoya, 135 P.2d 281, 170 Or. 499.
- Pa.—Commonwealth ex rel. Reynolds v. Fluck, 57 Montg.Co. 317.
- S.D.—Ex parte Williams, 21 N.W.2d 593, 71 S.D. 95.
- Tenn.—State ex rel. Lea v. Brown, 64 S.W.2d 841, 166 Tenn. 663, 91 A.L.R. 1246, certiorari denied State of Tennessee ex rel. Lea v. Brown, 54 S.Ct. 717, 292 U.S. 638, 78 L.Ed. 1491.
- Tex.—Ex parte Robertson, 210 S.W. 2d 593, 151 Tex.Cr. 635—Ex parte Woodland, 177 S.W.2d 62, 146 Tex. Cr. 616.
- Utah.—Moreaux v. Ferrin, 100 P.2d 560, 98 Utah 450.
- Wis.—State ex rel. Krueger v. Mich-alski, 85 N.W.2d 339, 1 Wis.2d 644, 25 C.J. p 258 note 66.
- Person not subject to prosecution for crime in the demanding state is not a fugitive from justice.**
- Fla.—State v. Allen, 92 So. 155, 83 Fla. 655.
- "Fleeing from justice" not synony-mous**
- The terms "fugitive from justice" as used in extradition statute, and "fleeing from justice" as used in the statute of limitations, are not synon-ymous terms.
- Kan.—Thompson v. Nye, 257 P.2d 937, 174 Kan. 750.
- Neb.—Taylor v. State, 292 N.W. 233, 138 Neb. 156.
- Persons charged with desertion or nonsupport of wife or children held extraditable as fugitives from jus-tice.**
- Ark.—Ex parte Koelsch, 205 S.W.2d 186, 212 Ark. 199.
- Fla.—Gatewood v. Culbreath, 47 So. 2d 725.
- Md.—Lincoln v. State, 85 A.2d 765, 199 Md. 194.
- Mo.—Keeton v. Gaiser, 55 S.W.2d 302, 331 Mo. 449.
- N.D.—Ex parte Quint, 209 N.W. 1006, 54 N.D. 515.
- Pa.—Commonwealth ex rel. v. Weills, 66 Pa.Dist. & Co. 526.
- Commonwealth ex rel. v. Gern-ert, 33 Berks Co. 164—Common-wealth ex rel. Kutz v. Weills, Com. Pl., 59 Dauph.Co. 418—Common-wealth ex rel. Reynolds v. Fluck, 57 Montg.Co. 317.
- Tex.—Ex parte Beeth, 154 S.W.2d 484, 142 Tex.Cr. 511—Ex parte Steavenson, 144 S.W.2d 552, 140 Tex.Cr. 311.
- Utah.—Osborn v. Harris, 203 P.2d 917, 115 Utah 204.
- 76. U.S.—Daugherty v. Hornsby, C. C.A.Ga., 151 F.2d 799—Bruce v. Rayner, Md., 124 F. 481, 485, 62 C. C.A. 501.**
- U. S. ex rel. Moulthroppe v. Mat-us, D.C.Conn., 127 F.Supp. 282—U. S. v. Johnson, D.C.Or., 63 F. Supp. 615.
- Ala.—State v. Parrish, 5 So.2d 828, 242 Ala. 7, second case.
- Corpus Juris Secundum quoted in Kay v. State, 37 So.2d 525, 528, 34 Ala.App. 8, certiorari denied 37 So.2d 529, 251 Ala. 419.**
- Ark.—Swann v. State, 174 S.W.2d 557, 206 Ark. 184.
- Cal.—Corpus Juris Secundum quoted in Ex parte Brewer, 143 P.2d 33, 36, 61 C.A.2d 388.
- Colo.—Matthews v. People, 314 P.2d 906, 136 Colo. 102—Teter v. People, 268 P.2d 407, 129 Colo. 211—Mc-Knight v. Forsyth, 266 P.2d 770, 129 Colo. 64—Corpus Juris Secun-dum quoted in Wigchert v. Lock-hart, 166 P.2d 988, 990, 114 Colo. 485.
- D.C.—Richards v. Matthews, 207 F.2d 227, 93 U.S.App.D.C. 70—Fowler v. Ross, 196 F.2d 25, 90 U.S.App.D.C. 305.
- In re Gibson, D.C., 147 F.Supp. 591.
- Fla.—Corpus Juris quoted in Kunev v. State, 102 So. 547, 549, 88 Fla. 354.
- Ga.—Jackson v. Pittard, 86 S.E.2d 295, 211 Ga. 427—Dawson v. Smith, 103 S.E. 846, 150 Ga. 350.
- Ill.—People ex rel. Borelli v. Loh-man, 150 N.E.2d 116, 13 Ill.2d 506—People ex rel. Gansler v. Meyer-ing, 185 N.E. 628, 352 Ill. 314—People v. Meyering, 180 N.E. 560, 348 Ill. 17.
- Ind.—Lawrence v. King, 180 N.E. 1, 203 Ind. 252.
- Iowa.—Drumm v. Pederson, 259 N.W. 208, 219 Iowa 642—Seely v. Beardsley, 190 N.W. 498, 194 Iowa 863.
- Ky.—Corpus Juris cited in Oakley v. Franks, 159 S.W.2d 415, 417, 289 Ky. 605.
- Me.—Ex parte King, 28 A.2d 562, 139 Me. 203.
- Md.—Audler v. Kriss, 79 A.2d 391, 197 Md. 362.
- Mo.—Williams v. Robertson, 95 S.W. 2d 79, 339 Mo. 34.
- Hagel v. Hendrix, App., 302 S.W. 2d 323—Corpus Juris cited in Ex parte Ellis, 9 S.W.2d 544, 547, 223 Mo.App. 125.
- Neb.—Ex parte Finch, 182 N.W. 565, 106 Neb. 45.
- N.H.—Fortier v. Frink, 24 A.2d 604, 92 N.H. 50.
- N.J.—Passalacqua v. Biehler, 133 A.2d 667, 46 N.J.Super. 63.
- N.Y.—People ex rel. Higley v. Mills-paw, 24 N.E.2d 117, 281 N.Y. 441.
- People ex rel. Mitchell v. Meder-er, 31 N.Y.S.2d 19, 263 App.Div. 743—People ex rel. Merklen v. En-right, 217 N.Y.S. 288, 291, 217 App. Div. 514.
- People ex rel. Hadley v. Peck, 147 N.Y.S.2d 174, 4 Misc.2d 529—People ex rel. Waldman v. Ruthaz-

return voluntarily to the former state.⁷⁷

Actual and corporeal former presence in the demanding state is essential; if a person was only "constructively" in a state, committing a crime

against it while not personally within its borders, he has not fled from it and is not a fugitive from justice.⁷⁸ The fact that since the date of the alleged crime in the demanding state he has been in that

er, 144 N.Y.S.2d 428, 2 Misc.2d 297—People ex rel. Johnson v. Ruthazer, 102 N.Y.S.2d 39, 198 Misc. 1044, affirmed 105 N.Y.S.2d 394, 278 App. Div. 905—People ex rel. Hartnett v. Ryan, 56 N.Y.S.2d 798, 185 Misc. 360.

People ex rel. Albert v. Commissioner of Correction of New York City, 111 N.Y.S.2d 307.

N.C.—**Corpus Juris** quoted in State v. Pelley, 20 S.E.2d 850, 856, 221 N. C. 487.

Okl.—Ex parte Sesler, 185 P.2d 705, 85 Okl.Cr. 110—Ex parte Cassel, 184 P.2d 467, 85 Okl.Cr. 4—Ex parte Foster, 61 P.2d 37, 60 Okl.Cr. 50.

Or.—Ex parte Montoya, 135 P.2d 281, 170 Or. 499.

Tenn.—**Corpus Juris** quoted in State ex rel. Lea v. Brown, 64 S.W.2d 841, 847, 166 Tenn. 669, 91 A.L.R. 1246, certiorari denied State of Tennessee ex rel. Lea v. Brown, 54 S.Ct. 717, 292 U.S. 638, 78 L.Ed. 1491.

Tex.—Ex parte Wooten, 206 S.W.2d 261, 151 Tex.Cr. 233—Ex parte Mayer, 97 S.W.2d 217, 131 Tex.Cr. 239—Ex parte Baird, 17 S.W.2d 1049, 112 Tex.Cr. 602.

Wash.—In re Wheeler, 280 P.2d 673, 46 Wash.2d 277.

W.Va.—Boyles v. Hudak, 199 S.E. 5, 120 W.Va. 431—Whited v. Phillips, 126 S.E. 916, 98 W.Va. 204, 40 A.L.R. 83—State v. Doepppe, 124 S.E. 667, 97 W.Va. 203.

Wis.—State ex rel. Krueger v. Michalski, 85 N.W.2d 339, 1 Wis.2d 644. 25 C.J. p 257 notes 57, 58.

Effect of return

Where defendant was effectively charged in Oregon with commission of crime of burning his insured automobile with intent to defraud insurer, and it was not denied that he was in the state when the crime was committed and had left Oregon and that he was presently in the state of Washington, defendant was a fugitive from justice even though he had returned to the site of his alleged crime and stayed there for several days on at least two occasions.

Wash.—McClendon v. Callahan, 284 P.2d 323, 46 Wash.2d 733.

77. Ala.—**Corpus Juris Secundum** quoted in Kay v. State, 37 So.2d 525, 528, 34 Ala.App. 8, certiorari denied 37 So.2d 529, 251 Ala. 419.

Iowa.—Drumm v. Pederson, 259 N.W. 208, 219 Iowa 642—Seely v. Beardsley, 190 N.W. 498, 194 Iowa 863.

78. U.S.—U. S. ex rel. Silver v. O'Brien, C.C.A.III., 138 F.2d 217,

certiorari denied 64 S.Ct. 522, 321 U.S. 766, 88 L.Ed. 1062.

Ala.—**Corpus Juris Secundum** quoted in Kay v. State, 37 So.2d 525, 528, 34 Ala.App. 8, certiorari denied 37 So.2d 529, 251 Ala. 419.

Cal.—**Corpus Juris Secundum** quoted in Ex parte Brewer, 143 P.2d 33, 36, 61 C.A.2d 388.

Colo.—**Corpus Juris Secundum** quoted in Wigchert v. Lockhart, 166 P.2d 988, 990, 114 Colo. 485.

D.C.—Fowler v. Ross, 196 F.2d 25, 90 U.S.App.D.C. 305.

In re Gibson, D.C., 147 F.Supp. 591.

Fla.—Ennist v. Baden, 28 So.2d 160, 158 Fla. 141—Kuney v. State, 102 So. 547, 38 Fla. 354.

Ga.—Jackson v. Pittard, 86 S.E.2d 295, 211 Ga. 427.

Ill.—People ex rel. Goldstein v. Babb, 123 N.E.2d 639, 4 Ill.2d 483, certiorari denied 75 S.Ct. 771, 349 U.S. 928, 99 L.Ed. 1259—People ex rel. Goshorn v. Babb, 122 N.E.2d 239, 4 Ill.2d 114.

Iowa.—Seely v. Beardsley, 190 N.W. 498, 194 Iowa 863.

Neb.—Ex parte Campbell, 25 N.W.2d 419, 147 Neb. 820.

N.Y.—Keller v. Butler, 158 N.E. 510, 246 N.Y. 249, 55 A.L.R. 349.

People ex rel. Merklen v. Enright, 217 N.Y.S. 288, 217 App.Div. 514.

Ohio.—English v. Matowitz, 72 N.E. 2d 898, 148 Ohio St. 39.

Okl.—Ex parte George, 73 P.2d 471, 63 Okl.Cr. 115—Ex parte Foster, 61 P.2d 37, 60 Okl.Cr. 50.

S.D.—**Corpus Juris Secundum** cited in Ex parte Kaufman, 39 N.W.2d 905, 907, 73 S.D. 166.

Tenn.—**Corpus Juris** quoted in State ex rel. Lea v. Brown, 64 S.W.2d 841, 847, 166 Tenn. 669, 91 A.L.R. 1246, certiorari denied State of Tennessee ex rel. Lea v. Brown, 54 S.Ct. 717, 292 U.S. 638, 78 L.Ed. 1491.

Tex.—Ex parte Barrow, 211 S.W.2d 753, 152 Tex.Cr. 155—Ex parte Beeth, 154 S.W.2d 484, 142 Tex.Cr. 511.

W.Va.—Whited v. Phillips, 126 S.E. 916, 98 W.Va. 204, 40 A.L.R. 83—State v. Doepppe, 124 S.E. 667, 97 W.Va. 203.

25 C.J. p 257 notes 58, 59.

Desertion and nonsupport

(1) The rule stated in the text has been applied to persons charged with desertion of, or failure to support, a wife or children.

Colo.—Wigchert v. Lockhart, 166 P. 2d 988, 114 Colo. 485.

D.C.—Fowler v. Ross, 196 F.2d 25, 90 U.S.App.D.C. 305.

Ill.—People v. Meyering, 180 N.E. 560, 348 Ill. 17.

Iowa.—Drumm v. Pederson, 259 N.W. 208, 219 Iowa 642.

Mo.—Keeton v. Gaiser, 55 S.W.2d 302, 331 Mo. 499—Schein v. Gallivan, 10 S.W.2d 521, 321 Mo. 268.

Mont.—Ex parte Heath, 287 P. 636, 87 Mont. 370.

N.Y.—People ex rel. Higley v. Millspaw, 24 N.E.2d 117, 281 N.Y. 441—People ex rel. Gottschalk v. Brown, 143 N.E. 653, 237 N.Y. 483, 32 A.L.R. 1164.

People ex rel. Buck v. Britt, 62 N.Y.S.2d 479, 187 Misc. 217.

Okl.—Ex parte Hawkins, 255 P. 718, 37 Okl.Cr. 17.

Tex.—Ex parte King, Cr., 236 S.W. 2d 806—Ex parte Presley, 27 S.W. 2d 815, 116 Tex.Cr. 150—Ex parte Hogue, 17 S.W.2d 1047, 112 Tex. Cr. 495.

(2) The presence of such person in the demanding state for any appreciable time during the period covered by the indictment is held sufficient.

Mo.—Keeton v. Gaiser, 55 S.W.2d 302, 331 Mo. 499.

Mont.—Ex parte Heath, 287 P. 636, 87 Mont. 370.

N.H.—Hinz v. Perkins, 82 A.2d 423, 97 N.H. 114.

N.Y.—People ex rel. Gottschalk v. Brown, 143 N.E. 653, 237 N.Y. 483, 32 A.L.R. 1164.

People ex rel. Faulds v. Herberich, 89 N.Y.S.2d 24, affirmed 93 N.Y. S.2d 272, 276 App.Div. 852, affirmed 93 N.E.2d 913, 301 N.Y. 614.

Tex.—Ex parte Logan, 205 S.W.2d 994, 151 Tex.Cr. 129—Ex parte Beeth, 154 S.W.2d 484, 142 Tex.Cr. 511—Ex parte Steavenson, 144 S. W.2d 552, 140 Tex.Cr. 311.

(3) However, an extradition warrant based on an indictment charging accused with having failed to support his children on a specified date has been held not open to the objection that accused was not within the demanding state on the date specified, his presence within the state not being regarded as necessary to enable him to commit the crime. Cal.—Ex parte Gornostayoff, 298 P. 55, 113 C.A. 255.

(4) Willful desertion and nonsupport and neglect to support a bastard are misdemeanors and come within purview of Uniform Enforcement Support Law, provision for criminal enforcement by extradition.

state and left it does not make him a fugitive,⁷⁹ although the rule is otherwise when the crime is of a continuing nature.^{79.5} A person is not a fugitive from justice merely because of the fact that he rendered himself liable to criminal prosecution in another state.⁸⁰

It is not, however, necessary that the criminal shall have done within the demanding state every act necessary to complete the crime,⁸¹ but if, in the case of a crime consisting of several acts or parts, accused commits within the state any one of them and departs before the happening of other acts

authorized or contemplated by him, he is a fugitive from the justice of that state.⁸² It is sufficient that he does an overt act which is, and is intended to be, a material step toward accomplishing the crime, and then absents himself from the state and completes the crime.⁸³ It is not necessary that the flight of the fugitive shall have been precipitate.⁸⁴

Purpose or motive of flight. The motive, purpose, or reason which induced the departure of the accused person from the demanding state is immaterial;⁸⁵ to be a fugitive from justice, in the sense of the act of congress, it is not necessary that

Pa.—Commonwealth ex rel. Houser v. Seip, 124 A.2d 110, 385 Pa. 545.

79. N.Y.—People v. Hyatt, 64 N.E. 825, 172 N.Y. 176, 92 Am.S.R. 706, affirmed 23 S.Ct. 456, 188 U.S. 691, 47 L.Ed. 657.

25 C.J. p 258 note 60.

79.5 U.S.—Daugherty v. Hornsby, C. C.A.Ga., 151 F.2d 799.

80. Colo.—Stobie v. Barger, 268 P.2d 409, 129 Colo. 222.

Conn.—Taft v. Lord, 103 A. 644, 92 Conn. 533, L.R.A.1918E 545.

Fla.—Kuney v. State, 102 So. 547, 88 Fla. 354.

81. Conn.—Taft v. Lord, 103 A. 644, 92 Conn. 539, L.R.A.1918E 545.

Mo.—Keeton v. Gaiser, 55 S.W.2d 302, 331 Mo. 499.

Corpus Juris cited in Ex parte Ellis, 9 S.W.2d 544, 545, 223 Mo. App. 125.

Neb.—Ex parte Finch, 182 N.W. 565, 106 Neb. 45.

Pa.—Commonwealth v. Matola, 74 Pa. Dist. & Co. 515, 31 Wash. Co. 50.

Tenn.—State ex rel. Sandford v. Cate, 285 S.W.2d 343, 199 Tenn. 195.

82. U.S.—U. S. ex rel. Miller v. Walsh, C.A.III., 182 F.2d 264.

Ex parte Morgan, D.C.Cal., 78 F. Supp. 756, affirmed, C.A., Morgan v. Horrall, 175 F.2d 404, certiorari denied 70 S.Ct. 76, 338 U.S. 827, 94 L.Ed. 503.

Mo.—*Corpus Juris cited in Ex parte Ellis*, 9 S.W.2d 544, 545, 223 Mo. App. 125.

N.C.—In re Malicord, 191 S.E. 730, 211 N.C. 684.

Okl.—Ex parte George, 73 P.2d 471, 63 Okl.Cr. 115.

Tex.—*Corpus Juris quoted in Ex parte Loos*, 81 S.W.2d 527, 528, 128 Tex.Cr. 453.

25 C.J. p 258 note 63.

83. Ala.—Ex parte Forbes, 85 So. 590, 17 Ala.App. 405, certiorari denied 85 So. 921, 204 Ala. 698.

Neb.—Ex parte Finch, 182 N.W. 565, 106 Neb. 45.

Tex.—*Corpus Juris quoted in Ex parte Loos*, 81 S.W.2d 527, 528, 128 Tex.Cr. 453.

W.Va.—Getzendanner v. Hiltner, 185 S.E. 694, 117 W.Va. 418—Whited v. Phillips, 126 S.E. 916, 98 W.Va. 204, 40 A.L.R. 83—State v. Doepp, 124 S.E. 667, 97 W.Va. 203.

25 C.J. p 258 note 64.

Necessity of overt act; continuing crime

(1) "There must be some overt act by the accused in the state where the crime is alleged to have been committed, which is a part of the crime, if ultimately consummated elsewhere; unless such overt act has been committed, the accused is not a fugitive from justice."

W.Va.—State v. Doepp, 124 S.E. 667, 97 W.Va. 203.

(2) Where, as in the case of non-support of children, the crime charged is continuing in nature and founded on neglect of duty, the absence of overt acts while in the demanding state is irrelevant.

Mont.—Ex parte Heath, 287 P. 636, 87 Mont. 370.

N.Y.—People ex rel. Gottschalk v. Brown, 143 N.E. 653, 237 N.Y. 483, 32 A.L.R. 1164.

Tex.—Ex parte Beeth, 154 S.W.2d 484, 142 Tex.Cr. 511.

(3) Parent deserting minor child and going to another state intending to abandon it, where he completes crime by withholding support, is extraditable.

Mo.—Keeton v. Gaiser, 55 S.W.2d 302, 331 Mo. 499.

84. Conn.—Taft v. Lord, 103 A. 644, 92 Conn. 539, L.R.A.1918E 545.

85. U.S.—*Corpus Juris Secundum cited in Donnell v. U. S.*, C.A.Tex., 229 F.2d 560, 565—Brewer v. Goff, C.C.A.Okl., 138 F.2d 710—Glass v. Becker, C.C.A.Cal., 25 F.2d 929.

Cal.—Ex parte Murdock, 55 P.2d 843, 5 C.2d 644.

D.C.—Reed v. Colpoys, 99 F.2d 396, 69 App.D.C. 163, certiorari denied 59 S.Ct. 97, 305 U.S. 598, 83 L.Ed. 379—Barrett v. Bigger, 17 F.2d 669, 57 App.D.C. 81, certiorari denied 47 S.Ct. 765, 274 U.S. 752, 71 L.Ed. 1332.

Fla.—Chase v. State, 113 So. 103, 93 Fla. 963, 54 A.L.R. 271.

Ill.—People ex rel. Ross v. Becker, 47 N.E.2d 475, 382 Ill. 404—People ex rel. McFadden v. Meyering, 193 N.E. 475, 358 Ill. 442—People ex rel. Parkinson v. Martin, 191 N.E. 275, 357 Ill. 109—People v. Baldwin, 174 N.E. 51, 53, 341 Ill. 604.

Kan.—Justice v. Lockett, 259 P.2d 152, 175 Kan. 25—Thompson v. Nye, 257 P.2d 937, 174 Kan. 750—Ohrzada v. Turner, 190 P.2d 413.

164 Kan. 581—*Corpus Juris cited in Ex parte Martin*, 52 P.2d 1196, 1197, 142 Kan. 907.

La.—State v. Stanton, 24 So.2d 819, 209 La. 457.

Mo.—Keeton v. Gaiser, 55 S.W.2d 302, 331 Mo. 499—State ex rel.

Gaines v. Westhues, 2 S.W.2d 612, 318 Mo. 928—Cockburn v. Willman, 257 S.W. 458, 301 Mo. 575.

Neb.—Colling v. State, 217 N.W. 87, 116 Neb. 308.

N.H.—Pearson v. Campbell, 91 A.2d 453, 97 N.H. 444.

N.Y.—People v. Stilwell, 155 N.E. 98, 244 N.Y. 196.

People ex rel. Whitfield v. Enright, 191 N.Y.S. 491, 117 Misc. 448, 39 N.Y.Cr. 377.

Okl.—Ex parte Jackson, 262 P.2d 722, 97 Okl.Cr. 289.

Pa.—Commonwealth ex rel. Hunt v. Groman, 82 A.2d 278, 169 Pa.Super. 68.

Tex.—Ex parte Robertson, 210 S.W. 2d 593, 151 Tex.Cr. 635—Ex parte Morris, 101 S.W.2d 259, 131 Tex.Cr. 596, certiorari denied Morris v. Davis, 57 S.Ct. 930, 301 U.S. 700, 81 L.Ed. 1355.

Wash.—Ex parte Nerreter, 183 P.2d 799, 28 Wash.2d 520—Ex parte Anthony, 87 P.2d 302, 198 Wash. 106—Ex parte Roberts, 56 P.2d 703, 186 Wash. 13.

25 C.J. p 258 note 67.

Fear of violence

That one charged with a crime fled to another state from fear of mob violence does not alter the fact that he is a fugitive from justice.

U.S.—Glass v. Becker, C.C.A.Cal., 25 F.2d 929.

Ill.—People ex rel. Heard v. Babb, 107 N.E.2d 740, 412 Ill. 507.

the person charged should have left the state in which the crime is alleged to have been committed in the belief that he had violated the criminal law and for the purpose of avoiding a prosecution anticipated or begun,⁸⁶ although there is some authority to the effect that the formation of a criminal intent before departure may be required,⁸⁷ and that consciousness of guilt may be a necessary element in proving accused to be a fugitive in a class of crimes which are known to a single locality and not general, or even usual.⁸⁸ A person may be a fugitive even though he left the state on legitimate business⁸⁹ or was returning to his home in another

state,⁹⁰ or was induced to come to the asylum state by fraud.⁹¹

Manner of flight. The mode or manner of a person's departure from the state generally does not affect his status as a fugitive from justice;⁹² so the fact that a person's departure was involuntary or under legal compulsion will not, under most authorities, preclude his extradition as a fugitive from justice;⁹³ and, while it has been said that a person leaving a state in the custody of an officer is not a fugitive,⁹⁴ this statement has been criticized and rejected.^{94.5} A convicted prisoner en route to

86. U.S.—Hogan v. O'Neill, N.J., 41 S.Ct. 222, 255 U.S. 52, 65 L.Ed. 497.

Ex parte Morgan, D.C.Cal., 78 F. Supp. 756, affirmed, C.A., Morgan v. Horrall, 175 F.2d 404, certiorari denied 70 S.Ct. 76, 338 U.S. 827, 94 L.Ed. 503.

Cal.—Ex parte Murdock, 55 P.2d 843, 5 C.2d 644.

Conn.—Corpus Juris Secundum cited in Moulthrope v. Matus, 93 A.2d 149, 151, 139 Conn. 272, certiorari denied 73 S.Ct. 785, 345 U.S. 926, 97 L.Ed. 1357.

D.C.—Lee Won Sing v. Cottone, 123 F.2d 169, 77 App.D.C. 374.

Ill.—People ex rel. McFadden v. Meyerling, 193 N.E. 475, 358 Ill. 442—People ex rel. Parkinson v. Martin, 191 N.E. 275, 357 Ill. 109—People ex rel. Wortman v. Munie, 188 N.E. 545, 354 Ill. 490.

Kan.—Ex parte Martin, 52 P.2d 1196, 142 Kan. 907.

Minn.—State v. Wall, 244 N.W. 811, 187 Minn. 246, 85 A.L.R. 114.

Neb.—Application of Gorgen, 70 N.W. 2d 514, 160 Neb. 457—Ex parte Finch, 182 N.W. 565, 106 Neb. 45.

N.Y.—People ex rel. Gottschalk v. Brown, 143 N.E. 653, 237 N.Y. 483, 32 A.L.R. 1164.

People ex rel. Hutchings v. Mallon, 214 N.Y.S. 211, 126 Misc. 591, reversed on other grounds 218 N.Y.S. 432, 218 App.Div. 461, affirmed 157 N.E. 842, 245 N.Y. 521.

Okl.—Corpus Juris cited in Ex parte Jackson, 262 P.2d 722, 724, 97 Okl. Cr. 289—Corpus Juris cited in Ex parte Hamilton, 273 P. 286, 287, 41 Okl. Cr. 322—Ex parte Baker, 244 P. 459, 33 Okl. Cr. 413—In re Gundy, 236 P. 440, 30 Okl. Cr. 390.

Pa.—Commonwealth v. Matola, 74 Pa. Dist. & Co. 515, 31 Wash. Co. 50. Commonwealth ex rel. Reynolds v. Fluck, 57 Montg. Co. 317.

Tex.—Ex parte Carroll, 216 S.W.2d 580, 152 Tex. Cr. 581—Ex parte Robertson, 210 S.W.2d 593, 151 Tex. Cr. 635—Ex parte Morris, 101 S.W.2d 259, 131 Tex. Cr. 596, certiorari denied Morris v. Davis, 57 S.Ct. 930, 301 U.S. 700, 81 L.Ed. 1355.

Utah.—Moreaux v. Ferrin, 100 P.2d 560, 98 Utah 450. 25 C.J. p 258 note 66.

87. Mo.—Keeton v. Gaiser, 55 S.W. 2d 302, 331 Mo. 499—Schein v. Galivan, 10 S.W.2d 521, 321 Mo. 268.

88. N.Y.—People v. Higgins, 178 N.Y.S. 728, 109 Misc. 328. 25 C.J. p 258 note 68.

89. U.S.—In re White, N.Y., 55 F. 54, 5 C.C.A. 29.

Iowa.—Leonard v. Zweifel, 151 N.W. 1054, 171 Iowa 522.

90. U.S.—In re Roberts, D.C.Ga., 24 F. 132, affirmed 6 S.Ct. 291, 116 U.S. 80, 29 L.Ed. 544. 25 C.J. p 259 note 70.

91. U.S.—Ex parte Brown, D.C.N.Y., 28 F. 653.

92. Cal.—Corpus Juris Secundum quoted in Application of Fedder, 299 P.2d 881, 885, 143 C.A.2d 103. Ga.—Brown v. Lowry, 195 S.E. 759, 185 Ga. 539.

Ill.—People ex rel. McFadden v. Meyerling, 193 N.E. 475, 358 Ill. 442.

Minn.—State v. Wall, 244 N.W. 811, 187 Minn. 246, 85 A.L.R. 114.

Nev.—Application of Robinson, 322 P.2d 304.

Okl.—Corpus Juris Secundum quoted in Ex parte Langley, Cr., 325 P. 2d 1094, 1105—Corpus Juris Secundum quoted in Ex parte Jackson, 262 P.2d 722, 97 Okl. Cr. 289.

Pa.—Commonwealth ex rel. Huey v. Dye, 96 A.2d 129, 373 Pa. 508.

Tex.—Corpus Juris Secundum quoted in Ex parte Gourley, 204 S.W.2d 993, 994, 151 Tex. Cr. 25—Ex parte Morris, 101 S.W.2d 259, 131 Tex. Cr. 596, certiorari denied Morris v. Davis, 57 S.Ct. 930, 301 U.S. 700, 81 L.Ed. 1355.

Voluntary or involuntary departure of paroled prisoner as affecting status as fugitive see infra subdivision b (2) of this section.

93. U.S.—U. S. ex rel. Moulthrope v. Matus, C.A.Conn., 218 F.2d 466. U. S. ex rel. Moulthrope v. Matus, D.C.Conn., 127 F.Supp. 282.

Ga.—Brown v. Lowry, 195 S.E. 759, 185 Ga. 539.

Nev.—Application of Robinson, 322 P.2d 304.

N.Y.—People ex rel. Hutchings v. Mallon, 218 N.Y.S. 432, 218 App. Div. 461, affirmed 157 N.E. 842, 245 N.Y. 521.

Okl.—Corpus Juris Secundum quoted in Ex parte Langley, Cr., 325 P.2d 1094, 1105—Corpus Juris Secundum quoted in Ex parte Jackson, 262 P. 2d 722, 724, 97 Okl. Cr. 289.

Tex.—Corpus Juris Secundum quoted in Ex parte Gourley, 204 S.W.2d 993, 994, 151 Tex. Cr. 25.

Prisoner removed by federal authorities from demanding state is subject to extradition from asylum state as a fugitive from justice.

U.S.—Spencer v. Hamilton, C.C.A. Kan., 12 F.2d 976.

Cal.—Corpus Juris Secundum quoted in Application of Fedder, 299 P.2d 881, 885, 143 C.A.2d 103.

Ga.—Scheinfain v. Aldredge, 12 S.E. 2d 868, 191 Ga. 479.

Ill.—People ex rel. McFadden v. Meyerling, 193 N.E. 475, 358 Ill. 442.

Kan.—Thompson v. Nye, 257 P.2d 937, 174 Kan. 750—Ohrzada v. Turner, 190 P.2d 413, 164 Kan. 531—Perry v. Gwartney, 178 P.2d 185, 162 Kan. 607—Ex parte Martin, 52 P.2d 1196, 142 Kan. 907.

Minn.—State v. Wall, 244 N.W. 811, 187 Minn. 246, 85 A.L.R. 114.

N.J.—Ex parte Cohen, 146 A. 423, 104 N.J. Eq. 560.

N.Y.—People v. Benham, 128 N.Y.S. 610, 71 Misc. 345.

Pa.—Commonwealth v. Palmer, 77 Pa. Dist. & Co. 13, 10 Law.L.J. 17.

Tex.—Corpus Juris Secundum quoted in Ex parte Gourley, 204 S.W.2d 993, 994, 151 Tex. Cr. 25.

Wash.—Ex parte Anthony, 87 P.2d 302, 198 Wash. 106.

94. Cal.—In re Whittington, 167 P. 404, 34 C.A. 344.

94.5 Cal.—Application of Fedder, 299 P.2d 881, 143 C.A.2d 103.

Nev.—Application of Robinson, 322 P.2d 304.

the penitentiary in custody of an officer does not become a fugitive from justice in another state through which it is necessary to transport him, so as to require extradition proceedings in such state.^{94.10}

Consent or knowledge of authorities or complainant. The fact that the alleged fugitive from justice left the state with the consent or knowledge of the state authorities⁹⁵ or of complainant⁹⁶ does not affect his status as a fugitive from justice, where he refuses to return or there is a second indictment or complaint.

One who is not amenable to further punishment in the demanding state cannot be extradited as a fugitive from justice.⁹⁷

(2) Escaped or Paroled Prisoners

An indicted or convicted prisoner may be extradited as a fugitive from justice after his escape, as may a paroled prisoner who violates his parole or whose parole has been revoked.

An indicted⁹⁸ or convicted⁹⁹ prisoner who escapes may be extradited as a fugitive from justice; and the same is true as to a paroled prisoner¹ who

94.10 Wash.—In re Maney, 55 P. 930, 20 Wash. 509.

95. U.S.—Bassing v. Cady, R.I., 28 S.Ct. 392, 208 U.S. 386, 52 L.Ed. 540, 13 Ann.Cas. 905.

S.D.—Grogan v. Welch, 227 N.W. 74, 55 S.D. 613, 67 A.L.R. 1474.

Tex.—Ex parte Morris, 101 S.W.2d 259, 131 Tex.Cr. 596, certiorari denied Morris v. Davis, 57 S.Ct. 930, 301 U.S. 700, 81 L.Ed. 1355—*Corpus Juris* cited in Ex parte Crane, 29 S.W.2d 357, 359, 115 Tex.Cr. 168.

Wash.—*Corpus Juris* cited in Ex parte Roberts, 56 P.2d 703, 706, 186 Wash. 13.

Consent or knowledge as affecting right to extradite paroled prisoner see *infra* subdivision b (2) of this section.

96. Tex.—Ex parte Pinkus, 25 S.W.2d 334, 114 Tex.Cr. 326.

Wash.—Ex parte Roberts, 56 P.2d 703, 186 Wash. 13.

25 C.J. p 259 note 79.

Contrary dictum in:

S.D.—In re Tod, 81 N.W. 637, 12 S.D. 386, 76 Am.S.R. 616, 47 L.R.A. 566, expressly disapproved and overruled in Grogan v. Welch, 227 N.W. 74, 55 S.D. 613, 67 A.L.R. 1474.

97. Mo.—Ex parte Wernhauser, 216 S.W. 548, 202 Mo.App. 245.

25 C.J. p 259 note 82.

Matters to be considered on determination as to rendition see *infra* § 15.

Commutation of sentence

Where a prisoner's sentence for a particular crime has been commuted in order to permit his release to federal authorities, he cannot be held to be a fugitive from justice with respect to the crime and sentence in question.

Kan.—Jones v. Morrow, 121 P.2d 219, 154 Kan. 588.

98. D.C.—Howgate v. U. S., 7 App. D.C. 217, 247.

Kan.—*Corpus Juris Secundum* quoted in Davis v. Rhyne, 312 P.2d 626, 630, 181 Kan. 443—McTigue v. Rhyne, 298 P.2d 228, 180 Kan. 8—*Corpus Juris Secundum* quoted in Powell v. Turner, 207 P.2d 492, 496, 167 Kan. 524, certiorari denied 70 S.Ct. 41, 338 U.S. 835, 94 L.Ed.

509—Tines v. Hudspeth, 190 P.2d 867, 164 Kan. 471.

Tex.—*Corpus Juris Secundum* quoted in Ex parte Gourley, 204 S.W.2d 993, 994, 151 Tex.Cr. 25.

Release on bail

Petitioner, who left foreign state when released from custody under bail, was nevertheless a fugitive from justice who could be extradited. Ala.—Kay v. State, 37 So.2d 525, 34 Ala.App. 8, certiorari denied 37 So. 2d 529, 251 Ala. 419.

Agreement for dismissal of charges

Relator was still a fugitive from justice and subject to be extradited to state where information had been filed charging him with forgery, issuing checks without funds, and issuing checks without sufficient funds, even though relator had performed all acts required of him under agreement with county attorney for dismissal of charges, where record showed that charges had never actually been dismissed.

S.D.—Ex parte Williams, 21 N.W.2d 593, 71 S.D. 95.

99. Cal.—Ex parte Murdock, 55 P.2d 843, 5 C.2d 644.

Kan.—*Corpus Juris Secundum* quoted in Davis v. Rhyne, 312 P.2d 626, 630, 181 Kan. 443—McTigue v. Rhyne, 298 P.2d 228, 180 Kan. 8—Hanson v. Nye, 270 P.2d 790, 176 Kan. 373—*Corpus Juris Secundum* quoted in Powell v. Turner, 207 P.2d 492, 496, 167 Kan. 524, certiorari denied 70 S.Ct. 41, 338 U.S. 835, 94 L.Ed. 509.

Ky.—Gray v. Connors, 147 S.W.2d 384, 285 Ky. 229.

Miss.—*Corpus Juris Secundum* cited in Loper v. Dees, 49 So.2d 718, 722, 210 Miss. 402.

Pa.—Commonwealth ex rel. Huey v. Dye, 96 A.2d 129, 373 Pa. 508.

Corpus Juris Secundum cited in Commonwealth ex rel. Rushkowski v. Burke, 89 A.2d 899, 902, 171 Pa. Super. 1, certiorari denied Rushkowski v. Burke, 73 S.Ct. 730, 345 U.S. 919, 97 L.Ed. 1352, rehearing denied 73 S.Ct. 798, 345 U.S. 937, 97 L.Ed. 1364, rehearing denied 73 S.Ct. 942, 345 U.S. 961, 97 L.Ed. 2d 1381—Commonwealth ex rel.

Bucksburg v. Good, 58 A.2d 842, 162 Pa.Super. 557—Commonwealth ex rel. Davis v. Dye, 53 A.2d 750, 161 Pa.Super. 74.

Tex.—*Corpus Juris Secundum* quoted in Ex parte Gourley, 204 S.W.2d 993, 994, 151 Tex.Cr. 25.

25 C.J. p 259 note 73.

1. U.S.—Brewer v. Goff, C.C.A.Okl., 138 F.2d 710.

Collins v. Golden, D.C.Neb., 95 F. Supp. 251.

Kan.—*Corpus Juris Secundum* quoted in Davis v. Rhyne, 312 P.2d 626, 630, 181 Kan. 443—McTigue v. Rhyne, 298 P.2d 228, 180 Kan. 8—*Corpus Juris Secundum* quoted in Powell v. Turner, 207 P.2d 492, 496, 167 Kan. 524, certiorari denied 70 S.Ct. 41, 338 U.S. 835, 94 L.Ed. 509.

Pa.—*Corpus Juris Secundum* cited in Commonwealth ex rel. Rushkowski v. Burke, 89 A.2d 899, 902, 171 Pa. Super. 1, certiorari denied 73 S.Ct. 730, 345 U.S. 919, 97 L.Ed. 1352, rehearing denied 73 S.Ct. 798, 345 U.S. 937, 97 L.Ed. 1364, and 73 S.Ct. 942, 345 U.S. 961, 97 L.Ed. 1381.

S.D.—Ex parte Colcord, 207 N.W. 213, 49 S.D. 416.

Tex.—*Corpus Juris Secundum* quoted in Ex parte Gourley, 204 S.W.2d 993, 994, 151 Tex.Cr. 25.

Right to extradite not waived

Where answers to letters from presiding justice of district court of appeal to Illinois, Louisiana, and federal penitentiary officials indicated that parole, granted habeas corpus petitioner while serving term in Illinois penitentiary, was canceled by Illinois officials in 1930 and that they never knew of petitioner's subsequent whereabouts until his imprisonment on conviction of felony in California in 1945 and they filed no detainers or orders to hold petitioner while he was serving terms in Louisiana and federal prisons, Illinois authorities did not waive right to extradite petitioner from California after such parole would otherwise have expired.

Cal.—Ex parte Reed, 181 P.2d 662, 80 C.A.2d 330.

violates his parole or whose parole has been revoked.² This rule applies notwithstanding the paroled prisoner's entry into the asylum state, prior to the violation or revocation of his parole, was with the

consent or knowledge of the authorities of the demanding state,³ and irrespective of whether his departure from the demanding state or his entry into the asylum state was voluntary or involuntary.⁴

Parole granted by asylum state

When a convict is granted a parole by the governor of the asylum state, the governor may honor a requisition to deliver the paroled convict to the authorities of a demanding state. *Mo.—Mattes v. Taylor*, 153 S.W.2d 833, 348 Mo. 434.

2. U.S.—*Brewer v. Goff*, C.C.A.Okla., 138 F.2d 710.

Corpus Juris Secundum cited in *Ex parte Morgan*, D.C.Cal., 78 F. Supp. 756, 761, affirmed, C.A., *Morgan v. Horrall*, 175 F.2d 404, certiorari denied 70 S.Ct. 76, 338 U.S. 827, 94 L.Ed. 503.

Cal.—*In re Marzec*, 154 P.2d 873, 25 C.2d 794—*Ex parte Tenner*, 128 P.2d 338, 20 C.2d 670.

Ex parte Reed, 181 P.2d 662, 80 C.A.2d 330—*Ex parte McBride*, 281 P. 651, 101 C.A. 251.

Colo.—**Corpus Juris Secundum cited in** *Self v. People*, 297 P.2d 887, 889, 133 Colo. 524—*Marsolais v. De Angelis*, 215 P.2d 315, 121 Colo. 299.

Conn.—*Moulthrop v. Matus*, 93 A.2d 149, 139 Conn. 272, certiorari denied 73 S.Ct. 785, 345 U.S. 926, 97 L.Ed. 1357—*Cappola v. Platt*, 192 A. 156, 123 Conn. 38, certiorari denied 58 S.Ct. 47, 302 U.S. 726, 82 L.Ed. 560.

D.C.—*Reed v. Colpoys*, 99 F.2d 396, 69 App.D.C. 163, certiorari denied 59 S.Ct. 97, 305 U.S. 598, 83 L.Ed. 379.

Ga.—*Mathews v. Foster*, 75 S.E.2d 427, 209 Ga. 699—*Deering v. Mount*, 22 S.E.2d 828, 194 Ga. 833—*Beavers v. Lowry*, 198 S.E. 692, 186 Ga. 537—*Brown v. Lowry*, 195 S.E. 759, 185 Ga. 539.

Ill.—*People ex rel. Holmes v. Babb*, 111 N.E.2d 316, 414 Ill. 490—*People ex rel. Barrett v. Crowe*, 55 N.E.2d 84, 387 Ill. 53—*People ex rel. Ross v. Becker*, 47 N.E.2d 475, 382 Ill. 404—*People ex rel. Westbrook v. O'Neill*, 38 N.E.2d 174, 378 Ill. 324—*People ex rel. Mark v. Toman*, 199 N.E. 124, 362 Ill. 232, 102 A.L.R. 379—*People ex rel. Lyman v. Smith*, 186 N.E. 159, 352 Ill. 496.

Kan.—**Corpus Juris Secundum quoted in** *Davis v. Rhyne*, 312 P.2d 626, 630, 181 Kan. 443—*McTigue v. Rhyne*, 298 P.2d 228, 180 Kan. 8—**Corpus Juris Secundum quoted in** *Powell v. Turner*, 207 P.2d 492, 496, 167 Kan. 524, certiorari denied 70 S.Ct. 41, 338 U.S. 835, 94 L.Ed. 509—*Ohrzada v. Turner*, 190 P.2d 413, 164 Kan. 581.

Ky.—*Gray v. Connors*, 147 S.W.2d 384, 285 Ky. 229.

Minn.—*State ex rel. Stephenson v. Ryan*, 50 N.W.2d 259, 235 Minn. 161.

Miss.—*Deas v. Payne*, 82 So.2d 894, 225 Miss. 168.

Mo.—*Ex parte Kabrich*, 120 S.W.2d 42, 343 Mo. 196.

N.M.—*Ex parte Nabors*, 267 P. 58, 33 N.M. 324.

N.Y.—*People ex rel. Samet v. Kennedy*, 140 N.Y.S.2d 466, 285 App. Div. 1116—*People ex rel. Pahl v. Hagerty*, 28 N.Y.S.2d 186, 262 App. Div. 45, affirmed 36 N.E.2d 689—*People ex rel. Hutchings v. Mallon*, 218 N.Y.S. 432, 218 App.Div. 461, affirmed 157 N.E. 842, 245 N.Y. 521.

N.D.—*Ex parte Amundson*, 20 N.W.2d 340, 74 N.D. 134.

Okla.—*Ex parte Langley, Cr.*, 325 P.2d 1094—*Ex parte Ayers*, 213 P.2d 297, 90 Okl.Cr. 255—*Ex parte Burnett*, 144 P.2d 126, 78 Okl.Cr. 93—*Ex parte Foster*, 61 P.2d 37, 60 Okl.Cr. 50—*Ex parte Hamilton*, 273 P. 286, 41 Okl.Cr. 322.

S.D.—*Ex parte Colcord*, 207 N.W. 213, 49 S.D. 416.

Tenn.—*State ex rel. Saunders v. Robinson*, 228 S.W.2d 75, 190 Tenn. 101.

Tex.—*Ex parte Siemon, Cr.*, 319 S.W.2d 716—*Ex parte Brower*, 218 S.W.2d 463, 153 Tex.Cr. 175—**Corpus Juris Secundum quoted in** *Ex parte Gourley*, 204 S.W.2d 993, 994, 151 Tex.Cr. 25—*Ex parte Garvey*, 112 S.W.2d 747, 133 Tex.Cr. 560.

Vt.—*Ex parte Gordon*, 165 A. 905, 105 Vt. 277.

25 C.J. p 259 note 74.

Fleeing after imprisonment would have ended

One who leaves the state after his parole has been revoked and his rearrest ordered may be extradited as a fugitive from justice, although he does not flee to the asylum state until his term of imprisonment would have ended.

Tex.—*Ex parte Carroll*, 217 S.W. 382, 86 Tex.Cr. 301, 8 A.L.R. 901.

3. Cal.—*Ex parte Tenner*, 128 P.2d 338, 20 C.2d 670.

Application of *Daily*, App., 341 P.2d 364—*Ex parte McBride*, 281 P. 651, 101 C.A. 251.

Conn.—*Moulthrop v. Matus*, 93 A.2d 149, 139 Conn. 272, certiorari denied 73 S.Ct. 785, 345 U.S. 926, 97 L.Ed. 1357—*Cappola v. Platt*, 192 A. 156, 123 Conn. 38, certiorari denied 58 S.Ct. 47, 302 U.S. 726, 82 L.Ed. 560—*Von Walden v. Geddes*, 135 A. 396, 105 Conn. 374.

D.C.—*Reed v. Colpoys*, 99 F.2d 396, 69 App.D.C. 163, certiorari denied 59 S.Ct. 97, 305 U.S. 598, 83 L.Ed. 379.

Ga.—*Taylor v. Foster*, 52 S.E.2d 314, 205 Ga. 36—*Beavers v. Lowry*, 198

S.E. 692, 186 Ga. 537—*Brown v. Lowry*, 195 S.E. 759, 185 Ga. 539.

Ill.—*People ex rel. Ross v. Becker*, 47 N.E.2d 475, 382 Ill. 404—*People ex rel. Westbrook v. O'Neill*, 38 N.E.2d 174, 378 Ill. 324—*People ex rel. Lyman v. Smith*, 186 N.E. 159, 352 Ill. 496.

Kan.—**Corpus Juris Secundum quoted in** *Davis v. Rhyne*, 312 P.2d 626, 630, 181 Kan. 443—**Corpus Juris Secundum cited in** *McTigue v. Rhyne*, 298 P.2d 228, 180 Kan. 8—**Corpus Juris Secundum quoted in** *Powell v. Turner*, 207 P.2d 492, 496, 167 Kan. 524, certiorari denied 70 S.Ct. 41, 338 U.S. 835, 94 L.Ed. 509.

Mo.—*Ex parte Kabrich*, 120 S.W.2d 42, 343 Mo. 196.

Neb.—*Bartel v. O'Grady*, 292 N.W. 383, 138 Neb. 184.

N.M.—*Ex parte Nabors*, 267 P. 58, 33 N.M. 324.

N.J.—*Ex parte Trignani*, 80 A.2d 371, 13 N.J.Super. 306.

N.Y.—*People ex rel. Pahl v. Hagerty*, 28 N.Y.S.2d 186, 262 App.Div. 45, affirmed 36 N.E.2d 689, 286 N.Y. 645—*People ex rel. Hutchings v. Mallon*, 218 N.Y.S. 432, 218 App.Div. 461, affirmed 157 N.E. 842, 245 N.Y. 521.

Okla.—*Ex parte Langley, Cr.*, 325 P.2d 1094—*Ex parte Foster*, 61 P.2d 37, 60 Okl.Cr. 50—*Ex parte Hamilton*, 273 P. 286, 41 Okl.Cr. 322.

Pa.—*Commonwealth ex rel. Huey v. Dye*, 96 A.2d 129, 373 Pa. 508.

Tex.—**Corpus Juris Secundum quoted in** *Ex parte Gourley*, 204 S.W.2d 993, 994, 151 Tex.Cr. 25—*Ex parte Garvey*, 112 S.W.2d 747, 133 Tex. Cr. 560.

Knowledge or consent of authorities as affecting status as fugitive generally see *supra* subdivision b (1) of this section.

Attempted agreement not to extradite prisoner paroled by another state, unjustified in any way, would be void as against public policy.

Conn.—*Von Walden v. Geddes*, 135 A. 396, 105 Conn. 374.

4. U.S.—*Brewer v. Goff*, C.C.A.Okla., 138 F.2d 710.

Conn.—*Moulthrop v. Matus*, 93 A.2d 149, 139 Conn. 272, certiorari denied 73 S.Ct. 785, 345 U.S. 926, 97 L.Ed. 1357.

Ga.—*Taylor v. Foster*, 52 S.E.2d 314, 205 Ga. 36—*Broyles v. Mount*, 30 S.E.2d 48, 197 Ga. 659—*King v. Mount*, 26 S.E.2d 419, 196 Ga. 461—*Brown v. Lowry*, 195 S.E. 759, 185 Ga. 539—*Johnson v. Lowry*, 188 S. E. 23, 183 Ga. 207—*Bartlett v. Lowry*, 182 S.E. 850, 181 Ga. 526.

§ 11. — Persons in Custody in Asylum State

A person held on a criminal charge in the asylum state at the time of the demand need not be surrendered until the judgment of that state is satisfied, but the executive thereof may surrender him if he so chooses. Authorities disagree as to whether a refusal to extradite is justified where accused is in custody on a civil charge.

If at the time of the demand accused is held on a criminal charge in the state where he is a fugitive, he need not be surrendered until after the judgment

of that state is satisfied.⁵ The executive authority of the asylum state may withhold a rendition request until the fugitive has completed a prison sentence imposed by a court of the asylum state,^{5,5} but this is a matter of executive discretion and not a personal right of the fugitive.^{5,10} However, while there is some authority to the contrary,⁶ it is usually held that the executive of the asylum state may waive the right of that state to retain the prisoner, and may surrender him to the demanding state,⁷

Kan.—*Corpus Juris Secundum* quoted in *Davis v. Rhyne*, 312 P.2d 626, 630, 181 Kan. 443—*Corpus Juris Secundum* cited in *McTigue v. Rhyne*, 298 P.2d 228, 230, 180 Kan. 8—*Corpus Juris Secundum* quoted in *Powell v. Turner*, 207 P.2d 492, 496, 167 Kan. 524, certiorari denied 70 S.Ct. 41, 338 U.S. 835, 94 L.Ed. 509.

N.J.—Ex parte *Cohen*, 146 A. 423, 104 N.J.Eq. 560.

N.Y.—People ex rel. *Hutchings v. Mallon*, 218 N.Y.S. 432, 218 App. Div. 461, affirmed 157 N.E. 842, 245 N.Y. 521.

Okl.—Ex parte *Langley, Cr.*, 325 P. 2d 1094.

Tex.—*Corpus Juris Secundum* quoted in *Ex parte Gourley*, 204 S.W.2d 993, 994, 151 Tex.Cr. 25.

Manner or mode of departure as affecting status as fugitive generally see supra subdivision b (1) of this section.

5. Cal.—*Corpus Juris Secundum* quoted in *Application of Kostal*, 312 P.2d 280, 281, 151 C.A.2d 739.

Ill.—People ex rel. *Barrett v. Bartley*, 50 N.E.2d 517, 383 Ill. 437, 147 A.L.R. 935—People v. *Klinger*, 149 N.E. 799, 319 Ill. 275, 42 A.L.R. 581.

Mass.—Ex parte *Graves*, 128 N.E. 867, 236 Mass. 493.

Mo.—State v. *Saunders*, 232 S.W. 973, 288 Mo. 640.

Neb.—State v. *Liakas*, 86 N.W.2d 373, 165 Neb. 503.

Okl.—Ex parte *Middaugh*, 268 P. 321, 40 Okl.Cr. 280.

Pa.—Commonwealth ex rel. *Houser v. Seip*, 124 A.2d 110, 385 Pa. 545. Commonwealth ex rel. *Kamons v. Ashe*, 173 A. 715, 114 Pa.Super. 119.

Tenn.—State ex rel. *Brown v. Grosch*, 152 S.W.2d 239, 177 Tenn. 619.

25 C.J. p 259 note 83.

Support order

A criminal prosecution was not "still pending" against defendant sought to be extradited to another state for nonsupport of his children within statute authorizing governor of asylum state to surrender a person on demand of executive authority of demanding state if a criminal prosecution has been instituted and

is "still pending" against such person, where defendant pleaded guilty to charge of nonsupport of his minor children and was placed on probation for five years on certain conditions, since court of asylum state must presume that defendant will not violate terms of his probation. Ohio.—Ex parte *Bell*, Com.Pl., 75 N. E.2d 186.

Right not personal to fugitive

The right of the governor of an asylum state to decline to honor a demand for extradition is the right of the state, not based on the personal right of the fugitive.

Ill.—People v. *Klinger*, 149 N.E. 799, 319 Ill. 275, 42 A.L.R. 581.

5.5 N.H.—*Koch v. O'Brien*, 131 A.2d 63, 101 N.H. 11.

5.10 N.H.—*Koch v. O'Brien*, supra.

6. Tex.—Ex parte *McDaniel*, Civ. App., 173 S.W. 1018.

Ex parte *Hobbs*, 22 S.W. 1035, 1037, 32 Tex.Cr. 312, 40 Am.S.R. 782.

Under the Oregon statute, if the demanded person is in custody on a judgment of conviction of crime, he cannot be delivered up until he is legally discharged therefrom.

Or.—*Carpenter v. Lord*, 171 P. 577, 88 Or. 128, L.R.A.1918D 674.

25 C.J. p 259 note 89.

7. Cal.—*Corpus Juris Secundum* quoted in *Application of Kostal*, 312 P.2d 280, 281, 151 C.A.2d 739.

Ill.—People ex rel. *Barrett v. Bartley*, 50 N.E.2d 517, 383 Ill. 437, 147 A.L.R. 935—People v. *Klinger*, 149 N.E. 799, 319 Ill. 275, 42 A.L.R. 581.

Mo.—*Hansen v. Edwards*, 240 S.W. 489, 210 Mo.App. 35.

Neb.—State v. *Liakas*, 86 N.W.2d 373, 165 Neb. 502.

N.Y.—People ex rel. *Seller v. Warden of City Prison*, 102 N.Y.S.2d 969, 199 Misc. 570.

Ohio.—Ex parte *Bell*, Com.Pl., 75 N. E.2d 186.

Pa.—Commonwealth ex rel. *Houser v. Seip*, 124 A.2d 110, 385 Pa. 545. Commonwealth ex rel. *Accobacco v. Burke*, 60 A.2d 426, 162 Pa. Super. 592—Commonwealth ex rel. *Kamons v. Ashe*, 173 A. 715, 114 Pa. Super. 119.

Surrender of accused as not precluding subsequent extradition to asylum state see *infra* § 21.

Executive agreements

(1) Governor of New Jersey has right to enter into agreement with governor of New York for extradition of prisoners while they are serving prison sentences in New Jersey.

N.J.—*Rau v. McCorkle*, 131 A.2d 895, 45 N.J.Super. 191, affirmed 135 A.2d 224, 47 N.J.Super. 26.

(2) The fact that an agreement of extradition was not accurate in its recital as to status of prisoners' prosecution in the state was entirely immaterial in view of fact that such references were merely descriptive, and not conditional, and prisoners were in nowise prejudiced thereby. N.J.—*Rau v. McCorkle*, 135 A.2d 224, 47 N.J.Super. 36.

Conviction in federal court

(1) Fugitive from Illinois could be extradited, in absence of objection by federal authorities, even though he had been convicted of a felony in federal district court in Texas and had given notice of appeal.

Tex.—Ex parte *Estep*, 276 S.W.2d 284, 161 Tex.Cr. 247, followed in 276 S.W.2d 285.

(2) Fugitive from Georgia could be extradited, in absence of objection by federal authorities, even though he had been convicted in federal district court in Texas subsequent to indictment returned against him in Georgia and was on federal probation.

Tex.—Ex parte *Hale, Cr.*, 320 S.W.2d 362.

Waiver not reviewable by courts

Tenn.—State ex rel. *Brown v. Grosch*, 152 S.W.2d 239, 177 Tenn. 619.

In Massachusetts

(1) It has been held that the governor alone has no authority, without exercising his powers of pardon or commutation of sentence, to surrender a fugitive on whom a sentence of a Massachusetts court is being executed in the state prison, such action being deemed an interference with the judicial branch of the government.

before⁸ or after⁹ the fugitive's arrest, on his acquittal,¹⁰ or after his conviction and while he is still undergoing, or subject to, punishment in the asylum state.¹¹

Even if custody of the prisoner has been obtained by requisition, he may be extradited to another state on the receipt of a requisition from that state.¹²

On civil charge. That accused is already in custody on a civil charge in the state to which he has fled does not, under some authorities, excuse a refusal by the executive of that state to comply with the requisition of the governor of another state;¹³ but other decisions are to a different effect.¹⁴

§ 12. Preliminary Detention

a. In general

Mass.—In re Opinion of the Justices, 89 N.E. 174, 201 Mass. 609, 24 L.R. A., N.S., 799.

(2) However, under a recent statutory enactment, which, at least in so far as it applies to a person not shown to be incarcerated or in the custody of the court, has been held valid, the governor is expressly authorized, in his discretion, to surrender a fugitive on the demand of the executive authority of another state, although a criminal prosecution is then pending against him for violation of the law of Massachusetts.

Mass.—In re Harris, 34 N.E.2d 504, 309 Mass. 180, 135 A.L.R. 969.

8. U.S.—Roberts v. Reilly, Ga., 6 S. Ct. 291, 116 U.S. 80, 29 L.Ed. 544.

Cal.—Corpus Juris Secundum quoted in Application of Kostal, 312 P.2d 280, 281, 151 C.A.2d 739.

9. Cal.—Corpus Juris Secundum quoted in Application of Kostal, 312 P.2d 280, 281, 151 C.A.2d 739.

Kan.—In re Hess, 48 P. 596, 5 Kan. App. 763.

Mass.—In re Murphy, 72 N.E.2d 413, 321 Mass. 206.

25 C.J. p 259 note 85.

Statute not affecting right

The statute providing for surrender of person charged with crime in another state if such person is not held in custody or under bail to answer for any offense against the laws of United States or of the state was intended to protect the right of the state to retain offenders in cases where it was deemed advisable to require them first to answer charges against them in the state without interfering with the discretion of the chief executive to surrender them in appropriate cases to the demanding state.

Tenn.—State ex rel. Brown v. Grosch, 152 S.W.2d 239, 177 Tenn. 619.

A person at liberty under bail or bond in the asylum state may be surrendered to the executive authorities of another state in a proper case.

Mass.—In re Harris, 34 N.E.2d 504, 309 Mass. 180.

Mo.—Hansen v. Edwards, 240 S.W. 489, 210 Mo.App. 35.
25 C.J. p 259 note 91.

10. Cal.—Corpus Juris Secundum quoted in Application of Kostal, 312 P.2d 280, 281, 151 C.A.2d 739.

Miss.—Ex parte Walters, 64 So. 2, 106 Miss. 439.

11. Cal.—Corpus Juris Secundum quoted in Application of Kostal, 312 P.2d 280, 281, 151 C.A.2d 739.

Ga.—House v. Grimes, 105 S.E.2d 745, 214 Ga. 572—Johnson v. Lowry, 188 S.E. 23, 183 Ga. 207—Bartlett v. Lowry, 182 S.E. 850, 181 Ga. 526.
Mo.—Mattes v. Taylor, 153 S.W.2d 833, 348 Mo. 434—State v. Saunders, 232 S.W. 973, 288 Mo. 640.

N.Y.—People ex rel. Tyrian v. Adam, 74 N.Y.S.2d 57.

Pending appeal

N.Y.—People v. Hagan, 69 N.Y.S. 475, 34 Misc. 85.

On suspension of sentence

Where fugitive is at liberty on suspended sentence of asylum state's court, governor, without concurrence of judicial branch, may surrender fugitive on requisition.

Okl.—Ex parte Middaugh, 268 P. 321, 40 Okl.Cr. 280.

Subsequent disposition of prisoner

Where fugitive is under sentence at time of his extradition, he is delivered to demanding state for trial as matter of comity, and it becomes matter of agreement between executives of states, made previously or later, as to what shall afterward be done with prisoner.

Pa.—Commonwealth ex rel. Kamons v. Ashe, 173 A. 715, 114 Pa.Super. 119.

b. Necessity for arrest warrant

c. Effect of illegal preliminary detention on extradition proceedings

d. Period of detention

a. In General

A fugitive from justice may be arrested and detained, on reasonable information that he stands charged with a crime in the courts of another state, pending the institution of extradition proceedings.

At common law and under various statutes, a fugitive from justice, if properly identified,^{14.50} may be arrested and detained on reasonable information that he stands charged with a crime in the courts of another state,^{14.55} pending the arrival of a

12. Ind.—Hackney v. Welsh, 8 N.E. 141, 107 Ind. 253, 57 Am.R. 101.

Tex.—Ex parte Guinn, 284 S.W.2d 721, 162 Tex.Cr. 293—Ex parte Innes, 173 S.W. 231, 77 Tex.Cr. 351, affirmed 36 S.Ct. 290, 240 U.S. 127, 60 L.Ed. 562.

13. Cal.—In re Rosenblat, 51 C. 285.

R.I.—In re Harriott, 25 A. 349, 18 R.I. 12.

Lunacy proceedings instituted in probate court against one who is charged with crime in a sister state will not prevent the executive from issuing his warrant for extradition of a fugitive from justice.

Ohio.—State ex rel. Davey v. Owen, 12 N.E.2d 144, 133 Ohio St. 96, 114 A.L.R. 686.

14. N.J.—In re Troutman, 24 N.J. Law 634.

N.Y.—In re Briscoe, 51 How.Pr. 422.

14.50 Ala.—Snead v. State, 93 So. 48, 18 Ala.App. 437.

Del.—Simpers v. Wilson, 75 A.2d 254, 6 Terry 423.

14.55 Kan.—Powell v. Turner, 207 P.2d 492, 167 Kan. 524, certiorari denied 70 S.Ct. 41, 338 U.S. 835, 94 L.Ed. 509.

Conviction of crime

Statute authorizing preliminary detention of accused was held not limited to cases where accused has been tried and convicted of a felony in another state and fled to the asylum state after conviction, but applies to person who has been charged by warrant or indictment with the commission of a felony in another state.

Ky.—Wilkins v. Bax, 262 S.W.2d 663.

Capias issued outside the state confers no authority to arrest the fugitive.

Ala.—State of Tennessee v. Hamilton, 190 So. 306, 28 Ala.App. 587.

demand from the state from which he fled.¹⁵ Statutes providing for the detention of fugitives have been held to be constitutional,¹⁶ and merely to implement the common law and prescribe the procedure which shall be followed in connection with the arrest, detention, and removal of the fugitive.^{16.5}

The legislature has the power to prescribe a statutory mode of procedure for the preliminary arrest and detention of a fugitive from another state and to affix such conditions thereto as it may deem proper,¹⁷ and where such statutes exist they must be strictly complied with,¹⁸ and the arrest and detention otherwise are illegal.^{18.5} An alleged fugitive has the right not to be imprisoned or dealt with by the states in disregard of the safeguards provided

by the federal Constitution and statutes.¹⁹ Arrest of a fugitive from justice not charged with a crime for which he might be imprisoned for more than a year on a "detainer" telegram is a violation of the Uniform Criminal Extradition Act.^{19.5}

b. Necessity for Arrest Warrant

Although there is authority to the contrary, in some jurisdictions a fugitive from justice from another state may be arrested without a warrant, but in such case he must be taken before a magistrate without unnecessary delay and a proper warrant procured.

In some jurisdictions an officer has no authority to arrest without a warrant a fugitive from justice from another state,²⁰ even on telegraphic or personal request of the officers of the demanding state.^{20.5}

Warrant and indictment

With exemplified copy of indictment from demanding state charging a felony and the warrant issued thereon in his possession, officer of asylum state would be justified in believing that felony had been committed.

Ala.—Snead v. State, 93 So. 48, 18 Ala.App. 437.

Information held sufficient for detention

Kan.—Powell v. Turner, 207 P.2d 492, 167 Kan. 524, certiorari denied 70 S.Ct. 41, 338 U.S. 835, 94 L.Ed. 509.

15. Ala.—Snead v. State, 93 So. 48, 18 Ala.App. 437.

D.C.—Herzog v. Colpoys, 143 F.2d 137, 79 U.S.App.D.C. 81.

Ky.—Wilkins v. Bax, 262 S.W.2d 663.

Miss.—Loper v. Dees, 49 So.2d 718, 210 Miss. 402.

Mo.—State v. Fleming, 227 S.W.2d 106, 240 Mo.App. 1208.

N.Y.—People ex rel. Mumbulo v. Ormsby, 241 N.Y.S. 225, 136 Misc. 637.

Pa.—Commonwealth ex rel. Cohick v. Keeper of County Prison, 85 Pa. Dist. & Co. 394, 3 Lycoming 256.

25 C.J. p 260 notes 95, 98.
Habeas corpus to obtain discharge from preliminary detention see Habeas Corpus § 39.

Pending arrival of issued warrant

Arrest of fugitive and detention until following day when governor's extradition warrant which had been issued two days before such arrest was received were not violative of Uniform Extradition Act.

Kan.—Powell v. Turner, 207 P.2d 492, 167 Kan. 524, certiorari denied 70 S.Ct. 41, 338 U.S. 835, 94 L.Ed. 509.

On warrant of justice of peace

A fugitive from demanding state may be arrested in advance of demand for him by executive of that state on warrant of a justice of

peace of asylum state, issued on affidavit, and, after arrest has been made, it is duty of justice of peace to satisfy himself that there is a probability of fugitive having committed offense charged, and if satisfied of that probability, to commit him.

Del.—Simpers v. Wilson, 75 A.2d 254, 6 Terry 423.

Prima facie case

Under statute providing for arrest of fugitives from other states and for hearing and commitment, it is not required for commitment that a prima facie case be established by competent proof.

Del.—Simpers v. Wilson, supra.

16. U.S.—Burton v. New York Cent. & H. R. R. Co., N.Y., 38 S.Ct. 108, 245 U.S. 315, 62 L.Ed. 314.

N.Y.—People ex rel. Sidran v. Warden of City Prison, 220 N.Y.S. 529, 129 Misc. 327.

Pa.—Commonwealth ex rel. Huey v. Dye, 96 A.2d 129, 373 Pa. 508.
25 C.J. p 260 note 99.

16.5 Ky.—Wilkins v. Bax, 262 S.W. 2d 663.

17. Cal.—In re Rosenblat, 51 C. 285.

18. Cal.—In re Rosenblat, supra.
Conn.—State v. Engle, 162 A. 922, 115 Conn. 638.

Mo.—State v. Fleming, 227 S.W.2d 106, 240 Mo.App. 1208.

N.Y.—People ex rel. Sidran v. Warden of City Prison, 220 N.Y.S. 529, 129 Misc. 327.

Commitment held properly made

N.Y.—People v. Lawson ex rel. Jenkins, 140 N.Y.S.2d 623, 285 App. Div. 1207.

18.5 Ala.—Cunningham v. Baker, 16 So. 68, 104 Ala. 160, 53 Am.S.R. 27.

No lawful custody can be retained of a fugitive from justice which omits any constitutional or statutory requirement.

Mo.—State v. Fleming, 227 S.W.2d 106, 240 Mo.App. 1208.

19. U.S.—U. S. ex rel. McCline v. Meyering, C.C.A.III, 75 F.2d 716.

19.5 U.S.—Picking v. Pennsylvania R. Co., C.C.A.Pa., 151 F.2d 240, rehearing denied 152 F.2d 753.

20. Ala.—Bank of Cottonwood v. Hood, 149 So. 676, 227 Ala. 237—Cunningham v. Baker, 16 So. 68, 104 Ala. 160, 53 Am.S.R. 27.

S.D.—Ex parte Kaufman, 39 N.W.2d 905, 73 S.D. 166.

5 C.J. p 410 note 50—25 C.J. p 260 note 2.

Authority to arrest without warrant generally see Arrest § 5.

Extradition warrant see infra § 16.

Function of fugitive warrant is to provide for arrest and detention of alleged fugitive pending the institution and conduct of an extradition proceeding.

Wis.—State ex rel. Wells v. Hanley, 27 N.W.2d 373, 250 Wis. 374.

Authorization by statute is essential to legality of arrest without warrant.

Conn.—State v. Engle, 162 A. 922, 115 Conn. 638.

20.5 Conn.—State v. Engle, supra.

Letter by unknown person

An officer making an arrest without a warrant, based on a letter signed by an unknown person, not showing that prosecution for the alleged offense had been commenced in another state, and not showing that the acts constituted an offense in that state, is not justified.

Mich.—Malcomson v. Scott, 23 N.W. 166, 56 Mich. 459.

Telegram from police officer outside state to police officer in state asking him to keep track of named persons, swindling commission merchants, does not authorize their arrest.

Ala.—Cunningham v. Baker, 16 So. 68, 104 Ala. 160, 53 Am.S.R. 27.

In other jurisdictions an arrest may be made by an officer without a warrant, at least under certain circumstances, as where the fugitive has committed a felony,²¹ and a telegram from authorities of a sister state requesting that a designated person be held for extradition is a sufficient basis for his provisional arrest and detention.^{21.5} If the fugitive is an escaping felon he may be arrested by a private citizen without a warrant and afterward detained by order of court.²²

Where an arrest is made without a warrant, a proper warrant should be procured and the charge formulated as soon as possible.^{22.5} In such case, the prisoner must be taken before a magistrate as soon as possible, without unnecessary delay, or with all practicable speed, and where he is not so taken within a reasonable time, his subsequent imprisonment is illegal.^{22.10} Under some statutes, an accused arrested without a demand from the executive of the demanding state must be taken before a magistrate for the issuance of a warrant.^{22.15}

It has been held that a preliminary affidavit for a detention warrant need not contain the essentials of the charge.²³ The complaint on which a warrant is issued, however, must show that accused has been legally charged with crime in the demanding state.²⁴ Under some statutes, including the Uniform Criminal Extradition Act, a person may be arrested on a warrant issued by a judicial officer of the asylum state on the charge on oath of some credible person that the arrested person committed a crime in another state and fled from justice.^{24.5} A lawful signature to the warrant for arrest is essential to its issuance, and if it is not signed by one with authority to do so, the mere involuntary custody of one held under it will not waive the defect or confer jurisdiction.^{24.10} A credible witness within the meaning of such a statute is one who is competent and worthy of belief.^{24.15}

Hearing. The prisoner cannot be committed to await the issuance of an extradition warrant without a hearing before the magistrate who issued the warrant of arrest.²⁵

21. U.S.—*Stallings v. Splain*, App.D. C., 40 S.Ct. 537, 253 U.S. 339, 64 L. Ed. 940.

Day v. Keim, C.C.A.W.Va., 2 F.2d 966.

Kan.—*Powell v. Turner*, 207 P. 492, 167 Kan. 524, certiorari denied 70 S.Ct. 41, 338 U.S. 835, 94 L.Ed. 509.—*Yaws v. Warden of N. M. State Penitentiary*, 203 P.2d 742, 166 Kan. 685.

N.J.—*Ex parte Sifola*, 138 A. 369, 101 N.J.Eq. 540.

Pa.—*Commonwealth ex rel. Huey v. Dye*, 96 A.2d 129, 373 Pa. 508. *Commonwealth ex rel. Cohick v. Keeper of County Prison*, 85 Pa. Dist. & Co. 394, 3 Lycoming 256.

W.Va.—*State ex rel. for Use of Brown v. Spangler*, 197 S.E. 360, 120 W.Va. 72, overruling *George v. Norfolk Railway Co.*, 88 S.E. 1036, 78 W.Va. 345.

5 C.J. p 410 note 51—25 C.J. p 260 note 3.

Special policeman whose powers are analogous to those of a conservator of the peace can arrest one charged with felony in a sister state without a warrant.

Va.—*Williams v. Commonwealth*, 128 S.E. 572, 142 Va. 667.

Warrant issued in another state

Magistrate's order of commitment of alleged fugitive from justice, based solely on warrant of justice of the peace of another state was void. N.Y.—*People ex rel. Sidran v. Warden of City Prison*, 220 N.Y.S. 529, 129 Misc. 327.

21.5 Miss.—*Loper v. Dees*, 49 So.2d 718, 210 Miss. 402.

N.Y.—*People ex rel. Mumbulo v.*

Ormsby, 241 N.Y.S. 225, 136 Misc. 637.

22. Pa.—*Commonwealth v. Baer*, 36 Pa.Co. 46.

S.C.—*State v. Anderson*, 19 S.C.L. 327.

22.5 Va.—*Williams v. Commonwealth*, 128 S.E. 572, 142 Va. 667.

22.10 U.S.—*Great Am. Indem. Co. v. Beverly*, D.C.Ga., 150 F.Supp. 134.

Pa.—*Commonwealth ex rel. Huey v. Dye*, 96 A.2d 129, 373 Pa. 508.

Delay held unreasonable

Delay of seventy-two hours in taking a prisoner before a judge or magistrate is not a taking with all practicable speed.

Pa.—*Commonwealth ex rel. Cohick v. Keeper of County Prison*, 85 Pa. Dist. & Co. 394, 3 Lycoming 256.

22.15 Kan.—*Powell v. Turner*, 207 P. 2d 492, 167 Kan. 524, certiorari denied 70 S.Ct. 41, 338 U.S. 835, 94 L.Ed. 509.

23. Tex.—*Ex parte Jones*, 199 S.W. 1110, 82 Tex.Cr. 627.

25 C.J. p 260 note 6.

Affidavit that affiant "has reason to believe" and failing to assert that affiant does believe is insufficient.

Tex.—*Ex parte Ross*, 261 S.W. 1042, 97 Tex.Cr. 451.

Affidavit held sufficient

Miss.—*Wall v. Quin*, 114 So. 744, 148 Miss. 335.

Issuance by clerk

Clerk of district court has authority to issue warrants under rendition statute.

Mass.—*Thompson v. Globe News*

per Co., 181 N.E. 249, 279 Mass. 176.

24. U.S.—*Reichman v. Harris*, Tenn., 252 F. 371, 164 C.C.A. 295.

25 C.J. p 261 note 7.

24.5 Pa.—*Commonwealth ex rel. Cohick v. Keeper of County Prison*, 85 Pa. Dist. & Co. 394, 3 Lycoming 256.

24.10 Mo.—*State v. Fleming*, 227 S. W.2d 106, 240 Mo.App. 1208.

No waiver

Omission of lawful signature to a warrant for arrest of a fugitive from justice is not a mere irregularity that may be waived under some circumstances, by conduct of one forcibly detained thereunder.

Mo.—*State v. Fleming*, *supra*.

Person required to sign

Warrant must be under the hand of the magistrate issuing it, and a warrant signed by the clerk of the court of the magistrate is void.

Mo.—*State v. Fleming*, *supra*.

24.15 Mo.—*State v. Fleming*, *supra*.

Person held credible witness

Sheriff was a credible witness where he based his complaint on the fact that he had a warrant of arrest issued in another state for the fugitive and statements by the fugitive that he had escaped from the penitentiary in such state and would move heaven and earth to keep from going back.

Mo.—*State v. Fleming*, *supra*.

25. N.C.—*In re Mitchell*, 172 S.E. 350, 205 N.C. 788.

c. Effect of Illegal Preliminary Detention on Extradition Proceedings

The illegality of the original arrest or detention of a fugitive from justice from another state will not affect the validity of subsequent proper extradition proceedings.

A fugitive from justice from another state cannot urge, in opposition to proper extradition proceedings, the fact that his original arrest or detention was illegal.²⁶ Once proper proceedings have been instituted, it is too late to claim that the preliminary detention was illegal.²⁷

Return day

Warrant for arrest of petitioner as fugitive from justice, commanding he be forthwith arrested and brought before justice, made warrant returnable instant, and no other return day was required.

Miss.—Wall v. Quin, 114 So. 744, 148 Miss. 335.

26. U.S.—Stallings v. Splain, App. D.C., 40 S.Ct. 537, 253 U.S. 339, 64 L.Ed. 940.

Colo.—Corpus Juris Secundum quoted in Travis v. People, 308 P.2d 997, 999, 135 Colo. 141.

Tex.—Ex parte Sloan, 106 S.W.2d 271, 132 Tex.Cr. 573.

Substantial compliance with the Uniform Criminal Extradition Act is sufficient to uphold the validity of an extradition proceeding and the court will not consider the procedure employed in the arrest or conviction of the relator.

Pa.—Commonwealth ex rel. Jenkins v. Kelley, Com.Pl., 71 Montg.Co. 338.

27. Colo.—Corpus Juris Secundum quoted in Travis v. People, 308 P.2d 997, 999, 135 Colo. 141.

Ill.—People ex rel. Mack v. Meyerling, 189 N.E. 494, 355 Ill. 456.

N.J.—La Sasso v. MacLeod, 56 A.2d 430, 136 N.J.Law 345, motion denied 57 A.2d 661, 137 N.J.Law 45.

Arrest for nonextraditable offense

Extradition of paroled convict on charge in reinstated indictment was held lawful, although he was arrested in another state for nonextraditable offense.

Ill.—People v. Hill, 183 N.E. 17, 350 Ill. 129.

Absence of warrant

Fact that original detention was not based on a warrant and fugitive was held for a number of days in jail pending receipt of demand from sister state did not enable him to oppose proper extradition proceedings.

Colo.—Travis v. People, 308 P.2d 997, 135 Colo. 141.

d. Period of Detention

A person arrested and detained pending the arrival of a requisition for his extradition from another state may not be detained for an indefinite term, but only for a reasonable time or the period prescribed by statute.

A person arrested and detained pending the arrival of a requisition or demand for his extradition from another state may not be detained for an indefinite term,^{27,50} but only for the time within which a requisition might reasonably arrive,²⁸ or for the period of time prescribed by statute.²⁹ The expiration of the prescribed statutory time will not

Functus officio

Fugitive warrant issued by clerk rather than by judge became functus officio on issuance and service of rendition warrant, and legality or illegality of fugitive warrant was immaterial in subsequent habeas corpus proceedings.

Mo.—Lombardo v. Tozer, App., 264 S.W.2d 376.

27.50 Del.—Simpers v. Wilson, 75 A.2d 254, 6 Terry 423.

28. D.C.—Stallings v. Splain, 258 F. 510, 49 App.D.C. 38, affirmed 40 S. Ct. 537, 253 U.S. 339, 64 L.Ed. 940.

Miss.—Loper v. Dees, 49 So.2d 718, 210 Miss. 402.

25 C.J. p 260 note 96.

To allow consummation of proceedings

Where a fugitive is arrested on the warrant of a justice of the peace, without a warrant for him from the executive of the demanding state, he should be committed for such reasonable time as will permit extradition proceedings to be instituted and consummated.

Del.—Simpers v. Wilson, 75 A.2d 254, 6 Terry 423.

29. Mo.—Lombardo v. Tozer, App., 264 S.W.2d 376.

Purpose of statute is to prevent unreasonably long confinement of a fugitive pending receipt of demand for his extradition.

S.C.—Bolton v. Timmerman, 105 S.E. 2d 518, 233 S.C. 429.

Statute as mandatory

Statute fixing maximum time for preliminary detention of alleged fugitive from justice in custody is mandatory.

La.—State v. Sitner, 119 So. 408, 167 La. 407.

Improper requisition

On hearing of alleged fugitive arrested on affidavit of local police officer, wherein it appeared that documents accompanying requisition of demanding state were not properly authenticated, alleged fugitive was not entitled to be discharged without delay because governor had issued warrant for his arrest based on

such documents, but hearing could be continued for thirty days from date of affidavit pending efforts of authorities to have documents properly authenticated.

La.—State v. Rutledge, 155 So. 392, 179 La. 897.

Exhaustion of power

Under statute authorizing judge to commit fugitive from foreign jurisdiction for period not exceeding thirty days to enable arrest of such accused on extradition warrant, and authorizing a recommitment for further period of not to exceed sixty days, judge was not authorized to fix several successive periods within the thirty and sixty day periods, and, having fixed an original period of fifteen days and having recommitted accused for second fifteen day period, judge's jurisdiction was exhausted, rendering void any further attempt to recommit accused.

Mo.—Christopher v. Tozer, App., 263 S.W.2d 864.

Successive affidavits

Where indictment, accompanying requisition for extradition of fugitive from justice, was not certified by governor of demanding state, no proper demand for fugitive's return was made, and asylum state could not hold him in prison under successive affidavits beyond statutory thirty day period.

La.—State v. Commisso, 39 So.2d 729, 214 La. 1055.

Delay due to prisoner

Prisoner arrested on fugitive warrant would not be discharged on ground that more than six months had intervened between date of his first arrest and date he was taken into custody for delivery to agent of demanding state, where agent of demanding state was unable to obtain custody of prisoner within six months because of delays occasioned by action of prisoner.

Ill.—People ex rel. De Bardas v. Toman, 4 N.E.2d 859, 364 Ill. 516, appeal dismissed People of State of Illinois ex rel. De Bardas v. Toman, 57 S.Ct. 613, 300 U.S. 642, 81 L.Ed. 857.

entitle one out on bail to release and discharge from bail and a judicial declaration that the demanding state has abandoned her extradition efforts, where the delay in the receipt of the extradition papers was due to the temporary absence of the governor of the demanding state from his state.^{29.5}

§ 13. Requisition

- a. In general
- b. Sufficiency of requisition
- c. Second requisition

a. In General

To secure the extradition of a person, substantial compliance with the prescribed procedure is required, and generally a requisition or demand for extradition must be made by the governor or chief executive of the demanding state or territory to the governor of the asylum state.

Substantial compliance with the procedure prescribed is necessary and sufficient for a valid extra-

dition.^{29.50} Although in some jurisdictions the demanding state has the option of proceeding by direct application to the governor of the asylum state for a writ of extradition, or by complaint under oath to any judge, justice of the peace, or police magistrate of the asylum state in the manner prescribed by state statute,^{29.55} as a general rule, a requisition or demand for extradition must be made by the chief executive or other designated officer of the demanding state to the chief executive of the asylum state.^{29.60}

The requisition or demand for extradition may be for the return of a fugitive,^{29.65} in which case the procedure to be followed is governed by the federal Constitution and the federal legislation thereunder,³⁰ or it may be for the surrender of a person charged in the demanding state with committing an act in the asylum state, or in a third state, intentionally resulting in a crime in the demanding state,^{30.5} in which case the federal legislation is not applicable

29.5 S.C.—*Bolton v. Timmerman*, 105 S.E.2d 518, 233 S.C. 429.

29.50 Erasures and alterations on copy of extradition demand and supplemental commission which create confusion as to who is the duly authorized agent to receive custody of the prisoner may cause the court to discharge him.

Pa.—*Commonwealth ex rel. Jenkins v. Kelley*, Com.Pl., 71 Montg.Co. 338.

Restraint illegal

Where sheriff, who purported to hold person for extradition, had neither a demand, written or otherwise, by governor of demanding state nor any copy of an indictment, information, affidavit, judgment of conviction, or sentence authenticated by governor of demanding state, restraint was illegal.

Ga.—*West v. Graham*, 87 S.E.2d 849, 211 Ga. 662.

29.55 Ill.—*People ex rel. Gilbert v. Babb*, 114 N.E.2d 358, 415 Ill. 349, 40 A.L.R.2d 1142.

29.60 U.S.—*Ex parte Morgan*, D.C. Cal., 78 F.Supp. 756, affirmed, C.A., *Morgan v. Horrall*, 175 F.2d 404, certiorari denied 70 S.Ct. 76, 338 U.S. 827, 94 L.Ed. 503.

Ala.—*Harrison v. State*, 77 So.2d 384, 38 Ala.App. 60, certiorari denied 77 So.2d 387, 262 Ala. 701.

Mo.—*Hagel v. Hendrix*, App., 302 S.W.2d 323.

Dictum to contrary

However, there is dictum that the courts of one state may direct the arrest of a felon from another state without the demand or the order of the governor of either state.

Ala.—*Morrell v. Quarles*, 35 Ala. 544.

Requisition, not warrant of governor of asylum state, is basis of extradition proceeding.

Colo.—*Self v. People*, 297 P.2d 887, 133 Colo. 524.

Formal demand by the executive authority of the demanding state on the executive authority of the asylum state is required.

Ga.—*Brown v. Grimes*, 104 S.E.2d 907, 214 Ga. 388.

Failure to address to governor

An extradition requisition, not addressed to governor of asylum state or any other person, was not sufficient.

Tex.—*Ex parte Graves*, 186 S.W.2d 248, 148 Tex.Cr.R. 234.

Waiver of demand

No demand for extradition of escaped convict sentenced for felony is necessary, where after apprehension he accompanied officers back to state whence he fled.

Miss.—*Wright v. State*, 139 So. 869, 162 Miss. 494.

29.65 Colo.—*Matthews v. People*, 314 P.2d 906, 136 Colo. 102.

Md.—*State ex rel. Gildar v. Kriss*, 62 A.2d 568, 191 Md. 568.

N.Y.—*People ex rel. Swanson v. Fitzsimmons*, 153 N.Y.S.2d 772, 2 A.D. 2d 235.

Authorization for action taken

Where the demand on a state is for the return of a fugitive, the demanding state appears, not as a state seeking a favor, but as one demanding rights granted to it by the federal Constitution and laws, and the governor of the asylum state, in making the arrest and delivery under such demand, finds his duty, authority, and protection under the federal Constitution and laws.

Colo.—*Matthews v. People*, 314 P.2d 906, 136 Colo. 102.

30. Ariz.—*Ex parte Riccardi*, 203 P.2d 627, 68 Ariz. 180.

Fla.—*Chase v. State*, 113 So. 103, 93 Fla. 963, 54 A.L.R. 271.

Ill.—*People ex rel. Millet v. Babb*, 115 N.E.2d 241, 1 Ill.2d 191.

Tex.—*Ex parte Stanley*, 109 S.W.2d 1053, 133 Tex.Cr. 192.

Foundation and nature of right of extradition see supra § 2.

Fugitive's constitutional rights

"The rights of personal liberty which such alleged fugitive has under the Constitution . . . in such a proceeding are the right to require that he be substantially and in good faith charged with an offense against the laws of the demanding state, that the demand be made in due form . . . and that he be given the opportunity to show that he was not . . . a fugitive from justice."

Ill.—*People v. Baldwin*, 174 N.E. 51, 54, 341 Ill. 604.

30.5 Colo.—*Matthews v. People*, 314 P.2d 906, 136 Colo. 102.

Md.—*State ex rel. Gildar v. Kriss*, 62 A.2d 568, 191 Md. 568.

N.Y.—*People ex rel. Swanson v. Fitzsimmons*, 153 N.Y.S.2d 772, 2 A.D. 2d 235.

Authorization for action taken

Where the requisition asks for the surrender of a person charged with committing an act in the asylum, or a third, state intentionally resulting in a crime in the demanding state, the demand is more properly termed a request, and the governor of the asylum state may cause the arrest and delivery in the exercise of his discretion, and in so doing finds his

and the procedure is authorized and governed by state legislation.^{30.10} If extradition is sought for the abandonment, desertion, or nonsupport of a person or persons in the demanding state, it may be under a procedure prescribed by statutes specifically dealing with that subject, such as a Reciprocal Enforcement of Support Act.^{30.15}

Where extradition is sought under one procedure, it is improper to cause the arrest and delivery to be made pursuant to another procedure,^{30.20} and where the federal procedure is followed, it takes priority over any other state process by which the fugitive is held and renders such proceedings *functus officio*.^{30.25} A requisition which asserts the commission of the offense in the demanding state, the flight of the fugitive therefrom, and his taking refuge in the asylum state is insufficient where it appears that he is sought to be extradited for an

act in the asylum state which resulted in a crime in the demanding state.^{30.30} There is authority, however, which holds that one charged in the demanding state with desertion and abandonment of minor children is subject to extradition under a statute authorizing the surrender of one who was not in the demanding state at the time of the commission of the crime, even though the requisition was not predicated on such statute by name or number or other allegation, but recited that the governor of the demanding state was acting by virtue of the federal Constitution and laws.^{30.35}

Written demand. To procure the extradition of a criminal the chief executive or other designated officer of the state from which the accused has fled must send a written demand to the chief executive of the state where the criminal is alleged to be, demanding him as a fugitive from justice.³¹

authority and protection under a state statute.

Colo.—*Matthews v. People*, 314 P.2d 906, 136 Colo. 102.

30.10 Md.—*State ex rel. Gildar v. Kriss*, 62 A.2d 568, 191 Md. 568.

Similar to federal procedure

The procedural method to be employed to obtain extradition under statute permitting extradition of person charged in the demanding state with an act in the asylum state resulting in a crime in the demanding state has been construed to be the same as that to be employed in extradition proceedings under federal constitutional authority.

Neb.—*Ex parte Campbell*, 25 N.W.2d 419, 147 Neb. 820.

30.15 Cal.—*Ex parte Floyd*, 273 P.2d 820, 43 C.2d 379.

Procedures available

Two distinct courses of action are open in enforcement of support duties under Reciprocal Enforcement of Support Act, either extradition or the initiation of civil proceedings in the demanding state, with an opportunity thereafter given to the obligor to submit to the subsequently assumed jurisdiction of the court in the asylum state, and where extradition is sought the person demanded may not defeat the extradition process by independently instituting an action in the asylum state for a support order and complying therewith.

Cal.—*Ex parte Floyd*, supra.

30.20 Colo.—*Matthews v. People*, 314 P.2d 906, 136 Colo. 102—*Stobie v. Barger*, 268 P.2d 409, 129 Colo. 222.

N.Y.—*People ex rel. Swanson v. Fitzsimmons*, 153 N.Y.S.2d 772, 2 A.D.2d 235.

30.25 Ill.—*People ex rel. Millet v. Babb*, 115 N.E.2d 241, 1 Ill.2d 191.

30.30 S.D.—*Ex parte Kaufman*, 39 N.W.2d 905, 73 S.D. 166.

Desertion of child

N.Y.—*People ex rel. Fazio v. Warden of City Penitentiary of New York County*, 69 N.Y.S.2d 383.

Failure to provide for minor children
S.D.—*Ex parte Kaufman*, 39 N.W.2d 905, 73 S.D. 166.

Inconsistent factual showing

Requisition inconsistent with the factual showing on which it is predicated is insufficient to authorize the extradition of a person.

S.D.—*Ex parte Kaufman*, supra.

30.35 Tex.—*Ex parte Oxford*, 249 S.W.2d 917, 157 Tex.Cr. 512.

31. U.S.—*Collins v. Golden*, D.C. Neb., 95 F.Supp. 251.

Ala.—*State of Tennessee v. Hamilton*, 190 So. 306, 28 Ala.App. 587.

Cal.—*Ex parte Brewer*, 143 P.2d 33, 61 C.A.2d 388.

Fla.—**Corpus Juris cited in Chase v. State**, 113 So. 103, 107, 93 Fla. 963, 54 A.L.R. 271—*State v. Chase*, 107 So. 541, 91 Fla. 413.

Ill.—*People ex rel. Maypole v. Meyer*, 193 N.E. 495, 358 Ill. 589.

Kan.—*Powell v. Turner*, 207 P.2d 492, 167 Kan. 524, certiorari denied 70 S.Ct. 41, 338 U.S. 835, 94 L.Ed. 509—*Yaws v. Warden of N. M. State Penitentiary*, 203 P.2d 742, 166 Kan. 685.

Ky.—*Oakley v. Franks*, 159 S.W.2d 415, 289 Ky. 605.

Me.—*Ex parte King*, 28 A.2d 562, 139 Me. 203.

Md.—*State ex rel. Gildar v. Kriss*, 62 A.2d 568, 191 Md. 568.

Mass.—*In re Baker*, 39 N.E.2d 762, 310 Mass. 724, certiorari denied *Baker v. Delay*, 62 S.Ct. 1297, 316 U.S. 699, 86 L.Ed. 1768.

Mo.—*State ex rel. Gaines v. Westhues*, 2 S.W.2d 612, 318 Mo. 928.

N.J.—*Stark v. Livermore*, 65 A.2d 625, 3 N.J.Super. 94.

N.Y.—*People ex rel. Pahl v. Hagerty*, 26 N.Y.S.2d 568, 261 App.Div. 1049. *People ex rel. Hadley v. Peck*, 147 N.Y.S.2d 174, 4 Misc.2d 529. Ohio.—*In re McMeans*, Com.Pl., 146 N.E.2d 159.

Pa.—*Commonwealth ex rel. Taylor v. Superintendent, Philadelphia County Prison*, 114 A.2d 343, 382 Pa. 181.

Commonwealth v. Steele, 78 Pa. Super. 352.

Commonwealth ex rel. Falson v. Watkins, 9 Pa.Dist. & Co.2d 571, 73 Montg.Co. 44.

Commonwealth ex rel. Wyatt v. Adams, Com.Pl., 30 West.L.J. 169. Tex.—*Ex parte Hareck*, 274 S.W.2d 74, 160 Tex.Cr. 602—*Ex parte Anderson*, 120 S.W.2d 259, 135 Tex.Cr. 291.

Va.—*Spiak v. Seay*, 40 S.E.2d 250, 185 Va. 710.

25 C.J. p 261 note 9.

Demand by mail

Procedure by which demand from governor of demanding state on governor of asylum state for arrest of fugitive was handled by mail satisfied requirement of extradition act that demand for fugitive must be in writing.

Kan.—*Yaws v. Warden of N. M. State Penitentiary*, 203 P.2d 742, 166 Kan. 685.

Order for delivery on demand

Prisoner could not lawfully be delivered to authorities of another state until governor has honored requisition for extradition, and hence it was error to order sheriff to deliver prisoner to authorities of another state on their demand.

N.C.—*In re Mitchell*, 172 S.E. 350, 205 N.C. 788.

Second warrant on same requisition. If a prisoner escapes from arrest before being taken from the state,³² or if he becomes a fugitive again after he has been delivered to the demanding state,³³ the governor may issue a second warrant without waiting for a new requisition.

Authority to demand extradition. The authority to demand the extradition of fugitives from justice is vested by statute in particular officers of the jurisdiction from which accused has fled,³⁴ such as the governor of the state,³⁵ or the chief justice of the District of Columbia.³⁶ As a requisition by the governor is an official act, it may be signed by a person given by statute the power of an acting governor during the governor's disability,³⁷ and a requisition which has already been made is not affected by a change of governors.³⁸

Application to executive of demanding state. The application to the executive of the state to make requisition for the delivery of a fugitive from justice is usually made by some person designated by

statute,³⁹ but it seems that any person may make such application,⁴⁰ if it is made in good faith.⁴¹ Under the Uniform Criminal Extradition Act, the prosecutor's application for the institution of extradition proceedings must accompany the requisition.⁴²

b. Sufficiency of Requisition

Within the area of extradition preempted by the federal legislation, the sufficiency of a requisition or demand for extradition is tested thereby, in that additional requirements may not be imposed; generally all the elements or jurisdictional facts essential to extradition must appear on the face of the papers, such as the fugitive status of the person demanded and that he is charged with the commission of a crime.

The sufficiency of a requisition or demand for extradition is tested by the federal Constitution and statutes within the area of extradition preempted by the federal legislation,⁴³ and this is particularly true where there is no state statute setting forth the requirements thereof.^{43.5} Additional requirements imposed by state statutes need not be complied with to make a requisition valid.⁴⁴ State legisla-

32. Tex.—Ex parte Hobbs, 22 S.W. 1035, 32 Tex.Cr. 312, 40 Am.S.R. 782.

33. N.C.—In re Hughes, 61 N.C. 57.

34. Indian Territory

Formerly the judges of the United States court in the Indian Territory had the authority.

U.S.—Ex parte Morgan, D.C.Ark., 20 F. 298.

Ind.Terr.—Ex parte Dickson, 69 S. W. 943, 4 Ind.Terr. 481.

35. D.C.—Hill v. Dorsey, 22 F.2d 1003, 57 App.D.C. 305.
25 C.J. p 261 note 13.

Discretion

Matter of issuing an extradition requisition by governor is an executive function which is discretionary with him, and exercise thereof will not be interfered with by the courts.

Ohio.—State ex rel. Corbett v. Common Pleas Court of Stark County, 155 N.E.2d 923, 168 Ohio St. 468.

36. D.C.—Hayes v. Palmer, 21 App. D.C. 450.

37. Mo.—Cockburn v. Willman, 257 S.W. 458, 301 Mo. 575.
25 C.J. p 261 note 16.

Duty to show authority

It is not incumbent on asylum state to establish that person executing demand was in fact acting governor of demanding state on day he executed demand.

Tex.—Ex parte Gesek, Cr.App., 302 S.W.2d 417—Ex parte Fuqua, 283 S.W.2d 50, 162 Tex.Cr. 126.

38. Colo.—In re Knowlton, 5 Cr.L. Mag. 250.

39. N.Y.—People ex rel. Sapiro v.

Bolan, 267 N.Y.S. 323, 149 Misc. 73.

25 C.J. p 261 note 19.

Inadvertent error in application

Where the sheriff's application to the governor for a requisition on the authorities of the District of Columbia for an alleged fugitive from justice referred to the prisoner as "he," instead of "she," the state's agent had no right to change the paper; but the mistake was immaterial, the context showing that the use of the word "he" was inadvertent.

D.C.—John v. Splain, 269 F. 717, 50 App.D.C. 201.

Surplusage

Where demand was for extradition of person who was not in the demanding state at the time of the commission of the crime and who had not fled therefrom, allegation in prosecuting attorney's affidavit requesting extradition, that relator was fugitive from justice, would be treated as mere surplusage.

N.Y.—People ex rel. Kaufman v. O'Brien, 96 N.Y.S.2d 401, 97 Misc. 1019.

40. S.C.—Ex parte Swearingen, 13 S. C. 74.

41. Ill.—Lacondra v. Hermann, 175 N.E. 820, 343 Ill. 608.
25 C.J. p 261 note 21.

42. Mich.—Ex parte Molisak, 288 N. W. 329, 291 Mich. 46.

43. Fla.—Young v. Stoutamire, 176 So. 759, 129 Fla. 805.

Mo.—Ex parte Arrington, 270 S.W.2d 39.

Tex.—Ex parte Pinkus, 25 S.W.2d 334, 114 Tex.Cr. 326.

Attestation by secretary of state

Absence of attestation by secretary of state of demanding state on requisition of governor of the demanding state would not vitiate extradition proceedings.

Tex.—Ex parte Rhoades, 155 S.W.2d 813, 142 Tex.Cr. 632.

Signing by fugitive

There is nothing in the federal extradition statute which requires that the prisoner sign the extradition papers.

U.S.—Collins v. Golden, D.C.Neb., 95 F.Supp. 251.

43.5 Tex.—Ex parte Peairs, 283 S. W.2d 755, 162 Tex.Cr. 243, appeal dismissed Peairs v. State of Texas, 76 S.Ct. 104, 350 U.S. 858, 100 L.Ed. 762.

44. Mo.—Hayes v. O'Connell, App., 263 S.W.2d 66.

Ohio.—In re Sanders, App., 31 N.E. 2d 246.

Statute held in conflict with federal rule

Mo.—Ex parte Arrington, 270 S.W. 2d 39.

Stating fugitive under arrest

Requisition need not state whether fugitive is under arrest in asylum state, provision therefor not being in federal statute but in the rules adopted by conference of delegates appointed by governors in 1887.

Mo.—Hansen v. Edwards, 240 S.W. 489, 210 Mo.App. 35.

Parole agreement

A transcript of record certified to governor as basis for extraditing

tion, however, may provide a procedure less exacting for the extradition of a fugitive than the federal legislation,^{44.5} and in areas not preempted by the federal statutes, state legislation may require the demand or requisition to contain averments not essential under the federal statute.^{44.10}

In order that an alleged fugitive may be extradited, the requisition papers must be in order.^{44.15} The requisition or demand must be in proper form,^{44.20} and all the elements or jurisdictional facts essential to extradition must appear on the

face of the papers,⁴⁵ although the requisition itself need not recite all the facts if they are found in papers which are annexed to it and duly certified to be correct.⁴⁶

Where essential to the right to extradite, it must appear in the demand or in the accompanying papers, either by express allegation or by necessary implication, that the person demanded was in the demanding state at the time when the offense charged was committed,⁴⁷ and such an allegation is required under some state statutes in instances not

parole violator to California was not deficient because of absence of parole agreement entered into between prisoner and state of California, since extradition statute makes no reference to any parole agreement.

Ill.—People ex rel. Westbrook v. O'Neill, 38 N.E.2d 174, 378 Ill. 324.

44.5 Cal.—Ex parte Davis, 158 P.2d 36, 68 C.A.2d 798.

Md.—State ex rel. Gildar v. Kriss, 62 A.2d 568, 191 Md. 568.

Mo.—Ex parte Arrington, 270 S.W.2d 39—State ex rel. Taylor v. Blair, 214 S.W.2d 555, 358 Mo. 345.

Hayes v. O'Connell, App., 263 S.W.2d 66.

N.Y.—People ex rel. Matochik v. Baker, 114 N.E.2d 194, 306 N.Y. 32.

Tex.—Ex parte Peairs, 283 S.W.2d 755, 162 Tex.Cr. 243, appeal dismissed Peairs v. State of Texas, 76 S.Ct. 104, 350 U.S. 853, 100 L.Ed. 762.

44.10 Mo.—Ex parte Arrington, 270 S.W.2d 39.

44.15 Pa.—Commonwealth ex rel. Houser v. Seip, 124 A.2d 110, 355 Pa. 545—Commonwealth ex rel. Henderson v. Baldi, 93 A.2d 458, 372 Pa. 463.

Proceedings held regular

Pa.—Commonwealth ex rel. Simmons v. Frame, Com.Pl., 6 Chest.Co. 47.

44.20 Mont.—State v. Booth, 328 P.2d 1104.

45. U.S.—Ex parte Thaw, D.C.N.H., 214 F. 423.

Mass.—Kingsbury's Case, 106 Mass. 223.

Strictness and accuracy

In proceeding for extradition, same strict accuracy of statement and proceedings is not required as in indictments.

U.S.—U. S. ex rel. Jackson v. Meyer-ing, C.C.A.Ill., 54 F.2d 621, certiorari denied 52 S.Ct. 498, 286 U.S. 542, 76 L.Ed. 1280.

Requisition held sufficient

(1) Generally.

N.J.—La Sasso v. MacLeod, 56 A.2d 430, 136 N.J.Law 345, motion denied 57 A.2d 661, 137 N.J.Law 45.

Tex.—Ex parte McClung, 285 S.W.2d 369, 162 Tex.Cr. 354.

(2) Demand accompanied by copies of indictment and warrant was not insufficient because it did not show on its face that the fugitive was charged by indictment with crime and did not enumerate the documents certified therein to be authentic.

Tex.—Ex parte Hale, Cr., 320 S.W.2d 362.

46. U.S.—In re White, C.C.Minn., 45 F. 237.

N.Y.—People ex rel. Higley v. Mills-paw, 12 N.Y.S.2d 435, 257 App.Div. 40.

Cure of error in signature

Error in signature of Mississippi circuit court clerk's name by another, with letters "D. C.," standing for "deputy clerk," after his name, to certification that signers of requisition papers legally held their respective offices and that their signatures were genuine, was not fatal, in view of Mississippi Attorney General's certificate that requisition was in due form according to law.

Mich.—Ex parte Morrow, 17 N.W.2d 767, 310 Mich. 597.

Requisition or demand and accompanying papers held sufficient

N.J.—Huff v. Ayers, 71 A.2d 392, 6 N.J.Super. 380—Stark v. Livermore, 65 A.2d 625, 3 N.J.Super. 94.

State v. Wilson, 52 A.2d 50, 135 N.J.Law 398.

Tex.—Ex parte Partridge, 275 S.W.2d 682, 161 Tex.Cr. 185.

47. D.C.—In re Gibson, D.C., 147 F. Supp. 591.

Fla.—Hattaway v. Culbreath, 57 So. 2d 661.

Me.—Ex parte King, 28 A.2d 562, 139 Me. 203.

Mass.—In re Harris, 34 N.E.2d 504, 309 Mass. 180, 135 A.L.R. 969.

Mont.—Ex parte Mo, 204 P. 175, 62 Mont. 137.

N.H.—Fortier v. Frink, 24 A.2d 604, 92 N.H. 50.

N.Y.—People ex rel. Higley v. Mills-paw, 24 N.E.2d 117, 281 N.Y. 441.

People ex rel. Hadley v. Peck, 147 N.Y.S.2d 174, 4 Misc.2d 529.

Pa.—Commonwealth ex rel. Hernandez v. Price, 11 Pa.Dist. & Co.2d 232, 105 Pittsb.Leg.J. 343, appeal dismissed 122 A.2d 206, 385 Pa. 44,

certiorari denied 77 S.Ct. 56, 35 U.S. 836, 1 L.Ed.2d 55.

Commonwealth ex rel. Drumm v. Houser, 48 Dauph.Co. 203.

Tex.—**Corpus Juris Secundum** cited in Ex parte Emmons, Cr., 322 S.W.2d 534, 536.

25 C.J. p 261 note 25.

Accompanying indictment or affidavit see infra §§ 14(1)–14(9).

Mandatory requirement

Ohio.—In re McMeans, Com.Pl., 146 N.E.2d 159.

State statutory requirement

Provision of Uniform Criminal Extradition Act providing that no demand for extradition of a person charged with crime in another state shall be recognized by the governor unless alleging that accused was present in demanding state at the time of the commission of the alleged crime is not in conflict with the federal Constitution and statutes on the subject and is valid.

Fla.—State v. Bennett, 90 So.2d 43.

Crime requiring accused's presence

A demand plainly showing that an alleged fugitive from justice is charged with a crime, the nature of which required his presence at the time and place where the offense occurred, and that thereafter he fled to asylum state is sufficient for purposes of extradition, even though demand does not expressly state that alleged fugitive was in demanding state at time of offense.

Mass.—In re Baker, 39 N.E.2d 762, 310 Mass. 724, certiorari denied Baker v. Delay, 62 S.Ct. 1297, 316 U.S. 699, 86 L.Ed. 1768.

Application for requisition

Where the requisition, although not sworn to, stated that the person demanded was charged with a crime, and represented that he had fled to Ohio, and was accompanied by the application for the requisition, sworn to by a prosecuting attorney of the demanding state and indicating that such person was a fugitive, the requisition was not objectionable because not accompanied by sworn evidence that the person demanded was a fugitive.

within, or preëmpted by, the federal statutes.^{47.5} Where that fact otherwise appears, however, an express averment thereof is not required in the requisition or demand itself,^{47.10} and hence it is sufficient where that fact appears in the required accompanying papers,^{47.15} as in a copy of the indictment or other pleading charging the person demanded with the commission of a crime.^{47.20}

It is also necessary for the requisition or demand to show that the person demanded is charged with the commission of a crime,^{47.25} or that prosecution has been begun in the demanding state before some court or magistrate,⁴⁸ or that the person demanded has been convicted of crime in the demanding state and has broken his parole,^{48.5} or that

he has escaped from confinement or has broken the terms of his bail, probation, or parole,^{48.10} and that the accused has fled from justice, or from the state,^{48.15} or, in other words, that the person demanded is a fugitive from justice.⁴⁹ It is not necessary that an affidavit accompanying the requisition papers for the purpose of showing that the person demanded was a fugitive should state the facts or elements of the crime charged.⁵⁰

On the other hand, the requisition need not allege the presence of the person demanded in the demanding state where the crime for which extradition is sought is the commission of an act in the asylum state, or in a third state, resulting in a crime in the demanding state,^{50.5} as where the crime

Ohio.—In re Sanders, App., 31 N.E.2d 246.

Demand and accompanying papers held sufficient

(1) Generally.
Ala.—Cazalas v. Bridges, 81 So.2d 913, 38 Ala.App. 232.
Mo.—Ex parte Arrington, 270 S.W.2d 39.
N.J.—Huff v. Ayers, 71 A.2d 392, 6 N.J.Super. 380.
Pa.—Commonwealth ex rel. Taylor v. Superintendent, Philadelphia County Prison, 114 A.2d 343, 382 Pa. 181.

(2) Where demand for extradition alleged that fugitive appeared and pleaded guilty and supporting documents attached thereto showed accused present at commission of alleged crime in demanding state, demand for extradition was not defective because it contained no allegation that accused was present in demanding state at time of commission of alleged crime.
Conn.—Odell v. Platt, 141 A.2d 484, 21 Conn.Sup. 12.

(3) Where requisition showed that accused had been charged by complaint with crime of embezzlement committed in demanding state and that he had fled therefrom and had taken refuge in asylum state, and authenticated papers annexed thereto charged that defendant at certain county of demanding state did embezzle and convert over nine thousand dollars, "said money having then and there come into the possession" of accused by virtue of his employment, the requisition and such papers sufficiently averred that accused was present in demanding state at the time the crime charged was committed.
Tex.—Ex parte Emmons, Cr., 322 S.W.2d 534.

Requisition held insufficient

Request of governor reciting that accused was charged with desertion and nonsupport of wife and child

committed in demanding state was insufficient.

Cal.—Ex parte Brewer, 143 P.2d 33, 61 C.A.2d 388.

47.5 Mo.—Ex parte Arrington, 270 S.W.2d 39.

47.10 Mo.—Ex parte Arrington, supra.

N.H.—Fortier v. Frink, 24 A.2d 604, 92 N.H. 50.

47.15 Pa.—Commonwealth ex rel. Heiss v. Ruch, 119 A.2d 237, 384 Pa. 36.

Accompanying paper incorporated by reference

Where requisition for extradition incorporates therein by reference an attached authenticated copy of indictment of demanding state specifically charging relator with having committed crime in that state on a day certain, and requisition asserts that relator fled from demanding state, the requisition sufficiently avers that relator was in demanding state at time crime was committed.
Pa.—Commonwealth ex rel. Heiss v. Ruch, supra—Commonwealth ex rel. Taylor v. Superintendent, Philadelphia County Prison, 114 A.2d 343, 382 Pa. 181.

Averment in nonauthenticated document

Where demand for extradition did not contain necessary allegation that fugitive was present in the demanding state when alleged crime was committed, and such allegation did not appear in arrest warrant referred to in the demand or in supporting affidavit, failure to allege that defendant was in demanding state when offense was committed was a fatal defect notwithstanding nonauthenticated sworn application by prosecuting officer did allege that he was so present.

Fla.—Hattaway v. Culbreath, 57 So. 2d 661.

47.20 Tex.—Ex parte Blankenship, 259 S.W.2d 208, 158 Tex.Cr. 667.

47.25 Cal.—Ex parte Brewer, 143 P.2d 33, 61 C.A.2d 388.

Ga.—Brown v. Grimes, 104 S.E.2d 907, 214 Ga. 388.

Tex.—Ex parte Graves, 186 S.W.2d 248, 148 Tex.Cr. 234.

Requisition held sufficient to charge crime

Cal.—Ex parte Katcher, 243 P.2d 785, 39 C.2d 30.

N.J.—La Sasso v. MacLeod, 56 A.2d 430, 136 N.J.Law 345, motion denied 57 A.2d 661, 137 N.J.Law 45.

48. Cal.—Ex parte White, 49 C. 433.
48.5 Ala.—Steadman v. State, 54 So. 2d 633, 36 Ala.App. 253.

Statement held insufficient

Statement in requisition warrant that parole of person sought to be extradited had been revoked was insufficient.

Ala.—Steadman v. State, supra.

48.10 Statement held sufficient

N.J.—Huff v. Ayers, 71 A.2d 392, 6 N.J.Super. 380.

La Sasso v. MacLeod, 56 A.2d 430, 136 N.J.Law 345, motion denied 57 A.2d 661, 137 N.J.Law 45—State v. Wilson, 52 A.2d 50, 135 N.J.Law 398.

48.15 Cal.—Ex parte Brewer, 143 P.2d 33, 61 C.A.2d 388.

N.Y.—People ex rel. Hadley v. Peck, 147 N.Y.S.2d 174, 4 Misc.2d 529.

Mandatory requirement

Ohio.—In re McMeans, Com.Pl., 146 N.E.2d 159.

49. Cal.—Ex parte Brewer, 143 P.2d 33, 61 C.A.2d 388.

Ill.—People ex rel. Buxton v. Jeremiah, 4 N.E.2d 373, 364 Ill. 274—People v. Meyering, 181 N.E. 300, 348 Ill. 486.

25 C.J. p 264 notes 60, 61.

50. Wyo.—Ryan v. Rogers, 132 P. 95, 21 Wyo. 311.

50.5 Cal.—Ex parte Hayes, 225 P.2d 272, 101 C.A.2d 416—Ex parte Morgan, 194 P.2d 800, 86 C.A.2d 217.

charged is nonsupport of a person in the demanding state and extradition is requested under a statute authorizing extradition therefor.^{50.10}

A requisition is not invalid because it fails to contain a definite date for the offense charged,^{50.15} or, where the crime charged is an act outside the demanding state resulting in a crime in the demanding state, because it does not allege with particularity the exact time at which the accused was in a certain place.^{50.20}

Sworn evidence need not accompany the requisition.⁵¹

A delay in instituting extradition proceedings need not be explained in the requisition,⁵² and will not require that extradition be refused.^{52.5} A requisition is not invalidated by delay in presenting it to the governor of the asylum state.^{52.10}

Description or identification of person demanded. There is no mandatory requirement that the requisition papers contain a personal description of the person demanded or other identification other than his name and the date and place of the alleged crime,^{52.15} and the necessity of forwarding a personal description of the alleged fugitive from jus-

tice is absent where his identity is not disputed.^{52.20}

c. Second Requisition

A second requisition may issue on the original application where the person demanded is not found in the state on which requisition is made, and a refusal to honor a requisition will not bar subsequent extradition proceedings on the same grounds.

Where the person demanded is not found in the state on which requisition was made, but is ascertained to be in another and different state, the governor may issue a second requisition on the original application.⁵³ A refusal to honor a requisition is not such an adjudication of the merits as bars the institution of another extradition proceeding on the same grounds,⁵⁴ the second requisition need not show any change of circumstances since the rejection of the first demand.⁵⁵

§ 14(1). — Accompanying Indictment or Affidavit

The requisition in extradition proceedings must be accompanied by a copy of an instrument charging the person demanded with a crime.

The extradition record filed with the governor of the asylum state must contain such papers and documents as are prescribed by statute.^{55.50} The

Fla.—State v. Bennett, 90 So.2d 43.
Neb.—Ex parte Campbell, 25 N.W.2d 419, 147 Neb. 820.

Required averments

Extradition statutes were held to require that indictment, information or affidavit, under which extradition is sought, allege that person sought to be extradited to another state was in asylum state when he committed crime charged or was then in third state and committed therein an act intentionally resulting in crime in demanding state, or contain a showing that he was in demanding state when crime was committed, to authorize issuance of extradition warrant.

Fla.—Ennist v. Baden, 28 So.2d 160, 158 Fla. 141.

50.10 Cal.—Ex parte Hayes, 225 P.2d 272, 101 C.A.2d 416.

Tex.—Ex parte Oxford, 249 S.W.2d 917, 157 Tex.Cr. 512—Ex parte Coleman, 245 S.W.2d 712, 157 Tex. Cr. 37.

Abandonment of minor child

Where the crime for which extradition was sought was abandonment of minor children, provision of Uniform Enforcement of Support Act providing for extradition was applicable, and was not inconsistent with extradition provisions of the state and federal Constitution, and therefore, extradition could be made even though demand did not contain an express allegation that petitioner was

present in demanding state at the time of commission of the crime.

Fla.—State v. Bennett, 90 So.2d 43.
50.15 D.C.—Stumpf v. Matthews, 195 F.2d 35, 90 U.S.App.D.C. 177.

50.20 N.Y.—People ex rel. Swanson v. Peck, 127 N.Y.S.2d 751, 205 Misc. 326.

51. Mass.—In re Baker, 39 N.E.2d 762, 310 Mass. 724, certiorari denied Baker v. Delay, 62 S.Ct. 1297, 316 U.S. 699, 86 L.Ed. 1768.

52. Cal.—Ex parte Norquist, 294 P. 433, 110 C.A. 605.

52.5 Cal.—Ex parte Davis, 158 P.2d 36, 68 C.A.2d 798.

52.10 Ind.—Worth v. Wheatley, 108 N.E. 958, 183 Ind. 598.

52.15 N.H.—Thomas v. O'Brien, 95 A.2d 120, 98 N.H. 111.

52.20 N.H.—Thomas v. O'Brien, supra.

53. Kan.—Moon v. Butler County, 2 P. 818, 30 Kan. 458.

54. D.C.—Reed v. Colpoys, 99 F.2d 396, 69 App.D.C. 163, certiorari denied 59 S.Ct. 97, 305 U.S. 598, 83 L.Ed. 379.

N.Y.—People ex rel. MacArthur v. Warden of the Penitentiary, 200 N.Y.S. 81, 205 App.Div. 650.

Doctrine of res judicata does not apply to extradition proceedings since they are not judicial.

D.C.—Reed v. Colpoys, 99 F.2d 396, 69 App.D.C. 163, certiorari denied

59 S.Ct. 97, 305 U.S. 598, 83 L.Ed. 379.

55. Ill.—People v. Baldwin, 174 N.E. 51, 341 Ill. 604.

55.50 U.S.—Morgan v. Horrall, C.A. Cal., 175 F.2d 404, certiorari denied 70 S.Ct. 76, 338 U.S. 827, 94 L.Ed. 503.

Sworn statement of complainant

Under extradition statute requiring that governor's requisition be accompanied by sworn statement of complainant, "complainant" did not refer to victim or person wronged in criminal act, and statement by police detective was sufficient.

La.—State v. Fleming, 73 So.2d 462, 225 La. 564.

Supporting documents accompanying requisition held sufficient

(1) Generally.

U.S.—U. S. ex rel. Miller v. Walsh, D.C.Ill., 90 F.Supp. 332, affirmed, C.A., 182 F.2d 264.

Ala.—Cazalas v. Bridges, 81 So.2d 913, 38 Ala.App. 232.

(2) Requisition, accompanied by sworn statement of complainant setting forth complete statement of facts and statement of district attorney setting forth offense of which defendants were charged, was sufficient to justify extradition.

La.—State v. Fleming, 73 So.2d 462, 225 La. 564.

(3) Extradition record, consisting of demand by governor of demanding;

requisition or demand for extradition must be accompanied by a copy of an instrument charging the person demanded with a crime in the demanding state, which instrument may be either an indictment found or an affidavit made before a magistrate,⁵⁶ and under the federal statutes, and state statutes with similar requirements, the one or the other of

the two specified instruments must be produced,^{56.5} but both are not required.^{56.10} Under some statutes, however, where the charge is the commission of an act in the asylum or a third state resulting in a crime in the demanding state it must be contained in an indictment, and in such case a charge

state, application for requisition, copy of complaint and information subscribed and sworn to before a magistrate, warrant issued out of justice court, four affidavits each sworn to before magistrate and statements of certain persons named with the demanded person as codefendants in criminal complaint, which statements were exhibits made part of an affidavit executed before magistrate, was sufficient to confer jurisdiction on governor of asylum state to issue extradition warrant.

U.S.—*Morgan v. Horrall*, 175 F.2d 404, certiorari denied 70 S.Ct. 76, 338 U.S. 827, 94 L.Ed. 503.

56. U.S.—*U. S. ex rel. McCline v. Meyering*, C.C.A.Ill., 75 F.2d 716—*Collins v. Traeger*, C.C.A.Cal., 27 F.2d 842.

Collins v. Golden, D.C.Neb., 95 F. Supp. 251—*Corpus Juris Secundum* cited in *Ex parte Morgan*, D.C. Cal., 78 F.Supp. 756, 761, affirmed, C.A., 175 F.2d 404, certiorari denied 70 S.Ct. 76, 338 U.S. 827, 94 L.Ed. 503.

Ala.—*Russell v. State*, 37 So.2d 233, 251 Ala. 268.

Harrison v. State, 77 So.2d 384, 38 Ala.App. 60, certiorari denied 77 So.2d 387, 262 Ala. 701—*State of Tennessee v. Hamilton*, 190 So. 306, 28 Ala.App. 587.

Ariz.—*Corpus Juris Secundum* cited in *Ex parte Rubens*, 238 P.2d 402, 406, 73 Ariz. 101, certiorari denied *Rubens v. Boies*, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

Cal.—*Ex parte Harper*, 62 P.2d 390, 17 C.A.2d 446.

D.C.—*Watts v. Splain*, 277 F. 335, 51 App.D.C. 129.

Fla.—*Corpus Juris* cited in *Chase v. State*, 113 So. 103, 107, 93 Fla. 963, 54 A.L.R. 271—*State v. Chase*, 107 So. 541, 91 Fla. 413.

Ga.—*Corpus Juris Secundum* cited in *McFarlin v. Shirley*, 76 S.E.2d 1, 4, 209 Ga. 794—*Denny v. Foster*, 52 S.E.2d 596, 204 Ga. 872—*Broyles v. Mount*, 30 S.E.2d 48, 197 Ga. 659.

Ill.—*People ex rel. Webb v. Babb*, 123 N.E.2d 822, 5 Ill.2d 35—*People ex rel. Eveland v. Harrell*, 87 N.E. 2d 765, 404 Ill. 81—*People ex rel. Willis v. Mulcahy*, 64 N.E.2d 860, 392 Ill. 411—*People ex rel. Gardner v. Mulcahy*, 62 N.E.2d 418, 390 Ill. 511—*People ex rel. Buxton v. Jeremiah*, 4 N.E.2d 373, 364 Ill. 274—*People ex rel. Maypole v. Meyer-*

ing, 193 N.E. 495, 358 Ill. 589—*People ex rel. Romani v. Meyering*, 186 N.E. 150, 352 Ill. 436—*Corpus*

Juris cited in *Lacondra v. Hermann*, 175 N.E. 820, 822, 343 Ill. 608.

Ky.—*Oakley v. Franks*, 159 S.W.2d 415, 289 Ky. 605.

La.—*State v. Comisso*, 39 So.2d 729, 214 La. 1055—*State ex rel. Covington v. Hughes*, 102 So. 824, 157 La. 652.

Mass.—*In re Murphy*, 72 N.E.2d 413, 321 Mass. 206.

Miss.—*Loper v. Dees*, 49 So.2d 718, 210 Miss. 402—*Bishop v. Jones*, 42 So.2d 421, 207 Miss. 423.

Mo.—*State ex rel. Taylor v. Blair*, 214 S.W.2d 555, 358 Mo. 345—*State ex rel. Gaines v. Westhues*, 2 S.W. 2d 612, 318 Mo. 928.

Hagel v. Hendrix, App., 302 S.W. 2d 323—*Hayes v. O'Connell*, App., 263 S.W.2d 66.

N.Y.—*People ex rel. Merklen v. Enright*, 217 N.Y.S. 288, 217 App.Div. 514.

Okl.—*Ex parte Ryan*, 129 P.2d 204, 75 Okl.Cr. 144—*Ex parte Brown*, 259 P. 280, 38 Okl.Cr. 124—*Ex parte Hill*, 245 P. 663, 34 Okl.Cr. 120—*Ex parte Offutt*, 234 P. 222, 29 Okl. Cr. 401.

Or.—*Ex parte Paulson*, 124 P.2d 297, 168 Or. 457.

Pa.—*Commonwealth ex rel. Taylor v. Superintendent*, Philadelphia County Prison, 114 A.2d 343, 382 Pa. 181.

Commonwealth v. Steele, 78 Pa. Super. 352.

Commonwealth ex rel. Faison v. Watkins, 9 Pa.Dist. & Co.2d 571, 73 Montg.Co. 44.

Tex.—*Ex parte Cherry*, 234 S.W.2d 1011, 155 Tex.Cr. 324—*Ex parte Dalton*, 226 S.W.2d 871, 154 Tex. Cr. 258—*Ex parte Anderson*, 120 S.W.2d 259, 135 Tex.Cr. 291—*Ex parte Johnson*, 49 S.W.2d 788, 120 Tex.Cr. 65—*Ex parte Cragolla*, 260 S.W. 189, 97 Tex.Cr. 10—*Ex parte Gradington*, 231 S.W. 781, 89 Tex. Cr. 432.

25 C.J. p 261 note 30.

Necessity of charge of crime see supra § 9.

Habeas corpus as remedy where requisition not supported by copy of sufficient charge see Habeas Corpus § 39.

Purpose of requirement is to require some proof of probable guilt of accused so as to prevent his removal on unfounded accusations.

N.J.—*Ex parte Fritz*, 44 A.2d 414, 137 N.J.Eq. 185.

Purpose in permitting affidavit

If a requisition was permitted only after indictment, the sometimes considerable delay in awaiting grand jury action might enable a fugitive to escape extradition; to obviate this delay was the obvious legislative purpose in permitting an affidavit to be used as support for a requisition.

D.C.—*Bruzaud v. Matthews*, 207 F. 2d 25, 93 U.S.App.D.C. 47.

Insertion in requisition

Indictment need not be copied in requisition of demanding state or in extradition warrant, but certified copy must accompany requisition. Tenn.—*State v. Taylor*, 22 S.W.2d 222, 160 Tenn. 44.

Affidavit as conclusive evidence of charge

Affidavit was required to be received as conclusive evidence of charge.

Ala.—*Norman v. Burch*, 177 So. 309, 28 Ala.App. 28.

Amendment or addition to charge

New York district attorney cannot amend, supplement, or add to indictment in application to governor for requisition of fugitive, nor can governor do so in requisition.

U.S.—*Lee Gim Bor v. Ferrari*, C.C.A. Mass., 55 F.2d 86, 84 A.L.R. 329.

Valid accompanied by invalid complaint

Requisition relating to charge contained in annexed complaint certified by governor to be authentic was valid, although two of three complaints attached were void.

Tex.—*Ex parte McEntyre*, 18 S.W.2d 156, 112 Tex.Cr. 638.

56.5 Colo.—*Henry v. McArthur*, 223 P.2d 621, 122 Colo. 474.

Mo.—*State ex rel. Taylor v. Blair*, 214 S.W.2d 555, 358 Mo. 345.

56.10 D.C.—*Bruzaud v. Matthews*, 207 F.2d 25, 93 U.S.App.D.C. 47.

Indictment alone is sufficient

N.Y.—*People ex rel. Lipshitz v. Bes-senger*, 75 N.Y.S.2d 392, 273 App. Div. 19.

Absence of indictment is immaterial where the papers accompanying the requisitions contain a proper affidavit or copy thereof.

Mass.—*In re Murphy*, 72 N.E.2d 413, 321 Mass. 206.

by affidavit accompanying the application for extradition is insufficient.^{56.15}

Statutory requirements with respect to copies of papers charging a crime in the demanding state accompanying the demand for extradition or requisition are mandatory.^{56.20} The required papers are necessary in order to confer jurisdiction on the governor of the asylum state,^{56.25} and a requisition unaccompanied by such a paper is no justification for the arrest of a fugitive.⁵⁷ The indictment or affidavit need not be annexed to the requisition if it accompanies it,⁵⁸ and the mere recital that an indictment is annexed is of no avail, there being in fact none attached.⁵⁹

Copy. It is not necessary that the original pleading charging the crime be forwarded with the requisition, a copy being sufficient.^{59.5}

Duplicate copy for fugitive. A statutory provision requiring duplicate copies of the indictment, information, affidavit, or judgment of conviction or sentence and other instruments accompanying the demand or requisition to be furnished and delivered to the fugitive or his attorney is directory.^{59.10} The right conferred, however, is a valuable right and

it becomes mandatory on demand.^{59.15}

Requisition supported by both sufficient and insufficient accompanying instruments. Where the requisition is accompanied by a copy of a proper instrument sufficiently charging the person demanded with a crime, the fact that it is also accompanied by a copy of an unauthorized or otherwise insufficient instrument is immaterial.^{59.20}

§ 14(2). — — — Other Instruments Charging Crime

In general, the document accompanying the requisition and setting forth the crime with which the person demanded is charged may be a copy of a criminal pleading other than an indictment or affidavit before a magistrate, such as an information or complaint, or a copy of the judgment of conviction or sentence.

The extradition provisions of the federal Constitution and statutes do not cover the whole ground relative to extradition between states, and ordinarily are held not to preclude the states from providing that the document accompanying the requisition and setting forth the crime charged may be a copy of a criminal pleading other than an indictment or affidavit before a magistrate.^{59.50} Thus, although it

56.15 Idaho.—Videan v. State, 194 P.2d 615, 68 Idaho 269.

Withdrawn count

An extradition warrant, stating that person sought to be extradited was charged by indictment with crime of nonsupport of his minor children, was unauthorized, where such charge was originally contained in count of accused's divorced wife's criminal complaint sworn to before justice of the peace, and prosecuting attorney's supporting affidavit, accompanying application to governor of demanding state for requisition, directed that such count be disregarded and considered as surplusage. Idaho.—Videan v. State, *supra*.

56.20 Pa.—Commonwealth ex rel. Faison v. Watkins, 9 Pa.Dist. & Co.2d 571, 73 Montg.Co. 44.
Tenn.—State ex rel. Daugherty v. Payne, 174 S.W.2d 457, 180 Tenn. 268.

56.25 U.S.—Morgan v. Horrall, C.A. Cal., 175 F.2d 404, certiorari denied 70 S.Ct. 76, 338 U.S. 827, 94 L.Ed. 503.
Miss.—Bishop v. Jones, 42 So.2d 421, 207 Miss. 423.

57. Fla.—Hattaway v. Culbreath, 57 So.2d 661—State ex rel. Hanowski v. Sullivan, 41 So.2d 338—Ex parte Powell, 20 Fla. 806.

Ga.—McFarlin v. Shirley, 76 S.E.2d 1, 209 Ga. 794.

La.—State v. Comisso, 39 So.2d 729, 214 La. 1055.

Miss.—Bishop v. Jones, 42 So.2d 421, 207 Miss. 423.

Mo.—State ex rel. Taylor v. Blair, 214 S.W.2d 555, 358 Mo. 345.

N.J.—Ex parte Fritz, 44 A.2d 414, 137 N.J.Eq. 185.

N.Y.—People ex rel. Namluk v. Wagner, 144 N.Y.S.2d 237, 208 Misc. 520.

Matter of Rutter, 7 Abb.Pr., N.S., 67.

Tex.—Ex parte Dalton, 226 S.W.2d 871, 154 Tex.Cr. 258.

Foundation of proceedings

Foundation of extradition proceedings is a judgment or affidavit substantially charging the person demanded with having committed a crime under the law of demanding state.

Or.—Ex parte Paulson, 124 P.2d 297, 168 Or. 457.

Indictment after requisition

(1) Indictment filed in another state after governor had issued warrant could not establish necessary jurisdictional facts.

Tenn.—State v. Hackett, 33 S.W.2d 422, 161 Tenn. 602.

(2) Where requisition for extradition certifying attached documents to be authentic bore date prior to date appearing on petition, affidavit, and indictment attached to requisition, so that it was apparent that governor of demanding state could not have had such documents before him when he certified them to be au-

thentic, requisition for extradition was fatally defective.

N.J.—Ex parte Kelsey, 21 A.2d 676, 19 N.J.Misc. 488.

Copy of charge by transcript of minutes is insufficient.

Ala.—Watson v. State, 2 So.2d 470, 30 Ala.App. 184.

58. Mass.—Kingsbury's Case, 106 Mass. 223.

59. U.S.—Ex parte Hart, Md., 63 F. 249, 11 C.C.A. 165, 28 L.R.A. 801.

59.5 Ill.—People ex rel. Gates v. Mulcahy, 65 N.E.2d 21, 392 Ill. 498 —People ex rel. Bell v. Mulcahy, 64 N.E.2d 474, 392 Ill. 290, certiorari denied 66 S.Ct. 901, 327 U.S. 800, 90 L.Ed. 1025.

Mo.—Gugenhine v. Gerk, 31 S.W.2d 1, 326 Mo. 333, appeal dismissed and certiorari denied 51 S.Ct. 180, 282 U.S. 810, 75 L.Ed. 726.
25 C.J. p 264 note 69.

59.10 Tex.—Ex parte Moore, 256 S. W.2d 103, 158 Tex.Cr. 407.

59.15 Tex.—Ex parte Tucker, Cr., 324 S.W.2d 853—Ex parte Moore, 256 S.W.2d 103, 158 Tex.Cr. 407.

59.20 Ga.—Broyles v. Mount, 30 S. E.2d 48, 197 Ga. 659.

Tex.—Ex parte Key, Cr., 301 S.W.2d 90—Ex parte Logan, 205 S.W.2d 994, 151 Tex.Cr. 129.

59.50 Cal.—Ex parte Davis, 158 P.2d 36, 68 C.A.2d 798.

N.Y.—People ex rel. Matochik v. Baker, 114 N.E.2d 194, 306 N.Y. 32.

has been held that within the field covered by the federal statutes a state cannot require some instrument, such as an information, instead of an indictment or affidavit,^{59.55} generally any method prescribed by the demanding state for the institution of a criminal proceeding and which may be the basis for the issuance of a warrant of arrest satisfies the federal requirements with respect to the accompanying copy of an indictment or affidavit charging a crime.^{59.60}

Under various statutes, including the Uniform Criminal Extradition Act, in addition to a copy of an indictment or affidavit made before a magistrate, as discussed supra § 14(1), the required accompanying documents showing the person demanded to be

charged with a crime may be a copy of an information supported by affidavit,^{59.65} or of a warrant supported by an affidavit made before a committing magistrate,^{59.70} or of a judgment or conviction,^{59.75} or of a judgment of conviction or sentence imposed in execution thereof.^{59.80}

Information. An information has been held a sufficient instrument to support a requisition where the mode of procedure in the demanding state is by information and not by indictment, in some of the jurisdictions the courts holding a copy of an information to be a valid substitute for a copy of an indictment and in other jurisdictions the statutes expressly authorizing such a procedure,⁶⁰ especial-

People ex rel. Hollander v. Britt, 92 N.Y.S.2d 662, 195 Misc. 722, affirmed 93 N.Y.S.2d 704, 276 App. Div. 815.

59.55 Mo.—Hayes v. O'Connell, App., 263 S.W.2d 66.

59.60 U.S.—Ex parte Morgan, D.C. Cal., 78 F.Supp. 756, affirmed, C.A., Morgan v. Horrall, 175 F.2d 404, certiorari denied 70 S.Ct. 76, 338 U.S. 827, 94 L.Ed. 503.

59.65 Mass.—In re Murphy, 72 N.E. 2d 413, 321 Mass. 206.

N.Y.—People ex rel. Matochik v. Barker, 114 N.E.2d 194, 306 N.Y. 32. People ex rel. Hollander v. Britt, 93 N.Y.S.2d 662, 195 Misc. 722, affirmed 93 N.Y.S.2d 704, 276 App. Div. 815.

Tex.—Ex parte Peairs, 283 S.W.2d 755, 162 Tex.Cr. 243, appeal dismissed Peairs v. State of Tex., 76 S.Ct. 104, 350 U.S. 858, 100 L.Ed. 762.

59.70 Fla.—State ex rel. Hanowski v. Sullivan, 41 So.2d 338.

59.75 Tex.—Ex parte Peairs, 283 S.W.2d 755, 162 Tex.Cr. 243, appeal dismissed Peairs v. State of Texas, 76 S.Ct. 104, 350 U.S. 858, 100 L.Ed. 762.

59.80 Pa.—Commonwealth ex rel. Faison v. Watkins, 9 Pa. Dist. & Co. 2d 571, 73 Montg. Co. 44.

60. U.S.—Ex parte Nash, D.C. Ark., 44 F.2d 403.

Cal.—Ex parte Davis, 158 P.2d 36, 68 C.A.2d 798.

Ga.—Denny v. Foster, 52 S.E.2d 596, 204 Ga. 872.

Ill.—People ex rel. Lyman v. Smith, 186 N.E. 159, 352 Ill. 496.

Ind.—Cook v. Rodgers, 20 N.E.2d 933, 215 Ind. 500.

Kan.—Smith v. Nye, 272 P.2d 1079, 176 Kan. 679.

N.J.—Stark v. Livermore, 65 A.2d 625, 3 N.J. Super. 94. 25 C.J. p 262 note 35.

Form of charge as immaterial

In extradition proceedings, whether instrument charging accused with

crime is affidavit, or complaint or information under oath, is immaterial. Minn.—State v. Murnane, 215 N.W. 863, 172 Minn. 401.

In New York

(1) Formerly the lower courts were divided with respect to the sufficiency of an information to support a requisition. Some held that an extradition proceeding may be predicated on an information where the law of the demanding state authorizes prosecution by that method, and that an information constitutes a sufficient compliance with the requirements of the federal statutes. N.Y.—People ex rel. MacSherry v. Enright, 184 N.Y.S. 248, 112 Misc. 568, affirmed 188 N.Y.S. 945, 196 App. Div. 964.

(2) Others held that a state has the right to provide by statute for extradition on the basis of an information and that under the statutes of New York extradition was authorized on the basis of an information where the law of the demanding state provides for prosecution by information.

N.Y.—People ex rel. Hollander v. Britt, 92 N.Y.S.2d 662, 195 Misc. 722, affirmed 93 N.Y.S.2d 704, 276 App. Div. 815.

(3) On the other hand, it was also held that an information is not a substitute for an indictment within the requirements of the federal statute, and that it would not support a requisition even though a state statute expressly authorized it, because the requirements of the federal statute were exclusive and controlling. N.Y.—People ex rel. Lipshitz v. Bes-senger, 75 N.Y.S.2d 392, 273 App. Div. 19.

(4) This conflict of authority was resolved by a decision of the court of appeals which, while stating that there is merit in the view that an information is a sufficient compliance with the requirements of the federal statute, based its decision that an

information is a proper instrument to sustain a requisition on the theory that the federal statutes are not exclusive and the state legislature had expressly authorized such a procedure.

N.Y.—People ex rel. Matochik v. Barker, 114 N.E.2d 194, 306 N.Y. 32.

In Texas

(1) Prior to the enactment of the Uniform Criminal Extradition Act in 1951, a copy of an information could not be used as the required document which must accompany the demand or requisition.

Tex.—Ex parte Cherry, 234 S.W.2d 1011, 155 Tex.Cr. 324—Ex parte Kinsloe, 115 S.W.2d 955, 134 Tex. Cr. 299—Ex parte Stanley, 109 S.W. 2d 1053, 133 Tex.Cr. 192—Ex parte Bourland, 105 S.W.2d 251, 132 Tex. Cr. 434—Ex parte Stone, 87 S.W.2d 267, 129 Tex.Cr. 302—Ex parte Shillings, 63 S.W.2d 853, 124 Tex. Cr. 482—Ex parte Chittenden, 61 S.W.2d 1008, 124 Tex.Cr. 228—Ex parte Johnson, 49 S.W.2d 788, 120 Tex.Cr. 65—Ex parte Randall, 257 S.W. 1101, 96 Tex.Cr. 466. 25 C.J. p 262 notes 37–39.

(2) Since the enactment of that statute, an information supported by an affidavit is sufficient, where there is an affirmative showing in the record that the law of the demanding state authorizes prosecution of the offense charged on an information.

Tex.—Ex parte Peairs, 283 S.W.2d 755, 162 Tex.Cr. 243, appeal dismissed Peairs v. State of Texas, 76 S.Ct. 104, 350 U.S. 858, 100 L.Ed. 762.

(3) Where evidence of laws of demanding state authorizing a prosecution for felony on an information is introduced in extradition proceeding, order of extradition is proper. Tex.—Ex parte Cooper, Cr., 308 S.W. 2d 22.

(4) Where, however, there is no showing that prosecution of offenses on an information is authorized in

ly where there has been a conviction and sentence,^{60.5} and there are dicta by the United States supreme court bearing out this view.⁶¹

In other cases, however, it has been held that an information cannot be regarded as a substitute for the affidavit permitted by statute where it is unverified,^{61.5} or where it is not verified by one having knowledge of the facts,⁶² but that a properly verified information may reasonably be construed to come within the provision for a charge by affidavit,^{62.5} and that where there is an attempt to rely on an information properly subscribed under oath, it must be accompanied by an affidavit made before a magistrate.^{62.10} Congress or the states, if they see fit to do so, have power under the federal constitutional provision governing extradition to include an information, verified or unverified, as a proper document to accompany the requisition.^{62.15}

An information is insufficient under a statute providing that where the charge is the commission

of an act in the asylum, or a third, state resulting in a crime in the demanding state it must be contained in an indictment.^{62.20} Where the procedure of the demanding state requires an indictment for the prosecution of a felony, an information containing sworn statements made on information and belief is insufficient.^{62.25}

Under a statute authorizing the required document accompanying the demand to be an information supported by affidavit, the affidavit need not be made before a magistrate,^{62.30} and the information need not be based on the affidavit,^{62.35} which may be sworn subsequently to the date of the information.^{62.40}

Complaint. It has been stated generally that a complaint charging a crime is sufficient to support a requisition.^{62.45} In other instances, however, it has been held that while a preliminary complaint or affidavit, where verified, is sufficient to support a requisition,⁶³ it is not sufficient when not sworn

the demanding state, it will not be sufficient.

Tex.—Ex parte Doyal, Cr., 318 S.W. 2d 642—Ex parte Cooper, supra.

(5) In the absence of evidence in the record showing that a felony offense may be prosecuted in the demanding state on an information, it is assumed that prosecution of such an offense on an information is not authorized in the demanding state.

Tex.—Ex parte Doyal, 318 S.W.2d 642.

60.5 Ga.—Denny v. Foster, 52 S.E. 2d 596, 204 Ga. 872.

61. U.S.—In re Strauss, N.Y., 25 S. Ct. 535, 197 U.S. 324, 49 L.Ed. 774 —Commonwealth of Kentucky v. Dennison, Ky., 24 How. 66, 16 L.Ed. 717.

"Who would doubt that an information, where that is the statutory pleading for purposes of trial, is sufficient to justify an extradition?" U.S.—In re Strauss, N.Y., 25 S.Ct. 535, 197 U.S. 324, 49 L.Ed. 717.

61.5 Mo.—State ex rel. Taylor v. Blair, 214 S.W.2d 555, 358 Mo. 345.

62. Colo.—Henry v. McArthur, 223 P.2d 621, 122 Colo. 474. 25 C.J. p 262 notes 37-39.

Document held insufficient

Copy of paper labeled "information," which was mere verified accusation by prosecuting attorney, and was barren of oaths as to matters contained therein and did not show indorsement of names of prosecuting witnesses was insufficient. Colo.—Henry v. McArthur, supra.

In Oklahoma

(1) An information, duly verified, may form the basis of an extradition

proceeding, where it is a proper method of charging crime in the demanding state.

Okl.—Ex parte Ryan, 129 P.2d 204, 75 Okl.Cr. 144—In re Gundy, 236 P. 440, 30 Okl.Cr. 390.

(2) It has been held, however, that an information not sworn to on personal knowledge will not support an extradition proceeding.

Okl.—Ex parte Hill, 245 P. 663, 34 Okl.Cr. 120.

(3) Another case held that an information was sufficient.

Okl.—Ex parte Rogers, 242 P. 781, 33 Okl.Cr. 82.

62.5 Mo.—State ex rel. Taylor v. Blair, 214 S.W.2d 555, 358 Mo. 345.

62.10 Colo.—Henry v. McArthur, 223 P.2d 621, 122 Colo. 474.

62.15 Mo.—State ex rel. Taylor v. Blair, 214 S.W.2d 555, 358 Mo. 345. N.Y.—People ex rel. Matochik v. Baker, 114 N.E.2d 194, 306 N.Y. 32.

People ex rel. Hollander v. Britt, 92 N.Y.S.2d 662, 195 Misc. 722, affirmed 93 N.Y.S.2d 704, 276 App. Div. 815.

62.20 Idaho.—Videan v. State, 194 P.2d 615, 68 Idaho 269.

62.25 N.Y.—People ex rel. Namlik v. Wagner, 144 N.Y.S.2d 237, 208 Misc. 520.

62.30 Tex.—Ex parte Peairs, 283 S.W.2d 755, 162 Tex.Cr. 243, appeal dismissed Peairs v. State of Texas, 76 S.Ct. 104, 350 U.S. 858, 100 L.Ed. 762.

Notary public

Affidavit sworn before notary public is sufficient.

Tex.—Ex parte Peairs, 283 S.W.2d 755, 162 Tex.Cr. 243, appeal dis-

missed Peairs v. State of Tex., 76 S.Ct. 104, 350 U.S. 858, 100 L.Ed. 762.

62.35 Tex.—Ex parte Peairs, 283 S.W.2d 755, 162 Tex.Cr. 243, appeal dismissed Peairs v. State of Texas, 76 S.Ct. 104, 350 U.S. 858, 100 L.Ed. 762.

62.40 Tex.—Ex parte Peairs, 283 S.W.2d 755, 162 Tex.Cr. 243, appeal dismissed Peairs v. State of Texas, 76 S.Ct. 104, 350 U.S. 858, 100 L.Ed. 762.

Purpose of affidavits is only to demonstrate to governors of both demanding state and state of asylum that there is merit in formal charge and date of supporting affidavits has no bearing on their sufficiency to meet requirements of statute, and therefore affidavits executed months after date of information are sufficient.

N.Y.—People ex rel. Moore v. Skinner, 135 N.Y.S.2d 107, 284 App.Div. 770.

62.45 Tex.—Ex parte Cherry, 234 S.W.2d 1011, 155 Tex.Cr. 324—Ex parte Norris, 225 S.W.2d 193, 154 Tex.Cr. 68.

63. Ariz.—Corpus Juris Secundum cited in Ex parte Rubens, 238 P.2d 402, 406, 73 Ariz. 101, certiorari denied Rubens v. Boies, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

Cal.—Ex parte Jackson, 256 P. 250, 82 C.A. 719.

D.C.—Riley v. Colpoys, 85 F.2d 282, 66 App.D.C. 116.

Ill.—People ex rel. Morris v. Walsh, 81 N.E.2d 574, 401 Ill. 165—People ex rel. Gates v. Mulcahy, 65 N.E.2d 21, 392 Ill. 498.

to or when made on information and belief without stating the sources of affiant's information.⁶⁴

Conviction or sentence. It has been held that a judgment of conviction is not a substitute for an affidavit or indictment and will not support a requisition,⁶⁵ but there is authority that a judgment of conviction will support an extradition proceeding,⁶⁶ even though the criminal proceeding was instituted by an unverified information.⁶⁷

Warrant. A warrant of arrest, it has been held, does not meet the requirement of an indictment or affidavit and will not support a requisition.⁶⁸ Other authority, however, has held that a warrant which sufficiently charges a crime is sufficient and is in

effect an indictment under the extradition laws, where it was issued by a judge acting as a one-man grand jury and is a sufficient instrument in the demanding state on which to hold a person for trial.^{68.5}

Under some statutes, if the accompanying document is a copy of an affidavit made before a magistrate, it must also be accompanied by a copy of the warrant which was issued thereon.^{68.10} The federal Constitution and statutes, however, do not require the issuance by the demanding state of a warrant for the alleged fugitive, or the presentation of such a warrant with the requisition, in the event that one has been issued,^{68.15} and in various jurisdictions it is held that a writ or warrant of arrest need not be

Mass.—In re Murphy, 72 N.E.2d 413, 321 Mass. 206.

Minn.—State ex rel. Webster v. Moeller, 253 N.W. 668, 191 Minn. 193—State v. Murnane, 215 N.W. 863, 172 Minn. 401.

Okl.—Ex parte Ryan, 129 P.2d 204, 75 Okl.Cr. 144—In re Gundy, 236 P. 440, 30 Okl.Cr. 390.

Tex.—Ex parte Logan, 205 S.W.2d 944, 151 Tex.Cr. 129—Ex parte Chabiz, 260 S.W. 190, 97 Tex.Cr. 9. Utah.—Bell v. Corless, 196 P. 568, 57 Utah 604.

25 C.J. p 262 note 42.

Complaint by accomplice

Accused was not entitled to resist extradition for felony in Alabama on ground that complaints were made by accomplice.

Cal.—Ex parte Jackson, 256 P. 250, 82 C.A. 719.

Complaint issued by justice of peace charging crime denounced by statutes of demanding state, together with warrant of arrest and affidavits filed with governor of asylum state, were sufficient compliance with federal extradition statute.

U.S.—Ex parte Morgan, D.C.Cal., 78 F.Supp. 756, affirmed, C.A., Morgan v. Horrall, 175 F.2d 404, certiorari denied 70 S.Ct. 76, 338 U.S. 827, 94 L.Ed. 503.

64. Minn.—State v. Richardson, 24 N.W. 354, 34 Minn. 115. 25 C.J. p 262 notes 40, 41.

65. Ga.—Deering v. Mount, 22 S.E. 2d 828, 194 Ga. 833.

Mo.—Rummerfield v. Watson, 70 S.W.2d 895, 335 Mo. 71.

Requirements not changed by conviction

Requirements of an indictment or affidavit charging commission of a crime are the same for extradition of persons who have been tried and convicted as they are for those who have only been accused but not yet tried on charges against them.

Mo.—State ex rel. Taylor v. Blair, 214 S.W.2d 555, 358 Mo. 345.

Merger of charge in conviction

Term "charged with crime" in statute providing for extradition includes persons convicted, and therefore indictment does not merge into judgment of conviction so as to permit substitution of copy of judgment in lieu of indictment in extradition proceedings.

Mo.—Rummerfield v. Watson, 70 S.W. 2d 895, 335 Mo. 71.

66. Colo.—Travis v. People, 308 P.2d 997, 135 Colo. 141.

Kan.—Corpus Juris Secundum cited in Smith v. Nye, 272 P.2d 1079, 1081, 176 Kan. 679.

Miss.—Loper v. Dees, 49 So.2d 718, 210 Miss. 402.

Tex.—Ex parte Cook, Cr., 312 S.W.2d 520.

Wash.—State v. Remann, 4 P.2d 866, 165 Wash. 92, 78 A.L.R. 412.

Record of conviction

Where charge of crime has resulted in conviction, record of such conviction is sufficient evidence in extradition proceedings, and sufficiency of affidavits preliminary to original criminal complaint or indictment is immaterial.

Colo.—Lyle v. Kieback, 337 P.2d 392.

67. Wash.—State v. Remann, 4 P. 2d 866, 165 Wash. 92, 78 A.L.R. 412.

68. D.C.—Bruzard v. Matthews, 207 F.2d 25, 93 U.S.App.D.C. 47.

Tex.—Ex parte Shillings, 63 S.W.2d 853, 124 Tex.Cr. 482.

Document containing charge

It is indictment or affidavit, and not the issuing of a warrant, which constitutes the charge against fugitive.

Idaho.—Applications of Williams, 279 P.2d 882, 76 Idaho 173.

68.5 N.J.—Robichaud v. Brennan, 49 A.2d 287, 134 N.J.Law 532, affirmed 52 A.2d 697, 135 N.J.L. 472, certiorari denied 68 S.Ct. 54, 332 U.S. 756, 92 L.Ed. 342, rehearing denied

68 S.Ct. 149, 332 U.S. 819, 92 L.Ed. 396.

68.10 Pa.—Commonwealth ex rel. Faison v. Watkins, 9 Pa.Dist. & Co. 2d 571, 73 Montg.Co. 44.

Purpose of provision is to show to governor of asylum state that there is pending against person demanded valid charge of crime committed in demanding state and upon which such person might be lawfully arrested in such state.

Tenn.—State ex rel. Trigg v. Thompson, 270 S.W.2d 332, 196 Tenn. 147.

Capias, which authorized any peace officer of demanding state to arrest person sought to be extradited on affidavit of crime duly filed against him, was in form of warrant, and constituted compliance with statute of asylum state requiring that copy of any warrant issued on affidavit of demanding state shall accompany application for warrant of extradition. Tenn.—State ex rel. Trigg v. Thompson, supra.

Warrant containing no affidavit

Extradition warrant of parole board of demanding state, containing no affidavit, was fatally defective.

Tenn.—State ex rel. Daugherty v. Payne, 174 S.W.2d 457, 180 Tenn. 268.

68.15 Ariz.—Ex parte Riccardi, 203 P.2d 627, 68 Ariz. 180.

Idaho.—Applications of Williams, 279 P.2d 882, 76 Idaho 173.

Affidavit only held sufficient

Idaho.—Applications of Williams, supra.

Issuance of warrant immaterial

Issuance or failure to issue a warrant of arrest by authorities of demanding state was not material, since federal statutes require no more than an affidavit made before a magistrate charging the person demanded with having committed crime.

Ill.—People ex rel. Gates v. Mulcahy, 65 N.E.2d 21, 392 Ill. 498.

made a part of the extradition papers,^{68.20} some of them holding such a requirement in a state statute in conflict with the federal statute and hence void.^{68.25}

§ 14(3). — Subsequent Filing of Indictment or Other Pleading

A requisition based on an affidavit sufficiently charging a crime is not rendered insufficient by the subsequent filing of an information or other criminal pleading charging the same crime.

A requisition based on an affidavit is valid even though subsequently an information is filed⁶⁹ or an indictment returned⁷⁰ charging the fugitive with the same crime. Where an indictment has been returned there is no necessity for basing a requisition on a mere affidavit,^{70.5} and in such case, where a copy of the indictment accompanies the requisition, an earlier affidavit made by a complaining witness need not be attached to and accompany the

requisition, and where it is included among the extradition papers it will be regarded as mere surplusage.^{70.10}

§ 14(4). — Affidavit Taken before Magistrate

Under the federal and various state extradition statutes, an affidavit in support of a requisition must be taken before a magistrate, who, although not required to be a judge of a court of general jurisdiction, must be clothed with power as a public civil officer.

Under the federal and various state extradition statutes, an affidavit in support of a requisition must be taken before a magistrate,⁷¹ but it has been held that that fact need not appear on the face of the affidavit.⁷² The magistrate required is one clothed with power as a public civil officer,⁷³ or a judicial officer having a summary jurisdiction in matters of a criminal or quasi-criminal nature.⁷⁴ He is not required to be a judge of a court of general juris-

68.20 Colo.—*Marsolais v. De Angelis*, 215 P.2d 315, 121 Colo. 299.
Miss.—*Tyler v. Pierce*, 61 So.2d 309, 216 Miss. 498.

68.25 Ariz.—*Ex parte Riccardi*, 203 P.2d 627, 68 Ariz. 180.
Idaho.—*Applications of Williams*, 279 P.2d 882, 79 Idaho 173.

Warrant issued on affidavit

Where extradition proceeding was based on an indictment, presentation of a warrant from demanding state was not necessary as a prerequisite to issuance of extradition warrant, under state statute requiring a warrant issued on an affidavit made before magistrate in demanding state charging alleged fugitive with crime. Ariz.—*Ex parte Riccardi*, 203 P.2d 627, 68 Ariz. 180.

69. Fla.—*Mitchell v. Stoutamire*, 152 So. 629, 113 Fla. 822.

Prosecution under affidavit barred

Where affidavit made before magistrate in demanding state and information subsequently filed by county prosecuting attorney charged same crime against same person in practically same language, filing of information did not deprive affidavit of its efficacy as basis for extradition proceedings even though prosecution under affidavit was barred by limitations.

Fla.—*Mitchell v. Stoutamire*, *supra*.

70. Tex.—*Coleman v. State*, 113 S.W. 17, 53 Tex.Cr. 93.

70.5 D.C.—*Bruzaud v. Matthews*, 207 F.2d 25, 93 U.S.App.D.C. 47.

70.10 D.C.—*Bruzaud v. Matthews*, *supra*.

71. U.S.—*Collins v. Traeger*, C.C.A. Cal., 27 F.2d 842.

Ariz.—*Corpus Juris Secundum* cited

in *Ex parte Rubens*, 238 P.2d 402, 406, 73 Ariz. 101, certiorari denied *Rubens v. Boies*, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

Colo.—*Smith v. Short*, 237 P.2d 113, 124 Colo. 398—*Henry v. McArthur*, 223 P.2d 621, 122 Colo. 474.

Fla.—*State ex rel. Miller v. McLeod*, 194 So. 628, 142 Fla. 254.

Ga.—*Denny v. Foster*, 52 S.E.2d 596, 204 Ga. 372.

Ill.—*Lacondra v. Hermann*, 175 N.E. 820, 343 Ill. 608.

Mont.—*State v. Booth*, 328 P.2d 1104.
N.Y.—*People ex rel. Lipshitz v. Bes-senger*, 75 N.Y.S.2d 392, 273 App. Div. 19.

Okl.—*Ex parte Hill*, 245 P. 663, 34 Okl.Cr. 120.

25 C.J. p 264 note 63.

Proof of authority

(1) Fact that in addition to affidavit made before magistrate charging fugitive with crime, there was also included among supporting documents, certification that justice of peace who witnessed affidavit held such office on date somewhat later than that recited in affidavit, did not in any way reflect on, or preclude, justice's having had proper authority on date affidavit was executed, and there being no evidence or implication that he did not hold office on such date, there was no failure to comply with statutory requirements. Ill.—*People ex rel. Webb v. Babb*, 123 N.E.2d 322, 5 Ill.2d 35.

(2) It is not incumbent on asylum state to establish that person named in demand as magistrate was in fact a magistrate.

Tex.—*Ex parte Gesek*, Cr., 302 S.W. 2d 417.

"J. of P."

County clerk's certificate concern-

ing magistracy of one issuing warrant in demanding state and recital in body of warrant that it was issued by justice of peace, showed that "J. of P." following name of magistrate issuing warrant, meant "justice of the peace," and use of such warrant was not contrary to constitutional requirement of asylum state that official writings be in English language.

Ill.—*People ex rel. McCline v. Mey-ering*, 190 N.E. 261, 356 Ill. 210.

72. Fla.—*State v. Allen*, 92 So. 155, 83 Fla. 655.

73. U.S.—*Compton v. Alabama*, Ala., 29 S.Ct. 605, 214 U.S. 1, 53 L.Ed. 855, 16 Ann.Cas. 1098.

In re *Keller*, D.C.Minn., 36 F. 681.

Fla.—*State ex rel. Miller v. McLeod*, 194 So. 628, 142 Fla. 254.

In New York

(1) It has been stated that the term "magistrate" as used in the federal statute comprehends a judicial officer.

N.Y.—*People ex rel. Lipshitz v. Bes-senger*, 75 N.Y.S.2d 392, 273 App. Div. 19.

(2) Other authority has held that a magistrate is not limited to a judicial officer, but that any public civil officer may be regarded as a magistrate.

N.Y.—*People ex rel. Hollander v. Britt*, 92 N.Y.S.2d 662, 195 Misc. 722, affirmed 93 N.Y.S.2d 704, 276 App.Div. 815.

74. Colo.—*Smith v. Short*, 237 P.2d 113, 124 Colo. 398—*Henry v. McArthur*, 223 P.2d 621, 122 Colo. 474.

Fla.—*State v. Allen*, 92 So. 155, 83 Fla. 655.

diction of the state,^{74.5} but may be a justice of the peace,^{74.10} a police judge,^{74.15} or, generally, one who is regarded as a magistrate in the demanding state.⁷⁵

The requirement that the affidavit be taken before a magistrate does not mean that the magistrate must write the affidavit or administer the oath;⁷⁶ it is sufficient that the affidavit be made in the presence of the magistrate,⁷⁷ or that the affidavit be laid before him for appropriate action.⁷⁸ The affidavit referred to is the affidavit which must be made before the magistrate who issues the warrant of arrest.^{78.5} A complaint can be an affidavit within the

meaning of the requirement,^{78.10} and hence a verified complaint made before a magistrate is the same as an affidavit and satisfies the statutory requirements.^{78.15}

§ 14(5). — Authentication

The papers accompanying the demand or requisition and showing the person demanded to be charged with a crime must be properly authenticated by the governor or chief magistrate of the demanding state or territory.

In general, the papers accompanying the demand or requisition must be properly authenticated.^{78.50}

74.5 Mont.—State v. Booth, 328 P. 2d 1104.

Municipal court

Warrant on which extradition was sought was not invalid for extradition purposes because complaint and warrant were issued out of municipal court of county of state which sought extradition rather than out of a state court.

Kan.—Thompson v. Nye, 257 P.2d 937, 174 Kan. 750.

Officials held to be magistrates

(1) Judge of municipal court.

U.S.—Collins v. Traeger, C.C.A.Cal., 27 F.2d 842.

Mass.—In re Murphy, 72 N.E.2d 413, 321 Mass. 206.

Tex.—Ex parte Strom, Cr., 324 S.W. 2d 224.

(2) City judge and ex officio justice of the peace.

Fla.—State v. Allen, 92 So. 155, 83 Fla. 655.

(3) County judge.

Colo.—Smith v. Short, 237 P.2d 113, 124 Colo. 398.

(4) Judge of district court.

Cal.—Ex parte Davis, 158 P.2d 36, 68 C.A.2d 798.

Mo.—Gugenhine v. Gerk, 31 S.W.2d 1, 326 Mo. 333, appeal dismissed and certiorari denied 51 S.Ct. 180, 282 U.S. 810, 75 L.Ed. 726.

(5) Clerk of circuit court before whom the affidavit was sworn to and who was authorized to issue the warrant therefor in absence of any direction by a court or judge.

N.Y.—People ex rel. Hollander v. Britt, 92 N.Y.S.2d 662, 195 Misc. 722, affirmed 93 N.Y.S.2d 704, 276 App.Div. 815.

(6) Clerk of justice of peace.

Fla.—Mitchell v. Stoutamire, 152 So. 629, 113 Fla. 822.

(7) Deputy clerk of city court, criminal branch.

Fla.—State ex rel. Miller v. McLeod, 194 So. 628, 142 Fla. 254.

(8) Municipal court clerk.

D.C.—Marks v. Eckerman, 23 F.2d 761, 57 App.D.C. 340.

(9) Recorder.

N.Y.—Levine v. Warden of Women's

Prison, 64 N.Y.S.2d 337, 188 Misc. 307, affirmed 67 N.Y.S.2d 708, 271 App.Div. 951.

(10) Other officials see 25 C.J. p 264 note 63 [a].

Officials held not to be magistrates

(1) Notary public.

Ga.—Denny v. Foster, 52 S.E.2d 596, 204 Ga. 872—Deering v. Mount, 22 S.E.2d 828, 194 Ga. 833.

Ill.—People ex rel. La Rue v. Meyer-ing, 191 N.E. 318, 357 Ill. 166.

N.Y.—People ex rel. Lipshitz v. Bes-senger, 75 N.Y.S.2d 392, 273 App. Div. 19.

(2) Clerk of court of record.

N.Y.—People ex rel. Lipshitz v. Bes-senger, supra.

(3) Clerk of district court.

Fla.—State ex rel. Hanowski v. Sul-livan, 41 So.2d 338.

(4) Clerk of municipal court.

Fla.—State ex rel. Huston v. Clark, 163 So. 471, 121 Fla. 161.

(5) County solicitor.

N.Y.—People ex rel. Lipshitz v. Bes-senger, supra.

(6) Other officials see 25 C.J. p 264 note 63 [a] (6).

Certification of court record

Affidavit in extradition proceeding was presumed to have been made in court, where copy of record of court was certified by clerk.

Mo.—Gugenhine v. Gerk, 31 S.W.2d 1, 326 Mo. 333, appeal dismissed and certiorari denied 51 S.Ct. 180, 282 U.S. 810, 75 L.Ed. 726.

74.10 Colo.—Smith v. Short, 237 P. 2d 113, 124 Colo. 398—Henry v. McArthur, 223 P.2d 621, 122 Colo. 474.

Ill.—People ex rel. Bell v. Mulcahy, 64 N.E.2d 474, 392 Ill. 290, certiorari denied 66 S.Ct. 901, 327 U.S. 800, 90 L.Ed. 1025.

Mo.—Hayes v. O'Connell, App., 263 S.W.2d 66.

Mont.—State v. Booth, 328 P.2d 1104.

74.15 Colo.—Smith v. Short, 237 P. 2d 113, 124 Colo. 398—Henry v. McArthur, 223 P.2d 621, 122 Colo. 474.

75. Colo.—Smith v. Short, 237 P.2d

113, 124 Colo. 398—Henry v. McArthur, 223 P.2d 621, 122 Colo. 474. D.C.—Marks v. Eckerman, 23 F.2d 761, 57 App.D.C. 340.

Fla.—State ex rel. Miller v. McLeod, 194 So. 628, 142 Fla. 254—Mitchell v. Stoutamire, 152 So. 629, 113 Fla. 822.

N.Y.—People ex rel. Hollander v. Britt, 92 N.Y.S.2d 662, 195 Misc. 722, affirmed 93 N.Y.S.2d 704, 276 App.Div. 815.

76. Mass.—In re Murphy, 72 N.E.2d 413, 321 Mass. 206.

Mo.—Ex parte Davis, 62 S.W.2d 1086, 333 Mo. 262, 89 A.L.R. 589—Gugenhine v. Gerk, 31 S.W.2d 1, 326 Mo. 333, appeal dismissed and certiorari denied 51 S.Ct. 180, 282 U.S. 810, 75 L.Ed. 726.

77. Minn.—State v. Murnane, 215 N. W. 863, 172 Minn. 401.

Before clerk

Fact that the oath to the complaint was before the clerk of the municipal court did not render the affidavit invalid.

Mass.—In re Murphy, 72 N.E.2d 413, 321 Mass. 206.

78. Ariz.—*Corpus Juris Secundum* cited in Ex parte Rubens, 238 P.2d 402, 406, 73 Ariz. 101, certiorari denied Rubens v. Boies, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

Minn.—State v. Murnane, 215 N.W. 863, 172 Minn. 401.

Mo.—Ex parte Davis, 62 S.W.2d 1086, 333 Mo. 262, 89 A.L.R. 589—Gugenhine v. Gerk, 31 S.W.2d 1, 326 Mo. 333, appeal dismissed and certiorari denied 51 S.Ct. 180, 282 U.S. 810, 75 L.Ed. 726.

78.5 Ariz.—Ex parte Rubens, 238 P. 2d 402, 73 Ariz. 101, certiorari denied Rubens v. Boies, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

78.10 Mass.—In re Murphy, 72 N.E. 2d 413, 321 Mass. 206.

78.15 Ariz.—Ex parte Rubens, 238 P.2d 402, 73 Ariz. 101, certiorari denied Rubens v. Boies, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

78.50 Fla.—Schrivver v. Tucker, 42 So.2d 707.

Pa.—Commonwealth ex rel. Thomas v. Superintendent Philadelphia

The copy of the indictment, affidavit, or other authorized instrument must be certified to be authentic by the governor or chief magistrate of the demanding state or territory.⁷⁹ This requirement is mandatory,^{79,5} but where the required papers have been authenticated to the satisfaction of the governor of

the asylum state it is not necessary that the authentication accompany the governor's warrant to the arresting officer.^{79,10}

The certificate need not state that the papers are genuine but only that they are duly authenticated,⁸⁰

County Prison, 94 A.2d 732, 372 Pa. 595.

Commonwealth ex rel. Hernandez v. Price, 11 Pa. Dist. & Co. 2d 232, 105 Pittsb. Leg. J. 343, appeal dismissed 122 A.2d 206, 385 Pa. 44, certiorari denied 77 S.Ct. 56, 35 U.S. 836, 1 L.Ed.2d 55—Commonwealth ex rel. Faison v. Watkins, 9 Pa. Dist. & Co. 2d 571, 44 Montg. Co. 44.

Governing statutes

(1) In extradition proceeding, papers are sufficiently authenticated if they comply with Code of Criminal Procedure provision pertaining to form of the demand.

N.Y.—People ex rel. Gadson v. Hoy, 138 N.Y.S.2d 704, 285 App. Div. 974, certiorari denied People of State of N. Y. ex rel. Gadson on Behalf of Morgan v. Hoy, 76 S.Ct. 60, 350 U.S. 829, 100 L.Ed. 740.

(2) Civil Practice Act provision pertaining to certification of record or other paper declared by law to be evidence is not applicable to a demand in an extradition proceeding.

N.Y.—People ex rel. Gadson v. Hoy, 138 N.Y.S.2d 704, 285 App. Div. 974, certiorari denied People of State of N. Y. ex rel. Gadson on Behalf of Morgan v. Hoy, 76 S.Ct. 60, 350 U.S. 829, 100 L.Ed. 740.

Authentication held sufficient

(1) Generally.

Mo.—Hayes v. O'Connell, App., 263 S.W.2d 66.

N.Y.—People ex rel. Habner v. Skinner, 155 N.Y.S.2d 391.

Or.—Ex parte Paulson, 124 P.2d 297, 168 Or. 457.

(2) Recitation in demand that annexed papers are hereby certified to be authentic is sufficient.

Tex.—Ex parte Hale, Cr., 320 S.W.2d 362—Ex parte Barnett, 190 S.W.2d 361, 148 Tex. Cr. 628.

79. U.S.—U. S. ex rel. McCline v. Meyering, C.C.A. Ill., 75 F.2d 716. Ala.—Harrison v. State, 77 So.2d 384, 38 Ala. App. 60, certiorari denied 77 So.2d 387, 262 Ala. 701—State of Tennessee v. Hamilton, 190 So. 306, 28 Ala. App. 587.

Fla.—Corpus Juris cited in Chase v. State, 113 So. 103, 107, 93 Fla. 963, 54 A.L.R. 271—State v. Chase, 107 So. 541, 91 Fla. 413.

Ga.—Brown v. Grimes, 104 S.E.2d 907, 214 Ga. 388—McFarlin v. Shirley, 76 S.E.2d 1, 209 Ga. 794.

Ill.—People ex rel. Gilbert v. Babb, 114 N.E.2d 358, 415 Ill. 349—Peo-

ple ex rel. Eveland v. Harrell, 87 N.E.2d 765, 404 Ill. 81—People ex rel. Downer v. O'Brien, 26 N.E.2d 488, 373 Ill. 383, certiorari dismissed Downer v. O'Brien, 60 S.Ct. 1107, 311 U.S. 720, 85 L.Ed. 469—People ex rel. Buxton v. Jeremiah, 4 N.E.2d 373, 364 Ill. 274—People ex rel. Romani v. Meyering, 186 N.E. 150, 352 Ill. 436.

Ky.—Oakley v. Franks, 159 S.W.2d 415, 289 Ky. 605.

La.—State v. Comisso, 39 So.2d 729, 214 La. 1055—State ex rel. Covington v. Hughes, 102 So. 824, 157 La. 652.

Miss.—Loper v. Dees, 49 So.2d 718, 210 Miss. 402—Bishop v. Jones, 42 So.2d 421, 207 Miss. 423.

Mo.—Ex parte Davis, 62 S.W.2d 1086, 333 Mo. 262, 89 A.L.R. 589—State ex rel. Gaines v. Westhues, 2 S.W.2d 612, 318 Mo. 928.

Hagel v. Hendrix, App., 302 S.W.2d 323.

N.J.—Ex parte Fritz, 44 A.2d 414, 137 N.J. Eq. 185.

Pa.—Commonwealth v. Steele, 78 Pa. Super. 352.

Commonwealth ex rel. Hernandez v. Price, 11 Pa. Dist. & Co. 2d 232, 105 Pittsb. Leg. J. 343, appeal dismissed 122 A.2d 206, 385 Pa. 44, certiorari denied 77 S.Ct. 56, 35 U.S. 836, 1 L.Ed.2d 55.

Tenn.—State ex rel. Daugherty v. Payne, 174 S.W.2d 457, 180 Tenn. 268.

Tex.—Ex parte Harck, 274 S.W.2d 74, 160 Tex. Cr. 602—Ex parte Barnett, 190 S.W.2d 361, 148 Tex. Cr. 628—Ex parte Anderson, 120 S.W.2d 259, 135 Tex. Cr. 291—Ex parte Gradington, 231 S.W. 781, 89 Tex. Cr. 432. 25 C.J. p 264 note 70.

Strict compliance is required.

Pa.—Commonwealth ex rel. Faison v. Watkins, 9 Pa. Dist. & Co. 2d 571, 73 Montg. Co. 44.

Certification by court

Certified copy of indictment, authenticated by clerk of court and presiding justice, but not by governor of demanding state, is insufficient.

N.Y.—People ex rel. Merklen v. Enright, 217 N.Y.S. 288, 217 App. Div. 514.

Warrant authenticated

(1) Where only warrant and not affidavit or indictment was certified by Governor of demanding state, requisition was void and could not form basis for extradition proceeding.

U.S.—U. S. ex rel. McCline v. Meyering, C.C.A. Ill., 75 F.2d 716.

La.—State ex rel. Covington v. Hughes, 102 So. 824, 157 La. 652.

(2) Under statute requiring authentication of affidavit supporting copy of warrant, express authentication of the essential affidavit is required, and authentication of the warrant will not impliedly certify as authentic the affidavit on which it is based.

Fla.—Hattaway v. Culbreath, 57 So. 2d 661.

(3) Where laws of demanding state required written and signed examination of informant on oath by magistrate as to commission of offense and issuance of warrant on reasonable cause, certification by governor of demanding state that warrant for arrest had been legally sworn out was sufficient certification that affidavit was authentic.

Ill.—People ex rel. McCline v. Meyering, 190 N.E. 261, 356 Ill. 210.

That authenticating certificate was not inseparably attached to papers it authenticated was not failure to comply with law of requisition.

Mo.—Ex parte Ellis, 9 S.W.2d 544, 223 Mo. App. 125.

Proof

Conclusion that copies of sentence were not duly authenticated was inescapable where they were dated subsequent to the date of the authentication of the requisition by the governor.

Pa.—Commonwealth ex rel. Faison v. Watkins, 9 Pa. Dist. & Co. 2d 571, 73 Montg. Co. 44.

Authentication held sufficient

Ala.—Cazalas v. Bridges, 81 So.2d 913, 38 Ala. App. 232.

79.5 Pa.—Commonwealth ex rel. Hernandez v. Price, 11 Pa. Dist. & Co. 2d 232, 105 Pittsb. Leg. J. 343, appeal dismissed 122 A.2d 206, 385 Pa. 44, certiorari denied 77 S.Ct. 56, 35 U.S. 836, 1 L.Ed.2d 55—Commonwealth ex rel. Faison v. Watkins, 9 Pa. Dist. & Co. 2d 571, 73 Montg. Co. 44.

79.10 Pa.—Commonwealth ex rel. Hernandez v. Price, 11 Pa. Dist. & Co. 2d 232, 105 Pittsb. Leg. J. 343, appeal dismissed 385 Pa. 44, 122 A.2d 206, certiorari denied 77 S.Ct. 56, 35 U.S. 836, 1 L.Ed.2d 55.

80. N.Y.—Levine v. Warden of Women's Prison, 64 N.Y.S.2d 337, 188 Misc. 307, affirmed 67 N.Y.S.2d 708, 271 App. Div. 951.

and it need not be in any particular form,⁸¹ as long as it makes clear the fact that the documents are what they purport to be.⁸² The federal statute for the authentication of public acts and judicial proceedings in the several states is not applicable in extradition proceedings,⁸³ and whether the papers are certified in accordance with the laws of the demanding state will not be considered.⁸⁴

The question of authenticity is one for the determination of the governor of the demanding state and his certificate to the fact is alone required,⁸⁵ and is conclusive,⁸⁶ or, at least, it makes a prima facie case that there has been a compliance with the requirements of law.^{86.5} In the absence of a showing that documents for extradition purposes, certified as authentic by the governor of the demanding state, are spurious, the certification of the governor is sufficient.^{86.10} Where a statute does not provide for the manner in which the complaint and supporting papers accompanying the demand or requisition should be authenticated, the fact that they were not transmitted with demand in a single document connected by ribbon and seal will not render their

authentication insufficient, particularly where there is no showing of any errors among the documents which could have affected the rights of accused.^{86.15} A statute requiring proof of execution of a written instrument when denied by the opposite party under oath has been held not to apply to extradition proceedings.⁸⁷

Where the requisition and accompanying documents are duly authenticated by the governor of the demanding state in conformity with the requirements of the federal statute, the fact that the petition for extradition filed with the governor of the demanding state was not verified by affidavit, as required by state statute, will not enable the fugitive to avoid extradition.^{87.5}

§ 14(6). — Sufficiency of Accompanying Papers Charging Crime

The sufficiency of the indictment or affidavit, a copy of which must accompany the requisition in extradition proceedings, must be tested by the laws of the demanding state.

The sufficiency of documents,^{87.50} such as the indictment, affidavit, or other authorized pleading

Or.—Ex parte Paulson, 124 P.2d 297, 168 Or. 457.

Utah.—Bell v. Corless, 196 P. 568, 57 Utah 604.

25 C.J. p 264 note 71.

81. Ohio.—In re Sanders, App., 31 N.E.2d 246.

Utah.—Bell v. Corless, 196 P. 568, 57 Utah 604.

25 C.J. p 264 note 72.

82. Utah.—Bell v. Corless, supra.

25 C.J. p 265 note 73.

83. Ala.—State v. Curry, 56 So. 736, 2 Ala.App. 251.

D.C.—Lee Won Sing v. Cottone, 123 F.2d 169, 74 App.D.C. 374.

Ill.—People ex rel. Buxton v. Jeremiah, 4 N.E.2d 373, 364 Ill. 274—People ex rel. McCline v. Meyering, 190 N.E. 261, 356 Ill. 210.

Kan.—Wilson v. Turner, 208 P.2d 846, 168 Kan. 1.

Ohio.—In re Sanders, App., 31 N.E.2d 246.

Affidavit as to flight from prison need not be authenticated in the manner provided by the federal statute as to the authentication of public acts and judicial proceedings.

Mo.—Albright v. Clinger, 234 S.W. 57, 290 Mo. 83.

Wash.—State v. Remann, 4 P.2d 866, 165 Wash. 92, 78 A.L.R. 412.

84. U.S.—Collins v. Traeger, C.C.A. Cal., 27 F.2d 842.

25 C.J. p 265 note 75.

85. Ariz.—Corpus Juris Secundum quoted in Ex parte Riccardi, 203 P.2d 627, 633, 68 Ariz. 180.

35 C.J.S.—27

D.C.—Lee Won Sing v. Cottone, 123 F.2d 169, 74 App.D.C. 374.

Fla.—Young v. Stoutamire, 176 So. 759, 129 Fla. 805.

Mo.—Albright v. Clinger, 234 S.W. 57, 290 Mo. 83.

Okl.—Ex parte Baker, 244 P. 459, 33 Okl.Cr. 413—In re Gundy, 236 P. 440, 30 Okl.Cr. 390.

Tex.—Ex parte Barnett, 190 S.W.2d 361, 148 Tex.Cr. 628—Ex parte McIntyre, 18 S.W.2d 156, 112 Tex.Cr. 638.

25 C.J. p 265 note 76.

State seal

It is not necessary that demand for extradition show seal of demanding state or be authenticated by secretary of state.

Tex.—Ex parte Pinkus, 25 S.W.2d 334, 114 Tex.Cr. 326.

Certification by custodian

Indictment accompanying requisition of governor of demanding state need not be certified as true and correct by its custodian.

Tex.—Ex parte Pinkus, supra.

86. Ariz.—Corpus Juris Secundum quoted in Ex parte Riccardi, 203 P.2d 627, 633, 68 Ariz. 180.

Mo.—Albright v. Clinger, 234 S.W. 57, 290 Mo. 83.

25 C.J. p 266 notes 93–95.

86.5 Burden to disprove is on accused.

Tex.—Ex parte Coleman, 245 S.W.2d 712, 157 Tex.Cr. 37.

86.10 Colo.—Lyle v. Kieback, 337 P. 2d 392—Tinsley v. Woods, 313 P.2d

1006, 135 Colo. 590—Travis v. People, 308 P.2d 997, 135 Colo. 141.

Wash.—State v. Remann, 4 P.2d 866, 165 Wash. 92, 78 A.L.R. 412.

86.15 Tex.—Ex parte Strom, Cr., 324 S.W.2d 224.

87. Ind.—Worth v. Wheatley, 108 N. E. 958, 183 Ind. 598.

87.5 Ohio.—State ex rel. Cutshaw v. Smith, App., 127 N.E.2d 633, appeal dismissed 115 N.E.2d 689, 160 Ohio St. 262.

87.50 N.J.—Robichaud v. Brennan, 49 A.2d 287, 134 N.J.Law 532, affirmed 52 A.2d 697, 135 N.J.Law 472, certiorari denied 68 S.Ct. 54, 332 U.S. 756, 92 L.Ed. 342, rehearing denied 68 S.Ct. 149, 332 U.S. 819, 92 L.Ed. 396.

Harmless error

Use of word "affidavit," instead of "warrant," in court's certificate that "above" document, which was copy of warrant issued by a justice of the peace for arrest of one sought to be extradited, was correct copy of original affidavit, was harmless error.

Mich.—Ex parte Morrow, 17 N.W.2d 767, 310 Mich. 597.

Variance between stipulations and record

Where stipulation between alleged fugitive and authorities of demanding state was in conflict with record made in prosecution in demanding state, court of asylum state was bound to adhere to the record.

Tex.—Ex parte Brower, 218 S.W.2d 463, 153 Tex.Cr. 175.

charging the person demanded with a crime,⁸⁸ a copy of which must accompany the requisition, is to be tested by the laws of the demanding state. It must, and is sufficient if it does, substantially charge the alleged fugitive with the commission of a crime against the laws of such state.⁸⁹

88. *Ariz.—Corpus Juris Secundum* cited in *Ex parte Rubens*, 238 P.2d 402, 406, 73 *Ariz.* 101, certiorari denied *Rubens v. Boies*, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

Cal.—Ex parte Katcher, 243 P.2d 785, 39 C.2d 30.

Fla.—Ennist v. Baden, 28 So.2d 160, 158 *Fla.* 141—*State ex rel. Ljungdahl v. Sullivan*, 21 So.2d 713, 155 *Fla.* 817—*State v. Allen*, 92 So. 155, 83 *Fla.* 655.

Ill.—People ex rel. Gilbert v. Babb, 114 N.E.2d 358, 415 *Ill.* 349—*People ex rel. Eveland v. Harrell*, 87 N.E.2d 765, 404 *Ill.* 81—*People ex rel. Morris v. Walsh*, 81 N.E.2d 574, 401 *Ill.* 165—*People ex rel. Flowers v. Gruenwald*, 60 N.E.2d 225, 390 *Ill.* 79—*People ex rel. Mack v. Meyer*, 189 N.E. 494, 355 *Ill.* 456—*People v. Meyer*, 181 N.E. 300, 348 *Ill.* 486.

Ind.—Waggoner v. Feeney, 44 N.E.2d 499, 220 *Ind.* 543.

Md.—State ex rel. Gildar v. Kriss, 62 A.2d 568, 191 *Md.* 568.

Mo.—Flournoy v. Owens, 275 S.W. 923, 310 *Mo.* 355.

Mont.—Corpus Juris Secundum cited in *State v. Booth*, 328 P.2d 1104, 1109.

N.J.—Passalacqua v. Biehler, 133 A.2d 667, 46 N.J.Super. 63—*Frank v. Naughtright*, 64 A.2d 90, 1 N.J.Super. 242.

Robichaud v. Brennan, 49 A.2d 287, 134 N.J.Law 532, affirmed 52 A.2d 697, 135 N.J.Law 472, certiorari denied 68 S.Ct. 54, 332 U.S. 756, 92 L.Ed. 342, rehearing denied 68 S.Ct. 149, 332 U.S. 819, 92 L.Ed. 396.

N.Y.—People ex rel. Gellis v. Sheriff of Westchester County, 166 N.E. 795, 251 N.Y. 33, reargument denied 168 N.E. 426, 251 N.Y. 556.

Ohio.—In re Acton, 103 N.E.2d 577, 99 *Ohio App.* 100.

25 C.J. p 262 note 48, p 264 note 62.

Form of affidavit

Question of whether the affidavit is in proper form has been stated to be a question to be considered by the law of the asylum state.

Mont.—State v. Booth, 328 P.2d 1104.

89. *Cal.—Ex parte Harper*, 62 P.2d 390, 17 C.A.2d 446.

Conn.—Winnick v. Reilly, 123 A. 440, 100 *Conn.* 291.

Ga.—McFarlin v. Shirley, 76 S.E.2d 1, 209 *Ga.* 794.

Ill.—People ex rel. Gilbert v. Babb, 114 N.E.2d 358, 415 *Ill.* 349—*People ex rel. Eveland v. Harrell*, 87 N.E.2d 765, 404 *Ill.* 81—*People v. Traeger*, 173 N.E. 168, 340 *Ill.* 147.

Minn.—State v. Wall, 227 N.W. 176, 178 *Minn.* 368.

Mo.—Hagel v. Hendrix, App., 302 S. W.2d 323.

Mont.—Corpus Juris Secundum cited in *State v. Booth*, 328 P.2d 1104, 1110.

N.J.—Ex parte Fritz, 44 A.2d 414, 137 N.J.Eq. 185.

Ex parte Kelsey, 21 A.2d 676, 19 N.J.Misc. 488.

Okl.—Ex parte Ryan, 129 P.2d 204, 75 *Okl.Cr.* 144—*Ex parte Deal*, 259 P. 282, 38 *Okl.Cr.* 122.

Pa.—Commonwealth ex rel. Katz v. Superintendent of Philadelphia County Prison, 58 A.2d 366, 162 *Pa.Super.* 459.

Tex.—Ex parte Ponzi, 290 S.W. 170, 106 *Tex.Cr.* 58.

25 C.J. p 262 note 44.

Pleadings examined

If indictment or affidavit on which extradition is sought by county is available, it may be examined to determine its legality and sufficiency, and petitioner shall be discharged if it is decided that indictment or affidavit does not substantially charge the commission of an offense.

Ohio.—In re Acton, 103 N.E.2d 577, 99 *Ohio App.* 100.

Acts done feloniously

Allegation in affidavit in support of requisition for extradition that certain acts were done feloniously by alleged fugitive was susceptible of but single construction that the acts, thus done, constituted crimes.

Wis.—State ex rel. Kojis v. Barczak, 58 N.W.2d 420, 264 *Wis.* 136, followed in 58 N.W.2d 424, 264 *Wis.* 142.

Aided by copy of mittimus

Affidavit supporting requisition for fugitive could not be aided by copy of mittimus attached thereto, where mittimus was not referred to in affidavit and was not certified, and was fatally defective because sentencing relator to penitentiary for "three" without saying whether "three" meant three months, days, or years.

Ill.—People ex rel. La Rue v. Meyer, 191 N.E. 318, 357 *Ill.* 166.

All of the essential elements of the crime must be substantially charged.

N.C.—Ex parte Hubbard, 160 S.E. 569, 201 N.C. 472, 81 A.L.R. 547.

Vague and indefinite charge

In extradition proceeding, question is not whether charges set forth in indictment are vague and indefinite, but whether they charge accused with crime.

N.Y.—People ex rel. Sapiro v. Bolan, 267 N.Y.S. 323, 149 *Misc.* 73.

Prima facie case

That information filed pursuant to direction of New York grand jury

and with approval of judge and certification of governor of New York made a prima facie case of a crime cognizable by New York laws was sufficient to support extradition warrant.

N.J.—Stark v. Livermore, 65 A.2d 625, 3 N.J.Super. 94.

Charge held sufficient

(1) Generally.

Ala.—Cazalas v. Bridges, 81 So.2d 913, 38 *Ala.App.* 232—*Clay v. Mathews*, 21 So.2d 573, 32 *Ala.App.* 63.

Ariz.—Ex parte Rubens, 238 P.2d 402, 73 *Ariz.* 101, certiorari denied *Rubens v. Boies*, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

Cal.—Ex parte Morgan, 194 P.2d 800, 86 C.A.2d 217.

Fla.—Gatewood v. Culbreath, 47 So. 2d 725—*State ex rel. Ljungdahl v. Sullivan*, 21 So.2d 713, 155 *Fla.* 817.

Ill.—People ex rel. Goshorn v. Babb, 122 N.E.2d 239, 4 *Ill.* 2d 114—*People ex rel. Gates v. Mulcahy*, 65 N.E.2d 21, 392 *Ill.* 498—*People ex rel. De Bardas v. Toman*, 4 N.E.2d 859, 364 *Ill.* 516, appeal dismissed *People of State of Illinois ex rel. De Bardas v. Toman*, 57 S.Ct. 613, 300 U.S. 642, 81 L.Ed. 857.

Mass.—In re Harris, 34 N.E.2d 504, 309 *Mass.* 180, 135 A.L.R. 969.

Mo.—Lombardo v. Tozer, App., 264 S.W.2d 376.

N.J.—Stark v. Livermore, 65 A.2d 625, 3 N.J.Super. 94—*Frank v. Naughtright*, 64 A.2d 90, 1 N.J.Super. 242.

La Sasso v. MacLeod, 56 A.2d 430, 136 N.J.Law 345, motion denied 57 A.2d 661, 137 N.J.Law 45—*Robichaud v. Brennan*, 49 A.2d 287, 134 N.J.Law 532, affirmed 52 A.2d 697, 135 N.J.Law 472, certiorari denied 68 S.Ct. 54, 332 U.S. 756, 92 L.Ed. 342, rehearing denied 68 S.Ct. 149, 332 U.S. 819, 92 L.Ed. 396.

N.Y.—People ex rel. Gellis v. Sheriff of Westchester County, 166 N.E. 795, 251 N.Y. 33, reargument denied 168 N.E. 426, 251 N.Y. 556.

People ex rel. Shurburt v. Noble, 169 N.Y.S.2d 181, 4 A.D.2d 649—*People ex rel. Matochik v. Baker*, 116 N.Y.S.2d 754, 280 *App.Div.* 1025, appeal denied 117 N.Y.S.2d 918, 281 *App.Div.* 776, affirmed 114 N.E. 2d 194, 306 N.Y. 32.

Ohio.—In re Acton, 103 N.E.2d 577, 99 *Ohio App.* 100.

S.C.—State ex rel. Philips v. Garren, 195 S.E. 834, 186 S.C. 333.

Tenn.—State ex rel. Sandford v. Cate, 285 S.W.2d 343, 199 *Tenn.* 195.

Tex.—Ex parte Gesek, 302 S.W.2d 417—*Ex parte McClung*, 285 S.W. 2d 369, 162 *Tex.Cr.* 354—*Ex parte Thompson*, 261 S.W.2d 844, 159 *Tex.*

Although all reasonable presumptions are indulged to sustain the sufficiency of the instrument by which the crime is charged,^{89.5} and doubts as to its sufficiency are to be resolved in favor of the demanding state,⁹⁰ extradition should be refused where it shows that no crime was committed,^{90.5} or wholly fails in any of the fundamental elements of the crime indicated,^{90.10} even though it is legally possible to amend it so as to make it charge an offense.^{90.15} An instrument which charges a crime in futuro is insufficient for extradition purposes.^{90.20} A charge made substantially in the language of the statute of the demanding state defining the crime is sufficient.⁹¹ Mere irregularities in the extradition papers, or reversible errors existing before

conviction, cannot prevent extradition, although it is otherwise where the verdict and judgment are void on their face and are nullities.^{91.5}

With respect to extradition, the demanding state has the power to determine what acts shall be crimes and to establish the forms of its process and pleadings.⁹² The validity of a statute defining a crime⁹³ or the constitutionality of the practice of the demanding state⁹⁴ may not be made the subject of inquiry in the asylum state. Similarly the asylum state will not consider alleged defects in the procedure in instituting criminal charges or in applying to the governor of the demanding state to institute extradition proceedings.⁹⁵

Cr. 161—Ex parte Watkins, 259 S. W.2d 215, 159 Tex.Cr. 14—Ex parte Blankenship, 259 S.W.2d 208, 158 Tex.Cr. 667.

Va.—Spiak v. Seay, 40 S.E.2d 250, 185 Va. 710.

Wis.—State ex rel. Kojis v. Barczak, 58 N.W.2d 420, 264 Wis. 136, followed in 58 N.W.2d 424, 264 Wis. 142.

(2) To charge robbery.

Tex.—Ex parte Strom, Cr., 324 S.W. 2d 224.

(3) Charge alleging acts in asylum state by person sought to be extradited resulting in crime in demanding state.

Md.—State ex rel. Gildar v. Kriss, 62 A.2d 568, 191 Md. 568.

(4) Charge that person demanded, although not resident in demanding state, did unlawfully while in the asylum state omit to provide for his minor children who were in the demanding state.

Okl.—Ex parte Bledsoe, 227 P.2d 680, 93 Okl.Cr. 302.

(5) An affidavit averring that one sought to be extradited unlawfully escaped from jail of certain county in demanding state, where he was undergoing lawful imprisonment, against the peace and dignity of such state.

Ill.—People ex rel. Bell v. Mulcahy, 64 N.E.2d 474, 392 Ill. 290, certiorari denied 66 S.Ct. 901, 327 U.S. 800, 90 L.Ed. 1025.

Charge held insufficient

D.C.—Fowler v. Ross, 196 F.2d 25, 90 U.S.App.D.C. 305.

Fla.—Ennist v. Baden, 28 So.2d 160, 158 Fla. 141.

N.Y.—Application of Burgher, 134 N.Y.S.2d 435—People ex rel. Kuzner v. Police Dept. of City of New York, 102 N.Y.S.2d 614.

Okl.—Ex parte Offutt, 234 P. 222, 29 Okl.Cr. 401.

Supporting documents to be read together

Complaint and supporting affidavit

of officer, basis of demand and warrant respectively in extradition proceeding, must be read together.

U.S.—Rafferty ex rel. Huie Fong v. Bligh, C.C.A.Mass., 55 F.2d 189.

89.5 W.Va.—Cassis v. Fair, 29 S.E. 2d 245, 126 W.Va. 557, 151 A.L.R. 233.

90. Cal.—Ex parte Katcher, 243 P.2d 785, 39 C.2d 30.

Mo.—Ex parte Davis, 62 S.W.2d 1086, 333 Mo. 262.

N.J.—Stark v. Livermore, 65 A.2d 625, 3 N.J.Super. 94.

N.Y.—People ex rel. Hayes v. McLaughlin, 160 N.E. 357, 247 N.Y. 238, certiorari denied 49 S.Ct. 8, 278 U.S. 599, 73 L.Ed. 529.

People ex rel. Shurburt v. Noble, 169 N.Y.S.2d 181, 4 A.D.2d 649.

90.5 Ga.—Brown v. Grimes, 104 S.E. 2d 907, 214 Ga. 388.

90.10 W.Va.—Cassis v. Fair, 29 S.E. 2d 245, 126 W.Va. 557, 151 A.L.R. 233.

90.15 W.Va.—Cassis v. Fair, supra.

90.20 D.C.—Fowler v. Ross, 196 F. 2d 25, 90 U.S.App.D.C. 305.

91. U.S.—Collins v. Traeger, C.C.A. Cal., 27 F.2d 842.

Conn.—Winnick v. Reilly, 123 A. 440, 100 Conn. 291.

Fla.—Chase v. State, 113 So. 103, 93 Fla. 963, 54 A.L.R. 271.

Ill.—People ex rel. Mack v. Meyering, 189 N.E. 494, 355 Ill. 456—People v. Meyering, 181 N.E. 300, 348 Ill. 486—People v. Baldwin, 174 N.E. 51, 341 Ill. 604.

Mich.—Ex parte Molisak, 288 N.W. 329, 291 Mich. 46.

Mont.—State v. Booth, 328 P.2d 1104.

N.C.—Ex parte Hubbard, 160 S.E. 569, 201 N.C. 472, 81 A.L.R. 547.

Or.—Ex parte Paulson, 124 P.2d 297, 168 Or. 457.

25 C.J. p 262 note 48.

91.5 Miss.—Tyler v. Pierce, 61 So.2d 309, 216 Miss. 498.

92. U.S.—Collins v. Traeger, C.C.A. Cal., 27 F.2d 842.

Cal.—Ex parte Davis, 158 P.2d 36, 68 C.A.2d 798.

Ill.—People ex rel. Flowers v. Gruenwald, 60 N.E.2d 225, 390 Ill. 79—People ex rel. Biggs v. Nash, 8 N.E. 2d 359, 366 Ill. 186.

N.C.—Ex parte Hubbard, 160 S.E. 569, 201 N.C. 472, 81 A.L.R. 547.

25 C.J. p 262 note 47.

Act not crime in asylum state or at common law

Fact that indictment in requisition papers for extradition did not charge crime under either common law or law of state of asylum is immaterial in determining sufficiency of demand.

Ill.—People ex rel. Mack v. Meyering, 189 N.E. 494, 355 Ill. 456—People v. Meyering, 181 N.E. 300, 348 Ill. 486.

Conspiracy against laws of another state

Demanding state has power to declare that conspiracy within its borders, followed by overt acts therein, in aid or violation of laws of another state against gambling and bookmaking constitute a misdemeanor.

N.J.—Stark v. Livermore, 65 A.2d 625, 3 N.J.Super. 94.

93. Miss.—Ullom v. Davis, 150 So. 519, 169 Miss. 208.

94. N.H.—State v. Clough, 53 A. 1086, 71 N.H. 594, 67 L.R.A. 946.

Tex.—Ex parte Peairs, 283 S.W.2d 755, 162 Tex.Cr. 243, appeal dismissed Peairs v. State of Texas, 76 S.Ct. 104, 350 U.S. 858, 100 L. Ed. 762.

95. U.S.—Downey v. Schmidt, D.C. Tex., 4 F.Supp. 1.

Minn.—State v. Wall, 227 N.W. 176, 178 Minn. 368.

Ohio.—In re Acton, 103 N.E.2d 577, 90 Ohio App. 100.

Indorsement of indictment

Requisition need not show that prosecutor's name was indorsed on back of indictment or that it was signed by proper prosecuting officer.

Unless the indictment, affidavit, or other pleading charging a crime is clearly void, its validity will be left to the courts of the demanding state.⁹⁶ The asylum state is not concerned with the sufficiency of the indictment, affidavit, or other authorized pleading as a criminal pleading.⁹⁷ The charge of crime

need not be technically correct;^{97.5} and need not meet the technical requirements of a criminal pleading under the laws of the demanding state.^{97.10} Its technical sufficiency, regardless of what form of pleading is used, is not open to consideration in an extradition proceeding;^{97.15} the question of its suffi-

Fla.—Chase v. State, 113 So. 103, 93 Fla. 963, 54 A.L.R. 271.

Method of impaneling grand jury in demanding state cannot be assailed in courts of rendering state. N.Y.—People ex rel. Sapiro v. Bolan, 267 N.Y.S. 323, 149 Misc. 73.

Omission of seal

Fact that seal of court of demanding state was not affixed to jurat did not invalidate affidavit.

Mo.—Gugenhine v. Gerk, 31 S.W.2d 1, 326 Mo. 333, appeal dismissed and certiorari denied 51 S.Ct. 180, 282 U.S. 810, 75 L.Ed. 726.

Verification

A technical objection to the jurat of a justice of the peace affixed to the affidavit which is certified to by the governor of the demanding state as authentic will not be considered.

Tex.—Ex parte Roselle, Cr., 222 S.W. 248, 87 Tex.Cr. 470.
25 C.J. p 264 note 68.

96. U.S.—Downey v. Hale, C.C.A. Mass., 67 F.2d 208, certiorari denied 54 S.Ct. 438, 291 U.S. 662, 78 L.Ed. 1053.

Ariz.—Corpus Juris Secundum cited in Ex parte Rubens, 238 P.2d 402, 406, 73 Ariz. 101, certiorari denied 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

Cal.—Ex parte Katcher, 243 P.2d 785, 39 C.2d 30.

N.J.—Frank v. Naughtright, 64 A.2d 90, 1 N.J.Super. 242.

N.Y.—People ex rel. Hayes v. McLaughlin, 160 N.E. 357, 247 N.Y. 238, certiorari denied 49 S.Ct. 8, 278 U.S. 599, 73 L.Ed. 529.

Okl.—Ex parte Sesler, 185 P.2d 705, 85 Okl.Cr. 110—Ex parte Cassel, 184 P.2d 467, 85 Okl.Cr. 4.

Tex.—Corpus Juris Secundum quoted in Ex parte Strom, Cr., 324 S.W.2d 224—Corpus Juris Secundum quoted in Ex parte Gesek, Cr., 302 S.W.2d 417, 418, 164 Tex.Cr. 652—

Corpus Juris Secundum quoted in Ex parte Gore, 283 S.W.2d 69, 70, 162 Tex.Cr.R. 128—Ex parte Woodland, 177 S.W.2d 62, 146 Tex.Cr. 616.
25 C.J. p 263 note 51.

Test is whether the substance of criminality is lacking altogether when determined by any standard of penal justice that can rationally be supposed to prevail in the demanding jurisdiction.

Ind.—Waggoner v. Feeney, 44 N.E.2d 499, 220 Ind. 543.

N.Y.—People ex rel. Gellis v. Sheriff of Westchester County, 166 N.E.

795, 251 N.Y. 33, reargument denied 168 N.E. 426, 251 N.Y. 556—People ex rel. Hayes v. McLaughlin, 160 N.E. 357, 247 N.Y. 238, certiorari denied 49 S.Ct. 8, 278 U.S. 599, 73 L.Ed. 529.

People ex rel. Shurburt v. Noble, 169 N.Y.S.2d 181, 4 A.D.2d 649.

People ex rel. Pizzino v. Moran, 244 N.Y.S. 590, 137 Misc. 905, affirmed 244 N.Y.S. 869, 231 App.Div. 724.

Legality of revocation of parole or probation of the one sought to be extradited is a question properly to be decided by the courts of the demanding state.

Fla.—State ex rel. Williams v. Littlefield, 54 So.2d 694.

97. U.S.—Collins v. Traeger, C.C.A. Cal., 27 F.2d 842.

D.C.—Blevins v. Snyder, 22 F.2d 876, 57 App.D.C. 300.

Ill.—People ex rel. Biggs v. Nash, 8 N.E.2d 359, 366 Ill. 186—People ex rel. McCline v. Meyering, 190 N.E. 261, 356 Ill. 210—People ex rel. Mack v. Meyering, 189 N.E. 494, 355 Ill. 456.

Ind.—Waggoner v. Feeney, 44 N.E.2d 499, 220 Ind. 543.

Me.—Ex parte King, 28 A.2d 562, 139 Me. 203.

Minn.—State v. Wall, 232 N.W. 788, 181 Minn. 456.

Mo.—Lombardo v. Tozer, App., 264 S.W.2d 376.

N.J.—Stark v. Livermore, 65 A.2d 625, 3 N.J.Super. 94.

Ex parte Williams, 137 A. 422, 5 N.J.Misc. 528, 101 N.J.Eq. 75.

N.C.—Ex parte Hubbard, 160 S.E. 569, 201 N.C. 472, 81 A.L.R. 547.

Or.—Ex parte Paulson, 124 F.2d 297, 168 Or. 457.

Tex.—Corpus Juris Secundum quoted in Ex parte Strom, Cr., 324 S.W.2d 224, 227—Corpus Juris Secundum quoted in Ex parte Gesek, 302 S.W.2d 417, 418, 164 Tex.Cr. 652—Corpus Juris Secundum quoted in Ex parte Gore, 283 S.W.2d 69, 70, 162 Tex.Cr. 128—Ex parte Ponzi, 290 S.W. 170, 106 Tex.Cr. 58.

Wis.—State ex rel. Kojis v. Barczak, 58 N.W.2d 420, 264 Wis. 136, followed in 58 N.W.2d 424, 264 Wis. 142.

25 C.J. p 263 notes 50, 56, p 267 note 19.

Forms of pleading in demanding state will be accepted as sufficient.

N.Y.—People ex rel. De Martini v.

McLaughlin, 153 N.E. 853, 243 N.Y. 417.

More defects in the indictment as an instrument of criminal pleading will be disregarded in determining whether it states a crime so as to warrant extradition.

W.Va.—Cassis v. Fair, 29 S.E.2d 245, 126 W.Va. 557, 151 A.L.R. 233.

Unnecessary evidentiary allegations in demanding state's complaint would be deemed surplusage and disregarded.

Ill.—People ex rel. Goshorn v. Babb, 122 N.E.2d 239, 4 Ill.2d 114.

Venue

Where the complaint was made "in the probate court of the county of" B in the demanding state before the "probate judge," and was certified to by such judge under the seal of such court, and the complaint on its face showed that it was taken and sworn to in B county, the venue sufficiently appeared on the face of the complaint to render the complaint sufficient.

Utah.—Bell v. Corless, 186 P. 568, 57 Utah 604.

97.5 Mo.—Lombardo v. Tozer, App., 264 S.W.2d 376.

Mont.—State v. Booth, 328 P.2d 1104.

Technical rules of pleading applicable in criminal cases are not applicable for the purpose of testing the sufficiency of a pleading relied on to justify the holding of a petitioner in habeas corpus for extradition.

Ill.—People ex rel. Goshorn v. Babb, 122 N.E.2d 239, 4 Ill.2d 114.

97.10 Or.—Ex parte Paulson, 124 P. 2d 297, 168 Or. 457.

Technical nicety not required

Affidavits in extradition proceedings charging person demanded with having committed an offense need not be viewed with technical nicety, but if they contain all essential elements in plain understandable English they are sufficient to justify governor in issuing an executive warrant.

Mo.—Ex parte Barron, App., 222 S.W. 2d 241.

97.15 Ill.—People ex rel. Morris v. Walsh, 81 N.E.2d 574, 401 Ill. 165—People ex rel. Bell v. Mulcahy, 64 N.E.2d 474, 392 Ill. 290, certiorari denied 66 S.Ct. 901, 327 U.S. 800, 90 L.Ed. 1025—People ex rel. Flowers v. Gruenwald, 60 N.E.2d 235, 390 Ill. 79.

Md.—State ex rel. Gildar v. Kriss, 62 A.2d 568, 191 Md. 568.

ciency for that purpose will be left to the demanding state.⁹³ It need not be sufficient to withstand a demurrer, or a motion to quash, or a motion in arrest of judgment in the asylum state.^{98.5} The question to be considered by the asylum state is whether the indictment or affidavit satisfactorily shows that the fugitive has in fact been charged, however inartificially, with a crime in the state from which he fled.⁹⁹

§ 14(7). — — Indictment and Affidavit Contrasted

Where extradition is sought on the basis of an affida-

vit, it will be more critically examined than an indictment to see whether or not it charges a crime, but it need not satisfy the requirements of a pleading or have the technical exactness of an indictment.

It has been held that, where extradition is sought on affidavits, they will be more critically examined than will an indictment to see whether the facts alleged constitute a crime,¹ since the finding of an indictment presupposes the testimony of witnesses before a grand jury and is thus a safeguard against a removal that is wanton or ignorant.² An affidavit, however, while it must distinctly charge an offense,^{2.5} need not satisfy the requirements of a

Tenn.—State ex rel. Sandford v. Cate, 285 S.W.2d 343, 199 Tenn. 195.

Positive verification

Fact that affidavit of prosecuting attorney in demanding state was not positively verified did not vitiate warrant in extradition proceeding.

Ill.—People ex rel. Gardner v. Mulcahy, 62 N.E.2d 418, 390 Ill. 511.

98. U.S.—Brown v. Fitzgerald, C.C. A.Cal., 39 F.2d 870.

Cal.—Ex parte Katcher, 243 P.2d 785, 39 C.2d 30.

Ill.—People ex rel. McCline v. Meyer-ing, 190 N.E. 261, 356 Ill. 210—People v. Meyer, 181 N.E. 300, 348 Ill. 486.

N.J.—Stark v. Livermore, 65 A.2d 625, 3 N.J.Super. 94.

Robichaud v. Brennan, 49 A.2d 287, 134 N.J.Law 532, affirmed 52 A.2d 697, 135 N.J.Law 472, certiorari denied 68 S.Ct. 54, 332 U.S. 756, 92 L.Ed. 342, rehearing denied 68 S.Ct. 149, 332 U.S. 819, 92 L.Ed. 396.

Ex parte Williams, 137 A. 422, 101 N.J.Eq. 75, 5 N.J.Misc. 528.

N.Y.—People ex rel. Hayes v. McLaughlin, 160 N.E. 357, 247 N.Y. 238, certiorari denied 49 S.Ct. 8, 278 U.S. 599, 73 L.Ed. 529.

People ex rel. Moore v. Skinner, 135 N.Y.S.2d 107, 284 App.Div. 770.

People ex rel. MacSherry v. Enright, 184 N.Y.S. 248, 112 Misc. 568, 38 N.Y.Cr. 479, affirmed 188 N.Y.S. 945, 196 App.Div. 964.

25 C.J. p 263 notes 49, 50.

Tenn.—State ex rel. Sandford v. Cate, 285 S.W.2d 343, 199 Tenn. 195.

Tex.—Corpus Juris Secundum quoted in Ex parte Strom, Cr., 324 S.W.2d 224, 227—Corpus Juris Secundum quoted in Ex parte Gesek, 302 S.W.2d 417, 418, 164 Tex.Cr. 652—Corpus Juris Secundum quoted in Ex parte Gore, 283 S.W.2d 69, 70, 162 Tex.Cr. 128.

98.5 Ind.—Waggoner v. Feeney, 44 N.E.2d 499, 220 Ind. 543.

99. Ariz.—Corpus Juris Secundum quoted in Ex parte Rubens, 238 P.2d 402, 406, 73 Ariz. 101, certiorari

denied Rubens v. Boies, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

Cal.—Ex parte Katcher, 243 P.2d 785, 39 C.2d 30.

D.C.—Hill v. Dorsey, 22 F.2d 1003, 57 App.D.C. 305—Blevins v. Snyder, 22 F.2d 876, 57 App.D.C. 300.

Fla.—State v. Allen, 92 So. 155, 83 Fla. 655.

Ind.—Waggoner v. Feeney, 44 N.E.2d 499, 220 Ind. 543.

Me.—Ex parte King, 28 A.2d 562, 139 Me. 203.

Minn.—State v. Wall, 232 N.W. 788, 181 Minn. 456.

Mo.—Lombardo v. Tozer, App., 264 S.W.2d 376.

N.Y.—People ex rel. Shurburt v. Noble, 169 N.Y.S.2d 181, 4 A.D.2d 649.

People ex rel. MacSherry v. Enright, 184 N.Y.S. 248, 112 Misc. 568, 38 N.Y.Cr. 479, affirmed 188 N.Y.S. 945, 196 App.Div. 964.

Or.—Ex parte Paulson, 124 P.2d 297, 168 Or. 457.

Reason for rule

"If more were required it would impose upon courts . . . the duty of a critical examination of the laws of states with whose jurisprudence and criminal procedure they can have only a general acquaintance. Such a duty would be an intolerable burden, irritable to the just pride of the states, and fruitful of miscarriages of justice."

U.S.—Pierce v. Creecy, Mo., 28 S.Ct. 714, 718, 210 U.S. 387, 52 L.Ed. 1113.

Collins v. Traeger, C.C.A.Cal., 27 F.2d 842, 846.

Ariz.—Ex parte Rubens, 238 P.2d 402, 406, 73 Ariz. 101, certiorari denied Rubens v. Boies, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

Minn.—State v. Wall, 227 N.W. 176, 177, 178 Minn. 368.

Within reasonable understanding

A showing that, within bounds of reasonable understanding, acts of accused alleged to be a crime may be such in demanding state is sufficient to sustain extradition warrant.

N.J.—Stark v. Livermore, 65 A.2d 625, 3 N.J.Super. 94.

1. N.Y.—People ex rel. Gellis v. Sheriff of Westchester County, 166 N.E. 795, 251 N.Y. 33, reargument denied 168 N.E. 426, 251 N.Y. 556—People ex rel. De Martini v. McLaughlin, 153 N.E. 853, 243 N.Y. 417.

People ex rel. Shurburt v. Noble, 169 N.Y.S.2d 181, 4 A.D.2d 649.

People ex rel. Namlik v. Wagner, 144 N.Y.S.2d 237, 208 Misc. 520—People ex rel. Kassan v. Sheriff of New York County, 266 N.Y.S. 595, 149 Misc. 11—People ex rel. MacSherry v. Enright, 184 N.Y.S. 248, 112 Misc. 568, 38 N.Y.Cr. 479, affirmed 188 N.Y.S. 945, 196 App. Div. 964.

People ex rel. Kuzner v. Police Dept. of City of New York, 102 N.Y.S.2d 614.

25 C.J. p 263 note 55.

Similar effect after grant of extradition

Although closer scrutiny may be necessary in determining whether a crime against laws of demanding state is sufficiently charged, where requisition is based on affidavit instead of indictment, if charge as pleaded is in law sufficient for purpose of extradition, the same presumptions and incidents will follow on grant of extradition by the governor, as if demand had been based on indictment.

Ga.—Ellis v. Grimes, 30 S.E.2d 921, 198 Ga. 51.

2. Idaho.—Corpus Juris Secundum quoted in Videau v. State, 194 P.2d 615, 618, 68 Idaho 269.

N.Y.—People ex rel. Hayes v. McLaughlin, 160 N.E. 357, 247 N.Y. 238, certiorari denied 49 S.Ct. 8, 278 U.S. 599, 73 L.Ed. 529.

People ex rel. Lipshitz v. Bes-senger, 75 N.Y.S.2d 392, 273 App. Div. 19.

People ex rel. Namlik v. Wagner, 144 N.Y.S.2d 237, 208 Misc. 520—People ex rel. Kassan v. Sheriff of New York County, 266 N.Y.S. 595, 149 Misc. 11.

2.5 Ohio.—In re Acton, 103 N.E.2d 577, 90 Ohio App. 100.

pleading,^{2,10} or have the technical exactness of an indictment,³ or provide proof sufficient to convict the person informed against.^{3,5}

Where the proceeding is based on an affidavit, the affidavit must contain facts from which the governor of the asylum state may determine that there is probable cause to believe that the person demanded committed the crime with which he is charged; it should set forth the facts and circumstances relied on to prove the crime, or it must set out the alleged crime with sufficient explicitness to apprise the governor who receives it of the facts which constitute the offense,⁴ while an indictment is *prima facie* evidence of probable cause.⁵

The affidavit required is one stating facts which would be admissible as evidence and sufficient to warrant a finding of probable cause to believe the person demanded committed the crime charged,⁶ and with such certainty as would justify a magistrate in the state on which the demand is made in committing the accused for trial therein.⁷ An affidavit by an incompetent affiant is tantamount to no affidavit and will not be sufficient to authorize a person's extradition.^{7,5}

Since the finding of an indictment is *prima facie* evidence that the acts charged constitute a crime,⁸ it need not state such fact specifically,⁹ nor need it be accompanied by the statutes of the demanding

2.10 Wis.—State ex rel. Kojis v. Barczak, 58 N.W.2d 420, 264 Wis. 136, followed in 58 N.W.2d 424, 264 Wis. 142.

3. Fla.—State ex rel. Huston v. Clark, 163 So. 471, 121 Fla. 161.

Ill.—People ex rel. Patterson v. Barrow, 122 N.E.2d 179, 4 Ill.2d 52—People ex rel. Bell v. Mulcahy, 64 N.E.2d 474, 392 Ill. 290, certiorari denied 66 S.Ct. 901, 327 U.S. 800, 90 L.Ed. 1025—People ex rel. Gardner v. Mulcahy, 62 N.E.2d 418, 390 Ill. 511—People ex rel. McCline v. Meyering, 190 N.E. 261, 356 Ill. 210.

Ohio.—In re Acton, 103 N.E.2d 577, 90 Ohio App. 100.

25 C.J. p 263 note 57.

3.5 Wis.—State ex rel. Kojis v. Barczak, 58 N.W.2d 420, 264 Wis. 136, followed in 58 N.W.2d 424, 264 Wis. 142.

Proof beyond reasonable doubt

Affidavits need not make such a showing as to establish beyond a reasonable doubt that the person demanded was actually guilty of the crime.

N.Y.—People ex rel. Shurburt v. Noble, 169 N.Y.S.2d 181, 4 A.D.2d 649.

4. U.S.—U. S. ex rel. McCline v. Meyering, C.C.A.III, 75 F.2d 716.

Colo.—Henry v. McArthur, 223 P.2d 621, 122 Colo. 474.

25 C.J. p 263 note 53.

Several affidavits

Where there are two or more affidavits, their sufficiency in charging person demanded with having committed an offense must be determined by reading them together.

Mo.—Ex parte Barron, App., 222 S. W.2d 241.

Identity of affiant

(1) Affidavit omitting name of complaining witness and verification was insufficient to support extradition warrant.

Okl.—Ex parte Brown, 259 P. 280, 38 Okl.Cr. 124.

(2) Where affiant is not identified or shown to have personal knowl-

edge of facts asserted, the affidavit is insufficient.

N.Y.—People ex rel. Kasson v. Sheriff of New York County, 266 N.Y.S. 595, 149 Misc. 11.

(3) Affidavit purporting to be signed by "Mrs. George Owen" before magistrate of demanding state was sufficient to show that it was signed by a person, in absence of proof that no such person existed.

Ill.—People ex rel. McCline v. Meyering, 190 N.E. 261, 356 Ill. 210.

Affidavits held sufficient

(1) Generally.

Colo.—Smith v. Short, 237 P.2d 113, 124 Colo. 398.

Fla.—Gatewood v. Culbreath, 47 So. 2d 725.

Ill.—Gardner v. Mulcahy, 62 N.E.2d 418, 390 Ill. 511.

Mass.—In re Murphy, 72 N.E.2d 413, 321 Mass. 206.

Mo.—Hayes v. O'Connell, App., 263 S. W.2d 66—Ex parte Barron, App., 222 S.W.2d 241.

N.J.—Frank v. Naughtright, 64 A.2d 90, 1 N.J.Super. 242.

N.Y.—People ex rel. Shurburt v. Noble, 169 N.Y.S.2d 181, 4 A.D.2d 649.

(2) Affidavit positively sworn to, which embraces all the elements required by the statute.

D.C.—Watts v. Splain, 277 F. 335, 51 App.D.C. 129.

(3) Where complaint of demanding state charged person demanded with crime of disposing of mortgaged property without written consent of mortgagee substantially in language of statute, and in addition stated date and place of alleged offense, character of the mortgaged property, the sum for which it was sold, and name of holder of mortgage, omission from the complaint of a copy of mortgage was not fatal.

Or.—Ex parte Paulson, 124 P.2d 297, 168 Or. 457.

(4) Affidavit charging that certain persons named were in bank at time of robbery, and were by violence put in fear by prisoner, charged an of-

fense, notwithstanding failure to allege that certain persons were at the time "in charge of or connected with the bank."

Mo.—Flournoy v. Owens, 275 S.W. 923, 310 Mo. 355.

Affidavits held insufficient

(1) Generally.

Tex.—Ex parte Dalton, 226 S.W.2d 871, 154 Tex.Cr. 258.

(2) Affidavit failing to state name of owner of property, character of property, or date of alleged removal from state.

Okl.—Ex parte Deal, 259 P. 282, 38 Okl.Cr. 122.

(3) Affidavit which did not state essentials of crime charged.

Fla.—State ex rel. Huston v. Clark, 163 So. 471, 121 Fla. 161.

N.Y.—Application of Burgher, 134 N. Y.S.2d 485—People ex rel. Kuzner v. Police Dept. of City of New York, 102 N.Y.S.2d 614.

5. U.S.—U. S. ex rel. McCline v. Meyering, C.C.A.III, 75 F.2d 716.

6. U.S.—Rafferty ex rel. Huie Fong v. Bligh, C.C.A.Mass., 55 F.2d 189.

7. U.S.—In re Strauss, N.Y., 126 F. 327, 63 C.C.A. 99, certified questions answered 25 S.Ct. 535, 197 U.S. 324, 49 L.Ed. 774.

25 C.J. p 263 note 54.

7.5 Tex.—Ex parte Gardner, 264 S. W.2d 125, 159 Tex.Cr. 365.

Spouse of person demanded

Where affidavit in support of information charging alleged fugitive with bigamy had been executed by alleged fugitive's legal wife, the information and affidavit would not support warrant for extradition.

Tex.—Ex parte Gardner, supra.

8. Ga.—Barranger v. Baum, 30 S.E. 524, 103 Ga. 465, 68 Am.S.R. 113.

25 C.J. p 262 note 46.

9. Neb.—In re Van Sciever, 60 N. W. 1037, 42 Neb. 772, 47 Am.S.R. 730.

N.J.—Katyuga v. Cosgrove, 50 A. 679, 67 N.J.Law 213.

state.¹⁰ An indictment will be examined only to the extent of ascertaining whether it substantially charges a crime.¹¹ The indictment will prevail over the writ or warrant for arrest as to the contents of the indictment,^{11.5} and where there is an inconsistency or discrepancy between the copy of the indictment and that of an earlier or later affidavit by a complaining witness, the copy of the indictment will control.^{11.10}

§ 14(8). — — Pleadings on Information and Belief

An affidavit charging the person demanded with a crime is sufficient where it is full, definite, and specific and is made on knowledge and not on information and belief, but if it is based on information and belief it is insufficient, unless it states the source of the information and the grounds of belief.

An affidavit which appears to be full, definite, and specific, and is made on knowledge and not on information and belief, is sufficient.¹² On the other hand, although it has been held not necessary that

the affidavit show personal knowledge on the part of the affiant,^{12.5} other authority has held that the affidavit should state facts of affiant's own knowledge,^{12.10} or should be under the oath or affirmation of some person familiar with the facts and circumstances which are set forth with sufficient definiteness to justify the testimony as to their truthfulness,^{12.15} and that it should not be the mere verification of a court paper by a public official who makes no claim to personal information of the matter stated.^{12.20}

Generally, an affidavit based on information and belief is insufficient¹³ where it does not give the source of the information or the grounds for the belief;¹⁴ but it has been held that an affidavit on information and belief is sufficient where it states the sources of information and the grounds of belief.¹⁵ Moreover, it has been held that a complaint which states the offense in positive terms and is duly sworn to by the affiant complies with the requirements of the federal statute,^{15.5} and that where an

10. Mo.—Ex parte Pelinski, 213 S. W. 809.
25 C.J. p 261 note 27.

11. U.S.—Brown v. Fitzgerald, C.C. A.Cal., 39 F.2d 870.

N.Y.—People ex rel. MacSherry v. Enright, 184 N.Y.S. 248, 112 Misc. 568, 38 N.Y.Cr. 479, affirmed 188 N.Y.S. 945, 196 App.Div. 964.

11.5 Miss.—Tyler v. Pierce, 61 So.2d 309, 216 Miss. 498.

11.10 D.C.—Bruzaud v. Matthews, 207 F.2d 25, 93 U.S.App.D.C. 47.

Contradictory affidavit

Where indictment charged crime and, in seeking extradition, demanding state submitted certified copy of indictment and also subsequent affidavit of principal state's witness and such affidavit showed on face that no crime was committed, essential requisites for extradition were nevertheless set forth, since invalidity of the unnecessary affidavit could not be visited on indictment.

Fla.—Thompson v. Baker, 17 So.2d 298, 154 Fla. 303.

12. Colo.—Smith v. Short, 237 P.2d 113, 124 Colo. 398.

D.C.—Riley v. Colpoys, 85 F.2d 282, 66 App.D.C. 116.

N.Y.—People ex rel. Gellis v. Sheriff of Westchester County, 166 N.E. 795, 251 N.Y. 33, reargument denied 168 N.E. 426, 251 N.Y. 556.

Tex.—Ex parte Kinsloe, 115 S.W.2d 955, 134 Tex.Cr. 299.

Affiant's means of knowledge need not be set out.

Ill.—People ex rel. McCline v. Meyer-ing, 190 N.E. 261, 356 Ill. 210.

Dying declaration is evidentiary fact which affiant before whom it

was made may set out in affidavit and have treated as fact within his knowledge and as competent evidence of crime charged in extradition proceeding.

U.S.—Rafferty ex rel. Huie Fong v. Bligh, C.C.A.Mass., 55 F.2d 189.

"As deponent verily believes"

An affidavit charging a crime directly and positively is not vitiated by a conclusion "as deponent verily believes."

U.S.—In re Keller, D.C.Minn., 36 F. 681.

Affidavit based in part on matters not within affiant's personal knowledge, but revealed only by police investigation of which affiant had only hearsay knowledge, was held sufficient.

Ill.—People ex rel. Patterson v. Barrow, 122 N.E.2d 179, 4 Ill.2d 52.

12.5 Tenn.—State ex rel. Trigg v. Thompson, 270 S.W.2d 332, 196 Tenn. 147.

12.10 U.S.—Rafferty ex rel. Huie Fong v. Bligh, C.C.A.Mass., 55 F.2d 189.

Idaho.—Videan v. State, 194 P.2d 615, 68 Idaho 269.

12.15 Colo.—Smith v. Short, 237 P.2d 113, 124 Colo. 398—Henry v. McArthur, 223 P.2d 621, 222 Colo. 474.

12.20 Colo.—Smith v. Short, 237 P.2d 113, 124 Colo. 398.

13. N.Y.—People ex rel. De Martini v. McLaughlin, 153 N.E. 853, 243 N.Y. 417.

People ex rel. Namlik v. Wagner, 144 N.Y.S.2d 237, 208 Misc. 520.

Ohio.—In re Blankmeyer, 197 N.E. 594, 50 Ohio App. 151.

Tex.—Ex parte Cooper, 295 S.W.2d 906, 163 Tex.Cr. 642—Ex parte Logan, 205 S.W.2d 944, 151 Tex.Cr. 129—Ex parte Gillespie, 124 S.W.2d 151, 136 Tex.Cr. 203—**Corpus Juris cited in** Ex parte Kinsloe, 115 S.W.2d 955, 957, 134 Tex.Cr. 299.

25 C.J. p 264 note 64.

Affidavit based on records

Requisition for fugitive was insufficient, where affidavit stated that "records show" recited facts, instead of stating them as facts.

Ill.—People ex rel. La Rue v. Meyer-ing, 191 N.E. 318, 357 Ill. 166.

14. N.Y.—People ex rel. Namlik v. Wagner, 144 N.Y.S.2d 237, 208 Misc. 520—People ex rel. MacSherry v. Enright, 184 N.Y.S. 248, 112 Misc. 568, 38 N.Y.Cr. 479, affirmed 188 N.Y.S. 945, 196 App.Div. 964.

Application of Burgher, 134 N.Y. S.2d 435.

15. N.J.—Stark v. Livermore, 65 A.2d 625, 3 N.J.Super. 94.

S.C.—State ex rel. Phillips v. Garren, 195 S.E. 834, 186 S.C. 333—Ex parte Murray, 99 S.E. 798, 112 S.C. 342.

15.5 U.S.—U. S. ex rel. Miller v. Walsh, D.C.Ill., 90 F.Supp. 332, affirmed, C.A., 182 F.2d 264.

Inclusion in affidavit by reference

Affidavit supporting request for extradition requisition was amply sufficient where it included, by reference, signed complaint stating positively and unequivocally that defendant had committed crime of burglary.

Ill.—People ex rel. Patterson v. Barrow, 122 N.E.2d 179, 4 Ill.2d 52.

affidavit is positive in its terms, it cannot be attacked as based only on information and belief where nothing on the face of the affidavit so indicates.¹⁶

It is not necessary that all the elements of the crime be known by the person making the affidavit, but only enough to disclose the commission of the crime.^{16.5}

Statement by district attorney. A requirement that the requisition be accompanied by a statement of facts by the district attorney is sufficiently complied with by a statement by him that the facts contained in the complainant's sworn statement, which set forth a complete statement of the facts and accompanied the requisition, were true and correct to the best of his knowledge and belief.^{16.10}

16. Cal.—Ex parte Davis, 158 P.2d 36, 68 C.A.2d 798.
D.C.—Riley v. Colpoys, 85 F.2d 282, 66 App.D.C. 116.
Minn.—State ex rel. Denton v. Curtiss, 126 N.W. 718, 111 Minn. 240.
Or.—Ex parte Paulson, 124 P.2d 297, 168 Or. 457.
Tex.—Ex parte Blankenship, 259 S.W.2d 208, 158 Tex.Cr. 667—Ex parte Gillespie, 124 S.W.2d 151, 136 Tex.Cr. 203—Ex parte Kinsloe, 115 S.W.2d 955, 134 Tex.Cr. 299.
Utah.—Harris v. Burbidge, 199 P. 663, 58 Utah 392.
25 C.J. p 264 note 65.

Statements made by custodian of records in his affidavit in extradition proceeding, that accused after release on parole violated parole by not reporting to case supervisor and by leaving state without written permission were not insufficient as mere conclusions from record recitals, but statements made on affiant's own knowledge.

- Ill.—People ex rel. Mark v. Toman, 199 N.E. 124, 362 Ill. 232, 102 A.L.R. 379.

Other evidence of crime

Prisoner held for extradition was not entitled to discharge because affidavit, positive on its face, was shown on inquiry to be founded on information and belief, where guilt was positively established by other evidence.

- Ga.—Dobbs v. Anderson, 154 S.E. 342, 170 Ga. 826.

- 16.5 Ill.—People ex rel. Gates v. Mulcahy, 65 N.E.2d 21, 392 Ill. 498.

Ownership of building burglarized

An affidavit of a policeman forming basis of a requisition was not in-

sufficient because it did not state that affiant knew who was owner of building allegedly burglarized by one sought to be extradited.

- Ill.—People ex rel. Gates v. Mulcahy, supra.

- 16.10 La.—State v. Fleming, 73 So. 2d 462, 225 La. 564.

17. Tex.—Ex parte Cheatham, 95 S.W. 1077, 50 Tex.Cr. 51.
25 C.J. p 264 note 60.

- 17.5 Okl.—Ex parte Chase, 180 P.2d 199, 84 Okl.Cr. 159.

Proof that person demanded was in demanding state at time of commission of crime see infra § 15 b.

It is sufficient to charge that crime was committed on some specified date prior to filing of complaint.

- Okl.—Ex parte Chase, supra.

- 17.10 Ariz.—Ex parte Rubens, 238 P.2d 402, 73 Ariz. 101, certiorari denied Rubens v. Boies, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

- Colo.—Glover v. Foster, 272 P.2d 656, 130 Colo. 15.

- Me.—Ex parte King, 28 A.2d 562, 139 Me. 203.

18. Ill.—People ex rel. De Bardas v. Toman, 4 N.E.2d 859, 364 Ill. 516, appeal dismissed People of State of Illinois ex rel. De Bardas v. Toman, 57 S.Ct. 613, 300 U.S. 642, 81 L.Ed. 857.

Discrepancies in dates shown in accusatory affidavit and the jurat to the affidavit and warrant, involving date of commission of the crime, were at most defensive, to be used at a trial under the indictment, and could not prevent extradition.

- D.C.—Bruzaud v. Matthews, 207 F.2d 25, 93 U.S.App.D.C. 47.

§ 14(9). — Time and Place of Crime; Identity of Criminal

The pleadings charging the crime for which extradition is sought, a copy of which is required to accompany the requisition, must show the identity of the person demanded and that the crime charged was committed in the demanding state, but an averment of an inaccurate or vague date on which the crime was committed will not render them insufficient.

The pleadings charging the crime for which extradition is sought, a copy of which is required to accompany the requisition, must show that the crime charged was committed in the demanding state.¹⁷

Generally, the date on which the crime is charged to have been committed is not material in extradition proceedings,^{17.5} and hence a charge is not insufficient because the crime is alleged to have been committed on or about a specified date,^{17.10} or because the date as of which it asserts the crime was committed is not correct,¹⁸ unless time is an essen-

Court term

Indictment was not invalid because it recited that it was returned at July term, while alleged larceny, if committed, was committed in October, since court would assume that July term ran past that date.
Miss.—Tyler v. Pierce, 61 So.2d 309, 216 Miss. 498.

Year of crime

(1) That complaint charged crime to have been committed one year after true date did not make extradition proceedings void, where limitation was not involved and complaint did not show crime was committed after presentment of indictment or filing of complaint, especially where accused admitted presence in demanding state on true date of crime.

- Tex.—Ex parte Morris, 101 S.W.2d 259, 131 Tex.Cr. 596, certiorari denied Morris v. Davis, 57 S.Ct. 930, 301 U.S. 700, 81 L.Ed. 1355.

(2) In extradition proceeding, it was immaterial that because of clerical mistake indictment charged that alleged fugitive deserted minor children on certain day of year 1937 instead of 1936, since under such allegation state could prove offense to have been committed at any time during period covered by limitations.
Okl.—Ex parte George, 73 P.2d 471, 63 Okl.Cr. 115.

(3) Petitioner was not entitled to discharge because of admission that petitioner was not in latter state on date laid in indictment as that of robbery, in view of affidavits and state's attorney's statement in verified petition to governor of demanding state that crime was committed on same day of same month in preceding year.

tial element of the offense.¹⁹ An indictment charging the person demanded with nonsupport of his wife on a certain day has been held not to authorize his extradition where it appears that he has paid in full for her support up to that date.^{19.5}

An indictment has been held to be sufficient, even though it did not state when the crime was committed²⁰ or asserts that it occurred at an impossible time.²¹ Thus, even if it is shown that the person charged was not physically present in the demanding state on the date alleged in the indictment or complaint, he may be extradited if the evidence tends to show that the offense was committed at another time and the person demanded was present in the demanding state at the time when it was committed.^{21.5} Where, however, extradition of a person is sought for commission of a crime within a demanding state, the date of the offense must appear either in the indictment or other papers accompanying the requisition, or by testimony, in order that a prima facie case of fugitivity may be made out.^{21.10}

Identity of criminal. A charge is not insufficient as a basis for extradition in that it does not allege the fugitive's true name; all that is necessary is that it appear that the fugitive is the particular person

charged or intended to be charged;²² but it has been held that a charge will not support a requisition where it does not name or describe the person so that he can be identified.²³ The governor of the asylum state or of the demanding state, however, may not insert in the requisition any name other than that which appears on the face of the indictment or affidavit.²⁴

§ 15. Determination as to Rendition

- a. In general
- b. Proof
- c. Matters considered
- d. Hearing and notice

a. In General

On the presentation of a requisition for a fugitive from justice, the governor of the asylum state must determine that the person demanded is substantially charged with a crime and is a fugitive from justice.

Quoted in: *Ariz.—Ex parte Rubens*, 238 P.2d 402, 405, 73 Ariz. 101, certiorari denied 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

The power and duty of determining whether a sufficient showing has been made to warrant the extradition of the person demanded rest in the first instance on the governor of the asylum state,²⁵

Mo.—Williams v. Robertson, 95 S.W. 2d 79, 339 Mo. 34.

Presence in state

Where relator challenged his extradition on ground that he was not a fugitive in that he was not in state of Arizona at time of alleged offense, state of Texas was not bound by date stated in complaint in extradition proceedings.

Tex.—Ex parte Beeth, Cr., 154 S.W.2d 484.

Allegation conclusive

Time of commission of crime by alleged fugitive as charged in complaint is conclusive in extradition proceeding, in absence of contrary evidence, unless time is essential element of crime itself.

Mo.—Williams v. Robertson, 95 S.W.2d 79, 339 Mo. 34.

19. Okl.—Ex parte Chase, 180 P.2d 199, 84 Okl.Cr. 159—*Ex parte George*, 73 P.2d 471, 63 Okl.Cr. 115.

19.5 Pa.—Commonwealth ex rel. Scripko v. Bodenstein, 79 Pa.Dist. & Co. 238, 41 Luz.Leg.Reg. 513.

20. D.C.—Stumpf v. Matthews, 195 F.2d 35, 90 U.S.App.D.C. 177—*Blevins v. Snyder*, 22 F.2d 876, 57 App. D.C. 300.

Tex.—Ex parte Woodland, 177 S.W. 2d 62, 146 Tex.Cr. 616.

21. Mo.—Ex parte Ellis, 9 S.W.2d 544, 223 Mo.App. 125.

21.5 Ill.—People ex rel. Goshern v. Babb, 122 N.E.2d 239, 4 Ill.2d 114.

Crucial date

Governor, on whom demand is made, in determining whether accused was in demanding state at time crime was committed, is not bound by date of crime as alleged in information or indictment, and the crucial date is date when crime charged was actually committed, not the alleged date thereof.

Conn.—Stenz v. Sandstrom, 118 A.2d 900, 143 Conn. 72.

21.10 D.C.—In re Gibson, D.C., 147 F.Supp. 591.

Usual presumption of fugitivity flowing from proof of defendant's presence in the demanding state on date of offense and his subsequent presence in another jurisdiction cannot arise.

D.C.—In re Gibson, supra.

22. Ill.—People ex rel. Georgevitch v. Allman, 31 N.E.2d 590, 375 Ill. 363—*People v. Meyering*, 181 N.E. 300, 348 Ill. 486.

Initials instead of full names

That information, filed by prosecuting officer of state demanding return of fugitives, described fugitives by their initials instead of their full names, did not require discharge of fugitives in habeas corpus proceedings, if fugitives were identified by proper proof as the persons charged.

Ind.—Cook v. Rodgers, 20 N.E.2d 933, 215 Ind. 500.

Name only in title of indictment

Indictment presented with request for extradition by governor of New York was sufficient although full name of defendants appeared only in title.

U.S.—Downey v. Hale, C.C.A.Mass., 67 F.2d 208, certiorari denied 54 S.Ct. 438, 291 U.S. 662, 78 L.Ed. 1053.

23. U.S.—Lee Gim Bor v. Farrari, C.C.A.Mass., 55 F.2d 86, 84 A.L.R. 329.

24. Ill.—People ex rel. Maypole v. Meyering, 193 N.E. 495, 358 Ill. 589.

25. U.S.—U. S. ex rel. Silver v. O'Brien, C.C.A.Ill., 138 F.2d 217, certiorari denied 64 S.Ct. 522, 321 U.S. 766, 88 L.Ed. 1062—*Black v. Miller*, C.C.A.Wash., 59 F.2d 687. *Downey v. Schmidt*, D.C.Tex., 4 F.Supp. 1.

Cal.—Corpus Juris Secundum cited in Application of Fedder, 299 P.2d 881, 886, 143 C.A.2d 103.

Ill.—People ex rel. Eveland v. Harrell, 87 N.E.2d 765, 404 Ill. 81—*People ex rel. McGee v. Fischer*, 81 N.E.2d 483, 401 Ill. 95—*People ex rel. Gardner v. Mulcahy*, 62 N.E.2d 418, 390 Ill. 511—*People ex rel. Chevlin v. O'Brien*, 25 N.E.2d 4, 372 Ill. 640—*People ex rel. Buxton v. Jeremiah*, 4 N.E.2d 373, 364 Ill. 274—*People ex rel. Mark v. To-*

which power and duty cannot be delegated by him.²⁶ In general, extradition may be granted by a governor, and it is his duty to do so, where the requisition or demand for extradition and the accompanying documents meet the requirements of the extradition statutes,^{26.5} or where he is properly charged with a crime in the demanding state and proper application with proof has been made to the governor of the asylum state.^{26.10}

As a prerequisite to granting requisition, the governor of the asylum state must determine the jurisdictional facts authorizing it,^{26.15} which have

been held to be that a demand for the person charged has been made by the executive of the demanding state, that the requisition is accompanied by the proper documents, and that they have been duly certified as authentic by the executive of the demanding state.^{26.20} It is necessary and sufficient to show the governor of the asylum state that the person demanded is substantially charged with a crime against the laws of the demanding state by a proper criminal pleading, certified as authentic by the governor of the demanding state, and that the person demanded is a fugitive from the justice of that state.^{26.25}

man, 199 N.E. 124, 362 Ill. 232, 102 A.L.R. 379.
Iowa.—Seely v. Beardsley, 190 N.W. 498, 194 Iowa 863.
Mass.—In re Murphy, 72 N.E.2d 413, 321 Mass. 206—Ex parte Germain, 155 N.E. 12, 258 Mass. 289, 51 A.L.R. 789.
N.J.—Ex parte Cohen, 92 A.2d 837, 23 N.J.Super. 209, affirmed 96 A.2d 794, 12 N.J. 362.
N.C.—Ex parte Hubbard, 160 S.E. 569, 201 N.C. 472, 81 A.L.R. 547.
Okl.—Ex parte Ryan, 129 P.2d 204, 75 Okl.Cr. 144—In re Gundy, 236 P. 440, 30 Okl.Cr. 390.
Pa.—Commonwealth ex rel. Hernandez v. Price, 11 Pa.Dist. & Co.2d 232, 105 Pittsb.Leg.J. 343, appeal dismissed 122 A.2d 206, 385 Pa. 44, certiorari denied 77 S.Ct. 56, 35 U.S. 836, 1 L.Ed.2d 55.
Tex.—Ex parte Gibson, Cr.App., 197 S.W.2d 109, 149 Tex.Cr. 543.
Judicial review by habeas corpus see Habeas Corpus § 39.

Discretion

Discretion of the governor of asylum state is absolute in issuing a warrant of rendition on extradition papers.
Wash.—Ex parte Summers, 243 P.2d 494, 40 Wash.2d 419.

Jurisdiction to ascertain facts

Governor of asylum state has jurisdiction to ascertain from the evidence before him embodied in the requisition of demanding state the jurisdictional facts to authorize issuance of a warrant of arrest to hold alleged fugitive for delivery to demanding state.
Ala.—Russell v. State, 37 So.2d 233, 251 Ala. 268.

Executive duties of governor include powers relating to extradition.
N.Y.—People ex rel. Woloshin v. Warden of City Prison, Queens County, 95 N.Y.S.2d 370, 197 Misc. 609.

Sufficiency of requisition, in first instance, is for consideration of governor of asylum state.
Iowa.—Bicknell v. Farley, 5 N.W.2d 831, 232 Iowa 464.

Dying declaration

Whether alleged dying declarations were made as required involved preliminary question of fact, in first instance, for governor of state of refuge.
U.S.—Rafferty ex rel. Huie Fong v. Bligh, C.C.A.Mass., 55 F.2d 189.

Arrest and detention of fugitive held proper

Tex.—Ex parte Strongson, 272 S.W. 2d 353, 160 Tex.Cr. 457.
26. Mo.—Ex parte Pelinski, 213 S.W. 809.
Tenn.—State ex rel. Brown v. Grosch, 152 S.W.2d 239, 177 Tenn. 619.

26.5 Ill.—People ex rel. Millet v. Babb, 115 N.E.2d 241, 1 Ill.2d 191—People ex rel. Eveland v. Harrell, 87 N.E.2d 765, 404 Ill. 81.

N.Y.—People ex rel. Tobin v. Police Com'r of City of New York, 89 N.Y.S.2d 15.

Ohio.—State ex rel. Cutshaw v. Smith, App., 127 N.E.2d 633, appeal dismissed 115 N.E.2d 689, 160 Ohio St. 262.

Pa.—Commonwealth ex rel. Bucksbarg v. Good, 58 A.2d 842, 162 Pa. Super. 557.

Prima facie case

(1) Extradition requisition reciting that accused was charged with certain crime against laws of state and had become fugitive from justice of the state, accompanied by certified copy of indictment or affidavit, makes prima facie case against accused as alleged fugitive from justice.
Md.—Audler v. Kriss, 79 A.2d 391, 197 Md. 362.

(2) Extradition papers, unless fatally defective, make out a prima facie case for extraditing the fugitive.

Miss.—Tyler v. Pierce, 61 So.2d 309, 216 Miss. 498.

Proper basis for extradition held shown

(1) Generally.
Mass.—In re Baker, 39 N.E.2d 762, 310 Mass. 724, certiorari denied Baker v. Delay, 62 S.Ct. 1297, 316 U.S. 699, 86 L.Ed. 1768.

Mich.—Ex parte Morrow, 17 N.W.2d 767, 310 Mich. 597.
Ohio.—In re Acton, 103 N.E.2d 577, 90 Ohio App. 100.

(2) Photostatic copies of court and prison records of demanding state certified by governor to be authentic formed proper legal basis for issuance of extradition warrant.

Kan.—Wilson v. Turner, 208 P.2d 846, 168 Kan. 1.

(3) Requisition papers, showing indictment in demanding state for crime for which guilt had been ascertained, sentence thereon, commitment to state penitentiary, and escape therefrom, were sufficient for purpose of extradition.

Pa.—Commonwealth ex rel. Hatton v. Dye, 96 A.2d 127, 373 Pa. 502.

26.10 Tex.—Ex parte Brower, 218 S.W.2d 463, 153 Tex.Cr. 175.

26.15 Ala.—Harrison v. State, 77 So. 2d 384, 38 Ala.App. 60, certiorari denied 77 So.2d 387, 262 Ala. 701.
Ariz.—Ex parte Rubens, 238 P.2d 402, 73 Ariz. 101, certiorari denied Rubens v. Boies, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

N.Y.—People ex rel. Swanson v. Fitzsimmons, 153 N.Y.S.2d 772, 2 A.D. 2d 235.

26.20 Ala.—Harrison v. State, 77 So. 2d 384, 38 Ala.App. 60, certiorari denied 77 So.2d 387, 262 Ala. 701.

26.25 Ill.—People ex rel. Gilbert v. Babb, 114 N.E.2d 358, 415 Ill. 349, 40 A.L.R.2d 1142—People ex rel. Eveland v. Harrell, 87 N.E.2d 765, 404 Ill. 81—People ex rel. McGee v. Fischer, 81 N.E.2d 483, 401 Ill. 95—People ex rel. Willis v. Mulcahy, 64 N.E.2d 860, 392 Ill. 411—People ex rel. Bell v. Mulcahy, 64 N.E.2d 474, 392 Ill. 290, certiorari denied 66 S.Ct. 901, 327 U.S. 800, 90 L.Ed. 1025—People ex rel. Gardner v. Mulcahy, 62 N.E.2d 418, 390 Ill. 511—People ex rel. Flowers v. Gruenewald, 60 N.E.2d 225, 390 Ill. 79.

Kan.—Smith v. Nye, 272 P.2d 1079, 176 Kan. 679.

Md.—Audler v. Kriss, 79 A.2d 391, 197 Md. 362.

Subject to the rule where extradition is sought on the basis of an act committed in the asylum or a third state resulting in a crime in the demanding state, two questions are presented to the governor which he must decide affirmatively in order to grant extradition: (1) Is the person demanded substantially charged with a crime against the laws of the

demanding state by an indictment, affidavit properly certified, or other authorized criminal pleading?

(2) Is he a fugitive from justice from the state demanding him?²⁷ The first is a question of law,²⁸ and is to be determined from the face of the requisition papers,^{28.5} while the second is a question of

27. U.S.—U. S. ex rel. Silver v. O'Brien, C.C.A.Ill., 138 F.2d 217, certiorari denied 64 S.Ct. 522, 321 U.S. 766, 88 L.Ed. 1062—U. S. ex rel. Jackson v. Meyering, C.C.A.Ill., 54 F.2d 621, certiorari denied 52 S.Ct. 498, 286 U.S. 542, 76 L.Ed. 1280—U. S. ex rel. Brody v. Hecht, C.C.A.N.Y., 11 F.2d 128.

Corpus Juris cited in Downey v. Schmidt, D.C.Tex., 4 F.Supp. 1, 3. Ala.—Pierce v. Holcombe, 67 So.2d 278, 37 Ala.App. 305—Kelley v. State, App., 200 So. 115, 30 Ala.App. 21.

Ariz.—Ex parte Rubens, 238 P.2d 402, 73 Ariz. 101, certiorari denied Rubens v. Boies, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653—Ex parte Riccardi, 203 P.2d 627, 68 Ariz. 180.

Cal.—**Corpus Juris Secundum** cited in Application of Fedder, 299 P.2d 881, 886, 143 C.A.2d 103—Ex parte Harper, 62 P.2d 390, 17 C.A.2d 446. Conn.—Moulthrop v. Matus, 93 A.2d 149, 139 Conn. 272, certiorari denied 73 S.Ct. 785, 345 U.S. 926, 97 L.Ed. 1357.

D.C.—Bruzaud v. Matthews, 207 F.2d 25, 93 U.S.App.D.C. 47—Lee Won Sing v. Cottone, 123 F.2d 169, 74 App.D.C. 374.

Ga.—McFarlin v. Shirley, 76 S.E.2d 1, 209 Ga. 794.

Ill.—People ex rel. Millet v. Babb, 115 N.E.2d 241, 1 Ill.2d 191—People ex rel. McGee v. Fischer, 81 N.E.2d 483, 401 Ill. 95—People ex rel. Willis v. Mulcahy, 64 N.E.2d 860, 392 Ill. 411—People ex rel. Bell v. Mulcahy, 64 N.E.2d 474, 392 Ill. 290, certiorari denied 66 S.Ct. 901, 327 U.S. 800, 90 L.Ed. 1025—People ex rel. Gardner v. Mulcahy, 62 N.E.2d 418, 390 Ill. 511—People ex rel. Flowers v. Gruenewald, 60 N.E.2d 225, 390 Ill. 79—People ex rel. La Rue v. Meyering, 191 N.E. 318, 357 Ill. 166—People v. Meyering, 178 N.E. 122, 345 Ill. 598—People v. Baldwin, 174 N.E. 51, 341 Ill. 604.

Iowa.—Seely v. Beardsley, 190 N.W. 498, 194 Iowa 863.

Md.—Audler v. Kriss, 79 A.2d 391, 197 Md. 362.

N.Y.—Keller v. Butler, 158 N.E. 510, 246 N.Y. 249, 55 A.L.R. 349.

People ex rel. Hauptmann v. Hanley, 274 N.Y.S. 813, 153 Misc. 61, affirmed 274 N.Y.S. 824, 242 App.Div. 257.

Ohio.—State ex rel. Davey v. Owen,

12 N.E.2d 144, 133 Ohio St. 96, 114 A.L.R. 686.

Pa.—Commonwealth ex rel. Wadley v. Baldi, 88 Pa.Dist. & Co. 165.

Tenn.—State ex rel. Brown v. Grosch, 152 S.W.2d 239, 177 Tenn. 619—**Corpus Juris** cited in State v. Selman, 12 S.W.2d 368, 370, 157 Tenn. 641.

Utah.—Moreaux v. Ferrin, 100 P.2d 560, 98 Utah 450.

25 C.J. p 265 note 85.

Only questions proper to consider

Tenn.—State ex rel. Iverson v. Sheriff & Officer of Cook County, Chicago, Ill., 210 S.W.2d 483, 186 Tenn. 349.

Inquiry is restricted to whether the person demanded is substantially charged with a crime in the demanding state and whether he was physically present in the demanding state at the time the crime charged is alleged to have been committed.

N.Y.—People ex rel. Johnson v. Ruthazer, 102 N.Y.S.2d 39, 198 Misc. 1044, affirmed 105 N.Y.S.2d 394, 278 App.Div. 905.

Crime

(1) On extradition the question of whether the charge is one of actual crime is to be considered.

N.J.—Powell v. Meyer, 43 A.2d 175, 23 N.J.Misc. 222, certiorari denied 46 A.2d 671, 134 N.J.Law 169.

(2) It is not only the right, but the duty of the proper executive authorities of the asylum state, to determine whether the person demanded is in fact charged with a crime in the demanding state.

W.Va.—Cassis v. Fair, 29 S.E.2d 245, 126 W.Va. 557, 151 A.L.R. 233.

Fugitive status

Governor of asylum state must determine whether person demanded is a fugitive from justice.

Ill.—People ex rel. Pusch v. Mulcahy, 64 N.E.2d 458, 392 Ill. 209, certiorari denied 66 S.Ct. 1371, 328 U.S. 865, 90 L.Ed. 1635.

Miss.—Bishop v. Jones, 42 So.2d 421, 207 Miss. 423.

Or.—Ex parte Montoya, 135 P.2d 281, 170 Or. 499.

Under Uniform Extradition Act one of the jurisdictional facts necessary for governor to find as a predicate for issuance of warrant of extradition is that accused is lawfully charged by indictment or information filed by a prosecuting officer and

supported by affidavit to the facts, or by an affidavit made before a magistrate in demanding state, with having committed a crime under the laws of that state, or that he has been convicted of crime in that state and has escaped from confinement or broken his parole.

Ala.—Watson v. State, 2 So.2d 470, 30 Ala.App. 184.

28. U.S.—U. S. ex rel. Silver v. O'Brien, C.C.A.Ill., 138 F.2d 217, certiorari denied 64 S.Ct. 522, 321 U.S. 766, 88 L.Ed. 1062.

Ariz.—Ex parte Rubens, 238 P.2d 402, 73 Ariz. 101, certiorari denied Rubens v. Boies, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653—Ex parte Riccardi, 203 P.2d 627, 68 Ariz. 180.

Cal.—**Corpus Juris Secundum** cited in Application of Fedder, 299 P.2d 881, 886, 143 C.A.2d 103.

D.C.—Bruzaud v. Matthews, 207 F.2d 25, 93 U.S.App.D.C. 47—Lee Won Sing v. Cottone, 123 F.2d 169, 74 App.D.C. 374.

Ga.—McFarlin v. Shirley, 76 S.E.2d 1, 209 Ga. 794.

Ill.—People ex rel. Millet v. Babb, 115 N.E.2d 241, 1 Ill.2d 191—People ex rel. McGee v. Fischer, 81 N.E.2d 483, 401 Ill. 95—People ex rel. Willis v. Mulcahy, 64 N.E.2d 860, 392 Ill. 411—People ex rel. Bell v. Mulcahy, 64 N.E.2d 474, 392 Ill. 290, certiorari denied 66 S.Ct. 901, 327 U.S. 800, 90 L.Ed. 1025—People ex rel. Gardner v. Mulcahy, 62 N.E.2d 418, 390 Ill. 511—People ex rel. Flowers v. Gruenewald, 60 N.E.2d 225, 390 Ill. 79—People ex rel. La Rue v. Meyering, 191 N.E. 318, 357 Ill. 166.

Md.—Audler v. Kriss, 79 A.2d 391, 197 Md. 362.

Mo.—Keeton v. Gaiser, 55 S.W.2d 302, 331 Mo. 499.

Hagel v. Hendrix, App., 302 S.W. 2d 323.

N.C.—Ex parte Hubbard, 160 S.E. 569, 201 N.C. 472, 81 A.L.R. 547.

Okl.—Ex parte Ryan, 129 P.2d 204, 75 Okl.Cr. 144.

Pa.—Commonwealth ex rel. Taylor v. Superintendent, Philadelphia County Prison, 114 A.2d 343, 382 Pa. 181.

Tenn.—State ex rel. Brown v. Grosch, 152 S.W.2d 239, 177 Tenn. 619.

Utah.—Moreaux v. Ferrin, 100 P.2d 560, 98 Utah 450.

25 C.J. p 266 note 86.

28.5 Ill.—People ex rel. Millet v. Babb, 115 N.E.2d 241, 1 Ill.2d 191.

fact.²⁹ If the governor resolves these questions against the person demanded, extradition should be granted.^{29.5} The governor, however, cannot be compelled to grant extradition.^{29.10}

Where extradition is sought for acts committed in the asylum or a third state resulting in a crime in the demanding state, the governor, before he grants extradition, must determine that such acts were committed and in addition any other matters required by the laws of the asylum state, such as that the acts for which extradition is sought would be punishable by the laws of the asylum state;^{29.15} and under some statutes, where extradition is sought on such grounds the governor, in his discretion, is authorized to attach conditions to the surrender of the person demanded.^{29.20} In such case, extradition

may properly be granted without proof that the person demanded is a fugitive from justice.^{29.25}

b. Proof

The governor of the asylum state may require the production of such evidence of the jurisdictional facts as he sees fit before he grants extradition. The requisition and its accompanying documents are to be considered as evidence, and if in conformity with the statutory requirements establish a prima facie case authorizing extradition, but the governor may require additional independent evidence.

The governor of the asylum state may require the production of satisfactory evidence of the jurisdictional facts which must be found before he issues his warrant for extradition.³⁰ No fixed rules of evidence, however, are applicable.^{30.5} Strict com-

29. U.S.—U. S. ex rel. Silver v. O'Brien, C.C.A.Ill., 138 F.2d 217, certiorari denied 64 S.Ct. 522, 321 U.S. 766, 88 L.Ed. 1062.

U. S. ex rel. Faris v. McClain, D. C.Pa., 42 F.Supp. 429.

Ariz.—Ex parte Rubens, 238 P.2d 402, 73 Ariz. 101, certiorari denied Rubens v. Boles, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653—Ex parte Riccardi, 203 P.2d 627, 68 Ariz. 180.

Cal.—Corpus Juris Secundum cited in Application of Fedder, 299 P.2d 881, 886, 143 C.A.2d 103.

Conn.—Mouthrope v. Matus, 93 A.2d 149, 139 Conn. 272, certiorari denied 73 S.Ct. 785, 345 U.S. 926, 97 L.Ed. 1357.

D.C.—Bruzard v. Matthews, 207 F.2d 25, 93 U.S.App.D.C. 47—Lee Won Sing v. Cottone, 123 F.2d 169, 74 App.D.C. 374.

Ill.—People ex rel. Millet v. Babb, 115 N.E.2d 241, 1 Ill.2d 191—People ex rel. Gilbert v. Babb, 114 N.E.2d 358, 415 Ill. 349, 40 A.L.R.2d 1142—People ex rel. McGee v. Fischer, 81 N.E.2d 483, 401 Ill. 95—People ex rel. Willis v. Mulcahy, 64 N.E.2d 860, 392 Ill. 411—People ex rel. Bell v. Mulcahy, 64 N.E.2d 474, 392 Ill. 290, certiorari denied 66 S.Ct. 901, 327 U.S. 800, 90 L.Ed. 1025—People ex rel. Gardner v. Mulcahy, 62 N.E.2d 418, 390 Ill. 511—People ex rel. Flowers v. Gruenewald, 60 N.E.2d 225, 390 Ill. 79—People ex rel. Carr v. Murray, 192 N.E. 198, 357 Ill. 326, 94 A.L.R. 1487—People ex rel. La Rue v. Meyering, 191 N.E. 318, 357 Ill. 166—People v. Meyering, 181 N.E. 300, 348 Ill. 436.

Md.—Audler v. Kriss, 79 A.2d 391, 197 Md. 362.

Mass.—In re Murphy, 72 N.E.2d 413, 321 Mass. 206—Ex parte Germain, 155 N.E. 12, 258 Mass. 289, 51 A.L.R. 789.

Mo.—Keeton v. Gaiser, 55 S.W.2d 302, 331 Mo. 499.

N.Y.—People ex rel. Higley v. Mills-paw, 24 N.E.2d 117, 281 N.Y. 441.

People ex rel. Gottschalk v. Brown, 201 N.Y.S. 862, 207 App. Div. 695, reversed on other grounds 143 N.E. 653, 237 N.Y. 483, 32 A.L.R. 1164.

N.C.—Ex parte Hubbard, 160 S.E. 569, 201 N.C. 472, 81 A.L.R. 547.

Tenn.—State ex rel. Brown v. Grosch, 152 S.W.2d 239, 177 Tenn. 619—Corpus Juris cited in State v. Selman, 12 S.W.2d 368, 370, 157 Tenn. 641.

Utah.—Moreaux v. Ferrin, 100 P.2d 560, 98 Utah 450.

25 C.J. p 266 note 87.

29.5 D.C.—Bruzard v. Matthews, 207 F.2d 25, 93 U.S.App.D.C. 47.

29.10 N.J.—Ex parte Cohen, 92 A.2d 837, 23 N.J.Super. 209, affirmed 96 A.2d 794, 12 N.J. 362.

29.15 N.Y.—People ex rel. Swanson v. Fitzsimmons, 153 N.Y.S.2d 772, 2 A.D.2d 235.

29.20 N.Y.—People ex rel. Swanson v. Fitzsimmons, supra.

29.25 Tex.—Ex parte Gilbreath, Cr., 311 S.W.2d 851—Ex parte Oxford, 249 S.W.2d 917, 157 Tex.Cr. 512.

30. Ala.—Kelley v. State, 200 So. 115, 30 Ala.App. 21—Smith v. State, 129 So. 681, 24 Ala.App. 15—Thacker v. State, 101 So. 636, 20 Ala.App. 302, certiorari denied Ex parte Thacker, 101 So. 638, 212 Ala. 3. Ill.—People v. Meyering, 178 N.E. 122, 345 Ill. 598.

Tenn.—State v. Taylor, 22 S.W.2d 222, 160 Tenn. 44.

25 C.J. p 266 notes 88, 2.

Duty to file papers

(1) Governor need not file all papers acted on in granting requisition.

Tex.—Ex parte Ponzi, 290 S.W. 170, 106 Tex.Cr. 58.

(2) Original requisition papers need not be filed in office of secretary of state.

Or.—Ex parte Paulson, 124 P.2d 297, 168 Or. 457.

Proof held sufficient

(1) Generally.

Ala.—Tingley v. State, 63 So.2d 712, 36 Ala.App. 665, certiorari denied 63 So.2d 722, 258 Ala. 436, certiorari denied Tingley v. McDowell, 74 S.Ct. 55, 346 U.S. 837, 98 L.Ed. 358.

Mo.—Hagel v. Hendrix, App., 302 S.W.2d 323.

(2) To establish presence of accused in the demanding state on the date involved, or at the time the crime charged was committed.

U.S.—U. S. ex rel. Goldstein v. Lohman, C.A.Ill., 251 F.2d 259, certiorari denied 78 S.Ct. 702, 356 U.S. 918, 2 L.Ed.2d 714.

Conn.—Stenz v. Sandstrom, 118 A.2d 900, 143 Conn. 72.

(3) To establish identity of accused as the person demanded.

Pa.—Commonwealth ex rel. Lane v. Baldi, 110 A.2d 409, 380 Pa. 201, certiorari denied Commonwealth ex rel. Lane v. Baldi, 76 S.Ct. 95, 350 U.S. 853, 100 L.Ed. 758.

30.5 D.C.—Gibson v. Beall, 249 F.2d 489, 101 U.S.App.D.C. 397.

Ill.—People ex rel. Millet v. Babb, 115 N.E.2d 241, 1 Ill.2d 191.

Tex.—Delgado v. State, 252 S.W.2d 935, 158 Tex.Cr. 52.

No statutory provisions govern the particular kind of evidence or character of proof to be produced and how it shall be authenticated.

U.S.—Munsey v. Clough, N.H., 25 S.Ct. 282, 196 U.S. 364, 372, 49 L.Ed. 515.

U. S. ex rel. Silver v. O'Brien, C.A.Ill., 138 F.2d 217, certiorari denied 64 S.Ct. 522, 321 U.S. 766, 88 L.Ed. 1062.

mon-law evidence is not required,^{30,10} and these facts may be determined in any way which the executive to whom the requisition is addressed deems satisfactory.³¹

The requisition and its accompanying documents are to be considered as evidence,^{31.5} and the gov-

ernor is not required to demand proof apart from the proper requisition papers,³² which, if in conformity with the statutory requirements, establish a prima facie case authorizing extradition.^{32.5} He, however, may require and is at liberty to hear independent evidence as to the facts.³³

Ariz.—Ex parte Riccardi, 203 P.2d 627, 68 Ariz. 180.

Ill.—People ex rel. Eveland v. Harrell, 87 N.E.2d 765, 404 Ill. 81.

Tex.—Ex parte Gibson, 197 S.W.2d 109, 149 Tex.Cr. 543.

30.10 U.S.—Munsey v. Clough, N.H., 25 S.Ct. 282, 196 U.S. 364, 372, 49 L.Ed. 515.

U. S. ex rel. Silver v. O'Brien, C. C.A.III., 138 F.2d 217, certiorari denied 64 S.Ct. 522, 321 U.S. 766, 88 L.Ed. 1062.

Ariz.—Ex parte Riccardi, 203 P.2d 627, 68 Ariz. 180.

D.C.—Lee Won Sing v. Cottone, 123 F.2d 169, 74 App.D.C. 374.

Ill.—People ex rel. Chevlin v. O'Brien, 25 N.E.2d 4, 372 Ill. 640—People ex rel. Mark v. Toman, 199 N. E. 124, 362 Ill. 232, 102 A.L.R. 379.

Mass.—In re Murphy, 72 N.E.2d 413, 321 Mass. 206—Ex parte Wallace, 163 N.E. 870, 265 Mass. 101.

Tex.—Ex parte Gibson, 197 S.W.2d 109, 149 Tex.Cr. 543.

31. U.S.—Munsey v. Clough, N.H., 25 S.Ct. 282, 196 U.S. 364, 372, 49 L.Ed. 515.

U. S. ex rel. Silver v. O'Brien, C. C.A.III., 138 F.2d 217, certiorari denied 64 S.Ct. 522, 321 U.S. 766, 88 L.Ed. 1062—Rafferty ex rel. Huie Fong v. Bligh, C.C.A.Mass., 55 F. 2d 189.

U. S. ex rel. Faris v. McClain, D. C.Pa., 42 F.Supp. 429.

Ala.—Harris v. State, 60 So.2d 266, 257 Ala. 3.

Ariz.—Ex parte Riccardi, 203 P.2d 627, 68 Ariz. 180.

D.C.—Gibson v. Beall, 249 F.2d 489, 101 U.S.App.D.C. 397.

Ill.—People ex rel. Millet v. Babb, 115 N.E.2d 241, 1 Ill.2d 191—People ex rel. Eveland v. Harrell, 87 N.E.2d 765, 404 Ill. 81—People ex rel. McGee v. Fischer, 81 N.E.2d 483, 401 Ill. 95—People ex rel. Buxton v. Jeremiah, 4 N.E.2d 373, 364 Ill. 274.

Iowa.—Seely v. Beardsley, 190 N.W. 498, 194 Iowa 863.

Mass.—In re Murphy, 72 N.E.2d 413, 321 Mass. 206.

Mo.—Williams v. Robertson, 95 S.W. 2d 79, 339 Mo. 34—Albright v. Clinger, 234 S.W. 57, 290 Mo. 83.

Tex.—*Corpus Juris Secundum* cited in Delgado v. State, 252 S.W.2d 935, 937, 158 Tex.Cr. 52.

Wash.—Ex parte Nerreter, 183 P.2d 799, 28 Wash.2d 520.

25 C.J. p 266 notes 89, 1, 3, 4.

Any mode of proof satisfactory in kind and convincing in effect, and having a reasonable tendency to establish the fact of flight from justice, is sufficient.

Tex.—Ex parte Gibson, 197 S.W.2d 109, 149 Tex.Cr. 543.

Direct hearing

The fact that governor determined facts by direct hearing, rather than from report of judicial officer, could not work any substantial injustice on fugitive.

Ill.—People ex rel. Gilbert v. Babb, 114 N.E.2d 358, 415 Ill. 349, 40 A. L.R.2d 1142.

Picture of fugitive

Affidavits with photographs were competent evidence before governor on question whether person demanded was fugitive from justice.

U.S.—Rafferty ex rel. Huie Fong v. Bligh, C.C.A.Mass., 55 F.2d 189—U. S. ex rel. Austin v. Williams, C.C. A.La., 12 F.2d 66.

Ex parte affidavit

Wife's ex parte affidavit that defendant was in demanding state during period he allegedly failed to provide necessities for minor children could be considered in determining whether accused was a fugitive from justice subject to extradition.

Tex.—Ex parte Gibson, 197 S.W.2d 109, 149 Tex.Cr. 543.

Consideration of corroborating affidavits

Where one affidavit is sufficient, and all that is required, no error was committed in considering affidavits of two persons who were present when accused committed the offense, which merely corroborate it, notwithstanding such affidavits may be in themselves insufficient.

S.C.—State ex rel. Philips v. Garren, 195 S.E. 834, 186 S.C. 333.

Admissions

Where accused admitted in pleadings that, while under sentence for felony and on parole, he violated the latter and fled to this state, it was ample to satisfy the governor and to authorize granting extradition and issuing warrant for relator's arrest and delivery to the agent of such other state.

Mo.—Albright v. Clinger, 234 S.W. 57, 290 Mo. 83.

Proof of failure to serve sentence

Affidavit of warden showing conviction, incarceration, and escape of fugitive and latter's failure to prove parole, was sufficient proof of failure

to serve sentence.

Wash.—State v. Remann, 4 P.2d 866, 165 Wash. 92, 78 A.L.R. 412.

31.5 U.S.—U. S. ex rel. Silver v. O'Brien, C.C.A.III., 138 F.2d 217, certiorari denied 64 S.Ct. 522, 321 U.S. 766, 88 L.Ed. 1062.

32. U.S.—Marbles v. Creecy, Mo., 30 S.Ct. 32, 215 U.S. 63, 54 L.Ed. 92.

U. S. ex rel. Faris v. McClain, D. C.Pa., 42 F.Supp. 429.

Ariz.—Ex parte Rubens, 238 P.2d 402, 73 Ariz. 101, certiorari denied Rubens v. Boies, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

Ill.—People ex rel. Chevlin v. O'Brien, 25 N.E.2d 4, 372 Ill. 640—People ex rel. Mark v. Toman, 199 N. E. 124, 362 Ill. 232, 102 A.L.R. 379.

Iowa.—Seely v. Beardsley, 190 N.W. 498, 194 Iowa 863.

Pa.—Commonwealth ex rel. Taylor v. Superintendent, Philadelphia County Prison, 114 A.2d 343, 382 Pa. 181.

Wash.—Ex parte Nerreter, 183 P.2d 799, 28 Wash.2d 520.

25 C.J. p 267 note 6.

32.5 Ill.—People ex rel. Millet v. Babb, 115 N.E.2d 241, 1 Ill.2d 191.

Md.—Audler v. Kriss, 79 A.2d 391, 197 Md. 362.

N.J.—Ex parte Cohen, 92 A.2d 837, 23 N.J.Super. 209, affirmed 96 A.2d 794, 12 N.J. 362.

Pa.—Commonwealth ex rel. Taylor v. Superintendent, Philadelphia County Prison, 114 A.2d 343, 382 Pa. 181.

Prima facie evidence

Governor of asylum state may be guided by the record as prima facie evidence in acting on a requisition for extradition.

Ky.—Galloway v. McClard, 316 S.W. 2d 125.

Where extradition papers make a case under federal Constitution, governor of asylum state should honor the demand and issue his warrant for extradition.

Ga.—Hart v. Mount, 26 S.E.2d 453, 196 Ga. 452.

33. Ill.—People ex rel. Chevlin v. O'Brien, 25 N.E.2d 4, 372 Ill. 640—People ex rel. Buxton v. Jeremiah, 4 N.E.2d 373, 364 Ill. 274.

Mass.—Ex parte Graves, 128 N.E. 867, 236 Mass. 493.

25 C.J. p 266 note 91, p 267 note 7.

Presence in demanding state

Question whether the person demanded was present in the demanding state at the time of the commis-

Under various statutes, the governor may call on the attorney general or other prosecuting officer in the state to investigate a demand for extradition,^{33.5} and under such a statute the governor may consider evidence outside the papers sent with the requisition.³⁴ He is not required, however, to have such an investigation made,^{34.5} and where he does he is not required to follow the advice and report of the attorney general.^{34.10}

As it is to the requisition a governor looks for authority to issue his warrant,³⁵ no copy of the laws of the demanding state need be submitted to him to prove that the requisition is properly founded.³⁶ He, however, may take notice of the laws of the demanding state without proof thereof being submitted to him.³⁷ The certificate of the governor of the demanding state that the alleged fugitive is charged with a crime is worthy of consideration and entitled to weight,^{37.5} or it is prima facie proof of that fact,³⁸ but it is not conclusive.^{38.5} The record of an unsatisfied judgment of conviction is sufficient evidence that the person demanded is charged with a crime.^{38.10}

That person demanded is fugitive from justice.

The governor may consider any proof which reasonably tends to establish either that the person demanded is or is not a fugitive from justice.^{38.15} He is entitled to act on a statement in an affidavit accompanying the requisition that the person demanded is a fugitive from justice,³⁹ but such an affidavit is not conclusive,⁴⁰ and may be refuted.^{40.5} It has been held, however, that mere recitals in the requisition, there being no statement in the affidavit that the person demanded was a fugitive from justice, are not sufficient to warrant the governor in acting.⁴¹

An affidavit in support of a requisition that the prisoner is a fugitive from justice will not be disregarded as the statement of a mere conclusion of law,⁴² but the conclusion is one of fact to which a witness may be allowed to testify.⁴³ The fact that a man is charged with crime in one state and is afterward found in another has generally been regarded as prima facie evidence that he is a fugitive,⁴⁴ but it may be rebutted.⁴⁵

Generally it must be shown that the alleged offender was in the demanding state at the time of the commission of the crime,^{45.5} but where it appears

sion of the crime may, but need not, be investigated by the officials of the asylum state.

Pa.—Commonwealth ex rel. Hernandez v. Price, 11 Pa.Dist. & Co.2d 232, 105 Pittsb.Leg.J. 343, appeal dismissed 122 A.2d 206, 385 Pa. 44, certiorari denied 77 S.Ct. 56, 35 U.S. 836, 1 L.Ed.2d 55.

33.5 U.S.—Powell v. Turner, 207 P. 2d 492, 167 Kan. 524, certiorari denied 70 S.Ct. 41, 338 U.S. 835, 94 L.Ed. 509.

Kan.—Yaws v. Warden of N. M. State Penitentiary, 203 P.2d 742, 166 Kan. 685.

Mich.—In re Riggins, 11 N.W.2d 871, 307 Mich. 234.

Special assistant attorney general is a proper person to conduct investigation and make report to governor. Md.—State ex rel. Zack v. Kriss, 74 A.2d 25, 195 Md. 559.

34. Mass.—Ex parte Graves, 128 N. E. 867, 236 Mass. 493. 25 C.J. p 266 note 92 [a].

34.5 Kan.—Powell v. Turner, 207 P. 2d 492, 167 Kan. 524, certiorari denied 70 S.Ct. 41, 338 U.S. 835, 94 L. Ed. 509—Yaws v. Warden of N. M. State Penitentiary, 203 P.2d 742, 166 Kan. 685.

34.10 Mass.—In re Murphy, 72 N.E. 2d 413, 321 Mass. 206.

35. D.C.—Benson v. Palmer, 31 App. D.C. 561, 17 L.R.A., N.S., 1247.

Tex.—Hibler v. State, 43 Tex. 197.

36. Tex.—Ex parte Roselle, 222 S. W. 248, 87 Tex.Cr. 470. 25 C.J. p 266 note 98.

37. U.S.—Hogan v. O'Neill, N.J., 41 S.Ct. 222, 255 U.S. 52, 65 L.Ed. 497.

37.5 Wis.—State ex rel. Kojis v. Barczak, 58 N.W.2d 420, 264 Wis. 136, followed in 58 N.W.2d 424, 264 Wis. 142.

38. Ind.—Tullis v. Fleming, 69 Ind. 15.

38.5 Wis.—State ex rel. Kojis v. Barczak, 58 N.W.2d 420, 264 Wis. 136, followed in 58 N.W.2d 424, 264 Wis. 142.

38.10 Colo.—Tinsley v. Woods, 313 P.2d 1006, 135 Colo. 590.

38.15 Ill.—People ex rel. Pusch v. Mulcahy, 64 N.E.2d 458, 392 Ill. 209, certiorari denied 66 S.Ct. 1371, 328 U.S. 865, 90 L.Ed. 1635.

Evidence held sufficient

Affidavit of principal complaining witness that alleged fugitive from justice was in demanding state and was seen there by affiant at time of alleged commission of offense with which he was charged and report of attorney general as to his fugitive status were held sufficient to justify governor of asylum state in determining that person sought was in fact a fugitive from justice.

Ariz.—Ex parte Riccardi, 203 P.2d 627, 68 Ariz. 180.

39. U.S.—Rafferty ex rel. Huie Fong v. Bligh, C.C.A.Mass., 55 F.2d 189. Ariz.—Ex parte Rubens, 238 P.2d 402,

73 Ariz. 101, certiorari denied Rubens v. Boies, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

Ill.—People ex rel. Mark v. Toman, 199 N.E. 124, 362 Ill. 232, 102 A.L.R. 379.

25 C.J. p 267 note 8.

40. Ala.—Ex parte State, 73 Ala. 503, 49 Am.R. 63.

Ariz.—Ex parte Rubens, 238 P.2d 402, 73 Ariz. 101, certiorari denied Rubens v. Boies, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

40.5 Ariz.—Ex parte Rubens, 238 P. 2d 402, 73 Ariz. 101, certiorari denied Rubens v. Boies, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

41. Ind.—Hartman v. Aveline, 63 Ind. 344, 30 Am.R. 217.

42. U.S.—Ex parte Reggel, Utah, 5 S.Ct. 1148, 114 U.S. 642, 29 L.Ed. 250.

25 C.J. p 267 note 11.

43. Mass.—Duddy's Case, 107 N.E. 364, 219 Mass. 548.

44. U.S.—Ex parte Reggel, Utah, 5 S.Ct. 1148, 114 U.S. 642, 29 L.Ed. 250.

25 C.J. p 267 note 13.

45. U.S.—Reed v. U. S., Cal., 224 F. 378, 140 C.C.A. 64.

45.5 Miss.—Bishop v. Jones, 42 So. 2d 421, 207 Miss. 423.

N.Y.—People ex rel. Rankin v. Ruthazer, 107 N.E.2d 458, 304 N.Y. 302. Necessity that date of crime be alleged in pleadings, a copy of which is

that he was in the demanding state in the neighborhood of the time the offense was allegedly committed, it is sufficient.^{45.10} Where the crime charged involves continuing acts, such as conspiracy to embezzle, the presence of the fugitive in the demanding state need not be on the exact date charged, but it is sufficient if he was present on any of the dates alleged in the indictment of the demanding state.^{45.15} If the record presents merely contradictory evidence on the question of the presence of accused in, or his absence from, the demanding state, a warrant properly issues.^{45.20} The fact that it appears from the indictment or other pleading charging the crime that the offenses were committed more than the number of years prescribed as the limitation period before the finding of the indictment does not preclude a finding that accused was a fugitive from justice.⁴⁶ The determination of the governor of the asylum state that the person demanded is a fugitive from the demanding state is *prima facie* correct.^{46.5}

Proof of identity. In extradition proceedings before the governor of the asylum state or his representative, the asylum state does not have the burden

of affirmatively establishing the identity of accused with the person named in the requisition papers where such matter is not made an issue in the hearing.^{46.10}

c. Matters Considered

In general, the character of the crime charged to have been committed, the guilt or innocence of the person demanded, or the motives underlying the demand for extradition are not matters to be considered in determining whether or not extradition should be granted; but it has been held within the discretionary power of the governor of the asylum state to refuse extradition where it is sought for some ulterior purpose.

The governor of an asylum state has been held to act in an executive, and not in a judicial, capacity in granting extradition.^{46.50} The only question for his consideration is whether the person demanded is within the provisions of the statutes providing for extradition.^{46.55} He is not concerned with the character of the crime charged to have been committed,⁴⁷ nor will there be any inquiry into the motives underlying the demand,⁴⁸ or the guilt or innocence, or criminal liability, of the person demanded,⁴⁹ except as such an inquiry may be material in

required to accompany requisition, see *supra* § 14 (9).

Customary method of proof

Whether person in custody is a fugitive is usually determined by the governor on proof satisfactory to him that accused was present in demanding state on date when offense is alleged to have occurred.

Ill.—People ex rel. Goldstein v. Babb, 123 N.E.2d 639, 4 Ill.2d 483, certiorari denied 75 S.Ct. 771, 349 U.S. 928, 99 L.Ed. 1259.

45.10 Ill.—People ex rel. Strobel v. Mulcahy, 60 N.E.2d 397, 390 Ill. 233, certiorari denied 66 S.Ct. 49, 326 U.S. 681, 90 L.Ed. 398—People ex rel. Mortensen v. O'Brien, 20 N.E.2d 782, 371 Ill. 351.

45.15 Ill.—People ex rel. James v. Lynch, 158 N.E.2d 60, 16 Ill.2d 380—People ex rel. Borelli v. Sain, 157 N.E.2d 417, 16 Ill.2d 321—People ex rel. Moore v. Wirz, 181 N.E. 641, 349 Ill. 80.

45.20 Ill.—People ex rel. Eveland v. Harrell, 87 N.E.2d 765, 404 Ill. 81. Iowa.—Bicknell v. Farley, 5 N.W.2d 831, 232 Iowa 464.

46. Ind.—Waggoner v. Feeney, 44 N.E.2d 499, 220 Ind. 543.

N.H.—State v. Clough, 53 A. 1086, 71 N.H. 594, 67 L.R.A. 946.

46.5 Iowa.—Bicknell v. Farley, 5 N.W.2d 831, 232 Iowa 464.

46.10 Ariz.—Ex parte Freeman, 291 P.2d 795, 80 Ariz. 21.

46.50 Ohio.—In re Acton, 103 N.E.2d 577, 90 Ohio App. 100.

46.55 N.J.—Powell v. Meyer, 43 A.2d 175, 23 N.J.Misc. 222, certiorari denied 46 A.2d 671, 134 N.J.Law 169.

Limited inquiry

Under the fugitive provisions of the extradition act, the area of inquiry and review is limited.

N.Y.—People ex rel. Swanson v. Fitzsimmons, 153 N.Y.S.2d 772, 2 A.D. 2d 235.

47. U.S.—Drew v. Thaw, N.H., 35 S.Ct. 137, 235 U.S. 432, 59 L.Ed. 302—Kentucky v. Dennison, Ky., 24 How. 66, 16 L.Ed. 717.

Scope of review on habeas corpus see Habeas Corpus § 39.

Place of confinement

Fact that confinement of alleged fugitive from justice was in reformatory of demanding state was not a determining factor on question of whether he could be extradited.

Tex.—Ex parte Brower, 218 S.W.2d 463, 153 Tex.Cr. 175.

48. U.S.—U. S. ex rel. Faris v. McClain, D.C.Pa., 42 F.Supp. 429.

Ill.—People ex rel. Carr v. Murray, 192 N.E. 198, 357 Ill. 326, 94 A.L.R. 1487.

N.J.—Ex parte Cohen, 92 A.2d 837, 23 N.J.Super. 209, affirmed 96 A.2d 794, 12 N.J. 362—Frank v. Naughton, 64 A.2d 90, 1 N.J.Super. 242.

N.Y.—Matter of Thaw, 152 N.Y.S. 771, 167 App.Div. 104.

Or.—In re DeFoe, 170 P.2d 383, 179 Or. 334.

Pa.—Commonwealth ex rel. Hunt v. Groman, 82 A.2d 278, 169 Pa.Super.

68—Commonwealth ex rel. Bucksbarg v. Good, 58 A.2d 842, 162 Pa.Super. 557—Commonwealth ex rel. Spivak v. Heinz, 14 A.2d 875, 141 Pa.Super. 158.

Tenn.—State ex rel. Groover v. Payne, 174 S.W.2d 464, 180 Tenn. 278.

25 C.J. p 267 note 18.

Assumption of good faith

In determining validity of requisition for a fugitive, it must be assumed that sister state, in asking the return of one properly accused of committing a crime in such state, does so in good faith and for proper motives.

Utah.—Moreaux v. Ferrin, 100 P.2d 560, 98 Utah 450.

Act of sovereign state

An extradition requisition is the act of a sister state having equal sovereignty to the asylum state, and not the act of some creditor or person holding a selfish private motive who may have instigated the prosecution.

Va.—Spiak v. Seay, 40 S.E.2d 250, 185 Va. 710.

49. U.S.—Drew v. Thaw, N.H., 35 S.Ct. 137, 235 U.S. 432, 59 L.Ed. 302.

Ala.—Kilgore v. State, 75 So.2d 126, 261 Ala. 465—State v. Parrish, 5 So.2d 828, 242 Ala. 7, second case.

State v. Shelton, 8 So.2d 216, 30 Ala.App. 484.

Ark.—Swann v. State, 174 S.W.2d 557, 206 Ark. 184.

identifying the person demanded,^{49.5} and in determining whether or not he is a fugitive from justice.^{49.10} It is no defense that the person demanded has made, offered to make, or intends to make resti-

tution to the complainant.^{49.15}

If the requisition is in due form it is not for the asylum state to determine whether the charge is well founded,⁵⁰ or whether prosecution is barred by limi-

Cal.—In re Scott's Estate, 310 P.2d 46, 150 C.A.2d 590.

Colo.—Tinsley v. Woods, 313 P.2d 1006, 135 Colo. 590.

Ga.—Mayfield v. Hornsby, 23 S.E.2d 312, 199 Ga. 70.

Md.—Lincoln v. State, 85 A.2d 765, 199 Md. 194—State ex rel. Gildar v. Kriss, 62 A.2d 568, 191 Md. 568.

Mich.—In re Riggins, 11 N.W.2d 871, 307 Mich. 234.

Miss.—Tyler v. Pierce, 61 So.2d 309, 216 Miss. 498.

N.J.—Ex parte Cohen, 92 A.2d 837, 23 N.J.Super. 209, affirmed 96 A.2d 794, 12 N.J. 362.

Powell v. Meyer, 43 A.2d 175, 23 N.J.Misc. 222, certiorari denied 46 A.2d 671, 134 N.J.Law 169.

N.Y.—People ex rel. Samet v. Kennedy, 140 N.Y.S.2d 466, 285 App. Div. 1116.

People ex rel. Habner v. Skinner, 155 N.Y.S.2d 391.

Ohio.—In re Acton, 103 N.E.2d 577, 90 Ohio App. 100.

Or.—Corpus Juris Secundum cited in In re DeFoe, 170 P.2d 383, 388, 179 Or. 334.

Pa.—Commonwealth ex rel. Houser v. Seip, 124 A.2d 110, 385 Pa. 545 —Commonwealth ex rel. Hernandez v. Price, 122 A.2d 206, 385 Pa. 44, certiorari denied 77 S.Ct. 56, 35 U.S. 836, 1 L.Ed.2d 55.

Commonwealth ex rel. Hunt v. Groman, 82 A.2d 278, 169 Pa.Super. 68—Commonwealth ex rel. Bucks-barg v. Good, 58 A.2d 842, 162 Pa. Super. 557.

Tenn.—State ex rel. Groover v. Payne, 174 S.W.2d 464, 180 Tenn. 278.

Tex.—Ex parte Garcia, Cr., 319 S.W.2d 328—Ex parte Cook, Cr., 312 S.W.2d 520—Ex parte Thompson, 261 S.W.2d 844, 159 Tex.Cr. 161.

Va.—Spiak v. Seay, 40 S.E.2d 250, 185 Va. 710.

25 C.J. p 267 note 20.

Purpose of restriction

Purpose of statutory provision prohibiting inquiry into guilt or innocence of accused is to restrict such inquiry to the state which has jurisdiction of the crime charged.

Pa.—Commonwealth ex rel. Hatton v. Dye, 96 A.2d 127, 373 Pa. 502.

Immaterial attack

(1) Extradition is not based on guilt, but solely on the fact that the accused is charged with crime, and any attack on extradition proceedings which is based on the claimed innocence of accused is wholly immaterial.

W.Va.—Cassis v. Fair, 29 S.E.2d 245, 126 W.Va. 557, 151 A.L.R. 233.

(2) Affidavits which attempted to bolster charge against accused made by complaining witness who signed a criminal complaint on which justice court of demanding state issued warrant of arrest were wholly unnecessary to determination by governor of asylum state as to whether extradition should be issued, because they were an attempt to offer proof of guilt of the accused, and fact that affidavits were not executed before a magistrate would not invalidate extradition warrant.

Ariz.—Ex parte Rubens, 238 P.2d 402, 73 Ariz. 101, certiorari denied Rubens v. Boies, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

Insanity

In extradition proceeding, evidence of present insanity of alleged fugitive could not be presented.

Ohio.—State ex rel. Davey v. Owen, 12 N.E.2d 144, 133 Ohio St. 96, 114 A.L.R. 686.

Fugitive on parole

(1) Since conviction was a necessary precedent to granting of parole, the fact that relator was at large physically instead of being in durance when he forfeited his right to clemency was a matter with which the governor of asylum state need not concern himself, the right to requisition being based on the unsatisfied judgment of conviction, not on violation of parole.

Mo.—Albright v. Clinger, 234 S.W. 57, 290 Mo. 83.

(2) Fact that alleged fugitive from justice was out of prison after conviction for a felony under parole would not preclude extradition, since demanding state had right to fix conditions of parole and had right to determine whether conditions had been violated.

Tex.—Ex parte Brower, 218 S.W.2d 463, 153 Tex.Cr. 175.

(3) In extradition proceedings based on fact that prisoner had violated his parole, whether the prisoner had in fact violated his parole was of no concern in the courts of the asylum state.

Colo.—Tinsley v. Woods, 313 P.2d 1006, 135 Colo. 590.

(4) Under the Interstate Parole Compact law, when the return to the demanding state is sought of an alleged parole violator, it need only be shown that he is the same person described in the papers, and that the officers from the demanding state are authorized persons.

N.Y.—People ex rel. Rankin v. Ruth-azer, 107 N.E.2d 458, 304 N.Y. 302.

Limitation of issues held proper

Governor of asylum state was held to have properly limited hearing to identity of person demanded and to have properly refused to investigate his guilt or innocence, even though there was a dispute whether charge against accused was in the form of an indictment or merely a complaint in a justice of the peace court, and even though accused maintained that charge against him was motivated by malice.

Or.—In re DeFoe, 170 P.2d 383, 179 Or. 334.

49.5 Ala.—Kilgore v. State, 75 So.2d 126, 261 Ala. 465—State v. Parrish, 5 So.2d 828, 242 Ala. 7, second case.

State v. Shelton, 8 So.2d 216, 30 Ala.App. 484.

Kan.—Yaws v. Warden of N. M. State Penitentiary, 203 P.2d 742, 166 Kan. 685.

Md.—Lincoln v. State, 85 A.2d 765, 199 Md. 194.

N.J.—Ex parte Cohen, 92 A.2d 837, 23 N.J.Super. 209, affirmed 96 A.2d 794, 12 N.J. 362.

49.10 Ala.—State v. Parrish, 5 So.2d 828, 242 Ala. 7, second case.

State v. Shelton, 8 So.2d 216, 30 Ala.App. 484.

49.15 Mont.—State v. Booth, 328 P. 2d 1104.

50. Ala.—State v. Parrish, 5 So.2d 828, 242 Ala. 7, second case.

Cal.—Ex parte Harper, 62 P.2d 390, 17 C.A.2d 446.

Colo.—Self v. People, 297 P.2d 887, 133 Colo. 524.

Ill.—People v. Baldwin, 174 N.E. 51, 341 Ill. 604.

Mass.—In re Harris, 34 N.E.2d 504, 309 Mass. 180, 135 A.L.R. 969—Kingsbury's Case, 106 Mass. 223, 227.

N.J.—State v. Wilson, 52 A.2d 50, 135 N.J.Law 398—Powell v. Meyer, 46 A.2d 671, 134 N.J.Law 169.

N.Y.—People ex rel. Gottschalk v. Brown, 143 N.E. 653, 237 N.Y. 483, 32 A.L.R. 1164.

Pa.—Commonwealth ex rel. Spivak v. Heinz, 14 A.2d 875, 141 Pa.Super. 158.

S.D.—Stauffer v. Brother, 292 N. W. 432, 67 S.D. 314, 128 A.L.R. 925.

Tenn.—State ex rel. Bryant v. Fleming, 260 S.W.2d 161, 195 Tenn. 419.

Tex.—Ex parte Key, Cr., 301 S.W.2d 90.

25 C.J. p 267 note 21.

tations,⁵¹ but it has been held that the governor should refuse the demand where it clearly appears that prosecution for the crime charged is barred by limitations.⁵²

Consideration should not be given to, or extradition refused on the ground of, alleged mistreatment of prisoners in the demanding state, or an assertion that the person demanded will suffer cruel and inhuman treatment if he is returned thereto,^{52.5} or his fear of physical injury or of being lynched,^{52.10} or his claim that he has been wronged as a result of public hysteria directed at persons connected with communism,^{52.15} or a mere suggestion that the fugitive, because of his race and color, will not be fairly and justly dealt with in the state to which it is sought to remove him, or will not be adequately protected against violence.⁵³

Generally, however, it is within the discretionary power of the governor of the asylum state to refuse extradition where it is sought for some ulterior purpose,^{53.5} as for the purpose of collecting private debts^{53.10} or gratifying personal malice.^{53.15} It has been said that there is no satisfactory reason why a governor should issue a warrant where he is satisfied that the sole object of the party complain-

ing is to enforce payment of a private claim for money.⁵⁴

Insanity. It is proper for the executive of the asylum state, in determining whether he will surrender a citizen of that state as a fugitive from justice, to consider that accused has been found to be a lunatic by the court of the asylum state, that a committee has been appointed for the custody of his person, and a place for his detention has been designated.⁵⁵

Identity. Since the question of identity of the person arrested as the one demanded does not arise until after an arrest on the governor's warrant, it is not for the governor to determine,⁵⁶ but the governor must decide whether the person sought is the same as the one alleged to be a fugitive from justice.⁵⁷

d. Hearing and Notice

Proceedings for extradition are summary in their nature and not subject to rules of judicial procedure; the person demanded is not entitled to notice or a hearing before the governor of the asylum state.

Proceedings for extradition are summary in their nature.⁵⁸ They are not judicial proceedings and are

Alibi

In extradition proceeding, absence from scene of crime or an alibi, being matters of defense, cannot be shown unless probative of fact that accused is not a fugitive, but must be determined by courts of demanding state.

N.Y.—People ex rel. MacArthur v. Warden of the Penitentiary, 200 N.Y.S. 81, 205 App.Div. 650.

Ohio.—State ex rel. Davey v. Owen, 12 N.E.2d 144, 133 Ohio St. 96, 114 A.L.R. 686.

Plea of former jeopardy was defense only in Illinois court wherein indictment was pending; hence it could not prevent extradition from New York.

N.Y.—People ex rel. Coine v. Reilly, 240 N.Y.S. 27, 228 App.Div. 427.

Parole

Validity and effect of parole and later revocation thereof by parole board of demanding state should be left to that state to determine.

Okl.—Ex parte Ayers, 213 P.2d 297, 90 Okl.Cr. 255—Ex parte Burnett, 144 P.2d 126, 78 Okl.Cr. 93.

51. U.S.—President of U. S. ex rel. Caputo v. Kelly, C.C.A.N.Y., 96 F. 2d 787.

52. Mo.—Williams v. Robertson, 95 S.W.2d 79, 339 Mo. 34.
Ohio.—State ex rel. Davey v. Owen, 12 N.E.2d 144, 133 Ohio St. 96, 114 A.L.R. 686.

52.5 N.H.—Koch v. O'Brien, 131 A.2d 63, 101 N.H. 11.

Pa.—Commonwealth ex rel. Henderson v. Baldi, 93 A.2d 458, 372 Pa. 463.

Defense of prison system not required

Scheme of interstate rendition as set forth in federal Constitution and implementing statutes contemplates prompt return of fugitive as soon as state from which he fled demands him, and does not contemplate an appearance by demanding state in state of fugitive's asylum to defend against claimed abuses of its prison system.

U.S.—Sweeney v. Woodall, 73 S.Ct. 139, 344 U.S. 86, 97 L.Ed. 114, rehearing denied 73 S.Ct. 332, 344 U.S. 916, 97 L.Ed. 706.

Pa.—Commonwealth ex rel. Henderson v. Baldi, 93 A.2d 458, 372 Pa. 463.

52.10 N.Y.—People ex rel. Reid v. Warden of City Prison, 63 N.Y.S. 2d 620.

52.15 Minn.—State ex rel. Horowitz v. Jones, 71 N.W.2d 839, 245 Minn. 125.

53. U.S.—Marbles v. Creedy, Mo., 30 S.Ct. 32, 215 U.S. 63, 54 L.Ed. 92.
U. S. ex rel. Faris v. McClain, D. C.Pa., 42 F.Supp. 429.

53.5 Mont.—State v. Booth, 328 P.2d 1104.

53.10 Mont.—State v. Booth, supra.

53.15 Mont.—State v. Booth, supra.

54. Ohio.—Work v. Corrington, 34 Ohio St. 64, 32 Am.R. 345.

In re Williams, 5 Ohio App. 55.

55. Pa.—Opinion of Attorney-General, 26 Pa.Dist. 477.

56. U.S.—Rafferty ex rel. Huie Fong v. Bligh, C.C.A.Mass., 55 F.2d 189.

57. Ark.—State ex rel. Lewis v. Allen, 109 S.W.2d 952, 194 Ark. 688.

N.J.—Powell v. Meyer, 43 A.2d 175, 23 N.J.Misc. 222, certiorari denied 46 A.2d 671, 134 N.J.Law 169.

Pa.—Commonwealth ex rel. Baldi, 88 Pa.Dist. & Co. 165.

Tex.—Ex parte Riddle, 101 S.W.2d 268, 131 Tex.Cr. 563.

58. D.C.—Lee Won Sing v. Cottone, 123 F.2d 169, 74 App.D.C. 374.

Ill.—People ex rel. Millet v. Babb, 115 N.E.2d 241, 1 Ill.2d 191.

Ind.—Waggoner v. Feeney, 44 N.E.2d 499, 220 Ind. 543.

Minn.—State ex rel. Horowitz v. Jones, 71 N.W.2d 839, 245 Minn. 125.

N.Y.—People ex rel. Johnson v. Ruthazer, 102 N.Y.S.2d 39, 198 Misc. 1044, affirmed 105 N.Y.S.2d 394, 278 App.Div. 905.

Pa.—Commonwealth ex rel. Faison v. Watkins, 9 Pa.Dist. & Co.2d 571, 73 Montg.Co. 44.

Tenn.—State ex rel. Brown v. Grosch, 152 S.W.2d 239, 177 Tenn. 619.

25 C.J. p 267 note 25.

not subject to the rules of judicial procedure.^{58.5} The executive of the asylum state may act on the requisition in the absence of accused,⁵⁹ and without previous notice to him.⁶⁰ A statute providing for the furnishing to accused of copies of the complete set of instruments accompanying the requisition has been held to be directory only, and to become mandatory only when a request for them has been made by the alleged fugitive.^{60.5}

The person demanded is not entitled to a hearing before the governor of the asylum state,⁶¹ although the governor, in his discretion, and as a matter of grace, may grant him one.⁶² If the governor grants a hearing, it may be in such mode and manner as he deems satisfactory.^{62.5} It need not be conducted by

the governor,^{62.10} and a commissioner appointed to receive evidence and make a report may conduct it.^{62.15} It is immaterial that the hearing was held before the private secretary of the governor.⁶³

Where there are alternative methods by which extradition proceedings may be commenced in a state, one by direct application to the governor for a writ of extradition, and the other by complaint, under oath, to a judicial officer, a fugitive who moves to continue proceedings before a judicial officer and then requests and is granted a hearing on the writ filed with the governor thereby waives further proceedings in the court even though he questions the propriety of the executive to proceed while the court action is pending.^{63.5}

Summary executive action

D.C.—Gibson v. Beall, 249 F.2d 489, 101 U.S.App.D.C. 397.

58.5 Ill.—People ex rel. Millet v. Babb, 115 N.E.2d 241, 1 Ill.2d 191.

No fixed rules of procedure are applicable.

Tex.—Delgado v. State, 252 S.W.2d 935, 158 Tex.Cr. 52.

59. U.S.—Marbles v. Creedy, Mo., 30 S.Ct. 32, 215 U.S. 63, 54 L.Ed. 92.

60. U.S.—Marbles v. Creedy, supra. Gerrish v. State of N. H., D.C. Me., 97 F.Supp. 527—Collins v. Golden, D.C.Neb., 95 F.Supp. 251. D.C.—Gibson v. Beall, 249 F.2d 489, 101 U.S.App.D.C. 397.

Kan.—Yaws v. Warden of N. M. State Penitentiary, 203 P.2d 742, 166 Kan. 685.

Miss.—Deas v. Payne, 82 So.2d 894, 225 Miss. 168—Tyler v. Pierce, 61 So.2d 309, 216 Miss. 498.

60.5 Tex.—Ex parte Moore, 256 S.W.2d 103, 158 Tex.Cr. 407.

61. U.S.—U. S. ex rel. Darcy v. Superintendent of County Prisons of Philadelphia, C.C.A.Pa., 111 F.2d 409, certiorari denied 61 S.Ct. 19, 311 U.S. 662, 85 L.Ed. 425—Rafferty ex rel. Huie Fong v. Bligh, C.C.A. Mass., 55 F.2d 189.

Gerrish v. State of N. H., D.C. Me., 97 F.Supp. 527—Collins v. Golden, D.C.Neb., 95 F.Supp. 251—Johnson v. Scarborough, D.C.Tex., 88 F.Supp. 523.

D.C.—Gibson v. Beall, 249 F.2d 489, 101 U.S.App.D.C. 397—Lee Won Sing v. Cottone, 123 F.2d 169, 74 App.D.C. 374.

Fla.—Young v. Stoutamire, 176 So. 759, 129 Fla. 805—State ex rel. Marks v. Chase, 116 So. 21, 95 Fla. 37.

Iowa.—Bicknell v. Farley, 5 N.W.2d 831, 232 Iowa 464—Seely v. Beardsley, 190 N.W. 498, 194 Iowa 863.

Kan.—Powell v. Turner, 207 P.2d 492, 167 Kan. 524, certiorari denied 70 S.Ct. 41, 338 U.S. 835, 94 L.Ed. 509.

Ky.—Galloway v. McClard, 316 S.W. 2d 125.

Me.—Randall v. Pinkham, 100 A.2d 660, 149 Me. 320.

Mass.—In re Murphy, 72 N.E.2d 413, 321 Mass. 206.

Minn.—State ex rel. Horowitz v. Jones, 71 N.W.2d 839, 245 Minn. 125.

Miss.—Deas v. Payne, 82 So.2d 894, 225 Miss. 168.

N.J.—Ex parte Cohen, 92 A.2d 837, 23 N.J.Super. 209, affirmed 96 A.2d 794, 12 N.J. 362.

Ex parte Collier, 55 A.2d 29, 140 N.J.Eq. 469, certiorari denied Collier v. Meyer, 68 S.Ct. 446, 333 U.S. 829, 92 L.Ed. 1114.

Tenn.—State ex rel. Brown v. Grosch, 152 S.W.2d 239, 177 Tenn. 619—State ex rel. Van Scoyoc v. State, 103 S.W.2d 26, 171 Tenn. 357.

Tex.—Ex parte Moore, 256 S.W.2d 103, 158 Tex.Cr. 407—*Corpus Juris Secundum* cited in Delgado v. State, 252 S.W.2d 935, 937, 158 Tex. Cr. 52.

25 C.J. p 267 note 28.

Under Uniform Criminal Extradition Act

Kan.—Yaws v. Warden of N. M. State Penitentiary, 203 P.2d 742, 166 Kan. 685.

Tex.—Ex parte Wagner, 256 S.W.2d 98, 158 Tex.Cr. 444.

Custom of granting hearing

The fact that it was customary for governor to grant hearings on extraditions when requested, and that he would have done so in instant case had he known of fugitive's desire to contest extradition, did not invalidate extradition warrant.

Ga.—Scheinfaun v. Aldredge, 12 S.E. 2d 868, 191 Ga. 479.

62. U.S.—Rafferty ex rel. Huie Fong v. Bligh, C.C.A.Mass., 55 F.2d 189.

Ky.—Galloway v. McClard, 316 S.W. 2d 125.

Minn.—State ex rel. Horowitz v.

Jones, 71 N.W.2d 839, 245 Minn. 125.

N.J.—Ex parte Cohen, 92 A.2d 837, 23 N.J.Super. 209, affirmed 96 A.2d 794, 12 N.J. 362.

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Tenn.—State ex rel. Brown v. Grosch, 152 S.W.2d 239, 177 Tenn. 619.

Tex.—Ex parte Moore, 256 S.W.2d 103, 158 Tex.Cr. 407.

62.5 Ky.—Galloway v. McClard, 316 S.W.2d 125.

62.10 Ky.—Galloway v. McClard, supra.

62.15 Ky.—Galloway v. McClard, supra.

Authority not delegated

Such procedure does not delegate any authority or power of governor; he alone determines whether he will honor or refuse extradition.

Ky.—Galloway v. McClard, supra.

Decision not illegal

Governor's action in honoring request for extradition of alleged fugitive is not illegal because not based on a hearing conducted by him, but instead on a report of commissioner appointed to consider record and conduct the hearing.

Ky.—Galloway v. McClard, supra.

63. Mo.—Flournoy v. Owens, 275 S.W. 923, 310 Mo. 355.

25 C.J. p 267 note 29.

63.5 Ill.—People ex rel. Gilbert v.

Babb, 114 N.E.2d 358, 415 Ill. 349, 40 A.L.R.2d 1142.

Governor entitled to disregard judicial hearing

Where accused was arrested and detained in Illinois on a complaint charging her with being a fugitive from justice in a sister state, which state, while fugitive complaint was pending, requisitioned accused's extradition, governor of Illinois was not precluded from disregarding the

§ 16. Warrant

- a. Authority to issue
- b. Requisites
- c. To whom issued and authority to execute
- d. Conclusiveness
- e. Revocation

a. Authority to Issue

As a general rule the governor of the asylum state or territory has exclusive, nondelegable authority to issue the warrant, and the issuance authorizes the arrest and surrender of the accused person.

A warrant by the governor of the asylum state is indispensable to extradition,^{63.50} and the authority to issue the warrant rests exclusively in the governor of the asylum state⁶⁴ or territory.⁶⁵ Under some state statutes, however, a further proceeding before a court may be necessary before the

alleged fugitive may be surrendered to the demanding state in accordance with the warrant.⁶⁶

The governor cannot delegate this authority;⁶⁷ but he may ratify a warrant already issued in his name and in his official capacity by a secretary or other assistant.⁶⁸ Unless so required by the statute, the governor need not sign the warrant with his own hand; it is only required that he make the decision and direct or cause the issuance of the warrant.⁶⁹

A governor has no inherent powers of arrest and surrender and he cannot proceed as a volunteer in extradition matters, but in issuing a warrant is limited to acting pursuant to a demand or request from a sister state,^{69.5} and then only in strict conformity with the law.^{69.10} Thus, a warrant which is not in accordance with the requisition is wholly ineffectual for any purpose.^{69.15} However, the

pending judicial hearing, to which accused was entitled on fugitive complaint, and issuing extradition warrant.

Ill.—People ex rel. Millet v. Babb, 115 N.E.2d 241, 1 Ill.2d 191.

63.50 Mich.—Ann Arbor Bank v. Weber, 61 N.W.2d 84, 338 Mich. 341.

Tex.—Ex parte Hagler, 278 S.W.2d 143, 161 Tex.Cr. 387.

64. Fla.—Young v. Stoutamire, 176 So. 759, 129 Fla. 805.
25 C.J. p 268 note 31.

Acting governor

(1) Rendition warrant, which was not signed by governor of state from which relator was being extradited, was not defective in absence of showing that acting governor signed warrant while either governor or lieutenant governor was capable of performing duties of governor.

Ill.—People ex rel. Holmes v. Babb, 111 N.E.2d 316, 414 Ill. 490.

(2) Where the governor of the state died in office and the then lieutenant governor of state succeeded to the office of governor, and on the date of the executive warrant, the office of lieutenant governor was vacant, an executive warrant for the extradition of petitioner, issued by the president pro tempore of the senate as acting governor and attested to by the assistant secretary of state under the state seal, was proper.

Tex.—Ex parte Raulie, 237 S.W.2d 998, 155 Tex.Cr. 616.

65. U.S.—Ex parte Krause, D.C. Wash., 228 F. 547.

Ind.Terr.—Ex parte Dickson, 69 S.W. 943, 4 Ind.Terr. 481.

66. Ind.—Vollmer v. Dubois County, 101 N.E. 321, 53 Ind.App. 149.
25 C.J. p 268 note 33.

67. Tenn.—State v. Selman, 12 S.W. 2d 368, 157 Tenn. 641.
25 C.J. p 268 note 34.

Private secretary

Warrant for extradition of fugitive made by governor's private secretary during governor's absence was void.

Tenn.—State v. Selman, 12 S.W.2d 368, 157 Tenn. 641.

68. Fla.—Young v. Stoutamire, 176 So. 759, 129 Fla. 805.

69. Fla.—Young v. Stoutamire, supra.

Ill.—People ex rel. Poncher v. O'Brien, 39 N.E.2d 994, 379 Ill. 127.

Reinstatement

Where, pursuant to hearing before governor, extradition warrant originally issued by clerk in governor's absence is reinstated, warrant is valid although not signed personally by governor.

Minn.—State ex rel. Webster v. Moeller, 253 N.W. 668, 191 Minn. 193.

69.5 Colo.—Matthews v. People, 314 P.2d 906, 136 Colo. 102.

Necessity for requisition or demand see supra § 13 a.

Essential jurisdictional fact

Jurisdictional fact essential to the issuance by governor of a warrant for the arrest and extradition of a fugitive from justice wanted by another state to answer to a criminal charge was a demand from the governor of the demanding state accompanied by a copy of the indictment charging the criminal offense authenticated by the governor of the demanding state.

Ky.—Oakley v. Franks, 159 S.W.2d 415, 289 Ky. 605.

Basis of proceedings

Warrant of the governor of an asylum state merely implements ex-

tradition proceedings which are based on a requisition from the demanding state.

Colo.—Self v. People, 297 P.2d 887, 133 Colo. 524.

Authentication

(1) Rendition warrant based on documents not certified as authentic by the executive authority of the demanding state would be void.

Fla.—Schriver v. Tucker, 42 So.2d 707.

(2) Extradition proceeding was invalid where extradition warrant failed to allege that accused was present in demanding state at time of commission of alleged crime and that thereafter he fled from the state, and none of the papers constituting extradition warrant were authenticated by executive authority making the demand.

Pa.—Commonwealth ex rel. Thomas v. Superintendent Philadelphia County Prison, 94 A.2d 732, 372 Pa. 595.

(3) Evidence established that governor of asylum state had before him and acted on requisition from governor of demanding state and the papers, including authenticated copy of complaint charging person demanded with commission of a felony, thereto annexed, at time of issuance of his warrants for arrest and removal of person demanded and that he did not act on duplicate copies.

Or.—Ex parte Paulson, 124 P.2d 297, 168 Or. 457.

69.10 Colo.—Matthews v. People, 314 P.2d 906, 136 Colo. 102.

69.15 Colo.—Matthews v. People, supra—Stobie v. Barger, 268 P.2d 409, 129 Colo. 222.

Idaho.—Videan v. State, 194 P.2d 615, 68 Idaho 269.

mere fact that there may be recitals in the warrant which are at variance with the facts as stated in the requisition does not invalidate the warrant.^{69,20}

In issuing the warrant, the governor acts in his official character and capacity,⁷⁰ so that a warrant issued by him is not functus officio at the time of the arrest thereunder merely because his term of office expired after issuance of the warrant.⁷¹

The governor's warrant in extradition proceedings is authority for the arrest and surrender of the accused person,⁷² and it supersedes all pending statutory extradition proceedings against the person named in the warrant, if the proceedings are based on the same charge,⁷³ and takes priority over any other state process by which the fugitive is held.^{73,5} The warrant is under the governor's control as long as the fugitive has not been removed to the demanding state under the authority of the warrant.⁷⁴

Second warrant. The fact that an extradition warrant had been improvidently issued by the governor's secretary did not preclude the governor from thereafter issuing a proper warrant as against the contention that the subsequent warrant was not valid in the absence of a second request for its issuance.⁷⁵ So a prisoner who was arrested on an executive warrant for extradition was not entitled to his discharge because a second executive warrant based on the same charge was issued before the former proceeding had been finally disposed of, since the state is not precluded from instituting new or additional proceedings if it deems it advisable, in order to supplement those originally instituted.⁷⁶

If, however, subsequent to a hearing in a habeas corpus proceeding a new and different warrant is substituted for the original, the substituted warrant is void,^{76,5} and does not affect the rights of the person held for extradition.^{76,10}

Single warrant for two fugitives. The fact that the governor's warrant directs the arrest of two persons for extradition in a single warrant will not invalidate it.^{76,15}

b. Requisites

- (1) Language and contents in general
- (2) Statement of charge of crime
- (3) Statement of flight from justice
- (4) Recital or copy of requisition or papers accompanying it

(1) Language and Contents in General

The warrant must show on its face that there has been a compliance with the requirements of the laws, and it must ordinarily name the fugitive as in the requisition and in the indictment or affidavit; but there is no requirement of any particular form or language and mere technical faults will not invalidate it.

The warrant of the executive who surrenders a fugitive must show on its face that there has been a compliance with the requirements of the laws,⁷⁷ namely, that accused had been demanded by the executive of the state from which he fled, as a fugitive from justice; that such a demand was supported by a copy of an indictment found or an affidavit made before a magistrate, charging the fugitive with having committed a crime; and that such copy of indictment or affidavit was certified by the executive

N.Y.—*People ex rel. Swanson v. Fitzsimmons*, 153 N.Y.S.2d 772, 2 A.D. 2d 235.
Pa.—*Commonwealth ex rel. Spivak v. Heinz*, 14 A.2d 875, 141 Pa.Super. 158.
S.D.—*Ex parte Kaufman*, 39 N.W.2d 905, 73 S.D. 166.
69.20 Colo.—*Self v. People*, 297 P. 2d 887, 133 Colo. 524.
70. U.S.—*Farrell v. Hale*, C.C.A. Mass., 92 F.2d 798.
Ill.—*People ex rel. De Bardas v. Toman*, 4 N.E.2d 859, 364 Ill. 516, appeal dismissed *People of State of Illinois ex rel. De Bardas v. Toman*, 57 S.Ct. 613, 300 U.S. 642, 81 L.Ed. 857.
71. U.S.—*Farrell v. Hale*, C.C.A. Mass., 92 F.2d 798.
72. Ill.—*People v. Meyering*, 178 N. E. 122, 345 Ill. 598.
Tex.—*Ex parte Cook*, Cr., 261 S.W.2d 566.
73. W.Va.—*In re Heck*, 7 S.E.2d 866, 122 W.Va. 175.

73.5 Ill.—*People ex rel. Millet v. Babb*, 115 N.E.2d 241, 1 Ill.2d 191.
—*People ex rel. Barrett v. Bartley*, 50 N.E.2d 517, 333 Ill. 437, 147 A.L. R. 935.
Extradition of persons in custody in asylum state see supra § 11.
74. Ill.—*People ex rel. De Bardas v. Toman*, 4 N.E.2d 859, 364 Ill. 516, appeal dismissed *People of State of Illinois ex rel. De Bardas v. Toman*, 57 S.Ct. 613, 300 U.S. 642, 81 L.Ed. 857.
75. Tex.—*Ex parte Sharp*, 106 S.W. 2d 273, 132 Tex.Cr. 569.
76. Tex.—*Ex parte Sloan*, 106 S.W. 2d 271, 132 Tex.Cr. 573.
76.5 Ind.—*Miller v. Trierweiler*, 120 N.E.2d 262, 233 Ind. 485.
76.10 Ind.—*Miller v. Trierweiler*, 120 N.E.2d 262, 233 Ind. 485.
76.15 Tex.—*Ex parte Strom*, Cr., 324 S.W.2d 224.
77. Ala.—*Harris v. State*, 60 So.2d

266, 257 Ala. 3—*Russell v. State*, 37 So.2d 233, 251 Ala. 268.
State v. Rogers, 9 So.2d 758, 30 Ala.App. 515, certiorari denied 9 So.2d 761, 243 Ala. 272.
Fla.—*State v. Chase*, 107 So. 541, 91 Fla. 413.
Mo.—*State ex rel. Chase v. Calvird*, 24 S.W.2d 111, 324 Mo. 429.
S.D.—*Ex parte Kaufman*, 39 N.W. 2d 905, 73 S.D. 166.
Tex.—*Ex parte Haynes*, 267 S.W. 490, 98 Tex.Cr. 609.
Warrant held valid on its face
Fla.—*Mitchell v. Stoutamire*, 152 So. 629, 113 Fla. 822.
N.Y.—*People ex rel. MacSherry v. Enright*, 184 N.Y.S. 248, 112 Misc. 568, 38 N.Y.Cr. 479, affirmed 183 N.Y.S. 945, 196 App.Div. 964.
Pa.—*Commonwealth v. Tiblerino*, 81 Pa.Super. 9.
Commonwealth ex rel. Simmons v. Frame, Com.Pl., 6 Chest.Co. 47.
Tex.—*Ex parte Cupp*, 84 S.W.2d 731, 129 Tex.Cr. 25—*Ex parte Wells*, 298 S.W. 904, 108 Tex.Cr. 57.

of the demanding state to be duly authenticated.⁷⁸ The warrant need not recite the legal authority for action on the part of the governor of the asylum state, or the enabling statute under which he purports to act.^{78.5}

There is no requirement of any particular form or language,⁷⁹ and the warrant will not be invalid because it has technical faults which do not materially affect its clearness or purport,⁸⁰ although in an early case a warrant was held void because the seal was unintelligible.⁸¹

Ordinarily the governor has no right to insert any other name in his warrant than that designated in the requisition⁸² and in the indictment or affidavit on which it is based.⁸³ It has been held, however, that the name designated in the warrant is immaterial if the person arrested is in fact the identical person indicted or intended to be charged in the demanding state, the sole effect of such an error being to shift the burden of proof to the state as to identity;⁸⁴ but the warrant is invalid if the evidence does not establish the identity between the

78. Fla.—*Corpus Juris* cited in *State v. Chase*, 107 So. 541, 544, 91 Fla. 413.

Mo.—*Corpus Juris* quoted in *Ex parte Hagan*, 245 S.W. 336, 340, 295 Mo. 435.

N.C.—In *re Veasey*, 146 S.E. 599, 196 N.C. 662.

Tenn.—*State v. Hackett*, 33 S.W.2d 422, 161 Tenn. 602.

Tex.—*Ex parte Anderson*, 120 S.W.2d 259, 135 Tex.Cr. 291—*Ex parte Bourland*, 105 S.W.2d 251, 132 Tex. Cr. 434—*Ex parte Chittenden*, 61 S.W.2d 1008, 124 Tex.Cr. 228—*Ex parte Haynes*, 267 S.W. 490, 98 Tex.Cr. 609—*Ex parte Holt*, 244 S.W. 1016, 92 Tex.Cr. 614.

25 C.J. p 268 note 36.

Warrants held sufficient

Me.—*Randall v. Pinkham*, 100 A.2d 660, 149 Me. 320.

Miss.—*Loper v. Dees*, 49 So.2d 718, 210 Miss. 402.

Tex.—*Ex parte Carroll*, 216 S.W.2d 580, 152 Tex.Cr. 581.

Warrants held insufficient

(1) Recitals of warrant that accused was "charged by the transcript of the minutes" in Okaloosa county, Fla., of a certain crime, was insufficient to meet statutory requirement that accused must be shown to be lawfully charged by indictment or information or by affidavit made before magistrate in the demanding state with having there committed a crime under its laws.

Ala.—*Watson v. State*, 2 So.2d 470, 30 Ala.App. 184.

(2) A warrant of extradition issued under statute authorizing issuance of warrants of extradition in cases where accused is not a fugitive could not be treated as by implication charging relator with committing an act in Pennsylvania intentionally resulting in a crime in demanding state, since a warrant of extradition must on its face expressly state all facts essential to its validity.

Pa.—*Commonwealth ex rel. Spivak v. Heinz*, 14 A.2d 875, 141 Pa.Super. 153.

(3) Where governor's warrant stated that petitioner was charged

in demanding state by affidavit and complaint with commission of a crime and that the crime was charged "in manner and form as follows, namely: nonsupport of a minor child," the governor's warrant did not substantially recite facts necessary to sustain validity of its issue.

Ind.—*Rice v. Magenheimer*, 75 N.E.2d 906, 225 Ind. 441.

78.5 Colo.—*Olson v. People*, 332 P.2d 486.

79. U.S.—*Collins v. Traeger*, C.C.A. Cal., 27 F.2d 842.

Ala.—*Morrison v. State*, 63 So.2d 346, 258 Ala. 410.

State v. Knight, 14 So.2d 159, 31 Ala.App. 174, certiorari denied 14 So.2d 161, 244 Ala.App. 430.

Fla.—*State v. Chase*, 107 So. 541, 91 Fla. 413.

25 C.J. p 268 note 37.

Particular warrants construed

(1) "Duly certified" or "certified to be in due form" is the equivalent of "certified as authentic."

Ala.—*Parker v. State*, 124 So. 249, 23 Ala.App. 238, certiorari denied 124 So. 250, 220 Ala. 103, and followed in *Henderson v. State*, 124 So. 249, first case, 23 Ala.App. 239, certiorari denied 124 So. 249, second case, 220 Ala. 90.

25 C.J. p 268 note 37 [a] (2).

(2) "Charged by complaint" is the equivalent of "charged by affidavit." Tex.—*Ex parte Combs*, 105 S.W.2d 1096, 132 Tex.Cr. 500—*Ex parte Gordon*, 37 S.W.2d 1023, 118 Tex. Cr. 150.

25 C.J. p 268 note 37 [a] (3).

(3) A warrant stating that defendant stands charged by indictment in the demanding state is not insufficient in failing to state that defendant was under conviction therein.

Tex.—*Ex parte Walton*, 112 S.W.2d 467, 133 Tex.Cr. 534.

80. Fla.—*Freeman v. Blackburn*, 92 So.2d 262.

Ill.—*Lacondra v. Hermann*, 175 N.E. 820, 343 Ill. 608.

Mo.—*Ex parte Davis*, 62 S.W.2d 1086, 333 Mo. 262.

Ohio.—In *re Acton*, 103 N.E.2d 577, 90 Ohio App. 100.

Pa.—*Commonwealth ex rel. Taylor v. Superintendent, Philadelphia County Prison*, 114 A.2d 343, 332 Pa. 181.

25 C.J. p 268 note 38.

Surplusage

Ala.—*Harrison v. State*, 77 So.2d 384, 38 Ala.App. 60, certiorari denied 77 So.2d 387, 262 Ala. 701.

Particular defects

(1) Omission of word "found" after "copy of indictment" in extradition warrant does not invalidate it. Fla.—*State ex rel. Marks v. Chase* 116 So. 21, 95 Fla. 37.

(2) That warrant recited wrong date of alleged crime, there being undisputed evidence that crime was committed nine years before, was held not to require alleged fugitive's discharge.

U.S.—*U. S. ex rel. Jackson v. Meyering*, C.C.A.III., 54 F.2d 621, certiorari denied 52 S.Ct. 498, 286 U.S. 542, 76 L.Ed. 1280.

81. Mo.—*Vallad v. St. Louis County Sheriff*, 2 Mo. 26.

82. Ga.—*Johnston v. Riley*, 13 Ga. 97.

83. Ill.—*People ex rel. Maypole v. Meyering*, 193 N.E. 495, 358 Ill. 589.

84. Ill.—*People ex rel. Maypole v. Meyering*, supra.

Incorrect middle initial of name of accused as given in warrant for extradition purposes is mere surplusage.

Ill.—*People v. Traeger*, 172 N.E. 168, 340 Ill. 147.

Use of other names

(1) Where relator's identity and his use of name used in extradition warrant have been established, it is immaterial whether he was also known by other names.

N.Y.—*People ex rel. Steele v. Mulrooney*, 248 N.Y.S. 520, 139 Misc. 525.

(2) Extradition statute providing that if fugitive shall have assumed another name in state and governor shall be satisfied, by evidence, of identity of such person with fugitive demanded, he shall state facts in his warrant for the arrest, becomes op-

person named in the indictment and the one named in the warrant.⁸⁵

(2) Statement of Charge of Crime

The warrant must specify, at least substantially, the offense alleged to have been committed by the accused, and, while the offense must appear to be the same as that named in the indictment or affidavit, it need not be shown that the act charged is in fact a crime by the laws of the demanding state.

A warrant need not show on its face that the act charged as a crime in the requisition is in fact a crime by the law or statutes of the demanding state,⁸⁶ but it must specify the offense alleged to have been committed by accused,⁸⁷ and such offense must be the same as the one specified in the indictment or affidavit presented to the governor by the demand for extradition.⁸⁸ The offense need only be stated substantially.⁸⁹ The facts on which the indictment was based need not be set out in the

warrant.⁹⁰ Where the crime with which the fugitive is charged involves a continuing act, the warrant is not insufficient for failure to recite the specific date or dates on which it was committed.^{90.5}

(3) Statement of Flight from Justice

The warrant need show only that the accused is demanded as a fugitive and the burden of showing that he is not a fugitive rests on the accused.

Although it was once apparently required that the warrant show that in the opinion of the executive issuing it accused was a fugitive from justice,⁹¹ it is now generally settled that it need show only that accused is demanded as a fugitive.⁹² The issuance of a warrant by the governor of the asylum state creates a presumption that accused is a fugitive from justice,^{92.5} and the burden of showing that he is not a fugitive rests on accused.⁹³

erative only when the fugitive has assumed a different name in state and its purpose is to ascertain in advance of arrest whether person having assumed name is person described in requisition proceeding by another name.
Ga.—Hart v. Mount, 26 S.E.2d 453, 196 Ga. 452.

85. Ill.—People ex rel. Maypole v. Meyering, 193 N.E. 495, 358 Ill. 589.

86. Tex.—Corpus Juris quoted in Ex parte Riddle, 101 S.W.2d 268, 269, 131 Tex.Cr. 563—Ex parte Cupp, 84 S.W.2d 731, 129 Tex.Cr. 25.

25 C.J. p 268 note 41.

Insufficiency of indictment

Claim that indictment charged no offense may be dismissed, in absence of proof that extradition warrant was improperly issued.
Tex.—Ex parte Ponzi, 290 S.W. 170, 106 Tex.Cr. 58.

Warrant held not void

Where record in habeas corpus proceeding to obtain release from imprisonment pursuant to extradition did not show that there was no such offense under laws of the demanding state as that for which fugitive was sought, extradition warrant was not void on that ground.

Ga.—Scheinfain v. Aldredge, 12 S.E. 2d 868, 191 Ga. 479.

87. Tex.—Corpus Juris quoted in Ex parte Riddle, 101 S.W.2d 268, 269, 131 Tex.Cr. 563—Ex parte Yawman, 18 S.W.2d 647, 113 Tex. Cr. 20.

25 C.J. p 268 note 42.

Warrant held not void

Where mittimus from demanding state recited that fugitive was to be extradited to serve a sentence for carnal abuse, whereas governor's ex-

tradition warrant stated that fugitive was to be extradited to stand trial for rape of child, warrant was not void on ground that fugitive was to be extradited under a different charge and for a purpose different from that specified in supporting documents.

Ga.—Scheinfain v. Aldredge, 12 S.E. 2d 868, 191 Ga. 479.

88. Idaho.—Videan v. State, 194 P. 2d 615, 68 Idaho 269.

N.Y.—People ex rel. Merklen v. Enright, 217 N.Y.S. 288, 217 App.Div. 514.

89. Tex.—Ex parte Cupp, 84 S.W. 2d 731, 129 Tex.Cr. 25—Ex parte Yawman, 18 S.W.2d 647, 113 Tex. Cr. 20.

25 C.J. p 268 note 43.

Naming laws violated

Where warrant of extradition named the laws, the violation of which fugitive was charged, and the state offered in evidence a copy of those laws, which were certified to by the governor of the demanding state, warrant was sufficient as against contention that it did not set out or advise fugitive of the offense of which he was charged.

Tex.—Ex parte Cupp, 84 S.W.2d 731, 129 Tex.Cr. 25.

Warrants held sufficient

Ill.—People ex rel. McGee v. Fischer, 81 N.E.2d 483, 401 Ill. 95.

N.Y.—People ex rel. Swanson v. Peck, 127 N.Y.S.2d 751, 205 Misc. 326.

Tenn.—Reeves v. State ex rel. Thompson, 288 S.W.2d 451, 199 Tenn. 598.

Tex.—Ex parte Watkins, 259 S.W.2d 215, 159 Tex.Cr. 14—Ex parte DuBois, 243 S.W.2d 698, 156 Tex.Cr. 463.

90. N.H.—State v. Clough, 53 A. 1086, 71 N.H. 594, 67 L.R.A. 946.

N.Y.—People v. Donohue, 84 N.Y. 438.

90.5 Ill.—People ex rel. Borelli v. Sain, 157 N.E.2d 417, 16 Ill.2d 321.

91. U.S.—In re Jackson, D.C.Mich., 13 F.Cas.No.7,125, 2 Flipp. 183.

92. Tenn.—State v. Hackett, 33 S. W.2d 422, 161 Tenn. 602.
25 C.J. p 269 note 47.

Recital of former presence

Recital that accused was present in the demanding state at time of commission of alleged offense was not essential to the validity of a governor's warrant of extradition.

Ala.—Kay v. State, 37 So.2d 525, 34 Ala.App. 8, certiorari denied 37 So. 2d 529, 251 Ala. 419—State v. Knight, 14 So.2d 159, 31 Ala.App. 174, certiorari denied 14 So.2d 161, 244 Ala. 430—State v. Rogers, 9 So. 2d 758, 30 Ala.App. 515, certiorari denied 9 So.2d 761, 243 Ala. 272—State v. Shelton, 8 So.2d 216, 30 Ala.App. 484.

92.5 Ariz.—Ex parte Riccardi, 203 P.2d 627, 68 Ariz. 180.

Md.—Mason v. Warden, Baltimore City Jail, 99 A.2d 739, 203 Md. 659—State ex rel. Channell v. Murphy, 96 A.2d 473, 202 Md. 650, certiorari denied State of Md. ex rel. Channell v. Murphy, 74 S.Ct. 40, 346 U. S. 824, 98 L.Ed. 349.

93. Ariz.—Corpus Juris Secundum cited in Ex parte Rubens, 238 P.2d 402, 405, 73 Ariz. 101, certiorari denied 73 S.Ct. 50, 344 U.S. 840, 97 L. Ed. 653.

Ill.—People ex rel. Wortman v. Munie, 188 N.E. 545, 354 Ill. 490.

Mo.—State ex rel. Gaines v. Westhues, 2 S.W.2d 612, 318 Mo. 928.

N.Y.—People ex rel. Pizzino v. Moran, 244 N.Y.S. 590, 137 Misc. 905.

(4) Recital or Copy of Requisition or Papers Accompanying It

The warrant must show on its face, without resort to proof, that it was issued on an indictment or affidavit, but it need not recite the contents or effect of papers which accompanied the demand for extradition or set out a copy of the indictment or affidavit.

While the warrant must show on its face, without resort to proof, that it was issued on an indictment or affidavit,⁹⁴ it need not recite the contents or effect of papers which accompanied the demand for extradition.⁹⁵ So the warrant need not set out a copy of the indictment or affidavit accompanying the requisition,⁹⁶ nor need a certified copy thereof be attached,⁹⁷ nor need it recite that a copy of an indictment or affidavit accompanied the requisition.⁹⁸

If it appears that an affidavit did accompany the requisition the warrant need not set out the form of the affidavit,⁹⁹ and in such a case a recital in the warrant that the fugitive was charged by indictment is a mere immaterial clerical error.¹

It must, however, appear that an affidavit is a true affidavit and not a mere complaint,² and in an early case it was held that the executive warrant must show that the affidavit on which the requisition was made was executed before a magistrate or judicial officer,³ although there is also authority to the contrary.⁴ If a warrant is prima facie invalid because of the absence of the necessary allegations it is cured if accompanied by the affidavit which shows the facts.⁵ There is, moreover, no method

affirmed 244 N.Y.S. 869, 231 App. Div. 724.

25 C.J. p 269 note 48.

Amount of evidence

(1) Prima facie case established by extradition warrant issued by governor, reciting ample jurisdictional facts to establish that person sought is a fugitive from justice, can be overcome only by clear and convincing evidence or by evidence to convince beyond a reasonable doubt. Ariz.—Ex parte Riccardi, 203 P.2d 627, 68 Ariz. 180.

(2) Conflict of evidence is not sufficient to overcome presumption, created by warrant issued by governor of asylum state, that accused is wanted fugitive, and evidence to overcome such presumption must be overwhelming.

Md.—Mason v. Warden, Baltimore City Jail, 99 A.2d 739, 203 Md. 659 —State ex rel. Channell v. Murphy, 96 A.2d 473, 202 Md. 650, certiorari denied State of Md. ex rel. Channell v. Murphy, 74 S.Ct. 40, 346 U. S. 824, 98 L.Ed. 349.

Evidence held insufficient

Where evidence in extradition proceeding tended to show that relator, who was charged with abandonment and nonsupport in demanding state, had been guilty of the offense on dates other than the specific date charged, and there was no evidence that relator had been elsewhere than in that state on such dates, relator did not overcome burden of proving that he was not a fugitive from justice, notwithstanding he had shown he had not been in demanding state on specific dates charged.

Ill.—People ex rel. Goshorn v. Babb, 122 N.E.2d 239, 4 Ill.2d 114.

Conclusive evidence

Duly certified copy of an information charging relator with having committed the crime of burglary in the nighttime in demanding state, accompanied by sworn affidavits attesting to the commission of the

crime charged, constituted a prima facie showing that relator was in that state when crime was committed, making it incumbent on relator to establish by conclusive evidence that he was not in demanding state when crime was committed and that he was not a fugitive from justice, in default of which proof extradition was proper.

N.Y.—People ex rel. Matochik v. Baker, 114 N.E.2d 194, 306 N.Y. 32.

94. Fla.—State v. Chase, 107 So. 541, 91 Fla. 413.

Tenn.—State v. Hackett, 33 S.W.2d 422, 161 Tenn. 602.

Tex.—Ex parte Bourland, 105 S.W. 2d 251, 132 Tex.Cr. 434.

Warrants held sufficient

(1) In general.

Ala.—Cazalas v. Bridges, 81 So.2d 913, 38 Ala.App. 232.

Kan.—Smith v. Nye, 272 P.2d 1079, 176 Kan. 679.

(2) Documents filed with governor were held not in conflict with affidavit attached to executive warrant in manner as to vitiate warrant.

Tex.—Ex parte Buchanan, 67 S.W.2d 262, 125 Tex.Cr. 113.

(3) Warrant reciting that it was accompanied by copy of penitentiary commitment authenticated by governor of demanding state, although not referring to indictment or affidavit, was sufficient, it being presumed in support of warrant that commitment may have contained, in authentic manner, all the requisites to show that defendant was under conviction of an extraditable crime in demanding state, "commitment" being defined as authority for holding in prison one convicted of crime.

Tex.—Ex parte Haynes, 267 S.W. 490, 98 Tex.Cr. 609.

95. Fla.—Schrivver v. Tucker, 42 So. 2d 707.

Miss.—Loper v. Dees, 49 So.2d 718, 210 Miss. 402.

Tex.—Ex parte Haynes, 267 S.W. 490, 98 Tex.Cr. 609.

96. Fla.—Schrivver v. Tucker, 42 So. 2d 707—State v. Chase, 107 So. 541, 91 Fla. 413.

Tenn.—State v. Hackett, 33 S.W.2d 422, 161 Tenn. 602.

25 C.J. p 269 note 49.

97. Ala.—Morrison v. State, 63 So. 2d 346, 258 Ala. 410.

Monk v. State, 30 So.2d 396, 33 Ala.App. 122.

Fla.—State v. Chase, 107 So. 541, 91 Fla. 413.

Tex.—Ex parte Parkinson, 271 S.W. 2d 638, 160 Tex.Cr. 369—Ex parte Norris, 225 S.W.2d 193, 154 Tex. Cr. 68—Ex parte Roselle, 222 S.W. 248, 87 Tex.Cr. 470.

98. S.C.—Ex parte Murray, 99 S.E. 798, 112 S.C. 342.

25 C.J. p 269 note 51.

99. Ohio.—In re Moore, 7 Ohio Dec., Reprint, 272, 2 Cinc.L.Bul. 42.

1. Tex.—Coleman v. State, 113 S.W. 17, 53 Tex.Cr. 93.

2. Minn.—State v. Curtis, 126 N.W. 719, 111 Minn. 240.

25 C.J. p 269 note 54.

3. Fla.—Ex parte Powell, 20 Fla. 806.

4. Ala.—Morrison v. State, 63 So.2d 346, 258 Ala. 410.

Ill.—People v. Shea, 27 Chi.Leg.N. 214.

Tex.—Ex parte Noble, 198 S.W.2d 893, 151 Tex.Cr. 1.

Presumption

Governor's rendition warrant issued for return of accused to demanding state which failed to recite that affidavits presented for its issuance were sworn to before a magistrate of that state was sufficient because prima facie valid under a presumption of official regularity.

Tenn.—State ex rel. Zahnd v. Head, 206 S.W.2d 426, 185 Tenn. 462.

5. U.S.—U. S. ex rel. Faris v. McClain, D.C.Ga., 42 F.Supp. 429.

Ala.—Harris v. State, 60 So.2d 266, 257 Ala. 3.

of forcing an executive to produce for the benefit of accused the papers which accompanied the requisition if he does not desire to do so.⁶

If the governor has sufficient documentary evidence on which to issue a warrant, the fact that he did not see the transfer agent of the demanding state personally does not render the warrant objectionable.^{6,5}

c. To Whom Issued and Authority to Execute

Except where otherwise provided by statute, the warrant need not be directed to any named officer; but only an officer coming within the designation of the persons to whom the warrant is directed is authorized to make an arrest thereunder.

In the absence of any statutory requirement to the contrary, the warrant need not be directed to any named officer.⁷ It may be addressed to the sheriff of the county⁸ or to the agent of the demanding state,⁹ although state legislation on the subject is competent,¹⁰ and the requirements of such legislation must be complied with.¹¹ An officer who does not come within the designation in the warrant of the persons to whom it is directed has no

authority to make an arrest thereunder.¹²

Where on judicial review of the extradition proceedings it is established that there was a sufficient demand for return of the prisoner but that the authority of the agent named to receive him was insufficiently shown, the court will remand the prisoner to custody to be delivered to an agent with proper authority.¹³

d. Conclusiveness

In the absence of proof to the contrary, it will be presumed that the governor acted in conformity with law in the issuance of his warrant, and the warrant or the recitals therein are prima facie evidence of the existence of the jurisdictional facts, although it is not conclusive proof of compliance with statutory requirements.

Quoted in: Cal.—Application of Fedder, 299 P.2d 881, 886, 143 C.A.2d 103.

In the absence of proof to the contrary, it will be presumed that the governor acted in conformity with law in the issuance of his warrant,¹⁴ and that he performed his duty as to the determination of the jurisdictional facts;¹⁵ and the warrant is prima facie evidence of such facts,¹⁶ as are the recitals

Tingley v. State, 63 So.2d 712, 36 Ala.App. 665, certiorari denied 63 So.2d 722, 258 Ala. 436, certiorari denied Tingley v. McDowell, 74 S.Ct. 55, 346 U.S. 837, 98 L.Ed. 358.

Cal.—In re Romaine, 23 C. 585.

Tex.—Ex parte DuBois, 243 S.W.2d 698, 156 Tex.Cr. 463.

6. N.Y.—In re Scrafford, 12 N.Y.S. 943, 59 Hun 320.

6.5 Tex.—Ex parte DuBois, 243 S.W.2d 698, 156 Tex.Cr. 463.

7. Ind.—Robinson v. Flanders, 29 Ind. 10.

8. N.H.—State v. Clough, 53 A. 1086, 71 N.H. 594, 67 L.R.A. 946. 25 C.J. p 269 note 60.

9. Mass.—Commonwealth v. Hall, 9 Gray 262, 69 Am.D. 285.

10. U.S.—Munsey v. Clough, N.H., 25 S.Ct. 282, 196 U.S. 364, 49 L.Ed. 515.

11. Mass.—Ex parte Graves, 128 N. E. 867, 236 Mass. 493. 25 C.J. p 269 note 63.

12. Mass.—Ex parte Graves, supra.

13. Tex.—Ex parte Pinkus, 25 S.W.2d 334, 114 Tex.Cr. 326.

14. U.S.—Rafferty ex rel. Huie Fong v. Bligh, C.C.A.Mass., 55 F.2d 189—Collins v. Traeger, C.C.A.Cal., 27 F.2d 842.

U. S. ex rel. Faris v. McClain, D.C.Pa., 42 F.Supp. 429.

Ala.—Morrison v. State, 63 So.2d 346, 258 Ala. 410.

Thacker v. State, 101 So. 636, 20 Ala.App. 302, certiorari denied Ex

parte Thacker, 101 So. 638, 212 Ala. 3.

D.C.—Lee Won Sing v. Cottone, 123 F.2d 169, 74 App.D.C. 374.

Fla.—State ex rel. Florio v. McCreary, 165 So. 904, 123 Fla. 9.

Ga.—Mayfield v. Hornsby, 33 S.E.2d 312, 199 Ga. 70—Hart v. Mount, 26 S.E.2d 453, 196 Ga. 452.

Ill.—People ex rel. Holmes v. Babb, 111 N.E.2d 316, 317, 414 Ill. 490.

Kan.—McTigue v. Rhyne, 298 P.2d 228, 180 Kan. 8—Ryan v. Sheriff of Leavenworth County, 259 P.2d 172, 175 Kan. 159—Corpus Juris Secundum quoted in Powell v. Turner,

207 P.2d 492, 495, 167 Kan. 524, certiorari denied 70 S.Ct. 41, 338 U.S. 835, 94 L.Ed. 509.

La.—State ex rel. Covington v. Hughes, 102 So. 824, 157 La. 652.

Mo.—Flournoy v. Owens, 275 S.W. 923, 310 Mo. 355.

Neb.—Corpus Juris Secundum cited in Ex parte Campbell, 25 N.W.2d 419, 422, 147 Neb. 820.

Ohio.—State ex rel. Davey v. Owen, 12 N.E.2d 144, 133 Ohio St. 96, 114 A.L.R. 686.

Pa.—Commonwealth ex rel. Faison v. Watkins, 9 Pa.Dist. & Co.2d 571, 73 Montg.Co. 44.

Tex.—Corpus Juris Secundum quoted in Ex parte Parkinson, 271 S.W. 2d 638, 640, 160 Tex.Cr. 369—Ex parte Combs, 105 S.W.2d 1096, 132 Tex.Cr. 500—Ex parte Cupp, 84 S.W.2d 731, 129 Tex.Cr. 25.

25 C.J. p 269 note 66.

Review on habeas corpus see Habeas Corpus § 39.

Authenticatio

Where governor recited in warrant of arrest and warrant of extradition that he had received requisition from governor of demanding state and the copy of complaint attached thereto, the recital of authentication by the governor of asylum state, in absence of proof to the contrary, would be accepted as controlling, in view of presumption that official duty has been regularly performed.

Or.—Ex parte Paulson, 124 P.2d 297, 168 Or. 457.

15. Ala.—Pool v. State, 78 So. 407, 16 Ala.App. 410.

N.D.—Ex parte Quint, 209 N.W. 1006, 54 N.D. 515.

Okl.—Ex parte George, 73 P.2d 471, 63 Okl.Cr. 115.

Pa.—Commonwealth ex rel. Spivak v. Heinz, 14 A.2d 875, 141 Pa.Super. 158.

Tex.—Ex parte Pinkus, 25 S.W.2d 334, 114 Tex.Cr. 326.

Facts to be determined see supra § 15.

16. U.S.—U. S. ex rel. Silver v. O'Brien, C.C.A.Ill., 138 F.2d 217, certiorari denied 64 S.Ct. 522, 321 U.S. 766, 88 L.Ed. 1062—Black v. Miller, C.C.A.Wash., 59 F.2d 687. Johnson v. Scarborough, D.C. Tex., 88 F.Supp. 523.

Ala.—Blackwell v. State, 89 So.2d 228, 38 Ala.App. 562—Harrison v. State, 77 So.2d 384, 38 Ala.App. 60, certiorari denied 77 So.2d 387, 262 Ala. 701—Denson v. State, 57 So. 2d 830, 36 Ala.App. 216, certiorari denied 57 So.2d 832, 257 Ala. 184—Adams v. State, 8 So.2d 219, 30—

Ala.App. 487—Parker v. State, 124 So. 249, 23 Ala.App. 238, certiorari denied 124 So. 250, 220 Ala. 103, followed in Henderson v. State, 124 So. 249, first case, 23 Ala.App. 239, certiorari denied 124 So. 249, second case, 220 Ala. 90.

Fla.—State ex rel. Huston v. Clark, 163 So. 471, 121 Fla. 161.

Ga.—Broyles v. Mount, 30 S.E.2d 48, 197 Ga. 659—Hart v. Mount, 26 S.E.2d 453, 196 Ga. 452.

Ill.—People ex rel. James v. Lynch, 158 N.E.2d 60, 16 Ill.2d 380.

La.—State ex rel. Covington v. Hughes, 102 So. 824, 157 La. 652.

Md.—Willin v. Sheriff of Wicomico County, 95 A.2d 87, 201 Md. 667.

Mass.—In re Murphy, 72 N.E.2d 413, 137 Mass. 206—In re Baker, 39 N.E.2d 762, 310 Mass. 724.

Miss.—Roberson v. Quave, 51 So.2d 62, 211 Miss. 398—Loper v. Dees, 49 So.2d 718, 210 Miss. 402—Grace v. Dogan, 117 So. 596, 151 Miss. 267, 61 A.L.R. 709.

Mo.—*Corpus Juris Secundum* cited in Ex parte Arrington, 270 S.W.2d 39, 41—Flourney v. Owens, 275 S.W. 923, 310 Mo. 355.

Hagel v. Hendrix, App., 302 S.W.2d 323.

N.J.—Foley v. State, 108 A.2d 24, 32 N.J.Super. 154.

N.Y.—People ex rel. Albert v. Commissioner of Correction of New York City, 111 N.Y.S.2d 307.

Ohio.—In re Acton, 103 N.E.2d 577, 90 Ohio App. 100—In re Roma, 81 N.E.2d 612, 82 Ohio App. 414.

Okl.—Ex parte Cassel, 184 P.2d 467, 85 Okl.Cr. 4—Ex parte Chase, 180 P.2d 199, 84 Okl.Cr. 159—Ex parte Breene, 162 P.2d 559, 81 Okl.Cr. 228.

Pa.—Commonwealth ex rel. Taylor v. Superintendent, Philadelphia County Prison, 114 A.2d 343, 382 Pa. 181.

Commonwealth ex rel. Katz v. Superintendent of Philadelphia County Prison, 58 A.2d 366, 162 Pa.Super. 459.

Tenn.—State ex rel. Sandford v. Cate, 285 S.W.2d 343, 199 Tenn. 195—State ex rel. Trigg v. Thompson, 270 S.W.2d 332, 196 Tenn. 147—State ex rel. Brown v. Grosch, 152 S.W.2d 239, 177 Tenn. 619.

Tex.—Ex parte Garcia, Cr., 319 S.W.2d 328—Ex parte Tangney, Cr., 307 S.W.2d 804—Ex parte Gesek, 302 S.W.2d 417, 164 Tex.Cr. 652—Ex parte Conner, Cr., 297 S.W.2d 834—Ex parte Howard, Cr., 289 S.W.2d 277—Ex parte Guinn, 284 S.W.2d 721, 162 Tex.Cr. 293—Ex parte Teplitz, 261 S.W.2d 567, 159 Tex.Cr. 94—Ex parte Norris, 225 S.W.2d 193, 154 Tex.Cr. 68—Ex parte Alvey, 204 S.W.2d 838, 150 Tex.Cr. 570—Ex parte Noble, 198 S.W.2d 893, 151 Tex.Cr. 1.

25 C.J. p 269 note 68.

"It was well settled that, where the executive warrant of extradition is

regular and sufficient upon its face, it constitutes prima facie evidence of the facts therein set forth and of the authority of the authorized officer to arrest and detain the petitioner in custody for the purpose stated in such warrant; the burden of overcoming the prima facie case made by the warrant being upon the accused."

Fla.—State ex rel. Florio v. McCreary, 165 So. 904, 905, 123 Fla. 9.

Identity

(1) State, in extradition proceedings, establishes a prima facie case of identity of person as the wanted fugitive, from proof of the recital as to identity found in the governor's warrant, and the identity of name.

Ariz.—Ex parte Freeman, 291 P.2d 795, 80 Ariz. 21.

(2) Where no issue was made at extradition hearing as to prisoner's identity as being the person wanted in the demanding state, introduction in evidence of warrant of the governor of the asylum state made out a prima facie case.

Tex.—Ex parte Wiggins, Cr., 289 S.W.2d 278—Ex parte Falkman, 284 S.W.2d 153, 162 Tex.Cr. 230.

Former presence in demanding state

(1) Issuance of governor's warrant for return of fugitive from justice to demanding state is attended by presumption that such person was personally present within demanding state when crime was committed.

U.S.—Daugherty v. Hornsby, C.C.A. Ga., 151 F.2d 799.

(2) Extradition warrant which contained requisite jurisdictional recitals, when exhibited with return of sheriff, made out a "prima facie case" for the prisoner's legal restraint, as against contention that warrant was fatally deficient because it failed to show that prisoner was present in demanding state when offense was committed.

Ala.—State v. Knight, 14 So.2d 159, 31 Ala.App. 174, certiorari denied 14 So.2d 161, 244 Ala. 430.

(3) In extradition proceeding, determination of whether or not prisoner was physically present in the demanding state at or about the time the offense of which he is charged is alleged to have been committed, requisition papers with their accompanying affidavits and the governor's warrant made a prima facie case.

Ill.—People ex rel. Borelli v. Lohman, 150 N.E.2d 116, 13 Ill.2d 506.

Fugitive from justice

Warrant is prima facie evidence that accused was a fugitive from justice.

Ill.—People ex rel. Goldstein v. Babb, 123 N.E.2d 639, 4 Ill.2d 483, certiorari denied 75 S.Ct. 771, 349 U.S. 928, 99 L.Ed. 1259—People ex rel. Goshorn v. Babb, 122 N.E.2d 239, 4 Ill.2d 114—People ex rel. Pusch v. Mulcahy, 64 N.E.2d 453, 392 Ill.

209, certiorari denied 66 S.Ct. 1371, 328 U.S. 865, 90 L.Ed. 1635—People ex rel. Flowers v. Gruenewald, 60 N.E.2d 225, 390 Ill. 79—People ex rel. Chevlin v. O'Brien, 25 N.E.2d 4, 372 Ill. 640.

Md.—Mason v. Warden, Baltimore City Jail, 99 A.2d 739, 203 Md. 659—State ex rel. Channell v. Murphy, 96 A.2d 473, 202 Md. 650, certiorari denied State of Md. ex rel. Channell v. Murphy, 74 S.Ct. 40, 346 U.S. 824, 98 L.Ed. 349—Audler v. Kriss, 79 A.2d 391, 197 Md. 362.

Minn.—State ex rel. Stephenson v. Ryan, 50 N.W.2d 259, 235 Minn. 161—State ex rel. Webster v. Moeller, 253 N.W. 668, 191 Minn. 193—State v. Owens, 244 N.W. 820, 187 Minn. 244—State v. Murnane, 215 N.W. 863, 172 Minn. 401.

Mo.—State ex rel. Gaines v. Westhues, 2 S.W.2d 612, 318 Mo. 928.

Neb.—Application of Gorgen, 70 N.W.2d 514, 160 Neb. 457.

N.J.—Passalacqua v. Biehler, 133 A.2d 667, 46 N.J.Super. 63.

Tenn.—Reeves v. State ex rel. Thompson, 288 S.W.2d 451, 199 Tenn. 598.

Tex.—Ex parte Strom, Cr., 324 S.W.2d 224—Ex parte Cuttrel, 288 S.W.2d 773, 162 Tex.Cr. 639—Ex parte Strongson, 272 S.W.2d 353, 160 Tex.Cr. 457—Ex parte Watkins, 259 S.W.2d 215, 159 Tex.Cr. 14—*Corpus Juris Secundum* cited in Delgado v. State, 252 S.W.2d 935, 937, 158 Tex.Cr. 52—Ex parte Smith, 232 S.W.2d 992, 155 Tex.Cr. 163.

Wash.—Ex parte Nerreter, 183 P.2d 799, 28 Wash.2d 520.

Prima facie validity overcome

(1) In habeas corpus proceeding to obtain release from custody under rendition warrants, telegram and letter from sheriff of a parish in demanding state established that warrants on which petitioners had previously been arrested in another county were issued for the purpose of collecting a debt so that petitioners could not have been properly extradited thereon.

Ala.—King v. State, 56 So.2d 379, 36 Ala.App. 368.

(2) Where evidence presented at hearing shows that extradition warrant of governor was issued in a case not authorized by law, the prima facie case made by the warrant is overcome, and such rule applies where it is shown that alleged fugitive was not present in demanding state at time of commission of the alleged offense.

Ala.—State v. Knight, 14 So.2d 159, 31 Ala.App. 174, certiorari denied 14 So.2d 161, 244 Ala. 430.

Prima facie validity not overcome

(1) In general.

Tex.—Ex parte Conner, Cr., 297 S.W.2d 834.

contained therein.¹⁷ The warrant is ordinarily not conclusive proof that the requirements of the statute were complied with before its issuance.¹⁸

The burden is on accused to come forward with evidence to overcome the prima facie case,^{18.5} or

to prove he is entitled to discharge.^{18.10}

The refusal of the governor to allow accused to inspect the requisition and the accompanying documents, or to produce them or to furnish copies of them, will rebut the prima facie sufficiency of the warrant.¹⁹

(2) Prima facie case for detention of prisoner under rendition warrant containing jurisdictional facts was not overcome by complaints, warrants, and affidavits received in evidence, but which had only negative probative value in absence of requisition demand certifying them.

Ala.—Blanton v. State, 50 So.2d 786, 35 Ala.App. 561.

(3) Where warrant was based on affidavit, made before magistrate in demanding state, sufficiently charging crime of grand theft, prima facie validity of warrant could not be overcome by magistrate's indorsement on back of affidavit, warrant not being based on indorsement.

Fla.—Mitchell v. Stoutamire, 152 So. 629, 113 Fla. 822.

(4) Testimony of alleged fugitive was insufficient to overcome prima facie case established by extradition warrant.

Ariz.—Ex parte Riccardi, 203 P.2d 627, 68 Ariz. 180.

Kan.—McTigue v. Rhyne, 293 P.2d 228, 180 Kan. 8.

Tex.—Ex parte Norris, 225 S.W.2d 193, 154 Tex.Cr. 68.

17. Ala.—State v. Parrish, 5 So.2d 828, 242 Ala. 7, second case—Ex parte Paulk, 143 So. 585, 225 Ala. 420.

Johnson v. State, 72 So.2d 861, 37 Ala.App. 586, reversed on other grounds 72 So.2d 863, 261 Ala. 1—Pierce v. Holcombe, 67 So.2d 278, 37 Ala.App. 305—Blanton v. State, 50 So.2d 786, 35 Ala.App. 561—State v. Smith, 29 So.2d 438, 32 Ala.App. 651—Adams v. State, 8 So.2d 219, 30 Ala.App. 487—State v. Shelton, 8 So.2d 216, 30 Ala.App. 484—Kelley v. State, 200 So. 115, 30 Ala.App. 21—Smith v. State, 129 So. 681, 24 Ala.App. 15—Thacker v. State, 101 So. 636, 20 Ala.App. 302, certiorari denied Ex parte Thacker, 101 So. 638, 212 Ala. 3—Pool v. State, 78 So. 407, 16 Ala. App. 410.

Ariz.—Corpus Juris Secundum cited in Ex parte Riccardi, 203 P.2d 627, 631, 68 Ariz. 180.

Ill.—People ex rel. Gardner v. Mulcahy, 62 N.E.2d 418, 390 Ill. 511—People ex rel. Strobel v. Mulcahy, 60 N.E.2d 397, 390 Ill. 233, certiorari denied 66 S.Ct. 49, 326 U.S. 681, 90 L.Ed. 398—People ex rel. Flowers v. Gruenewald, 60 N.E.2d 225, 390 Ill. 79—People v. Meyering, 180 N.E. 560, 348 Ill. 17—People v. Meyering, 178 N.E. 80, 345

Ill. 449—Lacondra v. Hermann, 175 N.E. 820, 343 Ill. 608.

N.Y.—People ex rel. Samet v. Kennedy, 140 N.Y.S.2d 466, 285 App. Div. 1116.

Or.—Ex parte Paulson, 124 P.2d 297, 168 Or. 457.

Tenn.—State v. Taylor, 22 S.W.2d 222, 160 Tenn. 44.

Tex.—Ex parte Carroll, 216 S.W.2d 580, 152 Tex.Cr. 581—Ex parte Haynes, 267 S.W. 490, 98 Tex.Cr. 609.

Date of crime

In absence of other evidence, date recited in extradition warrant must be taken as time of commission of alleged crime.

Ill.—People ex rel. Gansler v. Meyer-ing, 185 N.E. 628, 352 Ill. 314.

18. Ala.—Johnson v. State, 72 So.2d 861, 37 Ala.App. 586, reversed on other grounds 72 So.2d 863, 261 Ala. 1—Denson v. State, 57 So.2d 830, 36 Ala.App. 216, certiorari denied 57 So.2d 832, 257 Ala. 184—State of Tennessee v. Hamilton, 190 So. 306, 28 Ala.App. 587—Dean v. State, 126 So. 416, 23 Ala.App. 423.

Ga.—Hart v. Mount, 26 S.E.2d 453, 196 Ga. 452.

La.—State ex rel. Covington v. Hughes, 102 So. 824, 157 La. 652.

Mo.—Ex parte Davis, 62 S.W.2d 1086, 333 Mo. 262.

N.J.—Ex parte Cohen, 92 A.2d 837, 23 N.J.Super. 209, affirmed 96 A.2d 794, 12 N.J. 362.

N.Y.—People ex rel. Tumminia v. Police Commissioner of New York City Police Dept., 178 N.Y.S.2d 532, 14 Misc.2d 755.

Okl.—Ex parte Breene, 162 P.2d 559, 81 Okl.Cr. 228.

Pa.—Commonwealth ex rel. Spivak v. Heinz, 14 A.2d 875, 141 Pa.Super. 158.

Commonwealth ex rel. Faison v. Watkins, 9 Pa.Dist. & Co.2d 571, 73 Montg.Co. 44.

Commonwealth ex rel. Houser v. Seip, Com.Pl., 68 Dauph.Co. 36, affirmed 124 A.2d 110, 385 Pa. 545—Commonwealth ex rel. Wyatt v. Adams, Com.Pl., 30 West.Co. 169, 25 C.J. p 270 note 70.

Defect apparent on record

(1) Under some statutes the issue of a warrant by the governor is conclusive that the demand is conformable to law and ought to be complied with, unless there is some defect apparent on the record.

Mass.—Davis' Case, 122 Mass. 324—Kingsbury's Case, 106 Mass. 223.

(2) Thus, if the previous proceedings appear to be regular the warrant is conclusive evidence of the right to remove such persons to the state from which they fled.

Mass.—In re Murphy, 72 N.E.2d 413, 321 Mass. 206—In re Baker, 39 N.E.2d 762, 310 Mass. 724, certiorari denied Baker v. Delay, 62 S.Ct. 1297, 316 U.S. 699, 86 L.Ed. 1768.

18.5 U.S.—U. S. ex rel. Silver v. O'Brien, C.C.A.Ill., 138 F.2d 217, certiorari denied 64 S.Ct. 522, 321 U.S. 766, 88 L.Ed. 1062.

U. S. ex rel. Faris v. McClain, D. C.Pa., 42 F.Supp. 429.

Fla.—Schriver v. Tucker, 42 So.2d 707.

Pa.—Commonwealth ex rel. Taylor v. Superintendent, Philadelphia County Prison, 114 A.2d 343, 382 Pa. 181.

Commonwealth ex rel. Faison v. Watkins, 9 Pa.Dist. & Co.2d 571, 73 Montg.Co. 44.

Authority of lieutenant governor

Where requisition was attested and had been acted on by governor, although signed by lieutenant governor of demanding state rather than by governor thereof, accused had burden to show that lieutenant governor had been without authority to sign requisition as governor.

Tex.—Ex parte Fuqua, 283 S.W.2d 50, 162 Tex.Cr. 126.

Identity

Person for whom executive warrant was issued had burden to show that he was not person charged in demanding state.

Tex.—Ex parte Fuqua, supra.

18.10 Ill.—People ex rel. Gardner v. Mulcahy, 62 N.E.2d 418, 390 Ill. 511—People ex rel. Flowers v. Gruenewald, 60 N.E.2d 225, 390 Ill. 79.

Tenn.—State ex rel. Sandford v. Cate, 285 S.W.2d 343, 199 Tenn. 195.

Burden of proof in habeas corpus proceedings see C.J.S. Habeas Corpus § 39.

19. Ala.—Johnson v. State, 72 So.2d 863, 261 Ala. 1.

S.C.—Ex parte Murray, 99 S.E. 798, 112 S.C. 342.

In New York

(1) It was formerly the rule that the finding of the governor was final and that he could not be required to produce the evidence on which the warrant was issued.

e. Revocation

The governor may revoke a warrant of rendition as long as the alleged fugitive is still in the state of asylum, and he may vacate his order revoking the warrant.

If a warrant has been issued in a case in which it should not have been issued, the governor may revoke it whether it was issued by himself or his predecessor,²⁰ and this power exists regardless of any lapse of time between the granting of the warrant and its attempted revocation where the alleged fugitive remains within the state during the interim.²¹ On the other hand, the revocation to be effective must be issued before the alleged fugitive is taken from the asylum state.²²

The courts have on the ground of impropriety declined to review the action of the governor in revoking a warrant²³ or in refusing to revoke it.²⁴

The governor may vacate his order suspending the warrant and may order it redelivered for execution to the sheriff if he determines that the warrant was improperly suspended.²⁵

§ 17. Examination and Review of Proceedings by Courts

While as a general rule the action of the governor in according or refusing rendition of a fugitive cannot be controlled by the courts, whether there has been compliance with statutory requirements may be determined

in a habeas corpus proceeding or, under some statutes, in a special judicial proceeding.

As a general rule, the action of the governor in according or refusing rendition of a fugitive from another state cannot be controlled by the courts.²⁶ Where it is claimed that the warrant of rendition is defective in itself, or was issued without compliance with the requirements of the statute, resort may be had to habeas corpus to secure the prisoner's discharge, as discussed in Habeas Corpus, § 39, and in the absence of special statutory provision there is no other method of securing judicial review of the extradition proceeding.²⁷ It is the right and duty of the proper judicial authorities of the asylum state to determine whether the person sought to be extradited is in fact charged with a crime in the demanding state,^{27.5} but the guilt or innocence of the person demanded may not be inquired into in any proceeding after the demand for extradition of the asylum state, except as it may be material in identifying the person charged or in determining whether he is a fugitive from justice.^{27.10} The fact that a compact between states does not allow the courts of the asylum state to review the decision of the demanding state to retake a paroled prisoner does not render the extradition invalid.^{27.15}

By some statutes, however, the warrant of arrest is returnable to a specified court or judge,²⁸ and

N.Y.—In re Scrafford, 12 N.Y.S. 943, 59 Hun 320.
25 C.J. p 270 note 72.

(2) It seems now settled that, although the governor may withhold the papers on which his decision is based, that decision is not conclusive. N.Y.—People ex rel. Merkle v. Enright, 217 N.Y.S. 288, 217 App.Div. 514.

25 C.J. p 270 note 73.

20. U.S.—Downey v. Schmidt, D.C. Tex., 4 F.Supp. 1.

Ill.—People ex rel. De Bardas v. Toman, 4 N.E.2d 859, 364 Ill. 516, appeal dismissed People of State of Illinois ex rel. De Bardas v. Toman, 57 S.Ct. 613, 300 U.S. 642, 81 L.Ed. 857.

Neb.—State v. Eberstein, 182 N.W. 500, 105 Neb. 833.

25 C.J. p 270 note 75.

Early decision to the contrary

N.Y.—Hosmer v. Loveland, 19 Barb. 111.

21. U.S.—Downey v. Schmidt, D.C. Tex., 4 F.Supp. 1.

Ohio.—State ex rel. Cutshaw v. Smith, App., 127 N.E.2d 633, appeal dismissed 115 N.E.2d 689, 160 Ohio St. 262.

22. Fla.—Corpus Juris cited in Young v. Stoutamire, 176 So. 759, 762, 129 Fla. 805.

Minn.—State v. Toole, 72 N.W. 53, 69 Minn. 104, 65 Am.S.R. 553, 38 L.R.A. 224.

Ohio.—State ex rel. Cutshaw v. Smith, App., 127 N.E.2d 633, appeal dismissed 115 N.E.2d 689, 160 Ohio St. 262.

23. Minn.—State v. Toole, 72 N.W. 53, 69 Minn. 104, 65 Am.S.R. 553, 38 L.R.A. 224.

24. U.S.—Ex parte Brown, D.C.N. Y., 28 F. 653.

25. Ill.—People ex rel. De Bardas v. Toman, 4 N.E.2d 859, 364 Ill. 516, appeal dismissed People of State of Illinois ex rel. De Bardas v. Toman, 57 S.Ct. 613, 300 U.S. 642, 81 L.Ed. 857.

Tex.—Ex parte Oxford, 256 S.W.2d 105, 158 Tex.Cr. 435.

26. Ark.—Stuart v. Johnson, 94 S. W.2d 715, 192 Ark. 757.

Mich.—Ex parte Ray, 183 N.W. 774, 215 Mich. 156.

N.J.—Ex parte Cohen, 92 A.2d 837, 23 N.J.Super. 209, affirmed 96 A.2d 794, 12 N.J. 362.

27. Ariz.—Corpus Juris Secundum cited in Ex parte Rubens, 238 P.2d 402, 405, 73 Ariz. 101, certiorari denied 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

W.Va.—In re Heck, 7 S.E.2d 866, 122 W.Va. 175.

27.5 W.Va.—Cassiss v. Fair, 29 S.E. 2d 245, 126 W.Va. 557, 151 A.L.R. 233.

Accusation no longer pending

Where it appeared that accusation on which requisition was based was no longer pending in demanding state and that all matters connected therewith had been fully determined, fugitive would be ordered released from further custody.

Tex.—Ex parte Oliver, Cr., 318 S.W. 2d 647.

27.10 Ala.—State v. Parrish, 5 So.2d 828, 242 Ala. 7, second case.

State v. Shelton, 8 So.2d 216, 30 Ala.App. 484.

Tex.—Ex parte Garcia, Cr., 319 S.W. 2d 328.

27.15 U.S.—U. S. ex rel. MacBlain v. Burke, C.A.Pa., 200 F.2d 616.

28. Ohio.—In re Sanders, App., 31 N.E.2d 246.

25 C.J. p 270 note 81.

Jurisdiction

The common pleas court does not lack jurisdiction merely because the governor's warrant issued for the arrest of the person demanded does not appear among the extradition papers or is not introduced in evidence. Ohio.—In re Sanders, supra.

provision is made for an examination by him of the proceedings substantially the same as would be procured by an application for a writ of habeas corpus.²⁹ A statute requiring that, on the issue of a warrant of rendition, the prisoner be taken before a judge of a court of record and informed of his right to contest extradition by habeas corpus is designed to provide a judicial hearing to determine whether he should be surrendered,^{29.5} and the same purpose is accomplished under a section of the act providing for the arrest of a fugitive without a warrant which requires that he be taken before a judge or magistrate where his answer shall be heard as if he had been arrested on a warrant.^{29.10} The question whether accused should be adjudged a fugitive from justice can only be determined at the hearing accorded him by statute,^{29.15} and at such hearing accused may test the sufficiency of the requisition.^{29.20}

There is no constitutional obligation so to time the arrest of the person charged and so to conduct his deportation as to afford him a convenient opportunity, before some judicial tribunal sitting in the state of asylum, to test the question whether he was a fugitive from justice and as such liable to be extradited.³⁰

§ 18. Discharge and Rearrest

A person arrested on a demand for extradition is

entitled to be discharged where the agent of the demanding state does not appear and take custody of him within the prescribed statutory time.

The effect as *res judicata* of the discharge on habeas corpus of an alleged fugitive arrested in extradition proceedings and the right to rearrest him are treated in *extenso* in another title.³¹⁻³⁶

Under the federal Constitution and statutes, a person arrested on a demand for extradition is entitled to be discharged if the agent of the demanding state does not appear and take custody of him within the prescribed statutory time,^{36.5} but such provisions do not apply so as to entitle him to be discharged where the delay is due to proceedings instituted to test the validity of his arrest.^{36.10} The arrest referred to is the arrest caused by the executive authority of the asylum state after formal demand has been made by the governor of the demanding state,^{36.15} and an arrest made prior to such formal demand or the issuance of an extradition warrant by the governor of the asylum state is not the arrest contemplated in computing the period after which the prisoner may be discharged.^{36.20} The limitation on the time a fugitive may be detained refers only to the length of time the detaining state may hold or detain him while waiting for the requesting state to come and pick him up,^{36.25} and the failure of the requesting state to pick him up within the prescribed time will not affect its right to have him returned.^{36.30}

29. Ohio.—*In re Sanders*, supra.
25 C.J. p 270 note 82.

Nature and scope of proceedings

Examining judge in extradition proceedings is not obliged to determine whether the person demanded is guilty of offense in demanding state, but only whether the demanding state has shown *prima facie* evidence, and has supported its requisition with proper formalities.

Ohio.—*Milovich v. Langley*, App., 121 N.E.2d 188—*In re Sanders*, App., 31 N.E.2d 246.

Burden of proof

The requisition papers make a *prima facie* case, and the state is not obliged to offer oral evidence in addition, so that the court may require accused to go forward with the evidence; where there is conflicting evidence on the question whether affidavits charging the offense were signed by prosecutrix through coercion and over-persuasion, the matter is for the examining judge, and his conclusion will not be disturbed on appeal.

Ohio.—*In re Sanders*, supra.

Sufficiency of evidence

Evidence held to warrant holding defendant for extradition.

Ohio.—*Milovich v. Langley*, App., 121 N.E.2d 188.

29.5 Md.—*Willin v. Sheriff of Wicomico County*, 95 A.2d 87, 201 Md. 667.

Pa.—*Commonwealth ex rel. Huey v. Dye*, 96 A.2d 129, 373 Pa. 508.

29.10 Rights held not violated

Where fugitive from justice, although arrested without a warrant, was afforded a hearing at time of his arrest his constitutional rights were not violated.

Pa.—*Commonwealth ex rel. Huey v. Dye*, supra.

29.15 La.—*State v. Svoboda*, 56 So. 2d 416, 220 La. 260.

29.20 La.—*State v. Svoboda*, supra.

Discharge

If the requisition is found to be insufficient, accused is entitled to be discharged.

La.—*State v. Svoboda*, supra.

30. U.S.—*Pettibone v. Nichols*, Idaho, 27 S.Ct. 111, 203 U.S. 192, 51 L.Ed. 148, 7 Ann.Cas. 1047.

31-36. See Habeas Corpus § 104 b (1).

36.5 Ill.—*People ex rel. Heard v. Babb*, 107 N.E.2d 740, 412 Ill. 507.

N.J.—*Foley v. State*, 108 A.2d 24, 32 N.J.Super. 154.

36.10 N.J.—*Foley v. State*, 108 A.2d 24, 32 N.J.Super. 154.

S.C.—*Bolton v. Timmerman*, 105 S.E. 2d 518, 233 S.C. 429.

36.15 Ill.—*People ex rel. Heard v. Babb*, 107 N.E.2d 740, 412 Ill. 507.

Date period runs from

Period after which the prisoner may be discharged begins to run from date of his arrest under extradition warrant issued by governor of asylum state on demand of governor of state wherein it is charged that offense was committed.

S.C.—*Bolton v. Timmerman*, 105 S.E. 2d 518, 233 S.C. 429.

36.20 Ill.—*People ex rel. Heard v. Babb*, 107 N.E.2d 740, 412 Ill. 507.

36.25 Ohio.—*Wise v. State*, App., 96 N.E.2d 786.

36.30 Ohio.—*Wise v. State*, supra.

Conviction and sentence not affected

Federal statute providing for discharge of a fugitive from justice if agent does not appear within six months to return prisoner to state requesting his arrest does not affect fugitive's conviction and sentence in requesting state or state's right to have fugitive returned.

Ohio.—*Wise v. State*, supra.

No forfeiture of right of return

Demanding state does not forfeit its right to have escaped convict re-

Where an alleged fugitive was extradited to the demanding state and there discharged on motion of the state's attorney before accused was placed in jeopardy, such discharge does not prevent his arrest and extradition for the same offense on a second requisition.^{36.35}

§ 19. Bail

Although bail may be permitted in the discretion of the court where accused is held pending the arrival of a requisition, it is generally the rule, in the absence of contrary statute, that bail may not be given for a prisoner held under a warrant of rendition.

Quoted in: Idaho—Application of Haney, 289 P.2d 945, 946, 77 Idaho 166.

N.D.—In re Amundson, 19 N.W.2d 918, 919, 74 N.D. 83.

Power to grant bail in behalf of fugitives from justice who are held in custody by virtue of extradition proceedings is not inherent in the courts, but must arise by virtue of constitutional or statutory provisions.^{36.50}

Where an alleged fugitive is preliminarily detained to await an extradition requisition and warrant, he is, under some statutes, including the Uni-

form Criminal Extradition Act, entitled to bail,³⁷ if the offense for which he is arrested is a bailable offense;^{37.5} but such a provision is applicable only while the person is being held to await requisition and before the warrant for his arrest is issued by the governor.^{37.10} It has also been held that the matter is one within the discretion of the court and that it is not mandatory to grant bail.³⁸

Where the fugitive is not detained awaiting a request from another state for his surrender, but is held on a warrant of extradition, according to the weight of authority, he is not, in the absence of statute authorizing it, entitled to bail.³⁹ Constitutional and statutory provisions granting persons charged with offenses against the laws of the state the right to bail have been held not applicable to persons arrested for interstate extradition proceedings.^{39.5}

Under some statutes, however, the admission to bail is within the judicial discretion of the court⁴⁰ or is a matter of right, where sought pending an appeal by an accused remanded to custody on a habeas corpus hearing.⁴¹ It has also been held that, where the charge is only a misdemeanor, the pris-

turned to it as a fugitive from justice by failing to show for convict within six months after his arrest in asylum state as a fugitive from justice at request of authorities of demanding state.
Ohio.—Wise v. State, supra.

36.35 U.S.—Bassing v. Cady, R.I., 28 S.Ct. 392, 208 U.S. 386, 52 L.Ed. 540, 13 Ann.Cas. 905.

36.50 Fla.—State ex rel. Stringer v. Quigg, 107 So. 409, 91 Fla. 197.
N.D.—In re Amundson, 19 N.W.2d 918, 74 N.D. 83.

37. Idaho.—Application of Haney, 289 P.2d 945, 77 Idaho 166.

Ky.—Corpus Juris cited in Commonwealth v. Roberts, 279 S.W. 330, 331, 212 Ky. 351.

Neb.—Ex parte Campbell, 23 N.W.2d 698, 147 Neb. 382.

N.D.—In re Amundson, 19 N.W.2d 918, 74 N.D. 83.

Tex.—Morgan v. State, 296 S.W. 312, 107 Tex.Cr. 200.

25 C.J. p 261 note 8, p 271 note 90.
Bail generally see Bail § 33.

Before adjudication

Under statute so providing, person arrested on warrant charging that he is fugitive from justice of another state is entitled to bail at any time before he is adjudged by court to be such a fugitive, but not after such adjudication.

La.—State v. Svoboda, 56 So.2d 416, 220 La. 260—State v. Birnbach, 165 So. 717, 184 La. 215.

37.5 Del.—Simpers v. Wilson, 75 A. 2d 254, 6 Terry 423.

37.10 Iowa.—Allen v. Wild, 86 N.W. 2d 839.

N.D.—In re Amundson, 19 N.W.2d 918, 74 N.D. 83.

38. Pa.—Commonwealth v. Bentz, 22 Pa.Dist. & Co. 132.

39. U.S.—Johnson v. Scarborough, D.C.Tex., 88 F.Supp. 523.

Ariz.—Waller v. Jordan, 118 P.2d 450, 58 Ariz. 169, 143 A.L.R. 1349.

Fla.—Corpus Juris cited in State ex rel. Stringer v. Quigg, 107 So. 409, 414, 91 Fla. 197.

Iowa.—Corpus Juris Secundum cited in Allen v. Wild, 86 N.W.2d 839, 842.

Minn.—Corpus Juris quoted in State ex rel. Hildebrand v. Moeller, 234 N.W. 649, 650, 182 Minn. 369.

Neb.—Corpus Juris Secundum cited in Ex parte Campbell, 23 N.W.2d 698, 699, 147 Neb. 382.

N.D.—In re Amundson, 19 N.W.2d 918, 74 N.D. 83.

Wash.—State ex rel. Rheinstrom v. Ronald, 179 P. 843, 106 Wash. 189.
25 C.J. p 271 note 91.

Well considered case

Ga.—Corpus Juris cited in Hames v. Sturdivant, 182 S.E. 601, 602, 181 Ga. 472.

Majority rule

"Courts, with marked uniformity, have denied bail to a fugitive from justice, in extradition proceedings, after issuance of the warrant of extradition, although the fugitive sought bail incidentally to a writ of habeas corpus brought to test the legality of his detention under the

executive warrant, and we regard their position as correct, since any inherent power of the courts in such cases to deal with the custody of the fugitive may be fully exercised by appropriate regulation of the form and manner of his custody."
Fla.—State ex rel. Stringer v. Quigg, 107 So. 409, 414, 91 Fla. 197.

What law governs

Right of accused to bail should be tested by laws of demanding state and not by the laws of the asylum state which holds him solely for the purpose of rendition.

Fla.—State ex rel. Stringer v. Quigg, supra.

39.5 Ariz.—Waller v. Jordan, 118 P. 2d 450, 58 Ariz. 169, 143 A.L.R. 1349.

Fla.—State ex rel. Stringer v. Quigg, 107 So. 409, 91 Fla. 197.

Iowa.—Allen v. Wild, 86 N.W.2d 839.
N.J.—Ex parte Thompson, 96 A. 102, 85 N.J.Eq. 221.

N.D.—In re Amundson, 19 N.W.2d 918, 74 N.D. 83.

Tex.—Ex parte Erwin, 7 Tex.App. 238.

Wash.—State ex rel. Rheinstrom v. Ronald, 179 P. 843, 106 Wash. 189.

40. Conn.—Winnick v. Reilly, 123 A. 440, 100 Conn. 291—Farrell v. Hawley, 61 A. 502, 78 Conn. 150, 112 Am.S.R. 98, 70 L.R.A. 686, 3 Ann. Cas. 874.

Idaho.—Application of Haney, 289 P. 2d 945, 77 Idaho 166.

41. See Habeas Corpus § 115 c.

oner may be entitled to bail as a matter of right unless his liberty would be a menace to the community.⁴²

A bail bond showing that defendant is held as a fugitive from justice in another state is not void as failing to show whether the charge was a misdemeanor or a felony.⁴³

Forfeiture of bond. The rules governing criminal cases generally with reference to forfeiture of appearance bonds are applicable to extradition cases.⁴⁴ If the person sought to be extradited absconds and fails to appear at the time fixed for appearance the bond is subject to forfeiture.^{44.5} In proceedings for forfeiture of a bail bond, the surety cannot go behind the warrant of the governor of the asylum state and test the sufficiency of the requisition of the demanding state,^{44.10} or raise defenses which accused might have raised at a hearing to test the sufficiency of the requisition.^{44.15}

§ 20. Authority and Liability of Agent to Receive Fugitive

An agent to receive a fugitive is an officer of the state whose governor appoints him and not of the United States, and the right by which he holds the prisoner may be inquired into by a state court, or by a federal court in so far as his actions exceed the authority given him by federal statutes.

In order that one may become an agent to receive a fugitive within the terms and meaning of the extradition laws there must be compliance with the federal Constitution and laws and any state laws in aid thereof, or not in conflict therewith.^{44.50} It is necessary that the governor of the demanding state make demand under such laws and that he appoint

such person agent thereunder for the purpose of receiving and returning the person demanded.^{44.55} In the absence of any such agency, one who goes to another state to receive and return a fugitive is acting as a private citizen.^{44.60}

The agent, although his authority is derived from the laws of the United States, is an officer or agent of the state whose governor appoints him, and not of the United States.⁴⁵ His authority to hold a fugitive is prima facie proved by a precept from the governor who appoints him,⁴⁶ and his acts in declining to demand a fugitive or withdrawing a requisition will be presumed to be under instructions from his principal.⁴⁷ The right by which the agent holds a fugitive may be inquired into by a state court,⁴⁸ but he is subject to federal courts if he exceeds the authority given him by United States statutes.⁴⁹

The agent, as such, has nothing to do with securing the requisition from the governor of the demanding state, nothing to do with having it honored by the governor of the asylum state, and no duty to arrest and secure the fugitive.^{49.5} His duty is to conduct or transport the fugitive to the demanding state after the executive authority of the asylum state has delivered up such fugitive to him,^{49.10} and if he does this without unreasonable delay and acts within the scope of his authority he is not liable to an action for false imprisonment,⁵⁰ even if his feelings toward the prisoner are in fact malicious.⁵¹

An agent cannot defend the arrest of a fugitive by pleading a warrant bearing another name.⁵² Even if he tells a fugitive that payment of a debt might stop extradition this is not necessarily an

42. U.S.—*Ex parte Thaw*, D.C.N.H., 209 F. 954.

43. Tex.—*Morgan v. State*, 296 S. W. 312, 107 Tex.Cr. 200.

44. La.—*State v. Svoboda*, 56 So.2d 416, 220 La. 260—*State v. Birnbach*, 165 So. 717, 184 La. 215.

44.5 La.—*State v. Svoboda*, 56 So.2d 416, 220 La. 260.

44.10 La.—*State v. Svoboda*, supra.

44.15 La.—*State v. Svoboda*, supra.

44.50 Okl.—*Boston v. Causey*, 242 P.2d 712, 206 Okl. 251.

44.55 Okl.—*Boston v. Causey*, supra.

44.60 Okl.—*Boston v. Causey*, supra.

45. U.S.—*Robb v. Connolly*, Cal., 4 S.Ct. 544, 111 U.S. 624, 28 L.Ed. 542.

25 C.J. p 271 note 95.

46. Mass.—*Commonwealth v. Hall*, 9 Gray 262, 69 Am.D. 285.

Seal and attestation

(1) Extradition demand, in so far

as it appoints agent to receive fugitive, must be sealed with state's seal and attested by secretary of state. Tex.—*Ex parte Pinkus*, 25 S.W.2d 334, 114 Tex.Cr. 326.

(2) Where documents consisting of requisition signed by governor of Georgia and properly attested by secretary of Georgia, demanding return of escaped convict, and designation of agents by governor of Georgia were fastened together by a ribbon and the great seal of Georgia impressed thereon, it was not necessary that the great seal be impressed on each document separately, since the seal placed on the ribbon related and attached to every document connected therewith. Tex.—*Ex parte Gallogly*, 137 S.W.2d 776, 138 Tex.Cr. 585.

47. N.J.—*In re Troutman*, 24 N.J. Law 634.

48. U.S.—*Robb v. Connolly*, Cal., 4 S.Ct. 544, 111 U.S. 624, 28 L.Ed. 542.

49. U.S.—*In re Bull*, C.C.Neb., 4 F. Cas.No.2,119, 4 Dill. 323—*In re Burke*, D.C.Minn., 4 F.Cas.No.2,158.

49.5 Pa.—*Douthett v. Lawrence*, 4 Pa.Dist. 608.

Delivery of requisition

Fact that manual delivery of the requisition to the governor of the asylum state was made by the attorney for the prosecuting witness instead of by the agent of the governor of the demanding state is immaterial. Ind.—*Worth v. Wheatley*, 108 N.E. 958, 183 Ind. 598.

49.10 Pa.—*Douthett v. Lawrence*, 4 Pa.Dist. 608.

50. Ga.—*Pettus v. State*, 42 Ga. 358.

51. U.S.—*In re Titus*, D.C.N.Y., 23 F.Cas.No.14,062, 8 Ben. 411.

Tex.—*Regan v. Jessup*, 77 S.W. 972, 34 Tex.Civ.App. 74.

52. Ga.—*Johnston v. Riley*, 13 Ga. 97.

abuse of office.⁵³ The fact that the alleged fugitive would be taken from the state by a deputy of the agent designated by the governor of the demanding state does not affect the validity of the arrest.⁵⁴

§ 21. Proceedings after Return

- a. In general
- b. Prosecution in another state

a. In General

Generally, the fact that one was extradited on a charge of a specific crime does not preclude his prosecution for other offenses without his having been given an opportunity to leave the state; but authority is divided as to whether the prisoner may be subjected to civil process while held by virtue of the extradition proceedings.

As a general rule, a fugitive from justice, surrendered by one state on the demand of another, is not protected from prosecution for offenses other than that for which he was surrendered, but may be tried for any crimes committed in the demanding state either before or after extradition without having been given an opportunity to leave the state.⁵⁵ Therefore, although he is tried for a different offense against his objection, no right, privilege, or immunity secured to him by the laws and Constitution of the United States is thereby denied.⁵⁶

Even under the view that the fugitive cannot be tried for a different crime, he may be tried for an included crime⁵⁷ or another crime growing out of

the same transaction,⁵⁸ and has only a reasonable time within which to leave the state.⁵⁹

If a prisoner voluntarily signs a waiver of extradition process, or otherwise waives extradition, he cannot be heard to complain that he was brought to the demanding state without such process.^{59.5} In such case, he may be charged with and tried for other crimes,^{59.10} and his rights are not violated because the charge against him is raised to a higher degree,^{59.15} or where he pleads guilty to, and is sentenced on, other charges;^{59.20} and if he returns voluntarily, knowing that if he resists he will be extradited, he will not be protected from arrest on a second charge.⁶⁰ Where a resident of another state has been brought within the state on criminal process to answer for an offense alleged to have been committed while in the state of his residence, he will not, on his discharge before he has had an opportunity to return, be retained to answer for an act of omission since he was brought in the state unless the omission was conscious and willful on his part.⁶¹

Subjection to civil process. In some jurisdictions, sometimes under statute, such as the Uniform Criminal Extradition Act, one accused of crime who has been brought within the state by requisition proceedings cannot, until he has been given a reasonable opportunity to depart therefrom, be served with civil process⁶² nor may accused be arrested on civil

53. U.S.—In re Burke, D.C.Minn., 4 F.Cas.No.2,158.

54. Tex.—Ex parte Wells, 298 S.W. 204, 108 Tex.Cr. 57.

55. U.S.—Cardigan v. Biddle, C.C.A. Kan., 13 F.2d 1020—*Corpus Juris* quoted in Cardigan v. Biddle, C.C.A. Kan., 10 F.2d 444, 445.

Cal.—*Corpus Juris* quoted in People v. Martin, 205 P. 121, 122, 188 C. 281, 21 A.L.R. 1399.

Conn.—State v. Kirschenbaum, 146 A. 837, 109 Conn. 394.

Kan.—Stebens v. Hand, 320 P.2d 790, 182 Kan. 304.

Mo.—State v. Daegle, 302 S.W.2d 20.

Neb.—*Corpus Juris Secundum* cited in Jackson v. Olson, 22 N.W.2d 124, 131, 146 Neb. 885, 165 A.L.R. 932.

Pa.—Commonwealth v. Widmeyer, Quar.Sess., 31 Del.Co. 213.

Tex.—Gaines v. State, 251 S.W. 245, 95 Tex.Cr. 368, petition dismissed Gaines v. State of Texas, 44 S.Ct. 132, 263 U.S. 728, 68 L.Ed. 528.

Va.—Howell v. Commonwealth, 46 S. E.2d 37, 187 Va. 34.

Wash.—*Corpus Juris* quoted in Ex parte Ringrose, 62 P.2d 1104, 1106, 188 Wash. 477.

25 C.J. p 272 note 14.

Violation of parole

Officials of county, in which stricken indictment against parole violator was reinstated, could prosecute him under such indictment after his extradition from another state or surrender him to state prison authorities for violation of parole.

Ill.—People v. Hill, 183 N.E. 17, 350 Ill. 129.

56. Kan.—Stebens v. Hand, 320 P.2d 790, 182 Kan. 304.

Md.—State ex rel. Freeland v. Warden of Md. Penitentiary, 70 A.2d 597, 194 Md. 74.

Ohio.—Ex parte Moeller, 14 Ohio App. 300.

Tenn.—State ex rel. Lea v. Brown, 64 S.W.2d 841, 166 Tenn. 669, 91 A.L.R. 1246, certiorari denied State of Tennessee ex rel. Lea v. Brown, 54 S.Ct. 717, 292 U.S. 638, 78 L.Ed. 1491.

25 C.J. p 272 note 15.

57. Kan.—State v. Dunn, 71 P. 811, 66 Kan. 483.

25 C.J. p 272 note 16.

58. Ind.—Musgrave v. State, 32 N.E. 885, 133 Ind. 297.

25 C.J. p 272 note 17.

59. Ohio.—Ex parte McKnight, 28 N. E. 1034, 48 Ohio St. 558, 14 L.R.A.

128, appeal dismissed 15 S.Ct. 248, 155 U.S. 685, 39 L.Ed. 310.

25 C.J. p 272 note 18.

59.5 Kan.—Stebens v. Hand, 320 P. 2d 790, 182 Kan. 304—Rutledge v. Hudspeth, 218 P.2d 241, 169 Kan. 243.

59.10 Va.—Howell v. Commonwealth, 46 S.E.2d 37, 187 Va. 34.

59.15 Kan.—Stebens v. Hand, 320 P. 2d 790, 182 Kan. 304.

59.20 Pa.—Commonwealth ex rel. Hardy v. Martin, Com.Pl., 55 Lanc. L.Rev. 257.

60. Kan.—State v. McNaspy, 50 P. 895, 58 Kan. 691, 38 L.R.A. 756.

61. Kan.—In re Fowles, 131 P. 598, 89 Kan. 430, 47 L.R.A., N.S., 227.

62. U.S.—Bramwell v. Owen, D.C. Or., 276 F. 36.

Mich.—McCullough v. McCullough, 168 N.W. 929, 203 Mich. 288.

Mo.—*Corpus Juris Secundum* cited in State v. Owen, App., 271 S.W.2d 864, 867.

N.J.—Klaiber v. Frank, 86 A.2d 679, 9 N.J. 1.

Ohio.—White v. Marshall, 23 Ohio Cir.Ct. 376.

25 C.J. p 272 note 21.

process.⁶³ This rule was followed where the criminal and civil actions were closely related,^{63.5} but the extradited person has been held not exempt from process where the criminal action was not instituted by the plaintiff in the civil suit nor did it arise out of the same facts as the criminal prosecution.⁶⁴

The privilege from arrest may be waived by accused.⁶⁵ Also, if the requisition was issued in order to obtain jurisdiction of accused in a civil suit, process procured by the fraud in this manner will be held void.⁶⁶ If it were known before his surrender that the requisition was issued in order to subject him to a civil suit, the governor who received it would have no authority to issue a warrant for his arrest.⁶⁷

Restraint as insane person. One who has been committed to an insane hospital and escapes therefrom to another state may, after his return and acquittal of the crime of conspiracy on a charge of which he was extradited, be returned to the insane hospital without being allowed a reasonable time within which to depart from the state.⁶⁸

Failure to furnish correct copy of affidavit. The fact that after the prisoner has been returned to the demanding state, copies of the affidavit made for the purpose of extraditing him, furnished his attorney by the prosecutor, are not exact copies of

the one filed with the governor of the demanding state is immaterial where there is no showing that the attorney for the prisoner did not have time to secure a correct copy, or that any information was withheld from them, or that the prosecution knew the copy furnished was not correct, and there is no claim that a correct copy would have aided in the cross-examination of the complaining witness.^{68.5}

b. Prosecution in Another State

Although there is some authority to the contrary, generally a state by honoring a requisition does not thereby waive its right subsequently to punish the prisoner for past delinquencies, or to extradite him for that purpose. A person who has been extradited may be re-arrested after discharge and surrendered to a third state on its demand.

As appears supra § 11, a person in custody for an offense in one state may be surrendered to another state which requests his extradition. Such surrender has been held to operate as a waiver of the jurisdiction of the state over the person of the prisoner,⁶⁹ and it has been held that he cannot thereafter be considered a fugitive from justice from the surrendering state so as to permit it to requisition him on termination of proceedings against him in the second state, and that it has waived its right to secure his return to answer for the offense for which he was originally held in custody.⁷⁰

Good faith

The fact that the criminal prosecution was instituted in good faith does not vary the rule to render valid service made on such nonresident witness so within the jurisdiction. Ohio.—Lotz v. Lotz, 23 Ohio N.P., N.S., 309.

63. Mo.—*Corpus Juris Secundum* quoted in State v. Owen, App., 271 S.W.2d 864, 866.

Wis.—State v. Boynton, 121 N.W. 887, 140 Wis. 89, 17 Ann.Cas. 618, 25 C.J. p 272 note 22.

63.5 Mo.—State v. Owen, App., 271 S.W.2d 864.

64. Ill.—Nichols, Shepard & Co. v. Goodheart, 5 Ill.App. 574. Minn.—Reid v. Ham, 56 N.W. 35, 54 Minn. 305, 40 Am.S.R. 333, 21 L.R. A. 232.

25 C.J. p 272 note 24.

65. Ohio.—White v. Marshall, 23 Ohio Cir.Ct. 376.

66. Neb.—In re Walker, 86 N.W. 510, 61 Neb. 803. N.J.—Klaiber v. Frank, 86 A.2d 679, 9 N.J. 1.

25 C.J. p 272 note 26.

67. U.S.—Ex parte Slauson, C.C.Va., 73 F. 666.

68. N.Y.—In re Thaw, 152 N.Y.S. 771, 167 App.Div. 104.

68.5 Mich.—People v. Parker, 11 N.W.2d 924, 307 Mich. 372.

69. Mo.—State v. Saunders, 232 S.W. 973, 288 Mo. 640.

Neb.—State v. Eberstein, 182 N.W. 500, 105 Neb. 833.

Okl.—Ex parte Hart, 244 P.2d 859, 95 Okl.Cr. 269—Adams v. Waters, 237 P.2d 914, 94 Okl.Cr. 428, certiorari denied 72 S.Ct. 638, 343 U.S. 906, 96 L.Ed. 1325.

Permanent waiver

Where a prisoner serving a sentence is extradited as a fugitive from justice and delivered to another state, jurisdiction over his person is forever waived by the asylum state. Ill.—People ex rel. Barrett v. Bartley, 50 N.E.2d 517, 383 Ill. 437, 147 A.L.R. 935.

Priority over state process

Waiver of jurisdiction of a state over a fugitive is a prerogative of the governor of the asylum state and his extradition warrant takes priority over all state process by which the fugitive is held.

Ill.—People ex rel. Barrett v. Bartley, supra.

Jurisdiction of court of requisitioning state

The court of the requisitioning state will not inquire into the regularity of the surrender, and it has no

jurisdiction to determine whether, because of the fact that accused was under a felony charge in the state surrendering him, his surrender violated his rights to a speedy trial under the constitution of that state. Ill.—People v. Klinger, 149 N.E. 799, 319 Ill. 275, 42 A.L.R. 581.

Fugitive not entitled to object

Where no objection is made by court or authorities having jurisdiction over a fugitive, he may not object to the exercise of jurisdiction over him by the court of another state, to whose authority he is surrendered in extradition proceedings. Ill.—People ex rel. Barrett v. Bartley, 50 N.E.2d 517, 383 Ill. 437, 147 A.L.R. 935—People v. Klinger, 149 N.E. 799, 319 Ill. 275, 42 A.L.R. 581.

70. Cal.—In re Whittington, 167 P. 404, 34 C.A. 344.

Okl.—Ex parte Hart, 244 P.2d 859, 95 Okl.Cr. 269—Adams v. Waters, 237 P.2d 914, 94 Okl.Cr. 428, certiorari denied 72 S.Ct. 638, 343 U.S. 906, 96 L.Ed. 1325.

Constitutional rights

Prisoner cannot be handed from one jurisdiction to another for trial, conviction, and service of a new sentence, before being returned to the asylum state for service of an unexpired sentence, without violating his constitutional rights.

According to other decisions, however, which have been stated to be the weight of authority,^{70.5} the return of a fugitive to another state does not constitute a waiver of jurisdiction by the state surrendering him subsequently to punish him for past delinquency,^{70.10} especially where there is an express reservation of the right of return of the prisoner in the extradition agreement.^{70.15} The surrendering state does not waive or forfeit any of its rights to regain the person surrendered for the purpose of trial, sentence, or punishment for any crime committed within the state.^{70.20} It may subsequently extradite the prisoner and have him brought back, where no indictment had been returned against him at the time of his surrender to the demanding state,⁷¹ or where the existence of his delinquency was not known at that time,⁷² or where he was awaiting trial in the asylum state for a criminal offense,^{72.5} or was serving a prison sentence,^{72.10} or where he is paroled or otherwise released before expiration of his sentence, and is thereupon surrendered to another state on request for his rendition.⁷³ After he has been brought back into the state from which he was originally extradited the prisoner may be confined in prison under a commitment in effect at the time he was originally extradited.^{73.5}

Under the rule that a state by honoring a requisition thereby waives its jurisdiction over the person

of the prisoner, the honoring of a requisition for one at liberty under a suspended sentence^{73.10} or pending an appeal from conviction⁷⁴ in the state of asylum does not satisfy the judgment against him, although it does operate as a waiver of the right thereafter to extradite him from the other state as a fugitive.

A person who has been brought into a state from another state under extradition proceedings, and has been discharged, may be rearrested and surrendered to a third state on its demand as a fugitive from its justice, without being allowed an opportunity to leave the state to which he had been extradited.⁷⁵ As the state to which a person has been illegally brought may hold him to answer for his offenses against it, it may arrest and surrender him on extradition proceedings to answer for his offenses against another state.⁷⁶

Right to object to completed extradition. A person who has been extradited from one state to another and then subsequently extradited and brought back to the first state cannot, after he is once again held by the first state, inquire into the legality of his extradition back into that state, or into the right of the first state to his custody after his commitment to a penal institution therein.^{76.5}

III.—People ex rel. Barrett v. Bartley, 50 N.E.2d 517, 383 Ill. 437, 147 A.L.R. 935.

70.5 Kan.—Davis v. Rhyne, 312 P.2d 626, 181 Kan. 443.

70.10 Kan.—Davis v. Rhyne, supra. Md.—State ex rel. Eberle v. Warden of Md. Penitentiary, 65 A.2d 291, 192 Md. 731, certiorari denied Eberle v. Swenson, 70 S.Ct. 42, 338 U.S. 855, 94 L.Ed. 510.

N.J.—Rau v. McCorkle, 135 A.2d 224, 47 N.J.Super. 36.

Honoring of requisition from governor of state after conviction of prisoner as not constituting pardon see Pardons § 10 a.

70.15 N.J.—Rau v. McCorkle, supra.

Misnomer of crime for which prisoner was being held in asylum state was held not to prejudice extradition agreement between governors of asylum and demanding states.

N.J.—Rau v. McCorkle, 131 A.2d 895, 45 N.J.Super. 191, affirmed 135 A.2d 224, 47 N.J.Super. 36.

70.20 N.J.—Rau v. McCorkle, 131 A.2d 895, 45 N.J.Super. 191, affirmed 135 A.2d 224, 47 N.J.Super. 36.

71. Or.—State v. Swain, 31 P.2d 35 C.J.S.—29

745, 147 Or. 207, 93 A.L.R. 921, rehearing denied 32 P.2d 773, 147 Or. 207, 93 A.L.R. 930.

72. N.Y.—People ex rel. Pepe v. Ashworth, 31 N.Y.S.2d 225.

72.5 N.J.—Rau v. McCorkle, 131 A.2d 895, 45 N.J.Super. 191, affirmed 135 A.2d 224, 47 N.J.Super. 36.

72.10 N.J.—Rau v. McCorkle, 131 A.2d 895, 45 N.J.Super. 191, affirmed 135 A.2d 224, 47 N.J.Super. 36.

73. Ga.—Johnson v. Lowry, 188 S.E. 23, 183 Ga. 207—Bartlett v. Lowry, 182 S.E. 850, 181 Ga. 526.

Pa.—Commonwealth ex rel. Kamons v. Ashe, 173 A. 715, 114 Pa.Super. 119.

Commonwealth ex rel. Williamson v. Burke, Comp.Pl., 3 Lycoming 211, affirmed 92 A.2d 239, 172 Pa. Super. 39.

Surrender to federal authorities

Ga.—Williams v. Mount, 29 S.E.2d 704, 197 Ga. 530—King v. Mount, 26 S.E.2d 419, 196 Ga. 461.

73.5 Md.—State ex rel. Eberle v. Warden of Md. Penitentiary, 65 A.2d 291, 192 Md. 731, certiorari denied Eberle v. Swenson, 70 S.Ct. 42, 338 U.S. 855, 94 L.Ed. 510.

Illegal original extradition

Prisoner's confinement in prison under original commitment after his return to state from which he was first extradited is not illegal, even though his original extradition was illegal because he was not taken before a judge or court of record of the asylum state and informed of the crime with which he was charged before he was delivered to an officer of the demanding state, as required by extradition act.

Md.—State ex rel. Eberle v. Warden of Md. Penitentiary, 65 A.2d 291, 192 Md. 731, certiorari denied Eberle v. Swenson, 70 S.Ct. 42, 338 U.S. 855, 94 L.Ed. 510.

73.10 Okl.—Ex parte Hart, 244 P.2d 859, 95 Okl.Cr. 269.

74. Okl.—Ex parte Youstler, 268 P. 323, 40 Okl.Cr. 273.

75. U.S.—Innes v. Tobin, Tex., 36 S.Ct. 290, 240 U.S. 127, 60 L.Ed. 562.

25 C.J. p 273 note 29.

76. U.S.—Ex parte Brown, D.C.N.Y., 28 F. 653.

Tex.—Ex parte Innes, 173 S.W. 291, 77 Tex.Cr. 351.

76.5 U.S.—Dean v. State of Ohio, D. C.W.Va., 107 F.Supp. 937.

§ 22. — Effect of Illegal Rendition

As a general rule, illegal rendition of a prisoner by one state to another does not exempt him from prosecution in the state against which he offended, although if the governor of the asylum state requests his release, he should, in comity, be discharged.

It is not, according to the generally accepted view, as discussed in Criminal Law § 146, a cause for exemption from prosecution for a crime that accused was illegally arrested in another state and unlawfully brought within the jurisdiction of the state against which he offended, although the contrary has been held; nor is he protected from prosecution even if he was kidnapped in the other state and brought into the state without a semblance of right. It follows, therefore, that he is within the jurisdiction of the court even though he was illegally arrested or surrendered on invalid extradition proceedings,⁷⁷ as where the requisition proceedings were not strictly legal.⁷⁸

The state from which he was wrongfully taken has no redress except to demand the extradition of the abductors that they in turn may be prosecuted by it;⁷⁹ but if the governor of the state from which a fugitive has been taken by artifice or force

demands such fugitive's release the court of the state to which he is taken should, in comity, discharge him.⁸⁰ The defense that the prisoner is not a fugitive from justice must be raised before he is taken from the state to which he has fled,⁸¹ although there is also authority to the contrary.⁸²

Damages. Under the Uniform Criminal Extradition Act, a person who claims to have been illegally arrested under a demand for extradition is not entitled to maintain a civil action for either civil or punitive damages.^{82.5}

§ 23. Costs and Expenses

The costs, expenses, and compensation for which agents may recover, the governmental unit primarily responsible for payment thereof, and the procedure for the allowance thereof, are determinable in accordance with applicable state statutes.

Under the terms of the federal statute, 18 U.S.C. A. § 3195, all costs incurred in apprehending, securing, and transmitting a fugitive must be paid by the demanding state.

The costs and expenses which agents may incur, and the amount of compensation recoverable for their services,⁸³ and the instances in which such

77. U.S.—Collins v. Golden, D.C. Neb., 95 F.Supp. 251.

Ill.—**Corpus Juris** cited in People ex rel. Barrett v. Dixon, 56 N.E.2d 816, 819, 387 Ill. 420—People v. Hill, 183 N.E. 17, 350 Ill. 129—People v. Klinger, 149 N.E. 799, 319 Ill. 275, 42 A.L.R. 581.

Mo.—State v. Saunders, 232 S.W. 973, 288 Mo. 640.

Neb.—Jackson v. Olson, 22 N.W.2d 124, 146 Neb. 885, 165 A.L.R. 932, overruling In re Robinson, 45 N.W. 267, 29 Neb. 135, 26 Am.S.R. 378, 8 L.R.A. 398.

Okl.—Ex parte Harrelson, 264 P.2d 1004, 97 Okl.Cr. 399—Adams v. Waters, 237 P.2d 914, 94 Okl.Cr. 428, certiorari denied 72 S.Ct. 638, 343 U.S. 906, 96 L.Ed. 1325.

Pa.—Commonwealth ex rel. Hardy v. Martin, Com.Pl., 55 Lanc.L.Rev. 257.

S.C.—State v. Waitus, 83 S.E.2d 629, 226 S.C. 44, certiorari denied 75 S.Ct. 439, 348 U.S. 951, 99 L.Ed. 743, 25 C.J. p 271 note 8.

Other statement of rule

How one in custody under extradition warrant got into state is immaterial.

Tex.—Ex parte Ponzi, 290 S.W. 170, 106 Tex.Cr. 58.

Court of demanding state has jurisdiction to enter defendant's plea of guilty in prosecution for forgery. Cal.—People v. O'Connor, 251 P.2d 64, 114 C.A.2d 723.

78. Minn.—State v. Justus, 87 N.W. 770, 84 Minn. 237, 55 L.R.A. 325, 25 C.J. p 271 note 9.

Absence of counsel

Fact that a prisoner received on extradition from another state did not have counsel to represent him at time he waived extradition, and that such person was but seventeen years of age and may not have been capable of intelligently waiving extradition, could not defeat jurisdiction of court wherein a felony charge was pending against such person. Okl.—Ex parte Harrelson, 264 P.2d 1004, 97 Okl.Cr. 399.

79. U.S.—Mahon v. Justice, Ky., 8 S.Ct. 1204, 127 U.S. 700, 32 L.Ed. 283.

80. Ala.—Ex parte Barker, 6 So. 7, 87 Ala. 4, 13 Am.S.R. 17.

Pa.—Norton's Case, 15 Wkly.N.C. 395.

81. Mo.—**Corpus Juris** cited in Bloom v. Marciniak, 76 S.W.2d 712, 713, 25 C.J. p 272 note 12.

82. U.S.—Tennessee v. Jackson, D.C. Tenn., 36 F. 258, 1 L.R.A. 370.

82.5 U.S.—Picking v. Pennsylvania R. Co., C.C.A.Pa., 151 F.2d 240, rehearing denied 152 F.2d 753.

83. Tex.—Brightman v. Sheppard, 59 S.W.2d 112, 122 Tex. 318, 25 C.J. p 273 note 32.

Expenses on preliminary detention proceeding

Statute providing for costs and charges in extradition proceeding re-

fers to an issuance of a fugitive warrant by a justice of the peace, and not to a rendition warrant issued by the governor.

Tenn.—State ex rel. Groover v. Payne, 174 S.W.2d 464, 180 Tenn. 278.

Incidental expenses

Statutes allowing mileage to person returning fugitive under governor's requisition and authorizing governor to contract necessary expenses were held not superseded, but supplemented, by statute providing for judicial approval of expenses of person identifying or assisting in returning fugitive, in view of ejusdem generis rule.

Miss.—Kitchens v. Union County, 22 So.2d 356, 198 Miss. 403.

Jail fees

Statute providing that jailer need not receive any person committed under fugitive warrant until his jail fees are paid in advance is for benefit of jailer and not the prisoner.

Tenn.—State ex rel. Groover v. Payne, 174 S.W.2d 464, 180 Tenn. 278.

Particular expenses

Personal expenses of agent and expenses of victim kidnapped by fugitives, who was returned with them, were not allowable in addition to mileage.

Miss.—Kitchens v. Union County, 22 So.2d 356, 198 Miss. 403.

expenses shall be borne by the state⁸⁴ and in which by the county,⁸⁵ are determinable from the provisions of the statutes of the various states governing such matters.

With respect to the allowance of expenses, the agent appointed by the governor to receive a fugitive, even though he is a deputy sheriff, or sheriff, acts as a special agent to extradite, and not as an officer of the court, or as sheriff under his bond, at least until he has the prisoner in his custody in his county.^{85.5} Hence, the fees provided by the state statute are recoverable notwithstanding the agent is at the same time the sheriff of the county where the crime was committed,⁸⁶ unless the governor appoints an agent to receive a fugitive on the express condition that the state shall not be responsible for the expenses incurred.⁸⁷

The statutory procedure prescribed for the presentation of claims for expenses and the allowance thereof should be followed, which, under some statutes, is by petition to a specified court, which court, after a hearing, enters an order allowing such expenses, if proper, and such order is then presented to the county board of supervisors and allowed by the board.^{87.5} Where members of the board of supervisors are not required to be made parties defendant to proceedings against the county

for an order for issuance of a warrant for expenses of an agent in returning fugitives under the governor's requisition, a defect in a summons directed to the supervisors is immaterial,^{87.10} and the failure of the supervisors to appear in the proceeding and contest on behalf of the county is also immaterial.^{87.15}

Although the fees claimed by the agent are those allowed a sheriff for similar services and are reasonable, the state auditor cannot be compelled to issue a warrant therefor until after allowance by the governor;⁸⁸ but in these matters the governor acts merely as an auditing officer and may be compelled by mandamus to audit the account of an agent.⁸⁹ When an agent is appointed on condition that the arrest is to be made without expense to the state, he cannot collect from the state the expenses incurred by him in the matter.⁹⁰

Where under a statute complainant is liable for costs and charges for the weekly support of the prisoner, the jailer may discharge him for default in the payment thereof.⁹¹ The asking or receiving of a fee by an extradition agent may be made a misdemeanor by statute, to prevent abuses.⁹² The payment of costs by an injured person does not invalidate proceedings for extradition.⁹³

Unsuccessful proceedings

Agent named in requisition to reclaim fugitive in another state could not claim compensation for services where he did not return prisoner because governor of asylum state refused to honor requisition, notwithstanding governor of demanding state approved his claim.
Ky.—Coleman v. Greene, 40 S.W.2d 283, 239 Ky. 680.

84. Cal.—Dufton v. Daniels, 213 P. 949, 190 C. 577.
25 C.J. p 273 note 33.

85. Cal.—Dufton v. Daniels, supra.
Miss.—Kitchens v. Union County, 22 So.2d 356, 198 Miss. 403.

25 C.J. p 273 note 34.

85.5 Miss.—Kitchens v. Union County, supra.

86. Kan.—Franklin County v. Bell, 29 P. 392, 48 Kan. 131.

87. Mich.—Follensbee v. St. Clair County, 35 N.W. 257, 67 Mich. 614.

87.5 Miss.—Kitchens v. Union County, 22 So.2d 356, 198 Miss. 403.

Issues

On petition for mileage, etc., for returning fugitives under governor's requisition court can inquire only in-

to question whether requisition was issued and prisoners returned, and question of actual mileage and other reasonably essential expenses.

Miss.—Kitchens v. Union County, supra.

Presentation of claim to district attorney for opinion

(1) Under statutes requiring petition to circuit court for allowance of mileage for returning fugitives and requiring district attorney's opinion before allowance of public accounts, judge must ask district attorney's advice before allowing such mileage, but claim therefor need not be first presented to district attorney.

Miss.—Kitchens v. Union County, supra.

(2) Although district attorney's opinion as to allowance of claim must be presented to court, its allowance is ultimately committed to judgment of court, and in court claim may be contested by district attorney on behalf of county.

Miss.—Kitchens v. Union County, supra.

(3) Where court does not obtain district attorney's opinion with respect to allowance of claim for ex-

penses of agent, it has no authority either to allow or disallow claim, and in such situation judgment denying petition is tantamount merely to erroneous dismissal of claim and not a final judgment on merits.

Miss.—Kitchens v. Union County, supra.

87.10 Miss.—Kitchens v. Union County, supra.

87.15 Miss.—Kitchens v. Union County, supra.

88. Ind.—Vollmer v. Dubois County, 101 N.E. 321, 53 Ind.App. 149.
Mo.—State v. Allen, 79 S.W. 164, 180 Mo. 27.

89. Ky.—Wilson v. Bradley, 48 S.W. 166, 1088, 105 Ky. 52, 20 Ky.L. 1118.

Mont.—Territory v. Potts, 3 Mont. 364.

90. Mich.—Follensbee v. St. Clair County, 35 N.W. 257, 67 Mich. 614.
25 C.J. p 273 note 39.

91. Mich.—Malcolmson v. Scott, 23 N.W. 166, 56 Mich. 459.

92. N.Y.—People v. Columbia County, 31 N.E. 322, 134 N.Y. 1.

93. Ind.—Worth v. Wheatley, 108 N.E. 958, 183 Ind. 598.

III. INTERNATIONAL EXTRADITION

§ 24. Nature of Right

The right of a foreign power to demand the extradition of one accused of crime and the correlative duty to surrender him exist only when created by treaty; and in the United States, in the absence of statutory or treaty provision therefor, no authority exists in any branch of the government to surrender a fugitive criminal to a foreign government.

The right of a foreign power to demand the extradition of one accused of crime and the correlative duty to surrender him to the demanding country exist only when created by treaty.⁹⁴ There is no obligation on a government, under the law of nations, to surrender fugitive criminals to another government,⁹⁵ and where, in the absence of a treaty imposing such right and duty, such delivery is made, it is on the principle of comity, founded on the broad principle that it is to the interest of civilized communities that crimes acknowledged to be such should not go unpunished.⁹⁶ Under such circumstances the sovereign power on which demand is made may exercise its discretion and may investigate the charge on which the surrender is demanded.⁹⁷

In the United States it is well settled that, independent of statutory or treaty provision, no author-

ity exists in any branch of the government to surrender a fugitive criminal to a foreign government,⁹⁸ and mere desirability of providing for extradition is not a substitute for constitutional authority.⁹⁹ Power to extradite a national must be found in the statute or treaty conferring the power; it is not enough that the statute or treaty does not deny the power to surrender.¹ In 1864, however, Mr. Seward, secretary of state of the United States, with the sanction of President Lincoln, directed the arrest of a fugitive from Cuba as a purely executive act in a case in which this country had no extradition treaty with the country from which the criminal had fled.²

As the United States does not surrender fugitive criminals in the absence of treaty stipulation, its practice is to decline to request extradition from a foreign government with which this government has no treaty providing for surrender,³ although there are isolated cases in which this government has requested of foreign governments the surrender of fugitive criminals as an act of comity, but in these cases the request has always been accompanied by the statement that under our law reciprocity cannot be granted.⁴

94. U.S.—Factor v. Laubenheimer, III, 54 S.Ct. 191, 290 U.S. 276, 78 L.Ed. 315.

25 C.J. p 274 note 49.

Only in accordance with treaty

An accused person having sought an asylum in Mexico can be removed to the United States only in accord with the treaty of extradition.

Tex.—Dominguez v. State, 234 S.W. 79, 90 Tex.Cr. 92.

Proceedings sui generis

"Proceedings in extradition are sui generis, finding their origin and existence, as between different nations, wholly in treaty obligations."

Fla.—State v. Chase, 107 So. 541, 542, 91 Fla. 413—State v. Quigg, 107 So. 409, 411, 91 Fla. 197.

95. U.S.—U. S. ex rel. Donnelly v. Mulligan, C.C.A.N.Y., 74 F.2d 220, 25 C.J. p 273 note 43.

Right of asylum

In the absence of a treaty, a state may without violating any recognized international obligation decline to surrender to a demanding state a fugitive offender against the laws of the latter, but the right is that of the state to offer asylum, not that of the fugitive to insist upon it; and the arrest of United States national in Germany by United States troops for treason allegedly committed there during the Second World War was

not a violation of any right of asylum conferred by international law.

U.S.—Chandler v. U. S., C.A.Mass., 171 F.2d 921, certiorari denied 69 S.Ct. 640, 336 U.S. 918, 93 L.Ed. 1081, rehearing denied 69 S.Ct. 809, 336 U.S. 947, 93 L.Ed. 1103.

96. U.S.—U. S. ex rel. Donnelly v. Mulligan, C.C.A.N.Y., 74 F.2d 220, 25 C.J. p 274 notes 47, 48.

97. N.Y.—People v. Thaw, 154 N.Y.S. 949, affirmed 152 N.Y.S. 771, 167 App.Div. 104.

Tex.—Dominguez v. State, 234 S.W. 79, 90 Tex.Cr. 92.

"Thus it is now clear that apart from a treaty a state has no duty to deliver up a person who has sought asylum within its boundaries. If the state wishes, it can afford him a refuge and protection from the state which he has fled. Of course, a state is under no duty to afford asylum to a fugitive; it may expel him from its territories if it choose, and without complaint from the individual who is expelled. But it may grant to him an asylum, and, if such is done by it, no breach of international law is involved. The discretion, it should be noted, is that of the state to which the criminal has fled."

U.S.—U. S. ex rel. Donnelly v. Mulligan, C.C.A.N.Y., 74 F.2d 220, 222.

98. U.S.—Valentine v. U. S. ex rel. Neidecker, N.Y., 57 S.Ct. 100, 299 U.S. 5, 81 L.Ed. 5.

Ivancevic v. Artukovic, C.A.Cal., 211 F.2d 565, certiorari denied Artukovic v. Ivancevic, 75 S.Ct. 28, 348 U.S. 818, 99 L.Ed. 645, rehearing denied 75 S.Ct. 202, 348 U.S. 889, 99 L.Ed. 698.

25 C.J. p 274 note 45.

The executive is without inherent power to seize a fugitive criminal and surrender him to a foreign nation.

U.S.—Argento v. Horn, C.A.Ohio, 241 F.2d 258, certiorari denied 78 S.Ct. 23, 355 U.S. 818, 2 L.Ed.2d 35, rehearing denied 78 S.Ct. 145, 355 U.S. 885, 2 L.Ed.2d 115.

99. U.S.—Valentine v. U. S. ex rel. Neidecker, N.Y., 57 S.Ct. 100, 299 U.S. 5, 81 L.Ed. 5.

1. Treaty with France held not to grant to the executive the discretionary power to surrender citizens of the United States.

U.S.—Valentine v. U. S. ex rel. Neidecker, supra.

2. U.S.—Ex parte McCabe, D.C.Tex., 46 F. 363, 12 L.R.A. 589.

25 C.J. p 274 note 46.

3. U.S.—Wing's Case, 6 Op.Atty.Gen. p 85.

25 C.J. p 274 note 50.

4. Vol. 4 Moore Int.L.Dig. § 582.

Criminal nature. Extradition proceedings are not in their nature criminal, even if the alleged fugitive is a criminal; extradition is not punishment for crime, even though such punishment may follow extradition.⁵

§ 25. Treaty and Statutory Provisions

Extradition treaties have the force and effect of acts of congress, binding on all courts, and should be liberally construed. Congress may provide for the surrender of criminals for extradition, with or without treaties to such effect.

In view of the rule discussed in the preceding section that international extradition in the United States is based on treaty stipulation, the United States has treaties of extradition with most governments.⁶ A treaty stipulation on the part of the government of the United States to surrender fugitives from justice is a lawful stipulation, and within the authority of the treaty making power.⁷

"Asylum," as used in extradition treaties, means a place where the matter of which a person is accused may not be tried.⁸

Effect of war. Taking into consideration the conduct of the nations involved, acting through the political branches of their governments, it has been held that a treaty of extradition was not terminated by war, but merely suspended during its existence, and is now in effect.^{8.5} However, the treaty between the United States and Germany providing for the delivery on requisition of persons charged with specified crimes, but not including treason, has been held not applicable where the treason was committed by a United States national in Germany during the Second World War.^{8.10}

Construction. The construction of an extradition treaty made by the Constitution a part of the supreme law of the land is for the courts, and they are not bound by the construction placed thereon by the executive or diplomatic branches of the government or by the foreign country with whom the treaty is made.⁹ If an extradition treaty fairly admits of two constructions, one restricting the rights which may be claimed under it and the other enlarging them, the more liberal construction is to be preferred.¹⁰ Such treaties should be con-

5. U.S.—U. S. ex rel. Oppenheim v. Hecht, C.C.A.N.Y., 16 F.2d 955, certiorari denied 47 S.Ct. 572, 273 U.S. 969, 71 L.Ed. 883.

U. S. ex rel. Klein v. Mulligan, D.C.N.Y., 1 F.Supp. 635, affirmed, C.C.A., 50 F.2d 687, certiorari denied 52 S.Ct. 41, 284 U.S. 665, 76 L. Ed. 563.

6. U.S.—In re Stupp, C.C.N.Y., 23 F. Cas.No.13,562, 11 Blatchf. 124. 25 C.J. p 274 note 59.

Treaties with Germany

(1) Treaty between Western Germany and United States, although it excluded Berlin and Germany as whole, would be interpreted as terminating occupation of Germany by United States, for purpose of determining applicability of statute providing for extradition of one in United States to any foreign country or territory or part thereof occupied by or under control of United States. U.S.—In re Kraussman, D.C.Conn., 130 F.Supp. 926.

(2) Other treaties see 33 C.J. p 414 note 42 [b].

Treaties with Great Britain

(1) Where extradition treaty between United States and Great Britain provided that it should become effective ten days after its publication, treaty was published in United States on Aug. 9, 1932, and in Great Britain on June 14, 1935, extradition proceeding commenced in October, 1937, was governed by the treaty, notwithstanding two of the nineteen crimes for which extradition was

sought were committed before June 24, 1935.

U.S.—Cleugh v. Strakosch, C.C.A. Cal., 109 F.2d 330.

(2) Treaties of Great Britain with the United States have been extended to include the surrender of fugitive offenders between the state of North Borneo and the Philippine Islands or Guam.

Parliamentary Paper, 1914, Cd. 7149. Treaty Series 1914 No. 1.

Treaty with Serbia

Extradition treaty executed by and between the United States and the Kingdom of Serbia in 1902 is a valid and effective treaty between the United States and the Federal Peoples' Republic of Yugoslavia.

U.S.—Ivancevic v. Artukovic, C.A. Cal., 211 F.2d 565, certiorari denied Artukovic v. Ivancevic, 75 S. Ct. 28, 348 U.S. 818, 99 L.Ed. 645, rehearing denied 75 S.Ct. 202, 348 U.S. 889, 99 L.Ed. 698.

7. U.S.—U. S. ex rel. Geen v. Fetters, D.C.Pa., 1 F.Supp. 637.

Cal.—Corpus Juris Secundum cited in Coumas v. Superior Court in and for San Joaquin County, 192 P.2d 449, 452, 31 C.2d 682.

25 C.J. p 274 note 60.

8. U.S.—In re Stupp, C.C.N.Y., 23 F.Cas.No.13,562, 11 Blatchf. 124, 155.

5 C.J. p 1417 note 4.

8.5 U.S.—Argento v. Horn, C.A.Ohio, 241 F.2d 258, certiorari denied 78 S.Ct. 23, 355 U.S. 818, 2 L.Ed.2d 35, rehearing denied 78 S.Ct. 145, 355 U.S. 885, 2 L.Ed.2d 115.

Effect of war on treaties generally see Treaties § 10 c.

Treaty with Italy

Notification by the state department to the Italian government, that the United States government desired to keep in force and revive twelve treaties with respect to conduct of affairs for the mutual benefit of both countries and protection of citizens and property rights including the right of extradition, was not invalid, and hence an Italian national was not entitled to avoid extradition to Italy on the ground that no valid treaty existed between Italy and United States authorizing his extradition.

U.S.—Argento v. North, D.C.Ohio, 131 F.Supp. 538, affirmed, C.A., 241 F. 2d 258, certiorari denied 78 S.Ct. 23, 355 U.S. 818, 2 L.Ed.2d 35, rehearing denied 78 S.Ct. 145, 355 U. S. 885, 2 L.Ed.2d 115.

8.10 U.S.—Chandler v. U. S., C.A. Mass., 171 F.2d 921, certiorari denied 69 S.Ct. 640, 336 U.S. 918, 93 L.Ed. 1081, rehearing denied 69 S.Ct. 809, 336 U.S. 947, 93 L.Ed. 1103.

D.C.—Gillars v. U. S., 182 F.2d 962, 87 U.S.App.D.C. 16.

9. U.S.—Ex parte Charlton, C.C.N.J., 185 F. 880, affirmed 33 S.Ct. 945, 229 U.S. 447, 57 L.Ed. 257—U. S. v. Greene, D.C.Ga., 146 F. 766, affirmed 154 F. 401, 85 C.C.A. 251, certiorari denied 28 S.Ct. 261, 207 U.S. 596, 52 L.Ed. 351.

10. U.S.—Factor v. Laubenheimer,

strued more liberally than criminal statutes or the technical requirements of criminal procedure.¹¹ There is no room for construction, however, where the treaty is explicit on the subject.¹²

Operation and effect. In accordance with the usual rules as to the construction and operation of treaties, discussed in Treaties § 12, a treaty is of equal force with an act of congress, and the provisions of a treaty of extradition are binding on the courts.¹³ Such treaties are obligatory on the tribunals of the several states as well as those of the federal government.¹⁴ A treaty of extradition is available to persons having rights secured or recognized thereby, and may be set up as a defense to a criminal prosecution established in disregard thereof.¹⁵

It has been held that prior crimes are included within the operation of a treaty, where its language will admit of such a construction, unless they are expressly excepted.¹⁶ Accordingly, a person who

has committed a crime abroad and come to the United States before the conclusion of a treaty of extradition authorizing surrender for such a crime does not thereby acquire a right of asylum,¹⁷ and a treaty construed as covering a crime committed before its conclusion¹⁸ or before the dates of the exchange of ratifications¹⁹ is not obnoxious to the objection that it is an *ex post facto* law.

The obligation of the government to institute extradition proceedings pursuant to a treaty with a foreign government continues until it can say that any further attempt is subversive of the protection which the government affords to all within its borders.²⁰

Statutes. The authority is vested in the federal government to enter into extradition treaties and to enact laws on the subject,²¹ and a statute of a state providing for the surrender of fugitives from the justice of foreign countries is unconstitutional and void.²² Congress has a perfect right to provide for

Ill., 54 S.Ct. 191, 290 U.S. 276, 78 L.Ed. 315.

Villareal v. Hammond, C.C.A. Tex., 74 F.2d 503.

11. Reason for rule

"The surrender of a fugitive, duly charged in the country from which he has fled with a nonpolitical offense and one generally recognized as criminal at the place of asylum, involves no impairment of any legitimate public or private interest. The obligation to do what some nations have done voluntarily, in the interests of justice and friendly international relationships . . . should be construed more liberally than a criminal statute or the technical requirements of criminal procedure." U.S.—Factor v. Laubenheimer, Ill., 54 S.Ct. 191, 197, 290 U.S. 276, 78 L. Ed. 315.

To limited extent

In the construction and carrying out of extradition treaties the ordinary technicalities of criminal proceedings are applicable only to a limited extent, since an exact correspondence between the laws of the two countries cannot be expected and the only purpose of extradition is to put the accused on trial under the laws of his own country.

U.S.—U. S. v. Greene, D.C.Ga., 146 F. 766, affirmed 154 F. 401, 85 C.C.A. 251, certiorari denied 28 S.Ct. 261, 207 U.S. 596, 52 L.Ed. 351.

25 C.J. p 275 note 71.

12. Cal.—Coumas v. Superior Court in and for San Joaquin County, 192 P.2d 449, 31 C.2d 682.

"Citizens," "persons"

In view of the express provision of art 5 in the treaty with France,

providing that neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of the convention, a citizen of this country is not included within the term "persons" as used in art 1, providing that the contracting parties "mutually agree to deliver up persons" etc. U.S.—Valentine v. U. S. ex rel. Neidecker, N.Y., 57 S.Ct. 100, 299 U.S. 5, 81 L.Ed. 5.

Treaty with Hellenic Republic

Stipulation in extradition treaty between Greece and United States, that state appealed to shall decide whether person claimed is its own citizen, countervails any argument that United States intended its doctrine of absolute right of expatriation to prevail in extradition demand on Greek government for return of Greek native naturalized as American citizen without Greek government's consent.

Cal.—Coumas v. Superior Court in and for San Joaquin County, 192 P.2d 449, 31 C.2d 682.

13. U.S.—Ex parte Schorer, D.C. Wis., 195 F. 334.

In re Metzger, D.C.N.Y., 17 F. Cas.No.9,511, 1 Edm.Sel.Cas. 399, 5 N.Y.Leg.Obs. 83.

Cal.—Coumas v. Superior Court in and for San Joaquin County, 192 P.2d 449, 31 C.2d 682.

14. Cal.—Coumas v. Superior Court in and for San Joaquin County, supra.

Pa.—Goldfon v. Allegheny County, 8 Pa.Dist. 387.

Tex.—Dominguez v. State, 234 S.W. 79, 90 Tex.Cr. 92.

Blandford v. State, 10 Tex.App. 627.

15. Cal.—**Corpus Juris Secundum** quoted in Coumas v. Superior Court in and for San Joaquin County, 192 P.2d 449, 452, 31 C.2d 682.

Tex.—Dominguez v. State, 234 S.W. 79, 90 Tex.Cr. 92.

16. U.S.—Cleugh v. Strakosch, C.C. A.Cal., 109 F.2d 330. 25 C.J. p 276 note 94.

17. U.S.—Ker v. People of State of Illinois, Ill., 7 S.Ct. 225, 119 U.S. 436, 30 L.Ed. 421.

In re De Giacomo, C.C.N.Y., 7 F. Cas.No.3,747, 12 Blatchf. 391. 25 C.J. p 275 note 66.

18. U.S.—U. S. ex rel. Oppenheim v. Hecht, C.C.A.N.J., 16 F.2d 955, certiorari denied 47 S.Ct. 572, 273 U.S. 769, 71 L.Ed. 833.

In re De Giacomo, C.C.N.Y., 7 F. Cas.No.3,747, 12 Blatchf. 391.

19. U.S.—In re Vandervelpen, C.C. N.Y., 28 F.Cas.No.16,844, 14 Blatchf. 137.

20. U.S.—Ex parte Schorer, D.C. Wis., 195 F. 334.

21. U.S.—U. S. v. Rauscher, N.Y., 7 S.Ct. 234, 110 U.S. 407, 30 L.Ed. 425—Holmes v. Jennison, Vt., 14 Pet. 540, 10 L.Ed. 579, 618.

National power

Power to provide for extradition is a national power.

U.S.—Valentine v. U. S. ex rel. Neidecker, N.Y., 57 S.Ct. 100, 299 U.S. 5, 81 L.Ed. 5.

22. N.Y.—People v. Columbia County, 31 N.E. 322, 134 N.Y. 1. 25 C.J. p 275 note 74.

the surrender of criminals for extradition in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered on such proofs of criminality as it may judge sufficient;²³ and this power is not affected by the character of the criminal procedure of the foreign country or by the fact that the alleged offender is a citizen of the United States.²⁴

Whatever may be the power of congress to provide for extradition independent of treaty, that power has not been exercised save with relation to a foreign country or territory occupied or under the control of the United States,^{24.5} and aside from those provisions the act of congress relating to extradition simply defines the procedure to carry out an existing extradition treaty or convention.²⁵

Until 1848 there was no legislation in the United States on the subject of extradition. Extradition was granted under the provisions of the treaties with Great Britain and France, although the question whether a fugitive could be legally surrendered in the absence of an act of congress passed to carry out the provisions of the treaty was decided in the affirmative in many cases,²⁶ and in the negative in an early case arising under the treaty with France.²⁷

§ 26. Extraditable Offenses

Extradition can be granted only for an offense included in the extradition treaty.

Since no authority exists in any branch of the United States government to surrender a fugitive criminal in the absence of a treaty stipulation, as discussed supra § 24, extradition can be granted, where a treaty exists, only for an offense enumerat-

ed in the treaty and this government will request extradition from a foreign government only for an offense included in the treaty.²⁸ By the enumeration in the several extradition treaties of certain crimes for which the surrender of a fugitive may be demanded, it seems that all other offenses not included in such enumeration are, by necessary implication, excluded from the operation of the treaties, and that therefore one of the contracting nations cannot, by virtue of the provisions of the treaty and as a matter of right, demand of the other nation the surrender of a person charged with an offense not specified in the treaty between the two nations.²⁹

It has been held, however, that the existence of a treaty providing for extradition for certain crimes does not deprive either contracting nation of the power and right to exercise its own discretion in cases not coming within the terms of the treaty. With relation to persons charged with offenses not named in the treaty, each government, as an incident of its sovereignty, may either grant or deny to the fugitive an asylum within its jurisdiction, and, where a person charged with a crime not provided for by treaty is delivered to the authorities of the United States as an act of comity, such person is not entitled to be discharged on habeas corpus, and none of his personal rights has been violated.³⁰ When general terms are used in an extradition treaty enumerating extraditable offenses, the courts will not confine them to their meaning at common law; the question whether a given offense comes within the treaty must be determined by the law as it exists in the two countries at the time application is made for extradition.³¹

23. U.S.—Voloshin v. Ridenour, C.C. A.Canal Zone, 299 F. 134.

25 C.J. p 274 note 56, p 275 note 75.

24. U.S.—In re Neely, C.C.N.Y., 103 F. 626, affirmed 21 S.Ct. 308, 180 U.S. 126, 45 L.Ed. 457.

24.5 U.S.—Valentine v. U. S. ex rel. Neidecker, N.Y., 57 S.Ct. 100, 299 U.S. 5, 81 L.Ed. 5.

Meaning of "occupation and control"

"Occupation and control," mentioned in statute providing for extradition of one in United States to any foreign country or to territory or part thereof occupied by or under control of United States, refers to full governmental authority based on dominating police or military force which makes authority effective.

U.S.—In re Kraussman, D.C.Conn., 130 F.Supp. 926.

Statute held inapplicable

Where, while case was pending for

extradition of one from United States to jurisdiction of United States High Commission Courts for Germany, occupation of Germany by United States was terminated by treaty, statute providing for extradition of one in United States to any foreign country or territory or part thereof occupied by or under control of the United States became inapplicable, notwithstanding treaty provision that the United States High Commission Courts would continue in existence for several months to dispose of cases pending or proceedings based on acts or omissions which occurred prior to effective date of treaty.

U.S.—In re Kraussman, supra.

25. U.S.—Valentine v. U. S. ex rel. Neidecker, N.Y., 57 S.Ct. 100, 299 U.S. 5, 81 L.Ed. 5.

25 C.J. p 275 notes 78-82.

26. U.S.—In re Metzger, N.Y., 5 How. 176, 12 L.Ed. 104.

25 C.J. p 275 note 76.

27. N.Y.—In re Metzger, 1 Barb. 248.

25 C.J. p 275 note 77.

28. U.S.—Wing's Case, 6 Op. Atty. Gen. p 85.

29. U.S.—In re Dubroca y Paniagua, D.C.Pa., 33 F.2d 181.

25 C.J. p 276 notes 89, 91.

30. Cal.—Ex parte Foss, 36 P. 669, 102 C. 347, 41 Am.S.R. 182, 25 L.R. A. 593.

25 C.J. p 276 note 92.

31. U.S.—Cohn v. Jones, D.C.Iowa, 100 F. 639.

Iowa.—State v. Spiegel, 83 N.W. 722, 111 Iowa 701.

State law governing

State law was applicable in determining whether accused was subject

The court will not decline to surrender for extradition a person charged with an extraditable offense notwithstanding a possibility that he might also be tried for the same offense within the United States.³² Whether the offense committed is an extraditable crime is a mixed question of law and of fact,³³ and the decision of the courts of the asylum country as to whether an offense is within the terms of an extradition treaty is final and the question cannot be again raised in the courts of the demanding country after extradition.³⁴ Particular crimes have been held to be, or not to be, extraditable offenses within the terms of particular treaties.³⁵

A crime subject to infamous punishment in a foreign country may be an extraditable crime under the treaty with that country, although not subject to such punishment in this country.³⁶

Barred offense. Under the provisions of some treaties extradition shall not be granted if legal proceedings or the enforcement of the penalty for the act committed by the person claimed has become barred by limitation, according to the laws of the country to which the requisition is addressed. The question whether the contracting sovereigns intended that only the statute of limitations of the country to which the requisition is addressed should

to extradition to Yugoslavia on charges of murder and participation in murder in 1941 and 1942 while serving as Minister of Internal Affairs in independent state of Croatia. U.S.—U. S. ex rel. Karadzole v. Artukovic, D.C.Cal., 170 F.Supp. 383.

32. Victim's death in jurisdiction

Person completed offense of murder when fatal blow was struck in Mexico, and was subject to extradition to Mexico, although victim died in United States.

U.S.—Ex parte Davis, C.C.A., 54 F.2d 723.

33. U.S.—Terlinden v. Ames, Ill., 22 S.Ct. 484, 184 U.S. 270, 46 L.Ed. 534.

34. U.S.—Greene v. U. S., Ga., 154 F. 401, 85 C.C.A. 251, certiorari denied 28 S.Ct. 261, 207 U.S. 596, 52 L.Ed. 351.

35. U.S.—In re Balensi, C.C.N.Y., 120 F. 864.
25 C.J. p 276 note 97.

Attempt to take life held an extraditable offense under treaty with Italy.

U.S.—U. S. ex rel. Di Stefano v. Moore, D.C.N.Y., 46 F.2d 308, affirmed, C.C.A., 46 F.2d 310, certiorari denied U. S. ex rel. Di Stefano v. Pulver, 51 S.Ct. 364, 283 U.S. 830, 75 L.Ed. 1443.

Embezzlement of public funds

(1) Such crime is extraditable under the treaty with Mexico.

U.S.—Fernandez v. Phillips, N.H., 45 S.Ct. 541, 268 U.S. 311, 69 L.Ed. 970.

(2) Other cases see 25 C.J. p 276 note 97 [h].

False pretenses

The crime of obtaining money or valuable securities by false pretenses is extraditable under treaty with Great Britain.

U.S.—Cleugh v. Strakosch, C.C.A.Cal., 109 F.2d 330.

25 C.J. p 276 note 97 [j].

Fraud

Complaint charging accused with

having committed "crime of fraud" did not charge an offense covered by treaty with Mexico.

U.S.—In re Wise, D.C.Tex., 168 F. Supp. 366.

Fraudulent conversion is an extraditable offense under treaty with Great Britain.

U.S.—Cleugh v. Strakosch, C.C.A.Cal., 109 F.2d 330.

Kidnapping

(1) Kidnapping is an extraditable offense under treaty with Mexico.

U.S.—Villareal v. Hammond, C.C.A. Tex., 74 F.2d 503.

(2) Also under the Webster-Ashburn Treaty of 1842.

U.S.—Collier v. Vaccaro, C.C.A.Md., 51 F.2d 17.

(3) The offense of seduction is not extraditable as "kidnapping" under Treaty of April 6, 1904, art 2 par 14, 33 U.S.St. at L. p 2268, between the United States and Cuba defining kidnapping to be the abduction and detention of a person in order to exact money or for other unlawful end.

U.S.—In re Dubroca y Paniagua, D.C. Pa., 33 F.2d 181.

(4) Other cases see 25 C.J. p 276 note 97 [e].

Larceny

(1) "Larceny," as generally understood in United States, and as used in treaties, consists in the wrongful or fraudulent invasion by one of another's possession of personal property with intent to convert it to taker's own use and in the taking and carrying it away.

U.S.—Hatfield v. Guay, C.C.A.N.H., 87 F.2d 358, certiorari denied 57 S.Ct. 669, 300 U.S. 678, 81 L.Ed. 883, rehearing denied 57 S.Ct. 793, 301 U.S. 713, 81 L.Ed. 1365.

(2) The amount stolen, to constitute an extraditable offense under the treaty with Mexico, must exceed the minimum amount fixed by the treaty.

U.S.—In re Lucke, D.C.Tex., 20 F. Supp. 658.

(3) Larceny is an extraditable offense within treaty with Canada.

U.S.—U. S. ex rel. Donnelly v. Mulligan, C.C.A.N.Y., 76 F.2d 511.

(4) Other cases see 25 C.J. p 276 note 97 [o].

Murder

(1) Murder held extraditable offense within treaty with Canada.

U.S.—Vaccaro v. Collier, D.C.Md., 38 F.2d 862, modified on other grounds, C.C.A., Collier v. Vaccaro, 51 F.2d 17.

(2) Crime of murder is within provisions of Treaty between United States and Yugoslavia relating to extradition.

U.S.—U. S. ex rel. Karadzole v. Artukovic, D.C.Cal., 170 F.Supp. 383.

Obtaining money under false representations held extraditable offense under treaty with Canada.

U.S.—Bernstein v. Gross, C.C.A.Tex., 58 F.2d 154.

Receiving money knowing it to have been fraudulently obtained held extraditable offense under treaty with Great Britain.

U.S.—Factor v. Laubenheimer, Ill., 54 S.Ct. 191, 290 U.S. 276, 78 L.Ed. 315.

U. S. ex rel. Klein v. Mulligan, C. C.A.N.Y., 50 F.2d 687, certiorari denied 52 S.Ct. 41, 284 U.S. 665, 76 L.Ed. 563.

U. S. ex rel. Geen v. Feters, D. C.Pa., 1 F.Supp. 637.

Seduction is an extraditable offense under Treaty with Cuba of Jan. 14, 1926 art 2 par 19, 44 U.S.St. at L. p 2393.

U.S.—In re Dubroca y Paniagua, D. C.Pa., 33 F.2d 181.

Worthless check

Giving of worthless check was not within treaty with Mexico.

U.S.—In re Wise, D.C.Tex., 168 F. Supp. 366.

36. U.S.—In re Farez, C.C., 8 F.Cas. No.4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How.Pr., N.Y., 107.

be considered in extradition proceedings under such a treaty, and that the application of the statute of the demanding state should be left for determination by its courts, will not be decided where it is apparent that prosecution for the offense charged is not barred by the statutes of limitations in either country.³⁷ Where there is no statute of limitations affecting the offense charged in the state in which the accused person is found, extradition proceedings are not barred by the lapse of time.³⁸

Criminality in both countries. Under some treaties an offense is extraditable only if the acts charged are criminal under the laws of both countries.³⁹ The law does not require that the name by which the crime is described in the two countries shall be the same, or that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.⁴⁰

Furthermore, in the United States, extradition for such an offense is not limited to persons charged with acts which are made criminal by the laws of the United States but may be effected as well in the case of persons charged with acts which are made criminal by the law of the foreign country and the law of the state in which the fugitive is found,⁴¹ particularly since there are no common-law crimes against the United States, although some cases speak of applying the common-law definition of a crime in extradition proceedings.⁴²

In view of the policy of our government, however, in entering into extradition treaties, to name as treaty offenses only those generally recognized as criminal by the laws in force within its own

territory, where the treaty expressly names an offense as extraditable, extradition of a fugitive charged with such an offense will be granted, notwithstanding he has succeeded in finding some state, territory, or district in which the offense charged is not punishable.⁴³ This rule is subject to the qualification that where the treaty naming the offense as extraditable also expressly provides that it must be made criminal by the laws of both countries, as, for example, paragraph 4 of article 1 of the Convention of 1889 with Great Britain, the offense charged must also be a crime within the state where the fugitive is found.⁴⁴

Where an extradition treaty uses general names, such as "murder" or "arson," in defining the classes of crimes for which extradition may be granted thereunder, such names are not necessarily confined to their meaning at common law, but the question whether a given offense comes within the treaty must be determined by the law as it exists in the two countries at the time the extradition is applied for.⁴⁵ The fact that the crime committed did not also constitute a crime in the asylum country at the time it was committed is immaterial, if it constituted a crime in both countries at the time demand was made.⁴⁶

Escape after conviction. Where the prisoner has been convicted in a foreign country of an extraditable offense and has fled his country to escape punishment, he is a fugitive from justice and may be extradited.⁴⁷

Political offenses. A person will not be extradited for political offenses.⁴⁸ The decision of the

37. U.S.—President of U. S. ex rel. Caputo v. Kelly, C.C.A.N.Y., 96 F. 2d 787.

38. U.S.—Vaccaro v. Collier, D.C. Md., 38 F.2d 862, modified on other grounds, C.C.A., Collier v. Vaccaro, 51 F.2d 17.

39. U.S.—Collins v. Loisel, La., 42 S. Ct. 469, 259 U.S. 309, 66 L.Ed. 956. 25 C.J. p 277 note 5.

40. U.S.—Collins v. Loisel, supra. U. S. ex rel. Hatfield v. Guay, D. C.N.H., 11 F.Supp. 806, modified on other grounds, C.C.A., Hatfield v. Guay, 87 F.2d 358, certiorari denied 57 S.Ct. 669, 300 U.S. 678, 81 L. Ed. 833, rehearing denied 57 S.Ct. 793, 301 U.S. 713, 81 L.Ed. 1365—U. S. ex rel. Geen v. Fetters, D.C. Pa., 1 F.Supp. 637. 25 C.J. p 277 notes 6, 13.

41. U.S.—Villareal v. Hammond, C. C.A.Tex., 74 F.2d 503—Bernstein v. Gross, C.C.A.Tex., 58 F.2d 154—U. S. ex rel. Klein v. Mulligan, C.

C.A.N.Y., 50 F.2d 687, certiorari denied 52 S.Ct. 41, 284 U.S. 665, 76 L. Ed. 563—In re Dubroca y Paniagua, D.C.Pa., 33 F.2d 181.

U. S. ex rel. Geen v. Fetters, D.C. Pa., 1 F.Supp. 637.

In re Farez, N.Y., 8 F.Cas.No. 4,645, 2 Abb. 346, 7 Blatchf. 345, 348, 40 How.Pr., N.Y., 107.

25 C.J. p 277 note 7.

42. U.S.—In re Adutt, C.C.Ill., 55 F. 376.

43. U.S.—Factor v. Laubenheimer, Ill., 54 S.Ct. 191, 290 U.S. 276, 78 L.Ed. 315.

However, it was broadly stated in a circuit court case that the right of extradition stands on whether or not the offense with which accused is charged is an offense under the laws of the state where found. U.S.—In re Walshe, C.C.Ind., 125 F. 572, affirmed 24 S.Ct. 657, 194 U.S. 205, 48 L.Ed. 938.

44. U.S.—Wright v. Henkel, N.Y.,

23 S.Ct. 781, 190 U.S. 40, 47 L.Ed. 948.

45. U.S.—Cohn v. Jones, D.C.Iowa, 100 F. 639—In re Ezeta, D.C.Cal., 62 F. 972—In re Cross, D.C.N.C., 43 F. 517.

25 C.J. p 277 note 12.

46. U.S.—U. S. ex rel. Oppenheim v. Hecht, C.C.A.N.J., 16 F.2d 955, certiorari denied 47 S.Ct. 572, 273 U. S. 769, 71 L.Ed. 883.

47. U.S.—U. S. ex rel. Di Stefano v. Moore, D.C.N.Y., 46 F.2d 308, affirmed, C.C.A., 46 F.2d 310, certiorari denied U. S. ex rel. Di Stefano v. Pulver, 51 S.Ct. 364, 283 U.S. 830, 75 L.Ed. 1443.

25 C.J. p 278 notes 24–27.

48. U.S.—U. S. ex rel. Giletti v. Commissioner of Immigration, Ellis Island, New York Harbor, C.C. A.N.Y., 35 F.2d 687.

25 C.J. p 277 notes 14–16.

"War crimes"

Indictment alleging that many un-

question whether or not an offense is political is by express provision of several of the treaties of the United States declared to rest with the authorities of the government on which the demand for surrender is made, but in the absence of such a conventional provision the right to determine the question undoubtedly inheres in the government of which the extradition is requested.⁴⁹ What constitutes a political offense has not been satisfactorily defined,^{49,5} and depends on the particular circumstances of each case.⁵⁰ To bring an offense within the meaning of the words "of a political character" it must be incidental to, and form part of, political disturbances.⁵¹ An extradition magistrate has jurisdiction, and it is his duty, to determine whether an offense charged is political within the meaning of the treaty provision.⁵²

§ 27. — Joinder of Offenses

The joinder of a nonextraditable offense with an extraditable offense in a complaint is not fatal.

If two offenses, only one of which is specified as extraditable in the treaty, are joined in the complaint, this will not render the warrant unlawful as it will not be presumed that the demanding government, contrary to the provisions of the treaty, will punish for an offense not specified in the treaty.⁵³

§ 28. Persons Who May Be Extradited

In the absence of a treaty restriction to the contrary, a citizen of the country on which the demand is made may be extradited.

In the absence of any treaty stipulation provid-

ing otherwise, it is immaterial that the person whose extradition is demanded is a citizen of the country on which the demand is made.⁵⁴ Many of the extradition treaties of the United States, however, contain a provision declaring that neither of the contracting parties shall be bound to surrender its own citizens, and where a treaty so provides there can be no such surrender or demand.⁵⁵

Some treaties contain a provision that neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of the convention, but they shall have the power to deliver them up if in their discretion it is deemed proper to do so.⁵⁶ When a treaty does not exempt from extradition citizens who have returned to their native country after committing a crime in the demanding country, the United States will extradite its own citizens who are seeking asylum in the United States, even though the foreign government demanding their extradition makes a different interpretation of the treaty and refuses to extradite its own citizens under similar conditions.⁵⁷

"*Fugitives.*" Where the treaty provides for the delivery up of those who "shall seek an asylum" and those who "shall be found" in the respective jurisdictions, the right of extradition is not limited to fugitives, but applies to those who shall be found in the jurisdiction who have committed extraditable offenses, irrespective of whether or not they are fugitives.⁵⁸ A treaty, however, containing a mutual undertaking of the parties to deliver up on requisition any person who may be charged with, or may

identified persons were killed on orders of one, who was sought to be extradited to Yugoslavia, while he was a Government official in Croatia during World War II, charged offenses of a political character within meaning of Treaty between the United States and Yugoslavia prohibiting surrender of fugitives charged with political offenses; and the fact that alleged offenses were allegedly "war crimes" would not cause them to lose their character as "political offenses."

U.S.—Karadzole v. Artukovic, C.A. Cal., 247 F.2d 198, vacated on other grounds 78 S.Ct. 381, 355 U.S. 393, 2 L.Ed.2d 356.

49. U.S.—In re Ezeta, D.C.Cal., 62 F. 972.

49.5 U.S.—U. S. ex rel. Karadzole v. Artukovic, D.C.Cal., 170 F.Supp. 333.

50. U.S.—In re Ezeta, D.C.Cal., 62 F. 972.

25 C.J. p 278 note 22.

51. U.S.—In re Ezeta, supra. Ind.—Knox v. State, 73 N.E. 255, 164 Ind. 226, 108 Am.S.R. 291, 3 Ann. Cas. 539.

25 C.J. p 278 notes 20, 21.

Political uprising

"Political character" means an offense against the government itself or incident to political uprisings. It is not a political offense because the crime was committed by a politician. The crime must be incidental to, and form a part of, political disturbances. It must be in furtherance of one side or another of a bona fide struggle for political power.

U.S.—U. S. ex rel. Karadzole v. Artukovic, D.C.Cal., 170 F.Supp. 333.

52. U.S.—Ornelas v. Ruiz, Tex., 16 S.Ct. 689, 161 U.S. 502, 40 L.Ed. 787.

In re Ezeta, D.C.Cal., 62 F. 972.

25 C.J. p 278 note 23.

53. U.S.—Bingham v. Bradley, Ill., 36 S.Ct. 634, 241 U.S. 511, 60 L.Ed. 1136.

54. U.S.—In re Neely, C.C.N.Y., 103 F. 626, affirmed 21 S.Ct. 308, 180 U. S. 126, 45 L.Ed. 457—Ex parte McCabe, D.C.Tex., 46 F. 363, 12 L.R.A. 589.

25 C.J. p 278 notes 30, 31.

55. U.S.—U. S. ex rel. Neidecker v. Valentine, C.C.A.N.Y., 81 F.2d 32, affirmed Valentine v. U. S., 57 S.Ct. 100, 299 U.S. 5, 81 L.Ed. 5.

Cal.—Cumas v. Superior Court in and for San Joaquin County, 192 P.2d 449, 31 C.2d 682.

25 C.J. p 278 notes 32-34.

56. U.S.—In re Lucke, D.C.Tex., 20 F.Supp. 658.

25 C.J. p 279 note 37.

57. U.S.—Charlton v. Kelly, N.J., 33 S.Ct. 945, 229 U.S. 447, 57 L.Ed. 1274, 46 L.R.A., N.S., 397.

58. U.S.—Ex parte Hammond, C.C.A. Cal., 59 F.2d 683, certiorari denied Hammond v. Sittel, 53 S.Ct. 89, 287 U.S. 640, 77 L.Ed. 554.

have been convicted of, any of the crimes specified, committed within the territorial jurisdiction of one of the parties, and who shall be found within the territories of the other, applies only to fugitives who have fled the country where the crime was committed.^{58.5}

§ 29. "Jurisdiction" and "Territory"

The words "jurisdiction" and "territory," as used in treaties providing for the surrender of persons charged with crimes committed within the jurisdiction of one of the parties, who may be found within the territory of the other, have generally been construed to mean "territorial jurisdiction."

Treaties of extradition provide for the surrender of persons charged with crimes committed within the "jurisdiction" of one of the contracting parties, who may be found within the "territory" of the other. These words have generally been construed to mean "territorial jurisdiction,"⁵⁹ although there is a judicial decision giving to "jurisdiction" an enlarged meaning equivalent to "power of the courts" and permitting the extradition from the United States to Germany of a German subject who had committed an offense in Belgium.⁶⁰ The attorney general decided in this case, however, that the words "committed within the jurisdiction," as used in the treaty, do not refer to the personal liabilities of the criminal, but to locality; and that the place where the crime is committed must be within the jurisdiction of the party demanding the fugitive, in other words, within the territorial jurisdiction.⁶¹

Whether the actual presence of the accused in

the country demanding his extradition at the time of the commission of the alleged offense is necessary would seem to depend on the nature of the offense charged,⁶² and also on the language of the particular treaty describing the person to be surrendered as a fugitive or otherwise.⁶³ A treaty providing for the extradition of persons charged with offenses "committed within the jurisdiction of" either party does not authorize the extradition of a person charged with the commission of an offense in a place or country which was not at the time within the jurisdiction of the country seeking the extradition, although it has since been brought within such jurisdiction.⁶⁴

For a historical discussion of the operation of extraterritoriality on extradition see 25 C.J. p 330 note 21-p 331 note 40.

§ 30. — Vessels

Vessels on the high seas and ships of war everywhere are within the jurisdiction of the nations to which they belong, but a merchant vessel within the territorial waters of the United States is within the territory of the United States for extradition purposes.

For purposes of extradition, vessels on the high seas and ships of war everywhere are within the jurisdiction of the nations to which they belong;⁶⁵ but a merchant vessel within the territorial waters of the United States is within the territory of the United States, and a subject of the nation to which such vessel belongs may be arrested on a warrant issued by an extradition magistrate in pursuance of proceedings for his extradition.⁶⁶

58.5 D.C.—Gillars v. U. S., 182 F.2d 962, 87 U.S.App.D.C. 16.

Treaty held inapplicable

U.S.—Chandler v. U. S., C.A.Mass., 171 F.2d 921, certiorari denied 69 S.Ct. 640, 336 U.S. 918, 93 L.Ed. 1081, rehearing denied 69 S.Ct. 809, 336 U.S. 947, 93 L.Ed. 1103.

D.C.—Gillars v. U. S., 182 F.2d 962, 87 U.S.App.D.C. 16.

59. U.S.—14 Op. Atty. Gen. p 281—8 Op. Atty. Gen. p 215—1 Op. Atty. Gen. p 83.
25 C.J. p 279 note 41.

60. U.S.—In re Stupp, C.C.N.Y., 23 F.Cas.No.13,562, 11 Blatchf. 124, 155.

61. U.S.—In re Stupp, C.C.N.Y., 23 F.Cas.No.13,563, 12 Blatchf. 501.

62. False pretenses

(1) The crime of obtaining money under false pretenses is committed where the victim parts with his money as a result of the false pretenses. Thus the drawer of a draft in this country on a Canadian bank was subject to extradition to Canada, where its collection by the bank

in Canada was as his agent, and the collection constituted the offense.

U.S.—Ex parte Hammond, C.C.A.Cal., 59 F.2d 683, certiorari denied Hammond v. Sittel, 53 S.Ct. 89, 287 U.S. 640, 77 L.Ed. 554.

(2) Other cases see 25 C.J. p 279 note 44 [a].

63. U.S.—Sternaman v. Peck, N.Y., 83 F. 690, 28 C.C.A. 377.
25 C.J. p 279 note 45.

64. U.S.—In re Taylor, D.C.Mass., 118 F. 196.

Effect of war

(1) Italian authorities were not entitled to extradition of member of United States Army on charge of murder for killing of another member of United States Army, when same occurred in portion of Italy at time of occupation of German armies, subsequent to Italian declaration of war against Germany, but prior to time peace treaty between United States and Italy became effective, since crime involved was one of which Italy did not have jurisdiction and concerning which

treaty relative to extradition had no application.

U.S.—In re LoDolce, D.C.N.Y., 106 F. Supp. 455.

(2) Effect of war on treaties of extradition generally see supra § 25.

65. U.S.—U. S. v. Cooper, C.C.Pa., 25 F.Cas.No.14,865—U. S. v. Robins, D.C.S.C., 27 F.Cas.No.16,175, Bee 266.

Extradition held not necessary

Extradition was not necessary merely because master of United States merchant vessel put wounded crew member ashore in Spanish Morocco after he allegedly committed assault and manslaughter on board vessel and, in absence of United States consul, sought assistance of British consul in restraining him, since he was never in the custody of British consul as such and had not sought asylum in any country.

U.S.—U. S. v. Dixon, D.C.N.Y., 73 F. Supp. 683.

66. U.S.—In re Newman, C.C.Cal., 79 F. 622.

§ 31. Authority to Entertain, Institute, or Conduct Proceedings

Extradition of a person to or from the United States should be conducted by the federal government.

Extradition of a fugitive from a foreign country, in which he has taken refuge, to the United States must be conducted by the federal government.⁶⁷ The fact that the demand was made by the governor of the state on the foreign government is not, however, a defense for the accused after he is brought to this country.⁶⁸

The governor of a state does not have the power to deliver up to a foreign government a person charged with having committed a crime in the territory of that government.⁶⁹ Extradition proceedings to secure the removal from the United States of one charged with crime must be prosecuted by the foreign government in the public interest, and may not be used by a private party for private vengeance or personal purposes.⁷⁰

Authority to make complaint in extradition proceedings is discussed *infra* § 37.

§ 32. Indictment or Warrant of Arrest in Foreign Country

The secretary of state cannot order the extradition of a prisoner until such time as he has been charged, in the courts of the demanding country, with an extraditable offense.

Although the commissioner may take into cus-

tody an alleged fugitive before the filing of a charge against him in the courts of the demanding country,⁷¹ under the statute defining the powers of the secretary of state he cannot order the extradition of a prisoner until such time as he has been charged, in the courts of the demanding country, with an extraditable offense.⁷² In the absence of a treaty requirement to the contrary, however, it is not necessary that there have been some authorized public accusation of equivalent effect of an indictment, since to adopt such a rule would interpolate in the treaties a condition requiring what might, in some countries, be considered objectionable as a partial prejudication of guilt in cases to be afterward tried.⁷³

A treaty requiring that the fugitive shall have been "accused" of the crimes enumerated means merely that he is to be charged or accused in due form of law.⁷⁴ Where the treaty requires as a prerequisite to a requisition for the surrender of a fugitive criminal that a warrant of arrest shall have issued in the foreign country, the judicial department will presume, from the mandate of the secretary of state, that such a warrant was issued,⁷⁵ and the issuance of such a warrant in the foreign country may also be proved by depositions, properly authenticated.⁷⁶

It has furthermore been held that congress has dispensed with the requirement with respect to the production of a copy of a warrant of arrest, or

Puerto Rico.—*Ex parte Alvarez*, 14 Puerto Rico 581.

67. U.S.—*U. S. v. Rauscher*, N.Y., 7 S.Ct. 234, 119 U.S. 407, 30 L.Ed. 425.

Pa.—*Goldfon v. Allegheny County*, 8 Pa.Dist. 387.
25 C.J. p 279 note 53.

Kidnapping

A person may be carried out of a foreign country to this country to answer for crime only by the authority of the highest executive officials and in accordance with treaty provisions governing extradition, and an individual who unlawfully brings out of another country a person charged with crime is guilty of kidnapping.

U.S.—*Collier v. Vaccaro*, C.C.A.Md., 51 F.2d 17.

68. Cal.—*People v. Pratt*, 20 P. 731, 78 C. 345.

69. U.S.—*Holmes v. Jennison*, Vt., 14 Pet. 540, 10 L.Ed. 579, 618.
N.Y.—*People v. Curtis*, 50 N.Y. 321, 10 Am.R. 483.

In re *Vogt*, 44 How.Pr. 171.
Vt.—*Ex parte Holmes*, 12 Vt. 631.

70. U.S.—*President of U. S. ex rel.*

Caputo v. Kelly, C.C.A.N.Y., 92 F. 2d 603, certiorari denied 58 S.Ct. 521, 303 U.S. 635, 82 L.Ed. 1096.

71. U.S.—*Ex parte Davis*, C.C.A., 54 F.2d 723.

72. U.S.—*Ex parte Davis*, *supra*.

False pretenses

Indictment charging that defendants "by deceit, falsehood or other fraudulent means defrauded" designated corporation of money and securities, contrary to the Criminal Code of Canada, charged extraditable offense, notwithstanding the indictment did not state the acts constituting the alleged crime.

U.S.—*U. S. ex rel. Rauch v. Stockinger*, D.C.N.Y., 170 F.Supp. 506.

Larceny

(1) Indictment charging that defendants "did steal money and securities" from designated corporation, and "that defendants by deceit, falsehood or other fraudulent means defrauded" such corporation "of money and securities," contrary to Criminal Code of Canada, charged extraditable offenses, notwithstanding Ontario statutes contained words "with intent" and that such words

were not in indictment, since the word "steal" necessarily involved required intent.

U.S.—*U. S. ex rel. Rauch v. Stockinger*, *supra*.

(2) Indictment charging that defendants stole money and securities of named corporation and defrauded such corporation of money and securities "to the value of \$960,000.00 more or less," contrary to the Criminal Code of the Province of Ontario, Canada, sufficiently indicated the approximate sum involved and therefore charged extraditable offenses.

U. S.—*U. S. ex rel. Rauch v. Stockinger*, *supra*.

73. U.S.—*Muller's Case*, D.C., 17 F. Cas.No.9,913, 5 Phila., Pa., 289.
25 C.J. p 280 note 56.

74. Iowa.—*State v. Rowe*, 73 N.W. 833, 104 Iowa 323.
25 C.J. p 280 note 57.

75. U.S.—*Grin v. Shine*, Cal., 23 S. Ct. 98, 187 U.S. 181, 47 L.Ed. 130.
Ex parte Van Hoven, C.C.Minn., 28 F.Cas.No.16,859, 4 Dill. 415.
25 C.J. p 280 note 58.

76. U.S.—*In re Urzua*, C.C.N.Y., 188 F. 540.

other equivalent document issued by a foreign magistrate, by the enactment of the statute governing extradition proceedings.⁷⁷

§ 33. Requisition

Extradition treaties usually provide for the presentation to the executive of the asylum country of a requisition for the surrender of the accused person.

Extradition treaties usually provide for the presentation, to the executive of the government of which the surrender of a fugitive criminal is sought, of a requisition therefor, by the chief diplomatic or consular officer of the demanding government.⁷⁸ Requisitions for surrender of fugitives are addressed to the executive, not the judicial, branch of the government.⁷⁹

Technical objections as to matters of form will not be favorably considered and it is sufficient if the certificates, signatures, etc., are in substantial conformity with the requirements of the statutes and give reasonable assurance of authenticity.⁸⁰ The failure to produce a requisition before the extradition commissioner may be cured by producing in a habeas corpus proceeding a certified copy of the requisition on file in the office of the secretary of state.⁸¹

Where, however, it is clear that the individual concerning whom extradition is sought by a foreign country does not come within the treaty provisions relating to extradition between such country and the United States, the department of state may deny extradition without submitting the matter to any court or commissioner.^{81.5}

Necessity for presentation of formal requisition to committing magistrate in proceedings for

provisional arrest is considered *infra* § 38.

§ 34. Proceedings before Committing or Examining Magistrate

Jurisdiction of preliminary proceedings for extradition to a foreign country is, in the United States, vested by statute solely in judges or justices of the United States, commissioners expressly authorized by federal courts, and judges of state courts of record of general jurisdiction. The proceedings are before the judge, justice, or commissioner as a magistrate of the United States and not as a court.

Except where the foreign country or territory to which extradition is sought is under the control of the United States, in which case the proceedings must be before a judge of a court of the United States,⁸² under the statute, 18 U.S.C.A. § 3184, jurisdiction of proceedings, preliminary to final executive action, for extradition to a foreign country is vested in any judge or justice of the United States, who may be a justice of the United States supreme court⁸³ or a United States district judge,⁸⁴ or in a commissioner⁸⁵ expressly authorized to act by any of the courts of the United States,⁸⁶ or in a judge of a court of record of general jurisdiction of any state.⁸⁷

A commissioner empowered to act in an extradition case is deemed a magistrate,⁸⁸ and likewise a state or federal judge is, when hearing an extradition proceeding, a magistrate of the United States,⁸⁹ the proceeding not being a suit, prosecution, or proceeding in the court of which he is judge.⁹⁰

The jurisdiction of the commissioner or other magistrate involves both jurisdiction of the subject matter, that is, authority to act in extradition cases, and jurisdiction of the alleged fugitive.⁹¹

77. U.S.—*Voloshin v. Ridenour*, C. C.A. Canal Zone, 299 F. 134.
25 C.J. p 280 notes 60, 61.

78. U.S.—*President of U. S. ex rel. Caputo v. Kelly*, C.C.A.N.Y., 92 F. 2d 603, certiorari denied 58 S.Ct. 521, 303 U.S. 635, 82 L.Ed. 1096.
25 C.J. p 280 note 67.

79. U.S.—*President of U. S. ex rel. Caputo v. Kelly*, *supra*.

80. U.S.—*In re Neely*, C.C.N.Y., 103 F. 626, affirmed 21 S.Ct. 308, 180 U.S. 126, 45 L.Ed. 457.

81. U.S.—*In re Urzua*, C.C.N.Y., 188 F. 540.

81.5 U.S.—*In re LoDolce*, D.C.N.Y., 106 F.Supp. 455.

82. U.S.—*Neely v. Henkel*, N.Y., 21 S.Ct. 302, 180 U.S. 109, 45 L.Ed. 448.

83. U.S.—*In re Keene's Extradition*, D.C.Tex., 6 F.Supp. 308.

84. U.S.—*Bernstein v. Gross*, C.C. A.Tex., 58 F.2d 154.

85. U.S.—*Cleugh v. Strakosch*, C.C. A.Cal., 109 F.2d 330.
25 C.J. p 281 note 77.

86. U.S.—*Vaccaro v. Collier*, D.C. Md., 38 F.2d 862, modified on other grounds, C.C.A., *Collier v. Vaccaro*, 51 F.2d 17.

25 C.J. p 281 note 76.

Sufficient authority

(1) A commissioner authorized by a district court to discharge all the duties and exercise all the powers which may be performed by a justice of the supreme court, or a circuit or district judge, under the statute, is a magistrate specially empowered to act in extradition cases. U.S.—*In re Grin*, C.C.Cal., 112 F. 790, affirmed *Grin v. Shine*, 23 S. Ct. 98, 187 U.S. 181, 47 L.Ed. 130.

(2) Order of appointment construed to cover the case of fugitives. U.S.—*In re Kaine*, N.Y., 14 How. 103, 14 L.Ed. 345.

Power to appoint extradition commissioners is vested in the courts by an act of congress enacted under authority of the United States constitution.

U.S.—*Rice v. Ames*, Ill., 21 S.Ct. 406, 180 U.S. 371, 45 L.Ed. 577.

87. U.S.—*In re Keene's Extradition*, D.C.Tex., 6 F.Supp. 308.

88. U.S.—*Benson v. McMahon*, N.Y., 8 S.Ct. 1240, 127 U.S. 457, 32 L.Ed. 234.
25 C.J. p 281 notes 80, 83.

89. U.S.—*In re Keene's Extradition*, D.C.Tex., 6 F.Supp. 308.

90. U.S.—*In re Keene's Extradition*, *supra*.

91. U.S.—*Vaccaro v. Collier*, D.C. Md., 38 F.2d 862, modified on other

§ 35. — Preliminary Requisition

No requisition from the demanding government is necessary in so far as the preliminary proceedings before a United States commissioner or other committing magistrate are concerned.

No preliminary requisition is required from the demanding government to initiate extradition proceedings before, and confer jurisdiction on, a United States commissioner or other committing magistrate.⁹²

Requisitions generally are discussed supra § 33.

§ 36. — Preliminary Mandate

Where not required by treaty, either because the treaty makes no provision therefor or makes only a permissive, and not obligatory, provision, the prior issuance of an executive mandate by the secretary of state is not an essential prerequisite to the entertaining of extradition proceedings by a magistrate.

In the United States it is established by judicial decisions and executive practice that, in cases where the treaty does not require a previous executive mandate, the issuing of such a mandate is not essential as a prerequisite to the entertaining of proceedings and the issuing of a warrant of arrest by a magistrate.⁹³ Prior to 1852⁹⁴ it was the practice of extradition magistrates generally to entertain complaints in cases of extradition without the prior presentation of a mandate. The majority of the court in the case of *Kaine* did not agree as to the interpretation to be given to the treaty and law, and the case came before Mr. Justice Nelson at chambers, who held that the previous authority of the executive should have been obtained to warrant the interposition of the judiciary.⁹⁵ The same view was also expressed in a few other cases.⁹⁶ The secretary of state does not now issue mandates

except where provision is made therefor by treaty, and even when a treaty contains such a provision it has been held that the language of the treaty is permissive and not necessarily obligatory.⁹⁷

The mandate when issued is granted under the hand of the secretary of state and the seal of the department of state,⁹⁸ the secretary of state acting for the president;⁹⁹ it is issued at the instance of the foreign power acting through its diplomatic or consular agents as designated in the treaties;¹ and it imports that the preliminary steps to justify its issuance have been taken.² There is no special form prescribed by law. It is sufficient if the offense is described in the terms of the treaty.³ A mandate issued by the executive remains operative until recalled by the executive or until he signifies in some way that its functions are exhausted.⁴

§ 37. — Complaint

- a. Authority to make
- b. Allegations
- c. Verification

a. Authority to Make

The requisite complaint may and must be made by someone acting under the authority of the foreign government seeking the extradition.

Treaty provisions concerning what officers may make requisitions have no bearing on who may initiate judicial proceedings.⁵ The complaint under oath which, under the statute, 18 U.S.C.A. § 3184, is necessary to the institution of proceedings for extradition to a foreign country may and must be made by someone acting under the authority or sanction of the executive of the foreign government.⁶

grounds, C.C.A., *Collier v. Vaccaro*, 51 F.2d 17.

U. S. ex rel. *Donnelly v. Mulligan*, D.C.N.Y., 8 F.Supp. 262, reversed on other grounds, C.C.A., 74 F.2d 220.

92. U.S.—President of U. S., ex rel. *Caputo v. Kelly*, C.C.A.N.Y., 92 F.2d 603, certiorari denied 58 S.Ct. 521, 303 U.S. 635, 82 L.Ed. 1096. 25 C.J. p 281 notes 90, 91.

93. U.S.—*Grin v. Shine*, Cal., 23 S. Ct. 98, 187 U.S. 181, 47 L.Ed. 130. 25 C.J. p 281 notes 91, 95.

94. U.S.—In re *Kaine*, N.Y., 14 How. 103, 14 L.Ed. 345.

95. U.S.—Ex parte *Kaine*, C.C.N.Y., 14 F.Cas.No.7,597, 3 Blatchf. 1, certiorari dismissed 14 How. 103, 14 L.Ed. 345.

96. U.S.—In re *Farez*, C.C.N.Y., 8 F. Cas.No.4,644, 7 Blatchf. 34. 25 C.J. p 282 note 98.

97. U.S.—In re *Schlippenbach*, D.C.N.Y., 164 F. 783—*Castro v. De Uriarte*, D.C.N.Y., 16 F. 93. 25 C.J. p 282 note 99.

98. U.S.—In re *Farez*, C.C.N.Y., 8 F. Cas.No.4,644, 7 Blatchf. 34—Ex parte *Van Hoven*, C.C.Minn., 28 F. Cas.No.16,858, 4 Dill. 411.

99. U.S.—In re *Farez*, C.C.N.Y., 8 F. Cas.No.4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How.Pr.N.Y., 107—Ex parte *Van Hoven*, C.C.Minn., 28 F.Cas. No.16,858, 4 Dill. 411.

1. U.S.—In re *Farez*, C.C.N.Y., 8 F. Cas.No.4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How.Pr.N.Y., 107.

2. U.S.—In re *Farez*, supra—Ex parte *Van Hoven*, C.C.Minn., 28 F. Cas.No.16,859, 4 Dill. 415.

Review

The grant of a directive by the secretary of state submitting the matter to a court in order that the evidence of the criminality of accused may be heard is subject to review. U.S.—In re *Lo Dolce*, D.C.N.Y., 106 F.Supp. 455.

3. U.S.—In re *Grin*, C.C.Cal., 112 F. 790, affirmed *Grin v. Shine*, 23 S. Ct. 98, 187 U.S. 181, 47 L.Ed. 130. In re *MacDonnell*, C.C.N.Y., 16 F. Cas.No.8,771, 11 Blatchf. 79. 25 C.J. p 282 note 3.

4. U.S.—In re *Kelly*, C.C.Minn., 26 F. 852.

5. U.S.—President of U. S. ex rel. *Caputo v. Kelly*, C.C.A.N.Y., 92 F.2d 603, certiorari denied 58 S.Ct. 521, 303 U.S. 635, 82 L.Ed. 1096.

6. U.S.—*Grin v. Shine*, Cal., 23 S. Ct. 98, 187 U.S. 181, 47 L.Ed. 130. 25 C.J. p 282 note 9.

A complaint of this character may be made by the consul of the foreign government⁷ and ordinarily is made through him or directly on papers sworn to by the foreign officers representing the executive;⁸ but it is not necessary that the complaint should be made by the consul, or by officers of the executive department, of the foreign government. Any person authorized by the executive department to act is a proper person to appear and file a complaint.⁹

Where a complaint is made by a consul, his official character is sufficient evidence of his authority;¹⁰ and although, where the complaint is made by a private individual, it must appear that he is acting under the authority of the foreign government,¹¹ it is sufficient if this showing is made at any time while the proceedings are pending before the commissioner.¹² If it appears by the complaint that the moving party is the authorized agent of the demanding government, he need not swear to this fact in the jurat,¹³ nor need an officer representing a foreign government swear to his official character in the complaint if it sufficiently appears in the testimony that he is a properly authorized agent of the demanding power.¹⁴

b. Allegations

The complaint should set forth the knowledge of complainant on which he makes the complaint, the substance of the offense charged, and, where the proceeding is before a commissioner, the special authority of such commissioner to act in the proceeding; but it need not allege the issuance of a mandate by the executive of this country, nor need it allege the issuance of a warrant abroad where the pertinent treaty does not make such issuance a condition precedent to the preliminary parts of the extradition proceeding.

A complaint in a proceeding for extradition to a foreign country may be held sufficient¹⁵ without regard to refinements of pleading.¹⁶ While it is not necessary to charge the offense with the particularity of an indictment, it should be sufficiently explicit to inform accused of the nature of the charge.^{16.5}

The question of whether there is a variance between the complaint and the evidence is to be decided by the general law, and not by that of the state.¹⁷

Authority of commissioner. If the proceedings are before a commissioner, the complaint should show the authority of the commissioner to act in the proceedings, by describing the commissioner as a commissioner specially authorized to act in extradition proceedings,¹⁸ although there is a dictum to the contrary.¹⁹ An extradition commissioner is not authorized, after the conclusion of the proceedings before him, to amend the complaint by interlining the word "extradition" before the word "commissioner" in the description of the magistrate.²⁰

Knowledge. The complaint should sufficiently set forth the knowledge of complainant on which he makes the complaint, although it need not be made on his personal knowledge.²¹ A complaint made on telegraphic information²² and a complaint on telegrams and depositions from the authorities of the government demanding the extradition, made by a consular officer of a foreign country,²³ have been held sufficient; but a contrary view has also been asserted.²⁴

7. U.S.—Cleugh v. Strakosch, C.C. A.Cal., 109 F.2d 330.

8. U.S.—In re Ferrelle, C.C.N.Y., 28 F. 878.

9. U.S.—President of U. S. ex rel. Caputo v. Kelly, C.C.A.N.Y., 92 F. 2d 603, certiorari denied 58 S.Ct. 521, 303 U.S. 635, 82 L.Ed. 1096. 25 C.J. p 282 note 11.

10. U.S.—Grin v. Shine, Cal., 23 S. Ct. 98, 187 U.S. 181, 47 L.Ed. 130. 25 C.J. p 282 note 12.

11. U.S.—In re Herres, C.C.Minn., 33 F. 165.

25 C.J. p 282 note 13.

12. U.S.—In re Herres, supra—In re Ferrelle, C.C.N.Y., 28 F. 878.

13. U.S.—In re Adutt, C.C.Ill., 55 F. 376.

14. U.S.—In re Mineau, C.C.Vt., 45 F. 188—In re Herres, C.C.Minn., 33 F. 165.

15. U.S.—Fernandez v. Phillips, N. H., 45 S.Ct. 541, 268 U.S. 311, 69 L.Ed. 970.

Karadzole v. Artukovic, C.A.Cal., 247 F.2d 198, vacated on other grounds 78 S.Ct. 381, 355 U.S. 393, 2 L.Ed.2d 356.

16. U.S.—Bernstein v. Gross, C.C.A. Tex., 58 F.2d 154.

Habeas corpus

On habeas corpus proceeding to secure release of petitioner on bail pending hearing on complaint for extradition of petitioner, ordinary technicalities of pleading were applicable in extradition proceedings only to a limited extent in determining whether United States Commissioner had jurisdiction, but they were entitled to respectful notice by federal district court.

U.S.—Artukovic v. Boyle, D.C.Cal., 107 F.Supp. 11, reversed on other grounds, C.A., Ivancevic v. Artukovic, 211 F.2d 565, certiorari denied Artukovic v. Ivancevic, 75 S. Ct. 28, 348 U.S. 818, 99 L.Ed. 645, rehearing denied 75 S.Ct. 202, 348 U.S. 889, 99 L.Ed. 698.

16.5 U.S.—In re Wise, D.C.Tex., 168 F.Supp. 366.

17. U.S.—Collins v. Loisel, La., 42 S.Ct. 469, 259 U.S. 309, 66 L.Ed. 956.

18. U.S.—Ex parte Lane, D.C.Mich., 6 F. 34.

19. U.S.—In re MacDonnell, C.C.N.Y., 16 F.Cas.No.8,771, 11 Blatchf. 79.

20. U.S.—Ex parte Lane, D.C.Mich., 6 F. 34.

21. U.S.—In re Farez, C.C.N.Y., 8 F.Cas.No.4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How.Pr.N.Y., 107. 25 C.J. p 283 note 23.

22. U.S.—Castro v. De Uriarte, D.C. N.Y., 16 F. 93.

In re Thomas, C.C.N.Y., 23 F.Cas. No.13,887, 12 Blatchf. 370.

23. U.S.—Ex parte Van Hoven, C.C. Minn., 28 F.Cas.No.16,859, 4 Dill. 415.

24. Canal Zone.—In re Huey, 1 Canal Zone 137.

Warrant or other proceedings in demanding country. Where it is not a necessary preliminary to an investigation, under an extradition treaty, that a warrant shall have been issued abroad, it is not essential that the complaint allege such issuance.²⁵ A complaint on oath by a duly authorized officer that accused had been charged before a justice of the peace in the foreign country with murder there committed, and a warrant issued for arrest, the original warrant being attached to the complaint, and that the officer believes the charge as stated in the warrant to be true, is sufficient to give the commissioner jurisdiction to issue a warrant of arrest.²⁶

The record of the proceedings before the foreign court and the deposition of witnesses therein contained on which the extradition proceedings are based need not be attached to the complaint if they are in the custody and keeping of the one making the complaint and the commissioner is possessed of the information which they contain,²⁷ and although it is advisable in extradition proceedings that certified copies of the foreign complaint and warrant be attached to, and made a part of, the local complaint, it is sufficient if they be presented to the commissioner at the hearing.²⁸

Issuance or description of mandate. It is not necessary that the complaint should state that a mandate has been issued by the executive,²⁹ it being sufficient if the mandate is exhibited to the committing magistrate between the time of the arrest of accused under a warrant issued on the complaint and the final hearing.³⁰ A variance between the mandate and the complaint, the former referring to accused as "George Macdonell," and the latter as "George Macdonell, otherwise Macdonnell," has been held not to be fatal.³¹

Statement of offense. The complaint should set forth clearly, but briefly, the substance of the offense charged, so that the court can see that one or more of the particular crimes enumerated in the

treaty is alleged to have been committed.³² While the complaint must be sufficiently clear and distinct in its averments to enable the party accused to understand precisely what he is charged with,³³ it need not set forth the crime with the particularity of an indictment, but need only conform to the requirements for a preliminary complaint according to the local law where accused is found.³⁴

It need not expressly allege that the offense was committed in the demanding country if such fact can be inferred from other allegations of the complaint.³⁵ If the complaint describes an offense punishable by the laws of both countries and included under some name in the extradition treaty, it is sufficient;³⁶ and even if a complaint charges two offenses only one of which is extraditable, the detention of accused under an extradition warrant will be upheld, since it will not be presumed that the demanding government will try him for an offense other than that for which he is surrendered.³⁷ A complaint charging an offense at common law is sufficient, notwithstanding it concludes "against the form of the statute."³⁸

Under a treaty providing that offenses which are committed thereafter are alone embraced, the date of the offense must be shown in the complaint.³⁹

Where a treaty provides for the surrender of persons charged with the crimes therein specified, "when these crimes are subject to infamous punishment," it is regarded as doubtful whether it is necessary to aver in the complaint that the offense for which the extradition is sought is subject to infamous punishment.⁴⁰

c. Verification

The complaint must be made under oath; but it may be made on information and belief, provided the sources of the information and the grounds of the belief are stated; and the oath need not be taken before the judge or commissioner who issues the warrant of arrest.

As provided by statute, 18 U.S.C.A. § 3184, the

25. U.S.—In re Farez, C.C.N.Y., 11 F. Cas.No.4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How.Pr., N.Y., 107.

25 C.J. p 283 note 28.

26. U.S.—Ex parte Sternaman, D.C. N.Y., 77 F. 595, affirmed 80 F. 883, 26 C.C.A. 214, and reargument denied 83 F. 690, 28 C.C.A. 377.

27. U.S.—Yordi v. Nolte, Tex., 30 S. Ct. 90, 215 U.S. 227, 54 L.Ed. 170.

28. U.S.—Powell v. U. S., Mich., 206 F. 400, 124 C.C.A. 282.

29. U.S.—In re MacDonnell, C.C.N.Y., 16 F.Cas.No.8,771, 11 Blatchf. 79.

30. U.S.—Ex parte Charlton, C.C.N.

J., 185 F. 880, affirmed 33 S.Ct. 945, 229 U.S. 447, 57 L.Ed. 257.

31. U.S.—In re MacDonnell, C.C.N.Y., 16 F.Cas.No.8,771, 11 Blatchf. 79.

32. U.S.—Kelly v. Griffin, Ill., 36 S. Ct. 487, 241 U.S. 6, 60 L.Ed. 861. 25 C.J. p 283 note 37.

33. U.S.—Yordi v. Nolte, Tex., 30 S.Ct. 90, 215 U.S. 227, 54 L.Ed. 170. 25 C.J. p 283 note 39.

34. U.S.—In re Roth, D.C.N.Y., 15 F. 506. 25 C.J. p 283 note 38.

35. U.S.—Bingham v. Bradley, Ill.,

36 S.Ct. 634, 241 U.S. 511, 60 L.Ed. 1136.

36. U.S.—Powell v. U. S., Mich., 206 F. 400, 124 C.C.A. 282—Greene v. U. S., Ga., 154 F. 401, 85 C.C.A. 251, certiorari denied 28 S.Ct. 261, 207 U.S. 596, 52 L.Ed. 357.

37. U.S.—Bingham v. Bradley, Ill., 36 S.Ct. 634, 241 U.S. 511, 60 L.Ed. 1136.

38. U.S.—Ex parte Lane, D.C.Mich., 6 F. 34.

39. U.S.—Castro v. De Uriarte, D.C. N.Y., 12 F. 250.

40. U.S.—In re Farez, C.C.N.Y., 8 F. Cas.No.4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How.Pr., N.Y., 107.

complaint must be made "under oath."⁴¹ It is not necessary that the oath to the complaint be taken before a commissioner authorized to act in extradition proceedings,⁴² or before the judge or commissioner who issues the warrant of arrest,⁴³ or even before a magistrate in the country to which the fugitive has fled, provided that after it has been made in the country where the crime was committed the affidavit or a duly certified copy of the affidavit is transmitted to the government of the country to which the fugitive has fled.⁴⁴

A complaint which makes charges solely on information and belief without attempt to set forth the sources of the information or grounds of the belief is bad,⁴⁵ and it is not cured by the fact that complainant described himself as a government detective duly authorized as the agent of the demanding government to prosecute extradition proceedings.⁴⁶

However, if the representative of the foreign government has no personal knowledge of the facts, he may make the complaint on information and belief, stating the sources of his information and the grounds for his belief,⁴⁷ and annexing to the complaint a properly certified copy of an indictment or equivalent proceedings which may have been found in the foreign country,⁴⁸ or a copy of the deposition of witnesses, having actual knowledge of the facts, taken under the treaty and act of congress,⁴⁹ or supporting it by the testimony of witnesses who were stated to have deposed and are therefore presumed to have been sworn.⁵⁰

The irregularity, if any, in making a complaint in extradition proceedings on information and belief without attaching thereto the record of the foreign

court which is the basis of the proceeding is cured by the production at the hearing of such record, which is sufficient to justify the detention of accused.⁵¹

§ 38. — Provisional Arrest and Detention; Warrant

To be valid under the statute authorizing a magistrate to issue a warrant for the arrest of a fugitive from a foreign country, the warrant must be preceded by a sufficient complaint under oath; it must, if issued by a commissioner, show on its face that the commissioner is authorized to act in extradition cases; and it must recite the fact, if it is a fact, that a mandate has been issued by the executive. Under treaty, a fugitive may be provisionally arrested and detained pending the production of extradition papers.

The magistrate possesses statutory authority, on compliance with the prescribed conditions, to issue his warrant for the apprehension of the person charged, that he may be brought before such magistrate, to the end that the evidence of criminality may be heard and considered.⁵² A warrant issued without a sufficient complaint on oath is invalid.⁵³ Also a warrant which does not show on its face that the commissioner issuing it is a commissioner authorized to act in extradition cases is void,⁵⁴ unless the treaty obviates the necessity of such showing.⁵⁵

Where a mandate has been issued by the executive, the warrant of arrest must recite that fact.⁵⁶ The warrant need not state with particularity the offense with which defendant is charged; it is sufficient if it follow the terms of the statute or treaty.⁵⁷

A commissioner authorized by a court of the United States to act in extradition cases has power to issue a warrant on which a marshal of a district in another state may arrest a fugitive;⁵⁸ but it be-

41. U.S.—Ex parte McCabe, D.C. Tex., 46 F. 363, 12 L.R.A. 589.

Canal Zone.—In re Huey, 1 Canal Zone 137.

42. U.S.—In re Grin, C.C.Cal., 112 F. 790, affirmed Grin v. Shine, 23 S.Ct. 98, 187 U.S. 181, 47 L.Ed. 130.

43. U.S.—U. S. ex rel. Lo Pizzo v. Mathues, C.C.A.Pa., 36 F.2d 565. 25 C.J. p 284 note 48.

44. U.S.—In re Heilbronn, D.C.N.Y., 11 F.Cas.No.6,323.

45. U.S.—Rice v. Ames, Ill., 21 S. Ct. 406, 180 U.S. 371, 45 L.Ed. 577. Ex parte Lane, D.C.Mich., 6 F. 34.

46. U.S.—Rice v. Ames, Ill., 21 S. Ct. 406, 180 U.S. 371, 45 L.Ed. 577.

47. U.S.—Desmond v. Eggers, C.C.A. Wash., 18 F.2d 503. 25 C.J. p 284 note 52.

48. U.S.—Rice v. Ames, Ill., 21 S.

Ct. 406, 180 U.S. 371, 45 L.Ed. 577. Powell v. U. S., Mich., 206 F. 400, 124 C.C.A. 282.

49. U.S.—Rice v. Ames, Ill., 21 S. Ct. 406, 180 U.S. 371, 45 L.Ed. 577.

50. U.S.—Glucksman v. Henkel, N. Y., 31 S.Ct. 704, 221 U.S. 508, 55 L.Ed. 830.

51. U.S.—Yordi v. Nolte, Tex., 30 S.Ct. 90, 215 U.S. 227, 54 L.Ed. 170.

52. U.S.—In re Urzua, C.C.N.Y., 188 F. 540.

Puerto Rico.—Ex parte Alvarez, 14 Puerto Rico 628.

Warrant held not defective because it named alleged fugitive as Mariana Viamonte, instead of Mariana Viamonte Fernandez, he being named both ways in proceedings, and identified by testimony.

U.S.—Fernandez v. Phillips, N.H., 45 S.Ct. 541, 268 U.S. 311, 69 L.Ed. 970.

53. U.S.—Ex parte McCabe, D.C. Tex., 46 F. 363, 12 L.R.A. 589.

Canal Zone.—In re Huey, 1 Canal Zone 137.

N.Y.—In re Heilbronn, 1 Park.Cr. 429. 25 C.J. p 285 note 68.

54. U.S.—In re Farez, C.C.N.Y., 8 F.Cas.No.4,644, 7 Blatchf. 34. 25 C.J. p 285 note 69.

55. U.S.—Ex parte McCabe, D.C. Tex., 46 F. 363, 12 L.R.A. 589.

25 C.J. p 285 note 70.

56. U.S.—In re Farez, C.C.N.Y., 8 F. Cas.No.4,644, 7 Blatchf. 34.—In re MacDonnell, C.C.N.Y., 16 F.Cas.No. 8,771, 11 Blatchf. 79.

57. U.S.—Ex parte Hibbs, D.C. Or., 26 F. 421.

25 C.J. p 285 note 73.

58. U.S.—In re Henrich, C.C.N.Y., 11 F.Cas.No.6,369, 5 Blatchf. 414.

25 C.J. p 285 note 78.

comes the duty of the marshal to take accused before the nearest magistrate in his district who is authorized by the treaty and the acts of congress to hear and consider the evidence of criminality.⁵⁹

The *provisional arrest and detention* of a criminal fugitive, in advance of the presentation of a formal requisition with proofs, is within the letter and spirit of most, if not all, of the extradition treaties of the United States with other nations.⁶⁰ Such arrest and detention may be made on telegraphic request, provided the request is made by such person or persons that officials in this country representing both of the high contracting parties are justified in believing the truth of the statements contained in the telegram.⁶¹ Under some treaties a prisoner cannot be detained longer than forty days unless extradition documents have been produced.⁶²

§ 39. — Hearing and Evidence

- a. In general
- b. Matters to be proved, considered, and determined
- c. Admissibility of evidence generally
- d. Examination of witnesses by, and admission of evidence for, accused
- e. Admissibility of documentary evidence
- f. Weight and sufficiency of evidence

a. In General

A hearing is necessary; and the procedure in conducting it is governed by the laws of the state wherein it is held; but form is not to be insisted on beyond the requirements of safety and justice. The magistrate may, in the exercise of a reasonable discretion, grant, or refuse to grant, an adjournment of the hearing.

A person arrested on an extradition warrant is entitled to a hearing⁶³ within the state, district, or territory where he is found,⁶⁴ to the end that the evidence of criminality may be heard and considered.^{64.5} It is provided by statute, 18 U.S.C.A. § 3189,

that the hearing shall be held on land, publicly, and in a room or office easily accessible to the public. The examination must be conducted according to the laws of the state in which the proceeding is had, in the particulars in which such proceedings are not specially regulated by a statute of the United States.⁶⁵

The old doctrine that proceedings for the extradition of an alien are to be conducted with extreme technicality has been abandoned. The proceedings before the commissioner are not to be treated as if they were a trial before a petit jury;⁶⁶ and form is not to be insisted on beyond the requirements of safety and justice.⁶⁷

Adjournment. The magistrate may in the exercise of a just and reasonable discretion grant adjournments.⁶⁸ His action in adjourning a hearing will not be held unreasonable unless it is shown that he has abused his discretion,⁶⁹ nor will the continuation of proceedings before an extradition commissioner for a longer period than an examining magistrate is authorized to continue a case under the state laws invalidate proceedings for extradition under a treaty providing that extradition shall be carried out "in conformity with the laws regulating extradition for the time being in force in the surrendering States," as the laws contemplated therein are those of the United States, and not the laws of the particular state within which the proceedings are taken.⁷⁰

An adjournment to enable the prisoner to obtain evidence from abroad lies within the discretion of the commissioner whose action in refusing to grant it will not be reviewed,⁷¹ especially if the affidavits in support of the motion do not show that there is any evidence on the part of the prisoner that exists or is accessible or is likely to be obtained.⁷² Although the magistrate is supposed to give the prosecution every reasonable opportunity to secure its evidence, it is not contemplated that a subject and

59. U.S.—Pettit v. Walshe, Ind., 24 S.Ct. 657, 194 U.S. 205, 48 L.Ed. 938.

60. U.S.—U. S. ex rel. McNamara v. Henkel, D.C.N.Y., 46 F.2d 84, 25 C.J. p 284 note 61.

61. U.S.—U. S. ex rel. McNamara v. Henkel, supra.
Complaint made on telegraphic information see supra § 37.

62. U.S.—Ex parte Reed, D.C.N.J., 158 F. 891.

63. U.S.—In re Lucke, D.C.Tex., 20 F.Supp. 658.

64. U.S.—In re Walshe, C.C.Ind., 125

F. 572, affirmed 24 S.Ct. 657, 194 U.S. 205, 48 L.Ed. 938.

64.5 U.S.—Karadzole v. Artukovic, Cal., 78 S.Ct. 381, 355 U.S. 393, 2 L. Ed.2d 356.

65. U.S.—Collins v. Loisel, La., 42 S.Ct. 469, 259 U.S. 309, 66 L.Ed. 956.
25 C.J. p 285 note 82.

66. U.S.—Grin v. Shine, Cal., 23 S. Ct. 98, 187 U.S. 181, 47 L.Ed. 130.
25 C.J. p 286 note 88.

67. U.S.—Vaccaro v. Collier, D.C. Md., 38 F.2d 862, modified on other

grounds, C.C.A., Collier v. Vaccaro, 51 F.2d 17.

68. U.S.—Ex parte Schorer, D.C. Wis., 195 F. 334.
25 C.J. p 285 note 83.

69. U.S.—In re Ludwig, C.C.N.Y., 32 F. 774.

70. U.S.—Rice v. Ames, Ill., 21 S. Ct. 406, 180 U.S. 371, 45 L.Ed. 577.

71. U.S.—In re Wadge, C.C.N.Y., 16 F. 332, 21 Blatchf. 300.

72. U.S.—In re Farez, C.C.N.Y., 8 F. Cas.No.4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How.Pr., N.Y., 107.

resident of the asylum state shall be held in custody or under bail indefinitely.⁷³

b. Matters to Be Proved, Considered, and Determined

The hearing before an extradition magistrate is of limited scope, it being in the nature of a preliminary hearing or examination having reference only to a commitment for future trial. Various matters are not to be considered or determined therein, and consequently evidence thereof need not be introduced. The magistrate is required, by statute, if he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty, to certify the same, together with a copy of all testimony taken before him, to the secretary of state.

The hearing before a commissioner or other magistrate in a proceeding for extradition to a foreign country is not a full trial, but is in the nature of a preliminary hearing or examination having reference only to a commitment for future trial.⁷⁴ It covers at least two points, namely, a determination of the place of the commission of the alleged offense and a determination of whether the alleged offense is covered by the terms of the treaty.⁷⁵

However, where the magistrate has jurisdiction, and the crime charged is an extraditable one, the sole question before him for determination is whether there is competent legal evidence which, according to the laws of the state where accused is found, would justify his apprehension and commitment for trial if the crime had been committed in that state,⁷⁶ or, in other words, whether the evidence shows a probable cause of belief in the fugitive's guilt of the offense charged.⁷⁷

The magistrate is not concerned with matters

of defense at the trial to be had subsequently in the foreign country,⁷⁸ and he has nothing to do with the question whether the government of the foreign country has duly authorized an application for the extradition.⁷⁹ Likewise, it is not his province or function to inquire or determine whether accused is guilty⁸⁰ or whether, if surrendered, he will be given a fair and impartial trial in the demanding country.⁸¹

The sufficiency of the complaint or other charge or accusation in the foreign country is not an issue in the proceeding before the extradition magistrate⁸² and is not before him for consideration except as it may tend to show whether or not accused has committed an extraditable crime.⁸³ Indeed, it is not necessary to produce an indictment found in the foreign country⁸⁴ or to introduce evidence of the institution of proceedings against accused in such country.⁸⁵ Also forged papers produced to, and deposed to by, witnesses giving depositions abroad, where the charge is forgery, need not be produced here before the commissioner.⁸⁶

Cure of failure to produce requisition, or certified copy thereof, before the commissioner is considered *supra* § 33.

Where the magistrate deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he may and must, as provided by statute, "certify the same, together with a copy of all the testimony taken before him, to the Secretary of State."⁸⁷ To comply with this statute the commissioner should keep a record of all the oral evidence taken before him, together

73. N.Y.—In re Calder, 2 Edm.Sel. Cas. 374.

74. U.S.—Charlton v. Kelly, N.J., 33 S.Ct. 945, 229 U.S. 447, 57 L.Ed. 1274, 46 L.R.A.N.S., 397.
In re Wadge, D.C.N.Y., 15 F. 864, affirmed, C.C., 16 F. 332.

75. U.S.—In re Lucke, D.C.Tex., 20 F.Supp. 658.

76. U.S.—Collins v. Loisel, La., 42 S.Ct. 469, 259 U.S. 309, 66 L.Ed. 956.

Cleugh v. Strakosch, C.C.A.Cal., 109 F.2d 330.
In re Lucke, D.C.Tex., 20 F.Supp. 658.

77. U.S.—In re Neely, C.C.N.Y., 103 F. 631, affirmed 21 S.Ct. 302, 180 U.S. 109, 45 L.Ed. 448.

78. U.S.—Hatfield v. Guay, C.C.A.N.H., 87 F.2d 358, certiorari denied 57 S.Ct. 669, 300 U.S. 678, 81 L.Ed. 883, rehearing denied 57 S.Ct. 793, 301 U.S. 713, 81 L.Ed. 1365.

79. U.S.—In re Dugan, D.C.Mass., 7 F.Cas.No.4,120, 2 Lowell 367.

80. U.S.—Collins v. Loisel, La., 42 S.Ct. 469, 259 U.S. 309, 66 L.Ed. 956.

Corpus Juris cited in Desmond v. Eggers, C.C.A.Wash., 18 F.2d 503, 505.

In re Lucke, D.C.Tex., 20 F.Supp. 658.

25 C.J. p 289 note 62.

81. U.S.—In re Neely, C.C.N.Y., 103 F. 631, affirmed 21 S.Ct. 302, 180 U.S. 109, 45 L.Ed. 448.

82. U.S.—Desmond v. Eggers, C.C.A.Wash., 18 F.2d 503.

83. U.S.—Ex parte Davis, C.C.A., 54 F.2d 723.

Indictment considered

In proceeding for extradition of alleged criminal to Yugoslavia, text of indictment filed against him in such country controls over text of extradition complaint, to which copy of indictment is attached, if there is any difference between them, and whole indictment must be read to

determine whether conduct complained of was of political character within provision of treaty with Yugoslavia prohibiting surrender of fugitive charged with political offense.
U.S.—Artukovic v. Boyle, D.C.Cal., 140 F.Supp. 245, affirmed, C.A., 247 F.2d 198, vacated on other grounds 78 S.Ct. 381, 355 U.S. 393, 2 L.Ed. 2d 356.

84. U.S.—Grin v. Shine, Cal., 23 S. Ct. 98, 187 U.S. 181, 47 L.Ed. 130.
Whether indictment or warrant of arrest in foreign country is condition precedent to preliminary proceedings before magistrate or final action by secretary of state see *supra* § 32.

85. U.S.—Ex parte Davis, C.C.A., 54 F.2d 723.

86. U.S.—In re Farez, C.C.N.Y., 8 F. Cas.No.4,645, 2 Abb. 364, 7 Blatchf. 345, 40 How.Pr., N.Y., 107.

87. U.S.—In re Lucke, D.C.Tex., 20 F.Supp. 658.
25 C.J. p 282 note 17, p 286 note 98.

with the objections made to the admissibility of the evidence, but excluding the arguments and disputes of counsel.⁸⁸ A United States commissioner may hear and consider the evidence, and certify the proceedings to the secretary of state, even though he did not issue the warrant of arrest.⁸⁹

Presumptions. In international extradition proceedings, general rules as to presumptions apply.^{89.5}

c. Admissibility of Evidence Generally

The evidence receivable in an international extradition proceeding is not limited by the technical rules governing the admissibility of evidence in criminal prosecutions generally.

It is not essential that the evidence in a proceeding before a magistrate for extradition to a foreign country comply with the technical rules governing the admissibility of evidence in a criminal trial⁹⁰ or that it be receivable in a local prosecution⁹¹ or on a local preliminary examination,⁹² as the phrase "such evidence of criminality," in treaties providing for extradition only on such evidence of criminality as, according to the laws of the place where accused is found, would justify his commitment for trial, refers only to the sufficiency of the evidence to block out the elements essential to a conviction and not to the rules governing the admissibility of the evidence.⁹³

It has been said that greater liberality in the reception of evidence is exercised than is done

in other civil proceedings,^{93.5} and even hearsay evidence may be received in a proceeding of this kind,⁹⁴ although, as noted *infra* subdivision f of this section, the hearsay character of a statement is a factor to be considered in determining the weight to be accorded it. Also the fact that alleged dying declarations fall short of being such does not make them inadmissible as evidence in an extradition proceeding.⁹⁵

The testimony of an accomplice is admissible, as is also evidence in corroboration thereof;⁹⁶ and, where obtaining money by false pretenses is charged, testimony of the defrauded person that he relied on accused's representation is admissible evidence of a fact best known to himself.⁹⁷

d. Examination of Witnesses by, and Admission of Evidence for, Accused

The accused has a limited right to introduce oral evidence in his behalf by testifying himself and examining other witnesses; but he should not be permitted to introduce evidence which would require the demanding country to conduct the trial at the place of arrest, instead of at the place where the offense was committed.

Accused has a right to be examined as a witness in his own behalf on an investigation before a commissioner.⁹⁸ He is also entitled to examine witnesses in his own behalf;⁹⁹ but his right to examine witnesses or introduce evidence in his own behalf is not unlimited¹ under statutes, treaties, or consti-

88. U.S.—*Ex parte Glucksman*, C. C.N.Y., 189 F. 1016.

In re *Henrich*, C.C.N.Y., 11 F.Cas. No.6,369, 5 Blatchf. 414.

89. U.S.—In re *Grin*, C.C.Cal., 112 F. 790, affirmed *Grin v. Shine*, 23 S.Ct. 98, 187 U.S. 181, 47 L.Ed. 130.

89.5 U.S.—*Argento v. Horn*, C.A. Ohio, 241 F.2d 258, certiorari denied 78 S.Ct. 23, 355 U.S. 818, 2 L.Ed.2d 35, rehearing denied 78 S.Ct. 145, 355 U.S. 885, 2 L.Ed.2d 115.

Consent to production of evidence

In proceeding to extradite accused from the United States to Italy it would be presumed, in absence of contrary showing, that attorney general had consented to production, for purpose of identifying accused as person convicted of crime in Italy, of records filed under the Alien Registration Act.

U.S.—*Argento v. Horn*, C.A. Ohio, 241 F.2d 258, certiorari denied 78 S.Ct. 23, 355 U.S. 818, 2 L.Ed.2d 35, rehearing denied 78 S.Ct. 145, 355 U.S. 885, 2 L.Ed.2d 115.

90. U.S.—U. S. ex rel. *Klein v. Muligan*, C.C.A.N.Y., 50 F.2d 687, certiorari denied 52 S.Ct. 41, 284 U.S. 665, 76 L.Ed. 563.

In re *LoDolce*, D.C.N.Y., 106 F. Supp. 455.

Remote evidence

In proceeding for extradition of one who was charged with murder and participation in murder in independent state of Croatia, evidence going back several years to show background of offenses charged and for a time after charges to show a continuance of same situation was admissible on issue of political character of offenses charged.

U.S.—U. S. ex rel. *Karadzole v. Artukovic*, D.C.Cal., 170 F.Supp. 383.

91. U.S.—U. S. ex rel. *Klein v. Muligan*, D.C.N.Y., 1 F.Supp. 635, affirmed, C.C.A., 50 F.2d 687, certiorari denied 52 S.Ct. 41, 284 U.S. 665, 76 L.Ed. 563.

92. U.S.—*Collins v. Loisel*, La., 42 S.Ct. 469, 259 U.S. 309, 66 L.Ed. 956.

93. U.S.—*Collins v. Loisel*, *supra*.

93.5 U.S.—In re *LoDolce*, D.C.N.Y., 106 F.Supp. 455.

94. U.S.—U. S. ex rel. *Klein v. Muligan*, C.C.A.N.Y., 50 F.2d 687, certiorari denied 52 S.Ct. 41, 284 U.S. 665, 76 L.Ed. 563.

President of U. S. ex rel. *Caputo v. Kelly*, D.C.N.Y., 19 F.Supp. 730, affirmed, C.C.A., 92 F.2d 603, certiorari denied 58 S.Ct. 521, 303 U.S. 635, 82 L.Ed. 1096.

95. U.S.—President of U. S. ex rel. *Caputo v. Kelly*, *supra*.

96. U.S.—*Curreri v. Vice*, C.C.A. Cal., 77 F.2d 130, certiorari denied 56 S.Ct. 170, 296 U.S. 638, 80 L.Ed. 454.

97. U.S.—*Bernstein v. Gross*, C.C.A. Tex., 58 F.2d 154.

98. U.S.—In re *Farez*, C.C.N.Y., 8 F.Cas.No.4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How.Pr., N.Y., 107.

99. U.S.—In re *Kelley*, D.C.Minn., 25 F. 268.

1. Cross-examination of affiant

Where the complaint is made on information and belief, accused may not demand the right to cross-examine affiant before the prosecution gives evidence.

U.S.—In re *Farez*, C.C.N.Y., 8 F.Cas. No.4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How.Pr., N.Y., 107.

Depositions

There is no warrant in the law or practice for receiving in behalf of

tutional provisions.²

While there is no fixed rule as to the extent to which the magistrate should hear witnesses produced by accused,³ generally speaking, accused should be permitted to testify and present other evidence to explain the evidence produced against him, or otherwise to establish want of probable cause,⁴ but not to give evidence to sustain a defense.⁵

Detention or commitment for extradition is not rendered illegal or invalidated by evidence of malice or of an ulterior purpose on the part of the prosecuting witness at whose instance a criminal prosecution was instituted in a foreign country⁶ or by the mere wrongful exclusion by the committing magistrate of specific evidence, however important.⁷

defendant testimony by commission, or by the depositions of witnesses taken abroad; all the provisions of the law contemplate the production of defendant's witnesses in person before the magistrate.

U.S.—*In re Wadge*, D.C.N.Y., 15 F. 864, affirmed, C.C., 16 F. 332.

2. Provision of Sixth Amendment to the Federal Constitution requiring that accused be confronted with witnesses against him does not apply to proceedings for extradition to a foreign country.

U.S.—*Ex parte La Mantia*, D.C.N.Y., 206 F. 330.

Federal statutes

(1) The provision of the federal statute providing a means whereby accused may secure the attendance of witnesses does not give him the right to introduce all evidence which would be admissible on a trial under an issue of not guilty.

U.S.—*Charlton v. Kelly*, N.J., 33 S.Ct. 945, 229 U.S. 447, 57 L.Ed. 1274, 46 L.R.A., N.S., 397.

(2) The statute, considered *infra* subdivision e of this section, providing for the admission in evidence of duly authenticated documents applies only to documentary evidence submitted by the prosecution to establish the criminality of the accused and not to papers offered on the part of accused.

U.S.—*Oteiza v. Jacobus*, N.Y., 10 S.Ct. 1031, 136 U.S. 330, 34 L.Ed. 464.

In re Wadge, D.C.N.Y., 15 F. 864, affirmed, C.C., 16 F. 332.

Treaties and state laws

(1) The law of the state cannot give to a prisoner held for extradition a right to introduce evidence which would be incompetent under the extradition treaty. To permit accused to give evidence to sustain a defense would require the country demanding the extradition to conduct the trial at the place of arrest,

instead of at the place where the offense was committed, as contemplated by the extradition treaty.

U.S.—*Collins v. Loisel*, La., 42 S.Ct. 469, 259 U.S. 309, 66 L.Ed. 956.

(2) Treaties of extradition do not give accused the right to be confronted with the witnesses against him.

U.S.—*In re Dugan*, D.C.Mass., 7 F. Cas.No.4,120, 2 Lowell 367.

3. U.S.—*Charlton v. Kelly*, N.J., 33 S.Ct. 945, 229 U.S. 447, 57 L.Ed. 1274, 46 L.R.A., N.S., 397.

4. U.S.—*Collins v. Loisel*, La., 42 S.Ct. 469, 259 U.S. 309, 66 L.Ed. 956.

Extradition of Mertz, D.C.Tex., 52 F.2d 241.

5. U.S.—*Collins v. Loisel*, La., 42 S.Ct. 469, 259 U.S. 309, 66 L.Ed. 956.

Corpus Juris cited in *Desmond v. Eggers*, C.C.A.Wash., 18 F.2d 503, 505.

25 C.J. p 289 note 62.

Insanity

An examining magistrate does not exceed his authority by excluding evidence of insanity offered by accused.

U.S.—*Charlton v. Kelly*, N.J., 33 S.Ct. 945, 229 U.S. 447, 57 L.Ed. 1274, 46 L.R.A., N.S., 397.

6. U.S.—*Ex parte Zentner*, D.C. Mass., 188 F. 344—*In re Herskovitz*, D.C.Ohio, 136 F. 713.

7. U.S.—*Collins v. Loisel*, La., 42 S.Ct. 469, 259 U.S. 309, 66 L.Ed. 956.

8. U.S.—*Desmond v. Eggers*, C.C.A. Wash., 18 F.2d 503.

25 C.J. p 287 note 15.

"The courts have been very lenient in admission of evidence in extradition cases. Practically any document properly authenticated has been received in evidence."

U.S.—*U. S. ex rel. Karadzole v. Artu-*

e. Admissibility of Documentary Evidence

Papers, or copies thereof, are, under a statute, admissible in evidence for all the purposes of the hearing where they are properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused has escaped. Proof that the papers, or copies thereof, offered in evidence are authenticated in the required manner may be made in the mode provided by statute, namely, by the certificate of the principal diplomatic or consular officer of the United States resident in the foreign country; but the statutory mode of proof is not exclusive.

By virtue of statute, 18 U.S.C.A. § 3190, any depositions, warrants, or other papers, or copies thereof are admissible in evidence on the hearing of an extradition case,⁸ for all the purposes of the hearing,⁹ if, as shown *infra* this section, they are properly and legally authenticated.

kovic, D.C.Cal., 170 F.Supp. 383, 387.

9. U.S.—*Collier v. Vaccaro*, C.C.A. Md., 51 F.2d 17.

Papers offered by accused see *supra* subdivision d of this section.

Time of filing

Under article of Treaty of Kingdom of Serbia providing that provisional detention of a fugitive shall cease and prisoner shall be released if a formal requisition for his surrender accompanied by necessary evidence of criminality has not been produced under stipulations of treaty within two months from date of his provisional arrest and detention, accused, who was released on bail in habeas corpus action on Sept. 20, 1951, following arrest on Aug. 29, 1951, was not entitled to have stricken exhibits filed ten days before date set for hearing on an amended complaint in June of 1958.

U.S.—*U. S. ex rel. Karadzole v. Artukovic*, D.C.Cal., 170 F.Supp. 383.

Identity and criminality of accused

(1) In proceedings to extradite one charged with bank robbery, admission in evidence of duly authenticated depositions and photograph of one of bank robbers, authenticated by two witnesses, and attached to depositions, which appeared to be likeness of accused, was proper method of proving identity.

U.S.—*Bagley v. Starwich*, C.C.A. Wash., 8 F.2d 42.

(2) Copies of depositions from abroad, taken subsequently to the date of the original warrant of arrest issued abroad, may be admissible in evidence as constituting, with oral evidence taken before the commissioner, legal testimony tending to prove the criminality of accused, and material for a decision of the commissioner on the question of fact, as to the criminality of accused.

The class of properly authenticated papers admissible under the statute includes ex parte affidavits,¹⁰ unsworn statements,¹¹ depositions¹² even though unsworn to,¹³ a translation of a deposition testified to by the translator as correct,¹⁴ and papers purporting to be depositions, and so certified, although the recitals contained in the introductory part thereof show that they are mere statements and not depositions.¹⁵

It is not limited to papers on which a warrant of arrest was issued abroad;¹⁶ and a prior statutory provision dealing only with the admission in evidence of copies of foreign depositions is deemed, by virtue of its inconsistency with the present statute, to fall within a repealing clause of the latter statute.¹⁷

In the case of extradition to the United States the documentary evidence required by the state department has been prescribed by departmental regulation.¹⁸

The authentication contemplated by the statute is a proper and legal authentication entitling the papers in question to be received for similar purposes by the tribunals of the foreign country from which accused has escaped.¹⁹ By virtue of express statutory provision, the certificate of the principal diplomatic or consular officer of the United States, resident in the foreign country, is proof that the papers offered in evidence are authenticated in the required manner.²⁰

It is said that under the present statute the single test of admissibility of documentary evidence is the consular certificate,²¹ and, while it is true that a former statutory provision requiring copies of depositions to be attested on oath of the party producing them to be true copies of the original depositions is eliminated,²² a consular certificate is the only mode of proof of authentication now provided for by statute,²³ and it is not necessary, otherwise than by the certificate of the consul, to prove that the law of the

U.S.—In re Stupp, C.C.N.Y., 23 F.Cas. No.13,563, 12 Blatchf. 501.

10. U.S.—Bingham v. Bradley, Ill., 36 S.Ct. 634, 241 U.S. 511, 60 L.Ed. 1136.

Desmond v. Eggers, C.C.A.Wash., 18 F.2d 503.

U. S. ex rel. Karadzole v. Artukovic, D.C.Cal., 170 F.Supp. 383 —President of U. S. ex rel. Caputo v. Kelly, D.C.N.Y., 19 F.Supp. 730, affirmed, C.C.A., 92 F.2d 603, certiorari denied 58 S.Ct. 521, 303 U.S. 635, 82 L.Ed. 1096.

Hearsay

In proceeding to extradite accused from the United States to Italy, hearsay evidence, consisting of sworn statements taken ex parte in Italy without knowledge of accused or his counsel and identifying accused as person who had been charged with murder in Italy, was admissible in view of unambiguous testimony of expert on Italian law that such statements could properly be received for similar purposes by Italian tribunals.

U.S.—Argento v. Horn, C.A.Ohio, 241 F.2d 258, certiorari denied 78 S.Ct. 23, 355 U.S. 818, 2 L.Ed.2d 35, rehearing denied 78 S.Ct. 145, 355 U.S. 885, 2 L.Ed.2d 115.

11. U.S.—Collins v. Loisel, La., 42 S.Ct. 469, 259 U.S. 309, 66 L.Ed. 956.

President of U. S. ex rel. Caputo v. Kelly, D.C.N.Y., 19 F.Supp. 730, affirmed, C.C.A., 92 F.2d 603, certiorari denied 58 S.Ct. 521, 303 U.S. 635, 82 L.Ed. 1096.

25 C.J. p 287 note 22.

12. U.S.—Extradition of Mertz, D.C. Tex., 52 F.2d 241—U. S. ex rel. Klein v. Mulligan, C.C.A.N.Y., 50

F.2d 687, certiorari denied 52 S.Ct. 41, 284 U.S. 665, 76 L.Ed. 563.

President of U. S. ex rel. Caputo v. Kelly, D.C.N.Y., 19 F.Supp. 730, affirmed, C.C.A., 92 F.2d 603, certiorari denied 58 S.Ct. 521, 303 U.S. 635, 82 L.Ed. 1096.

Muller's Case, D.C.Pa., 17 F.Cas. No.9,913, 5 Phila. 289.

13. U.S.—Ex parte La Mantia, D.C. N.Y., 206 F. 330—Ex parte Glaser, N.Y., 176 F. 702, 100 C.C.A. 254.

14. U.S.—Ex parte Zentner, D.C. Mass., 188 F. 344.

In re Henrich, C.C.N.Y., 11 F.Cas. No.6,369, 5 Blatchf. 414.

15. U.S.—In re Ezeta, D.C.Cal., 62 F. 972.

16. U.S.—In re Farez, C.C.N.Y., 8 F. Cas.No.4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How.Pr., N.Y., 107.

17. U.S.—Collins v. Loisel, La., 42 S.Ct. 469, 259 U.S. 309, 66 L.Ed. 956.

18. Mem.Dept.State Oct. 1892.

25 C.J. p 287 note 27.

19. U.S.—Desmond v. Eggers, C.C.A. Wash., 18 F.2d 503.

25 C.J. p 287 note 15, p 288 note 44.

Authentication in very language of statute is sufficient.

U.S.—In re Krojanker, C.C.N.Y., 44 F. 482.

25 C.J. p 288 note 52.

20. U.S.—Collins v. Loisel, La., 42 S.Ct. 469, 259 U.S. 309, 66 L.Ed. 956.

Desmond v. Eggers, C.C.A.Wash., 18 F.2d 503.

25 C.J. p 288 note 45.

Sufficiency of certificate

(1) A certificate made by an offi-

cial designated by the statute, and literally complying with the statute, is, of course, sufficient.

U.S.—Voloshin v. Ridenour, C.C.A. Canal Zone, 299 F. 134.

(2) A certificate reciting that the papers "are properly and legally authenticated, so as to entitle them to be received in evidence for similar purposes" in the foreign country, is sufficient.

U.S.—In re Grin, C.C.Cal., 112 F. 790, affirmed Grin v. Shine, 23 S.Ct. 98, 187 U.S. 181, 47 L.Ed. 130—In re Breen, C.C.N.Y., 73 F. 458.

(3) The United States courts will take judicial notice that a chargé d'affaires ad interim was, at the time such certificate was given, the principal diplomatic officer of the country where it was given.

U.S.—In re Orpen, C.C.Cal., 86 F. 760.

(4) It has been held that any American consul resident in Canada is a principal within the meaning of the statute.

U.S.—Desmond v. Eggers, C.C.A. Wash., 18 F.2d 503.

(5) Certification by a vice consul will be accepted.

U.S.—In re Herres, C.C.Minn., 33 F. 165.

21. U.S.—Ex parte Schorer, D.C. Wis., 197 F. 67.

25 C.J. p 287 note 17.

22. U.S.—Collins v. Loisel, La., 42 S.Ct. 469, 259 U.S. 309, 66 L.Ed. 956.

Ex parte Schorer, D.C.Wis., 197 F. 67.

23. U.S.—Ex parte Schorer, supra—Ex parte Glaser, N.Y., 176 F. 702, 100 C.C.A. 254.

foreign country would allow copies of depositions taken before a magistrate to be received as proof of criminality.²⁴ Nevertheless, the statutory mode of proving authentication is not exclusive²⁵ and resort may be had to other proof.²⁶

Where dependence is placed on a certificate or certificates, each piece of documentary evidence, whether an original²⁷ or a copy,²⁸ offered in support of the charge against accused should be accompanied by a certificate,²⁹ unless the court can ascertain with reasonable certainty what papers are referred to in the certificate.³⁰

f. Weight and Sufficiency of Evidence

To justify a magistrate in committing a prisoner for extradition to a foreign country, it is not necessary that the evidence be sufficient to convict; all that is required is that the evidence be such as would be deemed sufficient to justify holding the prisoner for trial if the offense had been committed in the state where accused is found; and this requirement is satisfied by evidence affording reasonable ground to believe that accused is guilty of the offense which is charged and is within the treaty.

The laws of the place where the criminal is found furnish the rule as to what evidence is necessary to authorize his arrest and commitment;³¹ and in the United States the law of the place where found is the law of the asylum state.³²

Under the federal statute which directs a certification of the evidence to the secretary of state, as considered, *supra*, subdivision b of this section, and

the issuance of a warrant for the commitment of accused to jail to await surrender to the foreign government, *infra* § 40, if the magistrate deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, see 18 U.S.C.A. § 3184, and under a treaty provision, which appears in most of the extradition treaties of the United States, that extradition shall be granted only on such evidence of criminality as, according to the laws of the place where the fugitive or person charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed,³³ it is sufficient to warrant commitment for extradition, especially where the legality of the detention is questioned subsequently in habeas corpus proceedings, discussed in Habeas Corpus § 39, that there is legal evidence on which the magistrate may properly conclude that accused has committed an offense within the treaty as charged,³⁴ and his conclusion to this effect may be based on such evidence as would be deemed sufficient to justify holding accused for trial if the offense had been committed in this country.³⁵

Although in some of the earlier cases it was held that, in cases under a treaty of extradition, the proof that the offense has been committed by the fugitive in the foreign jurisdiction should be sufficient to warrant a conviction,³⁶ or at least an in-

24. U.S.—In re Charleston, D.C. Minn., 34 F. 531.

In re Macdonnell, C.C.N.Y., 16 F. Cas.No.8,772, 11 Blatchf. 170.

25. U.S.—Desmond v. Eggers, C.C. A.Wash., 18 F.2d 503.

26. U.S.—Desmond v. Eggers, *supra*, 25 C.J. p 288 note 54, p 289 note 55.

27. U.S.—In re Henrich, C.C.N.Y., 11 F.Cas.No.6,369, 5 Blatchf. 414.

28. U.S.—In re McPhun, C.C.N.Y., 30 F. 57.

29. U.S.—In re Henrich, C.C.N.Y., 11 F.Cas.No.6,369, 5 Blatchf. 414.

25 C.J. p 288 note 50.

30. U.S.—In re Dugan, D.C.Mass., 7 F.Cas.No.4,120, 2 Lowell 367—In re Farez, C.C.N.Y., 8 F.Cas.No.4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How. Pr., N.Y., 107.

31. U.S.—Pettit v. Walshe, Ind., 24 S.Ct. 657, 194 U.S. 205, 48 L.Ed. 938.

25 C.J. p 290 note 82.

32. U.S.—Pettit v. Walshe, *supra*. Cleugh v. Strakosch, C.C.A.Cal., 109 F.2d 330—U. S. ex rel. Di Stefano v. Moore, D.C.N.Y., 46 F.2d 308, affirmed, C.C.A., 46 F.2d 310, certiorari denied U. S. ex rel. Di Stefano v. Pulver, 51 S.Ct. 364,

283 U.S. 830, 75 L.Ed. 1443—Vaccaro v. Collier, D.C.Md., 38 F.2d 862, modified on other grounds. C.C.A., Collier v. Vaccaro, 51 F.2d 17.

U. S. ex rel. Karadzole v. Artukovic, D.C.Cal., 170 F.Supp. 383.

33. U.S.—Curreri v. Vice, C.C.A.Cal., 77 F.2d 130, certiorari denied 56 S.Ct. 170, 296 U.S. 638, 80 L.Ed. 454—Vaccaro v. Collier, D.C.Md., 38 F.2d 862, modified on other grounds, C.C.A., Collier v. Vaccaro, 51 F.2d 17.

25 C.J. p 289 note 76.

34. U.S.—Ex parte Bryant, N.Y., 17 S.Ct. 744, 167 U.S. 104, 42 L.Ed. 94.

25 C.J. p 290 note 78.

Understanding of offense

The magistrate is limited by the statute to determining whether there is sufficient evidence of criminality to justify holding accused for the particular offense, "as we understand that offense by its description in the treaty and in our laws." U.S.—Ex parte Schorer, D.C.Wis., 197 F. 67.

Evidence held to support charge

U.S.—Bernstein v. Gross, C.C.A.Tex., 58 F.2d 154.

Evidence held sufficient as to one, but not another, crime charged

U.S.—Hatfield v. Guay, C.C.A.N.H., 87 F.2d 358, certiorari denied Hatfield v. Guay, 57 S.Ct. 669, 300 U. S. 678, 81 L.Ed. 883, rehearing denied 57 S.Ct. 793, 301 U.S. 713, 81 L.Ed. 1365—Collier v. Vaccaro, C. C.A.Md., 51 F.2d 17.

35. U.S.—U. S. ex rel. Lo Pizzo v. Mathues, C.C.A.Pa., 36 F.2d 565—In re Dubroca y Paniagua, D.C.Pa., 33 F.2d 181.

25 C.J. p 290 note 77.

Commitment for trial

It is not the function of the committing magistrate to determine whether accused is guilty, but merely whether there was competent evidence, which according to the law of the state, would justify his apprehension and commitment for trial, if the crime had been committed in that state.

U.S.—Collins v. Loisel, La., 42 S.Ct. 469, 259 U.S. 309, 66 L.Ed. 956.

U. S. ex rel. Karadzole v. Artukovic, D.C.Cal., 170 F.Supp. 383.

36. U.S.—In re Risch, D.C.Tex., 36 F. 546.

Ex parte Kaine, C.C.N.Y., 14 F. Cas.No.7,597, 3 Blatchf. 1.

dictment,³⁷ it is now established that, in an extradition case, it is not necessary that the evidence be sufficient to convict³⁸ or to convince the magistrate of accused's guilt beyond a reasonable doubt,³⁹ it being sufficient that the evidence affords reasonable ground or probable cause to believe that accused is guilty of the offense charged and that it is within the treaty.⁴⁰

The magistrate may determine the credibility of witnesses⁴¹ and the weight to be given testimony presented by depositions, he not being required, either by treaty or by statute, to accept blindly, and without question, testimony produced by deposition.⁴² The hearsay character of a statement is a factor to be considered in determining the weight to be accorded it;⁴³ and evidence which is entirely hearsay is insufficient;⁴⁴ but circumstantial evidence has been held sufficient to justify committing the fugitive.⁴⁵ The conviction of a fugitive in contumaciam in his absence is to be treated merely as a charge of crime and not as a conviction.⁴⁶

Situs of crime. Extradition from the United States is precluded by evidence establishing that the act alleged to be criminal was done in this country;⁴⁷ and even where the evidence warrants the commissioner or other magistrate in believing, as it sometimes does,⁴⁸ that the crime under consideration

took place in a foreign country, a preliminary finding to this effect is not conclusive of the fundamental issue, the question of the situs of the crime being merely preliminary to a determination of actual guilt.⁴⁹

The identity of the prisoner must be established by legal proof in each case;⁵⁰ but it may be sufficiently established by his admissions⁵¹ and the testimony of other persons,⁵² or by comparison of his features with a photograph of accused identified by, and attached to, the depositions taken in the foreign country.⁵³ The fact that the fugitive's name is spelled differently in the languages of the demanding and the asylum countries is immaterial, since a fugitive may be held under an alias without knowledge of his true name.⁵⁴

§ 40. — Commitment for Extradition

It is the statutory duty of the magistrate, when he deems the evidence sufficient to support the charge, to issue his warrant for the commitment of the prisoner to the proper jail to await surrender to the foreign government. His order or warrant of commitment need not specifically set forth the charge established by the evidence.

The statute, 18 U.S.C.A. § 3184, which directs the magistrate, if he deems the evidence sufficient to sustain the charge under the provisions of the prop-

37. N.Y.—In re Calder, 2 Edm.Sel. Cas. 374.

38. U.S.—Fernandez v. Phillips, N. H., 45 S.Ct. 541, 268 U.S. 311, 69 L.Ed. 970.

U. S. ex rel. Klein v. Mulligan, C.C.A.N.Y., 50 F.2d 687, certiorari denied 52 S.Ct. 41, 284 U.S. 665, 76 L.Ed. 563—Vaccaro v. Collier, D. C.Md., 38 F.2d 862, modified on other grounds, C.C.A., Collier v. Vaccaro, 51 F.2d 17—In re Dubroca y Paniagua, D.C.Pa., 33 F.2d 181.

Testimony of accomplice is alone sufficient to justify holding of person for extradition, even though it would be insufficient to convict.

U.S.—Curren v. Vice, C.C.A.Cal., 77 F.2d 130, certiorari denied 56 S.Ct. 170, 296 U.S. 638, 80 L.Ed. 454.

39. U.S.—Fernandez v. Phillips, N. H., 45 S.Ct. 541, 268 U.S. 311, 69 L.Ed. 970.

U. S. ex rel. Lo Pizzo v. Mathues, C.C.A.Pa., 36 F.2d 565.

Miss.—Corpus Juris Secundum cited in Bishop v. Jones, 38 So.2d 920, opinion withdrawn and error sustained on other grounds 42 So.2d 421, 207 Miss. 423.

40. U.S.—Fernandez v. Phillips, N. H., 45 S.Ct. 541, 268 U.S. 311, 69 L.Ed. 970.

Hatfield v. Guay, C.C.A.N.H., 87 F.2d 358, certiorari denied 57 S.Ct.

669, 300 U.S. 678, 81 L.Ed. 883, rehearing denied 57 S.Ct. 793, 301 U.S. 713, 81 L.Ed. 1365—U. S. ex rel. Donnelly v. Mulligan, C.C.A.N.Y., 76 F.2d 511—Ex parte Davis, C.C.A., 54 F.2d 723—U. S. ex rel. Klein v. Mulligan, C.C.A.N.Y., 50 F.2d 687, certiorari denied 52 S.Ct. 41, 284 U.S. 665, 76 L.Ed. 563—U. S. ex rel. Lo Pizzo v. Mathues, C.C.A.Pa., 36 F.2d 565—In re Dubroca y Paniagua, D.C.Pa., 33 F.2d 181.

President of U. S. ex rel. Caputo v. Kelly, D.C.N.Y., 19 F.Supp. 730, affirmed, C.C.A., 92 F.2d 603, certiorari denied 58 S.Ct. 521, 303 U.S. 635, 82 L.Ed. 1096.

Evidence held insufficient

U.S.—In re Wise, D.C.Tex., 168 F. Supp. 366.

41. U.S.—Extradition of Mertz, D. C.Tex., 52 F.2d 241.

42. U.S.—Extradition of Mertz, supra.

43. U.S.—U. S. ex rel. Klein v. Mulligan, C.C.A.N.Y., 50 F.2d 687, certiorari denied 52 S.Ct. 41, 284 U.S. 665, 76 L.Ed. 563.

U. S. ex rel. Karadzole v. Artukovic, D.C.Cal., 170 F.Supp. 383.

44. U.S.—U. S. ex rel. Karadzole v. Artukovic, supra.

Ex parte Fudera, C.C.N.Y., 162 F. 591, appeal dismissed 31 S.Ct. 470, 219 U.S. 589, 55 L.Ed. 348.

45. U.S.—In re Urzua, C.C.N.Y., 188 F. 540—In re Bryant, C.C.N.Y., 80 F. 282, affirmed 17 S.Ct. 744, 167 U.S. 104, 42 L.Ed. 94.

46. U.S.—Ex parte La Mantia, D.C. N.Y., 206 F. 330—Ex parte Fudera, C.C.N.Y., 162 F. 591, appeal dismissed 31 S.Ct. 470, 219 U.S. 589, 55 L.Ed. 348.

47. U.S.—Extradition of Mertz, D. C.Tex., 52 F.2d 241.

48. U.S.—Vaccaro v. Collier, D.C. Md., 38 F.2d 862, modified on other grounds, C.C.A., Collier v. Vaccaro, 51 F.2d 17.

49. U.S.—Vaccaro v. Collier, D.C. Md., 38 F.2d 862, modified on other grounds, C.C.A., Collier v. Vaccaro, 51 F.2d 17.

50. U.S.—Ex parte La Mantia, D.C. N.Y., 206 F. 330.

51. U.S.—In re Charleston, D.C. Minn., 34 F. 531.

52. U.S.—U. S. ex rel. Lo Pizzo v. Mathues, C.C.A.Pa., 36 F.2d 565.

53. U.S.—Glucksman v. Henkel, N. Y., 31 S.Ct. 704, 221 U.S. 508, 55 L.Ed. 830.

25 C.J. p 291 note 98.

54. U.S.—Ex parte Glucksman, C.C. N.Y., 189 F. 1016.

er treaty or convention, to issue his warrant for the commitment of the person charged to the proper jail, there to remain until surrender to the foreign government shall be made, may and should be complied with.⁵⁵ A magistrate's order of commitment must be interpreted as limited by his finding as to the charge established by the evidence,⁵⁶ and it need not specifically set forth that charge.⁵⁷

§ 41. — Rearrest

A second warrant may be issued for the arrest of an alleged fugitive after his discharge, or even during the pendency of habeas corpus proceedings, although it cannot be executed while accused is in the custody of the court in such proceedings.

Where an alleged fugitive has been discharged, a new complaint may be made, and a new warrant issued for his arrest, with a view to a reexamination of the case.⁵⁸ Where the fugitive has been discharged on the ground of insufficiency of evidence, the sufficiency of the additional evidence need not be considered prior to the issue of a second warrant.⁵⁹ In such a case a second warrant may issue on the same papers,⁶⁰ and the same is true when the first warrant is of questionable regularity.⁶¹

Where an extradition commissioner has committed the accused for extradition, and the commitment has been set aside on habeas corpus for errors on the examination, accused is not necessarily released, but may be held under the warrant of arrest with a view to a new examination before the commissioner.⁶² While a second warrant can be validly issued,⁶³ it cannot be executed,⁶⁴ while habeas corpus proceedings are pending and the prisoner is in the custody of the court in such proceedings.

§ 42. — Bail

Bail may be granted in an international extradition

case, but there is no right thereto, and usually it is not granted.

A prisoner is not entitled as of right to bail pending examination in an international extradition case;⁶⁵ and, while power to grant bail exists,⁶⁶ it should be exercised very sparingly⁶⁷ and only when the justification is pressing, as well as plain,⁶⁸ or there are unusual circumstances.⁶⁹

That it is ever advisable to admit to bail prior to the date of a reasonably early examination is denied;⁷⁰ but, on the other hand, the court may feel constrained to admit the prisoner to bail where considerable time must necessarily elapse before a hearing is held and the offense charged is bailable under the laws both of the state and the demanding country.⁷¹

The practice is not to admit to bail⁷² or not to do so usually.⁷³ A refusal to admit a fugitive to bail, even though based on the ground of want of power, is not reversible error.⁷⁴

§ 43. — Review

No appeal lies from the decision of a magistrate in an international extradition proceeding.

The decision of the magistrate in an international extradition proceeding is not appealable;⁷⁵ but, as shown *infra* § 44, it may be revised by the executive.

The scope of the inquiry in habeas corpus proceedings is stated in Habeas Corpus § 39. The writ of certiorari accompanying a writ of habeas corpus does not confer on the court any wider range of determination on the sufficiency of the facts shown than does the writ of habeas corpus.⁷⁶

55. U.S.—*Ex parte Davis*, C.C.A., 54 F.2d 723.

56. U.S.—*Collins v. Loisel*, La., 43 S.Ct. 618, 262 U.S. 426, 67 L.Ed. 1062.

57. U.S.—*Collins v. Loisel*, *supra*.

58. U.S.—*Collins v. Loisel*, La., 43 S.Ct. 618, 262 U.S. 426, 67 L.Ed. 1062.

Voloshin v. Ridenour, C.C.A.—*Canal Zone*, 299 F. 134.

25 C.J. p 292 note 12.

59. U.S.—*Ex parte Schorer*, D.C. Wis., 195 F. 334.

60. U.S.—*In re Kelly*, C.C.Minn., 26 F. 852.

61. U.S.—*Petition of Fergus*, C.C. Mass., 30 F. 607.

62. U.S.—*In re Farez*, C.C.N.Y., 8 F. Cas.No.4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How.Pr., N.Y., 107.

63. U.S.—*Collins v. Loisel*, La., 43 S.Ct. 618, 262 U.S. 426, 67 L.Ed. 1062.

64. U.S.—*In re Farez*, C.C.N.Y., 8 F.Cas.No.4,644, 7 Blatchf. 34.

65. U.S.—*In re Klein*, D.C.N.Y., 46 F.2d 85—*In re Gannon*, D.C.Pa., 27 F.2d 362.

66. U.S.—*In re Klein*, D.C.N.Y., 46 F.2d 85—U. S. ex rel. *McNamara v. Henkel*, D.C.N.Y., 46 F.2d 84. 25 C.J. p 292 note 23.

67. U.S.—*In re Klein*, D.C.N.Y., 46 F.2d 85.

68. U.S.—*In re Klein*, *supra*. *In re Mitchell*, D.C.N.Y., 171 F. 289.

69. U.S.—*In re Klein*, 46 F.2d 85.

70. U.S.—U. S. ex rel. *McNamara v. Henkel*, D.C.N.Y., 46 F.2d 84.

71. U.S.—*In re Gannon*, D.C.Pa., 27 F.2d 362.

72. U.S.—*In re Wright*, C.C.N.Y., 123 F. 463, affirmed 23 S.Ct. 781, 190 U.S. 40, 47 L.Ed. 948—*In re Carrier*, D.C.Colo., 57 F. 578.

73. U.S.—U. S. ex rel. *McNamara v. Henkel*, D.C.N.Y., 46 F.2d 84.

74. U.S.—*Wright v. Henkel*, N.Y., 23 S.Ct. 781, 190 U.S. 40, 47 L.Ed. 948.

75. U.S.—*Collins v. Miller*, La., 40 S.Ct. 347, 252 U.S. 364, 64 L.Ed. 616.

In re LoDolce, D.C.N.Y., 106 F. Supp. 455—*In re Keene's Extradition*, D.C.Tex., 6 F.Supp. 308.

76. U.S.—*In re Lincoln*, D.C.N.Y., 228 F. 70, affirmed 36 S.Ct. 721, 241 U.S. 651, 60 L.Ed. 1222.

§ 44. Surrender to Demanding Country

Provisions relative to the delivery of a person committed for extradition to an authorized representative of the demanding government and his conveyance out of the asylum country may, and, as far as mandatory, must, be complied with; and, where extradition is not completed within the time limited therefor, accused is entitled to be discharged unless good cause to the contrary is shown; but the secretary of state is not obliged to order the delivery of the committed person to a representative of the foreign government, it being permissible for him to review the evidence before, and the opinion of, the committing magistrate and decide that the case is not one calling for surrender.

Under the federal statute, 18 U.S.C.A. § 3186, which continues the procedure established by judicial decisions under extradition treaties prior to its enactment, the secretary of state is authorized to order the person committed by an extradition magistrate to be delivered to an authorized representative of the foreign government, to be tried for the crime of which such person shall be accused, and such person is required to be delivered up accordingly.⁷⁷ It was at first held that the executive had merely a ministerial duty in the matter.⁷⁸ It is now well established, however, that the executive has power to revise the opinion of the extradition magistrate,⁷⁹ either on the ground that the case is not within the treaty,⁸⁰ or on the ground of insufficiency of the evidence to establish the charge under the treaty,⁸¹ or on the fact that the charge for which the extradition magistrate had committed accused was not embraced in the requisition of the foreign government for the extradition of the fugitive.⁸² Even where a court has refused to discharge accused in habeas corpus proceedings, the secretary of state may review the evidence before the magistrate and decide whether the case presented is one calling for the surrender of accused to the authorities of the foreign country.⁸³

Whether an indictment or warrant of arrest in the demanding country is a condition precedent to action by the secretary of state is considered *supra* § 32. The necessity of a requisition is discussed *supra* § 33.

Time for completing extradition. A federal statute, 18 U.S.C.A. § 3188, providing that, if the pris-

oner is not delivered up and conveyed out of the United States within two calendar months after commitment, over and above the time actually required to convey him from the jail to which he was committed, by the readiest way out of the United States, it shall be lawful for any judge of the United States, or of any state, on application made to him by or in behalf of the prisoner, and on proof that reasonable notice of the intention to make such application has been given to the secretary of state, to order the prisoner to be discharged, unless sufficient cause is shown to such judge why such discharge ought not to be ordered, clearly indicates the purpose of congress to require prompt action, on the part of representatives of this government and of the demanding government, in completing extradition,⁸⁴ and it is construed to be tantamount to a mandate requiring discharge unless sufficient cause to the contrary is shown.⁸⁵

It is not incumbent on petitioner to show a sufficient cause for extending the benefits of the statute,⁸⁶ but, on the contrary, the burden is on those who resist the petition to present evidence which would justify the judge in withholding the discharge after the expiration of the time limited.⁸⁷

The fact that at the time of the application an agent from the government requesting the extradition is on his way to remove the prisoner is not sufficient cause when there is no satisfactory evidence why the coming of the officer has been so long delayed.⁸⁸ On finding that the delay is not attributable to any efforts on the part of the prisoner to postpone the time when he should actually be delivered to an authorized representative of the foreign government, the responsibility of the judge ends and it is not his province further to search for the cause of the delay.⁸⁹

Extradition from foreign country. Provision is made by statute, 18 U.S.C.A. § 3192, for the transportation and safekeeping of a person delivered by a foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for the crime of which he is duly accused.⁹⁰

77. U.S.—Terlinden v. Ames, Ill., 22 S.Ct. 484, 184 U.S. 270, 46 L.Ed. 534.
25 C.J. p 293 note 37.

78. U.S.—In re Sheazle, C.C.Mass., 21 F.Cas.No.12,734, 1 Woodb. & M. 66.

79. U.S.—In re Ezeta, D.C.Cal., 62 F. 972.

80. U.S.—In re Stupp, C.C.N.Y., 23 F.Cas.No.13,563, 12 Blatchf. 501.

81. U.S.—Ex parte La Page, D.C. N.Y., 216 F. 256.

82. Mr. Gresham to Mr. Guzman Oct. 26, 1894, M.S.S. Notes to Salvador Dept. State.

83. U.S.—Collier v. Vaccaro, C.C.A. Md., 51 F.2d 17.
In re Stupp, C.C.N.Y., 23 F.Cas. No.13,563, 12 Blatchf. 501.

84. U.S.—In re Normano, D.C.Mass., 7 F.Supp. 329.

85. U.S.—In re Normano, *supra*.

86. U.S.—In re Normano, *supra*.

87. U.S.—In re Normano, *supra*.

88. U.S.—In re Dawson, C.C.N.Y., 101 F. 253.
N.Y.—In re Washburn, 4 Johns.Ch. 106, 8 Am.D. 548, 3 Wheel.Cr. 473.

89. U.S.—In re Normano, D.C.Mass., 7 F.Supp. 329.

90. Instructions State Dept. July 1885.
25 C.J. p 293 note 39.

Articles in possession of accused. A provision common to extradition treaties is that all articles found in the possession of accused, whether being the proceeds of the crime charged, or material as evidence in making proof of the crime, shall as far as practicable and in conformity with law be given up when the extradition takes place. A proviso is generally inserted that the rights of third parties to such articles shall nevertheless be respected.⁹¹

§ 45. Costs and Expenses

Payment or reimbursement of costs and expenses in an international extradition is made by the demanding government. Where extradition is made from a foreign country of an offender against a state law, the question of recovery for services and expenses by an officer against the state or country is governed by local statutes and the proper construction thereof.

Every treaty of extradition to which the United States is a party contains a provision that the expenses of extradition shall be borne by the demanding government,⁹² and it is the practice for the demanding government to defray the expenses of the proceedings whether the fugitive is eventually surrendered or not. In several of our treaties the proviso is added that the demanding government shall not be compelled to bear any expense for the services of such officers of the government from which extradition is sought as receive a fixed salary, and that in cases where such officers receive only fees, the charge for their services shall not exceed the fees to which they would be entitled under the laws of the country for services rendered in ordinary criminal proceedings. The magistrate is required to certify witness' fees and costs of every nature, including his own fees, to the secretary of state, who is authorized to allow payment thereof out of the appropriation to defray the expenses of the judiciary, and to obtain reimbursement of the amount to be paid to the United States from the foreign government by whom the proceedings may have been instituted, see 18 U.S.C.A. § 3195.

In the United States the expenses incurred in securing the extradition from foreign countries of offenders against the federal laws are borne by the government of the United States, an annual appropriation being made, "for actual expenses incurred in bringing home from foreign countries persons charged with crime." Where the offense is against

the law of a state or territory the expenses are paid by the state or territory.⁹³

A treaty provision⁹⁴ that on extradition the expense of apprehension and delivery shall be borne by the "party who makes the requisition, and receives the fugitive," has been held to refer to the contracting parties to the treaty, and has no reference to any question which may arise between the government which receives the fugitive and its officers or citizens.⁹⁵

A person named by the governor and by the president of the United States to receive from the Canadian authorities and return to a particular county under the extradition treaty between the United States and Great Britain one charged with crime in that county cannot hold the state or county for expenses and services in securing the return of the prisoner under a statute providing that such expenses shall be paid for "removing any person charged with having committed . . . any offence in this state from another State into this State for trial."⁹⁶ On the other hand, a statute forbidding an officer to ask or receive any fee or compensation for expenses incurred in procuring from the government a demand on the executive authority of a state or territory or of a foreign government does not apply to international extradition proceedings.⁹⁷

The agent representing the state is the only person who can make expenditures in extradition proceedings which the county from which the fugitive fled will be required to repay; and, where the county has paid such agent, it will not be called on to reimburse its county attorney for expenses incurred by him in the proceedings.⁹⁸

Witnesses for indigent defendant. Effect is accorded a statute, 18 U.S.C.A. § 3191, providing that, where, by order of the judge or commissioner in a proceeding for extradition to a foreign country, witnesses are subpoenaed for a prisoner who is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner as similar fees are paid in the case of witnesses subpoenaed in behalf of the United States.⁹⁹

91. Malloy Treaties 1776-1909—Charles Treaties 1910-1913.

92. Malloy Treaties 1776-1909—Charles Treaties 1910-1913.

93. N.Y.—People v. Columbia County, 8 N.Y.S. 752, 56 Hun 17, affirmed 31 N.E. 322, 134 N.Y. 1.

Pa.—Goldfon v. Allegheny County, 8 Pa.Dist. 387.

94. Treaty between United States and Great Britain, 1842, art. 10.

95. N.Y.—People v. Columbia County, 8 N.Y.S. 752, 56 Hun 17, affirmed 31 N.E. 322, 134 N.Y. 1.

96. Pa.—Goldfon v. Allegheny

County, 8 Pa.Dist. 387, affirmed 14 Pa.Super. 75.

97. N.Y.—Ellis v. Jacob, 45 N.Y.S. 177, 17 App.Div. 471.

98. Kan.—Rucker v. Coffey County, 54 P. 141, 7 Kan.App. 470.

99. U.S.—In re Kelley, D.C.Minn.,

§ 46. Rights and Liabilities of Accused after Surrender

A person extradited from a foreign country cannot be tried for a prior offense other than the one charged in the extradition proceedings until, after his release or trial on such charge, he has been allowed the time specified by treaty, or a reasonable time, to return to the country from which he was extradited. There is a like immunity from arrest in a civil action, and also one from extradition to a third country unless the government which granted the original extradition consents to the reextradition.

A person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty can be tried only for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial on such charge, to return to the country from whose asylum he has been taken, or, if the treaty definitely fixes the time for this purpose, until such time has elapsed,¹ although there are some early cases which seem to hold a contrary view.²

If the United States tries the fugitive for a crime other than the one for which extradition was granted, it violates the contractual obligations of the treaty and the courts will be without jurisdiction over him, unless he waives such issue.^{2,5} It has also been held, however, that the immunity from trial for any other offense than that for which extradition has been granted cannot be waived by accused since an individual cannot release the government from the obligations with reference to fugitives from justice which it has assumed toward other nations with which it has entered into extradition treaties.³

The remedy generally pursued in cases of detention which are illegal by reason of the fact that

accused is held for a crime other than that for which he was extradited is by plea in abatement or objection to the jurisdiction of the trial court,⁴ or a motion in arrest of judgment,⁵ but on a failure of the state court to protect the right of accused in this regard resort may be had to the United States courts.⁶

The fact that a crime is included in a crime specified in the extradition treaty does not authorize trial and conviction therefor.⁷ However, various matters are immaterial and do not preclude trial and conviction, such as the fact that different names are applied to the alleged criminal act in the two countries,⁸ a slight variance between the wording of the information in the extradition proceedings and the indictment on which the fugitive is tried,⁹ and the fact that certain property described in the indictment on which the extradition proceeding was grounded is of less value than the amount alleged.¹⁰

The finding of a new indictment to remedy a technical defect in a former one does not charge another and different offense so as to prevent his trial on the good indictment of a defendant who has been extradited from a foreign country on a defective one;¹¹ and, where the complaint or indictment is quashed for technical defects after accused has been returned from a foreign country by virtue of an extradition warrant, it is no violation of the prisoner's rights to hold him until a new complaint can be filed or new indictment can be returned on the same facts.¹²

As long as the prisoner is tried on the facts which appeared in evidence before the commissioner who committed him for extradition, and on one of the charges for which he was surrendered, it is immaterial whether he is indicted on all of such charges.¹³ Where a person is extradited as an ac-

25 F. 268—In re Wadge, D.C.N.Y., 15 F. 864, affirmed, C.C., 16 F. 332.

1. U.S.—U. S. v. Rauscher, N.Y., 7 S.Ct. 234, 119 U.S. 407, 30 L.Ed. 425.

25 C.J. p 294 note 63.

Extradition treaties of the United States with other nations contain express provisions on the subject although these provisions vary somewhat in the various treaties.

U.S.—U. S. ex rel. Donnelly v. Mulligan, C.C.A.N.Y., 74 F.2d 220. 25 C.J. p 295 note 75.

2. U.S.—In re Miller, C.C.Pa., 23 F. 32.

25 C.J. p 294 note 64.

25 U.S.—U. S. v. Sobell, D.C.N.Y., 142 F.Supp. 515, affirmed, C.A., 244 F.2d 520, certiorari denied 78 S.Ct.

120, 121, 355 U.S. 873, 2 L.Ed.2d 77, rehearing denied 78 S.Ct. 338, two cases, 355 U.S. 920, 2 L.Ed.2d 280.

3. U.S.—Ex parte Coy, D.C.Tex., 32 F. 911.

4. U.S.—Ker v. Illinois, Ill., 7 S.Ct. 225, 119 U.S. 436, 30 L.Ed. 421. 25 C.J. p 294 note 70.

5. U.S.—U. S. v. Rauscher, N.Y., 7 S.Ct. 234, 119 U.S. 407, 30 L.Ed. 425.

6. U.S.—Ker v. Illinois, Ill., 7 S.Ct. 225, 119 U.S. 436, 30 L.Ed. 421. 25 C.J. p 294 note 72.

7. U.S.—U. S. v. Rauscher, N.Y., 7 S.Ct. 234, 119 U.S. 407, 30 L.Ed. 425.

25 C.J. p 294 note 66 [a], [c].

8. U.S.—Greene v. U. S., Ga., 154 F. 401, 85 C.C.A. 251, certiorari denied 28 S.Ct. 261, 207 U.S. 596, 52 L.Ed. 357.

9. U.S.—Greene v. U. S., supra. Iowa.—State v. Spiegel, 83 N.W. 722, 111 Iowa 701. 25 C.J. p 295 note 78.

10. Cal.—People v. Blumen, 261 P. 1103, 87 C.A. 236.

11. U.S.—In re Rowe, Iowa, 77 F. 161, 23 C.C.A. 103. Tex.—Ex parte Fischl, 100 S.W. 773, 51 Tex.Cr. 63.

12. Tex.—Ex parte Fischl, supra.

13. U.S.—Ex parte Bryant, N.Y., 17 S.Ct. 744, 167 U.S. 104, 42 L.Ed. 94.

complice in the commission of the crime of embezzlement, his trial for embezzlement is not a trial for an offense different from that for which he is extradited.¹⁴

In no event is there any objection to the trial of the fugitive for an offense committed subsequent to his extradition,¹⁵ nor has an extradited person a right to be tried on the offense for which he was extradited before he is tried for an offense committed subsequent to his extradition,¹⁶ but a fugitive extradited on a pending indictment may not be imprisoned in the demanding country on a previous conviction.¹⁷

Under a treaty which contained a provision prohibiting trial or punishment for any other offense than that for which extradition has been granted until accused shall have had an opportunity to return to the country from which he has been extradited, it was held that a person who while at liberty on bail goes to the country from which he was extradited and subsequently voluntarily returns cannot be arrested for another offense committed prior to his extradition, but is entitled to a reasonable time to depart to the country from which he was surrendered, after his discharge from custody or imprisonment on account of the offense for which he has been extradited.¹⁸

However, where an indicted person who has escaped to a foreign country and against whom an extradition warrant has been issued returns to this country voluntarily, under an agreement that he shall be tried only for the offense for which he has been indicted, and he is thereupon tried and convicted, the objection that the crime for which he was tried was not an extraditable offense must be raised at the trial in order to be available.¹⁹ A fugitive who after the institution of extradition proceedings returns voluntarily is not entitled to immunity from prosecution for an offense other than that which was the basis of the extradition proceedings.²⁰

Extradition to third country. After a person has been extradited from a foreign country and discharged, he cannot, within the time allowed by treaty for return to the asylum country, be extradited to a third country for a prior crime other than the one specified in the original extradition,²¹ unless the country from which he was originally extradited consents to the reextradition.²²

Arrest in civil action. An extradited person, after his acquittal of the charge on which he was surrendered, is not liable to arrest in a civil action, before the expiration of a reasonable time for his return to the country from which he was extradited,²³ although there are some decisions to the contrary.²⁴

A person who has been discharged in proceedings for extradition to a foreign country may be arrested in a civil action in a state wherein he was brought by virtue of the warrant in the extradition proceedings when the civil action is not prosecuted by complainant in the extradition proceedings.²⁵

§ 47. — Effect of Illegal Extradition

A completed international extradition is not subject to attack in the courts of the demanding country. Even though a person has been brought into the country by force or stratagem, and without reference to an extradition treaty, he is within the jurisdiction of domestic courts so as to be liable to trial on a regular indictment and imprisonment under a valid judgment and sentence.

The decision of the courts of the asylum country as to whether a fugitive shall be surrendered and whether the offense charged is within the terms of an extradition treaty is final, and the question cannot again be raised in the courts of the demanding country after extradition.²⁶ The regularity of the proceedings in the asylum country leading up to the issuance of the warrant and surrender will not be examined into in the courts of the demanding country.²⁷ So, too, in the tribunals of his own country, the surrendered fugitive cannot question the good faith of the extradition proceedings.²⁸

14. U.S.—In re Rowe, Iowa, 77 F. 161, 23 C.C.A. 103.

Iowa.—State v. Rowe, 73 N.W. 833, 104 Iowa 323.

15. U.S.—Collins v. Johnston, Cal., 35 S.Ct. 649, 237 U.S. 502, 59 L.Ed. 1071.

25 C.J. p 295 note 82.

16. U.S.—Collins v. Johnston, supra.

17. U.S.—Johnson v. Browne, N.Y., 27 S.Ct. 539, 205 U.S. 309, 51 L.Ed. 816, 10 Ann.Cas. 636.

18. U.S.—Cosgrove v. Winney,

Mich., 19 S.Ct. 598, 174 U.S. 64, 43 L.Ed. 897.

19. U.S.—In re Cross, D.C.N.C., 43 F. 517.

20. Tenn.—Ward v. State, 52 S.W. 996, 102 Tenn. 724.

21. U.S.—U. S. ex rel. Donnelly v. Mulligan, C.C.A.N.Y., 74 F.2d 220.

22. U.S.—U. S. ex rel. Donnelly v. Mulligan, C.C.A.N.Y., 76 F.2d 511.

23. U.S.—In re Reinitz, C.C.N.Y., 39 F. 204, 4 L.R.A. 236.

25 C.J. p 295 note 83.

24. N.Y.—Adrianne v. Lagrave, 59 N.Y. 110, 17 Am.R. 317.

25. N.Y.—Moesz v. Hermann, 8 N. Y.S. 667.

26. N.Y.—People ex rel. Stilwell v. Hanley, 148 N.E. 634, 240 N.Y. 455, 25 C.J. p 296 note 94.

27. U.S.—Hall v. Patterson, C.C.N. J., 45 F. 352.

Tex.—Kelly v. State, 13 Tex.App. 158.

28. U.S.—Greene v. U. S., Ga., 154 F. 401, 85 C.C.A. 251, certiorari denied 28 S.Ct. 261, 207 U.S. 596, 52 L.Ed. 357.

25 C.J. p 296 note 96.

The court in passing on a fugitive's plea to its jurisdiction will not enter on any inquiry as to whether he came here voluntarily or against his will.²⁹ A person brought from a foreign country by force, without reference to the treaty of extradition between that country and the United States, cannot allege that irregularity to defeat his trial for an offense charged in a regular indictment³⁰

or his imprisonment under a valid judgment and sentence;³¹ nor can a party claim immunity on the ground that he was enticed from a foreign country into the United States by stratagem.³² For the injury done to a fugitive from justice brought back to the United States against his will and without reference to an extradition treaty, he has a remedy against the wrongdoers by a civil suit.³³

EXTRADOTAL PROPERTY. See Husband and Wife § 469.

EXTRAHAZARDOUS. Characterized or attended by circumstances or conditions of special and unusual danger;¹ extradangerous.²

Phrases employing the word are set out in the subjoined note.³

EXTRAHURA. See the C.J.S. definition Ex.

EXTRAJUDICIAL. That which is done, given, or effected outside the course of regular judicial proceedings; not founded upon, or unconnected with, the action of a court of law, as extrajudicial evidence, an extrajudicial oath; also that which, although done in the course of regular judicial proceedings, or interpolated, or beyond their scope, as an extrajudicial opinion, (dictum); and also that which does not belong to the judge or his jurisdic-

tion, notwithstanding which he takes cognizance of it.⁴

Phrases employing the word are set out in the subjoined note.⁵

EXTRALATERAL, EXTRALIMINAL, and EXTRALIMITAL. As mining terms see Mines and Minerals § 3 h.

EXTRA LEGEM POSITUS EST CIVILITER MORTUUS.⁶

EXTRAMURAL. Beyond the corporate limits of a municipality, as distinguished from "intramural."⁷

EXTRAÑAMIENTO DEL REINO. In Spanish law, banishment from the kingdom.⁸

EXTRANEOUS. Being outside of a thing and not naturally appertaining to it; external; having no

29. U.S.—In re Newman, C.C.Cal., 79 F. 622.

30. U.S.—Ker v. Illinois, Ill., 7 S. Ct. 225, 119 U.S. 436, 30 L.Ed. 421. U. S. v. Sobell, D.C.N.Y., 142 F. Supp. 515, affirmed, C.A., 244 F.2d 520, certiorari denied 78 S.Ct. 120, 121, 355 U.S. 873, 2 L.Ed.2d 77, rehearing denied 78 S.Ct. 338, two cases, 355 U.S. 920, 2 L.Ed.2d 280. 25 C.J. p 296 note 98.

31. Tex.—Ex parte Campbell, D.C. Tex., 1 F.Supp. 899.

32. U.S.—In re Newman, C.C.Cal., 79 F. 622. 25 C.J. p 296 note 99.

33. U.S.—Ker v. Illinois, Ill., 7 S. Ct. 225, 119 U.S. 436, 30 L.Ed. 421. Ex parte Ker, C.C.Ill., 18 F. 167.

1. Black L.D.

2. Iowa.—Russell v. Cedar Rapids Ins. Co., 32 N.W. 95, 96, 71 Iowa 69.

3. *Phrases*

(1) "Extrahazardous business," "extrahazardous employment," "extrahazardous enterprise," "extrahazardous occupation," or "extrahazardous work" see Infants § 12, with reference to employment of minors;

Master and Servant § 372, as affecting employee's assumption of risk; and Workmen's Compensation Acts §§ 27, 28, within compensation statutes.

(2) "Extrahazardous crossing." Minn.—Engberg v. Great Northern Ry. Co., 290 N.W. 579, 582, 207 Minn. 194—Krause v. Chicago, St. P., M. & O. Ry. Co., 290 N.W. 294, 297, 207 Minn. 175.

See also Railroads §§ 710–716, as to rights and duties at railroad crossings in general.

(3) "Other extrahazardous purposes."

N.Y.—Reynolds v. Commerce Fire Insurance Co. of N. Y., 47 N.Y. 597, 604.

4. Black L.D.

5. *Phrases*

(1) "Extrajudicial act," as descriptive of court's action in appointing a receiver to take charge of a labor union and to conduct an election. Ill.—McLane v. Romano, 38 N.E.2d 545, 555, 312 Ill.App. 281.

(2) "Extrajudicial admissions or declarations" see Evidence §§ 272–298.

(3) "Extrajudicial confession" see Criminal Law § 816 c note 9.

(4) "Extrajudicial identification." Ark.—Gill v. State, 108 S.W.2d 785, 786, 194 Ark. 521. Okl.—Alberty v. State, 97 P.2d 904, 913, 68 Okl.Cr. 246.

(5) "Extrajudicial oath" see Oaths and Affirmations § 2.

(6) "Extrajudicial opinion" defined see Courts § 217 note 52.

6. A maxim meaning "One who is put out of the law [i. e. outlawed] is civilly dead." Adams Gloss.

7. *Applied to powers*

When the legal voters of a city attempt to exercise authority beyond the corporate limits of their municipality they are using an extramural power, as contrasted with "intramural power."

Or.—State v. Astoria, 154 P. 399, 404, 79 Or. 1.

See also Municipal Corporations § 141.

8. Escriche Diccionario and Suplemento.

essential relation to a subject; extrinsic; foreign.^{8.50}

EXTRANEUS. See the C.J.S. definition Ex.

EXTRANEUS EST SUBDITUS QUI EXTRA TERRAM, I. E., POTESTATEM REGIS, NATUS EST.⁹

EXTRANJERO. In Spanish law, an alien who, when residing in Spain, enjoys most of the civil, as opposed to political, rights of a Spanish subject.¹⁰ As to the American citizens, this was expressly guaranteed by treaty.¹¹

EXTRAORDINARY.

As a Noun

Something not ordinary; especially, an extraordinary expense or allowance; specifically, in England, any allowance made to troops beyond the customary gross paid.¹²

As an Adjective

While the word "extraordinary" is comprehensive

and flexible in meaning,^{12.5} it is not a word of art.^{12.10} It includes all occurrences, events, and phenomena that are beyond the usual and ordinary,¹³ but it does not always connote some event or occurrence of shattering or staggering magnitude.^{13.5} The term presupposes other like occurrences, although rare or infrequent.^{13.10}

The word "extraordinary" is defined as meaning above ordinary; so in an eminent degree;¹⁴ being beyond or out of the common order or rule; not of the usual, customary, or regular kind; not ordinary;¹⁵ exceeding the common degree or measure;¹⁶ not greater or less, since a thing may be extraordinary for greatness or for littleness or for neither;¹⁷ not usual;¹⁸ outside of the ordinary;¹⁹ hence, rare, remarkable, uncommon,²⁰ unusual,²¹ wonderful.²² Also, employed for an exceptional purpose or on a special occasion.²³

The term has been held synonymous with "unusual."²⁴

It has been described as the antithesis of "customary,"²⁵ the antonym of "ordinary,"²⁶ and has

8.50 New Standard D.

Phrases

(1) "Extraneous influence" see Criminal Law § 1494 a (4) and New Trial § 169.

(2) "Extraneous offense" is one that is extra, beyond, or foreign to, the offense which is under consideration, or for which a person is on trial.

Tex.—Ridinger v. State, 174 S.W.2d 319, 320, 146 Tex.Cr. 286.

9. A maxim meaning "A foreigner is one who is born out of the territory, that is, the government of the king." Black L.D.

10. Escriche Diccionario.

11. Escriche Diccionario, citing Treaty of Oct. 27, 1795 arts VII, XI.

12. Kan.—State v. Rogers, 52 P.2d 1185, 1195, 142 Kan. 841.

12.5 Ind.—Zollman v. Baltimore & O. S. W. R. Co., 121 N.E. 135, 140, 70 Ind.App. 395.

12.10 Mo.—Fry v. National Rejectors, Inc., 306 S.W.2d 465, 468.

13. Ind.—Zollman v. Baltimore & O. S. W. R. Co., 121 N.E. 135, 140, 70 Ind.App. 395.

Scope of term discussed

(1) "An incident that has occasionally occurred, although exceptional in nature, may on its reoccurrence be properly characterized as unusual and extraordinary. Also an event the like of which has never previously occurred, and respecting which there is no reasonable ground for ex-

pecting it to occur, may on its occurrence likewise properly be designated as unusual and extraordinary."

Ind.—Zollman v. Baltimore & O. S. W. R. Co., supra.

(2) It does not mean necessarily what has never been previously heard of, or within former experience, but only what is beyond the ordinary, usual, or common.

U.S.—The Titania, D.C.N.Y., 19 F. 101, 105.

13.5 Mo.—Fry v. National Rejectors, Inc., 306 S.W.2d 465, 468.

13.10 Tex.—State v. Malone, Civ. App., 168 S.W.2d 292, 300, error refused.

14. N.Y.—Fox v. Fox, 22 How.Pr. 453, 458.

15. N.Y.—Burns v. City of Watertown, 213 N.Y.S. 90, 101, 126 Misc. 140.

25 C.J. p 296 note 17, p 297 notes 18, 25.

Similarly expressed

"Being beyond or out of the common order or method."

Kan.—State v. Rogers, 52 P.2d 1185, 1195, 142 Kan. 841.

As relating to accident or casualty

"Extraordinary" designates an accident, casualty, occurrence, or risk of a class or kind other than those which ordinary experience or prudence would foresee, anticipate, or provide for.

Ga.—Western & Atlantic R. R. v. Hassler, 88 S.E.2d 559, 562, 92 Ga. App. 278.

16. Ala.—Southern R. Co. v. Burgess, 42 So. 35, 37, 143 Ala. 364. 25 C.J. p 297 note 19.

Similarly expressed

"Exceeding the ordinary degree." Kan.—State v. Rogers, 52 P.2d 1185, 1195, 142 Kan. 841.

17. Wis.—Carpenter v. State, 39 Wis. 271, 284.

18. U.S.—Puget Sound Traction, Light & Power Co. v. Reynolds, D. C.Wash., 223 F. 371, 378.

Wis.—Geuder, Paeschke & Frey Co. v. Milwaukee, 133 N.W. 835, 839, 147 Wis. 491.

19. Wis.—Carpenter v. State, 39 Wis. 271, 284.

20. N.Y.—Burns v. City of Watertown, 213 N.Y.S. 90, 101, 126 Misc. 140.

25 C.J. p 297 notes 26–28.

21. Kan.—State v. Rogers, 52 P.2d 1185, 1195, 142 Kan. 841.

22. Ala.—Southern R. Co. v. Burgess, 42 So. 35, 37, 143 Ala. 364. 25 C.J. p 297 note 29.

23. Kan.—State v. Rogers, 52 P.2d 1185, 1195, 142 Kan. 841.

24. Wis.—Geuder, Paeschke & Frey Co. v. City of Milwaukee, 133 N.W. 835, 839, 147 Wis. 491.

25. Or.—Layman v. State Unemployment Compensation Commission, 117 P.2d 974, 979, 167 Or. 379, 136 A.L.R. 1468.

26. Kan.—State v. Rogers, 52 P.2d 1185, 1195, 142 Kan. 841.

Mo.—State v. Gordon, 181 S.W. 1016,

been contrasted with, or distinguished from, "extensive" see supra p 291 note 80, "prudent,"²⁷ "unprecedented,"²⁸ "unusual,"²⁹ and "very."^{29.5}

Phrases employing the word are set out in the subjoined note.³⁰ Other phrases as to which more recent adjudications have not been found see 25 C.J.

p 297 note 31—p 298 note 77.

EXTRAPAROCHIAL. Out of a parish, not within the bounds or limits of any parish.³¹

EXTRA QUATUOR MARIA. See the C.J.S. definition Extra.

1021, 266 Mo. 394, Ann.Cas.1918B 191.

27. "It is a much stronger word than prudent, or ordinarily prudent." Ala.—Gadsden & A. W. R. Co. v. Causler, 12 So. 439, 441, 97 Ala. 235.

28. Wis.—Geuder, Paeschke & Frey Co. v. City of Milwaukee, 133 N.W. 835, 839, 147 Wis. 491.

29. Kan.—Broadway Mfg. Co. v. Leavenworth Terminal Ry. & Bridge Co., 106 P. 1034, 1035, 81 Kan. 616, 28 L.R.A.N.S., 156.

29.5 Ala.—Southern R. Co. v. Burgess, 42 So. 35, 37, 143 Ala. 364.

30. Phrases construed

(1) "Extraordinary and exceptional circumstances."

U.S.—Danahy Packing Co. v. McGowan, D.C.N.Y., 12 F.Supp. 457, 458.

(2) "Extraordinary and unusual."

Pa.—Hill v. West Penn Rys. Co., 16 A.2d 527, 529, 340 Pa. 297.

(3) "Extraordinary condition of weather and sea."

U.S.—Compania de Navegacion, Interior, S. A., v. Fireman's Fund Ins. Co., D.C.La., 14 F.2d 196, 198.

(4) "Extraordinary cost."

Ky.—Champion v. Dunn, 25 S.W.2d 1023, 1024, 233 Ky. 366.

(5) "Extraordinary manifestation of natural force."

U.S.—Johnson v. Kosmos Portland Cement Co., C.C.A.Ky., 64 F.2d 193, 195.

(6) "Extraordinary motion or case."

Ga.—Cox v. Hillyer, 65 Ga. 57, 59. Herrington v. State, 123 S.E. 147, 148, 32 Ga.App. 83—Farmers' Union Warehouse of Metter v. Boyd, 119 S.E. 542, 31 Ga.App. 104.

(7) "Extraordinary motions for new trial."

Ga.—King v. State, 163 S.E. 168, 171, 174 Ga. 432.

(8) "Extraordinary obsolescence," as meaning an extensive supersession of property used for the transmission or generation of power or instrumentalities used for the transportation of passengers, and distinguished from "ordinary obsolescence."

Mo.—State ex rel. City of St. Louis v. Public Service Commission, 110 S.W.2d 749, 775, 341 Mo. 920.

(9) "Extraordinary occurrence."

U.S.—M. A. Quina Export Co. v. Seebold, C.C.A.Fla., 287 F. 626, 629 —M. O. H. of West Indies v. Christoffer Hannevig, C.C.A.N.Y., 264 F. 311, 312.

N.J.—Lauter v. Hedden Construction Co., 83 A. 878, 879, 83 N.J.Law 617.

(10) "Extraordinary powers."

U.S.—City of Los Angeles v. Gurdane, C.C.A.Cal., 59 F.2d 161, 162.

N.J.—Laredef Corporation v. Federal Seaboard Terra Cotta Corporation, 25 A.2d 433, 438, 131 N.J.Eq. 368.

(11) "Extraordinary proceedings."

Ga.—Casey v. McElreath, 169 S.E. 342, 343, 177 Ga. 35.

(12) "Extraordinary rainfall."

Ga.—Western & Atlantic R. R. v. Hassler, 88 S.E.2d 559, 563, 92 Ga. App. 278.

Ky.—Johnson v. Ratliff, 25 S.W.2d 355, 356, 233 Ky. 187.

Va.—City of Portsmouth v. Weiss, 133 S.E. 781, 787, 145 Va. 94.

(13) "Extraordinary reasons."

D.C.—Bowers v. Basiliko, Mun.App., 38 A.2d 623, 624.

Idaho.—Breckenridge v. Johnston, 108 P.2d 833, 836, 62 Idaho 121.

(14) "Extraordinary remedy," or "extraordinary legal remedy."

U.S.—Thompson Products v. National Labor Relations Board, C.C.A., 133 F.2d 637, 639.

N.Y.—Zielinski v. Harding, 31 N.Y.S. 2d 925, 928, 177 Misc. 773.

Ohio.—McDorman v. Johnson, App., 39 N.E.2d 162, 166.

25 C.J. p 298 note 58.

(15) "Extraordinary repairs."

U.S.—Maryland Casualty Co. v. Scharlack, C.C.A.Tex., 115 F.2d 719, 720.

Maryland Casualty Co. v. Scharlack, D.C.Tex., 31 F.Supp. 931, 934. Conn.—Hill v. Employers' Liability Assur. Corporation, 188 A. 277, 279, 122 Conn. 193.

Ky.—Nixon v. Gammon, 229 S.W. 75, 77, 191 Ky. 175.

(16) "Extraordinary risk or hazard."

N.H.—Stone v. Howe, 32 A.2d 484, 487, 92 N.H. 425.

See also Master and Servant §§ 361-370.

(17) "Extraordinary services."

Cal.—In re Turner's Estate, 123 P.2d 66, 67, 50 C.A.2d 332—In re Jennings' Estate, 74 P.2d 794, 795, 24 C.A.2d 206.

Iowa.—Glynn v. Cascade State Bank of Cascade, 289 N.W. 722, 726, 227 Iowa 932—In re Jewe's Will, 208 N.W. 723, 724, 201 Iowa 1154—In re McClellan's Estate, 183 N.W. 398, 401, 192 Iowa 384.

Ky.—Allen v. Smith, 270 S.W. 782, 783, 208 Ky. 207.

Tex.—Frame v. Frame, 36 S.W.2d 152, 154, 120 Tex. 61, 73 A.L.R. 1512.

25 C.J. p 298 note 62.

(18) "Extraordinary storm."

Conn.—Spitzer v. City of Waterbury, 154 A. 157, 160, 113 Conn. 84.

Okl.—Oklahoma City v. Evans, 50 P. 2d 234, 238, 173 Okl. 586.

Wis.—Geuder, Paeschke & Frey Co. v. City of Milwaukee, 133 N.W. 835, 839, 147 Wis. 491.

Phrases elsewhere discussed

(1) "Difficult and extraordinary cases" see Costs § 202 a.

(2) "Extraordinary care" see Negligence § 13.

(3) "Extraordinary circumstances" and similar phrases see the C.J.S. definition Circumstance.

(4) "Extraordinary danger" see the C.J.S. definition Danger.

(5) "Extraordinary diligence" see the C.J.S. definition Diligence.

(6) "Extraordinary ditching, grading, gravelling" see the C.J.S. definition Ditch.

(7) "Extraordinary dividends" regarded as income or capital see Corporations § 471 c.

(8) "Extraordinary duty" see the C.J.S. definition Duty.

(9) "Extraordinary efforts" see the C.J.S. definition Effort.

(10) "Extraordinary emergency" see the C.J.S. definition Emergency.

(11) "Extraordinary expenditure" see the C.J.S. definition Expenditure, also Municipal Corporations § 1860.

(12) "Extraordinary expenses" and "extraordinary necessary expense" see the C.J.S. definition Expense.

(13) "Extraordinary flood" see the C.J.S. definition Flood, and also Waters §§ 19, 20, 29.

(14) "Extraordinary or special grand jury" see Grand Juries, §§ 3, 4.

(15) "Extraordinary risk" within the doctrine of assumed risk see Master and Servant §§ 361-370.

31. Black L.D.

EXTRATERRITORIAL. Beyond the territory.³² term see 25 C.J. p 298 note 79.
For reference to some specific applications of the

EXTRATERRITORIALITY

"Extraterritoriality" is, as is shown in Conflict of Laws § 6, the exercise by a state of its jurisdiction beyond its boundaries over its nationals who, for the time being, may be sojourning in the territory of another state.

The nature, origin, history, and operation of the doctrine are discussed at length in 25 Corpus Juris pages 299-331 inclusive, to which reference is here made. Reference is also made to the titles International Law § 9 wherein is discussed questions of extraterritorial rights and jurisdiction; Adoption of Children § 3 b for the extraterritorial law of adoption; Ambassadors and Consuls § 12 for the privileges, immunities, and disabilities of foreign diplomatic officers and consuls, and § 18 for mat-

ters concerning consular courts; Conflict of Laws § 6 b for extraterritorial domicile; Criminal Law § 28 for the extraterritorial operation of criminal laws, and § 138 d for the jurisdiction of the courts of the sovereignty to punish crimes committed on its vessels within the territorial limits of another sovereignty; Divorce §§ 326-353 for the conclusiveness and effect of foreign divorces; Extradition §§ 24-47 for international extradition; and Marriage § 4, as to the law governing foreign marriages.

Examine Pocket Parts for later cases.

The doctrine of extraterritoriality may apply in the case of aliens subject to deportation and to vessels which are deemed a part of the territory of the country whose flag they fly.³³

EXTRA TERRITORIUM JUS DICENTI NON PARETUR IMPUNE.¹

EXTRAVAGANTE. In the old Spanish law, a clerk who was not assigned to any particular town or tribunal.²

EXTRAVAGANTES. In Spanish ecclesiastical

law, the pontifical constitutions posterior to those of Pope Clement.³ In canon law generally, those decretal epistles which were published after the Clementines.⁴

EXTRA VIRES. See the C.J.S. definition Extra (Latin).

32. Anderson L.D.

"Extraterritorial jurisdiction," defined generally as that jurisdiction exercised by a nation in other countries by treaty, as by United States in China.

U.S.—U. S. v. Lucas, D.C.Wash., 6 F. 2d 327, 328.

See also the titles Ambassadors and Consuls § 18 b, Conflict of Laws § 6 a, Divorce § 331 note 82, Federal Courts § 322, and International Law § 9.

"Extraterritorial domicile" see Conflict of Laws § 6 b.

"Extraterritorial legislation"

Or.—Union Pac. R. Co. v. Anderson, 120 P.2d 578, 582, 167 Or. 687.

"Extraterritorial tribunals" see the titles Ambassadors and Consuls § 18, and Federal Courts § 321.

33. U.S.—Corpus Juris Secundum cited in Delany v. Moraitis, C.C.A. Md., 136 F.2d 129, 133.

1. A maxim meaning "One who ex-

ercises jurisdiction out of his territory is not obeyed with impunity." Black L.D.

Applied or explained in

Mo.—Wilson v. St. Louis & S. F. R. Co., 18 S.W. 286, 293, 108 Mo. 588, 32 Am.S.R. 624.
25 C.J. p 331 note 1 [c].

Maxim characterized or described as (1) A "known" maxim.

Ark.—Barkman v. Hopkins, 11 Ark. 157, 163.

Mo.—Wilson v. St. Louis & S. F. Ry. Co., 18 S.W. 286, 293, 108 Mo. 588, 32 Am.S.R. 624.

(2) A "general" maxim.

Eng.—Cookney v. Anderson, 9 Jur., N.S., 736.

(3) An "old and well-established" maxim.

Eng.—Reg. v. Keyn, 2 Ex.D. 63, 160, 5 E.R.C. 946.

(4) "The maxim in regard to process issued to enforce judgments in external jurisdictions."

N.J.—Elizabethtown Sav. Inst. v. Gerber, 34 N.J.Eq. 130, 133.

2. Escriche Diccionario.

3. Escriche Diccionario.

What term includes

They included some twenty epistles, decretals, and constitutions of Pope John XXII, distributed among fourteen titles but without division into books; and later ones of the same class which were so divided. Escriche Diccionario.

4. Black L.D.

"They were so called because at first they were not digested or arranged with the other papal constitutions, but seemed to be, as it were, detached from the canon law. They continued to be called by the same name when they were afterwards inserted in the body of the canon law. The first extravagantes are those of Pope John XXII, successor of Clement V. The last collection was brought down to the year 1483, and was called the 'Common Extravagantes,' notwithstanding that they were likewise incorporated with the rest of the canon law."

Black L.D.

EXTREMA POTIUS PATI QUAM TURPIA FACERE.⁵

EXTREME. The best or worst; most urgent, most violent;⁶ greatest, highest, strongest, or the like; also, at the utmost point, edge, or border; most remote; last; conclusive.⁷

It is sometimes used, not in a strict superlative sense, but as meaning merely excessive, far advanced, grievous, in a very high degree, or very far advanced;⁸ immoderate or violent.⁹

It has been said that the term may be synonymous with, and also distinguished from, "utmost;"¹⁰ and it has been held the opposite of "moderate."¹¹

Phrases employing the word are set out in the subjoined note.¹²

EXTREMIS. When a person is sick beyond the hope of recovery, and near death, he is said to be "in extremis."¹³

When a navigator of a vessel, suddenly realizing that a collision is imminent by no fault of his own,

in the confusion and excitement of the moment does something which contributes to the collision, or omits to do something by which the collision might be avoided, such act or omission is ordinarily considered to be "in extremis," as stated in Collision § 155.

EXTREMIS PROBATUS PRÆSUMUNTUR MEDIA.¹⁴

EXTREMITY. The furthest point.¹⁵

EXTRINSIC. Being outside of or external to the nature of an object or case;¹⁶ foreign; from outside sources; *dehors*.¹⁷ Opposed to "intrinsic."¹⁸

Phrases employing the word are set out in the subjoined note.¹⁹

EXTRUSION. The act or process of extruding; expulsion.^{19.50}

EXTUMÆ. See the C.J.S. definition *Ex*.

EX TURPI CAUSA NON ORITUR ACTIO.²⁰

5. A maxim meaning "Extremities are rather to be suffered than to do disgraceful, infamous or scandalous things." Adams Gloss.

6. Webster New Int.D.

7. Black L.D.

8. Cal.—In re Nelson, 64 P. 294, 298, 132 C. 182.

9. Black L.D.

10. The term "utmost" conveys a stronger and more significant meaning than the word "extreme," although there seems to be much reason for holding these two words synonymous.

Ga.—East Tennessee, V. & G. R. Co. v. Miller, 22 S.E. 660, 661, 95 Ga. 738.

11. Cal.—In re Nelson, 64 P. 294, 298, 132 C. 182.

12. Phrases

(1) "Extreme care," defined as such care as a prudent man would exercise in a place of danger.

Pa.—Schlossstein v. Bernstein, 142 A. 324, 327, 293 Pa. 245.

(2) "Extreme cases."

La.—Teacle v. Hughes, 83 So. 457, 458, 146 La. 195.

(3) "Extreme cruelty" see Divorce § 24.

(4) "Extreme hardship" see Bail § 91 a note 81.

(5) "Extreme low tide," and other phrases of similar import see the C. J.S. definition Tide.

(6) "Extreme pressure lubricant," defined as a lubricant whose action is

characterized by a chemical reaction between it and the bearing surface to form films of lower shear strength than the bearing surfaces, thus preventing seizure and reducing friction. U.S.—Sea Gull Lubricants, Inc., to Use of National Acme Co. v. U. S., 50 F.Supp. 230, 233, 99 Ct.Cl. 716.

(7) "Extreme technicality," as having no fixed and definite meaning.

Ill.—Vincendeau v. People, 76 N.E. 675, 678, 219 Ill. 474.

13. Black L.D.

As condition precedent to validity of noncupative will see Wills § 212.

14. A maxim meaning "Extremes being proved, those things which fall within or between them are presumed."

Trayner Leg.Max. 207.

Applied in

N.Y.—McCarthy v. Whalen, 19 Hun 503, 506.

Similarly rendered

"Extremes being proved, intermediate things are presumed."

Black L.D.

15. Tex.—Roberts v. Hart, Civ.App., 165 S.W. 473, 476.

Phrase construed

"Permanent paralysis of either extremities" as referring to any one of the four extremities of the body. Ark.—Brotherhood of Locomotive Firemen & Enginemen v. Aday, 134 S.W. 928, 930, 97 Ark. 425, 34 L.R. A., N.S., 126.

16. Standard D.

17. Black L.D.

18. Cal.—Bley v. Dessin, 87 P.2d 889, 892, 31 C.A.2d 338.

19. Phrases

(1) "Extrinsic accident."

Cal.—Hallett v. Slaughter, 140 P.2d 3, 6, 22 C.2d 552.

(2) "Extrinsic ambiguity," as equivalent to "latent ambiguity" see the C.J.S. definition Ambiguity.

(3) "Extrinsic evidence" see Evidence § 2.

(4) "Extrinsic fact."

Tex.—Trevino v. American Nat. Ins. Co., 168 S.W.2d 656, 659, 140 Tex. 500.

(5) "Extrinsic fraud" and "extrinsic or collateral fraud" in general see Fraud § 2, and as grounds for annulling, setting aside, or vacating decrees or judgments see the titles Divorce § 169, and Equity, § 663, and the index to the title Judgments.

(6) "Extrinsic or collateral to the matter tried."

Mass.—Stephens v. Lampron, 30 N.E. 2d 838, 840, 308 Mass. 50.

19.50 New Standard D.

Extrusion machine has been stated to be an elegant name for a squirt gun.

U.S.—Dewey & Almy Chemical Co. v. Mimex Co., C.C.A.N.Y., 124 F.2d 986, 988.

20. A maxim meaning "Out of a base [illegal, or immoral] consideration, an action does [can] not arise." Black L.D.

Applied or explained in

U.S.—Collins v. The Steamer Flori-

EX TURPI CONTRACTU NON ORITUR ACTIO.²¹

EXUERE PATRIAM and **EXULARE**. See the C.J.S. definition **Ex**.

EX UNO DISCES OMNES.²²

EXUPERARE. See the C.J.S. definition **Ex**.

EX VI TERMINI. See the C.J.S. definition **Ex**.

EY. Water, or a watery place.²³

EYDE. Aid, assistance, or relief; hence a subsidy.²⁴

EYE. Primarily, the organ of vision, the physiological mechanism of the sense of sight.²⁵ In a particular connection, the eye is said not to be embraced in the words "any limb or member" of the body.²⁶

Derivatively or figuratively, vision, the act of seeing, or the field of sight; hence, observation, watch;²⁷ also something that resembles, or is analogous to, the eye, in form or appearance, as a loop forming part of anything, or a hole through anything to receive a hook, rope, pin, shaft, etc.²⁸

EYELET. A metallic ring designed to be placed in a perforation called an eyelet-hole, in cloth, leather, etc., for the passage of a lace, cord, or small rope;²⁹ a hollow cylindrical barrel made of metal, one end of which terminates in a spread out portion called a "flange."³⁰

EYEWITNESS. Defined see **Witnesses** § 1. As to duty of prosecution to call eyewitnesses in a criminal case see **Criminal Law** §§ 806, 1019. Eyewitness within provision that benefits are not recoverable for accidental or violent death unless there is an eyewitness to the accident or occurrence see **Insurance** § 1349, in accident and similar policies, and § 1675, in fraternal or mutual benefit insurance.

EYOTT. A small island arising in a river.³¹

EYRE. A journey, hence a court of itinerant justices. Justices in eyre were judges commissioned in Anglo-Norman times in England to travel systematically through the kingdom, once in seven years, holding courts in specified places for the trial of certain descriptions of causes.³²

EYRER. Law French, to travel or journey, to go about or itinerate.³³

da, D.C., 101 U.S. 37, 43, 25 L.Ed. 898.

Ala.—Clark v. Colbert, 67 Ala. 92, 94.
Ga.—Sewell v. Norris, 58 S.E. 637,
639, 128 Ga. 824, 13 L.R.A., N.S.,
1118.

1 C.J. p 958 note 38 [a] (1)—25 C.
J. p 332 note 17 [c].

Similarly rendered

(1) "No action arises out of an immoral consideration."

Broom Leg.Max.

(2) "No disgraceful matter can ground an action."

Ga.—Eidson v. Maddox, 24 S.E.2d
895, 897, 195 Ga. 641.

Maxim characterized as:

(1) "The familiar maxim."

U.S.—U. S. Bank v. Owens, Ky., 2
Pet. 527, 539, 7 L.Ed. 508.

Ohio.—Robinson v. Robinson, 17
Ohio St. 480, 484.

(2) "The common-law maxim."

U.S.—Harris v. Runnels, Miss., 12
How. 79, 83, 13 L.Ed. 901.

N.J.—Church v. Muir, 33 N.J.Law
318, 320.

(3) "The old law maxim."

N.Y.—DeGroot v. Van Duzer, 20
Wend. 390, 404.

(4) "A rule both in law and equity."

N.Y.—Gray v. Hook, 4 N.Y. 449, 455.
Pa.—Weckerly v. Lutheran Congrega-

tion, 3 Rawle 172, 175.

(5) "A very ancient and very important maxim of the common law."

Ohio.—State v. Buttles, 3 Ohio St.
309, 319.

(6) A maxim long established and constantly acted upon by courts of both law and equity.

Ga.—Eidson v. Maddox, 24 S.E.2d
895, 897, 195 Ga. 641.

Further discussion of maxim

(1) It is intimately related to the maxim, "In Aequali Jure Melior Est Conditiō Possidentis."

Broom Leg.Max.

(2) "This and other kindred maxims of the Roman law have been adopted by all civilized nations, whether governed by that system of laws or by the common law of England."

Can.—Consumers Cordage Co. v. Connolly, 31 Can.S.C. 244, 298.

(3) It is simply the complement of the other maxim: "In pari delicto melior est conditiō defendantis."

Ga.—Eidson v. Maddox, 24 S.E.2d 895,
897, 195 Ga. 641.

21. A maxim meaning "No action arises on an immoral contract."

Bouvier L.D.

Applied or explained in:

U.S.—Standard Lumber Co. v. Butler Ice Co., Pa., 146 F. 359, 362, 76
C.C.A. 639, 7 L.R.A., N.S., 467.

Ky.—Howe v. Griffin, 103 S.W. 714,
716, 126 Ky. 373, 128 Am.S.R. 296.

25 C.J. p 332 note 18 [a].

Similarly rendered

"From an immoral or iniquitous

contract an action does not arise. A contract founded upon an illegal or immoral consideration cannot be enforced by action."

Black L.D.

22. A maxim meaning "From one thing you can discern all."

Black L.D.

23. Black L.D.

24. Black L.D.

25. Century D.

26. N.C.—State v. Wilson, 125 S.E.
612, 613, 188 N.C. 781.

27. Century D.

"Jealous eye" as equivalent to "careful scrutiny."

W.Va.—Coffman v. Hedrick, 9 S.E. 65,
70, 32 W.Va. 119.

28. Webster New Int.D.

"Eye splice"

In shipping, a sort of eye or circle formed by splicing the end of a rope into itself.

N.Y.—Trapp v. McClellan, 74 N.Y.S.
130, 68 App.Div. 362, 363.

29. Century D.

30. "The purpose of shoe eyelets is to protect lacing holes against wear, tear, and distortion."

U.S.—United Shoe Machinery Corporation v. Atlas Tack Corporation,
D.C.N.Y., 27 F.Supp. 499, 501.

31. Black L.D.

32. Black L.D.

33. Black L.D.

EZARDAR. In Hindu law, a farmer or renter of land in the districts of Hindoostan.³⁴

F. The sixth letter of the alphabet.³⁵ As an abbreviation see Abbreviations 1 C.J.S. p 276 note 5.

Under the old English criminal law, this letter was branded upon felons, on their being admitted to the benefit of clergy, also upon those convicted of fights or frays, or falsity.³⁶

FABEADORES. In the ancient Spanish law of Zaragoza, a sort of nominating committee to determine who should enter the lists for office.³⁷

FABRIC. It has been said that in modern use the word "fabric" is applied only to cloth that is woven or knit from fibers, either vegetable or animal;^{37.5} thus, in its primary sense, the term is defined to mean a woven, felted, or knitted material for wear or ornament, as cloth, felt, hosiery or lace; also the material used in its making;³⁸ manufactured cloth; a textile fabric; as silks or other fabrics.^{38.5}

In a secondary sense the word signifies something that has been fabricated, constructed or put together;³⁹ any complex construction; a system built up of co-related parts; structure, edifice, as a social fabric;⁴⁰ anything manufactured, or the structure

of anything;⁴¹ also, the act of building; as tithe was received for the fabric of the churches of the poor.⁴²

In its primary sense, the term has been held to include "cotton cloth,"⁴³ but also it has been said that the word is rather a broad one in common speech, and that it is certainly as broad, if not broader, than the word "cloth,"⁴⁴ and that, in its broad sense, it undoubtedly includes a flexible sheet metal.⁴⁵

In concrete construction the term is applied to a union of drawn wires made up in rows.⁴⁶

In acoustics, particularly in the art of sound deadening, "fabric" is a term of art, and has been held not to include sheet metal or cement slabs.⁴⁷

As used in tariff acts see Customs Duties §§ 40, 43.

Phrases employing the word are set out in the subjoined note.⁴⁸

FÁBRICA. In Spanish law, a word used in several senses. In its most common signification it means factory. Such establishments, and the workers therein, particularly child laborers, have been the subject of advanced legislation for many years in Spain.⁴⁹

34. Black L.D.

35. Black L.D.

36. Black L.D.

37. Escribano Diccionario.

37.5 U.S.—Application of Frederick, 175 F.2d 462, 466, 36 C.C.P.A. Patents 1123.

38. U.S.—Application of Frederick, supra.
Guaranty Trust Co. of New York v. Johns-Manville Corporation, D.C. N.Y., 14 F.Supp. 792, 797.

38.5 U.S.—Application of Frederick, 175 F.2d 462, 466, 36 C.C.P.A. Patents 1123.

39. U.S.—Johns-Manville Corporation v. National Tank Seal Co., C. C.A.Okl., 49 F.2d 142, 145.
Guaranty Trust Co. of New York v. Johns-Manville Corporation, D.C. N.Y., 14 F.Supp. 792, 797.

Similarly expressed

Anything may be denominated fabric which has been manufactured, and, broadly speaking, a locomotive, a pair of shoes, or a mouse trap, under the broad meaning, could properly be so denominated.

U.S.—Application of Frederick, supra, 175 F.2d 462, 466, 36 C.C.P.A. Patents 1123.

40. U.S.—Guaranty Trust Co. of New York v. Johns-Manville Cor-

poration, D.C.N.Y., 14 F.Supp. 792, 797.

41. U.S.—Johns-Manville Corporation v. National Tank Seal Co., C. C.A.Okl., 49 F.2d 142, 146.

42. Century D.

43. U.S.—Converse v. U. S., C.C.N. Y., 113 F. 817.

44. U.S.—In re Mills, C.C.N.Y., 49 F. 726, 727.

45. U.S.—Johns-Manville Corporation v. National Tank Seal Co., C. C.A.Okl., 49 F.2d 142, 146.

46. Cal.—Soule v. Northern Constr. Co., 165 P. 21, 22, 33 C.A. 300.

47. U.S.—Guaranty Trust Co. of New York v. Johns-Manville Corporation, D.C.N.Y., 14 F.Supp. 792, 797.

48. Phrases

(1) "Fabric lands," defined in English law, as lands given toward the maintenance, rebuilding, or repairing of cathedral and other churches; and called by the Saxons "timber-lands."
Black L.D.

(2) "Fast pile fabric" described and contrasted with "loose pile fabric."

U.S.—Saltex Looms v. Collins & Aikman Corporation, D.C.N.Y., 43 F. Supp. 914, 916.

(3) "Knit fabrics," as distinguished from "knit goods," and referring more especially to manufactured material than to manufactured articles.

U.S.—Arnold, Constable & Co. v. U. S., N.Y., 13 S.Ct. 406, 408, 147 U.S. 494, 37 L.Ed. 253.

(4) "Pile fabrics," in commercial usage, a generic term employed to describe certain varieties of textiles including velvets, velveteens, plushes, corduroys and specifically upholstery plushes but not including "astrachans."

U.S.—Saltex Looms, Inc. v. Collins & Aikman Corporation, supra.

In re Herrmann, N.Y., 56 F. 477, 5 C.C.A. 582.

(5) "Ramie fabrics."

In re Eckstein, Treas.Dec. 25710.

(6) "Textile fabrics," defined as those fabrics woven, as carpets, or capable of being woven, or formed by weaving.

Iowa.—Wood v. Allen, 82 N.W. 451, 452, 111 Iowa 97.

"Dry goods" compared see the C.J.S. definition Dry.

49. Escribano Diccionario and Suplemento.

"Fábrica tabacos"

It is said the words are of common use in the tobacco trade and in Spanish speaking communities, have been

In its ecclesiastical sense, as used in canon law, it means the revenue collected in cathedral, parochial, and other churches for repairs and to defray the expenses of worship; and is also applied to the board or body administering such revenues and to the act of applying them to their proper use.⁵⁰

In old English law, the Latin word "fabrica" was used as meaning the making or coining of money.⁵¹

FABRICARE. Latin, to make. Applied, in old English law, to a lawful coining, and also to the unlawful making or counterfeiting of coin. Used in an indictment for forging a bill of lading.⁵²

FABRICATE. In its primary sense the word "fabricate" is defined as meaning to build, construct, form by art and labor, or form into a whole by joining the parts; to frame, make, manufacture, or produce, as to fabricate a bridge or ship, to fabricate woollens;⁵³ to frame, build, forge; to make, shape, or prepare according to standardized specifications, so as to be interchangeable; to construct or build up into a whole by uniting interchangeable or standardized parts often made elsewhere.^{53.5}

In a derived sense "fabricate" means to invent or contrive, devise falsely, concoct, forge, as to fabricate a lie or a story or to fabricate a report.^{53.10} In this latter sense, the word implies fraud or falsehood; a false or fraudulent concoction, knowing it to be wrong.⁵⁴

In English criminal law, the word has been said

to import a criminal intention—a mens rea, a wrongful act, an act done with a mens rea, fraud or falsehood, a false or fraudulent concoction, knowing it to be wrong and contrary to statute.⁵⁵

In its primary sense, the word has been held synonymous with "construct" see the C.J.S. definition of that term. While "manufacture" and "fabricate" have meanings and applications which may differ, yet they are often, and in their broadest sense, interchangeable in meaning, the definition in any particular instance depending on the environment of the particular use of either.⁵⁶

Fabricating. In a particular context, "fabricating" does not imply or signify "manufacturing" but the meaning of the term is restricted to cutting, carving, dressing, shaping, and working over stone.⁵⁷

Fabricator. A fabricator of steel products is one who contracts to construct a specific product, such as a building, bridge, or other structure, according to special design and specification.^{57.5}

Phrases employing the word "fabricate" in its various forms are set out in the note.⁵⁸

FABRICATION. The act of framing or constructing; construction, formation, or manufacture.⁵⁹ In a particular connection, the term has been used in a broad sense as including "reworking and assembling."⁶⁰

It is often used as interchangeable in meaning with "manufacture."⁶¹

applied to all known manufactured products of the plant.

Colo.—The Solis Cigar Co. v. Pozo, 26 P. 556, 557, 16 Colo. 388, 25 Am.S.R. 279.

50. Eseriche Diccionario.

51. Black L.D.

52. Black L.D.

53. Century D.

53.5 Ala.—Foster & Creighton Co. v. Box, 66 So.2d 746, 750, 259 Ala. 474.

53.10 Century D.

54. Black L.D.

Always has invidious sense

"Invent" is sometimes used in a bad sense, but "fabricate" never in any other. To fabricate a story implies that it is so contrary to probability as to require the skill of a workman to induce belief in it. Black L.D.

55. Eng.—Aberdare Local Bd. of Health v. Hammett, L.R. 10 Q.B. 162, 165, 166.

56. U.S.—Union Wire Rope Corpo-

ration v. Atchison, T. & S. F. Ry. Co., C.C.A.Mo., 66 F.2d 965, 970.

57. Pa.—Commonwealth v. Paul W. Bounds Co., 173 A. 633, 634, 316 Pa. 29.

57.5 U.S.—U. S. v. Columbia Steel Co., D.C.Del., 74 F.Supp. 671, 674. Distinguished from "manufacturer" see Manufactures § 1 b (3).

58. Phrases construed

(1) "Fabricated evidence" see Evidence § 155.

(2) "Fabricated" steel," as describing steel ready for use in the construction of a building.

Minn.—Illinois Steel Warehouse Co. v. Hennepin Lumber Co., 182 N.W. 994, 995, 149 Minn. 157.

(3) "Fabricating natural and artificial stone."

Pa.—Commonwealth v. Paul W. Bounds Co., 173 A. 633, 634, 316 Pa. 29.

59. Century D.

Phrase construed

"Fabrication of tangible personal property," as a statutory term ap-

plied to services performed on materials which consumers furnish either directly or indirectly for the fabrication work, and held to constitute a sale within the statute. Cal.—Bigsby v. Johnson, 99 P.2d 268, 270.

In the fabrication of steel, there are two general classes of fabrication, structural fabrication and plate fabrication. Structural fabrication includes bridges, steel buildings, and structural frames. Plate fabrication is somewhat more diversified and consists of pressure vessels such as cylindrical containers, bubble and cracking towers used in the oil industry, penstock or piping, well casing, corrugated culverts, and other somewhat similar articles.

U.S.—U. S. v. Columbia Steel Co., D.C.Del., 74 F.Supp. 671, 674.

60. U.S.—Union Wire Rope Corporation v. Atchison, T. & S. F. Ry. Co., C.C.A.Mo., 66 F.2d 965, 969, 970.

61. U.S.—Union Wire Rope Corpo-

FABULA. In old European law, a contract or formal agreement; particularly used in the Lombardic and Visigothic laws to denote a marriage contract or a will.⁶²

FACCIÓN DE TESTAMENTO. Spanish; the capacity to make a will (activa) or to receive under a will (pasiva).⁶³

FACE. Presence; view, or sight;⁶⁴ the outward appearance or aspect of a thing; the surface of anything, especially the front, upper, or outer part or surface, or that which particularly offers itself to the view of a spectator.⁶⁵

In commercial law, the words of a written paper in their apparent or obvious meaning, as, face of a note, bill, bond, check, draft, judgment, record, or contract;⁶⁶ that which is shown by the mere language employed, without any explanation, modification, or addition from extrinsic facts or evidence.⁶⁷ Also the principal sum which it expresses to be due or payable, without any additions in the way of interest or costs;⁶⁸ the sum less interest which appears to be due by an instrument or record.⁶⁹

In a particular connection, the term has been held identical in meaning with "principal."⁷⁰

Face value. The value expressed on the face of a writing in the commodity in which it is payable;⁷¹ the value which can be ascertained from the language of the instrument without any aid from extrinsic facts or evidence;⁷² and, when applied to interest-bearing notes and like instruments, the phrase has been held to mean the amount named on the notes;⁷³ the principal thereof plus accrued interest to a given date;⁷⁴ the value, written or printed on the face of an instrument and any unmatured coupons attached thereto, without reference to its actual or market value.⁷⁵

The term has been held equivalent to "par value."⁷⁶

It has been distinguished from "actual value"⁷⁷ and from "par value."⁷⁸

Other phrases are listed in the note.⁷⁹ Still other phrases as to which more recent adjudications have not been found see 25 C.J. p 333 notes 42-50.

- ration v. Atchison, T. & S. F. Ry. Co., supra.
62. Black L.D.
63. Escriche Diccionario.
64. Webster New Int.D.
65. Tex.—*Corpus Juris* cited in Cunningham v. Great Southern Life Ins. Co., Civ.App., 68 S.W.2d 765, 773.
66. Tex.—*Corpus Juris* cited in Cunningham v. Great Southern Life Ins. Co., supra.
- Wis.—Olson v. Tanner, 94 N.W. 305, 306, 117 Wis. 544.
67. U.S.—Investors' Syndicate v. Willcuts, D.C.Minn., 45 F.2d 900, 502.
- Tex.—*Corpus Juris* quoted in Cunningham v. Great Southern Life Ins. Co., Civ.App., 66 S.W.2d 765, 773.
- Wyo.—Burns v. Corn Exch. Nat. Bank of Omaha, Neb., 240 P. 683, 687, 33 Wyo. 474.
- 25 C.J. p 333 note 39.
68. Tex.—*Corpus Juris* quoted in Cunningham v. Great Southern Life Ins. Co., Civ.App., 66 S.W.2d 765, 773.
- Wis.—Olson v. Tanner, 94 N.W. 305, 306, 117 Wis. 544.
69. Wis.—Olson v. Tanner, supra.
70. Wis.—State v. Newby, 171 N.W. 953, 955, 169 Wis. 208.
71. N.C.—Marriner v. John L. Roper Co., 16 S.E. 906, 907, 112 N.C. 164.
- 25 C.J. p 334 note 55.
72. U.S.—Investors' Syndicate v. Willcuts, D.C.Minn., 45 F.2d 900, 902.
73. R.I.—Petition of Mowry, 17 A. 553, 555, 16 R.I. 514.
74. Va.—American Nat. Bank of Portsmouth v. Ames, 194 S.E. 784, 798, 169 Va. 711.
75. Cal.—*Corpus Juris* cited in Wilson v. Justice's Court of Township of San Diego, 70 P.2d 695, 696, 22 C.A.2d 278.
76. U.S.—Goodyear Tire & Rubber Co. v. U. S., Ct.Cl., 47 S.Ct. 263, 273 U.S. 100, 71 L.Ed. 558.
- N.Y.—People v. Miller, 69 N.E. 1103, 1104, 177 N.Y. 461.
- 46 C.J. p 1175 note 95 [a].
77. U.S.—Goodyear Tire & Rubber Co. v. U. S., Ct.Cl., 47 S.Ct. 263, 273 U.S. 100, 71 L.Ed. 558.
78. N.Y.—People v. Miller, 69 N.E. 1103, 1104, 177 N.Y. 461.
79. Phrases
- (1) "Face amount of a life policy" see Insurance § 938.
- (2) "Face of a judgment," as meaning the sum for which the judgment was rendered, exclusive of interest.
- Tex.—*Corpus Juris* cited in Cunningham v. Great Southern Life Ins. Co., Civ.App., 66 S.W.2d 765, 773.
- 25 C.J. p 333 note 43.
- (3) "Face of the loan" usually means the principal thereof.
- Utah.—*Corpus Juris Secundum* cited in Seaboard Finance Co. v. Wahlen, 260 P.2d 556, 559, 123 Utah 529.
- (4) "Face of the record."
- Ga.—Jones v. State, 198 S.E. 566, 58 Ga.App. 374.
- Tex.—Permian Oil Co. v. Smith, 107 S.W.2d 564, 566, 129 Tex. 413, 111 A.L.R. 1152.
- Carson v. Taylor, Civ.App., 261 S.W. 824.
- (5) "Face or par value."
- N.Y.—In re Stoneman, 146 N.Y.S. 172, 175.
- S.C.—Evans v. Tillman, 17 S.E. 49, 53, 38 S.C. 238.
- (6) "Face or prima facie value."
- N.D.—Robertson v. Moses, 108 N.W. 788, 790, 15 N.D. 351.
- (7) "Face to face."
- Ill.—People v. Clark, 134 N.E. 95, 97, 301 Ill. 428.
- 25 C.J. p 333 note 46.
- See generally Criminal Law §§ 999-1009 as to right of accused to confront witnesses.
- (8) "Face value of pay envelope."
- Pa.—Commonwealth v. Bethlehem Steel Co., 11 Pa.Dist. 88, 91.
- (9) "Regular on its face," when used to characterize process, has been held to mean that it proceeds from a court, officer, or body having authority of law to issue such process, that it is legal in form, and contains nothing to notify or fairly apprise any one that it is issued without authority.
- Cal.—Pankewicz v. Jess, 149 P. 997, 998, 27 C.A. 340.

FACE AU FLEUVE or **FACE**, and **FRENTE AL RIO**, or **FRENTE**. Literally in French and Spanish conveyances, respectively, "Front to the river," or "front." The words have been held to indicate that the land to which the words are applied extends to, or is bounded by, the river, rather than merely facing toward it.⁸⁰

FACENDA and **FACENDERA**. In old Spanish law, personal labor and public works.⁸¹

FACERE. The present infinitive of the Latin verb, meaning to do, to make.⁸²

Other parts of the verb used in legal terms or phrases are: (1) The present indicative first person singular "facio," I do, I make, or I cause.⁸³ (2) The present subjunctive second person singular "facias," that you cause, that you may cause, or that you may do.⁸⁴ (3) The gerund "faciendo," in or by doing or paying; in some activity.⁸⁵

FACERÍA. In the Spanish law of Navarre, the partnership or community of pasture among neighboring towns.⁸⁶

FACIAL. Pertaining to the face, as facial expression.⁸⁷

FACIAS and **FACIENDO**. See the definition *Facere ante*.

FACIES. Latin, the face or countenance; the exterior appearance or view; hence, contemplation or study of a thing on its external or apparent side. Thus "prima facie" means at the first inspection, on a preliminary or exterior scrutiny. When we speak of a prima facie case, we mean one which, on its own showing, on a first examination, or without investigating any alleged defenses, is apparently good and maintainable.⁸⁸

FACILE. Latin, literally "easily." In Scotch law, easily persuaded, easily imposed upon.⁸⁹

FACILIS EST LAPsus JUVENTUTIS.⁹⁰

FACILITATE. It has been said that the word "facilitate" is a term that is used in everyday transactions between people.^{90.5}

The word is defined as meaning to make easy or less difficult;⁹¹ to free from difficulty or impedi-

80. As indicating a riparian estate

"In French and Spanish conveyances, both public and private, the words face au fleuve, face, frente al rio, frente, front to the river, or front, exclusively designate estates bounded by the river, which in the country are otherwise called riparian, bound to the repair of the road, its ditches, bridges, and levees, and to supply ground for either or the whole of these, when that which they cover is carried away by the water. . . . We conclude that, on the inspection of the deed . . . the words front to the river, used therein, were intended to denote a riparian estate bordering on the river." *La.—La Branche v. Montegut*, 17 So. 247, 248, 47 La. Ann. 674—*Morgan v. Livingston*, 6 Mart. 19, 224, 225, 226.

81. *Escriche Diccionario*.

82. Black L.D.

It occurs in various phrases, such as: "Facere defaultam—to make default; facere duellum—to make the duel, or make or do battle; facere finem—to make or pay a fine; facere legem—to make one's law; facere sacramentum—to make oath." Black L.D.

83. Black L.D.

Facio ut des

Literally, "I do that you may give." A species of contract in the civil law, being one of the innominate contracts, which occurs when a

man agrees to perform anything for a price either specifically mentioned or left to the determination of the law to set a value on it, as when a servant hires himself to his master for certain wages or an agreed sum of money; also the consideration of that species of contract.

Black L.D.

Facio ut facias

Literally "I do that you may do." The consideration of that species of contract in the civil law, or the contract itself, being one of the innominate contracts, which occurs when I agree with a man to do his work for him if he will do mine for me; or if two persons agree to marry together, or to do any other positive acts on both sides; or it may be to forbear on one side in consideration of something done on the other.

Black L.D.

84. Black L.D.

Phrases

(1) "Exigi facias" see *Exigent* or *Exigi Facias ante*.

(2) "Extendi facias" see *ante*.

(3) "Fieri facias"—that you cause to be made or done.

Black L.D.

(4) "Levari facias"—that you cause to be levied.

Burrill L.D.

See also *Executions* § 12.

(5) "Scire facias"—that you cause to know [that you make known].

Black L.D.

(6) Used also in the phrases "Do ut facias"—I give that you may do, discussed in the C.J.S. definition of the Latin verb *Do*, and "Facio ut facias"—I do that you may do, discussed in the preceding note, these being two of the divisions of considerations made in 2 Blackstone Comm. p 444.

Black L.D.

85. Black L.D.

86. *Escriche Diccionario*.

87. *Century D.*

Phrases

(1) "Facial disfigurement." *S.C.—Vick v. Springs Cotton Mills*, 40 S.E.2d 409, 411, 209 S.C. 372—*Ferguson v. South Carolina State Highway Dept.*, 15 S.E.2d 775, 778, 197 S.C. 520—*Poole v. Saxon Mills*, 6 S.E.2d 761, 765, 192 S.C. 339.

(2) "Serious facial or head disfigurement" see the C.J.S. definition *Disfigurement*.

88. Black L.D.

89. Black L.D.

90. A maxim meaning "Youth is very liable to err." *Morgan Leg. Max.*

90.5 U.S.—U. S. v. One 1950 Buick Sedan, C.A.Pa., 231 F.2d 219, 222.

91. Webster New Int.D.

U.S.—U. S. v. One 1950 Buick Sedan, C.A.Pa., 231 F.2d 219, 222—*Platt v. U. S.*, C.C.A. Okl., 163 F.2d 165, 166. U. S. v. One Dodge Coupe, Motor No. D14-105424, Serial No.

ment;^{91.5} as to facilitate the execution of a task;^{91.10} to free more or less completely from hindrance or obstruction;^{91.15} to free from difficulty, obstruction, or hindrance;^{91.20} to lessen the labor of;^{91.25} to make more easy or less difficult;^{91.30} to assist.^{91.35}

FACILITY. The word "facility" is derived from the Latin "facilis," meaning capable of being made or done; hence easy.^{91.40} It is not a technical word, but one in common use, and its meaning is to be found in the sense attached to it by approved usage.⁹² It is a very inclusive term, embracing anything which aids or makes easier the performance of a duty.⁹³

The word "facility" is defined as meaning the quality of being easily performed, ease in performance, or the means by which the performance of anything is rendered more easy;⁹⁴ that which promotes the ease of any action;^{94.5} operation, transaction, or course of conduct;^{94.10} a convenient means;⁹⁵ an aid;^{95.5} advantage, aid, or valuable aid, assistance, convenience, or help;⁹⁶ advantage;^{96.5}

opportunity;^{96.10} ease, freedom from difficulty.^{96.15}

The term is also defined as meaning that which aids, assists, or makes more easy the acquisition of knowledge.⁹⁷

"Facility" has been held to be equivalent to, or synonymous with, "aid," "assistance," and "help."^{97.5}

It has been distinguished from "equipment" see the C.J.S. definition of that word, and "instrumentality."⁹⁸

Facilities. The word "facilities" is generally regarded as a widely inclusive term, embracing everything which aids or makes easier the performance of the activities involved in the business of a person or corporation.^{98.5} It means, as applied to public agencies or utilities, everything incident to the general, prompt, safe, and impartial performance of the duties to the public at large imposed by the state, in the proper exercise of its police power, on transportation or transmission companies; and, specifically applied to carriers, everything necessary

30284066, D.C.N.Y., 43 F.Supp. 60, 61.

N.C.—Radio Station WMFR v. Eitel-McCullough, Inc., 59 S.E.2d 779, 782, 232 N.C. 287—Smith v. Davis, N.C., 45 S.E.2d 51, 57, 228 N.C. 172, 174 A.L.R. 643.

Phrases

(1) "Facilitate their operation," in aid of initiative and referendum see Statutes § 119.

(2) "Facilitating the driving, hauling, and assorting of logs," as not authorizing a corporation to drive or haul logs.

Minn.—Northwestern Impr. & Boom Co. v. O'Brien, 77 N.W. 989, 990, 75 Minn. 335.

91.5 U.S.—U. S. v. One 1950 Buick Sedan, C.A.Pa., 231 F.2d 219, 222—Platt v. U. S., C.C.A.Okl., 163 F.2d 165, 166.

N.Y.—Panzer v. Horan, 83 N.Y.S.2d 887, 893.

N.C.—Radio Station WMFR v. Eitel-McCullough, Inc., 59 S.E.2d 779, 782, 232 N.C. 287—Smith v. Davis, 45 S.E.2d 51, 57, 228 N.C. 172, 174 A.L.R. 643.

91.10 U.S.—U. S. v. One 1950 Buick Sedan, C.A.Pa., 231 F.2d 219, 222—Platt v. U. S., C.C.A.Okl., 163 F.2d 165, 166.

91.15 U.S.—U. S. v. One 1950 Buick Sedan, C.A.Pa., 231 F.2d 219, 222—Platt v. U. S., C.C.A.Okl., 163 F.2d 165, 166.

U. S. v. One Dodge Coupe Motor No. D14-105424, Serial No.

30284066, D.C.N.Y., 43 F.Supp. 60, 61.

91.20 U.S.—U. S. v. One 1949 Ford Sedan, D.C.N.C., 96 F.Supp. 341, 343.

91.25 U.S.—U. S. v. One 1950 Buick Sedan, C.A.Pa., 231 F.2d 219, 222—Platt v. U. S., C.C.A.Okl., 163 F.2d 165, 166.

U. S. v. One 1949 Ford Sedan, D.C.N.C., 96 F.Supp. 341, 343—U. S. v. One Dodge Coupe Motor No. D14-105424, Serial No. 30284066, D.C.N.Y., 43 F.Supp. 60, 61.

91.30 U.S.—U. S. v. One 1950 Buick Sedan, C.A.Pa., 231 F.2d 219, 222—Platt v. U. S., C.C.A.Okl., 163 F.2d 165, 166.

U. S. v. One 1949 Ford Sedan, D.C.N.C., 96 F.Supp. 341, 343.

N.Y.—Panzer v. Horan, 83 N.Y.S.2d 887, 893.

91.35 U.S.—Platt v. U. S., C.C.A.Okl., 163 F.2d 165, 166.

91.40 Mo.—State v. Perrin, 292 S.W. 54, 55, 316 Mo. 585.

92. Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 370, 392 Ill. 153.

Mont.—State v. Cave, 52 P. 200, 203, 20 Mont. 468.

93. U.S.—Hartford Electric Light Co. v. Federal Power Commission, C.C.A., 131 F.2d 953, 960, 961.

Wis.—Nekoosa-Edwards Paper Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 259 N.W. 618, 620, 217 Wis. 426.

94. Mo.—State v. Perrin, 292 S.W. 54, 55, 316 Mo. 585.

Mont.—State v. Cave, 52 P. 200, 203, 20 Mont. 468.

In Scotch law the term is said to mean pliancy of disposition. Black L.D.

94.5 Mont.—State v. Cave, 52 P. 200, 203, 20 Mont. 468.

94.10 Ill.—Illinois Bell Tel. Co. v. Miner, 136 N.E.2d 1, 9, 11 Ill.App.2d 44.

S.C.—Caldwell v. McMillan, 77 S.E.2d 798, 800, 224 S.C. 150.

95. U.S.—Briggs Mfg. Co. v. U. S., D.C.Conn., 30 F.2d 962, 964.

95.5 N.Y.—Bernardine v. City of New York, 62 N.E.2d 604, 605, 294 N.Y. 361.

96. Mont.—State v. Cave, 52 P. 200, 203, 20 Mont. 468.

96.5 S.C.—Caldwell v. McMillan, 77 S.E.2d 798, 800, 224 S.C. 150.

96.10 S.C.—Caldwell v. McMillan, supra.

96.15 Mo.—State v. Perrin, 292 S.W. 54, 55, 316 Mo. 585.

97. Mont.—State v. Cave, 52 P. 200, 203, 20 Mont. 468.

97.5 Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 370, 392 Ill. 153.

98. Wis.—Nekoosa-Edwards Paper Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 259 N.W. 618, 620, 217 Wis. 426.

98.5 U.S.—Hartford Electric Light Co. v. Federal Power Commission, C.C.A., 131 F.2d 953, 960, 961.

for the convenience of passengers and the safety and prompt transportation of freight.⁹⁹

The meaning of the word is not limited to inanimate bodies or things, and men are often facilities,¹ although ordinarily it includes inanimate means rather than human agencies.²

As to the duty of those rendering public services to furnish facilities see such titles as Carriers §§ 19, 40, 645; Ferries §§ 27, 28; Public Utilities §§ 7, 8; Railroads §§ 390, 391, and Shipping § 102.

In *Connecticut*. "Facilities" is a term which was applied to certain notes made payable two years after the War of 1812, which were issued by some of the Connecticut banks.³

Phrases employing the word are set out in the note.⁴

FACINUS QUOS INQUINAT ÆQUAT.⁵

FACIO UT DES and **FACIO UT FACIAS**. See the definition *Facere ante*.

FACIT CESSARE TACITUM.⁶

FACIT PER ALIUM FACIT PER SE.⁷

FACSIMILE. An exact copy, preserving all the marks of the original.⁸

FACT. The word "fact" is derived from the Latin "factum," from "facere,"⁹ and has a variety of

99. Cal.—*Corpus Juris* quoted in *Fraters v. Keeling*, 67 P.2d 118, 119, 20 C.A.2d 490.

Tex.—*Corpus Juris* cited in *Texas Interurban Ry. v. Hughes*, Civ.App., 34 S.W.2d 1103, 1109.

25 C.J. p 334 notes 70, 71.

Use of term illustrated

U.S.—*U. S. v. Delaware, L. & W. R. Co.*, C.C.N.Y., 40 F. 101, 103.

25 C.J. p 334 note 70 [a].

Use of term illustrated

U.S.—*Jersey Central Power & Light Co. v. Federal Power Commission*, 63 S.Ct. 953, 959, 319 U.S. 61, 87 L. Ed. 1258—*New Jersey Power & Light Co. v. Federal Power Commission*, 63 S.Ct. 953, 319 U.S. 61, 87 L. Ed. 1258.

Sioux City Stock Yards Co. v. U. S., D.C.Iowa, 49 F.Supp. 801, 804.

III.—*People ex rel. Schlaeger v. Bunge Bros. Coal Co.*, 64 N.E.2d 365, 370, 392 Ill. 153.

1. Ill.—*People ex rel. Schlaeger v. Bunge Bros. Coal Co.*, supra.
Mont.—*State v. Cave*, 52 P. 200, 203, 20 Mont. 468.

2. Ala.—*Sloss-Sheffield Steel & Iron Co. v. Smith*, 64 So. 337, 338, 185 Ala. 607.

3. Mass.—*Springfield Bank v. Merrick*, 14 Mass. 322, 325.

4. Phrases using "facility"

(1) "Facility for interchange of traffic."

U.S.—*Louisville & N. R. Co. v. U. S.*, D.C.Tenn., 227 F. 258, 269.

(2) "'Facility of payment' clause."
Ark.—*Potter v. Young*, 104 S.W.2d 802, 804, 193 Ark. 957.

D.C.—*French v. Lanham*, 57 F.2d 422, 61 App.D.C. 56.

Ind.—*Bragdon v. Prudential Ins. Co. of America*, 34 N.E.2d 173, 175, 176, 109 Ind.App. 278.

La.—*Smooth v. Metropolitan Life Ins. Co.*, App., 157 So. 298, 299.

Mo.—*Rohde v. Metropolitan Life Ins.*

Co., 111 S.W.2d 1006, 1009, 233 Mo. App. 865.

Neb.—*Uptegrove v. Metropolitan Life Ins. Co. of New York*, 15 N.W.2d 220, 224, 145 Neb. 51.

Va.—*Fulcher v. Parker*, 194 S.E. 714, 716, 169 Va. 479.

See generally Insurance § 1184, as to industrial insurance, and §§ 1173, 1193, 1297, as to life insurance.

(3) "Housing facility" is a unit, usually in a sizeable development, that serves as a home.

Fla.—*Davis v. State*, 87 So.2d 416, 417.

Phrases using "facilities"

(1) "Additional school facilities."
Mont.—*State v. Cave*, 52 P. 200, 203, 20 Mont. 468.

(2) "Buildings, machinery, equipment, or other facilities."
U.S.—*Briggs Mfg. Co. v. U. S.*, D.C. Conn., 30 F.2d 962, 964.

(3) "Facilities and accommodations."
Vt.—*State v. Central Vermont R. Co.*, 71 A. 194, 196, 81 Vt. 463, 130 Am. S.R. 1065.

(4) "Facilities for generation."
U.S.—*Hartford Electric Light Co. v. Federal Power Commission*, C.C.A., 131 F.2d 953, 960, 961—*Jersey Central Power & Light Co. v. Federal Power Commission*, C.C.A., 129 F. 2d 183, 195.

(5) "Facilities for production of war materials."

U.S.—*Texas Pipe Line Co. v. U. S.*, Ct.Cl., 58 F.2d 852, 857.

(6) "Facilities for transmission."
U.S.—*Hartford Electric Light Co. v. Federal Power Commission*, C.C.A., 131 F.2d 953, 960, 961—*Jersey Central Power & Light Co. v. Federal Power Commission*, C.C.A., 129 F.2d 183, 195.

(7) "Facilities for transportation."
Okl.—*St. Louis & S. F. R. Co. v. Miller*, 123 P. 1047, 1048, 31 Okl. 801.

Pa.—*Minds v. Pennsylvania R. Co.*, 77 A. 909, 228 Pa. 575.

(8) "Reasonable facilities."

Ark.—*St. Louis, I. M. & S. Ry. Co. v. State*, 107 S.W. 989, 991, 85 Ark. 284.

Okl.—*Missouri, K. & T. R. Co. v. Town of Norfolk*, 107 P. 172, 25 Okl. 325, 29 L.R.A., N.S., 159.

25 C.J. p 334 note 70 [d].

(9) "Reasonable, proper, and equal facilities."

D.C.—*U. S. ex rel. City of Los Angeles v. Interstate Commerce Commission*, 34 F.2d 228, 231, 59 App. D.C. 98.

(10) "Service, facilities, rules, regulations, and practices."

Pa.—*Borough of Swarthmore v. Public Service Commission*, 121 A. 488, 489, 277 Pa. 472.

(11) "Special facilities within the place of amusement."

Ky.—*Martin v. F. H. Bee Shows*, 113 S.W.2d 448, 452, 271 Ky. 822.

5. A maxim meaning "Guilt makes equal those whom it stains."
Black L.D.

6. A maxim meaning "He acts who ceases to be silent."

U.S.—*Mesa Market Co. v. Crosby*, Colo., 174 F. 96, 105, 98 C.C.A. 70.

7. A maxim meaning "That which is done through another is done by one's self."

N.Y.—*Samuels v. Evening Mail Assoc.*, 9 Hun 288, 292.

25 C.J. p 334 note 78.

8. Black L.D.

Facsimile probate

In England, where the construction of a will may be affected by the appearance of the original paper, the court will order the probate to pass in facsimile, as it may possibly help to show the meaning of the testator.
Black L.D.

9. Ind.—*Boyle v. State*, 5 N.E. 203, 218, 105 Ind. 469, 55 Am.R. 218.

"Facere" defined see ante.

"Factum" defined see post.

meanings.¹⁰

It is defined as meaning an act, an incident,¹¹ a circumstance;^{11.5} an action;^{11.10} an act or action which is the subject of testimony;¹² action or deed;¹³ an actual happening in time or space;¹⁴ an actuality;¹⁵ an effect produced or achieved;¹⁶ an event;¹⁷ any event, mental or physical;¹⁸ an occurrence or event;¹⁹ a reality as distinguished from supposition or opinion;²⁰ something fixed,

unchangeable;²¹ a thing done;²² a thing done or said;²³ the assertion or statement of a thing done or existing;^{23.5} a thing supposed or asserted to be done;^{23.10} a truth as distinguished from fiction or error;²⁴ what took place, as distinguished from what might or might not have happened.²⁵ Sometimes, loosely, by a transfer of meaning, the thing supposed (even though falsely) to be done or to exist.^{25.5}

10. Vol. 1 Bentham Jud.Ev. p. 48.

"There are two kinds of facts—evidentiary facts and inferential facts."

Ind.—Woodfill v. Patton, 76 Ind. 575, 579, 40 Am.R. 269—Locke v. Merchants' Nat. Bank, 66 Ind. 353, 362.

11. Ind.—Boyle v. State, 5 N.E. 203, 218, 105 Ind. 469, 55 Am.R. 218.

Okl.—Reininger v. Prickett, 137 P.2d 595, 598, 192 Okl. 486—German-American Ins. Co. v. Huntley, 161 P. 815, 818, 62 Okl. 39.

25 C.J. p 335 notes 85, 88.

11.5 Wash.—Lesamiz v. Lawyers Title Ins. Corp., 322 P.2d 351, 353, 51 Wash.2d 835.

11.10 Wash.—Lesamiz v. Lawyers Title Ins. Corp., supra.

12. Ala.—Corpus Juris Secundum quoted in American Life Ins. Co. v. Powell, 65 So.2d 516, 523, 259 Ala. 70.

Ind.—Barr v. Chicago, St. L. & P. R. Co., 37 N.E. 814, 815, 10 Ind.App. 433.

13. Ala.—Corpus Juris Secundum quoted in American Life Ins. Co. v. Powell, 65 So.2d 516, 523, 259 Ala. 70.

N.Y.—Lackey v. Vanderbilt, 10 How. Pr. 155, 161.

14. Ala.—Corpus Juris Secundum quoted in American Life Ins. Co. v. Powell, 65 So.2d 516, 523, 259 Ala. 70.

N.Y.—Corpus Juris Secundum cited in Rost v. Kessler, 49 N.Y.S.2d 97, 99, 267 App.Div. 686—Fowler-Curtis Co. v. Dean, 196 N.Y.S. 750, 754, 203 App.Div. 317.

15. Ala.—Corpus Juris Secundum quoted in American Life Ins. Co. v. Powell, 65 So.2d 516, 523, 259 Ala. 70.

N.Y.—Distillers Factors Corp. v. Country Distillers Products, 71 N.Y.S.2d 654, 657, 189 Misc. 497.

Or.—Churchill v. Meade, 182 P. 368, 371, 92 Or. 626.

16. Ind.—Gates v. Haw, 50 N.E. 299, 150 Ind. 370, 372.

17. Ala.—Corpus Juris Secundum quoted in American Life Ins. Co. v. Powell, 65 So.2d 516, 523, 259 Ala. 70.

Ind.—Barr v. Chicago, St. L. & P. R.

Co., 37 N.E. 814, 815, 10 Ind.App. 433.

Similarly expressed

An event or incident.

N.Y.—Drake v. Cockcroft, 4 E.D.Smith 34, 37.

18. N.Y.—Corpus Juris Secundum cited in Rost v. Kessler, 49 N.Y.S. 2d 97, 99, 267 App.Div. 686—Fowler-Curtis Co. v. Dean, 196 N.Y.S. 750, 754, 203 App.Div. 317.

State of mind as fact

(1) "The condition or state of mind at a given time is a fact. If any emotion is felt, as joy, grief, or anger, the feeling is a fact. If the operations of the mind produce an effect, as knowledge, skill, intention, this effect on the mind is a fact. When the mental processes lead up to and produce a desire or intention to do a certain thing, such state of mind is a fact. Willfulness is a desire or intention to produce a certain result; hence willfulness is a fact." Ind.—Barr v. Chicago, St. L. & P. R. Co., 37 N.E. 814, 815, 10 Ind.App. 433.

(2) "As Lord Bowen once said: 'The state of a man's mind is as much a fact as the state of his digestion.'" N.Y.—Fowler-Curtis Co. v. Dean, 196 N.Y.S. 750, 754, 203 App.Div. 317.

(3) In substance mental condition is a fact. Md.—Doyle v. Rody, 25 A.2d 457, 462, 180 Md. 471.

Knowledge as fact

(1) Where knowledge is possible, one who represents a mere belief as knowledge misrepresents a "fact." D.C.—Sovereign Pocohontas Co. v. Bond, App.D.C., 120 F.2d 39, 40.

(2) "Fact is knowledge." N.Y.—Distillers Factors Corp. v. Country Distillers Products, 71 N.Y.S.2d 654, 657, 189 Misc. 497.

Intent as fact

Intent is a "fact" which may be inferred from relevant facts in evidence.

U.S.—Majestic Securities Corporation v. Commissioner of Internal Revenue, C.C.A., 120 F.2d 12, 14.

Mental attitude not fact under particular statute

Ky.—Huggins v. Field, 244 S.W. 903, 905, 196 Ky. 501, 29 A.L.R. 1268.

19. Ind.—Boyle v. State, 5 N.E. 203, 218, 105 Ind. 469, 55 Am.R. 218—Woodfill v. Patton, 76 Ind. 575, 579, 40 Am.R. 269.

20. N.Y.—Lackey v. Vanderbilt, 10 How.Pr. 155, 161.

Ownership of property as fact

Generally, ownership of property is a "fact" and not a "legal conclusion."

Cal.—Diamond v. Grath, 116 P.2d 114, 116, 46 C.A.2d 443.

21. U.S.—Huber v. Guggenheim, C.C. N.Y., 89 F. 598, 601.

Ala.—Corpus Juris Secundum quoted in American Life Ins. Co. v. Powell, 65 So.2d 516, 523, 259 Ala. 70.

22. Ala.—Corpus Juris Secundum quoted in American Life Ins. Co. v. Powell, 65 So.2d 516, 523, 259 Ala. 70.

N.Y.—Corpus Juris Secundum cited in Rost v. Kessler, 49 N.Y.S.2d 97, 99, 267 App.Div. 686—Fowler-Curtis Co. v. Dean, 196 N.Y.S. 750, 754, 203 App.Div. 317.

Okl.—Reininger v. Prickett, 137 P. 2d 595, 598, 192 Okl. 486—German-American Ins. Co. v. Huntley, 161 P. 815, 818, 62 Okl. 39.

Wash.—Lesamiz v. Lawyers Title Ins. Corp., 322 P.2d 351, 353, 51 Wash.2d 835.

25 C.J. p 335 note 90.

23. Ala.—Corpus Juris Secundum quoted in American Life Ins. Co. v. Powell, 65 So.2d 516, 523, 259 Ala. 70.

Ind.—Barr v. Chicago, St. L. & P. R. Co., 37 N.E. 814, 815, 10 Ind.App. 433.

23.5 Wash.—Lesamiz v. Lawyers Title Ins. Corp., 322 P.2d 351, 353, 51 Wash.2d 835.

23.10 Wash.—Lesamiz v. Lawyers Title Ins. Corp., supra.

24. N.Y.—Lackey v. Vanderbilt, 10 How.Pr. 155, 161.

25. Ala.—Corpus Juris Secundum quoted in American Life Ins. Co. v. Powell, 65 So.2d 516, 523, 259 Ala. 70.

Or.—Churchill v. Meade, 182 P. 368, 371, 92 Or. 626.

25.5 Wash.—Lesamiz v. Lawyers Title Ins. Corp., 322 P.2d 351, 353, 51 Wash.2d 835.

Fact, as distinguished from law, is that out of which the point of law arises; that which is asserted to be or not to be, and is to be presumed or proved to be or not to be, for the purpose of applying or refusing to apply a rule of law.²⁶ It has been said that the word, as employed in the legal sense, includes those conclusions reached by the trier from sifting testimony, weighing evidence, and passing on the credit of the witnesses, and does not denote those inferences drawn by the trial court from the facts ascertained and settled by it.²⁷

For references to some specific applications or uses of the term see 25 C.J. p 335 note 81.

"Fact" has been held to be equivalent to, or synonymous with, "circumstance" and "deed," see the C.J.S. definitions of these terms, and also "evidence" see Evidence § 2, "matter,"²⁸ and "point."²⁹

"Fact" has been compared with, or distinguished from, "allegation" and "circumstance," see the C. J.S. definitions of these terms, and also "evidence," see Evidence § 2, "inference,"^{29.5} and "law."³⁰

The terms "fact" and "truth" are often used in common parlance as synonymous, but as employed

with reference to pleadings they are widely different.³¹

Material fact. The term has been defined generally in American Law Institute Restatement, Torts § 538, as a fact, the existence or nonexistence of which is a matter to which a reasonable man would attach importance in determining his choice of action in the transaction in question. Other authorities define it more specifically, as a fact which constitutes substantially the consideration of a contract;³² a fact of such a nature as to have induced action on the part of the complaining party;³³ also, a fact that is essential to the claim or defense, application, etc., without which it could not be supported;³⁴ such as is necessary to determine the issue;³⁵ or such as might influence a jury in its decision.³⁶

What are material facts with reference to avoidance and forfeiture of insurance policies see the C.J.S. title Insurance §§ 477, 490, 494, 584, 594, 646, 648.

Other phrases are listed in the note.³⁷ Still other phrases as to which more recent adjudications

26. W.Va.—Hulings v. Hulings Lumber Co., 18 S.E. 620, 627, 38 W. Va. 351.

27. Wis.—Porter v. Industrial Commission of Wisconsin, 181 N.W. 317, 318, 173 Wis. 267.

Held to include

(1) The record before the appellate court, the evidence, documentary and oral, and the instructions and pleadings.

Mo.—State ex rel. Horspool v. Haid, 40 S.W.2d 611, 613, 328 Mo. 327.

(2) The relevant parts of the trial and appellate record and procedure. Tex.—American Nat. Bank of Wichita Falls v. Hall, 265 S.W. 378, 380, 114 Tex. 164.

Held not to include

An opinion expressed in a coroner's certificate that death was suicidal.

U.S.—New York Life Ins. Co. v. Anderson, C.C.A.Minn., 66 F.2d 705, 706.

28. Kan.—State v. Grinstead, 61 P. 975, 976, 10 Kan.App. 74.

N.Y.—Whelpley v. Van Epps, 9 Paige 332, 333, 37 Am.D. 400.

Or.—State v. Luper, 95 P. 811, 813, 49 Or. 605.

29. Ala.—Taylor v. State, 81 So. 364, 17 Ala.App. 28.

Ark.—Kent v. State, 41 S.W. 849, 851, 64 Ark. 247.

29.5 U.S.—Montgomery v. Hutchins, C.C.A.Cal., 118 F.2d 661, 665.

30. Mass.—Hinckley v. Town of

Barnstable, 42 N.E.2d 581, 584, 311 Mass. 600.

W.Va.—Hulings v. Hulings Lumber Co., 18 S.E. 620, 627, 38 W.Va. 351.

31. Ill.—Gerrity v. Brady, 44 Ill. App. 203.

N.Y.—Drake v. Cockroft, 4 E.D.Smith 34, 37, 1 Abb.Pr. 203, 205, 10 How. Pr. 377.

In pleading a fact is a circumstance, act, event, or incident.

Ill.—Gerrity v. Brady, 44 Ill.App. 203.

N.Y.—Drake v. Cockroft, 4 E.D.Smith 34, 37, 1 Abb.Pr. 203, 205, 10 How. Pr. 377.

32. Ga.—Lyons v. Stephens, 45 Ga. 141, 143.

39 C.J. p 1387 note 88.

33. Ala.—Cooper v. Rowe, 94 So. 725, 726, 208 Ala. 494.

34. Wash.—Hansen v. Sandvik, 222 P. 205, 207, 128 Wash. 60.

39 C.J. p 1388 note 89.

Similarly expressed

"Material facts are those which relate to the merits of the cause of action or defense—facts which are within the issues to be tried and which may be made available on the trial as completing the cause of action or defense."

Ill.—People v. Lake St. Elevated R. Co., 54 Ill.App. 348, 353.

See generally Evidence § 159 and Pleading § 43.

35. Mich.—Woolman Construction Co. v. Sampson, 188 N.W. 420, 422, 219 Mich. 125.

Similarly expressed

(1) "Facts are 'material' which tend to establish any of the issues raised, although each of them may be but weak links in the chain of proof leading up to the recovery sought."

Pa.—Sherwood Bros. v. Yellow Cab Co. of Philadelphia, 129 A. 563, 564, 283 Pa. 488.

(2) "Such as are of legal significance in the cause, having such a relation to the question in controversy that they may or ought to have some influence on the determination of the cause."

Pa.—Greensboro Gas Company v. Home Oil and Gas Company, 33 Pa. Co. 658, 666.

36. N.Y.—People v. Kresel, 264 N. Y.S. 464, 469, 147 Misc. 241.

37. In fact

(1) As a meaning of "actually" see the C.J.S. definition Actually.

(2) As one of the meanings of "verily."

Mont.—Gregg v. Sigurdson, 215 P. 662, 663, 67 Mont. 272.

Matter of fact

(1) Defined generally as that which is to be ascertained by the senses, or by the testimony of witnesses describing what they have perceived. Black L.D.

(2) More specifically, as the facts contested, or in some degree sought to be established by evidence.

have not been found see 25 C.J. p 335 note 1-p 336 note 10.

FACTA. The plural of "factum" hereinafter defined.

FACTA SUNT POTENTIORA VERBIS.³⁸

FACTA TENENT MULTA QUÆ FIERI PROHIBENTUR.³⁹

FACTION. A party in political society, combined or acting in union, usually applied to a minority, but may be applied to a majority; a number of persons combined for a common purpose, usually a

Cal.—City of Santa Ana v. Gildmacher, 65 P. 882, 885, 133 C. 395.

(3) Sometimes used in antithesis to, or as distinguished from, "matter of law" or "matter of opinion."
U.S.—Moses v. U. S., Vt., 221 F. 863, 871, 137 C.C.A. 433.

Mo.—Brown v. South Joplin Lead & Zinc Mining Co., 92 S.W. 699, 704, 194 Mo. 681.

Quasi-jurisdictional facts

(1) Facts which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged, and established to the satisfaction of the court, cannot be attacked collaterally, such as the allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a federal court.

U.S.—Noble v. Union River Logging R. Co., D.C., 13 S.Ct. 271, 273, 147 U.S. 165, 37 L.Ed. 123.

(2) Further discussed.

Okl.—Abraham v. Homer, 226 P. 45, 47, 48, 102 Okl. 12.

"Ultimate fact"

(1) Defined generally as the logical conclusion deduced from certain primary facts evidentiary in their character.

U.S.—National Labor Relations Board v. Hudson Motor Car Co., C.C.A., 128 F.2d 528.

Cal.—Levins v. Rovegno, 12 P. 161, 162, 71 C. 273.

(2) More specifically, as the final or resulting fact reached by processes of logical reasoning from the detached or successive facts in evidence, and which is fundamental and determinative of the whole case.

Or.—Maeder Steel Products Co. v. Zanelli, 220 P. 155, 159, 109 Or. 562.

Other phrases construed

(1) "Fact from which the fact in issue would be presumed," as distinguished from evidence irrelevant to any fact in issue.

Utah.—In re Sadleir, 85 P.2d 810, 817, 97 Utah 291.

(2) "Fact inference."

U.S.—In re Rupp, D.C.Pa., 35 F.Supp. 887, 888.

(3) "Facts as found by the court," as referring to the ultimate facts, not evidential facts or statements of testimony or comments on the evidence or its effect, but the necessary inferences of fact to be drawn from all the evidence.

S.D.—Blake v. Gunderson, 195 N.W. 653, 46 S.D. 642.

(4) "Facts of the case."

La.—Llorens v. McCann, 175 So. 442, 444, 187 La. 642.

(5) "Facts well pleaded," as being those of a substantive nature necessary to the framing of the issue submitted.

Mo.—Bushman v. Barlow, 15 S.W.2d 329, 331, 321 Mo. 1052.

See also Pleading § 261.

(6) "Inferential fact," defined as an inference or conclusion from evidence, or from the evidentiary facts, being distinguished from the latter term.

Ind.—Louisville, N. A. & C. Ry. Co. v. Miller, 37 N.E. 343, 348, 141 Ind. 533.

(7) "Litigated facts."

Mass.—Eastman v. Symonds, 108 Mass. 567, 569.

(8) "Material fact to be tried," as meaning controverted facts to be tried.

Kan.—State v. Hooper, 37 P.2d 52, 62, 140 Kan. 481.

(9) "Primary facts" are matters which can be established by direct testimony.

U.S.—N. L. R. B. v. Hudson Motor Car Co., C.C.A., 128 F.2d 528, 532.

(10) "Statement of facts constituting cause of action," as meaning narrative of events, acts, and things done which show legal liability of defendant to plaintiff.

Neb.—Rhoads v. Columbia Fire Underwriters' Agency, 260 N.W. 174, 178, 128 Neb. 710.

(11) "Suppression of fact" distinguished from "silence."

Md.—Chicora Fertilizer Co. of Charleston, S. C. v. Dunan, 46 A. 347, 351, 91 Md. 144, 50 L.R.A. 401. 58 C.J. p 732 note 9 [b].

Phrases elsewhere discussed

(1) "Allegation of fact" see the C.J.S. definition Allegation.

(2) "Collateral facts" and admission or exclusion of evidence concerning them see Evidence § 169, as sometimes susceptible of proof by hearsay, see Evidence § 209.

(3) "Continuing facts" see Evidence § 585.

(4) "Dispositive facts" see the C.J.S. definition Dispositive.

(5) "Essential facts" see the C.J.S. definition Essential.

(6) "Evidentiary fact" see the C.J.S. definition Evidentiary.

(7) "Explanatory facts" see Evidence § 163.

(8) "Facts judicially known" see Evidence §§ 10-12.

(9) "Facts not alleged" see Pleading § 57.

(10) "Facts of family history" see Evidence §§ 168-172.

(11) "Facts unknown to plaintiff" see Pleading § 85, also 49 C.J. p 151 note 42.

(12) "Incidental facts" see Evidence § 217, in declarations against interest, § 231, in declarations as to pedigree.

(13) "Incontrovertible physical facts" rule see the C.J.S. definition Incontrovertible.

(14) "Issues of fact" or "facts in issue" see Pleading § 517.

(15) "Jurisdictional facts" see Courts § 24, and Pleading § 76.

(16) "Main or principal fact" in res gestæ doctrine see Evidence §§ 404-408.

(17) "Mistake of fact" see the C.J.S. definition Mistake.

(18) "Negative facts" see Evidence § 112, burden of proving, § 1025, sufficiency of proof.

(19) "Presumptions of fact" see Evidence § 116.

(20) "Questions of fact" see Criminal Law §§ 1120-1142; and Trial §§ 203, 206-219.

(21) "Remote facts" as sometimes susceptible of proof by hearsay, see Evidence § 209.

(22) "Statements of fact" as distinguished from opinions see Evidence §§ 459-484.

(23) "Stipulations and agreements as to facts" as judicial admissions see Evidence § 307.

(24) "Ultimate facts," as synonymous with "essential facts" and "essential issues" see the C.J.S. definition Essential.

38. A maxim meaning "Deeds [or facts] are more powerful than words." Black L.D.

39. A maxim meaning "Deeds contain many things which are prohibited to be done." Black L.D.

Applied in Warcombe's Case, 12 Coke 124, 125, 77 Reprint 1399.

party within a party; a party of persons having a common end in view, usually such a party seeking to bring about changes in any association of which it forms a part.⁴⁰

"Faction" and "branch" have been used synonymously.^{40.5}

FACTIO TESTAMENTI. Latin, in the civil law, the right, power, or capacity of making a will, called "factio activa;" also the right or capacity of taking by will, called "factio passiva."⁴¹

FACTO. The ablative singular of "factum" hereinafter defined.

FACTOR (English). With relation to causation, one of the elements, circumstances, or influences that contribute to produce a result.⁴²

As meaning a commission or selling agent see **Factors** § 1.

FACTOR (Spanish). In Spanish law, a commercial agent.⁴³

FACTORAGE. See **Factors** § 1.

FACTORIA. In Spanish law, the office or employment of a factor; also the establishment over which he presides.⁴⁴

FACTORING. A practice or system of commercial financing, confined principally to the textile industry, which involves notice to trade debtors, being thus distinguished from the business of "non-notification financing."^{44.50}

FACTORIZING PROCESS. See **Garnishment** § 1.

40. Wis.—*State v. Houser*, 100 N. W. 964, 974, 122 Wis. 534.

Applied to political parties the word suggests a division of the members thereof, and a separate organization of the parts, not a mere division of a regularly called convention into two camps, the body of the party not necessarily being divided.

Wis.—*State v. Houser*, supra.
See also **Elections** § 84 a note 67.

40.5 Pa.—*In re McKean's Estate*, 33 A.2d 51, 52, 152 Pa.Super. 613.

41. Black L.D.

42. U.S.—*Garrow, MacClain & Garrow v. Bass*, C.C.A.Tex., 88 F.2d 574, 577.

Phrases construed

(1) "Factor of five," a term by the use of which in a municipal ordinance is meant that the floor [of a store or warehouse] must be five times stronger than necessary to carry the ordinary weight it is designed to carry.

La.—*O'Rourke v. Fulton Bag & Cotton Mills*, 63 So. 480, 482, 133 La. 955, 960.

(2) "Factor of general applicability," construed within Price Control Act.

U.S.—*Lakemore Co. v. Brown*, Em. App., 137 F.2d 355, 358.

(3) "Material income-producing factor."

U.S.—*Garrow, MacClain & Garrow v. Bass*, C.C.A.Tex., 88 F.2d 574, 577.

43. *Escrache Diccionario*.

Factor de provisiones

A sort of commissary officer in the Spanish army.

Escrache Diccionario.

44. *Escrache Diccionario*.

44.50 U.S.—*Corn Exchange Nat. Bank & Trust Co., Philadelphia, v. Klauder*, Pa., 63 S.Ct. 679, 682, 318 U.S. 434, 87 L.Ed. 884, 144 A.L.R. 1189.

FACTORS

This Title includes the regulation and conduct of the business of receiving and selling goods consigned or otherwise intrusted to factors, commission merchants, etc., for sale; rights, powers, duties, and liabilities of persons engaged in such business and the principals or consignors, as between themselves and as to others, arising from such consignments, etc., and incidental transactions, such as advances, pledges, etc., especially as affected by their possession or control of the goods or of evidences of title.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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- II. POWERS OF FACTOR, §§ 8-17**
- III. RIGHTS AND DUTIES AS BETWEEN FACTOR AND PRINCIPAL, §§ 18-51**
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I. IN GENERAL

§ 1. Definitions, Nature, and Distinctions

- a. Definitions
- b. Classes and kinds of factors
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- d. Elements of relation
- e. Nature of relation

a. Definitions

- (1) Factor
- (2) Factorage or commission
- (3) Other terms

(1) Factor

A factor, or a commission merchant or consignee, as he is sometimes called, is an agent who, in pursuance of his usual business and for a compensation, sells goods or merchandise intrusted to his possession for that purpose by or for the owner.

The word "factor" has a fairly well defined meaning.¹ A factor is an agent who, in pursuance of his usual trade or business, and for a compensation commonly called factorage or commission, sells goods or merchandise consigned or intrusted to his possession for that purpose by or for the owner.²

1. Tex.—Hedgepeth v. Hamilton Warehouse Co., 140 S.W. 1084, 104 Tex. 496.

2. U.S.—McCarley v. Foster-Milburn Co., D.C.N.Y., 93 F.Supp. 421, 423.

Ala.—Corpus Juris cited in Birmingham Post Co. v. Sturgeon, 149 So. 74, 78, 227 Ala. 162.

Cal.—Leland v. Oliver, 255 P. 775, 82 C.A. 474.

D.C.—Neild v. District of Columbia, 110 F.2d 246, 71 App.D.C. 306.

Ga.—City of Atlanta v. York Mfg. Co., 116 S.E. 195, 155 Ga. 33.

Iowa.—Corpus Juris Secundum cited in West v. Hartford Fire Ins. Co., 83 N.W.2d 465, 468, 248 Iowa 993.

Minn.—Clark v. Otto B. Ashbach & Sons, Inc., 64 N.W.2d 517, 518, 241 Minn. 267.

N.C.—Holleman v. Taylor, 158 S.E. 88, 200 N.C. 618.

S.C.—Corpus Juris quoted in Sams v. Arthur, 133 S.E. 205, 207, 135 S.C. 123.

Tex.—Falls Rubber Co. v. La Fon, Com.App., 256 S.W. 577.

Corpus Juris cited in M. H. Thomas & Co. v. Hawthorne, Civ. App., 245 S.W. 966, 971.

W.Va.—Ruffner v. Hewitt, 7 W.Va. 585.

25 C.J. p 340 note 2.

Other definitions

(1) "One whose business is to receive and sell goods for a commission."

Fla.—Gadsden County Tobacco Co. v. Corry, 137 So. 255, 257, 103 Fla. 217.

Mich.—Commercial Investment Trust v. Stewart, 209 N.W. 660, 661, 235 Mich. 502.

25 C.J. p 340 note 2 [a] (1).

(2) "An agent employed to sell goods for a principal."

U.S.—The Robin Gray, D.C.N.Y., 53 F.2d 1037, 1041, reversed in part on other grounds, C.C.A., 65 F.2d 375, modified on other grounds 65 F.2d 376, certiorari denied Seas Shipping Co. v. Approximately 3,251,000 Feet Board Measure of Lumber, 54 S.Ct. 70, 290 U.S. 653, 78 L.Ed. 566.

(3) "An agent to whom merchandise is intrusted for the purpose of sale."

N.Y.—Lemnos Broad Silk Works v. Spiegelberg, 217 N.Y.S. 595, 597, 127 Misc. 855.

(4) "An agent employed to sell goods for his principal which are in his possession for a commission."

Ind.—Robertson v. State, 192 N.E. 887, 888, 207 Ind. 374.

(5) "A bailee for the purpose of selling the goods of his bailor."

U.S.—U. S. v. Marienfeld, D.C.Mo., 116 F.Supp. 634, 638, affirmed, C.A., Marienfeld v. U. S., 214 F.2d 632, certiorari denied 75 S.Ct. 87, 348 U. S. 865, 99 L.Ed. 681.

(6) Other similar definitions.

Tenn.—Hughes v. Young, 65 S.W.2d 858, 17 Tenn.App. 24.

25 C.J. p 340 note 2 [a].

Statutory definition

(1) Where the statute so provides, a factor is "an agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser."

Cal.—Moody v. Goodwin, 200 P. 733, 53 C.A. 693.

25 C.J. p 340 note 2 [b].

(2) By statute, a factor has been defined as one who lends upon the security of merchandise.

N.J.—Taylor v. New Line Industries, 117 A.2d 643, 644, 37 N.J.Super. 501.

(3) Particular persons held factors within statutory definition.

Cal.—Kenny v. Christianson, 253 P. 715, 200 C. 419, 50 A.L.R. 1297.

Cooper v. American Fruit Growers, Inc., of California, 30 P.2d 558, 137 C.A. 494—Glantz v. Freedman, 280 P. 704, 100 C.A. 611—Rhee v. L. K. Small Co., 256 P. 839, 83 C.A. 339.

The standard presumptive meaning of the word "factor" includes and denotes a selling agent.

N.Y.—Irving Trust Co. v. B. Lindner & Bro., 190 N.E. 332, 264 N.Y. 165, reargument denied 191 N.E. 621, 264 N.Y. 675—Shoyer v. Edmund Wright-Ginsberg Co., 148 N.E. 328, 240 N.Y. 223.

Facts held to constitute one a factor for the sale of

(1) Automobiles.

Cal.—Pacific Finance Corp. v. Foust, 285 P.2d 632, 44 C.2d 853—Kenny v. Christianson, 253 P. 715, 200 C. 419, 50 A.L.R. 1297.

Siegel v. Bayless, 248 P.2d 968, 113 C.A.2d 661.

(2) Fruit, vegetables, or produce.

Cal.—Irvine Co. v. McColgan, 157 P. 2d 847, 26 C.2d 160, 167 A.L.R. 934.

Cooper v. American Fruit Growers, Inc., of California, 30 P.2d 558, 137 C.A. 494—De Raad v. Nash-De Camp Co., C.A., 23 P.2d 68—Glantz v. Freedman, 280 P. 704, 100 C.A. 611—Rhee v. L. K. Small Co., 256 P. 839, 83 C.A. 339.

25 C.J. p 340 note 2 [c].

(3) Lumber.

U.S.—The Robin Gray, D.C.N.Y., 53 F.2d 1037, reversed in part on other grounds, C.C.A., 65 F.2d 375, modified on other grounds 65 F.2d 376, certiorari denied Seas Shipping Co. v. Approximately 3,251,000 Feet Board Measure of Lumber, 54 S.Ct. 70, 290 U.S. 653, 78 L.Ed. 566.

Ky.—Rock-castle Lumber Co. v. Burns, 194 S.W. 95, 175 Ky. 224.

Miss.—D. S. Pate Lumber Co. v. Weathers, 146 So. 433, 167 Miss. 228.

(4) Machinery.

U.S.—Bendix Homes Appliances v. Radio Accessories Co., C.C.A.Neb., 129 F.2d 177.

Ill.—Hamilton Mach. Tool Co. v. Mechanics' Mach. Co., 179 Ill.App. 145.

Mich.—Bellows v. Goodfellow, 267 N. W. 885, 276 Mich. 471.

(5) Other things.

U.S.—Girard v. Kimbell Milling Co., C.C.A.Tex., 116 F.2d 999.

Ill.—Burton v. Goodspeed, 69 Ill. 237.

Me.—Gallagher v. Aroostook Federal

Although a factor usually sells only goods intrusted to him for that purpose, under some definitions the agency may also include the purchase and sale of such goods.³

Other terms sometimes used as synonymous with or as a general equivalent for "factor," are "commission merchant"⁴ and "consignee."⁵

Joint owner as factor. A person having a joint interest in the property to be sold may occupy with relation to the other owners the position of a factor.⁶

Common carrier as factor. A common carrier may be a factor, as where he transports goods to a distant place and undertakes to sell them there; in such a case he acts in a dual capacity, the one as a carrier in the transportation of the goods, the other as a factor while engaged in the sale of the goods.⁷

(2) Factorage or Commission

The term "factorage" or "commission" usually indicates the allowance given to a factor as compensation for his services.

The term "factorage" or "commission" is usually used to indicate the allowance given to a factor as compensation for his services.⁸ A *del credere* commission, correctly speaking, is the additional compensation given by the principal to the factor for his guaranty of payment;⁹ but the term is sometimes also applied to the contract itself.¹⁰

(3) Other Terms

The goods received by a factor for sale are called a "consignment." A "mortgage-marketing contract" is an indenture of dual character. "Return commissions" are an allowance to cover expenses of the consignee while goods are in his charge.

An article or collection of goods sent to a factor for sale is called a "consignment."¹¹

The term "*del credere* factor" is defined *infra* subdivision b (2) of this section.

A "mortgage-marketing contract" is an indenture of dual character, securing to the mortgagee the exclusive right to furnish supplies essential for packing a crop and the right to market it on a com-

tion of Farmers, 197 A. 554, 135 Me. 386.

Tex.—Steere v. Stockyards Nat. Bank, Civ.App., 266 S.W. 531. 25 C.J. p 340 note 2 [c].

Facts held not to constitute one a factor

(1) Where a consignee is at liberty, under his contract with the consignor, to sell at any price and receive payment at any time he likes, and is bound, if he sells, to pay the consignor a fixed price, their relation is not that of principal and factor.

Tex.—City of San Antonio v. Chas. M. Stieff, Inc., Civ.App., 83 S.W.2d 357, reversed on other grounds Chas. M. Stieff, Inc. v. City of San Antonio, 111 S.W.2d 1086, 130 Tex. 594.

Wis.—Northern Electrical Mfg. Co. v. J. C. Wagner Co., 84 N.W. 894, 108 Wis. 584.

(2) One permitted by the owner of an automobile to drive it to a prospective buyer's place of business for purposes of exhibition without authority to sell or deliver it to the latter was not clothed with the authority of a factor.

Cal.—Moody v. Goodwin, 200 P. 733, 53 C.A. 693.

3. Wis.—Beardsley v. Schmidt, 98 N.W. 235, 120 Wis. 405, 102 Am.S.R. 991.

25 C.J. p 341 note 3.

4. Cal.—Leland v. Oliver, 255 P. 775, 82 C.A. 474.

D.C.—Neild v. District of Columbia, 110 F.2d 246, 71 App.D.C. 306.

Md.—Allen C. Driver, Inc. v. Mills, 86 A.2d 724, 199 Md. 420.

35 C.J.S.—32

Minn.—Clark v. Otto B. Ashbach & Sons, Inc., 64 N.W.2d 517, 241 Minn. 267.

Mo.—Tucker v. St. Louis-San Francisco Ry. Co., App., 233 S.W. 512, affirmed 250 S.W. 390, 298 Mo. 51. N.Y.—Duguid v. Edwards, 50 Barb. 288.

Tenn.—Thompson v. Woodruff, 7 Cold. 401—Spears v. Loague, 6 Cold. 420.

Hughes v. Young, 65 S.W.2d 858, 17 Tenn.App. 24.

Tex.—M. H. Thomas & Co. v. Hawthorne, Civ.App., 245 S.W. 966.

12 C.J. p 147 note 43.

"The terms 'factor' and 'commission merchants' are said to be nearly or quite synonymous; the former expression being more common in the language of the law, and the latter in the language of commerce."

Tenn.—I. J. Cooper Rubber Co. v. Johnson, 182 S.W. 593, 594, 133 Tenn. 562, L.R.A.1917A 282.

"Commission merchant" defined

(1) "An agent employed to sell goods or merchandise consigned or delivered to him, by or for his principal, for a compensation, commonly called factorage or commission."

Mo.—State v. Thompson, 25 S.W. 346, 348, 120 Mo. 12.

Tenn.—Hughes v. Young, 65 S.W.2d 858, 864, 17 Tenn.App. 24.

(2) Other similar definitions.

Ala.—Lehman v. Pritchett, 4 So. 601, 84 Ala. 512.

Ark.—G. H. Hammond Co. v. Joseph Mercantile Co., 222 S.W. 27, 144 Ark. 108.

12 C.J. p 147 notes 44—53.

5. Cal.—The Astorian, 2 P.2d 1004, 16 C.A. 563.

Mass.—International Trust Co. v. Webster Nat. Bank, 154 N.E. 330, 258 Mass. 17, 49 A.L.R. 267.

Minn.—Clark v. Otto B. Ashbach & Sons, Inc., 64 N.W.2d 517, 241 Minn. 267.

N.Y.—Duguid v. Edwards, 50 Barb. 288.

Tenn.—Spears v. Loague, 6 Cold. 420. 12 C.J. p 528 notes 26—28.

The term "consignee" is nearly synonymous with "factor."

Conn.—Lyon v. Alvord, 18 Conn. 66.

6. N.Y.—Bradford v. Kimberly, 3 Johns.Ch. 431.

7. U.S.—The Waldo, D.C.Me., 28 F. Cas.No.17,056, 2 Ware 165.

25 C.J. p 341 note 9.

8. N.J.—Malinowsky v. Lincoln Developing Co., 136 A. 202, 103 N.J. Law 394.

N.C.—Holleman v. Taylor, 158 S.E. 88, 200 N.C. 618.

Tenn.—Hughes v. Young, 65 S.W.2d 858, 17 Tenn.App. 24.

25 C.J. p 342 note 11, p 338 note 18.

9. N.Y.—Duguid v. Edwards, 50 Barb. 288.

25 C.J. p 342 note 12.

10. R.I.—Balderston v. National Rubber Co., 27 A. 507, 18 R.I. 338, 49 Am.S.R. 772.

25 C.J. p 342 note 13.

11. N.Y.—Duguid v. Edwards, 50 Barb. 288.

12 C.J. p 528 note 32.

mission basis, and creating a lien in favor of the mortgagee on the mortgagor's realty and crop.¹²

"Return commissions" is said to mean that on goods taken away by a consignor before sale, the consignee receives an equitable allowance to cover the expense of handling, insuring, and storing the goods while in his charge.^{12.5}

b. Classes and Kinds of Factors

Factors are sometimes classified as "home" and "foreign" factors. A *del credere* factor is one who expressly engages to pay to his principal the price of the goods sold by him, if the purchaser fails to do so.

A factor is called a "home factor" when he resides in the same state or country as his principal.¹³ If he resides in a different state or country, he is called a "foreign factor."¹⁴ As understood in marine matters, however, a "foreign factor" is a person who has charge of the cargo, to handle it, dispose of it, and convert it into money or exchange it for other property.¹⁵

A *del credere* factor, or a factor with a *del credere* commission or agency, is one who, in consideration of a higher compensation, expressly engages to pay to his principal the price of all goods sold by himself, if the purchaser fails so to do.¹⁶

c. Distinctions

A factor is to be distinguished from a person occupying the position merely of an ordinary agent, banker, clerk, employee, merchant, purchaser, traveling salesman, trustee, warehouseman, or other similar position; and a consignment for sale must be distinguished from a sale.

The term "factor," in its strict and technical sense, is not properly applicable to a person occupying the position merely of an ordinary commercial banker,¹⁷ merchant,¹⁸ officer,¹⁹ or trustee;²⁰ and in at least some of its characteristics the agency of factor is to be distinguished from that of a broker, see Brokers § 4, "forwarding agent,"²¹ "insurance agent,"²² "warehouseman,"²³ traveling salesman,²⁴ collecting agent,²⁵ or clerk or employee,²⁶ and from the relation of debtor and creditor,²⁷ or joint own-

12. U.S.—Pacific Fruit Exchange v. U. S., Ct.Cl., 26 F.Supp. 228.

12.5 N.Y.—Botany Worsted Works v. Wendt, 48 N.Y.S. 1024, 22 Misc. 156.

54 C.J. p 741 note 76.

13. W.Va.—Ruffner v. Hewitt, 7 W. Va. 585.

14. W.Va.—Ruffner v. Hewitt, supra.

15. N.Y.—Gilchrist Transp. Co. v. Worthington & Sill, 184 N.Y.S. 81, 193 App.Div. 250.

25 C.J. p 341 note 4.

"Supercargo" see Shipping § 171.

16. Mich.—Corpus Juris quoted in Commercial Investment Trust v. Stewart, 209 N.W. 660, 661, 235 Mich. 502.

Minn.—Corpus Juris Secundum quoted in Clark v. Otto B. Ashbach & Sons, Inc., 64 N.W.2d 517, 522, 241 Minn. 267.

N.Y.—Duguid v. Edwards, 50 Barb. 288.

Lemnos Broad Silk Works v. Spiegelberg, 217 N.Y.S. 595, 127 Misc. 855.

25 C.J. p 341 note 10.

Facts held to constitute one a *del credere* factor

Tenn.—Corpus Juris cited in Hughes v. Young, 65 S.W.2d 858, 865, 17 Tenn.App. 24.

Facts held not to constitute one a *del credere* factor

(1) Contract stating that defendant was to act as factor for plaintiffs, and agreed to guarantee plaintiffs' accounts as approved by defendant's credit department, and to advance eighty-five per cent of net outstandings, defendant assuming credit

risk only, held not to make defendant a *del credere* factor.

N.Y.—Shoyer v. Edmund Wright-Ginsberg Co., 148 N.E. 328, 240 N. Y. 223.

(2) Where, under conditional sales contract covering motor scrapers and agency contract, under which seller's agents were to receive certain commissions, but agreed to take over obligations of sales contract if buyer defaulted, agents, who were not in possession, or bailees, of the scrapers which were sold, and who did not receive additional compensation for guaranteeing solvency of buyer and his performance of conditional sales contract, were not *del credere* agents of seller, and, therefore, could not be held absolutely liable in the first instance for payments to be made by buyer.

Minn.—Clark v. Otto B. Ashbach & Sons, Inc., 64 N.W.2d 517, 241 Minn. 267.

17. Persons held bankers, not factors

Defendants, who, although styled "factors" in contract, did not sell plaintiffs' goods, but merely guaranteed buyers' credit, and made advances on goods, were "commercial bankers," and not "factors."

N.Y.—Lemnos Broad Silk Works v. Spiegelberg, 217 N.Y.S. 595, 127 Misc. 855.

18. Ala.—Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497.

Okl.—Oklahoma City Livestock Exchange v. Parkey, 144 P.2d 960, 193 Okl. 426.

12 C.J. p 147 note 48 [a].

19. Wash.—Slotemaker v. Interna-

tional Fruit & Produce Co., 287 P. 883, 156 Wash. 574.

20. U.S.—Chapman v. Forsyth, Ky., 21 How. 202, 11 L.Ed. 236.

21. Ala.—Perkins v. State, 50 Ala. 154.

25 C.J. p 343 note 40.

22. N.Y.—Gilchrist Transp. Co. v. Worthington & Sill, 184 N.Y.S. 81, 193 App.Div. 250.

23. Tex.—Hedgepeth v. Hamilton Warehouse Co., 140 S.W. 1084, 104 Tex. 496.

25 C.J. p 343 note 41.

24. N.Y.—Sage v. Shepard & Morse Lumber Co., 39 N.Y.S. 449, 4 App. Div. 290, affirmed 52 N.E. 1126, 158 N.Y. 672.

63 C.J. p 808 note 27 [d].

25. U.S.—Hopkirk v. Bell, Va., 3 Cranch 454, 2 L.Ed. 497.

25 C.J. p 343 note 43.

26. Ala.—Corpus Juris cited in Birmingham Post Co. v. Sturgeon, 149 So. 74, 78, 227 Ala. 162.

25 C.J. p 343 note 44—11 C.J. p 841 note 97 [c].

A factor is not a "servant" within the technical relation of "master and servant."

N.C.—Holleman v. Taylor, 158 S.E. 88, 200 N.C. 618.

27. Mo.—Deming Co. v. Webb, 76 Mo.App. 329.

25 C.J. p 343 note 45.

Trust receipt

(1) Transaction whereby dealer received automobiles from distributor and executed trust receipt and promissory note to finance company for unpaid purchase price did not constitute consignment to factor for

er.²⁸

Factor and ordinary agent. A factor is to be distinguished from a person occupying the position merely of an ordinary agent.^{28.5} While in a sense, as appears infra subdivision e of this section, a factor or commission merchant is the agent of the consignor, he does not conduct an agency or business for the principal at the factor's place of business at his own risk,²⁹ and the proceeds of the sale do not become the exclusive property of the consignor.³⁰ The important difference, however, between a factor and an ordinary agent is that the agent need not have possession of the property of his principal, while the factor must be in possession;³¹ and under some definitions other and greater powers are conferred on a factor than on an agent.³²

A del credere factor is distinguished from other agents in that he guarantees that those persons to whom he sells will perform the contracts which he makes with them.³³

Factor and bailee. Although a factor is regarded as a bailee of the property, see infra § 40, he

differs from an ordinary bailee mainly in that he is authorized to sell in the ordinary course of business, see Bailments § 1 c.

Consignment for sale or sale. It has been held that a factor who has made advances has the rights of a purchaser;³⁴ but ordinarily a consignment for sale such as will give rise to the relation of principal and factor must be distinguished from a sale.³⁵ In a sale, title passes to the buyer, while in a consignment to a factor title remains in the principal, but the possession passes to the factor,³⁶ and the factor is liable, not to pay a price, but to account for the proceeds of the goods when sold;³⁷ and if it appears that the depositor of the goods reserves a right to take them back, the transaction is considered a consignment and the consignee a factor.³⁸

The transaction is a sale, and not a consignment to a factor for sale, if it appears that it is the intention of the parties that the title to the goods is to pass to the party receiving them, for a price to be paid by him, without any reservation by the depositor of the right to take back the goods,³⁹ or

sale where dealer was under no obligation to account for proceeds when sold.

N.H.—General Motors Acceptance Corporation v. Berry, 167 A. 553, 86 N.H. 280.

(2) Defendant, a sugar refiner, contracted to receive from a second party shipments of raw sugar aggregating a stated quantity, to make advances on and refine the same, and to account to the shipper for the proceeds of the refined sugar after deducting its advances and charges. After shipments had been received and some of them treated, defendant executed to complainant bank, which had also made advances to the shipper, trust certificates, each covering a single shipment, acknowledging its receipt from complainant and agreeing after it was refined and sold "to hand over the proceeds of such sale, after deducting advances made by us and our charges for refining and handling in accord with the contract" between defendant and the shipper. In a suit by complainant for an accounting, it appeared that there was a surplus on some shipments after deducting advances and charges and on others a deficiency, and that on the aggregate there was a large deficiency due defendant from the shipper. It was held that the certificates did not create a relation of principal and factor between complainant and defendant.

U.S.—Old Colony Trust Co. v. Sugarland Industries, D.C.Tex., 296 F. 129, modified on other grounds, C.

C.A., Sugarland Industries v. Old Colony Trust Co., 6 F.2d 203, certiorari denied 46 S.Ct. 26, 269 U.S. 570, 70 L.Ed. 417.

28. N.J.—Elwell v. Coon, Ch., 46 A. 580.

25 C.J. p 343 note 46.

28.5 U.S.—Corpus Juris Secundum quoted in McCarley v. Foster-Milburn Co., D.C.N.Y., 93 F.Supp. 421, 423.

29. Ga.—City of Atlanta v. York Mfg. Co., 116 S.E. 195, 155 Ga. 33. Minn.—Corpus Juris cited in Hoven v. McCarty Bros. Co., 204 N.W. 29, 30, 163 Minn. 339.

Tenn.—I. J. Cooper Rubber Co. v. Johnson, 182 S.W. 593, 133 Tenn. 562, L.R.A.1917A 282.

30. Ga.—City of Atlanta v. York Mfg. Co., 116 S.E. 195, 155 Ga. 33. Tenn.—I. J. Cooper Rubber Co. v. Johnson, 182 S.W. 593, 133 Tenn. 562, L.R.A.1917A 282.

31. Okl.—People's Bank v. Frick Co., 73 P. 949, 13 Okl. 179.

32. Cal.—Wisp v. Hazard, 6 P. 91, 66 C. 459.

33. W.Va.—Ford v. Moreland, 122 S. E. 652, 96 W.Va. 225.

25 C.J. p 343 note 52.

34. U.S.—Ryttenberg v. Schefer, D. C.N.Y., 131 F. 313.

35. U.S.—Marrinan Medical Supply v. Ft. Dodge Serum Co., C.C.A. Minn., 47 F.2d 458.

25 C.J. p 343 note 57.

Agency distinguished from sale see Agency § 2 i.

Bailments for sale distinguished from sales see Bailments § 3 e.

Transaction held consignment to factor for sale, not sale.

U.S.—U. S. v. Masonite Corporation, D.C.N.Y., 40 F.Supp. 852.

Colo.—Warschauer Sheep & Wool Co. v. Rio Grande State Bank, 247 P. 183, 79 Colo. 540.

Ga.—Payne v. American Agricultural Chemical Co., 18 S.E.2d 635, 66 Ga. App. 596.

Mo.—Sligh v. Kuehne Commission Co., 115 S.W. 1065, 135 Mo.App. 206.

S.D.—Sioux Remedy Co. v. Lindgren, 130 N.W. 49, 27 S.D. 123.

Tex.—Chase Hackley Piano Co. v. Clymer, Civ.App., 202 S.W. 214.

36. Cal.—Moulton v. Williams Fruit Corporation, 21 P.2d 936, 218 C. 106.

Reiter v. Anderson, 262 P. 415, 87 C.A. 642.

Md.—McGaw v. Hanway, 87 A. 666, 120 Md. 197, Ann.Cas.1915A 601.

37. Cal.—Cass v. Rochester, 163 P. 212, 174 C. 358.

Md.—McGaw v. Hanway, 87 A. 666, 120 Md. 197, Ann.Cas.1915A 601.

Duty to account for proceeds generally see infra § 34.

38. Md.—B. F. Sturtevant Co. v. Cumberland, Dugan & Co., 68 A. 351, 106 Md. 587, 14 Ann.Cas. 675. 25 C.J. p 344 note 60.

39. Cal.—Reiter v. Anderson, 262 P. 415, 87 C.A. 642.

where the consignee is to sell on terms fixed by himself, and is bound to pay to the consignor a fixed price.⁴⁰

In determining whether a particular transaction is a sale or a consignment to a factor for sale, the intention of the parties must prevail,⁴¹ although their opinion as to the effect of the transaction is not binding on the court.⁴² The rule that, where a person receives property which he is not bound to return in the identical form, but may account therefor in money or other property, the transaction amounts to a sale does not apply to a consignment to sell made to a factor.⁴³

Del credere agency and sale. Where a contract provides for the sale of goods on commission at prices fixed by the consignor and returns at stated periods, the consignee guaranteeing payment, the relation created is that of agency on a *del credere* commission and not that of vendor and purchaser;⁴⁴ but where the consignee gives an acceptance for the value of the goods and agrees to account for the whole price, guaranteeing the sales, and is to receive a commission, the transaction is a consignment on sale as distinguished from a consignment on a *del credere* commission.⁴⁵

d. Elements of Relation

To constitute a consignee a factor it is essential that he have possession of the goods to be sold, that the goods are intrusted to him to sell, that he is engaged in the business of selling, and that he is to receive compensation for his services.

Quoted in: U.S.—McCarley v. Foster-Milburn Co., D.C. N.Y., 93 F.Supp. 421, 423.

It is not essential that the property be consigned directly by the principal in order to make the consignee a factor;⁴⁶ but it is essential that the consignee have the actual or constructive possession of the goods or merchandise which he is employed to sell.⁴⁷ It is a sufficient possession, however, that the property is in his own warerooms,⁴⁸ or that he holds the invoices and bills of lading representing the goods, so that he has the power to acquire and deliver possession to the purchaser,⁴⁹ unless he holds such invoice or bill of lading for a special purpose, other than that of sale.⁵⁰

It is also essential that the goods are intrusted to the factor to sell;⁵¹ that he is engaged in the business of selling or of buying and selling such goods and merchandise for others;⁵² and that he is to receive compensation for his services.⁵³ A person is not a factor who has no right, under a

Ind.—Frick Co. v. Walter Cox Co., 199 N.E. 462, 101 Ind.App. 402.
25 C.J. p 344 note 61.

40. U.S.—In re Rabenau, D.C.Mo., 118 F. 471.
25 C.J. p 344 note 62.

41. S.D.—Sioux Remedy Co. v. Lindgren, 130 N.W. 49, 27 S.D. 123.

True relationship established by intention of parties

If course of dealing between parties under contract was intended to be merely ostensibly, and not really, that of factor and principal, but in reality that of seller and purchaser, then true relationship would govern regardless of terms of contract.

Tenn.—Hughes v. Young, 65 S.W.2d 858, 17 Tenn.App. 24.

42. **Use of words "factor" and "factorage"** in contract relating to consignment or sale of goods is not binding as to effect of agreement, since words merely express opinion of parties.

Ind.—Frick Co. v. Walter Cox Co., 199 N.E. 462, 101 Ind.App. 402.

43. U.S.—Taylor v. Fram, N.Y., 252 F. 465, 164 C.C.A. 389.

44. Neb.—National Cordage Co. v. Sims, 62 N.W. 514, 44 Neb. 148.
25 C.J. p 344 note 64.

45. U.S.—Ex parte Flannagans, D.

C.Va., 9 F.Cas.No.4,855, 2 Hughes 264.

25 C.J. p 344 note 65.

Transaction held sale, not consignment on a del credere commission.
Pa.—Commercial Credit Co. v. Girard Nat. Bank, 92 A. 44, 246 Pa. 88.

46. Wis.—Beardsley v. Schmidt, 98 N.W. 235, 120 Wis. 405, 102 Am.S.R. 991.

47. Ala.—Leibold v. Brown, 71 So.2d 7, 260 Ala. 354.

Wis.—Beardsley v. Schmidt, 98 N.W. 235, 120 Wis. 405, 102 Am.S.R. 991.

25 C.J. p 342 note 15—12 C.J. p 147 note 49 [a].

Possession as necessary to:

Implied power to sell see *infra* § 11.

Lien see *infra* § 45.

48. Ky.—J. M. Robinson Norton & Co. v. Corsicana Cotton Factory, 99 S.W. 305, 124 Ky. 435, 30 Ky.L. 580, 8 L.R.A., N.S., 474, 14 Ann.Cas. 802, motion sustained 102 S.W. 869, 126 Ky. 75, 31 Ky.L. 527, 8 L.R.A., N.S., 474, 14 Ann.Cas. 802.

49. Ky.—J. M. Robinson Norton & Co. v. Corsicana Cotton Factory, *supra*.
25 C.J. p 342 note 17.

50. Mass.—Stollenwerck v. Thacher, 115 Mass. 224.

25 C.J. p 342 note 18.

51. N.Y.—Lindner v. Winston, 270 N.Y.S. 829, 151 Misc. 499—Lemnos Broad Silk Works v. Spiegelberg, 217 N.Y.S. 595, 127 Misc. 855.

Tex.—M. H. Thomas & Co. v. Hawthorne, Civ.App., 245 S.W. 966.

25 C.J. p 342 note 19—12 C.J. p 147 notes 45 [a], 49 [a].

Goods intrusted for exhibition

One permitted by the owner of an automobile to drive it to a prospective buyer's place of business for exhibition, without authority to sell it to the latter was not clothed with the authority of a factor.

Cal.—Moody v. Goodwin, 200 P. 733, 53 C.A. 693.

52. **Tex.—Corpus Juris cited in City of San Antonio v. Chas. M. Stieff, Inc., Civ.App., 83 S.W.2d 357, 359, reversed on other grounds Chas. M. Stieff, Inc. v. City of San Antonio, 111 S.W.2d 1086, 130 Tex. 594.**

25 C.J. p 342 note 20.

Tenant, under lease requiring him to market produce and pay landlord one third the selling-price thereof in cash as rental, is not a "factor."
Cal.—Leland v. Oliver, 255 P. 775, 777, 82 C.A. 474.

53. U.S.—In re Rabenau, D.C.Mo., 118 F. 471.
Right to compensation see *infra* §§ 41–42.

special agreement as a factor, to sell or dispose of property in his charge, and has no control over it when it is in a condition for sale.⁵⁴

Form of compensation. Although commissions constitute the ordinary method in which the remuneration of factors is provided, the compensation may be provided for by allowing the factor to retain the excess of the proceeds over a specified price,⁵⁵ or a share of the net profits,⁵⁶ or even by way of a fixed salary.⁵⁷

Effect of labor on goods. A person to whom property is consigned for sale is none the less a factor because he bestows labor on it before it is ready for sale;⁵⁸ and this is true although the character of the property is entirely changed,⁵⁹ as where milk is converted into butter and cheese,⁶⁰ or where animals are slaughtered and manufactured into meat.⁶¹

Business in premises leased in principal's name. The fact that the house in which the factor transacts business is leased in the name of the principal does not preclude his being a factor.⁶²

e. Nature of Relation

The relationship of principal and factor is of a fiduciary character, and is one of agency. The relationship may be changed by agreement of the parties; but the fact that a factor is acting under a *del credere* commission does not affect the ordinary relations existing between him and his principal.

The relation of principal and factor has long been regarded as beneficial in the transaction of business,⁶³ and is of a fiduciary character,⁶⁴ the factor being regarded in some instances, as where he sells in his own name, as a quasi trustee⁶⁵ or a trustee of an express trust.⁶⁶ It is competent for the parties to change by agreement the ordinary legal relations existing between factor and principal;⁶⁷ this must be done by an agreement which clearly points to that result, otherwise it will be presumed that their dealings are governed by the rules of law ordinarily applicable to dealings between principal and factor.⁶⁸

Agency. The relation of principal and factor is in its nature one of agency;⁶⁹ and in order to preserve this agency relationship it is not necessary that the factor advertise the fact of his agency to his customers, that the goods be segregated and

54. N.Y.—Barber v. Sterling, 68 N. Y. 267.

55. Pa.—Bridgeport Organ Co. v. Guldin, 3 Pa.Dist. 649.

56. Ill.—Burton v. Goodspeed, 69 Ill. 237—Winne v. Hammond, 37 Ill. 99.

57. Ga.—Corpus Juris cited in Planters' Warehouse Co. v. McKim, 136 S.E. 104, 105, 36 Ga. App. 219.
25 C.J. p 342 note 25.

58. Cal.—Rhee v. L. K. Small Co., 256 P. 839, 83 C.A. 339.
25 C.J. p 342 note 26.

59. Mo.—State v. Thompson, 25 S. W. 346, 120 Mo. 12.

60. Ill.—Elgin First Nat. Bank v. Schween, 20 N.E. 681, 127 Ill. 573, 11 Am.S.R. 174.

Mo.—State v. Thompson, 25 S.W. 346, 120 Mo. 12.

61. Ind.—Shaw v. Ferguson, 78 Ind. 547.

62. Ill.—Winne v. Hammond, 37 Ill. 99.

63. Conn.—Romeo v. Martucci, 45 A. 1, 99, 72 Conn. 504, 77 Am.S.R. 327, 47 L.R.A. 601.

Mich.—Corpus Juris quoted in Commercial Investment Trust v. Stewart, 209 N.W. 660, 662, 235 Mich. 502.

64. Cal.—Bones v. Fusco, 69 P.2d 911, 21 C.A.2d 476—Corpus Juris cited in National Bank of New Zea-

land v. Finn, 253 P. 757, 763, 81 C. A. 317.

Mo.—Corpus Juris cited in State ex rel. Cockrum v. Southern, 83 S.W. 2d 162, 164, 229 Mo.App. 749.

Okl.—Corpus Juris quoted in National Bank of Commerce at Hugo v. Whitten, 124 P.2d 990, 991, 190 Okl. 449.
25 C.J. p 342 note 32.

65. Cal.—National Bank of New Zealand v. Finn, 253 P. 757, 81 C. A. 317.

Mo.—State ex rel. Cockrum v. Southern, 83 S.W.2d 162, 229 Mo.App. 749—Fuller v. Smedley, App., 48 S.W. 2d 131.

66. Wis.—Beardsley v. Schmidt, 98 N.W. 235, 120 Wis. 405, 102 Am.S. R. 991.

25 C.J. p 342 note 33.
Holding goods and proceeds in character of trustee see infra § 60.

67. Mich.—Corpus Juris quoted in Commercial Investment Trust v. Stewart, 209 N.W. 660, 662, 235 Mich. 502.

25 C.J. p 343 note 34.

68. Mass.—Dolan v. Thompson, 126 Mass. 183.

Conversation held not agreement

Conversation between prospective cotton shipper and officer of cotton factor as to how factor would handle cotton, so that the transaction would show a profit, held but an expression of opinion and not an agreement

guaranteeing former against loss because of decline in cotton price, and not to alter customary relationship of customer and cotton factor.
Miss.—Stewart-Gwynne Co. v. Sigman, 101 So. 789, 136 Miss. 811.

69. Ga.—City of Atlanta v. York Mfg. Co., 116 S.E. 195, 155 Ga. 33—Willingham v. Rushing, 31 S.E. 130, 105 Ga. 72.

Mo.—Boatmen's Bank v. Vandiver, App., 281 S.W. 144.

N.C.—Holleman v. Taylor, 158 S.E. 88, 200 N.C. 618.

Tenn.—I. J. Cooper Rubber Co. v. Johnson, 182 S.W. 593, 133 Tenn. 562, L.R.A.1917A 282.

Factor and ordinary agent distinguished see supra subdivision c of this section.

Agency limited

Although a factor is in the last analysis an agent, the agency is a limited one.

Ind.—Robertson v. State, 192 N.E. 887, 207 Ind. 374.

Tex.—Falls Rubber Co. v. La Fon, Com.App., 256 S.W. 577.

Undisclosed agency

The peculiarity of a transaction creating the relationship of principal and factor is that the owner places goods in the hands of the factor with authority to sell in his own name without disclosing the agency or the name of the principal.

N.C.—Holleman v. Taylor, 158 S.E. 88, 200 N.C. 618.

marked as goods of the principal, or that the proceeds from sales be held separately by the factor;⁷⁰ neither is the fact that advances are made by the factor on the goods consigned inconsistent with an agency relationship.⁷¹ Indeed, if the factor makes advances on the goods consigned, with the consent of or by the direction of the principal, an agency coupled with an interest arises.⁷²

Del credere factor. The fact that a factor is acting under a del credere commission does not affect the ordinary relations existing between him and his principal; except for the additional security afforded the principal, their reciprocal rights, duties, and liabilities remain the same.⁷³

§ 2. Regulation of Business

The state may regulate the business of a factor; and statutes making such regulations have generally been held valid.

While there is no prohibition in positive law or in public policy against the handling of goods on consignment,⁷⁴ it is within the police power of the state to regulate the business or occupation of a

factor or commission merchant,⁷⁵ and statutes making such regulations have generally been held constitutional and valid.⁷⁶ Such statutes have as their object the protection of persons dealing with factors and commission merchants,⁷⁷ and they apply to all factors or commission merchants who come within their terms.⁷⁸

Regulation of "market agencies" under the Packers and Stockyards Act is considered in Agriculture §§ 65-74.

§ 3. — Licenses and Bonds

- a. Licenses
- b. Bonds

a. Licenses

Under some statutes or ordinances, a person is required to obtain a license and pay a tax or fee for the privilege of engaging in the business of a factor.

Under some statutes or ordinances, a person who wishes to engage in the business of a factor or commission merchant,⁷⁹ or in the business of a commission merchant selling farm products or prod-

70. U.S.—U. S. v. Masonite Corporation, D.C.N.Y., 40 F.Supp. 852, reversed on other grounds 62 S.Ct. 1070, 316 U.S. 265, 86 L.Ed. 1461, rehearing denied 62 S.Ct. 1302, 316 U.S. 713, 86 L.Ed. 1778.

71. U.S.—U. S. v. Masonite Corporation, *supra*.

72. Ga.—Willingham v. Rushing, 31 S.E. 130, 105 Ga. 72.
Mo.—Boatmen's Bank v. Vandiver, App., 281 S.W. 144.
25 C.J. p 343 note 37.

73. U.S.—U. S. v. Masonite Corporation, D.C.N.Y., 40 F.Supp. 852, reversed on other grounds 62 S.Ct. 1070, 316 U.S. 265, 86 L.Ed. 1461, rehearing denied 62 S.Ct. 1302, 316 U.S. 713, 86 L.Ed. 1778.

Mich.—**Corpus Juris** quoted in Commercial Investment Trust v. Stewart, 209 N.W. 660, 661, 235 Mich. 502.
25 C.J. p 343 note 38.

74. U.S.—Edgewood Shoe Factories, Division of General Shoe Corporation v. Stewart, C.C.A.Ala., 107 F. 2d 123.

75. Ill.—People ex rel. McLaughlin v. G. H. Cross Co., 198 N.E. 356, 361 Ill. 405, affirmed Hartford Accident & Indemnity Co. v. People of State of Illinois ex rel. McLaughlin, 56 S.Ct. 685, 298 U.S. 155, 80 L.Ed. 1099.

Minn.—State v. Wagener, 80 N.W. 633, 778, 1134, 77 Minn. 483, 77 Am. S.R. 681, 46 L.R.A. 442.

Mo.—Arnold v. Hanna, 290 S.W. 416,

315 Mo. 823, affirmed 48 S.Ct. 212, 276 U.S. 591, 72 L.Ed. 721.
25 C.J. p 345 note 79 [b].

76. Ill.—People ex rel. McLaughlin v. G. H. Cross Co., 198 N.E. 356, 361 Ill. 405, affirmed Hartford Accident & Indemnity Co. v. People of State of Illinois ex rel. McLaughlin, 56 S.Ct. 685, 298 U.S. 155, 80 L.Ed. 1099.

Minn.—State v. Marcus, 299 N.W. 241, 210 Minn. 576.

Mo.—Arnold v. Hanna, 290 S.W. 416, 315 Mo. 823, affirmed 48 S.Ct. 212, 276 U.S. 591, 72 L.Ed. 721.

N.Y.—Baldwin v. Standard Accident Ins. Co. (Olivit Action), 261 N.Y.S. 507, 237 App.Div. 334, affirmed 188 N.E. 71, 262 N.Y. 575.

Wash.—State v. Dillon, 62 P.2d 38, 188 Wash. 265.

25 C.J. p 345 notes 79-81.
State statutes regulating sale of farm produce on commission as not unduly burdening interstate commerce see Commerce § 85.

77. Cal.—Mosesian v. Parker, 112 P. 2d 705, 44 C.A.2d 544—La Rosa v. Glaze, 63 P.2d 1181, 18 C.A.2d 354.

Ill.—People v. Frank G. Heilman Co., 263 Ill.App. 514.

Minn.—State v. Marcus, 299 N.W. 241, 210 Minn. 576.

78. Minn.—Leasure v. Clarkin, 8 N.W.2d 521, 214 Minn. 420.

Factors selling hay and straw

A statute regulating commission merchants selling "any kind of farm products" applies to commission merchants selling hay and straw.

Mo.—Arnold v. Hanna, 290 S.W. 416,

315 Mo. 823, affirmed 48 S.Ct. 212, 276 U.S. 591, 72 L.Ed. 721.

Consignment shipper

One handling fruit under a "produce dealer's" license was not a "deciduous fruit dealer" but a "consignment shipper" as defined in the Deciduous Fruit Dealers' Act.

Cal.—Perkins v. Pacific Fruit Exchange, 22 P.2d 535, 132 C.A. 278.

Statute held inapplicable

The Citrus Fruit Growers Act, regulating contracts for handling and purchase of fruit, was inapplicable to agreement to sell oranges in orchards under seller's control.

Tex.—M. W. Fruit Co. v. Bierbauer, Civ.App., 216 S.W.2d 831, error refused no reversible error.

79. Minn.—State v. Marcus, 299 N.W. 241, 210 Minn. 576.
25 C.J. p 344 note 67.

Transacting business without license as offense see *infra* § 4.

One not acting as a commission merchant is not required to obtain a license.

Kan.—Simmons v. Oatman, 202 P. 977, 110 Kan. 44.

A provision requiring "commission merchants and produce dealers" to obtain a license applies to a produce dealer, although he is not engaged in the business of commission merchant.

Mo.—Kansas City v. Grush, 52 S.W. 286, 151 Mo. 128.

Natural gas company which, as an independent contractor, acted as exclusive sales agency of foreign corporation, through which a type of

uce,⁸⁰ is required to obtain a license for conducting such a business. Such statutes and ordinances have generally been held valid and constitutional,⁸¹ despite some authority to the contrary effect.^{81.5} Their object is to protect persons dealing with factors or commission merchants;⁸² and they are to be given a reasonable construction.⁸³

Right to license. To entitle one to a license as a factor or commission merchant, he must comply with all the conditions prescribed by the statute as conditions precedent to his right to engage in such business or occupation.⁸⁴ Accordingly, where the statute so provides, he must make application for the license to a designated board, commission, or officer,⁸⁵ and furnish proof as to his statutory qualifications, such as his financial responsibility.⁸⁶

cooking and heating gas manufactured by foreign corporation was marketed within the state, and which received a percentage of the net sales value as a monthly commission, was a "commission merchant" within license tax statute.
Va.—Natural Gas Co. of Va., Inc., v. Commonwealth, 45 S.E.2d 177, 186 Va. 921.

80. Cal.—La Rosa v. Glaze, 63 P.2d 1181, 18 C.A.2d 354—Perkins v. Pacific Fruit Exchange, 22 P.2d 535, 132 C.A.2d 278.

Idaho.—Lebrecht v. Union Indemnity Co., 22 P.2d 1066, 53 Idaho 228, 89 A.L.R. 640.

Ill.—People ex rel. McLaughlin v. G. H. Cross Co., 198 N.E. 356, 361 Ill. 405, affirmed Hartford Accident & Indemnity Co. v. People of State of Illinois ex rel. McLaughlin, 56 S. Ct. 685, 298 U.S. 155, 80 L.Ed. 1099.
People v. Wirkhus' Estate, 265 Ill.App. 248—People v. Frank G. Heilman Co., 263 Ill.App. 514.

N.J.—Duryee v. Zipkin, 172 A. 794, 12 N.J.Misc. 523.

Tex.—Eby v. U. S. Fidelity & Guaranty Co., Civ.App., 225 S.W.2d 457. 25 C.J. p 344 note 68.

Hay and straw come within the definition of "farm products."

Mo.—Arnold v. Hanna, 290 S.W. 416, 315 Mo. 823, affirmed 48 S.Ct. 212, 276 U.S. 591, 72 L.Ed. 721.

Merchants selling produce for consumption

Under some statutes an express distinction is made as to merchants engaged in selling produce for consumption, they not being required to obtain a license and comply with other regulations, as is required in the case of merchants conducting the business of receiving and selling produce for resale.

N.Y.—Huson v. Brown, 154 N.Y.S. 131, 90 Misc. 175.

The decision of the licensing authorities in refusing a license may, in a proper case, be reviewed.^{86.5}

Effect of failure to obtain license. Under statutes requiring factors or commission merchants to be licensed, it has been held in some jurisdictions that contracts procured in violation of such regulatory license provisions of the law are void;⁸⁷ but in other jurisdictions such contracts are not regarded as absolute nullities.⁸⁸ In any event, the failure of a commission merchant to procure a license does not prevent him from enforcing a collateral contract against one of his defaulting employees.⁸⁹

License tax or fee. Under some statutes, a factor is required to pay a license tax or fee for the privilege of engaging in the business of a factor.⁹⁰

81. Minn.—State v. Marcus, 299 N. W. 241, 210 Minn. 576.

Mo.—Arnold v. Hanna, 290 S.W. 416, 315 Mo. 823, affirmed 48 S.Ct. 212, 276 U.S. 591, 72 L.Ed. 721.

Wash.—State v. Dillon, 62 P.2d 38, 188 Wash. 265. 25 C.J. p 345 notes 79–81.

The provision must be clear and unambiguous in order to be valid.

Wash.—State v. Powles, 155 P. 774, 90 Wash. 112.

25 C.J. p 345 note 71.

81.5 Interference with right to carry on business

Such a provision has been held void as an unjustifiable interference with the rights of citizens to carry on legitimate business.

Mich.—Valentine v. Berrien Circuit Judge, 83 N.W. 594, 124 Mich. 664, 83 Am.S.R. 352, 50 L.R.A. 493.

82. Cal.—Mosesian v. Parker, 112 P. 2d 705, 44 C.A.2d 544—La Rosa v. Glaze, 63 P.2d 1181, 18 C.A.2d 354.

Ill.—People v. Frank G. Heilman Co., 263 Ill.App. 514.

Tex.—Eby v. U. S. Fidelity & Guaranty Co., Civ.App., 225 S.W.2d 457.

83. Cal.—People v. Mulholland, 104 P.2d 1045, 16 C.2d 62.

84. Cal.—Mosesian v. Parker, 112 P. 2d 705, 44 C.A.2d 544.

Refusal held improper

Mont.—Peterson v. Livestock Commission, 181 P.2d 152, 120 Mont. 140.

85. Cal.—Mosesian v. Parker, 112 P. 2d 705, 44 C.A.2d 544.

25 C.J. p 344 note 69 [b].

86. Cal.—Mosesian v. Parker, supra.

86.5 Mont.—Peterson v. Livestock Commission, 181 P.2d 152, 120 Mont. 140.

The function of court on appeal from order of livestock commission refusing to grant a license to operate

a livestock market was to determine whether the commission acted properly and according to law, and, in determining that question, the law in effect when commission acted, and not that in effect at time of hearing before the court, was required to be applied.

Mont.—Peterson v. Livestock Commission, 181 P.2d 152, 120 Mont. 140.

87. Cal.—Capitelli v. Sawamura, 266 P.2d 939, 123 C.A.2d 169.

Particular contract held void

Contract for sale of grape crop, procured by unlicensed agent of unlicensed copartnership engaged in buying grapes as a produce broker or commission merchant held void under statute requiring licensing of agents, dealers, brokers, and commission merchants engaged in handling agricultural products.

Cal.—La Rosa v. Glaze, 63 P.2d 1181, 18 C.A.2d 354.

88. Wash.—Fisher v. Thumlert, 76 P.2d 1018, 194 Wash. 70.

Commissions recoverable

A contract for the sale of grapes by a commission merchant in interstate commerce was not void because commission merchant was conducting business without license required by the Federal Perishable Agricultural Commodities Act penalizing the conduct of such business without a license, and hence commission merchant was not precluded thereby from recovering commission. N.Y.—Bovino v. Berberian, 5 N.Y.S. 2d 300, 255 App.Div. 143.

89. Wash.—Ferguson-Hendrix Co. v. Maryland Fidelity & Deposit Co., 140 P. 700, 79 Wash. 528. 25 C.J. p 345 note 75.

90. Validity

(1) Statutes imposing a license fee have been held valid where the fee is not oppressive.

b. Bonds

- (1) In general
- (2) Liability on bond
- (3) Remedies

(1) In General

Where the statute so requires, a factor must give a bond for the faithful performance of his contracts.

Under some statutes, a person engaging in the business of a factor or commission merchant,⁹¹ or in the business of a commission merchant selling farm products or produce,⁹² is required to give a bond, executed by a proper surety company,⁹³ for the faithful performance of his contracts; and statutes of this character have generally been held valid and constitutional,⁹⁴ although there is authority to the contrary effect.^{94.5}

Nature of bond. While the bond given by a factor as required by statute is a statutory bond,⁹⁵ it is not an official bond.⁹⁶ A failure to file a bond with the county clerk where required by statute will result in the bond's being treated as nonstatutory.^{96.5} Bonds in excess of the amount provided by statute have also been held to be nonstatutory in so far as they exceed the stated amount.^{96.10}

Construction of bond. Rules governing the construction of statutory bonds in general apply to the construction of factor's or commission merchant's bonds;⁹⁷ and in construing such a bond the statute requiring it must be read into, and considered a part of, the bond itself.⁹⁸

Persons protected by bond. The class of persons protected by a factor's bond depends primarily on the terms of the statute requiring the bond.⁹⁹

Wash.—State v. Bowen, 149 P. 330, 86 Wash. 23, Ann.Cas.1917B 625.

(2) However, a statute requiring merchants who sell farm produce on commission to pay a license fee has been held void.

Mo.—Kansas City v. Grush, 52 S.W. 286, 151 Mo. 128.
25 C.J. p 345 notes 77, 78 [a].

Liability of agency

An agency must be engaged in conducting a local cotton factorage, or commission brokerage business in order to be subject to the tax imposed by Acts 1924 No. 205 on cotton factors or commission brokers.
La.—State v. Norman Mayer & Co., 127 So. 743, 170 La. 337.

91. Minn.—State v. Marcus, 299 N.W. 241, 210 Minn. 576.

Registration and bonds under Packers and Stockyards Act see Agriculture § 67.

Bonds of dealers in commodities generally see Licenses § 36.

92. Cal.—Perkins v. Pacific Fruit Exchange, 22 P.2d 535, 132 C.A. 278.

Idaho.—Lebrecht v. Union Indemnity Co., 22 P.2d 1066, 53 Idaho 228, 89 A.L.R. 640.

Ill.—People ex rel. McLaughlin v. G. H. Cross Co., 198 N.E. 356, 361 Ill. 405, affirmed Hartford Accident & Indemnity Co. v. People of State of Illinois ex rel. McLaughlin, 56 S.Ct. 685, 298 U.S. 155, 80 L. Ed. 1099.

People v. Wirkhus' Estate, 265 Ill.App. 248—People v. Frank G. Heilman Co., 263 Ill.App. 514.

Tex.—Eby v. U. S. Fidelity & Guaranty Co., Civ.App., 225 S.W.2d 457, 25 C.J. p 344 note 69.

Hay and straw come within the definition of "farm products."

Mo.—Arnold v. Hanna, 290 S.W. 416,

315 Mo. 823, affirmed 48 S.Ct. 212, 276 U.S. 591, 72 L.Ed. 721.

93. Wash.—Ferguson-Hendrix Co. v. Maryland Fidelity & Deposit Co., 140 P. 700, 79 Wash. 528.

94. Ill.—People ex rel. McLaughlin v. G. H. Cross Co., 198 N.E. 356, 361 Ill. 405, affirmed Hartford Accident & Indemnity Co. v. People of State of Illinois ex rel. McLaughlin, 56 S.Ct. 685, 298 U.S. 155, 80 L.Ed. 1099.

Minn.—State v. Marcus, 299 N.W. 241, 210 Minn. 576.

Mo.—Arnold v. Hanna, 290 S.W. 416, 315 Mo. 823, affirmed 48 S.Ct. 212, 276 U.S. 591, 72 L.Ed. 721.

N.Y.—Baldwin v. Standard Accident Ins. Co. (Olivit Action), 261 N.Y. S. 507, 237 App.Div. 334, affirmed 188 N.E. 71, 262 N.Y. 575.

Wash.—State v. Dillon, 62 P.2d 38, 188 Wash. 265.

25 C.J. p 345 notes 79–81.

Statute requiring execution by surety company

A statute is not void because it requires the bond to be executed by a surety company and denies the right to deposit money or give personal security instead.

Wash.—State v. Bowen, 149 P. 330, 86 Wash. 23, Ann.Cas.1917B 625—Ferguson-Hendrix Co. v. Maryland Fidelity & Deposit Co., 140 P. 700, 79 Wash. 528.

94.5 Interference with right to carry on business

Such a statute has been held void as an unjustifiable interference with the rights of citizens to carry on legitimate business.

Mich.—Valentine v. Berrien Cir. Judge, 83 N.W. 594, 124 Mich. 664, 53 Am.S.R. 352, 50 L.R.A. 493.

25 C.J. p 345 note 78.

95. Wash.—Zagar v. Columbia Casualty Co., 43 P.2d 949, 181 Wash.

487—Slotemaker v. International Fruit & Produce Co., 287 P. 883, 156 Wash. 574.

96. Wash.—Slotemaker v. International Fruit & Produce Co., supra.

96.5 Tex.—Hunt Oil Co. v. Killion, Civ.App., 299 S.W.2d 316, error refused no reversible error.

96.10 Tex.—Hunt Oil Co. v. Killion, Civ.App., 299 S.W.2d 316, error refused no reversible error.

97. Ill.—People v. Frank G. Heilman Co., 263 Ill.App. 514.

Rules governing insurance policies: applicable

Indemnity bond given by grain, commission merchant is governed by same rules of construction as ordinary life and fire insurance policies.
Minn.—Kramer Equity Elevator v. Indemnity Ins. Co. of North America, 226 N.W. 396, 178 Minn. 136.

98. Ill.—People ex rel. McLaughlin v. G. H. Cross Co., 198 N.E. 356, 361 Ill. 405, affirmed Hartford Accident & Indemnity Co. v. People of State of Illinois ex rel. McLaughlin, 56 S.Ct. 685, 298 U.S. 155, 80 L.Ed. 1099.

People v. Frank G. Heilman Co., 263 Ill.App. 514.

Wash.—Zagar v. Columbia Casualty Co., 43 P.2d 949, 181 Wash. 487.

99. Nonresident consignors

Claims of nonresident consignor creditors were within the scope of the New York statute as it stood prior to its amendment in 1928.

N.Y.—Baldwin v. Standard Accident Ins. Co. (Olivit Action), 261 N.Y.S. 507, 237 App.Div. 334, affirmed 188 N.E. 71, 262 N.Y. 575.

Only consignors protected

Under some statutes the statutory bond of a farm produce commission merchant does not protect the merchant's consignees but only his con-

Duty of consignor. Under at least one statute, there is no duty on the consignor to take any steps or proceedings to safeguard the surety on the bond against his principal.¹ Thus, the consignor is under no duty to notify the surety of defaults on the part of the commission merchant and thus help to prevent or diminish damage to the surety.²

Estoppel to deny validity of bond. The surety may be estopped by his acts or conduct to deny the validity of the bond.³

(2) Liability on Bond

The nature and extent of the surety's obligation under a factor's bond are measured by the terms of the statute creating it. The surety is liable only for a breach or defalcation occurring during the term covered by the bond.

signors who are not paid cash for the produce delivered to him.

Idaho.—Lebrecht v. Union Indemnity Co., 22 P.2d 1066, 53 Idaho 228, 89 A.L.R. 640.

Producers

Acts 1937 c 17777, requiring citrus fruit dealers, including commission merchants, to give surety bonds before being granted licenses, limits protection of bonds to citrus fruit producers, so that surety on such a dealer's bond is not liable for dealer's failure to account for and pay amounts due to one dealing in, but not producing, such fruits.

Fla.—Pearson v. Columbia Casualty Co., 199 So. 339, 145 Fla. 350.

Vendor of boxes, bales, sacks, etc., was not a "person" with whom vendee, a citrus fruit dealer, dealt in "handling" citrus fruit within statute providing that bond required of citrus fruit dealers was for benefit of any "person" dealt with in "handling" citrus fruit, hence such vendor could not sue on the bond.

Tex.—Asa S. Agar, Inc., v. Texas Underwriters, Civ.App., 129 S.W.2d 374, error refused.

1. N.Y.—Pyrke v. Standard Accident Ins. Co., 252 N.Y.S. 635, 141 Misc. 186, reversed in part on other grounds and affirmed in part 254 N.Y.S. 520, 234 App.Div. 133.

Proceedings before commissioner

Under a statute authorizing the consignor to make complaints to the commissioner of agriculture of defaults by the commission merchant, the consignor is under no duty to make such complaints for the benefit of the surety on the merchant's bond.

N.Y.—Pyrke v. Standard Accident Ins. Co., supra.

2. N.Y.—Pyrke v. Standard Accident Ins. Co., 254 N.Y.S. 520, 234 App.Div. 133.

3. Ill.—People v. Wirkus' Estate, 265 Ill.App. 248.

4. Ariz.—Employer's Liability Assur. Corp. v. Lunt, 313 P.2d 393, 82 Ariz. 320—Bianco v. Firemen's Fund Indem., 232 P.2d 386, 72 Ariz. 181.

Minn.—Leasure v. Clarkin, 8 N.W.2d 521, 214 Minn. 420.

N.Y.—Pyrke v. Standard Accident Ins. Co., 254 N.Y.S. 520, 234 App. Div. 133.

Tex.—Asa S. Agar, Inc., v. Texas Underwriters, Civ.App., 129 S.W.2d 374, error refused.

Liability not dependent on fraud or negligence of factor.

Cal.—Moulton v. Williams Fruit Corporation, 21 P.2d 936, 218 C. 106.

Effect of waiver of statutory provisions

With respect to liability on statutory bond, the willingness of individuals, purchasing hogs through licensed operator of livestock sales ring, to waive statutory provisions for vaccination of hogs against cholera does not excuse licensee's violation of statute by sale of unvaccinated hogs.

Colo.—Seal v. State Bd. of Stock Inspection Com'rs, 167 P.2d 22, 114 Colo. 497.

Held no statutory right of action

Where bond was given by dealer engaged in business of buying and selling farm produce pursuant to requirements of Fruit and Vegetables Standardization Act, but such statute did not require bond of dealer, no statutory right of action could accrue in favor of person injured by dealer's violation of act.

Ariz.—Employer's Liability Assur. Corp. v. Lunt, 313 P.2d 393, 82 Ariz. 320.

5. Neb.—Swisher v. Fidelity & Casualty Co., of New York, 204 N. W. 383, 113 Neb. 592.

The nature and extent of the surety's obligation under a factor's or commission merchant's statutory bond are measured by the terms of the statute creating it, and can be neither greater nor less than the statute decrees.⁴ Depending on the terms of the statute, the surety may be held liable on the bond for acts of conversion on the part of the factor or commission merchant,⁵ or for the latter's failure to pay over to the consignor the proceeds of a sale,⁶ or for his failure to pay a guaranteed minimum price to the consignor;⁷ but, in order to render the surety liable for defaults on the part of the factor, the default must occur in connection with transactions by the factor which come within the protection of the bond,⁸ and the surety cannot be held liable for an obligation arising out of a contract which the factor could not lawfully make.⁹

6. Wash.—Zagar v. Columbia Casualty Co., 43 P.2d 949, 181 Wash. 487.

7. Cal.—Moulton v. Williams Fruit Corporation, 21 P.2d 936, 218 C. 106.

Transactions held within protection of bond

(1) Consignment to commission merchant of grain to be stored and sold when directed by consignor is consignment for sale on commission within protection of commission merchant's bond so as to render the surety liable for the commission merchant's acts of conversion.

Neb.—Swisher v. Fidelity & Casualty Co., of New York, 204 N.W. 383, 113 Neb. 592.

(2) Contract made defendant's statutory surety liable for breach, whether contract was for sale of apples to defendant or merely made defendant factor.

Idaho.—Steel v. Blunck, 295 P. 426, 50 Idaho 244.

(3) Other transactions see 25 C.J. p 345 note 72.

Transaction held not within protection of bond

Unqualified sale of cherries to licensed produce dealers is not within statutory bond covering default of principal engaged in business of buying, selling, and handling of fresh fruits on commission, and hence seller could not recover from surety for dealers' default.

Utah.—Carstensen v. Stratton, 58 P. 2d 1035, 90 Utah 19.

Void guaranty

A surety on bond required of produce dealer under Produce Dealers Act regulating such dealers was not liable to producer on contract of dealer whereby dealer guaranteed price for deciduous fruits without having license required under the Deciduous Fruit Dealers Act to make

The surety will not be held liable where to impose liability would inequitably allow claimant to recoup from the surety an amount for which claimant is himself liable.¹⁰ Where an application for a license has been refused, the bond accompanying the application does not become effective, and the surety will not be liable for acts performed by the applicant without a license.^{10.5}

Period of surety's liability. The surety is liable only for a breach or defalcation which occurs during the term covered by the bond.¹¹ Accordingly, where the factor fails to remit sums due the consignor, the surety is liable for sums which became due and payable during the term of the bond,¹² irrespective of when the goods were consigned;¹³ but he is not liable for sums which became due and payable before the execution of the bond¹⁴ or subsequent to its expiration.¹⁵

Release from liability. While an unauthorized cancellation of the bond by the surety will not release him from liability thereon,¹⁶ the consignor may release the surety from liability to him.¹⁷

(3) Remedies

(a) In general

(b) Action on bond

(a) In General

The usual method of enforcing liability on a factor's bond is by an action brought thereon, although under some statutes preliminary inquisitorial proceedings before a state commission are authorized.

The usual method of enforcing the liability on a factor's or commission merchant's bond is by an action brought on the bond,¹⁸ although in some jurisdictions the statutes authorize inquisitorial proceedings before a state commission or commissioner preliminary to the commencement of suit on the bond.¹⁹ Thus, under at least one statute, the commissioner of agriculture is authorized, on default by a commission merchant in any of the conditions of his bond, to examine claims of consignors and by certificate determine the amounts due thereon,²⁰ and thereafter, as will appear infra subdivision b (3) (b) of this section, he may bring an action on the bond in which his certificate deter-

such guaranty, since such contract could not lawfully be made.

Cal.—Brock v. Fidelity & Deposit Co. of Maryland, 75 P.2d 605, 10 C.2d 512.

10. Claim assigned to commission merchant

An action could not be maintained by the state director of agriculture on statutory bond of produce dealers for failure to pay proceeds of sale of fruits taken by dealers on consignment and sold for them by commission merchants, where commission merchants, under their agreement with producer, would profit by any recovery up to amount paid producer, inequitably allowing recoupment from surety an amount for which commission merchants were liable, but the payment of which they avoided by buying out producer and becoming plaintiff in producer's action against them.

Cal.—Brock v. Fidelity & Deposit Co. of Maryland, supra.

10.5 Tex.—Eby v. U. S. Fidelity & Guaranty Co., Civ.App., 225 S.W.2d 457.

11. Cal.—Brock v. A. G. Priest, Inc., 61 P.2d 1183, 17 C.A.2d 328.

Breach discovered after term

Act of commission merchant in obtaining advances on grain consigned to him to be stored and sold on order of consignor, without knowledge and consent of consignor, during term of bond required by statute, constitutes breach thereof, although amount of consignor's loss is not discovered or determined until after such term.

Neb.—Swisher v. Fidelity & Casualty Co., of New York, 204 N.W. 383, 113 Neb. 592.

12. Wash.—Zagar v. Columbia Casualty Co., 43 P.2d 949, 181 Wash. 487.

13. Wash.—Zagar v. Columbia Casualty Co., supra.

14. Wash.—Zagar v. Columbia Casualty Co., supra.

15. Bond expiring before sale made
Where the bond expires after the consignment is made but before sale, the surety is not liable for failure of the factor to remit to the consignor the proceeds of the sale.
Cal.—Brock v. A. G. Priest, Inc., 61 P.2d 1183, 17 C.A.2d 328.

16. Attempted cancellation by surety held ineffective to release surety from liability on bond.

Wash.—Slotemaker v. International Fruit & Produce Co., 287 P. 833, 156 Wash. 574.

17. Acts constituting release

Where producer accepted payment from commission merchants under settlement agreement whereby producer consented to a reversal of judgment against merchants for proceeds of fruit sold by merchants with knowledge that produce dealers who had shipped fruit to merchants had accepted fruit on consignment from producer, and then dismissed the action, producer discharged surety on statutory bond of produce dealer, and hence producer's attempted assignment to merchants of his claim against surety was ineffective.

Cal.—Brock v. Fidelity & Deposit Co. of Maryland, 75 P.2d 605, 10 C.2d 512.

18. Ill.—People v. Frank G. Heilman Co., 263 Ill.App. 514.

19. Ill.—People v. Frank G. Heilman Co., supra.
25 C.J. p 344 note 69 [b].

Proceedings before commission or commissioner as conditions precedent to action on bond see infra subdivision b (3) (b) of this section.

Procedure before commission

Although the statute requires a complaint to be filed, any formal, written, verified information, charging the default complained of, whether labeled complaint or otherwise, will be sufficient to set in motion inquisitorial proceedings before a commission authorized to act; an affidavit will answer the purpose.

Minn.—Atwater Farmers' Co-op. El. Co. v. Enge, 142 N.W. 328, 122 Minn. 316.

Review of commissioner's findings and conclusions

Claimant against bond of wholesale produce dealer whose claim had been disallowed by commissioner of agriculture was not entitled to have review of commissioner's findings and conclusions on his claim except by certiorari.

Minn.—Festler v. Wallach, 71 N.W. 2d 836, 245 Minn. 222.

20. N.Y.—Baldwin v. Standard Accident Ins. Co. (Olivit Action), 261 N.Y.S. 507, 237 App.Div. 334, affirmed 188 N.E. 71, 262 N.Y. 575.

mining the amounts due is presumptive evidence of the facts therein stated.

(b) Action on Bond

Except as statutes may provide specially, general rules governing actions on bonds apply in an action on a factor's bond.

An action on a factor's or commission merchant's statutory bond may be brought, where the statute so provides, by a particular official,²¹ such as the commissioner or director of agriculture,²² or by the consignor,²³ even though the bond runs to the state.²⁴ Under at least one statute, however, the

consignor, not being a party to the bond, cannot maintain an action thereon.²⁵

The action must be brought within the time prescribed by statute,²⁶ and conditions precedent, if any, must be complied with before the action may be maintained.²⁷ In such an action, general rules governing pleadings,²⁸ issues, proof, and variance,²⁹ and the weight and sufficiency of evidence³⁰ ordinarily apply.

Parties defendant. As a general rule, an action on a factor's bond cannot be maintained against one

21. N.Y.—Huson v. Brown, 154 N.Y.S. 131, 90 Misc. 175.

22. Ill.—People ex rel. McLaughlin v. G. H. Cross Co., 198 N.E. 356, 361 Ill. 405, affirmed Hartford Accident & Indemnity Co. v. People of State of Illinois ex rel. McLaughlin, 56 S.Ct. 685, 298 U.S. 155, 80 L.Ed. 1099.
25 C.J. p 345 note 86.

Statute valid

Statute authorizing commissioner of agriculture to bring action on bond held constitutional.

N.Y.—Baldwin v. Standard Accident Ins. Co. (Olivit Action), 261 N.Y.S. 507, 237 App.Div. 334, affirmed 188 N.E. 71, 262 N.Y. 575.

Reason for rule

Since "in many cases the amount of the farmer's [consignor's] claim would be too small to justify the expense of prosecuting the claim to collect, the Legislature has seen fit to put in part this burden upon the state through its commissioner of agriculture."

N.Y.—Baldwin v. Standard Accident Ins. Co. (Olivit Action), supra.

Failure of factor to make payment

(1) Under a statute so providing, the director of agriculture may bring an action on the bond for the benefit of consignors where the commission merchant fails to pay for farm products consigned to and sold by him. Cal.—Moulton v. Williams Fruit Corporation, 21 P.2d 936, 218 C. 106.

Whitacre v. Hall, 104 P.2d 401, 40 C.A.2d 68, rehearing denied 104 P.2d 660, 40 C.A.2d 68.

(2) Under such a statute the liability of the surety for the commission merchant's failure to make payments ordinarily is one to be enforced by the director of agriculture in an action brought by him and generally cannot be enforced in an action brought by the consignor. Cal.—Whitacre v. Hall, supra.

23. Minn.—Kramer Equity Elevator v. Indemnity Ins. Co. of North America, 226 N.W. 396, 178 Minn. 136.

25 C.J. p 345 note 87.

Consignor injured by factor's fraud

Where the statute so provides, any producer-consignor of farm products claiming to have been injured by the fraud or deceit of a commission merchant may bring an action on the bond against both principal and surety.

Cal.—Moulton v. Williams Fruit Corporation, 21 P.2d 936, 218 C. 106.

Whitacre v. Hall, 104 P.2d 401, 40 C.A.2d 68, rehearing denied 104 P.2d 660, 40 C.A.2d 68.

24. Minn.—Atwater Farmers' Co-op. El. Co. v. Enge, 142 N.W. 328, 122 Minn. 316.

N.Y.—Huson v. Brown, 154 N.Y.S. 131, 90 Misc. 175.

25. N.Y.—Pyrke v. Standard Accident Ins. Co., 252 N.Y.S. 635, 141 Misc. 186, reversed in part on other grounds, and affirmed in part 254 N.Y.S. 520, 234 App.Div. 133.

26. Statute held not one of limitation

A statute requiring a commission merchant to keep his records for a period of six months is not a limitation on the time within which an action should be commenced on his bond.

Ill.—People ex rel. McLaughlin v. G. H. Cross Co., 198 N.E. 356, 361 Ill. 405, affirmed Hartford Accident & Indemnity Co. v. People of State of Illinois ex rel. McLaughlin, 56 S.Ct. 685, 298 U.S. 155, 80 L.Ed. 1099.

27. Timely notice of dealer's default to Commissioner of Agriculture required.

Minn.—Leasure v. Clarkin, 8 N.W.2d 521, 214 Minn. 420.

Particular acts held not conditions precedent

(1) A statutory provision to the effect that if a licensed commission merchant fails to account for any property consigned to him for sale a consignor may file with the railroad and warehouse commission an affidavit setting forth the facts and thereafter bring an action against the commission merchant's bond, so far as the provision for filing the affidavit is concerned, is merely di-

rectory and a failure to file it is not fatal to the right of action on the bond.

Minn.—Kramer Equity Elevator v. Indemnity Ins. Co. of North America, 226 N.W. 396, 178 Minn. 136—Atwater Farmers' Co-op. El. Co. v. Enge, 142 N.W. 328, 122 Minn. 316.

(2) Compliance with Smith-Hurd Rev.St.1931 c 5 § 20, providing a course of procedure when a consignor of farm produce fails to obtain an honest accounting from a commission merchant, is not a condition precedent to an action on a commission merchant's bond brought under the authority of the act, Smith-Hurd Rev.St.1931 c 5 § 17 et seq. for the benefit of consignors.

Ill.—People v. Wirkus' Estate, 265 Ill.App. 248—People v. Frank G. Heilman Co., 263 Ill.App. 514.

28. Complaint held sufficient

Kan.—Smith v. La Forge, 228 P.2d 509, 170 Kan. 677.

Minn.—Kramer Equity Elevator v. Indemnity Ins. Co. of North America, 226 N.W. 396, 178 Minn. 136.

29. What must be proved

Consignors seeking to recover from vegetable factor's surety for failure of factor to turn over to consignors amounts recovered from railroad on claims for damages to vegetables as provided by contract must prove fraud and deceit and that they were injured thereby.

Cal.—Whitacre v. Hall, 104 P.2d 401, 40 C.A.2d 68, rehearing denied 104 P.2d 660, 40 C.A.2d 68.

30. Evidence held sufficient

(1) To sustain verdict or findings. Idaho.—Steel v. Blunck, 295 P. 426, 50 Idaho 244.

Minn.—Trovatten v. Minea, 7 N.W.2d 390, 213 Minn. 544, 144 A.L.R. 1263—Kramer Equity Elevator v. Indemnity Ins. Co. of North America, 226 N.W. 396, 178 Minn. 136.

(2) To show that payments, made to produce dealers by commission merchants were "advances." Cal.—Brock v. Fidelity & Deposit Co. of Maryland, 75 P.2d 605, 10 C.2d 512.

who is not a party thereto.³¹ The factor and surety, being parties to the bond, may be joined as parties defendant,³² but the surety may be sued without joining the factor³³ or his trustee in bankruptcy³⁴ as a party defendant where the bond is joint and several.

Defenses. Any available fact or facts which will defeat the cause of action in whole or in part may be set up as a defense in an action on a factor's bond.³⁵

Burden of proof. Generally, plaintiff has the burden of establishing the facts essential to his recovery;³⁶ but the burden is on defendant, if he relies on such fact, to show that the consignment in question was outside the general business for which the commission merchant was licensed,³⁷ as that the consigned produce was sold by him for consumption as distinguished from a sale for resale.³⁸

Certificate of commissioner as evidence. Under a statute authorizing the commissioner of agriculture, on default by a commission merchant in any of the conditions of his bond, to examine claims of con-

signors and by certificate determine the amounts due thereon, the certificate so made is, by the terms of the statute, presumptive evidence, in an action on the bond, of the facts therein stated³⁹ and, together with the claim of the consignor attached thereto, may be received in evidence.⁴⁰ Such a statute establishes a rule of evidence, and shifts the burden of proof after the presumption is created.⁴¹ The presumption, however, disappears when substantial evidence to the contrary is presented.⁴²

Costs. Under at least one statute, attorney's fees may be taxed as costs in an action on a factor's bond.⁴³

§ 4. — Offenses and Penalties

A violation of statutes governing the conduct of business by a factor may be made an offense, for which he may be subject to a penalty or other punishment.

Under some statutes which regulate the business of factors, a violation of the provisions of the statute by the factor makes him guilty of an offense,⁴⁴ and subjects him to a penalty or other punishment

31. **Consignor, not being party to bond, cannot be sued thereon.**

N.Y.—Pyrke v. Standard Accident Ins. Co., 252 N.Y.S. 635, 141 Misc. 186, reversed in part on other grounds and affirmed in part 254 N.Y.S. 520, 234 App.Div. 133.

32. N.Y.—Pyrke v. Standard Accident Ins. Co., 254 N.Y.S. 520, 234 App.Div. 133.

Pyrke v. Standard Accident Ins. Co., 258 N.Y.S. 869, 144 Misc. 53, affirmed Baldwin v. Standard Accident Ins. Co. (Olivit Action), 261 N.Y.S. 507, 237 App.Div. 334, affirmed 188 N.E. 71, 262 N.Y. 575.

33. N.Y.—Pyrke v. Standard Accident Ins. Co., 254 N.Y.S. 520, 234 App.Div. 133.

Pyrke v. Standard Accident Ins. Co., 258 N.Y.S. 869, 144 Misc. 53, affirmed Baldwin v. Standard Accident Ins. Co. (Olivit Action), 261 N.Y.S. 507, 237 App.Div. 334, affirmed 188 N.E. 71, 262 N.Y. 575.

34. N.Y.—Pyrke v. Standard Accident Ins. Co., 254 N.Y.S. 520, 234 App.Div. 133.

35. **Failure to comply with provisions of act**

Kan.—Smith v. La Forge, 244 P.2d 211, 173 Kan. 70.

Indebtedness of consignor to commission merchant may be pleaded by surety as a defense pro tanto.

N.Y.—Pyrke v. Standard Accident Ins. Co., 252 N.Y.S. 635, 141 Misc. 186, reversed in part on other grounds and affirmed in part 254 N.Y.S. 520, 234 App.Div. 133.

36. Cal.—Whitacre v. Hall, 104 P.2d 401, 40 C.A.2d 68, rehearing denied 104 P.2d 660, 40 C.A.2d 68.

37. N.Y.—Huson v. Brown, 154 N.Y.S. 131, 90 Misc. 175.

38. N.Y.—Huson v. Brown, supra.

39. N.Y.—Pyrke v. Standard Accident Ins. Co., 254 N.Y.S. 520, 234 App.Div. 133.

Statute held valid and within power of legislature to enact.

N.Y.—Baldwin v. Standard Accident Ins. Co. (Olivit Action), 261 N.Y.S. 507, 237 App.Div. 334, affirmed 188 N.E. 71, 262 N.Y. 575.

The purpose of the statute is to enable "the commissioner to prove his case against defaulting commission merchants without the undue hardship and burden of taking the deposition of each foreign claimant or bringing them into court upon the trial, an impractical and costly undertaking."

N.Y.—Pyrke v. Standard Accident Ins. Co., 258 N.Y.S. 869, 873, 144 Misc. 53, affirmed Baldwin v. Standard Accident Ins. Co. (Olivit Action) 261 N.Y.S. 507, 237 App.Div. 334, affirmed 188 N.E. 71, 262 N.Y. 575.

Sufficiency of certificate

That the commissioner's certificate fails to state that claimant is a consignor creditor does not invalidate the certificate as presumptive evidence of the facts stated.

N.Y.—Baldwin v. Standard Accident Ins. Co. (Olivit Action), 261 N.Y.S.

507, 237 App.Div. 334, affirmed 188 N.E. 71, 262 N.Y. 575.

40. **Verified claim as part of certificate**

The consignor's verified claim, when made a part of the commissioner's certificate, loses its identity as an affidavit, and becomes an integral part of the certificate, and as such may be received in evidence.

N.Y.—Pyrke v. Standard Accident Ins. Co., 258 N.Y.S. 869, 144 Misc. 53, affirmed Baldwin v. Standard Accident Ins. Co. (Olivit Action) 261 N.Y.S. 507, 237 App.Div. 334, affirmed 188 N.E. 71, 262 N.Y. 575.

41. N.Y.—Baldwin v. Standard Accident Ins. Co. (Olivit Action) 261 N.Y.S. 507, 237 App.Div. 334, affirmed 188 N.E. 71, 262 N.Y. 575.

42. N.Y.—Baldwin v. Standard Accident Ins. Co. (Olivit Action), supra.

43. **Bond held within statute authorizing taxation**

Commission merchant's bond, required by Comp.St.1922 § 7472, is fidelity insurance as classified by § 7814 subd. 4, and is within § 7811 providing for taxation of attorney's fees as costs in law cases on policies of fidelity insurance.

Neb.—Swisher v. Fidelity & Casualty Co., of New York, 204 N.W. 353, 113 Neb. 592.

44. Cal.—People v. Montgomery, 107 P.2d 291, 41 C.A.2d 574—Perkins v. Pacific Fruit Exchange, 22 P.2d 535, 132 C.A. 278.

Ill.—Wright v. People, 61 Ill. 332.

therefor.⁴⁵ Thus, under statutes so providing, a factor or commission merchant is guilty of a criminal offense where he engages in business without having secured a license as required by statute,⁴⁶ where he purchases goods received by him for sale on commission without prior written authority from the consignor;⁴⁷ where, with intent to defraud, he fails to account for goods received;⁴⁸ where he embezzles the proceeds of a sale;⁴⁹ or where he fails to render a true statement of a sale,⁵⁰ irrespective of his intent in failing so to do.⁵¹

A statute which declares a commission merchant who fails on demand to deliver to the consignor the proceeds of a sale of goods guilty of a misdemeanor makes an actual demand for the proceeds a necessary prerequisite to a conviction,⁵² and a conviction a necessary prerequisite to a recovery of the prescribed penalty.⁵³

Statutory regulations which impose a penalty for a failure to comply with the regulations are subject to the usual rule of strict construction,^{53.5} and

a recovery or conviction thereunder can be had only when the case is brought strictly within their provisions.⁵⁴

Prosecution. Rules governing criminal prosecutions in general ordinarily apply in prosecutions for the violations of statutes governing the conduct of business by factors or commission merchants,⁵⁵ such as with regard to the admissibility,⁵⁶ and the weight and sufficiency⁵⁷ of evidence.

§ 5. Creation and Termination of Relation

The relation of principal and factor is usually created by a contract entered into between the parties, to which the usual rules governing the construction of contracts apply.

The relation of principal and factor is usually created by a contract entered into between the parties.⁵⁸ Such a contract, to be valid, need not fix any definite or ascertainable amount of goods to be consigned to the factor for sale,⁵⁹ and in its construction the usual rules governing the construction of contracts in general apply.⁶⁰

45. Ky.—*McMasters v. Burnett*, 17 S.W. 1021, 92 Ky. 358.
25 C.J. p 346 note 95.

46. Cal.—*People v. Mulholland*, 104 P.2d 1045, 16 C.2d 62.
La Rosa v. Glaze, 63 P.2d 1181, 18 C.A.2d 354.

Tex.—*Eby v. U. S. Fidelity & Guaranty Co.*, Civ.App., 225 S.W.2d 457.

Validity of statute

To be valid, a statute making it an offense to engage in the business of a factor without a license must be clear and unambiguous.

Wash.—*State v. Powles*, 155 P. 774, 90 Wash. 112.

25 C.J. p 345 note 71 [a].

Elements of offense

In prosecution for acting as a commission merchant in soliciting sale of grower's crop of grapes on commission, without having secured a license as required by statute, necessary elements of offense charged were solicitation of grapes from grower for sale on commission, and failure of defendant to have a license at that time to act as a commission merchant.

Cal.—*People v. Montgomery*, 107 P. 2d 291, 41 C.A.2d 574.

Defenses

That some of grapes delivered by grower were below specified grade was not a defense in prosecution for acting as commission merchant in soliciting sale of grower's crop of grapes on commission without having secured a license.

Cal.—*People v. Montgomery*, supra.

47. Statute held not unreasonable
Mo.—*Arnold v. Hanna*, 290 S.W. 416,

315 Mo. 823, affirmed 48 S.Ct. 212, 276 U.S. 591, 72 L.Ed. 721.

48. Failure to remit proceeds

Statute denouncing failure to "account for" perishable farm products received in interstate commerce, where intent to defraud is present, includes failure to remit proceeds of sale.

U.S.—*U. S. v. Rehwald*, D.C.Cal., 44 F.2d 663.

49. Pa.—*Commonwealth v. Keller*, 9 Pa.Co. 253.

25 C.J. p 346 note 96.

50. Minn.—*State v. Edwards*, 102 N. W. 697, 94 Minn. 225, 69 L.R.A. 667.

25 C.J. p 346 note 97.

51. Minn.—*State v. Edwards*, supra.

25 C.J. p 346 note 98.

52. Ill.—*Wright v. People*, 61 Ill. 382.

25 C.J. p 346 note 99.

53. Mo.—*Hope v. Hull*, 60 Mo.App. 61.

25 C.J. p 346 note 1.

53.5 U.S.—*U. S. v. Solomon*, D.C.Ill., 3 F.R.D. 411.

25 C.J. p 346 note 2.

54. Ky.—*McMasters v. Burnett*, 17 S.W. 1021, 92 Ky. 358, 13 Ky.L. 617.

25 C.J. p 346 note 2.

Evidence held sufficient

To support finding that defendant carried on business of a dealer in a perishable agricultural commodity without a license so as to be subject to judgment in nature of penalty.

U.S.—*U. S. v. Solomon*, D.C.Ill., 3 F. R.D. 411.

55. Cal.—*People v. Montgomery*, 107 P.2d 291, 41 C.A.2d 574.

56. Irrelevant or immaterial evidence is inadmissible.

Cal.—*People v. Montgomery*, supra.

57. Evidence held to justify conviction for acting as a commission merchant without having secured a license as required by statute.

Cal.—*People v. Montgomery*, supra.

58. Ind.—*Western Union Telegraph Co. v. Mart*, 17 N.E.2d 500, 106 Ind. App. 590.

Factorage contract held fair and enforceable

Wash.—*Whitney-Ellsworth Co. v. Anderson Mercantile Co.*, 294 P. 548, 160 Wash. 108.

Crop mortgage and marketing agreement construed together

Where factor to whom grapes were consigned for sale under written marketing agreement had lent money to grower on security of crop mortgage, crop mortgage and marketing agreement must be construed together.

Cal.—*Bare v. Richman & Samuels of New York*, 140 P.2d 895, 60 C.A. 2d 413.

59. U.S.—*Marrinan Medical Supply v. Ft. Dodge Serum Co.*, C.C.A. Minn., 47 F.2d 458.

60. Mich.—*Commercial Investment Trust v. Stewart*, 209 N.W. 660, 235 Mich. 502.

Contract held modified by conduct of parties

N.Y.—*Zamax Mfg. Co. v. Grossman*, 102 N.Y.S.2d 833.

§ 6. — Appointment or Employment

To constitute one the factor of another there must be an appointment by the principal and an acceptance thereof by the factor.

To constitute one the factor of another there must be an appointment by the principal and an acceptance of the appointment by the factor,⁶¹ which appointment and acceptance may be made by parol,⁶² or may be implied.⁶³ If a factor accepts a consignment, he must accept and comply with the conditions imposed by the consignor.⁶⁴

Estoppel. A factor may be held liable as such to the owner of goods, although he obtains possession of the goods wrongfully;⁶⁵ but the mere fact that a factor has possession of goods does not preclude the owner from showing, as against a purchaser, that they were not intrusted to the factor for sale.⁶⁶

§ 7. — Duration and Termination

- a. In general
- b. Termination by operation of law

a. In General

In the absence of an express or implied agreement to the contrary, a factor's agency, as a general rule, may be terminated at any time by either the principal or the factor, although the principal's right to terminate it is limited where it is one coupled with an interest.

A factor may be employed for a specified length of time.⁶⁷ In the absence of a fixed time for the continuance of the employment, and where there is no "power coupled with an interest," as a general rule his authority may be revoked by the principal at any time,⁶⁸ unless, as will appear, the factor has made advances on the goods consigned, or unless it appears that the parties intended that the factor should have a reasonable period of time in which to sell the goods consigned, in which case his authority may not be revoked by the principal until such period of time has expired.⁶⁹ An agreement, while not specific as to time, may contain a provision which will determine the time of termination,^{69.5} as where it contains a provision that in the event of cancellation the agreement will remain in effect until the manufacturer has been paid for merchandise delivered.^{69.10}

The factor also may, as a general rule, renounce the agency at any time,⁷⁰ and may, by a default in his obligation under the contract, release the principal from continuing his agency;⁷¹ but it has been held that the principal will not be justified in rescinding an entire contract for a small breach thereof.⁷²

Contract permitting termination by notice. The parties may properly stipulate in the contract of

Warranty held not implied

U.S.—Nephi Processing Plan, Inc. v. Western Co-op. Hatcheries, C.A. Utah, 242 F.2d 567.

61. Cal.—Bare v. Richman & Samuels of New York, 140 P.2d 895, 60 C.A.2d 413.

Ind.—Western Union Telegraph Co. v. Mart, 17 N.E.2d 500, 106 Ind. App. 590.

25 C.J. p 346 note 3.

62. Ill.—Deshler v. Beers, 32 Ill. 368, 83 Am.D. 274.

63. Ill.—Dows v. McCleary, 14 Ill. App. 137.

25 C.J. p 346 note 5.

64. La.—Chaffe v. Heyner, 31 La. Ann. 594.

25 C.J. p 346 note 6.

65. Cal.—Lubert v. Chauviteau, 3 C. 458, 58 Am.D. 415.

N.Y.—Buckley v. Packard, 20 Johns. 421.

66. N.Y.—Cook v. Beal, 14 N.Y. Super. 497.

67. N.Y.—Newburger-Morris Co. v. Talcott, 114 N.E. 846, 219 N.Y. 505. 25 C.J. p 347 note 9.

Length of time covered by contract

Where agreement for marketing of crops covered year from August 17, 1936, to August 17, 1937, provision in agreement that it would be "bind-

ing" on both parties until advances and payments made by consignee to owner had been fully paid would not be construed to extend contract to include crops of following year on advances not being fully paid.

Cal.—Belmont v. Milton, 110 P.2d 525, 43 C.A.2d 120.

68. Cal.—Campodonico v. Marchesotti, 134 P.2d 856, 57 C.A.2d 451.

Mo.—Boatmen's Bank v. Vandiver, App., 281 S.W. 144.

N.Y.—Lion v. Lilienfeld, 30 N.Y.S.2d 866.

25 C.J. p 347 note 10.

Right of principal to retake possession see *infra* § 40.

69. Cal.—Pico Citizens Bank v. Tafco, Inc., 332 P.2d 739, 165 C.A.2d 739.

Portraits consigned for exhibition and sale

Where consignee art gallery in response to inquiry agreed to exhibit for sale Egyptian portraits if delivered by consignors, and portraits were delivered but no reference was made to length of consignment, consignees were entitled to possession of portraits for such a time as was reasonably sufficient to enable them to prepare for and make a suitable exhibition, and prior to expiration of such period of time consignors could not revoke consignees' authority.

N.Y.—Lion v. Lilienfeld, 30 N.Y.S.2d 866.

What constitutes a reasonable period of time depends on the facts in the particular case.

N.Y.—Lion v. Lilienfeld, *supra*.

69.5 Cal.—Pico Citizens Bank v. Tafco, Inc., 332 P.2d 739, 165 C.A.2d 739.

69.10 "Merchandise delivered" construed

The words "merchandise delivered" are not restricted to goods delivered by consignee to customers prior to effective date of cancellation, but include merchandise delivered by manufacturer and remaining in consignee's possession at date of cancellation.

Cal.—Pico Citizens Bank v. Tafco, Inc., 332 P.2d 739, 165 C.A.2d 739.

70. Mich.—Barrows v. Cushway, 37 Mich. 481.

N.C.—Owensboro Wagon Co. v. Riggan, 66 S.E. 126, 151 N.C. 303.

71. Cal.—Pann v. Barry, 4 P.2d 791, 118 C. 127.

25 C.J. p 347 note 13.

72. N.Y.—Alden Coal Min. Co. v. C. L. Amos Coal Co., 182 N.Y.S. 819, 192 App.Div. 371.

25 C.J. p 347 note 14.

employment that either party may terminate the employment by giving a certain number of days' notice to the other.⁷³

Implied revocation. A revocation will not be implied from acts which are not necessarily inconsistent with a continuation of the agency.⁷⁴

Effect of advances. Where the factor makes advances on the goods consigned, with the consent of or by the direction of the principal, an agency coupled with an interest arises, see *supra* § 1 e. It follows that in such a case the factor's authority is irrevocable to the extent of his lien for advances made and expenses incurred on the goods;⁷⁵ and his authority to sell in such a case is not terminated by an attachment or garnishment of the goods by the principal's creditors.⁷⁶

Abandonment. If a party to a factoring agreement informs his factor that he abandons the contract which is being financed and will proceed no further in performing it, and if the factor then tries to protect the advances he has already made by taking over completion of the contract in the name of such party, the former factor will become the undisclosed principal in any subcontract that may be entered into by the party he formerly financed;^{76.5} but such change in relationship does not occur so long as the party whom the factor was

financing retains any interest in the contract and has not abandoned its completion.^{76.10}

When revocation becomes effective. A revocation by the principal becomes effective as to the factor only from the time he has received notice of it,⁷⁷ and as to a third person from the time he has notice thereof.⁷⁸

b. Termination by Operation of Law

A factor's agency may be terminated by operation of law, as by the death of the factor or principal or by the factor's insolvency.

As in the case of other agencies, a factor's agency may be terminated by operation of law,⁷⁹ as by the death of the factor,⁸⁰ in which event his agency does not pass to his executors or administrators,⁸¹ unless it is one coupled with an interest,⁸² or by the death of the principal,⁸³ unless the factor has made advances or incurred expenses on the goods.⁸⁴

The insolvency of the factor also ordinarily terminates his authority;⁸⁵ but it has been held that, while such insolvency is a ground for the revocation of the agency by the principal,⁸⁶ the mere fact that the factor is insolvent in the sense that he is unable to meet his obligations does not terminate his authority if he has made no assignment and no bankruptcy or insolvency proceedings have been instituted by or against him.⁸⁷

73. Cal.—Cline v. Smith, 274 P. 761, 96 C.A. 697.

25 C.J. p 347 note 9 [a].

Stipulation held not modified by letter written by principal to factor prior to execution of contract.

Cal.—Cline v. Smith, *supra*.

Notice by mail held sufficient

N.Y.—Kantrowitz v. Dairymen's League Co-op. Ass'n, 71 N.Y.S.2d 821, 272 App.Div. 470, appeal denied 73 N.Y.S.2d 484, 272 App.Div. 979, affirmed 80 N.E.2d 366, 297 N.Y. 991.

74. Cal.—Williams v. Parrott, 159 P. 824, 31 C.A. 73.

25 C.J. p 347 note 11.

Reduction to writing of lien to secure advances made by factor on goods consigned does not destroy the relationship of principal and factor where the terms of the writing are not inconsistent with its continuance.

Ga.—Myers-Fryer Co. v. W. C. Bradley Co., 134 S.E. 792, 35 Ga.App. 788.

75. Ga.—Willingham v. Rushing, 31 S.E. 130, 131, 105 Ga. 72.

Mo.—Boatmen's Bank v. Vandiver, App., 281 S.W. 144.

N.Y.—Lion v. Lilienfeld, 30 N.Y.S.2d 866.

Effect of advances on factor's right to sell generally see *infra* § 24.

In England and Ontario, as appears in 25 C.J. p 347 note 16, a contrary rule prevails.

76. Me.—White Mountain Bank v. West, 46 Me. 15.

Pa.—Baugh v. Kirkpatrick, 54 Pa. 84, 93 Am.D. 675.

76.5 U.S.—Wasilowski v. Park Bridge Corp., C.C.A.N.Y., 156 F. 2d 612.

76.10 U.S.—Wasilowski v. Park Bridge Corp., *supra*.

Factor not undisclosed principal

U.S.—Wasilowski v. Park Bridge Corp., *supra*.

77. U.S.—C. E. White & Co. v. Century Sav. Bank, Ill., 229 F. 975, 144 C.C.A. 257.

Me.—Jones v. Hodgkins, 61 Me. 480.

78. Me.—Jones v. Hodgkins, *supra*.

25 C.J. p 347 note 21.

79. La.—Torre v. Thiele, 25 La. Ann. 418.

25 C.J. p 347 note 23.

80. Tenn.—Jackson Ins. Co. v. Par-tee, 9 Heisk. 296.

25 C.J. p 347 note 24.

81. S.C.—Gage v. Allison, 3 S.C.L. 495, 2 Am.D. 682.

25 C.J. p 347 note 25.

82. **Power of representative**

On the death of a factor, where his agency is one coupled with an interest, his personal representative may continue to exercise the factor's powers so far as necessary to protect his estate.

Mo.—Boatmen's Bank v. Vandiver, App., 281 S.W. 144.

83. N.Y.—Hunt v. Lanehart, 249 N.Y.S. 614, 232 App.Div. 170.

Tex.—**Corpus Juris cited in** W. L. Moody Cotton Co. v. Hervey, Civ. App., 97 S.W.2d 275, 278, error dismissed.

25 C.J. p 347 note 26.

84. Ga.—Willingham v. Rushing, 31 S.E. 130, 105 Ga. 72.

Me.—Merry v. Lynch, 68 Me. 94.

85. U.S.—Terry v. Bamberger, C.C., 23 F.Cas.No.13,837, 44 Conn. 558, affirmed Bamberger v. Terry, 103 U.S. 40, 26 L.Ed. 317.

25 C.J. p 347 note 28.

Effect of factor's insolvency on principal's right to follow goods or proceeds see *infra* § 61.

86. S.C.—James Freeman Brown Co. v. Harris, 70 S.E. 802, 88 S.C. 558, 561.

87. Tex.—Interstate Nat. Bank v. Claxton, 80 S.W. 604, 97 Tex. 569, 104 Am.S.R. 885, 65 L.R.A. 820.

II. POWERS OF FACTOR

§ 8. In General

The powers of a factor are governed by the general rules prescribing the powers of an agent, and by his contract with his principal. In the absence of special authority, he can bind his principal, in the disposition of a consignment, only in the ordinary course of business.

The powers of a factor are governed by the general rules which prescribe the powers of an agent,⁸⁸ the extent of his powers depending largely on the contract between him and his principal,⁸⁹ and the instructions given to him by the principal.⁹⁰ His agency with respect to the particular goods or merchandise is general, unless expressly limited by instructions.⁹¹ Like other agents, he possesses such implied and incidental authority as is reasonably necessary and proper for the execution of his undertaking, and as is usually exercised by factors under like circumstances, and is not forbidden.⁹²

In the absence of special authority, a factor cannot, as a general rule, bind his principal in the disposition he makes of a consignment except in the ordinary course of business;⁹³ thus, a sale of the business itself, including stock in hand, good will, and merchandise held on consignment, is not a sale in the ordinary course of business.⁹⁴ Emergencies may arise, however, in which a factor may from the necessities of the case be justified in assuming extraordinary powers, and his acts fairly done under such circumstances bind the principal.⁹⁵

What law governs. The implied powers of a fac-

tor are to be determined by the law of the place where the sale or contract of disposition is made.⁹⁶

§ 9. Delegation of Authority

A factor generally cannot, except as to purely ministerial acts, and unless authorized by usage or custom, delegate his authority to another without the principal's knowledge and consent.

As a general rule, a factor cannot, except as to purely ministerial acts,⁹⁷ delegate his authority to another without the principal's knowledge and consent,⁹⁸ unless he is authorized to do so by usage or custom.⁹⁹ This rule can be invoked, however, only when it is sought to bind the principal by the acts of the subagent,¹ and not when the factor assumes the position of principal and the attempt is made to enforce in the factor's name the contract made by the subagent.²

Effect of delegation. If a factor employs a subagent without authority therefor, the subagent does not become the agent of the principal, and there is no privity of contract between them;³ nor is the principal liable to the subagent for an individual indebtedness due to him from the factor.⁴ In such a case, the factor is responsible for the acts of the subagent.⁵ Where, however, the employment of the subagent is authorized, a privity exists between the principal and subagent and the latter is accountable directly to the principal.⁶ Even though no such privity exists, if the subagent promises the principal to pay the proceeds to him, he is liable to such

88. Ga.—*Willingham v. Rushing*, 31 S.E. 130, 105 Ga. 72. 25 C.J. p 348 note 32.

Customs and usages as to factors see Customs and Usages § 19 l.

89. R.I.—*Hassett v. Cooper*, 40 A. 841, 20 R.I. 555. 25 C.J. p 348 note 33.

Writing held part of contract by reference

Wis.—*Darling & Co. v. Frank Carter Co.*, 242 N.W. 519, 208 Wis. 222.

Authority held exceeded

Cal.—*Wooley v. Schilder*, 327 P.2d 198, 161 C.A.2d 683.

90. Minn.—*Mobile Fruit & Trading Co. v. Potter*, 81 N.W. 392, 78 Minn. 487.

91. Iowa.—*M. M. Walker Co. v. Dubuque Fruit & Produce Co.*, 85 N.W. 614, 113 Iowa 428, 53 L.R.A. 775.

92. Fla.—*Gadsden County Tobacco Co. v. Corry*, 137 So. 255, 103 Fla. 217.

Negotiable paper

A factor has no implied authority

to bind his principal by making, accepting, or indorsing negotiable paper.

Fla.—*Gadsden County Tobacco Co. v. Corry*, supra.

Raising money for principal

In the absence of special authority a factor cannot resort to extraordinary and expensive means to raise money for his principal.

Mass.—*Shaw v. Stone*, 1 Cush. 228.

93. Conn.—*Abel v. Chase*, 97 A. 762, 90 Conn. 487.

25 C.J. p 348 note 40.

94. Conn.—*Romeo v. Martucci*, 45 A. 1, 99, 72 Conn. 504, 77 Am.S.R. 327, 47 L.R.A. 601.

95. N.Y.—*Jervis v. Hoyt*, 2 Hun 637. 25 C.J. p 348 note 42.

96. Ohio.—*Frank v. Jenkins*, 22 Ohio St. 597.

Tex.—*Harbert v. Neill*, 49 Tex. 143.

97. N.Y.—*McMorris v. Simpson*, 21 Wend. 610.

98. Cal.—*Corpus Juris* cited in *Imperial Valley Long Staple Cotton Growers' Ass'n v. Davidson*, 209 P. 58, 60, 58 C.A. 551.

Okl.—*Baker-Riedt Motor Co. v. Moore*, 220 P. 25, 93 Okl. 153.

25 C.J. p 348 note 52.

Disposition of goods through subagent as conversion see *infra* § 39.

99. U.S.—*Warner v. Martin*, Pa., 11 How. 209, 13 L.Ed. 667.

25 C.J. p 349 note 53.

Customs and usages as to factors generally see Customs and Usages § 19 l.

1. Ala.—*Harralson v. Stein*, 50 Ala. 347.

2. Ala.—*Harralson v. Stein*, supra.

3. Okl.—*Baker-Riedt Motor Co. v. Moore*, 220 P. 25, 93 Okl. 153.

25 C.J. p 349 note 57.

4. N.Y.—*Ladd v. Arkell*, 40 N.Y. Super. 150.

5. Neb.—*Housel v. Thrall*, 25 N.W. 612, 18 Neb. 484.

25 C.J. p 349 note 59.

6. Cal.—*Corpus Juris* quoted in *De Raad v. Nash-De Camp Co.*, App., 23 P.2d 68, 71.

25 C.J. p 349 note 61.

principal, although he has previously promised the factor to account to him.⁷

§ 10. Particular Powers

A factor authorized to make purchases for his principal may make them in his own name. A factor has no authority to use for his own benefit goods consigned to him, and hence, at common law, has no authority to sell or transfer them to pay his own debts, unconnected with his advances and charges on them, so as to give the transferee good title as against the principal, unless the latter allows the factor to indicate to third persons that he owns the goods.

Where the factor's authority includes the making of purchases for his principal, he may make such purchases in his own name,⁸ and he has power to buy on credit, but not to give the note of the principal.⁹

Power to use or transfer goods for own benefit. A factor has no authority to use for his own personal benefit goods consigned to him,¹⁰ and hence, at common law, has no authority to sell or transfer them in payment of his own debts, unconnected with his advances and charges on them, so as to confer on the transferee a good title as against the principal,¹¹ unless the principal allows the factor so to manage the goods as to indicate to third persons that he is the owner thereof.¹² This rule applies even though the state of accounts between him and his principal is in his favor,¹³ and even though the factor has a lien on the goods.¹⁴

This rule also applies to a purchaser without notice from one who has acquired possession of property from a factor in consideration of a pre-existing debt.¹⁵

§ 11. — Sale or Exchange of Goods in General

- a. General rules
- b. Cash or credit

a. General Rules

In the absence of express limitations, a factor has implied power to sell the goods consigned to him and in his possession, and to do everything necessary for the accomplishment of this object, and may sell in his own name; but he has no implied power to exchange such goods for other goods, or to rescind a completed sale.

Since the object and business of a factor is to sell goods consigned to him, he has, in the absence of express limitations, implied power to do so.¹⁶ The power to sell includes by implication such powers as are necessary for the accomplishment of this object¹⁷ and are not inconsistent with the general power to sell.¹⁸

Sale in own name. In the absence of usage or instructions to the contrary, a factor may sell in his own name, as well as in the name of his principal, the goods intrusted to him for sale.¹⁹ A factor has ostensible authority to deal with the property of his principal as his own, in transactions with persons not having notice of the actual ownership.^{19.5}

7. Mass.—Chickering v. Hosmer, 12 Mass. 183.

8. Ky.—Sutton v. Kiel Cheese & Butter Co., 159 S.W. 950, 155 Ky. 465.

25 C.J. p 350 note 72.

9. Mass.—Emerson v. Province Hat Mfg. Co., 12 Mass. 237, 7 Am.D. 66.

10. Neb.—Regier v. Craver, 74 N.W. 830, 54 Neb. 507.

25 C.J. p 350 note 86.

Right in, and title to, goods generally see infra § 40.

11. S.D.—Corpus Juris cited in De Bates v. Searls, 216 N.W. 586, 587, 52 S.D. 30, reheard 219 N.W. 559, 52 S.D. 603.

Tex.—Charles M. Stieff, Inc., v. City of San Antonio, 111 S.W.2d 1086, 130 Tex. 594.

25 C.J. p 350 note 87.

Protection of transferee under factors' acts see infra §§ 64-67.

12. Ill.—McCarthy v. Crawford, 86 N.E. 750, 238 Ill. 38, 128 Am.S.R. 95, 29 L.R.A., N.S., 252.

Tex.—Morris v. Sellers, 46 Tex. 391.

13. Mo.—Benny v. Pegram, 18 Mo. 191, 59 Am.D. 298.

14. Mo.—Benny v. Pegram, supra.

35 C.J.S.—33

15. Wash.—Eilers Music House v. Fairbanks, 141 P. 885, 80 Wash. 379.

25 C.J. p 351 note 92.

16. Ark.—G. H. Hammond Co. v. Joseph Mercantile Co., 222 S.W. 27, 144 Ark. 108.

25 C.J. p 348 note 37.

Customs and usages as affecting right to sell see Customs and Usages § 19 I.

Transfer of goods for factor's benefit see supra § 10.

Course of dealing between parties was held to be such that dealer could rightly assume that he held goods under consignment with authority to sell.

Mass.—Osgood Bradley Car Co. v. Standard Steel Motor Car Co., 156 N.E. 440, 259 Mass. 302.

Consignment contract held to contemplate sale

Tex.—Shield Co. v. Schunder, Civ. App., 81 S.W.2d 177.

Limitation on authority

Contract between rice growers' association and milling company permitting latter to sell rice only with consent of officers of association acting for its members, did not confer

on company authority to sell rice of members of association without such consent.

Ark.—Joy Rice Milling Co. v. Brown, 268 S.W. 1, 167 Ark. 205.

17. Mich.—Bellows v. Goodfellow, 267 N.W. 885, 276 Mich. 471.

Ohio.—Grieff v. Cowguill, 2 Disn. 58, 13 Ohio Dec., Reprint, 37.

Selecting purchaser; fixing price

A factor possessing power to sell has implied authority to select the purchaser and, in the absence of special instructions, to fix the price. Mich.—Bellows v. Goodfellow, 267 N.W. 885, 276 Mich. 471.

18. Pa.—Laussatt v. Lippincott, 6 Serg. & R. 386, 9 Am.D. 440.

19. Cal.—De Raad v. Nash-De Camp Co., App., 23 P.2d 68.

Mich.—Bellows v. Goodfellow, 267 N.W. 885, 276 Mich. 471.

Mo.—Corpus Juris Secundum quoted in Commercial Credit Co. v. Interstate Securities Co., App., 197 S.W. 2d 1000, 1004.

25 C.J. p 350 note 71.

19.5 Cal.—Pacific Finance Corp. v. Foust, 285 P.2d 632, 44 C.2d 853.

Siegel v. Bayless, 248 P.2d 968, 113 C.A.2d 661.

Necessity of possession. Since, as shown in § 1, supra, possession of the goods or merchandise is one of the elements necessary to constitute one a factor, a factor has power to sell only goods or merchandise which are in his possession.²⁰ However, it is not necessary that the factor have the actual possession of the goods; if he sells them in good faith by assigning the bill of lading therefor, the sale is valid as against the principal.²¹

Power to barter or exchange. Since a factor's power generally is to sell only, in the absence of special authority, he has no power, in the absence of special authority, to barter or exchange his principal's goods and merchandise for other goods or merchandise.²²

Power to rescind sale. A factor who has completed a sale for his principal has, ordinarily, no power to rescind it;²³ but he may rescind a sale which he is unable to complete.²⁴

b. Cash or Credit

According to the weight of authority, in the absence of instructions or usage to the contrary, a factor has implied authority to sell on reasonable credit, or on such credit as is customary in the market where the goods are sold.

The rule supported by the weight of authority is that, in the absence of instructions or usage to the contrary, a factor has implied authority to sell on a reasonable credit,²⁵ or on such credit as is usual and customary in the market in which the goods are sold;²⁶ and authority to sell on credit may be im-

plied from authority to sell to the best advantage.²⁷ According to other decisions, unless a factor is instructed to sell on credit,²⁸ or unless there is a custom of selling on credit,²⁹ he can sell for cash only and has no power to sell on credit;³⁰ and where the usage of the market in which the goods are sold authorizes sales for cash only, he cannot sell on credit unless authorized by his instructions.³¹

Even though it is the custom of the trade to sell on credit,³² a factor who is instructed to sell for cash cannot sell on credit,³³ unless such instructions have generally been disregarded in the course of dealing between him and his principal.³⁴ Where the contracts are ambiguous as to the question of cash or credit sale, their true meaning may be ascertained, not merely by a reading thereof, but also by evidence of usage of the trade and the prior acts of the parties in performance of the contract.^{34.5}

§ 12. — Collection of Price

- a. In general
- b. Medium of payment

a. In General

In the absence of restrictions, or of intervention or control by the principal, a factor who sells goods intrusted to him has implied power to receive payment and to give a receipt and discharge to the purchaser.

In the absence of restrictions, a factor who sells goods intrusted to his possession for that purpose has implied power to receive payment,³⁵ and to give a receipt and discharge to the purchaser;³⁶ and a

20. Tex.—Harbert v. Neill, 49 Tex. 143.

25 C.J. p 348 note 44.

21. U.S.—Ryberg v. Snell, Pa., 21 F. Cas.No.12,190, 2 Wash.C.C. 403.

25 C.J. p 348 note 45.

22. Wash.—Eilers Music House v. Fairbanks, 141 P. 885, 80 Wash. 379.

25 C.J. p 353 note 31.

23. Fla.—Gadsden County Tobacco Co. v. Corry, 137 So. 255, 103 Fla. 217.

S.C.—Smith v. Rice, 17 S.C.L. 648.

24. N.Y.—Macaulay v. Palmer, 26 N.E. 912, 125 N.Y. 742.

25 C.J. p 356 note 83.

25. U.S.—U. S. v. Copeland Milnes Wool Co., C.A.III., 242 F.2d 659.

Ark.—Corpus Juris cited in Bentonville Ice & Cold Storage Co. v. Anderson, 53 S.W.2d 993, 994, 186 Ark. 473.

Fla.—Gadsden County Tobacco Co. v. Corry, 137 So. 255, 103 Fla. 217.

25 C.J. p 350 note 81.

Authority to accept commercial paper in payment see infra § 12 b.

Duty as to sales on credit see infra § 31.

26. Kan.—Brown v. Funck, 132 P. 202, 89 Kan. 601, Ann.Cas.1915A 174.

25 C.J. p 350 note 82.

27. U.S.—Gerbier v. Emery, Pa., 10 F.Cas.No.5,357, 2 Wash.C.C. 413.

N.C.—Symington v. McLin, 18 N.C. 291.

28. Ind.—Babcock v. Orbison, 25 Ind. 75.

25 C.J. p 350 note 78.

29. Mo.—Murray v. Gordon-Watts Grain Co., 260 S.W. 513, 216 Mo. App. 607.

30. Mo.—Murray v. Gordon-Watts Grain Co., supra.

25 C.J. p 350 note 79.

31. Fla.—Gadsden County Tobacco Co. v. Corry, 137 So. 255, 103 Fla. 217.

25 C.J. p 350 note 80.

32. Mo.—Murray v. Gordon-Watts Grain Co., 260 S.W. 513, 216 Mo. App. 607.

25 C.J. p 350 notes 74, 75.

33. Fla.—Gadsden County Tobacco

Co. v. Corry, 137 So. 255, 103 Fla. 217.

Mo.—Murray v. Gordon-Watts Grain Co., 260 S.W. 513, 216 Mo.App. 607.

25 C.J. p 350 note 76.

34. U.S.—U. S. v. Copeland Milnes Wool Co., C.A.III., 242 F.2d 659.

Mo.—Smith v. Jefferson Bank, 126 S. W. 810, 147 Mo.App. 461.

25 C.J. p 350 note 77.

34.5 U.S.—U. S. v. Copeland Milnes Wool Co., C.A.III., 242 F.2d 659.

35. U.S.—U. S. v. Pfister, C.A.S.D., 205 F.2d 538.

Cal.—Corpus Juris Secundum cited in Pacific Finance Corp. v. Foust, 285 P.2d 632, 634, 44 C.2d 853.

Ky.—J. M. Robinson, Norton & Co. v. Corsicana Cotton Factory, 99 S.W. 305, 124 Ky. 435, 30 Ky.L. 580, 8 L.R.A.,N.S., 474, 14 Ann.Cas. 802, motion sustained 102 S.W. 869, 126 Ky. 75, 31 Ky.L. 527, 8 L.R.A.,N.S., 474, 14 Ann.Cas. 802.

25 C.J. p 354 note 49.

Duty as to collection see infra § 32.

36. Cal.—Corpus Juris Secundum cited in Pacific Finance Corp. v.

payment to the factor is binding on the principal, although the factor misappropriates the funds.³⁷

However, the power in the factor to collect does not prevent the principal from controlling the collection,³⁸ or the purchaser from paying to the principal in spite of the objection of the factor,³⁹ especially where the principal's contract with the factor provides that payment shall be made to the principal;⁴⁰ and, subject to the right of the factor to be protected to the extent of his lien, the principal may order the buyer to pay to him and not to the factor, and in such a case a subsequent payment to the factor does not relieve the purchaser from liability to the principal.⁴¹

A del credere factor, in the absence of intervention by the principal, may collect from purchasers the amount due;⁴² but it has been held that when the principal appears, the right of the agent to receive payment ceases,⁴³ although this rule has been limited to the extent that the principal cannot deprive the factor of the right to collect and sue on such debts in his own name save by relieving him of liability on the guaranty.⁴⁴

b. Medium of Payment

A factor generally cannot receive in payment anything except lawful money, unless there is special authority or usage of trade otherwise; but if he has power to sell on credit, he may, unless directed otherwise, take in payment a note in his own name.

As a general rule, a factor has no authority to receive in payment anything except lawful money,⁴⁵ unless there is special authority or a usage of trade otherwise;⁴⁶ he cannot take in payment depreciated currency,⁴⁷ or that which is worthless and void.⁴⁸ If the sale is in the name of the factor and the principal is not disclosed, payment made by a surrender of the factor's own check is binding.⁴⁹

Commercial paper. Ordinarily, a factor has no implied authority to accept negotiable paper;⁵⁰ but where a factor has power to sell on credit, he may, if not directed otherwise, take in payment a note in his own name.⁵¹ Even though there is authority to receive payment in notes, the principal is not obliged to accept notes for goods not sold;⁵² nor, where the factor is to account in satisfactory bank notes, is the principal obliged to accept notes of third persons, not shown to be either bank notes or satisfactory.⁵³ Where it is the practice of factors to sell the goods of several principals together, a factor in such a case may take the note of the purchaser for the whole lot.⁵⁴

§ 13. — Extension of Time of Payment

A factor has no implied power to extend the time of payment after a sale.

A factor has no implied power, after a sale of goods on credit, to extend the time of payment.⁵⁵

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| <p>Foust, 285 P.2d 632, 634, 44 C.2d 853.</p> <p>Ky.—Graham v. Duckwall, 8 Bush 12, 5 Ky.Op. 495.</p> <p>25 C.J. p 354 note 50.</p> <p>37. Cal.—Corpus Juris Secundum cited in Pacific Finance Corp. v. Foust, 285 P.2d 632, 634, 44 C.2d 853.</p> <p>Mass.—Allen v. Pierce, 1 Dane Abr. 612.</p> <p>38. Mass.—Kelly v. Munson, 7 Mass. 319, 5 Am.D. 47.</p> <p>39. N.C.—Golden v. Levy, 4 N.C. 141, 6 Am.D. 555.</p> <p>Payment of factor by sub-factor</p> <p>Factor is held to have prior lien on goods, for advances which he may have made, and a right to compel his sub-factor to account to him.</p> <p>N.Y.—Toland v. Murray, 18 Johns. 24.</p> <p>40. W.Va.—Duncan v. Doll, 84 S.E. 792, 75 W.Va. 381.</p> <p>25 C.J. p 354 note 54.</p> <p>41. Mass.—Kelley v. Munson, 7 Mass. 319, 5 Am.D. 47.</p> <p>25 C.J. p 354 note 55.</p> <p>42. Md.—Miller v. Lea, 35 Md. 396, 6 Am.D. 417.</p> <p>25 C.J. p 354 note 57.</p> | <p>43. N.Y.—Leverick v. Meigs, 1 Cow. 645.</p> <p>R.I.—Balderston v. National Rubber Co., 27 A. 507, 18 R.I. 338, 49 Am. S.R. 772.</p> <p>44. N.Y.—Commercial Nat. Bank v. Heilbronner, 15 N.E. 701, 108 N. Y. 439.</p> <p>45. Fla.—Gadsden County Tobacco Co. v. Corry, 137 So. 255, 103 Fla. 217.</p> <p>25 C.J. p 355 note 62.</p> <p>46. Mass.—Greenleaf v. Moody, 13 Allen 363.</p> <p>25 C.J. p 355 note 63.</p> <p>47. U.S.—Dunnell v. Mason, C.C.R.I., 8 F.Cas.No.4,179, 1 Story 543.</p> <p>25 C.J. p 355 note 64.</p> <p>48. Md.—Sangston v. Maitland, 11 Gill & J. 286.</p> <p>49. Me.—Traub v. Milliken, 57 Me. 63, 2 Am.R. 14.</p> <p>50. Fla.—Gadsden County Tobacco Co. v. Corry, 137 So. 255, 103 Fla. 217.</p> <p>51. Okl.—People's Bank v. Frick Co., 73 P. 949, 13 Okl. 179.</p> <p>25 C.J. p 355 note 68.</p> | <p>Power to sell on credit see supra § 11 b.</p> <p>Acceptance held not warranted</p> <p>Express authority to extend credit and make adjustments does not authorize a factor to take a note to cover the customer's account included with several others, where it appears that the note was taken, not only for the purpose of adjusting and settling the account, but for the purpose of enabling the customer who gave the note to reestablish himself and continue in business.</p> <p>Fla.—Gadsden County Tobacco Co. v. Corry, 137 So. 255, 103 Fla. 217.</p> <p>52. N.Y.—Childs v. Waterloo Wagon Co., 57 N.Y.S. 520, 37 App.Div. 242, affirmed 60 N.E. 1108, 167 N.Y. 576.</p> <p>53. N.Y.—Childs v. Waterloo Wagon Co., supra.</p> <p>54. N.Y.—Corlies v. Cumming, 6 Cow. 181.</p> <p>25 C.J. p 355 note 72.</p> <p>55. Fla.—Gadsden County Tobacco Co. v. Corry, 137 So. 255, 103 Fla. 217.</p> <p>25 C.J. p 355 note 73.</p> |
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§ 14. — Pledge of Goods

The general rule, which is subject to qualifications, as in the case of estoppel, is that a factor has no power, without his principal's consent or authorization, to pledge the latter's goods for his own individual debts, so as to pass title or interest to the pledgee as against the principal.

A factor may pledge the goods of his principal to secure money to pay duties or other charges justified by the usage of trade,⁵⁶ and also to raise money to meet drafts drawn on the factor by the principal before the sale of the goods;⁵⁷ and the general course of dealing may be such as to justify the factor in assuming that he holds the goods with authority to pledge them.⁵⁸ However, it is a well settled rule of the common law that without the principal's consent or authorization a factor has no power to pledge his principal's goods for his own individual debts, so as to pass any title to, or interest in, the goods to the pledgee as against the principal;⁵⁹ and this rule applies even though a bill of lading has been issued to the factor for the goods,⁶⁰ or the active member of a firm of factors is also a partner of the consignor.⁶¹

The general rule applies where the pledgee has notice of the pledgor's character as factor or of the principal's interest in the goods,⁶² and except to the extent that it has been modified by the adoption

of the factors' acts, which are discussed *infra* §§ 64-67, the rule also applies even though the pledgee has no notice of the pledgor's character.⁶³ The general rule does not allow the factor to pledge by the indorsement and delivery of the bill of lading⁶⁴ or other symbol of the title⁶⁵ any more than by the delivery of the goods themselves.

The general rule has been applied where the factor has a lien for advances or other sums due him;⁶⁶ but according to other authorities a factor may pledge the goods of his principal to the extent of his lien,⁶⁷ although it has been held that the factor must demand from his principal the amount of his charges before he can pledge the goods to that extent.⁶⁸

Estoppel. The principal may, by some act other than the mere delivery of possession of the goods to the factor, estop himself from denying the right of the factor to treat the goods as his own and pledge them.⁶⁹

§ 15. — Insurance of Goods

A factor has power to insure the goods consigned to him, and may do so in his own name.

A factor has the power to insure the goods consigned to him,⁷⁰ and may do so in his own name.⁷¹

56. U.S.—*Evans v. Potter*, C.C.R.L., 8 F.Cas.No.4,569, 2 Gall. 12.

57. U.S.—*Boyce v. Bank of Commerce*, C.C.Mo., 22 F. 53. 25 C.J. p 352 note 7.

58. Mass.—*Osgood Bradley Car Co. v. Standard Steel Motor Car Co.*, 156 N.E. 440, 259 Mass. 302.

59. Cal.—*Imperial Valley Long Staple Cotton Growers' Ass'n v. Davidson*, 209 P. 58, 58 C.A. 551. Fla.—*Tropical State Bank v. Sunshine Motor Co.*, 188 So. 595, 137 Fla. 703.

Mass.—*International Trust Co. v. Webster Nat. Bank*, 154 N.E. 330, 258 Mass. 17, 49 A.L.R. 267.

S.D.—*De Bates v. Searls*, 216 N.W. 586, 52 S.D. 30, reheard 219 N.W. 559, 52 S.D. 603.

Tex.—*Shield Co. v. Schunder*, Civ. App., 81 S.W.2d 177.

Wis.—*Jacob E. Decker & Sons v. Milwaukee Cold Storage Co.*, 180 N.W. 256, 173 Wis. 87, 14 A.L.R. 416.

25 C.J. p 351 note 94.

Local usage cannot confer on a factor the power to pledge the goods of his principal.

U.S.—*Interstate Banking & Trust Co. v. Brown*, Tenn., 235 F. 32, 148 C. C.A. 526, certiorari denied 37 S.Ct. 15, 342 U.S. 632, 61 L.Ed. 537.

Pa.—*Newbold v. Wright*, 4 Rawle 195.

60. La.—*Lallande v. His Creditors*, 7 So. 895, 42 La. Ann. 705. 25 C.J. p 351 note 95.

61. U.S.—*Allen v. St. Louis Nat. Bank*, Iowa, 7 S.Ct. 460, 120 U.S. 20, 30 L.Ed. 573. 25 C.J. p 351 note 97.

62. Mo.—*St. Louis Nat. Bank v. Ross*, 9 Mo. App. 399. 25 C.J. p 352 note 1.

63. Fla.—*Tropical State Bank v. Sunshine Motor Co.*, 188 So. 595, 137 Fla. 703.

Tex.—*Shield Co. v. Schunder*, Civ. App., 81 S.W.2d 177. 25 C.J. p 351 note 99.

64. La.—*Lallande v. His Creditors*, 7 So. 895, 42 La. Ann. 705. 25 C.J. p 352 note 2.

65. U.S.—*Allen v. St. Louis Nat. Bank*, Iowa, 7 S.Ct. 460, 120 U.S. 20, 30 L.Ed. 573. 25 C.J. p 352 note 3.

Warehouse receipt

Where plaintiff delivered goods to factor, and conferred no authority on factor to store goods in public warehouse, factor's pledge of warehouse receipts was invalid.

La.—*Maxwell v. W. B. Thompson & Co.*, 143 So. 230, 175 La. 252, certiorari denied *Hibernia Bank &*

Trust Co., 53 S.Ct. 119, 287 U.S. 572, 77 L.Ed. 502.

66. Cal.—*Corpus Juris* cited in *Imperial Valley Long Staple Cotton Growers' Ass'n v. Davidson*, 209 P. 58, 59, 58 C.A. 551. 25 C.J. p 351 note 96.

67. Or.—*Merchants' Nat. Bank v. Pope*, 26 P. 622, 19 Or. 35. 25 C.J. p 352 note 8.

68. Tenn.—*Merchants' Nat. Bank v. Trenholm*, 12 Heisk. 520.

69. Fla.—*Tropical State Bank v. Sunshine Motor Co.*, 188 So. 595, 137 Fla. 703.

Mass.—*International Trust Co. v. Webster Nat. Bank*, 154 N.E. 330, 258 Mass. 17, 49 A.L.R. 267.

Tex.—*Shield Co. v. Schunder*, Civ. App., 81 S.W.2d 177. 25 C.J. p 352 note 11.

70. Ill.—*Shoenfeld v. Fleisher*, 73 Ill. 404.

Md.—*B. F. Sturtevant Co. v. Cumberland, Dugan & Co.*, 68 A. 351, 106 Md. 587, 14 Ann.Cas. 675.

Rule under statute

Cal.—*Imperial Valley Long Staple Cotton Growers' Ass'n v. Davidson*, 209 P. 58, 58 C.A. 551.

71. Md.—*B. F. Sturtevant Co. v. Cumberland, Dugan & Co.*, 68 A. 351, 106 Md. 587, 14 Ann.Cas. 675. 25 C.J. p 354 note 41.

A promise by a factor that he will write to his principal to get insurance done does not bind the principal to insure.⁷²

§ 16. — Other Powers

With various qualifications, the general rule is that a factor has no power to compromise a claim against his principal, to mortgage the latter's goods for his own debts, to reship goods to another market, or to submit claims to arbitration; but in the absence of restrictions, he may give the usual warranty as to the goods.

A factor has no implied power to compromise a claim for the purchase price of the goods sold,⁷³ or a claim against his principal;⁷⁴ but a consignee on a joint account with the consignor may compromise a claim arising on a sale of the goods consigned, so as to bind the consignor, if the compromise is reasonable and made in good faith.⁷⁵

To mortgage. At common law a factor cannot, without his principal's consent or authorization, mortgage the latter's goods for his own individual debts, so as to pass any title or interest in the goods to the mortgagee as against the principal;⁷⁶ and this rule applies even though the mortgagee has no notice of the mortgagor's character as factor.⁷⁷ The principal may, however, by some act other than the mere delivery of possession of the goods to the factor, estop himself from denying the right of the factor to mortgage them.⁷⁸

To reship. As a general rule, goods consigned to a factor for sale are to be sold in the market to which they are shipped and where the factor transacts his business, and he has no implied authority to reship them to another market for sale there.⁷⁹ A reshipment, however, may be authorized by custom or usage,⁸⁰ or such authority may be implied from the circumstances of the particular case.⁸¹

To submit to arbitration. A factor has no implied power to submit to arbitration claims arising out of sales or purchases made by him on behalf of his principal.⁸²

To warrant. In the absence of restrictions, a factor has power, in making a sale, to give the usual warranty as to the condition and quality of the goods,⁸³ where the sale is one which according to usage is usually attended with a warranty;⁸⁴ but in the absence of usage or instructions to that effect, he has no authority to warrant that the goods will remain sound for an indefinite period of time,⁸⁵ and under conditions endangering their soundness.⁸⁶

§ 17. Ratification or Repudiation

Acts performed by the factor on the principal's behalf or in his name, without proper authority, may be repudiated or ratified by the principal. It is not necessary to ratification that there be positive or direct confirmation of the factor's acts, but the principal must have full knowledge.

The principal cannot ratify an act of the factor which is not done on his behalf or in his name;⁸⁷ but where the factor performs acts on the principal's behalf or in his name, without proper authority therefor, the principal may either repudiate such acts⁸⁸ or he may ratify them, in which case the rights, duties, and liabilities of all persons concerned are as effectively established as if the acts ratified had been fully authorized in the beginning,⁸⁹ except that the ratification cannot operate to the prejudice of intervening rights of third persons.⁹⁰ If the factor disobeys his instructions, or otherwise exceeds his authority, and the principal, with full knowledge of his acts, either expressly or impliedly approves them, the principal, as well as the other parties concerned, becomes bound by, or

72. U.S.—Randolph v. Ware, Va., 3 Cranch 503, 2 L.Ed. 512.

73. Mass.—Greenleaf v. Moody, 13 Allen 363.
25 C.J. p 355 note 78.

74. N.Y.—Monnet v. Merz, 27 N.E. 827, 127 N.Y. 151.
25 C.J. p 355 note 79.

75. N.Y.—Cunningham v. Littlefield, 1 Edw. 104.

76. Fla.—Tropical State Bank v. Sunshine Motor Co., 188 So. 595, 137 Fla. 703.

Tex.—Shield Co. v. Schunder, Civ. App., 81 S.W.2d 177.

77. Fla.—Tropical State Bank v. Sunshine Motor Co., 188 So. 595, 137 Fla. 703.

Tex.—Shield Co. v. Schunder, Civ. App., 81 S.W.2d 177.

78. Fla.—Tropical State Bank v.

Sunshine Motor Co., 188 So. 595, 137 Fla. 703.

Tex.—Shield Co. v. Schunder, Civ. App., 81 S.W.2d 177.

Wash.—Fisher v. Thumlert, 76 P.2d 1018, 194 Wash. 70.

79. Ark.—Coyne v. Leslie, 199 S.W. 379, 131 Ark. 435.
25 C.J. p 354 note 45.

80. Ky.—Wallace v. Bradshaw, 6 Dana 382.

81. Mo.—Phillips v. Scott, 43 Mo. 86, 97 Am.D. 369.
25 C.J. p 354 note 47.

82. Ill.—Ingraham v. Whitmore, 75 Ill. 24.
25 C.J. p 355 note 76.

83. U.S.—Schuchardt v. Allens, N.Y., 1 Wall. 359, 17 L.Ed. 642.
25 C.J. p 353 note 34.

84. Wis.—Pickert v. Marston, 32 N. W. 550, 68 Wis. 465, 60 Am.R. 876.
25 C.J. p 353 note 35.

85. Me.—Randall v. Kehlor, 60 Me. 37, 11 Am.R. 169.

86. Mass.—Upton v. Suffolk County Mills, 11 Cush. 586, 59 Am.D. 163.
25 C.J. p 354 note 37.

87. Ky.—Pemberton v. Price & Teeple Piano Co., 139 S.W. 742, 144 Ky. 518.

88. La.—Faraldo v. Gumbel, 54 So. 821, 128 La. 287.
Minn.—State v. Edwards, 102 N.W. 697, 94 Minn. 225, 69 L.R.A. 667.

89. Ky.—Louisville Tobacco Warehouse Co. v. Lee, 189 S.W. 16, 172 Ky. 171.
25 C.J. p 356 note 87.

90. Mo.—Smith v. Jefferson Bank, 97 S.W. 247, 120 Mo.App. 527.

is entitled to enforce, rights growing out of, such acts.⁹¹

It is not necessary that there be any positive or direct confirmation of the factor's acts,⁹² and in some cases a presumption of ratification may arise from slight circumstances.⁹³ Thus, the principal ratifies the factor's unauthorized acts if he acquiesces therein, as by failing to disapprove them within a reasonable time after notice thereof,⁹⁴ or if, with a knowledge of the facts, he accepts the benefit of advances made by the factor,⁹⁵ or receives and accepts the proceeds or other benefits of the sale,⁹⁶ unless it is understood by both parties at the time of the receipt of the proceeds that the right of action against the factor is not to be affected,⁹⁷ or if he draws the balance of an account rendered by

the factor without objecting thereto,⁹⁸ or if he sues to enforce the contract of sale.⁹⁹

Ratification in part. A ratification must be of the whole transaction; the principal cannot ratify a part and repudiate the other part.¹

Knowledge of facts. In order that the subsequent conduct of the principal may constitute a ratification of the factor's unauthorized acts, it is necessary that the principal should have at the time a full knowledge of all the material facts,² and if he ratifies without such knowledge, he may, after acquiring it, repudiate the transaction,³ unless he is estopped to do so, as against a third person who would be prejudiced thereby.⁴ It is not necessary, in this connection, that the factor should disclose facts of a general nature of which he may reasonably presume the principal has knowledge.⁵

III. RIGHTS AND DUTIES AS BETWEEN FACTOR AND PRINCIPAL

§ 18. Duties and Liabilities of Principal in General

It is the principal's duty to comply with the terms and conditions of his contract with the factor.

It is the duty of the principal to comply with the terms and conditions of his contract with the fac-

tor,⁶ including the duty, as explained in subsequent sections, of compensating the factor for his services, infra §§ 41, 42, and of reimbursing him for expenses incurred, infra § 43; and for a breach of the contract the principal may be held liable to the factor for the damages caused thereby.⁷ A principal, however, is not liable for a failure to ship

91. Ga.—Pilcher & Dillon v. Smith, 121 S.E. 701, 31 Ga.App. 606.
Ky.—American Flour Co. v. Pickrell & Craig Co., 258 S.W.2d 477.
25 C.J. p 356 note 89.

Subsequent consentment

However, where a factor violates his instructions and the principal notifies him that he will be held liable therefor, a subsequent consentment to the factor will not of itself constitute a ratification of such violation of instructions.

La.—Maggoffin v. Cowan, 11 La. Ann. 554.

92. N.Y.—Russell v. Wetmore, 3 N. Y. Leg. Obs. 318.

Instruction to sell

Principal instructing factor to sell ratified and forgave previous disobedience of selling orders.

Tex.—Lamm v. Gohlman, Lester & Co., Civ. App., 279 S.W. 552.

93. N.Y.—Russell v. Wetmore, 3 N. Y. Leg. Obs. 318.

94. Ga.—Pilcher & Dillon v. Smith, 121 S.E. 701, 31 Ga.App. 606.
Ky.—American Flour Co. v. Pickrell & Craig Co., 258 S.W.2d 477.
25 C.J. p 356 note 92.

95. U.S.—Bradley v. Richardson, C. C., 3 F.Cas.No.1,786, 2 Blatchf. 343, 23 Vt. 720.

96. Tex.—Robinson v. Cleveland, Civ. App., 217 S.W. 171.
25 C.J. p 356 note 94.

97. S.C.—Smith v. Boyce, 23 S.C.L. 248.
25 C.J. p 357 note 95.

98. Ohio.—Woodward v. Suydam, 11 Ohio 360.
25 C.J. p 357 note 96.

99. La.—Surgat v. Potter, 12 Mart. 365.
25 C.J. p 357 note 97.

1. Mich.—Maxon v. Chaddock-Carney Sales Co., 161 N.W. 854, 195 Mich. 249.

2. Ky.—American Flour Co. v. Pickrell & Craig Co., 258 S.W.2d 477.
Minn.—State v. Edwards, 102 N.W. 697, 94 Minn. 225, 69 L.R.A. 667.
25 C.J. p 357 note 2.

3. Mo.—Smith v. Jefferson Bank, 97 S.W. 247, 120 Mo.App. 527.

4. Mo.—Smith v. Jefferson Bank, supra.

5. U.S.—Norris v. Cook, C.C.R.I., 18 F.Cas.No.10,305, 1 Curt. 464.
Duty to inform principal generally see infra § 25.

6. Or.—Winchell v. Pacific Fruit & Produce Co., 11 P.2d 815, 140 Or. 552, motion denied 14 P.2d 626, 140 Or. 552.

Construction of contract against principal

A fruit marketing contract, prepared by attorney for owner of land on which fruit was grown, must be construed most strongly against latter, if indefinite or ambiguous.
Or.—Pinnacie Packing Co. v. Herbert, 70 P.2d 31, 157 Or. 96, 111 A. L.R. 1055.

7. U.S.—Ewing v. Von Nieda, C.C.A. Minn., 76 F.2d 177.

Breach of contract to furnish tablets to distributor

Under contract whereby manufacturer was to furnish stomach tablets to distributor who was to have privilege of soliciting business at any place in United States, and who made deposit, which could be increased, as a guaranty fund for payment of merchandise, manufacturer's refusal to furnish tablets unless distributor complied with his demand for increased deposit and his unlawful demand to withdraw from certain states constitutes breach sufficient to support action for damages, and distributor, by disposing of tablets remaining on hand after manufacturer repudiated contract to furnish distributor with tablets did not waive manufacturer's repudiation.
U.S.—Ewing v. Von Nieda, supra.

goods to the factor, under a contract which is merely for the delivery, from time to time, of such goods as the principal sees fit.⁸

If the principal is dissatisfied with the factor's conduct in handling his goods, he has the right to pay the factor's charges and dispose of the goods himself, but he is not bound to do so.⁹

§ 19. Duties and Liabilities of Factor in General

A factor is bound to comply with the terms and conditions of his contract with his principal.

A factor is bound to comply with the terms and conditions of his contract with his principal,¹⁰ and, as explained in subsequent sections, is bound, in all his dealings for the principal, to act with good faith and loyalty, infra §§ 21, 22, with reasonable care, skill, and diligence, infra § 20, in obedience to the principal's instructions, infra §§ 23, 24, and scrupulously to account to the principal for his acts, in dealing on the principal's behalf.¹¹

It is the duty of a factor, empowered to pay freight and related charges, to resist the exaction of illegal charges by a carrier;¹² but, where under

the terms of the contract the factor is to pay freight and storage charges on goods actually sold by him, but he makes no sale and all the goods shipped to him are returned to the principal at his order and request, the factor is not liable for freight and storage charges thereon.¹³

§ 20. Skill and Diligence Required in General

A factor must ordinarily exercise reasonable care, skill, and diligence in his dealings for his principal, and is responsible only for such losses as result from his failure to do so.

A factor does not guarantee that he will not commit error;¹⁴ he is not an insurer,¹⁵ and is not bound to provide against extraordinary risks.¹⁶ However, as the presumption is that the principal relies on his sound discretion,¹⁷ it is his duty to exercise a reasonable degree of care, skill, and diligence in his employment, that is, the same degree of care and diligence which a prudent man would exercise in his own business; and consequently he is responsible to his principal for such losses, and for such only, as are incurred by reason of his failure to exercise such care, skill, and diligence,¹⁸ except where he

Held no breach of implied warranty
U.S.—Nephi Processing Plant, Inc. v. Western Co-op. Hatcheries, C.A. Utah, 242 F.2d 567.

8. Pa.—Kalamazoo Stationery Co. v. Sabold-Herb Co., 148 A. 865, 298 Pa. 530.

9. Mo.—J. T. Fargason Co. v. Pitts, 281 S.W. 148, 220 Mo.App. 135.

10. Cal.—National Bank of New Zealand v. Finn, 253 P. 757, 81 C. A. 317.

Or.—Winchell v. Pacific Fruit & Produce Co., 11 P.2d 815, 140 Or. 552, motion denied 14 P.2d 626, 140 Or. 552.

Contract construed

Provision that machine shipped on consignment must be purchased and converted to a "sale" under seller's regular sixty day terms was ambiguous, and, on record presented, in seller's action against corporate buyer and its sole stockholder on account annexed and for conversion, judge was not required as a matter of law to rule that provision meant either that consigned merchandise held by buyer for sixty days must be purchased or that, on sale of consigned merchandise, buyer could hold proceeds for sixty days before transmitting same.

Mass.—Rock-Ola Mfg. Corp. v. Music & Television Corp., 159 N.E.2d 417.

Deposit of security

Under contract whereby stomach tablets were furnished on consign-

ment and were to remain property of manufacturer until sold by distributor, who was to pay for them when sold on basis of cost of manufacture plus fifty cents per one hundred tablets, and who made deposit as guaranty fund for payment of merchandise, which deposit could be increased but not to exceed value of tablets on hand or on order and unaccounted for by distributor, manufacturer was not empowered to demand increased deposit sufficient to cover amount of tablets on hand or on order by distributor at a value composed of cost to manufacturer plus profit of fifty cents per one hundred when sold.

U.S.—Ewing v. Von Nieda, C.C.A. Minn., 76 F.2d 177.

Guaranty of accounts

Contract wherein factor guaranteed principal's accounts and agreed to advance eighty-five per cent of "net outstandings," remaining fifteen per cent to be settled monthly, if sufficient goods were shipped to protect factor for goods returned, disputes as to merchandise to be settled at principal's risk and expense, limited factor's liability to goods actually delivered to customers, especially in view of previous course of dealing.

N.Y.—Shoyer v. Edmund Wright-Ginsberg Co., 206 N.Y.S. 421, 210 App.Div. 645, modified on other grounds 148 N.E. 328, 240 N.Y. 223.

Picking and marketing crop

Where an agreement for the marketing of a crop of oranges provides that the consignee will "pick . . . and market oranges now growing," a failure to pick and market a part of the oranges before they freeze does not constitute a breach of contract entitling the owner to recover damages therefor, since, by the terms of the agreement, the consignee is not required to pick and market all of the crop.

Cal.—Belmont v. Milton, 110 P.2d 525, 43 C.A.2d 120.

11. Cal.—National Bank of New Zealand v. Finn, 253 P. 757, 81 C.A. 317.

12. U.S.—Adams v. Mills, Ill., 52 S. Ct. 589, 286 U.S. 397, 76 L.Ed. 1184.

13. Md.—Buffalo Pressed Steel Co. v. Kirwan, 113 A. 628, 138 Md. 60.

14. Mo.—Corpus Juris cited in F. G. Barton Cotton Co. v. Vardell, 275 S.W. 62, 65, 217 Mo.App. 691. Wyo.—Justice v. Brock, 131 P. 38, 133 P. 1070, 21 Wyo. 281.

15. Iowa.—Blanchard v. Elmer Wood Co., 214 N.W. 533, 204 Iowa 255.

16. La.—Johnson v. Martin, 11 La. Ann. 27, 66 Am.D. 193.

17. Ark.—Wynne, Love & Co. v. Schnabaum, 94 S.W. 50, 78 Ark. 402.

18. Ark.—Wynne, Love & Co. v. Bunch, 248 S.W. 286, 157 Ark. 395.

acts without compensation, in which case it has been held he is liable only for gross negligence.¹⁹

If he acts in good faith with due diligence and skill in discharging his duties, he incurs no liability to his principal,²⁰ such as for losses due to errors of judgment,²¹ or for losses from accidental causes which could not be prevented by reasonable skill and diligence on his part.²² If a factor is employed to sell goods in a foreign market he is not liable to the principal for the negligence and delay of the carrier, provided he exercises reasonable skill and ordinary diligence in selecting the carrier and attending to the shipping of the goods.²³

§ 21. Duty to Be Loyal

It is a factor's duty, in all transactions affecting the subject matter of his agency, to act with good faith and loyalty for the protection and advancement of the interests of his principal, and he may not make a secret profit for himself.

It is the duty of a factor, in all transactions affecting the subject matter of his agency, to act with

good faith and loyalty for the protection and advancement of the interests of his principal,²⁴ and so sedulously is this principle guarded that all the factor's acts which tend to violate this duty are regarded as frauds on the confidence bestowed on him,²⁵ although it has been held that, if no actual fraud is chargeable against him, his conduct should receive a liberal and favorable construction.²⁶ In accordance with this principle, a factor cannot place himself in any position which is antagonistic to his relation as agent for his principal,²⁷ as by acting in the same transaction for both his principal and the buyer,²⁸ unless it is clearly understood between the parties that he may do so.²⁹

Making profit out of agency. A factor cannot deal with the subject matter of his agency so as to make a profit out of it for himself in excess of his lawful compensation, and if he does so he may be compelled to account to his principal for all the benefits or profits so acquired,³⁰ unless the principal is estopped to question the factor's right to such

Cal.—Rhee v. L. K. Small Co., 256 P. 839, 83 C.A. 339.

Iowa.—Blanchard v. Elmer Wood Co., 214 N.W. 583, 204 Iowa 255.

Mo.—Corpus Juris cited in F. G. Barton Cotton Co. v. Vardell, 275 S.W. 62, 65, 217 Mo.App. 691.

Or.—Corpus Juris cited in Hollywood Orchards Co. v. Dennis, Kimball & Pope, 263 P. 66, 69, 124 Or. 71.

25 C.J. p 358 note 15.

Shipping fruit

Commission merchants undertaking to pack and ship fruit owe the duty only of exercising reasonable care when shipping fruit, that is, the degree of care which an ordinarily prudent man would employ.

Or.—Denny v. Wolff, 199 P. 603, 101 Or. 255, 17 A.L.R. 535.

19. Mo.—McLean v. Rutherford, 8 Mo. 109.

20. La.—Bogert v. Dorsey, 14 La. 430.

25 C.J. p 358 note 17.

21. Tex.—Webster v. Richardson, 119 S.W. 142, 55 Tex.Civ.App. 331. 25 C.J. p 358 note 18.

As to time, manner, or terms of sale see *infra* § 28.

22. S.C.—Huguenin v. Legare, 45 S. C.L. 204.

25 C.J. p 358 note 19.

23. Or.—Denny v. Wolff, 199 P. 603, 101 Or. 255, 17 A.L.R. 535.

S.C.—McCants v. Wells, 4 S.C. 381.

Shipping fruit

Commission merchants undertaking to ship fruit perform their full duty when they ship under a contract with the carrier wherein the carrier agrees to protect the fruit against

loss by frost, and the commission merchants cannot be held negligent in not placing false floors in the cars and lining them with paper, refrigerator cars being used.

Or.—Denny v. Wolff, 199 P. 603, 101 Or. 255, 17 A.L.R. 535.

24. Ark.—Marks v. F. G. Barton Cotton Co., 280 S.W. 674, 170 Ark. 637—Wynne, Love & Co. v. Bunch, 248 S.W. 286, 157 Ark. 395.

Iowa.—Blanchard v. Elmer Wood Co., 214 N.W. 583, 204 Iowa 255.

Tex.—Corpus Juris quoted in W. L. Moody Cotton Co. v. Curtis, Civ. App., 275 S.W. 216, 218.

25 C.J. p 358 note 22.

A mere refusal to permit an examination of his files and records by the principal does not show bad faith on the part of the factor, where the refusal is not persisted in, and an expert accountant employed by the principal is later permitted to examine the factor's books and records.

Pa.—James E. Mitchell Co. v. Hart-sell Mills Co., 120 A. 462, 276 Pa. 439.

25. Md.—Keighler v. Savage Mfg. Co., 12 Md. 383, 71 Am.D. 600.

Tex.—Corpus Juris quoted in W. L. Moody Cotton Co. v. Curtis, Civ. App., 275 S.W. 216, 218.

26. N.Y.—Drummond v. Wood, 2 Cai. 310.

Facts not showing fraud

That plaintiff, a commission merchant who sold yarns manufactured by defendant, making contracts in his own name after the price was approved by defendant, and guaranteed the sales, the orders as between

plaintiff and defendant not being subject to cancellation, and plaintiff being limited to a five per cent commission and three per cent off for payment within ten days, dealt with such goods as though he were owner was not evidence of fraud or misconduct, in view of plaintiff's claim that he was the purchaser and not an agent of defendant.

Pa.—James E. Mitchell Co. v. Hart-sell Mills Co., 120 A. 462, 276 Pa. 439.

27. La.—Gordon v. Goodrich, 11 La. Ann. 410.

N.Y.—Britton v. Ferrin, 63 N.E. 954, 171 N.Y. 235.

28. Ill.—Bensley v. Moon, 7 Ill.App. 415.

Billing goods to third person, for customer, not bad faith

That plaintiff, a commission merchant selling yarn for defendant, at a fixed commission, in several instances billed out such yarn, on orders from customers who had resold the yarn, at prices other than he reported to defendant, which higher price was collected by plaintiff, but was not retained by him, the excess being turned over to the customer, is not sufficient to show bad faith.

Pa.—James E. Mitchell Co. v. Hart-sell Mills Co., 120 A. 462, 276 Pa. 439.

29. U.S.—Talcott v. Chew, C.C.Ga., 27 F. 273.

30. Ark.—Corpus Juris cited in Stuttgart Rice Mill Co. v. Lock-ridge, 47 S.W.2d 596, 599, 185 Ark. 340.

Pa.—James E. Mitchell Co. v. Hart-

profits, by reason of his continuing to deal with the factor with knowledge of the transactions out of which the profits were acquired.³¹

§ 22. — Sale by Factor to Himself

A factor cannot purchase for himself the goods which the principal leaves with him for sale, unless the principal, with full knowledge of the facts, consents.

Unless the principal, with full knowledge of the facts, consents to the transaction, a factor cannot purchase for himself the goods or merchandise which the principal leaves with him for sale,³² and this rule applies even though the factor purchases at the price fixed by the principal,³³ or even though he purchases to save himself from loss on advances made on the goods.³⁴ Likewise, a factor cannot sell to a partnership of which he is a member.³⁵

Where a factor sells to himself, the sale is *prima facie* voidable,³⁶ and the principal may either ratify the sale, and recover from the factor, as purchaser,³⁷ or he may repudiate it and recover the actual value of the goods.³⁸ If a factor, after purchasing the goods himself, resells at an increased price, the principal may require him to account for what he has received on the resale.³⁹

sell Mills Co., 120 A. 462, 276 Pa. 439.

25 C.J. p 358 note 28.

Factors not showing secret profits

The fact that the factor on several occasions made delivery of packages of merchandise, shipped by the principal to certain customers at a specified price, to other customers at a higher price, which he collected, does not show that he made secret profits at the principal's expense, where he made an equal delivery of the same kind of merchandise, which he had contracted to sell to such customers, at the higher price to other buyers who had contracted to buy at the lower price, it being a mere interchange of the packages, and the factor not making profits in excess of his prescribed commission. Pa.—James E. Mitchell Co. v. Hart-sell Mills Co., *supra*.

31. Ill.—In re Cooper's Estate, 227 Ill.App. 332.

Profits from resale of horses for war purposes, through partner by whom only resale could be made. Ill.—In re Cooper's Estate, *supra*.

32. U.S.—Midwest Farmers v. U. S., D.C.Minn., 64 F.Supp. 91.

Ky.—Sutton v. Kiel Cheese & Butter Co., 159 S.W. 950, 155 Ky. 465.

25 C.J. p 359 note 30.

33. Minn.—Tilleny v. Wolverton, 48 N.W. 908, 46 Minn. 256.

N.J.—Porter v. Woodruff, 36 N.J. Eq. 174.

34. S.C.—Sims v. Miller, 16 S.E. 155, 37 S.C. 402, 34 Am.S.R. 762.

35. N.H.—Martin v. Moulton, 8 N.H. 504.

36. Minn.—Tilleny v. Wolverton, 48 N.W. 908, 46 Minn. 256.

25 C.J. p 359 note 34.

37. Mass.—Wadsworth v. Gay, 118 Mass. 44.

25 C.J. p 359 note 35.

Form of remedy of principal against factor generally see *infra* § 49.

38. Ky.—Sutton v. Kiel Cheese & Butter Co., 159 S.W. 950, 155 Ky. 465.

S.C.—Sims v. Miller, 16 S.E. 155, 37 S.C. 402, 34 Am.S.R. 762.

39. Minn.—Tilleny v. Wolverton, 48 N.W. 908, 46 Minn. 256.

N.H.—Martin v. Moulton, 8 N.H. 504.

40. Ark.—Marks v. F. G. Barton Cotton Co., 280 S.W. 674, 170 Ark. 637.

Cal.—Bare v. Richman & Samuels of New York, 140 P.2d 895, 60 C.A. 2d 413—Bones v. Fusco, 69 P.2d 911, 21 C.A.2d 476.

Ga.—Planters' Warehouse Co. v. Hardin, 118 S.E. 441, 30 Ga.App. 459.

Iowa.—Blanchard v. Elmer Wood Co., 214 N.W. 583, 204 Iowa 255—Corpus Juris cited in Alley, Greene &

Pipe Co. v. Thornton Creamery Co., 207 N.W. 767, 768, 201 Iowa 621.

Ky.—American Flour Co. v. Pickrell & Craig Co., 258 S.W.2d 477.

Miss.—Gridley, Maxon & Co. v. Turner, 176 So. 733, 179 Miss. 890, suggestion of error overruled 177 So. 362, 179 Miss. 890.

Mo.—Corpus Juris cited in F. G. Barton Cotton Co. v. Vardell, 275 S.W. 62, 65, 217 Mo.App. 691.

Or.—Corpus Juris quoted in Hollywood Orchards Co. v. Dennis, Kimball & Pope, 263 P. 66, 69, 124 Or. 71.

25 C.J. p 359 note 38½.

41. U.S.—Heffner v. Gwynne-Treadwell Cotton Co., Ark., 160 F. 635, 87 C.C.A. 606.

25 C.J. p 359 note 39.

42. U.S.—Heffner v. Gwynne-Treadwell Cotton Co., *supra*.

25 C.J. p 359 note 40.

43. Md.—B. F. Sturtevant Co. v. Cumberland, 68 A. 351, 106 Md. 587, 14 Ann.Cas. 675.

25 C.J. p 359 note 41.

44. Ind.—Rapp v. Grayson, 2 Blackf. 130.

25 C.J. p 360 note 47.

45. Ga.—Citizens' Bank v. Rudisill, 60 S.E. 818, 4 Ga.App. 37.

25 C.J. p 359 note 42.

§ 23. Duty to Obey Instructions

- a. General rule
- b. Qualifications

a. General Rule

As a general rule, a factor must faithfully follow the instructions of his principal, and is liable for any loss resulting from his failure to do so, provided the instructions are expressed in clear and unambiguous language.

As stated in *Corpus Juris*, which has been quoted and cited with approval, it is a well settled general rule that a factor is bound faithfully to follow the directions and instructions of his principal, and that he will be liable to his principal for any loss or injury which may result from his failure to do so.⁴⁰ This rule applies not only to instructions accompanying the consignment,⁴¹ but also to subsequent instructions,⁴² except that, where the consignment is made under an express agreement, the factor is not bound to follow subsequent instructions inconsistent with such agreement.⁴³ The duty to obey instructions extends to instructions regarding the shipment of the goods.⁴⁴

If the principal's instructions are clear, the factor is generally bound to follow them without regard to how unbusinesslike they may be,⁴⁵ and, as a general rule, no usage or custom in a particular

market,⁴⁶ and no motive connected with the interest of the principal, however honestly entertained or wisely adopted,⁴⁷ will justify a departure from them; and it has been held that the factor is liable even though his departure from his instructions occurs through a mistake.⁴⁸ If, however, the factor, with proper care and diligence, faithfully and bona fide carries out the instructions of his principal, and a loss results, such loss must fall on the principal.⁴⁹ If the factor's written instructions refer him to a general agent, he may be justified in obeying new orders of such agent, although they are contrary to the first written instructions.⁵⁰

Acts outside scope of employment. The principal cannot, by instructions, require the factor to perform acts not within the usual scope of his agency, unless the factor undertakes by agreement to do so.⁵¹

Gratuitous service. The fact that the factor is acting without compensation will not prevent him from incurring liability for a departure from his instructions.⁵²

Requisites of instructions. It is not necessary that the instructions be couched in imperious or abrupt language;⁵³ but in order that they may be binding on the factor, so as to render him liable for failing to follow them, it is necessary that they be definite and expressed in clear and unambiguous language.⁵⁴ The mere communication of an expectation or hope as to the price to be obtained,⁵⁵

or of a wish as to the manner, mode, or terms of the sale,⁵⁶ is ordinarily insufficient to constitute an instruction which will be binding on the factor, unless the wish is expressed in such a manner or under such circumstances as to indicate an intention on the part of the principal that it shall be followed.⁵⁷

If the agreement or instructions are so ambiguous as to be capable of several constructions, and the factor acts in good faith in following one construction, he is not liable because of his failure to follow the construction which the principal intended.⁵⁸

b. Qualifications

A factor is not liable for failing to carry out his principal's instructions if without any fault on his part he is unable to do so, as by reason of a sudden emergency.

Where the factor uses reasonable diligence to comply with his instructions and without any fault on his part is unable to do so, he is not liable to his principal for a failure to carry out the instructions.⁵⁹ Inability to comply with instructions will not, however, justify a departure therefrom,⁶⁰ except to the extent that such departure is justified by custom or usage.⁶¹

Emergency. So, where by some sudden emergency or intervening necessity, or other unexpected event, it becomes impossible for the factor to comply with the exact terms of his instructions, he is not liable if in good faith he departs therefrom,⁶²

46. S.C.—Barksdale v. Brown, 10 S. C.L. 517, 9 Am.D. 720.

25 C.J. p 359 note 43.

Effect of custom or usage on powers and duties generally see Customs and Usages § 19.

47. U.S.—Courcier v. Ritter, Pa., 6 F.Cas.No.3,282, 4 Wash.C.C. 549.

Cal.—Rhee v. L. K. Small Co., 256 P. 839, 83 C.A. 339.

Ga.—Hatcher v. Comer, 73 Ga. 418.

48. N.Y.—Rundle v. Moore, 3 Johns. Cas. 36.

Tex.—Gohman, Lester & Co. v. Allen, Civ.App., 254 S.W. 1007.

25 C.J. p 360 note 45.

Error in telegram

That telegram directing sale of cotton gave shipper's name as "W. S. Allen," instead of "W. F. Allen," was not the proximate cause of factors' failure to sell the cotton as instructed, where the facts show that the factor in the exercise of ordinary care should have discovered the error, and should have known that the telegram referred to the cotton of W. F. Allen.

Tex.—Gohman, Lester & Co. v. Allen, supra.

49. Mo.—Sigerson v. Pomeroy, 13 Mo. 620.

25 C.J. p 360 note 46.

50. U.S.—Manella, Pujals & Co. v. Barry, Md., 3 Cranch 415, 2 L.Ed. 484.

51. Tenn.—Thompson v. Woodruff, 7 Coldw. 401.

25 C.J. p 360 note 48.

52. U.S.—Walker v. Smith, Pa., 29 F.Cas.No.17,086, 4 Dall. 389, 1 Wash. C.C. 152.

53. N.Y.—Marfield v. Douglass, 3 N. Y.Super. 360, reversed on other grounds 3 N.Y. 62, 8 N.Y.Leg.Obs. 110.

25 C.J. p 360 note 50.

54. Ark.—Marks v. F. G. Barton Cotton Co., 280 S.W. 674, 170 Ark. 637.

Md.—B. F. Sturtevant Co. v. Cumberland, 68 A. 351, 106 Md. 587, 14 Ann.Cas. 675.

25 C.J. p 360 note 51.

55. N.D.—Turner v. Crumpton, 130 N.W. 937, 21 N.D. 294, Ann.Cas. 1913C 1015.

25 C.J. p 360 note 52.

56. Pa.—Harper v. Kean, 11 Serg. & R. 280.

57. U.S.—William & James Brown & Co. v. McGran, Ga., 14 Pet. 479, 10 L.Ed. 550.

Tenn.—Beadles v. Hartmus, 7 Baxt. 476.

58. U.S.—Courcier v. Ritter, Pa., 6 F.Cas.No.3,282, 4 Wash.C.C. 549.

25 C.J. p 360 note 55.

59. Iowa.—Blanchard v. Elmer Wood

Co., 214 N.W. 583, 204 Iowa 255.

Or.—Corpus Juris quoted in Hollywood Orchards Co. v. Dennis, Kimball & Pope, 263 P. 66, 69, 124 Or. 71.

25 C.J. p 360 note 56.

60. Mo.—Pomeroy v. Sigerson, 22 Mo. 177.

Effect of advances by factor see infra § 24.

61. N.C.—Hagan v. Paine, 2 N.C. 272.

Or.—Hollywood Orchards Co. v. Dennis, Kimball & Pope, 263 P. 66, 69, 124 Or. 71.

62. Or.—Corpus Juris quoted in Hollywood Orchards Co. v. Dennis, Kimball & Pope, 263 P. 66, 69, 124 Or. 71.

25 C.J. p 360 note 60.

although such departure turns out to the disadvantage of the principal.⁶³

§ 24. — Effect of Advances; Sale for Reimbursement

As a general rule, if a factor has made advances or incurred liabilities on account of goods consigned to him, and the principal, after a reasonable notice and demand, fails to repay the advances or discharge the liabilities, and the factor has reasonable grounds to apprehend a loss, he may sell, in the usual course of trade, as much of the goods as may be necessary to reimburse such advances or meet such liabilities, although he violates the principal's instructions in doing so, unless there is an express agreement which controls or varies the right.

The mere fact that a factor has advanced money on a consignment does not authorize him wholly to disregard the principal's instructions as to a sale.⁶⁴ As a general rule, however, where a factor makes advances or incurs liabilities on account of the goods consigned to him, and the principal, after a reasonable notice and demand, fails to repay the advances or discharge such liabilities,⁶⁵ and the factor has reasonable grounds to apprehend a loss by obeying the instructions, either because of the insolvency of the principal,⁶⁶ or because of the insufficiency in value of the consignment to repay the advances,⁶⁷ he has the right to sell in the usual course of trade as much of the goods as may be necessary to reimburse such advances or meet such

liabilities. This is true even though he violates the principal's instructions in doing so,⁶⁸ unless there is an express agreement between him and his principal which controls or varies this right,⁶⁹ and as in other cases an existence of a usage to sell to pay advances will not control an express contract between the parties as to the sale of the goods.⁷⁰

In the absence of a contract to the contrary, a factor who has made advances is not bound to hold the goods, as instructed, where the principal fails, after a reasonable notice, to deposit more margins,⁷¹ and where, in the opinion of the factor, the goods are not sufficient security for the balance due him,⁷² even though the customer is solvent and the factor holds his note.⁷³ A factor, however, who has advanced generally on the goods in his hands cannot, in the absence of special authority, sell a debt existing in open account arising from the sale of a portion of the consignment so as to transfer a good title to the claim, especially where the debt has not yet matured and where the principal is not in default and has not been called on to repay the advances.⁷⁴

Refusal to sell. Unless a sale at the time or on the terms ordered by his principal will prejudice the factor's security,⁷⁵ the fact that a factor has made advances on goods does not justify him in refusing to sell as directed by the principal,⁷⁶ and,

63. Cal.—Bare v. Richman & Samuels of New York, 140 P.2d 895, 60 C.A.2d 413.

Mass.—Greenleaf v. Moody, 13 Allen 363.

Or.—Hollywood Orchards Co. v. Dennis, Kimball & Pope, 263 P. 66, 124 Or. 71.

64. Ark.—Marks v. F. G. Barton Cotton Co., 280 S.W. 674, 170 Ark. 637.

Cal.—Bare v. Richman & Samuels of New York, 140 P.2d 895, 60 C.A.2d 413—Cooper v. American Fruit Growers, Inc., of California, 30 P. 2d 558, 137 C.A. 494—Rhee v. L. K. Small Co., 256 P. 839, 83 C.A. 339.

Okl.—Moody v. Thompson, 166 P. 96, 65 Okl. 262.
25 C.J. p 360 note 63.

65. Ark.—Brown v. Southern Grocery Co., 271 S.W. 342, 168 Ark. 547, 40 A.L.R. 343.

Ga.—Planters' Warehouse Co. v. Hardin, 118 S.E. 441, 30 Ga.App. 459.

Ind.—Duffy v. England, 96 N.E. 704, 176 Ind. 575.
25 C.J. p 361 note 64.

66. Ga.—Cummins v. Boston, 25 Ga. 277.

Frost v. Powell, 72 S.E. 719, 10 Ga.App. 95.

67. Ga.—Frost v. Powell, supra.

68. Ark.—Corpus Juris cited in Brown v. Southern Grocery Co., 271 S.W. 342, 345, 168 Ark. 547, 40 A.L.R. 333.

Ga.—Planters' Warehouse Co. v. Hardin, 118 S.E. 441, 30 Ga.App. 459.

Mo.—J. T. Fargason Co. v. Pitts, 281 S.W. 148, 220 Mo.App. 135—J. T. Fargason & Co. v. Coleman, App., 272 S.W. 1003—Bailey-Ball-Pumphrey Co. v. Branham, App., 236 S.W. 379.

Tex.—Geo. Finberg Co. v. Jamison, Civ.App., 260 S.W. 884.

25 C.J. p 361 note 67.

Enforcement of lien see infra § 48.

Effect of garnishment

The fact that the factor has been garnished does not deprive him of his right of selling to reimburse himself for advances, since the creditor is by the process only subrogated to the rights of the debtor.

Me.—White Mountain Bank v. West, 46 Me. 15.

69. Ga.—Planters' Warehouse Co. v. Hardin, 118 S.E. 441, 30 Ga.App. 459.

25 C.J. p 361 note 68.

70. Pa.—Porter v. Patterson, 15 Pa. 229.

Tex.—Porter v. Heath, 2 Tex.A.Civ. Cas. § 124.

71. Ark.—Brown v. Southern Grocery Co., 271 S.W. 342, 168 Ark. 547, 40 A.L.R. 333.

Ga.—Meinhard-Feirst-Doyle Co. v. De Loach, 91 S.E. 446, 19 Ga.App. 323.
S.C.—McCutcheon v. Maybank, 134 S.E. 217, 136 S.C. 79.

25 C.J. p 361 note 71.

Agreement to recall sale

Offer of consignee, who had made advancements to shipper, to recall sale made after shipper's failure to furnish margins, on shipper's complying with certain conditions, was held without consideration, precluding shipper from complaining of failure to make offer good.

S.C.—McCutcheon v. Maybank, 134 S.E. 217, 136 S.C. 79.

72. Ga.—Leffler v. Pearson, 86 S.E. 256, 17 Ga.App. 57.

73. Ga.—Leffler v. Pearson, supra.

74. N.Y.—Commercial Nat. Bank v. Heilbronner, 15 N.E. 701, 108 N.Y. 439.

75. Or.—Winchell v. Pacific Fruit & Produce Co., 11 P.2d 815, 140 Or. 552, motion denied 14 P.2d 626, 140 Or. 552.
25 C.J. p 361 note 76.

76. Or.—Winchell v. Pacific Fruit & Produce Co., supra.
25 C.J. p 361 note 77.

if he is instructed to sell immediately, he may be held liable for any loss resulting from his failure to do so.⁷⁷

Consignment with instructions. Where, at the time the consignment is made, instructions are given to the factor as to the time, manner, or price of the sale, which instructions are assented to by the factor, the mere fact that he subsequently makes advances or incurs liabilities on account of the goods gives him no right to sell for his reimbursement, in violation of such instructions,⁷⁸ especially where the principal stands ready and offers to reimburse and discharge such advances and liabilities.⁷⁹ Where, however, the factor gives his principal reasonable notice to repay the advances and such repayment is refused, the factor is entitled to sell for reimbursement, even though the sale is in violation of the principal's instructions;⁸⁰ and within this exception notice to the principal of the amount of advances and a demand for repayment are essential to the right of the factor to sell.⁸¹

Where goods are consigned to be sold at a certain limited price and the principal fails to indemnify the factor after reasonable notice, the factor may, in the exercise of a sound discretion, sell as much of the consignment as is necessary for his protection at the current price, although that price is lower than the price previously fixed by the principal;⁸² and, where the factor and principal reside in different states, the factor's right to make such a sale of goods in his possession is not affected by the fact that he has brought a suit in the forum of the principal's residence for his advances, asking that the goods be sold under order of court.⁸³

Consignment without instructions. As a general rule, where the consignment is made without in-

structions, and the factor makes advances or incurs liabilities, either before or at the time of receiving the consignment, he is clothed with the right to sell in the exercise of a sound discretion for his reimbursement at such time and in such mode as the usage of trade and general duty require, and the consignor has no power by any subsequent orders to suspend or control this right of sale,⁸⁴ except as to the surplus not necessary to effect the reimbursement,⁸⁵ and especially where the consignor is insolvent, and the consignment constitutes the only fund for indemnity.⁸⁶ In some states, however, this rule is modified to the extent that the factor cannot sell in violation of subsequent instructions not to sell, without first giving reasonable notice to his principal and demanding repayment of the advances.⁸⁷

§ 25. Duty to Inform Principal

A factor must inform his principal of any facts or circumstances, relating to the consignment, which may make it necessary for the principal to take measures to protect his interests.

As stated in *Corpus Juris*, which has been quoted and cited with approval, it is the duty of the factor to inform the principal of all facts or circumstances, relating to the consignment, which may make it necessary for the principal to take measures for the protection of his interests; and the factor will be liable to his principal for any loss that may result from his failure to discharge such duty,⁸⁸ or from his negligence in transmitting the information.⁸⁹

It is the duty of the factor to notify the principal of any facts, not known to him, which vitally affect the validity and reliability of orders forwarded to the principal,⁹⁰ or of the seizure of the goods under

77. N.Y.—*La Farge v. Kneeland*, 7 Cow. 456—*Bell v. Palmer*, 6 Cow. 128.

78. U.S.—*Heffner v. Gwynne-Treadwell Cotton Co.*, Ark., 160 F. 635, 87 C.C.A. 606.
25 C.J. p 361 note 79.

79. U.S.—*William & James Brown & Co. v. McGran*, Ga., 14 Pet. 479, 10 L.Ed. 550—*Heffner v. Gwynne-Treadwell Cotton Co.*, Ark., 160 F. 635, 87 C.C.A. 606.

80. Ala.—*Lord v. Werneth*, 46 So.2d 236, 35 Ala.App. 290.

N.C.—*S. Blaisdell Co. v. Lee*, 37 S.E. 509, 127 N.C. 365.
25 C.J. p 362 note 81.

81. Ala.—*Lord v. Werneth*, 46 So. 2d 236, 35 Ala.App. 290.

N.M.—*Goesling v. Gross*, 113 P. 608, 15 N.M. 721.
25 C.J. p 362 note 82.

82. N.C.—*S. Blaisdell Co. v. Lee*, 37 S.E. 509, 127 N.C. 365.
25 C.J. p 362 note 83.

83. N.C.—*S. Blaisdell Co. v. Lee*, supra.

84. Miss.—*Gridley, Maxon & Co. v. Turner*, 176 So. 733, 179 Miss. 890, suggestion of error overruled 177 So. 362, 179 Miss. 890.

Mo.—*J. T. Fargason Co. v. Pitts*, 281 S.W. 148, 220 Mo.App. 135.
25 C.J. p 362 note 85.

85. Tex.—*Cleveland v. Jamison*, Civ. App., 182 S.W. 1175.
25 C.J. p 362 note 86.

86. U.S.—*William & James Brown & Co. v. McGran*, Ga., 14 Pet. 479, 10 L.Ed. 550.

87. N.Y.—*Marfield v. Goodhue*, 3 N.Y. 62, 8 N.Y.Leg.Obs. 110.
25 C.J. p 362 note 88.

88. N.Y.—*Shoyer v. Edmund Wright-Ginsberg Co.*, 148 N.E. 328, 240 N.Y. 223.

Or.—*Corpus Juris* quoted in *Hollywood Orchards Co. v. Dennis, Kimball & Pope*, 263 P. 66, 69, 124 Or. 71.

Va.—*Corpus Juris* quoted in *Mann v. W. C. Crenshaw & Co.*, 163 S.E. 375, 386, 158 Va. 193.

25 C.J. p 362 note 90.

Duty to disclose name or insolvency of purchaser see *infra* § 31.

89. Cal.—*Bambridge v. Crane*, 182 P. 779, 41 C.A. 259.

25 C.J. p 363 note 91.

90. N.Y.—*Shoyer v. Edmund Wright-Ginsberg Co.*, 148 N.E. 328, 240 N.Y. 223.

attachment proceedings against the principal,⁹¹ or of the nonpayment of a check or note taken for the purchase price of the goods,⁹² or of his inability to effect insurance, where it is his duty to insure,⁹³ or of his inability to sell the goods as instructed.⁹⁴ However, a mere failure to notify the principal of a certain fact will not render the factor liable where no damages result from such failure;⁹⁵ nor is the factor liable for failing to inform the principal in regard to matters of which the principal has the means of acquiring knowledge.⁹⁶

Depreciation of goods. Where the consignment is without instructions, and the factor has authority to sell in his discretion, he is not required to notify the principal of a depreciation in the value of the goods.⁹⁷

§ 26. Duty as to Care of Goods

It is the factor's duty to care for and protect, with reasonable prudence and diligence, goods consigned to him, and, if he does so, he is not responsible for any loss not due to any fault on his part. He should not substitute, for the principal's goods, other goods of the same kind, or mingle the principal's goods with those of himself or of others.

Although a contract may limit the liability of a factor in this respect,^{97.50} it is generally the factor's duty to care for and protect the goods which have been consigned to him, with a reasonable degree of

prudence and diligence,⁹⁸ that is, such care as a reasonably prudent man would take of his own property in a similar situation.⁹⁹ In exercising such care he may incur reasonable expenses for the benefit of the goods,¹ and may employ counsel to defend actions concerning the goods.² If he exercises such prudence and diligence, he is not liable for any loss of, or injury to, the goods while in his possession,³ as where the loss or injury is caused by a vis major,⁴ or act of God.⁵ On the other hand, if the factor fails to exercise reasonable prudence and diligence in caring for the goods, he is liable for any loss or injury that results therefrom.⁶

Unless instructed to the contrary, he may follow the usage or custom of trade in his care of the goods,⁷ provided the usage or custom is a reasonable one,⁸ has the quality of certainty,⁹ and is not inconsistent with the law.¹⁰

Intermingling goods; substitution. The factor cannot substitute for the goods consigned other goods of the same kind,¹¹ even though he is authorized to deal with them as if they were his own;¹² and as a general rule he should keep the goods of his principal unmixed with those of himself or of others,¹³ and, if he intermingles his principal's goods with his own and consigns the aggregate to a third person to be sold, the factor will be

91. Pa.—Moore v. Thompson, 9 Phila. 164.

92. N.J.—Park v. Miller, 27 N.J.Law 338.

25 C.J. p 363 note 93.

93. U.S.—De Tastett v. Crousillat, Pa., 7 F.Cas.No.3,828, 2 Wash.C.C. 132.

Duty as to insurance see infra § 27.

94. N.C.—Spruill v. Davenport, 20 S. E. 1022, 116 N.C. 34.

25 C.J. p 363 note 96.

95. Mass.—Dwight v. Whitney, 15 Pick. 179.

Pa.—Myers v. Brice, 2 Pennyp. 382.

25 C.J. p 363 note 97.

96. Wyo.—Koshland v. Weber, 148 P. 369, 152 Pa. 167, 23 Wyo. 241.

25 C.J. p 363 note 98.

97. Md.—Adams v. Capron, 21 Md. 186, 83 Am.D. 566.

97.50 Ga.—Light v. Smith, 71 S.E. 2d 844, 86 Ga.App. 591.

Responsibility not assumed

Under the provisions of a consignment contract whereby consignee for sale assumed no responsibility for loss or damage to trailer by fire, accident, or otherwise, the term "or otherwise" was ejusdem generis and referred to loss of the same kind or nature as "fire or accident" and would

not serve to free the consignee of responsibility for standing idly and negligently by and permitting someone else to take the trailer.

Ga.—Light v. Smith, supra.

98. Ga.—Light v. Smith, supra.

Or.—*Corpus Juris* cited in Hollywood Orchards Co. v. Dennis, Kimball & Pope, 263 P. 66, 69, 124 Or. 71—Denny v. Wolff, 199 P. 603, 101 Or. 255, 17 A.L.R. 535.

Va.—*Corpus Juris* quoted in Mann v. W. C. Crenshaw & Co., 163 S.E. 375, 386, 158 Va. 193.

25 C.J. p 363 note 1.

99. N.J.—Ives v. Freisinger, 57 A. 401, 70 N.J.Law 257.

Or.—Hollywood Orchards Co. v. Dennis, Kimball & Pope, 263 P. 66, 124 Or. 71.

Va.—Mann v. W. C. Crenshaw & Co., 163 S.E. 375, 158 Va. 193.

1. Me.—Colley v. Merrill, 6 Me. 50. Reimbursement for expenditures see infra § 43.

2. N.Y.—Monnett v. Merz, 27 N.E. 827, 127 N.Y. 151.

3. Ala.—Foster v. Bush, 16 So. 625, 104 Ala. 662.

25 C.J. p 363 note 5.

4. N.H.—Jones v. Sinclair, 2 N.H. 319, 9 Am.D. 75.

Tex.—Wilkinson v. Williams, 35 Tex. 181.

25 C.J. p 363 note 6.

5. Ill.—Dunbar v. Gregg, 44 Ill.App. 527.

25 C.J. p 363 note 7.

6. Va.—*Corpus Juris* quoted in Mann v. W. C. Crenshaw & Co., 163 S.E. 375, 386, 158 Va. 193.

25 C.J. p 363 note 12.

7. Minn.—Davis v. Kobe, 30 N.W. 662, 36 Minn. 214, 1 Am.S.R. 663.

25 C.J. p 363 note 8.

8. Tex.—Vincent v. Rather, 31 Tex. 77, 98 Am.D. 516.

9. Ind.—Wallace v. Morgan, 23 Ind. 399.

10. Tex.—Kaufman v. Edwards, 2 Tex.Unrep.Cas. 132.

11. N.Y.—Seymour v. Wyckoff, 10 N. Y. 213.

25 C.J. p 363 note 13.

12. N.Y.—Seymour v. Wyckoff, supra.

25 C.J. p 363 note 13 [b].

13. Cal.—Calistoga Vineyard Co. v. Luchetti, 18 P.2d 729, 129 C.A. 374

—*Corpus Juris* cited in Imperial Valley Long Staple Cotton Growers' Ass'n v. Davidson, 209 P. 58, 60, 58 C.A. 551.

S.C.—Pinckney v. Dunn, 2 S.C. 314.

regarded as having received the proceeds of sale of his principal's goods and is liable for the full amount.¹⁴ However, he may be authorized by usage or custom in storing the goods in a mass with other goods of the same grade,¹⁵ although he must keep account of the property of the different consignors.¹⁶

After termination of agency, and reasonable notice to the principal to take the goods back, the factor is liable only for gross negligence.¹⁷

Subagent. A subagent appointed by a factor without authority from the principal may receive goods consigned to the factor, as his representative, and place them in a warehouse for the owner, but he has no authority, by virtue of such relation, to store them in his own name either directly or indirectly.¹⁸

§ 27. Duty as to Insurance

It is the factor's duty to insure the goods when such obligation is imposed on him by custom or usage, the principal's instructions, or agreement or course of dealing. Under such obligation, it is his duty to exercise reasonable prudence and diligence to effect reasonable and proper insurance, and, although he may become liable as insurer by reason of his negligence in failing to effect insurance, he cannot, without his principal's consent, take the risk on himself as an insurer.

Although a factor has power to insure his principal's goods, as explained supra § 15, as a general rule, he is under no obligation to do so,¹⁹ unless such obligation is imposed on him by a general usage or custom to that effect,²⁰ by the instructions of the principal,²¹ or by an agreement or course of dealing between him and his principal.²² If the express contract between the parties does not re-

quire the factor to insure, such obligation is not imposed on him by a notice on the invoice sent with the goods consigned, to the effect that the goods are to be covered by insurance for the benefit of the consignor.²³

Extent of duty. Where a factor is under an obligation to insure, such obligation does not import that he shall be personally liable as insurer,²⁴ but his obligation is fulfilled by his obtaining reasonable and proper insurance,²⁵ which is generally presumed to mean full insurance,²⁶ unless it is not the custom or practice to effect full insurance.²⁷ The factor is not required to effect the insurance in the name of the principal, or to place the policy in his possession or control.²⁸ If reasonable diligence is used by the factor to insure the goods, he is not liable in case he is unable to effect the insurance;²⁹ and he may be excused from effecting insurance by a letter from his principal stating that he had requested a third person to effect it.³⁰ If a policy effected by him purports to cover goods belonging to him and also goods held on commission, the insurance inures to the benefit of the principal.³¹

The factor becomes liable as insurer if he does not use reasonable prudence and diligence to effect the insurance,³² or fails to inform his principal of his inability to effect it;³³ but it has been held that in such cases he is entitled to credit for premiums which should have been paid.³⁴ A factor is also liable as insurer if he insures in his own name and fails to collect the insurance.³⁵

Right to become insurer. Although a factor who is instructed to insure may become liable as insurer by reason of his negligence in respect of the

14. Me.—Williams v. White, 70 Me. 138.

15. Cal.—Calistoga Vineyard Co. v. Luchetti, 18 P.2d 729, 129 C.A. 374.—Imperial Valley Long Staple Cotton Growers' Ass'n v. Davidson, 209 P. 58, 58 C.A. 551.

Minn.—Davis v. Kobe, 30 N.W. 662, 36 Minn. 214, 1 Am.S.R. 663. 25 C.J. p 364 note 16.

16. Ill.—Trumbull v. Union Trust Co., 33 Ill.App. 319, affirmed 27 N. E. 24, 137 Ill. 146. 25 C.J. p 364 note 17.

17. Mich.—Barrows v. Cushway, 37 Mich. 481.

18. Cal.—Akron Cereal Co. v. San Francisco First Nat. Bank, 84 P. 778, 3 C.A. 198.

19. Md.—B. F. Sturtevant Co. v. Cumberland Dugan & Co., 68 A. 351, 106 Md. 587, 14 Ann.Cas. 675. 25 C.J. p 364 note 22.

20. U.S.—Kingston v. Wilson, Pa., 14 F.Cas.No.7,823, 4 Wash.C.C. 310. Md.—B. F. Sturtevant Co. v. Cumberland Dugan & Co., 68 A. 351, 106 Md. 587, 14 Ann.Cas. 675. 25 C.J. p 364 note 23.

21. Md.—B. F. Sturtevant Co. v. Cumberland Dugan & Co., supra. 25 C.J. p 364 note 24.

22. Md.—B. F. Sturtevant Co. v. Cumberland Dugan & Co., supra. 25 C.J. p 364 note 25.

23. Md.—B. F. Sturtevant Co. v. Cumberland Dugan & Co., supra. 25 C.J. p 364 note 25 [e].

24. Mass.—Johnson v. Campbell, 120 Mass. 449.

25. Mass.—Johnson v. Campbell, supra.

26. N.H.—Ela v. French, 11 N.H. 356.

N.Y.—Beardsley v. Davis, 52 Barb. 159.

27. N.Y.—Beardsley v. Davis, supra.

28. Mass.—Johnson v. Campbell, 120 Mass. 449.

29. U.S.—De Tastett v. Crousillat, Pa., 7 F.Cas.No.3,828, 2 Wash.C.C. 132.

30. La.—Tonge v. Kennett, 10 La. Ann. 800. 25 C.J. p 364 note 25 [c].

31. Mass.—Johnson v. Campbell, 120 Mass. 449.

32. U.S.—Kingston v. Wilson, Pa., 14 F.Cas.No.7,823, 4 Wash.C.C. 310. 25 C.J. p 365 note 33.

33. U.S.—De Tastett v. Crousillat, Pa., 7 F.Cas.No.3,828, 2 Wash.C.C. 132. 25 C.J. p 365 note 34.

34. U.S.—Kingston v. Wilson, Pa., 14 F.Cas.No.7,823, 4 Wash.C.C. 310. 25 C.J. p 365 note 35.

35. La.—Gordon v. Wright, 29 La. Ann. 812.

insurance, he cannot, without the principal's consent, take the risk on himself as an insurer; at least he cannot do so, so as to charge the principal with the premium, and, if he does take on himself the risk of insurance, he becomes bound to indemnify his principal not as an insurer, but on the ground of having failed to comply with his instructions.³⁶

Duty to account for insurance collected. Where the factor insures the goods of his principal and collects the insurance, he is bound to account to the principal therefor, although he was under no obligation to insure,³⁷ and although the goods were not in fact damaged,³⁸ the extent of his liability being the amount of the insurance plus interest thereon from the time payment is demanded of him.³⁹

§ 28. Duty as to Sale

A factor, acting in good faith and with due diligence, may sell in such a manner and on such terms as he may deem proper, in the exercise of a sound discretion, except as he is controlled by his agreement with his principal, or by the latter's instructions.

In the absence of an agreement or instructions as to the time, manner, or terms of sale, a factor is at liberty to sell at such time, in such manner, and on such terms as he may deem proper in the exercise of a sound discretion, and will incur no liability, where he acts in good faith and without negligence, for losses arising from his errors of judgment;⁴⁰ and in such a case the factor is neither bound to write for instructions, nor, having written for them, to wait for a reply.⁴¹ He may conduct the sale in his usual and customary manner,⁴² but he is bound to exercise ordinary diligence as to the manner and terms of the sale, and will be liable in case he is negligent in this respect.⁴³

The principal, however, ordinarily has the right to direct the time, manner, and terms of the sale,⁴⁴ so long as it does not impair the factor's right to reimbursement out of the proceeds for his advances and charges;⁴⁵ and it is the factor's duty to exercise reasonable diligence to sell as directed.⁴⁶ He cannot dispose of property consigned to him, contrary to the terms of his agreement with the principal, to a third person who is not a bona fide purchaser for value.⁴⁷

Condition of goods. In the absence of instructions or a different custom of trade, the factor should, as a general rule, sell the goods in the condition in which they are consigned to him for sale.⁴⁸

Compliance with revenue laws. In effecting a sale, a factor should comply with the revenue laws of the place of sale, and on his failure to do so he will, as a rule, be liable to his principal for the resulting damages.⁴⁹

§ 29. — Time and Place of Sale

In the absence of specific instructions, a factor

36. La.—Keane v. Branden, 12 La. Ann. 20.

25 C.J. p 365 note 38.

37. Ill.—Fish v. Seeberger, 39 N.E. 982, 154 Ill. 30.

N.Y.—Stillwell v. Staples, 19 N.Y. 401.

25 C.J. p 365 note 41.

38. Ill.—Fish v. Seeberger, 39 N.E. 982, 154 Ill. 30.

25 C.J. p 365 note 41 [b].

39. Ill.—Fish v. Seeberger, supra.

40. N.Y.—Hilton v. Vanderbilt, 82 N.Y. 591.

Wis.—Jacobi v. Rubicon Malting & Grain Co., 182 N.W. 344, 174 Wis. 344.

25 C.J. p 365 note 42.

41. Pa.—Conway v. Lewis, 13 A. 826, 120 Pa. 215, 6 Am.S.R. 700.

42. Neb.—Poels v. Brown, 111 N.W. 798, 78 Neb. 783.

43. U.S.—Eichel v. Sawyer, C.C.Ky., 44 F. 845, error dismissed Eichel v. Wallace, 12 S.Ct. 980, 145 U.S. 636, 36 L.Ed. 859.

25 C.J. p 365 note 45.

Duty to exercise skill and diligence generally see supra § 20.

Responsibility for undelivered goods
Where controversy between factor and principal as to responsibility for

undelivered goods was settled by agreement that factor should have ninety days to sell goods, failing which principal could sell at best price obtainable, principal had reasonable time only within which to dispose of goods, which would be held to have elapsed at time of trial three years thereafter.

N.Y.—Shoyer v. Edmund Wright-Ginsberg Co., 206 N.Y.S. 421, 210 App.Div. 645, modified on other grounds 148 N.E. 328, 240 N.Y. 223.

44. Cal.—Bones v. Fusco, 69 P.2d 911, 21 C.A.2d 476.

25 C.J. p 365 note 46.

Duty to obey instructions generally see supra §§ 23, 24.

45. Wyo.—Justice v. Brock, 131 P. 38, 133 P. 1070, 21 Wyo. 281.

Effect of advances generally see supra § 24.

46. Cal.—Rhee v. L. K. Small Co., 256 P. 839, 83 C.A. 339.

Tex.—Gohlman, Lester & Co. v. Allen, Civ.App., 254 S.W. 1007.

Wis.—Jacobi v. Rubicon Malting & Grain Co., 182 N.W. 344, 174 Wis. 344.

Mistake in principal's name, not excusing failure to sell

A factor's failure to sell pursuant

to a telegram instructing the sale of cotton of "W. S. Allen" is negligence, although the shipper's name is "W. F. Allen," where, under the facts, in the exercise of ordinary care the factor should not have been misled by the error; and, where a bank acting as the shipper's agent instructed such sale, the shipper's failure to inform the factor of the error after reading the factor's letter acknowledging the receipt of instructions to sell the cotton of "W. S. Allen" is not contributory negligence, since it was reasonable for the shipper to suppose that the use of the wrong initial was a clerical error on the part of the factor.

Tex.—Gohlman, Lester & Co. v. Allen, Civ.App., 254 S.W. 1007.

Duty to exercise diligence generally see supra § 20.

47. Tex.—Charles M. Stieff, Inc., v. City of San Antonio, 111 S.W.2d 1086, 130 Tex. 594.

48. N.J.—Vandyke v. Brown, 8 N.J. Eq. 657, reversed on other grounds Brown v. Vandyke, 8 N.J.Eq. 795, 55 Am.D. 250.

49. Mass.—Wellman v. Nutting, 3 Mass. 434.

25 C.J. p 365 note 49.

usually should sell within a reasonable time, at the place of his business or agency; but where the time or place of sale is fixed by agreement or instructions, he should exercise reasonable diligence to sell within the time fixed or at the place authorized.

In the absence of specific instructions, the time of sale is a matter within the sound discretion of the factor,⁵⁰ or is governed by the usual custom of the trade,⁵¹ especially where he has made advances on the goods, as discussed supra § 24. He must, however, sell the goods within a reasonable time, and will be held liable for damages resulting from an unnecessary delay in their sale;⁵² and, on the other hand, if he exercises his discretion fairly and in good faith, and sells the goods within a reasonable time after he receives them, he discharges his duty, and is not liable to the principal for damages sustained,⁵³ by reason of a decline in price,⁵⁴ or because he could have received an advanced price if he had held the goods.⁵⁵

Where the factor's authority is to sell only to protect his lien, and he is not directed by the principal to sell, he is not liable for a delay in the sale.⁵⁶ Where goods are delivered to the factor for sale under a contract of bailment, without specifying a time for performance, the principal cannot contend that an unreasonable time for sale has elapsed, where the goods are held in storage with his complete acquiescence.⁵⁷

Contract or instructions. Where the factor ex-

pressly contracts or receives instructions as to the time of sale, he must exercise reasonable diligence to comply therewith, and is liable for loss or injury sustained through his failure to do so,⁵⁸ except where he has made advances on the goods, and it becomes necessary to sell in order to protect himself against loss,⁵⁹ although if a sale can be made at a price which will more than pay his charges, he is bound to sell at his principal's request.⁶⁰ However, he is not responsible where he uses all reasonable diligence to effect a sale at the time ordered.⁶¹

When so instructed, it is the duty of the factor to use all reasonable diligence to sell immediately on arrival,⁶² or to sell immediately.⁶³ Where he contracts or is instructed to hold the goods until instructed to sell, he is liable if he sells in the absence of instructions,⁶⁴ although, in case of doubt, it will be presumed that the goods were to be sold during the current season, especially where the principal was largely indebted to the factor.⁶⁵ On the other hand, if the factor advises the sale of goods, and informs the principal of the weak condition of the market, he does not, by holding the goods in accordance with the directions of the principal, become liable for failure to use diligence merely because he afterward sells on a low market.⁶⁶

50. Iowa.—*Corpus Juris* quoted in *Alley, Greene & Pipe Co. v. Thornton Creamery Co.*, 207 N.W. 767, 768, 201 Iowa 621.

Mo.—*Bailey-Ball-Pumphrey Co. v. Branham*, App., 236 S.W. 379. 25 C.J. p 366 note 50.

51. Mo.—*Bailey-Ball-Pumphrey Co. v. Branham*, supra.

52. Iowa.—*Corpus Juris* quoted in *Alley, Greene & Pipe Co. v. Thornton Creamery Co.*, 207 N.W. 767, 768, 201 Iowa 621.

Mo.—*Bailey-Ball-Pumphrey Co. v. Branham*, App., 236 S.W. 379.

Tex.—*Geo. Finberg Co. v. Jamison*, Civ.App., 260 S.W. 884. 25 C.J. p 366 note 52.

53. Ark.—*Wynne v. Schnabaum*, 94 S.W. 50, 78 Ark. 402. 25 C.J. p 366 note 53.

54. Mich.—*Bangor Fruit Exch. v. Bangor Canning Co.*, 201 N.W. 215, 229 Mich. 167.

Tex.—*Willis v. Thacker*, 49 S.W. 128, 20 Tex.Civ.App. 233.

55. N.Y.—*Jervis v. Hoyt*, 2 Hun 637. Tex.—*Ward v. Bledsoe*, 32 Tex. 251.

56. U.S.—*McManus v. Sawyer*, D.C. N.Y., 231 F. 231.

57. Wash.—*Irwin v. Pacific Fruit &*

Produce Co., 63 P.2d 382, 188 Wash. 572.

58. Ark.—*Wilson-Ward Co. v. Fleeman*, 272 S.W. 853, 169 Ark. 88.

Miss.—*Gridley, Maxon & Co. v. Turner*, 176 So. 733, 179 Miss. 890, suggestion of error overruled 177 So. 362, 179 Miss. 890. 25 C.J. p 366 note 57.

Fruit should be sold while still in good condition, as instructed by the principal.

Cal.—*Bones v. Fusco*, 69 P.2d 911, 21 C.A.2d 476.

59. Ga.—*John Flannery Co. v. James*, 79 S.E. 912, 13 Ga.App. 425. 25 C.J. p 366 note 58.

Effect of advances generally see supra § 24.

60. Ga.—*Myers-Fryer Co. v. W. C. Bradley Co.*, 134 S.E. 792, 35 Ga. App. 788.

Wyo.—*Justice v. Brock*, 131 P. 38, 133 P. 1070, 21 Wyo. 281.

61. Ohio.—*Burnard v. Voss*, 8 Ohio Dec., Reprint, 221, 6 Cinc.L.Bul. 339.

62. U.S.—*Courcier v. Ritter*, Pa., 6 F.Cas.No.3,282, 4 Wash.C.C. 549. 25 C.J. p 366 note 61.

63. N.C.—*Spruill v. Davenport*, 20 S.E. 1022, 116 N.C. 34. 25 C.J. p 366 note 62.

64. Ga.—*Planters' Warehouse Co. v. Hardin*, 118 S.E. 441, 30 Ga.App. 459.

Tex.—*St. Louis Commission Co. v. Slotnick*, Civ.App., 258 S.W. 192. 25 C.J. p 366 note 63.

Until price agreeable to owner

Where a factor was bound under a contract to hold a consignment of wool which had been placed in his hands for sale until the price was agreeable to seller, it was not unreasonable for seller to insist on a further holding of the wool at the time that broker informed him that the same would be sold, when condition justified a belief that a rise in value of wool products might reasonably be anticipated.

Tex.—*St. Louis Commission Co. v. Slotnick*, supra.

65. La.—*Faraldo v. Gumbel*, 54 So. 821, 128 La. 287.

66. U.S.—*Charlotte Oil & Fertilizer Co. v. Hartog*, N.C., 85 F. 150, 29 C.C.A. 56.

Place of sale. In the absence of special instructions or a usage to the contrary, it is presumed that the goods are to be sold at the place to which they are shipped and where the factor has his place of business or maintains an agency, and it is his duty to sell them at that place or market;⁶⁷ and, since the principal selects the market, he assumes the risk of the factor's being unable, by the exercise of ordinary care, skill, and diligence, to make a sale there.⁶⁸ If the factor, in such a case, or otherwise in violation of his agreement as to place of sale,⁶⁹ reships the goods, he will be liable for the loss incurred from selling at a lower price than he could have obtained in the market where he had authority to sell,⁷⁰ and unless the principal is advised that a better price can be obtained at another market to which the goods are shipped, his failure to object to such shipment will not bar his right to recover damages for a failure to sell at the market where the factor has his agency.⁷¹

If the factor is authorized to direct the destination of the goods with a view to the best market, he must exercise reasonable skill and diligence and make all necessary inquiries to take advantage of the best available market.⁷² Where, however, the factor has made advancements to his principal on the goods consigned to him, and the disposal thereof becomes necessary to protect himself against loss, he may exercise his discretion as to the place of sale, even though contrary to positive instructions.⁷³

§ 30. — Price

In the absence of specific instructions as to price, it is the factor's duty to exercise reasonable skill and dili-

gence to sell at the highest price available in the market; but if he agrees, or is instructed, to sell at a specified price, it is generally his duty to sell at that price, unless it would affect his lien for advances, commissions, and charges, or there is an emergency.

Where the goods are consigned without any instructions as to price, it is the factor's duty to use reasonable skill and diligence to sell at the highest price obtainable in the market;⁷⁴ it is his duty to sell for at least the current market price, and if, in violation of this duty, he sells below such price, he is liable to his principal for the difference.⁷⁵ The market, within the meaning of this rule, means such market as is available to the factor,⁷⁶ and not the market of another city.⁷⁷

He is not bound to anticipate an extraordinary rise in the price of the article which may subsequently occur,⁷⁸ and if he exercises ordinary care and diligence in making the sale he is not responsible to his principal for any loss,⁷⁹ although he sells for less than the market value,⁸⁰ or fails to secure more than the current market price;⁸¹ nor is he liable, in the absence of fraud or bad faith, for a loss which occurred by his having held the goods in the hope of a better price,⁸² as where through a mistake of judgment he holds for a rise and the market weakens.⁸³ In the absence of custom or usage justifying it, a factor cannot dispose of his principal's goods, commingled with the goods of others, at an average price.⁸⁴

Where price is fixed. Where the factor enters into an agreement or guaranty as to the price to be received, he is liable if he sells below that price, although the price received is the market price,⁸⁵

67. Va.—*Corpus Juris* quoted in Mann v. W. C. Crenshaw & Co., 163 S.E. 375, 386, 158 Va. 193. 25 C.J. p 366 note 66.

68. Va.—Mann v. W. C. Crenshaw & Co., 163 S.E. 375, 158 Va. 193. Wyo.—Justice v. Brock, 131 P. 38, 133 P. 1070, 21 Wyo. 281. 25 C.J. p 366 note 67.

69. Cal.—Glantz v. Freedman, 280 P. 704, 100 C.A. 611.

70. Va.—*Corpus Juris* quoted in Mann v. W. C. Crenshaw & Co., 163 S.E. 375, 386, 158 Va. 193. 25 C.J. p 367 note 68. Authority to reship see supra § 16. Measure of damages for sale at improper place see infra § 50.

71. Ark.—Coyne v. Leslie, 199 S.W. 379, 131 Ark. 435.

72. Ark.—Coyne v. Leslie, supra. 25 C.J. p 367 note 70.

73. Mo.—Phillips v. Scott, 43 Mo. 86, 97 Am.D. 369.

74. Ill.—In re Cooper's Estate, 227 Ill.App. 332.

Va.—Mann v. W. C. Crenshaw & Co., 163 S.E. 375, 158 Va. 193. 25 C.J. p 367 note 73.

75. U.S.—Davis v. Bessemer City Cotton Mills, N.C., 178 F. 784, 102 C.C.A. 232.

Ark.—Joy Rice Milling Co. v. Brown, 268 S.W. 1, 167 Ark. 205. 25 C.J. p 367 note 74.

Fair value or market price

It is the duty of factor to exercise sound and honest discretion to sell for fair value or market price, and, when sale is made recklessly or in manner showing honest effort was not made and reasonable diligence was not used to obtain fair market value, factor must account for actual or fair market value.

Ark.—Joy Rice Milling Co. v. Brown, supra.

Mo.—Bailey-Ball-Pumphrey Co. v. Branham, App., 236 S.W. 379.

76. Wyo.—Justice v. Brock, 131 P. 38, 133 P. 1070, 21 Wyo. 281.

77. Ark.—Wynne v. Schnabaum, 94 S.W. 50, 78 Ark. 402.

78. N.Y.—Milbank v. Dennistoun, 21 N.Y. 386, 19 How.Pr. 126.

79. Tex.—Cleveland v. Jamison, Civ. App., 182 S.W. 1175. 25 C.J. p 367 note 78.

80. Tex.—Cleveland v. Jamison, supra—Drumm-Flato Commission Co. v. Union Meat Co., 77 S.W. 634, 33 Tex.Civ.App. 587.

81. Mass.—Mann v. Laws, 117 Mass. 293. 25 C.J. p 367 note 80.

82. Ariz.—Walker v. National Mohair Growers' Ass'n, 254 P. 1065. 31 Ariz. 515.

83. Wyo.—Justice v. Brock, 131 P. 38, 133 P. 1070, 21 Wyo. 281.

84. Cal.—Calistoga Vineyard Co. v. Luchetti, 18 P.2d 729, 129 C.A. 374.

85. Idaho.—*Corpus Juris* cited in Shake v. Payette Valley Produce Exchange, 245 P. 683, 684, 42 Idaho 403. 25 C.J. p 367 note 82.

Price satisfactory to principal
Or.—Winchell v. Pacific Fruit &

and although the contract price is arrived at through a mistake on the part of the factor.⁸⁶

If the factor procures the principal's goods on the representation that he can sell them for a specified price, it is his duty to sell when such price can be obtained, and he assumes the risk of loss in holding them for a better price.⁸⁷ So, where the factor's instructions limit the price at which the goods are to be sold, he is liable to the principal in damages if he sells for less than the price limited,⁸⁸ especially where he has made no advances,⁸⁹ unless, by the exercise of proper skill and diligence, he is unable to sell at that price.⁹⁰ As a general rule, however,

a factor is not obliged to sell at a price which would be less than his lien for advances, commission, and just charges, at the direction of his principal,⁹¹ unless the principal pays or tenders such advances and charges.⁹²

The mere fact that the invoice of the goods is accompanied by a statement of the price does not establish such price as the minimum at which the goods are to be sold;⁹³ and an agreement or instruction to sell for the best price obtainable merely requires that he shall sell at the price which he is able to receive by the exercise of reasonable care and diligence.⁹⁴

Produce Co., 11 P.2d 815, 140 Or. 552, motion denied 14 P.2d 626, 140 Or. 552.

Profit

If the factor guarantees a sale at a fixed profit, he is liable for that profit irrespective of the market value of the goods.

Cal.—Pugh v. Porter Bros. Co., 50 P. 772, 118 C. 628.

Realization of advances

(1) A guaranty that a commodity shipped could and would be sold for a sum equaling the advance then made as a consideration for the shipment is enforceable.

Ark.—Wynne, Love & Co. v. Bunch, 248 S.W. 286, 157 Ark. 395.

(2) Where a commodity was delivered to a factor under an alleged agreement that it was to be shipped under the guaranty that it could and would be sold for a sum equaling the advance then made as a consideration for the shipment, the seller could not hold the factor on such guaranty unless the factor had authority to sell in good faith at the best price obtainable.

Ark.—Wynne, Love & Co. v. Bunch, supra.

Construction of guaranty

(1) Where contract for consignment to licensed broker who advanced certain sum and guaranteed certain minimum price per car provided for an accounting at close of transaction and that "all railroad or other claims" should be the property of consignors, consignors were entitled to sums recovered by consignee from railroad for damage to shipments and consignee was not entitled to a corresponding credit on minimum price guaranteed per car.

Cal.—Whitacre v. Hall, 104 P.2d 401, 40 C.A.2d 68, rehearing denied 104 P.2d 660, 40 C.A.2d 68.

(2) Under contract between plaintiff growers and defendants, whereby plaintiffs agreed to deliver fruit to defendants in good merchantable and marketable condition, which defendants agreed to sell for highest mar-

ket price available, with a minimum guaranteed price, it was held that defendants undertook to guarantee such stated price to plaintiffs, defendants' compensation to be gained from whatever sums might be realized over and above such guaranteed prices.

Cal.—White v. Ardzooni, 235 P. 461, 71 C.A. 393.

Necessity of license to validate guaranty

(1) A dealer must be licensed under the Deciduous Fruit Dealers Act requiring a license of those dealing with growers of deciduous fruits in order to guarantee a price to a grower for his deciduous fruits, notwithstanding dealer may be licensed under Produce Dealers Act.

Cal.—Brock v. Fidelity & Deposit Co. of Maryland, 75 P.2d 605, 10 C.2d 512.

Perkins v. Pacific Fruit Exchange, 22 P.2d 535, 132 C.A. 278.

(2) Vineyard company which had deciduous fruit dealer's license authorizing it to guarantee price of deciduous fruits purchased from producer on consignment was not "consignment shipper" within Deciduous Fruit Dealers Act, as respects right of vineyard company to guarantee price to producer for his deciduous fruit.

Cal.—Manuel v. Calistoga Vineyard Co., 61 P.2d 1204, 17 C.A.2d 377.

Matters excusing liability on guaranty

(1) Commission merchant soliciting consignment of rabbits and guaranteeing sale at certain market price cannot escape liability on guaranty, although rabbits were lean, if they were in ordinary condition prevailing at place of shipment.

La.—Slawson v. Chisesi & Co., 6 La. App. 46.

(2) As respects factor's guaranty, principal's representations as to quality of lettuce on consignment for sale in Virginia were held to apply to condition on arrival, not when loaded in California.

Va.—Mann v. W. C. Crenshaw & Co., 163 S.E. 375, 158 Va. 193.

(3) A material alteration in the obligation assumed by a factor who guaranteed price, made without his assent, discharged him.

Ark.—Wynne, Love & Co. v. Bunch, 248 S.W. 286, 157 Ark. 395.

86. Ala.—Tyson v. Jennings Produce Co., 77 So. 986, 16 Ala.App. 374, certiorari denied 77 So. 993, 201 Ala. 331.

87. La.—Putnam & Norman v. Barbre, 122 So. 852, 168 La. 567.

88. U.S.—Levison v. Balfour, C.C. Cal., 34 F. 382, 13 Sawy. 223.

Ark.—Wilson-Ward Co. v. Fleeman, 272 S.W. 853, 169 Ark. 88. 25 C.J. p 367 note 84.

Duty to obey instructions

In the absence of specific agreement to contrary, it is duty of a factor to obey directions of his principal to sell for a price not less than specified sum per ton, and he is liable for a loss resulting from his failure to do so, even though factor has made advances on the crop.

Cal.—Bare v. Richman & Samuels of New York, 140 P.2d 895, 60 C.A.2d 413.

89. Miss.—Cotton v. Hiller, 52 Miss. 7.

25 C.J. p 367 note 85.

90. Iowa.—Blanchard v. Elmer Wood Co., 214 N.W. 583, 204 Iowa 255.

91. Ala.—Lord v. Werneth, 46 So.2d 236, 35 Ala.App. 290.

Or.—Winchell v. Pacific Fruit & Produce Co., 11 P.2d 815, 140 Or. 552, motion denied 14 P.2d 626, 140 Or. 552.

Wyo.—Justice v. Brock, 131 P. 38, 133 P. 1070, 21 Wyo. 281.

92. Wyo.—Justice v. Brock, supra.

93. Pa.—Smedley v. Williams, 1 Pars.Eq.Cas. 359.

25 C.J. p 368 note 88.

94. Ill.—Craig v. Harrison-Switzer Milling Co., 103 Ill.App. 486.

N.C.—Golden v. Levy, 4 N.C. 527, 6 Am.D. 555.

Emergency. Where the goods are of a perishable nature, the factor may sell below the price limited in order to prevent a total loss, if there is no opportunity to consult the principal.⁹⁵

Failure to sell. Where the principal notifies the factor not to sell unless the price will net him a specified amount, he thereby restricts the power of the factor to sell, and cannot complain of his failure to sell at a lower price.⁹⁶

§ 31. — Sale for Cash or on Credit

- a. In general
- b. Ascertaining responsibility of purchaser
- c. Disclosing name of purchaser

a. In General

When so instructed, it is generally the factor's duty to sell for cash, on delivery of the goods. If he is authorized to sell on credit, he must exercise reasonable care and diligence in doing so, including the taking of security, and is not liable for any loss, with regard to payment, which occurs without his fault, unless he is made liable by his contract.

If a factor is instructed to sell for cash, he is bound to do so, and a violation of such instruction will render him personally liable for the payment of the price for which the goods are sold.⁹⁷ A cash sale, within the meaning of such an instruction, requires the payment of the price on delivery of the goods,⁹⁸ notwithstanding it involves some inconvenience,⁹⁹ and the factor is liable to the principal if he allows the purchaser to take possession of the goods without paying,¹ although it has been held that, where it is the custom to deliver the property and wait a few days for the payment of the money, such sale may be regarded as a cash sale,² provided such custom is so certain, uniform, and notorious that it will be presumed to have been understood by the parties.³

Where the factor is authorized to sell on credit, as discussed supra § 11, it is his duty to exercise reasonable care and diligence in doing so, and if he does so he is not liable for losses with regard to payment of the purchase price which occur without any fault on his part,⁴ unless by express contract he renders himself liable for the payment of the purchase price,⁵ as where he sells on a *del credere* commission, as discussed infra § 38.

Taking security. It is the duty of the factor to take security from the purchaser to secure the payment of the purchase price, where he is so instructed,⁶ or where it is the usage or custom to take security;⁷ and he will be liable for any loss which may occur through his failure to do so.⁸

b. Ascertaining Responsibility of Purchaser

A factor must exercise reasonable care and diligence to ascertain the financial standing of a purchaser to whom he sells on credit, and to keep the principal advised as to the pecuniary ability of the purchaser.

A factor is not, in the absence of an express agreement, a guarantor of the responsibility of a purchaser to whom he sells,⁹ and is not liable for the entire amount that could have been realized had a sale, which failed through his negligence in this respect, been completed;¹⁰ but it is his duty to use reasonable diligence and care to ascertain, from the usual and available sources of information, the financial standing of a purchaser to whom he sells the goods on credit, and if, through carelessness or a want of proper examination and inquiry, he gives credit to a purchaser who is insolvent or of doubtful financial standing, he will be liable to his principal for any loss resulting from the insolvency of the purchaser.¹¹

It is also his duty to keep the principal advised as to the pecuniary ability of the purchaser whenever the interests of the principal will be advanced

95. N.H.—Frothingham v. Everton, 12 N.H. 239.

N.Y.—Lippmann v. Brown, 88 N.Y.S. 141, 43 Misc. 632.

Violation of instructions in case of emergency generally see supra § 23.

96. Wyo.—Koshland v. Weber, 148 P. 369, 152 P. 167, 23 Wyo. 241.

97. S.C.—Barksdale v. Brown, 10 S.C.L. 517, 9 Am.D. 720. 25 C.J. p 368 note 92.

98. Wis.—Hall v. Storrs, 7 Wis. 253.

25 C.J. p 368 note 93.

99. Wis.—Hall v. Storrs, supra. 25 C.J. p 368 note 92 [a].

1. Ill.—Deshler v. Beers, 32 Ill. 368, 83 Am.D. 274.

2. Mass.—Clark v. Van Northwick, 1 Pick. 343. 25 C.J. p 368 note 95.

3. N.J.—Stewart v. Scudder, 24 N.J. Law 96.

4. Me.—Greely v. Bartlett, 1 Me. 172, 10 Am.D. 54. 25 C.J. p 368 note 98.

5. Mich.—Clark v. Roberts, 26 Mich. 506. Liability by reason of dealings with principal or purchaser see infra § 33.

6. S.C.—Wilkinson v. Campbell, 1 S.C.L. 169.

Power to receive commercial paper in payment see supra § 12.

7. La.—Chew v. Keane, 2 La. 120.

8. La.—Chew v. Keane, supra. S.C.—Wilkinson v. Campbell, 1 S.C.L. 169.

9. Ill.—Foster v. Waller, 75 Ill. 464. Western Union Cold Storage Co. v. Winona Produce Co., 84 Ill.App. 678, reversed on other grounds 64 N.E. 496, 197 Ill. 457.

10. Ill.—Western Union Cold Storage Co. v. Winona Produce Co., supra.

11. Kan.—Brown v. Funck, 132 P. 202, 89 Kan. 601, Ann.Cas.1915A 174.

25 C.J. p 368 note 9.

by such knowledge.¹² If, however, he sells in conformity with the usage of trade and uses due diligence to ascertain the solvency of the purchaser, he is not responsible if the purchaser subsequently becomes insolvent.¹³ To charge the factor with negligence in this respect, it is not necessary that he absolutely know that the purchaser is discredited, but it is sufficient if he has notice of facts which ought to put a person of ordinary prudence on his guard.¹⁴

It has been held that even though the factor is instructed to accept the offer of a certain person, this does not authorize him to sell on credit if he knows that such person is irresponsible,¹⁵ and that he will not be responsible for a loss due to the depreciation in value of the goods before another sale can be effected, if he fails to sell to such person;¹⁶ nor will he be liable for a loss due to a fall in the market if the principal, after learning that the sale cannot be carried out on account of the irresponsibility of the purchaser, fails to take steps to protect himself.¹⁷

c. Disclosing Name of Purchaser

A factor is not bound to disclose the name of a purchaser to whom he sells on credit, unless such information is necessary to enable the principal to act with reference to the sale.

There is no hard and fast rule that the principal shall be notified of the name of the purchaser, where goods are sold on credit,¹⁸ and the mere failure of the factor to disclose the name of the purchaser will not render him liable for the payment of the purchase price.¹⁹ If, however, such information is necessary, or becomes necessary, in order to enable the principal to act with reference to the sale, the duty at once arises, and becomes obligatory on

the factor,²⁰ and it has been held that in such a case a custom or usage among factors not to include the name of the purchaser in the statement of sale made to the principal does not relieve him of that duty.²¹

§ 32. — Collection of Price

A factor should exercise proper care and diligence in collecting the purchase price of goods sold on credit.

Where goods have been sold by the factor on credit, it becomes, as a general rule, his duty to use proper diligence and care in the collection of the purchase price, and where he fails to do so he will become liable to his principal for damages resulting to the latter from such neglect;²² and it is not incumbent on the principal to give special instructions as to the course to be pursued in making the collection.²³ The factor should not, however, put the principal to the expense of a suit to recover the debt unless he has reasonable grounds for believing that the action will result in benefit to the principal;²⁴ but he is personally liable for the resulting loss if he fails to sue in a case where due diligence requires this course of action,²⁵ or if he extends the time of payment without the principal's consent.²⁶

If the factor exercises due prudence both in making the sale and in attempting to collect the money due for the goods, he is not responsible to his principal until the money is actually received.²⁷

§ 33. — Assumption of Debt by Factor

A factor is personally liable for the purchase price of goods sold on credit where his dealings with the purchaser or the principal, such as his taking or negotiating a note given for the purchase price in his own name or for his

12. U.S.—Forrestier v. Bordman, C. C.Mass., 9 F.Cas.No.4,945, 1 Story 43.

13. Ill.—Western Union Cold Storage Co. v. Winona Produce Co., 64 N.E. 496, 197 Ill. 457.

25 C.J. p 369 note 10.

14. N.Y.—Arnold Cheney & Co. v. Gillette & Livesey, 199 N.Y.S. 713. Van Alen v. Vanderpool, 6 Johns. 69, 5 Am.D. 192.

25 C.J. p 369 note 11.

15. U.S.—Burrill v. Phillips, C.C.R. I., 4 F.Cas.No.2,200, 1 Gall. 360.

16. Iowa.—Durant v. Fish, 40 Iowa 559.

17. Iowa.—Durant v. Fish, supra.

18. Ill.—Western Union Cold Storage Co. v. Winona Produce Co., 84 Ill.App. 678, reversed on other grounds 64 N.E. 496, 197 Ill. 457.

19. Ill.—Western Union Cold Stor-

age Co. v. Winona Produce Co., 64 N.E. 496, 197 Ill. 457.

25 C.J. p 369 note 16.

19. U.S.—Hamilton v. Cunningham, C.C.Va., 11 F.Cas.No.5,978, 2 Brock. 350.

25 C.J. p 369 note 17.

A list of delinquent purchasers need not be furnished by him to the principal.

N.Y.—Arnold Cheney & Co. v. Gillette & Livesey, 199 N.Y.S. 713.

20. Ill.—Western Union Cold Storage Co. v. Winona Produce Co., 64 N.E. 496, 197 Ill. 457.

Western Union Cold Storage Co. v. Winona Produce Co., 84 Ill.App. 678.

25 C.J. p 369 note 18.

21. Ill.—Western Union Cold Storage Co. v. Winona Produce Co., 64 N.E. 496, 197 Ill. 457.

22. Iowa.—M. M. Walker Co. v. Du-buque Fruit & Produce Co., 85 N. W. 614, 113 Iowa 428, 53 L.R.A. 775.

N.Y.—Arnold Cheney & Co. v. Gillette & Livesey, 199 N.Y.S. 713.

25 C.J. p 369 note 21.

Authority to collect or receive payment see supra § 12.

23. Me.—Folsom v. Mussey, 8 Me. 400, 23 Am.D. 522.

24. U.S.—Forrestier v. Bordman, C. C.Mass., 9 F.Cas.No.4,945, 1 Story 43.

25. Ala.—Leach v. Bush, 57 Ala. 145.

26. Va.—Hairston v. Medley, 1 Gratt. (42 Va.) 96.

25 C.J. p 355 note 74.

27. La.—Bird v. Dix, 4 Mart.N.S., 254.

own use, clearly show an intention to assume the purchaser's debt.

Although the factor is not, as a general rule, liable for the price of goods sold on credit, he may become so, where his dealings with the purchaser or principal clearly show an intention to assume the purchaser's debt,²⁸ as where he treats the original debt as his own,²⁹ or deprives the principal of his means of pursuing the purchaser,³⁰ but not where his acts amount merely to an improvement of the security.³¹

Closing accounts. Where the factor, for the purpose of closing his accounts with the principal, to whom he has made advances, pays the balance due from him, retaining notes taken for goods sold on credit, he thereby assumes such outstanding debts, and the principal is not bound to reimburse him in case such debts are not paid.³² However, the fact that he gives his principal a note for the balance due on an outstanding debt for goods sold on credit, which note is payable after the debt will fall due, is merely a liquidation of the account, and not an assumption of the purchaser's debt.³³

Taking note in own name. The fact that the factor takes a note for the purchase price of the goods in his own name does not render him personally liable for the debt,³⁴ unless it is taken under circumstances which show an intention on his part to make the debt his own,³⁵ or unless the sale on credit was unauthorized.³⁶ It has been held, however, that the taking of a note payable to himself and for an amount to cover the debt due the principal and a debt due himself operates as an appropriation of the debt by the factor, and renders him liable therefor to his principal,³⁷ unless such action is authorized by usage.³⁸

Where the factor sells the goods of several principals to the same purchaser, the fact that he takes one note payable to himself for the purchase price of the whole lot does not render him personally liable to each principal for the purchase price of the goods,³⁹ especially where his act in doing so is in accordance with a general usage of trade.⁴⁰

Negotiating note. The factor will be personally liable to his principal for the payment of the goods where he uses or negotiates for his own use a note taken for the purchase price;⁴¹ but this rule does not apply where the factor negotiates the note for the use of the principal.⁴²

§ 34. Rights and Duties as to Proceeds

- a. In general
- b. Care of proceeds
- c. Remitting proceeds
- d. Liability for interest

a. In General

In the absence of an agreement to other effect, and subject to the factor's lien for advances and charges, the proceeds of a sale by a factor belong to the principal, and it is the factor's duty to account to his principal for such proceeds, and to apply or dispose of them in the manner agreed on or instructed.

Unless there is an agreement, express or implied, giving the factor the right to appropriate the proceeds of a sale to his own use,⁴³ and subject to the lien of the factor for commissions, advances, and charges, as discussed *infra* § 45, the proceeds of goods sold by a factor belong to the principal, and the factor holds them in a fiduciary or trust capacity, although they are deposited to his credit in a bank⁴⁴ and although he has prosecuted a claim for the proceeds to judgment, for the use of the

28. N.Y.—Oakley v. Crenshaw, 4 Cow. 250.

25 C.J. p 370 note 26.

Del credere factor see *infra* § 38.

29. N.Y.—Robertson v. Livingston, 5 Cow. 473.

25 C.J. p 370 note 27.

30. U.S.—Jackson v. Baker, Pa., 13 F.Cas.No.7,129, 1 Wash.C.C. 394.

N.C.—Symington v. McLin, 18 N.C. 291.

25 C.J. p 370 note 26 [b].

31. N.Y.—Corlies v. Cumming, 6 Cow. 181.

25 C.J. p 370 note 26 [c].

32. N.Y.—Oakley v. Crenshaw, 4 Cow. 250—Consequa v. Fanning, 3 Johns.Ch. 587, modified on other grounds 17 Johns. 511, 8 Am.D. 442.

33. N.Y.—Robertson v. Livingston, 5 Cow. 473.

25 C.J. p 370 note 29.

34. Ala.—Goldthwaite v. McWhorter, 5 Stew. & P. 284.

25 C.J. p 370 note 30.

35. Mass.—Amory v. Hamilton, 17 Mass. 103.

25 C.J. p 370 note 31.

36. Mass.—Hemenway v. Hemenway, 5 Pick. 389.

37. N.C.—Symington v. McLin, 18 N.C. 291.

25 C.J. p 370 note 33.

38. Conn.—Leach v. Beardslee, 22 Conn. 404.

39. N.Y.—Corlies v. Cumming, 6 Cow. 181.

25 C.J. p 370 note 35.

40. U.S.—Hamilton v. Cunningham, C.C.Va., 11 F.Cas.No.5,978, 2 Brock. 250.

25 C.J. p 370 note 36.

41. Ky.—Byrne v. Schwing, 6 B.Mon. 199.

25 C.J. p 370 note 37.

42. Ky.—Byrne v. Schwing, *supra*.

Me.—Greely v. Bartlett, 1 Me. 172, 10 Am.D. 54.

43. Okl.—Corpus Juris quoted in National Bank of Commerce at Hugo v. Whitten, 124 P.2d 990, 991, 190 Okl. 449.

25 C.J. p 370 note 40.

44. Iowa.—Cable v. Iowa State Sav. Bank, 194 N.W. 957, 197 Iowa 393, 31 A.L.R. 748, modified on other grounds 197 N.W. 434, 197 Iowa 393, 31 A.L.R. 748.

N.Y.—Britton v. Ferrin, 63 N.E. 954, 171 N.Y. 235.

25 C.J. p 371 note 42.

"The trust fund doctrine in the commission merchant cases is predicated upon the trust relationship existing by virtue of the stock be-

principal.⁴⁵ This right or title of the principal also extends to unpaid purchase money,⁴⁶ and to securities taken by the factor in payment of goods sold, although taken in his own name.⁴⁷

Accordingly, as a general rule, the factor is liable, and bound to account to the principal, for the proceeds of a sale,⁴⁸ although the sale, as between the principal and the purchaser, is illegal,⁴⁹ or the principal obtained the goods under an illegal contract,⁵⁰ and although the factor has guaranteed the account.⁵¹ This general rule applies although the sale by the factor was unauthorized⁵² or was in violation of the law,⁵³ nor can he escape liability to the principal by setting up outstanding equities between the principal and a third person in which he has no concern,⁵⁴ unless the principal is not the owner and the true owner appears and establishes his right to the proceeds.⁵⁵

A factor cannot apply the profits of one of his customers in offsetting the losses of the others.⁵⁶

Disposition of proceeds. If the factor has agreed, or is instructed, to apply or dispose of the proceeds

in a particular manner, it is his duty so to apply or dispose of them,⁵⁷ as where a draft is drawn in favor of a third person on proceeds of a specific consignment, of which draft the factor has notice,⁵⁸ and, if he promises or is directed to appropriate them to the payment of a debt due from the principal to a third person, he is bound to apply them to that purpose and not to a debt due to himself,⁵⁹ or to any other purpose,⁶⁰ except as to proceeds which are not needed for the purpose specified.⁶¹

If the consignment is made without instructions, the factor may apply the proceeds to the payment of a debt due him from his principal.⁶² If the factor makes an unauthorized disposition of the proceeds, he is liable to his principal therefor,⁶³ as where he pays them to a third person without authority from his principal,⁶⁴ unless they are so paid through a mistake due to the fault of the principal.⁶⁵

An agreement to deliver the money or evidences of debts on demand is not affected by a further agreement to guarantee the debts if not paid within

ing delivered to a commission merchant, for sale only, and where the title to the stock does not pass to the commission merchant but remains in the party who delivers the stock to the commission merchant to make sale, for him."

Iowa.—Ward Commission Co. v. Sioux Falls Nat. Bank of Sioux Falls, S. D., 202 N.W. 829, 831, 199 Iowa 829.

Factor cannot set up adverse claim to proceeds of property.

Cal.—National Bank of New Zealand v. Finn, 253 P. 757, 81 C.A. 317.

Fiduciary character of factor's relation generally see supra § 1. Rights in, and title to, goods see infra § 40.

45. Pa.—In re Merrick, 2 Ashm. 445.

46. N.Y.—Moore v. Hillabrand, 37 Hun 491.
25 C.J. p 371 note 42 [b].

47. U.S.—Thompson v. Perkins, C.C. Mass., 23 F.Cas.No.13,972, 3 Mason 232.
25 C.J. p 371 note 42 [a].

48. Cal.—Raymond v. Independent Growers, 284 P.2d 57, 133 C.A.2d 154.

La.—Hill, Harris & Co. v. Averett, 129 So. 399, 14 La.App. 240.

Mo.—Fuller v. Smedley, App., 48 S.W. 2d 131.

N.Y.—Arnold Cheney & Co. v. Gillette & Livesey, 199 N.Y.S. 713.

Okl.—National Bank of Commerce at Hugo v. Whitten, 124 P.2d 990, 190 Okl. 449.

Or.—Nickelsen v. Kilbuck, 26 P.2d 828, 145 Or. 203.

25 C.J. p 371 note 42.

Application of proceeds to payment of advances see infra § 44.

Duty to keep and render accounts see infra § 37.

49. Vt.—Baldwin v. Potter, 46 Vt. 402.

50. N.Y.—Alvord v. Latham, 31 Barb. 294.

51. R.I.—State v. McAvoy, 101 A. 109, 40 R.I. 437.

Duties and liabilities of del credere factors see infra § 38.

52. N.Y.—Standard Sugar Refinery v. Dayton, 70 N.Y. 486.

53. S.C.—Tate v. Pegues, 6 S.E. 298, 28 S.C. 463.

25 C.J. p 371 note 47.

54. N.Y.—Aubery v. Fiske, 36 N.Y. 47, 1 Transcr.A. 245, 36 How.Pr. 279.

55. Mo.—Bain v. Clark, 39 Mo. 252.
N.Y.—Rotan v. Fletcher, 15 Johns. 207.

56. Ill.—Baxter v. Allen, 46 Ill.App. 464.

57. U.S.—Ernest v. Stoller, C.C.Colo., 8 F.Cas.No.4,520, 5 Dill. 438.
25 C.J. p 371 note 52.

Liability to third person on direction or promise of principal as to application of proceeds see infra § 56.

Validity of order of disposition

An order executed by a live stock shipper and accepted by a commission merchant directing the pro-

ceeds from shipments to be deposited in a named bank is not invalid, under Packers and Stockyards Act 1921 § 407, 7 U.S.C.A. § 228, as a discrimination between shippers, where the bank named is in the same town as the bank wherein other shippers' funds are deposited.

Or.—**Corpus Juris cited in** Wallowa Nat. Bank v. Sevier Commission Co., 5 P.2d 100, 101, 138 Or. 393, certiorari dismissed Sevier Commission Co. v. Wallowa Nat. Bank, 53 S.Ct. 120, 287 U.S. 575, 77 L.Ed. 504.

58. N.Y.—Lowery v. Steward, 25 N.Y. 239, 82 Am.D. 346.

25 C.J. p 371 note 53.
Duty to accept or meet draft generally see infra § 35.

59. S.C.—Cohen v. Hart, 20 S.C.L. 304.

25 C.J. p 371 note 55.

60. N.Y.—Lowery v. Steward, 25 N.Y. 239, 82 Am.D. 346.
25 C.J. p 371 note 54.

61. La.—Norwood v. Laws, 37 So. 764, 113 La. 812.
25 C.J. p 371 note 54 [a].

62. Tex.—Copes v. Perkins, 6 Tex. 150.

25 C.J. p 371 note 56.

63. Ala.—Malone v. Hill, 68 Ala. 225.

64. Ga.—Yon v. Blanchard, 75 Ga. 519.

25 C.J. p 371 note 58.

65. Mo.—Hays v. Warren, 46 Mo. 189.

a fixed time, although at the time of demand the time has not expired.⁶⁶

b. Care of Proceeds

A factor must exercise ordinary prudence and diligence in caring for the proceeds in his possession, and should not commingle them with his funds or those of another, unless there is a custom of commingling, to which the principal consents.

While the proceeds remain in his possession, the factor must exercise ordinary prudence and diligence in caring for them,⁶⁷ and will be liable for the loss thereof if it occurs through his negligence.⁶⁸ However, in the absence of a special agreement to that effect he is not an insurer of the safety of the proceeds,⁶⁹ and will not be liable if they are lost or stolen without any negligence on his part.⁷⁰

Commingling proceeds. A factor should keep his principal's funds unmixed with his own or with the funds of others,⁷¹ unless there is a custom, to which the principal consents, of commingling the funds in a common mass.⁷² If the factor mixes the principal's funds with his own or others, or uses them indiscriminately with his own funds, the principal may either seek satisfaction out of the whole mass with which his own funds have become undistinguishably commingled⁷³ or he may treat his factor as a debtor for the amount thus used or commingled.⁷⁴

Where a factor deposits the principal's funds in a bank in his own name without notice to the principal, and without indicating that they are the principal's funds, he is liable for a loss due to the insolvency of the bank,⁷⁵ or to the deprecia-

tion of the currency deposited;⁷⁶ but if he notifies his principal that the funds are so deposited and are subject to his order at any time, he is not so liable.⁷⁷

c. Remitting Proceeds

A factor generally holds the proceeds of sale subject to the principal's instructions, and need not remit them, unless he is required to do so by agreement, previous course of dealing, or usage of trade. A remittance, when required, should be in the mode authorized or instructed, or in accordance with the usual course of business.

In the absence of a special agreement, instructions, or usage to other effect, it is not the duty of the factor to make remittances of money to his principal, but it is his duty, after notifying him of the sale, to hold the money subject to his instructions;⁷⁸ and if, without authority or instructions therefor, he remits the proceeds in a particular manner, the remittance is at his risk.⁷⁹ Where, however, either by agreement or previous course of dealing, or by usage of trade, the factor is bound to forward the money to his principal, it is his duty to do so as he receives it at the earliest opportunity without waiting for a demand,⁸⁰ although it is only a portion of what he expects from the sale;⁸¹ and no usage to the contrary will either justify or excuse his retaining it beyond such time,⁸² unless the sum is so small as not to justify the expense of forwarding it.⁸³

A factor cannot justify a refusal to pay over the proceeds on the ground that they have been seized by virtue of an attachment against a third person, or that they have been paid over in pursuance of an order in proceedings supplementary to execution in an action against such third person, of which the principal had no notice, where either the seizure

66. Mass.—Nickerson v. Soesman, 98 Mass. 364.

25 C.J. p 371 note 52 [a].

67. Tenn.—Thompson v. Woodruff, 7 Coldw. 401.

68. U.S.—Read v. Bertrand, Pa., 20 F.Cas.No.11,601, 4 Wash.C.C. 514. 25 C.J. p 372 note 61.

69. S.C.—Pinckney v. Dunn, 2 S.C. 314.

70. S.C.—Pinckney v. Dunn, supra.

71. Ga.—A. C. Wyly & Co. v. Burnett & Rixey, 43 Ga. 438. N.Y.—Farmers' & Mechanics' Nat. Bank v. Sprague, 52 N.Y. 605.

72. Mass.—Vail v. Durant, 7 Allen 408, 83 Am.D. 695. 25 C.J. p 372 note 67.

Deposit to broker's account

Where cattle shippers knew of commission firm's custom of selling cattle in own name and depositing proceeds in bank to own account and to remit net proceeds to shipper by his

own check, and made no objection, they impliedly consented to such method of depositing and remitting proceeds.

Tex.—Steere v. Stockyards Nat. Bank, Civ.App., 266 S.W. 531.

73. Pa.—In re Farrell's Estate, 17 Pa.Super. 240.

S.C.—Pinckney v. Dunn, 2 S.C. 314. Right of principal to follow proceeds in hands of third person see infra §§ 60, 61.

74. Mass.—Vail v. Durant, 7 Allen 408, 83 Am.D. 695.

S.C.—Pinckney v. Dunn, 2 S.C. 314.

75. Ky.—Cartmell v. Allard, 7 Bush 482.

Or.—Corpus Juris cited in Joppa v. Clark Commission Co., 281 P. 834, 839, 132 Or. 21.

The Packers' Act, 7 U.S.C.A. §§ 181-229, relating to public market agencies, and passed for the protection of shippers, does not relieve commission company from liability

for proceeds of sale deposited in bank which became insolvent.

Or.—Joppa v. Clark Commission Co., 281 P. 834, 132 Or. 21.

76. S.C.—Pinckney v. Dunn, 2 S.C. 314.

77. Ga.—Ansley v. Anderson, 35 Ga. 8.

78. Pa.—Brown v. Arrott, 6 Watts & S. 402.

25 C.J. p 372 note 73.

79. Mass.—Clark v. Moody, 17 Mass. 145.

25 C.J. p 372 note 74.

80. Fla.—Roe v. Henderson, 190 So. 618, 139 Fla. 386.

N.Y.—Britton v. Ferrin, 63 N.E. 954, 171 N.Y. 235.

25 C.J. p 372 note 75.

81. Pa.—Brown v. Arrott, 6 Watts & S. 402.

82. Pa.—Brown v. Arrott, supra.

83. Pa.—Brown v. Arrott, supra.

under attachment or the payment under the order was without authority of law.⁸⁴ A factor who deposits the proceeds in a bank other than the one in which he was directed to deposit them is liable for the loss resulting from the failure of the former bank.⁸⁵ If a factor fails to remit the proceeds in his hands from the sale of a portion of goods sold according to the terms of his contract, he cannot hold his principal liable for failure to consign the balance, although the factor was obliged to buy at an advanced price to fulfill the contract of the purchaser, and although he should be considered as the principal's agent in making the contract of sale.⁸⁶

A statute declaring a factor guilty of fraud if he fails to pay over proceeds belonging to the principal does not apply to a violation of an express direction of the principal, or where there is no showing of a failure to account for or pay over the proceeds.⁸⁷ A statute which requires a commission merchant to remit to the producer within ten days after a sale is not void, because many sales must be made on credit, and the effect of the statute will be to require a merchant to remit before he has collected, since the statute may simply have the effect of requiring the sale to be made for cash.⁸⁸

Mode of remittance. If the factor is especially instructed as to the mode of remittance, he must follow such instruction⁸⁹ and exercise reasonable care and diligence in doing so.⁹⁰ Where, however, he has general authority to remit, without any instructions as to the mode thereof, he is bound only to exercise reasonable diligence and skill as to the mode and in making a remittance,⁹¹ and he will not be liable if he acts with such skill and diligence in accordance with the usual course of business in such cases.⁹²

By bill of exchange. If a factor is authorized to remit by bill of exchange or draft, and he exercises reasonable skill and diligence in purchasing and remitting a bill on a person in good credit, he is not responsible if it is protested or dishonored;⁹³ and, although he need not inquire into the credit of the drawee unless there are circumstances of suspicion sufficient to put a man of ordinary care on his guard,⁹⁴ he may be held responsible if he is chargeable with negligence, as to the standing of the drawee with regard to which he is put on inquiry.⁹⁵ He may be held responsible for a bill drawn by a bank in which he has deposited the proceeds to his own credit,⁹⁶ or if, instead of purchasing a bill, he remits one belonging to himself, and it is not paid.⁹⁷

Liability on indorsements. If the factor is instructed to remit by bill of exchange he is not obliged to indorse or guarantee the bills remitted unless the principal can show that custom or usage requires an indorsement or guaranty.⁹⁸ If he does indorse, he may prove that his indorsement with the knowledge and assent of his principal was made without intent to assume liability, but was for the sole purpose of facilitating collection;⁹⁹ and he is not liable on his indorsement if he receives no consideration for guaranteeing paper transmitted and does not undertake to do so by express contract.¹

d. Liability for Interest

A factor is not liable for interest unless he is in default or interest is provided for by his contract.

In the absence of any contract or usage to that effect, a factor is not liable for interest unless he is in some default,² especially where the principal has been guilty of laches and unfairness;³ and as a general rule, if the factor is ready at the proper time to account for and turn over the proceeds, he

84. N.Y.—Barnard v. Kobbe, 54 N. Y. 516.

85. U.S.—Ernest v. Stoller, C.C.Colo., 8 F.Cas.No.4,520, 5 Dill. 438, 2 McCrary, 380.

86. Md.—Curtis v. Gibney, 59 Md. 131.

25 C.J. p 372 note 82.

Part payment by factor to principal as accord and satisfaction see Accord and Satisfaction § 29.

87. Mo.—Murray v. Gordon-Watts Grain Co., 260 S.W. 513, 216 Mo. App. 607.

88. Wash.—Northern Cedar Co. v. French, 230 P. 837, 131 Wash. 394, modified on other grounds 233 P. 39, 133 Wash. 692, and error dismissed Northern Cedar Co. v. Gloyd, 46 S.Ct. 204, 270 U.S. 625, 70 L.Ed. 767.

89. N.Y.—Leverick v. Meigs, 1 Cow. 645.

Tex.—Kerr v. Cotton, 23 Tex. 411.

90. La.—Parker v. Harrison, 26 La. Ann. 751.

25 C.J. p 372 note 84.

91. U.S.—Muller v. Bohlens, Pa., 17 F.Cas.No.9,914, 2 Wash.C.C. 378.

N.Y.—Heubach v. Rother, 9 N.Y.Super. 227, 11 N.Y.Leg.Obs. 269.

92. Mass.—Goldsmith v. Manheim, 109 Mass. 187.

25 C.J. p 373 note 86.

93. Ill.—Chandler v. Hogle, 58 Ill. 46.

25 C.J. p 373 note 87.

94. N.Y.—Leverick v. Meigs, 1 Cow. 645.

25 C.J. p 373 note 88.

95. La.—Rourk v. Pegram, 10 La. Ann. 394.

N.Y.—Leverick v. Meigs, 1 Cow. 645.

96. Ky.—Cartmell v. Allard, 7 Bush 482.

25 C.J. p 373 note 90.

97. La.—Akin v. Bedford, 5 Mart., N.S., 502.

98. Mass.—Potter v. Morland, 3 Cush. 384.

99. Md.—Lewis v. Brehme, 33 Md. 412, 3 Am.R. 190.

25 C.J. p 373 note 96.

1. Pa.—Sharp v. Emmet, 5 Whart. 288, 44 Am.D. 554.

Tenn.—Byers v. Harris, 9 Heisk. 652.

2. Mass.—Ellery v. Cunningham, 1 Metc. 112.

25 C.J. p 373 note 98.

3. N.C.—McLin v. McNamara, 36 N. C. 75.

is not liable for interest until after a demand is made on him by the principal for the proceeds of sales made.⁴

Where, however, he fails or refuses to account on demand, or when it is otherwise his duty to do so, he is liable for interest from the time when he should have accounted and turned over the proceeds,⁵ particularly where his contract with the principal so provides;⁶ and where the contract provides for interest, and also for a carrying charge, such interest and charge on an unpaid balance do not cease on the factor's death.⁷ If he makes a tortious sale and is sued for the proceeds in assumpsit, he is liable for interest from the time of receiving the proceeds of the sale.⁸

§ 35. Duty to Accept or Meet Draft

A factor is under no obligation to accept or pay a draft drawn on him by his principal, unless he has, for a valuable consideration, agreed to do so, or unless such obligation is imposed on him by usage.

A factor is under no obligation to accept or pay a draft drawn on him by his principal,⁹ unless he has, for a valuable consideration, either expressly or impliedly agreed to do so,¹⁰ or unless such obligation is imposed on him by a usage of trade.¹¹ This rule applies even though the factor has in his hands, at the time, funds of the principal sufficient to meet the draft when presented.¹²

If a factor expressly agrees to accept bills drawn on him, he is bound to do so, and it is immaterial that he has no funds in his hands, unless this is made a condition of the agreement to accept.¹³ If the factor has notice that the principal has drawn on him in anticipation of the avails of the consignment, he becomes bound, by accepting the consignment, to pay the bill or draft, and in case of non-

payment is liable to his principal for the resulting damages;¹⁴ but where the factor has made advances on the goods consigned he is not bound to accept and pay a draft drawn on him by the principal, in favor of a third person, until such advances are repaid.¹⁵

In accepting and paying drafts, it is the factor's duty to exercise reasonable care and diligence to determine whether the drafts drawn on him are those of his principal, and if he has the means within his possession of determining the genuineness of the signatures, and he receives and discounts forged drafts, he must bear the loss.¹⁶

§ 36. Duty to Make Advances

A factor's duty to advance money due for freight on property consigned depends solely on the agreement or course of dealings between him and his principal.

There is no unvarying rule of law which makes it the duty of the factor to advance from his own pocket moneys due for freight on property consigned to him by his principals, and his duty to do so depends solely on the agreement or course of dealings between him and his principal.¹⁷

§ 37. Duty to Keep and Render Accounts

It is ordinarily the factor's duty to keep regular and accurate accounts of all transactions with regard to the goods consigned, and to give the principal an opportunity to inspect them; and, where the accounts are settled or stated, they are generally conclusive between the principal and the factor.

Since, as shown supra § 34, it is the duty of a factor to account for the proceeds of the goods consigned to him for sale, it is ordinarily his duty to keep true, regular, and accurate accounts of all his transactions and dealings with regard to such goods,¹⁸ and to give the principal an opportunity to

4. Ala.—Tyree v. Parham, 66 Ala. 424.

25 C.J. p 373 note 1.

5. Conn.—Union Hardware Co. v. Plume & A. Mfg. Co., 20 A. 455, 58 Conn. 219.

25 C.J. p 373 note 2.

6. Mich.—Keefe v. Bush & Lane Piano Co., 225 N.W. 585, 247 Mich. 82.

7. Mich.—Keefe v. Bush & Lane Piano Co., supra.

8. U.S.—Ricketson v. Wright, C.C. Mass., 20 F.Cas.No.11,805, 3 Summ. 335.

9. U.S.—Schimmelpennich v. Bayard, N.Y., 1 Pet. 264, 7 L.Ed. 138, 25 C.J. p 373 note 6.

10. Ga.—Moss v. Stokeley, 22 S.E. 692, 95 Ga. 675, 25 C.J. p 373 note 7.

11. U.S.—Schimmelpennich v. Bayard, N.Y., 1 Pet. 264, 7 L.Ed. 138.

12. Ga.—Moss v. Stokeley, 22 S.E. 692, 95 Ga. 675.

13. U.S.—De Tastett v. Crousillat, Pa., 7 F.Cas.No.3,828, 4 Wash.C.C. 132.

14. Utah.—Corpus Juris quoted in Mumford v. Hartford Accident & Indemnity Co., 228 P. 206, 211, 64 Utah 24.

25 C.J. p 374 note 11.

15. La.—Helm v. Meyer, 30 La. Ann. 943.

Utah.—Corpus Juris quoted in Mumford v. Hartford Accident & Indemnity Co., 228 P. 206, 211, 64 Utah 24.

16. La.—Howard v. Mississippi Valley Bank, 28 La. Ann. 727, 26 Am.R. 105.

17. N.Y.—Cooper v. Hong Kong & Shanghai Banking Corp., 14 N.E. 277, 107 N.Y. 282.

18. La.—Hill, Harris & Co. v. Averett, 129 So. 399, 14 La.App. 240, 25 C.J. p 374 note 17.

Sufficiency of information

(1) A person who intrusts property to another for sale is entitled to such information concerning proceeds of sale and expenses charged as will enable a person of ordinary intelligence to understand the transaction.

Cal.—Reinert v. California Almond Growers Exchange, 70 P.2d 190, 9 C.2d 181.

(2) Agreement, which provided that defendants should render monthly statements to plaintiff showing the status of its account, did not re-

inspect them,¹⁹ and also to give him a correct copy of the entries in the books, including all memoranda connected therewith;²⁰ and if the factor, without any excuse, destroys his books, before an examination thereof is finished,²¹ or refuses to enter an account of sales,²² such fact raises an unfavorable presumption against him with respect to the amount and value of the goods sold and unaccounted for. Although the contract between the parties provides for a settlement of accounts only by the written approval of the principal, they may subsequently modify the contract and make a valid settlement without approval in writing.²³

Time of accounting; demand. The factor should be ready to render to his principal a full and complete statement of his dealings and of the state of accounts between them, whenever reasonably requested or demanded,²⁴ or to render such an account within a reasonable time after sale, without a demand,²⁵ especially where a demand is impracticable or highly inconvenient;²⁶ and a refusal or failure to render an account for an unreasonable time may render him liable in damages.²⁷

Place of accounting. The factor may be required to account to the principal at the latter's place of business or residence.²⁸

Effect of account. Accounts current are necessarily provisional until settled, and may be rectified for errors or omissions;²⁹ but where a factor's account current shows that on a certain day there

was a balance in his hands due his principal, all previous charges against the principal are extinguished.³⁰ Where the accounts are settled or stated, they are, as a general rule, conclusive between the principal and factor,³¹ except that they may be opened, surcharged, or falsified on the ground of omission, fraud, mistake, or undue advantage.³² Thus, if the factor renders his account in good faith and the principal makes no objection to it, the principal's assent to it as correct is presumed;³³ unless he objects within a reasonable time³⁴ or within the time set by the agreement,^{34.5} he will be bound by the accounting rendered.

The account rendered may be conclusive against the factor himself in the matter of his charges for commissions,³⁵ or as to the place of payment of the balance due on the account;³⁶ but if it is challenged by the principal, it is open for correction by the factor.³⁷

§ 38. Duties and Liabilities of Del Credere Factors

The obligation under a del credere commission arises only under an express contract, and where the sale is made on credit. By the weight of authority, the contract of a del credere factor is an absolute engagement to pay debts arising out of sales made by him when they become due.

The obligation under a del credere commission arises only under an express contract and is not implied by law,³⁸ and also arises only where the sale is made on credit.³⁹

quire a copy of monthly transactions, but only month-end status.

N.Y.—Zamax Mfg. Co. v. Grossman, 102 N.Y.S.2d 833.

Mere nonpayment has been held not to constitute a failure or refusal to account, within the meaning of a statutory requirement.

U.S.—Iwata v. Western Fruit Growers, C.C.A.Cal., 90 F.2d 575.

19. N.Y.—Armour v. Gaffey, 51 N.Y.S. 846, 30 App.Div. 121, affirmed 59 N.E. 1118, 165 N.Y. 630.

20. Md.—Keighler v. Savage Mfg. Co., 12 Md. 383, 71 Am.D. 600.

21. N.Y.—Armour v. Gaffey, 51 N.Y.S. 846, 30 App.Div. 121, affirmed 59 N.E. 1118, 165 N.Y. 630. 25 C.J. p 374 note 20.

22. U.S.—Pope v. Barrett, C.C.Mass., 19 F.Cas.No.11,273, 1 Mason 117.

23. N.D.—Dowagiac Mfg. Co. v. Helleson, 100 N.W. 717, 13 N.D. 257.

24. N.Y.—Terwilliger v. Beals, 6 Lans. 403. 25 C.J. p 374 note 22.

25. Ala.—Tyree v. Parham, 66 Ala. 424.

25 C.J. p 374 note 23.

26. Mass.—Dodge v. Perkins, 9 Pick. 368.

25 C.J. p 374 note 24.

27. Mass.—Langley v. Sturtevant, 7 Pick. 214.

25 C.J. p 374 note 25.

28. U.S.—Cochran v. Esola, C.C.A.Cal., 67 F.2d 91, rehearing denied 67 F.2d 743.

29. La.—Dunbar v. Bullard, 2 La. Ann. 810.

25 C.J. p 375 note 28.

30. S.C.—Walter v. Richardson, 45 S.C.L. 466.

If there is a balance due the factor at the foot of the account it must arise from subsequent transactions. S.C.—Walter v. Richardson, supra.

31. Ill.—Gore v. Campbell, 4 Ill.App. 661.

25 C.J. p 375 note 31.

32. U.S.—Pasco County Peach Ass'n v. J. F. Solley & Co., C.C.A.Md., 146 F.2d 880.

N.Y.—Bruen v. Hone, 2 Barb. 586.

25 C.J. p 375 note 32.

33. La.—Ledoux v. Porche, 12 Rob. 543.

34. Iowa.—Everingham v. Halsey, 78 N.W. 220, 108 Iowa 709.

25 C.J. p 375 note 34—1 C.J. p 697 note 76.

34.5 N.Y.—Zamax Mfg. Co. v. Grossman, 102 N.Y.S.2d 833.

Written notice of objection

N.Y.—Zamax Mfg. Co. v. Grossman, supra.

35. Cal.—Randolph Fruit Co. v. Galbreath, 166 P. 859, 34 C.A. 28.

N.Y.—William Anson Wood Mower & Reaper Co. v. Thayer, 3 N.Y.S. 465, 50 Hun 516.

36. Mass.—Jellison v. Lafonta, 19 Pick. 244.

25 C.J. p 375 note 36.

37. N.Y.—William Anson Wood Mower & Reaper Co. v. Thayer, 3 N.Y.S. 465, 50 Hun 516.

38. U.S.—Wittkowski v. Harris, C. C.N.C., 64 F. 712.

25 C.J. p 375 note 38.

"Del credere factor" defined see supra § 1.

Liability for conversion see infra § 39.

39. U.S.—Wittkowski v. Harris, supra.

25 C.J. p 375 note 39.

Nature of liability. In some jurisdictions a del credere agent is considered merely a guarantor of the debt due from the purchaser of goods sold by him, and, in order to fix liability on him, the principal must have first made an effort to collect from the purchaser;⁴⁰ but the weight of authority is to the effect that the contract of a del credere factor is considered to be an absolute engagement to pay debts arising out of sales made by him when they become due.⁴¹ Under this rule, the liability of a del credere factor accrues when, and only when, the term of credit given on the sales has expired, and the purchase money is due;⁴² and when the debt becomes due, the liability is complete without any demand being made on the principal debtor.⁴³ However, the liability of the factor does not preclude his principal from resorting to the purchaser to obtain payment at any time before the debt is paid.⁴⁴

The extent of the liability of a del credere factor depends, of course, to a large extent on the terms of his contract with the principal;⁴⁵ but it may be laid down as a general rule that a del credere factor is bound to see that his principal is paid in full⁴⁶ for all goods sold by him,⁴⁷ unless for some good reason the sale is rescinded or the goods cannot be delivered.⁴⁸ If the goods consigned are not in accordance with the contract, he is not bound to insist on the buyer's accepting the goods for the purpose of putting his principal in a better position.⁴⁹ A factor who agrees to indorse or guarantee all notes taken from customers is not bound to indorse

a note taken for goods sold by a general agent of his principal against the factor's protest and after his statement that he would not indorse the note.⁵⁰

However useful a del credere agency may be in allocating risks between the parties and determining their rights between themselves, the terms of such an agency do not necessarily control when the rights of others intervene, whether they be creditors or the sovereign.^{50.5}

On remittance. It has been held that a guaranty under a del credere agency extends only to the collection of the proceeds and not to the remittance thereof;⁵¹ and hence, if the factor exercises due care in selecting a drawee in good credit, the guaranty does not extend to a bill of exchange which he remits to his principal in the usual course of business or under an express authority to remit,⁵² unless by agreement of the parties the factor is authorized to charge a commission for the guaranty of bills of exchange remitted, and in such case his omission to charge the commission does not absolve him from his liability as guarantor of the remittance.⁵³ On the other hand, it has been held that the factor is bound not only for the collection of the money, but also for its safe transmission to the principal,⁵⁴ unless the remittance is made under special instructions from the principal, which are observed with proper caution and diligence.⁵⁵

Waiver or release by principal. The principal may waive his rights under the contract.⁵⁶ The

40. Pa.—Commonwealth v. Thorne, Neale & Co., 107 A. 814, 264 Pa. 408.

25 C.J. p 375 notes 41, 42.

41. Minn.—Clark v. Otto B. Ashbach & Sons, Inc., 64 N.W.2d 517, 241 Minn. 267.

R.I.—Balderston v. National Rubber Co., 27 A. 507, 18 R.I. 338, 49 Am. S.R. 772.

25 C.J. p 375 note 44.

Agent held not del credere factor

Minn.—Clark v. Otto B. Ashbach & Sons, Inc., 64 N.W.2d 517, 241 Minn. 267.

42. R.I.—Balderston v. National Rubber Co., 27 A. 507, 18 R.I. 338, 49 Am.S.R. 772.

25 C.J. p 376 note 46.

43. N.Y.—Cartwright v. Greene, 47 Barb. 9.
Milliken v. Byerly, 6 How.Pr. 214.

44. Mass.—Cushman v. Snow, 71 N. E. 529, 186 Mass. 169.

25 C.J. p 376 note 48.

Extension of time

As respects factor's guaranty, any attempt by principal to extend buyer's time for payment of goods after

factor had acquired account would be ineffective.

N.Y.—Brawer v. Mendelson Bros. Factors, 260 N.Y.S. 674, 237 App. Div. 44, reargument denied 261 N. Y.S. 1055, 238 App.Div. 774, modified on other grounds 186 N.E. 200, 262 N.Y. 53, amended 188 N.E. 65, 262 N.Y. 562.

45. Cal.—Jackson v. Belmont, 238 P. 2d 1084, 108 CA.2d 288.

N.J.—Shapiro Bros. Factors Corporation v. Cherokee Silk Corporation, 176 A. 893, 114 N.J.Law 356.

46. U.S.—Dunnell v. Mason, C.C.R.I., 8 F.Cas.No.4,179, 1 Story 543.
25 C.J. p 376 note 49.

Buyer's insolvency after date account became due held not to affect factor's liability.

N.Y.—Brawer v. Mendelson Bros. Factors, 260 N.Y.S. 674, 237 App. Div. 44, reargument denied 261 N. Y.S. 1055, 238 App.Div. 774, modified on other grounds 186 N.E. 200, 262 N.Y. 53, amended 188 N.E. 65, 262 N.Y. 562.

47. N.Y.—Heubach v. Rother, 9 N. Y.Super. 227, 11 N.Y.Leg.Obs. 269.
25 C.J. p 376 note 50.

48. N.Y.—Talcott v. Canton Mills Co., 30 N.Y.S. 421, 31 Abb.N.Cas. 97.

25 C.J. p 376 note 51.

49. U.S.—Albion Phosphate Mining Co. v. Wyllie, S.C., 77 F. 541, 23 C. C.A. 276.

50. Ind.—Springfield Fertilizer Co. v. Thompkins, 45 N.E. 615, 16 Ind. App. 403.

50.5 U.S.—U. S. v. Masonite Corp., N.Y., 62 S.Ct. 1070, 316 U.S. 265, 86 L.Ed. 1461, rehearing denied 62 S.Ct. 1302, 316 U.S. 713, 86 L.Ed. 1778.

51. N.Y.—Heubach v. Rother, 9 N. Y.Super. 227, 11 N.Y.Leg.Obs. 269.
25 C.J. p 376 note 55.

52. N.Y.—Leverick v. Meigs, 1 Cow. 645.

25 C.J. p 376 note 56.

53. N.Y.—Heubach v. Rother, 9 N. Y.Super. 227, 11 N.Y.Leg.Obs. 269.

54. Md.—Lewis v. Brehme, 33 Md. 412, 3 Am.R. 190.

55. Md.—Lewis v. Brehme, supra.

56. **Indorsement of buyer's notes not waived**

That consignor wrote consignee to

fact that the principal renews a note which the factor has taken for the goods does not release the factor from liability.⁵⁷

§ 39. Liability for Conversion Generally

A factor is liable for a conversion of his principal's goods, or the proceeds thereof, where he deals with them in subversion of, or inconsistently with, the principal's rights therein.

A factor who, without a legal excuse, refuses to account for and deliver his principal's goods on a proper demand therefor is liable as for a conversion thereof,⁵⁸ as where he refuses to return unsold goods to the principal on demand,⁵⁹ or where, having a lien on the goods for advances and charges, he refuses to return them on a proper tender and demand by the principal.⁶⁰ The factor is also guilty of conversion where he otherwise deals with the goods or proceeds in subversion of, or in a manner inconsistent with, the principal's rights therein,⁶¹ as where he violates the contract or the instructions of the principal as to the sale of the goods,⁶² although not where the contract or instructions are ambiguous and he follows the construction put thereon by the parties themselves;⁶³ and he may be liable even if he does not exercise complete manual control over the goods⁶⁴ or does not appropriate to his own use the proceeds of the sale thereof.⁶⁵

On the other hand, a factor is not liable for conversion where his acts are not in subversion of, or inconsistent with, the principal's ownership,⁶⁶ as where he sells after the revocation of his agency but before notice of such revocation;⁶⁷ nor is he made liable for conversion by a mere failure to account,⁶⁸ or by a mere sale of the goods by the carrier by which he ships them to an agent;⁶⁹ and a mere intention on the part of the factor to appropriate the proceeds of the goods to his own use does not amount to a conversion.⁷⁰

Failure to pay over money. Where the factor is not bound to pay over the identical money received by him as factor, his failure to pay it over to the principal on demand is not a conversion.⁷¹

Conversion through subagent. A factor who disposes of the goods through a third person to whom he has delegated his authority, without the sanction of his principal or the usage of trade, is liable for a conversion,⁷² as is the subagent by reason of his sale of the goods;⁷³ but the principal may affirm the sale through the subagent and hold the factor liable for the value of the goods.⁷⁴

A del credere factor is not liable for conversion of the goods because he fails to collect for them; the principal's remedy is by suit on the guaranty.⁷⁵

hold notes for sales and collect them for consignor held not waiver of contract requirement that consignee indorse notes taken on sales, in view of other letters, and provision in contract, appointing consignee agent of consignor, that notes for sales should be consignor's property was not a waiver of requirement of indorsement.

Wis.—Darling & Co. v. Frank Carter Co., 242 N.W. 519, 208 Wis. 222.

57. Mo.—Buelterman v. Meyer, 34 S. W. 67, 132 Mo. 474.

58. Minn.—Coleman v. Pearce, 1 N. W. 846, 26 Minn. 123.

Federal Packers and Stockyards Act does not absolve factor from liability for conversion.

U.S.—John Clay & Co. Livestock Commission v. Clements, C.A.Tex., 214 F.2d 803.

59. Wash.—Passow v. Kirkwood Distillery Co., 103 P. 34, 54 Wash. 196.

25 C.J. p 377 note 63.

Goods shipped to foreign country

Liability exists even though goods have been shipped to a foreign country and a permit is needed from the foreign government to get them back.

N.Y.—Saul v. De Koenigsberg, 147 N.Y.S.2d 396.

60. Pa.—Wagenblast v. McKean, 2 Grant 393.

25 C.J. p 377 note 64.

61. Cal.—Alonso v. Badger, 138 P. 2d 24, 58 C.A.2d 752.

Iowa.—M. M. Walker Co. v. Dubuque Fruit & Produce Co., 76 N.W. 673, 106 Iowa 245.

25 C.J. p 377 note 65.

Payment to holder of defective title
A live stock commission company which was a market agency under the Federal Packers and Stockyards Act, was liable to owner of cattle for conversion which occurred when company paid selling price of cattle to drover from whom they received the cattle, without notice of his defective title.

Wash.—Moderie v. Schmidt, 108 P.2d 331, 6 Wash.2d 592.

62. Mich.—Bellows v. Goodfellow, 267 N.W. 885, 276 Mich. 471.

25 C.J. p 377 note 66.

63. R.I.—Hassett v. Cooper, 20 A. 841, 20 R.I. 585.

64. Mo.—Arkansas City Bank v. Cassidy, 71 Mo.App. 186.

65. Cal.—Alonso v. Badger, 138 P. 2d 24, 58 C.A.2d 752.

Mo.—Arkansas City Bank v. Cassidy, 71 Mo.App. 186.

66. Okl.—Kent v. Wright, 175 P.2d 802, 198 Okl. 103.

Pa.—Nonantum Worsted Co. v. Webb, 16 A. 632, 124 Pa. 125.

25 C.J. p 377 note 68.

67. Me.—Jones v. Hodgkins, 61 Me. 480.

68. Mich.—Hutchins v. Vinkemulder, 154 N.W. 80, 187 Mich. 676.

69. Mich.—Hutchins v. Vinkemulder, supra.

70. Cal.—Herron v. Hughes, 25 C. 555.

71. N.Y.—Greentree v. Rosenstock, 61 N.Y. 583.

25 C.J. p 377 note 73.

72. Cal.—Imperial Valley Long Staple Cotton Growers' Ass'n v. Davidson, 209 P. 58, 58 C.A. 551.

25 C.J. p 377 note 74.

73. Tenn.—Merchants' Nat. Bank v. Trenholm, 12 Heisk. 520.

74. Tenn.—Campbell v. Reeves, 3 Head 226.

75. N.Y.—Standard Fertilizer Co. v. Van Valkenburgh, 47 N.Y.S. 703, 21 Misc. 559.

Liabilities of del credere factors generally see supra § 38.

Pledge. If the factor wrongfully pledges his principal's goods, as for his own debt, the factor is liable for conversion and the principal may sue him in trover,⁷⁶ without first making a demand on him for redelivery;⁷⁷ but the factor may, in such action, recoup the amount of his charges and advances.⁷⁸ Instead of suing in trover, the principal is entitled, in a settlement of accounts with the factor, to an allowance for any loss or damages which result from the unauthorized pledge;⁷⁹ whether he may maintain an action of indebitatus assumpsit for goods sold and delivered has been said to be in doubt.⁸⁰

§ 40. Rights in and Title to Goods

As a general rule, the right in, or title to, the goods remains in the principal until the goods are transferred to a purchaser; the mere fact that the factor has made advances does not change the title, but the principal's right, title, and power of disposition are subject to the special interest of the factor arising out of his lien.

As a general rule, even though the factor has possession of the goods consigned, and is a *del credere* factor,⁸¹ the general right in, or title to, the goods remains in the principal until they are transferred to a purchaser,⁸² and, as shown *supra* § 28, he has the right to direct and control their sale or disposition. Unless there is a special contract with regard to returning the goods,⁸³ the principal may repossess himself of the goods at any time before sale on payment of his indebtedness to the factor,⁸⁴ and the factor may return the goods.^{84.5}

With some exceptions,⁸⁵ as where he has yielded to a paramount title asserted by a third person without his connivance,⁸⁶ the factor is estopped to deny the principal's title;⁸⁷ nor are the goods liable for the factor's debts.⁸⁸ The factor is regarded as a bailee of the property⁸⁹ and as sales agent of the bailor.^{89.5}

Effect of advances or lien. The mere fact that the factor has made advances to the principal on

76. U.S.—Halsey v. Bird, Va., 99 F. 525, 39 C.C.A. 638, certiorari denied 20 S.Ct. 1031, 178 U.S. 615, 44 L.Ed. 1217.

Kelly v. Smith, C.C.Conn., 14 F. Cas.No.7,675, 1 Blatchf. 290.
25 C.J. p 352 note 13.

Pledge for more than debt due

A factor pledging the goods of his principal must, in order to relieve himself of the charge of conversion, affirmatively show that the pledge was not for more than the principal owed him.

Cal.—Imperial Valley Long Staple Cotton Growers' Ass'n v. Davidson, 209 P. 58, 58 C.A. 551.
25 C.J. p 352 note 13 [a].

77. N.Y.—Acme Lumber Co. v. Montgomery, 107 N.Y.S. 1074, 123 App.Div. 620, affirmed 88 N.E. 1113, 195 N.Y. 532.

25 C.J. p 352 note 14.

78. Ky.—Louisville First Nat. Bank v. Boyce, 78 Ky. 42, 39 Am.R. 198.
25 C.J. p 353 note 15.

79. U.S.—Kelly v. Smith, C.C.Conn., 14 F.Cas.No.7,675, 1 Blatchf. 290.

80. U.S.—Kelly v. Smith, *supra*.

81. Mass.—Cushman v. Snow, 71 N. E. 529, 186 Mass. 169.
25 C.J. p 377 note 79.

82. U.S.—John Clay & Co. Livestock Commission v. Clements, C.A.Tex., 214 F.2d 803.

In re American Merchandising Co., D.C.N.J., 136 F.Supp. 952.

Ala.—J. H. Arnold & Co. v. Gibson, 113 So. 25, 216 Ala. 314.

Cal.—Cass v. Rochester, 163 P. 212, 174 C. 358.

Corpus Juris quoted in Campbell v. Smith, 274 P. 758, 760, 96 C.A. 689.

D.C.—Neild v. District of Columbia, 110 F.2d 246, 71 App.D.C. 306.

Iowa.—West v. Hartford Fire Ins. Co., 83 N.W.2d 465, 248 Iowa 993—Cable v. Iowa State Sav. Bank, 194 N.W. 957, 197 Iowa 393, 31 A.L.R. 748, modified on other grounds 197 N.W. 434, 197 Iowa 393, 31 A.L.R. 748.

N.J.—Kahn & Feldman v. United Piece Dye Works, 7 A.2d 793, 123 N.J.Law 18, affirmed 12 A.2d 384, 124 N.J.Law 372.

N.Y.—Automobile & Cycle Co. of America v. Motor Finance Co., 138 N.Y.S. 1016, 79 Misc. 37.

Wash.—Hansen Service v. Lunn, 283 P. 695, 155 Wash. 182.
25 C.J. p 377 note 80.

Passing of title on consignment for sale in general see Sales § 270. Rights and duties as to proceeds see *supra* § 34.

Title only in identifiable articles

Consignment contract retains title only to specific identifiable articles, and not to unidentifiable articles or money value of consigned goods delivered and not paid for.

U.S.—In re Edwards, D.C.Cal., 163 F. Supp. 935.

Under contract providing for retention of ownership of the goods by the principal until sold, the factor could not claim ownership.

Cal.—Campbell v. Smith, 274 P. 758, 96 C.A. 689.

25 C.J. p 377 note 80 [a].

83. Minn.—Maine v. Oien, 49 N.W. 523, 47 Minn. 89.

25 C.J. p 378 note 82.

84. N.Y.—Lion v. Lilienfeld, 30 N. Y.S.2d 866.

25 C.J. p 378 note 83.

84.5 U.S.—In re American Merchandising Co., D.C.N.J., 136 F.Supp. 952.

85. Minn.—Blackorby v. Friend, Crosby & Co., 158 N.W. 708, 134 Minn. 1, Ann.Cas.1918E 1199.

Facts insufficient to make rule inapplicable

U.S.—Iravani Mottaghi v. Barkey Importing Co., C.A.N.Y., 244 F.2d 238, certiorari denied 77 S.Ct. 1402, 354 U.S. 939, 1 L.Ed.2d 1538.

86. Minn.—Blackorby v. Friend, Crosby & Co., 158 N.W. 708, 134 Minn. 1, Ann.Cas.1918E 1199.

Pa.—Floyd v. Bovard, 6 Watts & S. 75.

87. U.S.—Iravani Mottaghi v. Barkey Importing Co., C.A.N.Y., 244 F.2d 238, certiorari denied 77 S.Ct. 1402, 354 U.S. 939, 1 L.Ed.2d 1538.

Minn.—Blackorby v. Friend, Crosby & Co., 158 N.W. 708, 134 Minn. 1, Ann.Cas.1918E 1199.

25 C.J. p 378 note 85.

Factor cannot set up adverse claim to property.

Cal.—National Bank of New Zealand v. Finn, 253 P. 757, 81 C.A. 317.

88. N.D.—Coverdell v. Erickson, 168 N.W. 367, 38 N.D. 579.

25 C.J. p 378 note 87.

89. Cal.—National Bank of New Zealand v. Finn, 253 P. 757, 81 C.A. 317.

D.C.—Neild v. District of Columbia, 110 F.2d 246, 71 App.D.C. 306.

Minn.—Clark v. Otto B. Ashbach & Sons, Inc., 64 N.W.2d 517, 241 Minn. 267.

25 C.J. p 378 note 88.

89.5 Minn.—Clark v. Otto B. Ashbach & Sons, Inc., *supra*.

the goods does not change the title thereto,⁹⁰ but to the extent that the factor has a lien on the goods, in accordance with the rules stated *infra* § 45, he has a special property or interest in the goods,⁹¹ and the principal's right, title, and power of disposition of the goods are subject to such lien.⁹² This rule also applies as against a person claiming to have purchased the goods from the principal,⁹³ and although the person to whom the factor has advanced money on the property may have acted fraudulently in obtaining the shipping bills without having paid for the property, yet if the advances were made by the factor in good faith and without any knowledge of the fraud, the shipper will lose his right of reclaiming the property and his title will be divested as against the factor,⁹⁴ who will be considered a bona fide purchaser to the extent of his advances.⁹⁵ Where a factor makes advances to his principal for the purchase of goods, he may stipulate by parol that the title shall be in him as security for the money advanced.⁹⁶

As a general rule the factor, although he has made advances on the goods, acquires no right of property whatever in them until the delivery thereof or of the bill of lading therefor,⁹⁷ although the principal is indebted to the factor for advances on previous consignments, to an amount greater than the value of the goods.⁹⁸ If in pursuance of an agreement goods are shipped to a factor in satisfaction of antecedent advances and are thus set apart and specifically appropriated for this particular purpose, the title to the goods vests in the factor upon the receipt thereof by the carrier,⁹⁹ although the principal retains the bill of lading or takes it in his own name;¹ but it must appear that

the delivery to the carrier was made with the intent to transfer the property.²

§ 41. Compensation of Factor

- a. In general
- b. As affected by sufficiency of services
- c. Rate or amount of compensation
- d. Forfeiture or loss of commissions

a. In General

A factor's right to compensation rests on a contract, express or implied, or on a statute; unless his contract provides otherwise, he is entitled to commissions only on sales made by him, and not on those made by the principal or other agents. He is generally entitled to commissions for funds advanced, drafts accepted, or notes indorsed for the principal's benefit.

A factor's right to compensation, which usually takes the form of commissions on the goods sold, as appears *supra* § 1, rests on a contract, express or implied,³ or on a statute.⁴ Such a contract may be implied from a custom among factors of charging a certain commission,⁵ or from the general course of dealing between the parties,⁶ and where a factor performs services without an express contract therefor, the law may imply a promise on the part of the principal to pay for the services,⁷ even though the person performing them is not engaged in the regular business of a factor.⁸

However, a person who acquires possession of the goods and sells them without the consent of the owner is not entitled to compensation;⁹ nor is a factor entitled to commissions for an unauthorized sale,¹⁰ unless the principal ratifies it.¹¹

Payment. The factor's compensation is generally payable, and estimated, in money, and not in the goods of his principal;¹² and where a factor takes

90. Mo.—Bailey-Ball-Pumphrey Co. v. Branham, App., 236 S.W. 379. 25 C.J. p 378 note 90.

91. Fla.—Gadsden County Tobacco Co. v. Corry, 137 So. 255, 103 Fla. 217.

Md.—Hall v. Hinks, 21 Md. 406. Miss.—Gridley, Maxon & Co. v. Turner, 176 So. 733, 179 Miss. 890, suggestion of error overruled 177 So. 362, 179 Miss. 890. 25 C.J. p 378 note 92.

92. Ga.—Willingham v. Rushing, 31 S.E. 130, 105 Ga. 72. 25 C.J. p 378 note 93.

93. N.Y.—Dows v. Greene, 16 Barb. 72. Rights of factor as against third persons generally see *infra* §§ 52-55.

94. N.Y.—Dows v. Greene, *supra*.

95. Md.—Hall v. Hinks, 21 Md. 406. N.Y.—Dows v. Greene, 16 Barb. 72.

96. Tenn.—Grange Warehouse Assoc. v. Owen, 7 S.W. 457, 86 Tenn. 355.

97. N.Y.—Rochester Bank v. Jones, 4 N.Y. 497, 55 Am.D. 290. 25 C.J. p 378 note 98.

98. N.Y.—Rochester Bank v. Jones, *supra*.

99. N.Y.—Bailey v. Hudson River R. Co., 49 N.Y. 70. 25 C.J. p 379 note 1.

1. N.Y.—Bailey v. Hudson River R. Co., *supra*. 25 C.J. p 379 note 2.

2. N.Y.—Bailey v. Hudson River R. Co., *supra*. 25 C.J. p 379 note 3.

3. Pa.—McKean v. Wagenblast, 2 Grant 462. 25 C.J. p 379 note 6.

4. Ky.—Orr v. Louisville Tobacco

Warehouse Co., 99 S.W. 225, 30 Ky.L. 457. 25 C.J. p 379 note 7 [a].

5. Ala.—Brown v. Harrison, 17 Ala. 774.

6. Miss.—Thompson v. Matthews, 56 Miss. 368.

7. Pa.—Masterson v. Masterson, 15 A. 652, 121 Pa. 605. 25 C.J. p 379 note 10.

8. Pa.—Masterson v. Masterson, *supra*.

9. Pa.—McKean v. Wagenblast, 2 Grant 462.

10. Cal.—Miller v. Price, 39 P. 781, 4 Cal.Unrep.Cas. 983. 25 C.J. p 379 note 13.

11. Cal.—Lubert v. Chauviteau, 3 C. 458, 58 Am.D. 415.

12. Mo.—McCune v. Erfort, 43 Mo. 134.

25 C.J. p 379 note 15.

from the purchaser a separate note to himself for the amount of his commission, and discounts it and appropriates the proceeds, his action amounts to a payment of his commissions as between him and his principal.¹³

Transactions for which compensation is payable. As a general rule a factor is entitled to commissions, as such, only on the amount of goods actually sold.¹⁴ He is so entitled only on sales made by him, and not on those made by the principal or other agents,¹⁵ especially after his agency has expired,¹⁶ although he has made advances on the faith of the property,¹⁷ and unless his contract expressly or impliedly provides that he shall be paid commissions on sales made by the principal or the latter's other agents.¹⁸ If a loss occurs because of a sale on credit, the factor will or will not be entitled to commissions on such sales according to the usage of commerce.¹⁹ A factor is not entitled to commission on the payment of his own debt to his principal.²⁰

Commissions for advances and acceptances; disbursements. In addition to commissions for other purposes, a factor is generally entitled to commissions for funds advanced, drafts accepted, or notes

indorsed for the principal's benefit in the course of the business;²¹ but he is not entitled to commissions on disbursements of the principal's money,²² or on disbursements which are chargeable to the purchaser as an item of shipping expense,^{22.5} or on the balance against the principal in their mutual accounts.²³

Subagent and cumulative commissions. In the absence of special authority, a factor employing another factor or broker to sell the goods cannot charge for both his own and the other factor's or broker's commission.²⁴

b. As Affected by Sufficiency of Services

Ordinarily a factor is entitled to commissions when, and only when, his services under the contract are complete; but he is entitled to proportionate compensation where he has performed important services, but is prevented, without his fault, from completing them.

Ordinarily a factor is entitled to his commissions when, and only when, his services under the contract are complete,²⁵ as when he sells and delivers the goods,²⁶ and not where he merely procures an order therefor.²⁷ However, the principal cannot, without just cause, deprive the factor of his right

13. Ohio.—Indianapolis Rolling Mill Co. v. Addy, 5 Ohio Dec., Reprint, 588, 6 Am.L.Rec. 764, 3 Cinc.L.Bul. 293.

14. Iowa.—Sanderson v. Tinkham Smoke Consumer Co., 49 N.W. 1034, 83 Iowa 446.
25 C.J. p 380 note 27.

Goods returned

Under a contract providing for payment to a factor of a commission for goods sold, he was not entitled to a commission on goods which were sold and then returned to his principal, where their return was not caused by any act or omission of the latter.

Cal.—McGuire v. Aluminum Products Co. of the Pacific Coast, 207 P. 925, 57 C.A. 636.

15. Vt.—Corlies v. Estes, 31 Vt. 653.
25 C.J. p 380 note 28.

16. Tex.—Ford Motor Co. v. Cranford Auto Co., Civ.App., 206 S.W. 108.

25 C.J. p 380 note 29.

17. La.—Taylor v. Wooten, 19 La. 518—Harrod v. Constant, 5 Mart. 575.

18. U.S.—Moore v. Lawrence, C.C. Tex., 16 F. 87.
25 C.J. p 380 note 31.

Agent assisting in sale by principal Selling agent may be entitled to commission for sale and delivery by principal directly to customer, where

agent assisted in sale and was promised commission.

La.—Hill, Harris & Co. v. Averett, 129 So. 399, 14 La.App. 240.

Accounts collected

Factor held entitled, under contract, to commissions on accounts receivable for merchandise purchased prior to the contract which were assigned to, and checked up and collected by, him.

U.S.—Boise v. Talcott, C.C.A.N.Y., 264 F. 61.

Contract held not to entitle factor to a commission on all sales of the principal's goods made by another agent.

N.Y.—Strauss v. Earnstein, 133 N.E. 440, 232 N.Y. 187.

19. Mass.—Clark v. Moody, 17 Mass. 145, 152.

25 C.J. p 380 note 32.

20. Pa.—Pavret v. Perot, 2 Yeates 185.

25 C.J. p 380 note 33.

21. N.Y.—Matthews v. Coe, 70 N.Y. 239, 26 Am.R. 583—Smith v. Marvin, 27 N.Y. 137.

25 C.J. p 381 notes 42, 43.

Commissions in excess of lawful interest see the C.J.S. title Usury § 45.

Reimbursement for advances see infra § 43.

22. Ala.—Lee v. Byrne, 75 Ala. 132.

22.5 Cal.—San Diego Fruit & Prod-

uce Co. v. Elster, 273 P.2d 70, 127 C.A.2d 80.

23. S.C.—Walters v. McGirt, 42 S.C. L. 287.

25 C.J. p 381 note 46.

24. Miss.—D. S. Pate Lumber Co. v. Weathers, 146 So. 433, 167 Miss. 228.

25 C.J. p 381 note 40.

Single instance as not notice of charge

Single instance where factor charged principal brokerage, but explained charge, did not put principal on notice that factor was charging him with brokerage.

Miss.—D. S. Pate Lumber Co. v. Weathers, supra.

25. Wash.—West Coast Mfrs. Agency v. Oregon Condensed Milk Co., 103 P. 4, 54 Wash. 247.

25 C.J. p 379 note 18.

Where the goods are destroyed or injured so as to prevent a sale, the factor loses the commissions to which he would have been entitled in case of a sale.

Vt.—Corlies v. Estes, 31 Vt. 653.

26. N.Y.—Hall v. French-American Wine Co., 134 N.Y.S. 158, 149 App. Div. 609.

25 C.J. p 379 note 19.

27. N.Y.—Hall v. French-American Wine Co., supra.

25 C.J. p 379 note 20.

to earn a commission,²⁸ and he is entitled to proportionate compensation where he has performed important services, but is prevented, without any fault on his part, from completing them.²⁹

Where complete performance is prevented by the principal's withdrawing the goods, without a substantial reason therefor, a factor who has made advances on the goods may be entitled to the full amount he would have earned by complete performance;³⁰ but if the withdrawal from the factor is made before he takes any steps to execute the power or acquires any interest in the goods or incurs any expense or liability with reference thereto, he is not entitled to commissions.³¹

c. Rate or Amount of Compensation

In the absence of an express agreement or statute fixing the amount of a factor's compensation, he is entitled to the amount usually charged for such services, provided it is just and reasonable, or, in the absence of a customary rate, to a fair and reasonable compensation.

The rate or amount of compensation to which a factor is entitled is generally determined by the contract,³² although it may be governed by statute.³³

Customary or reasonable rate or amount. In the absence of an express agreement fixing the rate or amount of compensation, the factor is entitled to

the amount usually charged for such services,³⁴ provided it is just and reasonable.³⁵ If there does not appear to be a customary rate, he is entitled to a fair and reasonable compensation, taking into consideration all the facts and circumstances of the particular case;³⁶ and this may be the rule of compensation even though the rate was fixed by a previous contract, if it is no longer operative.³⁷

In the absence of a special agreement to that effect, a factor is not entitled, as a matter of law, to the same commission on contracts negotiated by him as a broker as he received for his services as factor.³⁸

d. Forfeiture or Loss of Commissions

As a general rule, a factor who is guilty of fraud, misconduct, gross negligence, or breach of contract forfeits his right to commissions, unless the principal waives the tort or breach.

As a general rule, a factor who is guilty of fraud, misconduct, breach of contract, or gross negligence in the conduct of his agency forfeits his right to commissions,³⁹ unless the principal waives the tort or breach of contract.⁴⁰ Thus, he generally forfeits his commission where he violates his contract, or the principal's instructions, with regard to the sale,⁴¹ renders a false account with a fraudulent intent,⁴² fails to keep and render proper accounts,⁴³

28. La.—Thompson v. Packwood, 2 La. Ann. 624.

25 C.J. p 380 note 22.

New contract

The factor is entitled to his commission where the purchasers pay in full pursuant to a new contract made with the principal.

Minn.—Clark v. Otto B. Ashbach & Sons, Inc., 64 N.W.2d 517, 241 Minn. 267.

29. U.S.—Albion Phosphate Mining Co. v. Wyllie, S.C., 77 F. 541, 23 C.C.A. 276.

N.Y.—Horst v. Lovdal, 98 N.Y.S. 996, 113 App.Div. 277.

30. Pa.—Smedley v. Williams, 1 Pars. Eq. Cas. 359.

31. Pa.—Roberts v. Andrews, 15 Pa. Super. 311.

32. Ark.—Stuttgart Rice Mill Co. v. Lockridge, 47 S.W.2d 596, 185 Ark. 340—J. W. Myers Commission Co. v. Fruit Production Co., 25 S.W.2d 17, 181 Ark. 166.

Cal.—Clayton v. Randolph Marketing Co., 203 P. 831, 55 C.A. 523.

Mich.—Bangor Fruit Exch. v. Bangor Canning Co., 201 N.W. 215, 229 Mich. 167.

N.Y.—Weisberg v. Miller-Frank Co., 225 N.Y.S. 239, 222 App.Div. 28.

Wash.—Tonkoff v. Roche Fruit &

Produce Co., 242 P. 3, 137 Wash. 148.

25 C.J. p 380 note 34.

Damage claims against carrier

Where the factor accounted to his principal on the basis that goods damaged in shipment had been sold at the same price as undamaged goods, he was not entitled to commission on amounts realized by consignors on damage claims against the carrier on the ground that such amounts were part of the selling price.

Cal.—Whitacre v. Hall, 104 P.2d 660, 40 C.A.2d 68.

33. Minn.—State v. Rogers & Rogers, 182 N.W. 1005, 149 Minn. 151.

Statute held not retroactive

Wash.—Tonkoff v. Roche Fruit & Produce Co., 242 P. 3, 137 Wash. 148.

34. Pa.—Masterson v. Masterson, 15 A. 652, 121 Pa. 605.

25 C.J. p 381 note 35.

35. Ala.—Brown v. Harrison, 17 Ala. 774.

25 C.J. p 381 note 36.

36. N.Y.—Briggs v. Boyd, 56 N.Y. 289.

25 C.J. p 381 note 37.

37. U.S.—Goddard v. Foster, N.Y., 17 Wall. 123, 21 L.Ed. 589.

38. U.S.—Meriden Coal Min. Co. v. Van de Water, N.Y., 191 F. 805, 112 C.C.A. 319.

25 C.J. p 381 note 39.

39. U.S.—Talcott v. Chew, C.C.Ga., 27 F. 273.

25 C.J. p 381 note 57.

40. U.S.—Ricketson v. Wright, C.C. Mass., 20 F.Cas.No.11,805, 3 Sumn. 335.

25 C.J. p 382 note 58.

41. U.S.—Ball v. Clark, C.C.N.Y., 28 F. 179.

Pa.—Zurn v. Noedel, 6 A. 63, 113 Pa. 336.

Commissions deducted from damages

It has been held that, where the factor sells below the price limited, the principal is entitled to recover the difference between the price received and the price limited, but that the factor is entitled to a deduction for commissions.

Conn.—Union Hardware Co. v. Plume & A. Mfg. Co., 20 A. 455, 58 Conn. 219.

42. Ill.—Obermeyer v. Wisconsin Dairy Farms Co., 211 Ill.App. 213.

Mo.—Brack v. Hart Commission Co., 57 Mo.App. 605.

43. Ill.—Fish v. Seeberger, 39 N.E. 982, 154 Ill. 30.

25 C.J. p 382 note 61.

appropriates the proceeds of sale to his own use,⁴⁴ or accepts a commission from the buyer without the knowledge and approval of his principal.⁴⁵

A breach of duty in one transaction does not deprive a factor of his right to commissions in another transaction, where his agreement provides for the keeping of a separate account of each transaction;⁴⁶ nor does he lose his right to commissions because of clerical errors or mistakes which do not result in loss or damage to the principal,⁴⁷ and which are honestly made.⁴⁸ A question whether a factor had the authority to delegate authority to a subagent to make a sale does not affect the factor's right to compensation for sales made by the subagent.^{48.5}

Guaranty as to amount of sales. If the factor guarantees to his principal that he will realize a certain amount from the sales, he will not be allowed commission where such allowance would bring the amount received by the principal below the amount guaranteed by the factor.⁴⁹

§ 42. — Del Credere Commissions

A del credere factor is supposed to receive an additional consideration for the risk of guaranteeing the purchaser, when the sale is made on credit; it is earned, with respect to each sale, immediately on the sale's being effected.

One who sells on a del credere commission is supposed to receive an additional consideration for the risk incurred by guaranteeing the purchaser.⁵⁰ This additional consideration or commission is earned when the contract of guaranty is entered into, and that time, with reference to any particular sale, is immediately on the sale's being effected, and not when the account is collected.⁵¹ Such a commission may be demanded only where the factor is bound by his agreement to make the guaranty, and not where he makes it voluntarily,⁵² and also only where the sale is made on credit and not where it is for cash.⁵³

The fact that the factor becomes insolvent before the credit given on the sale has expired does not affect his right to his full commission, for although his insolvency may lessen the value of the guaranty, it does not alter the legal status of the parties.⁵⁴

Where principal fails to carry out contract. Where a del credere factor procures a contract of sale for his principal, and, upon the principal's being unable to furnish the full amount of goods, makes up the deficiency by procuring goods from other customers, and carries out the contract with profit to the principal, he is entitled to commissions on the whole amount of goods contracted for; but if the factor procures a release of the contract which the principal is unable to fulfill, he is entitled only to a proportionate share of his commissions.⁵⁵

§ 43. Reimbursement and Indemnity

- a. In general
- b. Forfeiture or loss of right to reimbursement

a. In General

A factor is entitled to be reimbursed by his principal for all necessary charges, expenses, disbursements, and advancements made or accruing in the course of the agency and for the principal's benefit, provided they are made in good faith and without negligence and are necessary to protect and promote the principal's interest in the subject matter of the agency; and he is entitled to interest on advances made by him or on a balance due him on an account stated.

A factor is entitled to be reimbursed by his principal for all necessary charges, expenses, disbursements, and advancements made or accruing in the course of the agency and for the principal's benefit,⁵⁶ provided such expenditures and advancements are made in good faith and without negligence, and are necessary in order to protect and promote the interest of the principal in the subject matter of the agency.⁵⁷ The right to reimburse-

Duty to keep and render accounts see supra § 37.

44. Ill.—Brannan v. Strauss, 75 Ill. 234.

45. U.S.—Talcott v. Chew, C.C.Ga., 27 F. 273.

25 C.J. p 382 note 62.

46. N.Y.—Gravenhorst v. Texas Co., 173 N.Y.S. 285, 185 App.Div. 511.

47. N.Y.—Gravenhorst v. Texas Co., supra.

48. Iowa.—Everingham v. Halsey, 78 N.W. 220, 108 Iowa 709.

48.5 Cal.—Cheminol Corp. v. Ohlson, 283 P.2d 773, 133 C.A.2d 223.

49. Mass.—Dalton v. Goddard, 104 Mass. 497.

25 C.J. p 382 note 66.

50. U.S.—In re Taft, Ohio, 133 F. 511, 66 C.C.A. 385.

51. N.Y.—Springville Mfg. Co. v. Lincoln, 11 N.Y.S. 75, 16 Daly 318.

25 C.J. p 381 note 48.

52. N.Y.—Colton v. Dunham, 2 Paige 267.

53. U.S.—Wittkowski v. Harris, C.C. N.C., 64 F. 712.

25 C.J. p 381 note 52.

54. N.Y.—Springville Mfg. Co. v. Lincoln, 11 N.Y.S. 75, 16 Daly 318.

55. U.S.—Albion Phosphate Mining

Co. v. Wyllie, S.C., 77 F. 541, 23 C.C.A. 276.

56. Cal.—Corpus Juris cited in Imperial Valley Long Staple Cotton Growers' Ass'n v. Davidson, 209 P. 58, 59, 58 C.A. 551.

Mont.—Corpus Juris cited in Bowles Livestock Commission Co. v. Midland Nat. Bank of Billings, 23 P. 2d 967, 970, 94 Mont. 467.

25 C.J. p 382 notes 68, 69.

57. Ga.—Byrne v. Doughty, 13 Ga. 46.

Mont.—Bowles Livestock Commission Co. v. Midland Nat. Bank of Billings, 23 P.2d 967, 94 Mont. 467.

ment for expenses extends to payments actually made on account of the goods for freight,⁵⁸ storage,⁵⁹ drayage, labor, and weighing,⁶⁰ insurance which he is under a duty to procure,⁶¹ and customs duties,⁶² as well as to other necessary and usual expenses incidental to the marketing of the goods,⁶³ the protection of the principal's title or interest,⁶⁴ or the general conduct of the agency.⁶⁵

Where his contract specifies the expenses which shall be borne by the principal, the factor is not entitled to reimbursement for other expenditures made by him;⁶⁶ nor is he entitled to reimbursement for expenditures which are in excess of his authority,⁶⁷ or in violation of his instructions.⁶⁸ He is not entitled to reimbursement for services rendered, or expenses incurred, in protecting his own interests,⁶⁹ unless he is entitled thereto under the

provisions of his contract.⁷⁰

For advances. Advances by a factor to his principal are generally made, as shown *infra* § 44, not only on the faith of the goods consigned, but also on the personal credit of the principal, and hence, as a general rule, the principal is personally bound to reimburse the factor for such advances,⁷¹ although the goods are destroyed.⁷² This rule applies to advances made by the factor's payment of the principal's drafts drawn on him⁷³ or indorsed by him,⁷⁴ and to money paid in the principal's behalf,⁷⁵ and also applies to advances outside the contract if the principal procures them and has the benefit thereof.⁷⁶

Where the factor realizes the amount of his advances by bills drawn against the purchaser of the

58. Cal.—*Corpus Juris* cited in Imperial Valley Long Staple Cotton Growers' Ass'n v. Davidson, 209 P. 58, 59, 58 C.A. 551.
25 C.J. p 382 note 71.

Compliance with instructions

Factor complying in good faith with principal's instructions to pay freight was entitled to reimbursement, without regard to question of consideration for promise to indemnify him, or principles of accord and satisfaction.
N.Y.—Jacobsen v. Bond, 211 N.Y.S. 819, 125 Misc. 898.

59. Cal.—*Corpus Juris* cited in Imperial Valley Long Staple Cotton Growers' Ass'n v. Davidson, 209 P. 58, 59, 58 C.A. 551.
25 C.J. p 382 note 72.

60. La.—Brander v. Lum, 11 La. Ann. 217.

61. U.S.—Kingston v. Wilson, Pa., 14 F.Cas.No.7,823, 4 Wash.C.C. 310.
25 C.J. p 382 note 74.

Duty as to insurance see *supra* § 27.
62. Md.—Drake v. Hudson, 7 Harr. & J. 399.
25 C.J. p 383 note 75.

63. Mass.—Talcott v. Smith, 8 N.E. 413, 142 Mass. 542.
25 C.J. p 383 note 76.

Advertising

Where contract of rice growers' association with milling company for milling of rice of members provided for collection of certain amount from owners to be used in advertising, company, on accounting for value of rice sold, should be allowed to deduct items which it has been required to account for and pay over to receiver of bankrupt association.
Ark.—Joy Rice Milling Co. v. Brown, 268 S.W. 1, 167 Ark. 205.

Payments to salesmen; traveling and office expenses

However, under a contract provid-

ing for the payment of a certain commission, a factor has been held not entitled to reimbursement for sums paid to his salesmen or for his traveling expenses or office expenses.

Cal.—McGuire v. Aluminum Products Co. of the Pacific Coast, 207 P. 925, 57 C.A. 636.

64. N.Y.—Monnet v. Merz, 27 N.E. 827, 127 N.Y. 151.
25 C.J. p 383 note 77.

65. Mass.—Carter v. Cunningham, 7 Metc. 491.
25 C.J. p 383 note 78.

66. N.Y.—Waterman v. Bowler, 19 N.Y.S. 491, 64 Hun 638.

67. La.—Gilly v. Berlin, 12 La. Ann. 723.

N.Y.—Monnet v. Merz, 18 N.Y.S. 780, 61 N.Y.Super. 120, affirmed 34 N.E. 515, 138 N.Y. 673.

68. U.S.—Fidelity Insurance Trust & Safe-Deposit Co. v. Roanoke Iron Co., C.C.Va., 91 F. 19.
Cal.—San Diego Fruit & Produce Co. v. Elster, 273 P.2d 70, 127 C.A.2d 80.

69. Pa.—Smith v. Equitable Trust Co., 64 A. 591, 215 Pa. 413.

Persuading principal to perform agreement

Expenses incurred in trying to persuade the principal not to breach his agreement to fill orders solicited by the factor held not recoverable.

Cal.—McGuire v. Aluminum Products Co. of the Pacific Coast, 207 P. 925, 57 C.A. 636.

70. N.Y.—Newburger-Morris Co. v. Talcott, 114 N.E. 846, 219 N.Y. 506.
25 C.J. p 383 note 83.

Agreement to hold factor harmless from risk or expense held not to authorize factor to recover from

principals cost of litigation between them respecting certain account.

N.Y.—Brawer v. Mendelson Bros. Factors, 260 N.Y.S. 674, 237 App. Div. 44, reargument denied 261 N.Y.S. 1055, 238 App.Div. 774, modified on other grounds 186 N.E. 200, 262 N.Y. 53, amended 188 N.E. 65, 262 N.Y. 562.

71. Cal.—Belmont v. Milton, 110 P. 2d 525, 43 C.A.2d 120.

Mo.—Bailey-Ball-Pumphrey Co. v. German, 247 S.W. 483, 213 Mo. App. 11.

Mont.—*Corpus Juris* cited in Bowles Livestock Commission Co. v. Midland Nat. Bank of Billings, 23 P. 2d 967, 970, 94 Mont. 467.

N.Y.—Shoyer v. Edmund Wright-Ginsberg Co., 206 N.Y.S. 421, 210 App.Div. 645, modified on other grounds 148 N.E. 328, 240 N.Y. 223 —Mandell v. Moses, 205 N.Y.S. 254, 209 App.Div. 531, affirmed 147 N.E. 192, 239 N.Y. 555.

Or.—Pinnacle Packing Co. v. Herbert, 70 P.2d 31, 157 Or. 96, 111 A.L.R. 1055.

Tex.—Overstreet v. Hancock, Civ. App., 177 S.W. 217.
25 C.J. p 383 note 86.

72. U.S.—Kufek v. Kehler, C.C.Mo., 19 F. 198.

73. U.S.—Heffner v. Gwynne-Treadwell Cotton Co., Ark., 160 F. 635, 87 C.C.A. 606.

Cal.—Schwaegler Co. v. Marchesotti, 199 P.2d 331, 88 C.A.2d 738.
25 C.J. p 383 note 88.

74. Miss.—Carson v. Alexander, 34 Miss. 528.

75. La.—Shaw v. Knox, 12 La. Ann. 41.
25 C.J. p 384 note 90.

76. U.S.—Bradley v. Richardson, C. C., 3 F.Cas.No.1,786, 2 Blatchf. 343, 23 Vt. 720.

goods, he cannot recover for such advances without showing that such bills were dishonored and that he has paid them or is liable thereon.⁷⁷

For loss and damage sustained. The principal is bound to indemnify the factor against the consequences of all legal and proper acts done by him in the execution of his agency or in pursuance of the authority conferred on him;⁷⁸ but the factor is not entitled to indemnity for losses incurred through his breach of his contract,⁷⁹ or in an unauthorized transaction,⁸⁰ unless the transaction is ratified by the principal.⁸¹ Where a factor becomes a guarantor to the purchaser, he may recover from his principal only the amount which he pays on the guaranty, and not the amount for which he has become liable, but has not paid.⁸²

Interest. As a general rule, a factor is entitled to interest on advances made by him,⁸³ or on a balance due him on an account stated,⁸⁴ although not on his own charges and commissions;⁸⁵ but it has been held that a del credere factor is not entitled to interest for advances, since he is by his contract bound for the payment of the price of the goods.⁸⁶ If a factor, by breach of the contract of agency, causes loss to the principal, he forfeits his right to interest on his advances.⁸⁷

b. Forfeiture or Loss of Right to Reimbursement

A factor may, by his negligence, fraud, or misconduct, whereby the principal sustains a loss, forfeit his right to be reimbursed for expenditures or advances.

A factor may, by his negligence, fraud, or misconduct in his agency, whereby the principal sustains a loss, forfeit his right to be reimbursed for expenditures or advances.⁸⁸ However, a sale in violation of his instructions does not entirely defeat his right to recover a balance due for advances;⁸⁹ nor is his right to reimbursement for advances waived by his agreeing to wait longer for reimbursement, on the principal's promise that he shall lose nothing thereby;⁹⁰ and a factor guilty of conversion of his principal's property has been held entitled to reimbursement for money properly advanced or expended before the conversion.⁹¹

A settlement in full between a factor who has sold goods on credit and his principal bars any claim thereafter for advances, in the absence of fraud or mistake.⁹²

§ 44. Security of Factor in General

A factor, in the absence of a special agreement to the contrary, has the personal security of his principal, as well as a lien on the goods, for his charges and advances, and under some authorities, although not others, he may proceed against the principal before resorting to the goods. Unless the principal directs the application of the proceeds of sale, the factor may direct such application to whichever of his demands he prefers.

A factor, in the absence of a special agreement to the contrary, has the personal security of his principal, as well as a lien on the goods, for his charges and advances;⁹³ and if the goods are sold and the proceeds are insufficient to pay the expendi-

77. Mo.—Sigerson v. Pomeroy, 13 Mo. 620.

78. Ga.—Beach v. Branch, 57 Ga. 362.

25 C.J. p 384 note 99.

79. S.C.—Long v. Hunter, 36 S.E. 579, 58 S.C. 152.

Tex.—Porter v. Heath, 2 Tex.A.Civ. Cas. § 125.

80. N.Y.—Rogers v. Kneeland, 10 Wend. 218.

25 C.J. p 384 notes 2, 7.

81. N.Y.—Rogers v. Kneeland, supra.

82. U.S.—Birge-Forbes Co. v. Heye, Tex., 212 F. 112, 128 C.C.A. 628, certiorari denied 34 S.Ct. 676, 234 U.S. 759, 58 L.Ed. 1580.

83. Cal.—Corpus Juris cited in Belmont v. Milton, 110 P.2d 525, 528, 43 C.A.2d 120—Corpus Juris cited in Imperial Valley Long Staple Cotton Growers' Ass'n v. Davidson, 209 P. 58, 59, 58 C.A. 551. 25 C.J. p 384 note 93.

Rate of interest

(1) Where a factor makes advances as a loan to his principal in Ameri-

ca, on goods to be consigned to the factor for sale in Australia, the rate of interest is that allowed at the place where the loan is made, in the absence of an express provision that it be repaid in Australia with the interest allowed in that country. U.S.—Wittkowski v. Harris, C.C.N.C., 64 F. 712.

(2) Where a contract between a commission merchant in New York and a person in another state stipulates that the latter shall send merchandise to the former to be sold, and that the former shall make advances, to be repaid with commissions and interest out of the sales, the rate of interest is to be determined by the laws of New York, which is the place of the performance. U.S.—Peyton v. Heinekin, Tenn., 131 U.S. Appendix ci, 20 L.Ed. 679.

84. U.S.—Bainbridge v. Wilcocks, C. C.Pa., 2 F.Cas.No.755, Baldw. 536. S.C.—Smetz v. Kennedy, 22 S.C.L. 218.

85. Ill.—Kennedy v. Gibbs, 15 Ill. 406.

86. U.S.—Wittkowski v. Harris, C.C. N.C., 64 F. 712.

Cal.—Belmont v. Milton, 110 P.2d 525, 43 C.A.2d 120.

87. Tex.—Willis v. Thacker, 49 S. W. 128, 20 Tex.Civ.App. 233.

Porter v. Heath, 2 Tex.A.Civ.Cas. § 124.

88. Mass.—Dodge v. Tileston, 12 Pick. 328.

25 C.J. p 384 note 6.

Forfeiture or loss of right to interest see supra § 43 a.

89. N.H.—Frothingham v. Everton, 12 N.H. 239.

90. N.C.—Blaisdale Co. v. Lee, 37 S. E. 509, 127 N.C. 365.

91. Cal.—Imperial Valley Long Staple Cotton Growers' Ass'n v. Davidson, 209 P. 58, 58 C.A. 551.

92. N.Y.—Consequa v. Fanning, 3 Johns.Ch. 587, modified on other grounds 17 Johns. 511, 8 Am.D. 442. Vt.—Jackson v. Bissonette, 24 Vt. 611.

93. Ky.—Rockcastle Lumber Co. v. Burns, 194 S.W. 95, 175 Ky. 224.

25 C.J. p 385 note 12.

tures and advances by the factor, he may recover the difference from his principal.⁹⁴

Under some authorities, the factor may, in the absence of any agreement to the contrary, recover from his principal for advances even before the goods are sold,⁹⁵ provided, it has been held, he has made a diligent effort for a reasonable time to sell the goods.⁹⁶ Where this rule prevails, however, a factor who has not discharged his obligation to his principal cannot demand repayment unless he has sold the goods or is able to show that the goods cannot be sold at all;⁹⁷ he cannot demand repayment until he is in a position to terminate the agency and make final settlement with the principal, but when he attains that position, then settlement may be made even though the goods have not been sold.⁹⁸

Under a different view, where the contract is an ordinary one between the principal and the factor, there is no implied agreement that advances, made under a belief by the factor that he is fully protected by the goods consigned to him, shall be repaid by the principal before the goods are sold,⁹⁹ and the factor must first resort to the goods consigned or their proceeds before he can enforce his claim against the principal personally,¹ unless it appears that the advance was made on the personal credit of the principal as well as the goods consigned,²

or unless the principal relieves him of the necessity of first resorting to the goods.³ The rule requiring the factor first to resort to the goods is not altered by a provision for the payment of interest and allowing the principal to fix the price of the goods.⁴

Since all that the factor can require of his principal is indemnity, that is, the amount actually paid by him in excess of the proceeds of the consignment, if the holder of bills drawn on the factor receives the goods from him as payment in full, although the goods are of less value than the amount of the bills, the principal is entitled to the benefit of the transaction and the factor cannot charge him the difference between the amount of the bills and the value of the goods.⁵

Order of applying proceeds or payments. In the absence of a different application, credits are applied to debts in the order of time in which they accrue;⁶ but unless the principal directs the application of the proceeds,⁷ the factor has a right to direct the application thereof to whichever of his demands he prefers.⁸ The factor cannot, however, in order to provide for the payment of debts not yet due, apply proceeds already in his hands to such debts, instead of to debts already due.⁹

Where a factor, without any new consideration, assents to his principal's demand that if he sells the

94. Or.—Pinnacle Packing Co. v. Herbert, 70 P.2d 31, 157 Or. 96, 111 A.L.R. 1055.

25 C.J. p 385 note 14.

An implied agreement to pay the deficiency exists.

N.Y.—Mandell v. Moses, 205 N.Y.S. 254, 209 App.Div. 531, affirmed 147 N.E. 192, 239 N.Y. 555.

25 C.J. p 385 note 14 [a].

95. Mass.—Dolan v. Thompson, 126 Mass. 183.

25 C.J. p 385 note 16.

Rule applies to del credere factor

Mass.—Dolan v. Thompson, 126 Mass. 183—Upham v. Lefavour, 11 Metc. 174.

96. Mo.—Bailey-Ball-Pumphrey Co. v. German, 247 S.W. 453, 213 Mo. App. 11.

97. Mo.—Bailey-Ball-Pumphrey Co. v. German, supra.

98. Mo.—Bailey-Ball-Pumphrey Co. v. German, supra.

99. Pa.—In re Murphy, 63 A. 745, 214 Pa. 258, 5 L.R.A., N.S., 1147, 6 Ann.Cas. 308.

1. N.Y.—Shoyer v. Edmund Wright-Ginsberg Co., 148 N.E. 328, 240 N.Y. 223.

25 C.J. p 385 note 22.

Until the factor has performed the whole of his contract by selling the goods and accounting to his principal, there is no default by the latter and therefore no liability to the former.

Pa.—In re Murphy, 63 A. 745, 214 Pa. 258, 5 L.R.A., N.S., 1147, 6 Ann.Cas. 308.

Assignment for creditors

If the consignor becomes insolvent and makes an assignment for the benefit of creditors, the factor cannot prove his entire claim for advances against the estate of the principal, but must first credit the proceeds of the goods consigned.

Pa.—In re Murphy, supra.

25 C.J. p 386 note 25.

Relation of debtor and creditor held not created by payment of draft drawn on factor, except for any balance which might remain unpaid out of the proceeds of the sale by the factor.

Colo.—Nisbet v. Siegel-Campion Live Stock Co., 123 P. 110, 21 Colo.App. 494, error dismissed 125 P. 524, 53 Colo. 333.

One acting as mere commercial banker, and having no lien on goods coming into his possession, has ordinary right to enforce his claims against principal by action.

N.Y.—Shoyer v. Edmund Wright-Ginsberg Co., 148 N.E. 328, 240 N.Y. 223.

Reasonable notice held given by factor to principal of intention to sell consigned truck to pay advances.

Ala.—Lord v. Werneth, 46 So.2d 236, 35 Ala.App. 290.

2. Ark.—Tunstall v. J. T. Fargason Co., 246 S.W. 856, 156 Ark. 513.

3. N.Y.—Shoyer v. Edmund Wright-Ginsberg Co., 206 N.Y.S. 421, 210 App.Div. 645, modified on other grounds 148 N.E. 328, 240 N.Y. 223.

4. R.I.—Balderston v. National Rubber Co., 27 A. 507, 18 R.I. 338, 49 Am.S.R. 772.

5. N.Y.—Hidden v. Waldo, 55 N.Y. 294.

6. Ala.—Alabama Gold L. Ins. Co. v. Sledge, 62 Ala. 566.

7. La.—Farmers & Merchants Bank of Memphis v. Franklin, 1 La. Ann. 393.

S.C.—Stewart v. Cochran, 8 S.C. Eq. 380.

8. La.—Chaffe v. Mackenzie, 10 So. 369, 43 La. Ann. 1062.

25 C.J. p 386 note 31.

9. U.S.—Brander v. Phillips, Ala., 16 Pet. 121, 10 L.Ed. 909.

25 C.J. p 386 note 32.

goods on which advances have been made, the proceeds shall be applied on certain notes held by the factor against the principal and not on the principal's open account, such assent is subject to the implied condition that the principal will keep up the required margins and continue solvent, and if the principal becomes bankrupt, the factor, after notice, is entitled to sell the goods for the best market price and credit the proceeds against the open account and commission before applying any part thereof to the notes.¹⁰

Waiver of rights by factor. The factor may waive his recourse against any security which he may enjoy;¹¹ thus, he may, by agreement, waive his recourse against the principal personally and limit his remedy for the recovery of his advances to the goods consigned,¹² or he may renounce his lien on the goods without affecting his remedy against the principal personally.¹³

Liability of assignee. A transfer by the principal of his interest in the goods does not render the transferee personally liable for the factor's advances and commissions, in the absence of an agreement by the transferee to that effect;¹⁴ and such agreement cannot be inferred from the fact that accounts are rendered by the factor to the transferee, and received by the latter without objection,

charging the transferee with advances and interest.¹⁵

§ 45. Lien of Factor

- a. In general
- b. Indebtedness secured
- c. Facts necessary to existence of lien

a. In General

A factor has a general lien, which arises independently of any special agreement therefor, on the goods consigned to him, while in his possession, or on the proceeds of a sale thereof, for all commissions, advances, and expenditures properly incurred; this lien generally cannot be transferred, but the factor's personal representative or assignee for the benefit of creditors succeeds to his right of lien.

It is a well-settled rule of the common law that a factor has a general lien on the goods consigned to him, while in his possession, for all commissions, advances, and expenditures properly incurred in the course of the relation of principal and factor.¹⁶ This right of the factor is recognized in equity as well as at law,¹⁷ and in some jurisdictions is directly or in effect declared by statute;¹⁸ in addition, a special statute may operate to create a lien in favor of a factor under circumstances not sufficient to create a lien at common law.¹⁹

10. U.S.—Heffner v. Gwynne-Treadwell Cotton Co., Ark., 160 F. 635, 87 C.C.A. 606.

11. **Guarantor's obligation not discharged**

Obligation of guarantor of principal's accounts held not discharged by factor's release of obligations as against buyer claiming damages from principal for delay in delivery of goods.

N.J.—Shapiro Bros. Factors Corporation v. Cherokee Silk Corporation, 176 A. 893, 114 N.J.Law 356.

12. U.S.—Peisch v. Dickson, C.C. Mass., 19 F.Cas.No.10,911, 1 Mason 9.

25 C.J. p 385 note 18.

13. Ala.—Martin v. Pope, 6 Ala. 532, 41 Am.D. 66.

Waiver of lien generally see infra § 47.

14. Pa.—Watson v. Beatty, 13 A. 521, 10 Pa.Cas. 108.

25 C.J. p 386 note 27.

15. N.Y.—Heinze v. Buckingham, 17 N.Y.S. 12, 62 Hun 622.

16. U.S.—**Corpus Juris** cited in Girard v. Kimbell Milling Co., C. C.A.Tex., 116 F.2d 999, 1001.

Fla.—Gadsden County Tobacco Co. v. Corry, 137 So. 255, 103 Fla. 217.

25 C.J. p 386 note 36.

A del credere factor has a lien on goods consigned to him, or the proceeds of such goods, for the amount of his commissions and any advances which he has made to his principal.

U.S.—Fourth Nat. Bank of City of New York v. American Mills Co., C.C.N.Y., 29 F. 611, rehearing denied 30 F. 420, affirmed 11 S.Ct. 52, 137 U.S. 234, 34 L.Ed. 655.

25 C.J. p 387 note 40.

A mere intermeddler, however, who sells property without any authority from the owner acquires no lien thereon.

Okl.—People's Bank v. Frick Co., 73 P. 949, 13 Okl. 179.

25 C.J. p 387 note 39.

17. Ky.—Bard v. Stewart, 3 T.B. Mon. 72.

18. U.S.—In re Frederick Speier Footwear Corp., D.C.Conn., 129 F. Supp. 434.

Cal.—Campbell v. Smith, 274 P. 758, 96 C.A. 689.

25 C.J. p 387 note 38.

Purpose of statute is to foster growth of function of factor as one who lends without selling goods or having possession of them.

U.S.—In re Frederick Speier Footwear Corp., D.C.Conn., 129 F.Supp. 434.

19. U.S.—Irving Trust Co. v. Commercial Factors Corporation, C.C. A.N.Y., 68 F.2d 864.

Alternative to mortgage or pledge

Lien created under Factors Act is an alternative to a chattel mortgage or a common-law pledge.

U.S.—In re Comet Textile Co., D.C. N.Y., 15 F.Supp. 963, affirmed, C.C. A., 91 F.2d 1008.

Common-law lien not abrogated

The "lien of a factor at common law," within the meaning of a provision in a statute creating a special factor's lien that nothing in the statute shall be construed as an abrogation of the lien of a factor at common law, means a lien that did not come into existence through statutory enactment.

N.Y.—Irving Trust Co. v. B. Linder & Bro., 190 N.E. 332, 264 N.Y. 165, reargument denied 191 N.E. 621, 264 N.Y. 675.

Construction of statute

(1) Statute must be strictly construed when it is in derogation of common law.

N.J.—Taylor v. New Line Industries, 117 A.2d 643, 37 N.J.Super. 501.

(2) Amendment to statute respecting liens on merchandise to secure repayment of loan made on security of such merchandise, as far as it indicates purpose to particularize and

As a general rule, a factor's lien is a personal privilege, of which he may avail himself or not, as he pleases,²⁰ and, as no question can arise on it except as between the principal and the factor, it can be asserted by the factor alone and cannot, as a general rule, be transferred;²¹ if he refuses to assert it, no one can assert it for him.²² It cannot be set up as against the principal by an attachment or execution creditor of the factor.²³ The factor's executor or administrator, however, succeeds to his right of lien,²⁴ as does also his assignee for the benefit of creditors.²⁵

What law governs. Whether or not a factor's lien which is recognized as valid and enforceable in one jurisdiction is valid and enforceable against goods located in another jurisdiction has been held to depend on the laws of the latter jurisdiction.²⁶

Agreement or instructions. Although the compensation, advances, or expenses for which a lien is claimed must be earned or incurred under a contract, express or implied, with the principal,²⁷ the factor's right to a lien for such claims is implied or inferred by law from the relation of the parties, and arises independently of any express agreement therefor;²⁸ it is deemed to exist in all cases until the contrary is clearly established.²⁹ The factor,

however, cannot claim a lien where such claim would be inconsistent with the agreement between him and his principal,³⁰ or where expenditures or advances are made on the principal's personal credit exclusively.³¹ So, where the factor receives and assents to specific instructions as to the application of the proceeds of the goods, he can claim a lien on such proceeds only in case there is a surplus after applying them as instructed.³²

Subject matter of lien. A factor's lien is available against the goods in his possession,³³ and against other property which comes into his hands in the course of his dealings with the principal.³⁴ If the goods have been sold, the lien extends to the proceeds of the sale in his hands,³⁵ or, if the sale is on credit, to the debt or securities taken for the price.³⁶ A factor's lien agreement may be construed as creating a lien on all accounts receivable, including accounts resulting from the sale of merchandise not subject to the lien.^{36.5} The lien extends only to so much of the goods or proceeds as is necessary to secure the claim.³⁷

Where the goods have been destroyed, it has been held that the factor's lien extends to the proceeds of an insurance policy taken out on them.³⁸ Where the goods of different shippers are covered by the

amplify subject covered by original act, must be construed in light of language used, notwithstanding courts may have implied contrary intent because of absence of such particularization in original statute. N.Y.—Irving Trust Co. v. B. Lindner & Bro., 190 N.E. 332, 264 N.Y. 165, reargument denied 191 N.E. 621, 264 N.Y. 675.

20. N.D.—Coverdell v. Erickson, 168 N.W. 367, 38 N.D. 579. Waiver of lien see *infra* § 47.

21. N.D.—Coverdell v. Erickson, 168 N.W. 367, 38 N.D. 579. 25 C.J. p 388 note 51.

Transfer on certain conditions permitted

"The factor may transfer his lien on the goods existing by virtue of the advances made by him to the consignor, and also for proper charges due to him on the same; but this must be done under certain conditions and limitations, with express notice of the lien to the party to whom the goods are delivered, and with the right on the part of the factor to retake them into his custody at any time he may desire to do so, or when he may be instructed to sell them."

U.S.—Halsey v. Bird, Va., 99 F. 525, 527, 39 C.C.A. 638.

22. N.D.—Coverdell v. Erickson, 168 N.W. 367, 38 N.D. 579.

23. Mass.—Holly v. Huggeford, 8 Pick. 73, 19 Am.D. 303. 25 C.J. p 388 note 53.

24. S.C.—Gage v. Allison, 3 S.C.L. 495, 2 Am.D. 682.

25. U.S.—In re Meyer, D.C.N.Y., 106 F. 828.

25 C.J. p 388 note 55.

26. N.J.—Kahn & Feldman v. United Piece Dye Works, 7 A.2d 793, 123 N.J.Law 18, affirmed 12 A.2d 384, 124 N.J.Law 372.

27. Mo.—Pallen v. Bogy, 78 Mo.App. 88.

25 C.J. p 387 note 43.

28. U.S.—Half Moon Fruit & Produce Co. v. Floyd, C.C.A.Cal., 60 F.2d 799.

Old Colony Trust Co. v. Sugarland, D.C.Tex., 296 F. 129, modified on other grounds, C.C.A., Sugarland Industries v. Old Colony Trust Co., 6 F.2d 203, certiorari denied 46 S.Ct. 26, 269 U.S. 570, 70 L.Ed. 417.

25 C.J. p 387 note 44.

29. Ala.—Martin v. Pope, 6 Ala. 532, 41 Am.D. 66.

Colo.—Nisbet v. Siegel-Campion Live Stock Co., 123 P. 110, 21 Colo.App. 494, error dismissed 125 P. 524, 53 Colo. 333.

30. U.S.—Old Colony Trust Co. v. Sugarland Industries, D.C.Tex., 296 F. 129, modified on other grounds, C.C.A., Sugarland Industries v. Old

Colony Trust Co., 6 F.2d 203, certiorari denied 46 S.Ct. 26, 269 U.S. 570, 70 L.Ed. 417.

25 C.J. p 387 note 47.

31. N.Y.—Wilmerding v. Hart, Lalor 305.

32. Ill.—Darlington v. Chamberlain, 20 Ill.App. 443, affirmed 12 N.E. 78, 120 Ill. 585.

25 C.J. p 388 note 49.

33. U.S.—Half Moon Fruit & Produce Co. v. Floyd, C.C.A.Cal., 60 F.2d 799.

Cal.—Campbell v. Smith, 274 P. 758, 96 C.A. 689.

25 C.J. p 388 note 57.

34. N.Y.—Myer v. Jacobs, 1 Daly 32.

25 C.J. p 388 note 58.

35. U.S.—Half Moon Fruit & Produce Co. v. Floyd, C.C.A.Cal., 60 F. 2d 799.

Fla.—Gadsden County Tobacco Co. v. Corry, 137 So. 255, 103 Fla. 217. 25 C.J. p 388 note 59.

36. U.S.—Brander v. Phillips, Ala., 16 Pet. 121, 10 L.Ed. 909.

25 C.J. p 388 note 60.

36.5 U.S.—Perkins v. Lakeport Nat. Bank, D.C.N.H., 139 F.Supp. 898.

37. U.S.—Jolly v. Blanchard, Pa., 13 F.Cas.No.7,438, 1 Wash.C.C. 252.

25 C.J. p 388 note 62.

38. Mass.—Johnson v. Campbell, 120 Mass. 449.

same bill of lading, the factor has no right to hold the goods of one shipper for charges on the goods of the other.³⁹

A lien resting on statute extends only to such property as is contemplated by the terms of the statute.⁴⁰ Accordingly the word "goods," as used in a statute, has been held to include all personal chattels other than things in action and money.^{40.5}

b. Indebtedness Secured

A factor's lien secures his compensation, his proper expenses and advances, and liabilities incurred by him for his principal. The lien generally covers not only expenditures and liabilities in connection with a particular consignment, but also the general balance of accounts in his favor.

A factor's lien secures his commissions or other compensation,⁴¹ and liabilities incurred by him for his principal;⁴² but it has been held that in the absence of a special agreement, the factor's lien on the goods does not extend to an indebtedness which he can call on the principal to pay on demand or at a specified time,⁴³ and it has also been held not to extend to a claim for damages arising from the principal's refusal to receive goods purchased by the factor.⁴⁴

A borrower's contingent liability on the sale of its accounts receivable can be secured by a factor's lien under a special statute.^{44.5}

Expenses and advances. The factor's lien secures his advances made on the faith of the consignment,⁴⁵ unless they are made without the principal's authorization;⁴⁶ and it also secures all expenses incurred or disbursements made to preserve and protect the property,⁴⁷ including payments for customs duties,⁴⁸ freight,⁴⁹ insurance,⁵⁰ salvage,⁵¹ storage in the factor's warehouse,⁵² and interest on advances made by him.⁵³

General balance of accounts. As a general rule, the lien of the factor covers not only the expenditures and liabilities incurred with regard to the particular consignment, but also the general balance of accounts in his favor growing out of similar dealings between him and his principal.⁵⁴ On the other hand, the factor cannot claim a lien for expenses and advances with respect to a particular consignment where the general balance of accounts is in favor of the principal.⁵⁵ Also, the factor cannot claim a lien for a general balance in opposition to the terms of a special contract under which the goods are received;⁵⁶ nor can there be a lien for a general balance where the relation of principal and factor does not exist,⁵⁷ as where there was but a single transaction between the parties.⁵⁸

After the principal's death, the factor's lien for a general balance then accrued does not attach to

39. Ill.—Hale v. Barrett, 26 Ill. 195, 39 Am.D. 367.

40. N.Y.—Heyman v. Kevorkian, 184 N.Y.S. 783, 193 App.Div. 859.

Agricultural products excepted

Md.—Dudley v. Roberts, 124 A. 883, 144 Md. 155.

Returned goods were not "proceeds resulting from a sale of merchandise" within statutory provision relating to liens on merchandise or proceeds thereof to secure loans or advances, so as to entitle factor to lien upon goods as "proceeds" of the accounts.

U.S.—Bloch v. Mill Factors Corporation, C.C.A.N.Y., 119 F.2d 536, 134 A.L.R. 1188.

40.5 U.S.—In re Tele-Tone Radio Corp., D.C.N.J., 133 F.Supp. 739.

Lien held to cover inventory

U.S.—In re Tele-Tone Radio Corp., D.C.N.J., 133 F.Supp. 739.

41. Wash.—Wenatchee Production Credit Ass'n v. Pacific Fruit & Produce Co., 92 P.2d 883, 199 Wash. 651.

25 C.J. p 389 note 65.

42. U.S.—Heffner v. Gwynne-Treadwell Cotton Co., Ark., 160 F. 635, 87 C.C.A. 606.

25 C.J. p 389 note 67.

43. Pa.—In re Murphy, 63 A. 745, 214 Pa. 258, 5 L.R.A.,N.S., 1147, 6 Ann.Cas. 308.

44. Tex.—Beakley v. Rainier, Civ. App., 78 S.W. 702, 25 C.J. p 389 note 69.

44.5 U.S.—In re Frederick Speier Footwear Corp., D.C.Conn., 129 F. Supp. 434.

45. U.S.—*Corpus Juris* cited in Girand v. Kimbell Milling Co., C. C.A.Tex., 116 F.2d 999, 1001, 25 C.J. p 389 note 70.

46. Ga.—Tison v. Howard, 57 Ga. 410.

La.—Smith v. McCall, 14 La. 7.

47. U.S.—*Corpus Juris* cited in Girand v. Kimbell Milling Co., C. C.A.Tex., 116 F.2d 999, 1001, 25 C.J. p 389 note 72.

48. Pa.—Higgins v. Grindrod, 16 Phila. 200.

49. La.—Buchanan v. Switzer, 14 La. Ann. 495.

50. U.S.—Wolf v. Smythe, C.C.Ill., 30 F.Cas.No.17,928, 7 Biss. 365.

51. La.—Buchanan v. Switzer, 14 La. Ann. 495.

25 C.J. p 389 note 76.

52. Pa.—Higgins v. Grindrod, 16 Phila. 200.

53. N.Y.—Heins v. Peine, 29 N.Y. Super. 420.

25 C.J. p 389 note 78.

54. Ala.—Baker v. American Agricultural Chemical Co., 77 So. 866, 201 Ala. 328.

25 C.J. p 389 note 79.

Indebtedness not yet due

Produce factor's lien on 1936 crop was held not to secure indebtedness incurred in connection with 1935 crop which was not due and payable until 1937.

Wash.—Wenatchee Production Credit Ass'n v. Pacific Fruit & Produce Co., 92 P.2d 883, 199 Wash. 651.

55. Wis.—McGraft v. Rugee, 19 N. W. 530, 60 Wis. 406, 50 Am.R. 378, 25 C.J. p 390 note 80.

56. Ala.—Schiffer v. Feagin, 51 Ala. 335.

25 C.J. p 390 note 81.

57. U.S.—Old Colony Trust Co. v. Sugarland, D.C.Tex., 296 F. 129, modified on other grounds, C.C.A., Sugarland Industries v. Old Colony Trust Co., 6 F.2d 203, certiorari denied 46 S.Ct. 26, 269 U.S. 570, 70 L.Ed. 417.

25 C.J. p 390 note 82.

58. U.S.—De Wolf v. Howland, C. C., 17 F.Cas.No.3,852, 2 Paine 356.

property coming into the factor's possession thereafter by order of the principal's representative.⁵⁹

Indebtedness incurred outside of agency. A factor's lien for a general balance of accounts extends only to debts incurred between the parties in their relation as principal and factor, and does not cover a debt due from the principal to the factor but not connected with the purposes of their relation as principal and factor.⁶⁰

c. Facts Necessary to Existence of Lien

- (1) In general
- (2) Possession by factor

(1) In General

A factor is not entitled to a lien unless he has complied with all contractual and statutory requirements; and, as a general rule, a factor's lien can exist only where the principal is the lawful owner of the goods.

A factor is not entitled to a lien unless he has complied with all contractual⁶¹ and statutory⁶² requirements therefor.

As a general rule, a factor's lien can exist only where the principal is the lawful owner of the goods, and if a factor receives goods from a person who has no title thereto, he cannot assert his lien as against the true and legal owner;⁶³ and this is especially true where the factor has knowledge that his consignor is not the owner or has not a good

title.⁶⁴ If the principal, after shipping the goods, parts with the title before the factor gets possession, no lien arises.⁶⁵ However, the principal's fraud in obtaining title does not affect a factor who has no notice thereof, and in such case the lien attaches as if the title were unquestioned.⁶⁶

Under a statute so providing, every person in whose name merchandise is shipped is to be deemed the true owner thereof so far as to entitle the consignee to a lien thereon for money advanced or negotiable security given to or for the use of the person in whose name the shipments have been made, or for any money or negotiable security received by the persons in whose name such shipments have been made to one for the use of such consignee.⁶⁷ It is necessary, in order to bring a shipment within such provision, that the goods shall have been shipped in the name of another with the consent of the true owner;⁶⁸ the provision does not apply where such shipment has been made without his consent,⁶⁹ as where goods have been wrongfully taken,⁷⁰ or where the property has been intrusted to an agent to ship in the owner's name and the agent ships it in his own name and obtains advances thereon,⁷¹ nor does it apply to or include one who discounts a draft drawn by the consignor on the consignee but not accepted, since the act is designed only to protect factors, agents, and con-

59. Ga.—Wylly v. King, Ga. Dec. Pt. II 7.

60. Md.—Barry v. Boninger, 46 Md. 59.
25 C.J. p 390 note 85.

61. N.Y.—Winter v. Coit, 7 N.Y. 288, 57 Am.D. 522—Rochester Bank v. Jones, 4 N.Y. 497, 55 Am.D. 290.

62. U.S.—Bloch v. Mill Factors Corporation, C.C.A.N.Y., 119 F. 2d 536, 134 A.L.R. 1188.

Notice; recording

(1) A factor is not entitled to a lien without giving the notice required by the statute creating the lien.

U.S.—In re Standard Const. Co., D.C. N.H., 92 F.Supp. 838, affirmed, C.A., Manchester Nat. Bank v. Roche, 186 F.2d 827.

N.Y.—Irving Trust Co. v. B. Lindner & Bro., 190 N.E. 332, 264 N.Y. 165, reargument denied 191 N.E. 621, 264 N.Y. 675.

(2) Notice giving one year as time during which loan might be made under the agreement, sufficiently complied with statute, notwithstanding failure to add that creditor had right to terminate prior to one year.

U.S.—In re Comet Textile Co., D.C.N.Y., 15 F.Supp. 963, affirmed, C.C.A., 91 F.2d 1008.

(3) Notice to each of a borrower's customers is not necessary where a formal assignment is made of each account to the factor.

U.S.—In re Standard Const. Co., D.C. N.H., 92 F.Supp. 838, affirmed, C.A., Manchester Nat. Bank v. Roche, 186 F.2d 827.

(4) Provisions requiring recording of assignment of accounts receivable given as security for loan in factorage relationship held inapplicable to assignments where such relationship does not exist.

N.J.—Taylor v. New Line Industries, 117 A.2d 643, 37 N.J.Super. 501.

Lien held not to exist

U.S.—Manchester Nat. Bank v. Roche, C.A.N.H., 186 F.2d 827.

A typographical error has been held not to invalidate a lien where no one has been misled or prejudiced by it.

N.Y.—Bloch Bros. Paper Co. v. Efficient Direct Mail Service, 102 N.Y. S.2d 1003, 198 Misc. 669.

63. Cal.—Newton v. S. A. Gerrard Co., 34 P.2d 797, 139 C.A. 737.
25 C.J. p 390 notes 86, 87.

Ownership at time of shipment

A factor does not acquire a lien for previous advances to one who does not own the goods at the time

of shipment, even though they may come into the factor's possession.

Md.—Dudley v. Roberts, 124 A. 883, 144 Md. 155—Ruhl v. Corner, 63 Md. 179.

64. U.S.—Grove v. Brien, D.C., 8 How. 429, 12 L.Ed. 1142.
25 C.J. p 391 note 88.

65. Ala.—Baker v. American Agricultural Chemical Co., 77 So. 886, 201 Ala. 328.

25 C.J. p 391 note 89.

66. Mass.—Hoffman v. Noble, 6 Metc. 68, 39 Am.D. 711.

25 C.J. p 391 note 90.

67. N.Y.—Toledo First Nat. Bank v. Shaw, 61 N.Y. 283.

25 C.J. p 391 note 92.

68. N.Y.—Kinsey v. Leggett, 71 N.Y. 387.

25 C.J. p 424 note 55.

69. N.Y.—Collins v. Ralli, 20 Hun 256, affirmed 85 N.Y. 637—Hazard v. Fiske, 18 Hun 277, affirmed 83 N.Y. 287.

70. N.Y.—Kinsey v. Leggett, 71 N.Y. 387.

Ohio.—Miller v. Laws, 6 Ohio Dec., Reprint, 736, 7 Am.L.Rec. 606.

71. N.Y.—Covill v. Hill, 4 Den. 323, affirmed 6 N.Y. 374.

signees who appear to be such on the bill of lading and who are induced by the bill to pay money or incur liabilities.⁷²

On the other hand, the provision does apply where the shipment is made by one who holds under a conditional sale the conditions of which have not been performed.⁷³

*The true owner may be estopped by his conduct to deny the right of the factor as against a third person to a lien for advances made on goods received by him.*⁷⁴

(2) Possession by Factor

In order that a factor's lien may attach to goods or their proceeds, the factor must have actual or constructive possession thereof, unless it is otherwise provided by statute. To have sufficient constructive possession, he must generally have control of the property.

The lien of a factor belongs to the class known as possessory liens;⁷⁵ and it is a well-settled rule that the factor must have either the actual or the constructive possession of the goods, or their proceeds, in order that his lien may attach thereto,⁷⁶ unless it is otherwise provided by statute.⁷⁷ Necessarily, a lien cannot be acquired before the goods come into his possession,⁷⁸ or after his possession has ceased.⁷⁹

The possession of the factor, in order to entitle him to a lien on the funds or property, must have been acquired lawfully, and in good faith;⁸⁰ and although his possession is generally regarded as the possession of the principal, for the purpose of

sustaining his lien the factor's possession is his own and not that of the principal.⁸¹

Actual possession by the factor is sufficient to support his lien,⁸² and it has been stated, in some cases, that actual possession is required;⁸³ but according to the more common view it is not necessary that the factor have actual possession of the goods or proceeds, constructive possession being sufficient,⁸⁴ as where he has possession through his agent.⁸⁵ What constitutes sufficient constructive possession by the factor to support his lien depends largely on the kind and nature of the property, the situation of the parties, and other circumstances peculiar to each case,⁸⁶ but in general the factor's possession is sufficient if the property is so appropriated to him as to place it under his control,⁸⁷ or if, where the goods consigned to him are bulky in character, he exercises dominion over them after they have reached their destination.⁸⁸

It has been held that the factor's possession is sufficient where the shipper's receipt or bill of lading is indorsed and delivered to him,⁸⁹ and that the assignment of the bill of lading as collateral security conveys title to the goods, and gives the factor a security for his advances independent of his lien as factor.⁹⁰ His possession is not sufficient where the sole purpose for which goods are delivered to him is to have them delivered to the purchaser,⁹¹ or where the goods are merely marked and invoiced to him.⁹² The factor has no lien where he comes into possession of property after the principal

72. N.Y.—Manufacturers' & Traders' Bank v. Farmers' & Mechanics' Nat. Bank, 2 Thomps. & C. 395, reversed on other grounds 60 N. Y. 40.

73. N.Y.—Bates v. Cunningham, 12 Hun 21.

74. Mass.—Fowler v. Parsons, 9 N. E. 799, 143 Mass. 401.
25 C.J. p 391 note 91.

75. U.S.—Boise v. Talcott, D.C.N.Y., 212 F. 268.

Cal.—Corpus Juris Secundum quoted in Baumbach v. Jorgensen, 308 P. 2d 799, 800, 149 C.A.2d 799.
25 C.J. p 391 note 94.

76. U.S.—Hess v. Factors Corp. of America, D.C.Pa., 90 F.Supp. 885.
Boise v. Talcott, D.C.N.Y., 213 F. 268.

25 C.J. p 391 note 95.

Mere acceptance by factor of bills drawn against the goods consigned gives him no lien, in the absence of actual or constructive possession.

Ill.—Lewis v. Galena & C. U. R. Co., 40 Ill. 281.

N.Y.—Dodge v. Wilbur, 10 N.Y. 579.

77. U.S.—Irving Trust Co. v. Commercial Factors Corporation, C.C.A. N.Y., 68 F.2d 864.

In re Comet Textile Co., D.C.N.Y., 15 F.Supp. 963, affirmed, C.C.A., 91 F.2d 1008.

78. Mo.—Bruce v. Andrews, 36 Mo. 593.

25 C.J. p 391 note 97.

79. Ill.—Ermeling v. Gibson Canning Co., 105 Ill.App. 196.

25 C.J. p 391 note 98.

Waiver or loss of lien by surrender of possession see *infra* § 47.

80. Colo.—Nisbet v. Siegel-Campion Live Stock Co., 123 P. 110, 21 Colo. App. 494, error dismissed 125 P. 524, 53 Colo. 333.

25 C.J. p 391 notes 99, 1.

81. Tex.—Couturie v. Roensch, Civ. App., 134 S.W. 413.

82. Ill.—Winne v. Hammond, 37 Ill. 99.

83. U.S.—Walter v. Ross, Pa., 29 F. Cas.No.17,122, 2 Wash.C.C. 283.

Md.—Ruhe v. Corner, 63 Md. 179.

84. Ky.—Rockcastle Lumber Co. v. Burns, 194 S.W. 95, 175 Ky. 224.

25 C.J. p 392 note 9.

85. Ga.—Burrus v. Kyle, 56 Ga. 24.
25 C.J. p 392 note 10.

86. N.D.—Rosenbaum v. Hayes, 86 N.W. 973, 10 N.D. 311.

25 C.J. p 392 note 11.

87. N.D.—Rosenbaum v. Hayes, *supra*.

25 C.J. p 392 note 12.

88. Mass.—Rice v. Austin, 17 Mass. 197.

25 C.J. p 393 note 13.

89. Ark.—Maloney v. Jones-Wise Commn. Co., 174 S.W. 239, 117 Ark. 180.

25 C.J. p 393 note 14.

90. U.S.—Gibson v. Stevens, Ind., 8 How. 384, 12 L.Ed. 1123.

Vt.—Tilden v. Minor, 45 Vt. 196.

91. Md.—Rowland v. Dolby, 59 A. 666, 100 Md. 272, 3 Ann.Cas. 643.

92. N.C.—Garrison v. Vermont Mills, 68 S.E. 142, 152 N.C. 643, reheard 69 S.E. 743, 154 N.C. 1, 31 L.R.A., N.S., 450.

has assigned his rights to the property to another.^{92.5}

Goods received after principal's death. Where the principal dies before the goods are in transitu to the factor, the fact that the goods subsequently come into his hands by order of the personal representative does not entitle the factor to a lien thereon for a general balance of accounts due to him and incurred in the lifetime of the principal;⁹³ nor has he a lien for advances made in the principal's lifetime on the faith of the future consignment of the identical goods which subsequently reach his hands from the personal representative.⁹⁴

Goods in transit. Goods consigned to a factor for sale without any special agreement between the factor and the principal with regard thereto are, while in transit, subject to the directions of the principal, and the factor, before he acquires the actual possession of the goods, has not such a constructive possession thereof as will entitle him to a lien thereon for his general balance of accounts,⁹⁵ unless he is entitled to a lien, in such a case, by virtue of a statutory provision.⁹⁶ This rule applies even though the bill of lading is taken in the name of the factor, provided the delivery to the carrier is not made with the intention of passing a special property in the goods to the factor.⁹⁷

On the other hand, although there is authority to the contrary,⁹⁸ where advances are made by the factor on the faith of a particular consignment, he may, under a number of authorities, acquire a lien on the goods while in transit, to the extent of such advances, although the consignment is made without any special agreement between the principal and the factor;⁹⁹ but the consignment must be made to him in terms and he must make advances or acceptances on the faith of it.¹

Where the consignment to the factor is made in pursuance of an agreement between the principal

and the factor, in pursuance of which the factor has made advances to the principal on the faith of the consignment, the delivery to the carrier of the goods consigned to the factor, with the intent to comply with the agreement, gives to the factor a lien on the goods from the time of such delivery;² and it has been held that, in such a case, simply notifying the factor of the consignment is sufficient, as between him and the principal, although the principal retains the bill of lading.³ A mere agreement to ship the goods, however, without an actual shipment, will not give the factor a lien thereon.⁴

Equitable lien. It has been held that an equitable lien may arise for advances without possession where the advances are made on an agreement to consign, although the goods are not shipped to the factor;⁵ but on the other hand it has been held that, although the parties attempt in good faith to create a lien by agreement, which fails because possession of the property remains in the principal, an equitable lien will not arise.⁶

§ 46. — Priorities

A factor's lien is superior to the equitable claims of third persons of which he had no notice at the time he acquired the lien, and it has been held superior to various particular claims of third persons, including that of a creditor of the principal who levies an attachment or execution on the goods; but it is subordinate to an outstanding legal title, or a paramount equity of which the factor has notice before his lien attaches.

A factor's lien is superior to the equitable claims of third persons to the goods, of which claims the factor had no notice at the time the lien was acquired.⁷ So, after the lien has attached, it is superior to the claim of the principal's vendor, who has not received the price of his goods;⁸ to the claim of a subsequent purchaser or assignee from the principal,⁹ especially where the purchaser or assignee has notice of the factor's lien at the time of the sale or assignment;¹⁰ to the claim of the fac-

92.5 Cal.—Baumbach v. Jorgensen, 303 P.2d 799, 149 C.A.2d 799.

93. Ga.—Wylly v. King, Ga.Dec.Pt. II 7.

25 C.J. p 392 note 5.

94. Ky.—Cook v. Brannin, 7 S.W. 877, 87 Ky. 101, 9 Ky.L. 955.

25 C.J. p 392 note 6.

95. Md.—Ruhl v. Corner, 63 Md. 179. 25 C.J. p 393 note 18.

96. La.—Ouachita Nat. Bank v. Weiss, 21 So. 857, 49 La.Ann. 573.

25 C.J. p 393 note 19.

97. N.D.—Rosenbaum v. Hayes, 67 N.W. 951, 5 N.D. 476.

25 C.J. p 393 note 20.

98. Tenn.—Oliver v. Moore, 12

Heisk. 482—Woodruff v. Nashville & C. R. Co., 2 Head 87.

99. N.D.—Rosenbaum v. Hayes, 67 N.W. 951, 5 N.D. 476.

25 C.J. p 393 note 22.

1. Vt.—Davis v. Bradley, 28 Vt. 118, 65 Am.D. 226.

2. Colo.—Nisbet v. Siegel-Campion Live Stock Co., 123 P. 110, 21 Colo. App. 494, error dismissed 125 P. 524, 53 Colo. 333.

25 C.J. p 394 note 24.

3. Iowa.—Hodges v. Kimball, 49 Iowa 577, 31 Am.R. 158.

4. Ala.—Desha v. Pope, 6 Ala. 690, 41 Am.D. 76.

25 C.J. p 394 note 26.

5. N.Y.—Triest v. Noval, 66 N.Y.S. 717, 32 Misc. 386.

S.C.—James Freeman Brown Co. v. Harris, 70 S.E. 802, 88 S.C. 558.

6. U.S.—Ryttenberg v. Schefer, D. C.N.Y., 131 F. 313.

7. Ark.—May v. McGaughey, 30 S. W. 417, 60 Ark. 357.

25 C.J. p 394 note 29.

8. La.—Laughlin v. Ganahl, 11 Rob. 140.

25 C.J. p 394 note 30.

9. Ill.—Eaton v. Truesdail, 52 Ill. 307.

25 C.J. p 394 note 31.

10. Ga.—Byrd v. Johnson, 38 Ga. 113.

tor's vendee to whom the goods have not been delivered;¹¹ to the claim of a subsequent bona fide holder of the bill of lading;¹² to the claim of a person who has made advances to the principal and to whom the factor is instructed to transmit the proceeds, but of whose advancements the factor has no notice;¹³ to the claim of one who makes advances without receiving the bill of lading;¹⁴ and, under at least one statute, to the claim of one who purchases, within a limited time, from the person to whom the factor had sold.¹⁵

Under at least one statute, the factor is regarded as a privileged creditor whose lien is superior to all privileges except those for wages and rents; and this privilege or preference is not affected by a respite granted to the consignor by a majority of his creditors.¹⁶

Second factor. A factor's lien is superior to the claim of a second factor, with notice, to whom a part of the goods are consigned in violation of the original contract;¹⁷ but the second factor has priority where the property or collateral security is transferred to him by the first factor.¹⁸

Factor's lien inferior. It is well settled that the factor's lien is subordinate to an outstanding legal title, or to a paramount equity of which the factor has notice before his lien attaches by virtue of his possession.¹⁹ Thus, it has been held that a factor cannot claim a lien on the goods as against a person who has made advances on the bill of lading and to whom the bill of lading,²⁰ or a duplicate bill,²¹ has been transferred. Where a factor makes

advancements during the principal's lifetime, but does not sell the property until after his death, his lien has been held to be subject to the lien of the principal's widow and minor children for support.²²

Creditors of principal. The principal cannot, by drawing on the factor in favor of another creditor, prefer the latter's claim.²³ Where the factor's lien has properly attached, it is superior to the general claim of an antecedent creditor of the principal,²⁴ and to the claim of a creditor of the principal who subsequently levies an attachment or execution on the goods;²⁵ but the factor must have acquired possession of the goods or bill of lading before the creditor levied his attachment or execution, otherwise his lien will not be entitled to priority.²⁶

A factor cannot claim a lien for a general balance of account against the owner, over an attaching creditor, in disregard of a statute.²⁷

§ 47. — Waiver, Loss, or Discharge

A factor's lien, once it has attached, may be waived only by express terms or necessary implication. The factor may waive or lose it by any act or claim inconsistent with its continuance, as where he enters into a contract with his principal which is inconsistent with the lien, or voluntarily parts with the possession; and he may lose it by fraud or misconduct in transacting his principal's business. Payment or tender by the principal to the factor of the amount due discharges the lien.

Where the lien of the factor has once attached, it cannot, as a general rule, be defeated or affected by the principal or a third person without the con-

11. Pa.—Harrison v. Mora, 24 A. 705, 150 Pa. 481.

12. U.S.—Wolf v. Smythe, C.C. Ill., 30 F.Cas.No.17,928, 7 Biss. 365.

13. N.Y.—Hollins v. Hubbard, 59 N. E. 317, 165 N.Y. 534.

Reynolds v. Davis, 12 N.Y.Super. 611, 2 Abb.Pr. 163.

14. Mass.—St. Louis Exch. Bank v. Rice, 107 Mass. 37, 9 Am.R. 1. 25 C.J. p 394 note 36.

15. Ala.—Beyer v. Bush, 50 Ala. 19. 25 C.J. p 394 note 37.

16. La.—Ott v. His Creditors, 54 So. 44, 127 La. 827.

17. N.Y.—Triest v. Noval, 66 N.Y.S. 717, 32 Misc. 386.

18. La.—Walmsley v. Resweber, 30 So. 5, 105 La. 522. 25 C.J. p 394 note 41.

19. Ala.—Baker v. American Agricultural Chemical Co., 77 So. 866, 201 Ala. 328. 25 C.J. p 395 note 42.

20. U.S.—Means v. Randall Bank,

Kan., 13 S.Ct. 186, 146 U.S. 620, 36 L.Ed. 1107.

25 C.J. p 395 note 43.

21. N.Y.—Batavia First Nat. Bank v. Ege, 16 N.E. 317, 109 N.Y. 120, 4 Am.S.R. 431.

25 C.J. p 395 note 44.

22. Ga.—Philpot v. Ramsey & Hogan, 171 S.E. 204, 47 Ga.App. 635.

Part sold before death

Where factor having lien for advances on principal's cotton sold one bale thereof before principal's death and eight thereafter, factor could not claim, as against those entitled to year's support, proceeds of the one bale, although entitled thereto, by merely showing amount of proceeds of all nine bales.

Ga.—Philpot v. Ramsey & Hogan, supra.

23. Ind.—Johnson v. Clark, 50 N.E. 762, 20 Ind.App. 247.

24. U.S.—In re Comet Textile Co., D.C.N.Y., 15 F.Supp. 963, affirmed, C.C.A., 91 F.2d 1008.

25. Ill.—Peters v. Elliott, 78 Ill. 321. N.H.—Colbath v. Mechanick Nat. Bank of Concord, 70 A.2d 608, 96 N. H. 110.

25 C.J. p 395 note 47.

Factor required to show superiority

Where a factor of attachment debtor in proceedings by special scire facias against garnishee in attachment claimed right to possession of goods manufactured by debtor which were in possession of garnishee to whom they had been sent by debtor, to be processed, factor, under statutory plea of no title in debtor, must show a lien on goods superior to claim of attaching creditors to justify surrender of goods to him.

N.J.—Kahn & Feldman v. United Piece Dye Works, 7 A.2d 793, 123 N.J.Law 18, affirmed 12 A.2d 384, 124 N.J.Law 372.

26. Iowa.—Hodges v. Kimball, 49 Iowa 577, 31 Am.R. 158.

25 C.J. p 395 note 48.

27. La.—Gray v. Bledsoe, 13 La. 489.

sent of the factor.²⁸ it may be waived only by express terms or necessary implication,²⁹ and is not waived, in the absence of fraud, by holding out the principal as owner,³⁰ or by failing to assert the lien when there is no duty to do so;³¹ nor is it affected by the death of the principal.³² It has been further held that the sale of goods without an obligation to account for the proceeds does not render invalid a factor's lien on the merchandise remaining in stock,^{32.5} and that the lien is not invalidated by the failure of a factor to require or receive from the principal a monthly inventory, as required by the agreement,^{32.10} or by the retention of the down payment by the borrower on the sale of goods by him.^{32.15}

On the other hand, the factor may himself waive or lose the lien by any act or claim on his part which is inconsistent with its continuance,³³ as where, when a demand is made on him by his principal for the goods, he refuses to deliver possession and assigns other reasons than his right to a lien on the goods as the ground for his refusal,³⁴ or where he wrongfully sells the goods;³⁵ and if he makes such sale without collecting the price, equity will not give him a lien as against general creditors on other property purchased by him for the principal.³⁶

Where a factor assents to a conveyance of the goods by his principal, without claiming his lien for a general balance, he is estopped to assert such lien as against the purchaser;³⁷ but he is not estopped to claim a lien for advances made on the

consignment by his mere failure to inform the purchaser from the principal that such advances had been made, at the time when the purchaser deposited the receipts for the goods with him and directed that they should be sold on his account.³⁸ An assignment of the lien after proceedings to enforce it are begun and the rights of the parties are fixed does not destroy it, for it is merged in the suit.³⁹

Contract inconsistent with lien. A factor waives his lien where he enters into an express or implied contract with his principal which is inconsistent with the continued existence of the lien,⁴⁰ as where he extends the time of payment beyond the time when the lien would naturally terminate,⁴¹ or accepts other security for the debt with an intention to rely on it exclusively,⁴² or agrees to look to the personal responsibility of the principal.⁴³

Surrender of possession. A factor waives his lien by voluntarily parting with the possession of the property, so as to lose control of it,⁴⁴ and the lien is not revived by his accidentally regaining possession of the property;⁴⁵ but if thereafter the property is again placed in the hands of the factor as such, his lien will again attach.⁴⁶ He does not lose his lien, however, where he is wrongfully deprived of possession of the property,⁴⁷ or where he delivers possession of it under a special agreement whereby he retains control of it.⁴⁸

Misconduct. A factor may lose his lien by his fraud, negligence, or misconduct in the transaction of his principal's business,⁴⁹ as where he wrong-

28. U.S.—Heffner v. Gwynne-Treadwell Cotton Co., Ark., 160 F. 635, 639, 87 C.C.A. 606.
25 C.J. p 395 note 50.

29. N.D.—Rosenbaum v. Hayes, 79 N.W. 987, 8 N.D. 461.
25 C.J. p 395 note 51.

30. Conn.—Seymour v. Hoadley, 9 Conn. 418.

31. N.Y.—Hollins v. Hubbard, 59 N.E. 317, 165 N.Y. 534.

32. La.—Allen v. Nettles, 2 So. 602, 39 La. Ann. 788.
25 C.J. p 396 note 54.

32.5 U.S.—Manchester Nat. Bank v. Roche, C.A.N.H., 186 F.2d 827.

32.10 N.H.—Colbath v. Mechanics Nat. Bank of Concord, 70 A.2d 608, 96 N.H. 110.

32.15 U.S.—In re Cut Rate Furniture Co., D.C.N.Y., 163 F.Supp. 360.

33. Cal.—Lehmann v. Schmidt, 25 P. 161, 87 C. 15.

Affidavit disclaiming lien

By making an affidavit for attachment stating that he had no lien, the factor abandoned his lien.

U.S.—In re Bauman, D.C.Cal., 57 F.2d 569, reversed on other grounds, C.C.A., Half Moon Fruit & Produce Co. v. Floyd, 60 F.2d 799.

34. Cal.—Lehmann v. Schmidt, 25 P. 161, 87 C. 15.
25 C.J. p 396 note 56.

35. Iowa.—M. M. Walker v. Dubuque Fruit & Produce Co., 85 N.W. 614, 113 Iowa 428, 53 L.R.A. 775.
25 C.J. p 396 note 57.

36. U.S.—Hillman v. New York State Steel Co., N.Y., 231 F. 936, 146 C.C.A. 132.
25 C.J. p 396 note 58.

37. Mass.—Stevens v. Robbins, 12 Mass. 180.

38. Ga.—Daniel v. Swift, 54 Ga. 113.

39. N.D.—Rosenbaum v. Hayes, 86 N.W. 973, 10 N.D. 311.

40. N.D.—Rosenbaum v. Hayes, supra.
25 C.J. p 396 note 63.

41. N.D.—Rosenbaum v. Hayes, supra.

42. N.D.—Rosenbaum v. Hayes, supra.
25 C.J. p 396 note 65.

43. N.D.—Rosenbaum v. Hayes, supra.

44. Iowa.—M. M. Walker Co. v. Dubuque Fruit & Produce Co., 76 N.W. 673, 106 Iowa 245.
25 C.J. p 396 note 68.

Possession as essential to lien see supra § 45.

45. Ill.—Hale v. Barrett, 26 Ill. 195, 79 Am.D. 367.

46. N.D.—Rosenbaum v. Hayes, 79 N.W. 987, 8 N.D. 461.

47. Ill.—Winne v. Hammond, 37 Ill. 99.

N.Y.—Holbrook v. Wright, 24 Wend. 169, 35 Am.D. 607.

48. U.S.—Matthews v. Menedger, C. Ohio, 16 F.Cas.No.9,289, 2 McLean 145.
25 C.J. p 397 note 72.

49. U.S.—Foerderer v. Tradesmen's Nat. Bank, N.Y., 107 F. 219, 46 C.C.A. 243.
25 C.J. p 397 note 74.

fully pledges the goods,⁵⁰ or suffers them to be attached,⁵¹ or wrongfully fails or refuses to render an account.⁵²

Discharge of lien. The payment⁵³ or tender⁵⁴ by the principal to the factor of the amount due him discharges the factor's lien.

§ 48. — Enforcement and Preservation

As a general rule, a factor may enforce his lien by retaining the property, proceeds, or securities until the claims for which his lien exists are paid; if the principal fails to satisfy the lien within a reasonable time, the factor may sell, in the usual course of trade, enough of the property to satisfy it. He may bring a suit in equity to enforce his lien for a general balance.

As a general rule, a factor may enforce his lien by retaining the property, proceeds, or securities until the charges, commissions, or other claims for which his lien exists are paid;⁵⁵ and if the goods are sold, he may apply the proceeds to the payment of his claims.⁵⁶ If the principal or his assignee demands the property, he must first satisfy the factor's lien thereon;⁵⁷ and this rule applies to creditors of the principal.⁵⁸

By way of preserving his lien, the factor may take the steps authorized by statute for that purpose,⁵⁹ or he may sue to regain possession of the property when he has been wrongfully deprived thereof,⁶⁰ or to recover its value⁶¹ and damages for its detention.⁶² Where the factor stipulates that the title to the goods shall be in him as security for the money advanced, he may maintain replevin against the principal, his representative, or his

creditors, for such of the goods as can be identified.⁶³

Sale. As a general rule, if the principal fails to satisfy the lien within a reasonable time or on a reasonable demand, the factor may sell, in the usual course of trade, enough of the property to satisfy his lien.⁶⁴ Where the principal transfers the goods to a third person subject to the factor's lien, and the factor sells the goods for his advances, but the proceeds are insufficient to reimburse him, such third person is not liable for the deficit where he has done nothing amounting to an assumption of the principal's debt.⁶⁵

Suit to enforce. A factor may bring a suit in equity to enforce his lien for a general balance on the goods, and will be entitled in such a suit to a deficiency decree in case the proceeds of the goods are insufficient to satisfy his claim;⁶⁶ and it has been held that, where he has a lien on notes in his hands belonging to his principal, he can satisfy it only by some proceeding, recognized by law, to foreclose his interest and extinguish the title of his principal.⁶⁷

§ 49. Actions by Principal against Factor

- a. In general; form of remedy
- b. Defenses and counterclaims
- c. Accrual of action; demand
- d. Parties
- e. Pleading
- f. Issues, proof, and variance

Violation of instructions

- III.—Larminie v. Carley, 29 N.E. 382, 114 Ill. 196—Jones v. Marks, 40 Ill. 313.
25 C.J. p 397 note 74 [a].
50. Iowa.—M. M. Walker Co. v. Dubuque Fruit & Produce Co., 76 N. W. 673, 106 Iowa 245.
25 C.J. p 397 note 75.
51. Iowa.—M. M. Walker Co. v. Dubuque Fruit & Produce Co., 76 N. W. 673, 106 Iowa 245.
Mass.—Holly v. Huggeford, 8 Pick. 73, 19 Am.D. 303.
52. Cal.—Lehmann v. Schmidt, 25 P. 161, 87 C. 15.
N.Y.—Terwilliger v. Beals, 6 Lans. 403.
53. Or.—Nickelsen v. Kilbuck, 26 P. 2d 828, 145 Or. 203.
Tenn.—Woodruff v. Nashville & Chattanooga R. Co., 2 Head 87.
54. Cal.—Miller v. Price, 39 P. 781, 4 CUnrep.Cas. 983.
25 C.J. p 397 note 79.
55. Wis.—Edgerton v. Michels, 26 N.W. 748, 28 N.W. 408, 66 Wis. 124.
25 C.J. p 397 note 80.
56. U.S.—In re Bauman, D.C.Cal., 57 F.2d 569, reversed on other grounds, C.C.A., Half Moon Fruit & Produce Co. v. Floyd, 60 F.2d 799.
25 C.J. p 397 note 81.
57. Cal.—Lehmann v. Schmidt, 22 P. 973, 3 CUnrep.Cas. 187, reheard 24 P. 120, and 25 P. 161, 87 C. 15.
58. Pa.—Baugh v. Kirkpatrick, 54 Pa. 84, 93 Am.D. 675.
25 C.J. p 397 note 83.
59. Ga.—Moring v. Flanders, 49 Ga. 594.
25 C.J. p 397 note 86.
60. Cal.—Campbell v. Smith, 274 P. 758, 96 C.A. 689.
25 C.J. p 397 note 84.
61. Cal.—Campbell v. Smith, supra.
N.Y.—Adams v. Bissell, 28 Barb. 382.
62. Cal.—Campbell v. Smith, 274 P. 758, 96 C.A. 689.
63. Tenn.—Grange Warehouse Assoc. v. Owen, 7 S.W. 457, 86 Tenn. 355.
64. Ga.—Planters' Warehouse Co. v. Hardin, 118 S.E. 441, 30 Ga.App. 459.
25 C.J. p 397 note 88.
Sale for reimbursement generally see supra § 24.
65. Pa.—Watson v. Beatty, 13 A. 521, 10 Pa.Cas. 108.
66. N.Y.—Whitman v. Horton, 46 N. Y.Super. 531, affirmed 94 N.Y. 644.
25 C.J. p 398 note 92.

Judgment held defective; proper charges

A judgment, foreclosing a lien, which directed the officer executing the order of sale to pay out of the proceeds all usual and customary current charges accrued, including all cash advanced and paid for freight thereon, was held defective in permitting the officer to determine the law and the facts as to what the proper charges on such items should be.

Tex.—Hendryx v. W. L. Moody Cotton Co., Civ.App., 257 S.W. 305.

67. Okl.—People's Bank v. Frick Co., 73 P. 949, 13 Okl. 179.

- g. Evidence
- h. Trial and determination

a. In General; Form of Remedy

Remedies available to a principal against his factor may include, dependent on the circumstances of the case, an action for money had and received, a suit for an accounting, a suit for damages for breach of contract, an action on the case for damages, assumpsit on an account stated, assumpsit for goods sold and delivered, and an action of trover.

Where the principal seeks to recover of his factor the proceeds of the sale of goods consigned to him, a proper remedy is an action for money had and received;⁶⁸ but in order that such an action may be maintained, there must have been an actual sale of the goods, since such action will not lie as long as the goods remain unsold.⁶⁹ There is such a trust relationship between the principal and factor as will enable the principal to sue in equity for an accounting;⁷⁰ but this form of action may be maintained only where there is a series of transactions, and not where there is but a single transaction.⁷¹ The principal is not precluded from an equitable accounting by first availing himself of the remedy of discovery.⁷² It has also been held that the common-law action of account render may be maintained;⁷³ or the principal may be entitled to a quantum meruit recovery.^{73.5}

Where the factor has violated his instructions or has been guilty of another omission or breach of duty, the principal may sue for damages for breach

of contract,⁷⁴ although this is not the exclusive remedy;⁷⁵ and under proper circumstances he may maintain an action on the case for damages against the factor⁷⁶ or assumpsit on an account stated, where the amount due is ascertained.⁷⁷ An action in assumpsit for breach of an agreement to pay the market value of goods may be based on either an express or an implied contract when it appears that the terms of the agreement have been fully performed with the exception of paying the stipulated sum thereunder.^{77.5}

Where the factor has been guilty of acts amounting to a conversion of the goods, the principal may maintain an action of trover against him.⁷⁸

Where, in accordance with a consignment agreement, the consignor takes an assignment of the consignee's accounts receivable, he does not make an election of remedies so as to foreclose himself from suing on the debt.^{78.5}

Goods sold and delivered. As a general rule, an action for goods sold and delivered will not lie against the factor,⁷⁹ except where the factor uses the goods as his own or sells them to himself;⁸⁰ and this is true although the factor has made an unauthorized sale of the goods⁸¹ or has been guilty of a delay in the sale;⁸² but it has also been held that where the factor sells the goods at a place beyond the shipping point in violation of his contract, the principal may sue in assumpsit for their value as for goods sold and delivered.⁸³

68. Mass.—Tucker v. Utley, 47 N.E. 198, 168 Mass. 415.
25 C.J. p 400 note 36.

69. Ill.—Stahl v. Ansley, 7 Ill. 32.
25 C.J. p 400 note 37.

70. U.S.—American Agr. Chemical Co. v. Barnes Co., D.C.S.C., 28 F. Supp. 73.

Mo.—Corpus Juris cited in State ex rel. Cockrum v. Southern, 83 S.W. 2d 162, 164, 229 Mo. 749.

Tex.—Samuels v. Finkelstein, Civ. App., 25 S.W.2d 923, error dismissed.
25 C.J. p 400 note 53.

Relation held not shown

Under purported factoring agreement, relation of trust and confidence necessary to sustain an action for an accounting held not to exist, but rather relationship of debtor and secured creditor.

N.Y.—Zamax Mfg. Co. v. Grossman, 102 N.Y.S.2d 833.

71. Ill.—Taylor v. Turner, 87 Ill. 296.

N.C.—McLin v. McNamara, 22 N.C. 82.

72. Mo.—State ex rel. Cockrum v.

Southern, 83 S.W.2d 162, 229 Mo. 749.

73. Conn.—Wetmore v. Woodbridge, Kirby 164.

73.5 Terms of agreement not determinable

If court could not determine definite terms of oral agreement between wool exporter and importer, under which exporter contended that it was entitled to certain payments from importer as consignee with respect to certain shipments, and importer contended that it could treat such shipments as either under consignment agreement or under sale agreement, exporter would be entitled to quantum meruit recovery for such items as he had not been paid.
U.S.—Irayani Mottaghi v. Barkey Importing Co., C.A.N.Y., 244 F.2d 238, certiorari denied 77 S.Ct. 1402, 354 U.S. 939, 1 L.Ed.2d 1538.

74. Cal.—Bare v. Richman & Samuels of New York, 140 P.2d 895, 60 C.A.2d 413—Glantz v. Freedman, 280 P. 704, 100 C.A. 611.
N.Y.—Campbell v. Thompson, 27 Hun 541.

25 C.J. p 400 note 38.

75. Cal.—Glantz v. Freedman, 280 P. 704, 100 C.A. 611.

76. N.H.—Frothingham v. Everton, 12 N.H. 239.
25 C.J. p 400 note 46.

77. Conn.—Mitchell v. Allen, 38 Conn. 188.

77.5 Cal.—Bare v. Richman & Samuels of New York, 140 P.2d 895, 60 C.A.2d 413.

78. Ga.—Wood v. Jones, 73 S.E. 1099, 10 Ga.App. 735.
Wash.—Passow v. Kirkwood Distillery Co., 103 P. 34, 54 Wash. 196.

25 C.J. p 400 note 49.

78.5 U.S.—U. S. Rubber Co. v. Pulliam, D.C.Ark., 151 F.Supp. 491.

79. Ind.—Lindley v. Downing, 2 Ind. 418.
25 C.J. p 400 note 40.

80. Mass.—Wadsworth v. Gay, 118 Mass. 44.

81. Ind.—Lindley v. Downing, 2 Ind. 418.

82. Me.—Selden v. Beale, 3 Me. 178.
25 C.J. p 400 note 43.

83. Cal.—Glantz v. Freedman, 280 P. 704, 100 C.A. 611.

Injunction. The principal may have an injunction and a receiver against his factor in case of misconduct or insolvency, whereby the property is endangered, although the consignment is to sell on a *del credere* commission.⁸⁴

b. Defenses and Counterclaims

A factor sued by his principal may set up available defenses, and may counterclaim for expenses incurred or for damages sustained by reason of the principal's default.

The fact that the principal has accepted notes from the factor guaranteeing payment for all sales on a credit basis under the terms of the contract does not bar an action for accounting for goods consigned to the factor;⁸⁵ but it is a matter of defense whether the acceptance of a check amounts to a waiver of all disputed claims.^{85.5} The recovery of commissions by the factor is no bar to an action for his breach of contract.^{85.10}

In an action for the proceeds received by the factor, he may set up as a defense the principal's want of title to the goods consigned;⁸⁶ and where the factor informs his principal that there is a balance due him for goods sold, and the principal draws for it and his bill is protested, the factor may show in defense to the principal's suit for the balance that he was mistaken as to there being a balance due, and that he had sold the goods on credit and had not yet been paid for them.⁸⁷ Where a factor is sued at law by his principal for a breach of trust whereby he has substituted himself in place of the purchaser, he may set up fraud or any other matter of defense which the purchaser could have set up if the suit had been against him.⁸⁸

It is no defense to a suit for an accounting against a factor that there is pending against him a suit by the government to recover as a penalty the value of part of the goods consigned to him because they had been undervalued by the principal in fraud of the revenue law.⁸⁹ An agreement to divide profits which is not legally or equitably binding on the

principal is no defense against a bill for accounting for all profits.⁹⁰

Breach of alleged guaranty. Where defendants agreed to sell goods for the shipper for specified commissions, and knew at the time the goods were packed that they did not meet the requirements of an alleged guaranty as to grade, the shipper is not precluded from recovery for breach of the agreement because of breach of the alleged guaranty.^{90.5}

Counterclaim. In an action for the proceeds the factor may counterclaim for expenses incurred by him with respect to the goods consigned,⁹¹ or for damages sustained by reason of the principal's default.⁹² A factor who refuses on demand to surrender the proceeds of a sale cannot in an action of conversion defeat a recovery by purchasing a claim of a third person against the principal and interposing it as a counterclaim, because the principal's action is in tort, and because defendant by such purchase assumes a position incompatible with his duty as an agent and in direct conflict with his principal's interest.⁹³

c. Accrual of Action; Demand

The general rule, subject to various exceptions, is that the factor must be placed in default by a demand before an action for the proceeds of the goods can be maintained against him by the principal. If the goods remain unsold in the hands of the factor, a demand and a refusal must be made before the owner can maintain an action for them.

As a general rule, unless the factor fails to remit pursuant to instructions, an action cannot be maintained against him by the principal for the proceeds of the sale until a demand therefor has been made,⁹⁴ even though the factor is acting for a foreign principal.⁹⁵ However, it has been held that an action for the proceeds may be maintained without a previous demand, where there is an agreement or instruction to remit within a fixed time, which the factor fails to do;⁹⁶ where the usage or course of dealings between the parties imposes on the factor the duty to remit;⁹⁷ where the factor un-

84. N.Y.—Micklethwaite v. Rhodes, 4 Sandf.Ch. 434.

85. U.S.—American Agr. Chemical Co. v. Barnes Co., D.C.S.C., 28 F. Supp. 73.

85.5 Cal.—Raymond v. Independent Growers, 284 P.2d 57, 133 C.A.2d 154.

85.10 N.Y.—Campbell v. Thompson, 27 Hun 541.

86. Pa.—Floyd v. Bouvard, 6 Watts & S. 75.

87. Ky.—Sneed v. Kelly, 3 Dana 538.

88. N.Y.—Le Guen v. Gouverneur, 1 Johns.Cas. 436, 1 Am.D. 121.

89. N.Y.—Monnet v. Merz, 27 N.E. 827, 127 N.Y. 151, 25 C.J. p 401 note 59.

90. Fla.—Wilson v. Duncan, 112 So. 48, 92 Fla. 470.

90.5 Cal.—Asamen v. Thompson, 131 P.2d 841, 55 C.A.2d 661.

91. Ill.—Carterville Coal Co. v. Covey-Durham Coal Co., 186 Ill.App. 163.

25 C.J. p 401 note 61.

92. Ill.—Carterville Coal Co. v. Covey-Durham Coal Co., supra.

93. N.Y.—Britton v. Ferrin, 62 N.E. 954, 171 N.Y. 235.

94. N.Y.—Middleton v. Twombly, 26 N.E. 621, 125 N.Y. 520, 25 C.J. p 401 note 68.

95. N.Y.—Halden v. Crafts, 4 E.D. Smith 490, 2 Abb.Pr. 301, 25 C.J. p 401 note 76.

96. N.Y.—Haebler v. Luttgen, 37 N.Y.S. 794, 2 App.Div. 390, affirmed 53 N.E. 1125, 158 N.Y. 693, 25 C.J. p 401 note 69.

97. N.Y.—Middleton v. Twombly, 26 N.E. 621, 125 N.Y. 520, Brink v. Dolsen, 8 Barb. 337.

reasonably neglects to render his account,⁹⁸ especially where the factor is acting for a foreign principal;⁹⁹ where an account has been rendered in which the balance is subject to the order of the principal, unless there is an understanding that the principal shall draw for the balance;¹ or where the factor has been guilty of conversion.²

The principal cannot recover damages from the factor for a failure to sell unless he is ready and offers to retake the goods and relieve the factor from further responsibility.³

Action for goods. If goods are in the hands of the factor and unsold, a demand and a refusal must be made before the owner can maintain an action for them.⁴ The purpose of the demand is to give the person in possession an opportunity to comply without incurring liability; the demand must be made when the demanding party has a right to possession, and must specifically indicate the chattels demanded.^{4,5} While a formal demand is not necessary, the statement or request constituting the demand must advise that the surrender of possession is wanted "then and there."^{4,10}

Where the factor exchanges property intrusted to him for sale, for other property, the principal may maintain an action for the value of the property without a demand for its return or for an accounting.⁵

d. Parties

Under proper circumstances, one of several owners may maintain an action against the factor; but where fire insurance moneys have been paid as a total sum to the factor, the proper remedy is a suit wherein all the owners are made parties.

An owner of only part of the goods consigned,

who, under authority of the other owners, has entered into the factorage contract as principal, may sue the factor for damages to the entire lot.⁶ One of two joint owners who has informed the factor of the extent of his ownership and has given separate instructions as to his share may maintain a separate action against the factor for violation of his instructions.⁷

Where the factor collects fire insurance moneys paid as a total sum on goods owned by several persons, one of such persons cannot maintain a separate action for his share, but the proper remedy is a suit in which all the owners are made parties to enable the court to determine the extent of each owner's interest.⁸ Where an agent for the sale of goods under the terms of his agreement consigns them to a factor for sale, the owner may sue the factor for any unfaithfulness on his part, in the name of the agent for the owner's benefit, or he may sue in his own name.⁹

Mortgaged crop. A shipper has been held entitled to maintain an action for breach of an agreement to sell a mortgaged crop without showing that the mortgage was paid, where the cause of action is in the shipper either as principal or as agent.^{9,5}

e. Pleading

The usual rules of pleading in civil actions apply to the declaration or complaint, the plea or answer, and the rejoinder. An amendment which does not state a different cause of action may be permitted.

In accordance with the usual rules of pleading, the declaration or complaint in an action by a principal against his factor must be sufficient to state a cause of action.¹⁰ If one count in the declaration is good although all the other counts are bad, it is

98. Tex.—Fulkerson v. White, 22 Tex. 674.

25 C.J. p 401 note 71.

99. Mass.—Langley v. Sturtevant, 7 Pick. 214—Clark v. Moody, 17 Mass. 145.

1. Mass.—Clark v. Moody, supra.

2. Tex.—Fulkerson v. White, 22 Tex. 674.

3. Mo.—Bailey-Ball-Pumphrey Co. v. German, 247 S.W. 483, 213 Mo.App. 11.

4. Ark.—Martin v. Webb, 5 Ark. 72, 39 Am.D. 363.

N.Y.—Borneo Sumatra Trading Co. v. Security Door & Panel Corp., 183 N.Y.S.2d 137.

4.5 N.Y.—Borneo Sumatra Trading Co. v. Security Door & Panel Co., supra.

Chattels held sufficiently indicated N.Y.—Borneo Sumatra Trading Co.

v. Security Door & Panel Corp., supra.

4.10 N.Y.—Borneo Sumatra Trading Co. v. Security Door & Panel Corp., supra.

Demand held not sufficient

N.Y.—Borneo Sumatra Trading Co. v. Security Door & Panel Corp., supra.

5. Iowa.—Haas v. Damon, 9 Iowa 589.

6. Ga.—W. W. Barron & Son v. Gentile Bros. Co., 137 S.E. 106, 36 Ga. App. 459.

7. U.S.—Hall v. Leigh, Md., 8 Cranch 50, 3 L.Ed. 484.

8. N.Y.—Gutman v. Rogers, 13 N.Y. S. 576.

9. Vt.—Langdon v. Burrill, 21 Vt. 466.

9.5 Cal.—Asamen v. Thompson, 131 P.2d 841, 55 C.A.2d 661.

10. Fla.—Tampa Union Terminal Co. v. Richards, 146 So. 591, 108 Fla. 516.

25 C.J. p 402 note 81.

Pleading custom

A count for breach of contract, based on New York Cotton Exchange custom, which does not plead that the contract was made with reference to the custom, was held demurrable.

Ala.—J. H. Arnold & Co. v. Gibson, 113 So. 25, 216 Ala. 314.

Action under Perishable Agricultural Commodities Act

(1) Where the complaint in an action for the purchase price of melons alleging the making of a reparation order by the secretary of agriculture does not allege that defendant was a commission merchant, dealer, or broker, or show that the transaction was one in interstate or foreign com-

sufficient.¹¹ The complaint need not anticipate defenses;¹² and a declaration which is curable by amendment cannot be objected to after verdict.¹³

Where the purchaser refused to accept the goods on their arrival and the factor resold for a smaller amount but refused to tell his principal the name of the original purchaser, thus depriving him of resort against such purchaser, it need not be alleged in an action for the difference between the two prices that the original purchaser was financially responsible.¹⁴ When goods are received to be sold at certain prices or returned on demand and they are sold and the money received, no special demand need be alleged in an action for the money; but it is otherwise if the action is for a failure to return the goods.¹⁵ Where the action by the principal is for negligence or other breach of duty on the part of the factor, the declaration or complaint should allege facts which show such negligence or breach of duty,¹⁶ and should also aver the facts from which the duty to act springs, although it is not necessary to set out the particular acts of diligence which should have been employed in the performance of that duty.¹⁷

Plea or answer, and set-off. In accordance with the usual rules of pleading, if the factor defends on the ground that the goods of plaintiff were destroyed without defendant's fault, an allegation that he had used proper diligence to sell the goods and had failed is necessary.¹⁸ Where the complaint alleges a debt on a contract, the factor may plead a

counterclaim for expenses incurred on the consignment;¹⁹ and in an action for goods sold and delivered by a factor to himself disbursements made by him for storage prior to the sale must be pleaded affirmatively in set-off, and cannot be deducted from the price under a general denial.²⁰

Rejoinder. It has been held that in an action of assumpsit brought by the principal against the factor for money in his hands, where the factor sets up in reduction of the principal's demand an account for expenses incurred by him, the principal cannot set up in rejoinder the negligence of the factor, but must bring his action for damages.²¹

An amendment to a complaint which does not state a different cause of action may be permitted.²²

In a bail-trover action against a consignee, amendments to the answer attempting to show that the consignor does not have title because of a conditional vendor's title have been held to be without merit because they seek to deraign the consignor's title.^{22.5}

f. Issues, Proof, and Variance

The usual rules as to issues, proof, and variance apply.

In accordance with the rules which govern the issues, proof, and variance in civil actions generally, only such questions should be submitted to the jury as are properly put in issue by the pleadings;²³ the proof must be confined to the issues,²⁴ and, al-

merce, or that there was any failure or refusal truly and correctly to account, or that the complaint filed with the department stated any other facts, the cause of action, if any, stated in the complaint does not arise under the Perishable Agricultural Commodities Act.
U.S.—Iwata v. Western Fruit Growers, C.C.A.Cal., 90 F.2d 575.

(2) In grower's suit against dealer on reparation order of secretary of agriculture, petition referring to order which showed that parties, citizens of Florida, had contracted for sale and purchase of citrus fruit for five years and that parties contemplated fruit would be shipped to other states, and that it was actually shipped to New York was held to show transaction in "interstate commerce" within the federal Perishable Agricultural Commodities Act.
U.S.—Krueger v. Acme Fruit Co., C. C.A.Fla., 75 F.2d 67.

Complaint or count held sufficient

U.S.—Collins v. Hubshman, D.C.N.Y., 27 F.Supp. 789.
Cal.—Rhee v. L. K. Small Co., 256 P. 839, 83 C.A. 339.

Fla.—Tampa Union Terminal Co. v. Richards, 146 So. 591, 108 Fla. 516.

11. Md.—Lee v. Strickland, 62 Md. 158.

12. Tex.—Hardy v. Kansas Mfg. Co., 18 S.W. 157.

13. Ga.—Moss v. Stokeley, 22 S.E. 692, 95 Ga. 675.

14. Minn.—Mobile Trust & Trading Co. v. Potter, 81 N.W. 392, 78 Minn. 487.

15. U.S.—Wyman v. Fowler, C.C. Mich., 30 F.Cas.No.18,114, 3 McLean 467.

16. Fla.—Tampa Union Terminal Co. v. Richards, 146 So. 591, 108 Fla. 516.

25 C.J. p 402 note 88.

17. Ala.—Leach v. Bush, 57 Ala. 145. 25 C.J. p 402 note 90.

18. Ky.—Francis v. Castleman, 4 Bibb 282.

19. N.Y.—Vandelle v. Rohan, 73 N. Y.S. 285, 36 Misc. 239.

20. Mass.—Wadsworth v. Gay, 118 Mass. 44.

21. Ga.—Brown v. Clayton, 12 Ga. 564.

22. Mass.—Swan v. Nesmith, 7 Pick. 220, 19 Am.D. 282.

22.5 Ga.—Light v. Smith, 71 S.E.2d 844, 86 Ga.App. 591.

23. Neb.—Prokop v. Gourlay, 91 N. W. 290, 65 Neb. 504. 25 C.J. p 402 note 98.

Failure to instruct as creating issue of contributory negligence

In an action for defendant's breach of an agreement to sell plaintiffs' barley as instructed by plaintiffs, contributory negligence was not an issue, since if plaintiffs directed defendant to sell, it became his duty to exercise reasonable diligence to execute the direction, while if no directions were given, defendant was relieved of liability, not because of contributory negligence, but because it had no duty to act.

Wis.—Jacobi v. Rubicon Malting & Grain Co., 182 N.W. 344, 174 Wis. 344.

24. Minn.—Mobile Trust & Trading Co. v. Potter, 81 N.W. 392, 78 Minn. 487.

25 C.J. p 402 note 99.

though a material variance will be fatal,²⁵ an immaterial variance will be disregarded.²⁶ A general denial places in issue the allegations of the complaint.²⁷

In an action for the proceeds of a sale of certain goods, where there is a counterclaim for advances made on those and other goods, and the court finds that the total proceeds exceed the advances by a sum smaller than that claimed in the complaint, the mere form in which the issues are presented will not preclude a recovery of such sum.²⁸

g. Evidence

- (1) Presumptions and burden of proof
- (2) Admissibility
- (3) Weight and sufficiency

(1) Presumptions and Burden of Proof

The burden is on the principal to prove his case, and the factor has the burden to prove an affirmative defense. Negligence or breach of duty is not presumed, and the factor has no burden of proving diligence unless the principal establishes a prima facie case of negligence.

In accordance with the usual rules in civil actions, the burden is on the principal to establish the facts which he alleges as a cause of action,²⁹ and on the factor to establish the facts which he relies on as ground of affirmative defense³⁰ or to support a plea of set-off.³¹ In an action against a factor for the

proceeds of goods sold, the burden is generally on plaintiff to show that there has been a sale of the goods,³² unless the lapse of time, without an accounting, together with other circumstances raises a presumption that the factor has sold the goods and received the proceeds so as to authorize an action against him for money had and received;³³ but this presumption may be overcome by evidence that he has received no returns from the goods.³⁴

In a suit under the federal Perishable Agricultural Commodities Act, the findings and order of the secretary of agriculture are prima facie correct,³⁵ and will prevail unless overcome by evidence;³⁶ but appellant has the right to seek to overcome their prima facie effect.³⁷ The court will assume that the secretary of agriculture would not have acted if he had lacked jurisdiction.³⁸

Negligence or misconduct. In the absence of proof, it will not be presumed that the factor has been guilty of negligence or other breach of duty,³⁹ or that the principal has suffered damage thereby,⁴⁰ and hence there is no burden on the factor of proving that he exercised due diligence in the performance of his duties.⁴¹ On the other hand, where the principal relies on negligence or other breach of duty on the part of the factor as a ground for

No variance between complaint and proof

Cal.—Glantz v. Freedman, 280 P. 704, 100 C.A. 611.

Failure of consideration; burglary

Where, under terms of contract for consignment, consignees assumed all risks of loss except that occasioned by fire, loss from burglary fell on consignees, so that proof of burglary fails to support allegations of their plea of failure of consideration.

Ala.—Loudonville Milling Co. v. Davis, 27 So.2d 6, 248 Ala. 202.

25. Mass.—Ayres v. Sleeper, 7 Metc. 45.

25 C.J. p 403 note 1.

26. N.Y.—Horst v. Lovdal, 98 N.Y.S. 996, 113 App.Div. 277.

25 C.J. p 403 note 2.

No fatal variance held shown

Cal.—Jackson v. Belmont, 238 P.2d 1084, 108 C.A.2d 288.

27. Mo.—Murray v. Gordon-Watts Grain Co., 260 S.W. 513, 216 Mo. App. 607.

Instructions to sell for cash

In an action to recover the value of a carload of wheat lost by reason of the alleged violation of plaintiffs' instructions to broker, where plain-

tiffs alleged that the instructions to broker were to sell for cash, a general denial put that matter in issue. Mo.—Murray v. Gordon-Watts Grain Co., supra.

28. Wis.—Anderson v. Fetzner, 44 N. W. 838, 75 Wis. 562.

25 C.J. p 403 note 3.

29. Ark.—Stripling v. Rudy, 254 S. W. 448, 160 Ark. 160.

Ill.—Jonas v. Garrison's Estate, 76 N.E.2d 194, 333 Ill.App. 384.

25 C.J. p 403 note 6.

Shipments as consignment

In action by wool exporter against importer for money allegedly due under several contracts and subsequent oral settlement agreement, whereunder importer was buyer with respect to part of the wool shipped and was consignee for resale at "best January prices" with respect to other wool, exporter had burden of proving on which shipments he was entitled to consignment prices.

U.S.—Irvani Mottaghi v. Barkey Importing Co., C.A.N.Y., 244 F.2d 238, certiorari denied 77 S.Ct. 1402, 354 U.S. 939, 1 L.Ed.2d 1538.

30. Mich.—Ludke v. Chandler Motor Sales Co., 219 N.W. 659, 243 Mich. 134.

25 C.J. p 403 note 7.

31. Va.—Mann v. W. C. Crenshaw & Co., 163 S.E. 375, 158 Va. 193.

32. N.Y.—Brink v. Dolsen, 8 Barb. 337.

33. Mich.—Hutchins v. Vinkemulder, 154 N.W. 80, 187 Mich. 676.

25 C.J. p 403 note 9.

34. Mich.—Hutchins v. Vinkemulder, supra.

35. U.S.—Krueger v. Acme Fruit Co., C.C.A.Fla., 75 F.2d 67.

Barker-Miller Distributing Co. v. Berman, D.C.N.Y., 8 F.Supp. 60.

36. U.S.—Farris v. Meyer Schuman Co., C.C.A.Ill., 115 F.2d 577.

Barker-Miller Distributing Co. v. Berman, D.C.N.Y., 8 F.Supp. 60.

37. U.S.—Krueger v. Acme Fruit Co., C.C.A.Fla., 75 F.2d 67.

38. U.S.—Barker-Miller Distributing Co. v. Berman, D.C.N.Y., 8 F.Supp. 60.

39. Va.—Corpus Juris cited in Mann v. W. C. Crenshaw & Co., 163 S.E. 375, 386, 158 Va. 193.

25 C.J. p 403 note 11.

40. Va.—Mann v. W. C. Crenshaw & Co., 163 S.E. 375, 158 Va. 193.

41. Mo.—J. T. Fargason & Co. v. Coleman, App., 272 S.W. 1003.

25 C.J. p 403 note 12.

recovery, the burden is on him to establish that fact,⁴² and the fact that he was damaged thereby.⁴³

Where, however, a prima facie case of negligence of the factor is established, the burden is on him to show facts relieving him from liability,⁴⁴ and this rule applies where the factor by his own testimony shows that in case of a sale on credit there was no inquiry or investigation as to the responsibility of the purchaser.⁴⁵ So, after proof of loss of the bailed property, the burden is on the consignee to show proper diligence on his part.^{45.5}

Where, in an action against a factor for conversion, he does not allege as a defense that he had sold the property which is unaccounted for, it will be presumed that he did not sell it, but concealed it with a view to appropriating it to his own use.⁴⁶

(2) Admissibility

Evidence is held admissible or inadmissible, in accordance with the rules applicable in civil actions generally.

In an action by a principal against his factor, evidence is held admissible⁴⁷ or inadmissible⁴⁸ in accordance with the general rules of evidence in civil actions. In an action for a negligent sale shortly before a sudden rise in the market price, evidence is inadmissible as to the original cost of the article or as to an expression by defendant to plaintiff, after the sale in question, of hopes to do better with another cargo which plaintiff had con-

signed at about the same time, together with evidence of the times and prices at which the second cargo is sold; and proof of the holding of other consignments by other persons for a better market is not relevant with regard to the propriety of the sale in controversy.⁴⁹ Proof of market value at the place of sale under the contract is proper for the purpose of showing that the factor obtained the best price, but evidence of its value at the place of shipment is inadmissible.⁵⁰

Evidence showing what price could have been obtained by the factor is admissible,⁵¹ but evidence of the sale price of other goods is inadmissible where it is not shown that the quality of the goods was the same.⁵² "Prices current" sent by a factor to his principal showing the price of goods in the factor's market on a certain date are admissible against him on an issue between him and the principal as to the market price at that time.⁵³ In an action against a factor for fraudulently selling goods on credit to an insolvent person, evidence of the pecuniary circumstances of the buyer of the goods and of his acts and conduct with respect to the goods after the purchase is admissible in connection with other evidence showing fraud in the sale, although it might be inadmissible if standing alone.⁵⁴

In an action against a factor to recover the proceeds of a sale under an agreement for a del credere commission, evidence which has a definite bearing on the terms and conditions of the agency and the

42. Ill.—Jonas v. Garrison's Estate, 76 N.E.2d 194, 333 Ill.App. 384.

Mo.—J. T. Fargason & Co. v. Coleman, App., 272 S.W. 1003.

Va.—Corpus Juris cited in Mann v. W. C. Crenshaw & Co., 163 S.E. 375, 386, 158 Va. 193.

25 C.J. p 403 note 13.

43. Va.—Mann v. W. C. Crenshaw & Co., 163 S.E. 375, 158 Va. 193.

44. Kan.—Brown v. Funck, 132 P. 202, 89 Kan. 601, Ann.Cas.1915A 174. 25 C.J. p 403 note 14.

45. Kan.—Brown v. Funck, supra.

45.5 Ga.—Light v. Smith, 71 S.E.2d 844, 86 Ga.App. 591.

46. N.Y.—Anker v. Smith, 87 N.Y. S. 479.

47. Ark.—Arts v. Jones, 118 S.W.2d 574, 196 Ark. 1177—J. T. Fargason Co. v. Driver, 284 S.W. 20, 171 Ark. 315.

Tex.—Allala v. A. N. Tandy & Sons, Civ.App., 59 S.W.2d 205, affirmed 92 S.W.2d 227, 127 Tex. 148.

25 C.J. p 403 note 18.

In bail-trover action against consignee of trailer for purpose of sale, introduction of conditional sale con-

tract between consignor and former conditional vendor, under which the trailer had been repossessed from the consignee for alleged nonpayment of installments, was admissible for single purpose of shedding light on value of trailer at time of trial.

Ga.—Light v. Smith, 71 S.E.2d 844, 86 Ga.App. 591.

48. Fla.—Tampa Union Terminal Co. v. Richards, 146 So. 591, 108 Fla. 516.

Mo.—J. T. Fargason Co. v. Pitts, 281 S.W. 148, 220 Mo.App. 135.

Tex.—Falls Rubber Co. v. La Fon, Com.App., 256 S.W. 577.

25 C.J. p 403 note 18.

In bail-trover action against consignee of trailer for purpose of sale, evidence, introduced over objections of consignor, as to conduct of agent of conditional vendor in repossessing the trailer for consignor's alleged nonpayment of installments, which tended to negative any idea of legal proceedings to obtain possession and tended to excuse consignee from protecting the property as bailed, was irrelevant, immaterial, and harmful in that it set up for consignee a defense not permitted under law; and

a telegram that agent of conditional vendor who had repossessed the trailer had informed the consignee of default in payment and had demanded and taken the trailer was inadmissible and should not have been admitted over objections.

Ga.—Light v. Smith, 71 S.E.2d 844, 86 Ga.App. 591.

49. N.Y.—Milbank v. Dennistoun, 14 N.Y.Super. 246, reversed on other grounds 21 N.Y. 386.

50. Cal.—Pugh v. Porter Bros. Co., 50 P. 772, 118 C. 628.

25 C.J. p 404 note 22.

51. Ark.—Arts v. Jones, 118 S.W.2d 574, 196 Ark. 1177.

Miss.—Gridley, Maxon & Co. v. Turner, 176 So. 733, 179 Miss. 890, suggestion of error overruled 177 So. 362, 179 Miss. 890.

52. Mo.—J. T. Fargason Co. v. Pitts, 281 S.W. 148, 220 Mo.App. 135.

53. N.Y.—Weidner v. Olivit, 96 N. Y.S. 37, 108 App.Div. 122, affirmed 81 N.E. 1178, 188 N.Y. 611.

54. U.S.—Castle v. Bullard, Ill., 23 How. 172, 16 L.Ed. 424.

Kan.—Brown v. Funck, 132 P. 202, 89 Kan. 601, Ann.Cas.1915A 174.

transactions thereunder is admissible.⁵⁵ Evidence of a long delay in selling in a constantly falling market is admissible on the question of good faith and reasonable diligence of the factor.⁵⁶ In an action for damages for selling below the invoice price defendant may show in reduction of damages that the goods at the time of sale and down to the time of trial were worth no more than the price at which they were sold;⁵⁷ and, where the principal seeks by way of counterclaim to recover damages for the factor's breach of contract to ship and sell goods on his account, the fact that plaintiff inspected the goods before entering into the contract does not preclude him from showing for the purpose of reducing damages that the goods were of inferior quality.⁵⁸

(3) Weight and Sufficiency

The rules which govern the weight and sufficiency of the evidence in other civil actions apply in an action by a principal against his factor.

The rules which govern the weight and suffici-

ency of the evidence in other civil actions are applied in an action by a principal against his factor,⁵⁹ as in an action to recover the proceeds or the value of property consigned,⁶⁰ to recover brokerage charges wrongfully charged,⁶¹ or to recover damages caused by a wrongful delay in selling⁶² or caused by any other breach of the factorage contract.⁶³

Under the particular circumstances of various cases, evidence has been held sufficient⁶⁴ or insufficient⁶⁵ to show negligence of the factor; sufficient⁶⁶ or insufficient⁶⁷ to show fraud by the factor; or sufficient⁶⁸ or insufficient⁶⁹ to show a guarantee of price.

Other evidence has been held sufficient to show ownership of the property consigned,⁷⁰ the amount to which the principal was entitled,⁷¹ or the marketability of the goods,^{71.5} or to sustain a finding that an allowance which the consignee had made to a buyer was an honest correction for an erroneous shipment,^{71.10} or to sustain other findings.^{71.15}

55. Ill.—Carterville Coal Co. v. Co-vey-Durham Coal Co., 186 Ill.App. 163.
25 C.J. p 404 note 26.
56. Mo.—Benedict v. Inland Grain Co., 80 Mo.App. 449.
57. N.Y.—Blot v. Boiceau, 3 N.Y. 78, 51 Am.D. 345.
58. Cal.—Earl Fruit Co. v. Curtis, 48 P. 793, 116 C. 632, 636.
59. Ark.—Arts v. Jones, 118 S.W.2d 574, 196 Ark. 1177.
Idaho.—Shake v. Payette Valley Produce Exchange, 245 P. 683, 42 Idaho 403.
Miss.—Gridley, Maxon & Co. v. Turner, 176 So. 733, 179 Miss. 890, suggestion of error overruled 177 So. 362, 179 Miss. 890.
Mo.—Yarbrough v. W. A. Gage & Co., 70 S.W.2d 1055, 334 Mo. 1145.
Tex.—W. L. Moody Cotton Co. v. Curtis, Civ.App., 275 S.W. 216—Gohlman, Lester & Co. v. Allen, Civ.App., 254 S.W. 1007.
Utah.—Mumford v. Hartford Accident & Indemnity Co., 228 P. 206, 64 Utah 24.
Va.—Mann v. W. C. Crenshaw & Co., 163 S.E. 375, 158 Va. 193.
25 C.J. p 404 note 31.
60. Ark.—Joy Rice Milling Co. v. Brown, 268 S.W. 1, 167 Ark. 205—J. T. Fargason Co. v. Bank of Lepanto, 244 S.W. 456, 155 Ark. 361.
Ga.—Reo-Savannah Motor Co. v. Davis, 146 S.E. 477, 167 Ga. 654.
25 C.J. p 405 note 32.
61. Miss.—D. S. Pate Lumber Co. v. Weathers, 146 So. 433, 167 Miss. 238.
62. Mo.—F. G. Barton Cotton Co. v.

- Vardell, 275 S.W. 62, 217 Mo.App. 691.
25 C.J. p 405 note 33.
63. Ariz.—Peppers Fruit Co. v. Curry, 226 P. 1089, 26 Ariz. 506.
Cal.—Cooper v. American Fruit Growers, Inc., of California, 30 P. 2d 558, 137 C.A. 494.
Mo.—Yarbrough v. W. A. Gage & Co., 70 S.W.2d 1055, 334 Mo. 1145.
N.Y.—Allied Silk Manufacturers v. Erstein, 186 N.Y.S. 295, 195 App. Div. 366.
Wis.—Jacobi v. Rubicon Malting & Grain Co., 182 N.W. 344, 174 Wis. 344.
64. Cal.—Bones v. Fusco, 69 P.2d 911, 21 C.A.2d 476—Rhee v. L. K. Small Co., 256 P. 839, 83 C.A. 339.
S.D.—Walker v. McCaull, 83 N.W. 578, 13 S.D. 512.
Tenn.—Sledge & Norfleet v. Bondurant, 5 Tenn.App. 319.
65. Ill.—Jonas v. Garrison's Estate, 76 N.E.2d 194, 333 Ill.App. 384.
Mo.—Murray v. Gordon-Watts Grain Co., 260 S.W. 513, 216 Mo.App. 607.
Tex.—W. L. Moody Cotton Co. v. Curtis, Civ.App., 275 S.W. 216.
25 C.J. p 404 note 31 [b].
Evidence held sufficient to prove diligence
N.Y.—Arnold Cheney & Co. v. Gillette & Livesey, 199 N.Y.S. 713.
66. Tex.—W. L. Moody Cotton Co. v. Curtis, Civ.App., 275 S.W. 216.
67. Ark.—Stuttgart Rice Mill Co. v. Lockridge, 47 S.W.2d 596, 185 Ark. 340.
68. U.S.—McNeil v. Mayhew, D.C. N.Y., 10 F.2d 393, affirmed, C.C.A., Mayhew v. McNeil, 10 F.2d 396.

- Cal.—Rasmussen v. Pacific Fruit Exchange, 295 P. 538, 111 C.A. 346.
69. Ark.—Stuttgart Rice Mill Co. v. Lockridge, 47 S.W.2d 596, 185 Ark. 340.
70. La.—Husmann v. Westfeldt Bros., 120 So. 623, 167 La. 995.
Minn.—Holden v. Maxfield, 101 N.W. 955, 94 Minn. 27.
Wash.—Moderie v. Schmidt, 108 P. 2d 331, 6 Wash.2d 592.
71. Cal.—Asamen v. Thompson, 131 P.2d 841, 55 C.A.2d 661.
Ky.—Roberts v. Bryant Bros., 295 S. W. 410, 220 Ky. 409.
Amount which defendant agreed to net plaintiff
Tex.—Western Wood Products Co. v. Box, Civ.App., 248 S.W.2d 974.
71.5 Cal.—Asamen v. Thompson, 131 P.2d 841, 55 C.A.2d 661.
71.10 U.S.—Irvani Mottaghi v. Barkley Importing Co., C.A.N.Y., 244 F. 2d 238, certiorari denied 77 S.Ct. 1402, 354 U.S. 939, 1 L.Ed.2d 1538.
71.15 Ark.—Turnage v. Matkin, 299 S.W.2d 831, 227 Ark. 528.
Cal.—Wooley v. Schilder, 327 P.2d 198, 161 C.A.2d 683—Alonso v. Badger, 138 P.2d 24, 58 C.A.2d 752.
Ga.—Light v. Smith, 71 S.E.2d 844, 86 Ga.App. 591.
N.Y.—Borneo Sumatra Trading Co. v. Security Door & Panel Corp., 183 N.Y.S.2d 137.
Utah.—Seamons v. Andersen, 253 P. 2d 209, 122 Utah 497.
Conversion in connection with sale of consigned items
In seller's action against corporate buyer and its sole stockholder, evidence would have warranted find-

Other evidence has been held insufficient to demand a verdict for the consignee,^{71.20} to prove a verbal contract,⁷² to show an excessive charge of commissions,⁷³ to show that defendant acquired the goods as factor,⁷⁴ to establish that the factor accounted for a smaller price than he actually received,⁷⁵ to show that goods which the factor offered to return were furnished by the principal,⁷⁶ to show that the factor was entitled to a certain credit,⁷⁷ to establish failure of the factor to market the goods as speedily as possible,⁷⁸ to show that the owner had given orders to sell,⁷⁹ to show that the factor delegated his authority,⁸⁰ to overcome an admission by the factor of delivery of the goods to him,⁸¹ to show a waiver of legal or contract rights,⁸² to sustain a finding as to market value,^{82.5} or a finding that defendant was a commission merchant,^{82.10} or to support other findings.^{82.15}

L. Trial and Determination

The rules which govern in other civil actions apply in an action against a factor with regard to the deter-

mination of questions of law and fact and to the instructions to the jury.

In accordance with the general rule in civil actions, questions of law are for the court,⁸³ and questions of fact are for the determination of the jury.⁸⁴ Thus, it is ordinarily a question for the jury whether or not the factor followed his instructions,⁸⁵ and, unless what constitutes care or diligence is under the particular circumstances a question of law,⁸⁶ the jury must determine whether the factor exercised reasonable care, skill, and diligence in the matter,⁸⁷ as in caring for the goods,⁸⁸ or in effecting a sale,⁸⁹ whether he committed a breach of contract in neglecting to insure the goods consigned to him,⁹⁰ or whether he had waived his lien on the goods for advances.⁹¹

Where the instructions to the factor are in writing, their construction is generally a question for the court,⁹² unless a particular instruction is capable of two interpretations, in which case the question should be submitted to the jury to determine

ings for seller on counts charging defendants with conversion in connection with sale of consigned items. *Mass.—Rock-Ola Mfg. Corp. v. Music & Television Corp.*, 159 N.E. 417.

Finding in favor of defendant
D.C.—Savage v. Grajek, Mun.App., 130 A.2d 589.

71.20 *Ga.—Light v. Smith*, 71 S.E.2d 844, 86 Ga.App. 591.

72 *La.—Haas v. S. Gumbel & Co.*, 99 So. 350, 155 La. 414.

73 *Mo.—Yarbrough v. W. A. Gage & Co.*, 70 S.W.2d 1055, 334 Mo. 1145.

74 *Tex.—Lewis v. E. H. Perry & Co.*, Civ.App., 42 S.W.2d 1038.

75 *Ark.—Stuttgart Rice Mill Co. v. Lockridge*, 47 S.W.2d 596, 185 Ark. 340.

76 *Ky.—Roberts v. Bryant Bros.*, 295 S.W. 410, 220 Ky. 409.

77 *Or.—Winchell v. Pacific Fruit & Produce Co.*, 14 P.2d 626, 140 Or. 552.

78 *Ark.—Stuttgart Rice Mill Co. v. Lockridge*, 47 S.W.2d 596, 185 Ark. 340.

79 *La.—New v. Crawford, Jenkins & Booth*, 99 So. 797, 155 La. 995.

80 *Cal.—Calistoga Vineyard Co. v. Luchetti*, 18 P.2d 729, 129 C.A. 374.

81 *La.—Hill, Harris & Co. v. Averett*, 129 So. 399, 14 La.App. 240.

82 *Va.—Mann v. W. C. Crenshaw & Co.*, 163 S.E. 375, 158 Va. 193.

Waiver as matter of law

Letter of shipper of cotton to consignee, who had made advancements

to shipper, after learning of sale on failure to forward additional margins, was held not such as to waive shipper's legal rights as matter of law.

S.C.—McCutcheon v. Maybank, 134 S.E. 217, 136 S.C. 79.

82.5 *Tex.—Western Wood Products Co. v. Box*, Civ.App., 248 S.W.2d 974.

82.10 *Tex.—Western Wood Products Co. v. Box*, supra.

82.15 *U.S.—Iravani Mottaghi v. Barkley Importing Co.*, C.A.N.Y., 244 F.2d 238, certiorari denied 77 S.Ct. 1402, 354 U.S. 939, 1 L.Ed.2d 1538.

83 *U.S.—Scanlan v. Hodges*, Minn., 52 F. 354, 3 C.C.A. 113.

Mass.—Porter v. Blood, 5 Pick. 54.

84 *U.S.—Armour & Co. v. Bassel Bros.*, C.C.A.Tex., 22 F.2d 728, certiorari denied 48 S.Ct. 420, 276 U.S. 635, 72 L.Ed. 743.

Ark.—Arts v. Jones, 118 S.W.2d 574, 196 Ark. 1177.

Idaho.—Shake v. Payette Valley Produce Exchange, 245 P. 683, 42 Idaho 403.

Ky.—Refiners Oil Corporation v. Bell, 92 S.W.2d 88, 263 Ky. 216.

N.Y.—Arnold Cheney & Co. v. Gillette & Livesey, 199 N.Y.S. 713.

Or.—Hollywood Orchards Co. v. Dennis, Kimball & Pope, 263 P. 66, 124 Or. 71.

Pa.—T. B. Pearman & Co. v. Damus Bros. Co., 98 Pa.Super. 234.

Va.—Mann v. W. C. Crenshaw & Co., 163 S.E. 375, 158 Va. 193. 25 C.J. p 405 note 36.

Existence of bona fide dispute

In action by seller against factor arising out of agreement under which factor assumed liability for buyer's financial inability to pay for textiles, whether bona fide disputes existed between seller and buyer as to quality of goods or claimed evasion of O.P.A. regulations justifying charge back of account by factor to seller was for the jury.

N.Y.—Seymour Mann, Inc. v. United Factors Corp., 89 N.Y.S.2d 477, 275 App.Div. 359, reargument denied 90 N.Y.S.2d 899, 275 App.Div. 937.

85 *Mo.—Fagin v. Conolly*, 25 Mo. 94, 69 Am.D. 450. 25 C.J. p 405 note 37.

86 *Md.—Ewalt v. Harding*, 16 Md. 160.

87 *U.S.—Eichel v. Sawyer*, C.C.Ky., 44 F. 845, error dismissed 12 S.Ct. 980, 145 U.S. 636, 36 L.Ed. 459.

N.Y.—Heinemann v. Heard, 50 N.Y. 27, 62 N.Y. 448.

88 *N.J.—Ives v. Freisinger*, 57 A. 401, 70 N.J.Law 257.

89 *Ohio.—Burnard v. Voss*, 8 Ohio Dec., Reprint, 221, 6 Cinc.L.Bul. 339.

Or.—Usborne v. Stephenson, 58 P. 1103, 36 Or. 328, 78 Am.S.R. 778, 48 L.R.A. 432.

90 *S.C.—Huguenin v. Legare*, 45 S.C.L. 204.

91 *Pa.—Buckley v. Handy*, 2 Miles 449.

92 *U.S.—Scanlan v. Hodges*, Minn., 52 F. 354, 3 C.C.A. 113.

N.C.—Symington v. McLin, 18 N.C. 291.

in what sense the instruction was understood by the factor.⁹³

The rules which govern in other civil actions are applied in an action against a factor with regard to the instructions to the jury.⁹⁴ Thus, an instruction which makes an incorrect assumption of fact,⁹⁵ or one which, although it purports to cover the whole case, omits an essential view of the case⁹⁶ or disregards facts in evidence,⁹⁷ is erroneous.

Where the evidence authorizes the inference that defendant made a contract with plaintiff and subsequently breached the contract, it is error to grant a nonsuit.⁹⁸ The direction of a verdict is proper where there is no conflict in the evidence and only one reasonable inference can be drawn therefrom.⁹⁹

A finding as to market value is immaterial where the judgment is not based on the value found.^{99.5} A commission merchant in a proceeding to enforce an award of the secretary of agriculture under the Perishable Agricultural Commodities Act cannot attack the findings of the secretary on the basis of evidence presented before him, particularly when the record of such evidence is not before the court,¹ but on an appeal from the award the appellant may challenge the findings for want of evidence with-

out first producing a certified copy of the evidence submitted to the secretary.²

§ 50. — Damages

- a. In general
- b. For sale at improper place
- c. For sale at improper time
- d. For sale at unauthorized price

a. In General

The principal may recover his actual damages sustained by reason of the factor's violation of instructions or other breach of duty. Interest may be recovered if the factor delays in remitting payment for the goods after the sale.

Where a factor has violated his instructions, or has been guilty of other acts which render him liable for damages to his principal, the latter is entitled to recover the actual damages, that is, such damages as will compensate him for the loss or injury he has sustained, as a natural and proximate result of the factor's acts;³ and the rule of damages is the same whether the cause of action is for a breach of contract or for a violation of duty.⁴ The principal cannot recover speculative damages;⁵ and if no loss or injury has been sustained, no damages can be recovered,⁶ or at most only nominal

93. N.Y.—*Evans v. Root*, 7 N.Y. 186, 57 Am.D. 512.

94. Fla.—*Tampa Union Terminal Co. v. Richards*, 146 So. 591, 108 Fla. 516.

Neb.—*Lyons v. Donahue-Randall & Co.*, 186 N.W. 354, 107 Neb. 509.

Va.—*Mann v. W. C. Crenshaw & Co.*, 163 S.E. 375, 158 Va. 193. 25 C.J. p 405 note 35.

Instructions held proper

Idaho.—*Shake v. Payette Valley Produce Exchange*, 245 P. 683, 42 Idaho 403.

Or.—*Hollywood Orchards Co. v. Dennis, Kimball & Pope*, 263 P. 66, 124 Or. 71.

Taking of consigned property

(1) In bail-trover action against consignee of trailer for purpose of sale on alleged ground that consignee had not acted to prevent a taking thereof, instruction, that if jury found that there had been a conversion, then they should find for plaintiff as to the property which had been consigned, regardless of agreement that consignee assumed no responsibility for loss of trailer by fire, accident, or otherwise, and that the agreement did not supersede an act of converting, was proper. Ga.—*Light v. Smith*, 71 S.E.2d 844, 86 Ga.App. 591.

(2) In such action, instruction to the effect that consignment contract relieved defendant of all negligence

not amounting to willfulness or wantonness was reversible error, the true rule being that the defendant was bound to use ordinary diligence to prevent the taking of the property; and instruction that consignor had burden of proving the conversion by a preponderance of the evidence was erroneous, since, after proof of loss of the bailed property, the burden was on consignee to show proper diligence on his part. Ga.—*Light v. Smith*, supra.

95. Fla.—*Tampa Union Terminal Co. v. Richards*, 146 So. 591, 108 Fla. 516.

Neb.—*Lyons v. Donahue-Randall & Co.*, 186 N.W. 354, 107 Neb. 509.

96. Va.—*Mann v. W. C. Crenshaw & Co.*, 163 S.E. 375, 158 Va. 193.

97. Neb.—*Lyons v. Donahue-Randall & Co.*, 186 N.W. 354, 107 Neb. 509.

98. Ga.—*W. W. Barron & Son v. Gentile Bros. Co.*, 137 S.E. 106, 36 Ga.App. 459.

Mistake as authorizing inference

Mistake in diverting wrong car, resulting in deterioration of peaches, authorized inference that defendant breached contract to sell peaches. Ga.—*W. W. Barron & Son v. Gentile Bros. Co.*, supra.

99. Ga.—*Thompson v. Neely & Wilcox*, 123 S.E. 171, 32 Ga.App. 131.

99.5 Tex.—*Western Wood Products*

Co. v. Box, Civ.App., 248 S.W.2d 974.

1. U.S.—*Barker-Miller Distributing Co. v. Berman*, D.C.N.Y., 8 F.Supp. 60.

2. U.S.—*Spano v. Western Fruit Growers*, C.C.A.Colo., 83 F.2d 150.

3. Ga.—*Gentile Bros. Co. v. W. W. Barron & Son*, 142 S.E. 908, 38 Ga. App. 156.

S.C.—*United Acceptance Corporation v. Kerr*, 171 S.E. 38, 170 S.C. 537. 25 C.J. p 398 notes 95, 96.

In action for alleged shortage on return of lumber sent to defendant by plaintiff for sale to third persons, measure of actual damages would be price defendant agreed to net plaintiff.

Tex.—*Western Wood Products Co. v. Box*, Civ.App., 248 S.W.2d 974.

Value of objects as stated in memorandum sheets held binding on parties.

N.Y.—*Saul v. De Koenigsberg*, 147 N.Y.S.2d 396.

4. N.Y.—*Carroll v. Sharp*, 122 N.Y.S. 694, 67 Misc. 254.

5. U.S.—*Pope v. Barrett*, C.C.Mass., 19 F.Cas.No.11,273, 1 Mason 117. 25 C.J. p 398 note 98.

6. Ga.—*Vinson v. W. O. Kinney & Co.*, 119 S.E. 217, 30 Ga.App. 731.

25 C.J. p 398 note 99.

damages.⁷

Where the principal waives the tort and sues in assumpsit for the proceeds of goods sold, he can recover only the proceeds of the sale,⁸ and damages for not remitting at a proper time cannot be recovered.⁹

In the absence of special circumstances, the measure of damages for a conversion is the fair market value of the consigned merchandise when sold.^{9.5}

On an accounting, the principal is entitled to receive the full price of the article delivered to the factor for sale less the commission, although the factor accepted other articles from the purchaser in partial payment;¹⁰ and the principal is entitled to the full price received less commissions, although the factor had persuaded the principal to sell the property for a smaller price.¹¹ The principal is under a duty to minimize his loss as far as possible.¹² Where the property depreciates in value through unauthorized use of it by the factor, he is liable for the value the property would have had in the absence of such use.¹³

Interest. Where the contract requires the factor to make payments as the goods are sold, interest is properly recoverable from the date of demand until the date of payment.¹⁴ In an action for the balance of the proceeds from a series of sales, the principal was held entitled to interest from the date of the last sale accounted for by the factor rather than from the date of the final statement made by him.¹⁵

b. For Sale at Improper Place

If the factor violates the contract as to the place of sale, he is liable for the difference between the market value at the place where the goods should have been sold and the price for which they were sold.

If the factor violates the contract as to the place of sale, he is liable for the actual loss to the principal, that is, the difference between the market value at the place where the goods should have been sold and the price for which they were sold;¹⁶ and in estimating this difference the highest value which the goods could have been sold for at the original market within a reasonable time after the conversion should be taken.¹⁷ Where, however, the goods net as much at the place where they are sold as they would have netted if sold at the proper place, the principal can recover no damages.¹⁸

Where a factor who has made advances on the goods is ordered to ship them to a place other than his residence for sale, but in the exercise of due diligence he is unable to ship to the place designated and ships to another place where the goods are sold, the measure of damages is, not the difference between the price obtainable at the place designated and the place of sale, but the difference between the price which might have been obtained at his residence and the price at the place of sale.¹⁹ Where, in disobedience of instructions, the factor sells his principal's goods, and, when subsequently directed to ship to another place, does not inform his principal of the sale, but buys other goods and ships them to the place designated, he is liable for the difference between the price for which the goods were sold at the place designated and the price obtained for the original consignment.²⁰

7. N.Y.—Allied Silk Manufacturers v. Erstein, 186 N.Y.S. 295, 195 App. Div. 366.

25 C.J. p 398 note 1.

8. Cal.—Lubert v. Chauviteau, 3 C. 458, 58 Am.D. 415.

25 C.J. p 398 note 2.

9. U.S.—Pope v. Barrett, C.C.Mass., 19 F.Cas.No.11,273, 1 Mason 117.

9.5 Mass.—Rock-Ola Mfg. Corp. v. Music & Television Corp., 159 N.E. 417.

10. N.Y.—Beskow v. Halow, 228 N.Y.S. 414, 223 App.Div. 434, affirmed 168 N.E. 409, 251 N.Y. 514.

11. N.Y.—Beskow v. Halow, supra.

12. U.S.—Barker-Miller Distributing Co. v. Berman, D.C.N.Y., 8 F.Supp. 60.

Immediate sale for highest offer

Shipper of melons performed its duty with respect to minimizing loss

by selling melons for highest offer and it was not necessary that melons be held for substantial length of time while shipper sought offers for them.

U.S.—Barker-Miller Distributing Co. v. Berman, supra.

13. Mich.—Ludke v. Chandler Motor Sales Co., 219 N.W. 659, 243 Mich. 134.

Evidence of value

Price paid for automobile and amount for which defendant advertised it for resale was held evidence of value of car used by defendant without authority.

Mich.—Ludke v. Chandler Motor Sales Co., supra.

Value at time of delivery

Lack of evidence of depreciation of automobile before resale authorized owner's recovery of value at time of delivery to sales company using it without authority.

Mich.—Ludke v. Chandler Motor Sales Co., supra.

14. Wash.—Hudnall v. Pennington & Co., 239 P. 2, 136 Wash. 155.

Interest where sale is at less than authorized price see *infra* subdivision d of this section.

15. Cal.—Spencer v. Lancashire, 290 P. 590, 107 C.A. 444.

16. Cal.—Bare v. Richman & Samuels of New York, 140 P.2d 895, 60 C.A.2d 413—Glantz v. Freedman, 280 P. 704, 100 C.A. 611.

25 C.J. p 399 note 11.

17. N.Y.—Scott v. Rogers, 31 N.Y. 676.

Wilson v. Mathews, 24 Barb. 295.

18. La.—Ryder v. Thayer, 3 La. Ann. 149.

19. N.C.—Bessent v. Harris, 63 N.C. 542.

25 C.J. p 399 note 14.

20. Ala.—Austill v. Crawford, 7 Ala. 335.

c. For Sale at Improper Time

If the factor improperly delays in selling the goods, he will be liable for a loss incurred through a decline in the market price; and if he sells prior to the time authorized, he will be liable for any advance in price which could have been obtained.

Where the factor fails to sell the goods within the time his duty requires him to sell them, he will be liable to his principal for a loss incurred through a decline in the market price,²¹ and also for injury to the goods by reason of their being left in storage;²² but he will not be liable for more than the difference between the price available if instructions had been followed and a price subsequently offered to the principal and refused.²³

Where the factor sells in violation of his duty not to sell, he will be liable for any advance in price which could have been obtained from an increase in the market price²⁴ at the time a sale was authorized,²⁵ or, if no time is designated, within a reasonable time after the breach of duty,²⁶ less any expenses and loss due to keeping the property over,²⁷ or due to its inferior quality.²⁸

If there has been no decrease in value between the time the factor fails to sell as instructed and the time the principal learns of the violation of his instructions so as to impose on him the duty to affirm or disapprove the factor's conduct, it has been held that no damages can be recovered by the principal.²⁹ A failure to sell does not make the factor liable for a subsequent loss by fire, if such failure is not the proximate cause of the loss.³⁰

d. For Sale at Unauthorized Price

As a general rule, a factor who sells for less than the price fixed by the principal is liable for the actual damages sustained by the principal.

Where the factor sells the property for a price which has not received the owner's approval, he is liable for the fair value of the property.³¹ There are decisions to the effect that, where the factor sells for less than the price fixed by his principal, he is regarded as a purchaser at such fixed price, and is responsible to the principal therefor,³² notwithstanding it may be above the market price.³³ However, the rule supported by the weight of authority limits the factor's liability to the actual damages sustained by the principal, that is, the difference between the price obtained and the market value of the goods, taking into consideration any increase in price within a reasonable time after the sale by the factor,³⁴ or up to the date of the trial,³⁵ or to the time when action is commenced,³⁶ not to exceed the limit fixed by the principal;³⁷ and if the market price ever since the sale has been less than the price obtained, no damages are recoverable.³⁸

Where goods having no market value are sold by a factor at a price below that fixed by his principal, he is liable to the principal for the price fixed.³⁹

Guaranteed price. Where the factor expressly guarantees a fixed price on the sale of goods, the measure of damages in case of a sale below such price is the difference between the price guaranteed

21. Ark.—Wilson-Ward Co. v. Fleeman, 272 S.W. 853, 169 Ark. 88. 25 C.J. p 399 note 17.

Refusal to accept offer as directed

If the factor refuses to accept an offer as directed by the principal, the damage for which he is liable is the difference between the principal's net profit if the offer had been accepted and the net profit derived from a later sale.

Cal.—Rhee v. L. K. Small Co., 256 P. 839, 83 C.A. 339.

Withholding goods to support market

Factor, failing to comply with instruction of farmer to sell at a certain time, at the best available price, cotton belonging to him in factor's possession, was rendered liable for difference between price then obtainable and amount actually received at a later date although market price could not then have been obtained, and cotton was withheld by factor to assist in supporting market.

Ark.—Wilson-Ward Co. v. Fleeman, 272 S.W. 853, 169 Ark. 88.

22. Ill.—Pulsifer v. Shepard, 36 Ill. 513.

23. Tex.—Carlton v. Adams, Civ. App., 54 S.W.2d 1073, error refused.

24. Ga.—Wood v. Jones, 73 S.E. 1099, 10 Ga.App. 735. 25 C.J. p 399 note 19.

25. U.S.—Fordyce v. Peper, C.C. Ark., 16 F. 516, 5 McCrary 221, reversed on other grounds 7 S.Ct. 287, 119 U.S. 469, 30 L.Ed. 435. Ga.—Gray v. Bass, 42 Ga. 270.

26. N.Y.—Scott v. Rogers, 31 N.Y. 676.

27. Ill.—Lanigan v. Henderson, 188 Ill.App. 569.

28. Cal.—Earl Fruit Co. v. Curtis, 48 P. 793, 116 C. 632. 25 C.J. p 399 note 23.

29. Ga.—Vinson v. W. O. Kinney & Co., 119 S.E. 217, 30 Ga.App. 731.

30. Ala.—Lehman v. Pritchett, 4 So. 601, 84 Ala. 512.

31. Mich.—Ludke v. Chandler Motor Sales Co., 219 N.W. 659, 243 Mich. 134.

32. Conn.—Union Hardware Co. v. Plume & A. Mfg. Co., 20 A. 455, 58 Conn. 219.

Mo.—Switzer v. Connett, 11 Mo. 88.

33. Mo.—Switzer v. Connett, supra.

34. Cal.—Pugh v. Porter Bros. Co., 50 P. 772, 118 C. 628. 25 C.J. p 399 note 28.

35. N.M.—Goesling v. Gross, Kelly & Co., 113 P. 608, 15 N.M. 721. N.Y.—Blot v. Boiceau, 3 N.Y. 78, 51 Am.D. 345.

36. La.—George v. McNeill, 7 La. 124, 26 Am.D. 498. 25 C.J. p 399 note 30.

37. N.M.—Goesling v. Gross, Kelly & Co., 113 P. 608, 15 N.M. 721.

38. N.Y.—Loeb v. Johnson-Salkeld Co., 152 N.Y.S. 1046.

39. N.Y.—Blot v. Boiceau, 3 N.Y. 78, 51 Am.D. 345. 25 C.J. p 399 note 33.

and the price at which the goods are sold and accounted for.⁴⁰

Interest. In an action by a principal for the unpaid portion of the market value of goods sold by a factor for less than the market value, in violation of instructions, the principal is entitled to interest on the unpaid portion of the market value.^{40.5}

§ 51. Actions by Factor against Principal

- a. In general
- b. Defenses
- c. Pleading; issues, proof, and variance
- d. Evidence
- e. Trial; judgment

a. In General

A factor may, in a proper case, maintain an action against the principal for the amount due him, but he cannot maintain an action for his advances without accounting for, or showing what has become of, the principal's goods or funds intrusted to his care. A principal who breaches his contract with his factor is liable for the damages sustained.

In addition to a suit to enforce his lien for commissions, advances, and charges, considered supra § 48, a factor may, in a proper case, especially where the goods are insufficient to satisfy his lien, maintain an action against the principal personally for the amount due him,⁴¹ and may file a bill against the principal for an accounting;⁴² but he cannot maintain an action for his advances without accounting for, or showing what has become of, the principal's goods or funds intrusted to his care.⁴³ Where goods have been consigned to be sold at a limited price, a factor may, after a seasonable time, if the price cannot be obtained, call for payment

of his advances or further security and sue for the amount due.⁴⁴

Damages. A principal who breaches his contract with his factor is liable to the factor for the damages sustained.⁴⁵ Where the principal fails to furnish the goods as agreed and the factor has made contracts in his own name to sell the goods, the measure of damages is the difference between the market value of the goods and the contract price at the time of the breach.⁴⁶ If the consignor prevails on his counterclaim for neglect of the factor to sell the goods, and the goods are not yet sold, the consignor should be charged with the value of the goods at the place where they are to be sold in the computation of damages.⁴⁷

In an action by commission agents under an oral agreement to indemnify them for losses resulting from the unsatisfactory condition of the goods which constitute the subject of the agreement, the measure of damages is the amount paid to or for defendant on account of his goods which were not in accordance with the sample, as the agreement required.^{47.5}

b. Defenses

In an action by a factor for his advances and disbursements, the principal may show, in bar or in reduction of the claim, want of diligence, or neglect, on the part of the factor, and may recoup or set off whatever damages he has sustained. A judgment in a prior suit in which the same issues were litigated may be asserted as *res judicata*.

In an action by a factor for his advances and disbursements, the principal may show, in bar or in reduction of the claim of the factor, want of diligence, or neglect, on the part of the factor.⁴⁸ In

40. Cal.—Pugh v. Porter Bros. Co., 50 P. 772, 118 C. 628.

40.5 Cal.—Bare v. Richman & Samuels of New York, 140 P.2d 895, 60 C.A.2d 413.

Interest generally see supra subdivision a of this section.

Requirement of proof of market value

In such action, mere fact that proof is required to determine the market value of produce on a designated date does not prevent allowance of interest thereon under statute providing for recovery of interest on damages certain or capable of being made certain by calculation.

Cal.—Bare v. Richman & Samuels of New York, 140 P.2d 895, 60 C.A.2d 413.

41. Mo.—Bailey-Ball-Pumphrey Co. v. German, 247 S.W. 483, 213 Mo. App. 11.

25 C.J. p 405 note 47.

42. N.Y.—Ludlow v. Simond, 2 Cai. Cas. 1, 2 Am.D. 291.

43. Ark.—Tunstall v. J. T. Fargason Co., 246 S.W. 856, 156 Ark. 513. Va.—Mertens v. Nottebohm, 4 Gratt. (45 Va.) 163.

44. Mass.—Upham v. Lefavour, 11 Metc. 174.

N.H.—Frothingham v. Everton, 12 N. H. 239.

45. Ind.—Western Union Telegraph Co. v. Mart, 17 N.E.2d 500, 106 Ind. App. 590.

Pa.—James E. Mitchell Co. v. Hartsell Mills Co., 120 A. 462, 276 Pa. 439.

Limitation of liability in separate instrument

Where buyer of cabbages refused to accept them because of misunderstanding resulting from mistake in telegram offering cabbages for sale, and telegraph company then em-

ployed broker to dispose of cabbages in order to minimize loss, company's liability to broker for breach of contract of employment was not measured by provisions on back of telegram limiting company's liability, since contract was independent of telegram.

Ind.—Western Union Telegraph Co. v. Mart, 17 N.E.2d 500, 106 Ind. App. 590.

46. Pa.—James E. Mitchell Co. v. Hartsell Mills Co., 120 A. 462, 276 Pa. 439.

47. Mo.—Bailey-Ball-Pumphrey Co. v. German, 247 S.W. 483, 213 Mo. App. 11.

47.5 Neb.—Benson v. Walker, 59 N. W.2d 739, 157 Neb. 436.

48. Mo.—Bailey-Ball-Pumphrey Co. v. German, 247 S.W. 483, 213 Mo. App. 11.

25 C.J. p 405 note 51.

an action for commissions on sales made by the principal in violation of an agreement that the factor should be sole agent of the principal's goods, a breach of a subsequent promise of the factor to be the principal's surety on a contract obtained by the principal for a sale of goods is no defense, since the factor had the right to recede from the promise and since the promise could have no effect on the contract between the principal and the factor.⁴⁹ After the factor has rendered his monthly statements for a long period of time, which statements have been admitted to be correct, it is too late to plead usury in defense of an action for a balance due the factor.⁵⁰

Where the principal has directed the factor to pay the transportation charges without limiting the amount and has agreed to reimburse him, he cannot defeat recovery in a suit by the factor on the grounds that the transportation charges were excessive.⁵¹

Recoupment or set-off. Where the factor sues for commissions, advances, etc., the principal may recoup or set off whatever damages he has sustained by reason of a breach of duty on the part of the factor,⁵² as by reason of his failure to sell according to instructions;⁵³ or he may recover such damages by an adjustment of his claim in a settlement of accounts without being driven to a cross action.⁵⁴ However, where in the particular case the relation between the parties is that of debtor and creditor, the principal cannot set up a counterclaim after a demand made for the proceeds, on the ground of conversion, in an action by the fac-

tor to recover his commissions.⁵⁵

Res judicata. In accordance with the general doctrine of *res judicata*, a judgment in a prior suit between the principal and factor may be set up in a subsequent action by the factor against the principal, in which the same fact or question is litigated.⁵⁶

c. Pleading; Issues, Proof, and Variance

The general rules of pleading apply to a factor's declaration or complaint and to the principal's plea or answer. The proof must be confined to the issues presented by the pleadings.

In accordance with the general rules of pleading, the declaration or complaint in an action by a factor against his principal must state facts sufficient to constitute a cause of action.⁵⁷ A complaint for commissions on a sale of goods should allege what amount, if any, was realized by defendant from the sale,⁵⁸ and should also allege a consideration for the factor's contract on which the suit is brought;⁵⁹ and an averment that defendant promised to pay plaintiff reasonable commissions should be followed by a statement of the reasonable value of such commissions.⁶⁰

Where, under the particular practice, a statement of claim is filed, it should be sufficiently specific to enable the principal to plead understandingly and with full knowledge of every claim that can be made or question which can be raised under it at the trial; and in an action to recover a balance of advances made by the factor, the statement of the claim should set out the account between the

Negligent delay

Mo.—Boatmen's Bank v. Clarahan, 286 S.W. 146, 220 Mo.App. 332.

Breach of contract

Contract whereby defendant, sued for the conversion of a stock of rugs, consigned such rugs to plaintiff firm to be sold by them for his account, at cost plus ten per cent, moneys received from the sale of the rugs to be remitted either in cash or by certified cashier's check to defendant every thirty days, etc., was held entire and not divisible, so that plaintiffs having failed to prove performance of the contract by them, but on the contrary breaches by them having been shown, they should not be allowed to recover on the contract.

Mo.—Asadorian v. Sayman, 233 S.W. 467.

49. N.Y.—Hadden v. Dimick, 31 How.Pr. 196, reversed on other grounds 13 Abb.Pr. 135.

50. U.S.—Woodward v. Jewell, C.C. Ga., 25 F. 689, modified on other

grounds 11 S.Ct. 784, 140 U.S. 247, 35 L.Ed. 478.

51. N.Y.—Jacobsen v. Bond, 211 N.Y.S. 819, 125 Misc. 898.

52. Ga.—Wood v. Jones, 73 S.E. 1099, 10 Ga.App. 735. 25 C.J. p 406 note 56.

53. Ga.—Frost v. Powell, 72 S.E. 719, 10 Ga.App. 95. 25 C.J. p 406 note 57.

54. U.S.—Kelly v. Smith, C.C.Conn., 14 F.Cas.No.7,675, 1 Blatchf. 290.

55. N.Y.—Parmenter v. American Box Mach. Co., 60 N.Y.S. 432, 44 App.Div. 47, appeal dismissed 57 N.E. 1119, 162 N.Y. 648.

56. Me.—White v. Savage, 47 A. 138, 94 Me. 138. 25 C.J. p 406 note 55.

57. N.Y.—Mandell v. Moses, 198 N.Y.S. 583, 204 App.Div. 655.

Cause of action based on agreement to indemnify held stated.

Neb.—Benson v. Walker, 59 N.W.2d 739, 157 Neb. 436.

Petition for commissions held sufficient

A petition for commissions on sales and leases of machines is sufficient which alleges the contract of agency and its performance by plaintiff, the making and forwarding of reports, etc., the amount of commissions due, and defendant's refusal to pay, although it does not allege the amounts for which the machines were sold or leased, and the time when the prices were payable and when collected, but notifies defendant to produce the reports on the trial which would show these facts specifically.

Tex.—Singer Mfg. Co. v. Wood, 1 Tex.A.Civ.Cas. § 1177.

58. N.Y.—Poland v. Hollander, 115 N.Y.S. 1042, 62 Misc. 523. 25 C.J. p 406 note 63.

59. N.Y.—Poland v. Hollander, supra.

60. U.S.—Rice v. Montgomery, C.C. Ind., 20 F.Cas.No.11,753, 4 Biss. 75.

parties showing the sales made by plaintiff and the prices received.⁶¹ Where a factor who has made advances sells the goods to reimburse himself, without special instructions, he may sue for the amount of deficiency arising on such sale without any averment of a certain balance due, of an express promise to pay it, and of a breach of such promise.⁶²

Plea or answer. In accordance with the general rules of pleading, the plea or answer which seeks to set up a defense to the action must state with certainty the facts relied on,⁶³ and where the factor sues to recover the balance of an account, principally for advances, a plea which sets up a violation of an agreement to sell the goods at a certain price whereby defendant was damaged to a greater amount than the sum sued for is insufficient if it does not state at what time the agreement was made.⁶⁴

Issues, proof, and variance. In accordance with general rules, the proof must be confined to the issues as presented by the pleadings.⁶⁵

d. Evidence

- (1) Presumptions and burden of proof
- (2) Admissibility
- (3) Weight and sufficiency

(1) Presumptions and Burden of Proof

In an action by a factor against his principal, the burden is on the factor to prove matters in issue which are essential to his cause of action, and the burden to prove matters of affirmative defense is on the principal. Where fraud or bad faith is not alleged, it will be presumed that a sale by the factor was fairly made and for the best price available.

In accordance with the usual rules of evidence, in an action by a factor against his principal the burden is on plaintiff to prove matters in issue which are essential to his cause of action,⁶⁶ and on defendant to prove matters of defense affirmed by him,⁶⁷ unless the subject matter of the defense is peculiarly within the knowledge of plaintiff.⁶⁸ Thus, in action for a balance due, where defendant denies the indebtedness and further alleges that by plaintiff's negligence and want of diligence the property was sold for less than its market value, the burden of proving the price for which the property was sold is on plaintiff as being peculiarly within his knowledge, but the burden of proving plaintiff's negligence and want of diligence is on defendant, unless the circumstances in the case raise a presumption of negligence.⁶⁹

Where no fraud or bad faith is alleged, it will be presumed that the sale by the factor was fairly made and for the best price available at the time.⁷⁰

(2) Admissibility

Evidence is held admissible or inadmissible in accordance with the general rules governing in civil actions.

In an action by a factor against his principal, evidence is held admissible or inadmissible in accordance with the general rules governing the competency, relevancy, and materiality of evidence in civil actions.⁷¹ In an action to recover advances, where the principal counterclaims, setting up a loss which he claims was occasioned by the factor's negligence in failing to sell, evidence of the market price in other localities is inadmissible, where there is no

61. U.S.—Park v. Standard Spinning Co., C.C.Pa., 135 F. 860.

62. N.Y.—Blackmar v. Thomas, 28 N.Y. 67.

63. Ga.—Grimes v. Reese, 30 Ga. 330.

64. Ga.—Grimes v. Reese, supra.

65. N.Y.—Wood v. Belden, 54 N.Y. 658.

Vt.—Mixer v. Williams, 17 Vt. 457.

Proof of conversion under general denial

Where in an action for the balance of an account for goods sold, and for commission on a sale by plaintiff of a carriage for defendant, at his request, the answer is a general denial, evidence that the carriage was sold by plaintiff without authority and against defendant's orders is inadmissible, since the evidence amounts to an offer to prove a conversion of the carriage by plaintiff, not raised by the pleadings. N.Y.—Wood v. Belden, 54 N.Y. 658.

Under plea of payment

In an action by a factor for damages for breach of a contract to fill orders for goods solicited by him, it was held that under a plea of payment, proof and a finding as to the amounts paid plaintiff by defendant on commissions due him under the contract were warranted.

Cal.—McGuire v. Aluminum Products Co. of the Pacific Coast, 207 P. 925, 57 C.A. 636.

66. Mo.—Pallen v. Bogy, 78 Mo.App. 88.

N.Y.—Mandell v. Moses, 198 N.Y.S. 583, 204 App.Div. 655.

Tex.—Geo. Finberg Co. v. Jamison, Civ.App., 260 S.W. 884, 25 C.J. p 407 note 75.

Proof of items making up account

Plaintiff, in an action on items making up an account rather than on account stated, has burden of proving such items.

N.Y.—John S. Metcalf Co. v. Mayer, 211 N.Y.S. 53, 213 App.Div. 607.

67. La.—Putnam & Norman v. Levee, App., 191 So. 135.

25 C.J. p 407 note 76.

68. N.C.—Govan v. Cushing, 16 S.E. 619, 111 N.C. 458.

69. N.C.—Govan v. Cushing, supra.

70. Ariz.—Walker v. National Mohair Growers' Ass'n, 254 P. 1065, 31 Ariz. 515.

71. Mo.—J. T. Fargason Co. v. Pitts, 281 S.W. 148, 220 Mo.App. 195—Bailey-Ball-Pumphrey Co. v. German, 247 S.W. 483, 213 Mo.App. 11, 25 C.J. p 407 note 82.

Condition of goods at time of shipment

The case turning on the condition and value of eggs at time of their arrival and sale at destination, evidence of their condition when shipped, in connection with evidence of the usual effect of shipment, was pertinent as bearing on their probable condition when they reached destination.

Tex.—Hosmer v. New York Buyers' Ass'n, Civ.App., 258 S.W. 853.

claim that the factor's failure to sell was the result of fraud, for if the factor had transferred the goods to another market, he would have been liable for any depreciation in the price.⁷²

Custom or usage. Evidence may be given to show the customs of merchants so far as they concern the transactions between the parties and the questions at issue between them,⁷³ provided the custom is so general, long established, and notorious that the party against whom it is to operate must be presumed to have knowledge of it,⁷⁴ and is not in contravention of a settled rule of law.⁷⁵

Receipts. Freight bills and receipts are secondary evidence and not admissible without preliminary testimony identifying them or showing their admissibility.⁷⁶ Where the defense to an action for advances is that the transaction was a sale and not a consignment, receipts signed by the bookkeeper of defendant, who was his "business man" and to whom the advances were paid, the receipts being to the effect that money had been received from plaintiff for advances from consignments, are admissible without proof of express authority of the bookkeeper to sign receipts in this form, and it is not competent for defendant to prove by the book-

keeper that he executed the receipts in this form without authority.⁷⁷

(3) Weight and Sufficiency

The usual rules as to the weight and sufficiency of the evidence in civil actions are applied in an action by a factor against his principal.

The usual rules as to the weight and sufficiency of the evidence in civil actions are applied to the evidence in an action by a factor against his principal,⁷⁸ including evidence introduced on a counterclaim by the principal in an action by the factor.⁷⁹

e. Trial; Judgment

The rules which govern in other civil actions apply, in an action by a factor against his principal, with regard to the determination of questions of law and fact and to the instructions to the jury. The judgment cannot be for a greater amount than that to which plaintiff shows he is entitled.

In accordance with the general rule in civil actions, questions of law are for the court⁸⁰ and questions of fact are for the jury's determination.⁸¹ Where the evidence is undisputed and only one reasonable inference can be drawn therefrom, it is proper for the court to give a peremptory instruction;⁸² but in particular circumstances the direc-

72. Mo.—Bailey-Ball-Pumphrey Co. v. German, 247 S.W. 483, 213 Mo. App. 11.

Wyo.—Justice v. Brock, 131 P. 38, 133 P. 1070, 21 Wyo. 281.

73. Ala.—Brown v. Harrison, 17 Ala. 774—Holmes v. Gayle, 1 Ala. 517.

La.—Thompson v. Packwood, 2 La. Ann. 624.

74. Minn.—Earl Fruit Co. v. Thurston Cold-Storage & Warehouse Co., 62 N.W. 439, 60 Minn. 351.

75. Ohio.—Indianapolis Rolling Mill Co. v. Addy, 5 Ohio Dec., Reprint, 588, 6 Am.L.Rec. 764, 3 Cinc.L.Bul. 293.

76. Okl.—Moody v. Thompson, 166 P. 96, 65 Okl. 262.

77. Pa.—Myers v. Brice, 2 Pennyp. 382.

78. Ark.—Dillard & Coffin Co. v. Chapman, 65 S.W.2d 900, 188 Ark. 472—W. W. Elzea, Inc., v. M. A. Wood Co., 49 S.W.2d 597, 185 Ark. 1190—Marks v. F. G. Barton Cotton Co., 280 S.W. 674, 170 Ark. 637—Brown v. Southern Grocery Co., 271 S.W. 342, 168 Ark. 547, 40 A.L.R. 383—Tunstall v. J. T. Fargason Co., 246 S.W. 856, 156 Ark. 513.

Cal.—Schwaegler Co. v. Marchesotti, 199 P.2d 331, 88 C.A.2d 738—Belmont v. Milton, 110 P.2d 525, 43 C.A.2d 120—McGuire v. Aluminum Products Co. of the Pacific Coast, 207 P. 925, 57 C.A. 636.

Ind.—Western Union Telegraph Co. v. Mart, 17 N.E.2d 500, 106 Ind. App. 590.

La.—Putnam & Norman v. Barbre, 122 So. 852, 168 La. 567.

Putnam & Norman v. Levee, App., 191 So. 135.

Minn.—Coyne v. Bearman Fruit Co., 224 N.W. 146, 176 Minn. 480.

Mont.—S. W. Bridges & Co. v. Bank of Fergus County, 251 P. 1057, 77 Mont. 524.

N.Y.—John S. Metcalf Co. v. Mayer, 211 N.Y.S. 53, 213 App.Div. 607.

N.D.—Acme Commission Co. v. Mandan Creamery & Produce Co., 266 N.W. 112, 66 N.D. 409.

25 C.J. p 407 note 91.

Evidence held to sustain finding for plaintiff

(1) Generally.

U.S.—Clarke Hybrid Corn Co. v. Stratton Grain Co., C.A.Iowa, 214 F.2d 7.

(2) In action by commission agents for indemnity under oral agreement for losses resulting from unsatisfactory condition of hay which was subject of the agreement, evidence supported verdict for plaintiffs.

Neb.—Benson v. Walker, 59 N.W.2d 739, 157 Neb. 436.

Mortgagee held principal under evidence

Mont.—Bowles Livestock Commission Co. v. Midland Nat. Bank of Billings, 23 P.2d 967, 94 Mont. 467.

79. S.C.—United Acceptance Corporation v. Kerr, 171 S.E. 38, 170 S. C. 537.

25 C.J. p 405 note 34.

80. S.C.—United Acceptance Corporation v. Kerr, 171 S.E. 38, 170 S. C. 537.

25 C.J. p 408 note 94.

81. Ind.—Western Union Telegraph Co. v. Mart, 17 N.E.2d 500, 106 Ind. App. 590.

Iowa.—Blanchard v. Elmer Wood Co., 214 N.W. 583, 204 Iowa 255.

25 C.J. p 408 note 94.

Reasonableness of time of sale

Iowa.—Alley, Greene & Pipe Co. v. Thornton Creamery Co., 207 N.W. 767, 201 Iowa 621.

Negligence

Minn.—Coyne v. Bearman Fruit Co., 224 N.W. 146, 176 Minn. 480.

Evidence sufficient to go to jury

Ala.—Frick Co. v. Ashworth, 28 So. 2d 184, 248 Ala. 433.

Iowa.—Blanchard v. Elmer Wood Co., 214 N.W. 583, 204 Iowa 255.

82. Miss.—Stewart-Gwynne Co. v. Sigman, 101 So. 789, 136 Miss. 811.

Refusal of peremptory instruction held erroneous

Where a cotton factor had advanced money on cotton shipped to him for sale, and after sale had given shipper proper credit for proceeds and sued for a balance due on advances, and in such suit the evidence was undisputed that there was very

tion of a verdict has been held improper.^{82.5}

The rules which govern in other civil actions are applied with regard to the instructions to the jury.⁸³ Thus, an instruction must not be misleading,⁸⁴ it must not ignore material facts in evidence,⁸⁵ it must be applicable to the evidence,⁸⁶ and it must sufficiently submit the parties' contentions to the jury.^{86.5} An instruction is erroneous which authorizes the jury in a suit for advances over and above the realization of consignments to find for plaintiff on a certain hypothesis without regard to whether plaintiff exercised due care and diligence.⁸⁷

Where the parties disagree as to the terms of a special contract for the sale of goods on commission, the fact that the court does not find the contract exactly as claimed by either party but adopts the testimony of each in part does not amount to a finding that there was no meeting of the minds on any definite contract.⁸⁸

A judgment for plaintiff cannot be given for a greater amount than that to which he shows he is entitled.⁸⁹

Damages are discussed supra subdivision a of this section.

IV. RIGHTS, DUTIES, AND LIABILITIES OF FACTOR AND PRINCIPAL AS TO THIRD PERSONS

§ 52. Rights of Factor against Third Persons

The rights of a factor as against third persons are considered with respect to contracts relating to goods infra § 53, and with respect to torts relating to goods infra § 54.

The duties and liabilities of third persons to agents generally are considered in the title Agency §§ 225-230, and the rights of agents to maintain actions against third persons, in § 285 of that title.

Examine Pocket Parts for later cases.

§ 53. — On Contracts Relating to Goods

In general, a factor may maintain an action in his

own name against a third person on a contract made by him relating to the goods.

As a general rule, since a factor has, from the nature of his employment, a special property in the goods consigned to him by his principal, he may maintain an action in his own name against a third person either for the breach or the enforcement of a contract made by him relating to the goods,⁹⁰ such as a contract of storage,⁹¹ or, especially where there is an express promise to pay him,⁹² for the recovery of the purchase price of goods sold by him.⁹³ He may maintain such action whether the name of the principal is disclosed or not,⁹⁴ and even though he has accounted to his principal in full for the purchase price,⁹⁵ as in such a case he

little demand for cotton such as that in question, that every effort was made to sell it at a fair price, that sales were made at every opportunity, and account sales regularly submitted to shipper, who made no objection, and there was no evidence as to the grade or staple of the cotton, or that it could have been sold at a higher price, it was error to refuse a peremptory instruction requested by plaintiff.

Miss.—Dillard & Coffin Co. v. Jennings, 96 So. 307, 132 Miss. 370.

82.5 Miss.—Waldrop & Thomas v. O. B. Crittenden & Co., 65 So. 644, 107 Miss. 595.

83. Ind.—Western Union Telegraph Co. v. Mart, 17 N.E.2d 500, 106 Ind. App. 590.

Mo.—Bailey-Ball-Pumphrey Co. v. Branham, App., 236 S.W. 379.
Okl.—Moody v. Thompson, 166 P. 96, 65 Okl. 262.

84. Wis.—Mason v. Bradley, 42 N. W. 229, 74 Wis. 189.
25 C.J. p 408 note 95.

85. Iowa.—Alley, Greene & Pipe Co.

v. Thornton Creamery Co., 207 N. W. 767, 201 Iowa 621.

86. Okl.—Moody v. Thompson, 166 P. 96, 65 Okl. 262.

86.5 Neb.—Benson v. Walker, 59 N. W.2d 739, 157 Neb. 436.

87. Md.—Adams v. Capron, 21 Md. 186, 83 Am.D. 566.

88. Wash.—Sherwood Bros. v. Seattle Fruit & Produce Auction Co., 161 P. 371, 93 Wash. 544.

89. N.Y.—Berkowitz v. Mitenthal, 62 N.Y.S. 484, 30 Misc. 772.
25 C.J. p 408 note 1.

90. Iowa.—Smith v. Bloom, 141 N. W. 32, 159 Iowa 592.
25 C.J. p 408 note 3.

Right of factor to sue carrier for loss of, or injury to, goods see Carriers § 249 k.

Del credere factor

A factor's guaranty under a del credere commission gives him the right, but not the exclusive right, to sue for and recover the proceeds of the sales in his own name.

N.Y.—Sherwood v. Stone, 14 N.Y. 267.

91. La.—Allen v. Steers, 2 So. 199, 39 La. Ann. 586.

92. Mass.—Van Staphorst v. Pearce, 4 Mass. 258.

93. Iowa.—Smith v. Bloom, 141 N. W. 32, 159 Iowa 592.
25 C.J. p 408 note 4.

Agent taking factor's place

Where goods which have been rejected by a consignee are sold by a third person to accommodate the consignor, such third party, being entitled to a commission merchant's commission, is at least an agent of the consignor with sufficient interest in the proceeds of the sale to entitle him to sue for the proceeds in his own name, particularly where the principal does not object.

R.I.—Huot v. Osler, 118 A. 871, 44 R.I. 471.

94. Mass.—Ilsley v. Merriam, 7 Cush. 242, 54 Am.D. 721.

Wis.—Beardsley v. Schmidt, 98 N. W. 235, 120 Wis. 405, 102 Am.S.R. 991.

95. Iowa.—Smith v. Bloom, 141 N. W. 32, 159 Iowa 592.

may maintain the suit for his own use;⁹⁶ but he cannot sue on a contract which the principal and the purchaser have rescinded.⁹⁷

Since a factor who sells goods in his own name is regarded as trustee of an express trust, see § 1 *e supra*, he is so regarded within the meaning of statutory provisions that a trustee of an express trust may sue in his own name on the contract without joining with him a person for whose benefit the action is prosecuted.⁹⁸ Where a factor has no lien on, or special interest in, the goods sold, and the purchaser has accounted to the principal therefor, the factor cannot maintain an action against the purchaser for the proceeds of the goods.⁹⁹

Substitution of goods. Where a factor makes a contract of sale, for the benefit of his principal, of goods to arrive within a certain period, he may, as against one who discounts drafts drawn on the goods consigned and to whom the bills of lading are delivered, substitute other goods of the same character in fulfillment of the contract.¹

Lien for purchase money. Under a statute to that effect, a factor, as the seller of goods, has a lien thereon against the purchaser for the purchase money.²

Defenses. A purchaser from a factor who sells in his own name cannot set off a claim against the principal which is not yet payable;³ nor is it a defense to an action by the factor for the price of goods sold that the sale was made by the factor's agent without authority from the principal, as such objection can be raised only by the principal.⁴

§ 54. — For Torts Relating to Goods

A factor may maintain an action in his own name for torts relating to goods in his possession; but under

some circumstances his recovery may be limited to the amount of his lien or special property in the goods.

As against a wrongdoer, a factor may maintain an action in his own name for torts relating to the goods in his possession, and may generally recover damages to the full amount of the injuries to the goods,⁵ as where the goods are wrongfully taken or withheld from his possession.⁶

However, where the action is against one claiming through the principal, the factor can recover only the value of his special property in the goods.⁷ Similarly, under a statute giving the owner of abandoned or captured property a right, after it has been sold by the government, to recover the proceeds of it, a factor is not such an owner as to entitle him to maintain an action of trover for the value of the property beyond the extent of his lien;⁸ and under a statute subjecting a city to the payment of damages, occasioned by the destruction of buildings to prevent the spreading of a conflagration, to owners or persons having an estate or interest in the buildings destroyed, a factor who has goods in such a building and has a lien on such goods may claim damages to the amount of his lien,⁹ but is not entitled to claim the value of the goods for the benefit of the owner.¹⁰

A factor who is compelled to pay an illegal exaction in connection with the shipment of goods in his possession may maintain in his own name a suit to recover the amount of the exaction, in a case where the owner might do so;¹¹ and the right to maintain such action does not terminate when he receives his compensation.¹²

§ 55. — Right of Principal to Control Action

A factor's right to maintain an action with respect to the goods is generally subject to the principal's right to

Wis.—Progress Blue Ribbon Farms v. Chicago Horse Sales Co., 140 N. W. 1132, 153 Wis. 249.

96. Wis.—Progress Blue Ribbon Farms v. Chicago Horse Sales Co., *supra*.

97. Mass.—Robinson v. Talbot, 121 Mass. 513.
25 C.J. p 409 note 10.

98. Miss.—Philly v. Toler, 95 So. 2d 783.

Wis.—Beardsley v. Schmidt, 98 N. W. 235, 120 Wis. 405, 102 Am.S.R. 991.
25 C.J. p 409 note 12.

99. Cal.—Pinson v. Schmalz, 30 P. 3, 94 C. 651.

1. N.Y.—Hong Kong & Shanghai

Banking Corp. v. Cooper, 21 N.E. 994, 114 N.Y. 388.

2. Ala.—Bever v. Bush, 50 Ala. 19.
25 C.J. p 387 note 41.

3. U.S.—McCobb v. Lindsay, D.C., 15 F.Cas.No.8,704, 2 Cranch C.C. 215.

4. Ala.—Harralson v. Stein, 50 Ala. 347.

5. N.Y.—Porter v. Schendel, 55 N.Y. S. 602, 25 Misc. 779.
25 C.J. p 409 note 20.

6. Cal.—Roberts v. Burr, 67 P. 46, 135 C. 156.
25 C.J. p 409 note 21.

7. N.Y.—Heard v. Brewer, 4 Daly 136.

25 C.J. p 409 note 22.

8. U.S.—U. S. v. Villalonga, Ct.Cl., 23 Wall. 35, 23 L.Ed. 64.

9. N.Y.—New York v. Stone, 20 Wend. 139, affirmed 25 Wend. 157.

10. N.Y.—New York v. Stone, *supra*.

11. U.S.—Hamilton v. Dillin, C.C. Tenn., 11 F.Cas.No.5,979, affirmed 21 Wall. 73, 22 L.Ed. 528.

12. U.S.—Adams v. Mills, Ill., 52 S. Ct. 589, 286 U.S. 397, 76 L.Ed. 1184.

Reason for rule

The duty of a factor to his principal to seek reparation for illegal exactions does not terminate on remission of the proceeds of the sale of the property, but persists with the assent of the principal until the claim is prosecuted to a successful conclusion.

U.S.—Adams v. Mills, *supra*.

control the litigation or sue in his own name. Authorities differ as to whether a foreign principal has the same right.

The right of a factor to sue for the price of goods or injuries to them is, as a general rule, subject to the right of the principal to control the litigation or to sue in his own name,¹³ except that the principal cannot intervene or sue in such a manner as to defeat the factor's lien.¹⁴ However, the factor may control such litigation where there is nothing to indicate that such control is contrary to the wishes of the principal.¹⁵

Foreign principal. It has been held that, where a factor makes a contract relating to the goods of a principal residing in a foreign country, the presumption arises that exclusive credit was given to the factor and that an action on the contract can be sustained by the factor alone,¹⁶ and not by the principal, except through and by the factor.¹⁷ On the other hand, it has been held that there is no such absolute presumption, and that the principal, whether foreign or domestic, may sue to recover the price of goods sold by his factor,¹⁸ unless it is made affirmatively to appear that exclusive credit was given to the factor by proof other than the mere fact that the principal resided in another state or country;¹⁹ and if the purchaser of a consignment becomes insolvent, the nonresident consignor is not affected by the discharge of the insolvent, but can sue to recover the price for which the goods were sold.²⁰

§ 56. Liability of Factor to Third Person

- a. In general
- b. Liability to purchaser or pledgee
- c. Liability on principal's promise or direction as to proceeds

a. In General

A factor is personally liable on contracts made by him except where he discloses his principal and makes the contract in such form as to bind the principal only. Authorities differ as to whether a factor for a foreign

principal is personally liable even though his principal is disclosed.

A factor is personally liable on a contract which he enters into in his own name without disclosing his principal,²¹ even though he is known to be a factor;²² and he cannot avoid such liability by settling with his principal, without the third person's consent.²³ However, where he discloses the fact of his agency and the name of the person for whom he is acting, he is not personally liable if he makes the contract in such form as to be binding on his principal, unless it appears that he also intended to bind himself personally.²⁴

Factor for foreign principal. It was held by some early decisions that by the usage of trade a factor acting for a merchant resident in a foreign country is personally liable for contracts made by him for his principal, notwithstanding he fully discloses, at the time, the character in which he acts.²⁵ This rule has been held not applicable to the case of a principal domiciled in another state of the Union, as the interests of trade do not require it.²⁶ However, it has also been held that where a written contract is made and expressed to be with the foreign principal and not with the factor, the latter is not liable, even though the contract is signed by him for, and on account of, the foreign principal.²⁷

Liability for money paid. Where a factor receives money for his principal, to which the latter is not entitled, he is liable to the party paying it, unless before it is claimed he actually pays it over to the principal, or does something equivalent thereto; a mere entry on the factor's books to the credit of the principal is no answer to the claim of the true owner if the factor has not parted with anything of value.²⁸

b. Liability to Purchaser or Pledgee

A factor selling in his own name and without disclosing his principal incurs all liabilities created by the contract of sale; and he is liable on a warranty made without authority or without disclosing his agency or

13. Tenn.—Jackson Ins. Co. v. Par-tee, 9 Heisk. 296.
25 C.J. p 410 note 30.

14. Wis.—Beardsley v. Schmidt, 98 N.W. 235, 120 Wis. 405, 102 Am.S. R. 991.
25 C.J. p 410 note 31.

15. Wis.—Beardsley v. Schmidt, supra.

16. Pa.—In re Merrick, 5 Watts & S. 9.

17. Pa.—In re Merrick, supra.
25 C.J. p 410 note 33.

18. Mass.—Barry v. Page, 10 Gray 398.
25 C.J. p 410 note 34.

19. Mass.—Barry v. Page, supra.

20. Mass.—Ilsley v. Merriam, 7 Cush. 242, 54 Am.D. 721.

21. N.D.—Turner v. Crumpton, 130 N.W. 937, 21 N.D. 294, Ann.Cas. 1913C 1015.
25 C.J. p 410 note 39.

Liability for freight charges see Carriers § 316 c, and Shipping § 165.

22. Ill.—Wheeler v. Reed, 36 Ill. 81.

23. Tenn.—Johnson v. McCampbell, 6 Baxt. 294.
25 C.J. p 410 note 41.

24. N.Y.—Kirkpatrick v. Stainer, 22 Wend. 244.

25. Me.—Rogers v. March, 33 Me. 106.

26. C.J. p 410 note 44.

26. Ind.—Vawter v. Baker, 23 Ind. 63.

25 C.J. p 410 note 45.

27. La.—Maury v. Ranger, 38 La. Ann. 485, 489, 58 Am.R. 197.

28. La.—Weld v. Shaw, 2 La. Ann. 559.

his principal. A factor is bound by an unauthorized pledge made by him.

Where a factor sells goods avowedly as factor for a disclosed principal and acts within his authority, he incurs no personal liability to the purchaser;²⁹ but where he sells goods in his own name, without disclosing his principal, he incurs all the liabilities, express or implied, created by the contract of sale, in the same manner as if he were the principal in interest;³⁰ and the same rule applies where the factor discloses the fact of his agency but does not disclose the name of his principal.³¹ Thus, if a factor sells in his own name a consignment of goods which were stolen, he is liable to the purchaser to whom he sells, if the goods are subsequently recovered by the true owner, for the return of the purchase money and the expenses incurred in defending his title.³²

On warranty. Where a factor warrants the goods, without any authority for such warranty from his principal,³³ or where he gives a warranty without designating that he is acting as agent or disclosing the name of his principal,³⁴ he may be held personally liable on the warranty, although he settles with his principal before notice of any breach of warranty, and although, before the property is delivered, the principal informs the purchaser that the property is sold on his account;³⁵ and the mere fact that the purchaser knew the name of the real owner of the goods does not preclude his right to hold the factor liable, where the purchaser intended to give credit to the factor.³⁶ The fact that the factor was dealing with the property of a third person does not affect the right of the purchaser to retain the goods and seek his remedy founded on a breach of warranty instead of returning the

goods.³⁷

An agent for the sale of goods who secures a subagent to make the actual sale will not be liable, either as undisclosed principal, where the buyer's contract is with the owner,³⁸ or as agent for an undisclosed principal,³⁹ on warranties, of which he was unaware, made by the subagent.

Liability to pledgee. An unauthorized pledge is valid as against the factor, since he is estopped from setting up his own tortious act,⁴⁰ and this rule has also been held to apply to a subsequent purchaser from the factor,⁴¹ although on the latter point there is some authority to the contrary.⁴²

c. Liability on Principal's Promise or Direction as to Proceeds

A factor is not liable to a third person for failing to turn over proceeds which he has been directed, or which he knows his principal has promised, to turn over to such third person, unless he has agreed to do so, or has notice of a transfer of control over the proceeds to the third person. These rules apply in determining whether a factor is liable for failure to accept a draft drawn against the consignment in favor of a third person.

In accordance with the doctrine of equitable assignments generally, see Assignments §§ 58-62, a factor is not liable to a third person for failing to turn over the proceeds to him, merely because he has been directed by his principal to do so,⁴³ or because he has notice of a promise by the principal to pay a debt due such third person out of the proceeds;⁴⁴ but he is so bound where he has made an agreement with his principal to do so,⁴⁵ or where he has notice that, by agreement, or by the circumstances of the transaction, there is an appropriation of the proceeds to such third person sufficient to transfer the control over them to him.⁴⁶

29. Ill.—Mida v. Geissmann, 17 Ill. App. 207.

30. U.S.—Sprague v. Rosenbaum, C. C. Ill., 38 F. 386.
25 C.J. p 411 note 48.

31. Ark.—Collier Commission Co. v. Redwine Bros., 277 S.W. 2, 169 Ark. 810.

25 C.J. p 411 note 49.

32. Mo.—Thompson v. Irwin, 42 Mo. App. 403.

Wis.—Edgerton v. Michels, 26 N.W. 748, 28 N.W. 408, 66 Wis. 124.

33. N.Y.—Argersinger v. MacNaughton, 21 N.E. 1022, 114 N.Y. 535, 11 Am.S.R. 687.

34. Mass.—Hastings v. Lovering, 2 Pick. 214, 13 Am.D. 420.

N.Y.—Argersinger v. MacNaughton, 21 N.E. 1022, 114 N.Y. 535, 11 Am. S.R. 687.

35. Mass.—Hastings v. Lovering, 2 Pick. 214, 13 Am.D. 420.

36. U.S.—Sprague v. Rosenbaum, C. C. Ill., 38 F. 386.

Mo.—Thompson v. Irwin, 42 Mo. App. 403.

37. N.Y.—Argersinger v. MacNaughton, 21 N.E. 1022, 114 N.Y. 535, 11 Am.S.R. 687.

38. Broker's connection unknown to purchaser

Where broker contracted with salmon packers to make advances and act as sales agent, reserving special property in salmon until advances were repaid out of proceeds, and then secured another agent to make actual sales, broker was not liable to buyers, as undisclosed principal, for unfitness of salmon for use, where buyers' contracts were with packers without knowledge of broker's connection with transaction.

Wash.—Western States Grocery Co. v. Gluck, 57 P.2d 1061, 186 Wash. 210.

39. Ark.—Collier Commission Co. v. Redwine Bros., 277 S.W. 2, 169 Ark. 810.

40. Ala.—Bott v. McCoy, 20 Ala. 578, 56 Am.D. 223.

41. Ala.—Bott v. McCoy, supra.

42. Mass.—Nowell v. Pratt, 5 Cush. 111.

25 C.J. p 352 note 5.

43. Ala.—Walton v. Tims, 7 Ala. 470.

25 C.J. p 412 note 87.

Rights and duties as to proceeds generally see supra § 34.

44. U.S.—Hess v. Factors Corp. of America, D.C.Pa., 90 F.Supp. 885.
Mo.—Pearce v. Roberts, 27 Mo. 179.

45. La.—Moore v. Clapp, 36 La. Ann. 690.

25 C.J. p 412 note 89.

46. S.C.—Peoples v. Werner, 29 S.E. 2, 51 S.C. 401.

25 C.J. p 413 note 90.

Thus, where a factor receives goods consigned to him with notice at the time he receives them that the owner has given to a third person, for money advanced, the right to the funds which may arise from the sale of the goods, the factor cannot divert the funds from the third person without liability to him;⁴⁷ and he cannot receive the funds as if to carry out the will of the consignor and respect the rights of the third person, and subsequently apply the proceeds of the sale to the payment of an account due the factor from the consignor.⁴⁸

Duty to accept draft or bill of exchange. These rules apply in determining whether a factor is liable for failure to accept a draft drawn against the consignment in favor of a third person.⁴⁹ Thus, where a bill of exchange is drawn against a consignment, an indorser cannot claim that the factor is bound to accept or apply the proceeds of the consignment to the payment of the bill, unless a letter accompanying the consignment expressly directs a specific application of the proceeds of the consignment to the payment of the bill;⁵⁰ and even though a specific appropriation has been made, an indorser who had no notice of it and who did not negotiate and indorse the bill on the faith that the proceeds would be applied to its payment has no other rights than those of an ordinary indorser.⁵¹ Similarly, a person who would be indirectly benefited by the factor's acceptance of a draft drawn against the consignment and payable to a bank cannot maintain an action against the factor for his failure to accept the draft.⁵²

Where the principal assigns a bill of lading to a third person who discounts a draft drawn on a particular consignment, and the factor has notice thereof, he cannot apply the proceeds of the consignment to other purposes, for the title to the consignment and the proceeds thereof belong to such

third person to the extent of the draft discounted on the security thereof;⁵³ but if a bank discounts a draft and obtains no property in the consignment by the assignment of the bill of lading or by the attachment thereof to the draft or by other means, it cannot enforce the promise of the factor made to the consignor to accept the draft and to pay it, but the factor may apply the proceeds of the consignment to the debt of the principal to him.⁵⁴

§ 57. — For Torts

- a. In general
- b. Conversion

a. In General

A factor, despite his good faith, is liable in tort to the true owner of property which the principal has wrongfully placed with the factor, provided there were defects in the principal's right of possession at that time.

Ordinarily, a factor must rely on his principal's honesty or financial responsibility to protect him in dealing with goods placed in his hands by the principal,⁵⁵ for no matter what innocence and good faith may characterize the factor's acts, he is liable in tort to the true owner or lienor against whom the principal's act of placing the chattels with the factor is a tort.⁵⁶ This liability, however, is limited to cases in which there are defects in the principal's right of possession when he turns the chattels over to the factor;⁵⁷ and if the principal has, in fact, a good title and right of possession when he delivers the chattels to the factor to sell, the factor's possession is lawful, and his authority to sell continues until he has notice of revocation.⁵⁸

Thus, where goods not belonging to his principal come into the hands of a factor, the true owner thereof, although previously unknown to the factor, may require an accounting of him;⁵⁹ and if the factor sells the goods, he is liable to the true owner

47. Cal.—National Bank of New Zealand v. Finn, 253 P. 757, 81 C.A. 317.

25 C.J. p 413 note 93.

48. Cal.—National Bank of New Zealand v. Finn, supra.

25 C.J. p 413 note 94.

49. S.D.—Finck v. Larson, 246 N.W. 99, 61 S.D. 20.

Duty to accept or meet draft generally see supra § 35.

50. N.Y.—Cowperthwaite v. Sheffield, 3 N.Y. 243.

25 C.J. p 413 note 91.

51. N.Y.—Cowperthwaite v. Sheffield, supra.

52. S.D.—Finck v. Larson, 246 N.W. 99, 61 S.D. 20.

35 C.J.S.—37

No agreement between parties

Where owner gave a creditor a check, and then gave a draft to the bank to cover the check, which draft was drawn against the proceeds of the factor's sale, the factor is not bound to honor the draft, and may retain part of the proceeds to pay prior debts of the owner, since there is no agreement between the owner and the creditor.

S.D.—Finck v. Larson, supra.

53. N.Y.—Batavia First Nat. Bank v. Ege, 16 N.E. 317, 109 N.Y. 120, 4 Am.S.R. 431.

25 C.J. p 413 note 95.

54. Mass.—St. Louis Exch. Bank v. Rice, 107 Mass. 37, 9 Am.R. 1.

55. U.S.—C. E. White & Co. v. Century Savings Bank, Ill., 229 F. 975, 144 C.C.A. 257.

25 C.J. p 411 note 62.

56. U.S.—C. E. White & Co. v. Century Savings Bank, supra.

N.C.—White v. Boyd, 32 S.E. 495, 124 N.C. 177.

57. U.S.—C. E. White & Co. v. Century Savings Bank, Ill., 229 F. 975, 144 C.C.A. 257.

58. U.S.—C. E. White & Co. v. Century Savings Bank, supra.

59. La.—Succession of Norton, 24 La. Ann. 218.

25 C.J. p 411 note 66.

in an action for money had and received,⁶⁰ and cannot apply such proceeds to a debt due him from the principal.⁶¹ However, where the factor is not benefited by the tort, and pays over the proceeds of the sale without notice of the rights of the real owner, he cannot be held liable in an action on contract.⁶²

b. Conversion

A factor is liable to the true owner for conversion where he receives from his principal property to which his principal has no right, and does not turn over the property or its proceeds to the true owner. Generally, the factor's good faith and ignorance of the true ownership are no defense; but it is a defense that he was misled by the owner, or that the owner consented to the sale.

Quoted in: U.S.—Sullivan Co. v. Wells, D.C.Neb., 39 F. Supp. 317, 319.

A factor is liable to the true owner for conver-

sion where he asserts dominion over the personal property of such owner against his will,⁶³ as where he receives from his principal property to which the latter has no right or title, and sells it and pays over the proceeds to the principal, or refuses to deliver the property or its proceeds to the true owner.⁶⁴

This rule is particularly applicable where the factor had notice of the true ownership before he sold the goods or before he paid over the proceeds,⁶⁵ or where the principal had stolen the goods or obtained them through fraud or forgery.⁶⁶ However, it is no defense to the factor that he acted in good faith throughout the entire transaction and without knowledge or notice that such third person was the real owner of the property,⁶⁷ or that he did not have the custody of the goods at the time the suit

60. Mass.—Tucker v. Utley, 47 N.E. 198, 168 Mass. 415.

N.Y.—Cobb v. Dows, 10 N.Y. 335.

61. Minn.—Dolliff v. Robbins, 86 N.W. 772, 83 Minn. 498, 85 Am.S.R. 466.

25 C.J. p 411 note 68.

62. Kan.—Greer v. Newland, 78 P. 835, 70 Kan. 315, 109 Am.S.R. 424, 70 L.R.A. 554.

25 C.J. p 411 note 69.

63. U.S.—Sig Ellingson & Co. v. De Vries, C.A.Minn., 199 F.2d 677, stating Iowa and Minnesota law, and certiorari denied 73 S.Ct. 505, 344 U.S. 934, 97 L.Ed. 719.

Tenn.—J. F. Fargason Co. v. Ball, 159 S.W. 221, 128 Tenn. 137, 50 L.R.A., N.S., 51.

25 C.J. p 411 note 71.

64. U.S.—John Clay & Co. Livestock Commission v. Clements, C.A. Tex., 214 F.2d 803—Sig Ellingson & Co. v. Butenbach, C.A.Minn., 199 F.2d 679, certiorari denied 73 S.Ct. 505, 344 U.S. 934, 97 L.Ed. 719.

U. S. v. Covington Independent Tobacco Warehouse Co., D.C.Ky., 152 F.Supp. 612.

Iowa.—Birmingham v. Rice Bros., 26 N.W.2d 39, 238 Iowa 410, 2 A.L.R.2d 1108, certiorari denied 68 S.Ct. 79, 332 U.S. 768, 92 L.Ed. 353, rehearing denied 68 S.Ct. 151, 332 U.S. 820, 92 L.Ed. 397—Corpus Juris cited in Mau v. Rice Bros., 249 N.W. 206, 208, 216 Iowa 864.

Md.—Allen C. Driver, Inc. v. Mills, 86 A.2d 724, 199 Md. 420.

N.D.—Kelly v. Lang, 62 N.W.2d 770. 25 C.J. p 412 note 72.

65. Tex.—Corpus Juris Secundum cited in Walker v. Caviness, Civ. App., 256 S.W.2d 880, 883—Post v. Houston Rice Milling Co., 80 S.W. 1025, 35 Tex.Civ.App. 642, 25 C.J. p 412 note 82.

Liability to owner of lien

(1) A factor with actual or constructive notice of a lien of a third person on his principal's goods is liable to the owner of the lien for the loss thereof occurring through a sale made by the factor and his subsequent action.

Ark.—Merchants' & Planters' Bank v. Meyer, 20 S.W. 406, 56 Ark. 499. 25 C.J. p 412 note 83.

(2) He will be so liable even though he has turned over the proceeds to his principal.

Tenn.—Hughes v. Ashton, 58 S.W. 396, 105 Tenn. 70.

(3) Under the law of Tennessee, where a cotton factor sold in Tennessee cotton covered by a chattel mortgage executed and recorded in Arkansas, in which the cotton was grown and the mortgagor resided, and, without authority from the mortgagor, applied part of the proceeds on his indebtedness to the factor, mortgagee was entitled to recover such amount from the factor, which was guilty of a conversion.

Ark.—Wilson-Ward Co. v. Farmers' Bank & Trust Co., 240 S.W. 1082, 153 Ark. 368.

(4) Generally, an agent, commission merchant or broker, selling mortgaged property for mortgagor, is liable to mortgagee for conversion thereof.

Mont.—Montana Meat Co. of Helena v. Missoula Livestock Auction Co., 230 P.2d 955, 125 Mont. 66.

66. U.S.—Moore v. Hill, C.C.Tenn., 38 F. 330.

Iowa.—Corpus Juris Secundum quoted in Birmingham v. Rice Bros., 26 N.W.2d 39, 41, 238 Iowa 410, 2 A.L.R.2d 1108, certiorari denied 68 S.Ct. 79, 332 U.S. 768, 92 L.Ed. 353,

rehearing denied 68 S.Ct. 151, 332 U.S. 820, 92 L.Ed. 397. 25 C.J. p 412 note 73.

67. U.S.—John Clay & Co. Livestock Commission v. Clements, C.A.Tex., 214 F.2d 803.

Corpus Juris Secundum cited in De Vries v. Sig Ellingson & Co., D.C.Minn., 100 F.Supp. 781, affirmed Sig Ellingson & Co. v. De Vries, 199 F.2d 677, certiorari denied 73 S.Ct. 505, 344 U.S. 934, 97 L.Ed. 719.

Iowa.—Birmingham v. Rice Bros., 26 N.W.2d 39, 238 Iowa 410, 2 A.L.R.2d 1108, certiorari denied 68 S.Ct. 79, 332 U.S. 768, 92 L.Ed. 353, rehearing denied 68 S.Ct. 151, 332 U.S. 820, 92 L.Ed. 397.

Md.—Allen C. Driver, Inc. v. Mills, 86 A.2d 724, 199 Md. 420.

Minn.—Corpus Juris cited in Hoven v. McCarthy Bros. Co., 204 N.W. 29, 30, 163 Minn. 339.

N.D.—Kelly v. Lang, 62 N.W.2d 770. Tex.—Corpus Juris Secundum cited in Walker v. Caviness, Civ.App., 256 S.W.2d 880, 883.

25 C.J. p 412 note 74.

Liability to owner of lien

(1) Commission merchants who acted as agents of mortgagor in selling mortgaged cattle were liable to mortgagee for conversion despite the fact that commission merchants acted in good faith and without actual notice of the chattel mortgage.

U.S.—U. S. v. Ferguson, D.C.Ark., 158 F.Supp. 814.

(2) Where tobacco raisers executed tobacco crop mortgage, which was recorded in Indiana county in which crop was raised, and delivered the tobacco to Kentucky warehouse company which sold the tobacco in Kentucky without any accounting being made for sale price to the United States, as mortgagee, warehouse company would be liable to the United

was instituted, but had previously, in good faith and without notice of the title of the true owner, sold them in due course of trade,⁶⁸ or that he acted for, or under authority from, another who himself had no authority,⁶⁹ or that a common carrier was guilty of negligence in permitting the property to be diverted from its true destination by means of a forged waybill and placed in the possession of the factor through a forged bill of lading.⁷⁰

Some authorities have held that, where the factor receives goods for sale in good faith, and pays over the proceeds to his principal, who purports to be the true owner, before he has notice of the true owner's rights, and has neither the goods nor the proceeds in his possession when demand is made by the true owner, he cannot be said to have knowingly asserted any claim to the property or its proceeds against the owner and consequently is not guilty of conversion.⁷¹

The factor is not liable for conversion where he

has been misled through the act of the owner,⁷² or of his agent,⁷³ or where he obtains possession, and sells the goods, with the consent of the owner.⁷⁴

Under Packers and Stockyards Act. Although it has been held that since a marketing agency, licensed under the Federal Packers and Stockyards Act, 7 U.S.C.A. §§ 181 et seq, is prevented from serving any principal, it would not be held personally liable, under strict common-law rules governing factors, for selling cattle to an innocent third party on behalf of a fraudulent buyer who had given the seller a worthless check for the purchase price, and for turning over the third party's money to the fraudulent buyer,^{74.5} the majority of opinions hold that such marketing agencies are not absolved from common-law liability for conversion,^{74.10} and that the Packers and Stockyards Act does not supersede state laws.^{74.15}

Conversion as against purchaser. Where title has passed from the principal to the buyer, and the

States for conversion of the mortgaged property, to extent of the sales price.

U.S.—*U. S. v. Covington Independent Tobacco Warehouse Co.*, D.C.Ky., 152 F.Supp. 612.

68. Ga.—*Flannery v. Harley*, 43 S. E. 765, 117 Ga. 483—*Miller v. Wilson*, 25 S.E. 578, 98 Ga. 567, 58 Am.S.R. 319.

69. Mo.—*Arkansas City Bank v. Cassidy*, 71 Mo.App. 186.

70. Minn.—*Johnson v. Martin*, 92 N. W. 221, 87 Minn. 370, 94 Am.S.R. 706, 59 L.R.A. 733.

71. Mo.—*Cresswell v. Leftridge*, App., 194 S.W.2d 48.

Tenn.—*J. F. Fargason Co. v. Ball*, 159 S.W. 221, 128 Tenn. 137, 50 L.R.A., N.S., 51.

25 C.J. p 412 note 78.

72. U.S.—*Corpus Juris Secundum* cited in *De Vries v. Sig Ellingson & Co.*, D.C.Minn., 100 F.Supp. 781, 784, affirmed, C.A., *Sig Ellingson & Co. v. De Vries*, 199 F.2d 677, certiorari denied 73 S.Ct. 505, 344 U.S. 934, 97 L.Ed. 719.

Tex.—*Kempner v. Thompson*, 100 S.W. 351, 45 Tex.Civ.App. 267. 25 C.J. p 412 note 79.

73. La.—*Bullitt v. Walker*, 12 La. Ann. 276.

Mo.—*Hays v. Warren*, 46 Mo. 189.

74. Ill.—*Taylor v. Turner*, 87 Ill. 296.

25 C.J. p 412 note 81.

74.5 U.S.—*Sullivan Co. v. Wells*, D.C. Neb., 89 F.Supp. 317.

Mo.—*Blackwell v. Laird*, 163 S.W.2d 91, 236 Mo.App. 1217.

Limited responsibility of stockyards
Stockyards, being in nature of

public utilities under federal law, subject to rigid control and inspection under state statutes, and required to furnish services, which are largely impersonal, without discrimination at regulated rates, are not held to same responsibility as ordinary agents in vouching for good faith and integrity of livestock sellers represented by them.

Mont.—*Montana Meat Co. of Helena v. Missoula Livestock Auction Co.*, 230 P.2d 955, 125 Mont. 66.

Statutory limitation of liability

(1) The state act declaring livestock market not liable to mortgagee of livestock for proceeds of mortgagor's sale thereof through such market, unless notice of mortgage is filed by mortgagee with state recorder of marks and brands, is not unconstitutional as depriving mortgagee, failing to file such notice, of property without due process of law, as mortgagee retains mortgage and right of action against mortgagor, and livestock market is not given complete immunity.

Mont.—*Montana Meat Co. of Helena v. Missoula Livestock Auction Co.*, supra.

(2) Under such act actual notice to livestock market of mortgage on livestock shipped thereto by mortgagor for sale is not substitute for constructive notice by filing of notice with state recorder of marks and brands, in absence of fraud.

Mont.—*Montana Meat Co. of Helena v. Missoula Livestock Auction Co.*, supra.

74.10 U.S.—*Seymour v. Austin*, D.C. Or., 101 F.Supp. 915.

Iowa.—*Birmingham v. Rice Bros.*, 26 N.W.2d 39, 238 Iowa 410, 2 A.L.R.2d

1108, certiorari denied 68 S.Ct. 79, 332 U.S. 768, 92 L.Ed. 353, rehearing denied 68 S.Ct. 151, 332 U.S. 820, 92 L.Ed. 397.

Md.—*Allen C. Driver, Inc. v. Mills*, 86 A.2d 724, 99 Md. 420.

N.D.—*Kelly v. Lang*, 62 N.W.2d 770.

Tex.—*Walker v. Caviness*, Civ.App., 256 S.W.2d 880.

Public welfare, including that of livestock producers, requires that a market agency should not be relieved of liability in tort for a wrongful conversion by one dealing with the agency, especially in view of fact that the agency can protect itself by requiring consignors of livestock to furnish indicia of title, bond, or insurance against loss.

U.S.—*De Vries v. Sig Ellingson & Co.*, D.C.Minn., 100 F.Supp. 781, affirmed, C.A., *Sig Ellingson & Co. v. De Vries*, 199 F.2d 677, certiorari denied 73 S.Ct. 505, 344 U.S. 934, 97 L.Ed. 719.

74.15 U.S.—*Sig Ellingson & Co. v. De Vries*, C.A.Minn., 199 F.2d 677, certiorari denied 73 S.Ct. 505, 344 U.S. 934, 97 L.Ed. 719.

Iowa.—*Birmingham v. Rice Bros.*, 26 N.W.2d 39, 238 Iowa 410, 2 A.L.R.2d 1108, certiorari denied 68 S.Ct. 79, 332 U.S. 768, 92 L.Ed. 353, rehearing denied 68 S.Ct. 151, 332 U.S. 820, 92 L.Ed. 397.

Minn.—*Mason City Production Credit Ass'n v. Sig Ellingson & Co.*, 286 N.W. 713, 205 Minn. 537, certiorari denied 308 U.S. 599, 60 S.Ct. 130, 84 L.Ed. 501, rehearing denied 308 U.S. 637, 60 S.Ct. 178, 84 L.Ed. 529.

S.D.—*First Nat. Bank v. Siman*, 289 N.W. 416, 67 S.D. 118.

Wash.—*Moderie v. Schmidt*, 108 P.2d 331, 6 Wash.2d 592.

property is then diverted by the factor to another, the factor will be liable to the buyer for conversion,⁷⁵ and he cannot set up in his defense the buyer's obligation to the principal, who was indebted to the factor.⁷⁶

§ 58. Rights of Principal against Third Persons

- a. In general
- b. Property wrongfully disposed of

a. In General

On an authorized sale by a factor, the principal is divested of title in the goods; and the principal may validly countermand the consignment only prior to sale.

On a sale by the factor conformably to his authority, the principal is divested of his title in the goods.⁷⁷

If the authority of a factor to sell has not yet been exercised, the owner may countermand the consignment and sell the goods in transitu, and the purchaser's title will be valid.⁷⁸ If, however, the factor sells and delivers the property before notice of the revocation of his authority, the purchaser who has bought bona fide acquires a good title as against a prior purchaser from the consignor without delivery.⁷⁹

The duties and liabilities of third persons to principals of agents generally are considered in the title Agency §§ 275-282.

b. Property Wrongfully Disposed of

Apart from the effect of the factor's acts, a factor's unauthorized or wrongful disposition of property to a third person passes no title and creates no rights as against the principal, except where he ratifies it or is estopped, as where he has clothed the factor with the apparent ownership or authority to dispose of the prop-

erty. In the case of an unauthorized pledge, the principal may sue the pledgee for conversion, or to recover the property, or, if the pledgee has sold it, for money had and received.

As a general rule, a person who deals with a factor is bound to take notice of the general extent of his powers,⁸⁰ and, apart from the effect of the factors' acts, as discussed infra §§ 64-67, an unauthorized or wrongful sale or other disposition of the property will pass no title and create no rights in the person dealing with the factor, as against the principal,⁸¹ even to the extent of the factor's lien,⁸² especially where the person dealing with the factor knows, or has information sufficient to charge him with notice, that the factor is exceeding his authority,⁸³ or is selling for a wrongful purpose.⁸⁴

Thus in the absence of ratification or estoppel, the principal's title does not pass where the factor delivers the goods in payment of his own antecedent debt, as discussed supra § 10, or pledges them for his own debt, supra § 14, or where the sale is not according to the usages of the trade.⁸⁵ Ignorance of the purchaser that the person selling is a mere factor and has the goods under consignment will not protect him if the sale is itself unauthorized;⁸⁶ but it will protect him against any charge of complicity in a wrongful disposition by the factor of the proceeds of an authorized sale.⁸⁷

The principal, however, will become bound by an unauthorized or wrongful sale or other disposition of the property where, with knowledge of the facts, he ratifies it;⁸⁸ or he may become bound, as against a bona fide purchaser for value and without notice, actual or constructive, on the ground of estoppel, where he has clothed the factor with the apparent ownership or authority to dispose of the property,⁸⁹ although the factor exceeds private instructions or limitations on his powers, of which

75. N.Y.—Procter & Gamble Co. v. Peters, White & Co., 134 N.E. 849, 233 N.Y. 97.

76. N.Y.—Procter & Gamble Co. v. Peters, White & Co., supra.

77. Cal.—Babson v. Salisbury, 139 P. 702, 46 C.A. 521, 25 C.J. p 415 note 25.

Delivery of cotton "on cash sale"

However, under a statute to that effect, where there is a delivery of cotton by a commission merchant "on cash sale," the title of the principal remains undivested until payment in full of the purchase price, and may be asserted by him even as against a bona fide purchaser from the factor's purchaser.

Ga.—Flannery v. Harley, 43 S.E. 765, 117 Ga. 483.

78. U.S.—Ryberg v. Snell, Pa., 21 F. Cas.No.12,190, 2 Wash.C.C. 403, 25 C.J. p 415 note 29.

79. Me.—Jones v. Hodgkins, 61 Me. 480.

80. N.C.—Winslow v. Staton, 63 S. E. 950, 150 N.C. 264, 266, 25 C.J. p 415 note 38.

81. Ga.—Payne v. American Agricultural Chemical Co., 18 S.E.2d 635, 66 Ga.App. 596, 25 C.J. p 416 note 39.

82. U.S.—Foerderer v. Tradesmen's Nat. Bank, N.Y., 107 F. 219, 46 C. C.A. 243.

83. Ill.—Clemmer v. Drovers' Nat. Bank, 41 N.E. 728, 157 Ill. 206, 25 C.J. p 416 note 41.

84. N.Y.—Easton v. Clark, 35 N.Y. 225, 25 C.J. p 416 note 42.

85. Conn.—Romeo v. Martucci, 45 A. 1, 99, 72 Conn. 504, 77 Am.S.R. 327, 47 L.R.A. 601, 25 C.J. p 416 note 45.

86. Conn.—Abel v. Chase, 97 A. 762, 90 Conn. 487, 25 C.J. p 416 note 46.

87. Conn.—Abel v. Chase, supra, 25 C.J. p 416 note 47.

88. Conn.—Abel v. Chase, supra. Ratification or repudiation in general see supra § 17.

89. Ga.—Pilcher v. Enterprise Mfg. Co., 138 S.E. 272, 36 Ga.App. 760. Mich.—Bellows v. Goodfellow, 287 N. W. 885, 276 Mich. 471, 25 C.J. p 416 note 49.

the person dealing with him is not required to take notice.⁹⁰

It has been held, in this connection, that the possession of the goods by the factor is sufficient to warrant the inference that he has full power to contract in relation to its sale,⁹¹ and that a purchaser need not inquire as to the ownership of the goods;⁹² but it has also been held that where an innocent purchaser or pledgee deals with a factor in reliance on the indicia of title afforded by his possession of the goods, supposing him to be the actual owner, he acquires no title to the property where the transfer is unauthorized under the express or implied terms of the principal's instructions.⁹³

Remedies for unauthorized pledge. If the factor wrongfully pledges his principal's goods, the principal may sue the pledgee as for a conversion of the goods;⁹⁴ and such action may be maintained without a previous demand for the goods, if the pledgee had no notice of the factor's lien, but the goods were pledged by the factor as his own,⁹⁵ or if the pledgee has sold the goods.⁹⁶ However, while there is some authority to the contrary,⁹⁷ an innocent pledgee is generally held to have the right to recoup in such action the amount due from the principal to the factor for advances and expenses;⁹⁸ and it has been held that the principal must properly tender this amount before he can sue in conversion,⁹⁹ although it has also been held that where the factor pledges the goods for more than his lien, trover will lie without any tender of his charges and advances either to the factor or to the pledgee.¹

If the pledgee has not disposed of the goods, the principal may sue to recover the goods from him,² without payment of the charges and advances by the factor;³ but if the pledgee executes a replevin bond, he may recoup from the damages recoverable on the bond the amount of charges and advances made by the factor.⁴ If the pledgee has sold the goods, the principal may sue for money had and received.⁵ Under at least one statute, where the factor pledges the goods for advancements, the owner of the goods may redeem them at any time before sale by the pledgee;⁶ and if the pledgee is charged with notice that the factor is not the real owner, he has no right to sell the goods except at public sale as provided by statute.⁷

§ 59. — On Factor's Contracts

The principal may generally enforce rights arising out of the factor's contracts made on his behalf; so, he may sue a purchaser for the purchase price. Where the principal is undisclosed, a purchaser without notice of the agency may assert, in an action by the principal, any defense to which he would be entitled if the action were brought by the factor.

The principal may, as a general rule, sue on, and enforce rights arising out of, contracts entered into by the factor in his behalf,⁸ unless the contract is an express one under seal with the factor, in which case he alone can sue.⁹ Thus, where the factor sells the goods for his principal, the contract is between the purchaser and the principal;¹⁰ and, subject to the right of the factor to be protected to the extent of his lien,¹¹ the principal, as a general rule, may sue to recover the purchase price of the goods sold,¹² even though the sale was made by the

90. Ga.—Pilcher v. Enterprise Mfg. Co., 138 S.E. 272, 36 Ga.App. 760. 25 C.J. p 416 note 50.

91. Pa.—Hall v. Fay, 15 Pa.Dist. 207. 25 C.J. p 416 note 51.

92. Pa.—Hall v. Fay, supra.

93. U.S.—Foerderer v. Tradesmen's Nat. Bank, N.Y., 107 F. 219, 46 C. C.A. 243. 25 C.J. p 416 note 53.

94. Tex.—Shuttle Bros. & Lewis v. American State Bank of Burkburnett, Civ.App., 254 S.W. 479. 25 C.J. p 353 note 18. Form of action see infra § 68.

95. Ill.—Silverman v. Bush, 16 Ill. App. 437.

96. Tenn.—Merchants' Nat. Bank v. Trenholm, 12 Heisk. 520.

97. N.Y.—Bonito v. Mosquera, 15 N. Y.Super. 401. 25 C.J. p 353 note 21.

98. Pa.—Macky v. Dillinger, 73 Pa. 85. 25 C.J. p 353 note 21.

99. U.S.—Steiger v. Third Nat. Bank, C.C.Mo., 6 F. 569, 2 McCrary 494.

25 C.J. p 353 note 22.

1. Ill.—Ludden v. Buffalo Batting Co., 22 Ill.App. 415.

2. La.—Lallande v. His Creditors, 7 So. 895, 42 La.Ann. 705. 25 C.J. p 353 note 24.

3. Ill.—Gray v. Agnew, 95 Ill. 315. Pa.—Macky v. Dillinger, 73 Pa. 85.

4. Pa.—Macky v. Dillinger, supra.

5. Mass.—Nowell v. Pratt, 5 Cush. 111—Chickering v. Hosmer, 12 Mass. 183.

6. N.Y.—Beken v. Kingsbury, 100 N. Y.S. 323, 113 App.Div. 555. 25 C.J. p 353 note 28.

7. N.Y.—Beken v. Kingsbury, supra. 25 C.J. p 353 note 29.

8. Ark.—Hearshy v. Hichox, 12 Ark. 125.

25 C.J. p 413 note 99.

9. Ark.—Hearshy v. Hichox, supra. Mass.—Huntington v. Knox, 7 Cush. 371.

10. Me.—Edmond v. Caldwell, 15 Me. 340. 25 C.J. p 414 note 2.

Sale on credit

Where the factor sells property on credit, the buyer may not pay the factor after notice from the owner that payment is to be made to him.

Mass.—Kelley v. Munson, 7 Mass. 319, 5 Am.D. 47.

11. Mass.—Barry v. Page, 10 Gray 398. 25 C.J. p 414 note 3.

12. U.S.—Lord & Spencer Co. v. Egan, Fickett & Co., D.C.Mass., 94 F.Supp. 786.

Mass.—Cushman v. Snow, 71 N.E. 529, 186 Mass. 169. 25 C.J. p 414 note 4.

factor in his own name without disclosing the principal;¹³ and this rule applies to a sale by a *del credere* factor.¹⁴

Where, however, a consignee is at liberty, under his contract with the consignor, to sell at any price and receive payment at any time he likes, and is bound, if he sells, to pay the consignor a fixed price, their relation is not that of principal and factor, and the consignor cannot sue the purchaser for the price.¹⁵

Note taken by factor. If, when a factor makes a sale, he takes a note in his own name for the price, the principal is entitled to sue for the price,¹⁶ except where such security is regarded as constituting payment.¹⁷

Where goods of several sold together. A principal may himself recover the purchase price of goods sold on credit although the goods of several principals are sold at the same time to one purchaser, provided the price for which the goods of each principal were sold can be ascertained.¹⁸ However, it has been held that, where goods of the principal and goods of the factor are sold together for a gross sum, the principal cannot sever his claim from the factor's, and sue in his own name, and thus subject the purchaser to a separate suit for the value of the goods belonging to him.¹⁹

Defenses. Where a factor makes a sale in his own name, without disclosing his principal, to a purchaser who has no notice, either actual or constructive, that the factor is selling as an agent, the purchaser, if an action is brought against him by the principal to recover the purchase price, may avail himself of every defense to which he would be entitled if the action were brought by the factor;²⁰ and, although there are decisions to the

contrary,²¹ it is generally held that if the purchaser dealt in good faith with the factor as owner, he may set off any debt or claim he may have against the factor in answer to the demand of the principal.²²

Where, however, the purchaser knows, or has reason to believe, at the time of the sale that the factor is selling the goods as agent, although he does not know or have the means of knowing who is the principal, he has no right to set off, in an action by the principal for the price of the goods, a debt or claim which he holds against the factor.²³ The mere fact that the factor is in the commission business is not notice to the purchaser that he is selling the goods as factor, where he is in the habit of selling goods of his own as well as those of his principal,²⁴ and if the purchaser knows at the time of the sale that the factor is in the habit of selling sometimes as factor and sometimes as principal, and he purchases with a view of covering his own debt and availing himself of a set-off, he is bound to inquire in what character the factor is acting in the particular sale.²⁵

Since the factor's lien is a personal privilege, as discussed *supra* § 45, it cannot be set up by any other person in defense to an action by the principal.²⁶

§ 60. — Right to Follow Property and Proceeds in General

Apart from statutes protecting persons dealing with factors, where a factor wrongfully disposes of the goods or proceeds the principal may follow and recover them wherever they may be traced, except from a *bona fide* purchaser for value without notice.

A factor holds the goods of his principal, and the proceeds of a sale thereof, in the character of a trustee,²⁷ and, in the absence of statutes which fur-

13. Mass.—Cushman v. Snow, *supra*.
25 C.J. p 414 note 5.

14. Mass.—Cushman v. Snow, *supra*.
25 C.J. p 355 note 58, p 414 note 6.

15. Wis.—Northern Electrical Mfg. Co. v. J. C. Wagner Co., 84 N.W. 894, 108 Wis. 584.

16. N.Y.—Corlies v. Cumming, 6 Cow. 181.

17. Mass.—Roosevelt v. Doherty, 129 Mass. 301, 37 Am.R. 356—West Boylston Mfg. Co. v. Searle, 15 Pick. 225.

18. N.Y.—Corlies v. Cumming, 6 Cow. 181.

Tenn.—Jackson Ins. Co. v. Partee, 9 Heisk. 296.

19. Mass.—Roosevelt v. Doherty, 129 Mass. 301, 37 Am.R. 356.

20. Mass.—Cushman v. Snow, 71 N.E. 529, 186 Mass. 169.
25 C.J. p 414 note 14.

21. S.C.—Dortic v. Jeffers, 44 S.C.L. 83.
25 C.J. p 414 note 15.

22. Tex.—Hudgins Produce Co. v. Beggs, Civ.App., 185 S.W. 339.
25 C.J. p 414 note 16.

Claim maturing subsequently

The purchaser may set off a claim against the factor which, although not due and payable at the time of the sale, becomes payable before the principal's action is instituted.

N.Y.—Hogan v. Shorb, 24 Wend. 458.

23. U.S.—Merrick v. Bernard, Pa., 17 F.Cas.No.9,464, 1 Wash.C.C. 479.
25 C.J. p 414 note 18.

24. N.Y.—Bliss v. Bliss, 20 N.Y.Super. 339.
25 C.J. p 415 note 19.

25. Md.—Miller v. Lea, 35 Md. 396, 6 Am.D. 417.

26. Mass.—Holly v. Huggefard, 8 Pick. 73, 19 Am.D. 303.
N.H.—Jones v. Sinclair, 2 N.H. 319, 9 Am.D. 75.

27. Cal.—National Bank of New Zealand v. Finn, 253 P. 757, 763, 81 C.A. 317.

Iowa.—Cable v. Iowa State Sav. Bank, 194 N.W. 957, 197 Iowa 393, 31 A.L.R. 748, modified on other grounds 197 N.W. 434, 197 Iowa 393, 31 A.L.R. 748.

Okl.—National Bank of Commerce at Hugo v. Whitten, 124 P.2d 990, 190 Okl. 449.

25 C.J. p 416 note 55.

nish protection to persons dealing with factors,²⁸ if the factor wrongfully disposes of the goods or proceeds, the principal may follow and recover them, wherever he can trace them as distinct from those of the factor, into whosoever hands they may come,²⁹ except a bona fide purchaser for value without notice.³⁰ He is entitled to recover the specific goods themselves if they can be had,³¹ and if the goods themselves cannot be recovered, but can be traced, he may recover their proceeds.³²

Thus, except where there is a ratification or estoppel,³³ the principal may follow and reclaim the property or its proceeds from a person to whom the factor has bartered the property in a manner not authorized by the principal and not within the ordinary modes of transacting business,³⁴ or from a person to whom the factor has turned over the property or its proceeds in payment of an antecedent debt due from the factor.³⁵

Where the contract between the principal and factor creates an express trust, the principal cannot rely on such contract with respect to goods as to which the trust feature has been abandoned.³⁶

As against subagent. It has been held that the doctrine of following trust funds is applicable in favor of a principal against the subagent of his factor, where the subagent claims the proceeds of goods sold for a balance due from the factor to him.³⁷ It has been held that a correspondent and agent who, under contract with the consignee and for a consideration moving from the consignee, discounts bills drawn by the shipper on the consignee, cannot, as against the shipper, claim the surplus of the proceeds remaining after deducting all the advances made on the goods.³⁸

§ 61. — Insolvency or Death of Factor

Where a factor becomes insolvent, or dies, title to the property of the principal, or the proceeds thereof, remains with the principal, who may reclaim the property or the proceeds, provided they are distinguishable from the rest of the estate; if they are not, or if the funds received by the factor have been used by him, the principal shares with other creditors in the distribution of the factor's estate.

Where a factor becomes insolvent, all that he can transfer to his assignee is his lien on the goods

Fiduciary character of relation generally see *supra* § 1 e.

28. Minn.—Norris v. Boston Music Co., 151 N.W. 971, 129 Minn. 198, L.R.A.1917B 615.
25 C.J. p 416 note 56.

Protection of third persons under factors' acts see *infra* §§ 64-67.

29. Cal.—Corpus Juris cited in Henderson v. General Acceptance Corporation, 286 P. 1014, 1015, 209 C. 268.

National Bank of New Zealand v. Finn, 253 P. 757, 81 C.A. 317.

Iowa.—Cable v. Iowa State Sav. Bank, 194 N.W. 957, 197 Iowa 393, 31 A.L.R. 748, modified on other grounds 197 N.W. 434, 197 Iowa 393, 31 A.L.R. 748.

Okl.—National Bank of Commerce at Hugo v. Whitten, 124 P.2d 990, 190 Okl. 449.

25 C.J. p 416 note 57.

Assignee charged with notice

Assignee of conditional sales contract from factor indebted to assignee, making effort to trace title, was charged with notice of factor's defective title.

Cal.—Henderson v. General Acceptance Corporation, 286 P. 1014, 209 C. 268.

30. Cal.—Henderson v. General Acceptance Corporation, *supra*.

Okl.—National Bank of Commerce at Hugo v. Whitten, 124 P.2d 990, 190 Okl. 449—C. M. Keys Commission Co. v. Beatty, 142 P. 1102, 42 Okl. 721.

Acquisition of equitable rights

Owner of property may maintain action in equity against bank in which factor deposits proceeds of sale to impress trust on any portion thereof remaining in bank, unless bank has acquired equitable right thereto, without notice of owner's claims.

Iowa.—Cable v. Iowa State Sav. Bank, 194 N.W. 957, 197 Iowa 393, 31 A.L.R. 748, modified on other grounds 197 N.W. 434, 197 Iowa 393, 31 A.L.R. 748.

31. Mich.—Commercial Investment Trust v. Stewart, 209 N.W. 660, 235 Mich. 502.

25 C.J. p 417 note 59.

32. Cal.—Henderson v. General Acceptance Corporation, 286 P. 1014, 209 C. 268.

25 C.J. p 417 note 60.

33. Minn.—Norris v. Boston Music Co., 151 N.W. 971, 129 Minn. 198, L.R.A.1917B 615.

25 C.J. p 417 note 61.

Payment of debt from proceeds

Where a factor to whom plaintiff shipped goods sold them by his direction, deposited the proceeds to its own credit, rendered accounts of sales to plaintiff, and subsequently, from the funds on deposit, paid a debt due from the factor to a bank which had no notice that the goods ever had been plaintiff's property, the bank was not liable to plaintiff. Ga.—Coleman v. Savannah Bank & Trust Co., 106 S.E. 301, 26 Ga.App. 400.

34. Minn.—Norris v. Boston Music Co., 151 N.W. 971, 129 Minn. 198, L.R.A.1917B 615.

25 C.J. p 417 note 61.

35. Ga.—Payne v. American Agricultural Chemical Co., 18 S.E.2d 635, 66 Ga.App. 596.

S.C.—International Agr. Corporation v. Lockhart Power Co., 188 S.E. 243, 181 S.C. 501.

25 C.J. p 417 note 62.

Transfer by factor in payment of own debt generally see *supra* § 10.

Creditor as bona fide purchaser

Preexisting debt of factor is not such a consideration for transfer of goods as will sustain plea of "bona fide purchaser" as against owner.

Mich.—Commercial Investment Trust v. Stewart, 209 N.W. 660, 235 Mich. 502.

Recovery of price or rental value

Where a factor turned over a piano for an antecedent debt, the principal was entitled to recover either possession and the reasonable rental value or the price of the piano.

Tex.—Charles M. Stieff, Inc., v. City of San Antonio, 111 S.W.2d 1086, 130 Tex. 594.

36. Ga.—Southern States Phosphate & Fertilizer Co. v. Barrett, 61 S.E. 731, 130 Ga. 749.

25 C.J. p 417 note 63.

37. Cal.—De Raad v. Nash-De Camp Co., App., 23 P.2d 68.

English authority to other effect see 25 C.J. p 417 note 64.

38. N.Y.—Dodge v. Wilbur, 10 N.Y. 579.

for advances or commissions;³⁹ his assignee or receiver merely succeeds to his rights, and is under the same obligation to restore to the consignor the proceeds of his goods, which are distinguishable, as the factor himself was.⁴⁰ The goods remaining in the factor's hands and the proceeds of such as have been sold are, with the exception of the value of the factor's lien, the property of the consignor and subject to his order, and if the consignor can trace them he may follow and reclaim them from the factor or the factor's receiver or assignee for the benefit of his creditors;⁴¹ and this rule applies even though the factor is acting under a *del credere* commission,⁴² except that, if the factor fails after having made advances in the form of notes or acceptances, his assignee is entitled to retain amounts arising from the sale of goods until the notes or acceptances are surrendered or destroyed.⁴³

However, if the funds received by the factor have been used by him or are incapable of identification, the principal only shares in the distribution of the factor's estate as any other creditor.⁴⁴ So, if the assignee, without notice of the principal's claim, makes a bona fide sale of the goods and distributes the proceeds, he is not responsible to the principal therefor.⁴⁵

Death of factor. In case of the death of the factor, no title to the property unsold or the debts due for property sold on credit passes to his personal representative as against the principal.⁴⁶

§ 62. — For Injury to or Loss of Goods

The principal may generally sue in his own name for torts of third persons which cause injury to, or loss of, his goods; but the factor's recovery of judgment for

injury to goods which are in his possession and on which he has a lien bars an action by the principal for such injury.

Although a factor has accepted and paid drafts drawn on him by the principal to an amount equal to or exceeding the value of the goods,⁴⁷ the principal may, as a general rule, sue in his own name for torts of third persons which cause an injury to, or loss of, his goods,⁴⁸ such as conversion, as where a third person, with full knowledge of the principal's title and the factor's relation to the goods, receives them from the factor in payment of the latter's private debt.⁴⁹ The principal may maintain an action against a sheriff or other officer for wrongfully taking the goods from the possession of the factor,⁵⁰ or for taking the goods, or the proceeds of a sale thereof, on an attachment against the factor.⁵¹ However, the recovery by the factor of a judgment for injury to goods which are in his possession and on which he has a lien is a bar to an action by the principal for such injury.⁵²

§ 63. Liability of Principal to Third Person

In general, the principal is liable for acts of the factor which are within the scope of the agency or which the principal has ratified; and on a proper sale by the factor, title in the goods passes to the purchaser. While property held by the factor is subject to attachment for the principal's debts, it is not, in the absence of statute or estoppel of the principal, subject to attachment or execution for the factor's debts.

The principal is bound by, and is liable for, the acts of a factor which are within the scope of the agency,⁵³ or are subsequently ratified by the principal,⁵⁴ except that the principal is not liable on a contract made by the factor where the person dealing with the factor gives exclusive credit to him.⁵⁵

39. U.S.—Terry v. Bamberger, C.C., 23 F.Cas.No.13,837, 14 Blatchf. 234.

44 Conn. 558, affirmed Bamberger v. Terry, 103 U.S. 40, 26 L.Ed. 317.

40. Pa.—In re Merrick, 5 Watts & S. 9.

25 C.J. p 418 note 67.

41. Mass.—Cushman v. Snow, 71 N. E. 529, 186 Mass. 169.

25 C.J. p 418 note 68.

42. Mass.—Cushman v. Snow, supra. 25 C.J. p 418 note 69.

43. N.Y.—Francklyn v. Sprague, 10 Hun 589.

44. U.S.—Hourquebie v. Girard, Pa., 12 F.Cas.No.6,732, 2 Wash.C.C. 212. 25 C.J. p 418 note 71.

45. Ky.—Fahnestock v. Bailey, 3 Metc. 48, 77 Am.D. 161.

46. U.S.—Veil v. Mitchel, Pa., 28 F. Cas.No.16,908, 4 Wash.C.C. 105.

25 C.J. p 418 note 73.

47. S.C.—Hill v. Georgia, C. & N. R. Co., 21 S.E. 337, 43 S.C. 461.

48. S.C.—Hill v. Georgia, C. & N. R. Co., supra.

25 C.J. p 418 note 75.

49. Cal.—Herron v. Hughes, 25 C. 555.

50. Wash.—Eilers Music House v. Fairbanks, 141 P. 885, 80 Wash. 379.

25 C.J. p 418 note 77.

51. N.Y.—Moore v. Hillabrand, 37 Hun 491, 16 Abb.N.Cas. 477.

25 C.J. p 418 note 75 [a].

52. N.Y.—Porter v. Schendel, 55 N. Y.S. 602, 25 Misc. 779.

53. U.S.—Higgins v. McCrea, Ohio, 6 S.Ct. 557, 116 U.S. 671, 29 L.Ed. 764.

Cal.—Pacific Finance Corp. v. Foust, 285 P.2d 632, 44 C.2d 853.

25 C.J. p 419 note 81.

Subsequent sale by owner

Where the owner delivered an automobile to a factor for sale, the owner cannot, after the factor has

sold it to a third person, lawfully retake it and sell it to his own vendee, for while a sale by the factor without delivery of possession would, under the statute defining fraudulent transfer, be deemed fraudulent on sale to another with delivery of possession, and the last purchaser would be entitled to the car, that principle does not apply to the owner.

Cal.—Babson v. Salisbury, 189 P. 702, 46 C.A. 521.

54. N.Y.—Cobb v. Dows, 10 N.Y. 335.

Ratification generally see supra § 17.

55. N.Y.—McCullough v. Thompson, 45 N.Y.Super. 449.

Where third person makes advances to owner of goods, and receives from him a bill of sale of such goods under an agreement that if a draft drawn to reimburse such person for his advances is not duly paid, he may consign the goods to a factor for

Title passing to purchaser. On a sale by the factor conformably to his authority, the title in the goods passes to the purchaser;⁵⁶ and the mere fact that the factor intends to appropriate, or subsequently does appropriate, the proceeds of the sale to his own use does not prevent the purchaser from acquiring a good title.⁵⁷ A bona fide sale by a factor of the goods of his principal for a valuable consideration by assigning over the bill of lading is valid as against the principal if the factor has the bill of lading in his possession,⁵⁸ even though the goods had not at the time of the transfer of the bill of lading come into the factor's hands.⁵⁹

Rights of creditors. The principal's property in the hands of his factor is subject to attachment for debts of the principal;⁶⁰ but in the absence of statute or estoppel against the principal, it is not subject to attachment or execution for debts of the factor,⁶¹ and the principal's right to stop the goods in transitu is ordinarily superior to the claims of the factor's creditors on the goods,⁶² unless the principal has parted with his property in the goods.⁶³ The fact that on attachment factors of defendant certify that they have no goods belonging to him does not affect the rights of other creditors who, before the certificate was given, had acquired an

equitable right to have any such goods applied to pay acceptances of defendant held by them, even though the factor is deemed to have lost his lien by making the certificate.⁶⁴

§ 64. Protection of Third Persons under Factors' Acts

- a. In general
- b. Property and documents within statutes

a. In General

Under the various factors' acts, possession of property or documents of title by a factor, as apparent owner, will protect a bona fide purchaser or pledgee as against the real owner; under some acts the owner or principal can reclaim his property on repayment of the sum with which the innocent party parted. Such acts have no retrospective or extraterritorial effect; authorities disagree as to whether they should be strictly or liberally construed.

In a number of jurisdictions, under statutes providing to that effect and known as factors' acts, it is the rule that possession of property or documents of title by a factor or agent, as apparent owner, is conclusive evidence that the factor or agent is the owner, so far as is necessary to protect a bona fide purchaser or pledgee as against the real owner.⁶⁵

sale, and, the draft not being paid, the goods are consigned to the factor named and are sold for less than the amount due for advances, such third person's right of recovery against the owner does not depend on whether or not the owner has a remedy against the factor for any unfaithfulness on his part.
Vt.—Langdon v. Burrill, 21 Vt. 466.

56. Tex.—Shield Co. v. Schunder, Civ.App., 81 S.W.2d 177.
25 C.J. p 415 note 25.

57. Cal.—Kenny v. Christianson, 253 P. 715, 200 C. 419, 50 A.L.R. 1297—Herron v. Hughes, 25 C. 555.

58. U.S.—Walter v. Ross, Pa., 29 F. Cas.No.17,122, 2 Wash.C.C. 283.

59. U.S.—Ryberg v. Snell, Pa., 21 F.Cas.No.12,190, 2 Wash.C.C. 403.

60. N.Y.—Westervelt v. Phelps, 66 N.Y.S. 517, 54 App.Div. 244, affirmed 63 N.E. 962, 171 N.Y. 212.
25 C.J. p 415 note 32.

61. Tenn.—Sargent & Co. v. De Soto Paint & Varnish Co., 77 S.W.2d 444, 168 Tenn. 247.

Tex.—Shield Co. v. Schunder, Civ. App., 81 S.W.2d 177.
25 C.J. p 415 note 33.

Exemption of goods in factor's hands from distress for rent see Landlord and Tenant § 681.

Property consigned for sale or in custody of agent, factor, or bailee

as subject to execution see Executions § 54.

Right of bank to apply funds of consignor to debt of factor see Banks and Banking § 302.

62. Nev.—Fenkhausen v. Fellows, 21 P. 886, 20 Nev. 312, 4 L.R.A. 732.

25 C.J. p 415 note 34.

63. Mass.—Lane v. Jackson, 5 Mass. 157.

64. N.Y.—Mutual Redemption Bank v. Sturgis, 22 N.Y.Super. 660.

65. Mass.—Associates Discount Corporation v. C. E. Fay Co., 30 N.E. 2d 876, 307 Mass. 577, 132 A.L.R. 519—International Trust Co. v. Webster Nat. Bank, 154 N.E. 330, 258 Mass. 17, 49 A.L.R. 267.

N.Y.—Copin v. Leuci, 138 N.Y.S.2d 290, 207 Misc. 396—Kirsch v. Provident Loan Soc. of N. Y., 71 N.Y.S. 2d 241, 189 Misc. 898—G. Dewey Sullivan, Inc., v. H. Stern, Inc., 265 N.Y.S. 481, 148 Misc. 235—Sanette Corporation v. Sanette Corporation of New England, 230 N.Y.S. 102, 132 Misc. 455.

25 C.J. p 420 note 97.

Purpose of factors' acts

(1) The purpose of this remedial legislation is to protect third persons who in good faith deal with factors or agents intrusted by the owners with the possession of the goods

or with the documentary evidence of title thereto.

N.Y.—People v. Rosenfeld, 83 N.Y.S. 2d 691, 193 Misc. 277—G. Dewey Sullivan, Inc. v. H. Stern, Inc., 265 N.Y.S. 481, 148 Misc. 235.

De Beixodon v. Brown & Seccomb, 158 N.Y.S. 451.

25 C.J. p 420 note 96.

(2) The purpose is to protect a bona fide purchaser where the agent has exceeded his authority.

Mass.—Associates Discount Corporation v. C. E. Fay Co., 30 N.E.2d 876, 307 Mass. 577, 132 A.L.R. 519.

(3) Factors' acts were designed to remedy the hardship imposed by the common law on innocent third persons dealing with factors.

U.S.—Foerderer v. Tradesmen's Nat. Bank, N.Y., 107 F. 219, 46 C.C.A. 243.

25 C.J. p 419 note 85.

(4) Common-law rule as to property wrongfully disposed of by factor see supra § 58.

The theory of factors' act, providing that agent intrusted by principal with possession of merchandise for purpose of sale or as security for advances thereon shall be deemed true owner thereof so far as to validate his contract for sale of merchandise, is that principal's selection of faithless agent is cause of loss to innocent third party, so that loss is placed on principal.

However, under some statutes, the title acquired by one dealing with a factor or agent who goes outside the scope of his specific authority is a qualified or limited title;⁶⁶ that is, while the purchaser or pledgee in good faith has valid title as against others,⁶⁷ the true owner or principal has the right to reclaim his property on payment of the sum with which the innocent party parted.⁶⁸

In so far as these statutes have not changed the law, and in cases to which the statutes do not apply, the common-law rule prevails,⁶⁹ as where the factor or agent attempts to pledge or transfer goods of his principal by the transfer of any document of title not within the act.⁷⁰

Construction and operation. The terms used in a factors' act have legalistic implications and are not to be taken in their ordinary meanings.⁷¹ It has been held that the factors' acts, being in derogation of the common law, should be strictly construed;⁷² but other authority holds that, since these statutes enact the common-law rule that, where one of two innocent persons must suffer loss from the act of a third person, such loss must be borne by him who has placed the third person in the position which enables him to do the act causing the loss, they must be liberally construed.⁷³

The rule of ejusdem generis has been applied in construing such an act.⁷⁴

The factors' acts have no retrospective effect, but apply solely to transactions by factors or agents after the enactment thereof;⁷⁵ and they have no extraterritorial effect, but apply only to transactions by factors or agents within the jurisdiction where-in they are enacted.⁷⁶

Repeal. A factors' act containing a provision which conflicts with a provision of a subsequent act is repealed by implication to the extent of the inconsistency.⁷⁷

b. Property and Documents within Statutes

Generally, all commodities of commerce are included within the operation of factors' acts. What are documents of title, within the meaning of the acts, depends on the terms of the particular statutes.

The word "goods" or "merchandise," as used in factors' acts, generally include all commodities of commerce;⁷⁸ but doubt has been expressed as to whether an incorporeal right, such as a copyright, is "merchandise" within the meaning of this statute.⁷⁹

Documents of title. What are documents of title within the meaning of factors' acts depends primarily on the language of the particular statutes,⁸⁰ and to render valid a contract made on the faith of the document of title the terms of the document must be consistent with the supposition that the factor owns the goods.⁸¹ A factor or agent may be

N.Y.—Kirsch v. Provident Loan Soc. of N. Y., 71 N.Y.S.2d 241, 189 Misc. 898.

History of factors' acts

(1) England first enacted remedial legislation.

Wis.—Price v. Wisconsin Marine & Fire Ins. Co., 43 Wis. 267.
25 C.J. p 419 notes 87, 88.

(2) The first New York statute was, with a few modifications, a reproduction of one of the English acts.

N.Y.—Toledo First Nat. Bank v. Shaw, 61 N.Y. 283.
25 C.J. p 419 notes 89, 90.

(3) In Massachusetts, the first factors' act did not protect a pledgee of the factor; but the statute was subsequently extended to include pledges.

Mass.—Michigan State Bank v. Gardner, 15 Gray 362.
25 C.J. p 420 note 92 [a].

Estoppel of owner

It is the act of the owner in conferring on his factor the apparent ownership and the right of disposal, together with the fact that an innocent third person has dealt with the latter in reliance thereon, that estops the former from following his property.

N.Y.—Howland v. Woodruff, 60 N.Y. 73.

66. N.Y.—Mann v. R. Simpson & Co., 13 N.Y.S.2d 423, 257 App.Div. 329, reargument and motion denied 16 N.Y.S.2d 102, 258 App.Div. 793, motion denied 27 N.E.2d 207, 282 N.Y. 800, reversed on other grounds 36 N.E.2d 658, 286 N.Y. 450.

67. N.Y.—Mann v. R. Simpson & Co., 36 N.E.2d 658, 286 N.Y. 450.

68. N.Y.—Mann v. R. Simpson & Co., 36 N.E.2d 658, 286 N.Y. 450—Nelkin v. Provident Loan Soc. of New York, 193 N.E. 245, 265 N.Y. 393.

69. N.Y.—Toledo First Nat. Bank v. Shaw, 61 N.Y. 283.
25 C.J. p 420 note 94.

70. N.Y.—Bonito v. Mosquera, 15 N.Y. Super. 401.

71. N.Y.—L. W. Sweet & Co. v. Provident Loan Soc. of New York, 4 N.Y.S.2d 727, 254 App.Div. 242, affirmed 18 N.E.2d 847, 279 N.Y. 540.

72. U.S.—Interstate Banking & Trust Co. v. Brown, Tenn., 235 F. 32, 148 C.C.A. 526.
25 C.J. p 420 note 1.

73. N.Y.—L. W. Sweet & Co. v. Provident Loan Soc. of New York, 4 N.Y.S.2d 727, 254 App.Div. 242,

affirmed 18 N.E.2d 847, 279 N.Y. 540—Kinston Cotton Mills v. Kuhne, 113 N.Y.S. 779, 129 App. Div. 250.

74. Tenn.—Starkey v. Nixon, 270 S. W. 980, 151 Tenn. 637.

75. Mass.—Michigan State Bank v. Gardner, 15 Gray 362.
25 C.J. p 420 note 4.

76. D.C.—Costikyan v. Sloan, 33 App. D.C. 420.
25 C.J. p 420 note 3.

77. Tenn.—James v. Meriwether Graham Oliver Co., 279 S.W. 390, 152 Tenn. 528.

78. Eng.—Heyman v. Flewker, 13 C. B.N.S. 519, 106 E.C.L. 519, 143 Reprint 205.
25 C.J. p 422 notes 19, 20.

Automobile

Mass.—Associates Discount Corporation v. C. E. Fay Co., 30 N.E.2d 876, 307 Mass. 577, 132 A.L.R. 519.

79. U.S.—Stodart v. Mutual Film Corp., D.C.N.Y., 249 F. 507, affirmed 249 F. 513, 161 C.C.A. 439.
25 C.J. p 422 note 21.

80. N.Y.—De Beixodon v. Brown & Seccomb, 188 N.Y.S. 451.

81. N.Y.—Bonito v. Mosquera, 15 N.Y. Super. 401.

regarded as the owner, within the meaning of the statute, where he is intrusted with the possession of a bill of lading⁸² drawn or indorsed to his name,⁸³ a custom-house permit,⁸⁴ or the receipt of a private warehouse,⁸⁵ although not of a bonded one.⁸⁶

The term "document of title," or an equivalent term, does not, however, include a weigher's return,⁸⁷ a delivery order,⁸⁸ a telegram from the shipper,⁸⁹ a manifest indicating the size of the shipment,⁹⁰ a consular invoice,^{90.5} or the certificate of registration of an automobile, at least where it has not been indorsed as required by statute to effect a transfer.⁹¹

§ 65. — Factors or Agents within Statutes

In order that the protection of the factors' acts may be invoked for one receiving property, the person improperly disposing of the property must have been the agent or factor of the owner.

In order that an unauthorized disposition of goods by a person other than the owner may be brought within the effect of the factors' acts, it is necessary that the relation of principal and agent or factor exist between such person and the owner of the goods;⁹² and if this relation in fact exists, the statute operates even though the parties call their relation by a different name.⁹³ While it has been held that the term "agent or factor," as used in the statutes, is to be taken in a restricted sense, and applies only to an agent or factor acting in mercantile transactions,⁹⁴ it has also been held that anyone who is intrusted with possession, or with

the lawful evidence of title to property, to enable him to sell it, becomes an agent within the meaning of the act.⁹⁵

The statute does not apply to a mere servant or clerk,⁹⁶ a caretaker,⁹⁷ the manager of a store carried on in the owner's name,⁹⁸ or one who has possession of the goods for carriage,⁹⁹ or otherwise as an independent contracting party.¹

§ 66. — Character and Sufficiency of Factor's or Agent's Possession of Goods or Evidence of Title

A factor's possession of goods, to come within the factors' acts, must be actual and not merely constructive; and possession of the goods or of documents of title must have been acquired with the consent of the owner and without fraud. In some jurisdictions, the factor must have been intrusted with the goods for the purpose of sale or as security for advances to be made or obtained thereon.

Where the possession of goods or merchandise, as distinguished from the possession of documentary evidence of title, is relied on to bring the case within a statute providing for the protection of persons dealing with a factor or agent intrusted with the possession of goods or merchandise, the possession must be actual and not merely constructive.² However, it has been held that the factor's possession is sufficient if he has such control of, or dominion over, the merchandise as to enable him rightfully to take possession of it without the aid of any new authority or document furnished by the

82. Cal.—Fairmont Creamery Co. v. Los Angeles Ice & Cold Storage Co., 190 P. 194, 47 C.A. 103. 25 C.J. p 422 note 24.

83. N.Y.—Toledo First Nat. Bank v. Shaw, 61 N.Y. 283.

Manufacturers' & Traders' Bank v. Farmers' & Mechanics' Nat. Bank, 2 Thomps. & C. 395, reversed on other grounds 60 N.Y. 40.

84. N.Y.—Bonito v. Mosquera, 15 N.Y. Super. 401.

25 C.J. p 422 note 26.

85. N.Y.—Bonito v. Mosquera, supra.

25 C.J. p 422 note 27.

86. U.S.—George v. Louisville Fourth Nat. Bank, C.C.Ky., 41 F. 257.

25 C.J. p 422 note 28.

87. N.Y.—Western Transp. Co. v. Barber, 56 N.Y. 544.

25 C.J. p 422 note 29.

88. N.Y.—Soltau v. Gerdau, 23 N.E. 864, 119 N.Y. 380, 16 Am.S.R. 843.

25 C.J. p 422 note 30.

89. N.Y.—De Beixodon v. Brown & Seccomb, 188 N.Y.S. 451.

90. N.Y.—De Beixodon v. Brown & Seccomb, supra.

90.5 N.Y.—Canales v. Earl, 168 N.Y.S. 726.

91. Mass.—Royle v. Worcester Buick Co., 137 N.E. 531, 243 Mass. 143, construing New York statute.

92. N.Y.—G. Dewey Sullivan, Inc., v. H. Stern, Inc., 265 N.Y.S. 481, 148 Misc. 235.

25 C.J. p 420 note 5.

93. N.Y.—New York Security & Trust Co. v. Lipman, 52 N.E. 595, 157 N.Y. 551.

25 C.J. p 421 note 6.

Trustee under trust receipt with power to sell

Mass.—Associates Discount Corporation v. C. E. Fay Co., 30 N.E.2d 876, 307 Mass. 577, 132 A.L.R. 519.

94. Md.—Levi v. Booth, 58 Md. 305, 42 Am.R. 332.

25 C.J. p 421 note 7.

Rule of ejusdem generis

The term "agent", as so used, applies only to agents engaged in busi-

ness similar to factors, under rule of "ejusdem generis."

Tenn.—Starkey v. Nixon, 270 S.W. 980, 151 Tenn. 637.

95. N.Y.—G. Dewey Sullivan, Inc. v. H. Stern, Inc., 265 N.Y.S. 481, 148 Misc. 235.

25 C.J. p 421 note 9.

Requirement that agent be authorized to sell see infra § 66.

96. N.Y.—Zachrisson v. Ahman, 4 N.Y. Super. 68.

25 C.J. p 421 note 10.

97. Md.—Levi v. Booth, 58 Md. 305, 42 Am.R. 332.

25 C.J. p 421 note 11.

98. N.Y.—Florence Sewing Mach. Co. v. Warford, 31 N.Y. Super. 433.

25 C.J. p 421 note 13.

99. Md.—Levi v. Booth, 58 Md. 305, 42 Am.R. 332.

25 C.J. p 421 note 17.

1. Md.—Levi v. Booth, supra.

25 C.J. p 421 note 18.

2. N.Y.—De Beixodon v. Brown & Seccomb, 188 N.Y.S. 451.

25 C.J. p 422 note 33.

owner.³ Goods in a warehouse subject to being withdrawn at pleasure by a factor on discharging the lien of the government for duties may be regarded as in his possession so as to support a pledge thereof made by him independently of the provisions of the act in regard to documentary evidences of title.⁴

Consent of owner. Whatever the character of the possession, whether of the goods or of the documents of title, it is essential that it be acquired with the consent of the owner,⁵ and that such consent be obtained without fraud.⁶ Possession acquired through negligence on the part of the owner is not sufficient, since negligence is not consent.⁷

While there is contradictory authority,⁸ it has been held not necessary that the principal should have intrusted the factor with the identical document of title on the faith of which he procures a lien, since intrusting him with the primary document is equivalent to intrusting him with all others which in ordinary usage of trade grow out of it.⁹

Purpose of possession. In some jurisdictions, where the possession of the goods is relied on to bring the transaction within the statute, the factor must not only be intrusted with the possession of the goods, but must be intrusted with their possession for the purpose of sale or as security for any advances to be made or obtained thereon;¹⁰ and, even though a factor obtained a customer for goods before they were consigned to him, he receives the goods for the purpose of making a transfer, within the meaning of this requirement.¹¹ A factor not authorized to sell does not, by paying freight, storage, and insurance premiums, acquire possession of the goods as security for advances, so as to be deemed the true owner within the factors' act.¹²

The provision that "nothing contained in this act shall authorize a common carrier, warehousekeeper or other person to whom merchandise or other property may be committed for transportation or storage only, to sell or hypothecate the same" com-

3. N.Y.—Pegram v. Carson, 23 N.Y. Super. 505.
25 C.J. p 422 note 34.

4. N.Y.—Cartwright v. Wilmerding, 24 N.Y. 521—Oakland Mfg. Co. v. F. C. Linde Co., 147 N.Y.S. 1045, 162 App.Div. 543.

5. N.Y.—Soltan v. Gerdau, 23 N.E. 864, 119 N.Y. 380, 16 Am.S.R. 843.
25 C.J. p 423 note 37.

6. Mass.—H. A. Prentice Co. v. Page, 41 N.E. 279, 164 Mass. 276.
25 C.J. p 423 note 38.

Test in determining applicability of the factors' act is whether, at time of obtaining possession, such possession was obtained with the preconceived intention of committing the crime of common-law larceny by trick and device, and, if so, the act does not apply, but if the intent was conceived after obtaining possession the act applies.

N.Y.—Deferred Payment Plan v. Bennett, 35 N.Y.S.2d 159, 264 App. Div. 694.

Copin v. Leuci, 138 N.Y.S.2d 290, 207 Misc. 396.

Fraud equivalent to larceny

(1) Where the owner's consent, or the possession, is obtained by fraud under such circumstances as would amount to larceny, the agent's possession is not such as is contemplated by the act.

N.Y.—L. W. Sweet & Co. v. Provident Loan Soc. of New York, 18 N.E.2d 847, 279 N.Y. 540.

Frisch v. Perle, 39 N.Y.S.2d 557, 265 App.Div. 220—Deferred Payment Plan v. Bennett, 35 N.Y.S.2d 159, 264 App.Div. 694—Nelkin v.

Provident Loan Soc. of New York, 271 N.Y.S. 314, 241 App.Div. 875, reversed on other grounds 193 N.E. 245, 265 N.Y. 393.

Copin v. Leuci, 138 N.Y.S.2d 290, 207 Misc. 396.

Landau v. Cramer, 32 N.Y.S.2d 684.

25 C.J. p 423 note 38 [a] (1).

(2) Where possession was obtained honestly, and the intention of converting the goods was subsequently formed, there would not be common-law larceny, and the factors' act would apply.

N.Y.—L. W. Sweet & Co. v. Provident Loan Soc. of New York, 18 N.E.2d 847, 279 N.Y. 540—Nelkin v. Provident Loan Soc. of New York, 193 N.E. 245, 265 N.Y. 393.

Sanette Corporation v. Sanette Corporation of New England, 230 N.Y.S. 102, 132 Misc. 455.

7. N.Y.—Toledo First Nat. Bank v. Shaw, 61 N.Y. 283.

25 C.J. p 423 note 39.

8. U.S.—George v. Louisville Fourth Nat. Bank, C.C.Ky., 41 F. 257.

9. N.Y.—Cartwright v. Wilmerding, 24 N.Y. 521.

25 C.J. p 424 notes 47, 50.

10. Mass.—Royle v. Worcester Buick Co., 137 N.E. 531, 243 Mass. 143, construing New York statute.

N.Y.—Brown v. S. & G. Gross & Co., 13 N.Y.S.2d 1020.

Tenn.—Gazzola v. Lacy Bros. & Kimball, 299 S.W. 1039, 156 Tenn. 229.
25 C.J. p 423 note 40.

Limited authority to sell is sufficient, and a bona fide sale beyond

factor's authority would be valid against the principal.

Mass.—Associates Discount Corporation v. C. E. Fay Co., 30 N.E.2d 876, 307 Mass. 577, 132 A.L.R. 519.

Custom affecting purpose of possession

Possession of piece of jewelry acquired under a memorandum agreement providing that the jewelry was delivered only for the purpose of examination and inspection was within the factors' act, where there was a general custom among jewelry dealers in city under which such a memorandum became agent in possession of chattel for purpose of sale.

N.Y.—Nelkin v. Provident Loan Soc. of New York, 193 N.E. 245, 265 N.Y. 393.

G. Dewey Sullivan, Inc., v. H. Stern, Inc., 265 N.Y.S. 481, 148 Misc. 235.

Landau v. Cramer, 32 N.Y.S.2d 684.

Possession by virtue of dealer's own title

Factor's act does not apply to automobile dealer not intrusted with possession of automobiles for purpose of sale, but in possession thereof by virtue of, and seeking to sell, his own title thereto, subject to mortgages thereon.

Ohio.—Cincinnati Finance Co. v. First Discount Corporation, 17 N.E.2d 383, 59 Ohio App. 131.

11. Cal.—Fairmont Creamery Co. v. Los Angeles Ice & Cold Storage Co., 165 P. 553, 33 C.A. 414.

12. Tenn.—Gazzola v. Lacy Bros. & Kimball, 299 S.W. 1039, 156 Tenn. 229.

prehends a factor intrusted with the possession for transportation or storage only.¹³

Loss of possession. Where the agent or factor accomplishes the purpose for which the goods or documents were intrusted to him, and parts with the possession in doing so, he does not, by afterward regaining possession, become intrusted with possession, within the meaning of the statutes.¹⁴

§ 67. — Persons Protected by Statutes

In general, factors' acts protect only those who in good faith, and in ignorance of any defect of title, purchase or make advances on goods or merchandise, on the faith of the apparent ownership thereof by the factor or agent. A valuable consideration other than an antecedent debt must generally be given for the sale or pledge.

As a general rule, factors' acts protect one who, in good faith, and in ignorance of any defect of title, purchases goods or merchandise, or makes advances thereon, on the faith of the apparent ownership thereof by a factor or agent who has been intrusted by the owner with the possession of the goods or merchandise or with the documents of title thereto,¹⁵ provided the purchaser or pledgee is induced so to act on the faith of the ownership being in the factor or agent.¹⁶ On the other hand, the purchaser or pledgee is not entitled to the protection of the statute where the factor or agent had neither possession of, nor documentary evidence of title to, the goods;¹⁷ or where the person who receives the goods from, or makes advances to, an agent or factor had notice, actual or constructive,

of the true ownership and want of authority on the part of the agent or factor;¹⁸ or where the protection of the statute would secure to a wrongdoer the fruits of a fraud, as where the goods or documents of title thereto were obtained from the owner by the factor or agent through fraud.¹⁹ The statute has also been held not to apply where the consignor accuses the consignee of misappropriating the consignor's property.^{19.5}

In some jurisdictions a person dealing with the factor is not deprived of the protection of the statute because of the fact that he knows the factor to be only an agent, if he acts bona fide and without notice that the factor is acting mala fide and beyond his authority;²⁰ but mere notice that the factor or agent holds the goods as such has been held sufficient to take the case out of the protection of the acts.²¹ A mere suspicion that the factor or agent is not the owner of the goods is not sufficient to put a person dealing with him on inquiry, and charge him with whatever knowledge such inquiry would have elicited.²²

Purchaser for value. To enable a person to claim the protection of the factors' acts, it is generally necessary that a valuable consideration should be given for the sale or pledge;²³ and it has been held that a person is not within the protection of the statutes where he receives the goods or document of title in payment of, or as security for, an antecedent debt of the factor or agent,²⁴ except where

13. Tenn.—Gazzola v. Lacy Bros. & Kimball, *supra*.
25 C.J. p 423 note 36.

14. U.S.—George v. Louisville Fourth Nat. Bank, C.C.Ky., 41 F. 257.

25 C.J. p 424 note 43.

15. N.Y.—Sanette Corporation v. Sanette Corporation of New England, 230 N.Y.S. 102, 132 Misc. 455.
25 C.J. p 425 note 61.

Pawnbrokers as within factors' acts see Pawnbrokers § 8.

16. N.Y.—Toledo First Nat. Bank v. Shaw, 61 N.Y. 283.
25 C.J. p 425 note 62.

Action on faith of documents of title
N.Y.—Pegram v. Carson, 23 N.Y.Super. 505.
25 C.J. p 424 note 52.

Duty of further inquiry

If the factor has possession of all the documents evidencing title which would ordinarily be in the hands of the true owner, the purchaser or pledgee is not bound to inquire further as to the true ownership.
N.Y.—Cartwright v. Wilmerding, 24 N.Y. 521.

25 C.J. p 424 note 48.

17. N.Y.—Elliott v. Bidwell, 51 N.Y. 644.

Kirsch v. Provident Loan Soc. of N. Y., 71 N.Y.S.2d 241, 189 Misc. 898.

25 C.J. p 425 note 63.

18. U.S.—Allen v. St. Louis Nat. Bank, Iowa, 7 S.Ct. 460, 120 U.S. 20, 30 L.Ed. 573.

25 C.J. p 425 note 65.

19. N.Y.—Landau v. Cramer, 32 N.Y.S.2d 684.

25 C.J. p 425 note 66.

Consent of owner generally see *supra* § 66.

19.5 N.Y.—People v. Rosenfeld, 83 N.Y.S.2d 691, 193 Misc. 277.

20. Wis.—Price v. Wisconsin M. & F. Ins. Co., 43 Wis. 267.

25 C.J. p 425 note 67.

Transaction held bona fide

Where an automobile distributor delivered an automobile to a retail dealer, with knowledge that a finance company had legal title, and later induced the dealer to exchange the automobile for another, notice to the distributor of circumstances which, if investigated, might have disclosed want of authority in the dealer to

exchange or barter the automobile was not inconsistent with good faith or with a bona fide contract, since the statutory test is good faith, and not reason to believe in the existence of authority or want of notice under principles of equity.

Mass.—Associates Discount Corporation v. C. E. Fay Co., 30 N.E.2d 876, 307 Mass. 577, 132 A.L.R. 519.

21. N.Y.—Stevens v. Wilson, 6 Hill 512.

25 C.J. p 426 note 68.

22. N.Y.—Kinston Cotton Mills v. Kuhne, 113 N.Y.S. 779, 129 App. Div. 250.

25 C.J. p 426 note 69.

23. U.S.—Blydenstein v. New York Security & Trust Co., N.Y., 67 F. 469, 15 C.C.A. 14.

25 C.J. p 426 note 70.

24. N.Y.—Commercial Credit Corporation v. Northern Westchester Bank, 177 N.E. 12, 256 N.Y. 482.

25 C.J. p 426 note 71.

Interest of agent acquired

By express provision of factors' act, one taking merchandise from a factor or agent in security for an antecedent debt of such agent ac-

such provision of the statute is repealed by implication because of inconsistency with some subsequent statute.²⁵

While it has been held that a person is not protected where he receives the goods through a barter by the factor for his own use,²⁶ it has also been held that an exchange or barter is within the statute;²⁷ and a contract of sale by a factor intrusted with goods for the purpose of sale is valid, although no money or obligation is given at the time of the contract, if an obligation is sufficiently entered into on the faith of the contract at any time while it remains unrescinded.²⁸

Transaction in ordinary course of business. Under some statutes it is necessary, in order to entitle one who deals with the factor or agent to the protection of a factors' act, that the sale or pledge for which he claims protection be transacted by such factor or agent in the usual and ordinary course of business.²⁹

Junior claimants have been held not protected by a factors' act, since that act inures only to the benefit of those acquiring valid liens on specific security.³⁰

§ 68. Actions by or against Principals or Factors

The form of action which should be instituted as between a principal or factor and a third person depends

on the circumstances of the case and the nature of the relief sought. Rules governing proceedings in civil actions generally have been applied in such actions with respect to pleading, evidence, and trial.

Where the principal's property is wrongfully sold or pledged, the principal may sue the purchaser in assumpsit for the purchase price,³¹ or may sue him in trover for the value of the property,³² or may maintain replevin to recover the property;³³ and, if the pledgee has sold the goods, the principal, instead of suing in trover, may maintain assumpsit against the pledgee for money had and received.³⁴

In accordance with the rule that a factor may, in his own name, sue a wrongdoer for torts relating to the goods in his possession, as discussed supra § 54, a factor may, in his own name, sue a third person in trover for a conversion of the goods,³⁵ or in replevin for their recovery when they are wrongfully taken from his possession.³⁶

A factor is liable in trover to the real owner of goods where he sells them and fails or refuses to turn over the proceeds.³⁷ An action against a factor to recover the proceeds of a consignment, brought by a third person claiming as owner of the goods, is a legal, and not an equitable, action.³⁸

Pleading. General rules of pleading have been applied in an action by the principal or factor against a third person, or by a third person against the principal or factor.³⁹ Where, in answering a bill by a principal's assignee against the factor for

quires no right or interest in the property other than such agent had, and so none where the agent had none.

N.Y.—*De Beixodon v. Brown & Secomb*, 188 N.Y.S. 451.
25 C.J. p 426 note 72.

Substitution of property pledged

(1) Where a factor made a valid pledge of certain goods, his subsequent substitution of other goods does not operate as a pledge for an antecedent debt, since the release of the goods previously pledged constitutes valuable consideration for the subsequent pledge.

Mass.—*Osgood Bradley Car Co. v. Standard Steel Motor Car Co.*, 156 N.E. 440, 259 Mass. 302.

(2) With regard to whether certain cars had been released from pledge by the subsequent pledge of a number of cars, including those originally pledged, it was held that the subsequent pledge was not a substitution of goods pledged, but was rather an additional pledge.

Mass.—*Osgood Bradley Car Co. v. Standard Steel Motor Car Co.*, supra.

25. Tenn.—*James v. Meriwether*

Graham Oliver Co., 279 S.W. 390, 152 Tenn. 528.

26. Wis.—*Victor Sewing Mach. Co. v. Heller*, 44 Wis. 265.

27. "Sale" as including exchange

Although, at common law, authority to sell does not include authority to exchange or barter, in statutes the word "sale" is commonly construed as including exchange or barter, and this is the construction given it in the factors' act relating to the validity of contracts of sale.

Mass.—*Associates Discount Corporation v. C. E. Fay Co.*, 30 N.E.2d 876, 307 Mass. 577, 132 A.L.R. 519.

28. N.Y.—*Jennings v. Merrill*, 20 Wend. 9.

29. Md.—*Levi v. Booth*, 58 Md. 305, 42 Am.R. 332.
25 C.J. p 426 note 75.

30. U.S.—*In re James, Inc.*, C.C.A. N.Y., 30 F.2d 555.

31. Ill.—*Hamilton Mach. Tool Co. v. Mechanics' Mach. Co.*, 179 Ill. App. 145.

32. Ga.—*Payne v. American Agricultural Chemical Co.*, 18 S.E.2d 635, 66 Ga.App. 596.

Mass.—*Peters v. Ballistier*, 3 Pick. 495.

25 C.J. p 353 note 18.

33. Ohio.—*Cleveland v. Shoeman*, 40 Ohio St. 176.

25 C.J. p 353 note 24, p 427 note 81.

34. Mass.—*Nowell v. Pratt*, 5 Cush. 111—*Chickering v. Hosmer*, 12 Mass. 183.

35. Ala.—*Beyer v. Bush*, 50 Ala. 19.
25 C.J. p 427 note 83.

36. Me.—*Sewall v. Nichols*, 34 Me. 582.

25 C.J. p 427 note 84.

37. Tex.—*Alamo Live Stock Commn. Co. v. Heimer*, Civ.App., 192 S.W. 591.

38. N.Y.—*American Trust & Savings Bank v. Thalheimer*, 51 N.Y.S. 813, 29 App.Div. 170.

39. Petition held sufficient

(1) In trover action based on allegation that trustee had possession of certain fertilizers of the plaintiff under trust agreement for sale and to account for proceeds, and after sale turned over cedar poles received in part payment to defendant, which credited poles, or their value, on past-due debts of trustee to plain-

an account, the factor claims to have paid a balance due his principal by notes of the principal purchased by him, he must answer particularly interrogatories as to how he came into possession of the notes and on what terms.⁴⁰

Evidence. General rules of evidence control in an action between a principal or factor and a third person, with regard to the burden of proof⁴¹ and

presumptions,⁴² the admissibility of evidence,⁴³ and its weight and sufficiency.⁴⁴

Trial. The general rules which govern the trials in civil actions in general apply in an action between a principal or factor and a third person, as with regard to questions of law and fact,⁴⁵ instructions,⁴⁶ and questions as to verdict and findings.⁴⁷

tiff's detriment, complaint was not demurrable for failure to allege wrongful conversion of either poles or proceeds.

S.C.—International Agr. Corporation v. Lockhart Power Co., 188 S.E. 243, 181 S.C. 501.

(2) Other petitions held sufficient see 25 C.J. p 427 note 88 [a].

40. Pa.—Farnum v. Farrell, 2 Phila. 368.

41. Tex.—Shield Co. v. Schunder, Civ.App., 81 S.W.2d 177. 25 C.J. p 427 note 91.

Present consideration

Bank taking bill of sale as collateral security has the burden of showing that the security was for money presently advanced rather than for an antecedent debt.

N.Y.—Commercial Credit Corporation v. Northern Westchester Bank, 177 N.E. 12, 256 N.Y. 482.

42. Ga.—Powell v. Brunner, 12 S.E. 744, 86 Ga. 531. 25 C.J. p 427 note 92.

Presumption of contract in factor's name

It has been held that there is a presumption that a factor has contracted in his own and not in his principal's name; but this may be overcome, even in the absence of direct evidence, by evidence of the relations between the parties prior and subsequent to the transaction in question, and evidence which shows that the contracting principals were in direct relation with each other both before and after the transaction in question, and that they have corresponded directly concerning it, will overcome the presumption.

Philippine.—Pastells v. Hollman, 2 Philippine 235.

43. Minn.—Banner Grain Co. v. Burr Farmers' Elevator & Supply Co., 202 N.W. 740, 162 Minn. 334. 25 C.J. p 427 note 93.

Evidence held inadmissible

(1) In an action by a shipper against a railroad for damages to the goods shipped, evidence as to the condition of the account between plaintiff and the factor to whom the goods were consigned is irrelevant, since the factor is not the owner of

the goods, although he may have advanced money equal to, or even exceeding, their value.

S.C.—Hill v. Georgia, C. & N. R. Co., 21 S.E. 337, 43 S.C. 461.

(2) Other evidence held inadmissible see 25 C.J. p 427 note 93 [b].

44. Wash.—Whitney-Ellsworth Co. v. Anderson Mercantile Co., 294 P. 548, 160 Wash. 108. 25 C.J. p 428 note 94.

Authority of agent

In an action for the conversion of cattle, evidence that defendant bought the cattle from one whom plaintiff had represented to be his agent, that plaintiff had stated to others that he had transferred the cattle to the agent, and that defendant had paid the agent for the cattle, such evidence tending to show that such person was plaintiff's factor, having possession, with power to sell and collect, was held insufficient to support a verdict for plaintiff.

Cal.—Soto v. Globe Oil Mills, 203 P. 830, 55 C.A. 532.

Delivery to agent for sale

Finding that former owner delivered automobile to agent for purpose of sale was held sustained by evidence in former owner's action against purchaser from agent.

Cal.—Kenny v. Christianson, 253 P. 715, 200 C. 419, 50 A.L.R. 1297.

Evidence held sufficient to establish

(1) That dealer was record owners' factor.

Cal.—Pacific Finance Corp. v. Foust, 285 P.2d 632, 44 C.2d 853.

(2) That commission merchants who received purchase price of cattle from purchaser and in turn paid mortgagor were acting as agents for mortgagor in selling such cattle, that purchaser of cattle was not advised as to actual ownership of the cattle at time of purchase, and that amount paid to mortgagor by commission merchants was fair market value of cattle.

U.S.—U. S. v. Ferguson, D.C.Ark., 158 F.Supp. 814.

(3) That the purchaser of a diamond ring was a bona fide purchaser

acting in good faith and with honest intentions, and that the seller clothed her agent who sold the ring to the purchaser with legal possession within meaning of the factor's act, so that loss resulting from alleged act of the agent was required to be placed not on the purchaser who was wholly innocent, but on the seller who brought about the loss. N.Y.—Copin v. Leuci, 138 N.Y.S.2d 290, 207 Misc. 396.

(4) That respondent filed a factor's lien in office of register of county, that a sign was properly posted and maintained in offices of corporation against which the lien was filed, which sign complied with statutory requirements, that respondent had lent money to another corporation, and that such money was due and owing when respondent filed a factor's lien against such other corporation.

N.Y.—Bloch Bros. Paper Co. v. Efficient Direct Mail Service, 102 N.Y. S.2d 1003, 198 Misc. 669.

Under Perishable Commodities Act

U.S.—Central Fruit and Vegetable Co. v. Crane, C.A.Cal., 198 F.2d 808. Harcourt-Green Co. v. Pennsylvania Macaroni Co., D.C.Pa., 82 F. Supp. 488—Western Fruit Growers v. Bellman Produce Co., D.C.Pa., 75 F.Supp. 334.

45. Cal.—Siegel v. Bayless, 248 P. 2d 968, 113 C.A.2d 661.

Pa.—Evans-Morrow Motor Co. v. Samuels, 83 Pa.Super. 280.

25 C.J. p 423 note 40 [b], p 428 note 1.

Estoppel of principal to follow proceeds of sale held for jury.

Tex.—Shield Co. v. Schunder, Civ. App., 81 S.W.2d 177.

46. N.C.—Hoffman v. Kramer, 31 S. E. 828, 123 N.C. 566.

25 C.J. p 428 note 3.

47. U.S.—Rodrigues v. Dunn, D.C. Mich., 128 F.Supp. 604.

Ga.—Planters' Warehouse Co. v. Hardin, 118 S.E. 441, 30 Ga.App. 459.

Mass.—Boston Supply Co. v. Rubin, 101 N.E. 133, 214 Mass. 217.

Amount of recovery

U.S.—U. S. v. Ferguson, D.C.Ark., 158 F.Supp. 814.

FACTORY. The term is defined in Manufactures § 1 c. See also Health § 22 d, and the indexes to the titles Master and Servant and Workmen's Compensation.

Phrases employing the word are set out in the note.¹

FACTUM. Literally "A fact." "Fact," as distinguished from "law."²

In old English law, a deed, a person's act and deed; more specifically, a culpable or criminal act, or an act not founded in law;³ also, anything stated or made certain,⁴ hence a thing done in writing; a conveyance or other written instrument, under seal, formerly otherwise termed "charta," and by the

civilians "litterarum obligatio."⁵

In testamentary law, the execution or due execution of a will.⁶

Its meanings in other systems of law are indicated in the footnote.⁷

Phrases employing the word are set out in the note.⁸

Facta. The plural of "factum," in old English law, deeds, as in the phrase "facta armorum," deeds or feats of arms, that is, jousts or tournaments; also, facts, as in the phrase "facta et casus," facts and cases.⁹

Facto. The ablative singular of "factum," meaning in fact, by an act, by the act or fact.¹⁰

1. Using the noun

(1) "Factory or workshop where machinery was used."

Okl.—Plaza Grill v. Webster, 78 P. 2d 818, 819, 182 Okl. 533—Harbour-Longmire-Pace Co. v. State Industrial Commission, 296 P. 456, 457, 147 Okl. 207.

(2) "Nontextile factory," defined by act of parliament as meaning, among other things, any works, warehouses, furnaces, mills, foundries, or places named in Part I of Schedule IV of the Factory and Workshop Act of 1878, and including bleaching and dyeing works.

Eng.—Rogers v. Manchester Packing Co., 1898, 1 Q.B. 344, 347. 46 C.J. p 494 note 76.

Using the adjective

(1) "Factory acts," defined as laws enacted for the purpose of regulating the hours of work, and the sanitary condition, and preserving the health and morals of the employees, and promoting the education of young persons employed at such labor. Black L.D.

(2) "Factory prices," as meaning the prices at which goods may be bought at factories as distinguished from the prices of those bought in the market, after they have passed into the hands of third parties or shopkeepers.

U.S.—Whipple v. Levett, C.C.R.I., 29 F.Cas.No.17,518, 2 Mason 89, 90.

(3) "Factory rating," with reference to carrying capacity of motor-trucks, means the customary public announcement of truck's capacity made by the manufacturer in placing motortrucks on market.

Tenn.—Memphis Steam Laundry Co. v. Crenshaw, 61 S.W.2d 669, 670, 166 Tenn. 168.

(4) "Tenant factory buildings," defined as buildings the separate parts of which are used by different persons, and one or more of which parts is used as a factory.

N.Y.—People on Complaint of McAllister v. Duplan Silk Corporation, 203 N.Y.S. 382, 383, 208 App.Div. 435.

(5) "Wholesale factory prices," as referring to some general rule known to cotton manufacturers, to be ascertained as a matter of fact from evidence of usage and intention of the parties, but as importing prima facie the actual wholesale market prices at the factory.

Conn.—Avery v. Stewart, 2 Conn. 69, 73, 82, 7 Am.D. 240.

2. Burrill L.D.

3. Black L.D.

4. Black L.D.

5. Burrill L.D.

6. Black L.D.

"Factum of a will"

U.S.—Weatherhead v. Baskerville, Tenn., 11 How. 328, 358, 13 L.Ed. 717.

7. In the civil law, fact, a fact, a matter of fact as distinguished from a matter of law.

Black L.D.

In French law, a memoir which contains concisely set down the fact on which a contest has happened, the means on which a party founds his pretensions, with the refutation of the means of the adverse party. Black L.D.

In old European law, a portion or allotment of land; otherwise called a hide, bovata, etc.

Black L.D.

In Roman law, some writers affected to make a distinction between "factum" and "gestum," but the best authorities pronounced this subtle and indefensible.

Black L.D., sub verbo Gestum.

8. "Non est factum"

(1) Literally, "Is not [his] deed." Burrill L.D.

(2) A plea by way of traverse,

which occurs in debt on bond or other specialty, and also in covenant.

Black L.D.

See also Bonds § 111 b; Contracts § 560; Covenant, Action of §§ 28, 33 a (2); Debt, Action of § 11 b (3); and the sections relating to pleading in other particular titles dealing with obligations.

Other phrases

(1) "Animus est factum," used with reference to change of domicile and as involving intention and bodily presence.

Or.—Pickering v. Winch, 87 P. 763, 767, 48 Or. 500, 9 L.R.A., N.S., 1159. Va.—Guilfoil v. Hayes, 194 S.E. 804, 807, 169 Va. 548.

See also Domicile §§ 9 notes 57-60 and 13 note 43.

(2) "Factum juridicum," as meaning a juridical fact, and denoting one of the factors or elements constituting an obligation. Black L.D.

(3) "Factum probandum," as the fact to be proved, a fact which is in issue, and to which evidence is to be directed.

Black L.D.

(4) "Factum probans," as meaning a probative or evidentiary fact, a subsidiary or connected fact tending to prove the principal fact in issue, or a piece of circumstantial evidence. Black L.D.

9. Black L.D.

10. Black L.D.

"Facto et animo"

In fact and intent.

N.D.—Northwestern Mortgage & Security Co. v. Noel Const. Co., 300 N.W. 28, 31, 71 N.D. 256.

"Ipso facto"

By the act itself; by the mere effect of a fact, without anything superadded, or any proceeding upon it to give it effect.

Black L.D.

FACTUM A JUDICE QUOD AD EJUS OFFICIUM NON SPECTAT, NON RATUM EST.¹¹

FACTUM CUIQUE SUUM, NON ADVERSARIO, NOCERE DEBET.¹²

FACTUM INFECTUM FIERI NEQUIT.¹³

FACTUM NEGANTIS NULLA PROBATIO.¹⁴

FACTUM NON DICITUR QUOD NON PERSEVERAT.¹⁵

FACTUM UNIUS ALTERI NOCERI NON DEBET.¹⁶

FACTURA. In Spanish commercial law, an invoice; and, more specifically, the itemized statement or account which a factor renders his principal.¹⁷

FACULTAD. Spanish, literally, "Faculty;" hence in Spanish law, power, permission, as a royal license; also a group of the doctors or masters of a university, as the "facultad de medicina," faculty of medicine.¹⁸

FACULTAS PROBATIONUM NON EST ANGUSTANDA.¹⁹

FACULTATIVE COMPENSATION. A civil law

term defined as compensation which operates by the will of the parties, when one of them removes an obstacle resulting from the dispositions of the law.²⁰

FACULTY and FACULTIES. Primarily, ability to act or do, whether inborn or cultivated; and, derivatively, a branch of learning or instruction in a university;²¹ hence in American colleges, the teaching body of the institution.²²

In ecclesiastical affairs, properly speaking, a license issued by the ordinary through his consistorial court, to effect certain alterations of a grave character in a parish church.²³

In Scotch law, a power founded on consent, as distinguished from a power founded on property.²⁴

"Faculties," the plural of the term, includes any mode of bodily or mental behavior regarded as implying a natural endowment or acquired power.²⁵ It has been compared with "senses."²⁶

Phrases employing the word are set out in the note.²⁷

FADEOMETER TEST. A test whereby window shades are subjected to a scientific test under artificial sunlight to determine whether they are made of the right material.^{27.50}

11. A maxim meaning "An act of a judge which relates not to his office is of no force."
Black L.D.

Applied in
Eng.—Marshalsea's Case, 10 Coke 68b, 76a, 77 Reprint 1027.

12. A maxim meaning "A party's own act should prejudice himself, not his adversary."
Black L.D.

13. A maxim meaning "A thing done cannot be undone."
Black L.D.

14. A maxim meaning "There is no proof incumbent upon him who denies a fact."
Black L.D.

15. A maxim meaning "That is not said to be done which does not last."
Black L.D.

Applied in
Eng.—Goodall's Case, 5 Coke 95a, 96a, 77 Reprint 202.

16. A maxim meaning "The deed of one should not hurt another."
Black L.D.

17. Escriche Diccionario.

18. Escriche Diccionario.

19. A maxim meaning "The power of proofs [right of offering or giving testimony] is not to be narrowed."
Black L.D.

20. La.—Brock v. Pan American Petroleum Corporation, 173 So. 121, 123, 186 La. 607—In re Canal Bank & Trust Company, 152 So. 578, 582, 178 La. 961.

In re Interstate Trust & Banking Co., App., 194 So. 35, 40, 42.
See also the C.J.S. definition Compensation and Set-Off and Counterclaim § 9.

"In France, where the Code contains articles similar to ours, it is universally recognized that, where the obstacle preventing compensation is in favor of one of the parties, that party may waive the obstacle and plead compensation; this kind of compensation being designated by the French commentators as 'facultative compensation.'"
La.—In re Canal Bank & Trust Company, 152 So. 578, 582, 178 La. 961.

21. Webster New Int.D.

22. Ohio.—West v. Board of Trustees of Miami University and Miami Normal School, 181 N.E. 144, 150, 41 Ohio App. 367.

23. Eng.—Boyd v. Phillpotts, L.R. 4 A. & E. 297, 342.

24. Black L.D.

25. Standard D.

26. Ill.—Kaminski v. Chicago City R. Co., 181 Ill.App. 706, 709.

27. Phrases

(1) "Allegation of faculties" see the C.J.S. definition Allegation.

(2) "Any faculty, profession, occupation, trade, or employment."
S.C.—Charleston v. Lee, 6 S.C.L. 57, 59.

(3) "Court of faculties" see Courts § 11.

(4) "Faculty of advocates," defined as the college or society of advocates in Scotland.
Black L.D.

(5) "Faculty of physic," as meaning the medical faculty of a university as distinguished from other faculties.

Md.—Regents Univ. of Maryland v. Williams, 9 Gill & J. 365, 392, 31 Am.D. 72.

(6) "Faculty tax" see Taxation § 3.

(7) "Master of the faculties," defined as an official in the archdiocese of Canterbury who granted dispensations.
Black L.D.

(8) "Reasonable use of faculties" means such use as an ordinarily prudent person would have made of them under the circumstances.
Mo.—Boland v. Thompson, App., 142 S.W.2d 790, 793.

27.50 N.Y.—Merriam Display Supply Studio v. Harlambides, 91 N.Y.S.2d 901, 902, 196 Misc. 352.

FADERFIUM. In old English law, a marriage gift coming from the father or brother of the bride.²⁸

FADE THE GAME. As used in crap shooting see Gaming § 1 b (3).

FADIGA. In Spanish feudal law, the lord's prior right of purchase whenever the fief is offered for sale.²⁹

FADING. As a term used with reference to radio reception see Telegraphs, Telephones, Radio, and Television § 293.

FÆDER-FEOH. In old English law, the portion brought by a wife to her husband, and which reverted to a widow, in case the heir of her deceased husband refused his consent to her second marriage; that is, it reverted to her family in case she returned to them.³⁰

FÆSTING-MEN. Approved men who were strong-armed; "habentes homines" or rich men, men of substance; pledges or bondsmen, who, by Saxon custom, were bound to answer for each other's good behavior.³¹

FAGGOT or FAGOT. In the days before the Reformation, an embroidered badge, in the form of a fagot of firewood, worn by persons who had recanted and abjured what was then adjudged to be heresy, as an emblem of what they had merited;³² also, a term applied to votes manufactured by nom-

inally transferring land to persons otherwise not qualified to vote for members of parliament.³³

FAIDA. In Saxon law, malice, open and deadly hostility, deadly feud.³⁴

FAIL. The word "fail" is defined as meaning to become or be found deficient or wanting;³⁵ to be wanting;^{35.5} to be wanting in action;^{35.10} to be affected with want;^{35.15} to come short of;^{35.20} to be or become deficient in any measure or degree;^{35.25} to fall short;^{35.30} to lack;^{35.35} to prove ineffective or inoperative.^{35.40}

"Fail" is further defined as meaning to keep or cease from an appointed, proper, expected, or required action;³⁶ to leave unperformed, to neglect, or omit;³⁷ and also to make an unavailing effort to succeed.³⁸

Where the word is used in connection with the performance of a duty for which a penalty or liability is imposed, it necessarily implies a notice in some reasonable form, as a prior act or condition by which the one failing shall have become aware of the duty;³⁹ it conveys the idea of fault, negligence, or refusal,⁴⁰ or, in some cases, neglect or default, requiring opportunity to act,⁴¹ and covers both the intentional and unintentional nonperformance of the duty imposed.⁴²

In a different sense "fail" means to become weaker, to grow faint, to sink;⁴³ hence to decline.⁴⁴

28. Black L.D.

29. Escriche Diccionario.

30. Black L.D.

31. Black L.D.

32. Black L.D.

33. "A faggot vote occurs where a man is formally possessed of a right to vote for members of parliament, without possessing the substance which the vote should represent; as if he is enabled to buy a property, and at the same moment mortgage it to its full value for the mere sake of the vote." Black L.D.

34. Black L.D.

Between families

The word designated the enmity between the family of a murdered man and that of his murderer, which was recognized, among the Teutonic peoples, as justification for vengeance taken by any one of the former upon any one of the latter. Black L.D.

35. N.Y.—In re Merritt's Will, 14 N.Y.S.2d 103, 107, 171 Misc. 812.

To become deficient or lacking

Ariz.—Rillito Canal Co. v. Schmidt, 89 P. 523, 525, 11 Ariz. 49.

35.5 Kan.—Driscoll v. Hershberger, 238 P.2d 493, 500, 172 Kan. 145.

35.10 U.S.—Ginnocchio v. Hydraulic Press Brick Co., D.C.Ohio, 266 F. 564, 569.

Similarly defined

To be found wanting with respect to an action, a duty, an effect, etc. Kan.—Driscoll v. Hershberger, 238 P.2d 493, 500, 172 Kan. 145.

35.15 Kan.—Driscoll v. Hershberger, supra.

35.20 Kan.—Driscoll v. Hershberger, supra.

N.Y.—In re Merritt's Will, 14 N.Y.S. 2d 103, 107, 171 Misc. 812.

Similarly defined

To come short of a result or object aimed at, desired, or attempted. Kan.—Driscoll v. Hershberger, 238 P.2d 493, 500, 172 Kan. 145.

35.25 Kan.—Driscoll v. Hershberger, supra.

35.30 Kan.—Driscoll v. Hershberger, supra.

35.35 Kan.—Driscoll v. Hershberger, supra.

N.Y.—In re Merritt's Will, 14 N.Y.S. 2d 103, 107, 171 Misc. 812.

35.40 N.Y.—In re Merritt's Will, supra.

36. Cal.—Romero v. Department of Public Works, 109 P.2d 662, 665, 17 C.2d 189.

37. Neb.—Buffalo County v. Phelps County, 261 N.W. 360, 361, 362, 129 Neb. 268.

25 C.J. p 429 notes 27, 29, 31.

38. Ind.—Pennsylvania Co. v. Good, 103 N.E. 672, 674, 56 Ind.App. 562.

39. Neb.—Buffalo County v. Phelps County, 261 N.W. 360, 361, 129 Neb. 268.

40. Mo.—Walker v. Sheffield Steel Corporation, 27 S.W.2d 44, 48, 224 Mo.App. 849.

41. Wis.—Worthington Pump & Machinery Corporation v. City of Cudahy, 195 N.W. 717, 182 Wis. 8.

42. Ark.—Howell v. Lamberson, 231 S.W. 872, 873, 149 Ark. 183.

43. Century D.

44. Neb.—Buffalo County v. Phelps

In commercial law "fail" means to become unable to pay one's notes or other obligations,⁴⁵ conveying an idea of insolvency or a want of resources to meet engagements.⁴⁶

In particular connections, the word has been held equivalent to, or synonymous with, "decline" see the C.J.S. definition "Decline," "lapse,"⁴⁷ "neglect,"⁴⁸ and "refuse,"⁴⁹ although it is also distinguished from "refuse."⁵⁰

Failed. In its primary meaning, the term has been said to signify fell short of, and, with nothing more, not to import a neglect of duty,⁵¹ but, in a particular context, it has been held to mean designedly or intentionally neglected to perform one's

duty.⁵²

In particular connections, the term has been held synonymous with "lapsed,"⁵³ and has been distinguished from "neglected."⁵⁴

Phrases employing the word are set out in the note.⁵⁵ Other phrases as to which more recent adjudications have not been found see 25 C.J. p 429 note 35—p 430 note 58.

FAILLITE. In French law, bankruptcy; failure; the situation of a debtor who finds himself unable to fulfill his engagements.⁵⁶

FAILURE. When used in connection with any enterprise, in its ordinary and obvious sense, the term

County, 261 N.W. 360, 361, 362, 129 Neb. 268.

45. U.S.—Mayer v. Hermann, C.C.N.Y., 16 F.Cas.No.9,344, 10 Blatchf. 256.

46. Ala.—Davis v. Campbell, 3 Stew. 319, 321.

47. U.S.—Gredig v. Sterling, C.C.A. Tex., 47 F.2d 832, 834.

Del.—Wilmington Trust Co. v. Wilmington Trust Co., 15 A.2d 830, 834, 25 Del.Ch. 204.

N.Y.—Sherman v. Richmond Hose Co. No. 2, 130 N.E. 613, 615, 230 N.Y. 462.

R.I.—Winsor v. Brown, 136 A. 434, 435, 48 R.I. 200.

48. Cal.—Norton v. Lewis, 168 P. 388, 389, 34 C.A. 621.

Ky.—Chesapeake & Ohio R. Co. v. Commonwealth, 84 S.W. 566, 568, 119 Ky. 519, 27 Ky.L. 176.

Minn.—Austro-Hungarian Consul v. Westphal, 139 N.W. 300, 308, 120 Minn. 122.

49. Ky.—Chesapeake & Ohio R. Co. v. Commonwealth, 84 S.W. 566, 568, 119 Ky. 519, 27 Ky.L. 176.

25 C.J. p 429 note 33.

50. Gist of distinction

"Fail" is distinguished from "refuse," in that the latter involves an act of the will, while the former may be an act of inevitable necessity.

U.S.—Taylor v. Mason, Md., 9 Wheat. 325, 344, 6 L.Ed. 101.

N.M.—Maestas v. American Metal Co. of New Mexico, 20 P.2d 924, 928, 37 N.M. 203.

51. Cal.—Rapaport v. Civil Service Commission of State of California, 25 P.2d 265, 267, 134 C.A. 319.

52. Ala.—Louisville & N. R. Co. v. Mason, 58 So. 963, 964, 4 Ala.App. 353.

53. N.Y.—Sherman v. Richmond Hose Co. No. 2, 130 N.E. 613, 615, 230 N.Y. 462.

54. Cal.—Rapaport v. Civil Service

Commission of State of California, 25 P.2d 265, 267, 134 C.A. 319.

55. "Fail and refuse"

(1) An ambiguous phrase which has different meanings in different connections.

Ala.—Louisville & N. R. Co. v. Mason, 58 So. 963, 965, 4 Ala.App. 353.

(2) It is a common legal phrase, implying only that conventional refusal which is inherent in mere failure.

U.S.—Mackey v. U. S., C.C.A.Tenn., 290 F. 18, 21.

(3) It may mean something more than passive neglect.

U.S.—Louisville & N. R. Co. v. Mason, supra.

"Failed and refused"

(1) Held not to imply that there was a deliberate, intentional, and inexcusable refusal to comply with the statute, either with or without demand therefor.

U.S.—Mackey v. U. S., C.C.A.Tenn., 290 F. 18, 21.

(2) Held to imply willful neglect or refusal.

Ala.—Louisville & N. R. Co. v. Mason, 58 So. 963, 964, 4 Ala.App. 353.

Other phrases

(1) "Fail by reason of insufficient membership."

Conn.—Dresser v. Hartford L. Ins. Co., 70 A. 39, 49, 80 Conn. 681.

(2) "Failed . . . to co-operate" see the C.J.S. definition Co-operate.

(3) "Failed to plead or otherwise defend."

U.S.—Commercial Casualty Ins. Co. v. White Line Transfer & Storage Co., C.C.A.Iowa, 114 F.2d 946, 947.

(4) "Failing to comply," as ordinarily synonymous with "refusing to comply," but not always so.

U.S.—Taylor v. Mason, Md., 9 Wheat. 327, 348, 6 L.Ed. 101.

53 C.J. p 1065 note 87.

(5) "Failing to pay," as distinguished from "refusing to pay."

Ind.—Rushville Co-op. Tel. Co. v. Irvin, 59 N.E. 327, 329, 27 Ind.App. 62.

(6) "Fail or refuse."

Wis.—Worthington Pump & Machinery Corporation v. City of Cudahy, 195 N.W. 717, 182 Wis. 8.

25 C.J. p 429 note 39.

(7) "Fails to appear."

Kan.—Covart v. Haskins, 18 P. 522, 523, 39 Kan. 571.

N.Y.—Stilwell v. Rowe, 145 N.Y.S. 1095, 1098, 83 Misc. 297.

"Default" synonymous see the C.J.S. definition Default.

(8) "Fails to attend upon the court."

Okl.—Smith v. State, 275 P. 1071, 1072, 42 Okl.Cr. 308.

(9) "Fails to proceed with the project."

Mo.—Haskins v. City of De Soto, App., 35 S.W.2d 964, 968.

(10) "Fail to comply," as signifying a refusal to comply.

U.S.—Ginocchio v. Hydraulic Press Brick Co., D.C.Ohio, 266 F. 564, 569.

(11) "Fail to reach an agreement."

Ind.—In re Moore, 138 N.E. 783, 784, 79 Ind.App. 470.

(12) "In failing circumstances" see the C.J.S. definition Circumstance, also Banks and Banking § 156 d notes 71-73.

(13) "Just barely fail to produce," as distinguished from "calculated to produce that result" see the C.J.S. definition Calculate.

(14) "Lapse" or "fail."

N.Y.—Sherman v. Richmond Hose Co. No. 2, 130 N.E. 613, 615, 230 N.Y. 462.

(15) "Shall fail, refuse, or neglect," as meaning something more than an unavoidable or accidental violation of the statute.

Ky.—Chesapeake & Ohio R. Co. v. Commonwealth, 84 S.W. 566, 568, 119 Ky. 519, 27 Ky.L. 176.

56. Black L.D.

means abandonment or defeat;⁵⁷ a cessation or deficiency of supply; a partial or total deficiency in action, etc.,⁵⁸ the result of action which predicates earnest effort, and not mere inaction and refusal to do.⁵⁹ The term connotes an attempt, an effort, a trial,⁶⁰ and presupposes an effort that has proved fruitless.⁶¹

The word "failure" is defined as meaning a default;^{61.5} an omission to perform a duty or appointed function;^{61.10} and it is sometimes used in the sense of nonperformance of a duty, that is, as the equivalent of "neglect,"⁶² and covers both intentional and unintentional nonperformance.⁶³

It may or may not be employed as synonymous with "refusal,"⁶⁴ and it has been held to be synonymous with "lapse"⁶⁵ and "want,"⁶⁶ although in a particular connection it has been said that "failure" is of broader significance than "want."⁶⁷

As used in a mechanics' lien statute relating to

the failure to name the owner against whom the lien is claimed see *Mechanics' Liens* § 162 a (4).

Commercial use. As applied to a merchant or mercantile concern, "failure" has been employed as meaning an inability of a debtor to pay his debts, as a result of insolvency;⁶⁸ a discontinuation of business from insolvency, bankruptcy, or the like, such as ordinarily would result from prior conditions and have a natural tendency to prove prior failing circumstances;⁶⁹ insolvency;⁷⁰ the situation of a debtor who cannot pay his debts;⁷¹ a suspension of payment or an enforced suspension of business.⁷²

In this sense, "failure" is usually accompanied by, or is the result of, insolvency; but it does not necessarily import insolvency conclusively;⁷³ and is not always synonymous with "insolvency."⁷⁴

Phrases employing the word are set out in the note.⁷⁵ Other phrases as to which more recent ad-

57. Mo.—*Corpus Juris* quoted in *State v. Summers*, 6 S.W.2d 883, 885, 320 Mo. 189.

N.C.—*White v. Pettijohn*, 23 N.C. 52, 55.

"There may be checks—or disappointments—there may be auguries of ill omen—but so long as the enterprise is prosecuted and its results are unascertained, there is no failure."

Mo.—*Corpus Juris* quoted in *State v. Summers*, 6 S.W.2d 883, 886, 320 Mo. 189.

N.C.—*White v. Pettijohn*, 23 N.C. 52, 55.

58. Tex.—*San Jacinto Oil Co. v. Ft. Worth Light & Power Co.*, 93 S.W. 173, 176, 41 Tex.Civ.App. 293.

59. Ky.—*Skidmore v. Hurst*, 68 S. W. 841, 842, 113 Ky. 694, 24 Ky.L. 536.

N.J.—*O'Connor v. Tyrrell*, 30 A. 1061, 1063, 53 N.J.Eq. 15.

60. Ind.—*In re Moore*, 138 N.E. 783, 784, 79 Ind.App. 470.

61. Vt.—*Scott v. Sutor*, 152 A. 801, 802, 103 Vt. 175.

61.5 Ohio.—*State ex rel. Flask v. Collins*, 73 N.E.2d 195, 197, 148 Ohio St. 45.

61.10 U.S.—*U. S. v. Heikkinen*, C.A. Wis., 240 F.2d 94, 100.

Similarly defined

Omission to perform, especially an appointed function.

Ohio.—*State ex rel. Flask v. Collins*, 73 N.E.2d 195, 197, 148 Ohio St. 45.

62. Minn.—*State v. Butler*, 83 N.W. 483, 484, 81 Minn. 103—*State v. Scott County*, 44 N.W. 64, 42 Minn. 282.

63. U.S.—*Standard Oil Co. v. U. S.*, Ill., 164 F. 376, 391, 90 C.C.A. 364. Wash.—*State ex rel. Woodworth & Cornell v. Superior Court for King County*, 113 P.2d 527, 530, 9 Wash. 2d 37.

64. May be synonymous

Ky.—*Ennis v. Adkins*, 118 S.W.2d 175, 177, 274 Ky. 121—*Hicks v. Conn*, 109 S.W.2d 811, 813, 270 Ky. 344.

Mass.—*Elfman v. Glaser*, 47 N.E.2d 925, 929, 313 Mass. 370. 25 C.J. p 430 note 66.

"Refuse" synonymous

Ky.—*Hicks v. Conn*, 109 S.W.2d 811, 813, 270 Ky. 344.

Okl.—*Woodroof v. Barrington*, 184 P. 2d 771, 773, 199 Okl. 125.

"Refusal" compared or distinguished Fla.—*Hillsborough County Board of Primary Elections v. Lester*, 118 So. 201, 203, 96 Fla. 484.

Ind.Terr.—*Brought v. Cherokee Nation*, 69 S.W. 937, 940, 4 Ind.Terr. 462.

Me.—*Cape Elizabeth v. Boyd*, 29 A. 1062, 86 Me. 317.

65. Del.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 15 A.2d 830, 834, 25 Del.Ch. 204.

66. Mont.—*Tiggerman v. Butte*, 119 P. 477, 478, 44 Mont. 138.

67. La.—*State v. Davis*, 97 So. 449, 456, 154 La. 295.

68. S.C.—*Boyce & Henry v. Ewart*, 24 S.C.L. 126, 140.

69. Mo.—*State v. Thompson*, 64 S. W.2d 277, 282, 333 Mo. 1069—*State v. Summers*, 6 S.W.2d 883, 885, 320 Mo. 189.

70. U.S.—*Goess v. A. D. H. Holding Corporation*, C.C.A.N.Y., 85 F.2d 72, 74.

71. La.—*State v. Lewis*, 8 So. 602, 603, 42 La. Ann. 847. 25 C.J. p 430 note 69.

72. U.S.—*American Credit Indemn. Co. v. Carrollton Furniture Mfg. Co.*, N.Y., 95 F. 111, 115, 36 C.C.A. 671.

73. Fla.—*State v. Tunnicliffe*, 124 So. 279, 281, 98 Fla. 731. Mo.—*State v. Summers*, 6 S.W.2d 883, 885, 320 Mo. 189.

74. Fla.—*State v. Tunnicliffe*, 124 So. 279, 281, 98 Fla. 731.

Mo.—*State v. Summers*, 8 S.W.2d 883, 885, 320 Mo. 189. 25 C.J. p 430 note 68 [a].

As relating to the fact of payment

"Failure means a failure to meet its current obligations at maturity. Insolvency looks to the liability to pay; failure, to the fact of payment."

S.C.—*Terry v. Calnam*, 13 S.C. 220, 226.

75. Phrases construed

(1) "Failure of good behavior," as ground for removal of a civil service employee, equivalent to "conduct unbecoming an employee," both meaning behavior contrary to recognized standards of propriety and morality, misconduct or wrong conduct.

Ohio.—*State ex rel. Ashbaugh v. Bahr*, 40 N.E.2d 677, 680, 682, 68 Ohio App. 308.

(2) "Failure of proof."

Cal.—*King v. San Jose Pacific Building & Loan Ass'n*, C.A., 107 P.2d 442, 444.

La.—*State v. Davis*, 97 So. 449, 456, 154 La. 295.

Mo.—*Took v. Wells*, 53 S.W.2d 389, 392, 331 Mo. 249—*State v. Woodall*, 300 S.W. 712, 713.

judications have not been found see 25 C.J. p 430 notes 72-83.

FAINT (or FEIGNED) ACTION. In old English practice, an action was so called where the party bringing it had no title to recover, although the words of the writ were true; while a false action was properly where the words of the writ were false.⁷⁶

FAINT PLEADER. A fraudulent, false, or col-

lusive manner of pleading to the deception of a third person.⁷⁷

FAIR.

As a Noun

A term derived from "feriæ," meaning holidays, and defined as a public mart or place of buying or selling; a greater species of market;⁷⁸ distinguished from an ordinary market in former times,⁷⁹ and even at the present time as existing or recurring at intervals of time.⁸⁰

Breslin-Griffitt Carpet Co. v. Asadorian, App., 145 S.W.2d 494, 496—Barber v. Todd, App., 128 S.W.2d 290, 293.

Or.—Crim v. Thompson, 229 P. 916, 920, 112 Or. 399—Wolke v. Schmidt, 228 P. 921, 923, 112 Or. 99.

R.I.—D'Onofrio v. First Nat. Stores, 26 A.2d 758, 759, 68 R.I. 144.

25 C.J. p 430 note 72.

As distinguished from "variance" see Pleading § 535.

(3) "Failure of proof in some particulars only," as distinguished from "total failure of proof."

Mo.—Took v. Wells, 53 S.W.2d 389, 392, 331 Mo. 249—Peters v. McDonough, 37 S.W.2d 530, 532, 327 Mo. 487.

(4) "Failure or inability."

Md.—Christliff v. City of Baltimore, 136 A. 527, 528, 152 Md. 204.

(5) "Failure to act," as restricted, in a particular connection, to specific statutory duties.

Mass.—Dolan v. Suffolk County, 37 N.E.2d 998, 1000, 310 Mass. 318.

(6) "Failure to bargain collectively."

U.S.—Rapid Roller Co. v. National Labor Relations Board, C.C.A., 126 F.2d 452, 459.

(7) "Failure to discharge official duty" or "failure to perform duties of office."

Del.—In re Assessment Board of Kent County, 140 A. 701, 703, 3 W. W.Harr. 583.

Ind.—Hilt v. Carr, 130 N.E. 1, 6, 77 Ind.App. 488.

(8) "Failure to elect" distinguished from "vacancy."

U.S.—Ringling v. City of Hempstead, Tex., 193 F. 596, 602, 113 C.C.A. 464.

66 C.J. p 385 note 77.

(9) "Failure . . . to file or serve any paper."

Idaho.—Consolidated Wagon & Machine Co. v. Housman, 221 P. 143, 144, 38 Idaho 343.

(10) "Failure to fill office."

Vt.—Scott v. Suitor, 152 A. 801, 802, 103 Vt. 175.

(11) "Failure to meet . . . obligations."

U.S.—Pyne v. Jackman, D.C.N.Y., 12 F.Supp. 653, 655.

N.J.—Hoover Steel Ball Co. v. Schaffer Ball Bearing Co., 105 A. 500, 502, 89 N.J.Eq. 433.

N.Y.—Brown v. Rosenbaum, 23 N.Y. S.2d 161, 169, 175 Misc. 295.

Pa.—State of Ohio ex rel. Squire v. Union Trust Co. of Pittsburgh, 8 A.2d 476, 480, 137 Pa.Super. 75.

(12) "Failure to observe," as distinguished from "willfulness."

Ind.—Huff v. Chicago, I. & L. R. Co., 56 N.E. 932, 934, 24 Ind.App. 492.

(13) "Failure to pay."

Tex.—Grand Lodge Colored K. P. of Texas v. Watson, Civ.App., 145 S. W.2d 601, 603.

(14) "Failure to protect the property from further damage."

U.S.—Pospisil v. National Fire Ins. Co. of Hartford, Conn., D.C.S.D., 35 F.2d 213, 218.

(15) "Failure to recover judgment."

Mich.—Olcynski v. Bolibrzuch, 255 N.W. 387, 388, 267 Mich. 665.

(16) "Failure to reduce assessment," as meaning failure to reduce after application by owner to appeal to tax court asking that assessment be reduced.

Md.—Aejis Co. v. Ray, 144 A. 842, 845, 156 Md. 590.

(17) "Willful failure," as closely analogous to, if not synonymous with, "refusal."

Fla.—Hillsborough County Board of Primary Elections v. Lester, 118 So. 201, 203, 96 Fla. 484.

Phrases discussed elsewhere

(1) "Failure of accused to testify" see Criminal Law §§ 593, 658, 1098.

(2) "Failure of consideration" see Bills and Notes §§ 152, 153, Contracts §§ 129-131, Deeds § 21, Mortgages § 96, Sales §§ 22, 491, Vendor and Purchaser § 159.

(3) "Failure of delivery" or "failure to make delivery" see Carriers §§ 155, 160 c, and Shipping § 120.

(4) "Failure of former action" as affecting limitations see Limitation of Actions § 292.

(5) "Failure of issue" see Estates § 121 b (1) (b); and Wills § 852.

(6) "Failure of title" see Sales §§ 22, 491; and Vendor and Purchaser § 161.

(7) "Failure or refusal of consignee to receive cargo," see Shipping § 121.

(8) "Failure to appear" see Appearances § 6.

(9) "Failure to call witnesses" see Criminal Law §§ 594, 659, 1099.

(10) "Failure to co-operate" see the C.J.S. definition Co-operate.

(11) "Failure to fence" see Railroads §§ 470, 559-561.

(12) "Failure to maintain or support" as element of abandonment see Husband and Wife § 633, and Parent and Child § 92.

(13) "Failure to prosecute," as ground for dismissal or nonsuit see Dismissal and Nonsuit § 65 a.

(14) "Failure to resist" as distinguished from "consent" see the C.J.S. definition Consent.

(15) "Failures in revenue," as explanatory of, and synonymous with, "casual deficits" see the C.J.S. definition Casual.

76. Black L.D.

77. Black L.D.

78. Eng.—Collins v. Cooper, 17 Cox C.C. 647, 650, 651, 654.

79. 1 Blackstone Comm. p 274.

80. Eng.—Collins v. Cooper, supra.

Carries idea of place of amusement

Although the chief idea in the word is that of buying and selling, it includes the idea of a place of amusements naturally sought by a large concourse of people attendant at a fair.

Eng.—Collins v. Cooper, supra.

As exhibition of industrial products

At the present time the term is very generally used to designate an exposition where the industrial products of a people are exhibited as a display of the success, workmanship, and art of the exhibitors, and to obtain such premiums as may be paid by the owners of the fair as a reward of excellence.

Ohio.—State v. Long, 28 N.E. 1038, 1039, 48 Ohio St. 509.

"Fair" has been distinguished from "market."⁸¹

As an Adjective

It has been said that the word "fair" is a vague and ambiguous term.^{81.5} In common usage it conveys some idea of justice or equity,⁸² and connotes means reasonably adapted to an exigency.⁸³ It has been defined as meaning impartial; free from suspicion of bias;⁸⁴ honest or free from suspicion;⁸⁵ equitable;⁸⁶ equitable as a basis of exchange; a fair value;⁸⁷ reasonable;⁸⁸ honest; upright;⁸⁹ honest, as distinguished from average or middling.⁹⁰

As applied to the weather, free from clouds; not obscure.⁹¹

The term has been held equivalent to, or synonymous with, "clear,"⁹² "equitable," "honest," "impartial,"⁹³ "just,"^{93.5} and "reasonable."⁹⁴

Fair hearing. One in which authority is fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law.⁹⁵ The requirements

of a fair hearing are dependent on the nature and purpose of the hearing itself.^{95.5}

The term implies a tribunal free from bias and prejudice,⁹⁶ but a hearing may in fact be unfair without any intention that it shall be so.⁹⁷

To constitute a fair hearing it is not necessary that the procedure followed conform strictly to the formalities of a court action,^{97.5} and it is not necessary that the strict judicial rules of evidence be followed.^{97.10}

Specifically, the term implies that a party concerned shall not only have an opportunity to present evidence in his favor, but also that he shall be apprised of the evidence against him, so that at the conclusion of the hearing he may be in a position to know all the evidence on which the matter is to be decided,⁹⁸ also that he shall have a right to present his argument on the evidence to the tribunal,⁹⁹ and the assistance of counsel has been held a fundamental requisite of "fair hearing."¹

Phrases construed

(1) "Exhibition or fair" see *Exhibition ante* p 197 note 54 (2).

(2) "Fair grounds" see *Agriculture* § 14.

(3) "Statute fair," in England, a fair at which laborers of both sexes stood and offered themselves for hire. *Black L.D.*

81. "Every fair is a market, but every market is not a fair." *Eng.—Collins v. Cooper*, 17 Cox C.C. 647, 650.

81.5 *Tex.—Railroad Commission v. Houston Natural Gas Corp.*, 289 S.W.2d 559, 571, 155 Tex. 502.

82. *Cal.—Wood v. Strother*, 18 P. 766, 767, 76 C. 545, 9 Am.S.R. 249.

83. *N.J.—In re Eleventh Ward Building & Loan Ass'n of Newark*, 21 A.2d 746, 749, 130 N.J.Eq. 414.

84. *Iowa.—Bryan v. Chicago, R. I. & P. R. Co.*, 19 N.W. 295, 296, 63 Iowa 464.

Tex.—Hirshfield v. Davis, 43 Tex. 155, 161.

Corpus Juris referred to for many definitions of the adjective "fair" as meaning "impartial," "free from suspicion of bias" etc.

Tex.—Looney v. Elliott, Civ.App., 52 S.W.2d 949, 952.

85. *Iowa.—Myers v. Fultz*, 100 N.W. 351, 352, 124 Iowa 437.

86. *Tex.—Hirshfield v. Davis*, 43 Tex. 155, 161.

87. *Utah.—Utah Assets Corporation v. Dooley Bros. Ass'n*, 70 P.2d 738, 741, 92 Utah 577.

88. *Utah.—Utah Assets Corporation v. Dooley Bros. Ass'n, supra.* 25 C.J. p 431 note 95.

Test

Whether action is "fair" depends on whether one acted in arbitrary and unreasonable manner in reaching his conclusion.

U.S.—Inghram v. Union Stock Yards Co. of Omaha, C.C.A.Neb., 64 F.2d 390, 392.

89. *Iowa.—Bryan v. Chicago, R. I. & P. R. Co.*, 19 N.W. 295, 296, 63 Iowa 464.

Tex.—Hirshfield v. Davis, 43 Tex. 155, 161.

90. *Cal.—East Bay Municipal Utility Dist. v. Kieffer*, 278 P. 476, 482, 99 C.A. 240.

91. *Colo.—De St. Aubin v. Field*, 62 P. 199, 201, 27 Colo. 414.

92. *S.D.—Smith v. Kimble*, 162 N.W. 162, 163, 38 S.D. 511.

93. *Tex.—Looney v. Elliott, Civ. App.*, 52 S.W.2d 949, 952.

93.5 *Conn.—New Haven Water Co. v. City of New Haven*, 139 A. 99, 105, 106 Conn. 562.

94. *Ind.—Jones v. Angell*, 95 Ind. 376, 382.

Ohio.—Wheeling & L. E. R. Co. v. Toledo Railway & Terminal Co., 14 Ohio Cir.Ct.R., N.S., 321, 323, 23 Ohio Cir.Ct.R. 303, affirmed 91 N.E.2d 1143, 81 Ohio St. 540.

Tex.—Looney v. Elliott, Civ.App., 52 S.W.2d 949, 952.

Cass v. State, 61 S.W.2d 500, 504, 124 Tex.Cr. 208.

95. *U.S.—U. S. ex rel. Dean, for and on behalf of Mahfood, v. Reynolds*, D.C.Ind., 2 F.Supp. 290, 291.

95.5 *D.C.—Ritch v. Directors of Vehicles and Traffic of District of Columbia, Mun.App.*, 124 A.2d 301, 302.

96. *U.S.—National Labor Relations Board v. Washington Dehydrated Food Co., C.C.A.*, 118 F.2d 980, 997.

97. *U.S.—Ex parte Petkos, D.C. Mass.*, 212 F. 275, 277.

97.5 *D.C.—Ritch v. Directors of Vehicles and Traffic of District of Columbia, Mun.App.*, 124 A.2d 301, 302.

97.10 *U.S.—Ex parte Bridges, D.C. Cal.*, 49 F.Supp. 292, 306.

98. *U.S.—Jeffries v. Olesen, D.C.Cal.*, 121 F.Supp. 463, 475.

Ex parte Petkos, D.C.Mass., 212 F. 275, 277.

"The test of a fair hearing is whether the issues were clearly defined, so that the respondent could address itself to the charges made against it."

U.S.—National Labor Relations Board v. Air Associates, C.C.A., 121 F.2d 586, 591.

99. *D.C.—Tri-State Broadcasting Co. v. Federal Communications Commission*, 107 F.2d 956, 958, 71 App. D.C. 157.

1. *U.S.—Glasser v. U. S.*, Ill., 62 S.Ct. 457, 464, 315 U.S. 60, 86 L.Ed. 680.

The term does not imply a right to have witnesses summoned for questioning on irrelevant matters² or require a hearing free from error,³ and the right of cross-examination is not indispensable.^{3,5}

In the case of one placed under arrest on charges, the term implies the right to be apprised of the nature of the charge against him and an opportunity to meet it.⁴

As a requirement of due process see Constitutional Law § 622, in judicial proceedings generally, and § 628 b, in administrative proceedings.

Fair market price. The resultant of the two opposing views of a willing seller and a willing purchaser, the former of whom is not compelled to sell and the latter of whom is not required to buy.⁵ Ordinarily the term implies the existence of a market created by buyers willing to buy and sellers willing to sell,⁶ but in a particular situation it may apply to a price fixed by the manufacturer.⁷

The term has been held to be ordinarily equivalent to, or synonymous with, "actual cash value,"⁸ "clear market price" see the C.J.S. definition Clear, and "market value."⁹

Fair market value. It has been said that an examination of the texts and judicial utterances reveals the fact that the expression "fair market value" has no invariable definition, but that its meaning varies with the circumstances surrounding a given object and situation to which it is sought to apply the term.^{9,5} It also has been said that a statement contained in the Corpus Juris Secundum definition of the term "market price" is equally applicable to the term "fair market value."^{9,10} "Fair market value" implies full knowledge of all the circumstances,^{9,15} and the term is not construed to mean the selling price of property at a forced or involuntary sale,^{9,20} and is neither the highest nor the lowest possible price at which a commodity under exceptional circumstances may be sold, for neither a forced sale nor a compulsory purchase affords the true test of such value.^{9,25} In essence, "fair market value" is market value fairly determined.^{9,30}

Fair market value is the fair, economic, just, and equitable value under normal conditions;¹⁰ the price brought at a fair sale between parties dealing on equal terms;¹¹ the price that would induce a willing

2. D.C.—Bethlehem Steel Co. v. National Labor Relations Board, 120 F.2d 641, 651, 74 App.D.C. 52.

N.D.—Corpus Juris Secundum cited in Williams Electric Coop. v. Montana-Dakota Util. Co., 79 N.W.2d 508, 526.

3. In departmental or administrative proceedings

Denial of "fair hearing" by administrative officers or authorities is not established merely by proving that the decision of the authorities was wrong.

U.S.—Jung Sam v. Haff, C.C.A.Cal., 116 F.2d 384, 387.

U. S. ex rel. Eng Fon Sing v. Reimer, D.C.N.Y., 40 F.Supp. 602, 604.

3.5 Tenn.—State ex rel. Sherman v. Hyman, 171 S.W.2d 822, 827, 180 Tenn. 99.

4. U.S.—Ex parte Kurth, D.C.Cal., 28 F.Supp. 258, 260.

Ex parte Keisuke Sata, D.C.Cal., 215 F. 173, 177.

5. Del.—Vale v. duPont, 182 A. 668, 673, 7 W.W.Harr. 254, 103 A.L.R. 946.

6. U.S.—Walter v. Duffy, C.C.A.N.J., 287 F. 41, 45, 46.

7. As price fixed by manufacturer
"Fair market price" for purpose of taxation must be price fixed by manufacturer for sale of its products where there is no market price other than price so fixed.

U.S.—Bourjois, Inc., v. McGowan, D.C.N.Y., 12 F.Supp. 787, 792.

8. N.D.—Butler v. Aetna Ins. Co. of Hartford, Conn., 256 N.W. 214, 218, 64 N.D. 764.

9. N.D.—Butler v. Aetna Ins. Co. of Hartford, Conn., supra.

9.5 Tenn.—John W. McDougall Co. v. Atkins, 301 S.W.2d 335, 337, 201 Tenn. 589.

9.10 Complete statement quoted

"When the Supreme Court of the State of Washington was dealing with the definition of 'market price' in the case of McGarry v. Superior Portland Cement Co., 95 Wash. 412, 163 P. 928, Ann.Cas.1918A, 572, its observation, stated in the language of the text of 55 C.J.S. p. 786, was this:—'When the term becomes the subject of legal controversy, it will be given that meaning which will best serve the purpose and intent of those who use it.' The good sense of that statement is readily recognized, and it is as equally applicable to the term 'fair market value' when that term becomes the subject of legal controversy."

Tenn.—John W. McDougall Company v. Atkins, supra.

9.15 Phrase implies

Full knowledge of circumstances.

U.S.—U. S. v. 10,245 Acres of Land, More or Less, Situate in Grant County, Wash., D.C.Wash., 50 F. Supp. 470, 472.

9.20 Ill.—Walker v. People, 61 N.E. 489, 490, 192 Ill. 106.

9.25 Voluntary sale the test

"Fair market value is neither the

highest nor the lowest possible price at which a commodity under exceptional conditions may be sold, for neither a forced sale nor a compulsory purchase affords the true test of such value."

Va.—Eastern Coal & Export Corporation v. Norfolk & Western Ry. Co., 113 S.E. 857, 859, 133 Va. 125.

9.30 U.S.—Pewee Coal Co. v. U. S., Ct.Cl., 161 F.Supp. 952, 956.

10. N.Y.—In re Board of Water Supply of City of New York, 14 N.E.2d 789, 792, 277 N.Y. 452.

State ex rel. Buck v. Rapp, 36 N.Y.S.2d 790, 794—People ex rel. Buck v. Woodworth, 36 N.Y.S.2d 790, 794.

Conditions must be normal

"If market sales are made under peculiar and unusual conditions, such as sales of small lots, forced sales, and sales in a restricted market, they may not furnish evidence of fair market value."

U.S.—Hazeltime Corporation v. Commissioner of Internal Revenue, C. C.A., 89 F.2d 513, 519.

Of corporate assets

"A value which the corporation might have realized on them for itself."

U.S.—In re Marine Iron Works, D.C. N.Y., 159 F. 753, 754.

11. Pa.—Union Nat. Bank of Pittsburgh v. Crump, 37 A.2d 733, 735, 349 Pa. 339—Appeal by Pennsylvania Co. for Insurance on Lives

seller to sell and a willing buyer to buy;^{11.5} the price which would be agreed on at a given time between a willing seller and a willing buyer in consummating a voluntary transaction;¹² the price a thing will bring on a free and open market as between one who desires to sell and one who desires to purchase, in the ordinary course of business, irrespective of its original cost;¹³ the price which a willing buyer would pay to a willing seller, neither being under compulsion to buy or sell, and both having full knowledge of all pertinent facts;^{13.5} the fair value as between one who desires but is not compelled to buy and one who is willing but not compelled to sell;^{13.10} the price which a willing

and informed purchaser, under no compulsion to buy, would pay for an article to a willing and informed seller, under no compulsion to sell;^{13.15} the price at which property changes hands in a transaction between a willing buyer not compelled to buy and a willing seller not compelled to sell.^{13.20}

When applied to land, the term "fair market value" has been defined as meaning the price it would probably bring after fair and reasonable negotiations where the owner is willing to sell, but not compelled to do so, and the buyer desires to purchase, but is under no necessity of obtaining the property;¹⁴ such a price as a capable and diligent

and Granting Annuities, 127 A. 441, 443, 282 Pa. 69.

11.5 N.M.—Board of Com'rs of Dona Ana County v. Gardner, 260 P.2d 682, 686, 57 N.M. 478.

Utah.—Utah Assets Corporation v. Dooley Bros. Ass'n, 70 P.2d 738, 741, 92 Utah 577.

Wis.—State ex rel. Farmers & Merchants State Bank v. Schanke, 19 N.W.2d 264, 267, 247 Wis. 182.

Similarly defined

(1) The amount that a willing buyer would pay to a willing seller. U.S.—Eastern S. S. Lines v. U. S., D. C.Mass., 74 F.Supp. 37, 38.

(2) What a willing buyer would pay in cash to a willing seller. U.S.—Baetjer v. U. S., C.C.A.Puerto Rico, 143 F.2d 391, 396.

12. Va.—Eastern Coal & Export Corporation v. Norfolk & W. Ry. Co., 113 S.E. 857, 859, 133 Va. 125.

13. S.D.—John Moodie Dry Goods Co. v. Gilruth, 153 N.W. 383, 384, 35 S.D. 567.

13.5 Cal.—In re Rowell's Estate, 282 P.2d 163, 168, 132 C.A.2d 421.

Similarly defined

(1) The price which a purchaser, willing but not obliged to buy, would pay an owner, willing but not obliged to sell, taking into consideration all the uses to which the property is adapted and might in reason be applied.

Pa.—Concannon v. Haile, 81 Pa. Dist. & Co. 480, 24 Northumb. Leg. J. 125.

Wash.—Donaldson v. Greenwood, 242 P.2d 1038, 1046, 40 Wash.2d 238.

(2) "What a willing buyer would pay to a willing seller for an article where neither is acting under compulsion."

U.S.—Commissioner of Internal Revenue v. Powers, C.C.A., 115 F.2d 209, 212.

(3) "At least the highest price which a normal purchaser, not under peculiar compulsion, will pay at the time and place in question in order to get the thing."

Mass.—Maguire v. Pan-American Amusement Co., 97 N.E. 142, 144, 211 Mass. 22—Bradley v. Hooker, 55 N.E. 848, 849, 175 Mass. 142.

(4) That which a purchaser willing but not obliged to buy would pay to one willing but not obliged to sell. Fla.—Root v. Wood, 21 So.2d 133, 138, 155 Fla. 613.

(5) The price property will bring on the market by a willing buyer under no compulsion to buy and sold by a willing seller under no compulsion to sell.

U.S.—Fraylon v. Royal Exchange Assur., D.C.N.C., 131 F.Supp. 676, 678.

(6) The price a willing seller could get from a willing buyer, neither being under compulsion to buy or sell. U.S.—Crane v. Harrison, D.C.Ill., 68 F.Supp. 439, 440.

(7) The price which could be obtained for property, in money, at a fair sale, between a willing seller and a willing buyer; that is, one not obliged to sell dealing with one not obliged to buy.

N.J.—Sorokach v. Trusewich, 113 A. 2d 194, 196, 35 N.J.Super. 86.

(8) The price which property will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it. Va.—Tuckahoe Woman's Club v. City of Richmond, 101 S.E.2d 571, 573, 574, 575, 199 Va. 734.

(9) The price at which a willing buyer and a willing seller would arrive after negotiation for sale where neither is acting under compulsion. U.S.—In re Williams' Estate, C.A., 256 F.2d 217, 218.

(10) The amount of money that a willing purchaser, who did not have to buy, pays to a willing seller, who did not have to sell it.

La.—State v. Burkes, 101 So.2d 193, 194, 234 La. 659.

13.10 N.J.—Schroeder v. Zink, 71 A. 2d 321, 327, 4 N.J. 1.

13.15 U.S.—Ames v. O'Malley, D.C. Neb., 91 F.Supp. 463, 464.

13.20 U.S.—Weil v. Donnelly, D.C. La., 111 F.Supp. 390, 392.

14. Ind.—Welty v. Taylor, 115 N.E. 257, 259, 63 Ind.App. 674.

Similarly expressed

(1) "The money which a purchaser, willing but not obligated to buy property, would pay the owner, willing but not obligated to sell."

Okla.—Grand River Dam Authority v. Bomford, 111 P.2d 182, 183, 138 Okl. 512.

(2) "The amount that would, in all probability, have been arrived at between an owner willing to sell and a purchaser desiring to buy."

U.S.—U. S. ex rel. and For Use of Tennessee Valley Authority v. Davis, D.C.Tenn., 41 F.Supp. 595, 599.

(3) Other similar definitions.

U.S.—Iriarte v. U. S., C.C.A.Puerto Rico, 157 F.2d 105, 110, 167 A.L.R. 494—Karison v. U. S., C.C.A.Minn., 82 F.2d 330, 337.

Cal.—Kaiser Co. v. Reid, 184 P.2d 879, 887, 30 C.2d 610—Pacific States Sav. & Loan Co. v. Hise, State Guaranty Corp., Intervener, 155 P. 2d 809, 817, 25 C.2d 822, 158 A.L.R. 955.

Fla.—City of Tampa v. Colgan, 163 So. 577, 582, 121 Fla. 218.

Ga.—Richardson v. John Hancock Mut. Life Ins. Co., 145 S.E. 448, 449, 167 Ga. 340.

Ill.—People ex rel. Rhodes v. Turk, 63 N.E.2d 513, 514, 391 Ill. 424.

Okla.—Jordan v. Peek, 268 P.2d 242, 244—Grand Hydro v. Grand River Dam Authority, 139 P.2d 798, 800, 192 Okl. 693—City of Tulsa v. Creekmore, 29 P.2d 101, 103, 167 Okl. 298.

Pa.—In re Premises, 255-57 South Fifteenth Street, 192 A. 923, 924, 326 Pa. 467—In re Lehigh & Wilkes-Barre Coal Co.'s Assessment, 148 A. 301, 303, 298 Pa. 294.

Appeal of Hickey, 188 A. 95, 96, 124 Pa.Super. 213—Appeal of Sailer, 181 A. 854, 855, 120 Pa.Super. 69.

Va.—Skyline Swannanoa v. Nelson County, 44 S.E.2d 437, 441, 186 Va.

business man could presently obtain from the property after conferring with those accustomed to buy such property.¹⁵

"Fair market value" has been said to involve the ascertainment of price which intelligent and reasonable buyers and sellers, having due regard for their mercenary interests, would have most likely agreed on, recognizing facts in evidence or in reasonable contemplation;¹⁶ it has been held to imply the existence of a market where the property may be exchanged for cash in an amount fairly close to its actual value,¹⁷ changeable value,¹⁸ a willing buyer and a willing seller,¹⁹ as well as an agreement between them on the price.²⁰ It has been held not to imply the existence of regular market reports.²¹

The term has been held equivalent to, or synonymous with, "actual cash value,"²² and such terms as "cash market value" and "cash value" treated in

the C.J.S. definition Cash, the term "clear market value" treated in the C.J.S. definition Clear. "Fair market value" has also been held to be equivalent to, or synonymous with, "fair cash market value,"²³ "fair value,"²⁴ "market value,"²⁵ "value,"²⁶ and "value in money."²⁷

"Fair market value" has been distinguished from "auction value," "panic value," "speculative value," and "value fixed by depressed or inflated prices;"²⁸ and it has been held that "market price"^{28.5} and "trade-in value"^{28.10} are not necessarily synonymous with "fair market value."

Fair valuation. When applied to property generally, it has been defined as the fair cash value or fair market value of the property as between one who wants to purchase and one who wants to sell the property;²⁹ the present market value;³⁰ such

878—City of Norfolk v. Snyder, 170 S.E. 721, 722, 161 Va. 288.

Wash.—Bellingham Community Hotel Co. v. Whatcom County, 70 P. 2d 301, 304, 190 Wash. 609.

Use in appraising the value of property

"Traditionally, courts and lawyers for many years regarded market price as the best, almost the conclusive, test of value. At times, where actual market prices were seen to be unreliable, hypothetical willing sellers and willing buyers have been conceived, and the supposed prices at which they would buy and sell have been called a 'fair' market value. There is, however, a noticeable present tendency not to be bound by instant market prices, but to look into the future, to a proper extent, in appraising the value of property."

U.S.—In re Warren Bros. Co., D.C. Mass., 39 F.Supp. 381, 384.

15. Pa.—Appeal of Hickey, 188 A. 95, 96, 124 Pa.Super. 213.

16. Del.—Vale v. State School Tax Department, 173 A. 795, 798, 6 W. W.Harr. 252.

17. U.S.—Champlin v. Commissioner of Internal Revenue, C.C.A., 71 F.2d 23, 29.

18. U.S.—Walls v. Commissioner of Internal Revenue, C.C.A.Wyo., 60 F.2d 347, 350.

19. U.S.—Syracuse Engineering Co. v. Haight, C.C.A.N.Y., 110 F.2d 468, 471.

20. Md.—Lewis v. Beall, 153 A. 354, 356, 162 Md. 18.

21. Md.—Chicago Bonding & Insurance Co. v. Oliner, 115 A. 592, 593, 139 Md. 408, 18 A.L.R. 1081.

22. U.S.—Stiles v. Commissioner of Internal Revenue, C.C.A.Fla., 69 F.2d 951, 952.

Iowa.—Farmers' Mercantile Co. v. Farmers' Ins. Co., 141 N.W. 447, 454, 161 Iowa 5.

Tex.—Niagara Fire Ins. Co. v. Pool, Civ.App., 31 S.W.2d 850, 852.

Equivalents of "fair market value"

"True cash value" is "actual value," and both are identical with "fair market value."

Pa.—Appeals of Matson, 33 A.2d 464, 465, 152 Pa.Super. 424.

See also the C.J.S. definition Actual Value.

23. Ala.—Housing Authority of Birmingham Dist. v. Title Guarantee Loan & Trust Co., 8 So.2d 835, 837, 243 Ala. 157.

Mass.—Commissioner of Corporations and Taxation v. Boston Edison Co., 39 N.E.2d 584, 593, 310 Mass. 674.

Tex.—West Texas Hotel Co. v. City of El Paso, Civ.App., 83 S.W.2d 772, 776—Fort Worth & D. N. Ry. Co. v. Sugg, Civ.App., 68 S.W.2d 570, 572.

Senters v. State, 291 S.W.2d 739, 740, 163 Tex.Cr. 423.

24. "There can be no other fair value except fair market value. Any other would not be fair, but speculative."

Pa.—Market St. Nat. Bank v. Huff, 179 A. 582, 583, 319 Pa. 286.

25. U.S.—U. S. v. 3969.59 Acres of Land, D.C.Idaho, 56 F.Supp. 831, 837.

Ala.—Housing Authority of Birmingham Dist. v. Title Guarantee Loan & Trust Co., 8 So.2d 835, 837, 243 Ala. 157.

Md.—Chicago Bonding & Ins. Co. v. Oliner, 115 A. 592, 593, 139 Md. 408, 18 A.L.R. 1081.

Tex.—Fort Worth & D. N. Ry. Co. v. Sugg, Civ.App., 68 S.W.2d 570, 572—Niagara Fire Ins. Co. v. Pool, Civ.App., 31 S.W.2d 850, 852.

The term "fair" hardly adds anything to the phrase "market value." U.S.—U. S. v. Miller, Cal., 63 S.Ct. 276, 280, 317 U.S. 369, 87 L.Ed. 336, 147 A.L.R. 55.

26. U.S.—U. S. v. 3969.59 Acres of Land, D.C.Idaho, 56 F.Supp. 831, 837.

Ala.—Housing Authority of Birmingham Dist. v. Title Guarantee Loan & Trust Co., 8 So.2d 835, 837, 243 Ala. 157.

Md.—Chicago Bonding & Insurance Co. v. Oliner, 115 A. 592, 593, 139 Md. 408, 18 A.L.R. 1081.

27. Wis.—In re Matthews' Will, 182 N.W. 744, 745, 174 Wis. 220.

28. N.Y.—In re Board of Water Supply of City of New York, 14 N. E.2d 789, 792, 277 N.Y. 452.

Or.—Public Market Co. of Portland v. City of Portland, 170 P.2d 586, 597, 178 Or. 367.

Va.—Kornegay v. City of Richmond, 41 S.E.2d 45, 51, 185 Va. 1013.

Wash.—Appeal of Schmitz, 268 P.2d 436, 439, 44 Wash.2d 429—Donaldson v. Greenwood, 242 P.2d 1038, 1046, 40 Wash.2d 238.

28.5 U.S.—Shamrock Oil & Gas Corporation v. Coffee, C.C.A.Tex., 140 F.2d 409, 410, 411.

28.10 Ohio.—Anderson v. American Bankers Ins. Co. of Fla., 132 N.E. 2d 256, 258, 99 Ohio App. 183.

29. U.S.—Grandison v. National Bank of Commerce, N.Y., 231 F. 800, 804, 145 C.C.A. 620.

Pa.—Corpus Juris quoted in Market St. Nat. Bank v. Huff, 179 A. 582, 583, 319 Pa. 286.

"Salable value" not synonymous U.S.—In re Crystal Ice & Fuel Co., D. C.Mont., 283 F. 1007, 1009. 54 C.J. p 1120 note 86.

30. Pa.—Corpus Juris quoted in

sum as the property will reasonably sell for to a purchaser desiring to buy, the owner wishing to sell;³¹ such a price as a capable and diligent business man could presently obtain for the property after conferring with those accustomed to buy such property.³²

Also, more specifically, the amount the property would bring at a sale on execution shown to have been in all respects fair and reasonable;³³ the value which the debtor might realize thereon if permitted to continue in business.³⁴

When applied to notes and accounts, the net sum that could have been realized, with reasonable diligence, from the collection of such notes and accounts.³⁵

In determining insolvency so as to warrant involuntary bankruptcy proceedings see Bankruptcy § 72 b notes 12-20, rendering preference voidable see Bankruptcy § 214 b notes 24-35.

Fair value. It has been said that the term does not import guesswork.³⁶ The term is defined generally to mean the price in the open market;^{36.5} market value;^{36.10} such a price as a capable and intelligent business man could presently obtain for property from a ready and willing buyer accustomed to buying such property.^{36.15}

When applied to merchandise, implements, and

other personal property, "fair value" is defined as meaning the reasonable value of property, used and useful, for a particular service at the time the property is being so used;³⁷ such a price as a capable and diligent business man could presently obtain from the property after conferring with those accustomed to buy such property;³⁸ the sum that could have been fairly realized from the sale of such property in bulk, or in parcels, in the usual and ordinary way of selling such classes of property for cash in the market.³⁹

Applied to real estate, "fair value," as a statutory test of the propriety of investments by trustees, has been said to be the price which buyers of the class which would be interested in buying the mortgaged property would be justified in paying for it.⁴⁰

The term has been held equivalent to, or synonymous with, "actual value,"⁴¹ "fair market value" see supra note 24, "fair valuation,"⁴² "intrinsic value,"⁴³ "market value,"⁴⁴ and "reasonable value."⁴⁵

It has been distinguished from "liquidating value" and "present realizable value,"⁴⁶ and it has been said that "fair value" and "reimbursement" are not convertible terms.^{46.5}

"Fair value" as an element in determining rate base for public utility see Public Utilities §§ 17, 18.

Other phrases are listed in the note.⁴⁷ Still other

Market St. Nat. Bank v. Huff, 179 A. 582, 583, 319 Pa. 286.

25 C.J. p 432 note 36 [a] (1), (4).

31. Okl.—Plymouth Cordage Co. v. Smith, 90 P. 418, 421, 18 Okl. 249, 11 Ann.Cas. 445.

Pa.—Corpus Juris quoted in Market St. Nat. Bank v. Huff, 179 A. 582, 583, 319 Pa. 286.

32. U.S.—Stern v. Paper, D.C.N.D., 183 F. 228, 231.

Pa.—Corpus Juris quoted in Market St. Nat. Bank v. Huff, 179 A. 582, 583, 319 Pa. 286.

33. U.S.—Grandison v. National Bank of Commerce, N.Y., 231 F. 800, 804, 145 C.C.A. 620.

Pa.—Corpus Juris quoted in Market St. National Bank v. Huff, 179 A. 582, 583, 319 Pa. 286.

34. W.Va.—Arnold v. Knapp, 84 S. E. 895, 900, 75 W.Va. 804.

35. Okl.—Plymouth Cordage Co. v. Smith, 90 P. 418, 421, 18 Okl. 249, 11 Ann.Cas. 445.

36. U.S.—Central Union Trust Co. of New York v. Edwards, C.C.A. N.Y., 287 F. 324, 328.

36.5 Md.—H. J. McGrath Co. v. Wisner, 55 A.2d 793, 796, 189 Md. 260.

36.10 La.—Department of Highways v. Wall, App., 32 So.2d 718, 719.

Fair market value

Ill.—People ex rel. Gutknecht v. City of Chicago, 111 N.E.2d 626, 635, 414 Ill. 600.

36.15 U.S.—In re Ouellette, D.C.Me., 98 F.Supp. 941, 943.

37. N.D.—Northern States Power Co. v. Board of Railroad Com'rs, 298 N.W. 423, 430, 71 N.D. 1.

38. Pa.—Corpus Juris quoted in Market St. National Bank v. Huff, 179 A. 582, 583, 319 Pa. 286.

39. Okl.—Plymouth Cordage Co. v. Smith, 90 P. 418, 421, 18 Okl. 249, 11 Ann.Cas. 445.

40. Pa.—In re Crane's Estate, 23 A. 2d 851, 855, 344 Pa. 141.

41. U.S.—Central Union Trust Co. of New York v. Edwards, C.C.A.N. Y., 287 F. 324, 328.

Va.—Kerr v. Clinchfield Coal Corporation, 192 S.E. 741, 744, 169 Va. 149.

42. "Fair valuation" and "fair value" defined in same terms

Pa.—Corpus Juris quoted in Market St. National Bank v. Huff, 179 A. 582, 583, 319 Pa. 286.

43. Md.—American General Corporation v. Camp, 190 A. 225, 228, 171 Md. 629.

44. U.S.—U. S. v. Crary, D.C.Va., 2 F.Supp. 870, 879.

Va.—Kerr v. Clinchfield Coal Corporation, 192 S.E. 741, 744, 169 Va. 149.

45. Wash.—Taylor v. Lubetich, 97 P.2d 142, 144, 2 Wash.2d 6.

46. Terms not equivalent

It has been said to be well settled that the words "fair value" need not mean "liquidating value," nor need they be regarded in law as equivalent to "present realizable value."

U.S.—In re Warren Bros. Co., D.C. Mass., 39 F.Supp. 381, 384.

46.5 Va.—City of Richmond v. Henrico County, 37 S.E.2d 873, 879, 185 Va. 176.

47. Phrases construed

(1) "Clear or fair market value," as meaning open and honest market value.

N.Y.—In re Dupignac's Estate, 204 N.Y.S. 273, 276, 123 Misc. 21.

(2) "Fair and feasible," as meaning economically expedient, without discrimination or destruction of vested rights.

U.S.—In re Stanley Drug Co., D.C. Pa., 22 F.Supp. 664, 665.

(3) "Fair and impartial."

U.S.—Neal v. U. S., C.C.A.Va., 22 F. 2d 52, 53.

phrases as to which more recent adjudications have | 432 note 38.
not been found are set out in 25 C.J. p 431 note 2-p |

(4) "Fair and impartial hearing."
U.S.—U. S. ex rel. Shaw v. Van De Mark, D.C.N.Y., 3 F.Supp. 101, 102. D.C.—Thomas v. District of Columbia, 90 F.2d 424, 428, 67 App.D.C. 179.

(5) "Fair and impartial jury" as meaning that every member of the jury must be a fair and impartial juror.

Tex.—City of San Antonio v. McKenzie Const. Co., 150 S.W.2d 989, 993, 136 Tex. 315.

(6) "Fair and impartial system of separation from service."

Ariz.—Welch v. State Board of Social Security and Welfare, 87 P.2d 109, 112, 53 Ariz. 167.

(7) "Fair and just compensation."
U.S.—Allison v. Sutton County, Civ. App., 278 S.W. 928, 930.

(8) "Fair and proper legal assessment."

Miss.—Edward Hines Yellow Pine Trustees v. Knox, 108 So. 907, 911, 144 Miss. 560.

(9) "Fair and reasonable compensation," as implying "full compensation."

Mo.—Pfeiffer v. Schee, App., 107 S.W.2d 170, 175.

(10) "Fair and reasonable market value," as importing a valuation determined after giving fair and reasonable consideration to market conditions prevailing where willing buyers meet willing sellers and deal on that basis, and synonymous with "market value."

N.Y.—Berkshire Life Ins. Co. of Pittsfield, Mass. v. Van Voorhis, 283 N.Y.S. 95, 98, 245 App.Div. 592.

(11) "Fair and reasonable value," as meaning the best price obtainable at a voluntary sale, to be paid at once in money, and excluding any additional amount that might be had were credit or terms allowed.
Ala.—State v. Woodward, 93 So. 826, 208 Ala. 31.

(12) "Fair and reasonable value, not necessarily market value," as meaning that market value is minimum value to be found, beyond which other circumstances may be considered to arrive at "fair and reasonable value."

U.S.—Louisville Joint Stock Land Bank v. Radford, C.C.A.Ky., 74 F.2d 576, 582, 583.

(13) "Fair and true report."
N.Y.—Naegle v. MacFadden Publications, 292 N.Y.S. 851, 854, 161 Misc. 684.

(14) "Fair and valuable consideration," in contradistinction to an "adequate consideration."
Okla.—Lucas v. Coker, 113 P.2d 589, 590, 189 Okl. 95.

(15) "Fair average value."
U.S.—Central Union Trust Co. of New York v. Edwards, C.C.A.N.Y., 287 F. 324, 328.

(16) "Fair current market price."
Eng.—Charrington & Co. Ltd., v. Wooder, 1914, A.C. 71, 88—Arnold Perrett & Co., Ltd. v. Radford, 17 T.L.R. 301.

(17) "Fair damages for the wrong suffered."
Va.—Gurfein v. Howell, 128 S.E. 644, 646, 142 Va. 197.

(18) "Fair effort in good faith."
Ky.—Fannon v. Commonwealth, 175 S.W.2d 531, 532, 295 Ky. 817—Benson v. Commonwealth, 60 S.W.2d 941, 943, 249 Ky. 328.

(19) "Fair market or real value."
Ala.—State v. Bienville Water-Supply Co., 8 So. 54, 89 Ala. 325.

Equivalent to "cash market value" and "fair and reasonable cash value" see the C.J.S. definition Cash.

(20) "Fair on its face."
Wyo.—Denny v. Stevens, 73 P.2d 308, 310, 52 Wyo. 253, 113 A.L.R. 1337. 25 C.J. p 431 note 28.

(21) "Fair persuasion," as meaning argument, exhortation, or entreaty addressed to a person without threat of physical harm or economic loss, or persistent molestation or harassment, or material and fraudulent misrepresentations.

Nev.—City of Reno v. Second Judicial District Court in and for Washoe County, 95 P.2d 994, 998, 59 Nev. 416, 125 A.L.R. 948.

(22) "Fair price," as implying an ascertainable valuation.
Ala.—McCormick v. Tissier, 133 So. 22, 24, 222 Ala. 422.

N.J.—Van Doren v. Robinson, 16 N.J.Eq. 256, 260.

(23) "Fair reflection of income."
U.S.—C. I. R. v. U. S. Trust Co. of New York, C.C.A.N.Y., 143 F.2d 243, 245.

(24) "Fair remuneration."
La.—Gelpi v. Wilbert, 119 So. 455, 456, 9 La.App. 170.

(25) "Fair rental value," as meaning the going rates of rental for similar facilities in community.

U.S.—Union Pac. R. Co. v. U. S., Mo., 61 S.Ct. 1064, 1077, 313 U.S. 450, 85 L.Ed. 1453.

(26) "Fair title" of the proposed law," as not a substitute for a "description" expressly required by constitution for a law proposed by initiative.

Mass.—In re Opinion of the Justices, 35 N.E.2d 676, 680, 309 Mass. 676.

(27) "Fair trade law," as not applicable to a statute designed to prevent fraud on purchasers in retail

sale of gasoline as ordinarily carried on in filling stations.

Mass.—Sperry & Hutchinson Co. v. McBride, 30 N.E.2d 269, 274, 307 Mass. 408.

(28) "Fair true, and impartial accounts."

Tex.—Bell Pub. Co. v. Garrett Engineering Co., Civ.App., 146 S.W.2d 301, 306.

(29) "Fair value base."
N.J.—Atlantic City Sewerage Co. v. Board of Public Utility Com'rs, 26 A.2d 71, 76, 128 N.J.Law 359.

(30) "Fair voluntary sale."
Tenn.—Treadwell Realty Co. v. City of Memphis, 116 S.W.2d 997, 1000, 173 Tenn. 168.

(31) "Fair wage."
Pa.—In re Fisher, 23 A.2d 878, 879, 344 Pa. 96.

(32) "Just and fair" as applying to the moral qualities of acts, dealings, and transactions, and cannot be properly construed as having reference to formal legal proceedings.
N.Y.—People v. White, 14 How.Pr. 498, 501.

(33) "Just and fair proceedings."
N.Y.—In re Roberts, 8 Daly 95, 97, 59 How.Pr. 136.

Phrases discussed elsewhere

(1) "Fair and equitable" and similar phrases see the C.J.S. definition Equitable.

(2) "Fair and full equivalent," and "fair equivalent" see the C.J.S. definition Equivalent.

(3) "Fair and impartial trial," "fair public trial," and "fair trial" see Criminal Law § 961, and Trial § 1.

(4) "Fair and reasonable cash value" see the C.J.S. definition Cash.

(5) "Fair and reasonable rental," "fair rent," or "fair rental value" where tenant holds over see Landlord and Tenant § 509.

(6) "Fair and reasonable tolls" see Bridges § 51 c (1) note 99.

(7) "Fair book value" see the C.J.S. definition Book.

(8) "Fair cash market value" see the C.J.S. definition Cash.

(9) "Fair cash valuation" and "fair cash value" see the C.J.S. definition Cash.

(10) "Fair comment" or "fair criticism" see title Libel and Slander § 130.

(11) "Fair compensation" see the C.J.S. definition Compensation.

(12) "Fair competition" see the C.J.S. definition Competition. See also Trade-Marks, Trade-Names and Unfair Competition § 16.

(13) "Fair consideration" and "fair

FAIRLY. The adverb of "fair," meaning equitably,⁴⁸ honestly,⁴⁹ impartially,⁵⁰ in good faith,⁵¹ measurably,⁵² and reasonably.⁵³

The term has been distinguished from "clearly" see the C.J.S. definition Clearly, "faithfully,"⁵⁴ and "truly."⁵⁵

Phrases employing the word are set out in the note.⁵⁶ Other phrases as to which more recent adjudications have not been found see 25 C.J. p 432 note 45-p 433 note 59.

FAIRNESS. That fair dealing which usually characterizes business transactions.⁵⁷

The term has been held to be the antithesis of "discrimination" see the C.J.S. definition of that term.

and valuable consideration" see the C.J.S. definition Consideration.

(14) "Fair expression of opinion by the jurors" as constituting valid verdict see Criminal Law § 1374 note 76.

(15) "Fair plan of reorganization" see Bankruptcy § 836 b.

(16) "Fair preponderance of evidence or testimony" see Evidence § 1021 a notes 96, 97.

(17) "Fair return" see Public Utilities §§ 13, 25.

(18) "Fair use" see Copyright and Literary Property §§ 94 c (4), 104.

(19) "Good fair," as distinguished from "average" see the C.J.S. definition Average.

48. Tex.—*Corpus Juris* quoted in Looney v. Elliott, Civ.App., 52 S.W.2d 949, 952.
25 C.J. p 432 note 41.

49. Mass.—*Ring v. Phoenix Assur. Co.*, 14 N.E. 525, 529, 145 Mass. 426.

Tex.—*Corpus Juris* quoted in Looney v. Elliott, Civ.App., 52 S.W.2d 949, 952.

50. Tex.—*Corpus Juris* quoted in Looney v. Elliott, supra.

51. N.Y.—*People v. Mancuso*, 175 N.E. 177, 179, 255 N.Y. 463.

52. Ohio.—*Cincinnati Tract. Co. v. Johnson*, 32 Ohio Cir.Ct. 594, 595.

53. Ala.—*Conway v. Robinson*, 113 So. 531, 533, 216 Ala. 495.

Ohio.—*Cincinnati Tract. Co. v. Johnson*, 32 Ohio Cir.Ct. 594, 595.

54. N.J.—*Den v. Thompson*, 16 N.J. Law 72, 73.

55. N.J.—*Lawrence v. Finch*, 17 N.J.Eq. 234, 239.

56. Phrases construed

(1) "Fairly and knowingly made." N.Y.—*Le Francois v. Hobart College*, 31 N.Y.S.2d 200, 203.

(2) "Fairly and reasonably compensate," as implying full compensation.

Mo.—*Pfeiffer v. Schee*, App., 107 S.W.2d 170, 175.

(3) "Fairly be inferred." Ala.—*Conway v. Robinson*, 113 So. 531, 533, 216 Ala. 495.

(4) "Fairly deducible of record." Okl.—*Pearce v. Freeman*, 254 P. 719, 721, 122 Okl. 285.

(5) "Fairly, legally, and with the same care and diligence." N.Y.—*People v. Mancuso*, 175 N.E. 177, 179, 255 N.Y. 463.

(6) "Fairly preponderating evidence," as distinguished from "clearly preponderating evidence" see the C.J.S. definition Clearly.

(7) "More fairly" is synonymous with the phrase "more impartially." Ga.—*Mann v. Harmon*, 8 S.E.2d 549, 554, 62 Ga.App. 231.

57. Miss.—*Morgan v. Hazlehurst Lodge*, 53 Miss. 665, 683.

58. Phrases

(1) "Fairness and good faith," used as the antithesis of mala fides. Miss.—*Morgan v. Hazlehurst Lodge*, supra.

(2) "Fairness of a contract," like its other qualities, must be judged of at the time it is entered into, or at least when the contract becomes absolute, and not by subsequent events.

U.S.—*Heyward v. Bradley*, S.C., 179 F. 325, 331, 102 C.C.A. 509.

(3) "Fairness of treatment" means uniformity unless there is some reasonable basis for distinction, and it is generally regarded as essential to "fair treatment" that all persons who are similarly situated be dealt with on equal basis.

U.S.—*Gregory v. Barr*, Em.App., 203 F.2d 364, 367.

Phrases employing the word are set out in the note.⁵⁸

FAIRWAY. On a golf course, a fairway is a strip of land, where the grass is kept mowed, having a tee located at the near extremity and the green at the opposite or further extremity.⁵⁹

As a maritime term see Collision § 2 p 11 notes 50-56.

FAIT. Law French, anything done; hence an act, a deed, a fact; a deed lawfully executed.⁶⁰

FAITH. Confidence, credit, or reliance; also belief, credence or trust;⁶¹ a firm conviction of the truth of what is declared by another by way of testimony without other evidence.⁶² Also, purpose;

59. Mo.—*Page v. Unterreiner*, App., 106 S.W.2d 528, 532.

60. Black L.D.

Phrases defined

(1) "Fait accompli," as meaning an accomplished fact, or an act done. La.—*Succession of Burns*, 7 So.2d 359, 363, 199 La. 1081.
Mo.—*Welch v. Mann*, 92 S.W. 98, 101, 193 Mo. 304.

(2) "Fait enrolle," as meaning a deed enrolled, as a bargain and sale of freeholds. Black L.D.

(3) "Fait juridique," in French law, a juridical fact; one of the factors or elements constitutive of an obligation. Black L.D.

(4) "Fait précis," a term appearing in a Swiss statute interpreted as meaning "precise fact" or "definite act."

Wis.—*Hite v. Keene*, 134 N.W. 383, 384, 149 Wis. 207, Ann.Cas.1913D 251.

(5) "Feme (or femme) de fait," as meaning a wife de facto. Black L.D.

61. Black L.D.

Meanings exemplified

(1) An act may be said to be done on the faith of certain representations. Black L.D.

(2) The constitution provides that "full faith and credit" shall be given to the judgments of each state in the courts of the others. Black L.D.

62. Tex.—*Daniel v. Modern Woodmen of America*, 118 S.W. 211, 214, 53 Tex.Civ.App. 570.

Presumptions as based on faith

"The basic principle upon which presumptions are built is philosophically related to the doctrine of

intent; sincerity; state of knowledge or design;⁶³ recognition of the obligations of morals and honor.⁶⁴ It has been said that the term does not mean necessarily a religious denomination.⁶⁵

In Scotch law, a solemn pledge, an oath.⁶⁶

Good faith. These two words, or their Latin equivalent, appear frequently in the law,⁶⁷ constituting a general term with a somewhat elastic meaning,⁶⁸ and described as a symbolic expression denoting the exercise of reasonable care, prudence, and diligence.⁶⁹

While it has been said on the one hand that good faith is an intangible and abstract quality,^{69.5} it

also has been stated that good faith is not an abstract quality or thing,^{69.10} but is a concrete principle,^{69.15} a concrete quality descriptive of the motivating purpose of one's act or conduct when challenged or called in question.^{69.20}

It has been said that the phrase has no technical or refined signification,⁷⁰ and that there is no statutory definition of the term.^{70.5} However, in common usage, it has a well-defined and generally understood meaning,⁷¹ being ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud,⁷² and, generally speaking, means being faithful to one's duty or obligation.⁷³ It is borrowed from equity

faith. Now faith, says Paul, is the substance of things hoped for, the evidence of things not seen. [Heb. ii: 1, q. v.] 'Presumption,' says Matthews (1 Mat. Presm. Ev. 1) 'is a principle of law, by which, for the furtherance and support of right, facts not established by positive evidence are inferred from circumstances.' That is, where the thing itself is unseen and unknown, in a close sense, it may yet be deemed seen and known in the light of the knowledge of mankind based on frequent occurrence, and found from experience to be generally accordant with truth." Mo.—Rodan v. St. Louis Transit Co., 105 S.W. 1061, 1066, 207 Mo. 392, 409.

63. Black L.D.

"The faith of a transaction involves the motive with which it is entered into." Ala.—Thornton v. Bledsoe, 46 Ala. 73, 76.

64. U.S.—Gerstet Corporation v. Wessex-Campbell Silk Co., C.C.A. N.Y., 3 F.2d 236, 238.

65. Md.—Board of Home Missions and Church Extension of M. E. Church v. Lynch, 176 A. 619, 620, 168 Md. 117.

66. Black L.D.

"To make faith" is to swear, with the right hand uplifted, that one will declare the truth. Black L.D.

67. U.S.—Siano v. Helvering, D.C. N.J., 13 F.Supp. 776, 780. Latin equivalent see the C.J.S. definition Bona Fide.

68. U.S.—In re 188 West Randolph Street Building Corporation, C.C.A. Ill., 88 F.2d 257, 260.

Two divergent meanings

"What one might call the broad or subjective view defines them (the words 'good faith') as describing an actual state of mind irrespective of its producing causes. . . . On the other hand, many courts have

construed the words narrowly and objectively and have introduced criteria."

U.S.—Siano v. Helvering, D.C.N.J., 13 F.Supp. 776, 780.

69. Md.—Obrecht v. Crawford, 2 A. 2d 1, 8, 175 Md. 385, 119 A.L.R. 1129.

69.5 N.Y.—Cravatts v. Klozo Fastener Corp., 133 N.Y.S.2d 235, 238, 205 Misc. 781.

Doyle v. Gordon, 158 N.Y.S.2d 248, 259, 260—Martin v. Columbia Pictures Co., 133 N.Y.S.2d 469, 473.

69.10 Mo.—Krone v. Snapout Forms Co., 230 S.W.2d 865, 869, 360 Mo. 821.

Not floating like bacteria

"Good faith is not an abstract quality floating in the firmament like bacteria in foul breath."

Fla.—Municipal Bond & Mortgage Corp. v. Bishop's Harbor Drainage Dist., 17 So.2d 226, 227, 154 Fla. 246.

69.15 Business transacted on principle

A concrete principle upon which the world's business is daily transacted.

Mo.—Krone v. Snapout Forms Co., 230 S.W.2d 865, 869, 360 Mo. 821.

69.20 Fla.—Municipal Bond & Mortgage Corp. v. Bishop's Harbor Drainage Dist., 17 So.2d 226, 228, 154 Fla. 246.

Mo.—Krone v. Snapout Forms Co., 230 S.W.2d 865, 869, 360 Mo. 821.

70. U.S.—In re Coleman, D.C.Ky., 21 F.Supp. 923, 924—In re Vater, D.C. Ky., 14 F.Supp. 631, 632.

Mass.—Gardner v. Gardner, 122 N.E. 308, 309, 232 Mass. 253.

No technical meaning

N.Y.—Cravatts v. Klozo Fastener Corp., 133 N.Y.S.2d 235, 238, 205 Misc. 781.

Doyle v. Gordon, 158 N.Y.S.2d 248, 259, 260—Martin v. Columbia Pictures Co., 133 N.Y.S.2d 469, 473.

70.5 N.Y.—Cravatts v. Klozo Fast-

ener Corp., 133 N.Y.S.2d 235, 238, 205 Misc. 781.

Doyle v. Gordon, 158 N.Y.S.2d 248, 259, 260—Martin v. Columbia Pictures Co., 133 N.Y.S.2d 469, 473.

In absence of statutory definition

"Nowhere in the statute is there any definition of 'good faith.' What is meant by the term must be drawn from the meaning of the words themselves, as interpreted by the context in which they are used, the purpose back of the statute, the mischiefs it was enacted to prevent, the results it was enacted to accomplish."

U.S.—R. L. Witters Associates v. Ebsary Gypsum Co., C.C.A.Fla., 93 F. 2d 746, 748.

71. U.S.—In re Coleman, D.C.Ky., 21 F.Supp. 923, 924—In re Vater, D.C.Ky., 14 F.Supp. 631, 632.

Cal.—Corpus Juris Secundum cited in People v. Nunn, 296 P.2d 813, 818, 46 C.2d 460.

Corpus Juris Secundum quoted in Gibson v. Corbett, 200 P.2d 216, 219, 87 C.A.2d 926.

Conn.—Corpus Juris Secundum quoted in Snyder v. Reshenk, 38 A.2d 803, 806, 131 Conn. 252.

N.M.—Redewill v. Gillen, 12 P. 872, 874, 4 N.M. 78.

Tex.—Dunning v. Badger, Civ.App., 74 S.W.2d 151, 155.

72. U.S.—In re Coleman, D.C.Ky., 21 F.Supp. 923, 924—In re Vater, D.C.Ky., 14 F.Supp. 631, 632.

Cal.—Corpus Juris Secundum cited in People v. Nunn, 296 P.2d 813, 818, 46 C.2d 460.

Corpus Juris Secundum quoted in Gibson v. Corbett, 200 P.2d 216, 219, 87 C.A.2d 926.

Conn.—Corpus Juris Secundum quoted in Snyder v. Reshenk, 38 A.2d 803, 806, 131 Conn. 252.

Iowa.—Meyers v. Canutt, 46 N.W.2d 72, 76, 242 Iowa 692, 24 A.L.R.2d 1.

Kan.—Sowder v. Lawrence, 281 F. 921, 923, 129 Kan. 135.

73. Cal.—Corpus Juris Secundum

jurisprudence, and, it is said, must be interpreted accordingly.⁷⁴

"Good faith" may mean, or consist of, an honest intention to abstain from taking any unconscientious advantage of another,⁷⁵ even through the forms and technicalities of the law, together with an absence of all information or belief of facts which would render the transaction unconscientious;⁷⁶ freedom from knowledge of circumstances which ought to put a person upon inquiry,⁷⁷ free from design to defraud;⁷⁸ honest and reasonable belief,

even though erroneous;⁷⁹ honest belief;⁸⁰ honest lawful intent;⁸¹ honesty of intention;⁸² honesty of purpose;^{82.5} the doing of a thing honestly;^{82.10} the absence of bad faith, of mala fides;⁸³ the opposite of fraud⁸⁴ and of bad faith;⁸⁵ the antithesis of malice;⁸⁶ the condition of acting without intent to assist in a fraudulent or otherwise unlawful scheme.⁸⁷

On the other hand, in particular connections, it has been said that good faith may mean more than the absence of actual fraud,⁸⁸ something beyond

cited in *People v. Nunn*, 296 P.2d 813, 818, 46 C.2d 460.

Corpus Juris Secundum quoted in *Gibson v. Corbett*, 200 P.2d 216, 219, 87 C.A.2d 926.

Conn.—**Corpus Juris Secundum** quoted in *Snyder v. Reshenk*, 28 A.2d 803, 806, 131 Conn. 252.

Wis.—*Hilker v. Western Automobile Ins. Co. of Ft. Scott, Kan.*, 235 N.W. 413, 414, 204 Wis. 1.

Observance of legal duties

"'Good faith' includes, not only personal upright mental attitude and clear conscience, but also intention to observe legal duties."

U.S.—*Kiyochi Fujikawa v. Sunrise Soda Water Works Co., C.C.A.Hawaii*, 158 F.2d 490, 494.

Mich.—*Bliss Petroleum Co. v. McNally*, 237 N.W. 53, 55, 254 Mich. 569.

74. Cal.—*Cardenas v. Miller*, 39 P. 783, 785, 41 P. 472, 108 C. 250, 49 Am.S.R. 84.

Corpus Juris Secundum quoted in *Janise v. Bryan*, 201 P.2d 466, 470, 89 C.A.2d Supp. 933—**Corpus Juris Secundum** cited in *Bumgarner v. Orton*, 146 P.2d 67, 69, 63 C.A.2d Supp. 841.

75. U.S.—*In re Coleman*, D.C.Ky., 21 F.Supp. 923, 924.

Cal.—*Gibson v. Corbett*, 200 P.2d 216, 219, 87 C.A.2d 926.

Conn.—*Snyder v. Reshenk*, 28 A.2d 803, 806, 131 Conn. 252.

Ky.—*Warfield Natural Gas Co. v. Allen*, 59 S.W.2d 534, 538, 248 Ky. 646, 91 A.L.R. 890.

Mo.—*Gray v. Clement*, 246 S.W. 940, 944, 296 Mo. 497.

Neb.—*Hilton v. Clements*, 291 N.W. 483, 488, 137 Neb. 791.

N.J.—*De Fazio v. Mayor and Council of City of Hoboken*, 79 A.2d 877, 879, 12 N.J.Super. 515.

Or.—*Jennings v. Lentz*, 93 P. 327, 329, 50 Or. 483, 29 L.R.A., N.S., 584.

S.D.—*Harker v. Cowie*, 161 N.W. 620, 623, 38 S.D. 385.

76. Cal.—*Gibson v. Corbett*, 200 P.2d 216, 219, 87 C.A.2d 926.

Conn.—*Snyder v. Reshenk*, 28 A.2d 803, 806, 131 Conn. 252.

Ky.—*Warfield Natural Gas Co. v. Allen*, 59 S.W.2d 534, 538, 248 Ky. 646, 91 A.L.R. 890.

Mo.—*Gray v. Clement*, 246 S.W. 940, 944, 296 Mo. 497.

Neb.—*Hilton v. Clements*, 291 N.W. 483, 488, 137 Neb. 791.

N.J.—*De Fazio v. Mayor and Council of City of Hoboken*, 79 A.2d 877, 879, 12 N.J.Super. 515.

N.D.—*Harry E. McHugh, Inc., v. Haley*, 237 N.W. 835, 839, 61 N.D. 359.

28 C.J. p 715 notes 99, 1.

77. Minn.—*Pennington County Bank v. Moorehead First State Bank*, 125 N.W. 119, 121, 110 Minn. 263, 136 Am.S.R. 496, 26 L.R.A., N.S., 849.

Pa.—*Cochran v. Fox Chase Bank*, 58 A. 117, 118, 209 Pa. 34, 103 Am.S.R. 976.

78. Ala.—*Tapia v. Williams*, 54 So. 613, 617, 172 Ala. 18.

79. "That there was an error makes no difference; for good faith in such a case results from an error of law as well as from an error of fact." La.—*Succession of Marinoni*, 164 So. 797, 806, 183 La. 776.

80. Mo.—*Jones v. Missouri Freight Transit Corporation*, 40 S.W.2d 465, 470, 225 Mo.App. 1076.

81. Ill.—*People v. Guagliata*, 200 N.E. 169, 171, 362 Ill. 427, 103 A.L.R. 1035.

Collins v. Becklenberg, 236 Ill. App. 324, 331.

28 C.J. p 715 note 5.

82. U.S.—*Siano v. Helvering*, D.C. N.J., 13 F.Supp. 776, 780.

Ind.—*Smith v. State*, 13 N.E.2d 562, 563, 214 Ind. 169.

28 C.J. p 715 note 6.

"A matter of intention"

S.D.—*Harker v. Cowie*, 161 N.W. 620, 623, 38 S.D. 385.

82.5 U.S.—*U. S. v. Center Veal & Beef Co., D.C.N.Y.*, 61 F.Supp. 65, 70.

Similarly expressed

An honest purpose as contrasted with collusion.

Eng.—*Lucas v. Dicker*, 5 C.P.D. 150, 155.

Implies honesty of purpose

"Good faith, apart from the element of notice with which it is closely identified, necessarily im-

plies honesty of purpose, and the absence of any intention to use the transaction to which it is applied to deprive others of rights or property to which in equity and good conscience they are entitled."

Md.—**Corpus Juris** cited in *People's Banking Co. of Smithsburg v. Fidelity & Deposit Co. of Maryland*, 170 A. 544, 553, 165 Md. 657.

82.10 U.S.—**Corpus Juris Secundum** cited in *U. S. v. Center Veal & Beef Co., D.C.N.Y.*, 61 F.Supp. 65, 70.

Eng.—*Tatam v. Haslar*, 23 Q.B.D. 345, 349.

83. Okl.—*Hankins v. Farmers' & Merchants' Bank*, 170 P. 890, 892, 69 Okl. 136.

84. Ill.—*McConnell v. Street*, 17 Ill. 253, 254.

Okl.—*Miller v. Tidal Oil Co.*, 17 P.2d 967, 970, 161 Okl. 155, 87 A.L.R. 811.

85. U.S.—*Canal Bank v. Hudson*, Miss., 4 S.Ct. 303, 311, 111 U.S. 66, 81, 28 L.Ed. 354.

Okl.—*Forbes v. Enid First Nat. Bank*, 95 P. 785, 788, 21 Okl. 206, 28 C.J. p 715 note 9.

86. Tex.—*Caruth v. Dallas Gas Co., Civ.App.*, 282 S.W. 334, 339—*Cobb v. Garlington, Civ.App.*, 193 S.W. 463, 467.

87. Ill.—*Crouch v. Chicago First Nat. Bank*, 40 N.E. 974, 979, 156 Ill. 342.

Collins v. Becklenberg, 236 Ill. App. 324, 331.

88. U.S.—*Baxter v. Savings Bank of Utica, N.Y., C.C.A.Ga.*, 92 F.2d 404, 406.

In re Brown, D.C.Iowa, 21 F.Supp. 935, 938—*In re Schaeffer*, D.C.Md., 14 F.Supp. 807, 814.

In farmer-debtor composition arrangements

U.S.—*In re Alatalo*, D.C.S.D., 26 F.Supp. 276, 278.

Issue of stock dividend

While a stock dividend issued in good faith may not generally be successfully questioned afterward, "good faith" requires the exercise by the corporate officers of good sense and reasonable business prudence.

N.C.—*Whitlock v. Alexander*, 76 S.E. 538, 541, 160 N.C. 465.

honest endeavor, something more than mere honesty of purpose, and that it imports a reasonable expectation of achieving the end sought.⁸⁹

Although in its original and popular sense the term denotes honesty of purpose, absence of bad faith,⁹⁰ and has been said to be more than a state of mind,^{90.5} yet it is popularly used to denote the actual existing state of the mind, without regard to what it should be from given standards of law and reason.⁹¹

It does not always require sound judgment and business sagacity,⁹² but it does imply the exercise of a reasonable discretion in the circumstances,⁹³ and does require the exercise of reasonable diligence

to learn the truth,^{93.5} and an honest effort to ascertain the facts, and an honest determination from such ascertained facts.⁹⁴

Good faith encompasses, among other things, an honest belief, the absence of malice, and the absence of a design to defraud or to seek an unconscionable advantage.^{94.5}

The term is used in law to qualify many different kinds of actions;⁹⁵ embracing those obligations which are imposed upon one in dealing with property by the circumstances attending it at the time,⁹⁶ as, for example, between persons standing in confidential or fiduciary relations.⁹⁷

"Good faith" has been held to be synonymous with

More than absence of fraud

To constitute "good faith" there must be an absence not only of participation in the fraud or collusion but also of knowledge or notice of the fraud or of facts and circumstances calculated to put an ordinarily prudent business man on inquiry to ascertain the truth.

U.S.—Siano v. Helvering, D.C.N.J., 13 F.Supp. 776, 780.

Mich.—Austin v. Hayden, 137 N.W. 317, 323, 171 Mich. 38, Ann.Cas. 1915B 894.

89. U.S.—Detroit Trust Co. v. Campbell River Timber Co., C.C.A.Wash., 98 F.2d 389, 392—First Nat. Bank v. Conway Road Estates Co., C.C.A.Mo., 94 F.2d 736, 739—Provident Mut. Life Ins. Co. of Philadelphia v. University Evangelical Lutheran Church of Seattle, C.C.A.Wash., 90 F.2d 992, 995—In re Tennessee Pub. Co., C.C.A.Tenn., 81 F.2d 463, 466.

In re Anderson, D.C.N.D., 22 F.Supp. 928, 932, 934—In re Dionne, D.C.Me., 21 F.Supp. 311, 313—In re R. L. Witters Associates, D.C.Fla., 19 F.Supp. 648, 651.

See also Bankruptcy § 791 notes 63–67, good faith in submitting proposal for agricultural composition or extension, and § 832 b, good faith in submitting plan for reorganization of corporations generally.

90. Mont.—Corpus Juris quoted in Tipton v. Sands, 60 P.2d 662, 670, 103 Mont. 1, 106 A.L.R. 474. 28 C.J. p 715 note 12.

Form of credibility

Good faith is one form of credibility, it means that motive that actuated conduct in question was in fact what actor ascribes to it, that is, that what he gives as his motive was in truth his motive.

U.S.—N. L. R. B. v. James Thompson & Co., C.A., 208 F.2d 743, 745.

90.5 Mo.—Krone v. Snapout Forms Co., 230 S.W.2d 865, 869, 360 Mo. 821.

91. U.S.—Siano v. Helvering, D.C.N.J., 13 F.Supp. 776, 780.

Iowa.—Meyers v. Canutt, 46 N.W.2d 72, 76, 242 Iowa 692, 24 A.L.R.2d 1. Mont.—Corpus Juris quoted in Tipton v. Sands, 60 P.2d 662, 670, 103 Mont. 1, 106 A.L.R. 474. 28 C.J. p 715 note 13.

A state or condition of mind

"Good faith, or the want of it, is not a visible, tangible fact that can be seen and touched, but rather a state or condition of mind which can only be judged of by actual or fancied tokens and signs."

U.S.—Wilder v. Gilman, 55 Vt. 504, 505. 28 C.J. p 715 note 6 [b].

"Good faith is a question of fact, and the legal presumption as to knowledge of the law has no place in determining the question."

Mo.—Corpus Juris cited in Vesper v. Ashton, 118 S.W.2d 84, 89, 233 Mo. App. 204.

Individual's good faith concept of his own mind

An individual's personal good faith is a concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone. The existence of defendants' good faith as a substantive fact, therefore, necessitates an examination and evaluation of external manifestations as well.

N.Y.—Cravatts v. Klozo Fastener Corp., 133 N.Y.S.2d 235, 238, 205 Misc. 781.

Doyle v. Gordon, 158 N.Y.S.2d 248, 259, 260—Martin v. Columbia Pictures Co., 133 N.Y.S.2d 469, 473.

92. Mass.—Minot v. Burroughs, 112 N.E. 620, 624, 223 Mass. 595.

Mont.—Corpus Juris quoted in Tipton v. Sands, 60 P.2d 662, 670, 103 Mont. 1, 106 A.L.R. 474.

93. Ala.—Kilgore v. Union Indemnity Co., 132 So. 901, 902, 222 Ala. 375.

93.5 Okl.—Hillers v. Local Federal Sav. & Loan Ass'n, 232 P.2d 626, 630, 204 Okl. 615.

Or.—Murray v. Wiley, 127 P.2d 112, 121, 169 Or. 381.

Diligence required

The term "good faith" means exercise of that caution and diligence which honest men of ordinary prudence would exercise under the same or similar circumstances.

Iowa.—Jones v. Southern Surety Co., 228 N.W. 98, 103.

94. U.S.—Colket v. St. Louis Union Trust Co., C.C.A.Mo., 52 F.2d 390, 391.

Ala.—Ripps v. Herrington, 1 So.2d 899, 902, 241 Ala. 209.

Wis.—Hilker v. Western Automobile Ins. Co. of Ft. Scott, Kan., 235 N.W. 413, 415, 204 Wis. 1.

In the interpretation of language, "good faith" means "that we conscientiously desire to arrive at the truth, that we honestly use all means to do so, and that we strictly adhere to it, when known to us . . . the shunning of subterfuges, quibbles, and political shuffling . . . that we take the words fairly as they were meant."

N.Y.—Hilleary v. Skookum Root Hair Grower Co., 23 N.Y.S. 1016, 1018, 4 Misc. 127.

94.5 N.Y.—Cravatts v. Klozo Fastener Corp., 133 N.Y.S.2d 235, 238, 205 Misc. 781.

Doyle v. Gordon, 158 N.Y.S.2d 248, 259, 260—Martin v. Columbia Pictures Co., 133 N.Y.S.2d 469, 473.

95. Tex.—Walraven v. Farmers' & Merchants' Nat. Bank, 74 S.W. 530, 534, 96 Tex. 331.

96. U.S.—Riederer v. Pfaff, C.C.Or., 61 F. 872, 873.

97. U.S.—In re 188 West Randolph Street Bldg. Corporation, C.C.A.Ill., 88 F.2d 257, 260.

Ala.—Kilgore v. Union Indemnity Co., 132 So. 901, 902, 222 Ala. 375.

"bona fide" and "conscience," see the C.J.S. definitions of those terms.

It has been compared with, or distinguished from, "bad faith," and "diligence," see the C.J.S. definitions of those terms, and it also has been compared with, or distinguished from, "notice" see Notice § 1.

As a basis of prescriptive title to land or as an element of color of title see Adverse Possession §§ 60 a (3), 63; as necessary to entitle mortgagee to protection see Mortgages § 235; and as used to qualify the action of a purchaser see Sales §§ 288-290, and Vendor and Purchaser §§ 320-323. For references to other specific titles consult the General Index.

In good faith. By prefixing the preposition "in" the term "good faith" forms an adverbial phrase which in law has a settled and well-defined meaning;⁹⁸ actually; honestly;⁹⁹ in an attitude of trust and confidence; innocently; in the absence of all

information or belief of facts that would render the transaction unconscientious;¹ really; without fraud, collusion, or deceit; without pretense.²

The phrase connotes a state of mind characterized by honesty of purpose, freedom from intention to be unfair, and the absence of known or readily discoverable facts which would lead to further inquiry,^{2,5} and imports that in any given case the transaction involved was honestly conceived and consummated without collusion, fraud, or knowledge of fraud, and without intent to assist in a fraudulent or otherwise unlawful design.³

The term has been held equivalent to, or convertible or synonymous with, "honest belief" see the C.J.S. definition Belief, "true,"⁴ and "without notice."⁵

It has been distinguished from "willful"⁶ and "willfully."⁷

Other phrases are listed in the footnote,⁸ and

98. Cal.—Appel v. Morford, 144 P.2d 95, 97, 62 C.A.2d 36—Heney v. Sutro, 153 P. 972, 974, 28 C.A. 698.

99. U.S.—In re South Coast Co., D.C.Del., 8 F.Supp. 43, 44.

Cal.—Janise v. Bryan, 201 P.2d 466, 470, 471, 89 C.A.2d Supp. 933—*Corpus Juris Secundum* cited in *Bumgarner v. Orton*, 146 P.2d 67, 69, 63 C.A.2d Supp. 841.

Me.—Waugh v. Prince, 115 A. 612, 614, 121 Me. 67.
28 C.J. p 716 notes 25, 26.

1. Cal.—Janise v. Bryan, 201 P.2d 466, 470, 471, 89 C.A.2d Supp. 933.

Mo.—State v. Diemer, 164 S.W. 517, 521, 255 Mo. 336.

2. Cal.—*Corpus Juris Secundum* cited in *Bumgarner v. Orton*, 146 P.2d 67, 69, 63 C.A.2d Supp. 841.

Me.—Waugh v. Prince, 115 A. 612, 614, 121 Me. 67.

Mo.—*Corpus Juris* cited in *Sheppard v. Travelers' Protective Ass'n of America*, App., 104 S.W.2d 784, 788.
28 C.J. p 716 notes 30-32.

2.5 U.S.—Alicia v. Porto Rico Gas & Coke Co., D.C.Puerto Rico, 89 F. Supp. 938, 941—Ferrer v. Waterman S. S. Corp., D.C.Puerto Rico, 84 F.Supp. 680, 686—*Corpus Juris Secundum* cited in *Kam Koon Wan v. E. E. Black, Limited*, D.C.Hawaii, 75 F.Supp. 553, 561.

3. Cal.—Appel v. Morford, 144 P.2d 92, 95, 97, 62 C.A.2d 36—Heney v. Sutro, 153 P. 972, 974, 28 C.A. 698.

"The words 'in good faith' imply honesty of purpose."

U.S.—In re Dutch Woodcraft Shops, D.C.Mich., 14 F.Supp. 467, 469.

Negligence not factor

A thing is done "in good faith" when it is in fact done honestly,

whether it be done negligently or not.

Ark.—Grauman v. Jackson, 225 S.W. 2d 678, 680, 216 Ark. 362.

4. Neb.—Carleton v. State, 61 N.W. 699, 714, 43 Neb. 373.

5. U.S.—Riederer v. Pfaff, C.C.Or., 61 F. 872, 873.

69 C.J. p 1321 note 87 [c].

6. Minn.—State v. Shevlin-Carpenter Co., 113 N.W. 634, 637, 102 Minn. 470.

Wis.—State v. Smith, 8 N.W. 870, 871, 52 Wis. 134.

7. Mich.—Eagle Tp. Highway Commissioners v. Ely, 19 N.W. 940, 944, 54 Mich. 173.

68 C.J. p 294 note 15.

8. Phrases

(1) "Abiding faith" see the C.J.S. definition Abiding.

(2) "Faith and credit" see Judgments § 889.

(3) "Good faith believe."

Ky.—Hutsell v. Commonwealth, 75 S.W. 225, 227, 25 Ky.L. 262.

(4) "Good-faith 'deposit'."

Neb.—State v. Farmers' State Bank of Dix, 214 N.W. 4, 6, 115 Neb. 574.

(5) "'Good-faith' depositor."

S.D.—Dockstader v. Smith, 229 N.W. 299, 300, 56 S.D. 433.

(6) "Good faith expenditure."

D.C.—Crowley v. Ickes, 107 F.2d 256, 258, 71 App.D.C. 57.

(7) "Good faith holder," as meaning one who purchases on the faith of a tax title and who is guilty of no fraud.

La.—Meredith v. Tubre, 120 So. 902, 904, 10 La.App. 369.

(8) "Good-faith mortgagee," as meaning one who takes chattel mort-

gage to secure debt justly owing to him without notice of prior equities against mortgaged property.

Neb.—First Nat. Bank of Decatur v. Young, 247 N.W. 586, 587, 124 Neb. 598.

(9) "Good faith possessor," as not including one who occupies property with knowledge that he holds under no instrument translativ of ownership.

La.—Levy v. Clemons, App., 3 So.2d 440, 442.

(10) "Good faith rule" see Corporations § 591 b.

(11) "Good faith tender."

Okl.—Seidenbach's v. Underwood, 63 P.2d 950, 954, 178 Okl. 624.

(12) "Good faith trespasser."

Tex.—Houston Production Co. v. Mecom Oil Co., Com.App., 62 S.W.2d 75, 77.

(13) "Good faith without notice."

Okl.—Galer Oil Co. v. Pryor, 47 P.2d 97, 102, 172 Okl. 302.

(14) "In good faith and for value."

S.C.—Farr-Barnes Lumber Co. v. Town of St. George, 122 S.E. 24, 25, 128 S.C. 67.

(15) "In good faith for value."

Okl.—Morgan v. Stanton Auto Co., 285 P. 962, 963, 142 Okl. 116.

(16) "In honor of the faith of the testator's parents."

Md.—Board of Home Missions and Church Extension of M. E. Church v. Lynch, 176 A. 619, 620, 168 Md. 117.

(17) "Mortgage in good faith," as meaning a mortgage for a valuable consideration without notice.

Tex.—Burlington State Bank v. Marlin Nat. Bank, Civ.App., 166 S.W. 499, 501.

still other phrases as to which more recent adjudications have not been found are set out in 28 C.J. p 717 notes 36-41.

FAITHFUL. Observant of compacts, treaties, contracts, vows, or other engagements; true to one's word.⁹ The term connotes the exercise of good faith,¹⁰ and in a particular connection has been held to imply the assumption of that measure of responsibility imposed by law.¹¹

It has been held synonymous with "honest," "trustworthy," and "trusty."¹²

Phrases employing the word are set out in the note.¹³

FAITHFULLY. As respects temporal affairs, diligently; without unnecessary delay;¹⁴ with conscientious diligence or faithfulness, adequate to the due execution of the object involved; with a just regard of adherence to duty, or a due observance of

the particular undertaking.¹⁵

In a particular connection, "faithfully" has been held to comprise the words "firmly," "impartially," "truly," and "well."¹⁶

The term has been distinguished from "fairly" see ante, and "impartially."¹⁷

Phrases employing the word are set out in the note.¹⁸ Other phrases as to which more recent adjudications have not been found see 25 C.J. p 433 note 74-p 434 note 84.

FAITOURS. Idle persons, idle livers, vagabonds.¹⁹

FAKE. As a noun, a swindle, a trick.²⁰

As a verb, in one sense, to make, make up, manufacture, or construct;²¹ and in another sense to steal or filch.²²

FAKER or FAKIR. A petty swindler.²³

(18) "On the true faith of a Christian."

Eng.—Miller v. Salomons, 21 L.J. Exch. 161, 170.

(19) "Possessor in good faith" see the C.J.S. definition Bona Fide.

(20) "Purchaser in good faith," as meaning one who buys honestly for a valuable consideration and without notice.

N.M.—Hunt v. Gragg, 145 P. 136, 138, 19 N.M. 450.
28 C.J. p 716 note 35.

(21) "Purchaser or mortgagee in good faith" as one who takes without actual or constructive notice of prior mortgage.

Wis.—Graham v. Perry, 228 N.W. 135, 137, 200 Wis. 211, 68 A.L.R. 267.

(22) "Want of good faith," as meaning a want of that caution and diligence which an honest man of ordinary prudence is accustomed to exercise in making purchases.

U.S.—Siano v. Helvering, D.C.N.J., 13 F.Supp. 776, 780.

Or.—Murray v. Wiley, 127 P.2d 112, 121, 169 Or. 381.

28 C.J. p 715 note 5 [a].

9. Century D.

10. N.Y.—In re McCafferty's Will, 264 N.Y.S. 38, 65, 147 Misc. 179.

11. Ind.—London & Lancashire Indemnity Co. of America v. Community Savings & Loan Ass'n, 4 N.E.2d 688, 693, 102 Ind.App. 665.

Neb.—Thurston County, to Use of Vesely, v. Chmelka, 294 N.W. 857, 863, 138 Neb. 696.

12. Okl.—Wright v. Fidelity & Deposit Co. of Maryland, 54 P.2d 1084, 1087, 176 Okl. 274.

35 C.J.S.—39

13. Phrases

(1) "Faithful, diligent, and prudent."

N.Y.—In re McCafferty's Will, 264 N.Y.S. 38, 65, 147 Misc. 179.

(2) "'Faithful discharge' of his duties," as a guaranty not only of his personal honesty, but also of his competency, skill, and diligence in the discharge of his duties.

Neb.—Thurston County, to Use of Vesely v. Chmelka, 294 N.W. 857, 863, 138 Neb. 696.

(3) "Faithful discharge of his office."

Ala.—Governor v. Wiley, 14 Ala. 172, 180.

(4) "Faithful discharge of official duties."

Kan.—City of Anthony v. Corbin, 299 P. 603, 604, 133 Kan. 337.

(5) "Faithful performance."

Kan.—Hensley v. Anderson County School Dist. No. 87, 154 P. 253, 97 Kan. 56.

25 C.J. p 433 note 70 [a].

(6) "Faithful performance of the contract on his part."

Okl.—Wright v. Fidelity & Deposit Co. of Maryland, 54 P.2d 1084, 1087, 176 Okl. 274.

14. N.J.—Den v. Thompson, 16 N.J. Law 72, 73.

15. Ky.—Commonwealth v. Polk, 75 S.W.2d 761, 764, 256 Ky. 100.

16. N.J.—Hoboken v. Evans, 31 N. J. Law 342, 343.

17. Pa.—In re Cambria St., 75 Pa. 357, 360.

In re Nicetown Lane, 11 Phila. 377.

18. Phrases

(1) "Faithfully discharge."

N.Y.—Central Hanover Bank & Trust

Co. v. National Surety Corporation, 296 N.Y.S. 276, 280, 163 Misc. 651.

25 C.J. p 433 note 75.

(2) "Faithfully, fairly, and impartially," as meaning more than "faithfully" alone.

N.J.—Perry v. Thompson, 16 N.J. Law 72, 73.

(3) "Faithfully perform."

Ga.—Smith v. Aultman, 118 S.E. 459, 460, 30 Ga.App. 507.

25 C.J. p 433 note 80.

(4) "Honestly and faithfully."

Ind.—London & Lancashire Indemnity Co. of America v. Community Savings & Loan Ass'n, 4 N.E.2d 688, 693, 102 Ind.App. 665.

19. Black L.D.

20. Mo.—Midland Pub. Co. v. Implement Trade Journal Co., 83 S. W. 298, 300, 108 Mo.App. 223.

21. U.S.—U. S. v. Heitler, D.C.Ill., 274 F. 401, 409.

"Faked alibi," as meaning a made, manufactured, or false alibi.

U.S.—U. S. v. Heitler, supra.

22. Mo.—Midland Pub. Co. v. Implement Trade Journal Co., 83 S. W. 298, 300, 108 Mo.App. 223.

23. Neb.—National Automobile Ass'n v. Strunk, 240 N.W. 294, 122 Neb. 890.

Use among Mohammedans

"Sometimes spelled faqueer or faker. A term applied among the Mohammedans to a kind of religious ascetic or beggar, whose claim is that he is in need of mercy, and poor in the sight of God, rather than in need of worldly assistance."

Black L.D.

FALANG. In old English law, a jacket or close coat.²⁴

FALCARE. In old English law, to mow.²⁵

FALCIDIA. In Spanish law, the fourth part of the inheritance, which is guaranteed to the heir free of legacies which must be reduced if they exceed three fourths.²⁶

FALCIDIAN LAW. In Roman law, a law on the subject of testamentary disposition.²⁷

FALCIDIAN PORTION. That portion of a testator's estate which, by the Falcidian law, was required to be left to the heir, amounting to at least one fourth.²⁸

FALD or FALDA. A sheep-fold.²⁹

FALDA and FALDAS. In Spanish, that part of the long dress from the waist down, as the skirt of women. By allusion, or metaphorically, that part of the hill or mountain which falls or descends from the middle down, the skirt or slope of a hill;³⁰ the

base or slope of the mountains but not the foothills.³¹

FALDISDORY. In ecclesiastical law, the bishop's seat or throne within the chancel.³²

FALDSTOOL. A place at the south side of the altar at which the sovereign kneels at his coronation.³³ A folding seat similar to a camp stool, made either of wood or metal, sometimes covered with silk or other material.³⁴

FALDWORTH. In Saxon law, a person reckoned old enough to become a member of the decennary, and so subject to the law of frank-pledge.³⁵

FALERÆ. In old English law, the tackle and furniture of a cart or wain.³⁶

FALESIA. In old English law, a hill or down by the sea-side.³⁷

FALK-LAND or FOLC-LAND. In Saxon law, land of the folk or people; land belonging to the people or the public.³⁸

"Commonly used in English to designate a person engaged in some useless or dishonest business." Black L.D.

24. Black L.D.

25. Black L.D.

Derived forms

(1) *Falcare prata*, to mow or cut grass in meadows laid in for hay. A customary service to the lord by his inferior tenants. Black L.D.

(2) *Falcata*, grass fresh mown, and laid in swaths; that which was mowed. Black L.D.

(3) *Falcatio*, a mowing. Black L.D.

(4) *Falcator*, a mower; a servile tenant who performed the labor of mowing. Black L.D.

(5) *Falcatura*, a day's mowing. Black L.D.

(6) *Falcatura una*, once mowing the grass. Black L.D.

(7) *Jus falcandi*, the right of cutting wood. Black L.D.

26. *Escrache Diccionario*.

In some cases doubt has been expressed whether or not the doctrine is still in force, but the prevailing opinion seems to sustain it. *Escrache Diccionario*.

27. Black L.D.

History

It was enacted by the people dur-

ing the reign of Augustus, in the Roman year 714, on the proposition of the tribune Falcidius. By this law the testator's right to burden his estate with legacies was subjected to an important restriction. It prescribed that no one could bequeath more than three fourths of his property in legacies, and that the heir should have at least one fourth of the estate, and that, should the testator violate this prescript, the heir might have the right to make a proportional deduction from each legatee, so far as necessary. Black L.D.

In the United States

A similar principle exists in Louisiana. In some of the states the statutes authorizing bequests and devises to charitable corporations limit the amount which a testator may give to a certain fraction of his estate. Black L.D.

See also Wills § 98.

28. Black L.D.

29. Black L.D.

Derived or compound forms

(1) *Faldæ cursus*, in old English law, a fold-course; the course (going or taking about) of a fold; a sheep walk, or feed for sheep. Black L.D.

(2) *Faldage*, the privilege which anciently several lords reserved to themselves of setting up folds for sheep in any fields within their manors, the better to manure them, and this not only with their own but their tenants' sheep. Called various-

ly "secta faldare," "fold-course," "free-fold," "faldagii." Black L.D.

(3) *Faldata*, in old English law, a flock or fold of sheep. Black L.D.

(4) *Faldfey*, in Saxon, a fee or rent paid by a tenant to his lord for leave to fold his sheep on his own ground. Black L.D.

(5) *Faldsoca*, in Saxon, the liberty or privilege of foldage. Black L.D.

(6) *Libera falda*, free fold or free foldage. Black L.D.

30. U.S.—The Fossat or Quicksilver Mine Case, Cal., 2 Wall. 649, 674, 17 L.Ed. 739.

31. Cal.—*Moore v. Wilkinson*, 13 C. 478, 486.

32. Black L.D.

33. Black L.D.

34. Black L.D.

"It was used by a bishop when officiating in other than his own cathedral church." Black L.D.

35. Black L.D.

36. Black L.D.

37. Black L.D.

38. Black L.D.

Ownership and use

"Folc-land was the property of the community. It might be occupied in common, or possessed in severalty; and, in the latter case, it was prob-

FALL.

As a Noun

Generally, that which falls or has fallen; something in the state of falling or having fallen; descent from a higher to a lower level.³⁹ It has been said that the word "fall," as used in this sense, connotes an unintentional act without foresight or design.^{39.5}

When applied to the seasons of the year, the season when the leaves fall from the trees;⁴⁰ popularly, it is said to cover upward of three months,⁴¹ and to begin on the first of September.⁴²

In a mechanical sense, a device used in connection with a painter's staging to raise and lower it, consisting of four ropes inserted in pulleys, which ropes are attached to a ladder and run from it to the building, where they are connected with a sling by a block and tackle.⁴³

"Falls," when applied to a watercourse, although in the plural form, usually applies to only one locality.⁴⁴

In one or another of the senses above indicated, "fall" has been construed as synonymous with "autumn" and "depression" see the C.J.S. definitions of

these terms.

Phrases using the noun are set out in the note.⁴⁵

As a Verb

To descend;^{45.5} to descend from a higher to a lower place or position through loss or lack of support; to come down by tumbling or loss of balance; to drop down; to sink;⁴⁶ to descend by the force or power of gravity;^{46.5} to pass downward freely; to drop; to come or go toward the center of gravity, as of the earth.^{46.10} The word is used primarily of objects freed from their suspension or support.^{46.15}

Derivatively, it is a word much used in common speech to indicate that lands become the property or estate of a particular person upon the occurrence of a particular event;⁴⁷ and in this sense has been defined as meaning to be assigned, to be transmitted, or to merge.⁴⁸

Also, in another derived sense, to arrive, to come, or become, to occur,⁴⁹ the term sometimes implying the happening by chance of an undesigned and involuntary event through external, violent, and accidental means,⁵⁰ as where a building is made to

ably parceled out to individuals in the folc-gemote or court of the district, and the grant sanctioned by the freemen who were there present. But, while it continued to be folc-land, it could not be alienated in perpetuity; and therefore, on the expiration of the term for which it had been granted, it reverted to the community, and was again distributed by the same authority. It was subject to many burdens and exactions from which boc-land was exempt." Black L.D.

39. Century D.

39.5 Tex.—McClelland v. Great Southern Life Ins. Co., Civ.App., 220 S.W.2d 515, 525.

40. Minn.—Aultman v. Clifford, 56 N.W. 593, 55 Minn. 159, 161, 43 Am. S.R. 478.

41. Ala.—Horn v. State, 99 So. 58, 59, 19 Ala.App. 572.
Conn.—Clegg v. Bishop, 136 A. 102, 104, 105 Conn. 564.

Or.—Rosenau v. Lansing, 232 P. 648, 113 Or. 638.

42. Ala.—Arrington v. Blackwell, 92 So. 902, 903, 207 Ala. 314.
Horn v. State, 99 So. 58, 59, 19 Ala.App. 572.

Ind.—Abel v. Alexander, 45 Ind. 523, 528, 15 Am.R. 270.

N.C.—State v. Haddock, 9 N.C. 461, 462.

Or.—Rosenau v. Lansing, 232 P. 648, 113 Or. 638.

43. Cal.—Bort v. Quadt, 96 P. 815, 816, 8 C.A. 290.

44. Me.—Davis v. Mattawamkeag Log Driving Co., 19 A. 828, 829, 82 Me. 346.

45. Phrases

(1) "Fall of [year named]."

Ala.—Arrington v. Blackwell, 92 So. 902, 903, 207 Ala. 314.

Horn v. State, 99 So. 58, 59, 19 Ala.App. 572.

Or.—Rosenau v. Lansing, 232 P. 648, 113 Or. 638.

(2) "Fall of land," in English law a quantity of land six ells square superficial measure.

Black L.D.

(3) "Fall payment."

Minn.—Aultman, Miller & Co. v. Clifford, 56 N.W. 593, 55 Minn. 159, 161, 43 Am.S.R. 478.

(4) "Fall term."

N.C.—State v. Haddock, 9 N.C. 461, 462.

(5) "Falls below the dam," as meaning falls immediately below the dam.

Me.—Davis v. Mattawamkeag Log Driving Co., 19 A. 828, 829, 82 Me. 346, 350.

(6) "This fall."

W.Va.—Weltner v. Riggs, 3 W.Va. 445, 450.

(7) "Until the fall."

Ind.—Abel v. Alexander, 45 Ind. 523, 526, 15 Am.R. 270.

(8) "Until the fall of each year." Conn.—Clegg v. Bishop, 136 A. 102, 104, 105 Conn. 564.

45.5 Okl.—Concordia Fire Ins. Co. of Milwaukee v. Smith, 237 P.2d 631, 633, 205 Okl. 344.

46. Ga.—Atlas Assur. Co. v. Lies, 27 S.E.2d 791, 794, 70 Ga.App. 162—Nalley v. Hanover Fire Ins. Co., 193 S.E. 619, 622, 56 Ga.App. 555.

Similarly expressed

To make a downward descent.

Ind.—Danner v. Marquiss, 33 N.E.2d 511, 513, 218 Ind. 441.

46.5 Ga.—Atlas Assur. Co. v. Lies, 27 S.E.2d 791, 794, 70 Ga.App. 162—Nalley v. Hanover Fire Ins. Co., 193 S.E. 619, 622, 56 Ga.App. 555.
Okl.—Concordia Fire Ins. Co. of Milwaukee v. Smith, 237 P.2d 631, 633, 205 Okl. 344.

46.10 Okl.—Concordia Fire Ins. Co. of Milwaukee v. Smith, supra.

46.15 Okl.—Concordia Fire Ins. Co. of Milwaukee v. Smith, supra.

47. Pa.—McCullough v. Gilmore, 11 Pa. 370, 372.

48. English L.D.

49. N.C.—West v. F. W. Woolworth Co., 198 S.E. 659, 660, 214 N.C. 214.

50. Ga.—Nalley v. Hanover Fire Ins. Co., 193 S.E. 619, 622, 56 Ga.App. 555.

S.D.—Richards v. Travelers' Ins. Co., 100 N.W. 428, 429, 18 S.D. 287, 67 L.R.A. 175.

fall by a tornado, distinguished from a fall caused by inherent weakness.⁵¹

In Scotch law, to lose or loose.⁵²

Phrases employing the word are set out in the note.⁵³

Falling

The word "falling" is a derivative of "fall," and partakes of the meaning of the verb, and as a present participle it expresses a state of action in progress or a present descending.^{53.5}

"Falling" has been held not synonymous with "accumulating" see the C.J.S. definition of that term.

Whether damage caused by a falling body is to be regarded as due to collision is treated in the C.J.S. definition Collision. See also Insurance § 797.

FALLAR. In Spanish law, to decide a cause, or to render final judgment.⁵⁴

FALLIDO. In Spanish law, a merchant who suspends business on account of inability, caused by

misfortune, to pay his debts; frequently distinguished from a bankrupt whose similar inability is caused by his own fraud or misconduct.⁵⁵

FALLO. In Spanish law, the final judgment in a cause.⁵⁶

FALLOPIAN TUBE. An essential part of the female reproductive system consisting of a narrow conduit, some four inches in length, that extends on each side of a woman's body from the base of the womb to the ovary on that side.⁵⁷

FALLOW. Applied to land, barren, unproductive; so when it is left barren and without seed it is said to be, or to lie, fallow.⁵⁸

FALLUM. In old English law, an unexplained term for some particular kind of land.⁵⁹

FALSA DEMONSTRATIO. In the civil law, false designation, or erroneous description of a person or thing in a written instrument.⁶⁰

51. Ga.—Nalley v. Hanover Fire Ins. Co., 193 S.E. 619, 622, 56 Ga.App. 555.

52. Black L.D.

"To fall from a right" is to lose or forfeit it.
Black L.D.

53. *Phrases*

(1) "Fall between July and December."
N.C.—West v. F. W. Woolworth Co., 198 S.E. 659, 660, 214 N.C. 214.

(2) "Fall due" see the C.J.S. definition Due.

(3) "Fall foul," defined as meaning to rush on with haste, rough force, and unreasonable violence; to run against; as the ship fell foul of her consort.
Ind.—Harper v. Delp, 3 Ind. 225, 231.

(4) "Fall into the possession of."
Pa.—McCullough v. Gilmore, 11 Pa. 370, 373.

(5) "Fall into the residue."
Eng.—In re Ballance, 42 Ch.D. 62, 65.
25 C.J. p 434 note 93 [c].

(6) "Falls to him upon the death of . . ."
Pa.—McCullough v. Gilmore, supra.

(7) "If a building . . . [shall] fall."
Cal.—Clayburgh v. Agricultural Ins. Co., 102 P. 812, 813, 155 C. 708, 18 Ann.Cas. 579.

Ga.—Nalley v. Hanover Fire Ins. Co., 193 S.E. 619, 622, 56 Ga.App. 555.
25 C.J. p 434 note 97 [a].

53.5 Okl.—Concordia Fire Ins. Co. of

Milwaukee v. Smith, 237 P.2d 631, 633, 205 Okl. 344.

Falling objects

(1) In the phrase "falling objects" the word "falling" is an adjective modifying the noun "objects," and simply expresses an attribute; it denotes a quality of the thing named.
Okl.—Concordia Fire Ins. Co. of Milwaukee v. Smith, supra.

(2) The phrase is construed to mean objects impelled by the force of gravity.

Okl.—Concordia Fire Ins. Co. of Milwaukee v. Smith, supra.

"Falling through," as not susceptible of a precise definition, but broad enough to comprehend the failure of a contract of sale through the refusal of the buyers to pay the price.
Pa.—Hopkinson v. Leeds, 9 Phila. 5, 9.

"Falling from steps" connotes an unintentional act.

Tex.—Consolidated Underwriters v. Foxworth, Civ.App., 196 S.W.2d 87, 95.

54. Escriche Diccionario.

55. Escriche Diccionario.

56. Escriche Diccionario.

57. N.J.—Smith v. Board of Examiners of Feeble-Minded, 88 A. 963, 965, 85 N.J.Law 46.

58. Cal.—May v. American Trust Co., 27 P.2d 101, 103, 153 C.A. 385.

"Summer fallow" and "summer fallowing"

(1) The terms refer to the agricultural practice of alternating the acreage. That is, one portion of the

lands will be harvested and the remaining portion left fallow for that year. The procedure is to plow and disk the area to remain uncultivated, and then leave it barren throughout the summer, with the plan and in the hope that the soil will again be renewed, and its fertility, impaired to some extent through the previous planting, will be restored. It is this scheme of plowing and disking that is called summer fallowing, and lands thus uncultivated beyond the plowing and disking are said to be in summer fallow.

Cal.—May v. American Trust Co., supra.

(2) The plowing of the ground and the harrowing of it during one season preparatory to sowing it for crop during the next season.

Wash.—Farmers' & Merchants' Bank of Walla Walla v. Small, 229 P. 531, 533, 131 Wash. 197.

(3) Working of the land during the spring and summer of one year so as to destroy weeds and to conserve moisture for the next year's crop.

Mont.—Letz v. Lampen, 104 P.2d 4, 5, 110 Mont. 477.

(4) "Summer fallowing" is not a thing, but a condition resulting from plowing of ground and harrowing it during one season preparatory to sowing it for crop during next season.

Wash.—Preugschat v. Hedges, 251 P.2d 166, 167, 41 Wash.2d 660.

59. Black L.D.

60. Wis.—Barton v. Babcock, 28 Wis. 192, 197.

FALSA DEMONSTRATIONE LEGATUM NON PERIMI.⁶¹

FALSA DEMONSTRATIO NON NOCET, or more fully, **FALSA DEMONSTRATIO NON NOCET CUM DE CORPORE CONSTAT.**⁶²

FALSA GRAMMATICA NON VITIAT CHARTAM.⁶³

FALSA MONETA. In the civil law, false or counterfeit money.⁶⁴

FALSA ORTHOGRAPHIA SIVE FALSA GRAMMATICA NON VITIAT CONCESSIONEM.⁶⁵

FALSARE. In old English law, to counterfeit.⁶⁶

61. A maxim meaning "A bequest is not rendered void by an erroneous description." Black L.D.

Applied in

N.Y.—Roman Catholic Orphan Asylum v. Emmons, 3 Bradf. Surr. 144, 149.

25 C.J. p 435 note 10 [a].

Otherwise rendered

"A legacy is not destroyed by an incorrect description."

Bouvier L.D.

62. A maxim meaning "Mere false description does not make an instrument inoperative."

Ga.—Rogers v. Rogers, 3 S.E. 451, 452, 78 Ga. 688.

Trusco Finance Co. v. Childs, 75 S.E.2d 336, 337, 87 Ga.App. 789.

In its fuller form

"Mere false description does not vitiate, if there be sufficient certainty as to the object."

Ga.—Thompson v. Hill, 73 S.E. 640, 641, 137 Ga. 308.

Harmon v. First Nat. Bank, 176 S.E. 833, 835, 50 Ga.App. 3.

N.J.—Weiss v. Rheinstein, 142 A.2d 104, 107, 50 N.J.Super. 308.

Applied or explained in

Ala.—Corpus Juris Secundum cited in Spires v. Nix, 57 So.2d 89, 92, 256 Ala. 642.

Ga.—Rowland v. Mathews, 113 S.E. 442, 445, 153 Ga. 849.

Ind.—Pate v. Bushong, 69 N.E. 291, 296, 161 Ind. 533, 100 Am.S.R. 287, 63 L.R.A. 593.

N.J.—Arnheiter v. Arnheiter, 125 A. 2d 914, 915, 42 N.J.Super. 71.

25 C.J. p 435 note 11 [d].

As applicable or inapplicable to conveyances see Deeds § 30 h notes 46, 52.

Otherwise rendered

"A false description does not render a deed or other writing inoperative, if, after rejecting so much of the description as is false, there remains a sufficient description to as-

certain with legal certainty the subject-matter to which the instrument applies."

Va.—Mathews v. Gillespie, 120 S.E. 324, 327, 137 Va. 639—State Sav. Bank v. Stewart, 25 S.E. 543, 544, 93 Va. 447.

Various characterizations of the maxim

(1) The familiar maxim.

Neb.—Hubermann v. Evans, 65 N.W. 1045, 1051, 46 Neb. 784.

(2) A maxim of the law.

Me.—Howard v. American Peace Society, 49 Me. 288, 293.

(3) The rule founded in common sense as well as in law.

N.Y.—Watervliet Turnpike Co. v. McKean, 6 Hill 616, 619.

(4) The well-known maxim.

Ga.—Rogers v. Rogers, 3 S.E. 451, 452, 78 Ga. 688.

(5) The well settled rule.

N.J.—State v. Orange, 32 N.J.Law 49, 53.

Maxim and its application discussed

(1) "Every application of the maxim, implies that a mistake has occurred in the use of language."

Md.—Criss v. English, 26 Md. 553, 569.

(2) "This rule of construction is said to be derived from the civil law."

Va.—State Sav. Bank v. Stewart, 25 S.E. 543, 544, 93 Va. 447.

63. A maxim meaning "False or bad grammar does not vitiate a deed." Black L.D.

Otherwise rendered

"Neither false Latin nor false English will make a deed void when the intent of the parties doth plainly appear."

Black L.D.

64. Black L.D.

65. A maxim meaning "False spelling or false grammar does not vitiate a grant."

Bouvier L.D.

FALSARIO. In Spanish law, one who commits the crime of falsehood, that is, one who adulterates, corrupts, falsifies, or alters an object or perverts the truth.⁶⁷

FALSARIUS or **FALCARIOUS.** A counterfeit-er.⁶⁸

FALSA SIMULATA NON VERITATEM MINUIT.⁶⁹

FALSE. The adjective is the correlative of the noun, "falsehood,"⁷⁰ and has two distinct and well recognized meanings. It signifies: (1) Intentionally or knowingly or negligently untrue. (2) Untrue by mistake, accident, or honestly after the exercise of reasonable care.⁷¹

Applied in

Eng.—Shrewsbury's Case, 9 Coke 46a, 48a.

Another form of the maxim

"Falsa orthographia non vitiat chartam, concessionem" (false spelling does not vitiate a deed).

Black L.D.

66. "Quia falsavit sigillum," as meaning because he counterfeited the seal.

Black L.D.

67. Escriche Diccionario.

68. Black L.D.

69. A maxim meaning "The truth is not impaired by any false or simulated statement."

Puerto Rico.—Hernández v. Fernández, 17 Puerto Rico, 103, 107.

70. U.S.—Wilensky v. Goodyear Tire & Rubber Co., C.C.A.Mass., 67 F. 2d 389, 390.

Gilpin v. Merchants' Nat. Bank, Pa., 165 F. 607, 611, 91 C.C.A. 445, 20 L.R.A., N.S., 1023.

71. U.S.—U. S. v. Ninety-Nine Diamonds, Minn., 139 F. 961, 966, 72 C.C.A. 9, 2 L.R.A., N.S., 185, certiorari denied 26 S.Ct. 760, 201 U.S. 645, 50 L.Ed. 903.

D.C.—Metropolitan Life Ins. Co. v. Adams, Mun.App., 37 A.2d 345, 350.

Ga.—Laughlin v. Bon Air Hotel, 68 S.E.2d 186, 189, 85 Ga.App. 43.

Miss.—W. T. Rawleigh Co. v. Brantley, 19 So.2d 808, 811, 197 Miss. 244, 157 A.L.R. 188.

Ohio.—Fouts v. State, 149 N.E. 551, 554, 113 Ohio St. 450.

25 C.J. p 435 note 16.

Similarly expressed

(1) False may mean untrue, or it may mean designedly untrue.

U.S.—In re Rosenfeld, C.C.A.N.Y., 262 F. 876, 879.

Colo.—McBride v. People, 248 P.2d 725, 728, 126 Colo. 277.

Wis.—Monahan v. Mutual Life Ins. Co. of New York, 212 N.W. 269, 271, 192 Wis. 102.

It is said to be a word of double meaning;⁷² and sometimes connotes an intent to deceive and sometimes does not.⁷³ The true meaning of the term must, as in other instances, often be determined by the context.⁷⁴

Involving evil intent or turpitude. In the more important uses in jurisprudence, and even in its popular application, the word implies something more than a mere untruth, that is an untruth coupled with a lying intent;⁷⁵ and this is described as the primary meaning of the word, importing moral delinquency, or somewhat more than the vernacular sense of erroneous or untrue;⁷⁶ and implying an evil, or a guilty, intent,⁷⁷ an intent to deceive,⁷⁸

or an intention to perpetrate some treachery or fraud,⁷⁹ including not only the element of error, but also that of intentional wrong.⁸⁰

In this sense, the term is most often used to characterize a wrongful or criminal act, such as involves an error or untruth, intentionally or knowingly put forward,⁸¹ or a mere pretense set up in bad faith and without color of fact;⁸² and in this sense the word "false" is defined as meaning assumed or designed to deceive, as a false check or entry, or false colors;⁸³ contrived or calculated to deceive and injure, deceitful;⁸⁴ designedly untrue;⁸⁵ dishonest, given to deceit, unvarnished, or uttering falsehood;⁸⁶ fraudulent;⁸⁷ intentionally or willfully untrue;⁸⁸

(2) The word "false" may mean merely erroneous, incorrect, as well as deceptive.

U.S.—Heindel v. U. S., C.C.A. Ohio, 150 F.2d 493, 498.

(3) The word "false" may be equivalent to intentionally untrue, as involving evil intent or turpitude, or it may be equivalent to erroneous or incorrect.

Tex.—Universal Life & Acc. Ins. Co. v. Burden, Civ.App., 294 S.W.2d 855, 858.

72. U.S.—North American Accident Ins. Co. v. Tebbbs, C.C.A. Utah, 107 F.2d 853, 855—Sentinel Life Ins. Co. v. Blackmer, C.C.A. Colo., 77 F.2d 347, 351.

73. Cal.—*Corpus Juris* cited in People v. Wahl, 100 P.2d 550, 551, 39 C.A.2d 771.

74. Ariz.—Williams v. Territory, 108 P. 243, 244, 13 Ariz. 27, 31, 27 L.R.A., N.S., 1032.
25 C.J. p 436 note 17.

75. Ariz.—Williams v. Territory, supra.
25 C.J. p 436 notes 18–20.

Similarly expressed

(1) "The word 'false' in its juristic uses frequently implies something more than a mere untruth."

N.J.—*Corpus Juris* cited in Dombroski v. Metropolitan Life Ins. Co., 19 A.2d 678, 680, 126 N.J.Law 545.

(2) "False" means that which is not true, coupled with a lying intent.

U.S.—Wilensky v. Goodyear Tire & Rubber Co., C.C.A. Mass., 67 F.2d 389, 390.

Gilpin v. Merchants' Nat. Bank, Pa., 165 F. 607, 611, 91 C.C.A. 445, 20 L.R.A., N.S., 1023.

25 C.J. p 436 note 21.

(3) In law this word means something more than untrue, it means something designedly untrue and deceitful.

U.S.—Wilensky v. Goodyear Tire & Rubber Co., supra.

U. S. v. Martinez, D.C.Pa., 73 F. Supp. 403, 407.

In re Rosenfeld, C.C.A.N.Y., 262 F. 876, 879—Gilpin v. Merchants' Nat. Bank, supra.

76. U.S.—Wilensky v. Goodyear Tire & Rubber Co., C.C.A. Mass., 67 F.2d 389, 390.

Gilpin v. Merchants' Nat. Bank, Pa., 165 F. 607, 611, 91 C.C.A. 445, 20 L.R.A., N.S., 1023.
Ohio—Fouts v. State, 149 N.E. 551, 554, 113 Ohio St. 450.

77. U.S.—In re Josephson, D.C.Or., 229 F. 272, 274.

Tex.—Hamlin v. Radford Grocery Co., Civ.App., 182 S.W. 716, 717.
25 C.J. p 436 note 20 [a].

78. U.S.—In re Axel, D.C.N.Y., 103 F.Supp. 810, 811—In re Barbieri, D.C.Pa., 97 F.Supp. 86, 88.

Ariz.—Williams v. Territory, 108 P. 243, 244, 13 Ariz. 27, 31, 27 L.R.A., N.S., 1032.

Wis.—Monahan v. Mutual Life Ins. Co. of New York, 212 N.W. 269, 271, 192 Wis. 102.
25 C.J. p 436 note 22.

Similarly expressed

Applied to the intentional act of a responsible being it implies a purpose to deceive.

U.S.—In re Rosenfeld, C.C.A.N.Y., 262 F. 876, 878—Gilpin v. Merchants' Nat. Bank, Pa., 165 F. 607, 611, 91 C.C.A. 445, 20 L.R.A., N.S., 1023.
Conn.—Salt's Textile Mfg. Co. v. Ghent, 139 A. 694, 695, 107 Conn. 211.

79. U.S.—Wilensky v. Goodyear Tire & Rubber Co., C.C.A. Mass., 67 F.2d 389, 390.

U. S. v. Martinez, D.C.Pa., 73 F. Supp. 403, 407.

In re Rosenfeld, C.C.A.N.Y., 262 F. 876, 878—Gilpin v. Merchants' Nat. Bank, Pa., 165 F. 607, 611, 91 C.C.A. 445, 20 L.R.A., N.S., 1023.
25 C.J. p 436 notes 22, 24.

80. Iowa.—Hatcher v. Dunn, 71 N. W. 343, 344, 102 Iowa 411, 36 L.R. A. 639.

81. Ga.—Laughlin v. Bon Air Hotel, 68 S.E.2d 186, 189, 85 Ga.App. 43.
Ohio.—Fouts v. State, 149 N.E. 551, 554, 113 Ohio St. 450.

82. N.Y.—Farnsworth v. Halstead, 18 N.Y.Civ.Proc. 227, 228.
25 C.J. p 435 note 16 [b].

83. U.S.—North American Accident Ins. Co. v. Tebbbs, C.C.A. Utah, 107 F.2d 853, 855—Sentinel Life Ins. Co. v. Blackmer, C.C.A. Colo., 77 F.2d 347, 351.

84. Or.—State v. Leonard, 144 P. 113, 118, 73 Or. 451.

85. U.S.—In re Rosenfeld, C.C.A. N.Y., 262 F. 876, 878.

Wis.—Monahan v. Mutual Life Ins. Co. of New York, 212 N.W. 269, 271, 192 Wis. 102.

86. U.S.—Wilensky v. Goodyear Tire & Rubber Co., C.C.A. Mass., 67 F.2d 389, 390.

Gilpin v. Merchants' Nat. Bank, Pa., 165 F. 607, 611, 91 C.C.A. 445, 20 L.R.A., N.S., 1023.

87. N.Y.—Foot v. Aetna L. Ins. Co., 61 N.Y. 571, 576.

88. U.S.—North American Accident Ins. Co. v. Tebbbs, C.C.A. Utah, 107 F.2d 853, 855, 856—Third Nat. Bank v. Schatten, C.C.A. Tenn., 81 F.2d 538, 540—Sentinel Life Ins. Co. v. Blackmer, C.C.A. Colo., 77 F.2d 347, 351, 352.

In re Cleveland, D.C.Mich., 40 F. Supp. 343—In re Brown, D.C.N.Y., 37 F.Supp. 526, 527.

Colo.—McBride v. People, 248 P.2d 725, 728, 126 Colo. 277.

Tex.—*Corpus Juris Secundum* cited in Universal Life & Acc. Ins. Co. v. Burden, Civ.App., 294 S.W.2d 855, 858.

Similarly expressed

"False" denotes an intentional, deliberate, and willful untruth or something beyond mere inaccuracy.

U.S.—Heindel v. U. S., C.C.A. Ohio, 150 F.2d 493, 497.

something designedly untrue, deceitful,⁸⁹ a thing being called "false" when it is done or made with knowledge, actual or constructive, that it is untrue or illegal.⁹⁰

Not involving evil intent or turpitude. The term, however, as often used, does not necessarily involve turpitude of mind,⁹¹ or deliberate deception,⁹² or what is intentionally or fraudulently false,⁹³ and this is described as its secondary sense and not the ordinary or usual signification.⁹⁴

In this sense, the word "false" is defined as meaning erroneous;⁹⁵ false in fact, as distinguished from legal falsity⁹⁶ or from legal insufficiency;⁹⁷ inaccurate;⁹⁸ at variance with the true situation;^{98.5}

incorrect;⁹⁹ not according to, or with, truth or reality;¹ contrary to fact;^{1.5} not true;² simply the opposite of correct or true;³ untrue,⁴ as a false statement.⁵

The term is further defined as meaning artificial, as false teeth; counterfeit, as false jewelry;⁶ faulty;⁷ feigned, or hypocritical;⁸ fictitious; not genuine;⁹ not genuine or real; sham, as false tears, false modesty, false gods.¹⁰

Other terms compared. When used in the sense involving evil intent, the word has been held equivalent to, or synonymous with, "fraudulent"¹¹ and "sham;"¹² and distinguished from "erroneous," see the C.J.S. definition of that word, "mistaken,"¹³

89. U.S.—Wilensky v. Goodyear Tire & Rubber Co., C.C.A.Mass., 67 F.2d 389, 390.

In re Rosenfeld, C.C.A.N.Y., 262 F. 876, 878—Gilpin v. Merchants' Nat. Bank, Pa., 165 F. 607, 611, 91 C.C.A. 445, 20 L.R.A., N.S., 1023.

25 C.J. p 436 note 24.

90. Ohio.—Fouts v. State, 149 N.E. 551, 554, 113 Ohio St. 450.

91. Ariz.—Williams v. Territory, 108 P. 243, 244, 13 Ariz. 27, 31, 27 L.R.A., N.S., 1032.

92. N.Y.—Abel v. Paterno, 274 N.Y. 52, 749, 754, 153 Misc. 248.

93. U.S.—U. S. v. Nashville, C. & St. L. R. Co., Tenn., 249 F. 678, 681, 161 C.C.A. 588.

94. U.S.—Gilpin v. Merchants' Nat. Bank, Pa., 165 F. 607, 611, 91 C.C.A. 445, 20 L.R.A., N.S., 1023.

95. U.S.—North American Accident Ins. Co. v. Tebbbs, C.C.A.Utah, 107 F.2d 853, 855—Sentinel Life Ins. Co. v. Blackmer, C.C.A.Colo., 77 F. 2d 347, 351.

Ariz.—Williams v. Territory, 108 P. 243, 244, 13 Ariz. 27.

Mo.—State v. Foster, 197 S.W.2d 313, 324, 355 Mo. 577—State v. Arnett, 92 S.W.2d 897, 900, 338 Mo. 907.

Or.—State v. Leonard, 144 P. 113, 118, 73 Or. 451.

Pa.—In re Davis, 37 A.2d 498, 499, 349 Pa. 651.

Tex.—Corpus Juris Secundum cited in Universal Life & Acc. Ins. Co. v. Burden, Civ.App., 294 S.W.2d 855, 858.

25 C.J. p 436 note 33.

96. Cal.—People v. Wong Fook Sam, 79 P. 848, 849, 146 C. 114.

97. N.Y.—In re Leavitt's Will, 32 N.Y.S.2d 586, 588.

98. Iowa.—Hatcher v. Dunn, 71 N. W. 343, 344, 102 Iowa 411, 36 L.R.A. 689.

Mo.—State v. Foster, 197 S.W.2d 313, 324, 355 Mo. 577.

98.5 Pa.—In re Davis, 37 A.2d 498, 499, 349 Pa. 651.

99. U.S.—Seaman v. Bowers, C.C.A. N.Y., 297 F. 371, 373—Woods v. Lewellyn, C.C.A.Pa., 252 F. 106, 109

—U. S. v. Nashville, C. & St. L. R. Co., Tenn., 249 F. 678, 681, 161 C. C.A. 588—Eliot Nat. Bank v. Gill, Mass., 218 F. 600, 603, 134 C.C.A. 358.

Mo.—State v. Arnett, 92 S.W.2d 897, 900, 338 Mo. 907.

Tex.—Corpus Juris Secundum cited in Universal Life & Acc. Ins. Co. v. Burden, Civ.App., 294 S.W.2d 855, 858.

1. U.S.—North American Accident Ins. Co. v. Tebbbs, C.C.A.Utah, 107 F.2d 853, 855—Sentinel Life Ins. Co. v. Blackmer, C.C.A.Colo., 77 F. 2d 347, 351.

Mo.—State v. Arnett, 92 S.W.2d 897, 900, 338 Mo. 907.

1.5 Pa.—In re Davis, 37 A.2d 498, 499, 349 Pa. 651.

2. U.S.—North American Accident Ins. Co. v. Tebbbs, C.C.A.Utah, 107 F.2d 853, 855—Sentinel Life Ins. Co. v. Blackmer, C.C.A.Colo., 77 F. 2d 347, 351.

Seaman v. Bowers, C.C.A.N.Y., 297 F. 371, 373—Woods v. Lewellyn, C.C.A.Pa., 252 F. 106, 109.

Mo.—State v. Foster, 197 S.W.2d 313, 324, 355 Mo. 577—State v. Arnett, 92 S.W.2d 897, 900, 338 Mo. 907.

3. Ariz.—Williams v. Territory, 108 P. 243, 244, 13 Ariz. 27, 31, 27 L.R.A., N.S., 1032.

Ohio.—Ratterman v. Ingalls, 28 N.E. 168, 169, 48 Ohio St. 468.

"A false assertion, in logic, ordinarily has a somewhat modified meaning. To say of a man that he reasons from false premises, or draws false conclusions from correct premises, is not libelous. In such cases the word 'false' means no more than that the premises were not true, or that the conclusion was erroneous."

Conn.—Walker v. Hawley, 16 A. 674, 675, 56 Conn. 559.

4. Ariz.—Williams v. Territory, 108

P. 243, 244, 13 Ariz. 27, 31, 27 L.R.A., N.S., 1032.

Pa.—In re Davis, 37 A.2d 498, 499, 349 Pa. 651.

Wis.—Monahan v. Mutual Life Ins. Co. of New York, 212 N.W. 269, 271, 192 Wis. 102.

25 C.J. p 436 note 38.

5. U.S.—North American Accident Ins. Co. v. Tebbbs, C.C.A.Utah, 107 F.2d 853, 855—Sentinel Life Ins. Co. v. Blackmer, C.C.A.Colo., 77 F. 2d 347, 351.

6. U.S.—North American Accident Ins. Co. v. Tebbbs, C.C.A.Utah, 107 F.2d 853, 855—Sentinel Life Ins. Co. v. Blackmer, C.C.A.Colo., 77 F. 2d 347, 351.

U. S. v. Darby, D.C.Md., 2 F.Supp. 378, 379.

7. Iowa.—Hatcher v. Dunn, 71 N.W. 343, 344, 102 Iowa 411, 36 L.R.A. 689.

8. U.S.—North American Accident Ins. Co. v. Tebbbs, C.C.A.Utah, 107 F.2d 853, 855—Sentinel Life Ins. Co. v. Blackmer, C.C.A.Colo., 77 F. 2d 347, 351.

9. N.H.—State v. Young, 46 N.H. 266, 270, 88 Am.D. 212.

N.J.—Rohr v. State, 38 A. 673, 675, 60 N.J.Law 576.

10. U.S.—North American Accident Ins. Co. v. Tebbbs, C.C.A.Utah, 107 F.2d 853, 855—Sentinel Life Ins. Co. v. Blackmer, C.C.A.Colo., 77 F. 2d 347, 351.

U. S. v. Darby, D.C.Md., 2 F. Supp. 378, 379.

11. Tex.—Wood v. Williams, Civ. App., 46 S.W.2d 332, 334.

12. Colo.—McBride v. People, 248 P. 2d 725, 728, 126 Colo. 277.

Minn.—State v. Weber, 105 N.W. 490, 96 Minn. 422, 424, 113 Am.S.R. 630.

N.Y.—In re Leavitt's Will, 32 N.Y.S. 2d 586, 588.

S.C.—Germofort Mfg. Co. v. Castles, 81 S.E. 665, 666, 97 S.C. 389.

13. U.S.—North American Accident Ins. Co. v. Tebbbs, C.C.A.Utah, 107

"not true,"¹⁴ and "untrue."¹⁵

When evil intent is not involved, it has been held synonymous with "erroneous" see the C.J.S. definition "Erroneous," "incorrect,"¹⁶ and "untrue,"¹⁷ the

opposite of "correct" or "true;"¹⁸ and distinguished from "fraudulent."¹⁹

Phrases employing the word are set out in the note.²⁰ Other phrases as to which more recent

F.2d 853, 855—Sentinel Life Ins. Co. v. Blackmer, C.C.A.Colo., 77 F.2d 347, 351.

14. U.S.—Gilpin v. Merchants' Nat. Bank, Pa., 165 F. 607, 611, 91 C.C.A. 445, 20 L.R.A., N.S., 1023.

15. Eng.—Anderson v. Fitzgerald, 4 H.L.Cas. 484, 506, 10 Reprint 551.

16. U.S.—Seaman v. Bowers, C.C.A. N.Y., 297 F. 371, 373—Gilpin v. Merchants' Nat. Bank, Pa., 165 F. 607, 611, 91 C.C.A. 445, 20 L.R.A., N.S., 1023.

17. U.S.—Gilpin v. Merchants' Nat. Bank, supra.

Tex.—Wood v. Williams, Civ.App., 46 S.W.2d 332, 334.

18. Ariz.—Williams v. Territory, 108 P. 243, 244, 13 Ariz. 27.

19. U.S.—Miller v. Tobin, C.C.Or., 18 F. 609, 614, 9 Sawy. 401.

N.Y.—Foot v. Aetna L. Ins. Co., 61 N.Y. 571, 576, 577.

20. "False claim"

(1) Discussed generally.

U.S.—U. S. ex rel. Kessler v. Mercur Corporation, C.C.A.N.Y., 83 F.2d 178, 182—Evans v. U. S., C.C.A.S.C., 11 F.2d 37, 39.

25 C.J. p 436 note 50.

(2) Specifically with reference to presenting false claims to public officers see False Pretenses § 34.

(3) False claims against the United States see United States §§ 168-174.

(4) In the English forest law as occurring where a man claimed more than his due, and was amerced and punished for the same.

Black L.D.

False impression

An impression created by statement of a partial truth and suppression of facts which would materially qualify statement made.

N.Y.—People v. National Cancer Hospital of America, 102 N.Y.S.2d 103, 107, 200 Misc. 363.

"False judgment"

(1) In old English law, a writ which lay when a false judgment had been pronounced in a court not of record, as a county court, court baron, etc.

Black L.D.

(2) In old French law, the defeated party in a suit had the privilege of accusing the judges of pronouncing a false or corrupt judgment, whereupon the issue was determined by his challenging them to the combat or duellum. This was called the appeal of false judgment.

Black L.D.

"False promise"

(1) As relating to something which is collateral to the contract and not itself the consideration thereof.

Tex.—Long v. Humble Oil & Refining Co., Civ.App., 154 S.W.2d 925, 933.

(2) Defined as a promise made with intention not to perform it.

Tex.—Prideaux v. Roark, Com.App., 291 S.W. 868, 870.

(3) Distinguished from "false representation."

Tex.—Prideaux v. Roark, supra.

"False statement"

(1) Discussed generally.

N.J.—State v. Samuels, 104 A. 322, 92 N.J.Law 131.

S.C.—State v. Johnston, 146 S.E. 657, 660, 149 S.C. 138.

25 C.J. p 438 note 86.

(2) Equivalent to "exaggerated statement" see the C.J.S. definition Exaggerate.

(3) Specifically, as ground for denying discharge in bankruptcy see Bankruptcy § 521 b.

(4) As referring to false reports or returns of bank officers and criminal liability therefor see Banks and Banking § 149 a.

(5) In insurance application as ground for avoidance or forfeiture of policy see Insurance §§ 475-481, 486-490, 595-607.

(6) In a statute not using "knowingly" and "willfully," the phrase has been construed as not implying knowledge of falsity.

Iowa.—State v. Dobry, 250 N.W. 702, 704, 217 Iowa 858.

(7) Of a fact particularly within the knowledge of the person making it, although in the form of opinion. Tex.—Kazmeir v. King, Civ.App., 131 S.W.2d 162, 163.

(8) Of personal property, construed as referring to a recital or list of such property, and not to its value. N.D.—Golden Valley County v. Greengard's Estate, 284 N.W. 423, 428, 69 N.D. 171.

Other phrases construed

(1) "False affidavit," as one which is consciously or intentionally false, that is, false in the perjury sense.

U.S.—In re Shapiro, D.C.Md., 35 F. Supp. 579, 585.

25 C.J. p 436 note 41.

(2) "False and fraudulent."

U.S.—Seven Cases v. U. S., Neb., 36 S.Ct. 190, 193, 239 U.S. 510, 60 L. Ed. 411, L.R.A.1916D 164.

U. S. v. Dr. David Roberts Veterinary Co., C.C.A.Wis., 104 F.2d 785, 788.

Miller v. Tobin, C.C.Or., 18 F. 609, 614, 9 Sawy. 401.

N.Y.—People ex rel. Greene v. Swasey, 203 N.Y.S. 22, 25, 122 Misc. 388.

(3) "False and malicious statement."

Minn.—Kelly v. First State Bank, 177 N.W. 347, 145 Minn. 331, 9 A.L.R. 929.

(4) "False and unprivileged communication."

Cal.—Snively v. Record Pub. Co., 198 P. 1, 3, 185 C. 565.

(5) "False certificate of acknowledgment," as being erroneous through intentional dereliction of duty.

Ariz.—Williams v. Territory, 108 P. 243, 244, 13 Ariz. 27.

Pa.—Commonwealth v. Haines, 97 Pa. 228, 233, 39 Am.R. 805.

(6) "False character," used in England to describe the wrongful act of personating a servant's master or mistress, or any representative of such master or mistress, and giving a false character to the servant.

Black L.D.

(7) "False decretals," defined as a collection of canon law, dated about the middle of the 9th century, which was probably made by a Frankish ecclesiastic who called himself Isadon, and which continued to be the chief repertory of the canon law until the 15th century when its untrustworthy nature was demonstrated.

Black L.D.

(8) "False fact," defined as a feigned, simulated, or fabricated fact; a fact not founded in truth, but existing only in assertion; the deceitful semblance of a fact.

Black L.D.

(9) "False in any material representation."

Mass.—Simons Wool Stock Corporation v. Clifford Steacie Co., 22 N.E. 2d 25, 26, 303 Mass. 551.

25 C.J. p 437 note 61.

(10) "False instrument," defined as an instrument that is counterfeit or not genuine,—an instrument by which some one has attempted to imitate another's personal act, and by means of such imitation to cheat and defraud, and not the doing of something in the name of another which does not profess to be the other's personal act, but that of the doer thereof, who claims by the act

adjudications have not been found see 25 C.J. p 436 note 40—p 438 note 94.

FALSEDAD. In Spanish law, the perversion of truth;²¹ the changing of the truth, alteration, imitation, suppression, and the like, as where a wit-

ness gives false testimony or is silent when he ought to speak.^{21.5}

It has been compared with, or distinguished from, "falsificación."^{21.10}

FALSEHOOD. In its common meaning, a willful

itself to be authorized to obligate the individual for whom he assumes to act.

Minn.—State v. Wilson, 9 N.W. 28, 29, 28 Minn. 52.

(11) "False key," defined as a contrivance, or a key other than the proper key, for opening a lock, as a skeleton key or picklock.

Mo.—State v. Young, 133 S.W.2d 404, 408, 345 Mo. 407.

See also Burglary § 70 note 88, as to sufficiency as description in indictment for possessing burglar's tools.

(12) "False Latin," a phrase used, when law proceedings were written in Latin, to indicate that if a word were significant though not good Latin, yet an indictment, declaration, or fine should not be made void for it; but if the word were not Latin, nor allowed by the law, and it were in a material point, it made the whole vicious.

Black L.D.

(13) "False lights and signals," as meaning lights and signals falsely and maliciously displayed for the purpose of bringing a vessel into danger.

Black L.D.

(14) "False making, uttering or using" a forged instrument."

Tex.—Grimes v. State, 94 S.W.2d 1153, 1156, 130 Tex.Cr. 482.

See also Forgery § 37.

(15) "False material statements," as including a failure to disclose a material fact.

N.Y.—Opera Wine & Liquor Corporation v. State Liquor Authority, 15 N.Y.S.2d 646, 647, 258 App.Div. 839.

(16) "False news," in England, the spreading of false news, whereby discord may grow between the queen of England and her people, or the great men of the realm, or which may produce other mischiefs, still seems to be a misdemeanor, under St. 3 Edw. I c 34.

Black L.D.

(17) "False or fraudulent claim."

N.Y.—People v. Dally, 24 N.Y.S.2d 692, 695.

Utah.—Burke v. Knox, 206 P. 711, 714, 59 Utah 596.

(18) "False or untrue, deceptive or misleading."

Cal.—People v. Wahl, 100 P.2d 550, 551, 39 C.A.2d 771.

(19) "False record."

U.S.—U. S. v. Selman-Reinstein, Inc., D.C.Minn., 52 F.Supp. 208, 209, 210.

(20) "False reports about the finances or management or activity of any co-operative corporation," held not to include an incidental reference to a particular co-operative as a member of the "milk trust."

N.Y.—Dairymen's League Co-op. Ass'n v. Brockway Co., 18 N.Y.S. 2d 551, 556, 173 Misc. 183.

(21) "False representation," defined as an untrue representation willfully made to deceive another to his damage.

U.S.—In re Rosenfeld, C.C.A.N.Y., 262 F. 876, 879.

(22) "False representation material to risk."

Va.—Williams v. Metropolitan Life Ins. Co., 123 S.E. 509, 512, 139 Va. 341.

(23) "False representation of a material fact."

Fla.—Sutton v. Gulf Life Ins. Co., 189 So. 828, 829, 138 Fla. 692.

N.Y.—Foot v. Aetna Life Ins. Co., 61 N.Y. 571, 577.

(24) "False representation of existing fact," as including a declaration of present intention, false when made, to perform an act in the future.

N.Y.—Pease & Elliman v. Wegeman, 229 N.Y.S. 398, 400, 223 App.Div. 682.

(25) "False return."

U.S.—Du Pont v. Graham, D.C.Del., 283 F. 300, 302.

Ohio.—Fouts v. State, 149 N.E. 551, 555, 113 Ohio St. 450.

25 C.J. p 438 note 85.

See also the index to the title Internal Revenue, and Taxation § 1026.

(26) "False suggestion of a material fact."

N.Y.—In re Clemens' Estate, 22 N.Y.S.2d 168, 178, 174 Misc. 1052.

(27) "False verdict," defined under English law as one obviously opposed to the principles of right and justice; an untrue verdict.

Black L.D.

(28) "False witness," as distinguished from "mistaken witness."

Or.—State v. Weston, 219 P. 180, 189, 109 Or. 19.

(29) "False words," applied to descriptions in wills, deeds, etc., are

misdescriptions of property devised or conveyed, not applicable to any property owned or intended to be devised or conveyed.

Ill.—Armstrong v. Armstrong, 158 N.E. 356, 358, 327 Ill. 85—Brown v. Ray, 145 N.E. 676, 679, 314 Ill. 570.

(30) "False writing."

Cal.—People v. Perrin, 227 P. 924, 926, 67 C.A. 612.

(31) "Material false statement," construed to signify one made with knowledge of its falsity and with an intent to deceive.

Conn.—Salt's Textile Mfg. Co. v. Ghent, 139 A. 694, 695, 107 Conn. 211.

(32) "Willfully false," as distinguished from "as the result of mistake."

Cal.—People v. Righetti, 4 P. 1185, 1186, 66 C. 184, 185—People v. Sprague, 53 C. 491, 493, 494.

Phrases treated elsewhere

(1) "Doctrine of false demonstration" see the C.J.S. definition Doctrine.

(2) "False arrest" see False Imprisonment § 1 et seq.

(3) "False dam" see the C.J.S. definition Dam.

(4) "False entries or books," "false entries or reports," or "false reports or returns" see Banks and Banking §§ 149, 150, 646.

(5) "False oath" and "false swearing," generally, see Perjury § 1, Aliens § 164, Bankruptcy §§ 518, 641, and Insurance § 491.

(6) "False or bogus checks" or "false or worthless checks" see False Pretenses § 21.

(7) "False representation" see False Pretenses §§ 8-16, and Fraud §§ 6-17.

(8) "False testimony" and effect thereof on credibility of witness see Witnesses § 469.

(9) "False token or writing" see False Pretenses § 20.

(10) "False weights or measures" and the use or possession thereof see Weights and Measures §§ 9, 10.

21. Escribiche Diccionario.

21.5 Puerto Rico.—In re Martorel, 12 Puerto Rico Fed. 50, 60.

21.10 Puerto Rico.—In re Martorel, supra.

act or declaration contrary to truth;²² a fabrication;^{22.5} a statement or assertion known to be untrue and intended to deceive.^{23*}

In Scotch law, a fraudulent imitation or suppression of truth, to the prejudice of another.²⁴

The term has been said to be correlative with the adjective "false" see False ante, and has been distinguished from "untruth."²⁵

As a badge of fraud see Fraudulent Conveyances §§ 79, 81.

22. N.H.—Putnam v. Osgood, 51 N. H. 192, 207.

22.5 Cal.—Werner v. Southern Cal. Associated Newspapers, App., 206 P.2d 952, 961.

23. Black L.D.

24. Black L.D.

25. "Crabbe thus distinguishes between falsehood and untruth: 'The latter is an untrue saying, and may be unintentional, in which case it reflects no disgrace on the agent. A falsehood and a lie are intentional

false sayings, differing only in degree of the guilt of the offender; falsehood being not always for the express purpose of deceiving, but a lie always for the worst of purposes.'" Black L.D.

FALSE IMPRISONMENT

This Title includes restraint of the person of another, without sufficient authority, not merely incident to a malicious prosecution; justification or excuse for such restraint; and liabilities and remedies therefor, civil or criminal.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. DEFINITIONS AND DISTINCTIONS

§ 1. Definition

False imprisonment is the unlawful restraint of an individual's personal liberty or freedom of locomotion.

False imprisonment consists in the unlawful restraint against his will of an individual's personal liberty or freedom of locomotion.¹ Similarly, false

1. Ga.—Westberry v. Clanton, 72 S. E. 238, 136 Ga. 795.

Sinclair Refining Co. v. Meek, 10 S.E.2d 76, 79, 62 Ga.App. 850.
Idaho.—Corpus Juris cited in Griffin v. Clark, 42 P.2d 297, 300, 55 Idaho 364.

Ill.—Shemaitis v. Froemke, 127 N.E. 2d 648, 6 Ill.App.2d 323—Shelton v. Barry, 66 N.E.2d 697, 702, 328 Ill.App. 497—Lindquist v. Friedman's, 1 N.E.2d 529, 285 Ill.App. 71, affirmed 8 N.E.2d 625, 366 Ill. 232—Schramko v. Boston Store, 243 Ill.App. 251.

Iowa.—Corpus Juris Secundum cited in Sergeant v. Watson Bros. Transp. Co., 52 N.W.2d 86, 92, 244

Iowa 185—Fox v. McCurnin, 218 N. W. 499, 205 Iowa 752.

Ky.—Corpus Juris cited in J. J. Newberry Co. v. Judd, 82 S.W.2d 359, 361, 259 Ky. 309.

Md.—Mahan v. Adam, 124 A. 901, 144 Md. 355.

Mo.—Burton v. Drennan, 58 S.W.2d 740, 332 Mo. 512—Hanser v. Bieher, 197 S.W. 68, 271 Mo. 326.

Hurst v. Montgomery Ward & Co., App., 107 S.W.2d 183.

Neb.—Corpus Juris quoted in Robertson v. Safe Way Stores, 264 N.W. 153, 154, 130 Neb. 82—Dillon v. Sears-Roebeck Co., 249 N.W. 604, 125 Neb. 269.

N.H.—Corpus Juris Secundum cited in Ferry v. Ferry, 54 A.2d 151, 153, 94 N.H. 395.

N.J.—Jorgensen v. Pennsylvania R. Co., 118 A.2d 854, 872, 38 N.J. Super. 317.

N.Y.—Corpus Juris cited in Grago v. Vassello, 19 N.Y.S.2d 34, 36, 173 Misc. 736.

Okl.—Corpus Juris quoted in S. H. Kress & Co. v. Bradshaw, 99 P.2d 508, 511, 186 Okl. 588.

Or.—Corpus Juris cited in Christ v. McDonald, 52 P.2d 655, 658, 152 Or. 494.

S.D.—Mannagh v. J. C. Penney Co., 250 N.W. 38, 61 S.D. 550—Tredway v. Birks, 242 N.W. 590, 59 S.D. 649.

Tex.—Hooper v. Deisher, Civ.App., 113 S.W.2d 966.

Va.—W. T. Grant Co. v. Owens, 141 S.E. 860, 149 Va. 906.

Wis.—Weiler v. Herzfeld-Phillipson Co., 208 N.W. 599, 189 Wis. 554. 25 C.J. p 443 note 1.

"Imprisonment" defined generally see the C.J.S. definition Imprisonment.

"False" is synonymous with "unlawful"

U.S.—Burlington Transp. Co. v. Josephson, C.C.A.S.D., 153 F.2d 372.

Md.—Mahan v. Adam, 124 A. 901, 144 Md. 355.

Other definitions

(1) The unlawful restraint of a person contrary to his will.

Ala.—Rich v. McNery, 15 So. 663, 665, 103 Ala. 345, 49 Am.S.R. 32.

Fla.—Johnson v. Weiner, 19 So.2d 699, 155 Fla. 169, 700—Fisher v. Payne, 113 So. 378, 380, 93 Fla. 1085.

Lewis v. Atlantic Discount Co., App., 99 So.2d 241, 242.

Mo.—State ex rel. Patterson v. Collins, App., 172 S.W.2d 284, 290.

N.C.—Mobley v. Broome, 102 S.E.2d 407, 409, 248 N.C. 54—Hoffman v. Clinic Hospital, 197 S.E. 161, 162, 213 N.C. 669—Parrish v. Boyseil Mfg. Co., 188 S.E. 817, 820, 211 N.C. 7.

(2) Any imprisonment which is not justifiable.

Minn.—Kleidon v. Glascock, 10 N.W. 2d 394, 397, 215 Minn. 417.

N.Y.—Vernes v. Phillips, 194 N.E. 762, 266 N.Y. 298.

Warner v. State, 68 N.Y.S.2d 60, 189 Misc. 51, reversed on other grounds 71 N.Y.S.2d 559, 272 App. Div. 954, reversed on other grounds 79 N.E.2d 459, 297 N.Y. 395—Grago v. Vassello, 19 N.Y.S. 2d 34, 173 Misc. 736—Francisco v. Little Falls Dairy Co., 296 N.Y.S. 956, 962, 163 Misc. 165.

(3) "The confinement or detention of the person without sufficient authority."

Pa.—Samuel v. Blackwell, 76 Pa.Super. 540, 545.

Goodman v. Frank & Seder of Philadelphia, Inc., 70 Pa.Dist. & Co. 622, 625.

(4) The unlawful restraint of a person without his consent, either with or without process of law.

U.S.—Reilly v. U. S. Fidelity & Guaranty Co., C.C.A.Cal., 15 F.2d 314, 315.

Cal.—Mackie v. Ambassador Hotel & Investment Corporation, 11 P.2d 3, 5, 123 C.A. 215—Donati v. Righetti, 97 P. 1128, 1129, 9 C.A. 45.

Neb.—Jonson v. Heller, 6 N.W.2d 359, 142 Neb. 380—Doescher v. Robinson, 271 N.W. 784, 786, 132 Neb. 299—Grebe v. State, 202 N.W. 909, 910, 113 Neb. 327—Johnson v. Bouton, 53 N.W. 995, 35 Neb. 898.

Wash.—Pallett v. Thompkins, 118 P. 2d 190, 191, 10 Wash.2d 697. 25 C.J. p 443 note 1 [a] (6).

(5) "Any unlawful exercise or show of force, by which a person is compelled to remain where he does not wish to remain, or to go where he does not wish to go."

Cal.—Parrott v. Bank of America Nat. Trust & Sav. Ass'n, 217 P.2d 89, 97 C.A.2d 14, 35 A.L.R.2d 263—Moffatt v. Buffums, Inc., 69 P. 2d 424, 425, 21 C.A.2d 371.

Colo.—Crews-Beggs Dry Goods Co. v. Bayle, 51 P.2d 1026, 1028, 97 Colo. 568.

Ill.—Lindquist v. Friedman's, 1 N.E. 2d 529, 532, 285 Ill.App. 71, affirmed 8 N.E.2d 625, 366 Ill. 232—Schramko v. Boston Store, 243 Ill. App. 251.

Mass.—Wax v. McGrath, 151 N.E. 317, 318, 255 Mass. 340.

Minn.—Durgin v. Cohen, 209 N.W. 532, 533, 168 Minn. 77.

Tex.—Newton v. Rhoads Bros., Com. App., 24 S.W.2d 378, 379.

Utah.—Hepworth v. Covey Bros. Amusement Co., 91 P.2d 507, 97 Utah 205.

(6) "Any unlawful physical restraint by one of another's liberty, whether in prison or elsewhere."

Kan.—Gariety v. Fleming, 245 P. 1054, 1055, 121 Kan. 42.

Ky.—Great Atlantic & Pacific Tea Co. v. Billups, 69 S.W.2d 5, 253 Ky. 126.

Va.—S. H. Kress & Co. v. Roberts, 129 S.E. 244, 245, 143 Va. 71.

(7) A trespass committed by one against the person of another by unlawfully arresting him or detaining him without legal authority, either in prison or in any place temporarily used for the purpose of restraining and detaining such person.

Cal.—Vandiveer v. Charters, 294 P. 440, 444, 110 C.A. 347.

Ill.—Llogas v. Lowenguth, 215 Ill. App. 216, 218—Mexican Cent. Ry. Co. v. Gehr, 66 Ill.App. 173, 178.

(8) The unlawful restraint by one person of the physical liberty of another.

U.S.—Burlington Transp. Co. v. Josephson, C.C.A.S.D., 153 F.2d 372, 375.

Conn.—Felix v. Hall-Brooke Sanitarium, 101 A.2d 500, 502, 140 Conn. 496.

Wash.—Rogers v. Sears, Roebuck & Co., 297 P.2d 250, 251, 48 Wash.2d 879.

(9) Further definitions.

U.S.—Forgione v. U. S., C.A.Pa., 202 F.2d 249, 252, certiorari denied 73 S.Ct. 950, 345 U.S. 966, 97 L.Ed. 1384.

George v. Leonard, D.C.S.C., 71 F.Supp. 662—Riegel v. Hygrade Seed Co., D.C.N.Y., 47 F.Supp. 290, 293.

Ala.—Standard Oil Co. v. Davis, 94 So. 754, 755, 208 Ala. 565.

Ill.—Hughes v. New York Cent. System, 155 N.E.2d 809, 20 Ill.App.2d 224—Hassenauer v. F. W. Woolworth Co., 41 N.E.2d 979, 314 Ill. App. 569.

N.Y.—Jones v. Independent Fence Co., 173 N.Y.S.2d 684, 12 Misc.2d 413.

Ohio.—Click v. Parish, 98 N.E.2d 333, 338, 89 Ohio App. 318, affirmed 98 N.E.2d 293, 155 Ohio St. 84.

Wis.—Hadler v. Rhyner, 12 N.W.2d 693, 695, 244 Wis. 448.

25 C.J. p 443 note 1 [a].

Text writers' definitions

(1) "A trespass committed by one man against the person of another by unlawfully arresting him and detaining him without any legal authority."

Addison Torts p 552.

U.S.—Riegel v. Hygrade Seed Co., D. C.N.Y., 47 F.Supp. 290, 293.

Cal.—Kaufman v. Brown, 209 P.2d 156, 93 C.A.2d 508.

Iowa.—Norton v. Mathers, 271 N.W. 321, 325, 222 Iowa 1170—Fox v. McCurnin, 218 N.W. 499, 501, 205 Iowa 752.

N.Y.—Houghtaling v. State, 175 N.Y. S.2d 659, 665, 11 Misc.2d 1049—Lippert v. State, 139 N.Y.S.2d 751, 755, 207 Misc. 632—Bass v. State, 92 N.Y.S.2d 42, 45, 196 Misc. 177—Damilitis v. Kerjas Lunch Corporation, 300 N.Y.S. 574, 577, 165 Misc. 186.

25 C.J. p 443 note 1 [c] (1).

(2) "Imposing, by force or threats, an unlawful restraint upon a man's freedom of locomotion."

1 Cooley Torts, 4th ed., p 345 § 109. U.S.—Meints v. Huntington, C.C.A. Minn., 276 F. 245, 248, 19 A.L.R. 664.

Ill.—Lindquist v. Friedman's, Inc., 1 N.E.2d 529, 532, 285 Ill.App. 71.

Iowa.—Norton v. Mathers, 271 N.W. 321, 325, 222 Iowa 1170—Fox v. McCurnin, 218 N.W. 499, 501, 205 Iowa 752.

W.Va.—State v. Totten, 185 S.E. 221, 222, 117 W.Va. 209.

25 C.J. p 443 note 1 [c] (3).

(3) "False imprisonment is restraint of one's liberty without any sufficient legal excuse therefor by words or acts which he fears to disregard, and neither malice, ill will, nor the slightest wrongful intention is necessary to constitute the offense."

Burks Pleading and Practice p 192.

U.S.—Montgomery Ward & Co. v. Freeman, C.A.Va., 199 F.2d 720, 723.

Va.—Montgomery Ward & Co. v. Wickline, 50 S.E.2d 387, 388, 188 Va. 485—S. H. Kress & Co. v. Musgrove, 149 S.E. 453, 455, 153 Va. 348.

arrest consists of an unlawful and total detention or restraint on one's freedom of locomotion, imposed by force or threats.^{1,5} False imprisonment is

sometimes defined by statute.² The gist of false imprisonment³ and false arrest^{3,5} is unlawful detention.

(4) Other definitions.

25 C.J. p 443 note 1 [c] (2), (4), (5).

Under the law of Mexico "false imprisonment . . . consists in imprisonment without justification, and is a redressible grievance there as here."

Ill.—Mexican Cent. R. Co. v. Gehr, 66 Ill.App. 173, 193.

Essence of false imprisonment

(1) Essence of a claim for false imprisonment is that the imprisonment is false, that is, without probable cause.

U.S.—Carr v. National Discount Corp., C.A.Mich., 172 F.2d 899, certiorari denied 70 S.Ct. 59, 338 U.S. 817, 94 L.Ed. 495.

(2) Essence of false imprisonment is direct restraint of personal liberty or freedom of locomotion, either by actual force or from the fear of force.

Ariz.—Wisniski v. Ong, 329 P.2d 1097, 84 Ariz. 372.

(3) Essence of tort of false imprisonment is in depriving imprisoned person of liberty without justification, and no actual force or threats are necessary.

Tenn.—Little Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357.

(4) Essence of tort of false imprisonment is deprivation of liberty without lawful justification.

Wis.—Weber v. Young, 26 N.W.2d 543, 250 Wis. 307.

1.5 Ohio.—City of Toledo v. Lowenberg, 131 N.E.2d 682, 99 Ohio App. 165.

Absence of valid process

False arrest is a detention without valid process or issued against a person wrongly arrested under it.

N.Y.—Jones v. Independent Fence Co., 173 N.Y.S.2d 684, 12 Misc.2d 413.

Deprivation of liberty

Cause of action for false arrest is based on deprivation of one's liberty without legal process, that may arise when arrest or detention is without warrant, or warrant charges no offense, or is void, or person arrested is not person named in warrant.

U.S.—George v. Leonard, D.C.S.C., 71 F.Supp. 662.

Unlawful arrest

N.Y.—Pope v. State, 79 N.Y.S.2d 466, 192 Misc. 587, affirmed 99 N.Y.S.2d 1019, 277 App.Div. 1015.

2. Statutory definitions

(1) "The unlawful detention of the

person of another, for any length of time, whereby he is deprived of his personal liberty."

Ala.—Buttrey v. Wilhite, 94 So. 585, 586, 208 Ala. 573.

Ga.—Hughes v. Georgia Power Co., 15 S.E.2d 466, 65 Ga.App. 163—Lovell v. Drake, 3 S.E.2d 783, 784, 60 Ga.App. 325.

N.Y.—Pope v. State, 79 N.Y.S.2d 466, 471, 192 Misc. 587, affirmed 99 N.Y.S.2d 1019, 277 App.Div. 1015.

25 C.J. p 443 note 1 [b] (1).

(2) "The unlawful violation of the personal liberty of another."

Cal.—Singleton v. Perry, 289 P.2d 794, 45 C.2d 489—Gogue v. MacDonald, 218 P.2d 542, 35 C.2d 482, 21 A.L.R.2d 639.

Barrier v. Alexander, 224 P.2d 436, 438, 100 C.A.2d 497—Parrott v. Bank of America Nat. Trust & Sav. Ass'n, 217 P.2d 89, 94, 97 C.A.2d 14, 35 A.L.R.2d 263—Dillon v. Haskell, 178 P.2d 462, 463, 18 C.A.2d 814—Mackie v. Ambassador Hotel & Investment Corporation, 11 P.2d 3, 123 C.A. 215, followed in 11 P.2d 7, 123 C.A. 770—Vandiveer v. Charters, 294 P. 440, 444, 110 C.A. 347.

Idaho.—Griffin v. Clark, 42 P.2d 297, 300, 55 Idaho 364.

Mont.—Cline v. Tate, 129 P.2d 89, 92, 113 Mont. 475.

25 C.J. p 443 note 1 [b] (2).

(3) "False imprisonment is the willful detention of another against his consent, and where it is not expressly authorized by law, whether such detention be effected by an assault, by actual violence to the person, by threats or by any other means which restrain the party so detained from removing from one place to another as he may see proper."

Tex.—S. H. Kress & Co. v. De Mont, Civ.App., 224 S.W. 520, 521.

25 C.J. p 443 note 1 [b] (3).

(4) False imprisonment is the unlawful restraint by one person of the physical liberty of another without adequate legal justification or without probable cause.

Idaho.—Clark v. Alloway, 170 P.2d 425, 428, 67 Idaho 32.

3. U.S.—Director General of Railroads v. Kastenbaum, N.Y., 44 S.Ct. 52, 263 U.S. 25, 68 L.Ed. 146.

Carr v. National Discount Corp., C.A.Mich., 172 F.2d 899, certiorari denied 70 S.Ct. 59, 338 U.S. 817, 94 L.Ed. 495.

Klein v. U. S., D.C.N.Y., 167 F.Supp. 410—Pollack v. City of New-

ark, D.C.N.J., 147 F.Supp. 35, affirmed, C.A., 248 F.2d 543, certiorari denied 73 S.Ct. 554, 355 U.S. 964, 2 L.Ed.2d 539—**Corpus Juris** quoted in Riegall v. Hygrade Seed Co., Inc., D.C.N.Y., 47 F.Supp. 290, 293.

Ala.—Hotel Tutwiler Operating Co. v. Evans, 94 So. 120, 208 Ala. 252. Alaska.—Wilson v. Eberle, 15 Alaska 260.

Ariz.—Swetnam v. F. W. Woolworth Co., 318 P.2d 364, 83 Ariz. 189.

Fla.—Johnson v. Weiner, 19 So.2d 699, 155 Fla. 169.

Lewis v. Atlantic Discount Co., App., 99 So.2d 241.

Mo.—**Corpus Juris** cited in Richardson v. Empire Trust Co., 94 S.W.2d 966, 970, 230 Mo.App. 580.

Neb.—**Corpus Juris** quoted in Robertson v. Safe Way Stores, 264 N.W. 153, 154, 130 Neb. 82.

N.J.—Earl v. Winne, 101 A.2d 535, 14 N.J. 119—Lakutis v. Greenwood, 87 A.2d 23, 9 N.J. 101.

Cannon v. Krakowitch, 148 A.2d 213, 54 N.J.Super. 93—Baldwin v. Point Pleasant Beach & Surf Club, 66 A.2d 62, 3 N.J.Super. 284.

Altana v. McCabe, 38 A.2d 192, 132 N.J.Law 12—Pine v. Okzewski, 170 A. 825, 112 N.J.Law 429.

N.Y.—Graves v. Rudman, 257 N.Y.S. 212, 235 App.Div. 380, appeal dismissed 184 N.E. 121, 260 N.Y. 628—Brush v. Lindsay, 206 N.Y.S. 304, 210 App.Div. 361.

Vallon v. Ramage, 93 N.Y.S.2d 56, 196 Misc. 740.

Guzy v. Guzy, 184 N.Y.S.2d 161.

N.C.—**Corpus Juris** cited in Parrish v. Boysell Mfg. Co., 188 S.E. 817, 820, 211 N.C. 7.

Or.—**Corpus Juris** cited in Christ v. McDonald, 52 P.2d 655, 658, 152 Or. 494.

Va.—Kress & Co. v. Roberts, 129 S.E. 244, 143 Va. 71.

W.Va.—Vorholt v. Vorholt, 160 S.E. 916, 111 W.Va. 196.

25 C.J. p 443 note 2.

Similar expressions

U.S.—Montgomery Ward & Co. v. Freeman, C.A.Va., 199 F.2d 720.

Forgione v. U. S., D.C.Pa., 100 F.Supp. 239, affirmed, C.A., 202 F.2d 249, certiorari denied 73 S.Ct. 950, 345 U.S. 966, 97 L.Ed. 1384.

N.Y.—Traversara v. Pinelli, 140 N.Y. S.2d 559.

Va.—Montgomery Ward & Co. v. Wickline, 50 S.E.2d 387, 188 Va. 485.

3.5 N.Y.—Kenyon v. Lord & Taylor, Inc., 143 N.Y.S.2d 391.

§ 2. Distinguished from Other Torts

False imprisonment has been distinguished from other wrongs, such as false arrest, kidnapping, libel and slander, and trespass.

False imprisonment is a distinct tort, which has been distinguished from various other torts.⁴

False arrest. A false arrest is one means of committing a false imprisonment,⁵ but a false imprisonment may be committed without an arrest,⁶ and a distinction has been drawn between the two in that a false arrest must be committed under assumption of legal authority whereas a false imprisonment may be committed without any pretense of legal authority.⁷

Kidnapping. False imprisonment differs from kidnapping in that the latter is false imprisonment aggravated by removal of the imprisoned person to some other place,⁸ and it has been said that it is the intent of the perpetrator secretly to confine his victim, which distinguishes the offense of kidnapping from that of false imprisonment.⁹

Libel and slander. False imprisonment differs from libel and slander in that these must include the element of malice which is not necessary in

false imprisonment,¹⁰ but it is like slander in that good faith will mitigate damages in both.¹¹

§ 3. — Abuse of Process

A distinction ordinarily is recognized between an action for false imprisonment and one for abuse of process, the first lying for detention without due process while the second lies for wrongful use of process duly issued.

A distinction is ordinarily recognized by the courts between an action for false imprisonment and one for abuse of process,¹² although there are decisions and dicta which either refuse to recognize such a distinction or ignore it.¹³ The remedy for malicious abuse of regular process is an action on the case; for the execution of irregular process, the remedy is by action of trespass against the party.¹⁴ Abuse of process lies for the wrongful use of process duly issued, whereas false imprisonment lies for a detention without due process.¹⁵ It follows that a warrant valid on its face may be a defense in false imprisonment, as shown *infra* § 27, but cannot be a defense to an action for abuse of process, as discussed in Process § 120. While the authorities are in conflict as to whether malice is an essential element of abuse of process, see Process § 120, they are, as shown *infra* § 7, in harmony on the

4. Kan.—Comer v. Knowles, 17 Kan. 436, 441.

25 C.J. p 443 note 3.

Distinguished from assault and battery see Assault and Battery § 1 b.

Trespass

(1) A trespass as to defendant's personal property, although involving some element of personal restraint, will not therefore constitute a false imprisonment.

Ala.—Friedenthal v. Goodloe, 81 So. 553, 202 Ala. 611.

25 C.J. p 444 note 12.

(2) However, as shown *infra* § 5, false imprisonment is in the nature of a trespass.

5. U.S.—Corpus Juris Secundum cited in Burlington Transp. Co. v. Josephson, C.C.A.S.D., 153 F.2d 372, 375.

Ill.—Shemaitis v. Froemke, 127 N.E. 2d 648, 6 Ill.App.2d 323.

Mont.—Harrer v. Montgomery Ward & Co., 221 P.2d 428, 124 Mont. 295.

N.C.—Corpus Juris Secundum quoted in Mobley v. Broome, 102 S.E.2d 407, 409, 248 N.C. 54.

Ohio.—Alter v. Paul, 135 N.E.2d 73, 101 Ohio App. 139.

Utah.—Hepworth v. Covey Bros. Amusement Co., 91 P.2d 507, 97 Utah 205.

Wrongful arrest in civil actions see Arrest §§ 85, 86.

Synonymous

False arrest is synonymous with

false imprisonment where one confines another purporting to act by authority of law which does not in fact exist.

Pa.—Rhoads v. Reading Co., 83 Pa. Dist. & Co. 168.

6. Ala.—Davis & Allcott Co. v. Boozer, 110 So. 28, 215 Ala. 116, 49 A.L.R. 1307.

La.—Corpus Juris Secundum cited in Banks v. Food Town, Inc., App., 98 So.2d 719, 721.

Utah.—Hepworth v. Covey Bros. Amusement Co., 91 P.2d 507, 97 Utah 205.

Intent to arrest as requisite of false imprisonment see *infra* § 6.

Locking mill doors

Where the foreman of a plant locked the mill doors in the usual course, and later refused to open them during working hours to permit departure of an employee seeking to go home because of illness, even conceding that he may have falsely imprisoned her, he did not "arrest" her by such conduct.

Ala.—Davis & Allcott Co. v. Boozer, 110 So. 28, 215 Ala. 116, 49 A.L.R. 1307.

7. Okl.—Alsop v. Skaggs Drug Center, 223 P.2d 530, 203 Okl. 525—Corpus Juris Secundum cited in McGlone v. Landreth, 195 P.2d 268, 271, 200 Okl. 425.

Utah.—Hepworth v. Covey Bros. Amusement Co., 91 P.2d 507, 97 Utah 205.

Held indistinguishable as cause of action

Mont.—Harrer v. Montgomery Ward & Co., 221 P.2d 428, 124 Mont. 295.

N.Y.—Houghtaling v. State, 175 N.Y.S.2d 659, 11 Misc.2d 1049.

Okl.—Alsop v. Skaggs Drug Center, 223 P.2d 530, 203 Okl. 525.

8. Ohio.—Samson v. State, 174 N.E. 162, 163, 37 Ohio App. 79.

25 C.J. p 444 note 5.

9. Wis.—Hackbarth v. State, 229 N.W. 83, 84, 201 Wis. 3.

False imprisonment as a criminal offense see *infra* §§ 71, 72.

10. Kan.—Comer v. Knowles, 17 Kan. 436.

Malice as element of false imprisonment see *infra* § 7.

11. Mo.—Dunlevy v. Wolferman, 79 S.W. 1165, 106 Mo.App. 46.

12. N.J.—McGrath v. Keenan, 46 A. 2d 725, 24 N.J.Misc. 121.

Or.—Lane v. Ball, 163 P. 975, 83 Or. 404.

25 C.J. p 447 note 30.

13. N.H.—Clark v. Tilton, 68 A. 335, 74 N.H. 330.

25 C.J. p 447 note 31.

14. Pa.—Berry v. Hamill, 12 Serg. & R. 210.

15. Miss.—State, for Use of Little v. U. S. Fidelity & Guaranty Co., 64 So.2d 697, 217 Miss. 576.

Mo.—Corpus Juris cited in Thompson v. Farmers' Exchange Bank, 62 S.W.2d 803, 810, 333 Mo. 437.

point that actual malice is unessential in false imprisonment.

A further difference should be noted in that the action for abuse of process accrues and the statute of limitations runs from the date of the misuse of the process, while the action for false imprisonment accrues and the statute runs from the termination of the imprisonment.¹⁶

§ 4. — Malicious Prosecution

The essential difference between a wrongful detention for which an action for malicious prosecution will lie, and one for which an action for false imprisonment is the proper remedy, is that in malicious prosecution the detention is malicious but under the due forms of law, whereas in false imprisonment the detention is without color of legal authority.

Although not always observed,¹⁷ the distinction between malicious prosecution and false imprisonment is fundamental.¹⁸ Historically the distinction grew out of the early cases distinguishing between trespass and the action on the case¹⁹ which later authorities have followed,²⁰ trespass being the common-law remedy for false imprisonment and action on case the remedy for malicious prosecution.²¹

Put briefly, the essential difference between a wrongful detention for which an action for malicious prosecution will lie, and one for which an action for false imprisonment will lie, is that in the former the detention is malicious but under the due forms of law, whereas in the latter the detention is without color of legal authority.²² In malicious

16. Or.—Lane v. Ball, 163 P. 975, 83 Or. 404.
37 C.J. p 881 note 37 [d].

Time to sue and limitations in respect of false imprisonment see infra § 49.

17. Pa.—Neall v. Hart, 8 A. 628, 115 Pa. 347, 2 Am.S.R. 559.
25 C.J. p 444 note 14.

Distinction one of phraseology

Distinction between actions of malicious arrest and malicious prosecution or false imprisonment is one of phraseology and is immaterial.
R.I.—Brusco v. Morry, 170 A. 84, 54 R.I. 108.

18. Fla.—Corpus Juris quoted in S. H. Kress & Co. v. Powell, 180 So. 757, 762, 132 Fla. 471.

Kan.—Corpus Juris Secundum cited in Sharp v. Cox, 146 P.2d 410, 411, 158 Kan. 253.

La.—Corpus Juris quoted in De Bouchel v. Koss Const. Co., 149 So. 496, 497, 177 La. 841—Corpus Juris quoted in Hunter v. Laurent, 104 So. 747, 750, 158 La. 874.

Corpus Juris quoted in Barrios v. Yoars, App., 184 So. 212, 215.

Md.—Corpus Juris quoted in Dorsey v. Winters, 122 A. 257, 261, 143 Md. 399.

Mo.—Corpus Juris Secundum cited in Gray v. Wallace, 319 S.W.2d 582, 585.

Tex.—Bluejacket v. Southland Greyhound Lines, Civ.App., 71 S.W.2d 1107.

W.Va.—Blevins v. Chesapeake & O. Ry. Co., 171 S.E. 813, 114 W.Va. 335.

25 C.J. p 444 note 15.

Abolition of common-law forms of action

The distinction between malicious prosecution and false imprisonment remains, although common-law forms of action have been abolished.

Tex.—Warwick v. First State Bank of Temple, Civ.App., 296 S.W. 348.

Difference in substance and remedy

Causes of action for "false imprisonment" and for "malicious prosecution" are fundamentally different, are made up of different elements, enforced by different forms of action, governed by different rules of pleading, evidence, and damages, and are subject to different defenses.

N.Y.—Damilitis v. Kerjas Lunch Corporation, 300 N.Y.S. 574, 165 Misc. 186.

19. Ind.—Poult v. Slocum, 3 Blackf. 421.

25 C.J. p 447 note 27.

20. Ala.—Rich v. McInerney, 15 So. 663, 103 Ala. 345, 49 Am.S.R. 32.

25 C.J. p 447 note 28.

21. Md.—Dorsey v. Winters, 122 A. 257, 143 Md. 399—Lewin v. Uzyber, 4 A. 285, 65 Md. 341.

Mo.—Corpus Juris Secundum cited in Jenkins v. Thompson, 251 S.W.2d 325, 329.

25 C.J. p 447 note 29.

Form of action for false imprisonment see infra § 47.

22. U.S.—Pollack v. City of Newark, D.C.N.J., 147 F.Supp. 35, affirmed, C.A., 248 F.2d 543, certiorari denied 78 S.Ct. 554, 355 U.S. 964, 2 L. Ed.2d 539—Robinson v. Chicago Great Western Ry. Co., D.C.Mo., 144 F.Supp. 713, 716—George v. Leonard, D.C.S.C., 71 F.Supp. 662, 663—Riegel v. Hygrade Seed Co., D.C.N.Y., 47 F.Supp. 290, 293.

Ala.—Sears, Roebuck & Co. v. Alexander, 39 So.2d 570, 572, 252 Ala. 122—Bryant v. Hartford Fire Ins. Co., 159 So. 685, 230 Ala. 80.

Cal.—Singleton v. Perry, 289 P.2d 794, 798, 45 C.2d 489.

Corpus Juris Secundum quoted in Stallings v. Foster, 259 P.2d 1006, 1009, 119 C.A.2d 614.

Fla.—Dodson v. Solomon, 183 So. 825, 134 Fla. 284—Corpus Juris quoted in S. H. Kress & Co. v. Powell, 180 So. 757, 762, 132 Fla. 471.

Ind.—Batten v. McCarty, 158 N.E. 583, 86 Ind.App. 462.

La.—Barfield v. Marron, 62 So.2d 276, 280, 222 La. 210—Corpus Juris quoted in De Bouchel v. Koss Const. Co., 149 So. 496, 497, 177 La. 841—Corpus Juris quoted in Hunter v. Laurent, 104 So. 747, 750, 158 La. 874.

Corpus Juris Secundum cited in Cox v. Cashio, App., 96 So.2d 872, 875—Corpus Juris quoted in Barrios v. Yoars, App., 184 So. 212, 215.

Md.—Safeway Stores, Inc. v. Barrack, 122 A.2d 457, 460, 210 Md. 168 —Corpus Juris quoted in Dorsey v. Winters, 122 A. 257, 261, 143 Md. 399.

Mo.—Coffman v. Shell Petroleum Corporation, 71 S.W.2d 97, 228 Mo. App. 727—Rice v. Gray, 34 S.W.2d 567, 225 Mo.App. 890—Rosendale v. Market Square Dry Goods Co., App., 213 S.W. 169.

Mont.—Enos v. American Surety Co. of New York, 28 P.2d 197, 95 Mont. 588.

N.H.—Blenn v. Morrill, 5 A.2d 42, 90 N.H. 109.

N.J.—Earl v. Winne, 101 A.2d 535, 540, 141 N.J. 119.

N.Y.—Raschid v. News Syndicate Co., 267 N.Y.S. 221, 239 App.Div. 289, modified on other grounds 191 N.E. 713, 265 N.Y. 1.

Graves v. Rudman, 257 N.Y.S. 212, 235 App.Div. 380, appeal dismissed 184 N.E. 121, 260 N.Y. 628.

N.C.—Corpus Juris quoted in Young v. Andrews Hardwood Co., 156 S.E. 501, 502, 200 N.C. 310—Rhodes v. Collins, 150 S.E. 492, 198 N.C. 23.

Ohio.—Stork v. Evert, 191 N.E. 794, 47 Ohio App. 256.

Pa.—Goodman v. Frank and Seder of Philadelphia, Inc., 70 Pa.Dist. & Co. 622, 624.

Tex.—Dallas Joint Stock Land Bank of Dallas v. Britton, 135 S.W.2d 981, 134 Tex. 529.

prosecution plaintiff must allege and prove malice and want of probable cause and the termination of the proceeding favorably to plaintiff, whereas in false imprisonment it has been stated that the allegation of want of probable cause is not essential,²³ and the burden is on defendant to prove probable

cause as a defense or in mitigation.²⁴

In false imprisonment malice is usually material only on the issue of damages;²⁵ and the termination of the proceeding is not material.²⁶ If the imprisonment is under legal authority it may be malicious but it cannot be false.²⁷ This is true

Corpus Juris quoted in *Bluejack-et v. Southland Greyhound Lines, Inc.*, Civ.App., 71 S.W.2d 1107, 1108. Wash.—*Pallett v. Thompson*, 118 P. 2d 190, 10 Wash.2d 697.

W.Va.—Corpus Juris quoted in *Vorholt v. Vorholt*, 160 S.E. 916, 918, 111 W.Va. 196. 25 C.J. p 444 note 16.

Arrest without warrant

Allegations that plaintiff was arrested and restrained of her liberty on charge of theft of twenty-five cents worth of tatting in absence of legal complaint filed against her, and warrant issued thereon, and that plaintiff executed release, and in consideration therefor defendant abandoned further proceedings, and whole proceedings were terminated, presented case for "false imprisonment" as distinguished from "malicious prosecution."

Tex.—S. H. Kress & Co. v. Rust, Civ. App., 97 S.W.2d 997, affirmed 120 S.W.2d 425, 132 Tex. 89.

23. U.S.—Robinson v. Chicago Great Western Ry. Co., D.C.Mo., 144 F. Supp. 713—*Riegel v. Hygrade Seed Co.*, D.C.N.Y., 47 F.Supp. 290.

Meints v. Huntington, C.C.A. Minn., 276 F. 245, 19 A.L.R. 664.

Cal.—Miller v. Glass, 282 P.2d 501, 44 C.2d 359.

Fla.—Dodson v. Solomon, 183 So. 825, 826, 134 Fla. 284—**Corpus Juris** quoted in *S. H. Kress & Co. v. Powell*, 180 So. 757, 762, 132 Fla. 471.

Md.—Corpus Juris quoted in *Dorsey v. Winters*, 122 A. 257, 261, 143 Md. 399.

Minn.—Corpus Juris cited in *Friedman v. Goffstein*, 234 N.W. 596, 597, 182 Minn. 396.

Mo.—Corpus Juris quoted in *Thompson v. Farmers' Exchange Bank*, 62 S.W.2d 803, 810, 333 Mo. 437. *Greaves v. Kansas City Junior Orpheum Co.*, 80 S.W.2d 228, 229 Mo.App. 663.

Ohio.—Click v. Parish, 98 N.E.2d 333, 89 Ohio App. 318, affirmed 98 N.E. 2d 293, 155 Ohio St. 84.

Tex.—Dallas Joint Stock Land Bank of Dallas v. Britton, 135 S.W.2d 981, 134 Tex. 529. 25 C.J. p 445 note 18.

Want of probable cause as element see *infra* § 7 b.

24. U.S.—Riegel v. Hygrade Seed Co., D.C.N.Y., 47 F.Supp. 290.

Fla.—Corpus Juris quoted in *S. H. Kress & Co. v. Powell*, 180 So. 757, 762, 132 Fla. 471.

Md.—Corpus Juris quoted in *Dorsey v. Winters*, 122 A. 257, 261, 143 Md. 399.

25 C.J. p 445 note 19.

25. U.S.—Riegel v. Hygrade Seed Co., D.C.N.Y., 47 F.Supp. 290.

Fla.—Corpus Juris quoted in *S. H. Kress & Co. v. Powell*, 180 So. 757, 762, 132 Fla. 471.

Ill.—Shemaitis v. Froemke, 127 N.E. 2d 648, 6 Ill.App.2d 323—*Shelton v. Barry*, 66 N.E.2d 697, 328 Ill. App. 497.

Mo.—Corpus Juris quoted in *Thompson v. Farmers' Exchange Bank*, 62 S.W.2d 803, 810, 333 Mo. 437. 25 C.J. p 445 note 20.

Allegation of malice as conclusive of character of action

A complaint which seeks exemplary damages and is otherwise construable as setting forth a cause of action for false imprisonment should not be interpreted as seeking to set forth a cause of action for malicious prosecution merely because it contains allegations of malice and bad faith on the part of defendant, since the latter allegations are appropriate on the issue of exemplary damages.

U.S.—Snyder v. Hausheer, C.C.A. Wyo., 263 F. 776.

26. U.S.—Riegel v. Hygrade Seed Co., D.C.N.Y., 47 F.Supp. 290.

Fla.—Corpus Juris quoted in *S. H. Kress & Co. v. Powell*, 180 So. 757, 762, 132 Fla. 471.

Iowa.—Sergeant v. Watson Bros. Transp. Co., 52 N.W.2d 86, 244 Iowa 185.

Mo.—Corpus Juris quoted in *Thompson v. Farmers' Exchange Bank*, 62 S.W.2d 803, 810, 333 Mo. 437.

Tex.—S. H. Kress & Co. v. Rust, Civ. App., 97 S.W.2d 997, affirmed 120 S.W.2d 425, 132 Tex. 89. 25 C.J. p 445 note 21.

27. U.S.—Corpus Juris cited in *Riegel v. Hygrade Seed Co.*, D.C.N.Y., 47 F.Supp. 290.

Fla.—White v. Miami Home Milk Producers Ass'n, 197 So. 125, 143 Fla. 518—**Corpus Juris** quoted in *S. H. Kress & Co. v. Powell*, 180 So. 757, 762, 132 Fla. 471.

Ill.—Shelton v. Barry, 66 N.E.2d 697, 328 Ill.App. 497.

La.—Corpus Juris Secundum quoted in *Cox v. Cashio*, App., 96 So.2d 872, 875.

S.D.—Corpus Juris cited in *Tredway*

v. Birks, 242 N.W. 590, 591, 59 S.D. 649.

W.Va.—Corpus Juris quoted in *Vorholt v. Vorholt*, 160 S.E. 916, 918, 111 W.Va. 196. 25 C.J. p 445 note 22.

Where an arrest results from a wrongful prosecution instituted maliciously

(1) Where an arrest results from a wrongful prosecution instituted maliciously and without probable cause but in compliance with the forms of law, the remedy for the consequent injury is an action for malicious prosecution and not for false imprisonment.

Ala.—Morgan v. Baird, 121 So. 526, 219 Ala. 225.

Fla.—Fisher v. Payne, 113 So. 378, 93 Fla. 1085.

(2) Where a lawful arrest has been improvidently procured, without probable cause, the remedy of the party thus wronged lies in an action for malicious prosecution, in which action the necessary element of malice may be inferred as a fact from the want of probable cause, and, where one is properly arrested by lawful authority, an action for false imprisonment cannot be maintained against the party causing the arrest.

S.C.—Bushardt v. United Inv. Co., 113 S.E. 637, 121 S.C. 324.

(3) Petition alleging that defendants, pursuant to malicious scheme to injure plaintiff, filed criminal complaint, that warrant was issued and plaintiff arrested and jailed, and that complaints were subsequently dismissed, showed cause of action for "malicious prosecution," not "false imprisonment."

Tex.—Bluejacket v. Southland Greyhound Lines, Civ.App., 71 S.W.2d 1107.

(4) Complaint charging that defendant wrongfully and maliciously charged before a justice of the peace that plaintiff had given a worthless check with intent to defraud, thereby causing the justice to issue a warrant for plaintiff's arrest, that plaintiff was held in bail for court, and that the grand jury subsequently ignored the charge, states an action for malicious prosecution rather than for false imprisonment.

Pa.—Goodman v. Frank and Seder of Philadelphia, Inc., 70 Pa.Dist. & Co. 622.

where legal authority is shown by valid process,²⁸ under the decisions on the question, will not constitute legal authority within this rule.³¹ even if irregular²⁹ or voidable.³⁰ Void process,

II. NATURE AND ELEMENTS

A. IN GENERAL

§ 5. Nature in General

False imprisonment is a tort against the liberty of the person, and its essential elements are detention and the unlawfulness thereof.

False imprisonment is a tort,³² and is in the nature of a trespass, in which the liability of defendant is predicated on personal participation, either directly or indirectly by procurement of others.³³ The right violated by this tort belongs historically to rights in rem—available against the community at large, as distinguished from rights in personam—

available against particular individuals.³⁴

Although the cause of action itself is a property right,³⁵ the gist of the tort is an injury to the person,³⁶ and the primary right involved is the liberty of the citizen, his freedom of locomotion, or right to come, go, or stay when and where he may choose.³⁷ The theory of the law is that one interferes with another's liberty of locomotion at his peril³⁸ and, to escape liability, must justify the interference by proof of its legality.³⁹

28. Fla.—*Corpus Juris* quoted in S. H. Kress & Co. v. Powell, 180 So. 757, 762, 132 Fla. 471—Fisher v. Payne, 113 So. 378, 93 Fla. 1085. Ga.—Lovell v. Drake, 3 S.E.2d 783, 60 Ga.App. 325.

Ill.—Llogas v. Lowenguth, 215 Ill. App. 216.

Mo.—Harbison v. Chicago, R. I. & P. Ry. Co., 37 S.W.2d 609, 327 Mo. 440, 79 A.L.R. 1.

25 C.J. p 446 note 23.

Arrest on warrant wrongfully obtained

Action for damages based on criminal warrant wrongfully obtained on sufficient legal proceedings would be for "malicious prosecution," not false imprisonment.

N.D.—Kittler v. Kelsch, 216 N.W. 898, 56 N.D. 227, 56 A.L.R. 1217.

29. Fla.—*Corpus Juris* quoted in S. H. Kress & Co. v. Powell, 180 So. 757, 762, 132 Fla. 471.

25 C.J. p 446 note 24.

30. Fla.—*Corpus Juris* quoted in S. H. Kress & Co. v. Powell, 180 So. 757, 762, 132 Fla. 471.

25 C.J. p 446 note 25.

31. Fla.—S. H. Kress & Co. v. Powell, 180 So. 757, 132 Fla. 471.

Ga.—Lovell v. Drake, 3 S.E.2d 783, 60 Ga.App. 325.

Ind.—John's Cash Furniture Stores v. Mitchell, 125 N.E.2d 827, 126 Ind.App. 231, rehearing denied 127 N.E.2d 128, 126 N.E.2d 231.

25 C.J. p 447 note 26.

Imprisonment for contempt under void process

Where tenant was imprisoned for contempt for failure to pay rent to receiver, and the contempt order and commitment were void for lack of jurisdiction over tenant's person, tenant's remedy against party procuring the imprisonment was suit for false imprisonment, not for mali-

cious prosecution, since imprisonment under lawful process is element of "malicious prosecution."

Tex.—Dallas Joint Stock Land Bank of Dallas v. Britton, 135 S.W.2d 981, 134 Tex. 529.

Warrant charging no crime

An arrest under a warrant which is void because charging no crime known to the law cannot form the basis of an action for malicious prosecution, especially where the parties acted in good faith, but for detention under such a warrant there may be an action for false imprisonment.

N.C.—Rhodes v. Collins, 150 S.E. 492, 198 N.C. 23.

32. Cal.—Gogue v. MacDonald, 218 P.2d 542, 35 C.2d 482, 21 A.L.R.2d 639.

Ga.—Sheppard v. Hale, 197 S.E. 922, 58 Ga.App. 140.

Kan.—Comer v. Knowles, 17 Kan. 436.

N.Y.—People v. Banner, 164 N.Y.S.2d 53, 5 Misc.2d 355, reversed on other grounds 154 N.E.2d 553, 5 N.Y. 2d 109, 180 N.Y.S.2d 292.

Tex.—McBeath v. Campbell, Com. App., 12 S.W.2d 118.

Gregg v. First State Bank of Bishop, Civ.App., 125 S.W.2d 319, error dismissed, judgment correct.

Under common law and statute

(1) "False imprisonment is a tort, both under our statute and under the common law."

Tex.—McBeath v. Campbell, Com. App., 12 S.W.2d 118, 122.

Gregg v. First State Bank of Bishop, Civ.App., 125 S.W.2d 319, 323, error dismissed, judgment correct.

(2) This is true whether the false imprisonment is committed by officer or private citizen.

Tex.—Box v. Fluit, Civ.App., 47 S. W.2d 1107.

33. U.S.—Director General of Railroads v. Kastenbaum, N.Y., 44 S. Ct. 52, 263 U.S. 25, 68 L.Ed. 146.

Carr v. National Discount Corp., C.A.Mich., 172 F.2d 899, certiorari denied 70 S.Ct. 59, 338 U.S. 817, 94 L.Ed. 495.

N.Y.—Vallon v. Ramage, 93 N.Y.S.2d 56, 196 Misc. 740.

Liability of individual directing arrest or giving information see *infra* § 24.

34. La.—Crossett v. Campbell, 48 So. 141, 122 La. 659, 129 Am.S.R. 362, 20 L.R.A., N.S., 967.

N.C.—Riley v. Stone, 94 S.E. 434, 174 N.C. 588.

35. Me.—Therriault v. Breton, 95 A. 699, 114 Me. 137.

25 C.J. p 448 note 42.

36. Mass.—Bennett v. Sweet, 51 N. E. 183, 171 Mass. 600.

25 C.J. p 448 note 43.

Personal rights

Gist of action, however, has been said to be injury to one's personal rights rather than to his person.

Mo.—Gray v. Wallace, 319 S.W.2d 582.

37. Idaho.—Griffin v. Clark, 42 P.2d 297, 55 Idaho 364.

"False imprisonment" defined see *supra* § 1.

38. Md.—Dennis v. Baltimore Transit Co., 56 A.2d 813, 189 Md. 610.

N.Y.—Brecka v. State, 179 N.Y.S.2d 469, 14 Misc.2d 317.

N.C.—Riley v. Stone, 94 S.E. 434, 174 N.C. 588.

Or.—*Corpus Juris* cited in Knight v. Baker, 244 P. 543, 544, 117 Or. 492.

25 C.J. p 448 note 44.

Burden of proof of legality see *infra* § 55.

39. N.Y.—Marks v. Baltimore & O. R. Co., 131 N.Y.S.2d 325, 284 App. Div. 251.

Elements of false imprisonment. Briefly stated, the elements of false imprisonment are twofold: (1) The detention of the person. (2) The unlawfulness of such detention.⁴⁰ It has been said that the true test is not the extent of the restraint, or the means by which it is accomplished, but the lawfulness thereof.⁴¹ The act constituting false imprisonment need not be committed under color of any legal or judicial proceeding.⁴²

Contributory negligence of a plaintiff injured in connection with a false imprisonment may go to the measure of damages but affords no defense to the action itself.⁴³

When imprisonment begins. A false imprison-

ment instituted by a false arrest is deemed to begin at the time of the arrest.⁴⁴

§ 6. Intent

Intent to restrain the plaintiff is an essential element of false imprisonment, although there need be no intent to make an arrest. A restraint which is purely accidental, or one which is incidental to the plaintiff's welfare, cannot constitute a false imprisonment.

To constitute false imprisonment, there must be an actual or legal intent to restrain plaintiff,⁴⁵ although there need be no intent to arrest.⁴⁶ Where the restraint is accidental,⁴⁷ or incidental to plaintiff's welfare,⁴⁸ or to a contest for the possession of a chattel,⁴⁹ it has been held not to constitute false imprisonment.

Tex.—Gold v. Campbell, 117 S.W. 463, 54 Tex.Civ.App. 269.

40. U.S.—Corpus Juris Secundum cited in U. S. v. Kessler, C.A.Pa., 213 F.2d 53, 57—Burlington Transp. Co. v. Josephson, C.C.A.S.D., 153 F.2d 372.

George v. Leonard, D.C.S.C., 71 F.Supp. 662.

Ala.—Buttrey v. Wilhite, 94 So. 585, 208 Ala. 573—Sokol Bros. Furniture Co. v. Gate, 93 So. 724, 208 Ala. 107—Rich v. McInerney, 15 So. 663, 103 Ala. 345, 49 Am.S.R. 32.

Ariz.—Swetnam v. F. W. Woolworth Co., 318 P.2d 364, 83 Ariz. 189.

Cal.—Hanna v. Raphael Weill & Co., 203 P.2d 564, 90 C.A.2d 461—Ware v. Dunn, 183 P.2d 128, 80 C.A.2d 936.

Fla.—Fisher v. Payne, 113 So. 378, 93 Fla. 1085.

Ga.—Conoly v. Imperial Tobacco Co., 12 S.E.2d 398, 63 Ga.App. 880.

Iowa.—Sergeant v. Watson Bros. Transp. Co., 52 N.W.2d 86, 244 Iowa 185.

Ky.—Jefferson Dry Goods Co. v. Stoess, 199 S.W.2d 994, 304 Ky. 73—Great Atlantic & Pacific Tea Co. v. Smith, 136 S.W.2d 759, 281 Ky. 583.

Md.—Safeway Stores, Inc. v. Barrack, 122 A.2d 457, 210 Md. 168.

Mo.—Engelbrecht v. Roworth, App., 157 S.W.2d 242—Richardson v. Empire Trust Co., 94 S.W.2d 966, 230 Mo.App. 580.

N.J.—Cannon v. Krakowitch, 148 A.2d 213, 54 N.J.Super. 93.

N.Y.—Traversara v. Pinelli, 140 N.Y. S.2d 559.

N.C.—Melton v. Rickman, 36 S.E.2d 276, 225 N.C. 700, 162 A.L.R. 793—Parrish v. Hewitt, 18 S.E.2d 141, 220 N.C. 708—Hoffman v. Clinic Hospital, 197 S.E. 161, 213 N.C. 669—Parrish v. Boyzell Mfg. Co., 188 S.E. 817, 211 N.C. 7.

Pa.—Cohen v. Lit Bros., 70 A.2d 419, 166 Pa.Super. 206—Patton v. Vucinic, 167 A. 450, 109 Pa.Super. 530.

Absence of probable cause see infra §§ 7 b, 25.

Intent to restrain see infra § 6. Motive or malice see infra § 7. Restraint and unlawfulness see infra §§ 8-35.

Written statement

It has been said that actions for false imprisonment may have as primary basis a written statement, either under oath or otherwise.

Fla.—Fisher v. Payne, 113 So. 378, 93 Fla. 1085.

41. Idaho.—Griffin v. Clark, 42 P.2d 297, 55 Idaho 364.

42. Idaho.—Griffin v. Clark, supra.

43. Mass.—Cieplinski v. Severn, 168 N.E. 722, 269 Mass. 261.

44. Mont.—Cline v. Tait, 129 P.2d 89, 113 Mont. 475.

N.Y.—Warner v. State, 68 N.Y.S.2d 60, 189 Misc. 51, reversed on other grounds 71 N.Y.S.2d 559, 272 App. Div. 954, reversed on other grounds 79 N.E.2d 459, 297 N.Y. 395—Grago v. Vassello, 19 N.Y.S.2d 34, 173 Misc. 736.

45. Ga.—Timmons v. Fulton Bag & Cotton Mills, 166 S.E. 40, 45 Ga. App. 670.

Kan.—Whitman v. Atchison, etc., R. Co., 116 P. 234, 85 Kan. 150, 34 L.R.A., N.S., 1029, Ann.Cas.1912D 722.

Md.—Safeway Stores, Inc. v. Barrack, 122 A.2d 457, 210 Md. 168.

Mont.—Harrer v. Montgomery Ward & Co., 221 P.2d 428, 124 Mont. 295.

W.Va.—Johnson v. Norfolk & W. R. Co., 97 S.E. 189, 82 W.Va. 692, 6 A.L.R. 1469.

25 C.J. p 451 note 63.

Head of psychiatric ward

Knowledge on part of superintendent of municipal hospital and head of the psychiatric ward of the hospital of plaintiff's presence at the hospital prior to receipt of court order committing him was essential element of plaintiff's case against superintendent and department head for false imprisonment.

D.C.—Orvis v. Brickman, D.C., 95 F.Supp. 605, affirmed 196 F.2d 762, 90 U.S.App.D.C. 266.

Intent by implication

Presence of a policeman who questions the plaintiff, or the bare assertion that authority to arrest exists in the defendant, without purporting to exercise it by taking the plaintiff into custody, is not imprisonment, so long as no present restraint of liberty is to be implied.

U.S.—Pollack v. City of Newark, N. J., D.C.N.J., 147 F.Supp. 35, affirmed, C.A., 248 F.2d 543, certiorari denied 78 S.Ct. 554, 355 U.S. 964, 2 L.Ed.2d 539.

46. Kan.—Garnier v. Squires, 62 P. 1005, 62 Kan. 321.

False imprisonment without arrest see supra § 2.

Placing in police patrol wagon

Where defendant police officer entered pool room and saw plaintiff's friend apparently committing assault, and plaintiff stated to officer that apparent assault was "all in fun" and requested officer not to arrest friend, and police officer did not intend to arrest plaintiff or to charge him with any offense, but nevertheless placed plaintiff in police patrol wagon and detained plaintiff against his will when patrol wagon came to take friend to police station, there was false imprisonment of plaintiff entitling him to recovery of damages.

Cal.—Baines v. Brady, 265 P.2d 194, 122 C.A.2d Supp. 957.

47. Mass.—Wood v. Cummings, 83 N.E. 318, 197 Mass. 80.

25 C.J. p 451 note 64.

48. Pa.—Ollet v. Pittsburg, C. & St. L. R. Co., 50 A. 1011, 201 Pa. 361.

25 C.J. p 451 note 65.

Prevention of bodily harm justifying restraint see infra § 18.

49. Ala.—Friedenthal v. Goodloe, 81 So. 553, 202 Ala. 611.

Tex.—McClure v. State, 9 S.W. 353, 26 Tex.App. 102.

§ 7. Motive or Malice

- a. In general
- b. Probable cause

a. In General

In actions for false imprisonment the motive of the defendant usually is immaterial on the issue of justification; actual malice, as distinguished from legal malice, is not an element of the tort, but both motive and malice become important on the issue of exemplary damages.

It has been broadly stated that to sustain an action for false imprisonment it is unnecessary to show

malice,⁵⁰ and it is clear that actual malice or bad motive is not an essential element of the tort.⁵¹ Some authorities express the underlying principle by stating that the tort itself implies malice,⁵² and malice in the sense of "legal malice" has been declared essential to support the action.⁵³

The motive of defendant, although material on the issue of exemplary damages,⁵⁴ is, with some exceptions,⁵⁵ immaterial on the issue of justification.⁵⁶ A lawful imprisonment does not become

50. U.S.—Montgomery Ward & Co. v. Freeman, C.A.Va., 199 F.2d 720. In re Devereaux, D.C.N.Y., 7 F. Supp. 991, reversed on other grounds, C.C.A., 76 F.2d 522, certiorari denied Devereaux v. Belsey, 56 S.Ct. 100, 296 U.S. 589, 80 L.Ed. 416.
- Ala.—De Armond v. Saunders, 9 So.2d 747, 243 Ala. 263—Phillips v. Morrow, 97 So. 130, 210 Ala. 34—Standard Oil Co. v. Humphries, 96 So. 629, 309 Ala. 493—Sokol Bros. Furniture Co. v. Gate, 93 So. 724, 208 Ala. 107.
- Cal.—Stallings v. Foster, 259 P.2d 1006, 119 C.A.2d 614—Miller v. Turner, 194 P. 66, 49 C.A. 653.
- Fla.—White v. Miami Home Milk Producers Ass'n, 197 So. 125, 143 Fla. 518.
- Ga.—Sinclair Refining Co. v. Meek, 10 S.E.2d 76, 62 Ga.App. 850—Vlass v. McCrary, 5 S.E.2d 63, 60 Ga.App. 744—Sheppard v. Hale, 197 S.E. 922, 58 Ga.App. 140—Duckett & Co. v. Ozmer, 172 S.E. 118, 48 Ga.App. 41.
- Ill.—Lindquist v. Friedman's, Inc., 3 N.E.2d 625, 366 Ill. 232. Hassenauer v. F. W. Woolworth Co., 41 N.E.2d 979, 314 Ill.App. 569.
- Iowa.—Wilson v. Lapham, 195 N.W. 235, 196 Iowa 745.
- Ky.—Harper v. Howton, 241 S.W. 329, 194 Ky. 840.
- Md.—Safeway Stores, Inc. v. Barrack, 122 A.2d 457, 210 Md. 168.
- Mo.—Carter v. Casey, App., 153 S.W.2d 744—Hurst v. Montgomery Ward & Co., App., 107 S.W.2d 183—Schuler v. Hughes, App., 52 S.W.2d 453—Utz v. Mayes, App., 267 S.W. 59, certiorari quashed State ex rel. Utz v. Daus, Sup., 287 S.W. 606—Vaughn v. Hines, 230 S.W. 379, 206 Mo.App. 425—Martin v. Woodlea Inv. Co., 226 S.W. 650, 206 Mo.App. 33.
- Neb.—Hall v. Rice, 223 N.W. 4, 117 Neb. 813, 78 A.L.R. 1421.
- Tex.—Dallas Joint Stock Land Bank of Dallas v. Britton, 135 S.W.2d 981, 134 Tex. 529.
- Va.—Crosswhite v. Barnes, 124 S.E. 242, 139 Va. 471, 40 A.L.R. 54.
- W.Va.—Noce v. Ritchie, 155 S.E. 127, 109 W.Va. 391. Legal malice as element see *infra* note 53.
- Not always essential to liability**
- N.C.—Butler v. Holt-Williamson Mfg. Co., 116 S.E. 726, 185 N.C. 250.
- Recovery of compensatory damages**
- In action for false arrest and false imprisonment, without probable cause, but also without malice, plaintiff may recover compensatory damages.
- U.S.—American Ry. Express Co. v. McDermott, C.C.A.Pa., 44 F.2d 955.
51. U.S.—Riegel v. Hygrade Seed Co., D.C.N.Y., 47 F.Supp. 290. Snyder v. Hausheer, C.C.A.Wyo., 268 F. 776.
- Ala.—Corpus Juris cited in Burk v. Knott, 101 So. 811, 813, 20 Ala.App. 316.
- Ariz.—Corpus Juris cited in Adair v. Williams, 210 P. 853, 856, 24 Ariz. 422, 26 A.L.R. 278.
- Cal.—Collins v. Jones, 22 P.2d 39, 131 C.A. 747.
- Fla.—Johnson v. Weiner, 19 So.2d 699, 155 Fla. 169.
- Idaho.—Corpus Juris cited in Griffin v. Clark, 42 P.2d 297, 300, 55 Idaho 364.
- Md.—Fleisher v. Ensminger, 118 A. 153, 140 Md. 604.
- N.J.—Baldwin v. Point Pleasant Beach & Surf Club, 66 A.2d 62, 3 N.J.Super. 284. Altana v. McCabe, 38 A.2d 192, 132 N.J.Law 12.
- N.Y.—Marks v. Baltimore & O. R. Co., 131 N.Y.S.2d 325, 284 App.Div. 251. Kenyon v. Lord & Taylor, Inc., 143 N.Y.S.2d 391—Traversara v. Pinelli, 140 N.Y.S.2d 559.
- Or.—McNeff v. Heider, 337 P.2d 819—Paget v. Cordes, 277 P. 101, 129 Or. 224.
- S.C.—Westbrook v. Hutchison, 10 S.E.2d 145, 195 S.C. 101.
- Va.—Montgomery Ward & Co. v. Wickline, 50 S.E.2d 387, 188 Va. 485. 25 C.J. p 450 note 55.
52. N.Y.—Jones v. Pickard, 166 N.Y.S. 721, 101 Misc. 117. 25 C.J. p 450 note 57.
53. Ala.—Corpus Juris cited in Burk v. Knott, 101 So. 811, 813, 20 Ala.App. 316.
54. Cal.—Singleton v. Perry, 289 P. 2d 794, 45 C.2d 489.
- N.J.—Corpus Juris cited in Wiegand v. Meade, 158 A. 825, 826, 108 N.J.Law 471. Motive and malice as bearing on issue of exemplary damages see *infra* §§ 56, 67.
55. N.J.—Corpus Juris cited in Wiegand v. Meade, 158 A. 825, 826, 108 N.J.Law 471. 25 C.J. p 448 note 49.
56. Ariz.—Corpus Juris cited in Adair v. Williams, 210 P. 853, 856, 24 Ariz. 422, 26 A.L.R. 278.
- Cal.—Singleton v. Perry, 289 P.2d 794, 45 C.2d 489.
- Md.—Mahan v. Adam, 124 A. 901, 144 Md. 355.
- Mo.—Rice v. Gray, 34 S.W.2d 567, 225 Mo.App. 890.
- N.J.—Corpus Juris cited in Wiegand v. Meade, 158 A. 825, 826, 108 N.J.Law 471.
- Or.—Joseph v. Meier & Frank Co., 250 P. 739, 120 Or. 117.
- Va.—S. H. Kress & Co. v. Musgrove, 149 S.E. 453, 153 Va. 348—Crosswhite v. Barnes, 124 S.E. 242, 139 Va. 471, 40 A.L.R. 54. 25 C.J. p 448 note 50.
- Honesty of purpose no excuse**
- Where a clerk in a store, mistakenly believing that merchandise had been stolen, restrained and searched a person not guilty, the restraint, however short, was unwarranted, and honesty of purpose and intention will not excuse the trespass.
- Mo.—Hurst v. Montgomery Ward & Co., App., 145 S.W.2d 992.
- Neither ill will nor the slightest wrongful intention is a necessary element of false imprisonment.**
- U.S.—Montgomery Ward & Co. v. Freeman, C.A.Va., 199 F.2d 720.
- Ill.—Hassenauer v. F. W. Woolworth & Co., 41 N.E.2d 979, 314 Ill.App. 569.
- Kan.—Comer v. Knowles, 17 Kan. 436.
- S.C.—Westbrook v. Hutchison, 10 S.E.2d 145, 195 S.C. 101—Westbrook

unlawful because of malicious motives;⁵⁷ nor does an unlawful detention become lawful because actuated by a laudable purpose,⁵⁸ or founded in good faith,⁵⁹ or in ignorance of the law.⁶⁰

Official acting without compensation. The fact that one unlawfully causing the arrest of another was serving in an official capacity without compensation and honestly acted in pursuance of what he believed to be his official duty will not relieve him of liability for false imprisonment.⁶¹

False arrest. Where a false arrest is merely one way of committing a false imprisonment, as discussed supra § 2, malice is immaterial;⁶² but where the term is used to indicate a wrongful arrest made

in connection with a malicious prosecution, and plaintiff sues for false arrest and malicious prosecution, he must allege and prove both malice and want of probable cause.⁶³

Advice of counsel. Generally speaking, it is no defense to an action for false imprisonment that defendant acted on legal advice,⁶⁴ although advice of counsel may be shown in mitigation of damages, as discussed infra § 66; and one acting pursuant to the advice and direction of a prosecuting attorney who is regarded as a quasi-judicial officer may be protected against liability for false imprisonment for a restraint imposed under the advice and direction of such official.⁶⁵

- v. Hutchison, 3 S.E.2d 207, 190 S.C. 414.
- Va.—Montgomery Ward & Co. v. Wickline, 50 S.E.2d 387, 188 Va. 485.
- In New York**
- (1) Motive is immaterial on the issue of justification.
- N.Y.—McLoughlin v. New York Edison Co., 169 N.E. 277, 252 N.Y. 202.
- Grago v. Vassello, 19 N.Y.S.2d 34, 173 Misc. 736.
- (2) However, in the federal court in New York, it has been stated that a judgment for false imprisonment can only be obtained in New York on a showing of wilful and malicious injury to complainant.
- U.S.—In re Stone, D.C.N.Y., 278 F. 566.
57. U.S.—Gladstone v. Galton, C.C.A. Cal., 145 F.2d 742.
- Ga.—Melton v. Jenkins, 178 S.E. 754, 50 Ga.App. 615.
- Mo.—**Corpus Juris** quoted in Thompson v. Farmers' Exchange Bank, 62 S.W.2d 803, 811, 333 Mo. 437.
- N.Y.—Sanders v. Roinick, 67 N.Y.S. 2d 652, 188 Misc. 627, affirmed 71 N.Y.S.2d 896, 272 App.Div. 803—Damilitis v. Kerjas Lunch Corporation, 300 N.Y.S. 574, 165 Misc. 186.
- 25 C.J. p 449 note 51.
58. Mo.—**Corpus Juris** quoted in Thompson v. Farmers' Exchange Bank, 62 S.W.2d 803, 811, 333 Mo. 437.
- N.Y.—Sanders v. Roinick, 67 N.Y.S. 2d 652, 188 Misc. 627, affirmed 71 N.Y.S.2d 896, 272 App.Div. 803.
- 25 C.J. p 449 note 52.
59. U.S.—Great Am. Indem. Co. v. Beverly, D.C.Ga., 150 F.Supp. 134.
- Ala.—Daniels v. Miltstead, 128 So. 447, 221 Ala. 353.
- Cal.—Ware v. Dunn, 183 P.2d 128, 80 C.A.2d 936.
- Ill.—Hassenauer v. F. W. Woolworth Co., 41 N.E.2d 979, 314 Ill.App. 569.
- Iowa.—Sergeant v. Watson Bros. Transp. Co., 52 N.W.2d 86, 244 Iowa 185.
- La.—Barrios v. Yoars, App., 184 So. 212.
- Md.—Dennis v. Baltimore Transit Co., 56 A.2d 813, 189 Md. 610.
- Mo.—**Corpus Juris** quoted in Thompson v. Farmers' Exchange Bank, 62 S.W.2d 803, 811, 333 Mo. 437.
- N.Y.—Wallenstein v. Rosenbaum, 272 N.Y.S. 346, 241 App.Div. 374.
- S.D.—Bean v. Best, 93 N.W.2d 403.
- Tenn.—Little Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357.
- Va.—Montgomery Ward & Co. v. Wickline, 50 S.E.2d 387, 188 Va. 485—Crosswhite v. Barnes, 124 S. E. 242, 139 Va. 471, 40 A.L.R. 54.
- 25 C.J. p 449 note 53.
- Procuring void warrant in good faith**
- Where warrant did not charge crime, prosecutors cannot, in an action for false imprisonment, justify arrest on ground that warrant was procured in good faith.
- N.C.—Rhodes v. Collins, 150 S.E. 492, 198 N.C. 23.
- Unfounded but honest belief in theft**
- Honesty of purpose and intention would not excuse a false arrest and imprisonment where defendant's sales clerk restrained plaintiff under mistaken belief that plaintiff or companion had stolen a dress from defendant's store, which dress was subsequently found upstairs in the store.
- Mo.—Titus v. Montgomery Ward & Co., 123 S.W.2d 574, 232 Mo.App. 987.
60. Ga.—Stembridge v. Wright, 124 S.E. 115, 32 Ga.App. 587.
- 25 C.J. p 450 note 54.
61. U.S.—Casserly v. Wheeler, C.C. A.Cal., 282 F. 389.
- Draft board official**
- That a member of a draft board, arresting on suspicion one applying for a permit to go to sea, was acting without compensation in the performance of what he believed to be his official duty and without malice, did not relieve him of liability for false imprisonment.
- U.S.—Casserly v. Wheeler, supra.
62. U.S.—Larocque v. Dorsey, C.C. A.N.Y., 299 F. 556.
- Cal.—Stallings v. Foster, 259 P.2d 1006, 119 C.A.2d 614.
- N.Y.—Kenyon v. Lord & Taylor, Inc., 143 N.Y.S.2d 391.
63. U.S.—Seaboard Oil Co. v. Cunningham, C.C.A.Fla., 51 F.2d 321, certiorari denied 52 S.Ct. 35, 284 U.S. 657, 76 L.Ed. 557.
- Va.—Virginia Electric & Power Co. v. Wynne, 141 S.E. 829, 149 Va. 882.
- Malice and want of probable cause as elements of malicious prosecution see Malicious Prosecution §§ 18-44.
64. Iowa.—Wilson v. Lapham, 195 N. W. 235, 196 Iowa 745.
- Mich.—Dallas v. Garras, 10 N.W.2d 897, 306 Mich. 313.
- 25 C.J. p 450 note 59.
- Determination**
- In determining whether advice of counsel is a defense in prosecution for a malicious prosecution and false imprisonment, counsel consulted must be one whom the person consulting has no reason to suspect of prejudice or bias, and in whose judgment he was justified in imposing confidence as impartial.
- Ala.—Lawrence v. Cranford, 44 So. 2d 573, 253 Ala. 389.
65. Mich.—Crawford v. Huber, 184 N.W. 594, 215 Mich. 564, 39 A.L.R. 1392.
- Okl.—Price v. Cook, 250 P. 519, 120 Okl. 105.
- Persons responsible generally see infra §§ 36-44.
- Failure of criminal prosecution**
- Sheriff, acting in good faith on advice and direction of county attorney, in making arrest without warrant in felony case, is protected, although criminal prosecution fails for lack of evidence to convict.
- Okl.—Price v. Cook, supra.

In an action for false arrest and malicious prosecution where, as shown supra this section, malice and want of probable cause are essential elements, advice of counsel may afford a defense,⁶⁶ but such advice is no defense unless defendant before obtaining it fully and fairly stated to counsel all material facts within his knowledge.⁶⁷

b. Probable Cause

Probable cause may afford a defense to an action for false imprisonment where the existence of probable cause makes the detention lawful, but probable cause affords no defense in so far as its presence merely negatives the element of actual malice.

There is some confusion in the authorities relative to the necessity for showing a want of prob-

able cause as an element of false imprisonment.⁶⁸ While there are broad judicial statements to the effect that "probable cause" is no defense in false imprisonment cases and that the want thereof is not an essential element of the tort,⁶⁹ and while it is clear that "probable cause" cannot justify a false imprisonment in so far as its presence merely negatives the existence of actual malice,⁷⁰ nevertheless it would seem that "probable cause" in the sense of reasonable ground for effecting an arrest or detention, as discussed infra § 25, may afford a defense to an action for false imprisonment in so far as the presence of such "probable cause" justifies the arrest or other restraint and therefore precludes it from being unlawful or "false."

B. IMPRISONMENT, DETENTION, OR RESTRAINT

1. NECESSITY AND SUFFICIENCY

§ 8. Necessity

Detention or restraint of the person is an essential element of false imprisonment, but actual confinement is not necessary.

It is essential to a cause of action for false imprisonment that there shall have been some detention or restraint of the person of plaintiff,⁷¹ and the mere watching of plaintiff or keeping him un-

66. U.S.—Seaboard Oil Co. v. Cunningham, C.C.A.Fla., 51 F.2d 321, certiorari denied 52 S.Ct. 35, 284 U.S. 657, 76 L.Ed. 557.

Ill.—Galarza v. Sprague, 1 N.E.2d 275, 284 Ill.App. 254.

Advice of counsel as defense in malicious prosecution see Malicious Prosecution §§ 45-53.

Consideration of acts preceding arrest

In action against president of school board for alleged false arrest of plaintiff for maliciously injuring and defacing school building by taking padlock and chain from door which president had placed there to prevent holding of school, acts of president and school board preceding institution of prosecution could be considered in determining whether president acted on probable cause and in good faith and on advice of counsel after full and fair statement of all the facts.

Iowa.—Gripp v. Crittenden, 271 N.W. 599, 223 Iowa 240.

67. U.S.—Seaboard Oil Co. v. Cunningham, C.C.A.Fla., 51 F.2d 321, certiorari denied 52 S.Ct. 35, 284 U.S. 657, 76 L.Ed. 557.

Ill.—Southern Limited, 25 N.E.2d 590, 303 Ill.App. 502.

Iowa.—Gripp v. Crittenden, 271 N.W. 599, 223 Iowa 240.

Pa.—Penn v. Baier, Com.Pl., 98 Pittsb. Leg.J. 340.

68. Cal.—Collyer v. S. H. Kress Co., 54 P.2d 20, 5 C.2d 175.

Advice of counsel as bearing on

probable cause see supra subdivision a of this section.

69. U.S.—Riegel v. Hygrade Seed Co., D.C.N.Y., 47 F.Supp. 290.

Ala.—De Armond v. Saunders, 9 So. 2d 747, 243 Ala. 263—Daniels v. Milstead, 128 So. 447, 221 Ala. 353.

Cal.—Stallings v. Foster, 259 P.2d 1006, 119 C.A.2d 614—Collins v. Jones, 22 P.2d 39, 131 C.A. 747.

Ga.—Sinclair Refining Co. v. Meek, 10 S.E.2d 76, 62 Ga.App. 850—Vlass v. McCrary, 5 S.E.2d 63, 60 Ga.App. 744—Sheppard v. Hale, 197 S.E. 922, 58 Ga.App. 140.

Iowa.—Sergeant v. Watson Bros. Transp. Co., 52 N.W.2d 86, 244 Iowa 185.

Ky.—Harper v. Howton, 241 S.W. 329, 194 Ky. 840.

Md.—Safeway Stores, Inc. v. Barrack, 122 A.2d 457, 210 Md. 168.

Mo.—Hanser v. Bieber, 197 S.W. 68, 271 Mo. 326.

Carter v. Casey, App., 153 S.W.2d 744—Hurst v. Montgomery Ward & Co., App., 107 S.W.2d 183—Greaves v. Kansas City Junior Orpheum Co., 80 S.W.2d 228, 229 Mo.App. 663—Vaughn v. Hines, 230 S.W. 379, 206 Mo.App. 425.

Okl.—Swafford v. Vermillion, 261 P. 2d 187.

Or.—McNeff v. Heider, 337 P.2d 819.

S.D.—Bean v. Best, 93 N.W.2d 403.

Tex.—Dallas Joint Stock Land Bank of Dallas v. Britton, 135 S.W.2d 981, 134 Tex. 529.

Va.—Montgomery Ward & Co. v. Wickline, 50 S.E.2d 387, 188 Va. 485.

69. U.S.—Riegel v. Hygrade Seed Co., D.C.N.Y., 47 F.Supp. 290.

Ala.—De Armond v. Saunders, 9 So. 2d 747, 243 Ala. 263—Daniels v. Milstead, 128 So. 447, 221 Ala. 353.

Cal.—Stallings v. Foster, 259 P.2d 1006, 119 C.A.2d 614—Collins v. Jones, 22 P.2d 39, 131 C.A. 747.

Ga.—Sinclair Refining Co. v. Meek, 10 S.E.2d 76, 62 Ga.App. 850.

Iowa.—Sergeant v. Watson Bros. Transp. Co., 52 N.W.2d 86, 244 Iowa 185.

Ky.—Harper v. Howton, 241 S.W. 329, 194 Ky. 840.

Md.—Safeway Stores, Inc. v. Barrack, 122 A.2d 457, 210 Md. 168.

Mo.—Hanser v. Bieber, 197 S.W. 68, 271 Mo. 326.

Carter v. Casey, App., 153 S.W.2d 744—Hurst v. Montgomery Ward & Co., App., 107 S.W.2d 183—Greaves v. Kansas City Junior Orpheum Co., 80 S.W.2d 228, 229 Mo.App. 663—Vaughn v. Hines, 230 S.W. 379, 206 Mo.App. 425.

In New York

(1) Earlier cases have held that probable cause is neither a complete nor partial defense to an action for false imprisonment.

N.Y.—Sanders v. Rolnick, 67 N.Y.S. 2d 652, 188 Misc. 627, affirmed 71 N.Y.S.2d 896, 272 App.Div. 803—Rodney v. Interborough Rapid Transit Co., 267 N.Y.S. 86, 149 Misc. 271.

(2) A later case has held that it is a defense.

N.Y.—Saunders v. State, 181 N.Y.S. 2d 138, 14 Misc.2d 881.

70. Ga.—Vlass v. McCrary, 5 S.E. 2d 63, 60 Ga.App. 744.

Or.—Joseph v. Meier & Frank Co., 250 P. 739, 120 Or. 117.

25 C.J. p 451 note 60.

Actual malice as element of false imprisonment see supra subdivision a of this section.

71. U.S.—Martin v. Lincoln Park West Corp., C.A.Ill., 219 F.2d 622.

Ala.—Davis v. Boozer, 110 So. 28, 215 Ala. 116, 49 A.L.R. 1307.

Burk v. Knott, 101 So. 811, 20 Ala.App. 316.

Cal.—Onick v. Long, 316 P.2d 427, 154 C.A.2d 381—Ware v. Dunn, 183 P.2d 128, 80 C.A.2d 936—Perry v. Washington Nat. Ins. Co., 58 P.2d 701, 59 P.2d 158, 14 C.A.2d 609.

Ga.—Sinclair Refining Co. v. Meek, 10 S.E.2d 76, 62 Ga.App. 850.

Ill.—Love v. Goldenberg Furniture Co., 46 N.E.2d 111, 317 Ill.App. 381.

Ky.—Great Atlantic & Pacific Tea

der surveillance, without detaining him by force or threat, does not constitute a false imprisonment.⁷²

The routine locking of the main doors or gates of a plant, and subsequent refusal to open them to permit egress of an employee desiring to leave during working hours does not constitute a false imprisonment where there are other means of egress,⁷³ and where it does not appear that a foreman refusing to open the gates or doors of a factory to permit egress of an employee had any control over such gates or doors, such refusal does not amount to a false imprisonment.⁷⁴ Visiting a police station with an officer to make a statement,⁷⁵ or for further identification,^{75.5} or mere threats of arrest unaccompanied by any restraint,⁷⁶ will not support an action for false imprisonment. On the other

hand, the restraint need not amount to actual confinement in order to be false and actionable.⁷⁷

False arrest. To constitute a false arrest, forming the basis of an action for damages for false imprisonment, there must first be an arrest or actual taking into custody,⁷⁸ or such conduct as would lead a reasonably prudent person to believe that he was arrested,^{78.5} and a claim of false arrest cannot be sustained by proof merely that defendants went in search of plaintiff for the purpose of arresting him,⁷⁹ or by proof that plaintiff voluntarily surrendered to an officer who was without a warrant,⁸⁰ as where, at the request of both child and mother, a child is permitted to accompany its mother to jail.^{80.5}

Co. v. Smith, 136 S.W.2d 759, 281 Ky. 583.

Md.—Mahan v. Adam, 124 A. 901, 144 Md. 355.

Minn.—Corpus Juris cited in Durgin v. Cohen, 209 N.W. 532, 533, 168 Minn. 77.

Neb.—Dillon v. Sears-Roebeck Co., 253 N.W. 331, 126 Neb. 357.

N.J.—Russell v. Levinsohn, 138 A. 205, 5 N.J.Misc. 765.

N.M.—Sanchez v. Securities Acceptance Corp., 260 P.2d 703, 57 N.M. 512.

N.Y.—Jones v. State, 167 N.Y.S.2d 536, 8 Misc.2d 140.

N.C.—Fridgen v. Carolina Coach Co., 47 S.E.2d 609, 229 N.C. 46.

Ohio.—Lester v. Albers Super Markets, Inc., 114 N.E.2d 529, 94 Ohio App. 313.

25 C.J. p 451 note 67.

Detention construed

In a false imprisonment the detention is purely a matter between private persons for a private end, and there is no intention of bringing person detained before a court, or of otherwise securing the administration of the law.

Okl.—Alsup v. Skaggs Drug Center, 223 P.2d 530, 203 Okl. 525.

Arrest merged into subsequent prosecution

Arrest of alleged shoplifter in city hall, when warrant of arrest was read to her, merged into subsequent prosecution, and did not justify recovery for unlawful arrest apart from claim for malicious prosecution.

Ky.—F. S. Marshall Co. v. Brashear, 37 S.W.2d 15, 238 Ky. 157.

Existence of way of escape

The rule that if a way of escape is left open which is available without peril of life or limb, there exists no false imprisonment, has no application where detention is brought about by reason of force or threats of force.

Mo.—Gust v. Montgomery Ward & Co., 136 S.W.2d 94, 234 Mo.App. 611.

Issuance of police citation

Where police officer, after collision between motor vehicles, issued citation directing driver of one vehicle to appear in court on day certain, issuance of such citation did not constitute unlawful detention.

Ohio.—City of Toledo v. Lowenberg, 131 N.E.2d 682, 99 Ohio App. 165.

72. Ga.—Sinclair Refining Co. v. Meek, 10 S.E.2d 76, 62 Ga.App. 850. "Shadowing" with threat of force as sufficient to constitute false imprisonment see *infra* § 9.

73. Ala.—Davis v. Boozer, 110 So. 28, 215 Ala. 116, 49 A.L.R. 1307.

74. Ga.—Timmons v. Fulton Bag & Cotton Mills, 166 S.E. 40, 45 Ga. App. 670.

Necessity of intent to restrain see *supra* § 6.

75. N.Y.—Limbeck v. Gerry, 39 N. Y.S. 95, 15 Misc. 663.

25 C.J. p 452 note 68. Submission to apparent legal authority as false imprisonment see *infra* § 12.

75.5 N.Y.—Darlow v. State, 137 N. Y.S.2d 69, 207 Misc. 124.

76. U.S.—Pollack v. City of Newark, D.C.N.J., 147 F.Supp. 35, affirmed, C.A., 248 F.2d 543, certiorari denied 78 S.Ct. 554, 355 U.S. 964, 2 L. Ed.2d 539.

Ga.—Sinclair Refining Co. v. Meek, 10 S.E.2d 76, 62 Ga.App. 850.

Me.—Knowlton v. Ross, 95 A. 281, 114 Me. 18.

25 C.J. p 452 note 69.

Apprehension of force as constituting false imprisonment see *infra* § 11.

77. Ala.—Burk v. Knott, 101 So. 811, 20 Ala.App. 316.

Place of restraint see *infra* § 13.

78. Ariz.—Swetnam v. F. W. Wool-

worth Co., 318 P.2d 364, 83 Ariz. 189.

La.—Hunter v. Laurent, 104 So. 747, 158 La. 874.

Mo.—Jarrett v. St. Francois County Finance Co., App., 185 S.W.2d 855

—Hurst v. Montgomery Ward & Co., App., 107 S.W.2d 183—Humphreys v. St. Louis-San Francisco Ry. Co., App., 286 S.W. 738.

Ohio.—City of Toledo v. Lowenberg, 131 N.E.2d 682, 99 Ohio App. 165.

Arrest sufficiently shown

In an action for false arrest, the act of a conductor in placing a passenger in custody of marshal was sufficient reasonably to cause belief by passenger that he was under arrest.

Mo.—Humphreys v. St. Louis-San Francisco Ry. Co., App., 286 S.W. 738.

Removal from premises

Where plaintiff's conduct was such as to justify his removal from premises and he refused to leave peacefully, owner of premises was justified in calling police officers and requesting them to remove plaintiff and the request to remove plaintiff from premises was not a request for an arrest, and removal by officers did not constitute an arrest.

Nev.—Lemel v. Smith, 187 P.2d 169, 64 Nev. 545.

78.5 Ariz.—Swetnam v. F. W. Woolworth Co., 318 P.2d 364, 83 Ariz. 189.

Mo.—Jarrett v. St. Francois County Finance Co., App., 185 S.W.2d 855.

79. La.—Hunter v. Laurent, 104 So. 747, 158 La. 874.

80. La.—Hunter v. Laurent, *supra*.

80.5 Miss.—State, for Use of Floyd, v. McCrory, 27 So.2d 365, 200 Miss. 362.

Sheriff held not liable

Sheriff who permitted eleven-year-old child to go to jail with her mother when mother was arrested was not

§ 9. Sufficiency

Any intentional conduct chargeable to defendant that results in the placing of a person in a position where he cannot exercise his will in going where he may lawfully go may constitute false imprisonment.

The imprisonment, detention, or restraint on which an action for false imprisonment may be based may have been effectuated by the employment of actual force, by threats, or by the causing of plain-

tiff to submit to reasonably apprehended force or to apparent legal authority⁸¹ as discussed infra §§ 10-12. Any intentional conduct chargeable to defendant that results in the placing of a person in a position where he cannot exercise his will in going where he may lawfully go may constitute false imprisonment.⁸² Although there is authority to the contrary,^{82.5} generally, it is not essential that there shall have been an actual arrest of plaintiff,⁸³ or

liable for false arrest and imprisonment of child because sheriff did not invoke the procedure provided for by juvenile statutes for disposition of children, since sheriff was not required to delay arrest of mother until a hearing could be had before a juvenile court.

Miss.—State, for Use of Floyd, v. McCrory, supra.

81. Ariz.—Swetnam v. F. W. Woolworth Co., 318 P.2d 364, 83 Ariz. 189.

Mo.—Jarrett v. St. Francois County Finance Co., App., 185 S.W.2d 855.

N.J.—McGrath v. Keenan, 46 A.2d 725, 24 N.J.Misc. 121.

Ohio.—City of Toledo v. Lowenberg, 131 N.E.2d 682, 99 Ohio App. 165.

S.D.—Corpus Juris quoted in Man-
naugh v. J. C. Penney Co., 250 N.W.
38, 39, 61 S.D. 550.

82. U.S.—Hundley v. Milner Hotel
Management Co., D.C.Ky., 114 F.
Supp. 206, affirmed, C.A., Milner
Hotel Management Co. v. Hundley,
216 F.2d 613—Watkins v. Oaklawn
Jockey Club, D.C.Ark., 86 F.Supp.
1006, affirmed, C.A., 183 F.2d 440.

Ala.—Daniels v. Milstead, 128 So.
447, 221 Ala. 353.

Cal.—Ware v. Dunn, 183 P.2d 128,
80 C.A.2d 936.

Colo.—Crews-Beggs Dry Goods Co.
v. Bayle, 51 P.2d 1026, 97 Colo.
568.

Idaho.—Corpus Juris cited in Grif-
fin v. Clark, 42 P.2d 297, 301, 55
Idaho 364.

Ill.—Lindquist v. Friedman's Inc., 8
N.E.2d 625, 366 Ill. 232—People
v. Scalisi, 154 N.E. 715, 324 Ill.
131.

Iowa.—Norton v. Mathers, 271 N.W.
321, 222 Iowa 1170—Fox v. McCur-
nin, 218 N.W. 499, 205 Iowa 752.

Ky.—Great Atlantic & Pacific Tea
Co. v. Smith, 136 S.W.2d 759, 281
Ky. 583—National Bond & Invest-
ment Co. v. Whithorn, 123 S.W.2d
263, 276 Ky. 204.

La.—Girlinghouse v. Zwahlen, 3 La.
App. 720.

Md.—Mahan v. Adam, 124 A. 901, 144
Md. 355—Fleisher v. Ensminger,
118 A. 153, 140 Md. 604.

Mo.—Burton v. Drennan, 58 S.W.2d
740, 332 Mo. 512.

Mont.—Panisko v. Dreibelbis, 124 P.
2d 997, 113 Mont. 310.

Neb.—Corpus Juris quoted in Dillon

v. Sears-Roebuck Co., 253 N.W.
331, 335, 126 Neb. 357.

N.J.—Pine v. Okzewski, 170 A. 825,
112 N.J.Law 429.

N.Y.—Seguin v. Myers, 108 N.Y.S.2d
28, 279 App.Div. 690.

Ippisch v. Moricz-Smith, 144 N.
Y.S.2d 505, 1 Misc.2d 120, modified
on other grounds 150 N.Y.S.2d 419,
1 A.D.2d 968.

Ohio.—Lester v. Albers Super Mar-
kets, Com.Pl., 101 N.E.2d 731.

S.C.—Wingate v. Postal Tel. & Ca-
ble Co., 30 S.E.2d 307, 204 S.C. 520
—Whitmire v. Publix Theatre
Corporation, 162 S.E. 753, 164 S.
C. 487.

Tenn.—Little Stores v. Isenberg, 172
S.W.2d 13, 26 Tenn.App. 357.

Tex.—Newton v. Rhoads Bros., Com.
App., 24 S.W.2d 378.

Wash.—Harris v. Stanioch, 273 P.
198, 150 Wash. 380.

25 C.J. p 452 note 74.

Locking from room

Where employee who had received free use of room in hotel as part of his wages was locked out of room by hotel on his resignation, such locking of room was not an unlawful detention of employee sufficient for him to maintain action for false arrest.

U.S.—Martin v. Lincoln Park West Corp., C.A.Ill., 219 F.2d 622.

Mob action

Defendants, who, with others, to the number of seventy-five or more, went to a house where plaintiff was and by a show of force compelled him to go with them, taking him in an automobile across the line into another state, tarring and feathering him, and ordering him not to return to the county in which he had resided for many years, were chargeable with false imprisonment.

U.S.—Meints v. Huntington, C.C.A.
Minn., 276 F. 245, 19 A.L.R. 664.

Refusal to let traveler pass

Where one stops another on the public road by means of threats or otherwise and, in consequence of such conduct, plaintiff is not permitted to pass along, as he has a right to do, this constitutes an illegal imprisonment.

Tenn.—Travis v. Bacherig, 7 Tenn.
App. 638.

Taking to police station

(1) While the illegal laying of

hands on plaintiff by a police officer would not alone be an illegal arrest, supporting an action for false imprisonment, where the officer did not take them off her until he had by force taken plaintiff from her home to the police station, where she was incarcerated for several hours, there was a false imprisonment.

Ga.—Markovitz v. Blake, 105 S.E.
622, 26 Ga.App. 153.

(2) Act of employer's servant in laying hands on plaintiff, and saying, "Come with us, you are under arrest," constituted false imprisonment, although no physical force was employed against the body of plaintiff, it being enough that, when force sufficient to dominate the situation was displayed, plaintiff yielded and journeyed peaceably but under compulsion to the police station.

N.Y.—McLoughlin v. New York Edi-
son Co., 169 N.E. 277, 252 N.Y. 202.

82.5 Ohio.—Neapolitan v. U. S. Steel Corp., App., 149 N.E.2d 589.

83. Ky.—Ashland Dry Goods Co. v.
Wages, 195 S.W.2d 312, 302 Ky.
577.

La.—Banks v. Food Town, Inc., App.,
98 So.2d 719.

Mo.—Jarrett v. St. Francois County
Finance Co., App., 185 S.W.2d 855.

N.Y.—Ippish v. Moricz-Smith, 144 N.
Y.S.2d 505, 1 Misc.2d 120, modified
on other grounds 150 N.Y.S.2d 419,
1 A.D.2d 968.

Okl.—S. H. Kress & Co. v. Bradshaw,
99 P.2d 508, 186 Okl. 588.

Tex.—Newton v. Rhoads Bros., Com.
App., 24 S.W.2d 378.

25 C.J. p 452 note 75.

Demonstration looking toward arrest

An actual manual arrest is not necessary to constitute a "false imprisonment," but a demonstration looking to arrest, which to all appearances can only be avoided by submission, is sufficient.

Mo.—Titus v. Montgomery Ward &
Co., 123 S.W.2d 574, 232 Mo.App.
987.

Arrest not synonymous with false imprisonment

It is elementary that detention is not synonymous with arrest, with-
in principles of false imprisonment.

U.S.—Pollack v. City of Newark, D.
C.N.J., 147 F.Supp. 35, affirmed,

a formal declaration of arrest,⁸⁴ or that the person detaining plaintiff should have any real or pretended authority for taking him into custody.⁸⁵ It is sufficient if one is restrained unlawfully in any manner of his right of freedom of locomotion;⁸⁶ and shadowing a person so as to show that, if necessary, force will be used to detain him,⁸⁷ or using improper means to decoy him into the jurisdiction,⁸⁸ may constitute false imprisonment. Where plaintiff is detained for a refusal to comply with a condition, which defendant had no right to impose, defendant is liable.⁸⁹

The detention must have been against the will of the person detained,⁹⁰ who must have been conscious of confinement.^{90.5} A mere voluntary remaining in custody on the part of plaintiff is not sufficient,⁹¹ as, for example, where he submits to avoid the payment of a small license fee,⁹² nor is a voluntary yielding to misrepresentations and threats inducing plaintiff to go to another place and remain in concealment for a time.⁹³

Detention in or of automobile. The driver of a car in which plaintiff is unlawfully made an unwilling passenger falsely imprisons him,⁹⁴ as where the driver so operates the automobile that plaintiff may not leave it with safety,⁹⁵ and a plaintiff may be falsely imprisoned by a combination of orders to remain and disabling of his car which in concert prevent his departure.⁹⁶ Where defendant unlawfully controls and moves plaintiff's car against plaintiff's will and while plaintiff lawfully remains therein, defendant is guilty of a false imprisonment, even though plaintiff was at liberty to step from the car and depart as a pedestrian.⁹⁷

§ 10. — Actual Physical Force

The employment of actual physical force to accomplish the restraint of the plaintiff is sufficient but not essential to constitute a false imprisonment. While false imprisonment includes a technical assault, it is not necessary that there be a battery or actual physical contact with the person of the plaintiff.

Actual physical force amounting to an unlawful

C.A., 248 F.2d 543, certiorari denied 78 S.Ct. 554, 355 U.S. 964, 2 L.Ed.2d 539.

84. Mo.—Hurst v. Montgomery Ward & Co., App., 145 S.W.2d 992 —Gust v. Montgomery Ward & Co., 136 S.W.2d 94, 234 Mo.App. 611—Hurst v. Montgomery Ward & Co., App., 107 S.W.2d 183.

Conduct depriving one of liberty

Plaintiff might have been arrested without being told that he was arrested in so many words, and, if officers' conduct was such as to place plaintiff under their dominion and deprive him of his liberty, he was under arrest.

Ala.—Burk v. Knott, 101 So. 811, 20 Ala.App. 316.

85. Ala.—Sokol Bros. Furniture Co. v. Gate, 93 So. 724, 208 Ala. 107.

86. U.S.—Johnson v. Tompkins, C. C.Pa., 13 F.Cas.No.7,416, Baldw. 571. Ga.—Conoly v. Imperial Tobacco Co., 12 S.E.2d 398, 63 Ga.App. 830—Turney v. Rhodes, 155 S.E. 112, 42 Ga.App. 104.

25 C.J. p 452 note 76.

Deprivation of freedom to leave

Cal.—Schanafelt v. Seaboard Finance Co., 239 P.2d 42, 108 C.A.2d 420.

87. U.S.—Fotheringham v. Adams Express Co., C.C.Mo., 36 F. 252, 1 L.R.A. 474.

Kan.—Whitman v. Atchison, T. & S. F. R. Co., 116 P. 234, 85 Kan. 150, 34 L.R.A., N.S., 1029, Ann.Cas.1912D 722.

Mere surveillance as false imprisonment see supra § 8.

88. Ill.—Wanzer v. Bright, 52 Ill. 35.

Mo.—Ahern v. Collins, 39 Mo. 145.

89. N.Y.—Beaver v. Cohen, 162 N.Y. S. 160.

25 C.J. p 453 note 79.

90. Cal.—Corpus Juris quoted in Vandiveer v. Charters, 294 P. 440, 444, 110 C.A. 347.

La.—Hunter v. Laurent, 104 So. 747, 158 La. 874.

Tenn.—Little Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357.

25 C.J. p 453 note 80.

In the case of an incompetent, the detention must be against the will of his legal guardians.

N.Y.—Barker v. Washburn, 93 N.E. 958, 200 N.Y. 280, 140 Am.S.R. 640, 34 L.R.A., N.S., 159.

25 C.J. p 453 note 84.

90.5 Tenn.—Little Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357.

91. N.C.—Corpus Juris cited in Hoffman v. Clinic Hospital, 197 S. E. 161, 162, 213 N.C. 669.

S.D.—Corpus Juris quoted in Mannaugh v. J. C. Penney Co., 250 N. W. 38, 39, 61 S.D. 550.

25 C.J. p 453 note 81.

92. U.S.—Cottam v. Oregon City, C. C.Or., 98 F. 570.

93. Mass.—Payson v. Macomber, 3 Allen 69.

94. D.C.—Chesapeake & Potomac Telephone Co. v. Lewis, 99 F.2d 424, 69 App.D.C. 191.

Mass.—Cieplinski v. Severn, 168 N. E. 722, 269 Mass. 722.

95. Mass.—Cieplinski v. Severn, supra.

Place of detention generally see infra § 13.

96. Kan.—Cordell v. Standard Oil Co., 289 P. 472, 131 Kan. 221.

Draining water from radiator

Detention of plaintiff at filling station by oil company's agent was actionable without use of force, where agent drained water from radiator of plaintiff's car and ordered plaintiff to remain.

Kan.—Cordell v. Standard Oil Co., supra.

97. Ky.—National Bond & Investment Co. v. Whithorn, 123 S.W.2d 263, 276 Ky. 204.

Hooking car onto wrecker

Where employees of holder of conditional sales contract on which payments due on an automobile were in arrears detained buyer operating automobile by threats of calling officers and directed a wrecker to be hooked on pulling automobile seventy-five or one hundred feet against protests of buyer, such conduct was a "false imprisonment" rendering holder of conditional sales contract liable to buyer, although buyer was at liberty to depart at any time without automobile.

Ky.—National Bond & Investment Co. v. Whithorn, supra.

Repossessed automobile

Where owner entered automobile after it had been repossessed for default under conditional sale contract, and over objections of reposessor's agents, and refused to leave automobile, which was removed to garage, reposessor was not liable to owner for false imprisonment.

Ind.—Westfield v. General Finance Corp., 104 N.E.2d 136, 122 Ind.App. 232.

detention is sufficient to constitute false imprisonment,⁹⁸ but the employment of such force is not essential,⁹⁹ it being sufficient that a physical restraint be imposed,¹ without a battery or actual physical contact with the person of plaintiff;² nor need there be any injury to the individual's person.³ While false imprisonment always includes at least a technical assault,⁴ an accompanying battery is only incidental.⁵

§ 11. — Apprehension of Force; Threats

The restraint constituting false imprisonment may arise out of words, acts, or gestures which induce a reasonable apprehension that force will be used if the plaintiff does not submit.

The restraint constituting a false imprisonment may arise out of words, acts, gestures, or the like⁶ which induce a reasonable apprehension that force will be used if plaintiff does not submit,⁷ and it is

98. U.S.—Patrick v. Esso Standard Oil Co., D.C.N.J., 156 F.Supp. 336—Hundley v. Milner Hotel Management Co., D.C.Ky., 114 F.Supp. 206, affirmed, C.A., Milner Hotel Management Co. v. Hundley, 216 F.2d 613.
- Cal.—People v. Wheeler, 14 P. 796, 73 C. 252.
- Ill.—McNay v. Stratton, 9 Ill.App. 215, appeal dismissed 109 Ill. 30.
- Ky.—Noble v. Louisville Taxicab & Transfer Co., 255 S.W.2d 493—Great Atlantic & Pacific Tea Co. v. Smith, 136 S.W.2d 759, 281 Ky. 583—National Bond & Investment Co. v. Whithorn, 123 S.W.2d 263, 276 Ky. 204.
- N.J.—Earl v. Winne, 101 A.2d 535, 14 N.J. 119.
- McGrath v. Keenan, 46 A.2d 725, 24 N.J.Misc. 121.
- N.C.—Riley v. Stone, 94 S.E. 434, 440, 174 N.C. 588.
- S.C.—Westbrook v. Hutchison, 10 S.E.2d 145, 195 S.C. 101.
- Utah.—Olesen v. Pincock, 251 P. 23, 68 Utah 507.
- 25 C.J. p 453 note 86.
99. Ariz.—Swetnam v. F. W. Woolworth Co., 318 P.2d 364, 83 Ariz. 189.
- Cal.—Corpus Juris cited in People v. Agnew, 107 P.2d 601, 603, 16 C.2d 655.
- Parrott v. Bank of America Nat. Trust & Sav. Ass'n, 217 P.2d 89, 97 C.A.2d 14, 35 A.L.R.2d 263—Hanna v. Raphael Weill & Co., 203 P.2d 564, 90 C.A.2d 461—Ware v. Dunn, 183 P.2d 128, 80 C.A.2d 936—Vandiveer v. Charters, 294 P. 440, 110 C.A. 347.
- Colo.—Crews-Beggs Dry Goods Co. v. Bayle, 51 P.2d 1026, 97 Colo. 568.
- Idaho.—Corpus Juris cited in Griffin v. Clark, 42 P.2d 297, 301, 55 Idaho 364.
- Ill.—Lindquist v. Friedman's Inc., 8 N.E.2d 625, 366 Ill. 232.
- Winans v. Congress Hotel Co., 227 Ill.App. 276.
- Mo.—State ex rel. Patterson v. Collins, App., 172 S.W.2d 284—Hurst v. Montgomery Ward & Co., App., 145 S.W.2d 992.
- N.J.—Earl v. Winne, 101 A.2d 535, 14 N.J. 119.
- Jorgensen v. Pennsylvania R. Co., 118 A.2d 854, 38 N.J.Super. 317.
- Vail v. Pennsylvania R. Co., 136 A. 425, 103 N.J.Law 213.
- N.Y.—Ippish v. Moricz-Smith, 144 N.Y.S.2d 505, 1 Misc.2d 120, modified on other grounds 150 N.Y.S.2d 419, 1 A.D.2d 968.
- S.C.—Wingate v. Postal Tel. & Cable Co., 30 S.E.2d 307, 204 S.C. 520.
- Tenn.—Little Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357.
- 25 C.J. p 454 note 87.
1. S.D.—Cullen v. Dickinson, 144 N.W. 656, 33 S.D. 27, 50 L.R.A., N.S., 987, Ann.Cas.1916B 115.
- 25 C.J. p 454 note 88.
2. Mo.—State ex rel. Patterson v. Collins, App., 172 S.W.2d 284—Hurst v. Montgomery Ward & Co., App., 145 S.W.2d 992—Gust v. Montgomery Ward & Co., 136 S.W.2d 94, 234 Mo.App. 611.
- S.C.—Wingate v. Postal Tel. & Cable Co., 30 S.E.2d 307, 204 S.C. 520.
- 25 C.J. p 454 note 89.
- Any genuine restraint is sufficient, and presumptively actionable, although effected without actual contact with the person.
- Mass.—Sweeney v. F. W. Woolworth Co., 142 N.E. 50, 247 Mass. 277, 31 A.L.R. 311—Jacques v. Childs Dining Hall Co., 138 N.E. 843, 244 Mass. 438, 26 A.L.R. 1329.
3. Kan.—Cordell v. Standard Oil Co., 289 P. 472, 131 Kan. 221—Comer v. Knowles, 17 Kan. 436.
- S.C.—Westbrook v. Hutchison, 10 S.E.2d 145, 195 S.C. 101—Westbrook v. Hutchison, 3 S.E.2d 207, 190 S.C. 414.
- Va.—W. T. Grant Co. v. Owens, 141 S.E. 860, 149 Va. 906.
4. U.S.—Burlington Transp. Co. v. Josephson, C.C.A.S.D., 153 F.2d 372.
- N.C.—Mobley v. Broome, 102 S.E.2d 407, 248 N.C. 54—Hoffman v. Clinic Hospital, 197 S.E. 161, 162, 213 N.C. 669—Parrish v. Boysell Mfg. Co., 188 S.E. 817, 211 N.C. 7.
- S.D.—Corpus Juris cited in Burkland v. Bliss, 252 N.W. 25, 26, 62 S.D. 91.
- 25 C.J. p 454 note 91.
5. N.C.—State v. Lunsford, 81 N.C. 528.
- 25 C.J. p 454 note 92.
- However, it has been stated that "false imprisonment implies a battery or an unlawful force, although the restraint may be no more than an overcoming of the will."
- Wash.—Weber v. Doust, 146 P. 623, 84 Wash. 330.
- Distinction between assault and battery and false imprisonment see Assault and Battery § 1 b.
6. U.S.—Patrick v. Esso Standard Oil Co., D.C.N.J., 156 F.Supp. 336.
- Ariz.—Swetnam v. F. W. Woolworth Co., 318 P.2d 364, 83 Ariz. 189.
- Cal.—Corpus Juris Secundum cited in Schanafelt v. Seaboard Finance Co., 239 P.2d 42, 43, 108 C.A.2d 420—Parrott v. Bank of America Nat. Trust & Sav. Ass'n, 217 P.2d 89, 97 C.A.2d 14, 35 A.L.R.2d 263—Corpus Juris quoted in Vandiveer v. Charters, 294 P. 440, 444, 110 C.A. 347.
- Ga.—Garner v. Mears, 103 S.E.2d 610, 97 Ga.App. 506—Corpus Juris quoted in Sinclair Refining Co. v. Meek, 10 S.E.2d 76, 79, 62 Ga.App. 850.
- Idaho.—Corpus Juris cited in Griffin v. Clark, 42 P.2d 297, 301, 55 Idaho 364.
- Ill.—Hassenaue v. F. W. Woolworth Co., 41 N.E.2d 979, 314 Ill.App. 569.
- Ky.—Corpus Juris cited in Great Atlantic & Pacific Tea Co. v. Billups, 69 S.W.2d 5, 6, 253 Ky. 126.
- Mo.—Jarrett v. St. Francois County Finance Co., App., 185 S.W.2d 855—Hurst v. Montgomery Ward & Co., App., 145 S.W.2d 992—Gust v. Montgomery Ward & Co., 136 S.W.2d 94, 234 Mo.App. 611—Hurst v. Montgomery Ward & Co., App., 107 S.W.2d 183.
- N.J.—Earl v. Winne, 101 A.2d 535, 14 N.J. 119.
- Jorgensen v. Pennsylvania R. Co., 118 A.2d 854, 38 N.J.Super. 317.
- Okl.—S. H. Kress & Co. v. Bradshaw, 99 P.2d 508, 186 Okl. 588.
- S.C.—Westbrook v. Hutchison, 10 S.E.2d 145, 195 S.C. 101—Westbrook v. Hutchison, 3 S.E.2d 207, 190 S.C. 414.
- 25 C.J. p 454 note 94.
7. U.S.—Patrick v. Esso Standard Oil Co., D.C.N.J., 156 F.Supp. 336—Hundley v. Milner Hotel Management Co., D.C.Ky., 114 F.Supp. 206, affirmed, C.A., Milner Hotel Management Co. v. Hundley, 216 F.2d 613—Watkins v. Oaklawn Jockey Club, D.C.Ark., 86 F.Supp. 1006, affirmed, C.A., 183 F.2d 440.

sufficient if they operate on the will of the person threatened and result in a reasonable fear of personal difficulty or personal injuries,⁸ and a false imprisonment may be accomplished by threats of injury to person, property, or reputation.⁹ The person threatened need not await an application of actual force,¹⁰ or actively resist,¹¹ or make any effort to escape.¹² A false imprisonment is shown where an officer going to execute his process has plaintiff in his power, and plaintiff submitting allows the officer to take him without resistance be-

fore a magistrate,¹³ or where plaintiff submits and accompanies an officer who makes an arrest under void process.¹⁴ A voluntary display of force intended to deprive plaintiff of his liberty, even without actually laying hands on plaintiff, has been held sufficient.¹⁵

On the other hand, submission to the mere verbal direction of another, unaccompanied by force or by threats of any character, cannot constitute a false imprisonment,¹⁶ and there is no false imprisonment

Ala.—**Corpus Juris** cited in *Burk v. Knott*, 101 So. 811, 813, 20 Ala.App. 316.

Cal.—**Corpus Juris** cited in *People v. Agnew*, 107 P.2d 601, 603, 16 C.2d 655.

Ware v. Dunn, 183 P.2d 128, 80 C.A.2d 936—**Corpus Juris** quoted in *Vandiveer v. Charters*, 294 P. 440, 444, 110 C.A. 347.

Ga.—*Garner v. Mears*, 103 S.E.2d 610, 97 Ga.App. 506—**Corpus Juris** quoted in *Sinclair Refining Co. v. Meek*, 10 S.E.2d 76, 79, 62 Ga.App. 850.

Ky.—**Corpus Juris** cited in *Great Atlantic & Pacific Tea Co. v. Billups*, 69 S.W.2d 5, 6, 253 Ky. 126.

Minn.—**Corpus Juris** cited in *Durgin v. Cohen*, 209 N.W. 532, 533, 168 Minn. 77.

Mo.—*State ex rel. Patterson v. Collins*, App., 172 S.W.2d 284.

Tenn.—*Little Stores v. Isenberg*, 172 S.W.2d 13, 26 Tenn.App. 357.

Tex.—**Corpus Juris** cited in *McDonald v. Henderson*, Civ.App., 250 S.W. 463.

Utah.—*Hepworth v. Covey Bros. Amusement Co.*, 91 P.2d 507, 97 Utah 205.

Va.—*S. H. Kress & Co. v. Musgrove*, 149 S.E. 453, 153 Va. 348.

25 C.J. p 454 note 95.

Submission must be to reasonably apprehended force in order to constitute false imprisonment where no force or violence is actually used.

N.C.—*Parrish v. Boysell Mfg. Co.*, 188 S.E. 817, 211 N.C. 7.

Detention at point of gun

Allegations of detention of plaintiff at the point of a gun, until the arrival of officers for whom defendant sent, made a case of "false imprisonment," within Pen.Code 1911 art 1039.

Tex.—*McDonald v. Henderson*, Civ. App., 250 S.W. 463.

Test to be applied

In action for false arrest and imprisonment, question is whether conduct of defendant was such as to give plaintiff reasonable cause to believe that defendant intended to control plaintiff's actions, and, if necessary, use physical force or violence for such purpose.

Mo.—*Titus v. Montgomery Ward &*

Co., 123 S.W.2d 574, 232 Mo.App. 987.

8. Cal.—**Corpus Juris** quoted in *Vandiveer v. Charters*, 294 P. 440, 444, 110 C.A. 347.

Ga.—*Garner v. Mears*, 103 S.E.2d 610, 97 Ga.App. 506—*Conoly v. Imperial Tobacco Co.*, 12 S.E.2d 398, 63 Ga. App. 880—**Corpus Juris** quoted in *Sinclair Refining Co. v. Meek*, 10 S.E.2d 76, 79, 62 Ga.App. 850.

Ky.—**Corpus Juris** cited in *Great Atlantic & Pacific Tea Co. v. Billups*, 69 S.W.2d 5, 6, 253 Ky. 126.

Mont.—*Meinecke v. Skaggs*, 213 P. 2d 237, 123 Mont. 308.

N.C.—*Hoffman v. Clinic Hospital*, 197 S.E. 161, 213 N.C. 669.

25 C.J. p 455 note 96.

Confinement or guard

Neither confinement to common jail nor custody of armed guard nor resistance to maintain freedom of locomotion is essential to constitute false imprisonment, but submission, with denial of freedom of action, under a reasonable apprehension of force is sufficient.

Va.—*S. H. Kress & Co. v. Musgrove*, 149 S.E. 453, 153 Va. 348.

Detention by bullying to extort confession

Detention of saleswoman by bullying and threats of imprisonment to compel confession of intent to steal constituted false imprisonment.

Va.—*W. T. Grant Co. v. Owens*, 141 S.E. 860, 149 Va. 906.

Holding for investigation

The taking of another into custody for purpose of investigating an alleged crime constitutes an "arrest."

Ga.—*Conoly v. Imperial Tobacco Co.*, 12 S.E.2d 398, 63 Ga.App. 880.

9. Ala.—*Robinson v. Greene*, 43 So. 797, 148 Ala. 434.

Neb.—*Dillon v. Sears-Roebeck Co.*, 253 N.W. 331, 126 Neb. 357.

10. Ga.—*Sinclair Refining Co. v. Meek*, 10 S.E.2d 76, 62 Ga.App. 850.

Mo.—*Hurst v. Montgomery Ward & Co.*, App., 107 S.W.2d 183.

25 C.J. p 455 note 99.

11. Mo.—*State ex rel. Patterson v. Collins*, App., 172 S.W.2d 284—*Titus v. Montgomery Ward & Co.*

123 S.W.2d 574, 232 Mo.App. 987—

Daniel v. Phillips Petroleum Co., 73 S.W.2d 355, 220 Mo.App. 150.

Return when charged with theft

There was "arrest" for purposes of false arrest action, where filling station operator followed motorists, suspected of taking money, stopped them, and had them return to station and taken in charge by police on a charge of theft, although persons arrested did not actively resist.

Mo.—*Daniel v. Phillips Petroleum Co.*, supra.

12. Mich.—*Moore v. Thompson*, 52 N.W. 1000, 92 Mich. 498.

Mo.—*Titus v. Montgomery Ward & Co.*, 123 S.W.2d 574, 232 Mo.App. 987.

When flight believed futile

Physical restraint is not essential to "false imprisonment" if words and conduct induce reasonable apprehension that resistance or attempted flight would be futile.

Okl.—*Halliburton-Abbott Co. v. Hodge*, 44 P.2d 122, 172 Okl. 175.

13. N.Y.—*Searls v. Viets*, 2 Thomps. & C. 224.

14. Ill.—*Greathouse v. Summerfield*, 25 Ill.App. 296.

15. Cal.—**Corpus Juris** quoted in *Vandiveer v. Charters*, 294 P. 440, 444, 110 C.A. 347.

Mich.—*Cook v. Hastings*, 114 N.W. 71, 150 Mich. 289, 14 L.R.A., N.S., 1123, 13 Ann.Cas. 194.

Any demonstration of physical power, which to all appearances can be avoided only by submission, operates as effectually to constitute an imprisonment, if submitted to, as though any amount of force had been exercised.

Mass.—*Jacques v. Childs Dining Hall*, 138 N.E. 843, 244 Mass. 438, 26 A.L.R. 1329.

16. Ohio.—**Corpus Juris Secundum** quoted in *Lester v. Albers Super Markets, Inc.*, 114 N.E.2d 529, 532, 94 Ohio App. 313.

Tex.—*Priddy v. Bunton*, Civ.App., 177 S.W.2d 805, error refused—*S. H. Kress & Co. v. De Mont*, Civ.App., 224 S.W. 520.

Submission to apparent legal authority see *infra* § 12.

where an employer interviewing an employee declines to terminate the interview if no force or threat of force is used,¹⁷ and false imprisonment may not be predicated on a person's unfounded belief that he was restrained against his will.¹⁸ Threats of arrest and imprisonment improperly made to induce a confession may invalidate the confession but threats of arrest and imprisonment improperly made to induce a confession have no bearing on the issue of false imprisonment where the person is not detained by force or threats of force.¹⁹

Discussion of charges

Where employee chose to remain in back room of employer's store to discuss charges of theft made against him, and signed two confessions under no restraint other than that if he left he risked the indignity and consequences of an arrest, there was no restraint as would constitute false imprisonment.

N.Y.—Blumenfeld v. Harris, 159 N.Y.S.2d 561, 3 A.D.2d 219, affirmed 145 N.E.2d 871, 3 N.Y.2d 905, 167 N.Y.S.2d 925, certiorari denied 78 S.Ct. 773, 356 U.S. 930, 2 L.Ed.2d 761.

Order by frail and elderly woman

Where a shopper was stopped on the street, after leaving a store, by a frail and elderly woman employee who directed her to return to the store and prove that she had not stolen the goods in her possession, and where the woman shopper, younger and larger than such employee, was not in any way frightened but did submit to detention and return as directed, the employee touching her arm but not actually holding her, there was no false imprisonment because the shopper submitted to detention without being in any way compelled to do so by either force or threat.

Tex.—S. H. Kress & Co. v. De Mont, Civ.App., 224 S.W. 520.

Examination of purse

Where officials of a store company interrogated plaintiff clerk about a belt which she had exchanged and asked her to exhibit the contents of her purse and the plaintiff voluntarily complied therewith, there was no false imprisonment.

Ky.—White v. Levy Bros., Inc., 306 S.W.2d 829.

17. Ky.—Corpus Juris Secundum cited in White v. Levy Bros., Inc., 306 S.W.2d 829, 830.

Wis.—Weiler v. Herzfeld-Phillipsor Co., 208 N.W. 599, 189 Wis. 554.

Command to "sit down"

Where an employee under compensation was being interviewed relative to her suspected thefts, and arising and asking if she could leave

now was told "No," to sit down, but the door was unlocked, a claim of false imprisonment could not be sustained.

Wis.—Weiler v. Herzfeld-Phillipsor Co., supra.

18. U.S.—Pollack v. City of Newark, D.C.N.J., 147 F.Supp. 35, affirmed, C.A., 248 F.2d 543, certiorari denied 78 S.Ct. 554, 355 U.S. 964, 2 L.Ed. 539.

N.C.—Hoffman v. Clinic Hospital, 197 S.E. 161, 213 N.C. 669.

Customer asked to pay or return to store

Store manager, who stopped customer after she had left store and insisted that she return while he investigated her purchase, whereupon customer paid money rather than go back to store, was not liable for false arrest and imprisonment.

Ky.—Great Atlantic & Pacific Tea Co. v. Billups, 69 S.W.2d 5, 253 Ky. 126.

Customer told to turn out pockets or be arrested

To charge one with larceny was not of itself false imprisonment, and there was no false imprisonment where one in charge of a store charged a customer with larceny and insisted that he should turn his pockets out, and told him that if he did not do so he would have an officer there and arrest him.

Mass.—Sweeney v. F. W. Woolworth Co., 142 N.E. 50, 247 Mass. 277, 31 A.L.R. 311.

Patient ordered to remain in hospital pending payment of bill

A hospital patient who was told by manager of hospital that she could not go home until she paid her bill, but who subsequently did leave the hospital in the hospital's wheel chair without restraint by word or act, could not maintain action for "false imprisonment" against the hospital.

N.C.—Hoffman v. Clinic Hospital, 197 S.E. 161, 213 N.C. 669.

19. N.Y.—Blumenfeld v. Harris, 159 N.Y.S.2d 561, 3 A.D.2d 219, affirmed 145 N.E.2d 871, 3 N.Y.2d 905, 167 N.Y.S.2d 925, certiorari denied

§ 12. — Submission to Apparent Legal Authority

Detention following submission to the exercise of apparent legal authority may constitute false imprisonment, but merely accompanying an officer who has not taken the plaintiff into actual or constructive custody is not sufficient.

A detention sufficient to support an action for false imprisonment may arise from plaintiff's submission to apparent legal authority,²⁰ as, for example, accompanying an officer who has exhibited a warrant or who demands submission to his authority,²¹ although the submission is induced by fraudu-

78 S.Ct. 773, 356 U.S. 930, 2 L.Ed. 2d 761.

Employer's attempt to coerce confession by threatening to send employee to jail does not bear on question of whether she was falsely imprisoned.

Wis.—Weiler v. Herzfeld-Phillipsor Co., 208 N.W. 599, 189 Wis. 554.

20. Ga.—Jackson v. Norton, 44 S.E. 2d 269, 75 Ga.App. 650—Hines v. Adams, 107 S.E. 618, 27 Ga.App. 155.

N.C.—Corpus Juris cited in Rhodes v. Collins, 150 S.E. 492, 494, 198 N.C. 23.

Or.—Christ v. McDonald, 52 P.2d 655, 152 Or. 494.

25 C.J. p 455 note 4.

Authority of house detective

Evidence that defendant's house detective seized plaintiff by arm, took away her packages, claiming she was from city to get plaintiff, and demanded that plaintiff come with her to the office, was sufficient to show detention against will, since plaintiff was not called on to resist, but had right to assume that detective spoke with legal authority requiring obedience.

Tex.—A. Harris & Co. v. Caldwell, Civ.App., 276 S.W. 298.

21. Ga.—Conoly v. Imperial Tobacco Co., 12 S.E.2d 398, 63 Ga.App. 880—Hines v. Adams, 107 S.E. 618, 27 Ga.App. 155.

N.C.—Rhodes v. Collins, 150 S.E. 492, 198 N.C. 23.

25 C.J. p 455 notes 5, 6.

Effect of refusal to release

Where branch manager of company and policeman came to school to question group of boys concerning breaking of a lock on door of company's building and stealing certain articles therefrom and took boys with them to see their parents, their accompanying of the officer could be deemed involuntary, and in any event refusal of policeman and manager to release one of boys on request of father of the boy constituted an "arrest" and restraint of boy's liberty, irrespective of whether boy

lent representations.²² However, merely accompanying an officer who has not taken plaintiff into either actual or constructive custody is insufficient to support the action.²³

The submission of plaintiff must not amount to voluntary consent to the detention.²⁴ An arrest, made on process, void on its face, but on the validity of which plaintiff relied and submitted, is actionable,²⁵ but, as shown *infra* § 45, one who submits to an arrest with knowledge that the arresting officer is acting without proper authority waives his rights by his own conduct. It has been held a legal duty not to resist an arresting officer, and to accompany him without requiring the officer to resort to actual violence to effect the arrest.²⁶

§ 13. — Time and Place

An unlawful and involuntary restraint of the person may constitute false imprisonment irrespective of the length of time it continues or the place wherein it occurs.

A case of false imprisonment is made out whenever the person complaining is actually restrained without legal authority for an appreciable time, however short,²⁷ as, for example, a few minutes,²⁸ or a few hours,²⁹ or a night.³⁰ An actual arrest is sufficient even when followed by plaintiff's immediate release.³¹ On the other hand, if plaintiff was not in fact restrained of his liberty, the length of time during which he remained in a given place under what he mistakenly claimed was a false imprisonment is immaterial.³²

Place. Confinement within any certain designated limits may constitute imprisonment.³³ Detention may amount to false imprisonment although the victim is not confined in prison,³⁴ or even within walls.³⁵ Where, however, a person is not actually restrained of his liberty, and the place wherein he is interviewed by another is in no way improper, the place of such an interview is wholly immaterial to the issue of false imprisonment.³⁶

voluntarily accompanied policeman and manager from schoolhouse.
Ga.—*Conoly v. Imperial Tobacco Co.*, 12 S.E.2d 398, 63 Ga.App. 880.

22. Kan.—*Whitman v. Atchison, T. & S. F. R. Co.*, 116 P. 234, 85 Kan. 150, 34 L.R.A., N.S., 1029, Ann.Cas. 1912D 722.

23. N.Y.—*Foulke v. New York Cons. R. Co.*, 168 N.Y.S. 72, 180 App.Div. 848, affirmed 127 N.E. 237, 228 N.Y. 269.

25 C.J. p 456 note 8.

24. Tex.—*Houston & T. C. R. Co. v. Roberson*, Civ.App., 138 S.W. 822. 25 C.J. p 456 note 9.

25. N.Y.—*Worden v. Davis*, 88 N.E. 745, 195 N.Y. 391, 22 L.R.A., N.S., 1196.

25 C.J. p 456 note 10.

26. Mich.—*Josselyn v. McAllister*, 25 Mich. 45. 25 C.J. p 456 notes 12, 13.

27. Ala.—*Sokol Bros. Furniture Co. v. Gate*, 93 So. 724, 208 Ala. 107. Cal.—*Parrott v. Bank of America Nat. Trust & Sav. Ass'n*, 217 P.2d 89, 97 C.A.2d 14, 35 A.L.R.2d 263—*Ware v. Dunn*, 183 P.2d 128, 80 C. A.2d 936.

Corpus Juris Secundum cited in
People v. Perry, 180 P.2d 465, 469, 79 C.A.2d Supp. 906.

N.Y.—*Warner v. State*, 68 N.Y.S.2d 60, 189 Misc. 51, reversed on other grounds 71 N.Y.S.2d 559, 272 App. Div. 954, reversed on other grounds 79 N.E.2d 459, 297 N.Y. 395.

Tenn.—*Little Stores v. Isenberg*, 172 S.W.2d 13, 26 Tenn.App. 357. 25 C.J. p 456 note 26.

Length of time of constraint as af-

fecting extent of recovery see *infra* § 65.

Arrest

Any deprivation of the liberty of another, for however short a time, may constitute an arrest.

U.S.—*Hundley v. Milner Hotel Management Co.*, D.C.Ky., 114 F.Supp. 206, affirmed, C.A., *Milner Hotel Management Co. v. Hundley*, 216 F. 2d 613.

Ala.—*Southern Ry. Co. v. Hall*, 96 So. 73, 209 Ala. 237.

Ariz.—*Swetnam v. F. W. Woolworth Co.*, 318 P.2d 364, 83 Ariz. 189.

Ky.—*Great Atlantic & Pacific Tea Co. v. Smith*, 136 S.W.2d 759, 281 Ky. 583—*Pratt v. Gross*, 92 S.W.2d 788, 263 Ky. 521—*Great Atlantic & Pacific Tea Co. v. Billups*, 69 S.W. 2d 5, 253 Ky. 126.

28. N.Y.—*Callahan v. Searles*, 28 N. Y.S. 904, 78 Hun 238.

Tenn.—*Smith v. State*, 7 Humphr. 43.

29. N.J.—*Jackson v. Miller*, 86 A. 50, 84 N.J.Law 189.

25 C.J. p 457 note 28.

30. Ky.—*Miller v. Ashcraft*, 32 S. W. 1085, 98 Ky. 314, 17 Ky.L. 894.

N.Y.—*Pastor v. Regan*, 30 N.Y.S. 657, 9 Misc. 547.

31. Ind.—*Harness v. Steele*, 64 N. E. 875, 159 Ind. 286.

32. Wis.—*Weiler v. Herzfeld-Phillipson Co.*, 208 N.W. 599, 189 Wis. 554.

Prolonged interview of suspected employee

Where an employee suspected of dishonesty was called to the superintendent's office and interviewed for a prolonged period, during which various sales slips of the employee were brought in and carefully exam-

ined, false imprisonment could not be predicated on the length of the interview where it further appeared that the door was unlocked and plaintiff was physically free to leave, and that during all the time that she remained in the office plaintiff was an employee under compensation.

Wis.—*Weiler v. Herzfeld-Phillipson Co.*, *supra*.

33. Ark.—*Floyd v. State*, 12 Ark. 43, 54 Am.D. 250.

Del.—*State v. Brewer*, 114 A. 604, 1 W.W.Harr. 363.

25 C.J. p 456 note 14.

Detention in improper place after lawful arrest see *infra* § 32.

34. Ill.—*People v. Scalisi*, 154 N.E. 715, 324 Ill. 131.

Md.—*Mahan v. Adam*, 124 A. 901, 144 Md. 355.

Mo.—*Hurst v. Montgomery Ward & Co.*, App., 145 S.W.2d 992.

N.M.—*Sanchez v. Securities Acceptance Corp.*, 260 P.2d 703, 57 N.M. 512.

S.C.—*Westbrook v. Hutchison*, 10 S. E.2d 145, 195 S.C. 101—*Westbrook v. Hutchison*, 3 S.E.2d 207, 190 S. C. 414.

35. S.C.—*Westbrook v. Hutchison*, 10 S.E.2d 145, 195 S.C. 101—*Westbrook v. Hutchison*, 3 S.E.2d 207, 190 S.C. 414.

36. Wis.—*Weiler v. Herzfeld-Phillipson Co.*, 208 N.W. 599, 189 Wis. 554.

Small but adequate office

Where an employee suspected of dishonesty was interviewed on such subject in the superintendent's office, which office, while small, was adequate to accommodate the two per-

An action for false imprisonment may be predicated on an unlawful and involuntary detention in an automobile, as shown supra § 9, or in a corn crib,³⁷ elevator,³⁸ field,³⁹ an inclosure within railway gates,⁴⁰ office,⁴¹ private house,⁴² or public street,⁴³ or in any kind of a room,⁴⁴ including

plaintiff's own house and room,⁴⁵ or in a store,⁴⁶ or in an institution, such as a penal institution,⁴⁷ or a hospital,^{47.5} and an action for false imprisonment may be predicated on an unlawful and involuntary detention in a police station,⁴⁸ insane asylum,⁴⁹ or juvenile home.⁵⁰

2. UNLAWFULNESS OF RESTRAINT

§ 14. In General

To constitute false imprisonment the detention or restraint must, under the circumstances existing at the time it was imposed, have been unlawful and involuntary.

Any restraint on another person's liberty to come

and go as he pleases may support an action for false imprisonment where it is unlawful in character.⁵¹ The detention or restraint must, however, not only have been involuntary, as shown supra § 9, but must have been illegal.⁵² A detention which is

sons, and where the door of the office was unlocked during such interview, the place in which the interview was conducted had no bearing on the question of alleged unlawful restraint of the employee's liberty. Wis.—Weiler v. Herzfeld-Phillipson Co., supra.

37. Ill.—McNay v. Stratton, 9 Ill. App. 215.

38. Ga.—Turney v. Rhodes, 155 S.E. 112, 42 Ga.App. 104.

39. Cal.—People v. Wheeler, 14 P. 796, 73 C. 252.

40. N.Y.—Lynch v. Metropolitan El. R. Co., 90 N.Y. 77, 43 Am.R. 141.

41. Tex.—A. Harris & Co. v. Caldwell, Civ.App., 276 S.W. 298.

Attorney's office

Tex.—Texas & P. R. Co. v. Parker, 68 S.W. 831, 29 Tex.Civ.App. 264.

42. Ind.—Hildebrand v. McCrum, 101 Ind. 61.

43. Mo.—Dunlevy v. Wolferman, 79 S.W. 1165, 106 Mo.App. 46. 25 C.J. p 456 note 25.

44. Me.—Prentiss v. Shaw, 56 Me. 427, 96 Am.D. 475.

Mass.—Williams v. Powell, 101 Mass. 467, 3 Am.R. 396.

45. Wis.—Sorenson v. Dundas, 7 N. W. 259, 50 Wis. 335.

46. Ky.—Great Atlantic & Pacific Tea Co. v. Smith, 136 S.W.2d 759, 281 Ky. 583.

Mo.—Hurst v. Montgomery Ward & Co., App., 145 S.W.2d 992. 25 C.J. p 456 note 21.

Detention on stairs

Detention of woman on stairs leading from department of store by clerk and demanding possession of stockings which he thought she had taken was "false imprisonment" in absence of showing of justification for interference with her freedom of movement.

Colo.—Crews-Beggs Dry Goods Co. v. Bayle, 51 P.2d 1026, 97 Colo. 568.

Employee held after hours

Where store employee in charge of daily receipts which had been found to be short was not permitted by employer to leave store, after business hours and after employee's duties had been terminated and store doors were locked, employee was "falsely imprisoned."

N.Y.—Reese v. Julia Sport Wear, 21 N.Y.S.2d 99, 260 App.Div. 263.

47. Mo.—Jarrett v. St. Francois County Finance Co., App., 185 S. W.2d 855.

Neb.—Scott v. Flowers, 84 N.W. 81, 60 Neb. 675.

25 C.J. p 456 note 15.

47.5 Cal.—People v. Rochin, 225 P. 2d 1, 101 C.A.2d 140, hearing denied 225 P.2d 913, 101 C.A.2d 140, reversed on other grounds 72 S.Ct. 205, 342 U.S. 165, 96 L.Ed. 183, 25 A.L.R. 1396.

48. U.S.—Montgomery Ward & Co. v. Medline, C.C.A.N.C., 104 F.2d 485.

49. N.Y.—Oakes v. Oakes, 67 N.Y.S. 427, 55 App.Div. 576, affirmed 60 N.E. 1117, 167 N.Y. 625.

Pa.—Hindman v. Hutchinson, 30 Pittsb.Leg.J., N.S., 422.

Restraint of insane persons generally see infra § 16.

50. Cal.—McAlmond v. Trippel, 269 P. 937, 93 C.A. 584.

Home generally used as shelter

Although a juvenile home is largely in the nature of a shelter for abandoned and mistreated children, confinement therein against the will of the person detained and without compliance with the legal procedure prescribed for such confinement may constitute a false imprisonment. Cal.—McAlmond v. Trippel, supra.

51. U.S.—Riegel v. Hygrade Seed Co., D.C.N.Y., 47 F.Supp. 290.

Ga.—Jackson v. Norton, 44 S.E.2d 269, 75 Ga.App. 650—Turney v. Rhodes, 155 S.E. 112, 42 Ga.App. 104.

Ind.—Hall v. State ex rel. Freeman, 52 N.E.2d 370, 114 Ind.App. 328.

Mass.—Frewen v. Page, 131 N.E. 475, 238 Mass. 499, 17 A.L.R. 134.

Mo.—Martin v. Woodlea Inv. Co., 226 S.W. 650, 206 Mo.App. 33.

N.Y.—Bass v. State, 92 N.Y.S.2d 42, 196 Misc. 177.

Kenyon v. Lord & Taylor, Inc., 143 N.Y.S.2d 891.

N.C.—Alexander v. Lindsey, 55 S.E. 2d 470, 230 N.C. 663.

Unlawful character of restraint sufficiently shown

Where plaintiff and her husband were arrested without a warrant, because the husband refused to pay an excess fare on defendant's train, and the evidence failed to show that plaintiff violated any law, state, municipal, or federal, the arrest was illegal, and a tort.

Ga.—Hines v. Adams, 107 S.E. 618, second case, 27 Ga.App. 157.

52. U.S.—Carr v. National Discount Corp., C.A.Mich., 172 F.2d 899, certiorari denied 70 S.Ct. 59, 338 U.S. 817, 94 L.Ed. 495.

George v. Leonard, D.C.S.C., 84 F.Supp. 205, reversed on other grounds, C.A., 178 F.2d 312, certiorari denied 70 S.Ct. 1000, 339 U.S. 965, 94 L.Ed. 1374.

Hadley v. U. S., 101 Ct.Cl. 112, certiorari denied 65 S.Ct. 79, 323 U.S. 671, 89 L.Ed. 546.

Cal.—Singleton v. Perry, 289 P.2d 794, 45 C.2d 489—Collyer v. S. H. Kress Co., 54 P.2d 20, 5 C.2d 175.

Barrier v. Alexander, 224 P.2d 436, 100 C.A.2d 497—Lapique v. Agoure, 195 P. 1075, 51 C.A. 56.

Ga.—Tasley v. Nelson, 148 S.E. 534, 39 Ga.App. 773.

Ky.—Rader v. Parks, 258 S.W.2d 728.

Mich.—Flanigan v. Chase, 239 N.W. 216, 291 Mich. 463.

Neb.—Dillon v. Sears-Roebeck Co., 249 N.W. 604, 125 Neb. 269, reheard 253 N.W. 331, 126 Neb. 357.

N.Y.—Marks v. Baltimore & O. R. Co., 131 N.Y.S.2d 325, 284 App.Div. 251.

Lippert v. State, 139 N.Y.S.2d 751, 207 Misc. 632—Bellinger v. State, 134 N.Y.S.2d 104, 206 Misc.

legal will not constitute a false imprisonment notwithstanding it may have been unjust,⁵³ and, conversely, an illegal detention of a guilty person may amount to false imprisonment.⁵⁴ An action for false imprisonment will not lie for a removal of the prisoner from one place of detention to another under authority of law.⁵⁵

Protection of property. Generally speaking, the owner may restrain one seeking to interfere with his property or to injure it without becoming liable for false imprisonment.⁵⁶ However, the owner of property is not justified in committing a false imprisonment in the process of recapturing it from a person whose original possession was rightful, even though such person may have wrongfully detained it after condition broken.⁵⁷

Time as of which legality determined. Justifi-

cation for an alleged false imprisonment is determined by the circumstances existing at the time of the arrest or detention.⁵⁸

§ 15. Persons Privileged from Arrest

In the absence of a statute to the contrary, one may not recover in false imprisonment for a restraint which is merely the violation of a personal privilege from arrest, but a detention in violation of a statute construed as absolutely taking away the right to arrest is illegal and may furnish the basis for an action.

Ordinarily exemptions from arrest are construed to create a personal privilege, and when so construed it is the general rule that an action for false imprisonment does not lie for the arrest of a person so exempted,⁵⁹ against either the party instigating the arrest⁶⁰ or the officer making the arrest.⁶¹ In harmony with the general rule that mal-

575, affirmed 139 N.Y.S.2d 274, 285 App.Div. 999.

S.D.—Tredway v. Birks, 242 N.W. 590, 59 S.D. 649.

Wis.—Weiler v. Herzfeld-Phillipson Co., 208 N.W. 599, 189 Wis. 554. 25 C.J. p 457 note 33.

Proper arrest under lawful authority

Where one is properly arrested by lawful authority, an action for false imprisonment cannot be maintained against the party causing the arrest. S.C.—Bushardt v. United Inv. Co., 113 S.E. 637, 121 S.C. 324.

Public justice

Causing a person's arrest for the purpose of vindicating public justice is ordinarily not actionable.

Fla.—S. H. Kress & Co. v. Powell, 180 So. 757, 132 Fla. 471.

Confinement authorized by law

(1) Confinement authorized by law will not furnish the basis for an action of false imprisonment.

Mass.—Doggett v. Hooper, 27 N.E.2d 737, 306 Mass. 129.

(2) Immigration officials inspecting crew and issuing order that alien seamen be detained aboard vessel were engaged in performance of duty which was imposed by statute and which involved exercise of discretion and performance of function of quasi judicial character, and hence officials, whatever their motive, were not liable for false imprisonment of the seamen.

U.S.—Papagianakis v. The Samos, C. A.Va., 186 F.2d 257, certiorari denied 71 S.Ct. 741, 341 U.S. 921, 95 L.Ed. 1354.

(3) Likewise, the vessel and her master and owners were not liable for false imprisonment, since the order justified the detention and the owners could presume that the provisions of the law had been observed in making such order.

U.S.—Papagianakis v. The Samos, supra.

(4) Vessel owners and master who held seaman under detention order of immigration authorities, which was not in precise form required by statute and regulations, were not liable to seaman in damages.

Va.—Neapolidis v. Theofana Maritime Co., 63 S.E.2d 795, 192 Va. 90, certiorari denied 72 S.Ct. 36, 342 U.S. 831, 96 L.Ed. 629.

Illegal procedure

One who arrests or restrains another may be liable for pursuing illegal or improper procedure as well as for acting on an insufficient or improper basis.

N.Y.—Warner v. State, 79 N.E.2d 459, 297 N.Y. 395.

53. U.S.—Polonsky v. Pennsylvania R. Co., C.C.N.Y., 184 F. 558, reversed on other grounds 184 F. 561, 106 C.C.A. 541.

Cal.—Peterson v. Robison, 277 P.2d 19, 43 C.2d 690.

N.Y.—Ranke v. State, 134 N.Y.S.2d 83, 206 Misc. 569, affirmed 141 N.Y.S.2d 516, 285 App.Div. 1113.

W.Va.—Finney v. Zingale, 95 S.E. 1046, 82 W.Va. 422.

25 C.J. p 457 note 34.

54. Ill.—Conkling v. Whitmore, 132 Ill.App. 574.

Illegality not determinative

Fact that imprisonment was illegal does not necessarily entitle person imprisoned to recover damages.

N.Y.—Schildhaus v. City of New York, 163 N.Y.S.2d 201, 7 Misc.2d 859—Fishbein v. State, 120 N.Y.S.2d 92, 204 Misc. 151, affirmed 125 N.Y.S.2d 845, 282 App.Div. 600, appeal denied 127 N.Y.S.2d 827, 282 App.Div. 1093.

55. Md.—Blake v. Burke, 42 Md. 45.

56. U.S.—J. C. Penney Co. v. O'Daniel, C.A.Okl., 263 F.2d 849.

Cal.—Collyer v. S. H. Kress Co., 54 P.2d 20, 5 C.2d 175.

Alterauge v. Los Angeles Turf Club, 218 P.2d 802, 97 C.A.2d 735. Okl.—Swafford v. Vermillion, 261 P. 2d 187.

Ejection of trespasser

Owner of premises, through himself or agent, has right to eject a trespasser.

Nev.—Lemel v. Smith, 187 P.2d 169, 64 Nev. 545.

57. Or.—Westerman v. Oregon Automobile Credit Corporation, 122 P.2d 435, 168 Or. 216.

58. N.J.—Pine v. Okzewski, 170 A. 825, 112 N.J.Law 429.

59. U.S.—Corpus Juris quoted in Bennett v. Ahrens, C.C.A.Ill., 57 F. 2d 948, 950.

Me.—Winchester v. Everett, 15 A. 596, 80 Me. 535, 6 Am.S.R. 228, 1 L.R.A. 425.

25 C.J. p 457 note 38.

Privileges and exemptions from arrest see Arrest §§ 3, 29-31.

Right to habeas corpus

Fact that persons or groups of persons are immune from arrest in sense that they are entitled to habeas corpus to secure release from custody or may secure such release by pleading their immunity does not destroy privilege of person making arrest. Mass.—Morrill v. Hamel, 148 N.E.2d 283.

60. U.S.—Corpus Juris quoted in Bennett v. Ahrens, C.C.A.Ill., 57 F. 2d 948, 950.

Vt.—Wood v. Kinsman, 5 Vt. 588. 25 C.J. p 457 note 39.

61. U.S.—Corpus Juris quoted in Bennett v. Ahrens, C.C.A.Ill., 57 F. 2d 948, 950.

25 C.J. p 457 note 40.

ice or bad motives are not material considerations in this form of action as distinguished from an action for malicious prosecution, see *supra* § 7, it is usually held that, where the arrest is made pursuant to valid process of arrest, knowledge that the arrested party is privileged does not impose liability.⁶²

Invalid process. Where a privileged person is arrested under invalid process, the same principles apply as in cases where no question of privilege is raised.⁶³

Statutes conferring right of action for violation of privilege. To recover under statutes conferring a right of action for arresting or causing the arrest of a privileged person, plaintiff must show facts bringing his case within the contemplation of the statute invoked.⁶⁴

Statutes taking away right to arrest. Where statutes affecting the individual's right to freedom from arrest have been construed, not as granting a personal privilege from arrest to the individual, but as absolutely taking away the right to arrest, an arrest in violation of the statute is illegal, and an action lies against the party procuring it,⁶⁵ the judicial official issuing it,⁶⁶ or the officer serving it.⁶⁷

§ 16. Insane Persons

a. In general

b. Detention pursuant to legal proceedings

a. In General

Ordinarily, in the absence of proper legal proceedings it is false imprisonment to restrain a sane person as insane, or to restrain an insane person except where reasonably necessary for the protection of himself or others.

The general rule is that an insane person may, without adjudication, be lawfully restrained of his liberty when not to do so would endanger his own life or those of others,⁶⁸ but that the right of restraint is limited to cases of actual insanity and immediate danger.⁶⁹

An insane person who is committing a breach of the peace may be arrested without process under the same circumstances as one who is sane,⁷⁰ such cases being governed by the principles which apply to cases of arrest on probable cause without process;⁷¹ and similarly an arrest is authorized where there is a reasonable apprehension that injury may be inflicted by him.⁷² It has been held that a physician, who signs a certificate of insanity in the honest belief that the alleged insane person is insane, does not incur liability.⁷³

False imprisonment may be shown by the restraint of a sane person as insane,⁷⁴ and even insanity is not a lawful excuse for restraint where it

62. U.S.—*Corpus Juris* quoted in *Bennett v. Ahrens*, C.C.A.Ill., 57 F.2d 948, 950.

Mass.—*Cassier v. Fales*, 1 N.E. 922, 139 Mass. 461.

25 C.J. p 458 note 41.

Waiver of privilege see *infra* § 45.

Officer executing process

That person arrested was exempt from arrest as attorney returning from court did not render arresting officers, who acted pursuant to valid warrant, liable for false imprisonment, notwithstanding claim that officers acted maliciously.

U.S.—*Bennett v. Ahrens*, C.C.A.Ill., 57 F.2d 948.

25 C.J. p 458 note 41 [b].

Under Soldiers' and Sailors' Relief Act

Where warrant issued by city tax collector for collection of excise tax on automobile was regular on its face and statutory notices had been served on taxpayer prior to date of warrant, deputy tax collectors were not liable in tort for false imprisonment for arrest of taxpayer on such warrant, regardless of whether under Soldiers' and Sailors' Civil Relief Act taxpayer was exempt from arrest on such warrant because, as arrest-

ing officers knew, he was on active duty in military service at the time. Mass.—*Morrill v. Hamel*, 148 N.E.2d 283.

63. Me.—*Winchester v. Everett*, 15 A. 596, 80 Me. 535, 6 Am.S.R. 228, 1 L.R.A. 425.
25 C.J. p 458 note 43.

64. Ind.—*Sewell v. Lane*, 1 Ind. 293, Smith 167.
N.Y.—*Kreiser v. Scofield*, 31 N.Y.S. 23, 10 Misc. 350.
25 C.J. p 458 note 46 [a].

65. N.Y.—*Deyo v. Van Valkenburgh*, 5 Hill 242.
25 C.J. p 458 note 47.

66. N.Y.—*Percival v. Jones*, 2 Johns.Cas. 49.
25 C.J. p 458 note 48.

67. N.Y.—*Love v. Humphrey*, 9 Wend. 204.
25 C.J. p 458 note 49.

68. Ill.—*Crawford v. Brown*, 151 N. E. 911, 321 Ill. 305, 45 A.L.R. 1457.
N.H.—*Ferry v. Ferry*, 54 A.2d 151, 94 N.H. 395.
25 C.J. p 458 note 50.

69. Ill.—*Crawford v. Brown*, 151 N. E. 911, 321 Ill. 305, 45 A.L.R. 1457.

Reasonable ground

In action against officer for false imprisonment, where officer arrested one on suspicion of insanity, officer is justified only by showing that he had reasonable ground to believe that individual was dangerously insane.

Ariz.—*Christiansen v. Weston*, 284 P. 149, 36 Ariz. 200.

70. Ind.—*Paetz v. Dain*, Wills. 148.
Mich.—*Lott v. Sweet*, 33 Mich. 308.

Attempted arson

Cal.—*Baer v. Smith*, 157 P.2d 646, 68 C.A.2d 716.

71. Ind.—*Paetz v. Dain*, Wills. 148.

72. U.S.—*Cahill v. Michaelis*, N.Y., 170 F. 66, 95 C.C.A. 342.

73. Cal.—*Baer v. Smith*, 157 P.2d 646, 68 C.A.2d 716.

Ky.—*Christopher v. Henry*, 143 S.W. 2d 1069, 284 Ky. 127.

Pa.—*Hinchman v. Richie*, Brightly 143.

74. N.C.—*Cook v. Highland Hospital*, 84 S.E. 352, 168 N.C. 250, L.R.A.1915D 611, Ann.Cas.1917C 158.
25 C.J. p 459 note 56.

Insane asylum as place where false imprisonment may be effected see *supra* § 13.

does not render the victim dangerous to himself or others,⁷⁵ and insane persons who are not dangerous or committing a breach of the peace cannot lawfully be restrained without legal proceedings.⁷⁶ A defendant who has committed an error of judgment in unlawfully restraining an insane person may be held responsible for false imprisonment.⁷⁷ Commitment of one to an insane asylum without certificate of physicians as required by statute imposes a liability for false imprisonment.⁷⁸

Necessity of instituting proceedings for further detention. It is the duty of one who has temporarily restrained an alleged insane person of his liberty to institute proper legal proceedings at once to authorize further detention;⁷⁹ and failure to do

so renders him liable as a trespasser ab initio.⁸⁰

Interference with custody. The committee of an incompetent can maintain an action for an unlawful taking of the ward from his custody or the custody of those with whom he temporarily has placed him.⁸¹

b. Detention Pursuant to Legal Proceedings

Commitment of an alleged insane person to an insane asylum cannot ordinarily constitute false imprisonment where it is made pursuant to legal process.

Where the commitment or detention of a person as insane is pursuant to a prescribed legal proceeding, as discussed in Insane Persons §§ 62-72, valid process therein is ordinarily a defense to an action for false imprisonment,⁸² but void process is not

Liability until commitment received

The superintendent of the Washington Asylum and Jail is liable for the detention therein of a man brought to the asylum by officers for observation as to his sanity, between the time the superintendent personally learned of such detention and the time he received a proper commitment authorizing the detention.

D.C.—Zinkhan v. District of Columbia, 271 F. 542, 50 App.D.C. 312.

75. Ill.—Crawford v. Brown, 151 N.E. 911, 321 Ill. 305, 45 A.L.R. 1457.

Probability of danger

One who has restrained a person who may be deranged in his mind, must show, in order to justify such conduct, when charged therewith as a wrongful act, not only that the person was insane at the time, but also that to permit him to go at large imperiled his own safety or that of the public, and defendant assumes the burden of showing that fact and the imminent necessity of the restraint, and must show that the danger from plaintiff's being at large was not merely possible, but probable.

N.J.—Boesch v. Kick, 116 A. 796, 97 N.J.Law 92.

Under statute

Physician or other person authorized by statute to make temporary commitment to insane asylum may not commit one who, although insane, does not need immediate treatment and is not dangerously insane or disturbing peace, as regards false imprisonment.

Mass.—Karjavainen v. Buswell, 194 N.E. 295, 289 Mass. 419.

76. Minn.—Witte v. Haben, 154 N.W. 662, 131 Minn. 71, L.R.A.1916C 228, Ann.Cas.1917D 534.
25 C.J. p 459 note 55.

77. Conn.—Porter v. Ritch, 39 A. 169, 70 Conn. 235, 39 L.R.A. 353.

N.Y.—Emmerich v. Thorley, 54 N.Y.S. 791, 35 App.Div. 452.
25 C.J. p 459 note 51.

Private person restraining at own risk

Private person who applies restraint on alleged insane person must act on facts, not suspicions, and takes responsibility of error of judgment.

Ill.—Crawford v. Brown, 151 N.E. 911, 321 Ill. 305, 45 A.L.R. 1457.

78. N.Y.—Warner v. State, 79 N.E. 2d 459, 297 N.Y. 395.

Pa.—Frey v. Barr, 28 Pa.Dist. 570.

79. N.H.—Colby v. Jackson, 12 N.H. 526.

25 C.J. p 459 note 62.

80. N.H.—Colby v. Jackson, supra.

81. N.Y.—Barker v. Washburn, 93 N.E. 958, 200 N.Y. 280, 140 Am.S.R. 640, 34 L.R.A., N.S., 159.

82. Ark.—Smith v. Fish, 30 S.W.2d 223, 182 Ark. 115.

Cal.—Baer v. Smith, 157 P.2d 646, 68 C.A.2d 716.

Conn.—Porter v. Ritch, 39 A. 169, 70 Conn. 235, 39 L.R.A. 353.

D.C.—Zinkhan v. District of Columbia, 271 F. 542, 50 App.D.C. 312.

Idaho.—Hansen v. Lowe, 100 P.2d 51, 61 Idaho 138.

N.Y.—Douglas v. State, 56 N.Y.S.2d 245, 269 App.Div. 521, appeal denied 68 N.E.2d 40, 295 N.Y. 941, affirmed 68 N.E.2d 605, 296 N.Y. 530.

Brecka v. State, 179 N.Y.S.2d 469, 14 Misc.2d 317—Durante v. Onondaga County, 147 N.Y.S.2d 922, 3 Misc.2d 69—Beitch v. State, 84 N.Y.S.2d 177, 193 Misc. 350, affirmed 113 N.Y.S.2d 439, 280 App.Div. 855, reargument and appeal denied 117 N.Y.S.2d 660, 280 App.Div. 1002.

Wis.—Weber v. Young, 26 N.W.2d 543, 250 Wis. 307.

25 C.J. p 460 note 66.

County judge

Under state constitution and stat-

utes, county court had jurisdiction of the subject matter of proceeding to commit allegedly insane person to state hospital and of the person of respondent and, in rendering judgment of commitment, county judge acted as a judicial officer and as such was not liable in damages for allegedly illegal confinement of the person committed.

Okl.—Quindlen v. Hirschi, 284 P.2d 723.

Sufficiency of commitment is not to be tested with same strictness as on an appeal or habeas corpus, and the mere fact that in such proceedings, or any other, commitment might be held bad, would not militate against its efficacy as protection from liability in suit for false imprisonment.

Idaho.—Hansen v. Lowe, 100 P.2d 51, 61 Idaho 138.

Formal errors disregarded

Mere omission to insert proper date in jurat was a formal error which could be disregarded.

N.Y.—Williams v. State, 183 N.Y.S. 2d 216.

Protection of private person

A private person, acting in good faith and following the provisions of Insanity Law § 82, outlining the methods for determining the question of insanity, is not liable for alleged incompetent's detention.

N.Y.—Schall v. Irwin, 199 N.Y.S. 141, 120 Misc. 573, affirmed 207 N.Y.S. 914, 212 App.Div. 834.

County clerk, issuing notice of insanity hearing, based on sufficient statement, and warrant of commitment, based on county court's judgment, fair and sufficient on its face, for respondent's commitment to state hospital, through deputy clerk, as required by statute, is not liable to respondent for false imprisonment.
Mo.—Ussery v. Haynes, 127 S.W.2d 410, 344 Mo. 530.

a protection.⁸³ One who merely gives information to a proper judicial officer is protected by the process issuing thereon,⁸⁴ unless the proceeding was instituted in bad faith.⁸⁵

Under statutory provisions authorizing detention of alleged insane persons without application to a court, those restraining such persons pursuant to the terms of the statute are not liable for false imprisonment.⁸⁶ Where statutory provisions authorize commitment on physician's certificates without further judicial proceedings, all who unite in procuring a commitment on false certificates are liable.⁸⁷ Physicians maliciously making false certificates of insanity under which a person is confined in an asylum have been held liable to an action for

false imprisonment.⁸⁸

Participation in the detention of an alleged insane person may, if it develops that the process was erroneously issued, impose liability on the party procuring its issuance⁸⁹ and those assisting in the detention,⁹⁰ although it has been held that the superintendent of an insane asylum receiving a patient committed pursuant to statutory procedure is protected against liability for false imprisonment even if it is later shown that commitment was unauthorized.⁹¹ In this connection it has been said that statutes authorizing restraint of personal liberty for any length of time, as in the case of temporary commitment to an insane asylum on a physician's request, should be strictly construed.⁹²

Affidavits made as basis of action

Proceedings for adjudication of insanity and commitment of insane person were "judicial proceedings," and hence affidavits made by alleged insane person's former husband and physicians, on which adjudication was based, were privileged and could not be made basis of action for false imprisonment induced thereby, irrespective of their truth or of malice in making them.

Tenn.—Dyer v. Dyer, 156 S.W.2d 445, 178 Tenn. 234.

83. N.Y.—Washer v. Slater, 73 N. Y.S. 425, 67 App.Div. 385. 25 C.J. p 460 note 68.

84. Cal.—Baer v. Smith, 157 P.2d 646, 68 C.A.2d 716.
Mo.—Dougherty v. Snyder, 71 S.W. 463, 97 Mo.App. 495.
N.Y.—Williams v. Williams, 4 Thoms. & C. 251. 25 C.J. p 460 note 69.

Physicians

(1) County physician, taking no part in actual commitment of alleged insane person to state hospital, although called and testifying as witness at insanity hearing and making out certificate, required by statute to be transmitted to hospital superintendent, at county court's behest, is not liable to such person for false imprisonment.

Mo.—Ussery v. Haynes, 127 S.W.2d 410, 344 Mo. 530.

(2) A person committed to hospital for the insane by order of the district court after a hearing in which she had opportunity to be heard was not entitled to recovery of damages on account of such commitment and restraint against physicians as a result of whose allegedly wrongful or negligent testimony she was ordered committed, in absence of allegation or inference that physicians had anything to do with institution of proceeding for commitment

or had any part therein except as witnesses or had conspired with respect thereto.

R.I.—Brady v. Collom, 27 A.2d 311, 68 R.I. 299.

(3) Doctors who attested to mental illness of certain person were not liable on ground of false imprisonment where warrant and arrest made thereunder and order of commitment were lawful.

Tex.—Pate v. Stevens, Civ.App., 257 S.W.2d 763, error dismissed.

Town welfare commissioner who petitioned for plaintiff's commitment to state insane hospital was not liable for damages for false imprisonment of plaintiff in such hospital, where plaintiff was committed after he was given notice of petition and hearing was held, and two physicians certified that he was insane.

N.Y.—Bridgeman v. Andrus, 287 N.Y. S. 532, 247 App.Div. 922.

85. Mo.—Dougherty v. Snyder, 71 S. W. 463, 97 Mo.App. 495. 25 C.J. p 460 note 70.

Good faith of doctor as defense to instigator

Where defendant instigated proceedings for the commitment of a sane person to an insane asylum, and acted in bad faith for the purpose of preventing the marriage of such person to another, defendant was liable in an action for false imprisonment for a detention proximately resulting from the false statements of himself and agents to the physician, even though the physician personally may have acted in good faith in procuring the commitment.

Mass.—Karjavainen v. Buswell, 194 N.E. 295, 289 Mass. 419.

86. Conn.—Felix v. Hall-Brooke Sanitarium, 101 A.2d 500, 140 Conn. 496.

N.H.—Davis v. Merrill, 47 N.H. 208. 25 C.J. p 460 note 72.

87. Miss.—Bacon v. Bacon, 24 So. 968, 76 Miss. 458.

88. Miss.—Bacon v. Bacon, supra.
N.Y.—Hurlehy v. Martine, 10 N.Y.S. 92, appeal dismissed 29 N.E. 148, 128 N.Y. 657.

89. Mass.—Karjavainen v. Buswell, 194 N.E. 295, 289 Mass. 419.
N.Y.—Williams v. Williams, 4 Thoms. & C. 251. 25 C.J. p 460 note 79.

90. N.Y.—Williams v. Williams, supra. 25 C.J. p 460 note 80.

Physicians

(1) Where physicians appointed by court as committee to examine an alleged insane person failed to do so, thereby depriving such person of an opportunity to be heard, and reported to court their findings that such person was insane, and such person was committed to an asylum for the insane by reason of such report, but, in fact, was not insane, physicians were liable to such person in an action for false imprisonment.

Fla.—Beckham v. Cline, 10 So.2d 419, 151 Fla. 481, 145 A.L.R. 705.

(2) The gravamen of the right of action lies in the failure of the physicians to make such an examination and in the making of a false report to the court that they had examined her and found her to be insane and thereby caused her to be confined in such asylum when, in truth, she was not insane and if physicians had made an examination they would have so discovered.

Fla.—Beckham v. Cline, supra.

91. U.S.—Miller v. Director, Middletown State Hospital, Middletown, N. Y., D.C.N.Y., 146 F.Supp. 674, affirmed, C.A., 243 F.2d 527.
Mass.—Karjavainen v. Buswell, 194 N.E. 295, 289 Mass. 419.

92. Mass.—Karjavainen v. Buswell, supra.

Restraint under voluntary commitment. Under a statute providing that an asylum may receive for observation and treatment any person so requesting in writing, but that no such person shall be confined for more than a specified number of days after his written notice of desire to leave, without commitment from a court of competent jurisdiction, the asylum is not under an affirmative duty to advise the patient as to how he may obtain his release in order to avoid liability for false imprisonment in detaining him after he wishes to be discharged.⁹³

§ 17. Delinquent Children

Police officers may, when acting in good faith, lawfully restrain without process children alleged to be delinquent.

It has been held that, when acting in good faith, police officers, representing the police power of the state, may detain without process a child alleged to be a delinquent, pending an investigation of his delinquency,⁹⁴ and this is so, although they did not comply with the procedure outlined in the Juvenile Delinquent Act.⁹⁵ However, certain officials have been held liable for false imprisonment where they have deprived a parent of the custody of his children without complying with statutory requirements.⁹⁶

§ 18. Prevention of Bodily Harm Justifying Restraint

Reasonable restraint to prevent bodily harm is a justification of a charge of false imprisonment.

Those acting to prevent bodily harm are justified in imposing such restraint as an ordinarily prudent man would deem necessary and reasonable under the circumstances;⁹⁷ but such restraint should not be continued after the danger has passed.⁹⁸ It is no defense to an action for false imprisonment that the unlawful acts of defendant were committed to protect plaintiff from similar acts by others which would have injured him.⁹⁹

§ 19. Authority Arising from Relationship of Parties

The relationship between the parties may be such as to render a restraint lawful as against a charge of false imprisonment.

The relationship existing between the parties may be such as to authorize a restraint which is reasonable under the circumstances,¹ as in the case of the relationship subsisting between participants in a public meeting and the presiding officer authorized by statute to conduct such meeting.² Other particular relationships from which a right of detention may arise precluding liability in false imprisonment include that of guardian and ward,³ parent and

Negligence

Statute authorizing temporary commitment to insane asylum on request by physician or other named persons impliedly requires bona fide request without negligence, as regards false imprisonment. Mass.—*Karjavainen v. Buswell*, supra.

93. Conn.—*Roberts v. Paine*, 199 A. 112, 124 Conn. 170.

94. Wash.—*Weber v. Doust*, 146 P. 623, 84 Wash. 330. 25 C.J. p 460 note 82.

95. Wash.—*Weber v. Doust*, supra.

96. County welfare agent and matron of county juvenile detention home who did not comply with statute relating to commitment of neglected children, in that they failed to give notice to father before obtaining order for commitment of children, were liable to the father for false arrest and imprisonment of his children.

Mich.—*Oversmith v. Lake*, 295 N.W. 339, 295 Mich. 627.

97. N.Y.—*Marks v. Brasser*, 280 N. Y.S. 435, 244 App.Div. 672. 25 C.J. p 460 note 84.

Restraint of insane person to prevent injury see supra § 16.

Person deprived of reason by drunkenness

Detention of person temporarily or partially deprived of reason by drunkenness, where necessary to prevent person from injuring himself or another, does not constitute false imprisonment.

N.Y.—*Marks v. Brasser*, supra.

98. Ill.—*McNay v. Stratton*, 9 Ill. App. 215, appeal dismissed 109 Ill. 30.

Deporting man from state

Where a mob took a man accused of disloyalty in time of war and by force removed him from the state, at the same time subjecting him to a coat of tar and feathers, it was no defense that if defendants had not done so others might have injured the man because of his general reputation for disloyalty.

U.S.—*Meints v. Huntington*, C.C.A. Minn., 276 F. 245, 19 A.L.R. 664.

99. U.S.—*Meints v. Huntington*, supra.

1. Tex.—*Peck v. Atchison*, T. & S. F. R. Co., Civ.App., 91 S.W. 323. 25 C.J. p 461 note 86.

2. Mass.—*Doggett v. Hooper*, 27 N. E.2d 737, 306 Mass. 129.

Confinement on refusal to withdraw A moderator at town meeting was

authorized by statute to order removal and confinement of person refusing to comply with moderator's order to withdraw from meeting for persisting, after warning by moderator, in "disorderly behavior" consisting of failure to observe moderator's ruling on question of order, and hence such confinement could not be made basis for "false imprisonment" action against moderator; the expediency and wisdom of moderator in ordering person to withdraw was not material, where moderator did not transcend his authority; and judgment of court as to question of order could not be substituted for judgment of moderator, where moderator's action was neither malicious nor dishonest.

Mass.—*Doggett v. Hooper*, supra.

3. Minn.—*Townsend v. Kendall*, 4 Minn. 412, 77 Am.D. 534. 25 C.J. p 461 note 88.

Guardian's right to custody of ward see Guardian and Ward § 56.

Taking charge of ward's person

A duly appointed guardian of the person of the ward cannot be held liable in an action for false imprisonment merely because he takes charge of his ward's person.

Minn.—*Townsend v. Kendall*, supra.

child,⁴ and teacher and pupil.⁵ Where a school-age child has care and custody of a nonschool-age child, the school authorities may, on detention of the former, take charge of, and care for, the latter until it can be returned to its parents.^{5.5}

Custodians of institutions. Custodians of institutions are justified in imposing a reasonable restraint on inmates for the purpose of enforcing discipline.⁶ Overseers of the poor, acting under statutory authority, may confine children committed to their charge in such institutions as seem best, and neither such children nor their relatives can later recover in false imprisonment for the children's confinement.⁷

Employer and employee. Statutes providing in general terms that an employee must comply with the lawful directions of his employer concerning the service in which he is engaged and on demand render an account of transactions in the course of his service do not authorize an employer forcibly to detain his employee for the purpose of compelling a confession of a theft from the employer at some prior time.⁸ An employer's investigation of the conduct of a suspected employee must scrupulously avoid trenching on the latter's personal lib-

erty, and, where action justifying personal restraint is indicated, as a general rule such restraint should be effected through the authorities constituted by law for the purpose.⁹ The mere fact that an attempt to apprentice plaintiff to defendant failed because of noncompliance with governing statutory provisions does not show that any false imprisonment was committed.¹⁰

Maritime authorities. Those in command of ships do not incur liability for confining a member of the crew, when necessary to enforce discipline on board,¹¹ and a libel in personam or in rem for false imprisonment will not lie for a detention in compliance with legal regulations.¹² The restraint should be founded on reasonable grounds,¹³ and should not be continued for an improper length of time.¹⁴ Where a foreign consul has no authority to take cognizance of the offenses of seamen in foreign ports or sentence them to prison, his order directing imprisonment cannot relieve the master from his responsibility.¹⁵

Shipmasters may, in a proper case, after exhausting pacific measures, place passengers under arrest,¹⁶ but, the power being a very serious one, should be personally exercised or at least the mas-

4. Miss.—Hewlett v. George, 9 So. 885, 68 Miss. 703, 13 L.R.A. 682.

25 C.J. p 461 note 87.
Parents' custody and control of children see Parent and Child, §§ 5-13.

5. Ind.—Fertich v. Michener, 11 N. E. 605, 111 Ind. 472, 60 Am.R. 709.
25 C.J. p 461 note 89.

Control and discipline of school children generally:

Private schools see Schools and School Districts § 11.

Public schools see Schools and School Districts §§ 493-505.

Enforcement of discipline

School authorities are justified, as a means of enforcing discipline, in imposing reasonable detention on pupils.

Ind.—Fertich v. Michener, supra.

5.5 Ariz.—Holmes v. Nester, 306 P. 2d 290, 81 Ariz. 372, 62 A.L.R.2d 1322.

6. N.Y.—Cunningham v. Shea, 97 N.Y.S. 884, 111 App.Div. 624.
25 C.J. p 461 note 91.

Restraint of the insane see supra § 16.

7. Mass.—Smith v. Peabody, 106 Mass. 262.

8. Cal.—Moffatt v. Buffums, Inc., 69 P.2d 424, 21 C.A.2d 371.

9. N.J.—Schantz v. Sears Roebuck & Co., 174 A. 162, 12 N.J.Misc. 689,

affirmed 178 A. 768, 115 N.J.Law 174.

Arrests by private persons without process see infra § 23.

10. Ky.—Brooks v. Madden, 248 S.W. 503, 198 Ky. 167.

11. U.S.—Grivas v. Alianza Compania Armadora S. A., D.C.N.Y., 150 F.Supp. 708—Maes v. Los Angeles Tanker Operators, D.C.Tex., 75 F.Supp. 7.

Gardner v. Bibbins, D.C.N.Y., 9 F.Cas.No.5,222, 1 Blatchf. & H. 356.
N.Y.—Lane v. Powell, 1 Edm.Sel.Cas. 256.

Discipline and punishment of seamen see Seamen §§ 222-236.

Master's authority over passengers and crew see Shipping § 62.

12. U.S.—The Edit H., C.C.A.Va., 119 F.2d 4—Elman v. Moller, C.C.A.Va., 11 F.2d 55, certiorari denied 46 S. Ct. 488, 271 U.S. 675, 70 L.Ed. 1145.
Grivas v. Alianza Compania Armadora S. A., D.C.N.Y., 150 F. Supp. 708—Maes v. Los Angeles Tanker Operators, D.C.Tex., 75 F. Supp. 7.

Detention over night pending decision on habeas corpus, on the suggestion of a state judge hearing the application for the writ, was not a false imprisonment of seamen so detained which would render master, owners, or ship liable.

U.S.—Elman v. Moller, C.C.A.Va., 11

F.2d 55, certiorari denied 46 S.Ct. 488, 271 U.S. 675, 70 L.Ed. 1145.

Restraint of aliens forbidden to land

Where after master of vessel had been notified by immigration authorities not to permit the landing of alien seamen, master employed a watching company to hold them in custody ashore for return to vessel, when master was forced to put the seamen ashore in order that the vessel might be fumigated by public health authorities, the vessel was not liable for "false imprisonment."

U.S.—The Edit H., C.C.A.Va., 119 F. 2d 4.

13. U.S.—Gardner v. Bibbins, D.C. N.Y., 9 F.Cas.No.5,222, 1 Blatchf. & H. 356—Jay v. Almy, C.C.Mass., 13 F.Cas.No.7,236, 1 Wood. & M. 262.

25 C.J. p 461 note 95.

14. U.S.—Gardner v. Bibbins, D.C. N.Y., 9 F.Cas.No.5,222, 1 Blatchf. & H. 356.

N.Y.—Brown v. Howard, 14 Johns. 119.

15. U.S.—The William Harris, D.C. Me., 29 F.Cas.No.17,695, 2 Ware 367.

16. U.S.—Ragland v. Norfolk & Washington, D. C., Steamboat Co., D.C.Va., 163 F. 376, modified on other grounds 169 F. 286, 94 C.C.A. 562.

25 C.J. p 461 note 98.

ter should give his personal direction to what is being done.¹⁷

§ 20. Military and Naval Authority

A state of war does not of itself suspend the civil law, and persons not subject to military law may maintain an action for false imprisonment where they are unlawfully arrested or restrained by or at the instance of the military establishment and its officers and officials. Military law, however, governs the arrest and restraint of persons subject thereto and the civil authorities will not interfere with the exercise of military authority within jurisdictional limits, although civil redress may be secured for the wrongful exercise of military authority.

The existence of a state of war does not suspend the civil law or justify the arrest and detention of a citizen without due process, and one connected with the military establishment who participates in such an arrest and detention may become liable for false imprisonment despite the fact that the nation is at war,¹⁸ as where a draft board official secures the arrest on suspicion of one not delinquent but whom he suspects without reasonable grounds of attempting unlawfully to avoid military service.¹⁹ The arrest of persons not subject to military or martial law can be justified on the same principles as apply to other cases.²⁰ Where the offense amounts to a felony, reasonable grounds to suspect that the arrested party is guilty justifies the arrest even where it develops that he was in fact innocent.²¹ Reasonable grounds to suspect the guilt of the arrested party may, even in cases where it does not justify, mitigate damages,²² and so may language provoking the arrest.²³

A military subordinate has been held not to be liable in false imprisonment for acts done in obedience to the orders of his commander, except where the order is palpably illegal.²⁴ An order of a superior officer, although not justifying an inferior officer in making the arrest, may mitigate the damages.²⁵ As in arrests by civil authority, the detention should not be accompanied with unnecessary harshness.²⁶

On the other hand, military law governs the arrest and detention of persons subject to such law for offenses within the cognizance of the military authorities.²⁷ The civil courts do not interfere with acts of military authorities within the scope of their jurisdiction,²⁸ although the injured person may obtain redress against the wrongdoer in the civil courts for malicious exercise of lawful authority,²⁹ or for acts in excess of authority, although done in good faith.³⁰ Liability in damages may be incurred for cruel treatment even if the detention was lawful.³¹ It seems that the arrest of a civilian whose conduct tended to create a breach of discipline among soldiers may be justified.³²

Martial law justifies arrests deemed necessary or advisable by the military authorities.³³

Local disturbances. Some courts, in analogy to cases governed by martial law, have maintained that where the local disturbance is so great that the militia have been called out to restore order the civil authorities become subordinate to the military, which may take such action as the circumstances re-

17. U.S.—Ragland v. Norfolk & Washington, D. C., Steamboat Co., supra.

18. U.S.—Casserly v. Wheeler, C.C. A.Cal., 282 F. 389.

War generally see War § 1 et seq.

19. U.S.—Casserly v. Wheeler, supra.

Mariner seeking permit to go to sea

A member of a draft board had no authority to arrest a mariner applying for permit to go to sea, or direct police officers to arrest him, because of third person's suspicion, communicated to him, that applicant was seeking to avoid military service by applying under an assumed name. U.S.—Casserly v. Wheeler, supra.

20. U.S.—Milligan v. Hovey, C.C. Ind., 17 F.Cas.No.9,605, 3 Biss 13. 25 C.J. p 462 note 11.

21. Ind.—Teagarden v. Graham, 31 Ind. 422. 25 C.J. p 462 note 12.

22. U.S.—Beckwith v. Bean, Vt., 98 U.S. 286, 25 L.Ed. 124.

Mitigation of damages see infra § 66.

23. U.S.—McCall v. McDowell, C.C.

Cal., 15 F.Cas.No.8,673, 1 Abb. 212, Deady 233.

24. U.S.—McCall v. McDowell, supra. Persons responsible generally see infra §§ 36-44.

25. Iowa.—Carpenter v. Parker, 23 Iowa 450.

26. U.S.—McCall v. McDowell, C.C. Cal., 15 F.Cas.No.8,673, 1 Abb. 212, Deady 233.

27. Vt.—Boutwell v. Thompson, Brayt. 119. 25 C.J. p 461 note 1.

Military law:

Generally see Army and Navy § 2 et seq.

As due process of law see Constitutional Law § 577.

Civilians in war zones

Arrest of merchant seamen in 1945 by United States military police in an Italian port which was a war zone under control of military authorities on complaint of a fellow member of crew that they had assaulted him without justification and threatened his life was lawful, for good cause,

and without malice and did not give rise to any cause of action for false imprisonment, although charges were withdrawn by order of captain of vessel and the seamen released.

U.S.—Forgione v. U. S., D.C.Pa., 100 F.Supp. 239, affirmed, C.A., 202 F. 2d 249, certiorari denied 73 S.Ct. 950, 345 U.S. 966, 97 L.Ed. 1384.

28. Me.—Hickey v. Huse, 56 Me. 493. 25 C.J. p 461 note 2, p 464 notes 38, 39.

29. U.S.—Dinsman v. Wilkes, D.C., 12 How. 390, 13 L.Ed. 1036. 25 C.J. p 462 note 3.

30. U.S.—Dinsman v. Wilkes, supra. Mass.—Tyler v. Pomeroy, 8 Allen 480. 25 C.J. p 462 note 4.

31. U.S.—Dinsman v. Wilkes, D.C., 12 How. 390, 13 L.Ed. 1036.

32. Tex.—Oglesby v. State, 39 Tex. 53.

33. Ill.—Johnson v. Jones, 44 Ill. 142, 92 Am.D. 159. 25 C.J. p 462 note 7.

Effect of establishment of martial law generally see War § 40.

quire.³⁴ An arrested party may be detained until the disturbance is suppressed before being delivered to the civil authorities.³⁵ It has been maintained, however, that the right of the militia to arrest, when duly called out to suppress local disturbances, is the same as that of peace officers.³⁶

§ 21. Detention or Restraint without Process

Illegal detention or restraint without process constitutes false imprisonment.

A detention without process and without a view to public prosecution for an offense is ordinarily illegal,³⁷ but in some jurisdictions, in the reasonable exercise of the police power, peace officers may detain a person, under some circumstances, for a reasonable time for investigation without incurring

liability for false imprisonment.³⁸ Although reasonable detention following a lawful arrest is justifiable,³⁹ generally the imprisonment of another without a mittimus or other lawful process is illegal, and imposes liability in damages to the one injured thereby.⁴⁰

If the original arrest was illegal, the detention of the arrested person in a cell is also illegal and a continuing tort,⁴¹ and, conversely, it has been said that an illegal arrest is necessary in order to constitute a false imprisonment where the detention charged is detention in jail by an officer after arrest.⁴² The power to arrest does not confer on the arresting officer the power to detain a prisoner for other purposes, and if he does so he is liable for false imprisonment.⁴³

34. U.S.—*Moyer v. Peabody*, Colo., 29 S.Ct. 235, 212 U.S. 78, 53 L.Ed. 410.

Colo.—*In re Moyer*, 85 P. 190, 35 Colo. 159, 117 Am.S.R. 189, 12 L.R.A.,N.S., 979.

Relation of militia to civil authority see Militia § 3.

35. U.S.—*Moyer v. Peabody*, Colo., 29 S.Ct. 235, 212 U.S. 78, 53 L.Ed. 410.

Colo.—*In re Moyer*, 85 P. 190, 35 Colo. 159, 117 Am.S.R. 189, 12 L.R.A.,N.S., 979.

Place of confinement

As respects false imprisonment, if the commanding officer of the National Guard engaged in preventing rioting believed plaintiff, a regular in the United States army, to be a member of his command, he should have sent him to the barracks instead of under guard to the city jail upon his insisting on going to a hotel, instead of to the barracks, to sleep.

N.C.—*Allen v. Gardner*, 109 S.E. 260, 182 N.C. 425.

36. Ky.—*Franks v. Smith*, 134 S.W. 484, 142 Ky. 232, L.R.A.1915A 1141, Ann.Cas.1912D 319.

25 C.J. p 462 note 10.

37. Ga.—*Sharpe v. Lowe*, 106 S.E.2d 28, 214 Ga. 513.

Duchess Chenilles, Inc. v. Masters, 67 S.E.2d 600, 84 Ga.App. 822—*Jackson v. Norton*, 44 S.E.2d 269, 75 Ga.App. 650.

W.Va.—*Clark v. Kelly*, 133 S.E. 365, 101 W.Va. 650, 46 A.L.R. 799.

25 C.J. p 462 note 19.

Finder of money

Street car conductor had no right to detain passenger finding money in street car who refused to turn money over to him.

Ohio.—*Cleveland Ry. Co. v. Durschuk*, 166 N.E. 909, 31 Ohio App. 248.

Imposition of illegal conditions

Where defendants were guilty of illegally detaining plaintiff, in an action for false imprisonment they cannot justify on the ground that they would have released plaintiff had she complied with certain conditions imposed by them, which conditions they had no legal right to impose.

Tex.—*Kuhn v. Palo Duro Corporation*, Civ.App., 151 S.W.2d 894, reversed on other grounds 161 S.W.2d 778, 139 Tex. 125.

38. Effect of arraignment

Any liability for false arrest terminated with arraignment, and, from that time on, the imprisonment was by due process of law, and a warrant of commitment issued by acting judge authorized plaintiff's subsequent confinement and protected prosecutor and county from liability, even though original information failed to charge plaintiff with a crime.

N.Y.—*Durante v. Onondaga County*, 147 N.Y.S.2d 922, 3 Misc.2d 69.

Blood test

That plaintiff in action of false arrest and wrongful imprisonment solicited arresting officers to commit act of prostitution justified her imprisonment for a period for one week for purpose of concluding blood test pursuant to health ordinance of city, and relieved officers of liability for such detention.

Wash.—*Laux v. Stitt*, 57 P.2d 321, 186 Wash. 180.

Investigation of law

Where a motorist was requested by a police officer to show his driver's license, and he claimed that such a license was not required by the laws of the state of his residence, detention of such motorist while investigating the laws of the state of his residence was proper, since the officer is not required or presumed to know the laws of other states.

N.J.—*Pine v. Okzewski*, 170 A. 825, 112 N.J.Law 429.

39. Wash.—*Smith v. Drew*, 26 P.2d 1040, 175 Wash. 11.

Duty to take before magistrate and unreasonable delay see *infra* §§ 30, 31.

40. La.—*Guilbeau v. Tate*, App., 94 So.2d 896.

Ohio.—*McFarland v. Shirkey*, App., 151 N.E.2d 797—*Lester v. Albers Super Markets, Inc.*, 114 N.E.2d 529, 94 Ohio App. 313.

W.Va.—*Clark v. Kelly*, 133 S.E. 365, 101 W.Va. 650, 46 A.L.R. 799.

Provision of law

Provisions of law relative to false or malicious arrest are intended to protect and remunerate those who have been wantonly abused under color of authority.

Ga.—*Jackson v. Norton*, 44 S.E.2d 269, 75 Ga.App. 650.

Absence of conviction or sentence

Confinement in prison without conviction or sentence of one arrested without warrant of law is wrongful.

Wash.—*Ulvestad v. Dolphin*, 278 P. 681, 153 Wash. 580.

Sheriff has complete and full control of jail and must see that no one is imprisoned therein unless by proper commitment or by officer while in discharge of his lawful duty.

Okl.—*Taylor v. Slaughter*, 42 P.2d 235, 171 Okl. 152.

Subsequent habeas corpus

Sheriff guilty of falsely imprisoning plaintiff was not relieved by habeas corpus writ from liability for subsequent imprisonment.

Tex.—*McBeath v. Campbell*, Com. App., 12 S.W.2d 118.

41. Mass.—*Wax v. McGrath*, 151 N.E. 317, 255 Mass. 340.

42. Ala.—*Sokol Bros. Furniture Co. v. Gate*, 93 So. 724, 208 Ala. 107.

43. Wis.—*Geldon v. Finnegan*, 252 N.W. 369, 213 Wis. 539.

Where the statute prescribes the circumstances under which an arrest without a warrant may be made, an arrest by an officer or another person without a warrant not within the statute is illegal and a ground for an action for false imprisonment.⁴⁴ Acts, if unlawful under the name of arrest and imprisonment, are equally unlawful if termed a taking into custody and restraint.⁴⁵ Private persons who are liable for making an illegal arrest without a warrant may also be liable for the detention of the person arrested after he has been turned over to the police.⁴⁶ The right which in certain instances exists to arrest without warrant on a criminal charge does not extend to civil cas-

es.⁴⁷

As a general rule, if a detention or arrest is unlawful, it may be the basis for a suit for false imprisonment, without regard to whether it was with or without probable cause.⁴⁸ In some jurisdictions in order to recover for false arrest it must be shown that the restraint was unreasonable and such as was not warranted by the circumstances.⁴⁹ Accordingly, in such jurisdictions it is held that, where defendant had probable cause to believe that plaintiff was about to injure him in his person or property, even though such injury would constitute but a misdemeanor, it is a defense to an action for false imprisonment if the detention was reasonable.⁵⁰

44. Ga.—Standard Sur. & Cas. Co. of N. Y. v. Johnson, 41 S.E.2d 576, 74 Ga.App. 823—Conoly v. Imperial Tobacco Co., 12 S.E.2d 398, 63 Ga. App. 880—Hines v. Adams, 107 S.E. 618, 27 Ga.App. 157.

Action at officer's peril

An officer making arrest without warrant in disregard of statute prescribing conditions under which such arrest may be made acts at his own peril.

Okl.—Duffey v. State, 153 P.2d 629, 79 Okl.Cr. 218.

45. Wash.—Ulvestad v. Dolphin, 278 P. 681, 152 Wash. 580.

46. Ky.—J. J. Newberry Co. v. Judd, 82 S.W.2d 359, 259 Ky. 309.

47. U.S.—Park v. Taylor, Miss., 118 F. 34, 55 C.C.A. 56.

Probable cause

(1) Probable cause is irrelevant in an action for false imprisonment for illegal arrest under civil process.

Cal.—Collyer v. S. H. Kress Co., 54 P.2d 20, 5 C.2d 175.

(2) That circumstances were such as to justify arrest of store patron and companion for suspected theft, if not sufficient to show that they were guilty of the charge, was no defense to action for actual damages for false imprisonment based on arrest by police officer without warrant.

Va.—Montgomery Ward & Co. v. Wickline, 50 S.E.2d 387, 188 Va. 485.

48. Md.—Mason v. Wrightson, 109 A.2d 128, 205 Md. 481—Mahan v. Adam, 124 A. 301, 144 Md. 355.

Va.—Montgomery Ward & Co. v. Wickline, 50 S.E.2d 387, 188 Va. 485.

Nature and elements of false imprisonment generally, see supra §§ 5-7.

Reasonable grounds of suspicion generally see infra § 25.

Ignorance of judgment debtor's discharge in bankruptcy would be no defense in judgment debtor's action for false arrest under body execu-

tion issued by attorneys for judgment creditor.

N.Y.—Nossek v. A. H. Todd & Son, 290 N.Y.S. 253, 160 Misc. 528.

49. Fla.—Dodson v. Solomon, 183 So. 825, 134 Fla. 284—Winn & Lovett Grocery Co. v. Archer, 171 So. 214, 126 Fla. 308.

50. Cal.—Collyer v. S. H. Kress Co., 54 P.2d 20, 5 C.2d 175.

Bettolo v. Safeway Stores, 54 P. 2d 24, 11 C.A.2d 430.

La.—Corpus Juris Secundum cited in Banks v. Food Town, Inc., App., 98 So.2d 719, 722.

Mo.—Teel v. May Department Stores Co., 155 S.W.2d 74, 348 Mo. 696, 137 A.L.R. 495, disapproving statements appearing in Titus v. Montgomery Ward & Co., 123 S.W.2d 574, 232 Mo.App. 987.

Okl.—Swafford v. Vermillion, 261 P. 2d 187.

Crucial element of defense

Existence of legal justification or probable cause for detention is the crucial element of the defense.

N.J.—Jorgensen v. Pennsylvania R. Co., 118 A.2d 854, 38 N.J.Super. 317.

Counterfeit money

One purchasing goods, wares, or merchandise in a store and tendering in payment therefor a coin thought by the clerk making the sale to be counterfeit, may be detained at the store for a reasonable time pending investigation of the genuineness of the coin.

Okl.—S. H. Kress & Co. v. Bradshaw, 99 P.2d 508, 186 Okl. 588.

Failure to present ticket

If it is the custom of carriers by steamboat to collect the passage tickets as the passengers are leaving the boat, and a passenger attempts to land without a ticket, alleging that he has lost it, the carrier has a right to detain him a reasonable time to inquire on the spot into the circumstances of the case.

Mass.—Standish v. Narragansett

Steamship Co., 111 Mass. 512, 15 Am.R. 66.

Failure to pay charge

(1) Restaurant proprietor had the right, if patron apparently had not paid, to detain her for a reasonable time to investigate the circumstances; but, if she was detained for an unreasonable time, or in an unreasonable way, she is entitled to recover. Mass.—Jacques v. Childs Dining Hall Co., 138 N.E. 843, 244 Mass. 438, 26 A.L.R. 1329.

(2) It is false imprisonment for a private individual to detain one for an unreasonable time, or under unreasonable circumstances, for purpose of investigating a dispute over payment of a bill alleged to be owed by person detained for cash services. Ohio.—Lester v. Albers Super Markets, Inc., 114 N.E.2d 529, 94 Ohio App. 313.

Shoplifting

(1) Where store employee had seen customer pick up article from shelf and conceal it in his pocket, reasonable and probable cause for detention of customer for investigation existed, as respects right of customer to damages as for a false imprisonment.

Cal.—Bettolo v. Safeway Stores, 54 P.2d 24, 11 C.A.2d 430.

(2) It has also been indicated that a storekeeper did not exceed the exercise of his legal rights in detaining a boy to determine if he had unlawfully been taking goods from the counter.

Mass.—Sweeney v. F. W. Woolworth Co., 142 N.E. 50, 247 Mass. 277, 31 A.L.R. 311.

(3) Circumstances held not to show probable cause.

La.—Banks v. Food Town, Inc., App., 98 So.2d 719.

Until return of goods

(1) Where plaintiff's sister-in-law charged goods obtained at store to certain man after falsely representing that she was such man's wife, plaintiff aided and abetted sister-in-

"Presence." In an action for false imprisonment, to justify an arrest without warrant on the ground that it was committed in the presence or view of the arresting party, it is not necessary that such party see the offense committed, if by any of his senses he has personal knowledge of its commission.⁵¹

§ 22. — Arrests by Peace Officers

To justify, in an action for false imprisonment, an

arrest without a warrant, a peace officer must show that the arrest was made under circumstances warranted by law.

Peace officers have no right to arrest simply by virtue of their office; their justification must depend on the fact that the arrest was made under circumstances warranted by law or on the issuance of valid process.⁵² An officer to justify because of his official character must show the fact of holding

law, and store employees made reasonable investigation by telephoning man's real wife and unsuccessfully attempting to telephone man himself, there was no "false imprisonment" in detaining plaintiff and sister-in-law until goods were returned, notwithstanding plaintiff and sister-in-law had no criminal intent and acted under instructions from such man. *Mo.—Teel v. May Department Stores Co.*, 155 S.W.2d 74, 348 Mo. 696, 137 A.L.R. 495.

(2) Plaintiff's detention in store was not unlawful because no immediate express demand for return of all goods obtained by false personation was made, where defendants had reasonable ground to believe that plaintiff was guilty of crime of obtaining or attempting to obtain property by false personation, and defendants were justified in detaining plaintiff for reasonable time to make reasonable investigation to determine amount of goods obtained and to recover such goods.

Mo.—Teel v. May Department Stores Co., supra.

In Texas

A house detective of hotel, making investigation of reported loss of money by guest, could arrest and detain one of maids without imposing liability on hotel for false imprisonment, if he had reasonable ground to suppose money was stolen by such maid.

Tex.—Citizens Hotel Co. v. Foley, Civ.App., 131 S.W.2d 402, error dismissed, judgment correct.

51. *Ga.—Piedmont Hotel Co. v. Henderson*, 72 S.E. 51, 9 Ga.App. 672. 25 C.J. p 473 note 33.

Crime in "presence" of officer so as to authorize arrest without warrant see Arrest § 5 b.

"Presence"

A crime is committed in the "presence" of an officer when the facts and circumstances occurring within his observation, in connection with what may be considered as common knowledge, give him probable cause to believe, or reasonable grounds to suspect, that such is the case.

W.Va.—Noce v. Ritchie, 155 S.E. 127, 109 W.Va. 391.

52. *U.S.—Kozlowski v. Ferrara*, D.C. N.Y., 117 F.Supp. 650.

Ariz.—Platt v. Greenwood, 69 P.2d 1032, 50 Ariz. 158.

Cal.—Dragna v. White, 289 P.2d 428, 45 C.2d 469.

Ware v. Dunn, 183 P.2d 128, 80 C.A.2d 936.

Ga.—Jackson v. Norton, 44 S.E.2d 269, 75 Ga.App. 650.

Ky.—Gross v. Metcalf, 224 S.W.2d 938, 311 Ky. 616—*Michael v. Fegenbush*, 38 S.W.2d 213, 238 Ky. 428, followed in *Winfield v. Fegenbush*, 38 S.W.2d 214, 238 Ky. 427—*Elam v. National Surety Co.*, 255 S.W. 1039, 201 Ky. 74.

La.—Guilbeau v. Tate, App., 94 So.2d 896.

Mich.—Donovan v. Guy, 80 N.W.2d 190, 347 Mich. 457—*Odinetz v. Budds*, 24 N.W.2d 193, 315 Mich. 512.

Mo.—Winegar v. Chicago, B. & Q. R. Co., App., 163 S.W.2d 357—*Martin v. Woodlea Inv. Co.*, 226 S.W. 650, 206 Mo.App. 33.

N.C.—Perry v. Hurdle, 49 S.E.2d 400, 229 N.C. 216.

Ohio.—State v. Marshall, Mun., 105 N.E.2d 891.

Okl.—Ingles v. Hotze, 130 P.2d 302, 191 Okl. 378—*Lyons v. Worley*, 4 P. 2d 3, 152 Okl. 57.

Tex.—McBeath v. Campbell, Com. App., 12 S.W.2d 118.

Korkmas v. Turner, Civ.App., 251 S.W.2d 425—*Box v. Fluitt*, Civ. App., 47 S.W.2d 1107.

W.Va.—Noce v. Ritchie, 155 S.E. 127, 109 W.Va. 391.

25 C.J. p 463 note 25.

"When no offense was committed, no complaint was made, and no warrant was issued, police officers making an arrest under such circumstances will be liable in a civil suit for damages at the instance of the person arrested."

N.J.—Collins v. Cody, 113 A. 709, 95 N.J.Law 65.

Forcibly bringing accused into district

Where accused is unlawfully and forcibly brought into judicial district for trial, accused may have remedy against officers by civil suit for false imprisonment.

U.S.—U. S. ex rel. Voigt v. Toombs, C.C.A.Tex., 67 F.2d 744, appeal dis-

missed 54 S.Ct. 442, 291 U.S. 686, 78 L.Ed. 1072.

Matters of defense

Where action is brought against officer for alleged illegal arrest without a warrant, whether any of the grounds for legal arrest without a warrant existed at the time of arrest is a matter of defense.

Ga.—Sharpe v. Lowe, 106 S.E.2d 28, 214 Ga. 513.

Personal anger

Where an officer, without a warrant and because of personal anger, arrests a person for a breach of the peace, and fails to sustain the charge, he is liable in damages to the person arrested.

La.—Smith v. Dunion, 37 So. 864, 113 La. 882.

Tender of check

Where officer, informed that shopper had purchased groceries and had tendered check but refused to identify herself, followed shopper into drug store where shopper was cashing check, arrested shopper and took her to grocery store but found that no check had been cashed there, and then took shopper to office room of jail while he phoned bank and found that check was good before releasing her, officer was liable for unlawful arrest.

Okl.—Ewing v. Kutch, 330 P.2d 361.

Unconstitutional, invalid, or inapplicable ordinances

(1) While a detention made in good faith reliance on ordinance valid on its face, but invalid or inapplicable in fact, may be privileged within rule that conscious confinement of a person without his consent is civilly actionable unless privileged, that privilege does not extend to a detention by those who know or who have reason to believe that the ordinance is invalid or inapplicable.

U.S.—Miller v. Stinnett, C.A.N.M., 257 F.2d 910.

(2) Sheriff and his deputy could not be held liable in damages in suit for allegedly unlawful arrest and false imprisonment of plaintiffs, even if the municipal ordinance which plaintiffs were charged with violating were unconstitutional, since they were entitled to act on the assump-

office at the time of the questioned conduct.⁵³

For felony. In view of the general rule that a peace officer may, without a warrant, arrest a person whom he has probable cause to believe guilty of a felony, discussed in Arrest § 6 b (a), a peace officer is not liable in an action for false imprisonment for an arrest on a charge of felony, although no felony has in fact been committed if he has reasonable grounds to suspect that such an offense has been committed and that the person arrested is guilty.⁵⁴ The fact that the officer's justification does not depend on whether a felony has been actually committed is a distinguishing feature between his liability and that of a private individual.⁵⁵ A peace officer may justify, in an action of this character, an arrest without warrant for a felony committed in his presence,⁵⁶ or when he has reasonable grounds to suppose that the arrested person is about to commit a felony.⁵⁷

In the absence of a statute to the contrary, it is usually held that, to justify an arrest without warrant, it is not necessary there should be danger of

the escape of accused,⁵⁸ although some courts seem to have maintained a rule to the contrary,⁵⁹ but danger that a felon will flee from justice or will obliterate the evidences of his crime are justifications for prompt action in his arrest.⁶⁰

Statutory provisions may modify the right to arrest without warrant for felony, and, where such is the case, the officer is liable unless the arrest is authorized by statute.⁶¹ It is not a defense that the officer supposed he had process whereas in fact he had none.⁶² An officer may justify in an action for false imprisonment under a statute providing that any peace officer may, without a warrant, arrest a person when he has received positive information by written, telegraphic, or other authoritative source that another officer holds a warrant for such arrest.⁶³

For misdemeanors. A peace officer is not liable to an action for false imprisonment for the arrest by him without warrant of one who is committing a breach of the peace in his presence;⁶⁴ but, conversely, at common law, as regards liability for

tion that all public laws and ordinances of municipalities are constitutional.

Tenn.—Bricker v. Sims, 259 S.W.2d 661, 195 Tenn. 361.

53. Colo.—Union Depot & R. Co. v. Smith, 27 P. 329, 16 Colo. 361. 25 C.J. p 463 note 26.

54. Cal.—Wilson v. Loustalot, 193 P. 2d 127, 85 C.A.2d 316—Allen v. McCoy, 27 P.2d 423, 135 C.A. 500, rehearing denied and modified on other grounds 28 P.2d 56, 135 C.A. 500.

Kan.—Torson v. Baehni, 5 P.2d 813, 134 Kan. 188.

Ky.—Chesapeake & Ohio Ry. Co. v. Welch, 103 S.W.2d 698, 268 Ky. 93—Elam v. National Surety Co., 255 S.W. 1039, 201 Ky. 74.

La.—Martin v. Magee, 161 So. 604, 182 La. 263—Martin v. Cappel, 106 So. 660, 160 La. 21.

Johnson v. Hodges, App., 65 So. 2d 812.

Mass.—Wax v. McGrath, 151 N.E. 317, 255 Mass. 340.

Mich.—Hammitt v. Straley, 61 N.W. 2d 641, 338 Mich. 587.

N.C.—State v. Mobley, 83 S.E.2d 100, 240 N.C. 476.

S.C.—Bushardt v. United Inv. Co., 113 S.E. 637, 121 S.C. 324.

Wash.—Sennett v. Zimmerman, 314 P.2d 414, 50 Wash.2d 649—Kalkanes v. Willestoff, 124 P.2d 219, 13 Wash.2d 127—Coles v. McNamara, 241 P. 1, 136 Wash. 624—Coles v. McNamara, 230 P. 430, 131 Wash. 377.

25 C.J. p 463 note 23.

Peril of officer

An arrest for a felony without a warrant is made at arresting officer's peril.

Mich.—Leisure v. Hicks, 57 N.W.2d 473, 336 Mich. 148—People v. Ward, 196 N.W. 971, 226 Mich. 45.

55. Ala.—American Ry. Express Co. v. Summers, 94 So. 737, 208 Ala. 531.

25 C.J. p 463 note 24.

56. N.Y.—Snead v. Bonnoil, 59 N.E. 899, 166 N.Y. 325.

Tex.—Giroux v. State, 40 Tex. 97. 25 C.J. p 463 note 27.

57. N.Y.—Newman v. New York, L. E. & W. R. Co., 7 N.Y.S. 560, 54 Hun 335.

25 C.J. p 463 note 28.

58. Mass.—Rohan v. Sawin, 5 Cush. 281.

59. Pa.—Burk v. Howley, 18 Pa.Co. 303.

60. Mass.—Rohan v. Sawin, 5 Cush. 281.

Pa.—McCarthy v. De Armit, 99 Pa. 63.

61. N.C.—Martin v. Houck, 54 S.E. 291, 141 N.C. 317, 7 L.R.A., N.S., 576.

25 C.J. p 463 note 32, p 464 note 33.

In New York

(1) Under statutory provisions a peace officer may arrest without warrant only when a felony has in fact been committed and he has reasonable grounds for believing the person to be arrested to have committed it.

N.Y.—Morgan v. New York Cent. R.

Co., 9 N.Y.S.2d 339, 256 App.Div. 177.

25 C.J. p 463 note 32 [b].

(2) Reasonable cause to believe that a felony has been committed does not constitute justification. N.Y.—Morgan v. New York Cent. R. Co., supra.

62. Tex.—Hall v. O'Malley, 49 Tex. 70.

63. La.—Martin v. Magee, 161 So. 604, 182 La. 263.

64. Cal.—Miller v. Glass, 282 P.2d 501, 44 C.2d 359.

Dussault v. Condon, App., 339 P. 2d 896.

Colo.—Fulton Inv. Co. v. Fraser, 230 P. 600, 76 Colo. 125.

Okl.—St. Clair v. Smith, 293 P.2d 597.

Pa.—Fagan v. Pittsburgh Terminal Coal Corporation, 149 A. 159, 299 Pa. 109.

Utah.—Myers v. Collett, 268 P.2d 432, 1 Utah 2d 406.

25 C.J. p 464 note 35.

Absence of express finding that plaintiff in action for false imprisonment was loitering without right did not show that defendant officer did not have the right to arrest him without warrant while committing a breach of the peace.

Vt.—Rugg v. Degnan, 118 A. 588, 96 Vt. 175.

Intoxication at home

To authorize an arrest, without warrant, of one who becomes intoxicated in his own home, there must be some breach of the public peace. This is true even though the intoxi-

false imprisonment, an officer has no authority to arrest, without a warrant, a person charged with the commission of a misdemeanor except where the offense is committed in the officer's presence.⁶⁵ Under this justification the officer must be allowed a reasonable time and fit opportunity to make the arrest,⁶⁶ but he may not arrest for a breach of the peace which has subsided prior to the arrest.⁶⁷

A peace officer is also justified in arresting to prevent a breach of the peace, or where there is reasonable apprehension of a renewal thereof;⁶⁸ but he cannot justify the arrest of one person on the ground that it was necessary to prevent another person from committing a breach of the peace.⁶⁹ He may also arrest a person who resists the proper enforcement of the law.⁷⁰ Where under the circum-

stances an officer is unauthorized to make an arrest, without a warrant, for a misdemeanor, he cannot justify the arrest on the ground that it was necessary to prevent an escape.⁷¹

In accordance with the rules governing his right to arrest, discussed in Arrest § 6 c (1), under the statutes of most jurisdictions a peace officer may justify, in an action for false imprisonment, an arrest without a warrant for misdemeanors and other violations of the law, although not necessarily amounting to a breach of the peace, when committed in his presence,⁷² the elements of justification being that the statutory provision authorizing the arrest is valid,⁷³ that the offense falls within the terms of the statute,⁷⁴ that it was being committed in the officer's presence,⁷⁵ and that the person ar-

cated person may need care, since if he has surrounded himself with some care it is not a question for police officers to determine whether such care is adequate.

Wash.—Ulvestad v. Dolphin, 278 P. 681, 152 Wash. 580.

65. U.S.—Burlington Transp. Co. v. Josephson, C.C.A.S.D., 153 F.2d 372. Ariz.—Platt v. Greenwood, 69 P.2d 1032, 50 Ariz. 158.

Cal.—Miller v. Glass, 282 P.2d 501, 44 C.2d 359.

Collins v. Owens, 176 P.2d 372, 77 C.A.2d 713.

Miss.—State, for Use of Daniel v. McNeel, 64 So.2d 636, 217 Miss. 573.

Mo.—Greaves v. Kansas City Junior Orpheum Co., 80 S.W.2d 228, 229 Mo.App. 663.

N.Y.—Gill v. Montgomery Ward & Co., 129 N.Y.S.2d 288, 284 App.Div. 38.

Breland v. Gray, 37 N.Y.S.2d 291, 2 Misc.2d 15.

Okl.—Alsup v. Skaggs Drug Center, 223 P.2d 530, 203 Okl. 525.

Kinkade v. City of Tulsa, Cr., 310 P.2d 615.

Va.—Montgomery Ward & Co. v. Wickline, 50 S.E.2d 387, 188 Va. 485.

66. N.Y.—Taylor v. Strong, 3 Wend. 384.

Assault

If officer saw plaintiff strike another with hammer, officer's act in at once arresting plaintiff was not unlawful, although assault was then complete, and plaintiff was not offering to create further disturbance. Tex.—Smith v. Bryson, Civ.App., 33 S.W.2d 268, error dismissed.

Time held reasonable

Where defendant officer at about 11:30 A.M. had observed plaintiff and another in a truck and noted that they had a rifle and there was blood on the back of the truck, and, after

they had driven off, defendant had, through a telescope from a distance of two and one-half miles, observed them hunting burros, defendant was entitled to await a more convenient time to see whether plaintiff had a hunting license, and, where defendant ascertained that fact after 5 P. M. on the same day and without warrant had arrested plaintiff, the time between defendant's observation and ascertaining that plaintiff had no license and the arrest was not unreasonable.

Cal.—Roynon v. Battin, 132 P.2d 266, 55 C.A.2d 861.

67. Ariz.—Platt v. Greenwood, 69 P. 2d 1032, 50 Ariz. 158. 25 C.J. p 464 note 37.

68. Mich.—Quinn v. Heisel, 40 Mich. 576.

Nev.—Lemel v. Smith, 187 P.2d 169, 64 Nev. 545.

69. Pa.—Meyers v. Tygh, 75 Pa.Super. 271.

Tex.—Heath v. Boyd, 175 S.W.2d 214, 141 Tex. 569.

70. Me.—Faloon v. O'Connell, 92 A. 932, 113 Me. 30.

N.J.—Miller v. Borough of Belmar, 135 A. 795, 5 N.J.Misc. 224.

25 C.J. p 464 note 40.

Advice of attorney

The fact that plaintiff was acting under the advice of an attorney does not justify her conduct so as to render the officer liable for false imprisonment.

Colo.—Fulton Inv. Co. v. Fraser, 230 P. 600, 76 Colo. 125.

71. Okl.—Lyons v. Worley, 4 P.2d 3, 152 Okl. 57.

72. U.S.—Janus v. U. S. ex rel. Humphrey, C.C.A.Idaho, 38 F.2d 431.

Cal.—Coverstone v. Davies, 239 P.2d 876, 38 C.2d 315, certiorari denied Mock v. Davies, 73 S.Ct. 50, 344 U. S. 840, 97 L.Ed. 653.

Roynon v. Battin, 132 P.2d 266, 55 C.A.2d 861.

Ky.—Elam v. National Surety Co., 255 S.W. 1039, 201 Ky. 74.

N.Y.—Freedman v. New York Soc. for Suppression of Vice, 290 N.Y.S. 753, 248 App.Div. 517, affirmed 10 N.E.2d 550, 274 N.Y. 559.

Okl.—Lyons v. Worley, 4 P.2d 3, 152 Okl. 57.

Utah.—Oleson v. Pincock, 251 P. 23, 68 Utah 507.

25 C.J. p 464 note 41.

Destruction of municipal property

Where plaintiffs, in action for false imprisonment, had been arrested by town marshal for driving truck through street barricade in violation of ordinance making destruction of town property a misdemeanor, the value of the barricade was immaterial in determining if marshal was liable for false arrest.

Colo.—Walker v. Tucker, 280 P.2d 649, 131 Colo. 198.

Search warrant for another crime

Where a return on a search warrant issued for intoxicating liquor recited that no liquor was found, the constable was not justified in making an arrest thereunder for adultery, and he could justify making such arrest only by showing that the offense was committed in his presence.

W.Va.—Noce v. Ritchie, 155 S.E. 127, 109 W.Va. 391.

73. Iowa.—Scott v. Feilschmidt, 182 N.W. 382, 191 Iowa 347. 25 C.J. p 465 note 42.

74. Iowa.—Leighton v. Getchell, 169 N.W. 649. 25 C.J. p 465 note 43.

75. U.S.—Miller v. Stinnett, C.A.N. M., 257 F.2d 910.

Ill.—Schramko v. Boston Store of Chicago, 243 Ill.App. 251.

Minn.—Hilla v. Jensen, 182 N.W. 902, 149 Minn. 58.

rested was guilty.⁷⁶ It seems, however, that the arrest need not be made at the very moment of the commission of the offense.⁷⁷ Nevertheless, if the officer witnessing an offense authorizing arrest without warrant departs, he cannot justify an arrest made without warrant on his return after an interval of time, and the shortness of the interval does not affect the right to justify the arrest.⁷⁸ Under some statutes police officers of cities of a certain class may arrest, on view, any person they have reason to suspect of having violated any law of the state or ordinance of the city, and an arrest so made damages no one.⁷⁹

Where, under the circumstances, the officer is not empowered to arrest without a warrant, neither actual belief in the guilt of the arrested party nor reasonable grounds to suspect him to be guilty constitutes a justification.⁸⁰ In some jurisdictions under the statutes a peace officer may justify an arrest without a warrant if he had reasonable grounds to believe that a misdemeanor was being committed in his presence.⁸¹ Where statutes enlarge the

right to arrest to include, for instance, violations of law not committed in the officer's presence, he must, to justify, show reasonable grounds to believe that the arrested party was guilty,⁸² and, where there is a right to arrest for an offense not committed in the officer's presence, if the offender is attempting to escape or for other reasons there is likely to be a failure of justice for want of an officer to issue a warrant, such facts must be shown to justify the arrest.⁸³

Where, under the statute, an officer may make an arrest when a criminal offense has in fact been committed, although not in his presence, and he has reasonable ground for believing that the person to be arrested has committed it, in order to justify an arrest and imprisonment for an offense not committed in his presence he must show that an offense actually has been committed, and reasonable grounds for believing that an offense has been committed is not sufficient.⁸⁴ In some jurisdictions the police officer need not justify an arrest by a subsequent showing that as a matter of fact the

Or.—Paget v. Cordes, 277 P. 101, 129 Or. 224.

Utah.—Oleson v. Pincock, 251 P. 23, 68 Utah 507.

25 C.J. p 465 note 44.

Observation through telescope

Evidence justified defendant officer in arresting plaintiff without warrant for taking burros without a hunting license, on ground that the taking was committed in the officer's "presence," where officer through a telescope from a distance of two and one-half miles had observed plaintiff hunting burros and on the same day had ascertained that plaintiff had no license and had arrested him.

Cal.—Roynon v. Battin, 132 P.2d 266, 55 C.A.2d 861.

Confession

Arrest without warrant for past misdemeanor is illegal, although accused, on being questioned by officer prior to arrest, admits commission of past offense.

Okl.—Lyons v. Worley, 4 P.2d 3, 152 Okl. 57.

Offense committed in another state

Plaintiff could not be held without warrant by city marshal for misdemeanor committed in another state. Cal.—Kenyon v. Hartford Accident & Indemnity Co., 260 P. 952, 86 C.A. 269.

In Kentucky in civil actions for false imprisonment by a public officer the court, where the defense is justification, has liberally construed the rights of the officer in making an arrest without a warrant for an offense committed in his presence, and

the rule is that a peace officer can arrest a person without a warrant when the person is committing an offense in his presence, or when he has reasonable grounds for and does believe in good faith that the person is committing an offense in his presence.

Ky.—Louisville & N. R. Co. v. Creech, 291 S.W. 15, 218 Ky. 147.

25 C.J. p 465 note [c].

76. Cal.—Miller v. Turner, 194 P. 66, 49 C.A. 653.

25 C.J. p 466 note 45.

Saucy talk to policeman

Arrest of a girl, who had committed no offense and who was minding her own business, but who, on being improperly addressed by policeman, talked saucily to him, and called him a "big prune," was illegal, entitling the girl to damages for wrongful arrest.

Iowa.—Scott v. Fellschmidt, 182 N.W. 382, 191 Iowa 347.

77. Ill.—Main v. McCarty, 15 Ill. 441.

N.Y.—Stevens v. Gilbert, 120 N.Y.S. 114.

S.C.—Loggins v. Southern R. Co., 42 S.E. 163, 64 S.C. 321.

25 C.J. p 466 note 47.

78. N.Y.—Meyer v. Clark, 41 N.Y. Super. 107.

79. Mo.—Peterson v. Fleming, 297 S.W. 163, 222 Mo.App. 296.

Waiver

Defendant, in action for false arrest, may invoke or waive protection of statute empowering police officer to arrest without warrant person charged with misdemeanor not

committed in officer's presence.

Mo.—Greaves v. Kansas City Junior Orpheum Co., 80 S.W.2d 228, 229 Mo.App. 663.

80. Ala.—Burk v. Knott, 101 So. 811, 20 Ala.App. 316.

Ga.—Conoly v. Imperial Tobacco Co., 12 S.E.2d 398, 63 Ga.App. 880—Vlass v. McCrary, 5 S.E.2d 63, 60 Ga.App. 744.

Minn.—Hilla v. Jensen, 182 N.W. 902, 149 Minn. 58.

Tex.—Heath v. Boyd, 175 S.W.2d 214, 141 Tex. 569.

Utah.—Oleson v. Pincock, 251 P. 23, 68 Utah 507.

W.Va.—Noce v. Ritchie, 155 S.E. 127, 109 W.Va. 391.

25 C.J. p 466 note 46.

81. Drunkenness

Peace officer, arresting one for being drunk in his presence, was not liable for false imprisonment, if person arrested was actually drunk, or officer had reasonable grounds to believe, and did believe in good faith, person arrested was drunk.

Ky.—Goins v. Hudson, 55 S.W.2d 383, 246 Ky. 517.

82. Mo.—Hanser v. Bieber, 197 S.W. 68, 271 Mo. 326.

25 C.J. p 466 note 50.

83. Ga.—Franklin v. Amerson, 45 S. E. 698, 118 Ga. 860.

84. Ill.—Shelton v. Barry, 66 N.E.2d 697, 328 Ill.App. 497—Schramko v. Boston Store of Chicago, 243 Ill. App. 251—Levin v. Costello, 214 Ill.App. 505.

Tex.—Price v. Durdin, Civ.App., 207 S.W.2d 228.

offense was committed;⁸⁵ but, where statutory enactments authorize arrests on suspicion for offenses other than felonies, an arrest is not justified without proof of reasonable grounds of suspicion,⁸⁶ and, where a statutory provision requires reasonable proof of the commission of the offense to authorize an arrest therefor, mere reasonable grounds of suspicion are not sufficient.⁸⁷

Under some statutes police officers have power to arrest, or at least to detain for a reasonable time for investigation, a nonresident driver of a motor vehicle who is unable to produce the vehicle registration certificate or his driver's license.⁸⁸

Under federal statutes providing that state officers may issue process for apprehension of offenders against federal laws, an arrest without process for a misdemeanor under federal laws is illegal.⁸⁹

§ 23. — Arrests by Private Persons

A lawful arrest without a warrant by a private person does not constitute a false imprisonment.

An action for false imprisonment will not lie for an arrest without warrant by a private person for a felony committed in the past where the offense had actually been committed and defendant had reasonable grounds for suspecting that the arrested person was guilty.⁹⁰ It has been suggested by some courts that it must be shown that the person arrested was actually guilty of the felony.⁹¹ If no

felony has actually been committed, reasonable suspicion only mitigates damages,⁹² and the fact that the person making the arrest believed in good faith an offense to be a felony, whereas in fact it was a misdemeanor not authorizing arrest without warrant, does not justify the arrest.⁹³

A private person's right to justify an arrest without a warrant may be varied by statutes modifying an individual's power to arrest,⁹⁴ as, for instance, by giving him the right to arrest on reasonable grounds for believing the arrested person had committed a felony,⁹⁵ or, on the other hand, by confining the right to arrest to offenses actually committed by the person arrested.⁹⁶ Under a statute giving a private person the right to arrest if he is acting on "certain" information that a felony has been committed, it is unnecessary as an actual fact that a felony has been committed in order to permit a private citizen to make an arrest.⁹⁷ Under some statutes a private individual may arrest only for a crime committed or attempted in his presence.⁹⁸

Fugitives from justice. A private individual is liable, it seems, for arresting another without warrant for a felony committed in another state, unless he can justify by showing that he proceeded according to the statutory provisions.⁹⁹

For misdemeanors. Although there is some authority apparently to the contrary,^{99.5} an arrest

85. Ohio.—Ryan v. Conover, 18 N. E.2d 277, 59 Ohio App. 361.

Wis.—Bursack v. Davis, 225 N.W. 738, 199 Wis. 115.

Game warden was held authorized by statute to arrest, immediately or subsequently, person caught under circumstances justifying reasonable belief snag pole was used or possessed unlawfully.

Wis.—Muska v. Apel, 232 N.W. 593, 203 Wis. 389.

86. Hawaii.—Ford v. Oceanic S.S. Co., 3 Hawaii Fed. 239.

87. Mass.—Kennedy v. Favor, 14 Gray 200—Mason v. Lothrop, 7 Gray 354.

88. *Driver and guest*

Temporary detention by police officer of nonresident driver of automobile bearing foreign license plates and of nonresident guest, for investigation, on their failure to produce driver's license when requested, was justified, notwithstanding explanation of nonresidents that their state did not require driver's license; therefore, there was no "false imprisonment."

N.J.—Pine v. Okzewski, 170 A. 825, 112 N.J.Law 429.

89. N.J.—McMichael v. Culliton, Sup., 104 A. 433.

90. Ark.—Missouri Pac. R. Co. v. Quick, 137 S.W.2d 263, 199 Ark. 1134.

N.Y.—Agar v. Kelsey, 300 N.Y.S. 630, 253 App.Div. 726.

Sanders v. Rolnick, 67 N.Y.S.2d 652, 188 Misc. 627, affirmed 71 N.Y.S.2d 896, 272 App.Div. 803.

Or.—Brown v. Meier & Frank Co., 86 P.2d 79, 160 Or. 608.

25 C.J. p 466 note 55.

Right to arrest see Arrest § 8 b.

91. Mo.—Pandjiris v. Hartman, 94 S.W. 270, 196 Mo. 539.

N.Y.—Doherty v. Lester, 159 N.Y.S. 2d 219, 4 Misc.2d 471.

25 C.J. p 467 note 56.

92. U.S.—Johnson v. Tompkins, C. C.Pa., 13 F.Cas.No.7,416, Baldw. 571.

N.Y.—Johnston v. Bruckheimer, 118 N.Y.S. 189, 133 App.Div. 649.

Sanders v. Rolnick, 67 N.Y.S.2d 652, 188 Misc. 627, affirmed 71 N.Y.S.2d 896, 272 App.Div. 803.

25 C.J. p 467 note 57.

93. Ky.—Begley v. Commonwealth, 60 S.W. 847, 22 Ky.L. 1546.

La.—Corpus Juris Secundum cited in Banks v. Food Town, Inc., App., 98 So.2d 719, 721.

94. N.Y.—Jones v. Freeman's Dairy, 127 N.Y.S.2d 200, 283 App.Div. 667, opinion supplemented 129 N.Y.S.2d 498, 283 App.Div. 806.

N.C.—Martin v. Houck, 54 S.E. 291, 141 N.C. 317, 7 L.R.A., N.S., 576.

25 C.J. p 467 note 59.

95. Ky.—Illinois Cent. R. Co. v. Dennington, 189 S.W. 217, 172 Ky. 326.

N.C.—State v. Mobley, 83 S.E.2d 100, 240 N.C. 476.

25 C.J. p 467 note 60.

96. Ill.—Lindquist v. Friedman's, 1 N.E.2d 529, 285 Ill.App. 71, affirmed 8 N.E.2d 625, 366 Ill. 232.

25 C.J. p 467 note 61.

97. S.C.—Burton v. McNeill, 13 S.E. 2d 10, 196 S.C. 250, 133 A.L.R. 603.

98. Ill.—Lindquist v. Friedman's, 1 N.E.2d 529, 285 Ill.App. 71, affirmed 8 N.E.2d 625, 366 Ill. 232.

25 C.J. p 467 note 64.

99. Ky.—Botts v. Williams, 17 B. Mon. 687.

99.5 *In Ohio*

(1) It has been stated to be the law that no person except an officer has the right to make an arrest for a misdemeanor, without a warrant. Ohio.—Fitscher v. Rollman & Sons Co., 167 N.E. 469, 31 Ohio App. 340.

without warrant by a private individual for a breach of the peace committed in his presence is justified;¹ but reasonable grounds for belief in the arrested person's guilt do not constitute a justification,² nor is the mental attitude of the person causing the arrest important.³ After the breach of the peace has ceased a person is not justified in arresting the one who committed it,⁴ unless there is a well-founded apprehension that it will be renewed.⁵ A private person may also arrest one who interferes with him while he is lawfully making an arrest.⁶

Under some statutes regulating the right of an individual to arrest without a warrant, in order so to justify the arrest that it does not constitute a false imprisonment, the misdemeanor committed must amount to a breach of the peace,⁷ but under other statutes arrests without warrant by private

individuals for misdemeanors, when committed in the presence of the arresting person, may be justified, even though the misdemeanors do not in all cases amount to a breach of the peace.⁸

It is not justifiable to arrest one who is not engaged in a breach of the peace or other misdemeanor,⁹ although the person making the arrest had probable cause to believe in the guilt of the arrested person.¹⁰ Thus liability is incurred for the arrest of one who is merely committing a civil trespass on another's lands,¹¹ unless statutory provisions make such trespass a misdemeanor,¹² or justifiably repelling one who is attempting to commit a trespass on the arrested person's lands,¹³ or disregarding the regulations of a carrier¹⁴ or restaurant proprietor,¹⁵ or who refuses to pay a fare which

(2) Accordingly, detention of plaintiff by store detective who was not a duly commissioned peace officer on charge of shoplifting was violation of plaintiff's rights.

Ohio.—*Szymanski v. Great Atlantic & Pacific Tea Co.*, 74 N.E.2d 205, 79 Ohio App. 407.

1. Cal.—*Hill v. Nelson*, 162 P.2d 927, 71 C.A.2d 528.

Conn.—*Malley v. Lane*, 115 A. 674, 97 Conn. 133.

25 C.J. p 467 note 66.

"Breach of the peace," for which private person may make arrest without warrant, is generic term including all violations of public peace or order calculated to disturb public tranquility, not merely fighting or rioting.

Wash.—*Smith v. Drew*, 26 P.2d 1040, 175 Wash. 11.

Facts sufficient to constitute breach of peace

(1) Prowling about and creeping up on parked automobiles and their occupants at night under circumstances indicating intent to commit crime.

Wash.—*Smith v. Drew*, supra.

(2) Other facts see 25 C.J. p 467 note 66 [a].

2. N.Y.—*Gill v. Montgomery Ward & Co.*, 129 N.Y.S.2d 288, 284 App. Div. 38.

Rodney v. Interborough Rapid Transit Co., 267 N.Y.S. 86, 149 Misc. 271.

25 C.J. p 467 note 67.

3. N.Y.—*Reisler v. Interborough Rapid Transit Co.*, 139 N.Y.S. 335, 79 Misc. 91.

4. N.Y.—*Winn v. Hobson*, 54 N.Y. Super. 330.

Phillips v. Trull, 11 Johns. 486. 25 C.J. p 467 note 69.

5. Md.—*Baltimore & O. R. Co. v.*

Cain, 31 A. 801, 81 Md. 87, 28 L.R. A. 688.

25 C.J. p 468 note 70.

6. S.D.—*Dunn v. Griffin*, 162 N.W. 366, 38 S.D. 569.

7. Tex.—*S. H. Kress & Co. v. Rust*, Civ.App., 97 S.W.2d 997, affirmed 120 S.W.2d 425, 132 Tex. 89.

8. Ala.—*Du Pont de Nemours Powder Co. v. Hyde*, 77 So. 733, 201 Ala. 207.

25 C.J. p 468 note 73.

Segregation of races in street car

Under some statutes a street car passenger remaining in a seat other than that to which he may have been assigned by the conductor in order to secure segregation of the races may not only be ejected from the car, but is subject to summary arrest by the conductor without a warrant.

Ga.—*Savannah Electric Co. v. Lowe*, 108 S.E. 313, 27 Ga.App. 350.

9. La.—*Barrios v. Yoars*, App., 184 So. 212.

Mo.—*Adams v. St. Louis-San Francisco Ry. Co.*, App., 272 S.W. 984.

N.Y.—*Rodney v. Interborough Rapid Transit Co.*, 267 N.Y.S. 86, 149 Misc. 271—*Adams v. F. W. Woolworth Co.*, 257 N.Y.S. 776, 144 Misc. 27.

25 C.J. p 468 note 74.

Failure to pay fare

Where failure to pay fare was not made a violation of law, notwithstanding the carrier's right to eject a passenger who refused to pay, the failure to pay was not authority for the passenger's arrest.

Ark.—*Ft. Smith & Van Buren Dist. v. Kidd*, 241 S.W. 374, 153 Ark. 489.

Shoplifting

Where a storekeeper sees and knows that a customer is taking and wrongfully carrying away merchandise from his store, he has the right to accost the culprit and pre-

vent the attempted "shoplifting" or larceny of his goods; but a merchant conducting a self-serving store does not have a right to apprehend and detain a customer and inspect her parcels and packages on the mere suspicion of her "shoplifting" based only on her failure to heed or comply with some rule or regulation of the self-serving store requiring customer to present for checking the merchandise she is carrying, regardless of whether it was elsewhere purchased or paid for when purchased.

Ky.—*Great Atlantic & Pacific Tea Co. v. Smith*, 136 S.W.2d 759, 281 Ky. 583.

10. Ala.—*Daniels v. Milstead*, 128 So. 447, 221 Ala. 353.

Ky.—*Jefferson Dry Goods Co. v. Stoess*, 199 S.W.2d 994, 304 Ky. 73. N.Y.—*Gill v. Montgomery Ward & Co.*, 129 N.Y.S.2d 288, 284 App.Div. 36.

Rodney v. Interborough Rapid Transit Co., 267 N.Y.S. 86, 149 Misc. 271.

25 C.J. p 468 note 75.

11. Ala.—*Du Pont de Nemours Powder Co. v. Hyde*, 77 So. 733, 201 Ala. 207.

25 C.J. p 468 note 76.

12. N.Y.—*Johnson v. May*, 178 N.Y. S. 742, 189 App.Div. 196. 25 C.J. p 468 note 77.

13. Mich.—*Nay v. Dickinson*, 148 N. W. 755, 182 Mich. 684.

14. Mass.—*Hull v. Boston, & M. R. Co.*, 96 N.E. 58, 210 Mass. 159, 36 L.R.A., N.S., 406, Ann.Cas.1912C 1147.

N.Y.—*Corbett v. Twenty-Third St. R. Co.*, 42 Hun 587.

25 C.J. p 468 note 79.

15. N.Y.—*Dupre v. Childs*, 65 N.Y.S. 179, 52 App.Div. 306, affirmed 62 N.E. 1095, 169 N.Y. 585.

25 C.J. p 469 note 80.

the carrier is entitled to demand,¹⁶ or an innkeeper's bill,¹⁷ or who, not being intoxicated, is merely attempting to board a train for which he has a ticket.¹⁸ Where the evidence discloses that the arrest and imprisonment were for the purpose of coercing payment of a civil demand due defendant, he cannot justify his action on the theory that he had a right to arrest plaintiff for an offense committed in his presence.¹⁹

§ 24. — Individual Directing Arrest or Giving Information

An individual who directs or requests an illegal arrest is liable for false imprisonment, but one who merely gives information regarding an offense does not incur liability.

Quoted in: *Neb.—Edgar v. Omaha Public Power Dist.*, 89 N.W.2d 238, 241, 166 Neb. 452.

An individual who directs or requests a peace officer to make an arrest which turns out to be illegal will be liable in the same manner as if he had made the arrest himself,²⁰ however pure his motives may have been.²¹ Conversely a private individual is exonerated who procures an officer to make an arrest which he might lawfully have made himself.²² The person directing an unlawful arrest may be liable, although the officer acting is exonerated.²³ A doctrine to the contrary, however, has been maintained by some courts to the effect that, if the arrest is made by an officer under circumstances rendering legal an arrest by him, the person who instigated it cannot be held liable, although such person's conduct would have been unlawful had he made the arrest.²⁴ The fact that the

16. N.Y.—*Lynch v. Metropolitan El. R. Co.*, 90 N.Y. 77, 43 Am.R. 141, 15 N.Y.Wkly.Dig. 317.
25 C.J. p 469 note 81.

17. W.Va.—*Galizian v. Henry*, 76 S.E. 440, 71 W.Va. 292.

18. Mo.—*Davis v. Chicago, R. I. & P. R. Co.*, 182 S.W. 826, 192 Mo. App. 419.

19. Ala.—*Kearley v. Cowan*, 116 So. 145, 217 Ala. 295.

20. U.S.—*Miller v. Stinnett, C.A.N.* M., 257 F.2d 910.

Ala.—*Corpus Juris* cited in *Caldwell v. Standard Oil Co.*, 124 So. 512, 513, 220 Ala. 227—*American Ry. Express Co. v. Summers*, 94 So. 737, 208 Ala. 531.

Alaska.—*Wilson v. Eberle*, 15 Alaska 260.

Cal.—*Kaufman v. Brown*, 209 P.2d 156, 93 C.A.2d 508—*Frickstad v. Medcraft*, 279 P. 840, 100 C.A. 188.

D.C.—*Chesapeake & Potomac Telephone Co. v. Lewis*, 99 F.2d 424, 69 App.D.C. 191.

Ga.—*Hill v. Henry*, 82 S.E.2d 35, 90 Ga.App. 93—*Webb v. Prince*, 9 S.E. 2d 675, 62 Ga.App. 749.

Ill.—*Lindquist v. Friedman's*, 1 N.E. 2d 529, 285 Ill.App. 71, affirmed 8 N.E.2d 625, 366 Ill. 232.

Iowa.—*Fox v. McCurnin*, 218 N.W. 499, 205 Iowa 752.

La.—*Romaine v. Fairchild Motor Car Co.*, 97 So. 390, 154 La. 171.

Mass.—*McDermott v. W. T. Grant Co.*, 49 N.E.2d 115, 313 Mass. 736.
Miss.—*Howell v. Viener*, 176 So. 731, 179 Miss. 872.

Mo.—*Heinold v. Muntz T. V., Inc.*, 262 S.W.2d 32—*Corpus Juris Secundum* cited in *Snider v. Wimberly*, 209 S.W.2d 239, 241, 357 Mo. 491.

Winegar v. Chicago, B. & Q. R. Co., App., 163 S.W.2d 357—*Richardson v. Empire Trust Co.*, 94 S.W.2d 966, 230 Mo.App. 580—*Greaves v. Kansas City Junior Orpheum Co.*, 30 S.W.2d 228, 229 Mo.App. 663—

Hines v. Fireman's Fund Ins. Co., App., 235 S.W. 174—*Martin v. Woodlea Inv. Co.*, 226 S.W. 650, 206 Mo.App. 33.

Mont.—*Harrer v. Montgomery Ward & Co.*, 221 P.2d 428, 124 Mont. 295.

N.H.—*Corpus Juris Secundum* cited in *Ferry v. Ferry*, 54 A.2d 151, 153, 94 N.H. 395.

N.Y.—*Vernes v. Phillips*, 194 N.E. 762, 266 N.Y. 298.

Ward v. Grow, 179 N.Y.S.2d 191, 14 Misc.2d 844—*Schildhaus v. City of New York*, 163 N.Y.S.2d 201, 7 Misc.2d 859—*Vallon v. Ramage*, 93 N.Y.S.2d 56, 196 Misc. 740—*Grago v. Vassello*, 19 N.Y.S.2d 34, 173 Misc. 736—*Damilitis v. Kerjas Lunch Corporation*, 300 N.Y.S. 574, 165 Misc. 186.

Davis v. Nadell, 138 N.Y.S.2d 50.

Okl.—*Corpus Juris Secundum* quoted in *Alsop v. Skaggs Drug Center*, 223 P.2d 530, 533, 203 Okl. 525.

Or.—*Knight v. Baker*, 244 P. 543, 117 Or. 492.

S.D.—*Corpus Juris* cited in *Tredway v. Birks*, 242 N.W. 590, 591, 59 S.D. 649.

Tex.—*Leon's Shoe Stores, Inc. v. Hornsby, Civ.App.*, 306 S.W.2d 402—*Citizens Hotel Co. v. Foley, Civ. App.*, 131 S.W.2d 402, error dismissed, judgment correct—*Corpus Juris* cited in *McDonald v. Henderson, Civ.App.*, 250 S.W. 463.

Wis.—*Hotzel v. Simmons*, 45 N.W.2d 683, 258 Wis. 234—*Ellis v. Chicago, N. S. & M. R. Co.*, 227 N.W. 235, 200 Wis. 15, certiorari denied 50 S. Ct. 237, 281 U.S. 722, 74 L.Ed. 1140.
25 C.J. p 469 note 85.

Nature of offense charged

Record made by magistrate as to nature of offense charged could not excuse defendant, sued for unlawful arrest and false imprisonment, if in fact there was no ground for arresting plaintiff.

Pa.—*Patton v. Vucinic*, 167 A. 450, 109 Pa.Super. 530.

21. Ark.—*Chrisman v. Carney*, 33 Ark. 316.

Ga.—*Holliday v. Coleman*, 78 S.E. 482, 12 Ga.App. 779.

N.Y.—*Johnston v. Bruckheimer*, 118 N.Y.S. 189, 133 App.Div. 649.

N.C.—*Caudle v. Benbow*, 45 S.E.2d 361, 228 N.C. 282.

Okl.—*Corpus Juris Secundum* quoted in *Alsop v. Skaggs Drug Center*, 223 P.2d 530, 533, 203 Okl. 525.

Probable cause

Defense that defendant acted on probable cause will not defeat plaintiff's recovery but will serve to reduce amount of his recovery.

Ga.—*Hill v. Henry*, 82 S.E.2d 35, 90 Ga.App. 93.

22. Mo.—*Reaves v. Rieger, App.*, 241 S.W.2d 389, appeal transferred, see 232 S.W.2d 500, 360 Mo. 1091.

N.Y.—*Adams v. Schwartz*, 122 N.Y.S. 41, 137 App.Div. 230.

Tex.—*James v. San Antonio, & A. P. R. Co.*, 116 S.W. 642, 53 Tex.Civ. App. 603.

25 C.J. p 469 note 87.

23. Mo.—*Winegar v. Chicago, B. & Q. R. Co.*, App., 163 S.W.2d 357—*Peterson v. Fleming*, 297 S.W. 163, 222 Mo.App. 296—*Harris v. Terminal R. Ass'n of St. Louis*, 218 S.W. 686, 203 Mo.App. 324.
25 C.J. p 469 note 88.

Reasonable cause

The fact that the officer when he arrested plaintiff without a warrant had reasonable cause to believe that plaintiff was guilty of a felony, by reason of defendant's statements, does not justify defendant's act in instigating the arrest unless he also had reasonable cause to believe plaintiff guilty.

Ala.—*Caldwell v. Standard Oil Co.*, 124 So. 512, 220 Ala. 227.

24. U.S.—*Van v. Pacific Coast Co.*, C.C.Wash., 120 F. 699.

officer acted wrongfully in making the arrest does not absolve the person who instigated the arrest.²⁵

What is a direction or request sufficient to impose liability within the meaning of this rule depends on the facts of each case,²⁶ and may be inferred from circumstances as well as established by direct proof.²⁷ It is not essential that there should be evidence of express command or direction to the officer to arrest,²⁸ nor is it essential that the party directing the arrest be present at the time of the arrest,²⁹ although the fact that he was not present at the time has been considered in determining that he did not direct or instigate the arrest;³⁰ and it

should appear that the arrest or unlawful detention was made pursuant to his direction or request,³¹ and, if the officer acts solely on his own judgment, defendant will not be responsible, even though he directs or requests such action, and even though he is actuated by malice or other improper motive.³² A request that officers remove a person from another's premises is not a request for an arrest,^{32.5} and the removal of such person is not an arrest.^{32.10}

No liability can attach to a person directing an arrest where it is the officer's duty to make the arrest, regardless of the direction from such person.³³

Ala.—American Ry. Express Co. v. Summers, 94 So. 737, 208 Ala. 531.
Or.—Bowles v. Creason, 78 P.2d 324, 159 Or. 129.

25. N.Y.—Warren v. Dennett, 39 N. Y.S. 830, 17 Misc. 86.

Tenn.—**Corpus Juris** quoted in Hertzka v. Ellison, 8 Tenn.App. 667, 674.

26. Tenn.—**Corpus Juris** quoted in Hertzka v. Ellison, 8 Tenn.App. 667, 678.

25 C.J. p 470 note 91.

Car taken from parking lot

Where parking lot operator, who made stolen car report to police when automobile of which he had custody was taken from lot, intended or knew that somebody would be arrested if found in the automobile, he was under duty to use reasonable care in making the report to determine that the automobile was in fact stolen.

Tenn.—(Blue) Star Service, Inc. v. McCurdy, 251 S.W.2d 139, 36 Tenn. App. 1.

Departure from directions

In debtor's action against creditor for arrest of debtor for alleged intent to leave state with property beyond need for support, where evidence warranted finding that creditor directed deputy to arrest debtor without notice, that officer, instead of obeying instructions, conferred with attorney of debtor, and arranged to make arrest on return of debtor to state, and provided opportunity for debtor to obtain bail, was no defense, since deputy's actions were less drastic than creditor's instructions.

Me.—Stern v. Sullivan, 188 A. 719, 135 Me. 1.

27. Mo.—Wright v. Automobile Gasoline Co., 250 S.W. 368.

Wright v. Hoover, 241 S.W. 89, 211 Mo.App. 185.

R.I.—**Corpus Juris Secundum** cited in Sylvester v. Buerhaus, 45 A.2d 150, 152, 71 R.I. 325.

Tenn.—(Blue) Star Service, Inc. v. McCurdy, 251 S.W.2d 139, 36 Tenn. App. 1—**Corpus Juris** quoted in Hertzka v. Ellison, 8 Tenn.App. 667, 674.

25 C.J. p 470 note 92.

28. Ala.—Standard Oil Co. v. Humphries, 96 So. 629, 209 Ala. 493—American Ry. Express Co. v. Summers, 94 So. 737, 208 Ala. 531.

Wood v. Hacker, 121 So. 437, 23 Ala.App. 12, certiorari denied 121 So. 441, 219 Ala. 139.

Instigation sufficient

Plaintiff is not required to prove that defendants ordered his arrest; it is sufficient to show that they instigated it.

Mo.—Wright v. Automobile Gasoline Co., 250 S.W. 368.

Vimont v. S. S. Kresge Co., App., 291 S.W. 159—Wright v. Hoover, 241 S.W. 89, 211 Mo.App. 185.

Utah.—**Corpus Juris Secundum** cited in Pixton v. Dunn, 238 P.2d 408, 120 Utah 658.

29. Ala.—Clifton v. Grayson, 2 Stew. 412.

N.Y.—Davern v. Drew, 138 N.Y.S. 1017, 153 App.Div. 844, affirmed 108 N.E. 1092, 214 N.Y. 681.

Tenn.—(Blue) Star Service, Inc. v. McCurdy, 251 S.W.2d 139, 36 Tenn. App. 1.

30. Mo.—Vimont v. S. S. Kresge Co., App., 291 S.W. 159.

31. Ala.—U. S. Fidelity & Guaranty Co. v. Kibbey, 165 So. 600, 27 Ala. App. 45.

Cal.—Frickstad v. Medcraft, 279 P. 840, 100 C.A. 188.

Ky.—Triangle Motors Co. v. Smith, 287 S.W. 914, 216 Ky. 479.

La.—Goodwin v. Terrell, 187 So. 663, 192 La. 267.

Mo.—Greaves v. Kansas City Junior Orpheum Co., 80 S.W.2d 228, 229 Mo.App. 663—Vimont v. S. S. Kresge Co., App., 291 S.W. 159.

Tenn.—(Blue) Star Service, Inc. v. McCurdy, 251 S.W.2d 139, 36 Tenn. App. 1—**Corpus Juris** quoted in Hertzka v. Ellison, 8 Tenn.App. 667, 674.

Tex.—El Paso Electric Ry. Co. v. Crews, Civ.App., 277 S.W. 732.

25 C.J. p 470 note 94.

Failure to discourage

Person summoning police officer to

place of business where man was endeavoring to sell him diamond was not liable for illegal arrest of such man by officers after investigation, notwithstanding person summoning police officer was present at all times during investigation and when arrest was made, where he did not direct or request arrest, notwithstanding he did nothing to prevent or discourage it, and stated that officer had his permission to call other officers.

Ga.—Hammond v. D. C. Black, Inc., 186 S.E. 775, 53 Ga.App. 609.

Transportation of officer

Where probable cause existed for arrest, and persons with arresting officer did nothing to effect arrest or imprisonment except to transport officer and prisoner to police station, where officer was required to take prisoner, such persons and their employer were not liable for false arrest or imprisonment.

Cal.—Van Fleet v. West American Ins. Co., 42 P.2d 378, 5 C.A.2d 125, rehearing denied 43 P.2d 557, 5 C.A.2d 125.

32. Ala.—Crescent Amusement Co. v. Scott, 40 So.2d 882, 34 Ala.App. 335, certiorari denied 40 So.2d 886, 252 Ala. 296.

Inquiry is: First, whether or not defendant or his agent directed, commanded, or in any way instigated the arrest; second whether such conduct, if shown, was a material factor in causing the officer to make the arrest.

Ala.—Standard Oil Co. v. Davis, 94 So. 754, 208 Ala. 565.

Casino Restaurant v. McWhorter, 46 So.2d 582, 35 Ala.App. 332—U. S. Fidelity & Guaranty Co. v. Kibbey, 165 So. 600, 27 Ala.App. 45.

32.5 Nev.—Lemel v. Smith, 187 P. 2d 169, 64 Nev. 545.

32.10 Nev.—Lemel v. Smith, supra.

33. Mo.—Bierwith v. Pieronnet, 65 Mo.App. 431.

25 C.J. p 470 note 95.

Individuals giving information. One who merely gives information regarding an offense justifying arrest does not incur liability,³⁴ even though the party giving the information acted maliciously or without probable cause.³⁵

Participating. An individual incurs liability for an arrest without process, if going beyond merely giving information he participates in making an arrest which turns out to have been unlawful.³⁶

§ 25. — Reasonable Grounds of Suspicion

Reasonable and probable grounds for suspicion of

guilt are generally, although not by all authorities, regarded as equivalent to a reasonable and probable cause for belief in guilt. What constitutes such grounds depends on the facts and circumstances of the particular case.

Reasonable and probable grounds for suspicion of the guilt of a person arrested which may, under the circumstances considered supra §§ 21-24, constitute a justification for his arrest without a warrant, and constitute a defense in an action for false imprisonment, are ordinarily regarded by the courts as equivalent to reasonable and probable cause for a belief in his guilt,³⁷ although by other authorities

34. U.S.—Carr v. National Discount Corp., C.A.Mich., 172 F.2d 899, certiorari denied 70 S.Ct. 59, 338 U.S. 817, 94 L.Ed. 495—Stueber v. Admiral Corp., C.A.Ill., 171 F.2d 777, certiorari denied 69 S.Ct. 891, 336 U.S. 961, 93 L.Ed. 1113.

Ala.—Casino Restaurant v. McWhorter, 46 So.2d 582, 35 Ala.App. 332—Crescent Amusement Co. v. Scott, 40 So.2d 882, 34 Ala.App. 335, certiorari denied 40 So.2d 886, 252 Ala. 296—Wofford Oil Co. v. Stauter, 154 So. 124, 26 Ala.App. 112.

Cal.—Peterson v. Robison, 277 P.2d 19, 43 C.2d 690—Hughes v. Oreb, 228 P.2d 550, 36 C.2d 854.

Dawson v. Martin, 309 P.2d 915, 150 C.A.2d 379—Walton v. Will, 152 P.2d 639, 66 C.A.2d 509.

D.C.—Chesapeake & Potomac Telephone Co. v. Lewis, 99 F.2d 424, 69 App.D.C. 191—Kinchlow v. Peoples Rapid Transit Co., 88 F.2d 764, 66 App.D.C. 382, certiorari denied 57 S.Ct. 926, 301 U.S. 693, 81 L.Ed. 1349—Takahashi v. Hecht Co., 50 F.2d 326, 60 App.D.C. 176.

Ga.—Webb v. Prince, 9 S.E.2d 675, 62 Ga.App. 749—**Corpus Juris cited in** Hammond v. D. C. Black, Inc., 186 S.E. 775, 776, 53 Ga.App. 609.

Ill.—Galarza v. Sprague, 1 N.E.2d 275, 284 Ill.App. 254.

La.—Goodwin v. Terrell, 187 So. 663, 192 La. 267.

Lavigne v. Balter, App., 153 So. 546.

Mass.—Mezullo v. Maletz, 118 N.E. 2d 356, 331 Mass. 233.

Mich.—Simpson v. Burton, 44 N.W.2d 178, 328 Mich. 557.

Miss.—Smith v. Patterson, 58 So.2d 64, 274 Miss. 87.

Mo.—Hooch v. S. S. Kresge Co., 230 S.W.2d 758—Snider v. Wimberly, 209 S.W.2d 239, 357 Mo. 491.

Corpus Juris cited in Richardson v. Empire Trust Co., 94 S.W. 2d 966, 971, 230 Mo.App. 580.

Neb.—Edgar v. Omaha Public Power Dist., 89 N.W.2d 238, 166 Neb. 452.

N.Y.—Schildhaus v. City of New York, 163 N.Y.S.2d 201, 7 Misc.2d 859—Grago v. Vassello, 19 N.Y.S. 2d 34, 173 Misc. 736—Mitchell v.

O'Hara, 1 N.Y.S.2d 20, 165 Misc. 630.

S.C.—Wingate v. Postal Telegraph & Cable Co., 30 S.E.2d 307, 204 S.C. 520.

Tenn.—(Blue) Star Service, Inc. v. McCurdy, 251 S.W.2d 139, 36 Tenn. App. 1—Hertzka v. Ellison, 8 Tenn. App. 687.

Tex.—Central Motor Co. v. Roberson, Civ.App., 154 S.W.2d 180, affirmed Burton v. Roberson, 164 S.W.2d 524, 139 Tex. 562, 143 A.L.R. 1.

Wash.—Smith v. Drew, 26 P.2d 1040, 175 Wash. 11.

Wis.—Buchholz v. Glass, 193 N.W. 392, 180 Wis. 527.

25 C.J. p 470 note 96.

Application for assistance

Defendant's application to sheriff for assistance in determining whether named persons had defendant's personalty did not make defendant liable for alleged false imprisonment of woman in named persons' party by police officer to whom sheriff phoned. Fla.—Camp v. Silas, 151 So. 706, 113 Fla. 323.

Identification

(1) In action for false arrest and imprisonment of plaintiff as the man named in swindling indictment, bank officers who innocently identified plaintiff as the man with whom they had had the transaction which resulted in the swindling indictment were not liable, in absence of evidence that officers induced, requested or directed the deputy sheriff to make the arrest.

Tex.—Schnauffer v. Price, Civ.App., 124 S.W.2d 940, error refused.

(2) Accompanying a police officer to identify one suspected of an offense or to identify property involved therein is no more than the giving of information in assistance of the officer, and unless accompanied by acts of affirmative direction, persuasion, or request for, or voluntary participation in, an arrest and imprisonment of the suspected offender, informer is not liable for false arrest and imprisonment.

Neb.—Edgar v. Omaha Public Power Dist., 89 N.W.2d 238, 166 Neb. 452.

(3) Victims of crime should not be held to responsibility of guarantors of accuracy of their identifications, and citizens who had been criminally wronged may, without fear of civil reprisal for honest mistake, report to police or public prosecutor facts of crime, and in good faith, without malice, identify as to best of their ability to such public officers the perpetrator of the crime. Cal.—Turner v. Mellon, 257 P.2d 15, 41 C.2d 45.

35. U.S.—Carr v. National Discount Corp., C.A.Mich., 172 F.2d 899, certiorari denied 70 S.Ct. 59, 338 U.S. 817, 94 L.Ed. 495.

Mich.—Simpson v. Burton, 44 N.W. 2d 178, 328 Mich. 557.

Mo.—**Corpus Juris cited in** Richardson v. Empire Trust Co., 94 S.W. 2d 966, 971, 230 Mo.App. 580.

25 C.J. p 471 note 97.

36. U.S.—Burke v. New York, N. H. & H. R. Co., C.A.N.Y., 267 F.2d 894.

D.C.—Chesapeake & Potomac Telephone Co. v. Lewis, 99 F.2d 424, 69 App.D.C. 191.

Mo.—**Corpus Juris cited in** Richardson v. Empire Trust Co., 94 S.W. 2d 966, 971, 230 Mo.App. 580.

25 C.J. p 471 note 98.

37. U.S.—Carr v. National Discount Corp., C.A.Mich., 172 F.2d 899, certiorari denied 70 S.Ct. 59, 338 U.S. 817, 94 L.Ed. 495.

Ala.—Caldwell v. Standard Oil Co., 124 So. 512, 220 Ala. 227.

Alaska—Wilson v. Eberle, 15 Alaska 260.

Cal.—Lowry v. Standard Oil Co. of California, 130 P.2d 1, 54 C.A.2d 782—**Corpus Juris cited in** Allen v. McCoy, 27 P.2d 423, 426, 135 C.A. 500, rehearing denied and modified on other grounds 28 P.2d 56, 135 C.A. 500.

Ill.—Watkins v. Sullivan, 136 N.E.2d 528, 11 Ill.App.2d 134.

Mo.—**Corpus Juris Secundum cited in** Snider v. Wimberly, 209 S.W.2d 239, 241, 357 Mo. 491—Teel v. May Department Stores Co., 176 S.W.2d 440, 352 Mo. 127.

a distinction has been drawn between suspicion of guilt and belief in guilt, and it has been held that the facts constituting probable cause for suspicion may not be sufficient to induce a belief in guilt.³⁸ Actual belief, without reasonable grounds therefor, is not a sufficient justification,³⁹ nor is mere suspicion without reasonable grounds therefor.⁴⁰

Whether such grounds exist must be judged by circumstances existing at the time of the arrest,⁴¹ and does not depend on the actual guilt or innocence of the person arrested.⁴² The arrest must be made on the volition of the person making it because of reasonable grounds of suspicion possessed

by him and not because of the command or direction of another;⁴³ but this does not mean that an officer's information creating the reasonable grounds of suspicion may not be derived from others,⁴⁴ including the person directing or requesting the arrest.⁴⁵ An arrest without a warrant cannot be justified by what the officers learned only by reason thereof.⁴⁶

What constitute reasonable grounds of suspicion. It is obvious that what constitute reasonable grounds of suspicion must depend on the facts and circumstances of the particular case.⁴⁷ Those facts and circumstances should be such as would justify

N.Y.—Vallon v. Ramage, 93 N.Y.S.2d 56, 196 Misc. 740.

Mudge v. State, 45 N.Y.S.2d 896.
Or.—Christ v. McDonald, 52 P.2d 655, 152 Or. 494.

25 C.J. p 471 note 2.

38. Pa.—McCarthy v. DeArmit, 99 Pa. 63.

39. Me.—Gee v. Patterson, 63 Me. 49.

Mass.—Mitchell v. Wall, 111 Mass. 492.

Pa.—Winebiddle v. Porterfield, 9 Pa. 137.

40. Mo.—Thompson v. St. Louis-San Francisco Ry. Co., App., 3 S.W.2d 1033.

Wash.—Kalkanes v. Willestoft, 124 P.2d 219, 13 Wash.2d 127.

25 C.J. p 471 note 6.

41. Cal.—Van Fleet v. West American Ins. Co., 42 P.2d 378, 5 C.A.2d 125, rehearing denied 43 P.2d 557, 5 C.A.2d 125.

Ky.—Gray v. McAtee, 25 S.W.2d 65, 233 Ky. 97.

25 C.J. p 471 note 7.

42. Cal.—Coverstone v. Davies, 239 P.2d 876, 38 C.2d 315, certiorari denied Mock v. Davies, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

N.Y.—Vallon v. Ramage, 93 N.Y.S.2d 56, 196 Misc. 740.

Or.—Allen v. William J. Burns International Detective Agency, 256 P. 197, 121 Or. 492.

Pa.—Fagan v. Pittsburgh Terminal Coal Corporation, 149 A. 159, 299 Pa. 109.

25 C.J. p 471 note 8.

43. U.S.—Polonsky v. Pennsylvania R. Co., N.Y., 184 F. 561, 106 C.C. A. 541.

25 C.J. p 471 note 9.

Informant having mere suspicion

An officer has no authority to arrest on mere belief that a person has been guilty of an offense, if such belief has no foundation in fact or sufficient circumstances on which to rest, or if the officer acts unreasonably at the request of a third person who himself has only a mere suspi-

cion of the guilt of one who is arrested.

Wash.—Kalkanes v. Willestoft, 124 P.2d 219, 13 Wash.2d 127.

44. Ala.—Rich v. McInerny, 15 So. 663, 103 Ala. 345, 49 Am.S.R. 32.

Md.—Edger v. Burke, 54 A. 986, 96 Md. 715—Kirk v. Garrett, 35 A. 1089, 84 Md. 383.

25 C.J. p 471 note 10.

45. Ala.—Rich v. McInerny, 15 So. 663, 103 Ala. 345, 49 Am.S.R. 32.

Ohio.—Johnson v. Reddy, 126 N.E.2d 911, 163 Ohio St. 347.

46. Concealed weapon

An arrest cannot be justified on the ground that the person arrested was carrying concealed a deadly weapon, where that fact was unknown when the officers made the arrest, and it was learned only by search of her possessions without warrant after she had been arrested without justification.

Ky.—Louisville & N. R. Co. v. Mason, 251 S.W. 184, 199 Ky. 337.

47. U.S.—J. C. Penney Co. v. O'Daniel, C.A.Okl., 263 F.2d 849.

Cal.—Allen v. McCoy, 27 P.2d 423, 135 C.A. 500, rehearing denied and modified on other grounds 28 P.2d 56, 135 C.A. 500.

Tenn.—Corpus Juris cited in Travis v. Bacherig, 7 Tenn.App. 638, 643.

25 C.J. p 471 note 14.

"Whether there is probable cause for making an arrest depends upon all the circumstances of each case, including delay which might enable the guilty person to escape, the nature of the information, the character of the person, and the extent of possible inquiry as to facts and circumstances."

Cal.—Michel v. Smith, 205 P. 113, 116, 188 C. 199.

Failure of person to identify himself, in and of itself, is not sufficient to justify an arrest, for it is only a fact or circumstance, among others, which may be shown in attempt to justify an arrest.

Mont.—Harrer v. Montgomery Ward & Co., 221 P.2d 428, 124 Mont. 295.

Immaterial matters should not be considered in determining presence of probable cause.

Iowa.—Gripp v. Crittenden, 271 N.W. 599, 223 Iowa 240.

Protestation of innocence

A declaration by plaintiff when arrested as a deserter under selective service act that he had told the officers of his local draft board of his new post office address is not sufficient to establish want of probable cause for making the arrest since officers cannot be required to accept the declarations of the person arrested as true.

Cal.—Michel v. Smith, 205 P. 113, 188 C. 199.

Reasonable grounds held to exist

(1) Generally.

U.S.—Ravenscroft v. Casey, C.C.A.N. Y., 139 F.2d 776, certiorari denied 65 S.Ct. 63, 323 U.S. 745, 89 L.Ed. 596, rehearing denied 65 S.Ct. 114, 323 U.S. 814, 89 L.Ed. 648.

Ark.—Missouri Pac. R. Co. v. Quick, 137 S.W.2d 263, 199 Ark. 1134.

Cal.—Mackie v. Ambassador Hotel & Investment Corporation, 11 P.2d 3, 123 C.A. 215, followed in 11 P.2d 7, 123 C.A. 770.

D.C.—Orvis v. Brickman, 196 F.2d 762, 90 U.S.App.D.C. 266.

La.—Barfield v. Marron, 62 So.2d 276, 222 La. 210.

N.J.—Cannon v. Krakowitch, 148 A. 2d 213, 54 N.J.Super. 93.

N.Y.—Mudge v. State, 45 N.Y.S.2d 896.

Ohio.—Johnson v. Reddy, 120 N.E.2d 459, reversed on other grounds 126 N.E.2d 911, 163 Ohio St. 347.

25 C.J. p 471 note 14 [a].

(2) Where plaintiff had solicited arresting officers to commit act of prostitution.

Wash.—Laux v. Stitt, 57 P.2d 321, 186 Wash. 180.

(3) Where home owner admitted that he had struck a harmless drunk with a stick after he had ejected drunk from his home into which drunk had wandered.

Ky.—Tucker v. Vornbrock, 110 S.W. 2d 659, 270 Ky. 712.

a careful and prudent person, acting circumspectly, in his belief.⁴⁸ Information obtained by the person making the arrest from the appearance, conduct, or statements of the one arrested may be sufficient,⁴⁹ and so may sufficient information, from a source on which the person making the arrest has a right to rely,⁵⁰ unless there are other circumstances showing that the information should not be acted on,⁵¹ or unless his own negligence has created the situation giving him reasonable grounds of suspicion.⁵²

Good faith is not enough to constitute probable cause, but such faith must be grounded on facts within the knowledge of the person who makes the arrest.⁵³ Accusation of a fellow employee by an

employee guilty of theft may constitute reasonable ground for suspicion.⁵⁴ A warrant for arrest which does not justify its execution may be sufficient as a reasonable cause to believe that the person arrested has committed a felony when it charges him with felony.⁵⁵

Where, under statutory provisions, the actual guilt of the arrested person must be shown, actual belief in his guilt or reasonable grounds of suspicion are not a justification.⁵⁶

Duty to investigate. It is the duty of the person making an arrest to take precautions against arresting an innocent person and this requires the

(4) Where plaintiff reported discovery of stolen automobile, but refused to disclose location thereof until paid a reward.

Cal.—Van Fleet v. West American Ins. Co., 42 P.2d 378, 5 C.A.2d 125, rehearing denied 43 P.2d 557, 5 C.A.2d 125.

(5) Where plaintiff's clothing was found in store from which goods were stolen.

Ky.—Gray v. McAtee, 25 S.W.2d 65, 233 Ky. 97.

(6) Where state police had received teletype message advising that certain individual was wanted on bench warrant for grand larceny.

N.Y.—Darlow v. State, 137 N.Y.S.2d 69, 207 Misc. 124.

(7) Where defendant reported to police that he suspected employee of corporate codefendant had, without authority, sent goods belonging to codefendant to one of the plaintiffs and requested police to investigate and police officer acting on his own initiative arrested plaintiffs and took them to precinct where defendants identified goods as property of codefendant and signed complaint, but plaintiffs were discharged by magistrate on ground of insufficiency of cause to believe them guilty of receiving stolen goods.

N.Y.—Dizazzo v. Miss Carolina Sportswear, Inc., 175 N.Y.S.2d 939, 11 Misc.2d 1029.

Reasonable grounds held not to exist
U.S.—Anderson v. Sager, C.A.S.D., 173 F.2d 794.

S.C.—Falls v. Palmetto Power & Light Co., 109 S.E. 93, 117 S.C. 327.

Va.—Virginia Electric & Power Co. v. Wynne, 141 S.E. 829, 149 Va. 882.

25 C.J. p 471 note 14 [b].

Reasonable doubts resolved in favor of arresting officer

Mich.—Hammit v. Straley, 61 N.W. 2d 641, 338 Mich. 587—Odinetz v. Budds, 24 N.W.2d 193, 315 Mich. 512.

Ohio.—Johnson v. Reddy, 126 N.E.2d 911, 163 Ohio St. 347.

48. U.S.—J. C. Penney Co. v. O'Daniel, C.A.Okl., 263 F.2d 849.

Cal.—Corpus Juris cited in Cook v. Singer Sewing Mach. Co., 32 P.2d 430, 432, 138 C.A. 418.

La.—Martin v. Cappel, 106 So. 660, 160 La. 21.

Mo.—Thompson v. St. Louis-San Francisco Ry. Co., App., 3 S.W.2d 1033.

Ohio.—Thomas v. F. & R. Lazarus & Co., App., 57 N.E.2d 103.

Or.—Christ v. McDonald, 52 P.2d 655, 152 Or. 494—Allen v. William J. Burns International Detective Agency, 256 P. 197, 121 Or. 492.

Tenn.—Corpus Juris cited in Travis v. Bacherig, 7 Tenn.App. 638, 643.

Wash.—Kalkanes v. Willestoff, 124 P.2d 219, 13 Wash.2d 127.

25 C.J. p 472 note 15.

"Probable cause may be defined as a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true."

Cal.—Michel v. Smith, 205 P. 113, 116, 188 Cal. 199—Van Fleet v. West American Ins. Co., 42 P.2d 378, 380, 5 C.A.2d 125, rehearing denied 43 P.2d 557, 5 C.A.2d 125.

Malice

Want of probable cause will not be inferred from malice in action for false arrest.

Va.—Virginia Electric & Power Co. v. Wynne, 141 S.E. 829, 149 Va. 882.

49. Md.—Kirk v. Garrett, 35 A. 1089, 84 Md. 383.

Mich.—Odinetz v. Budds, 24 N.W.2d 193, 315 Mich. 512.

25 C.J. p 472 note 16.

50. Me.—Kittredge v. Frothingham, 96 A. 1063, 114 Me. 537.

Mich.—Filer v. Smith, 55 N.W. 999, 96 Mich. 347, 35 Am.S.R. 603.

Mo.—State v. Evans, 83 Mo.App. 301. 25 C.J. p 472 note 17.

Colored informant

The fact that the informant was

a negro and the person charged a white man does not warrant an inference that the information was of so unreliable a character that the officer was not justified in acting thereon.

S.C.—Bushardt v. United Inv. Co., 113 S.E. 637, 121 S.C. 324.

Statement by participant

When a person who actually participated in the crime, and who knows who were present, not only swears beforehand that plaintiff was guilty, but when confronted by plaintiff adheres to his statement, although in the meantime he had made a different statement, the circumstances are such as to afford reasonable grounds for believing that plaintiff had committed a felony.

Ky.—Chesapeake & Ohio Ry. Co. v. Welch, 103 S.W.2d 698, 268 Ky. 93.

51. Mass.—Mitchell v. Wall, 111 Mass. 492.

52. N.Y.—Jacobs v. Third Ave. R. Co., 75 N.Y.S. 679, 71 App.Div. 199.

53. Intent not determinative

In an action for false imprisonment, the want of probable cause for arrest is measured by the state of the defendant's knowledge, and not by his intent.

U.S.—Director General of Railroads v. Kastenbaum, N.Y., 44 S.Ct. 52, 263 U.S. 25, 68 L.Ed. 146.

54. D.C.—Carroll v. Parry, 48 App. D.C. 453.

55. Ala.—King v. Robertson, 150 So. 154, 227 Ala. 378.

56. Mo.—Pandjiris v. Hartman, 94 S.W. 270, 196 Mo. 539.

Evil repute of house

While evil repute of house in which plaintiff and wife were arrested might have justified officers in keeping it under surveillance, it did not justify officers in entering his room and arresting and confining him against his will for misdemeanor of unlawful living together.

Ala.—Burk v. Knott, 101 So. 811, 20 Ala.App. 316.

making of such investigations as the circumstances permit.⁵⁷

Effect of subsequent proceedings. The disposition made of accused after his arrest may have a bearing in determining whether or not reasonable grounds for suspicion existed justifying his arrest,⁵⁸ such as his discharge at the preliminary hearing,⁵⁹ his acquittal after trial or examination,⁶⁰ or perhaps his release on habeas corpus.⁶¹ Some cases hold that it is not even prima facie evidence of want of reasonable grounds of suspicion that he is discharged or acquitted,⁶² or that the jury disagree.⁶³ In any event the outcome of such subsequent proceedings is not regarded as conclusively establishing the lack of probable cause.⁶⁴ It is prima facie evidence that reasonable grounds of suspicion existed at the time of the arrest that accused was held by the magistrate after examination for trial by a higher court⁶⁵ or was indicted by the grand jury.⁶⁶

It has been held that the fact that plaintiff was convicted of the charge for which the arrest was made is conclusive,⁶⁷ or at least prima facie⁶⁸ evidence, of the existence of probable cause, unless the conviction was obtained by corrupt or undue means.⁶⁹ It has also been held that a conviction

of accused is conclusive evidence of probable cause unless it was obtained by fraud or unfair means even though on appeal the conviction is set aside or accused acquitted.⁷⁰ The fact that a judgment of conviction was properly set aside by the court in which it was entered does not alone show want of probable cause.⁷¹

§ 26. Detention or Restraint under Process

Detention or restraint under valid process is discussed infra § 27, and under void, erroneous, or irregular process infra § 28.

Examine Pockets Parts for later cases.

§ 27. — Valid Process

An action for false imprisonment may not be maintained where an arrest or detention is made by virtue of process, legally sufficient in form, and duly issued by a court or official having jurisdiction to issue it.

It is a complete defense to an action for false imprisonment that the arrest or detention was by virtue of process, legally sufficient in form, and duly issued by a court or official having jurisdiction to issue it.⁷² The fact that the person arrested was

57. Tenn.—*Corpus Juris* cited in *Travis v. Bacherig*, 7 Tenn.App. 638, 643.

Wis.—*Wallner v. Fidelity & Deposit Co. of Md.*, 33 N.W.2d 215, 253 Wis. 66, 10 A.L.R.2d 745, 25 C.J. p 471 note 13.

58. Mich.—*Doak v. Springstead*, 279 N.W. 898, 284 Mich. 459, 25 C.J. p 473 note 21.

59. Ala.—*Caldwell v. Standard Oil Co.*, 124 So. 512, 220 Ala. 227.

60. Pa.—*Butler v. Stockdale*, 19 Pa. Super. 98.

61. Me.—*Whittaker v. Sanford*, 85 A. 399, 110 Me. 77, Ann.Cas.1914B 1202.

N.Y.—*Losaw v. Smith*, 96 N.Y.S. 191, 109 App.Div. 754.

62. Iowa.—*Sergeant v. Watson Bros. Transp. Co.*, 52 N.W.2d 86, 244 Iowa 185.

La.—*Sperier v. Ott*, 6 La.App., Orleans, 327.

No evidence of innocence

That magistrate did not hold plaintiff, suing for false imprisonment, for grand jury, is no evidence of innocence.

N.Y.—*Luhan v. Slavik*, 185 N.Y.S. 878, 194 App.Div. 728.

Gelles v. Rosenbaum, 252 N.Y.S. 827, 141 Misc. 588.

63. Mich.—*Burbanks v. Lepovsky*, 96 N.W. 456, 134 Mich. 384.

64. Ala.—*Union Indemnity Co. v. Webster*, 118 So. 794, 218 Ala. 468.

Cal.—*Vallindras v. Massachusetts Bonding & Ins. Co.*, 265 P.2d 907, 42 C.2d 149.

Ill.—*Galarza v. Sprague*, 1 N.E.2d 275, 284 Ill.App. 254.

La.—*Pellifigue v. Judice*, 98 So. 244, 154 La. 782.

N.Y.—*Freedman v. New York Soc. for Suppression of Vice*, 290 N.Y.S. 753, 248 App.Div. 517, affirmed 10 N.E.2d 550, 274 N.Y. 559.

Pa.—*Samuel v. Blackwell*, 76 Pa. Super. 540, 25 C.J. p 473 note 26.

"The acquittal of one accused of crime does not tend to show a want of probable cause for believing him guilty of the offense charged. The reason is obvious enough; for an acquittal is based upon any reasonable doubt of the defendant's guilt on all the evidence; while probable cause for accusing him is based upon a reasonable belief in his guilt growing out of such information as may be available to the accuser at the time he makes the charge."

Ala.—*Standard Oil Co. v. Davis*, 94 So. 754, 756, 208 Ala. 565.

65. N.Y.—*Schultz v. Greenwood Cemetery*, 83 N.E. 41, 190 N.Y. 276.

66. Mo.—*Steppuhn v. Chicago Great Western R. Co.*, 204 S.W. 579, 199 Mo.App. 571.

25 C.J. p 473 note 28.

67. Ky.—*Waddle v. Wilson*, 175 S. W. 382, 164 Ky. 228—*Louisville R. Co. v. Hutti*, 133 S.W. 200, 141 Ky.

511, 33 L.R.A., N.S., 867—*Johnson v. Scott*, 121 S.W. 695, 134 Ky. 736, 25 C.J. p 473 note 31.

68. Pa.—*Grohmann v. Kirschman*, 32 A. 32, 168 Pa. 189.

Perry v. Pennsylvania R. Co., 41 Pa. Super. 591.

69. Kan.—*Hill v. Day*, 215 P.2d 219, 168 Kan. 604.

Pa.—*Grohmann v. Kirschman*, 32 A. 32, 168 Pa. 189.

70. Mich.—*Doak v. Springstead*, 279 N.W. 898, 284 Mich. 459.

71. Ill.—*Galarza v. Sprague*, 1 N.E. 2d 275, 284 Ill.App. 254.

72. U.S.—*Miller v. Stinnett*, C.A.N. M., 257 F.2d 910—*Williams v. Franzoni*, C.A.Vt., 217 F.2d 533—*Schneider v. Kessler*, C.C.A.N.J., 97 F.2d 542.

Robinson v. Harris, D.C.Pa., 135 F.Supp. 239—*Johnson v. Scarborough*, D.C.Tex., 88 F.Supp. 523—*Riegel v. Hygrade Seed Co.*, D.C. N.Y., 47 F.Supp. 290.

Snyder v. Hausheer, C.C.A.Wyo., 268 F. 776.

219 Ala. 225.

Alaska.—*Corpus Juris Secundum* cited in *Wilson v. Eberle*, 15 Alaska 260, 267.

Ark.—*Smith v. Fish*, 30 S.W.2d 223, 182 Ark. 115.

Cal.—*Lincoln v. Didak*, 328 P.2d 498, 162 C.A.2d 625—*Lapique v. Agoure*, 195 P. 1075, 51 C.A. 56.

Conn.—*Corpus Juris* cited in *Clewley*

subsequently discharged,⁷³ that the civil process was obtained by one who did not have a cause of action,⁷⁴ that the debt for which civil process issued

had in fact been paid,⁷⁵ that the fine for nonpayment of which the warrant of arrest was issued was thereafter paid,^{75.5} or that the party procuring the

v. Brown, Thomson, Inc., 181 A. 531, 532, 120 Conn. 440—McGann v. Allen, 134 A. 810, 105 Conn. 177. Ga.—Teasley v. Nelson, 148 S.E. 534, 39 Ga.App. 773.

Ill.—Shemaitis v. Froemke, 138 N.E. 2d 839, 12 Ill.App.2d 231—Shemaitis v. Froemke, 127 N.E.2d 648, 6 Ill. App.2d 323—Love v. Goldenberg Furniture Co., 46 N.E.2d 111, 317 Ill.App. 381—Green v. Ross, 257 Ill. App. 344—Llogas v. Lowenguth, 215 Ill.App. 216.

Iowa.—Wilson v. Lapham, 195 N.W. 235, 196 Iowa 745.

Ky.—Stearns Coal Co. v. Johnson, 37 S.W.2d 38, 238 Ky. 247—Harper v. Howton, 241 S.W. 329, 194 Ky. 840.

Mich.—Doak v. Springstead, 279 N. W. 898, 284 Mich. 459.

Miss.—Gunter v. Reeves, 21 So.2d 468, 198 Miss. 31—*Corpus Juris* cited in King v. Weaver Pants Corporation, 127 So. 718, 719, 157 Miss. 77.

Mo.—Zeitinger v. Mitchell, 244 S.W. 2d 91.

N.J.—Baldwin v. Point Pleasant Beach & Surf Club, 66 A.2d 62, 3 N.J.Super. 284.

N.Y.—Beitch v. State, 113 N.Y.S.2d 439, 280 App.Div. 855, reargument and appeal denied 117 N.Y.S.2d 660, 280 App.Div. 1002—Nastasi v. State, 90 N.Y.S.2d 377, 275 App.Div. 524, affirmed 88 N.E.2d 658, 300 N. Y. 473—Lowande v. Eisenberg Farms, 20 N.Y.S.2d 747, 260 App. Div. 48.

Houghtaling v. State, 175 N.Y.S. 2d 659, 11 Misc.2d 1029—Schildhaus v. City of New York, 163 N.Y.S.2d 201, 7 Misc.2d 859—Lepre v. Kessler, 134 N.Y.S.2d 286, 206 Misc. 60—Warner v. State, 68 N.Y.S.2d 60, 189 Misc. 51, reversed on other grounds 71 N.Y.S.2d 559, 272 App. Div. 954, reversed on other grounds 79 N.E.2d 459, 297 N.Y. 395.

Guzy v. Guzy, 184 N.Y.S.2d 161—Mudge v. State, 45 N.Y.S.2d 896.

Ohio.—McFarland v. Shirkey, 151 N. E.2d 797, 106 Ohio App. 517, appeal dismissed 154 N.E.2d 83, 168 Ohio St. 288, and rehearing denied 155 N.E.2d 468, 106 Ohio App. 517, motion to certify overruled 155 N.E. 2d 925, 106 Ohio App. 517.

R.I.—Lee v. Jones, 116 A. 201, 44 R.I. 151.

Tex.—Workman v. Freeman, 289 S.W. 2d 910, 155 Tex. 474.

Corpus Juris Secundum cited in Pate v. Stevens, Civ.App., 257 S.W. 2d 763, 766, error dismissed.

Vt.—Rugg v. Degnan, 118 A. 588, 96 Vt. 175.

W.Va.—McNunis v. Zukosky, 89 S.E. 2d 354, 141 W.Va. 145.

Wis.—Rubin v. Pachefsky, 241 N.W. 370, 207 Wis. 375.

25 C.J. p 473 note 34.

Essentials stated

"It has been generally declared that in order that process may afford protection to the executive officer executing the same (1) the issuing court must have had jurisdiction of the subject-matter on which it acted in issuing said process . . . (2) the court must have had colorable authority to issue the process in question . . . (3) the process must be in the prescribed form or be a substantial compliance therewith; and (4) the process must not be void on its face."

Ala.—Phillips v. Morrow, 104 So. 260, 261, 213 Ala. 139, 40 A.L.R. 285, followed in Phillips v. Bailey, 104 So. 264, 213 Ala. 142.

Court order

(1) Sheriff and deputy, who imprisoned individual in accordance with chancellor's order, were not liable to the individual for false imprisonment, although chancellor's order may have been illegal, in view of the fact that the sheriff had to obey the order or subject himself to punishment for contempt.

Miss.—DeWitt v. Thompson, 7 So.2d 529, 192 Miss. 615.

(2) Under statutes providing for commitment of person mentally ill, where officers acted pursuant to court order to arrest and detain plaintiff as directed, they were fully protected from liability for so doing, although they did not possess a warrant or make return.

Ariz.—Savage v. Boies, 272 P.2d 349, 77 Ariz. 355.

(3) Sheriff, county jail warden, and two deputy sheriffs, carrying out county judge's order, which he had jurisdiction to make, in removing woman to hospital psychopathic ward from county jail, to which she had been remanded by police justice after binding her over to grand jury on charge of injuring public record, were not liable to her for false imprisonment.

U.S.—Ravenscroft v. Casey, C.C.A.N. Y., 139 F.2d 776, certiorari denied 65 S.Ct. 63, 323 U.S. 745, 89 L.Ed. 596, rehearing denied 65 S.Ct. 114, 323 U.S. 814, 89 L.Ed. 648.

Person privileged from arrest

Officer acting according to his precept in making arrest is, not tres-

passer, although person arrested is privileged from arrest.

Me.—Bragg v. Hatfield, 130 A. 233, 124 Me. 391.

Truth or falsity of complaint immaterial

Whether complaint on which arrest was made was true or false is immaterial in an action for false imprisonment.

Ohio.—Click v. Parish, 98 N.E.2d 333, 89 Ohio App. 318, affirmed 98 N.E. 2d 293, 155 Ohio St. 84.

Restraint under search warrant

(1) Reasonable surveillance of the party whose premises are being searched is authorized by a search warrant, and defendant keeping watch over plaintiff during search of plaintiff's premises under valid search warrant and preventing plaintiff from leaving room was not guilty of unlawful restraint of plaintiff's liberty.

Mo.—Harbison v. Chicago, R. I. & P. Ry. Co., 37 S.W.2d 609, 327 Mo. 440, 79 A.L.R. 1.

Tex.—Workman v. Freeman, 289 S.W. 2d 910, 155 Tex. 474.

(2) Officer holding a search warrant need have no fear of any civil action for damages against him for any unlawful arrest even though no contraband be found in possession of accused, and if contraband is discovered, arrest is then conclusively justified.

Tenn.—Murphy v. State, 254 S.W.2d 979, 194 Tenn. 698.

(3) Fact, however, that officers, in false imprisonment and arrest suit, had search warrant would not justify arrest.

Ga.—Sharpe v. Frost, 95 S.E.2d 309, 94 Ga.App. 444.

Person assisting in arrest

Under Connecticut law of false arrest and imprisonment, if municipal police officer was authorized to arrest railroad employee, no liability could attach to railroad for the assistance given officer by railroad detective in making the arrest.

U.S.—Burke v. New York, N. H. & H. R. Co., C.A.N.Y., 267 F.2d 894.

73. Miss.—King v. Weaver Pants Corporation, 127 So. 718, 157 Miss. 77.

25 C.J. p 474 note 35.

74. Conn.—McGann v. Allen, 134 A. 810, 105 Conn. 177.

75. N.E.—McDonough v. Telegraph Pub. Co., 39 N.B. 515.

75.5 N.Y.—Dakis v. City of New York, 160 N.Y.S.2d 654, 8 Misc.2d 581.

process did so from malicious⁷⁶ or other improper⁷⁷ motives, or obtained it by misrepresentations⁷⁸ or nondisclosure of facts,⁷⁹ does not prevent the process from being a complete protection. Likewise the fact that the committing magistrate acted maliciously does not go to the validity of his acts, but only to his motives, and the fact that the magistrate so acted does not constitute false imprisonment.⁸⁰

If the detention is under valid process, the person wrongfully detained must seek his remedy in some other form of action,⁸¹ the want of probable cause for belief in the guilt of accused not being material in this form of action.⁸² If the issuance of process is merely a sham to cover extortion or for some purpose other than a legal prosecution for an offense justifying arrest, some decisions hold that

it is not a protection,⁸³ whereas others hold that such a purpose does not prevent it from being a shield against an action for false imprisonment.⁸⁴

Such process is a protection only while it is in force,⁸⁵ and for an arrest thereunder within the jurisdiction of the court issuing it.⁸⁶

Form and requisites. Process in order to afford protection against an action for false imprisonment within this rule must be valid, although it may be informal or erroneous.⁸⁷ The validity of the process is not destroyed by defects which amount only to irregularities.⁸⁸ In the absence of statutory prescription as to form, process good at common law is sufficient.⁸⁹ Where, however, a statute applies, process must conform to its essential requirements.⁹⁰

76. Utah.—Smith v. Clark, 106 P. 653, 37 Utah 116, 26 L.R.A., N.S., 953, Ann.Cas.1912B 1366.
25 C.J. p 474 note 37.

77. Ga.—Michael v. Bacon, 63 S.E. 228, 5 Ga.App. 331.

Mich.—Tryon v. Pingree, 70 N.W. 905, 112 Mich. 338, 67 Am.S.R. 398, 37 L.R.A. 222.

Okla.—Corpus Juris Secundum cited in Ames v. Strain, 301 P.2d 641, 643.
25 C.J. p 474 note 38.

78. U.S.—Whitten v. Bennett, Conn., 86 F. 405, 30 C.C.A. 140.
Mass.—Coupal v. Ward, 106 Mass. 289.

79. Cal.—Donati v. Righetti, 97 P. 1128, 9 C.A. 45.
Utah.—Marks v. Sullivan, 33 P. 224, 9 Utah 12.
25 C.J. p 474 note 40.

80. S.D.—Tredway v. Birks, 242 N. W. 590, 59 S.D. 649.

81. Mo.—Dougherty v. Snyder, 71 S.W. 463, 97 Mo.App. 495.
25 C.J. p 474 note 41.

Malicious prosecution

Where arrest of which plaintiff complains was made under authority of a valid process, his remedy is an action for malicious prosecution, so that where plaintiff's arrest and detention in jail on charge of delivering check not backed by sufficient funds were under a valid warrant of arrest, plaintiff's remedy against defendants who procured the warrant was not that of an action for false imprisonment but was solely that of an action for malicious prosecution, even though warrant, which originally ran to the apparently fictitious drawer of the check, was amended at direction of defendants to include the name of plaintiff.

Ky.—Rader v. Parks, 258 S.W.2d 728.

82. Va.—Sands v. Norvell, 101 S.E. 569, 126 Va. 384.
25 C.J. p 474 note 42.

83. Mo.—Fellows v. Goodman, 49 Mo. 62.
25 C.J. p 474 note 43.

84. S.C.—McConnell v. Kennedy, 7 S.E. 76, 29 S.C. 180.
25 C.J. p 474 note 44.

85. U.S.—Stoyel v. Lawrence, C.C., 23 F.Cas.No.13,517, Brunn.Col.Cas. 311, 3 Day, Conn., 1.
N.Y.—Adams v. Freeman, 9 Johns. 117.
25 C.J. p 475 note 45.

86. N.Y.—MacDonnell v. McConville, 132 N.Y.S. 1085, 148 App.Div. 49, affirmed 103 N.E. 1126, 210 N.Y. 529.
25 C.J. p 475 note 46.

87. Cal.—Vallindras v. Massachusetts Bonding & Ins. Co., 265 P.2d 907, 42 C.2d 149.

N.Y.—Reilly v. State, 76 N.Y.S.2d 38, 190 Misc. 862—Douglas v. State, 52 N.Y.S.2d 857, 184 Misc. 441, affirmed 56 N.Y.S.2d 245, 269 App. Div. 521, appeal denied 68 N.E.2d 40, 295 N.Y. 941, affirmed 68 N.E.2d 605, 296 N.Y. 530.

Vona v. State, 54 N.Y.S.2d 453—Mudge v. State, 45 N.Y.S.2d 896.
R.I.—Lee v. Jones, 116 A. 201, 44 R.I. 151.

25 C.J. p 475 note 49.

Form and sufficiency of:

Executions against the person see Executions § 422.

Preliminary warrant or other process in criminal proceeding see Criminal Law §§ 316-329.

Warrant of commitment or mittimus in criminal proceeding see Criminal Law §§ 1607, 1608.

Writ, warrant, or order for civil arrest see Arrest §§ 57-59.

Indorsement

Uncertainty, if any, in indorsement of attorney for judgment creditor on

back of execution that officer should collect or commit, did not invalidate execution as a justification, since indorsement was no part of the process.

Me.—Trafton v. Hoxie, 180 A. 800, 134 Me. 1.

88. Ala.—Phillips v. Morrow, 104 So. 260, 213 Ala. 139, 40 A.L.R. 285, followed in Phillips v. Bailey, 104 So. 264, 213 Ala. 142.
Conn.—Chasoff v. Porto, 99 A.2d 189, 140 Conn. 267.

N.Y.—Schildhaus v. City of New York, 163 N.Y.S.2d 201, 7 Misc.2d 859.

25 C.J. p 475 note 50.

Affidavit

In the absence of a statute to the contrary, the sheriff may make the affidavit for a search warrant, and in so doing he violates no principle of public policy so as to be liable for false imprisonment.

Tex.—Cannon v. American Indemnity Co., Civ.App., 70 S.W.2d 815, error dismissed.

Information

In an action for false imprisonment, the information on which the warrant was issued under which plaintiff was arrested held sufficiently to charge the offense of larceny. N.Y.—Phillipson v. Ninno, 135 N.E. 270, 233 N.Y. 223.

Surplusage

Misnomer of statute in warrant, which may be disregarded as surplusage, does not vitiate the process as respects its sufficiency as justification.

Me.—Trafton v. Hoxie, 180 A. 800, 134 Me. 1.

89. N.Y.—Russell v. Hubbard, 6 Barb. 654.

90. Mont.—Corpus Juris cited in Folsom v. Fisco, 204 P. 367, 369, 62 Mont. 194.

25 C.J. p 475 note 52.

To constitute valid process affording a protection against false imprisonment, ordinarily process of arrest should run in the name of the state or sovereignty whose judicial officer issues it;⁹¹ but process in the name of the magistrate issuing it has been sustained as valid where statutory provisions did not prohibit.⁹² Further it should ordinarily show jurisdiction of the magistrate or judicial officer issuing it,⁹³ and should contain a command to the person to whom it is directed to make the arrest.⁹⁴ As a general rule the process must correctly name the person to be arrested,⁹⁵ or sufficiently identify him by description.⁹⁶ It has been held that process is not void in its face because of the want of a recital that a complaint or oath has been filed, it being presumed that the magistrate acted in conformity to law until the contrary appears.⁹⁷

The process, to be within the rule, should also recite the substance of the charge or reason for commitment,⁹⁸ although there is authority to the effect that at common law the recital in a warrant of the substance of the charge was not essential,⁹⁹ where it was in a process of commitment.¹ The warrant is sufficient in this respect if it designates the offense either by name only or by words from

which it may be inferred.² Process of arrest usually contains a command to make a return of the warrant and the officer's doings thereunder,³ but a failure to have it made returnable to a proper officer or court has been held to be a mere irregularity, so that the process afforded protection to the arresting officer.⁴

The process should doubtless be dated,⁵ and statutes ordinarily require that a warrant of arrest should be signed by the court or officer issuing it; warrants not properly signed have been held to afford no protection.⁶ It seems that at common law a seal was not necessary in order for a warrant to afford protection, even in criminal cases,⁷ although there is also authority to the contrary.⁸ In particular instances a statute may require that the warrant be under seal,⁹ and, by the weight of authority, it is not now essential unless a statute requires it.¹⁰ An alteration or spoliation of an information after it has been issued does not affect its validity in the form as it appeared without the alteration, if it is legible in such original form and was not thus altered by him who justifies under it.¹¹

Persons protected. The defense that the arrest or detention was pursuant to valid process is available to the party procuring its issuance,¹² the ju-

91. Ind.—Webster v. Farley, 6 Blackf. 163—Poulk v. Slocum, 3 Blackf. 421—Cooper v. Adams, 2 Blackf. 294.
25 C.J. p 475 note 53.

92. N.Y.—Dickenson v. Rogers, 19 Johns. 278.

93. Mich.—Crawford v. Huber, 184 N.W. 594, 215 Mich. 564, 39 A.L.R. 1392.

N.Y.—Schildhaus v. City of New York, 163 N.Y.S.2d 201, 7 Misc.2d 859.
25 C.J. p 475 note 55.

94. Mont.—Folsom v. Fisco, 204 P. 367, 62 Mont. 194.
25 C.J. p 475 note 56.

95. U.S.—West v. Cabell, Tex., 14 S.Ct. 752, 153 U.S. 78, 38 L.Ed. 643.
25 C.J. p 475 note 57.

S.D.—Bean v. Best, 93 N.W.2d 403.
96. Ga.—Blocker v. Clark, 54 S.E. 1022, 126 Ga. 484, 7 L.R.A., N.S., 268, 8 Ann.Cas. 31.
S.D.—Bean v. Best, 93 N.W.2d 403.
25 C.J. p 476 note 58.

97. Ill.—Lattin v. Smith, 1 Ill. 361.

98. Fla.—Roberts v. Dean, 187 So. 571, 133 Fla. 47, 136 Fla. 421.
25 C.J. p 476 note 61.

99. N.Y.—Smith v. Warden, 4 Hun 787—Payne v. Barnes, 5 Barb. 465.
Blythe v. Tompkins, 2 Abb.Pr. 468.

1. Ind.—Hiday v. Gilmore, 3 Blackf. 48.
25 C.J. p 477 note 63.

2. Ala.—Adams v. Coe, 26 So. 652, 123 Ala. 664.

25 C.J. p 477 note 64.

3. Mass.—Tubbs v. Tukey, 3 Cush. 438, 50 Am.D. 744.

Wis.—Messman v. Ihlenfeldt, 62 N.W. 522, 89 Wis. 585.

25 C.J. p 477 note 65.

4. Ala.—Phillips v. Morrow, 104 So. 260, 213 Ala. 139, 40 A.L.R. 285, followed in Phillips v. Bailey, 104 So. 264, 213 Ala. 142.

5. Ala.—Ahlrichs v. Rollo, 76 So. 37, 200 Ala. 271.

25 C.J. p 477 note 66.

6. Mich.—Whitman v. Branstrom, 168 N.W. 432, 202 Mich. 457.

25 C.J. p 477 note 68.

Signature by secretary

Where action was instituted before a justice of the peace whose eyes were bad on account of a cataract and the justice requested his secretary to sign his name to the summons which the secretary did in presence of the justice and under his supervision, the summons was valid and defendant who was taken into custody on an execution until the judgment was paid could not recover in an action for false arrest since under the circumstances the magis-

trate could deputize another to sign his name to the summons.

N.C.—Johnson v. Chambers, 14 S.E.2d 789, 219 N.C. 769.

7. N.Y.—Millett v. Baker, 42 Barb. 215.

25 C.J. p 477 note 69.

8. N.C.—Welch v. Scott, 27 N.C. 72.

9. N.Y.—Millett v. Baker, 42 Barb. 215.

Wis.—Bonesteel v. Bonesteel, 28 Wis. 245.

10. N.Y.—Millett v. Baker, 42 Barb. 215.

11. Ala.—King v. Robertson, 150 So. 154, 227 Ala. 378.

12. U.S.—Corpus Juris quoted in Schneider v. Kessler, C.C.A.N.J., 97 F.2d 542, 544.

Alaska.—Corpus Juris Secundum cited in Wilson v. Eberle, 15 Alaska 260, 267.

Conn.—McGann v. Allen, 134 A. 810, 105 Conn. 177.

Fla.—White v. Miami Home Milk Producers Ass'n, 197 So. 125, 143 Fla. 518.

Ga.—Teasley v. Nelson, 148 S.E. 534, 39 Ga.App. 773.

Ill.—Green v. Ross, 257 Ill.App. 344.

Iowa.—Wilson v. Lapham, 195 N.W. 235, 196 Iowa 745.

Mass.—Jordan v. C. I. T. Corporation, 19 N.E.2d 5, 302 Mass. 281—

dicial officer issuing it,¹³ even if he acts maliciously,¹⁴ the attorney who urged the issuance of process,¹⁵ and to the officer to whom it is addressed¹⁶ and those who assist him,¹⁷ and also to the inspector of a house of correction.¹⁸

Possession of a valid warrant, however, does not justify one not therein authorized to make the arrest.¹⁹ An officer who justifies his acts by virtue of his office must be an officer de jure.²⁰ When it is sought to impose liability on a party because of alleged defects in the form of the process, defects which are of such a nature that the process is regarded merely as irregular and not as void do not prevent the process from being a protection to the party procuring it,²¹ the judicial officer issuing it,²² and the officer executing it.²³

Parties who procure legal process are not accountable for an unlawful manner of executing it by the officer,²⁴ or because without participation therein by them the execution of the process is intrusted to an unauthorized person,²⁵ but may render themselves joint trespassers by participating in, assisting, commanding, or advising improper conduct.²⁶ If, however, the person executing the process is the agent of the one instigating the arrest, such principal may be liable for the unlawful acts of his agent.²⁷

§ 28. — Void, Erroneous, or Irregular Process

- a. In general
- b. Liability of parties

MacLean v. Naumkeag Trust Co., 167 N.E. 748, 268 Mass. 437.

Miss.—King v. Weaver Pants Corporation, 127 So. 718, 157 Miss. 77.
N.Y.—Levy v. Chasnoff, 283 N.Y.S. 891, 245 App.Div. 607.

Kaye v. Shane, 118 N.Y.S.2d 592, 204 Misc. 82—Damilitis v. Kerjas Lunch Corporation, 300 N.Y.S. 574, 165 Misc. 186.

Ohio.—Click v. Parish, 98 N.E.2d 293, 155 Ohio St. 84.

Wis.—Langen v. Borkowski, 206 N.W. 181, 188 Wis. 277, 43 A.L.R. 622. 25 C.J. p 477 note 73.

Probable cause

In suit for damages for false imprisonment, essential to the right to recover is the want on defendant's part of probable cause to believe plaintiff guilty of the offense charged, and when defendant has in good faith fully and fairly stated all the material facts within his knowledge to the prosecutor and signed the complaint on the latter's advice, a case of probable cause is established barring plaintiff's right to recover.

Mich.—Gooch v. Wachowiak, 89 N.W. 2d 496, 352 Mich. 347.

Sufficiency of information

Where defendant is charged with false imprisonment for causing plaintiff's arrest under a warrant which is alleged to have been void for want of sufficient information, great latitude of construction should be indulged in testing the sufficiency of such information, and neither complainant nor the justice of the peace should be made to respond in damages for failure to display a learning which they could not be presumed to possess. When so construed, the information is held not to be jurisdictionally defective and the warrant issued thereon a protection to defendant.

N.Y.—Vittorio v. St. Regis Paper Co., 145 N.E. 913, 239 N.Y. 148.

13. U.S.—*Corpus Juris* quoted in *Schneider v. Kessler*, C.C.A.N.J., 97 F.2d 542, 544.

Alaska.—*Corpus Juris Secundum* cited in *Wilson v. Eberle*, 15 Alaska 260, 267.

Ohio.—Click v. Parish, 98 N.E.2d 293, 155 Ohio St. 84.

Wis.—Langen v. Borkowski, 206 N.W. 181, 188 Wis. 277, 43 A.L.R. 622. 25 C.J. p 477 note 74.

14. Nev.—Gordon v. Nye County Fifth Judicial Dist. Ct., 131 P. 134, 36 Nev. 1, 44 L.R.A., N.S., 1078.

15. Wis.—Langen v. Borkowski, 206 N.W. 181, 188 Wis. 277, 43 A.L.R. 622.

16. U.S.—*Corpus Juris* quoted in *Schneider v. Kessler*, C.C.A.N.J., 97 F.2d 542, 544.

Ala.—King v. Robertson, 150 So. 154, 227 Ala. 378—Phillips v. Morrow, 104 So. 260, 213 Ala. 139, 40 A.L.R. 285, followed in Phillips v. Bailey, 104 So. 264, 213 Ala. 142.

Alaska.—*Corpus Juris Secundum* cited in *Wilson v. Eberle*, 15 Alaska 260, 267.

Cal.—Barrier v. Alexander, 224 P.2d 436, 100 C.A.2d 497.

D.C.—Fletcher v. McMahon, 121 F. 2d 729, 73 App.D.C. 263, certiorari denied 62 S.Ct. 131, 314 U.S. 662, 86 L.Ed. 531.

Ga.—Teasley v. Nelson, 148 S.E. 534, 39 Ga.App. 773.

Idaho.—*Corpus Juris* cited in *Hansen v. Lowe*, 100 P.2d 51, 57, 61 Idaho 138.

Iowa.—Wilson v. Lapham, 195 N.W. 235, 196 Iowa 745.

Mo.—Zeitinger v. Zitchell, 244 S.W. 2d 91.

Ohio.—Click v. Parish, 98 N.E.2d 293, 155 Ohio St. 84.

Vt.—Rugg v. Degnan, 118 A. 588, 96 Vt. 175.

Wis.—Langen v. Borkowski, 206 N.W. 181, 188 Wis. 277, 43 A.L.R. 622.

25 C.J. p 477 note 76.

17. U.S.—*Corpus Juris* quoted in *Schneider v. Kessler*, C.C.A.N.J., 97 F.2d 542, 544—*Elrod v. Moss*, C.C.A. S.C., 278 F. 123. 25 C.J. p 478 note 77.

18. Wis.—Langen v. Borkowski, 206 N.W. 181, 188 Wis. 277, 43 A.L.R. 622.

19. Ind.—American Express Co. v. Patterson, 73 Ind. 430.

Va.—Wells v. Jackson, 3 Munf. (17 Va.) 458.

20. Me.—Pooler v. Reed, 73 Me. 129.

21. Mo.—Shull v. Boyd, 158 S.W. 313, 251 Mo. 452. N.Y.—Jones v. Foster, 59 N.Y.S. 738, 43 App.Div. 33.

Dresser v. Van Pelt, 13 N.Y.Super. 687, 15 How.Pr. 19.

22. Ind.—Cooper v. Adams, 2 Blackf. 294.

N.Y.—Jones v. Foster, 59 N.Y.S. 738, 43 App.Div. 33.

23. Ala.—King v. Robertson, 150 So. 154, 227 Ala. 378.

25 C.J. p 478 note 82.

24. Or.—Neimitz v. Conrad, 29 P. 548, 22 Or. 164.

25 C.J. p 478 note 84.

25. S.C.—McConnell v. Kennedy, 7 S. E. 76, 29 S.C. 180.

26. Ohio.—Drinkwater v. Jones, 13 Ohio Cir.Ct. 489.

25 C.J. p 478 note 86.

Mere presence of person suing out writ of sequestration and failure to protest did not make him participant in unlawful arrest and assault by officer executing writ.

Tex.—Modesett v. Emmons, Civ.App., 286 S.W. 276, reversed on other grounds, Com.App., 292 S.W. 855.

27. S.C.—Stone v. Chambers, 32 S. C.L. 117.

25 C.J. p 478 note 87.

a. In General

In determining liability for false imprisonment, a distinction has been drawn between void, erroneous, and irregular process.

While the courts ordinarily distinguish between void and voidable process in determining liability for false imprisonment, there is, however, some apparent confusion in the decisions as to the use of the terms.²⁸ Void process has been defined to be such as the court has no power to award, or has not acquired jurisdiction to issue in the particular case, or which does not in some material respect comply in form with the legal requisites of such process, or which loses its vitality in consequence of noncompliance with a condition subsequent, obedience to which is rendered essential.²⁹ It is not necessary to set aside void process before starting suit for false imprisonment.³⁰

Erroneous process. Erroneous process usually signifies process issued because of the mistake or error of the court in a proceeding properly brought before it.³¹ It is a protection for acts done under it while it was in force.³²

Irregular process. Irregular process has been broadly defined to be such as the court has general jurisdiction to issue but which is unauthorized in the particular case by reason of the existence or nonexistence of some fact or circumstance rendering it improper in the given case.³³ The term has also been used in a narrower sense to mean process in obtaining which the party has proceeded without taking the steps required by law.³⁴ In the latter sense the distinction from erroneous process lies in the fact that in the case of an arrest under irregular process the party is responsible for ir-

regularity, and in the case of an arrest under erroneous process the court is responsible.³⁵ Irregular process is a protection until set aside,³⁶ and, before the arrested party can sue for false imprisonment, it is usually necessary to have the irregular process vacated by the court,³⁷ although in cases where the process is issued as a matter of course or ministerially, it seems that it may not be necessary to have it set aside.³⁸ When set aside it is not a protection to the party who procured it, even for acts done under it while in force,³⁹ although it protects the officer serving it.⁴⁰

b. Liability of Parties

- (1) Complainants
- (2) Clerical officers
- (3) Executive or ministerial officers

(1) Complainants

- (a) In criminal cases
- (b) In civil cases
- (c) Participation

(a) In Criminal Cases

The individual who merely makes a complaint or gives information concerning an alleged offense to the officer issuing the process is generally not liable for false imprisonment, even though the process was erroneously issued.

The general rule is that one who merely makes a complaint or lays facts before a judicial officer in a matter over which the officer has general jurisdiction is not liable for an arrest or detention under process issued by the officer, although its issuance was erroneous in the particular case, in the absence of any further action on his part constituting a participation in the arrest or detention.⁴¹ He

28. Ohio.—Brinkman v. Drolesbaugh, 119 N.E. 451, 97 Ohio St. 171, L.R.A. 1918F 1132.

29. N.Y.—Fischer v. Langbein, 8 N.E. 251, 103 N.Y. 84, 25 C.J. p 478 note 91.

30. N.Y.—Fischer v. Langbein, supra.

Dailey v. State, 75 N.Y.S.2d 40, 190 Misc. 542, 25 C.J. p 478 note 92.

31. N.Y.—Fischer v. Langbein, 8 N.E. 251, 103 N.Y. 84, 25 C.J. p 479 note 93.

32. Alaska.—Corpus Juris Secundum cited in Wilson v. Eberle, 15 Alaska 260, 267.

Me.—Winchester v. Everett, 15 A. 596, 80 Me. 535, 6 Am.S.R. 228, 1 L.R.A. 425.

N.Y.—Houghtaling v. State, 175 N.Y. S.2d 659, 11 Misc.2d 1049.

McKinney v. Macklis, 116 N.Y.S. 2d 216.

N.C.—Alexander v. Lindsey, 55 S.E.2d 470, 230 N.C. 663, 25 C.J. p 479 note 94.

Where a bona fide attempt is made to charge a possible offense under statute, but by reason of some defect or irregularity such charge is per se insufficient in law, the affidavit, information or indictment making such charge is voidable and not void and as to such voidable complaint or voidable processes issued thereon, there can be no false imprisonment per se.

Ohio.—Click v. Parish, 98 N.E.2d 333, 89 Ohio App. 318, affirmed 98 N.E. 2d 293, 155 Ohio St. 84.

33. N.Y.—Fischer v. Langbein, 8 N.E. 251, 103 N.Y. 84, 25 C.J. p 479 note 95.

34. N.Y.—Marks v. Townsend, 97 N.Y. 590.

25 C.J. p 479 note 96.

35. N.Y.—Simpson v. Hornbeck, 3 Lans. 53.

36. Idaho.—Hansen v. Lowe, 100 P. 2d 51, 61 Idaho 138, 25 C.J. p 479 note 98.

37. N.Y.—Fischer v. Langbein, 8 N.E. 251, 103 N.Y. 84, 25 C.J. p 479 note 99.

38. U.S.—Barnes v. Viall, C.C.R.I., 6 F. 661.

39. U.S.—Bryan v. Congdon, Kan., 86 F. 221, 29 C.C.A. 670, 25 C.J. p 479 note 2.

40. N.Y.—Hall v. Munger, 5 Lans. 100.

41. U.S.—Burke v. New York, N. H. & H. R. Co., C.A.N.Y., 267 F.2d 894, Smith v. Fontana, D.C.N.Y., 48 F. Supp. 55.

Ala.—Morgan v. Baird, 121 So. 526, 219 Ala. 225.

Cal.—Corpus Juris Secundum cited in

is protected because he has set a judicial officer in motion,⁴² and what that officer does, acting on his own responsibility, is not to be charged to complainant.⁴³ Complainant is not to be held liable if the proceedings taken by the judicial officer contain defects or omissions,⁴⁴ or if the magistrate unlawfully directs arrest without warrant.⁴⁵ The rule is otherwise, however, where complainant secures the issuance of process by a judicial officer who is entirely without jurisdiction.⁴⁶

According to the weight of authority complainant is protected where he does nothing more than lay the facts before the magistrate, although the facts are insufficient to show that the offense charged, or, indeed, any offense, has been committed.⁴⁷ More particularly is this true where the facts presented by complainant present in a slight degree a question calling for a judicial determination as to whether a crime has been committed by the party charged,⁴⁸ and as the attack on sufficiency of the complaint or information is not made directly, but in a collateral proceeding, great latitude of construction in sustaining the charge is indulged in.⁴⁹ Under this rule complainant may be protected, although it is apparent that the offense is barred by the statute of limitations,⁵⁰ and although the of-

fense is not alleged to have been committed within the jurisdiction,⁵¹ or although he knew that the facts stated did not constitute an offense for which an arrest was authorized.⁵²

In some jurisdictions, however, if the offense charged is no offense at all, the process does not constitute a justification.⁵³ A case does not fall within this rule, where giving the language employed in the affidavit its ordinary signification the court may gather from it that an offense has been committed or attempted.⁵⁴

A party who does no more than present a complaint to a competent judicial officer is not liable, although that officer issues a warrant void on its face and an arrest is made thereunder,⁵⁵ but he has been held liable where his own fault combined with that of the magistrate contributed to the issuance of a void warrant.⁵⁶

If the judicial officer has jurisdiction over the subject matter of violations of municipal ordinances, complainant is not liable, even if it develops that the arrest was in fact wrongful because the ordinance for the violation of which he was arrested was invalid.⁵⁷ Exemption from liability has also been allowed where the statute under which

Gogue v. MacDonald, 218 P.2d 542, 544, 35 C.2d 482, 21 A.L.R.2d 639.
La.—Pellifigue v. Judice, 98 So. 244, 154 La. 782.
Mich.—Tallis v. Stuart, 255 N.W. 354, 268 Mich. 84.
Mo.—Utz v. Mayes, App., 267 S.W. 59, certiorari quashed State ex rel. Utz v. Daues, Sup., 287 S.W. 606.
N.Y.—Vittorio v. St. Regis Paper Co., 145 N.E. 913, 239 N.Y. 148.
Traversara v. Pinelli, 140 N.Y.S. 2d 559.
N.C.—Alexander v. Lindsey, 55 S.E.2d 470, 230 N.C. 663.
R.I.—Lee v. Jones, 116 A. 201, 44 R. I. 151.
25 C.J. p 479 note 5.

"John Doe" warrant

Where the true name of defendant was not communicated to the magistrate issuing a warrant, and it was not prepared by him, the magistrate was not without jurisdiction to file the information and issue the warrant against "John Doe," although the informant and officer knew the name of accused; and the informant was not liable for false imprisonment, notwithstanding a statute, providing that the name of defendant, if known, be stated in the information.

Iowa.—Wilson v. Lapham, 195 N.W. 235, 196 Iowa 745.

42. Ill.—Mexican Cent. R. Co. v. Gehr, 66 Ill.App. 173.

N.C.—Bryan v. Stewart, 131 S.E. 286, 123 N.C. 92.

43. Hawaii.—Gomez v. Whitney, 21 Hawaii 539.

N.J.—Kendel v. Guterl, 87 A. 84, 84 N.J.Law 533.

N.Y.—Traversara v. Pinelli, 140 N.Y. S.2d 559.

25 C.J. p 480 note 8.

44. N.Y.—Vittorio v. St. Regis Paper Co., 145 N.E. 913, 239 N.Y. 148.
25 C.J. p 480 note 9.

45. Mich.—Poupard v. Dumas, 63 N. W. 301, 105 Mich. 326.

46. Mich.—Bates v. Kitchel, 125 N. W. 684, 160 Mich. 402.
25 C.J. p 480 note 11.

Persons who may make complaint

For instance, where the class of persons by whom complaint may be made is restricted by statutory provisions, the complaint of one who is not a member of such restricted class does not confer jurisdiction on the magistrate and the warrant does not protect the party obtaining it.

Conn.—Allen v. Gray, 11 Conn. 95.
Vt.—Goodell v. Tower, 58 A. 790, 77 Vt. 61, 107 Am.S.R. 745.

47. U.S.—Corpus Juris Secundum cited in Burlington Transp. Co. v. Josephson, C.C.A.S.D., 153 F.2d 372, 376.

La.—Girlinghouse v. Zwahlen, 3 La. App. 720.
25 C.J. p 480 note 13.

48. N.Y.—Vittorio v. St. Regis Paper Co., 145 N.E. 913, 239 N.Y. 148.
25 C.J. p 480 note 14.

49. U.S.—Smith v. Fontana, D.C.N. Y., 48 F.Supp. 55.

Neb.—Miller v. Woods, 36 N.W. 483, 23 Neb. 200.

25 C.J. p 480 note 15.

50. S.D.—Smith v. Jones, 92 N.W. 1084, 16 S.D. 337.

51. N.Y.—Whitney v. Hanse, 55 N.Y. S. 375, 36 App.Div. 420.

52. N.J.—Booth v. Kurrus, 26 A. 1013, 55 N.J.Law 370.

53. Tex.—Duncan v. Piper, Civ.App., 79 S.W.2d 172.

25 C.J. p 481 note 19.

54. Ala.—Rhodes v. King, 52 Ala. 272.

Campbell v. Johnson, 59 So. 708, 5 Ala.App. 518.

55. Utah.—Smith v. Clark, 106 P. 635, 37 Utah 116, 26 L.R.A., N.S., 953, Ann.Cas.1912B 1366.
25 C.J. p 481 note 21.

56. Ala.—Oates v. Bullock, 33 So. 835, 136 Ala. 537, 96 Am.S.R. 38.
25 C.J. p 481 note 22.

57. Mich.—Tillman v. Beard, 80 N. W. 248, 121 Mich. 475, 46 L.R.A. 215.

25 C.J. p 481 note 23.

the judicial officer acted was unconstitutional;⁵⁸ but the contrary ruling has also been made.⁵⁹

(b) In Civil Cases

Generally, a void writ or process in a civil case affords no justification; an irregular process is protection until it is set aside, but, when set aside, affords no protection, for acts done under it; an erroneously issued process or writ affords protection.

Although the courts have not been free from contrariety in their application, the underlying principles governing the liability of a complainant who secures an arrest or detention on civil process are by the weight of authority established as follows: (1) Where the writ or process under which plaintiff is detained is void, it furnishes no justification to the party securing it and he is liable in an action for false imprisonment without regard to whether or not the process has been set aside before the action is brought.⁶⁰ (2) Where the writ or process is irregular but is not absolutely void, an action will not lie until it is set aside, but, when it is set aside, it ceases to be a protection for acts done under it while it was in force.⁶¹ (3) Where the process is regularly issued in a case in which the court had jurisdiction, it constitutes a justification to the party securing its issuance for that which is done under it, although it was erroneously issued and may be set aside.⁶²

A party who merely files an affidavit for a *capias* and leaves the matter wholly in the hands of the justice to issue the writ or not as he sees fit, and who neither aids nor advises as to any future steps or action in the matter, is not liable to a person who may thereafter be arrested on a *capias* issued by the justice.⁶³ To afford protection to complainant

the process must be the result of a judicial, and not a ministerial, act;⁶⁴ and, if the act throughout is the act of the party and there is no judicial determination, the party is liable for a wrongful detention,⁶⁵ whether it was committed with or without malice.⁶⁶ A judgment will justify the acts of a party done under it while it is in force, if it is merely erroneous.⁶⁷

Decision as to jurisdiction. While it is sometimes broadly stated that the decision of the judicial officer as to the sufficiency of the showing made to him on which he issued his process will constitute a protection to complainant,⁶⁸ the determination of a judicial officer that he has jurisdiction will not confer jurisdiction on him when in fact he has no jurisdiction and process issued by him under such circumstances cannot be regarded as merely erroneous.⁶⁹

A complaint or affidavit is sufficient to confer jurisdiction when the proof presented, although slight and inconclusive, has a legal tendency to make out a proper case in all its parts for issuing process,⁷⁰ and is sufficient if it contains terms substantially equivalent to those of the statute,⁷¹ and although formalities in the execution of the complaint or preliminary proceedings have not been complied with;⁷² but, when there is a total defect of evidence as to any essential point, the complaint is not sufficient to confer jurisdiction,⁷³ and, where statutes require satisfactory evidence to be submitted to the judge before he is authorized to issue process, the process, to protect the party, should be founded on a complaint containing some legal evidence to sustain the cause for the arrest.⁷⁴

58. Mass.—Barker v. Stetson, 7 Gray 53, 66 Am.D. 457.

Ohio.—Williams v. Morris, 14 Ohio Cir.Ct., N.S., 353.

59. Neb.—Scott v. Flowers, 84 N.W. 81, 60 Neb. 675.
25 C.J. p 481 note 25.

60. N.Y.—Troutman v. State, 79 N.Y.S.2d 709, 273 App.Div. 619—Thomas v. First Nat. Bank of Lisbon, 33 N.Y.S.2d 500, 263 App.Div. 476—Rizzo v. Riddell, 27 N.Y.S.2d 837, 262 App.Div. 779.
Grago v. Vassello, 19 N.Y.S.2d 34, 173 Misc. 736.
25 C.J. p 482 note 31.

Body executions

Mich.—Dallas v. Garras, 10 N.W.2d 897, 306 Mich. 313.

61. U.S.—Bryan v. Congdon, Kan., 86 F. 221, 29 C.C.A. 670.
Mich.—Dallas v. Garras, 10 N.W.2d 897, 306 Mich. 313.

N.Y.—Fischer v. Langbein, 8 N.E. 251, 103 N.Y. 84.

62. Conn.—McGann v. Allen, 134 A. 810, 105 Conn. 177.

Ga.—Melton v. Jenkins, 178 S.E. 754, 50 Ga.App. 615.

Mich.—Dallas v. Garras, 10 N.W.2d 897, 306 Mich. 313.

N.Y.—Neugold v. Ace Mail Advertising, 280 N.Y.S. 302, 244 App.Div. 675.
25 C.J. p 482 note 33.

63. Ind.—Batten v. McCarty, 158 N.E. 583, 86 Ind.App. 462.

64. U.S.—Bryan v. Congdon, Kan., 86 F. 221, 29 C.C.A. 670.
25 C.J. p 482 note 34.

65. U.S.—Barnes v. Viall, C.C.R.I., 6 F. 661.
25 C.J. p 482 note 35.

66. U.S.—Barnes v. Viall, supra.

67. N.Y.—Hallock v. Dominy, 69 N.Y. 238.

25 C.J. p 482 note 37.

68. Cal.—Dusy v. Helm, 59 C. 188.
Ill.—Feld v. Loftis, 88 N.E. 281, 240 Ill. 105.

69. Cal.—Fukumoto v. Marsh, 62 P. 303, 509, 130 C. 66, 80 Am.S.R. 73.
25 C.J. p 482 note 40.

70. Mich.—Johnson v. Morton, 53 N.W. 816, 94 Mich. 1.
25 C.J. p 482 note 41.

71. U.S.—Norman v. Manciette, C.C. Or., 18 F.Cas.No.10,300, 1 Sawy. 484.
N.Y.—Miller v. Adams, 52 N.Y. 409.

72. Ill.—Outlaw v. Davis, 27 Ill. 467.
25 C.J. p 483 note 43.

73. Mich.—Paulus v. Grobben, 62 N.W. 160, 104 Mich. 42.
25 C.J. p 483 note 44.

74. N.Y.—Fischer v. Langbein, 8 N.E. 251, 103 N.Y. 84.
25 C.J. p 483 note 45.

Prior proceedings irregular or erroneous. It is the general rule that it is incumbent on private persons, voluntarily causing the enforcement of a writ, to find a record that will support the process,⁷⁵ and it has been held that a person causing an arrest and imprisonment for debt is liable for damages unless there has been a strict compliance with the law giving the right to cause such arrest.⁷⁶ Thus a party has been held liable for an arrest pursuant to process procured by him without first making the affidavit required by statute to authorize its issuance in such a case,⁷⁷ or unless, as required by law, he duly files such affidavit with the magistrate,⁷⁸ or where he issues a process of arrest to which he is not entitled because an appeal was pending,⁷⁹ or in violation of a stay of proceedings,⁸⁰ or because it is issued after the lawful time limit,⁸¹ or because, although the record justifies its issuance, he is a mere stranger to the case without authority to issue it,⁸² or where process is procured in the name of a dead man,⁸³ or where process was issued after the judgment debtor had been discharged in bankruptcy,⁸⁴ or where the pendency of an action is a condition precedent to the legal right to issue an order of arrest, and he procures such an order made when no action is pending.⁸⁵

Liability has also been imposed where the arrested party was induced by fraud to come within the jurisdiction in which process was served,⁸⁶ and,

where a creditor obtains process of arrest purely to extort payment of a debt, from his debtor, liability has been imposed, such proceeding being an abuse of legal process on the part of the creditor.⁸⁷ Where the record justifies the issuance of process of arrest, the party is protected,⁸⁸ although the process itself contains irregularities.⁸⁹

Clear absence of jurisdiction. In the clear absence of all jurisdiction the party procuring process is liable,⁹⁰ as, for instance, where the court being in vacation was without authority to issue process,⁹¹ or lost jurisdiction of the case by an unauthorized adjournment thereof,⁹² or the process was issued by a judge, whereas the statute required it to be issued by the court.⁹³ A party has been held liable where he causes an arrest for a debt in a case where a statutory enactment provides that none shall be arrested for such a debt,⁹⁴ or brings about an arrest in the first instance where a statute provides that such arrest is lawful when the debtor has property to satisfy the debt,⁹⁵ or brings about the arrest of a female where statutory provisions prohibit the arrest of females,⁹⁶ or brings about the arrest of one as an absconding debtor where no statute authorizes an arrest on that ground.⁹⁷

Where the judicial officer issues process on his own initiative, without the direction of the party, the party cannot be held responsible,⁹⁸ and the

75. Mo.—Tiede v. Fuhr, 175 S.W. 910, 264 Mo. 622.
25 C.J. p 483 note 46.

Void judgment

Where proof of service was void on its face, judgment was also void, and defendant arrested and imprisoned thereunder could maintain action for illegal arrest and imprisonment without first instituting suit to set aside judgment against him.

S.C.—Cannon v. Haverty Furniture Co., 183 S.E. 469, 179 S.C. 1.

76. S.C.—Cannon v. Haverty Furniture Co., *supra*.

77. Mass.—Cody v. Adams, 7 Gray 59.

N.Y.—Ackroyd v. Ackroyd, 3 Daly 38.

78. Vt.—Whitcomb v. Cook, 39 Vt. 585.

79. Mass.—Winslow v. Hathaway, 1 Pick. 211.

80. N.Y.—Ackroyd v. Ackroyd, 3 Daly 38.

81. Mich.—Porrett v. Lauer, 151 N. W. 619, 184 Mich. 497.
25 C.J. p 483 note 51.

82. Vt.—Pierson v. Gale, 8 Vt. 509, 30 Am.D. 487.

83. Ky.—Webber v. Kenny, 1 A.K. Marsh. 345.

84. N.Y.—Nossek v. A. H. Todd & Son, 290 N.Y.S. 253, 160 Misc. 528.

85. W.Va.—Ogg v. Murdock, 25 W. Va. 139.

86. Ill.—Wanzer v. Bright, 52 Ill. 35.
Mass.—Paine v. Kelley, 83 N.E. 8, 197 Mass. 22.

87. Me.—Dunsmore v. Pratt, 99 A. 717, 116 Me. 22.
25 C.J. p 484 note 56.

88. S.C.—Wilkins v. Hall, 13 S.C.L. 205.

89. U.S.—Devlin v. Gibbs, D.C., 7 F. Cas.No.3,842, 4 Cranch C.C. 626.

90. Alaska.—*Corpus Juris Secundum* cited in Wilson v. Eberle, 15 Alaska 260, 267.

Colo.—*Corpus Juris* cited in Pomeranz v. Class, 257 P. 1086, 1092, 82 Colo. 173.

N.Y.—Rizzo v. Riddell, 27 N.Y.S.2d 837, 262 App.Div. 779.

Grago v. Vassello, 19 N.Y.S.2d 34, 173 Misc. 736.

25 C.J. p 484 note 59.

91. Ind.—Taylor v. Moffatt, 2 Blackf. 305.

92. Wis.—Holz v. Rediske, 92 N.W. 1105, 116 Wis. 353.

93. Mich.—Whitman v. Branstrom, 168 N.W. 432, 202 Mich. 457.

94. Me.—Green v. Morse, 5 Me. 291.
25 C.J. p 484 note 65.

Judgment founded on note

Where action before justice of the peace was founded on a note, judgment based thereon furnished no justification for the issuance of body execution against the maker and such execution afforded instigators no protection against cause of action for false arrest and imprisonment.

N.Y.—Thomas v. First Nat. Bank of Lisbon, 33 N.Y.S.2d 500, 263 App. Div. 476.

95. N.Y.—Bergman v. Noble, 10 N.Y. St. 27, 45 Hun 133, 12 N.Y.Civ. Proc. 256, 19 Abb.N.Cas. 62.

Pa.—Allison v. Rheam, 3 Serg. & R. 139, 8 Am.D. 644.
25 C.J. p 484 note 66.

96. Cal.—Nelson v. Kellogg, 123 P. 1115, 162 C. 621, Ann.Cas.1913D 759.

97. Wash.—Hamilton v. Pacific Drug Co., 139 P. 642, 78 Wash. 689.

98. N.Y.—Bissell v. Gold, 1 Wend. 210, 19 Am.D. 480.
25 C.J. p 484 note 70.

question whether the party did order, direct, or instigate the detention should, if the facts are disputed, be left to the jury.⁹⁹ If, however, a party ratifies and adopts acts of the judicial officer done in the clear absence of jurisdiction, he becomes liable as if he had ordered them in the first instance.¹

Effect of malice or want of probable cause. If the case is such that the party obtaining process would not otherwise be liable, the fact that he procured it with malicious motives or in the absence of probable cause does not impose liability in this form of action,² nor is it important that he did not disclose all the material facts.³ On the other hand, although the party procuring process may have acted in good faith and without any wrong motive, if the process is wholly void, it forms no protection,⁴ although it may be considered on the question of malice to avoid exemplary damages.⁵

(c) Participation

A party obtaining process who participates in making an unlawful arrest or detention thereunder may be held liable for false imprisonment.

A party obtaining process incurs no liability unless he does something more than make a complaint before a judicial officer having jurisdiction over the general subject matter and person of the offender, by interfering and instigating the officer to enforce the process,⁶ nor is he liable for the acts of the officer in excess of his lawful authority, even if the arrest was under invalid process.⁷ If he does interfere and instigate the officer he is liable, where the process, although regular on its face and apparently good, is unauthorized, or was issued by a tribunal having no jurisdiction or acting beyond

the scope of its power.⁸ A prosecutor of the pleas acting in his public capacity in delivering process to an officer and directing its service has been exempted from liability.⁹ A complainant may also be held liable if he takes part in bringing about a detention under process void on its face.¹⁰

What constitutes participation depends on the facts and circumstances of each case.¹¹ A complainant who participates in having an illegal warrant issued may be liable for false imprisonment thereunder,¹² as where he procures its issuance on a false statement that the prosecuting attorney desired its issuance,¹³ and liability was imposed where he forged the justice's name to a writ and thus caused a detention.¹⁴ It is not indispensable that the party be present at the time of the arrest.¹⁵ Even though the arrested party may have been originally arrested without the knowledge or consent of the party instigating it, nevertheless, if the detention is illegal and continues by the direction or with the advice or assistance of the party instigating it, liability is imposed.¹⁶

(2) Clerical Officers

A clerk of court cannot be held liable for the issuance of process in conformity with an order of the court or judicial officer having jurisdiction to order process to issue.

Where the court or judicial officer has jurisdiction to order process to issue, the clerk of court cannot be held liable if he issues process in conformity with such order.¹⁷ He may be responsible, however, if he assumes judicial power to issue process in a case where he does not possess such power.¹⁸ Where process is issued as a matter of course by the clerk on the application of a party,

99. Wis.—Fenelon v. Butts, 5 N.W. 784, 49 Wis. 342.

1. Me.—Stuart v. Chapman, 70 A. 1069, 104 Me. 17.
25 C.J. p 484 note 72.

2. N.Y.—Marks v. Townsend, 97 N. Y. 590.
25 C.J. p 484 note 73.

3. N.Y.—Marks v. Townsend, supra.
25 C.J. p 484 note 74.

4. Cal.—Nelson v. Kellogg, 123 P. 1115, 162 C. 621, Ann.Cas.1913D 759.
25 C.J. p 484 note 75.

5. Mich.—Wachsmuth v. Merchants' Nat. Bank, 56 N.W. 9, 96 Mich. 426, 21 L.R.A. 278.

6. Ga.—Melton v. Jenkins, 178 S.E. 754, 50 Ga.App. 615.
25 C.J. p 485 note 77.

7. N.Y.—Baker v. Secor, 4 N.Y.S. 303, 51 Hun 643.
25 C.J. p 485 note 78.

8. Mass.—Emery v. Hapgood, 7 Gray 55, 66 Am.D. 459.
25 C.J. p 485 note 79.

9. N.J.—Hann v. Lloyd, 11 A. 346, 50 N.J.Law 1.

10. W.Va.—Williamson v. Glen Alum Coal Co., 78 S.E. 94, 72 W.Va. 288.
25 C.J. p 485 note 83.

11. Mich.—Love v. Halladay, 102 N. W. 1027, 139 Mich. 575.
25 C.J. p 485 note 84.

Participation in service not shown

(1) By defendant acting as messenger to carry the information to the circuit clerk and the capias to the sheriff.

Mo.—Utz v. Mayes, Mo.App., 267 S. W. 59, certiorari quashed State ex rel. Utz v. Daues, Sup., 287 S.W. 606.

(2) Other cases see 25 C.J. p 485 note 84 [b].

12. Cal.—Redgate v. Southern Pac. Co., 141 P. 1191, 24 C.A. 573.

N.J.—Earl v. Winne, 101 A.2d 535, 14 N.J. 119.

25 C.J. p 481 note 27.

13. Mo.—McCaskey v. Garrett, 91 Mo.App. 354.

14. Conn.—Moulton v. Burbanks, 1 Root 264.

15. Ala.—Clifton v. Grayson, 2 Stew. 412.

16. Mo.—Monson v. Rouse, 86 Mo. App. 97.

17. Ga.—Butler v. Tattnall Bank, 79 S.E. 456, 140 Ga. 579.
25 C.J. p 485 note 86.

18. Ind.—Cleveland v. Emerson, 99 N.E. 796, 51 Ind.App. 339.
25 C.J. p 485 note 89.

he is not liable where there is nothing on the records to show that its issuance is unlawful, but may be liable if he issues it contrary to law on facts within his knowledge.¹⁹

(3) Executive or Ministerial Officers

Process valid on its face issued by a court or judicial officer having apparent jurisdiction affords protection to the officer executing it, but generally he is not protected by the process where the court is without jurisdiction, or where the process is void on its face.

Process not void on its face issued by a judicial tribunal having general jurisdiction of the subject matter and of the person is a protection to the officer executing it.²⁰ The doctrine applies to courts of limited as well as general jurisdiction, if the subject matter of the suit appears to be within the jurisdiction of the court.²¹ The officer is not required to look beyond the writ to the validity and

regularity of the proceedings on which it is founded²² or to exercise his judgment touching its validity in point of law.²³ His exemption from liability is unaffected by his actual knowledge of any invalidity or irregularity in such antecedent proceedings,²⁴ or by the fact that the process may have been obtained fraudulently,²⁵ or that his feelings toward the party arrested were malicious;²⁶ nor is exemption affected by the fact that the judicial officer issuing process committed an error in doing so,²⁷ or by notice of facts which might render the arrest improper.²⁸ The fact that the process was subsequently set aside does not nullify its protection to the officer.²⁹

If the judicial officer issuing the process has jurisdiction over the subject of violations of municipal ordinances, he is not liable, even if it turns out that the ordinance is invalid.³⁰ Process, which

19. U.S.—Barnes v. Viall, C.C.R.I., 6 F. 661.

25 C.J. p 485 note 91.

20. U.S.—Sanford v. Robbins, C.C.A. Ga., 115 F.2d 435, certiorari denied Robbins v. Sanford, 61 S.Ct. 737, 312 U.S. 697, 85 L.Ed. 1132—Reilly v. U. S. Fidelity & Guaranty Co., C.C.A.Cal., 15 F.2d 314.

Ala.—King v. Robertson, 150 So. 154, 227 Ala. 378—Phillips v. Morrow, 104 So. 260, 213 Ala. 139, 40 A.L.R. 285, followed in Phillips v. Bailey, 104 So. 264, 213 Ala. 142.

Cal.—Vallindras v. Massachusetts Bonding & Ins. Co., 265 P.2d 907, 42 C.2d 149.

Jackson v. Osborn, 254 P.2d 871, 116 C.A.2d 875—Downey v. Allen, 97 P.2d 515, 36 C.A.2d 269—Malone v. Carey, 62 P.2d 166, 17 C.A.2d 505.

Colo.—Pomeranz v. Class, 257 P. 1086, 82 Colo. 173.

Conn.—McGann v. Allen, 134 A. 810, 105 Conn. 177.

Idaho.—Hansen v. Lowe, 100 P.2d 51, 61 Idaho 138.

Mo.—Corpus Juris quoted in Thompson v. Farmers' Exchange Bank, 62 S.W.2d 803, 813, 333 Mo. 437.

N.C.—Alexander v. Lindsey, 55 S.E. 2d 470, 230 N.C. 663.

Ohio.—McFarland v. Shirkey, App., 151 N.E.2d 797—Maxey v. Gather, 114 N.E.2d 607, 94 Ohio App. 115—Click v. Parish, 98 N.E.2d 333, 89 Ohio App. 318, affirmed 98 N.E. 2d 293, 155 Ohio St. 84.

Wash.—Pallett v. Thompkins, 118 P. 2d 190, 10 Wash.2d 697.

25 C.J. p 486 note 92.

Jailer who receives and confines one in jail under illegal commitment is not liable for false imprisonment. Ky.—Pratt v. Gross, 92 S.W.2d 788, 263 Ky. 521.

Process regular on face

Process is "regular on its face"

when it proceeds from a court, officer, or body having authority of law to issue process of such nature, and is legal in form, and contains nothing to fairly apprise anyone that it was issued without authority.

Cal.—Jackson v. Osborn, 254 P.2d 871, 116 C.A.2d 875.

21. U.S.—Reilly v. U. S. Fidelity & Guaranty Co., C.C.A.Cal., 15 F.2d 314.

25 C.J. p 486 note 93.

22. Ala.—King v. Robertson, 150 So. 154, 227 Ala. 378—Phillips v. Morrow, 104 So. 260, 213 Ala. 139, 40 A.L.R. 285, followed in Phillips v. Bailey, 104 So. 264, 213 Ala. 142. Cal.—Burlingame v. Traeger, 281 P. 1051, 101 C.A. 365.

Idaho.—Hansen v. Lowe, 100 P.2d 51, 61 Idaho 138.

Mo.—Corpus Juris quoted in Thompson v. Farmers' Exchange Bank, 62 S.W.2d 803, 813, 333 Mo. 437.

N.Y.—Nastasi v. State, 90 N.Y.S.2d 377, 215 App.Div. 524, affirmed 88 N.E.2d 658, 300 N.Y. 473.

25 C.J. p 486 note 94.

23. Hawaii.—Gomez v. Whitney, 21 Hawaii 539.

Mo.—Corpus Juris quoted in Thompson v. Farmers' Exchange Bank, 62 S.W.2d 803, 813, 333 Mo. 437.

N.Y.—Fishbein v. State, 120 N.Y.S. 2d 92, 204 Misc. 151, affirmed 125 N.Y.S.2d 845, 282 App.Div. 600, appeal denied 127 N.Y.S.2d 827, 282 App.Div. 1093.

24. Mass.—Underwood v. Robinson, 106 Mass. 296.

Utah.—Marks v. Sullivan, 33 P. 224, 9 Utah 12.

Error in summons

Deputy sheriff serving capias which was regular on its face was not liable in an action of trespass

for false imprisonment, notwithstanding only a blank form of summons had previously been served on arrested person, since officer was entitled to protection from charge of assault and false imprisonment, as any other officer would have been, notwithstanding he happened to be the same officer who made the error in the return of the summons. Mass.—David v. Larochele, 5 N.E.2d 571, 296 Mass. 302.

25. Idaho.—Peterson v. Merritt, 137 P. 526, 25 Idaho 324.

25 C.J. p 487 note 97.

Perjury

A sheriff and his deputy were not liable for deputy's arrest under warrant which was valid on its face but which was allegedly void because person who swore to complaint committed perjury.

Cal.—Downey v. Allen, 97 P.2d 515, 36 C.A.2d 269.

26. Tex.—Regan v. Jessup, 77 S.W. 972, 34 Tex.Civ.App. 74.

27. Colo.—Pomeranz v. Class, 257 P. 1086, 82 Colo. 173.

25 C.J. p 487 note 99.

28. Mass.—Cassier v. Fales, 1 N.E. 922, 139 Mass. 461.

25 C.J. p 487 note 1.

29. Mich.—Schultz v. Huebner, 66 N.W. 57, 108 Mich. 274.

N.Y.—Nastasi v. State, 90 N.Y.S.2d 377, 215 App.Div. 524, affirmed 88 N.E.2d 658, 300 N.Y. 473.

Ohio.—Brinkman v. Drolesbaugh, 119 N.E. 451, 97 Ohio St. 171, L.R.A. 1918F 1132.

25 C.J. p 487 note 2.

30. Me.—Rush v. Buckley, 61 A. 774, 100 Me. 322, 70 L.R.A. 464, 4 Ann. Cas. 318.

25 C.J. p 487 note 3.

because of its having been issued irregularly by a party is not a protection to him, is nevertheless a protection to the officer executing it,³¹ and to those who assist him.³² If, however, the officer is a party to the issuance and service of process which is merely a sham to cover extortion or some purpose other than the prosecution of the alleged offender for an offense justifying arrest he is liable.³³ Accordingly, an arresting officer is not protected from liability for an illegal arrest and imprisonment by a warrant procured by him for an offense he knew had not been committed.³⁴

Court without jurisdiction. In cases where, although the process appears regular on its face, the judicial tribunal has in fact no jurisdiction the general rule is that the officer is not protected by the process;³⁵ other decisions modify this rule by holding the officer liable if he enforces process after

notice of facts legally sufficient to establish lack of jurisdiction.³⁶ Likewise an officer has been held liable where he made the arrest under process issued pursuant to an unconstitutional statute.³⁷

Process void on face. The officer is not protected where the process is void on its face,³⁸ as where it does not disclose an offense known to the law,³⁹ or does not show the authority of the magistrate to issue it,⁴⁰ or discloses an offense over which the court has no jurisdiction,⁴¹ or shows that the crime attempted to be charged was not, in fact, committed,⁴² or where the proceedings show that they were instituted by one without legal authority to do so,⁴³ or that the right to arrest thereunder had expired through lapse of time,⁴⁴ or where a body writ, issued as a *capias*, discloses that it is based on a declaration stating a cause of action for which such remedy is not available.⁴⁵ The officer may refuse

31. N.Y.—Hall v. Munger, 5 Lans. 100.

Chapman v. Dyett, 11 Wend. 31, 25 Am.D. 598.

Vt.—Pierson v. Gale, 8 Vt. 509, 30 Am.D. 487.

32. Ind.—Goodwine v. Stephens, 63 Ind. 112.

Vt.—Pierson v. Gale, 8 Vt. 509, 30 Am.D. 487.

33. Ill.—Slomer v. People, 25 Ill. 70, 76 Am.D. 786.

S.C.—State v. Greenwood, 8 S.C.L. 420.

34. U.S.—Inmon v. State of Mississippi, C.C.A.Miss., 278 F. 23.

35. Ga.—Stembridge v. Wright, 124 S.E. 115, 32 Ga.App. 587.

25 C.J. p 487 note 7.

Knowledge of lack of jurisdiction

Where a justice of the peace signed and delivered to a deputy sheriff a commitment of plaintiff to jail for contempt of court, without holding court and without hearing any evidence as to plaintiff's guilt, his acts were without jurisdiction, of which fact the deputy sheriff had knowledge, rendering him liable for false imprisonment for executing the process.

Ky.—Pratt v. Gross, 92 S.W.2d 788, 263 Ky. 521.

36. Mass.—Tellefsen v. Fee, 46 N.E. 562, 168 Mass. 188, 60 Am.S.R. 379, 45 L.R.A. 481.

25 C.J. p 488 note 8.

No want of jurisdiction apparent

Where the warrant was regular on its face and disclosed no want of jurisdiction in the magistrate who issued it, the officer who served the process could not be held for false imprisonment, although in fact the magistrate did not have jurisdiction.

U.S.—Reilly v. U. S. Fidelity & Guaranty Co., C.C.A.Cal., 15 F.2d 314.

37. Ind.—Sumner v. Beeler, 50 Ind. 341, 19 Am.R. 718.

38. U.S.—Burke v. New York, N. H. & H. R. Co., C.A.N.Y., 267 F.2d 894 —Williams v. Franzoni, C.A.Vt., 217 F.2d 533—Reilly v. U. S. Fidelity & Guaranty Co., C.C.A.Cal., 15 F.2d 314.

Ala.—Phillips v. Morrow, 97 So. 130, 210 Ala. 34.

Ga.—Lovell v. Drake, 3 S.E.2d 783, 60 Ga.App. 325.

Mich.—Crawford v. Huber, 184 N.W. 594, 215 Mich. 564, 39 A.L.R. 1392.

Mont.—Folsom v. Fisco, 204 P. 367, 62 Mont. 194.

Wis.—Rubin v. Pachefsky, 241 N.W. 370, 207 Wis. 375.

25 C.J. p 488 note 10.

Mere blotting out or erasure of abbreviation “(Col.)” following name of person directed to be arrested, before sheriff received warrant, did not render warrant void on its face.

Ala.—King v. Robertson, 150 So. 154, 227 Ala. 378.

39. Ala.—Crumpton v. Newman, 12 Ala. 199, 46 Am.D. 251—Duckworth v. Johnston, 7 Ala. 578.

Mich.—Larson v. Collins, 162 N.W. 86, 195 Mich. 492.

25 C.J. p 488 note 11.

Statute authorizing civil liability

Where a constable made an arrest on a warrant issued by a justice of the peace for conducting a dance hall on Sunday in violation of a statute which does not authorize the issuing of a warrant, but imposes no more than a civil liability, the complaint showed on its face that the warrant was unauthorized, and the writ was not a protection to the officer serving it, since it was not “fair on its face.”

Mich.—Crawford v. Huber, 184 N.W. 594, 215 Mich. 564, 39 A.L.R. 1392.

40. Me.—Faloon v. O’Connell, 92 A. 932, 113 Me. 30.

41. Mich.—Wachsmuth v. Merchants’ Nat. Bank, 56 N.W. 9, 96 Mich. 426, 21 L.R.A. 278.

N.C.—Alexander v. Lindsey, 55 S.E.2d 470, 230 N.C. 663.

Territorial jurisdiction

Where the warrant disclosed its own invalidity as it showed that the offense charged was committed in one county and was returnable before the judge who issued it at another county, the arresting officers were not protected by it.

Ala.—Phillips v. Morrow, 97 So. 130, 210 Ala. 34.

42. Wis.—Lueck v. Heisler, 58 N.W. 1101, 87 Wis. 644.

25 C.J. p 489 note 14.

43. La.—O’Rourke v. O’Rourke, 79 So.2d 87, 227 La. 262.

Vt.—Goodell v. Tower, 58 A. 790, 77 Vt. 61, 107 Am.S.R. 745.

25 C.J. p 489 note 15.

44. U.S.—Stoyel v. Lawrence, C.C., 23 F.Cas.No.13,517, Brunn.Col.Cas. 311, 3 Day, Conn., 1.

25 C.J. p 489 note 16.

45. Matters held immaterial

Where process under which arrest was made was void on its face, it was no protection to either officer making arrest or jail keeper, and neither failure of arresting officer to serve it in requisite time before return day, nor his failure to return it to magistrate, nor the waiver by plaintiff of his right to be committed to jail, were material on question of their liability for false imprisonment.

Vt.—Parker v. Roberts, 131 A. 21, 99 Vt. 219, 49 A.L.R. 1382.

to execute process which is in fact void, although valid on its face, and no action will lie against him for such refusal,⁴⁶ and, a fortiori, may refuse to act under process substantially irregular on its face.⁴⁷

§ 29. Circumstances Attending and Following Arrest Affecting Legality

- a. In general
- b. Person arrested

a. In General

Circumstances attending or following a detention lawful in its inception may render it unlawful so as to impose liability for false imprisonment. On the other hand, an unlawful detention may be converted into a lawful one.

Circumstances attending or following a detention lawful in its inception may render it unlawful so as to impose liability for false imprisonment,⁴⁸ and, conversely, an unlawful detention may be converted into a lawful one so that liability for a false imprisonment exists only as to the period until the detention becomes lawful.⁴⁹ A valid arrest without a warrant for a felony does not become invalid on a showing by plaintiff that he was "booked" for a misdemeanor.^{49.5} The mere departure from the strict statutory method of making an arrest does not necessarily impose liability on an officer for false imprisonment.⁵⁰

A peace officer cannot justify an arrest on the ground that plaintiff was committing a breach of the peace where he provoked plaintiff into committing such breach of the peace.⁵¹ It has been

questioned whether a detention of plaintiff by a private person can be justified where it was not followed by any criminal charge against him in any court.⁵²

Compliance with conditions or directions in process. One who fails to comply with the conditions or directions contained in the process may be held liable.⁵³

Exhibition of warrant or statement of authority. It has been held that no liability is incurred by a regular officer, having a warrant in his possession, because of his failure to exhibit it on demand,⁵⁴ particularly where the party arrested has knowledge of the charge.^{54.5} On the other hand, one who is not a regular officer may incur liability by failure so to exhibit his warrant.⁵⁵ The fact that a search warrant was in the arresting officer's coat a few feet away from him at the time of the search and arrest does not render him liable for false imprisonment.⁵⁶

In cases of arrest without process, failure to make known his authority and intention at the time of the arrest has been held an additional reason for imposing liability on the arresting person, and if he fails to make known his official position he occupies no better position than a private person arresting another without warrant.⁵⁷ An officer, however, is not liable for false imprisonment for failure to notify accused of his official capacity before making the arrest, when it is known to accused or when by the exercise of ordinary reason he should have known it.⁵⁸

46. Ill.—Tuttle v. Wilson, 24 Ill. 553.

25 C.J. p 489 note 17.

47. N.Y.—Hayes v. Bowe, 12 Daly 193, 65 How.Pr. 347.

48. Minn.—Anderson v. Averbek, 248 N.W. 719, 189 Minn. 224—Stromberg v. Hansen, 225 N.W. 148, 177 Minn. 307.

N.Y.—Clark v. Nannery, 54 N.E.2d 31, 292 N.Y. 105.

Tex.—Moody v. Kimball, Civ.App., 173 S.W.2d 270.

25 C.J. p 489 note 19.

Duress to extract money

Although arrest may be legal, imprisonment thereafter is unlawful, when used as duress to extract money, and arrest knowingly made for such purpose, or knowingly used for such purpose, is illegal, and person making such arrest and holding defendant in custody is liable for false imprisonment.

Ga.—Stembridge v. Wright, 124 S.E. 115, 32 Ga.App. 587.

25 C.J. p 489 note 19 [a] (2).

49. Ala.—McPherson v. Gay, 117 So. 202, 217 Ala. 557.

N.Y.—Warner v. State, 79 N.E.2d 459, 297 N.Y. 395.

Berger v. Village of Seneca Falls, 151 N.Y.S.2d 133, 3 Misc.2d 647—Durante v. Onondaga County, 147 N.Y.S.2d 922, 3 Misc.2d 69—Bass v. State, 92 N.Y.S.2d 42, 196 Misc. 177.

25 C.J. p 489 note 20.

49.5 La.—Johnson v. Hodges, App., 65 So.2d 812.

50. Cal.—Allen v. McCoy, 27 P.2d 423, 135 C.A. 500, rehearing denied and modified on other grounds 28 P.2d 56, 135 C.A. 500.

D.C.—Orvis v. Brickman, 196 F.2d 762, 90 U.S.App.D.C. 266.

51. Wash.—Pavish v. Meyers, 225 P. 633, 129 Wash. 605, 34 A.L.R. 561.

25 C.J. p 464 note 35 [e].

52. Mo.—Humphreys v. St. Louis-San Francisco Ry. Co., App., 286 S.W. 738.

53. U.S.—Ingo v. Koch, C.C.A.N.Y., 127 F.2d 667.

Ill.—Pinkerton v. Gilbert, 22 Ill.App. 568.

25 C.J. p 489 note 21.

54. Neb.—Corpus Juris cited in Martin v. Sanford, 261 N.W. 136, 142, 129 Neb. 212, 100 A.L.R. 179.

N.Y.—Arnold v. Steeves, 10 Wend. 514.

25 C.J. p 489 note 23.

54.5 Neb.—Martin v. Sanford, 261 N.W. 136, 129 Neb. 212, 100 A.L.R. 179.

55. N.Y.—Frost v. Thomas, 24 Wend. 418.

S.C.—Hodge v. Piedmont & N. R. Co., 95 S.E. 138, 109 S.C. 62.

56. U.S.—Elrod v. Moss, C.C.A.S.C., 278 F. 123.

57. Ga.—Franklin v. Amerson, 45 S.E. 698, 118 Ga. 860.

58. Cal.—Allen v. McCoy, 27 P.2d 423, 135 C.A. 500, rehearing denied and modified on other grounds 28 P.2d 56, 135 C.A. 500.

A failure of an officer to conform to a statute providing that the person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it does not constitute false imprisonment.⁵⁹ Private persons apprehending an offender on fresh pursuit immediately after the commission of the act justifying his arrest need not advise him of the offense for which he is being arrested, since under such circumstances the person arrested knows the reason for his arrest.⁶⁰

Necessity of return of process. Process in order to justify an arrest should be regularly returned with a showing of substantial compliance with all its directions.⁶¹ It is generally held that there is no distinction between arrests under criminal process and those under civil process in this respect,⁶² but it has also been held that the failure of an officer to return a *capias ad satisfaciendum* into court did not bar his right to justify under the process.⁶³ Unless properly returned the process is not a protection to the officer executing it,⁶⁴ although the officer's failure in this regard will not prevent the process

from being a protection to the person procuring it,⁶⁵ or to the officer's aids and servants.⁶⁶

The officer's return may not be amended after the jurisdiction of the court has lapsed,⁶⁷ but it seems that it may be while the proceeding is still before the court.⁶⁸

Place of arrest. In general an arrest is illegal and liability is incurred if made beyond the jurisdiction of the court issuing the process⁶⁹ or of the officer making the arrest.⁷⁰ Under some statutes, however, the making of an arrest by a sheriff in a county other than his own without a warrant will not of itself, and standing alone, render him liable for false imprisonment.⁷¹

It is generally held that an arrest without warrant of a person suspected of having committed a felony in another jurisdiction is not justified.⁷²

Subsequent conviction. Although there is authority to the contrary,⁷³ it is generally held that a subsequent conviction on the charge for which the arrest was made is a bar to an action for false imprisonment,⁷⁴ at least if the conviction was had in

59. Cal.—Elliott v. Haskins, 67 P. 2d 698, 20 C.A.2d 591—Allen v. McCoy, 27 P.2d 423, 135 C.A. 500, rehearing denied and modified on other grounds 28 P.2d 56, 135 C.A. 500.

60. Wash.—Smith v. Drew, 26 P.2d 1040, 175 Wash. 11.

61. Vt.—Gibson v. Holmes, 62 A. 11, 78 Vt. 110, 4 L.R.A.,N.S., 451. 25 C.J. p 495 note 8.

62. Mass.—Tubbs v. Tukey, 3 Cush. 438, 50 Am.D. 744.

Vt.—Wright v. Templeton, 67 A. 817, 80 Vt. 358, 130 Am.S.R. 990.

63. Me.—Trafton v. Hoxie, 180 A. 800, 134 Me. 1.

64. Vt.—Gibson v. Holmes, 62 A. 11, 78 Vt. 110, 4 L.R.A.,N.S., 451. 25 C.J. p 495 note 10.

65. R.I.—Lisabelle v. Hubert, 50 A. 837, 23 R.I. 456.

Vt.—Gibson v. Holmes, 62 A. 11, 78 Vt. 110, 4 L.R.A.,N.S., 451.

66. Conn.—Dehm v. Hinman, 15 A. 741, 56 Conn. 320, 1 L.R.A. 374. Vt.—Ellis v. Cleveland, 54 Vt. 437. 25 C.J. p 495 note 12.

67. Vt.—Gibson v. Holmes, 62 A. 11, 78 Vt. 110, 4 L.R.A.,N.S., 451.

68. Mass.—Munroe v. Merrill, 6 Gray 236.

69. Ill.—Krug v. Ward, 77 Ill. 603.

70. N.C.—Martin v. Houck, 54 S.E. 291, 141 N.C. 317, 7 L.R.A.,N.S., 576.

Railway policemen

A statute authorizing railway policemen to make arrests for of-

fenses committed "upon the trains or about the depots" does not place a limitation on the place or locality where an arrest can be made.

Ky.—Johnson v. Chesapeake & O. Ry. Co., 83 S.W.2d 521, 259 Ky. 789.

Transportation through another county

Where legal complaint charging plaintiff with murder had been made but warrant had not been issued, the sheriff was without adequate legal justification for arresting plaintiff and after sheriff left boundaries of county in which he was sheriff with plaintiff as prisoner, the sheriff had no more authority than a private citizen.

Tex.—Hooper v. Deisher, Civ.App., 113 S.W.2d 966.

71. Kan.—Torson v. Baehni, 5 P.2d 813, 134 Kan. 188.

72. La.—Wells v. Johnston, 27 So. 185, 52 La. Ann. 713. 25 C.J. p 490 note 34.

73. Utah.—Oleson v. Pincock, 253 P. 23, 68 Utah 507.

74. U.S.—Erie R. Co. v. Reigherd, Ohio, 166 F. 247, 92 C.C.A. 590, 20 L.R.A.,N.S., 295, 16 Ann.Cas. 459.

Ariz.—Crowley v. Rummel, 195 P. 986, 22 Ariz. 179.

Ark.—Alter v. Arkansas Power & Light Co., 67 S.W.2d 177, 188 Ark. 681.

Colo.—Hushaw v. Dunn, 160 P. 1037, 62 Colo. 109.

Conn.—Clewley v. Brown, Thomson, Inc., 181 A. 531, 120 Conn. 440.

N.Y.—Jones v. Foster, 59 N.Y.S. 738, 43 App.Div. 33.

Cuniff v. Beecher, 32 N.Y.S. 1067, 84 Hun 137.

Canizio v. State, 169 N.Y.S.2d 185, 8 Misc.2d 943.

Ohio.—Maxey v. Gather, 114 N.E.2d 607, 94 Ohio App. 115—Ryan v. Conover, 18 N.E.2d 277, 59 Ohio App. 361.

Billington v. Hoverman, 7 Ohio Cir.Dec. 358, 18 Ohio Cir.Ct. 637.

Pa.—Smoker v. Ohl, 6 A.2d 810, 335 Pa. 270.

Wash.—Williams v. Brooks, 163 P. 925, 95 Wash. 410.

On plea of nolo contendere

Greek seamen who refused to leave Greek ship after notification of their discharge and, pursuant to instructions from the Greek Consul, were arrested by local police on board at the request of the master of the ship, and who pleaded nolo to complaints against them for assault and battery, could not maintain actions for false arrest against owners of the ship.

U.S.—Mavromatis v. United Greek Shipowners Corp., C.A.Me., 179 F. 2d 310.

In Michigan

(1) A judgment of conviction not appealed from has been held to be a complete defense to suit for false imprisonment.

Mich.—Turbessi v. Oliver Iron Mining Co., 229 N.W. 454, 250 Mich. 110, 69 A.L.R. 1059.

a court having jurisdiction,⁷⁵ and in the absence of fraud or undue means.⁷⁶ A discharge by a magistrate on abandonment of the case by the prosecutor constitutes a "favorable termination" of the criminal proceedings so as to authorize recovery against the prosecutor for false imprisonment.⁷⁷ The dismissal of an indictment against accused after he has been found insane and ordered committed to an asylum does not constitute ground for liability for false imprisonment where a statute authorized a dismissal in furtherance of justice.^{77.5}

Effect of subsequent proceedings as showing reasonable grounds of suspicion justifying an arrest without a warrant is considered *supra* § 25. Waiver by plea of guilty is discussed *infra* §§ 45, 46.

Time of arrest. An arrest, whether pursuant to or without process, made at a time when it is not authorized, is not justified,⁷⁸ and needless night arrests, or arrests made on the eve of Sunday, when the ordinary resources of immediate deliverance are not at hand, have been held to be without decent support.⁷⁹

b. Person Arrested

Generally the arrest of a person incorrectly named,

or the arrest of one not named in the process, constitutes false imprisonment; but it has been held that the arrest of a person bearing the identical name of the person named in the process can be justified, and that an arrest made on description can be justified by showing that the person making the arrest acted prudently.

The arrest of the person intended under process which states his name incorrectly will constitute a false imprisonment,⁸⁰ although there is some authority to the contrary,⁸¹ unless the name contained in the process is one by which he is customarily known⁸² or is a name which he has assumed.⁸³ The subsequent alteration of process, without the consent of the officer issuing it to correspond to the person's true name, does not render it a protection.⁸⁴ Statutes may, however, authorize the use of a fictitious name where the real name of the person to be arrested is unknown,⁸⁵ and statutes which authorize amendment of proceedings to conform to the arrested person's true name operate to justify an arrest under process containing a misnomer, if the proceedings are duly amended.⁸⁶

Person not named in process. The arrest of an innocent person whose name is not the one stated in the process cannot be justified,⁸⁷ although the one arresting makes an honest mistake in believing that

(2) There is, however, authority in Michigan to the contrary. Mich.—McCullough v. Greenfield, 95 N.W. 532, 133 Mich. 463, 62 L.R.A. 906, 1 Ann.Cas. 924.

In Oregon

(1) The text rule is now followed. Or.—McLean v. Sanders, 23 P.2d 321, 143 Or. 524, followed in Conrad v. Sanders, 23 P.2d 323, 143 Or. 531.

(2) Accordingly, plaintiff in false imprisonment action could not properly impeach municipal court's record of her conviction by testimony showing acquittal.

Or.—McLean v. Sanders, 23 P.2d 321, 143 Or. 524, followed in Conrad v. Sanders, 23 P.2d 323, 143 Or. 531.

(3) Where plaintiff's testimony showed nonexistence of record of plaintiff's conviction, pleaded by defendants, when false imprisonment action was instituted, and that plaintiff was discharged, plaintiff was entitled to opportunity to annul record directly.

Or.—McLean v. Sanders, 23 P.2d 321, 143 Or. 524, followed in Conrad v. Sanders, 23 P.2d 323, 143 Or. 531.

(4) It has been held in Oregon, however, that where defendant ejected plaintiff from its train, and had him arrested and imprisoned in the city jail for being drunk and drinking on its car, plaintiff's plea of guilty to a charge of being drunk had no conclusive effect in his subsequent civil action for his arrest.

Or.—Spain v. Oregon-Washington R. & Nav. Co., 153 P. 470, 78 Or. 355, Ann.Cas.1917E 1104.

75. Complaint

(1) If no formal complaint was actually made against plaintiff on his arrest for vagrancy, the magistrate's court acquired no jurisdiction to try or convict him.

Ariz.—Crowley v. Rummel, 195 P. 986, 22 Ariz. 179.

(2) Where the complaint charging a breach of the peace was good as against general demurrer, although defendant may have been entitled to compel the prosecution to specify details, proceedings and judgment based thereon are not absolutely void so as to afford no justification for the arrest.

Utah.—Olson v. Wall, 196 P. 1014, 58 Utah 20.

Jurisdiction of offense and person

Jurisdiction both of offense charged and of person of the plaintiff is essential to make an existing judgment of conviction a bar to recovery in an action for damages for false arrest and imprisonment.

N.Y.—Dailey v. State, 75 N.Y.S.2d 40, 190 Misc. 542.

76. Pa.—Grohmann v. Kirschmann, 32 A. 32, 168 Pa. 189.

77. Pa.—Arye v. Dickstein, 12 A.2d 19, 337 Pa. 471.

77.5 Cal.—Baer v. Smith, 157 P.2d 646, 68 C.A.2d 716.

78. N.Y.—Murphy v. Kron, 8 N.Y.St. 230, 20 Abb.N.Cas. 259. 25 C.J. p 489 note 28.

79. Mich.—Malcolmson v. Scott, 23 N.W. 166, 56 Mich. 459.

80. U.S.—West v. Cabell, Tex., 14 S.Ct. 752, 153 U.S. 78, 38 L.Ed. 643. 25 C.J. p 490 note 36.

Waiver by person inducing his own arrest by his conduct or statements notwithstanding failure of process to name him correctly see *infra* § 46.

81. Iowa.—Allen v. Leonard, 28 Iowa 529.

82. Ga.—Blocker v. Clark, 54 S.E. 1022, 126 Ga. 484, 7 L.R.A.,N.S., 268, 8 Ann.Cas. 31. 25 C.J. p 490 note 38.

83. Tex.—Keeter v. Davis, Civ.App., 58 S.W.2d 1046, error dismissed.

84. Colo.—Harris v. McReynolds, 51 P. 1016, 10 Colo.App. 532. 25 C.J. p 490 note 40.

85. U.S.—O'Halloran v. McGuirk, Mass., 167 F. 493, 93 C.C.A. 129. Ariz.—Williams v. Tidball, 8 P. 351, 2 Ariz. 50. 25 C.J. p 490 note 41.

86. Wis.—Keehn v. Stein, 39 N.W. 372, 72 Wis. 196.

87. Ala.—Corpus Juris cited in Simpson v. Boyd, 101 So. 664, 665, 212 Ala. 14.

he is arresting the right person;⁸⁸ but evidence of good faith is admissible in mitigation of damages.⁸⁹ It has been held, however, that where the description of the man wanted furnishes the officer with reasonable grounds to believe that the person arrested is the guilty person, he is protected in making the arrest and holding him for identification, although the one arrested is in fact innocent and is not named in the process.⁹⁰ An officer who neglects to exercise proper diligence in investigating the identity of the person arrested is, of course, liable for false imprisonment.⁹¹

Identity of name. If the person to be arrested is identified by name only, the one arresting must exercise due diligence in determining whether he bears the name of the person intended.⁹² If there are two men of the same name stated in the warrant and the officer arrests one who he knows is not the one intended, or he does not in good faith believe him to be so, the warrant is not a justification.⁹³

Some courts have held that the arrest of a person bearing the same name as the person intended can be justified by showing an honest belief that the one arrested was the one intended,⁹⁴ particularly if there is only one person by that name known to the officers or shown to exist.⁹⁵ In such case liability may nevertheless attach where a reasonable investigation would have established the fact that

he was not the person intended,⁹⁶ or where the detention is prolonged after ascertaining that he is not the right person.⁹⁷ Other courts have, however, maintained that the arresting person acts at his peril, and cannot justify the arrest of the wrong person.⁹⁸ Refusal to release where investigation would have established innocence imposes liability.⁹⁹

Identity of description. A person making an arrest on description furnished him by another can justify by showing that he made such investigation as the circumstances permitted,¹ had reasonable grounds to suspect that the person arrested was the one intended,² and acted honestly and prudently in applying the description to him.³ It has been held, however, that defendant cannot justify on the ground that plaintiff answered the description of the person charged with crime, as such fact can go only in mitigation of damages.⁴

§ 30. — Duty to Take before Magistrate

Unreasonable delay in taking the person arrested before the magistrate constitutes false imprisonment.

One making an arrest may be liable in an action for false imprisonment where he fails to take the person arrested before the officer designated in the warrant, or, if the arrest is made without warrant, to the nearest committing magistrate, or other officer designated by law.⁵ Failure to perform this

Mass.—Jordan v. C. I. T. Corporation, 19 N.E.2d 5, 302 Mass. 281.

25 C.J. p 490 note 44—5 C.J. p 394 note 20.

88. Ala.—Corpus Juris cited in Simpson v. Boyd, 101 So. 664, 665, 212 Ala. 14.

Iowa.—Holmes v. Blyler, 45 N.W. 756, 80 Iowa 365.

89. Ala.—Corpus Juris cited in Simpson v. Boyd, 101 So. 664, 665, 212 Ala. 14.

Tex.—Landrum v. Wells, 26 S.W. 1001, 7 Tex.Civ.App. 625.

90. Me.—Kittredge v. Frothingham, 96 A. 1063, 114 Me. 537. 25 C.J. p 491 note 47.

91. U.S.—Inmon v. State of Mississippi, C.C.A.Miss., 278 F. 23. Cal.—Walton v. Will, 152 P.2d 639, 66 C.A.2d 509.

92. Cal.—Walton v. Will, 152 P.2d 639, 66 C.A.2d 509.

Ga.—Blocker v. Clark, 54 S.E. 1022, 126 Ga. 484, 7 L.R.A.,N.S., 268, 8 Ann.Cas. 31.

Pa.—Kelley v. Laurito, Com.Pl., 94 Pittsb.Leg.J. 399.

93. Ala.—King v. Robertson, 150 So. 154, 227 Ala. 378.

94. U.S.—Schneider v. Kessler, C.C. A.N.J., 97 F.2d 542.

Ala.—Corpus Juris cited in King v. Robertson, 150 So. 154, 156, 227 Ala. 378, distinguishing, on the ground that there was no warrant charging plaintiff with the offense, Simpson v. Boyd, 101 So. 664, 212 Ala. 14.

25 C.J. p 491 note 53—5 C.J. p 395 note 23.

95. Striking of word "(Col.)"

Arrest of only person bearing name in warrant and to whom specified automobile tag had been issued was not rendered unlawful because "(Col.," following name, had been stricken before sheriff received warrant.

Ala.—King v. Robertson, 150 So. 154, 227 Ala. 378.

96. U.S.—Inmon v. State of Mississippi, C.C.A.Miss., 278 F. 23.

25 C.J. p 491 note 54—5 C.J. p 395 note 24.

Identification by special agent

A United States marshal and his deputies were not liable for false arrest and imprisonment because of alleged failure to use due diligence in ascertaining whether plaintiff was person intended in the process under

which plaintiff was arrested in that reliance was placed on identification made by a special agent of the bureau of prohibition.

U.S.—Schneider v. Kessler, C.C.A.N. J., 97 F.2d 542.

97. Ga.—Blocker v. Clark, 54 S.E. 1022, 126 Ga. 484, 7 L.R.A.,N.S., 268, 8 Ann.Cas. 31.

98. Tex.—Clark v. Winn, 46 S.W. 915, 19 Tex.Civ.App. 223.

25 C.J. p 491 note 56—5 C.J. p 395 note 22.

99. Cal.—Kalish v. White, 173 P. 494, 36 C.A. 604.

1. Mich.—Filer v. Smith, 55 N.W. 999, 96 Mich. 347, 35 Am.S.R. 603. Wash.—White v. Jansen, 142 P. 1140, 81 Wash. 435.

2. Wash.—White v. Jansen, supra.

3. Ga.—Blocker v. Clark, 54 S.E. 1022, 126 Ga. 484, 7 L.R.A.,N.S., 268, 8 Ann.Cas. 31.

25 C.J. p 491 note 60.

4. Ala.—Sugg v. Pool, 2 Stew. & P. 196.

5. U.S.—Corpus Juris quoted in Moran v. City of Beckley, C.C.A.W. Va., 67 F.2d 161, 164—U. S. ex rel. Humphrey v. Janus, D.C.Idaho, 30 F.2d 530, reversed on other

duty may impose liability on the arresting party as a trespasser ab initio,⁶ even if the arrest is made in entire good faith;⁷ but it has also been held that the arresting officer is liable as a trespasser ab initio only when the legal arrest is intentionally made and used as a cover for his subsequent illegal

grounds, C.C.A., *Janus v. U. S. ex rel. Humphrey*, 38 F.2d 431.
 Ala.—*Hill v. Wyrosdick*, 113 So. 49, 216 Ala. 235.
 Cal.—*Williams v. Zelzah Warehouse Co.*, 14 P.2d 177, 126 C.A. 28—*Vernon v. Plumas Lumber Co.*, 234 P. 869, 71 C.A. 112.
 Ga.—**Corpus Juris** quoted in *Stone v. National Surety Corporation*, 195 S.E. 905, 906, 57 Ga.App. 425.
 Idaho.—*Madsen v. Hutchison*, 290 P. 208, 49 Idaho 358.
 Ky.—*Butcher v. Adams*, 220 S.W.2d 398, 310 Ky. 205—*Goins v. Hudson*, 55 S.W.2d 388, 246 Ky. 517—*Louisville & N. R. Co. v. Offutt*, 263 S.W. 665, 204 Ky. 51.
 Mass.—*Doherty v. Shea*, 68 N.E.2d 707, 320 Mass. 173.
 Minn.—*Kleidon v. Glascock*, 10 N.W. 2d 394, 215 Minn. 417—*Anderson v. Averbek*, 248 N.W. 719, 189 Minn. 224—*Stromberg v. Hansen*, 225 N.W. 148, 177 Minn. 307.
 N.Y.—*Tierney v. State*, 34 N.Y.S.2d 749, 178 Misc. 421, modified on other grounds 42 N.Y.S.2d 877, 266 App.Div. 434, affirmed 54 N.E.2d 207, 292 N.Y. 523—*Damilitis v. Kerjas Lunch Corporation*, 300 N.Y.S. 574, 165 Misc. 186.
 Or.—**Corpus Juris** cited in *Brown v. Meier & Frank Co.*, 86 P.2d 79, 160 Or. 608—*Knight v. Baker*, 244 P. 543, 544, 117 Or. 492.
 Pa.—*Fagan v. Pittsburgh Terminal Coal Corporation*, 149 A. 159, 299 Pa. 109.
 R.I.—**Corpus Juris** cited in *Kominisky v. Durand*, 12 A.2d 652, 655, 64 R.I. 387.
 S.C.—*Westbrook v. Hutchison*, 10 S.E.2d 145, 195 S.C. 101.
 Tex.—*Robinson v. Lovell*, Civ.App., 238 S.W.2d 294, refused on reversible error—*Moody v. Kimball*, Civ.App., 173 S.W.2d 270—*Ellis v. Glascock*, Civ.App., 168 S.W.2d 946—*Box v. Fluitt*, Civ.App., 47 S.W.2d 1107—*Branch v. Guinn*, Civ.App., 242 S.W. 482.
 Va.—*McHone v. Commonwealth*, 57 S.E.2d 109, 190 Va. 435—**Corpus Juris Secundum** cited in *Mullins v. Sanders*, 54 S.E.2d 116, 120, 189 Va. 624.
 Wash.—*Housman v. Byrne*, 115 P.2d 673, 9 Wash.2d 560—*Ulvestad v. Dolphin*, 278 P. 681, 152 Wash. 580.
 W.Va.—*Floyd v. Chesapeake & O. Ry. Co.*, 164 S.E. 28, 112 W.Va. 66.
 25 C.J. p 491 notes 62–64.

Failure to arraign

Only justification for an arrest and only purpose for detention of a person are to initiate and insure a sub-

sequent criminal prosecution in a court, and if there is no arraignment, the arresting officer is a trespasser ab initio and probable cause or justification for arrest is no protection to him.

N.Y.—*Seguin v. Myers*, 108 N.Y.S.2d 28, 279 App.Div. 690.

Most accessible magistrate

Under a statute requiring one arrested without an order to be immediately taken before the nearest magistrate, where one arrested without a warrant was taken before the most accessible, although not the nearest, magistrate, there was a sufficient compliance with the statute. Tex.—**Corpus Juris** cited in *Haverbekken v. Hollingsworth*, Civ.App., 250 S.W. 261, 265.

Not duty of prisoner

"The law imposes a mandatory duty upon an officer making an arrest without a warrant to without delay bring such person before a committing magistrate where he can be charged with the crime for which he was arrested by affidavit or complaint. This duty is not complied with on the part of the officer by taking the prisoner before the district attorney. And he must exercise reasonable diligence and put forth some effort in carrying out the mandate of the law. It is not the duty of the prisoner or his attorney to hunt up a magistrate. That duty is imposed upon the arresting officer."

Or.—*Bowles v. Creason*, 66 P.2d 1183, 1191, 156 Or. 278.

Power of inquisition

In connection with the duty of an arresting officer to produce his prisoner before the magistrate without undue delay, it has been said that arresting officers are not clothed by law with power of inquisition through duress.

W.Va.—*Floyd v. Chesapeake & O. Ry. Co.*, 164 S.E. 28, 112 W.Va. 66.

"Public officers"

Under a statute providing that it is the duty of any private person, having arrested another for the commission of any public offense, to take him without unnecessary delay before a magistrate, servants of a corporation who arrested and imprisoned plaintiff without a warrant have been held private persons within statute, and not "public officers." Ala.—*Caudle v. Sears, Roebuck & Co.*, 182 So. 461, 236 Ala. 37.

Release and subsequent rearrest

Where a deputy sheriff arresting but failing to take before the proper

tribunal, a prisoner who was released by the sheriff made no attempt to re-arrest her and take her before the magistrate until an action for assault and false imprisonment was commenced, his subsequent act in arresting and taking her before the magistrate did not defeat the action. Me.—*Heffer v. Hunt*, 112 A. 675, 120 Me. 10.

Termination of responsibility

Where officers, who were justified in making arrest, were sought to be held liable for false arrest and imprisonment, because of delay in taking plaintiff before magistrate after arrest, the responsibility of the arresting officers ceased when they delivered the prisoner to other officers whose duty it was to take plaintiff before magistrate.

Nev.—*Lemel v. Smith*, 187 P.2d 169, 64 Nev. 545.

To obtain legal warrant

(1) "The general rule is that a person who has been arrested without a warrant cannot lawfully be held in custody for a longer period than is reasonably necessary to obtain a legal warrant for his detention; and that where he is held for a longer period without such writ or other authority from a competent court he has a right of action for false imprisonment against the officer or person who made the arrest and those by whom he has been so unlawfully held in custody."

N.J.—*Nelson v. Eastern Air Lines*, 24 A.2d 371, 372, 128 N.J.Law 46.

(2) Under statute providing that officers shall arrest persons found violating law until legal warrant can be obtained, although liable in damages for oppressive acts, duty imposed on officer is co-extensive with common-law powers to make arrests without warrant for offenses committed in officer's presence, and failure to obtain warrant within reasonable time makes officer a trespasser ab initio and subjects him to civil liability therefor.

Me.—*State v. Boynton*, 62 A.2d 182, 143 Me. 313.

6. Cal.—*Peckham v. Warner Bros. Pictures*, 97 P.2d 472, 36 C.A.2d 214.

N.J.—*Nelson v. Eastern Air Lines*, 24 A.2d 371, 128 N.J.Law 46.

N.Y.—*Seguin v. Myers*, 108 N.Y.S.2d 28, 279 App.Div. 690.

Bass v. State, 92 N.Y.S.2d 42, 196 Misc. 177.

25 C.J. p 492 note 65.

7. Mass.—*Phillips v. Fadden*, 125 Mass. 198.

conduct.⁸ Some decisions have held that, in the case of an arrest without process, the arresting party should at once release him if satisfied of his innocence,⁹ or if the charge is dropped, unless the prisoner demands that he be brought before the magistrate;¹⁰ but other decisions have maintained that such release is not justified.¹¹

§ 31. — Delay and Prolonged Detention

Unreasonable delay in releasing a person and prolonged detention constitute false imprisonment.

It is well settled that unreasonable delay in releasing a person who is entitled to be released, or unreasonable delay in calling, taking him before, or turning him over to, the proper authorities constitutes false imprisonment.¹² Accordingly, the ar-

resting party must bring his prisoner before the proper officer without a detention longer than is reasonably necessary,¹³ although, where the statute provides that in case of an arrest without a warrant the person arrested shall be forthwith carried before the most convenient magistrate of the county, it is improper to retain such person in jail until such time as he can be brought before some magistrate.¹⁴ Orders from a superior do not excuse the arresting party from fulfilling this duty, nor does delivery of the prisoner into the custody of another person;¹⁵ all those who take part in so detaining a person an unreasonable length of time are liable.¹⁶

It has been held that failure to take before a proper judicial officer without unnecessary delay

8. Ill.—Shaw v. Courtney, 46 N.E. 2d 170, 317 Ill.App. 422, affirmed 53 N.E.2d 432, 385 Ill. 559.

Tex.—Smith v. Bryson, Civ.App., 33 S.W.2d 268, error dismissed.

9. Me.—Therriault v. Breton, 95 A. 699, 114 Me. 137.
25 C.J. p 492 note 67.

10. Kan.—Atchison, T. & S. F. R. Co. v. Hinsdell, 90 P. 800, 76 Kan. 74, 12 L.R.A., N.S., 94, 13 Ann.Cas. 981.
25 C.J. p 492 notes 68, 69.

11. Iowa.—Stewart v. Feeley, 92 N. W. 670, 118 Iowa 524.
25 C.J. p 492 note 70.

12. Cal.—Lincoln v. Grazer, 329 P. 2d 928, 163 C.A.2d 758—Dragna v. White, 289 P.2d 428, 45 C.A.2d 469—Kangieser v. Zink, 285 P.2d 950, 134 C.A.2d 559—Ogulin v. Jeffries, 263 P.2d 75, 121 C.A.2d 211—Kaufman v. Brown, 209 P.2d 156, 93 C. A.2d 508.

Ill.—Hughes v. New York Cent. System, 155 N.E.2d 809, 20 Ill.App.2d 224.

Ind.—Corpus Juris Secundum cited in Matovina v. Hult, 123 N.E.2d 893, 897, 125 Ind.App. 236—Hall v. State ex rel. Freeman, 52 N.E. 2d 370, 114 Ind.App. 328.

Ky.—Garvin v. Muir, 306 S.W.2d 256—Rosenberg v. Bax, 258 S.W.2d 458.

Mass.—Doherty v. Shea, 68 N.E.2d 707, 320 Mass. 173.

Mo.—Teel v. May Department Stores Co., 176 S.W.2d 440, 352 Mo. 127—Corpus Juris cited in Teel v. May Department Stores Co., 155 S.W.2d 74, 79, 348 Mo. 696, 137 A.L.R. 495.

Jackson v. Thompson, App., 188 S.W.2d 853.

Mont.—Cline v. Tait, 155 P.2d 752, 116 Mont. 571.

N.J.—Cannon v. Krakowitch, 148 A. 2d 213, 54 N.J.Super. 93.

Okl.—Ames v. Strain, 301 P.2d 641.

Tenn.—Little Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357.

Tex.—Corpus Juris Secundum cited in Heath v. Boyd, 175 S.W.2d 214, 141 Tex. 569.

Corpus Juris Secundum cited in Moore v. State, 193 S.W.2d 204, 208, 149 Tex.Cr. 229.

Va.—Corpus Juris Secundum cited in Mullins v. Sanders, 54 S.E.2d 116, 120, 189 Va. 624.

13. U.S.—Corpus Juris quoted in Moran v. City of Beckley, C.C.A.W. Va., 67 F.2d 161, 164.

Cal.—Kaufman v. Brown, 209 P.2d 156, 93 C.A.2d 508.

Me.—Heffer v. Hunt, 112 A. 875, 120 Me. 10.

Mich.—Leisure v. Hicks, 57 N.W.2d 473, 336 Mich. 148.

Or.—Corpus Juris cited in Knight v. Baker, 244 P. 543, 117 Or. 492.

Tex.—Hicks v. Matthews, 266 S.W.2d 846, 153 Tex. 177.

Wis.—Peloquin v. Hibner, 285 N.W. 380, 231 Wis. 77.

25 C.J. p 492 note 74.

Reasonable delay

"It should be observed that this breach of duty arises from the officer's total failure to act; that he does not fail in any duty if he merely delays a reasonable length of time in taking the prisoner before a magistrate, or for a longer time, if a longer delay is justified by all the circumstances of the case."

Idaho.—Madsen v. Hutchison, 290 P. 208, 209, 49 Idaho 358.

14. Tex.—Heath v. Boyd, 175 S.W. 2d 214, 141 Tex. 569.

Three hours' detention

Jailer arresting and detaining plaintiff for three hours without warrant was liable, unless plaintiff waived right to be taken forthwith before magistrate.

Ky.—Goins v. Hudson, 55 S.W.2d 388, 246 Ky. 517.

Statute held not violated

Ky.—Tucker v. Vornbrock, 110 S.W. 2d 659, 270 Ky. 712.

N.Y.—Ranke v. State, 134 N.Y.S.2d 83, 206 Misc. 569, affirmed 141 N. Y.S.2d 516, 285 App.Div. 1113.

Va.—Mullins v. Sanders, 54 S.E.2d 116, 189 Va. 624.

Within hour

Where plaintiff was shot in resisting arrest and was given medical attention and released on bond within an hour, no violation of statute requiring arrested person to be taken before magistrate forthwith was shown.

Ky.—Johnson v. Chesapeake & O. Ry. Co., 83 S.W.2d 521, 259 Ky. 789.

15. U.S.—Corpus Juris quoted in Moran v. City of Beckley, C.C.A.W. Va., 67 F.2d 161, 164.
25 C.J. p 493 notes 75, 76

16. Ind.—Hall v. State ex rel. Freeman, 52 N.E.2d 370, 114 Ind.App. 328.

Pa.—Burk v. Howley, 18 Pa.Co. 303.

Delay of commissioner

Where, however, defendant found plaintiff in charge of sheep trespassing on Indian land contrary to statute, took plaintiff to sheriff and informed him and United States commissioner of charge against him, and offered to make oath before the commissioner to deposition or complaint to that effect, he was not liable for any delay thereafter due to doubt or uncertainty of the commissioner. U.S.—Janus v. U. S. ex rel. Humphrey, C.C.A.Idaho, 38 F.2d 431.

Jailer has custody of prisoners in the jail, and unless he has legal authority in the form of a written mittimus or court order, he is liable for false imprisonment for holding a person in jail beyond a reasonable time for procuring such authority.

Ky.—Garvin v. Muir, 306 S.W.2d 256.

imposes liability as a trespasser ab initio;¹⁷ but other courts have stated that liability is not that of a trespasser ab initio, unless the original arrest was made with the intent of being used for a subsequent wrong,¹⁸ and that liability commences only from the moment the detention is unreasonably prolonged.¹⁹ It has been held that liability attaches regardless of whether the arrested party was guilty of any crime.²⁰

Further liability may be imposed unless the arresting party takes his prisoner before the proper officer by the ordinary direct route, although an officer may be permitted to exercise some discre-

tion in the route chosen.²¹ Even though the original arrest may have been lawful, a detention of the person arrested after the discovery of the fact that he is not the person sought constitutes false imprisonment.²² Of course plaintiff cannot take advantage of delays due to his own conduct.²³

What is a reasonable time depends on the facts of each case.²⁴ Prolonged detention must, however, be considered with regard, among other things, to such matters as judicial accessibility and facilities,²⁵ the unavoidable duties of the officer making the arrest,²⁶ the intervention of Sunday²⁷ or the in-

17. U.S.—Great Am. Indem. Co. v. Beverly, D.C.Ga., 150 F.Supp. 134.

Cal.—Peckham v. Warner Bros. Pictures, 97 P.2d 472, 36 C.A.2d 214.

N.J.—Nelson v. Eastern Air Lines, 24 A.2d 371, 128 N.J.Law 46.

25 C.J. p 493 note 78.

18. Mich.—Oxford v. Berry, 170 N. W., 83, 204 Mich. 197—Friesenhan v. Maines, 100 N.W. 172, 137 Mich. 10.

19. Idaho.—Anderson v. Foster, 252 P.2d 199, 73 Idaho 340.

Kan.—Atchison, T. & S. F. R. Co. v. Hinsdell, 90 P. 800, 76 Kan. 74, 12 L.R.A.N.S., 94, 13 Ann.Cas. 981.

Mont.—Cline v. Tait, 129 P.2d 89, 113 Mont. 475.

20. Md.—Kirk v. Garrett, 35 A. 1089, 84 Md. 383.

Mont.—Cline v. Tait, 129 P.2d 89, 113 Mont. 475.

N.Y.—Hendrix v. Manhattan Beach Dev. Co., 168 N.Y.S. 316, 181 App. Div. 111.

21. Conn.—Gilbert v. Rider, Kirby 180.

Pa.—Huber v. Walker, 62 Pa.Super. 299.

25 C.J. p 492 notes 72, 73.

22. Ala.—Simpson v. Boyd, 101 So. 664, 212 Ala. 14.

Wis.—Wallner v. Fidelity & Deposit Co. of Md., 33 N.W.2d 215, 253 Wis. 66, 10 A.L.R.2d 745.

23. U.S.—Janus v. U. S. ex rel. Humphrey, C.C.A.Idaho, 38 F.2d 431.

Or.—Brown v. Meier & Frank Co., 86 P.2d 79, 160 Or. 608.

24. U.S.—Corpus Juris quoted in Moran v. City of Beckley, C.C.A.W. Va., 67 F.2d 161, 164.

Nev.—Corpus Juris Secundum quoted in Lemel v. Smith, 187 P.2d 169, 179, 64 Nev. 545.

N.D.—Haggard v. First Nat. Bank of Mandan, 8 N.W.2d 5, 72 N.D. 434.

Okl.—Corpus Juris quoted in Clements v. Canon, 40 P.2d 640, 641, 170 Okl. 340.

Tex.—Corpus Juris quoted in Fouraker v. Kidd Springs Boating and

Fishing Club, Civ.App., 65 S.W.2d 796, 798.

Corpus Juris quoted in Gilbert v. State, 284 S.W.2d 906, 907, 164 Tex.Cr. 290.

Utah.—Myers v. Collett, 268 P.2d 432, 1 Utah 2d 406.

Va.—Corpus Juris Secundum cited in McHone v. Commonwealth, 57 S.E. 2d 109, 113, 190 Va. 435.

25 C.J. p 493 note 83.

Jailing while securing complaint

The prevailing practice of arresting officer in lodging the arrested person in jail while the arresting officer proceeds to prosecuting attorney's office and secures a complaint is not out of harmony with statute requiring defendant to be taken before magistrate without delay.

Or.—Bowles v. Creason, 78 P.2d 324, 159 Or. 129.

Jury question

Reasonableness of period of detention before procuring warrant and taking prisoner before magistrate is for jury.

Kan.—Torsion v. Baehni, 5 P.2d 813, 134 Kan. 188.

Juvenile arrest statute imposes no mandatory requirement on police officers to inform parents of arrested minors of fact of arrest before incarceration, but notice of the arrest is merely to be given within a reasonable time, and thus arrest of minors for curfew violation did not become unlawful when notification of the arrest was not made until shortly after the minors were placed in a detention home.

Utah.—Myers v. Collett, 268 P.2d 432, 1 Utah 2d 406.

Reasonable periods

(1) One hour.

Ohio.—Conrad v. Lengel, 144 N.E. 278, 110 Ohio St. 532.

(2) Four hours.

Mich.—Lynn v. Weaver, 231 N.W. 579, 251 Mich. 265.

(3) Over night until justice opened his office.

Mont.—Cline v. Tait, 129 P.2d 89, 113 Mont. 475.

(4) Almost two days.

Cal.—Roynon v. Battin, 132 P.2d 266, 55 C.A.2d 861.

Wis.—Peloquin v. Hibner, 285 N.W. 380, 231 Wis. 77.

(5) Other periods see 25 C.J. p 493 note 83 [a].

Unreasonable periods

(1) More than thirty hours.

Cal.—Williams v. Zelzah Warehouse Co., 14 P.2d 177, 126 C.A. 28.

(2) Sixty-four and one-half hours. Ala.—Hill v. Wyrosdick, 113 So. 49, 216 Ala. 235.

(3) Where defendant's agents placed plaintiff in jail while they consulted attorneys, and then repaired to the magistrate's office, although the magistrate was accessible.

Cal.—Vernon v. Plumas Lumber Co., 234 P. 869, 71 C.A. 112.

(4) Other examples.

Wash.—Housman v. Byrne, 115 P.2d 673, 9 Wash.2d 560.

25 C.J. p 493 note 83 [b].

25. Mont.—Cline v. Tait, 129 P.2d 89, 113 Mont. 475.

Nev.—Corpus Juris Secundum quoted in Lemel v. Smith, 187 P.2d 169, 179, 64 Nev. 545.

Okl.—Corpus Juris quoted in Clements v. Canon, 40 P.2d 640, 641, 170 Okl. 340.

Tex.—Corpus Juris quoted in Fouraker v. Kidd Springs Boating and Fishing Club, Civ.App., 65 S.W.2d 796, 798.

Corpus Juris quoted in Gilbert v. State, 284 S.W.2d 906, 907, 164 Tex.Cr. 290.

25 C.J. p 493 notes 84, 85.

26. Nev.—Corpus Juris Secundum quoted in Lemel v. Smith, 187 P. 2d 169, 179, 64 Nev. 545.

Ohio.—Raitz v. Green, 13 Ohio Cir. Ct. 455, 7 Ohio Cir.Dec. 238.

Tex.—Corpus Juris quoted in Gilbert v. State, 284 S.W.2d 906, 907, 164 Tex.Cr. 290.

25 C.J. p 493 note 86.

27. Kan.—Torsion v. Baehni, 5 P.2d 813, 134 Kan. 188.

tervention of a national or a legal holiday,²⁸ and the intoxication or mental condition of the person detained.²⁹ It is the duty of an officer, making an arrest without a warrant, on discovering the absence of the magistrate from his office, to place his prisoner in jail and make an effort to secure the attendance of the magistrate at his office.³⁰ Mere unavoidable delay in taking bail has been held not to impose liability.³¹

Where defendant unlawfully caused plaintiff's arrest and incarceration in jail, the tort is a continuing one, for the consequences of which defendant is liable until plaintiff is released.³²

Investigation or identification. Delay in bringing the person arrested before the magistrate or other proper officer cannot be justified by the fact that the delay was necessary in order to investigate the case and procure evidence against accused;³³ but a detention for a reasonable time to identify the prisoner is justified.³⁴ It is not the business of an officer making an arrest to take a prisoner against his will and without his consent before some self-constituted inquisitorial body, and, if he does so,

all who participate in such unlawful detention are liable in damages.³⁵

§ 32. — Unnecessary Force, Hardship, Cruelty, or Indignity

Where the person making the arrest or detaining the person arrested imposes unnecessary force, hardship, cruelty, or indignity on the person arrested, he may be guilty of false imprisonment.

Liability in damages may be incurred by one who uses an undue amount of force in an arrest and detention,³⁶ or who subjects his prisoner to unnecessary hardships, cruel treatment, or indignities.³⁷ That amount of force will, however, be justified which does not exceed proper and rational bounds,³⁸ which must be judged by the circumstances attending the arrest and detention.³⁹ Damages in such cases ordinarily arise rather from a liability for assault and battery than for false imprisonment.⁴⁰ A person directing the arrest is liable for an assault committed by the arresting officer only if the officer in so doing is acting under his direction.⁴¹

Improper place of detention. Liability may also be incurred unless the arrested party is confined in

Nev.—*Corpus Juris Secundum* quoted in *Lemel v. Smith*, 187 P.2d 169, 179, 64 Nev. 545.

Tex.—*Corpus Juris* quoted in *Gilbert v. State*, 284 S.W.2d 906, 907, 164 Tex.Cr. 290.
25 C.J. p 493 note 87.

28. Mich.—*Linnen v. Banfield*, 72 N. W. 1, 114 Mich. 93.

Nev.—*Corpus Juris Secundum* quoted in *Lemel v. Smith*, 187 P.2d 169, 179, 64 Nev. 545.

Tex.—*Corpus Juris* quoted in *Gilbert v. State*, 284 S.W.2d 906, 907, 164 Tex.Cr. 290.
25 C.J. p 493 note 88.

29. Idaho.—*Corpus Juris Secundum* cited in *Anderson v. Foster*, 252 P. 2d 199, 203, 73 Idaho 340.

Miss.—*State, for Use of Kelley v. Yearwood*, 37 So.2d 174, 204 Miss. 181.

Nev.—*Corpus Juris Secundum* quoted in *Lemel v. Smith*, 187 P.2d 169, 179, 64 Nev. 545.

Okl.—*Corpus Juris* quoted in *Clements v. Canon*, 40 P.2d 640, 641, 170 Okl. 340.

Tex.—*Corpus Juris* quoted in *Fouraker v. Kidd Springs Boating and Fishing Club*, Civ.App., 65 S.W.2d 796, 798.

Corpus Juris quoted in *Gilbert v. State*, 284 S.W.2d 906, 907, 164 Tex.Cr. 290.

Va.—*McHone v. Commonwealth*, 57 S.E.2d 109, 190 Va. 435.

25 C.J. p 493 note 89, p 494 note 90.

30. U.S.—*Janus v. U. S. ex rel.*

Humphrey, C.C.A.Idaho, 38 F.2d 431.

31. Tex.—*Cargill v. State*, 8 Tex. App. 431.

32. Ark.—*Missouri Pac. R. Co. v. Yancey*, 22 S.W.2d 408, 180 Ark. 684.

33. Cal.—*Peckham v. Warner Bros. Pictures*, 97 P.2d 472, 36 C.A.2d 214 —*Vernon v. Plumas Lumber Co.*, 234 P. 869, 71 C.A. 112.

Ill.—*Fulford v. O'Connor*, 121 N.E. 2d 767, 3 Ill.2d 490.

Or.—*Brown v. Meier & Frank Co.*, 86 P.2d 79, 160 Or. 608.

Wis.—*Wallner v. Fidelity & Deposit Co. of Md.*, 33 N.W.2d 215, 253 Wis. 66, 10 A.L.R.2d 745.

25 C.J. p 494 note 92.

34. Tex.—*Wolf v. Perryman*, 17 S. W. 772, 82 Tex. 112.

25 C.J. p 494 note 93.

35. Or.—*Brown v. Meier & Frank Co.*, 86 P.2d 79, 160 Or. 608.

36. N.C.—*Riley v. Stone*, 94 S.E. 434, 174 N.C. 588.

25 C.J. p 494 note 95.

Invalidity of warrant

Petition against officer for tortious conduct in effecting arrest stated cause of action, regardless whether warrant was valid or whether officer knew of invalidity, and the officer's liability is unaffected by facts showing invalidity of warrant not known by officer.

Ga.—*Massachusetts Cotton Mills v. Hawkins*, 139 S.E. 429, 37 Ga.App. 198.

37. W.Va.—*Floyd v. Chesapeake & O. Ry. Co.*, 164 S.E. 28, 112 W.Va. 66.

25 C.J. p 494 note 96.

Reasonableness of delay in arraignment under such circumstances is immaterial.

N.Y.—*Dumas v. Erie R. Co.*, 278 N. Y.S. 197, 243 App.Div. 792.

Trespass ab initio

(1) Arrest, although legal in its inception, was illegal ab initio where during period of detention defendants brutally treated person arrested to extort false confession from him.

N.Y.—*Dumas v. Erie R. Co.*, supra.

(2) Trespass ab initio as relating to false imprisonment applies only when legal arrest is intentionally made and used as cover to subsequent illegal conduct.

Minn.—*Stromberg v. Hansen*, 225 N. W. 148, 177 Minn. 307.

38. Cal.—*Collyer v. S. H. Kress Co.*, 54 P.2d 20, 5 C.2d 175.

25 C.J. p 494 note 97.

39. Ohio.—*Ryan v. Conover*, 18 N. E.2d 277, 59 Ohio App. 361.

Tex.—*Corpus Juris* cited in *Smith v. Bryson*, Civ.App., 33 S.W.2d 268, 270.

25 C.J. p 494 note 98.

40. Ky.—*Grau v. Forge*, 209 S.W. 369, 183 Ky. 521, 3 A.L.R. 642—*Scott v. Commonwealth*, 93 S.W. 668, 29 Ky.L. 571.

41. N.Y.—*Regan v. Morgan*, 207 N. Y.S. 395, 211 App.Div. 443.

a proper place,⁴² and confinement in an improper place imposes liability as a trespasser ab initio.⁴³ The arresting person may adopt such usual measures as may be necessary for the safe-keeping of the prisoner,⁴⁴ and, it seems, must have a reasonable discretion as to where the place shall be within his jurisdiction.⁴⁵ Where a statute fixes the proper place of detention, all those concerned in a detention at an improper place are equally liable.⁴⁶ The person instigating the arrest is not, however, responsible for the illegal act of the officer in this regard.⁴⁷

A statute providing that a defendant during the periods of adjournment of the examination if he fail to give bail shall, during such adjournment, be confined in the county jail does not render officers guilty of false imprisonment who confine one in a city prison during the time between his arrest and examination, where he has been arrested by city officers under a warrant issued by the police judge of the city.⁴⁸

§ 33. — Refusal to Accept or Procure Bail

A refusal to accept proper bail or to afford a reasonable opportunity to procure bail, where the arrested person is entitled to be released on bail, may constitute false imprisonment.

A failure to discharge on tender of proper bail renders the officer whose duty it is to do so liable;⁴⁹ but mere unavoidable delay in taking bail does not, it seems, constitute false imprisonment.⁵⁰ Since

it is the duty of an arresting officer, in a proper case, to afford the person arrested an opportunity to give bond, if he wrongfully denies him such opportunity his imprisonment thereafter becomes unlawful and constitutes false imprisonment.⁵¹ However, an arresting officer has been held not chargeable in false imprisonment for the period of plaintiff's confinement occasioned by the refusal of the magistrate to accept bail and release plaintiff.^{51.5}

Where the person instigating the arrest directs or causes the officer to refuse proper bail, he is liable,⁵² and where the person causing plaintiff's arrest induced, by false representations, the bondsmen on plaintiff's bail bond to withdraw from the bond with the result that plaintiff was compelled to remain in jail, such person is liable in damages to plaintiff.⁵³ In the absence of a statute to the contrary, no obligation rests on the party making an arrest to conduct accused in search of bail.⁵⁴ A person, having given proper bail, has the absolute right to be at large, and the officer who rearrests him in disregard of his rights is liable.⁵⁵

§ 34. — Detention after Acquittal or Expiration of Term

Detention of a prisoner after the expiration of his sentence or term of commitment may constitute false imprisonment.

One who unlawfully detains a prisoner after the expiration of his sentence or term of commitment may be liable for false imprisonment.⁵⁶ It has been

42. Vt.—Gibson v. Holmes, 62 A. 11, 78 Vt. 110, 4 L.R.A.,N.S., 451.
25 C.J. p 495 note 1.

Uncomfortable cell

That plaintiff suing for false arrest and imprisonment was confined in uncomfortable cell did not give him right of action against police officers arresting him without warrant for breach of peace.

Mich.—Lynn v. Weaver, 231 N.W. 579, 251 Mich. 265.

43. Vt.—Gibson v. Holmes, 62 A. 11, 78 Vt. 110, 4 L.R.A.,N.S., 451.

44. Ind.—Wiltse v. Holt, 95 Ind. 469.

45. Utah.—Clinton v. Nelson, 2 Utah 284.
25 C.J. p 495 note 4.

46. Ohio.—Washer v. Her, 29 Ohio Cir.Ct. 319, affirmed 80 N.E. 1134, 75 Ohio St. 638.

47. N.Y.—Baker v. Secor, 4 N.Y.S. 303.

48. Ky.—Gray v. McAtee, 25 S.W.2d 65, 233 Ky. 97.

49. Tex.—King v. Roberts, 84 S.W. 2d 718, 125 Tex. 623.

Branch v. Guinn, Civ.App., 242 S.W. 482.

25 C.J. p 495 note 15.

Quasi-judicial officer

Where an assistant prosecuting attorney was acting in a quasi-judicial capacity in refusing bail, however, it has been held that he was not liable for false imprisonment for an error of judgment.

N.J.—Edelman v. Dunn, 149 A. 766, 8 N.J.Misc. 154, affirmed 153 A. 524, 107 N.J.Law 353.

Liability of judicial officers generally see infra § 44.

50. Tex.—Cargill v. State, 8 Tex. App. 431.

51. U.S.—State of Missouri ex rel. and to Use of De Vault v. Fidelity & Casualty Co. of New York, C.C.A. Mo., 107 F.2d 343.

Iowa.—Andersen v. Spencer, 294 N. W. 904, 229 Iowa 595.

Mo.—Corpus Juris cited in Teel v. May Department Stores Co., 155 S.W.2d 74, 79, 348 Mo. 696, 137 A. L.R. 495—Corpus Juris cited in Harbison v. Chicago, R. I. & P. Ry.

Co., 37 S.W.2d 609, 613, 327 Mo. 440, 79 A.L.R. 1.

Corpus Juris Secundum cited in Jackson v. Thompson, App., 188 S.W.2d 853, 857.

51.5 Idaho.—Anderson v. Foster, 252 P.2d 199, 73 Idaho 340.

52. N.H.—Gibbs v. Randlett, 58 N. H. 407.

53. Mont.—Pyles v. Armstrong, 275 P. 753, 84 Mont. 338.

54. Ala.—Corpus Juris cited in King v. Robertson, 150 So. 154, 156, 227 Ala. 378.
25 C.J. p 495 note 18.

55. N.Y.—Artega v. Conner, 88 N. Y. 403, 2 N.Y.Civ.Proc. 152, 14 N.Y. Wkly.Dig. 278.

56. Minn.—Peterson v. Lutz, 3 N.W. 2d 489, 212 Minn. 307.

N.Y.—Waterman v. State, 149 N.Y. S.2d 381, 1 A.D.2d 235, reargument denied and appeal granted 151 N. Y.S.2d 623, 2 A.D.2d 646, affirmed 140 N.E.2d 551, 2 N.Y.2d 803, 159 N.Y.S.2d 702—Birdsall v. Lewis, 285 N.Y.S. 146, 246 App.Div. 132, affirmed 3 N.E.2d 200, 271 N.Y. 592.

held that the person who instigated the arrest cannot be held liable for neglecting to give instructions for the arrested person's discharge when for any reason he becomes entitled to it, the duty of procuring his discharge under such circumstances devolving on the arrested person himself.⁵⁷ Also, in an action for false imprisonment against the prison official, plaintiff is barred from recovering, even though he was detained beyond the term of his sentence, where the official detained plaintiff pursuant to the terms of a commitment valid on its face.⁵⁸ A sheriff who has in his custody a prisoner who has been regularly and legally committed to his custody is not liable for damages in an action for false imprisonment where it appears that

the grand jury on an investigation of the charge has returned a "no bill," but before the court, or its authorized officer, has directed him to discharge the prisoner.⁵⁹

§ 35. Arrest on One Ground, Justification on Another

Ordinarily a person making an arrest on one ground cannot justify the arrest on another ground.

If an arrest without process is made on one ground, on which it subsequently develops it cannot be sustained, the arrest cannot later be justified on the theory that another ground existed at the time of the arrest,⁶⁰ even though such offense is

Williams v. State, 168 N.Y.S.2d 163, 8 Misc.2d 390, affirmed 172 N.Y.S.2d 206, 5 A.D.2d 936.
25 C.J. p 496 note 21.

Detention pending review

Where writ of habeas corpus by convict claiming to have completed servitude was dismissed, and convict remanded to custody of warden, warden was not guilty of false imprisonment in holding prisoner pending review of case, although judgment of trial court was erroneous and was reversed, since the judgment of the trial court was in the nature of a warrant issued by a judicial officer having jurisdiction, and there was no evidence of bad faith by the warden, although the issue of good faith was made.

Ga.—Teasley v. Nelson, 148 S.E. 534, 39 Ga.App. 773.

Drunken prisoner

Refusal of town marshal to discharge from custody, on verbal order of police judge in a drug store, a prisoner who had been lawfully arrested for drunkenness and disorderly conduct, was not ground for recovery by prisoner against marshal for false imprisonment, where arrest was made about dark, since under the statute marshal had duty to keep prisoner in custody until morning, "night" being defined as the beginning of darkness; nightfall.

Ky.—Bailey v. Shrader, 97 S.W.2d 575, 265 Ky. 663.

Arrest on parole board warrants

Where parole board warrants for arrest of claimant merely directed that prisoner be retaken and returned to the custody of warden, warden in receiving prisoner was required to look to the basic judgment and statute under which it was given to determine how long to hold prisoner, and state could not be protected from liability for arrest and detention beyond period authorized by law on ground of the quasi-judicial nature of the determination of delinquency

and warrants for detention by the parole board.

N.Y.—Williams v. State, 172 N.Y.S.2d 206, 5 A.D.2d 936.

Rearrest

Where plaintiff arrested on suspicion of vagrancy was confined in jail of city of which defendant was mayor, and charges were dropped by arresting city at time when plaintiff was out on temporary release granted by defendant, subsequent rearrest and confinement of plaintiff at time when plaintiff had failed to produce record showing that charge had been dropped, did not constitute false imprisonment, even if defendant was not to be regarded as surety, for plaintiff's custody, and therefore justified in having him reincarcerated.

Fla.—Thomas v. Taigman, 63 So.2d 639.

57. U.S.—Norman v. Manciet, C.C. Or., 18 F.Cas.No.10,300, 1 Sawy. 484.

Mass.—Martin v. Collins, 43 N.E. 91, 165 Mass. 256.
25 C.J. p 496 note 23.

58. Minn.—Peterson v. Lutz, 3 N.W.2d 489, 212 Minn. 307.

Warden

Wardens were merely administrative employees acting in pursuance of writs and orders valid on their face, and could not be held liable for false imprisonment because of prisoner's confinement after allowances for good time had been forfeited, nor could director of department of public safety be held liable, in view of fact that he did not trespass on his discretionary authority by arbitrary action.

U.S.—Uryga v. Ragen, C.A.Ill., 181 F.2d 660.

59. Mere statement of attorney for prisoner to jailer that prisoner should be discharged because grand jury had returned no bill was not sufficient proof of return or such notice as to be conclusive on jailer, so as to require jailer to act immedi-

ately at his peril, but jailer would be entitled to reasonable time for further inquiry before taking action, if charged with duty of making further inquiry by such notice.

Ga.—Lowry v. Thompson, 184 S.E. 891, 53 Ga.App. 71.

60. Ala.—Corpus Juris Secundum cited in Long v. Mann, 65 So.2d 500, 259 Ala. 17.

Ky.—Goins v. Hudson, 55 S.W.2d 388, 246 Ky. 517—Noe v. Meadows, 16 S.W.2d 505, 229 Ky. 53, 64 A.L.R. 648—Corpus Juris cited in Wright & Taylor v. Leigh, 16 S.W.2d 493, 494, 229 Ky. 32.

N.Y.—Williams v. State, 183 N.Y.S.2d 392.

Okl.—Lyons v. Worley, 4 P.2d 3, 152 Okl. 57.

Or.—McNeff v. Heider, 337 P.2d 819, 25 C.J. p 496 note 24.

Existence of legal grounds

(1) Where person, who had been allegedly illegally parked in no parking zone of park, was arrested for disorderly conduct although he was not guilty of that offense, arresting officers were guilty of false arrest, even if they could legally have arrested person for illegal parking or other offenses mentioned in municipal code.

Mich.—Donovan v. Guy, 80 N.W.2d 190, 347 Mich. 457.

(2) Fact that deputy sheriff who stopped plaintiff, in action for false imprisonment, and brought him before justice of the peace could have arrested plaintiff for violation of state law did not excuse him, where he suggested that justice of peace try plaintiff under a nonexistent village ordinance for driving on wrong side of street.

N.M.—Vickrey v. Dunivan, 279 P.2d 853, 59 N.M. 90.

Fire marshal

Where a fire marshal held witnesses in custody and permitted no communication with them under the erroneous belief that he was empow-

intimately connected in time and place.⁶¹ In some jurisdictions a person or officer who unlawfully arrests another without authority may properly detain him on a subsequent valid process,⁶² but in other jurisdictions it is held that he must first restore such party to his liberty before he may detain him on a subsequent valid process.⁶³ When, however, an arrest without process has been made on more than one ground and is justified on one ground, this is a sufficient justification.⁶⁴

When a single act constitutes more than one crime, the person making the arrest may justify the arrest on the ground of any offense established by the act.⁶⁵ Similarly, where detention is under two writs, one legal and the other illegal, the fact that one is illegal does not affect the character of the imprisonment, and the one arrested sustains no damage,⁶⁶ and this is so although the officer declares that he made the arrest under the illegal process.⁶⁷ A person or officer who unlawfully arrests another without authority cannot justify the act under subsequent valid process.⁶⁸

A police officer having made an illegal arrest without warrant cannot subsequently justify on the ground that a legal warrant was outstanding, if he acted without having had it or even without knowledge of its existence.⁶⁹ It has been held that, where a warrant which proves invalid has been issued, the arresting person may justify by showing that the facts authorized an arrest without war-

rant;⁷⁰ but the authorities are at variance on this point, some decisions maintaining that the person making the arrest cannot apprehend a person under a warrant, and, if it subsequently develops that the arrest cannot be sustained on that ground, justify on the theory that the arrest was proper without a warrant,⁷¹ especially if the other ground for arrest was not known to the arresting person at the time he made it.⁷²

Where it appears that the officer was acting by virtue of a warrant, and no claim is made to the contrary in the pleadings or evidence, the fact that the arrest might have been justified without warrant is immaterial.⁷³ It has been held that an arrest by a deputy or inferior officer may be justified by showing that valid process existed in the hands of the superior officer, although the process was not in the deputy's possession when he made the arrest,⁷⁴ or although he held another process which proved to be invalid, and did not know of the existence of the valid writ in his superior's hands and expressly declared that he made the arrest under the invalid process.⁷⁵

A process valid on its face protects the officer serving it, notwithstanding the prosecutor elects to prosecute on a different warrant from that on which the arrest is made,⁷⁶ and this rule has been applied for the protection of an officer who arrests for an offense committed in his presence.^{76.5}

III. PERSONS RESPONSIBLE

§ 36. In General

Generally, in order for a person to be liable for a false imprisonment, he must have participated in or caused

the wrongful arrest or detention either by direct act or indirect procurement.

In so far as the status and relation of the various

ered by statute to do so, in an action for false imprisonment he could not justify his conduct by showing that the persons so held were subject to legal arrest on other grounds. Wis.—Geldon v. Finnegan, 252 N.W. 369, 213 Wis. 539.

61. U.S.—*Corpus Juris* cited in *Moran v. City of Beckley*, for Use of Bowen, C.C.A.W.Va., 67 F.2d 161, 163.

62. Ala.—*McPherson v. Gay*, 117 So. 202, 217 Ala. 557.

Colo.—*Harris v. McReynolds*, 51 P. 1016, 10 Colo.App. 532.

Mich.—*McCullough v. Greenfield*, 95 N.W. 532, 133 Mich. 463, 62 L.R.A. 906, 1 Ann.Cas. 924.

63. N.Y.—*Mandeville v. Guernsey*, 51 Barb. 99, affirmed 50 N.Y. 669. Ohio.—*Tracy v. Coffey*, 28 Ohio Cir. Ct. 579.

64. Ky.—*Noe v. Meadows*, 16 S.W. 2d 505, 229 Ky. 53, 64 A.L.R. 648

—*Wright & Taylor v. Leigh*, 16 S.W.2d 493, 229 Ky. 32.

25 C.J. p 496 note 26.

65. Wash.—*Smith v. Drew*, 26 P.2d 1040, 175 Wash. 11.

66. Mass.—*Doherty v. Munson*, 127 Mass. 495.

25 C.J. p 496 note 27.

67. N.C.—*Meeds v. Carver*, 30 N.C. 298—*State v. Kirby*, 24 N.C. 201.

68. Ala.—*McPherson v. Gay*, 117 So. 202, 217 Ala. 557.

N.Y.—*Warner v. State*, 68 N.Y.S.2d 60, 189 Misc. 51, reversed on other grounds 71 N.Y.S.2d 559, 272 App. Div. 954, reversed on other grounds 79 N.E.2d 459, 297 N.Y. 395.

69. Ky.—*Wright & Taylor v. Leigh*, 16 S.W.2d 493, 229 Ky. 32.

25 C.J. p 496 note 29.

70. Minn.—*Nelson v. Halvorson*, 135 N.W. 818, 117 Minn. 255, Ann.Cas. 1913D 104.

71. Kan.—*Elwell v. Reynolds*, 51 P. 578, 6 Kan.App. 545.

N.Y.—*Murphy v. Kron*, 8 N.Y.St. 230, 20 Abb.N.Cas. 259.

25 C.J. p 496 note 32.

72. N.Y.—*MacDonnell v. McConville*, 132 N.Y.S. 1085, 148 App.Div. 49, affirmed 103 N.E. 1126, 210 N.Y. 529.

73. Iowa.—*Holmes v. Blyler*, 45 N.W. 756, 80 Iowa 365.

74. Tex.—*Cabell v. Arnold*, 23 S.W. 645, 86 Tex. 102, 22 L.R.A. 87.

75. N.C.—*Meeds v. Carver*, 30 N.C. 298.

76. Conn.—*McGann v. Allen*, 134 A. 810, 105 Conn. 177.

Okl.—*Corpus Juris Secundum* quoted in *St. Clair v. Smith*, 293 P.2d 597, 599.

76.5 Okl.—*St. Clair v. Smith*, 293 P. 2d 597.

parties to the act are factors in determining the unlawfulness of a restraint or detention, many questions concerning the persons who may be held liable in an action for false imprisonment have been considered supra §§ 14-35, in connection with the discussion of the unlawfulness of the restraint or detention.

However, as a general rule, in order that one may be liable for a false imprisonment, it must appear that he personally participated therein by direct act or by indirect procurement,⁷⁷ or, in other words,

he must be shown to have been the legal cause of the wrongful detention.⁷⁸ Responsibility for false imprisonment cannot be based on mere negation or failure to speak, but only on some affirmative act instigating thereto.⁷⁹ Stated conversely, the one responsible, whether as principal or agent, for a legally unjustifiable arrest or detention is generally liable therefor.⁸⁰

Public officers. It has been stated that the courts look with disfavor on actions for false arrest brought against a public officer who performs his

77. U.S.—Carr v. National Discount Corp., C.A.Mich., 172 F.2d 899, certiorari denied 70 S.Ct. 59, 338 U.S. 817, 94 L.Ed. 495.

Cal.—Turner v. Mellon, 257 P.2d 15, 41 C.2d 45—Hughes v. Oreb, 238 P.2d 550, 36 C.2d 854.

Kaufman v. Brown, 209 P.2d 156, 93 C.A.2d 508.

D.C.—Jillson v. Caprio, 181 F.2d 523, 86 U.S.App.D.C. 169.

Fla.—Johnson v. Weiner, 19 So.2d 699, 155 Fla. 169.

Ill.—Zimbon v. 1400 Lake Shore Drive Corp., 132 N.E.2d 51, 8 Ill. App.2d 542.

Mich.—Howard v. Burton, 61 N.W.2d 77, 338 Mich. 178.

Miss.—Smith v. Patterson, 58 So.2d 64, 274 Miss. 87.

Mo.—Richardson v. Empire Trust Co., 94 S.W.2d 966, 970, 230 Mo. App. 580.

N.H.—Corpus Juris Secundum cited in Ferry v. Ferry, 54 A.2d 151, 153, 94 N.H. 395.

N.J.—McGrath v. Keenan, 46 A.2d 725, 24 N.J.Misc. 121.

N.Y.—Regan v. Morgan, 207 N.Y.S. 395, 211 App.Div. 443.

Vallon v. Ramage, 93 N.Y.S.2d 56, 196 Misc. 740.

Ratoff v. Central Smelting Co., 56 N.Y.S.2d 858, reversed on other grounds 61 N.Y.S.2d 376, 270 App.Div. 838, appeal dismissed 61 N.Y.S.2d 377, 270 App.Div. 838.

Pa.—Bunting v. Goldstein, 129 A. 99, 283 Pa. 356.

Tex.—McBeath v. Campbell, Civ.App., 4 S.W.2d 999, reversed in part on other grounds and affirmed in part, Com.App., 12 S.W.2d 118. 25 C.J. p 497 note 41.

Other statements

(1) It must appear that he either assisted in the arrest or directed, countenanced, or encouraged the same.

Kan.—Hammargren v. Montgomery Ward & Co., 241 P.2d 1192, 172 Kan. 484.

Mo.—State ex rel. Fireman's Fund Ins. Co. v. Trimble, 242 S.W. 934, 294 Mo. 615.

Checkeye v. John Bettendorf Market, Inc., App., 257 S.W.2d 202—Hook v. S. S. Kresge Co., App.,

222 S.W.2d 568, affirmed 230 S.W. 2d 758.

(2) Although a person must either make, command, direct, or request that arrest be made, it is not necessary to do so in express terms.

Ga.—Jacobs v. Owens, 99 S.E.2d 895, 96 Ga.App. 318.

One not participating in the act of arrest may not be held liable, unless it appears that he instigated the proceeding or procured the arrest by direction or advisement.

Ky.—Triangle Motors Co. v. Smith, 287 S.W. 914, 216 Ky. 479.

Persons held not liable

(1) In general.

U.S.—Bucher v. Krause, C.A.Ill., 200 F.2d 576, certiorari denied Krause v. Bucher, 73 S.Ct. 1141, 345 U.S. 997, 97 L.Ed. 1404, rehearing denied 74 S.Ct. 17, 346 U.S. 842, 98 L.Ed. 363.

D.C.—Orvis v. Brickman, 196 F.2d 762, 90 U.S.App.D.C. 266.

Ga.—Walker v. Whittle, 64 S.E.2d 87, 83 Ga.App. 445.

Idaho.—Smith v. Lott, 249 P.2d 803, 73 Idaho 205.

N.Y.—Ratoff v. Central Smelting Co., 56 N.Y.S.2d 858, reversed on other grounds 61 N.Y.S.2d 376, 270 App. Div. 838, appeal dismissed 61 N.Y.S.2d 377, 270 App.Div. 838. Okl.—Garrett v. Jones, 200 P.2d 402, 200 Okl. 696.

(2) Administrator who was not present at time and had no knowledge of court's issuance of commitment of person to jail, nor anything to do with, or knowledge of, his arrest and imprisonment for contempt in failing to pay to estate sum wrongfully withheld and concealed. Mo.—Zeitinger v. Mitchell, 244 S.W. 2d 91.

(3) Where officer of corporation investigated alleged theft and testified during prosecution of plaintiff who was acquitted, but the officer did not commence the prosecution. Ala.—De Armond v. Saunders, 9 So.2d 747, 243 Ala. 263.

(4) Where defendant did not initiate the criminal prosecution but manager of store called the police who made an investigation and ar-

rested plaintiff, and the prosecutor recommended a warrant and defendant signed the complaint and the warrant thereafter issued was good on its face.

Mich.—Gooch v. Wachowiak, 89 N.W. 2d 496, 352 Mich. 347.

78. La.—Slush v. Carracce, App., 154 So. 62.

25 C.J. p 497 note 42.

State agent as instrument of wife

Claimant was not entitled to recover against the state for alleged false arrest, where it appeared that claimant was having difficulties with his wife and that the wife's sole object in contacting the authorities was to make the state's agent her instrument in the harassment of claimant. N.Y.—Hook v. State, 181 N.Y.S.2d 621.

Transferor of peddler's license was not liable to transferee for interference with transferee's business and incarceration due to erroneous belief of city authorities that license was not transferable.

La.—Slush v. Carracce, App., 154 So. 62.

Nominal party

One who is but a nominal party to a proceeding in which another is wrongfully arrested through the conduct of the real party in interest, and not an agent, is not liable in the absence of knowledge, consent, or ratification.

Mass.—Jordan v. C. I. T. Corporation, 19 N.E.2d 5, 302 Mass. 281.

79. Mo.—Richardson v. Empire Trust Co., 94 S.W.2d 966, 230 Mo. App. 580.

80. Ga.—Sharpe v. Frost, 95 S.E.2d 309, 94 Ga.App. 444.

N.Y.—Vernes v. Phillips, 194 N.E. 762, 266 N.Y. 298.

Warner v. State, 68 N.Y.S.2d 60, 189 Misc. 51, reversed on other grounds 71 N.Y.S.2d 559, 272 App. Div. 954, reversed on other grounds 79 N.E.2d 459, 297 N.Y. 395—Grago v. Vassello, 19 N.Y.S.2d 34, 173 Misc. 736.

Attorney at law

N.Y.—Vernes v. Phillips, 194 N.E. 762, 266 N.Y. 298.

duty conscientiously,^{80.5} but a public official may be held liable for false imprisonment where he has acted outside his authority.^{80.10}

§ 37. Joint Commission

Generally all those who participate in or legally cause

an unlawful detention are joint tort-feasors, and liable as such.

As a general rule, all those who, by direct act or indirect procurement, personally participate in or proximately cause an unlawful restraint or detention are liable therefor⁸¹ as principals,^{81.5} and as joint tort-feasors.⁸² The law places each partici-

80.5 U.S.—Kozlowski v. Ferrara, D. C.N.Y., 117 F.Supp. 650.

Arrests without warrant by peace officers see supra § 22.

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors."

U.S.—Gregoire v. Biddle, C.A.N.Y., 177 F.2d 579, 581.

"The courts should bend every effort to insure the fearless and effective administration of the law by protecting their enforcement officers from vindictive and retaliatory damage suits."

U.S.—Kozlowski v. Ferrara, D.C.N.Y., 117 F.Supp. 650, 653.

80.10 U.S.—Pollack v. City of Newark, D.C.N.J., 147 F.Supp. 35, affirmed, C.A., 248 F.2d 543, certiorari denied 78 S.Ct. 554, 355 U.S. 964, 2 L.Ed.2d 539.

N.J.—Lakutis v. Greenwood, 87 A.2d 23, 9 N.J. 101.

81. U.S.—Bucher v. Krause, C.A.Ill., 200 F.2d 576, certiorari denied Krause v. Bucher, 73 S.Ct. 1141, 345 U.S. 997, 97 L.Ed. 1404, rehearing denied 74 S.Ct. 17, 346 U.S. 842, 98 L.Ed. 363—Carr v. National Discount Corp., C.A.Mich., 172 F.2d 899, certiorari denied 70 S.Ct. 59, 338 U.S. 817, 94 L.Ed. 495.

Cal.—Lincoln v. Grazer, 329 P.2d 928, 163 C.A.2d 758.

Fla.—Johnson v. Weiner, 19 So.2d 699, 155 Fla. 169.

Ind.—Corpus Juris Secundum cited in Matovina v. Hult, 123 N.E.2d 893, 898, 125 Ind.App. 236.

Minn.—Kleidon v. Glascock, 10 N.W. 394, 215 Minn. 417.

Mo.—Harbison v. Chicago, R. I. & P. Ry. Co., 37 S.W.2d 609, 327 Mo. 440, 79 A.L.R. 1.

Jackson v. Thompson, App., 188 S.W.2d 853.

Mont.—Corpus Juris Secundum cited in Harrer v. Montgomery Ward & Co., 221 P.2d 428, 432, 124 Mont. 295.

Neb.—Dillon v. Sears-Roebeck Co., 253 N.W. 331, 126 Neb. 357.

N.Y.—Goldberg v. Fleischer's Confidence Food Stores, 102 N.Y.S.2d 176.

Okl.—Mayo Hotel Co. v. Cooper, 298 P.2d 443—Alsop v. Skaggs Drug Center, 223 P.2d 530, 203 Okl. 525—McGlone v. Landreth, 195 P.2d 268, 272, 200 Okl. 425—S. H. Kress & Co. v. Bradshaw, 99 P.2d 508, 186 Okl. 588.

Or.—Corpus Juris cited in Knight v. Baker, 244 P. 543, 544, 117 Or. 492.

Pa.—Keidel v. Baltimore & O. R. Co., 126 A. 770, 281 Pa. 289.

S.D.—Corpus Juris cited in Burkland v. Bliss, 252 N.W. 25, 27, 62 S.D. 91—Culver v. Burnside, 179 N.W. 490, 43 S.D. 398.

Tenn.—(Blue) Star Service, Inc. v. McCurdy, 251 S.W.2d 139, 36 Tenn. App. 1.

Vt.—Parker v. Roberts, 131 A. 21, 99 Vt. 219, 49 A.L.R. 1382.

Va.—Corpus Juris Secundum cited in Mullins v. Sanders, 54 S.E.2d 116, 120, 189 Va. 624.

Wis.—Corpus Juris Secundum quoted in Lemke v. Anders, 53 N.W.2d 436, 439, 261 Wis. 555—Hotzel v. Simmons, 45 N.W.2d 683, 258 Wis. 234.

Aiding and abetting

(1) One who aids and abets another in making an unlawful arrest or imprisonment is equally liable with the one actually making the arrest.

Ala.—Wood v. Hacker, 121 So. 437, 23 Ala.App. 12, certiorari denied 121 So. 441, 219 Ala. 139.

(2) If the aid furnished facilitates an unlawful arrest or imprisonment, it is sufficient, even though the arrest would have occurred without it.

Ala.—Wood v. Hacker, supra.

Arrest on complaint of another

That the arrest was made on complaint of another does not excuse detention after discovery of its wrongfulness.

Ala.—Simpson v. Boyd, 101 So. 664, 212 Ala. 14.

Independent contractor

One participating in an unlawful detention cannot escape liability because another of the joint tort-feasors is an independent contractor.

Okl.—Halliburton-Abbott Co. v. Hodge, 44 P.2d 122, 172 Okl. 175.

Participation held not shown

La.—Guilbeau v. Tate, App., 94 So.2d 896.

81.5 Mo.—Parrish v. Herron, 225 S.W.2d 391, 240 Mo.App. 1156—Jackson v. Thompson, App., 188 S.W.2d 853—Hines v. Fireman's Fund Ins. Co., App., 235 S.W. 174.

Deputy sheriff who was present with state highway patrolman during time plaintiff was being questioned in connection with a crime, taken into custody, driven to jail, finger printed and placed in jail and who guarded plaintiff while search for stolen goods was made was liable for false imprisonment as a principal.

Mo.—Parrish v. Herron, 225 S.W.2d 391, 240 Mo.App. 1156.

82. U.S.—Corpus Juris Secundum cited in Burlington Transp. Co. v. Josephson, C.C.A.S.D., 153 F.2d 372, 375.

Meints v. Huntington, C.C.A. Minn., 276 F. 245, 19 A.L.R. 664.

Cal.—Lincoln v. Grazer, 329 P.2d 928, 163 C.A.2d 758.

Conn.—McGann v. Allen, 134 A. 810, 105 Conn. 177.

Idaho.—Corpus Juris cited in Griffin v. Clark, 42 P.2d 297, 303, 55 Idaho 364.

Ind.—Corpus Juris Secundum cited in Matovina v. Hult, 123 N.E.2d 893, 898, 125 Ind.App. 236.

Iowa.—Drake v. Keeling, 299 N.W. 919, 230 Iowa 1038—Schultz v. Enlow, 205 N.W. 972, 201 Iowa 1083.

Minn.—Kleidon v. Glascock, 10 N.W. 2d 394, 215 Minn. 417—Corpus Juris cited in Anderson v. Averbach, 248 N.W. 719, 720, 189 Minn. 224.

Mo.—Corpus Juris Secundum cited in Parrish v. Herron, 225 S.W.2d 391, 399, 240 Mo.App. 1156—Hines v. Fireman's Fund Ins. Co., App., 235 S.W. 174.

pant on the same footing^{82.5} and all are jointly and severally liable,⁸³ regardless of the degree or extent of their individual activity,⁸⁴ and each is so liable although he did not know that the detention was illegal in its inception.⁸⁵

If proceedings are taken against one, that one cannot relieve himself from responsibility by showing that another participated in the illegal act,⁸⁶ or complain that another tort-feasor was not sued.⁸⁷ Plaintiff has the right to make as many or as few of the alleged tort-feasors defendants as he chooses;⁸⁸ and a verdict may be had against all or any,⁸⁹ but it should appear that the alleged wrong-

doer was the legal cause of the detention.⁹⁰ Thus, where defendants are sued jointly they are responsible for the entire recovery and they are not entitled to have the jury determine their individual actions and doings;^{90.5} and, where different parties participate at different times in an unlawful detention, plaintiff is not obligated to divide the trespass into parts and sue each for a part, since it is not necessary that all defendants should have been present at the commencement of the detention, for all those afterwards joining in the unlawful detention become trespassers ab initio.^{90.10}

On the other hand, it has been held that where it

N.Y.—Adams v. F. W. Woolworth Co., 257 N.Y.S. 776, 144 Misc. 27. N.C.—Houston v. De Herrodora, 136 S.E. 6, 192 N.C. 749.

Okl.—**Corpus Juris** cited in S. H. Kress & Co. v. Bradshaw, 99 P.2d 508, 514, 186 Okl. 588.

Or.—**Corpus Juris** cited in Knight v. Baker, 244 P. 543, 544, 117 Or. 492.

S.D.—**Corpus Juris** cited in Burkland v. Bliss, 252 N.W. 25, 26, 27, 62 S.D. 91—Culver v. Burnside, 179 N.W. 490, 43 S.D. 398.

Tex.—Alamo Downs, Inc. v. Briggs, Civ.App., 106 S.W.2d 733, error dismissed.

Vt.—Parker v. Roberts, 131 A. 21, 99 Vt. 219, 49 A.L.R. 1382.

Wis.—**Corpus Juris Secundum** quoted in Lemke v. Anders, 53 N.W.2d 436, 439, 261 Wis. 555.

25 C.J. p 497 note 43, p 498 note 53, p 499 notes 67-71.

Single detention by independent acts

Where arrested party suffers a single detention by the independent but contemporaneous wrongful acts of two or more persons, such persons are regarded as joint tort-feasors.

Mass.—Stone v. Dickinson, 5 Allen 29, 81 Am.D. 727.

25 C.J. p 498 note 49.

Single wrongful act committed

Ill.—Aldridge v. Fox, 108 N.E.2d 139, 348 Ill.App. 96.

82.5 Mont.—Harrer v. Montgomery Ward & Co., 221 P.2d 428, 124 Mont. 295.

Okl.—McGlone v. Landreth, 195 P.2d 268, 272, 200 Okl. 425—S. H. Kress & Co. v. Bradshaw, 99 P.2d 508, 186 Okl. 588.

83. U.S.—Meints v. Huntington, C.C. A.Minn., 276 F. 245, 19 A.L.R. 664. Ga.—Duchess Chenilles, Inc. v. Masters, 67 S.E.2d 600, 84 Ga.App. 822.

Ind.—**Corpus Juris Secundum** cited in Matovina v. Hult, 123 N.E.2d 893, 898, 125 Ind.App. 236.

Mont.—Harrer v. Montgomery Ward & Co., 221 P.2d 428, 124 Mont. 295.

Neb.—Dillon v. Sears-Roebeck Co., 253 N.W. 331, 126 Neb. 357.

Okl.—McGlone v. Landreth, 195 P.2d 268, 272, 200 Okl. 425—S. H. Kress & Co. v. Bradshaw, 99 P.2d 508, 186 Okl. 588.

Or.—Bratt v. Smith, 175 P.2d 444, 180 Or. 50.

Wash.—Wood v. Rolfe, 221 P. 982, 128 Wash. 55.

Wis.—**Corpus Juris Secundum** quoted in Lemke v. Anders, 53 N.W.2d 436, 439, 261 Wis. 555.

84. U.S.—Meints v. Huntington, C.C. A.Minn., 276 F. 245, 19 A.L.R. 664.

Cal.—Lincoln v. Grazer, 329 P.2d 928, 163 C.A.2d 758.

Ind.—**Corpus Juris Secundum** cited in Matovina v. Hult, 123 N.E.2d 893, 898, 125 Ind.App. 236.

Mont.—Harrer v. Montgomery Ward & Co., 221 P.2d 428, 124 Mont. 295.

Okl.—McGlone v. Landreth, 195 P.2d 268, 271, 200 Okl. 425—S. H. Kress & Co. v. Bradshaw, 99 P.2d 508, 186 Okl. 588.

Wis.—**Corpus Juris Secundum** quoted in Lemke v. Anders, 53 N.W.2d 436, 439, 261 Wis. 555.

85. Ind.—**Corpus Juris Secundum** cited in Matovina v. Hult, 123 N.E. 2d 893, 898, 125 Ind.App. 236.

Pa.—Burk v. Howley, 36 A. 327, 179 Pa. 539, 67 Am.S.R. 607.

Wis.—**Corpus Juris Secundum** quoted in Lemke v. Anders, 53 N.W.2d 436, 439, 261 Wis. 555.

25 C.J. p 498 note 54.

Causing denial of bail

Person inducing officer to deny prisoner right to give bail is liable as principal.

Mo.—Harbison v. Chicago, R. I. & P. Ry. Co., 37 S.W.2d 609, 327 Mo. 440, 79 A.L.R. 1.

Jailer's liability

(1) A jailer is liable if he receives and imprisons one brought in by another when he knows, or should have known, that the arrest is unlawful.

Cal.—Abbott v. Cooper, 23 P.2d 1027, 218 C. 425.

Tex.—McBeath v. Campbell, Com. App., 12 S.W.2d 118.

Box v. Fluitt, Civ.App., 47 S.W. 2d 1107.

(2) The jailer is not liable if the arresting officer makes a declaration that the prisoner was arrested for an offense committed in his presence. Ind.—Boaz v. Tate, 43 Ind. 60.

86. Neb.—Dillon v. Sears-Roebeck Co., 253 N.W. 331, 126 Neb. 357. 25 C.J. p 497 note 44.

87. Neb.—Scott v. Flowers, 84 N.W. 81, 60 Neb. 675.

N.Y.—Schultz v. U. S. Fidelity & Guaranty Co., 94 N.E. 601, 201 N. Y. 230.

88. Or.—**Corpus Juris** cited in Knight v. Baker, 244 P. 543, 544, 117 Or. 492.

Wash.—Wood v. Rolfe, 221 P. 982, 128 Wash. 55.

25 C.J. p 497 note 46.

89. Iowa.—Schultz v. Enlow, 205 N. W. 972, 201 Iowa 1083.

Wash.—Wood v. Rolfe, 221 P. 982, 128 Wash. 55.

25 C.J. p 497 note 47.

Joint verdict proper

Iowa.—Schultz v. Enlow, 205 N.W. 972, 201 Iowa 1083.

Verdict for one does not release others

Wash.—Wood v. Rolfe, 221 P. 982, 128 Wash. 55—Hayes v. Hutchinson, 142 P. 865, 81 Wash. 394.

90. Minn.—Hawkins v. Manston, 59 N.W. 309, 57 Minn. 323.

25 C.J. p 497 note 48.

Proximate cause essential

In order to render one liable as procuring or causing a false arrest, his acts must be the proximate cause of such arrest.

Ga.—Wilson v. Capital Automobile Co., 2 S.E.2d 147, 59 Ga.App. 834.

90.5 Ga.—Radney v. Levine, 42 S.E. 2d 644, 75 Ga.App. 137.

90.10 Ind.—**Corpus Juris Secundum** cited in Matovina v. Hult, 123 N. E.2d 893, 898, 125 Ind.App. 236.

N.Y.—Egleston v. Scheibel, 99 N.Y.S. 969, 113 App.Div. 798.

S.D.—Burkland v. Bliss, 252 N.W. 25, 62 S.D. 91.

25 C.J. p 498 note 59.

is sought to hold defendants jointly, no recovery can be had until they jointly participate.⁹¹

Conspiracy or common plan. In order to hold them liable as joint tort-feasors, it is not necessary to show that a conspiracy existed between the wrongdoers,⁹² as recovery in the action may be had against any one of them.⁹³ However, as discussed infra § 66, proof of conspiracy may aggravate damages.

Both in civil and criminal cases each is liable for the acts of the others done in pursuance of the mutual understanding or in furtherance of the common plan,⁹⁴ at least until the termination of the enterprise.⁹⁵

Mere presence. Those who, although present, did not participate in the illegal detention cannot be held responsible.⁹⁶

§ 38. — Instigating and Directing Others

Persons legally causing an unlawful arrest by instigation or direction are liable therefor.

One who is the legal cause of an unlawful arrest or detention, because he commands or instigates another to do the wrong, is responsible,⁹⁷ and this is so, although he does not know that the arrest was illegal.⁹⁸ Parties instigating the arrest or detention may also be liable for acts done by others in pursuance of an illegal object or enterprise in which they have all engaged,⁹⁹ although the immediate actors are unknown to them or have no other connection with them than by the unlawful acts committed, intended to effectuate the original object.¹ On the other hand, one instigating another's arrest on a felony charge cannot be held responsible for the arresting officer's subsequent conduct, in the

91. Alaska.—Barlow v. Kuchenbacher, 7 Alaska 519.

25 C.J. p 499 note 60.

92. U.S.—Meints v. Huntington, C. C.A.Minn., 276 F. 245, 19 A.L.R. 664.

Mont.—Harrer v. Montgomery Ward & Co., 221 P.2d 428, 124 Mont. 295. Okl.—McGlone v. Landreth, 195 P.2d 268, 272, 200 Okl. 425—S. H. Kress & Co. v. Bradshaw, 99 P.2d 508, 186 Okl. 588.

S.D.—Burkland v. Bliss, 252 N.W. 25, 62 S.D. 91—Culver v. Burnside, 179 N.W. 490, 43 S.D. 398.

25 C.J. p 498 note 50.

93. U.S.—Davis v. Johnson, W. Va., 101 F. 952, 42 C.C.A. 111.

94. U.S.—Meints v. Huntington, C. C.A.Minn., 276 F. 245, 19 A.L.R. 664.

Mich.—Fisher v. Rumler, 214 N.W. 310, 239 Mich. 224.

25 C.J. p 498 note 55.

During search of house

Restraint by officers searching house, of person in charge, within scope of enterprise is an act for which both were liable.

Mich.—Fisher v. Rumler, supra.

95. Tex.—Wolf v. Perryman, 17 S. W. 772, 82 Tex. 112.

Corpus Juris cited in McBeath v. Campbell, Civ.App., 4 S.W.2d 999, 1003, reversed in part on other grounds and affirmed in part, Com. App., 12 S.W.2d 118.

96. Iowa.—Drake v. Keeling, 299 N. W. 919, 230 Iowa 1038—Klemm v. Adair, 179 N.W. 51, 189 Iowa 896. Mo.—State ex rel. Fireman's Fund Ins. Co. v. Trimble, 242 S.W. 934, 294 Mo. 615.

25 C.J. p 499 note 61.

97. U.S.—Burlington Transp. Co. v. Josephson, C.C.A.S.D., 153 F.2d 372. Cal.—Hughes v. Oreb, 228 P.2d 550, 36 C.2d 854.

Colo.—**Corpus Juris cited in** Pomeranz v. Class, 257 P. 1086, 1092, 82 Colo. 173.

D.C.—Jillson v. Caprio, 181 F.2d 523, 86 U.S.App.D.C. 169.

Ga.—**Corpus Juris cited in** Stone v. National Surety Corporation, 195 S.E. 905, 906, 57 Ga.App. 427.

Ill.—Gill v. Lewin, 53 N.E.2d 336, 321 Ill.App. 633.

Iowa.—**Corpus Juris cited in** Fox v. McCurnin, 218 N.W. 499, 502, 205 Iowa 752.

Kan.—Hammargren v. Montgomery Ward & Co., 241 P.2d 1192, 172 Kan. 484.

Mo.—Snider v. Wimberly, 209 S.W.2d 239, 357 Mo. 491.

Winegar v. Chicago, B. & Q. R. Co., App., 163 S.W.2d 357—Hunt v. Ruterbusch, App., 38 S.W.2d 503—Rice v. Gray, 34 S.W.2d 567, 225 Mo.App. 890.

Mont.—Harrer v. Montgomery Ward & Co., 221 P.2d 428, 124 Mont. 295. N.Y.—Schildhaus v. City of New York, 163 N.Y.S.2d 201, 7 Misc.2d 859—Grago v. Vassello, 19 N.Y.S. 2d 34, 173 Misc. 736.

N.C.—Long v. Eagle 5, 10 & 25¢ Store Co., 198 S.E. 573, 214 N.C. 146.

Ohio.—Minor v. Seliga, 150 N.E.2d 852, 168 Ohio St. 1.

Or.—**Corpus Juris cited in** Knight v. Baker, 244 P. 543, 544, 117 Or. 492.

S.C.—Wingate v. Postal Telegraph & Cable Co., 30 S.E.2d 307, 204 S.C. 520.

Va.—**Corpus Juris Secundum cited in** Mullins v. Sanders, 54 S.E.2d 116, 120, 189 Va. 624.

Wis.—Hotzel v. Simmons, 45 N.W.2d 683, 258 Wis. 234.

25 C.J. p 499 notes 63, 67-71.

Liability of attorney

(1) Attorney who was active and procuring cause of arrest was liable for false imprisonment.

N.Y.—Fischer v. Langbein, 8 N.E. 251, 103 N.Y. 84.

Otto v. Levy, 279 N.Y.S. 462, 244 App.Div. 349.

(2) Liability of attorney as agent see infra § 41.

Conduct of marshal

Where conductor ejects passenger placing him in custody of marshal, the railroad is responsible for the marshal's conduct tending to furnish passenger with reasonable ground to believe he was under arrest.

Mo.—Humphreys v. St. Louis-San Francisco Ry. Co., App., 286 S.W. 738.

Exemption of judicial officers see infra § 44.

Presence at time of arrest is unnecessary if party instigated it.

N.Y.—Davern v. Drew, 138 N.Y.S. 1017, 153 App.Div. 844, affirmed 108 N.E. 1092, 214 N.Y. 681.

Direction unnecessary

If defendant instigated and was responsible for the unlawful arrest, he is liable, although he did not actually direct it.

Mo.—Thompson v. Fehlig Bros. Box & Lumber Co., App., 155 S.W.2d 279.

Pa.—Burk v. Howley, 36 A. 327, 179 Pa. 539, 67 Am.S.R. 607.

Liability of complainant see supra § 26.

Persons directing arrest or giving information in arrest without process see supra § 24.

98. Conn.—Allen v. Ruland, 65 A. 138, 79 Conn. 405, 118 Am.S.R. 146, 8 Ann.Cas. 344.

99. U.S.—Johnson v. Tompkins, C. C.Pa., 13 F.Cas.No.7,416, Baldw. 571.

1. U.S.—Johnson v. Tompkins, supra.

absence of a showing that he acted on the authority of, or that his conduct was caused by, such person.^{1.5}

No fixed set of rules can be laid down with which to measure acts constituting instigation of an arrest, for each case must be decided on the particular facts thereof and the inferences to be drawn therefrom.^{1.10}

§ 39. — Ratification

One may become liable for a false imprisonment by conduct amounting to an adoption or ratification of a wrongful arrest or detention.

One not originally responsible for a false arrest or detention may pursue a course of conduct which amounts to an adoption or ratification of the wrongful act, so as to render him liable therefor.² Thus, one who subsequent to an illegal arrest aids or encourages a continued detention becomes liable;³ and this is so, although the injured party may have been arrested without such other person's knowledge or consent, if the illegal restraint continues with the direction, advice, and assistance of such party.⁴

1.5 Va.—Mullins v. Sanders, 54 S. E.2d 116, 189 Va. 624.

Unreasonable or unjustifiable delay in bringing accused before committing officer

Va.—Mullins v. Sanders, supra.

1.10 Mont.—Harrer v. Montgomery Ward & Co., 221 P.2d 428, 124 Mont. 295.

Permissible inference

One may be held responsible as the instigator of an arrest without expressly requesting or demanding the arrest, if the facts surrounding the arrest reasonably create a permissible inference of instigation.

Ala.—Crescent Amusement Co. v. Scott, 40 So.2d 882, 34 Ala.App. 335, certiorari denied 40 So.2d 886, 252 Ala. 296.

2. Ill.—Schramko v. Boston Store of Chicago, 243 Ill.App. 251.

Mo.—**Corpus Juris Secundum** quoted in Snider v. Wimberly, 209 S.W.2d 239, 241, 357 Mo. 491.

Corpus Juris Secundum cited in Parrish v. Herron, 225 S.W.2d 391, 399, 240 Mo.App. 1156.

Circumstances not constituting ratification

Promise to send representative to look after matter.

Ky.—Triangle Motors Co. v. Smith, 287 S.W. 914, 216 Ky. 479.

Participation

Where defendant and his attorney sat in close proximity to justice of the peace during unlawful detention of plaintiffs and testified at the proceeding and defendant was repre-

sented by his attorney at all times and plaintiffs were under arrest under warrant issued by justice of the peace which was void on its face, defendant's participation amounted to an adoption and ratification of the initial wrongful arrest and was sufficient to predicate liability on him for false imprisonment and malicious prosecution.

Wis.—Lemke v. Anders, 53 N.W.2d 436, 261 Wis. 555.

3. Colo.—Grimes v. Greenblatt, 107 P. 1111, 47 Colo. 495, 19 Ann.Cas. 608.

La.—Spierior v. Ott, 6 La.A. (Orleans) 327.

Mo.—Cooper v. Johnson, 81 Mo. 483, 25 C.J. p 499 note 76.

4. N.Y.—Callahan v. Searles, 29 N. Y.S. 904, 78 Hun 238, 25 C.J. p 500 note 77.

Instruction to detain

Even though plaintiff was not arrested by defendant's order, arrest is ratified, and constitutes a technical false imprisonment, where defendant afterward orders officer to detain plaintiff.

N.Y.—Rolnick v. Borden's Farm Products Co., 212 N.Y.S. 189, 214 App.Div. 259.

25 C.J. p 500 note 77 [a].

5. Ala.—Birmingham News Co. v. Browne, 153 So. 773, 228 Ala. 395.

6. U.S.—Maryland Casualty Co. v. Woolley, C.C.A.Cal., 36 F.2d 460.

Colo.—Fulton Inv. Co. v. Fraser, 230 P. 600, 76 Colo. 125.

Ky.—Ward v. Kentucky River Coal

Corporation, 42 S.W.2d 530, 240 Ky. 423.

Mo.—**Corpus Juris Secundum** cited in Heinold v. Muntz T. V., Inc., 262 S.W.2d 32, 35.

N.Y.—Young v. Edelbrew Brewery, 87 N.Y.S.2d 199, 275 App.Div. 722, motion withdrawn 93 N.E.2d 351, 301 N.Y. 556, and reversed on other grounds 98 N.E.2d 473, 302 N.Y. 653.

S.C.—Wingate v. Postal Telegraph & Cable Co., 30 S.E.2d 307, 204 S.C. 520—Bushardt v. United Inv. Co., 113 S.E. 637, 121 S.C. 324.

Tenn.—Sears, Roebuck & Co. v. Steele, 130 S.W.2d 160, 23 Tenn. App. 275.

Wash.—Rogers v. Sears, Roebuck & Co., 297 P.2d 250, 48 Wash.2d 879.

"Unless the acts complained of are done within the scope of the employment and the limits of such implied authority, the master is not liable, unless express authority be shown, or there be subsequent ratification or adoption. The necessity for precedent authority or subsequent adoption or ratification exists where the act complained of is not done within the scope of the agent's employment and the limit of his implied authority."

Md.—McCrorry Stores Corporation v. Satchell, 129 A. 348, 350, 148 Md. 279.

Authority may be implied from circumstances.

Pa.—Farneth v. Commercial Credit Co., 169 A. 89, 313 Pa. 433.

6.5 Cal.—Turner v. Mellon, 257 P. 2d 15, 41 C.2d 45.

§ 40(1). Liability of Principal for Acts of Agent

The liability of a principal for a wrongful restraint or detention by an agent or employee depends on whether the act was authorized or subsequently ratified or whether the act was within the scope of the agent's or employee's employment or authority.

The liability of an alleged principal or employer for a false arrest or imprisonment by an agent or employee is determined by rules of agency, discussed generally in Agency §§ 254-261, and Master and Servant §§ 561-575, rather than by any rule peculiar to the law of false imprisonment.⁵ Thereunder the liability of a principal or employer for the act of his agent or employee depends on whether the principal authorized or subsequently ratified the act, or whether the act was within the scope of the agent's or employee's employment or authority,⁶ and whether the employee committed the tort in, and as a part of, the transaction of the business of the employer.^{6.5}

Accordingly, the principal is liable for an unlawful arrest or detention made or caused by his serv-

ant or agent acting within the scope of his express or implied authority,⁷ and in furtherance of the employer's business,⁸ or in protecting the principal's property in line with a duty imposed on him so to do, as discussed *infra* § 40(4). To hold the principal liable, the injured person must establish that the relationship existed,⁹ that the servant or agent actually caused or participated in the illegal restraint,¹⁰ and that he acted within the scope of his

authority either implied or express, or that the act was ratified by the principal.¹¹

Independent contractor. It has been held that where the person employed stands in the relation of independent contractor to the employer, the latter exercising no control over the activities of the former, the employer will not be responsible or liable for a false imprisonment caused by the employee.¹² Thus a collection agency employed to

7. U.S.—Director General of Railroads v. Kastenbaum, N.Y., 44 S. Ct. 52, 263 U.S. 25, 68 L.Ed. 146.
- Ala.—U. S. Cast Iron Pipe & Foundry Co. v. Henderson, 116 So. 915, 22 Ala.App. 448, certiorari denied 116 So. 917, 217 Ala. 520, and followed in U. S. Cast Iron Pipe & Foundry Co. v. Williams, 117 So. 927, 22 Ala.App. 695.
- Ark.—Missouri Pac. R. Co. v. Yancey, 22 S.W.2d 408, 180 Ark. 684.
- Cal.—Kaufman v. Brown, 209 P.2d 156, 93 C.A.2d 508—Peckham v. Warner Bros. Pictures, 97 P.2d 472, 36 C.A.2d 214—McInerney v. United Railroads of San Francisco, 195 P. 958, 50 C.A. 538.
- D.C.—Takahashi v. Hecht Co., 50 F. 2d 326, 60 App.D.C. 176.
- La.—Blickhan v. American Brewing Co., App., 171 So. 865.
- Neb.—Dillon v. Sears-Roeback Co., 253 N.W. 331, 126 Neb. 357.
- N.Y.—Vittorio v. St. Regis Paper Co., 145 N.E. 913, 239 N.Y. 148.
- Grago v. Vassello, 19 N.Y.S.2d 34, 173 Misc. 736.
- N.C.—**Corpus Juris cited in** Parrish v. Boyssell Mfg. Co., 188 S.E. 817, 819, 211 N.C. 7.
- Pa.—Kirschman v. Pitt Pub. Co., 178 A. 828, 318 Pa. 570.
- Shields v. Patterson, 97 Pa.Super. 398.
- Tex.—Magnolia Petroleum Co. v. Guffey, 102 S.W.2d 408, 129 Tex. 293.
- Galveston, H. S. & A. Ry. Co. v. Harden, Civ.App., 236 S.W. 146.
- 25 C.J. p 500 note 79—2 C.J. 849 note 27.
8. La.—Blickhan v. American Brewing Co., App., 171 So. 865.
9. U.S.—Mores v. Jackson, D.C. Wash., 60 F.2d 598.
- 25 C.J. p 500 note 80.

Acts of policeman

- (1) Ordinarily a private person is not responsible for acts of a special police officer performed as a public officer.
- Tenn.—Dupont Rayon Co. v. Henson, 36 S.W.2d 879, 162 Tenn. 394.
- (2) Store owner, having no contract of employment with police officer, is not liable for false imprisonment through conduct of such police officer in making arrest without instructions.

Ala.—J. J. Newberry Co. v. Smith, 149 So. 669, 227 Ala. 234.

10. D.C.—Chesapeake & Potomac Telephone Co. v. Lewis, 99 F.2d 424, 69 App.D.C. 191.

Okl.—McGlone v. Landreth, 195 P. 2d 268, 200 Okl. 425.

25 C.J. p 500 note 81.

Arrest by police officer

(1) That an arrest was actually made by a police officer not an employee does not relieve the principal if it was pursuant to a request by an agent or employee acting within the scope of his authority.

U.S.—Atkinson v. Dixie Greyhound Lines, C.C.A.Miss., 143 F.2d 477, certiorari denied 65 S.Ct. 92, 323 U. S. 758, 89 L.Ed. 607.

Ala.—Southern Ry. Co. v. Beaty, 103 So. 658, 212 Ala. 608.

D.C.—Takahashi v. Hecht Co., 50 F. 2d 326, 60 App.D.C. 176.

Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Roberts, 249 S.W. 1012, 198 Ky. 710.

N.C.—Long v. Eagle 5, 10 and 25th Store Co., 198 S.E. 573, 214 N.C. 146.

Va.—Montgomery Ward & Co. v. Wickline, 50 S.E.2d 387, 188 Va. 485.

(2) So, mere information to the officers of the law by agent, tending to show that an offense has been committed and that some person named may be suspected of its commission, is insufficient, of itself, to warrant inference that the informer participated in the unlawful arrest and imprisonment of accused by the officer.

U.S.—Stueber v. Admiral Corp., C.A. Ill., 171 F.2d 777, certiorari denied 69 S.Ct. 891, 336 U.S. 961, 93 L.Ed. 1113.

D.C.—Chesapeake & Potomac Telephone Co. v. Lewis, 99 F.2d 424, 69 App.D.C. 191.

(3) On the other hand, if the agent or employee merely acts for, or assists, the police officer in the arrest or detention, his acts are not within the scope of his employment for which the principal can be held liable.

Mont.—Plummer v. Northern Pac. Ry. Co., 255 P. 18, 79 Mont. 82.

Tex.—Presley v. Ft. Worth & D. C.

R. Co., Civ.App., 145 S.W. 669—Magnolia Petroleum Co. v. Guffey, Civ.App., 59 S.W.2d 174, reversed on other grounds, Com.App., 95 S. W.2d 690, motion granted and reheard 102 S.W.2d 408, 129 Tex. 293.

25 C.J. p 500 note 81 [c].

(4) So, where a discharged employee, after being removed from a car by peace officer, ran back into the car and was thereupon followed, brought out, and arrested by the peace officer for disorderly conduct, the railroad company having only authorized his removal from the car could not be liable for the false imprisonment.

Pa.—Decker v. Lackawanna & Wyo. Valley R. Co., 39 Pa.Super. 225.

11. Ala.—Birmingham News Co. v. Browne, 153 So. 773, 228 Ala. 395.

Cal.—Mackie v. Ambassador Hotel & Investment Corporation, 11 P.2d 3, 123 C.A. 215, followed in 11 P. 2d 7, 123 C.A. 770.

Mo.—Hurst v. Montgomery Ward & Co., App., 107 S.W.2d 183.

N.C.—Hammond v. Eckerd's of Asheville, 18 S.E.2d 151, 220 N.C. 596

—Parrish v. Boyssell Mfg. Co., 188 S.E. 817, 211 N.C. 7—Roland v. Railway Express Agency, 161 S.E. 483, 201 N.C. 815—Lamm v. Charles Stores Co., 159 S.E. 444, 201 N.C. 134, 77 A.L.R. 923.

Tex.—Fort Worth Hotel Co. v. Waggonman, Civ.App., 126 S.W.2d 578, error dismissed, judgment correct

—**Corpus Juris cited in** Price v. Lovejoy, Civ.App., 88 S.W.2d 785, 786.

25 C.J. p 500 note 82.

Agent of surety

Surety on administrator's bond directing agent to petition court for release was held not liable for unlawful imprisonment of administrator.

U.S.—Maryland Casualty Co. v. Woolley, C.C.A.Cal., 36 F.2d 460.

12. Ill.—Komorowski v. Boston Store of Chicago, 263 Ill.App. 88.

N.C.—Inscove v. Globe Jewelry Co., 157 S.E. 794, 200 N.C. 580.

Gasoline station attendant, who acts for oil company in selling oil and gas belonging to such company and pays over proceeds thereto, is an agent and not an independent contractor.

collect accounts on a percentage basis, the employer having no voice or control over the methods to be used, is an independent contractor, for whose conduct in making a wrongful arrest of one of the employer's debtors the employer is not responsible.¹³

Ratification. The principal may become liable if he or his duly authorized agent ratifies the act of his agent in the making or causing of a wrongful arrest.¹⁴ However, to establish a ratification by an agent it must appear that the act of ratification by such agent was within the scope of his authority, express or implied.¹⁵

Principal exonerated, if agent exonerated. The principal when sued because of an alleged wrongful detention by his agent may prove in justification that the agent could not have been liable,¹⁶ or has been released.¹⁷ Liability may, however, be imposed if it is established that the principal was the legal cause of the detention, independent of the acts of the agent.¹⁸

§ 40(2). — Scope of Authority or Employment

What comes within the scope of authority or employment may depend on the character of the employment, and authority to detain may be implied from the employer's relation to the principal and the mode in which he is permitted to act or conduct the business.

Where the authority given the agent to detain another is express, the principal is responsible if the detention is wrongful.¹⁹ In the absence of such express authority, the character of the employment is an important consideration in determining whether the agent's misconduct was within the scope of his authority or employment.²⁰ Hence, although, broadly speaking, arresting or causing the arrest of persons is not an incident of business committed to subordinate agents or employees, or in the line or scope of their employment, unless such authority is conferred expressly or by implication from acquiescence in a known course of conduct,²¹ authority of an agent or employee to detain another

Tex.—Magnolia Petroleum Co. v. Guffey, Civ.App., 59 S.W.2d 174, reversed on other grounds, Com.App., 95 S.W.2d 690, motion granted and reheard 102 S.W.2d 408, 129 Tex. 293.

13. N.C.—Inscow v. Globe Jewelry Co., 157 S.E. 794, 200 N.C. 580.

Extent of authority

(1) Agency to collect a debt did not make principal liable for agent's arrest of debtor in absence of proof that principal procured the arrest or ratified it.

Ala.—Bright v. Sawyer, 159 So. 211, 229 Ala. 657.

(2) However, one, who employs a collection agency in response to an advertisement announcing methods of collection as severe or easy, and gives no special instructions, authorizes the agency to use such means as it sees fit and hence is liable for its acts committed while collecting his accounts.

Mass.—Caswell v. Cross, 120 Mass. 545.

14. Pa.—Keidel v. Baltimore & O. R. Co., 126 A. 770, 281 Pa. 289.

Tex.—S. H. Kress & Co. v. Rust, 120 S.W.2d 425, 132 Tex. 89, 25 C.J. p 501 note 91.

Knowledge of acts without objection. Pa.—Shields v. Patterson, 97 Pa.Super. 398.

Insufficient knowledge

That proprietor took no action when some one telephoned to him that there was a woman in his store who would not leave did not make him responsible, since such information gave him no notice of the actual

situation of a wrongful detention by an employee.

N.Y.—Homeyer v. Yaverbaum, 188 N.Y.S. 849, 197 App.Div. 184.

Ratification absent

Ala.—Buttrey v. Wilhite, 94 So. 585, 208 Ala. 573.

Wofford Oil Co. v. Stauter, 154 So. 124, 26 Ala.App. 112.

Wash.—Rogers v. Sears, Roebuck & Co., 297 P.2d 250, 48 Wash.2d 879.

15. Ala.—Wofford Oil Co. v. Stauter, 154 So. 124, 26 Ala.App. 112, 25 C.J. p 501 note 92.

16. Ark.—Missouri Pac. R. Co. v. Quick, 137 S.W.2d 263, 199 Ark. 1134.

Cal.—Mackie v. Ambassador Hotel & Investment Corporation, 11 P.2d 3, 123 C.A. 215, followed in 11 P.2d 7, 123 C.A. 770.

Mo.—State ex rel. Fireman's Fund Ins. Co. v. Trimble, 242 S.W. 934, 294 Mo. 615.

25 C.J. p 502 note 93.

Reason for rule

The liability of the principal depends on the doctrine of respondeat superior.

Mo.—Vest v. Kresge Co., App., 213 S.W. 165.

Arrest independent act of police

If the arrest was not requested or directed by the agent, but was the independent act of the police officer, the principal is not liable even though the arrest was instigated by the agent.

Tex.—El Paso Electric Ry. Co. v. Crews, Civ.App., 277 S.W. 732.

17. Mass.—Horgan v. Boston El. R. Co., 94 N.E. 386, 208 Mass. 287.

25 C.J. p 502 note 94.

18. Mo.—Vest v. Kresge Co., App., 213 S.W. 165.

Verdict for agent immaterial

In an action for false imprisonment, a verdict for one defendant, who was in fact but an agent of two others, and, in making the arrest, had acted under their authority, was held not to release his codefendants.

Wash.—Wood v. Rolfe, 221 P. 982, 128 Wash. 55.

19. Ala.—Gambill v. Cargo, 43 So. 866, 161 Ala. 421, 25 C.J. p 500 note 84.

20. U.S.—Hundley v. Milner Hotel Management Co., D.C.Ky., 114 F. Supp. 206, affirmed, C.A., Milner Hotel Management Co. v. Hundley, 216 F.2d 613.

Ky.—J. J. Newberry Co. v. Judd, 82 S.W.2d 359, 259 Ky. 309.

N.C.—Lamm v. Charles Stores Co., 159 S.E. 444, 201 N.C. 134, 77 A.L.R. 923.

21. Ala.—Birmingham News Co. v. Browne, 153 So. 889, 228 Ala. 414.

Mo.—Heinold v. Muntz T. V., Inc., 262 S.W.2d 32.

Clerk

(1) Corporation operating drug store was not liable to customer in action for false arrest, because clerk at cigar stand in drug store followed customer outside drug store, accused him of stealing two cigars, and had policeman search the customer, since clerk had no implied authority to go out of store and prefer charges against customer and cause the customer to be searched.

N.C.—Hammond v. Eckerd's of Asheville, 18 S.E.2d 151, 220 N.C. 596

may be implied from his relation to the principal, the nature of his employment, and the mode in which he is permitted to act or conduct the business.²²

Liberality toward complainant is exercised in determining the scope of the agent's authority and the liability of the principal.²³

§ 40(3). — Effect of Breach of Instructions, Negligence, Malice, Etc., of Employee

The principal is liable for a wrongful restraint or detention by an agent or employee within the scope of his employment or authority even though the act was contrary to express instructions, and even though the agent or employee was guilty of negligence or of malicious conduct.

(2) Where store clerk had been instructed never to accuse or arrest a customer and clerk followed customer down street over a block and then summoned police officer and accused customer of theft from store, clerk was not acting within scope of his employment and store was not liable for false imprisonment. Wash.—Rogers v. Sears, Roebuck & Co., 297 P.2d 250, 48 Wash.2d 879.

Doorman

A servant instructed to admit into a church only such persons as have tickets cannot, by directing police officers to arrest one who seeks to enter without a ticket, make his master liable for a false arrest made pursuant thereto, as he would not be acting within the scope of his employment. Md.—Barabasz v. Kabat, 37 A. 720, 86 Md. 23.

22. Ala.—*Corpus Juris* cited in Caldwell v. Standard Oil Co., 124 So. 512, 513, 220 Ala. 227—*Corpus Juris* cited in Southern Ry. Co. v. Beaty, 103 So. 658, 661, 212 Ala. 608—*Corpus Juris* cited in Standard Oil Co. v. Davis, 94 So. 754, 756, 208 Ala. 565.

25 C.J. p 500 note 83.

Express directions

Express directions to do certain acts may imply authority to arrest and detain.

Tex.—Rucker v. Barker, 192 S.W. 528, 108 Tex. 280.

25 C.J. p 500 note 85.

Imposition of duties

An agent or employee having certain duties to perform has implied authority to do everything which will enable him to perform such duties.

Md.—McCrary Stores Corporation v. Satchell, 129 A. 348, 148 Md. 279. Mass.—Jacques v. Childs Dining Hall Co., 138 N.E. 843, 244 Mass. 438, 26 A.L.R. 1329.

Elevator operator

Operator of elevator refusing to

permit person in elevator to leave it acts within scope of employment as agent for owner of building.

Ga.—Turney v. Rhodes, 155 S.E. 112, 42 Ga.App. 104.

Hotel representative

An employee of a hotel, who is the only representative of the owner with whom a guest has contact, apparently has all the authority of the owner and renders the owner liable for his acts in causing a false arrest.

Ill.—Callaghan v. Harvey, 225 Ill.App. 353.

Manager

(1) Term "manager" or "assistant manager" of store carries implication of general power and permits reasonable inference that manager or assistant is vested with general conduct and control of employer's business in store, and his acts are acts of store as regards liability of store for assistant manager's false imprisonment of alleged shoplifter.

Ky.—J. J. Newberry Co. v. Judd, 82 S.W.2d 359, 259 Ky. 309.

(2) Store manager's unauthorized procurement of warrant for woman's arrest for cashing worthless check was not incidental to collection of account for employer.

N.C.—Lamm v. Charles Stores Co., 159 S.E. 444, 201 N.C. 134, 77 A.L.R. 923.

23. Ky.—J. J. Newberry Co. v. Judd, 82 S.W.2d 359, 259 Ky. 309.

24. Ala.—Birmingham News Co. v. Browne, 153 So. 773, 228 Ala. 395. Ill.—Callaghan v. Harvey, 225 Ill.App. 353.

Tex.—Magnolia Petroleum Co. v. Guffey, 102 S.W.2d 408, 129 Tex. 293. Galveston, H. & S. A. Ry. Co. v. Harden, Civ.App., 236 S.W. 146. 25 C.J. p 500 note 86.

25. Ala.—Birmingham News Co. v. Browne, 153 So. 773, 228 Ala. 395. 25 C.J. p 501 note 87.

If the arrest or detention can be said to be within the implied or express authority of the agent, the principal is liable, although the arrest or detention was wrongful and not specifically directed,²⁴ or although the agent in making it exceeded his actual authority,²⁵ or violated his instructions.²⁶ So, if the act of the agent is performed within the scope of his employment or authority while acting in furtherance of the employer's business, the employer is liable regardless of whether the agent performed the act in the ordinary way,²⁷ as where he used improper or unlawful means,²⁸ was guilty of negligence,²⁹ or of willful or malicious conduct,³⁰ or where he otherwise acted indiscreetly, or with bad judgment, or through mistake.³¹

26. Ala.—Birmingham News Co. v. Browne, supra.

Ky.—*Corpus Juris* cited in J. J. Newberry Co. v. Judd, 82 S.W.2d 359, 363, 259 Ky. 309.

Tex.—Newton v. Rhoads Bros., Com. App., 24 S.W.2d 378.

25 C.J. p 501 note 88.

27. Tex.—Magnolia Petroleum Co. v. Guffey, 102 S.W.2d 408, 129 Tex. 293.

28. Ala.—Birmingham News Co. v. Browne, 153 So. 773, 228 Ala. 395.

29. N.Y.—Dupre v. Childs, 65 N.Y. S. 179, 52 App.Div. 306, affirmed 62 N.E. 1095, 169 N.Y. 585.

25 C.J. p 501 note 89.

30. Ky.—*Corpus Juris* cited in J. J. Newberry Co. v. Judd, 82 S.W.2d 359, 363, 259 Ky. 309.

25 C.J. p 501 note 90.

Insulting speech

Cal.—McInerney v. United Railroads of San Francisco, 195 P. 958, 50 C.A. 538.

Undue violence

Cal.—McInerney v. United Railroads of San Francisco, supra.

31. Mo.—Hurst v. Montgomery Ward & Co., App., 107 S.W.2d 183.

Failure to make full disclosure

Where plaintiff, who had open account at shoe store, requested store cashier to cash her check and explained to cashier that she put notation on check so that bank would recognize that it was her check and was not a forged check on her account and cashier took the check to credit manager who had received information of recent passing of checks bearing plaintiff's forged name and who called police and who recognized plaintiff as the person who had account before police arrived, credit manager's failure to make full disclosure to police led to false arrest and imprisonment of plaintiff and store was liable to plaintiff.

§ 40(4). — Employees in Charge of or Protecting Business or Property

The principal is liable for a wrongful detention by an agent or employee intrusted with his business or property to protect or recover it, but not if merely to punish an alleged offender.

An agent or employee, intrusted with property, has implied authority to do all things necessary to protect such property³² except, it is sometimes held, to do things which the employer himself could not lawfully do.³³ Hence, the principal has been held responsible in numerous cases on the ground that the agent acted within the scope of his authority where the arrest or detention is made or caused

by an agent who is intrusted with the care and custody of the principal's business, and property, and the arrest or detention arises out of his efforts to protect the business or protect or recover the property of the principal,³⁴ or to protect the employer's servants.³⁵ This is so even if it is necessary to follow the alleged wrongdoer off the premises of the employer.³⁶

However, there is no implied authority in one having charge or custody of the principal's business or property to take such steps as he thinks fit merely to punish a person suspected or guilty of a past offense with respect to the property.³⁷

Tex.—Leon's Shoe Stores, Inc. v. Hornsby, Civ.App., 306 S.W.2d 402.

32. Md.—McCrorry Stores Corporation v. Satchell, 129 A. 348, 148 Md. 279.

Property intrusted for sale or safe-keeping

Md.—McCrorry Stores Corporation v. Satchell, supra.

33. N.Y.—Mali v. Lord, 39 N.Y. 381, 7 Transcr.A. 174, 100 Am.D. 448. Homeyer v. Yaverbaum, 188 N.Y. S. 849, 197 App.Div. 184.

Arrest on suspicion

"It cannot be presumed, that a master, by intrusting his servant with his property, and conferring power upon him to transact his business, thereby authorizes him to do any act for its protection that he could not lawfully do himself if present. The master would not, if present, be justified in arresting, detaining, and searching a person upon suspicion, however strong, of having stolen his goods, and secreted them upon his person. The authority of the defendants to the superintendent could not, therefore, be implied from his employment. The act was not done in the business of the defendants, and they were not, as masters, responsible therefor."

N.Y.—Mali v. Lord, 39 N.Y. 381, 384, 7 Transcr.A. 174, 100 Am.D. 448. Homeyer v. Yaverbaum, 188 N.Y. S. 849, 850, 197 App.Div. 184.

34. U.S.—Hundley v. Milner Hotel Management Co., D.C.Ky., 114 F. Supp. 206, affirmed, C.A., Milner Hotel Management Co. v. Hundley, 216 F.2d 613.

Ala.—Birmingham News Co. v. Browne, 153 So. 889, 228 Ala. 414. Cal.—Korkman v. Hanlon Dry Dock & Shipbuilding Co., 199 P. 880, 53 C.A. 147.

Ky.—J. J. Newberry Co. v. Judd, 82 S.W.2d 359, 259 Ky. 309.

La.—Blickhan v. American Brewing Co., App., 171 So. 865.

Md.—McCrorry Stores Corporation v. Satchell, 129 A. 348, 148 Md. 279.

Mo.—Titus v. Montgomery Ward &

Co., 123 S.W.2d 574, 232 Mo.App.

987—Hines v. Fireman's Fund Ins. Co., App., 235 S.W. 174.

Ohio.—Combs v. Kobacker Stores, Inc., App., 114 N.E.2d 447.

Pa.—Smith v. Bulzoni, Com.Pl., 46 Lack.Jur. 93.

W.Va.—Moseley v. J. G. McCrorry Co. of West Virginia, 133 S.E. 73, 101 W.Va. 480.

25 C.J. p 502 note 97.

Authority implied

Fla.—Winn & Lovett Grocery Co. v. Archer, 171 So. 214, 126 Fla. 308.

Md.—McCrorry Stores Corporation v. Satchell, 129 A. 348, 148 Md. 279.

Managers

Fla.—S. H. Kress & Co. v. Powell, 180 So. 757, 132 Fla. 471.

Ky.—J. J. Newberry Co. v. Judd, 82 S.W.2d 359, 259 Ky. 309.

Md.—McCrorry Stores Corporation v. Satchell, 129 A. 348, 148 Md. 279.

Neb.—Dillon v. Sears-Roebuck Co., 253 N.W. 331, 126 Neb. 357.

N.Y.—Dupre v. Childs, 65 N.Y.S. 179, 52 App.Div. 306, affirmed 62 N.E. 1095, 169 N.Y. 585.

N.C.—Long v. Eagle, 5, 10 and 25¢ Store Co., 198 S.E. 573, 214 N.C. 146.

W.Va.—Moseley v. J. G. McCrorry Co. of West Virginia, 133 S.E. 73, 101 W.Va. 480.

25 C.J. p 502 note 97 [e], [f], [h], [i].

Clerk

Clerk in charge of property, believing same has been stolen, is acting in apparent scope of employment in adopting means to prevent escape of thief.

Tex.—Newton v. Rhoads Bros., Com. App., 24 S.W.2d 378.

Sales clerk in store

Mo.—Hurst v. Montgomery Ward & Co., App., 145 S.W.2d 992—Hurst v. Montgomery Ward & Co., App., 107 S.W.2d 183.

Filling station attendant

Act of filling station attendant in falsely imprisoning customer to enforce payment for oil and gas after determining that check was not good, would be within scope of employment, so as to render oil company liable.

Tex.—Magnolia Petroleum Co. v. Guffey, Civ.App., 59 S.W.2d 174, reversed on other grounds, Com.App., 95 S.W.2d 690, motion granted and reheard 102 S.W.2d 408, 129 Tex. 293.

Railroad officials in charge of division.

Pa.—Keidel v. Baltimore & O. R. Co., 126 A. 770, 281 Pa. 289.

Strike guards

Where street railroad, during strike employed guards, acting under instructions from the president, who were sent to a section of city where attacks had been made on the railroad's employees and cars, the railroad was liable for the acts of such guards who assaulted and arrested a pedestrian in the mistaken belief that he was one of the strikers and had participated in the attacks, such assault and arrest being within the scope of their authority, regardless of the mistake.

Cal.—McInerney v. United Railroads of San Francisco, 195 P. 958, 50 C.A. 538.

35. Hawaii.—Ford v. Oceanic S.S. Co., 3 Hawaii Fed. 239.

Minn.—Smith v. Munch, 68 N.W. 19, 65 Minn. 256.

25 C.J. p 502 note 98.

36. Fla.—Winn & Lovett Grocery Co. v. Archer, 171 So. 214, 126 Fla. 308.

25 C.J. p 502 note 99.

"The important thing to consider is not whether the alleged wrong was committed inside or outside the store, but whether the employee by his conduct . . . was attempting to protect the property of the company or to vindicate public justice."

Fla.—Winn & Lovett Grocery Co. v. Archer, supra.

37. Ala.—Birmingham News Co. v. Browne, 153 So. 889, 228 Ala. 414—Southern Ry. Co. v. Beaty, 103 So. 658, 212 Ala. 608.

Wofford Oil Co. v. Stauter, 154 So. 124, 126, 26 Ala.App. 112.

Pa.—Smith v. Bulzoni, Com.Pl., 46 Lack.Jur. 93.

Hence, the principal is held not liable for the act of an agent, where, although intrusted with the business or property, the offense against the business has already been committed or the property has been taken from his custody, so that an arrest or criminal proceeding cannot be said to be necessary for its preservation, but, on the contrary, is merely to punish the offender or vindicate justice.³⁸

If the employee intrusted with the care of the business or property goes beyond or outside his employment in making or causing an arrest, the employer is not liable,³⁹ nor is the principal liable

where the agent steps aside from his employment and makes an arrest for his own purposes and ends.⁴⁰

Persons not intrusted with business or property. The principal is exonerated, in many instances, where the agent is not such a one as is intrusted with the care and custody of the principal's business and property.⁴¹

Property of another. The principal is ordinarily exonerated when the agent's act in causing the detention is not for the protection of property belonging to, or in the custody of, his principal.⁴²

Va.—*Manuel v. Cassada*, 59 S.E.2d 47, 190 Va. 906, 18 A.L.R.2d 395.

"The act of punishing the offender is not anything done with reference to the property; it is done merely for the purpose of vindicating justice and for the protection of the public generally."

Ala.—*Wofford Oil Co. v. Stauter*, 154 So. 124, 126, 26 Ala.App. 112.

33. Ala.—*Wofford Oil Co. v. Stauter*, supra.

Cal.—*Korkman v. Hanlon Dry Dock & Shipbuilding Co.*, 199 P. 880, 53 C.A. 147.

Ky.—*Louisville & N. R. Co. v. Vinson*, 223 S.W.2d 89, 310 Ky. 854—*Wood v. Southeastern Greyhound Lines*, 194 S.W.2d 81, 302 Ky. 110—*Corpus Juris* cited in *J. J. Newberry Co. v. Judd*, 82 S.W.2d 359, 362, 259 Ky. 309.

Md.—*McCrorry Stores Corporation v. Satchell*, 129 A. 348, 148 Md. 279.

N.C.—*Pridgen v. Carolina Coach Co.*, 47 S.E.2d 609, 229 N.C. 46.

Pa.—*Smith v. Bulzoni*, Com.Pl., 46 Lack.Jur. 93.

S.C.—*Bushardt v. United Inv. Co.*, 113 S.E. 637, 641, 121 S.C. 324.

W.Va.—*Pruitt v. Watson*, 138 S.E. 331, 103 W.Va. 627, 25 C.J. p 503 note 2.

"That a tortious act committed in putting the criminal law in operation after property has been stolen cannot be held to be within the implied authority of a servant merely because such servant was charged with the protection and preservation of the property at the time of the theft is settled by the great weight of authority."

S.C.—*Bushardt v. United Inv. Co.*, 113 S.E. 637, 641, 121 S.C. 324.

"The distinction is that where one, to prevent or terminate a present interference with the business or property of his principal, takes a certain step, such as ordering the arrest of a person, that is in furtherance of his duty as manager of the business, or custodian of the property; but where one causes the

arrest of another for an offense that has already been committed, such arrest cannot aid in the business of the principal nor serve to protect the principal's property. When the offense has been already committed, punishment therefor is entirely dissociated from the conduct of the principal's business. . . . 'There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done.'"

Cal.—*Mackie v. Ambassador Hotel & Investment Corporation*, 11 P.2d 3, 7, 123 C.A. 215, followed in 11 P. 2d 7, 123 C.A. 770.

No implied authority

Servant, having custody of property, has no implied authority to take steps to punish one who he supposes has done something with reference to it.

Fla.—*Winn & Lovett Grocery Co. v. Archer*, 171 So. 214, 126 Fla. 308.

Md.—*McCrorry Stores Corporation v. Satchell*, 129 A. 348, 148 Md. 279.

Identification at request of public officers

Corporation employing guards for paymaster was held not liable, under doctrine of respondeat superior, for acts of guards going to another city, identifying robbery suspect and swearing out warrant at request of public officers, notwithstanding clause in robbery policy.

Ala.—*Daniel v. Goodyear Tire & Rubber Co.*, 143 So. 449, 225 Ala. 446.

Arrest for bad check

(1) Where defendant's agent, causing plaintiff's arrest for uttering forged check for goods at defendant's store, acted some weeks thereafter, and in the absence of defendant, off his premises, and without any colorable right, pointed out plaintiff to a policeman, who arrested her on a street car, defendant was not liable. The agent having stepped aside from her employment.

Ala.—*Buttrey v. Wilhite*, 94 So. 585, 208 Ala. 573.

(2) Where defendant's employee, who aided in having plaintiff arrested for alleged issuance of bad checks was unauthorized to accept checks, and had paid loss from his own pocket before the arrest, he was not acting within scope of his employment rendering defendant liable for his acts. Ky.—*Cope v. Askins*, 270 S.W. 454, 208 Ky. 86.

39. Miss.—*Hudson v. Pevsner*, 61 So. 2d 777, 216 Miss. 126.

N.C.—*Butler v. Holt-Williamson Mfg. Co.*, 109 S.E. 559, 182 N.C. 547.

Pa.—*Smith v. Bulzoni*, Com.Pl., 46 Lack.Jur. 93.

40. Ky.—*J. J. Newberry Co. v. Judd*, 82 S.W.2d 359, 259 Ky. 309.

N.C.—*Butler v. Holt-Williamson Mfg. Co.*, 109 S.E. 559, 182 N.C. 547.

25 C.J. p 503 note 3.

41. Mo.—*Sacks v. St. Louis & S. F. R. Co.*, 192 S.W. 418.

25 C.J. p 502 note 1.

Department manager

The manager of a department in an ordinary business establishment has no implied authority to arrest and search a person suspected by him of stealing goods.

Md.—*Bernheimer v. Becker*, 62 A. 526, 102 Md. 250, 111 Am.S.R. 356, 3 L.R.A.,N.S., 221.

Messenger boy

Ordinarily duties of telegraph company messenger boy are not such as to give him implied authority to institute in behalf of the company criminal proceedings, rendering the company civilly liable for false arrest.

S.C.—*Wingate v. Postal Telegraph & Cable Co.*, 30 S.E.2d 307, 204 S.C. 520.

Saleswoman

N.Y.—*Conover v. Jaffee*, 263 N.Y.S. 618, 238 App.Div. 147.

42. N.Y.—*Lubliner v. Tiffany*, 66 N. Y.S. 659, 54 App.Div. 326.

25 C.J. p 503 note 4.

§ 40(5). — Detectives

Detectives employed for the purpose of protecting the principal's property and ferreting out and prosecuting persons guilty of offenses against the principal act within their authority in causing the arrest or detention of such alleged offenders, but this is not so generally as to detectives employed merely to ascertain the facts and report thereon.

The mere fact that one is employed under the appellation "detective" does not necessarily import that he has authority to make an arrest or cause a detention.⁴³ Thus the mere employment of a detective to ascertain and report facts about an offense concerning the employer's business or property does not render the employer liable for an arrest made by the detective for the purpose of ascertaining whether the person arrested was implicated therein,⁴⁴ although if, in an effort to obtain information as part of the investigation which the employer directed him to make, the detective detains a person against his will for questioning, the employer is liable therefor.⁴⁵

However, the employment of a detective under such limited authority is totally different from a case wherein the agent is charged with the duty of preserving the property of the principal and in

an attempt to do so causes the arrest of a third party on a charge of interfering or making away with the principal's property.⁴⁶ It must, therefore, be shown that the detective in making the arrest acted within the scope of his authority,⁴⁷ and, in general, persons employed for the purpose of protecting the property of, and ferreting out and prosecuting parties guilty of offenses against, the principal are held to act within the scope of their authority when they arrest or cause the arrest or detention of persons alleged to be offenders against their principal.⁴⁸

If the arrest or detention comes after the offense was committed, detention or punishment of the offender being the object rather than protection or recovery of the property, the principal is not liable therefor.⁴⁹ So, where the arrest is not made for an offense having any connection with the preservation of the employer's business or property, it does not fall within the detective's implied authority, so as to render the employer liable.⁵⁰

Detective agency. One who places a detective agency on his premises for the purpose of protecting his property by various means, including arrest, is responsible for wrongful arrests made by

43. Ala.—Smith v. S. H. Kress & Co., 98 So. 378, 210 Ala. 436.
25 C.J. p 503 note 5.

Employment to ascertain facts and report

Mo.—Wright v. Automobile Gasoline Co., 250 S.W. 368.

Search for property

Where hotel manager employed private detective to hunt for keys, but did not authorize him to arrest any one, and in the search, plaintiff, a maid, was arrested at suggestion of police officer acting with the detective, without the manager's knowledge, the hotel company was not liable.

Mo.—Wade v. Campbell, 243 S.W. 248, 211 Mo.App. 274.

44. Mo.—Milton v. Missouri Pac. R. Co., 91 S.W. 949, 193 Mo. 46, 4 L.R.A., N.S., 282.

Humphreys v. St. Louis-San Francisco Ry. Co., App., 286 S.W. 738.

45. Mo.—Humphreys v. St. Louis-San Francisco Ry. Co., supra.

46. Mo.—Milton v. Missouri Pac. R. Co., 91 S.W. 949, 193 Mo. 46, 4 L.R.A., N.S., 282.

25 C.J. p 503 note 7.

47. N.Y.—Kastner v. Long Island R. Co., 78 N.Y.S. 469, 76 App.Div. 323. 25 C.J. p 504 note 8.

Mode of execution immaterial

If it be shown that the detective acted within the scope of his au-

thority, it is immaterial what the exact mode of execution thereof was. Pa.—Duggan v. Baltimore & O. R. Co., 28 A. 182, 186, 159 Pa. 248, 39 Am.S.R. 672.

48. N.Y.—Adams v. F. W. Woolworth Co., 257 N.Y.S. 776, 144 Misc. 27.

25 C.J. p 504 note 10.

Railroad detective

(1) Railroad is liable for an arrest without probable cause by a detective employed to protect its property, it being within the scope of the agency of such an employee to discover perpetrators of crime against the property in order to recover the same and to procure the arrest of supposed offenders.

U.S.—Director General of Railroads v. Kastenbaum, N.Y., 44 S.Ct. 52, 263 U.S. 25, 68 L.Ed. 146.

(2) Thus, railroad is liable for injuries inflicted by its detectives, when mistakenly arresting an innocent man, instead of the men doing or threatening to do injury to railroad property, the mistake amounting to negligence.

U.S.—Delaware, L. & W. R. Co. v. Pittinger, C.C.A.N.J., 293 F. 853.

(3) Also, where captain of railroad's police department received information concerning improper selling of railroad tickets and assigned railroad detective to investigate, and the captain presented statement obtained in investigation to municipal

police officer who sent one of his policemen and the captain to see the prosecuting attorney who read the statement and filled out an information which the municipal court judge signed, and the municipal police officer and the railroad detective went to the railroad station and each grasped an arm of the ticket collector and marched him outside the station and took him in police automobile to police station house, the railroad, through its employees, was an active participant at every phase of the proceeding so as to be liable for false arrest and imprisonment of ticket collector.

U.S.—Burke v. New York, N. H. & H. R. Co., C.A.N.Y., 267 F.2d 894.

(4) However, it has been held that the mere employment of detective by railroad to protect property and get information does not give him real or apparent authority to make arrest in behalf of railroad.

Ala.—Orr v. Burleson, 107 So. 825, 214 Ala. 257.

(5) Other cases see 25 C.J. p 504 note 10 [c].

49. Cal.—Mackie v. Ambassador Hotel & Investment Corporation, 11 P.2d 3, 123 C.A. 215, followed in 11 P.2d 7, 123 C.A. 770.

50. Ark.—St. Louis, I. M. & S. R. Co. v. Sims, 152 S.W. 985, 106 Ark. 109, 44 L.R.A., N.S., 1156.
25 C.J. p 504 note 11.

operatives of such agency whether such agency be considered an agent of the employer or an independent contractor,⁵¹ particularly when the employer co-operates with the agency directly or through his employees.⁵²

§ 40(6). — Employees Also Public Officers

- a. In general
- b. Special policemen

a. In General

The principal is not liable for a wrongful arrest or detention by an employee who is also a public officer when performing his duties as a public officer.

A principal is not liable for any error or wrongful act of an agent or employee who is also a public officer, and who in making or causing an arrest or detention acts in performance of his public functions, since in such a case the agent or employee acts for the state and not for his employer.⁵³

b. Special Policemen

The principal is liable for a wrongful arrest by an agent or employee who is also a special police officer

under public authority only when the officer acts as his agent, and not when he acts as a public officer.

A person nominated and paid by a private individual or corporation, but commissioned by public authority, pursuant to statutory provisions to serve as a special peace officer, sometimes acts in making arrests as a servant of the party nominating and paying him, and sometimes in a public capacity as a servant of the state.⁵⁴ The fact that his salary is paid by the one who nominated him does not make him the mere servant of the one who pays him,⁵⁵ or affect his status as that of a police officer,⁵⁶ nor does the fact that he may be divested of his powers by the one nominating him,⁵⁷ or may be more diligent in making arrests for offenses committed on the premises or against the property of the party paying him.⁵⁸

To hold the employer liable it must be shown that the arrest was instigated by the employer and was made by the special officer as agent of the employer and not solely on his volition as a peace officer,⁵⁹ the employer being liable only for an arrest made in defending or preserving his property, and not for one made in vindication of justice or for an injury not done to the employer.⁶⁰ Thus it has been

51. N.Y.—Adams v. F. W. Woolworth Co., 257 N.Y.S. 776, 144 Misc. 27.

Ohio.—Zentko v. G. M. McKelvey Co., App., 88 N.E.2d 265—Szymanski v. Great Atlantic & Pacific Tea Co., 74 N.E.2d 205, 79 Ohio App. 407.

Okl.—Halliburton-Abbott Co. v. Hodge, 44 P.2d 122, 172 Okl. 175.

Va.—W. T. Grant Co. v. Owens, 141 S.E. 550, 149 Va. 906.

It has been held, however, that a contract by the employer with a detective agency, in effect making the agency an independent contractor, is in the absence of other circumstances sufficient to bar an action against the employer.

Ill.—Komorowski v. Boston Store of Chicago, 263 Ill.App. 88.

52. Neb.—Dillon v. Sears-Roebuck Co., 253 N.W. 331, 126 Neb. 357.

Investigation of employee

Employer, whose employee in charge of store called saleslady into his office and left room, leaving her in apparent charge of investigator in employ of detective organization contracting to investigate employees' faithfulness, became responsible for investigator's subsequent actions.

N.J.—Schantz v. Sears Roebuck & Co., 174 A. 162, 12 N.J.Misc. 689, affirmed 178 A. 768, 115 N.J.Law 174.

Va.—W. T. Grant Co. v. Owens, 141 S.E. 860, 149 Va. 906.

53. N.Y.—Vittorio v. St. Regis Paper Co., 145 N.E. 913, 239 N.Y. 148.

Justice of peace

N.Y.—Vittorio v. St. Regis Paper Co., supra.

54. Ill.—Komorowski v. Boston Store of Chicago, 263 Ill.App. 88.

N.C.—Butler v. Holt-Williamson Mfg. Co., 116 S.E. 726, 185 N.C. 250.

25 C.J. p 504 note 12.

55. Ala.—J. J. Newberry Co. v. Smith, 149 So. 669, 227 Ala. 234.

Pa.—Fagan v. Pittsburgh Terminal Coal Corporation, 149 A. 159, 299 Pa. 109.

Tenn.—Corpus Juris quoted in Dupont Rayon Co. v. Henson, 36 S. W.2d 879, 882, 162 Tenn. 394.

25 C.J. p 504 note 13.

56. Cal.—Redgate v. Southern Pac. Co., 141 P. 1191, 24 C.A. 573.

Tenn.—Dupont Rayon Co. v. Henson, 36 S.W.2d 879, 162 Tenn. 394.

57. N.J.—Tucker v. Erie R. Co., 54 A. 557, 69 N.J.Law 19.

58. D.C.—Wells v. Washington Market Co., 19 D.C. 385.

59. N.J.—Tucker v. Erie R. Co., 54 A. 557, 69 N.J.Law 19.

Wash.—Wheatley v. Washington Jockey Club, 234 P.2d 878, 39 Wash. 2d 163.

25 C.J. p 505 note 19.

60. Ala.—Southern Ry. Co. v. Beaty, 103 So. 658, 212 Ala. 608.

Cal.—Hanna v. Raphael Weill & Co., 203 P.2d 564, 90 C.A.2d 461.

Ill.—Komorowski v. Boston Store of Chicago, 263 Ill.App. 88.

Ky.—Louisville & N. R. Co. v. Vinson, 223 S.W.2d 89, 310 Ky. 854.

Mass.—Zygmuntowicz v. American Steel & Wire Co. of New Jersey, 134 N.E. 385, 240 Mass. 421.

N.C.—Butler v. Holt-Williamson Mfg. Co., 109 S.E. 559, 182 N.C. 547.

Pa.—Fagan v. Pittsburgh Terminal Coal Corporation, 149 A. 159, 299 Pa. 109—Bunting v. Pennsylvania R. Co., 130 A. 306, 284 Pa. 117.

Naugle v. Pennsylvania R. Co., 83 Pa.Super. 528.

S.C.—Stephenson v. Baldwin Cotton Mills, 103 S.E. 710, 114 S.C. 367.

Tenn.—Dupont Rayon Co. v. Henson, 36 S.W.2d 879, 162 Tenn. 394.

25 C.J. p 505 note 20.

"The general rule is that, in the absence of statute, a private person or corporation is not responsible for the acts of a special police officer, appointed by public authority, but employed and paid by the private person or corporation, when the acts complained of are performed in carrying out his duty as a public officer. But where he is acting in performance of the duties for which he is employed, or his movements are actively directed by his employer, in other words, where he represents his employer and not the public, such employer may become liable for his acts."

Mass.—Zygmuntowicz v. American Steel & Wire Co. of New Jersey, 134 N.E. 385, 387, 240 Mass. 421.

held that the principal is not liable where the officer arrests another on a charge of assault,⁶¹ disorderly conduct,⁶² carrying concealed weapons,⁶³ picketing,⁶⁴ larceny committed on employer's premises,⁶⁵ especially where the property stolen did not belong to the employer,⁶⁶ or violation of traffic laws.⁶⁷

On the other hand, liability has been imposed where it appears that the special police officer in making the arrest was acting within the express terms of authority given him by his employer,⁶⁸ or in the course and scope of his duties toward his employer the statutes under which the special officer was appointed sometimes so providing,⁶⁹ or where the acts of the special police officer are in excess of his authority as an officer.^{69.5}

Ratification. The act of a special policeman in making an arrest cannot be ratified so as to render

his employer liable where the policeman acts in the matter as an agent of the state and not of the employer.^{69.10}

Place of arrest as factor. Liability has been imposed on the employer for a false arrest by the special police officer acting in the course of his duties to such employer, although the arrest was not made on the employer's premises.⁷⁰ However, it has been said that, if such an officer makes an arrest on the premises of his employer or in protecting his property, the employer will be required to assume the burden of showing that it was not within the scope of his authority,⁷¹ whereas the fact that the arrest was not made on the premises of the employer has been mentioned as an element indicating that he was not acting as agent for his employer,⁷² especially where his duties were, by the authority appointing him, confined to the employer's premises.⁷³ On the other hand, it has been held that

Lockup on employer's premises

Company which had constructed lockup on its property, due to distance from county jail, was not liable for plaintiff's wrongful incarceration therein by its employee in line of his official duty as deputy sheriff, under warrant issued by duly qualified justice of peace on complaint of citizen of county, in which company did not participate.

Ky.—McKinney Steel Co. v. Belcher, 266 S.W. 42, 205 Ky. 453.

Assisting regular policeman

Employer is not liable when an employee who is also a special policeman is summoned to the assistance of a regular policeman who is making the arrest.

Mich.—Buman v. Michigan Cent. R. Co., 134 N.W. 972, 168 Mich. 651, Ann.Cas.1913D 107.

Public authority must be shown

If employer seeks to exonerate himself on the ground that the arrest was made by such a person when acting as a special police officer, he must show that such person was duly authorized.

Va.—Norfolk & W. R. Co. v. Galliher, 16 S.E. 935, 89 Va. 639, 25 C.J. p 504 note 17.

Presumption

Such a special officer in making arrests acts prima facie as a public official.

Pa.—Fagan v. Pittsburgh Terminal Coal Corporation, 149 A. 159, 299 Pa. 109.

Naugle v. Pennsylvania R. Co., 83 Pa.Super. 528, 25 C.J. p 505 note 18.

61. Ga.—Bright v. Georgia Cent. R. Co., 77 S.E. 372, 12 Ga.App. 364. Md.—Tolchester Beach Impr. Co. v.

Steinmeier, 20 A. 188, 72 Md. 313, 8 L.R.A. 846.

25 C.J. p 505 note 21.

62. Pa.—Fagan v. Pittsburgh Terminal Coal Corporation, 149 A. 159, 299 Pa. 109.

W.Va.—McKain v. Baltimore & O. R. Co., 64 S.E. 18, 65 W.Va. 233, 131 Am.S.R. 964, 23 L.R.A., N.S., 289, 17 Ann.Cas. 634.

25 C.J. p 505 note 22.

63. Md.—Philadelphia, B. & W. R. Co. v. Stumpo, 77 A. 266, 112 Md. 571.

64. Ont.—O'Donnell v. Canada Foundry Co., 4 Ont.W.R. 402, affirmed 5 Ont.W.R. 215.

65. N.H.—Cordner v. Boston & M. R. Co., 57 A. 234, 72 N.H. 413.

25 C.J. p 505 note 25.

66. D.C.—Wells v. Washington Market Co., 19 D.C. 385.

25 C.J. p 505 note 26.

67. Tenn.—Dupont Rayon Co. v. Henson, 36 S.W.2d 879, 162 Tenn. 394.

68. Cal.—Hanna v. Raphael Weill & Co., 203 P.2d 564, 90 C.A.2d 461.

Pa.—Fagan v. Pittsburgh Terminal Coal Corporation, 149 A. 159, 299 Pa. 109.

25 C.J. p 506 note 38.

Directing or ordering arrest

Pa.—Fagan v. Pittsburgh Terminal Coal Corporation, supra.

25 C.J. p 506 note 38 [a].

69. Cal.—Hanna v. Raphael Weill & Co., 203 P.2d 564, 90 C.A.2d 461.

Ky.—Louisville & N. R. Co. v. Offutt, 263 S.W. 665, 204 Ky. 51.

N.C.—Butler v. Holt-Williamson Mfg. Co., 116 S.E. 726, 185 N.C. 250.

Okl.—Baker v. Hines, 213 P. 313, 88 Okl. 266.

25 C.J. p 505 note 31.

Enforcement of regulations as factor

Mich.—Foster v. Grand Rapids R. Co., 104 N.W. 380, 140 Mich. 689.

R.I.—Rice v. Harrington, 94 A. 736, 38 R.I. 47, L.R.A.1916E 356.

25 C.J. p 506 note 34.

Protection of property as factor

An important consideration is that the arrest was made to protect the employer's property.

Md.—Baltimore, C. & A. R. Co. v. Ennalls, 69 A. 638, 108 Md. 75, 16 L.R.A., N.S., 1100.

25 C.J. p 506 note 33.

69.5 Cal.—Hanna v. Raphael Weill & Co., 203 P.2d 564, 90 C.A.2d 461.

Issue of damages

(1) If special officer continues to hold the one arrested in custody, question of authority, to that extent, bears on issue of damages for which private employer is liable.

Cal.—Hanna v. Raphael Weill & Co., supra.

(2) Damages generally see infra §§ 63-70.

69.10 Wash.—Wheatley v. Washington Jockey Club, 234 P.2d 878, 39 Wash.2d 163—Hayes v. Sears, Roebuck & Co., 209 P.2d 468, 34 Wash. 2d 666.

70. Tex.—Perkins Bros. Co. v. Anderson, Civ.App., 155 S.W. 556, 25 C.J. p 506 note 32.

71. Md.—Philadelphia, B. & W. R. Co. v. Stumpo, 77 A. 266, 112 Md. 571.

72. N.Y.—Samuel v. Wanamaker, 95 N.Y.S. 270, 107 App.Div. 433.

Tenn.—Dupont Rayon Co. v. Henson, 36 S.W.2d 879, 162 Tenn. 394.

73. Md.—Philadelphia B. & W. R. Co. v. Stumpo, 77 A. 266, 112 Md. 571.

25 C.J. p 505 note 29.

the fact that the arrest was made on the employer's premises is immaterial.⁷⁴

Participation by other employee. If the unlawful arrest is instigated, procured, or participated in by another employee of the principal acting within the scope of his authority, liability therefor is imposed because of the action of such other employee.⁷⁵ However, even if the unlawful arrest by a special officer was instigated by the principal's employees so as to render the principal liable, the principal would not be liable for a subsequent wanton and malicious assault on the prisoner by the officer, such assault not having been instigated or assented to by the principal's employees.⁷⁶

§ 40(7). — Regular Policemen

Ordinarily one is not liable for acts of a police officer making a wrongful arrest in the line of his duties as a public officer, even though stationed on private property for the protection of life and property.

A regular police officer performing his functions as such at the request of private person is at most a special agent, for whose wrongful acts in making an arrest such private person is not responsible.⁷⁷ So a regular policeman, stationed on private property to arrest offenders and protect life and property, but receiving instructions from, and reporting to, the police authorities, is not regarded as being in the employ of the owner of the property on which he is stationed, although such owner may

pay a part of his salary,⁷⁸ and the owner is not ordinarily responsible for arrests made by him.⁷⁹ On the other hand, by responding to the invitation of the owner, or his authorized agent, to aid in enforcing private regulations, the officer becomes a special agent for that purpose, and for his conduct, within the scope of the authority conferred, the owner is responsible,⁸⁰ although if, while he is enforcing such private regulations, the party whom he is dealing with commits an offense justifying arrest, the officer in arresting him is presumed to have acted in his public capacity.⁸¹

§ 40(8). — Corporate Principal

As a general rule, a corporation may be held liable for a wrongful restraint or detention by its officers, agents, or employees acting within the scope of their employment or authority, or if their acts have been expressly authorized or ratified by an officer having the general management of the corporation's affairs or standing as the alter ego of the corporation.

As noted in Corporations § 1276, an action for false imprisonment may be maintained against a private corporation for an illegal arrest made or caused by its agent or employee acting within the general scope of his employment, in the same manner as in the case of natural persons, and this is true, even though the act was not previously authorized or subsequently ratified, and even though the injury was inflicted willfully or maliciously, and despite the fact that the act is beyond the object of the corporation's creation.⁸² If the acts of

74. W.Va.—*McKain v. Baltimore & O. R. Co.*, 64 S.E. 18, 65 W.Va. 233, 131 Am.S.R. 964, 23 L.R.A., N.S., 289, 17 Ann.Cas. 634.

75. Va.—*Norfolk & W. R. Co. v. Perdue*, 83 S.E. 1058, 117 Va. 111. 25 C.J. p 506 note 35.

76. Pa.—*Finfrock v. Northern Cent. R. Co.*, 58 Pa.Super. 52.

77. Tex.—*Central Motor Co. v. Roberson*, Civ.App., 154 S.W.2d 180, affirmed 164 S.W.2d 524, 139 Tex. 562, 143 A.L.R. 1.

78. Ark.—*Chicago, R. I. & P. R. Co. v. Nelson*, 113 S.W. 44, 87 Ark. 524.

79. Ark.—*Chicago, R. I. & P. R. Co. v. Nelson*, supra. 25 C.J. p 506 note 40.

80. N.J.—*Jardine v. Cornell*, 14 A. 590, 50 N.J.Law 485.

81. N.J.—*Jardine v. Cornell*, supra. 25 C.J. p 506 note 42.

82. **Authority to act for corporation** is essential to its liability. *Miss.—Anticich v. Standard Oil Co. of Kentucky*, 4 So.2d 226, 191 Miss. 639.

Preventing interference with business

The president and general manager

of a shipbuilding corporation who was charged with the duty of keeping the work going, and whose decisions in that respect were final, acted within the scope of his employment in causing the arrest of a carpenter who had reported to his union that machinists were doing carpenters' work on the ships, where the arrest was made for the purpose of preventing the carpenters from being called off the work.

Cal.—*Korkman v. Hanlon Dry Dock & Shipbuilding Co.*, 199 P. 880, 53 C.A. 147.

Corporate executive

Theater corporation was responsible for acts of executive ordering removal and pressing charge against patron.

N.J.—*Marmorstein v. State Theaters' Corporation*, 140 A. 8, 6 N.J.Misc. 66, affirmed 146 A. 915, 106 N.J.Law 574.

Receiver of corporation

Receiver of a hotel is liable in his official capacity for false imprisonment of employees.

Miss.—*Gardner v. Martin*, 85 So. 182, 123 Miss. 218, 10 A.L.R. 1054.

Direct authorization or subsequent ratification

(1) A corporation is liable to a person injured by a malicious prosecution or by false imprisonment, instituted or caused by its officers, servants, or agents while acting in the course of their employment, whether directly authorized or subsequently ratified.

Ala.—*Central Iron & Coal Co. v. Wright*, 101 So. 815, 20 Ala.App. 82, certiorari denied Ex parte Central Iron & Coal Co., 101 So. 824, 212 Ala. 130.

(2) Where direct corporate action is charged, direct corporate authorization or ratification is essential in order to render it liable for acts of agents.

Ala.—Ex parte Central Iron & Coal Co., 101 So. 824, 212 Ala. 130.

President

N.Y.—*Goldberg v. Fleischer's Confidence Food Stores*, 102 N.Y.S.2d 176.

President and manager

La.—*Romaine v. Fairchild Motor Car Co.*, 97 So. 390, 154 La. 171.

Direct corporate action

In suit for false imprisonment,

the agents or employees are authorized or subsequently ratified, the corporation will also be held liable.⁸³

It has been said, however, that employees and subordinate officers of a private corporation have no implied authority to engage in the apprehension and prosecution of persons suspected of crime involving loss to the corporation,⁸⁴ except where arrest is made for the protection of the principal's property in his charge, or in connection with its recovery, or to prevent the crime at the time of its commission.⁸⁵ It is only such officers as have the general management of the corporation's affairs that have such implied powers.⁸⁶ Only one vested with the corporate power in such a sense that he is the alter ego of the corporation as regards such proceedings can bind the corporation for such tort or ratify it after commission.⁸⁷ In order that a subordinate officer may have such power, he must have a duty to protect the corporate property,⁸⁸ or his authority must be such that, in the ordinary and usual discharge of his duties, it may reasonably be implied that he has been given such power.⁸⁹

§ 40(9). — Carriers and Their Employees

a. Arrest of passengers

showing corporate act by defendant is unnecessary.

Ala.—Caldwell v. Standard Oil Co., 124 So. 512, 220 Ala. 227.

Employee with general power to arrest offenders

Where corporation appoints persons with general power to detect and arrest offenders against laws affecting company's rights, the employer is liable for the agent's acts within scope of his employment, although his instructions have been violated.

Mo.—Sacks v. St. Louis & S. F. R. Co., 192 S.W. 418.

Intent immaterial

Whether corporation was liable for illegal imprisonment by general manager of branch store depends on whether his acts were done in line of duty or within scope of his employment, and not whether his intent was to benefit or serve his employer.

N.C.—Kelly v. Newark Shoe Stores Co., 130 S.E. 32, 190 N.C. 406.

83. Ala.—Central Iron & Coal Co. v. Wright, 101 So. 815, 20 Ala.App. 82, certiorari denied Ex parte Central Iron & Coal Co., 101 So. 824, 212 Ala. 130.

Ratification held not shown

N.M.—Sanchez v. Securities Acceptance Corp., 260 P.2d 703, 57 N.M. 512.

84. Ala.—Daniel v. Goodyear Tire &

Rubber Co., 143 So. 449, 225 Ala. 446.

Express authority or ratification necessary

A corporation is not liable for the wrongful act of a subordinate agent in causing an arrest for larceny of property not under his care, unless such act was previously authorized or later ratified by some official or agent of the corporation having authority to do so.

Kan.—Mercer v. Fred Harvey, 226 P. 761, 116 Kan. 365.

85. Kan.—Lewis v. Montgomery Ward & Co., 62 P.2d 875, 144 Kan. 656—Mercer v. Fred Harvey, 226 P. 761, 116 Kan. 365.

86. La.—Blickhan v. American Brewing Co., App., 171 So. 865.

87. Ala.—Daniel v. Goodyear Tire & Rubber Co., 143 So. 449, 225 Ala. 446—Ex parte Central Iron & Coal Co., 101 So. 824, 212 Ala. 130.

Vice-principal

(1) Vice-principal may authorize an agent to arrest and thereby create liability in corporation for false imprisonment.

Ala.—Hotel Tutwiler Operating Co. v. Evans, 94 So. 120, 208 Ala. 252.

(2) Where the agent conducted plaintiff across the corporation's hotel lobby to office of its manager, who witnessed plaintiff's restraint by the agent and took part in the con-

b. Persons losing or without status as passengers

a. Arrest of Passengers

- (a) Employees in charge of transportation
- (b) Employees not in charge of transportation
- (c) Employees also special police officers
- (d) Strangers or police officers
- (e) Express authority and ratification

(a) Employees in Charge of Transportation

A carrier is liable for a wrongful detention of a passenger caused by employees in charge of a train or other transportation facilities, at least while engaged in protecting the business, property, or passengers in his care.

Where the relation of carrier and passenger exists, many decisions impose a stringent rule of liability for tortious acts of the carrier's employees in charge of the duty to transport the passenger safely, and hold that a passenger is entitled to protection against such employee's act in causing an unlawful detention without reference to whether such act was connected with the performance of a duty within the scope of his employment.⁹⁰

versation concerning the object of arrest, the manager was a vice-principal, whose acts were the direct acts of the corporation.

Ala.—Hotel Tutwiler Operating Co. v. Evans, supra.

Superintendent

Corporation may be held liable for acts of superintendent of its local business who looked after its business generally.

Ala.—Standard Oil Co. v. Davis, 94 So. 754, 208 Ala. 565.

88. La.—Blickhan v. American Brewing Co., App., 171 So. 865.

Salesman

Where corporation's agent for sale of beer products, who was required to sell products for cash, accepted postdated check from customer and personally paid corporation for beer sold to customer, corporation could not be held liable for agent's acts in causing customer's arrest on charge of having received money by false pretense when check was not paid.

Ala.—Blickhan v. American Brewing Co., supra.

89. La.—Blickhan v. American Brewing Co., supra.

90. N.Y.—McLeod v. New York, C. & St. L. R. Co., 76 N.Y.S. 347, 72 App.Div. 116.

25 C.J. p 507 note 44.

Liability of carrier for wrongful acts

Other cases, however, have not stated that the liability of the carrier for a wrongful arrest by its employees is absolute, irrespective of the scope of his authority, but have gone no further than to say that it is well settled that when one in charge of a train or other transportation facilities, while engaged in protecting the business, property, or passengers in his care, causes the detention of a passenger the carrier is responsible.⁹¹ For instance, it has been held that he acts within the scope of his employment in causing the unlawful detention of a passenger on his train for participating in an affray⁹² or an assault,^{92.5} or on the ground of disorderly conduct on the car or premises,⁹³ or intoxication,⁹⁴ or for nonpayment of fare,⁹⁵ or for attempting to ride on an allegedly invalid transfer ticket,⁹⁶ or because he tenders a supposed counterfeit coin in payment of fare,⁹⁷ although there are decisions holding that the act of causing the arrest

of a passenger on the charge of passing counterfeit money in payment of fare is beyond the scope of the implied authority of the carrier's employees, so that the carrier is not responsible.⁹⁸ Of course, if the agent is acting entirely beyond the scope of his authority and purely to effect a purpose in which the carrier has no interest, his act does not impose liability on the carrier.⁹⁹

The assault, ejection, and arrest of a passenger are frequently regarded as a series of acts constituting one continued tort,¹ but there are decisions holding that after ejecting a passenger the subsequent act of causing his arrest is beyond the scope of the employee's authority.²

(b) Employees Not in Charge of Transportation

The liability of a carrier for a wrongful detention of a passenger caused by agents or employees not in charge

of its agents and employees generally see Carriers §§ 689-694.
Right of carrier to arrest or detain passengers generally see Carriers § 827.

91. Ark.—Ft. Smith & Van Buren Dist. v. Kidd, 241 S.W. 374, 153 Ark. 489.

Md.—Dennis v. Baltimore Transit Co., 56 A.2d 813, 189 Md. 610.

Mo.—White v. Thompson, App., 176 S.W.2d 53.

Wis.—Hotzel v. Simmons, 45 N.W.2d 683, 258 Wis. 234.

25 C.J. p 507 note 45.

Racial segregation on bus

U.S.—Williams v. Carolina Coach Co., D.C.Va., 111 F.Supp. 329, affirmed, C.A., Carolina Coach Co. v. Williams, 207 F.2d 408.

Conductor or motorman of street railway

(1) Street railroad is liable for wrongful arrest of passenger on street car, caused by conductor-motorman.

Ark.—Arkansas Central Power Co. v. Hildreth, 296 S.W. 33, 174 Ark. 529.

(2) Conductor of street railway has implied authority to police his car, and to make an arrest, and when so acting the company is responsible; but he has no implied authority to prosecute a case after the arrest is made.

Pa.—Mikelberg v. Philadelphia Rapid Transit Co., 16 Pa.Dist. 906, 34 Pa. Co. 425.

Joint employees

Where a contract between a bridge district and a traction company provided that the district employ collectors of the bridge fares for the benefit of both, the expenses to be divided, the collectors were the serv-

ants of both parties, and each would be liable for a false arrest while acting within the line of their duty and scope of authority.

Ark.—Ft. Smith & Van Buren Dist. v. Kidd, 241 S.W. 374, 153 Ark. 489.

Regulations respecting transfer tickets

A reasonable regulation cannot protect a carrier against the mistakes of its own agents which result in an invasion of a passenger's rights; otherwise all that would be necessary for a carrier to do would be to regulate a given subject, and then shield itself behind such regulation when called to account for an infringement of the rights of its passengers.

N.Y.—Jacobs v. Third Ave. R. Co., 75 N.Y.S. 679, 71 App.Div. 199.

92. N.C.—Berry v. Carolina, C. & O. Co., 71 S.E. 322, 155 N.C. 287.

92.5 Wis.—Hotzel v. Simmons, 45 N.W.2d 683, 258 Wis. 234.

93. Mo.—Grayson v. St. Louis Transit Co., 71 S.W. 730, 100 Mo.App. 60.

25 C.J. p 507 note 47.

94. Ark.—St. Louis, I. M. & S. R. Co. v. Tukey, 175 S.W. 403, 119 Ark. 28, L.R.A.1915E 320.

25 C.J. p 507 note 48.

95. Ark.—Ft. Smith & Van Buren Dist. v. Kidd, 241 S.W. 374, 153 Ark. 489.

N.Y.—Lynch v. Metropolitan El. R. Co., 90 N.Y. 77, 43 Am.R. 141.

25 C.J. p 507 note 49.

More pointing out by conductor to special police officer of a passenger alleged to have ridden without payment of fare, with request to see whether he could get the fare out of

him, does not render the carrier liable for an unlawful arrest by the police officer, where the conductor did not direct or advise the arrest. Cal.—Squires v. Southern Pac. Co., 183 P. 695, 42 C.A. 459.

96. Mo.—Carmody v. St. Louis Transit Co., 99 S.W. 495, 122 Mo.App. 338.

25 C.J. p 507 note 50.

97. Ill.—West Chicago St. R. Co. v. Luleich, 85 Ill.App. 643.

Tex.—Galveston, H. & S. A. R. Co., 56 Tex. 162.

98. Md.—Central R. Co. v. Brewer, 28 A. 615, 78 Md. 394, 27 L.R.A. 63. 25 C.J. p 507 note 52.

99. Ark.—Mayfield v. St. Louis, I. M. & S. R. Co., 133 S.W. 168, 97 Ark. 24, 32 L.R.A., N.S., 525. 25 C.J. p 508 note 55.

1. Ark.—Little Rock Ry. & Electric Co. v. Dobbins, 95 S.W. 788, 78 Ark. 553.

25 C.J. p 508 note 53.

Arrest as mode of ejection

(1) Where the arrest of a passenger is a mode of ejecting a passenger, it is within the scope of the employment of the agent in charge.

Ark.—Little Rock Ry. & Electric Co. v. Dobbins, supra.

(2) Conductor-motorman's causing passenger to be arrested and to leave car with officer at point of intended debarkation is mode of ejection of passenger, relation of carrier passenger not having terminated.

Ark.—Arkansas Central Power Co. v. Hildreth, 296 S.W. 33, 174 Ark. 529.

2. Ark.—Dickinson v. Muse, 204 S.W. 609, 135 Ark. 76.

N.C.—Pridgen v. Carolina Coach Co., 47 S.E.2d 609, 229 N.C. 46.

25 C.J. p 508 note 54.

of transportation depends on whether the wrong was committed while the employee was acting within the scope of his employment.

In the case of employees not intrusted by the carrier with duties with respect to the execution of the contract of transportation or who do not have the duty of protecting the passenger, the rule of strict liability is relaxed and the carrier is not liable unless the detention is caused by the employee while acting within the scope of his employment.³ In such case if the employee acts to protect the business or property of the carrier, the detention is within the scope of his employment and the carrier is liable,⁴ whereas if the offense is past and the arrest merely to vindicate justice, the employee is not acting within the scope of his employment and the carrier is not liable.⁵ An element to be considered is whether the carrier had any interest in the matter.⁶

(c) Employees Also Special Police Officers

The fact that the employee is also a special police officer does not in itself preclude liability on the part of the carrier.

Where statutory provisions provide that conductors in charge of trains or others in charge of transportation facilities shall have all the powers of peace officers or conservators of the peace, nevertheless if the arrest is made or caused within the scope of their authority as employees of the carrier, liability is imposed, the statutes themselves sometimes so providing.⁷ However, the carrier is not responsible if the arrest or detention is not made to protect the company's property, business, or passengers, but to fulfill a duty imposed by the state, unless the arrest was expressly authorized or subsequently ratified.⁸

(d) Strangers or Police Officers

The carrier is liable for a wrongful arrest of a passenger by third persons, not regular policemen empowered to make such arrest, which its agents could have prevented by the exercise of due diligence.

A carrier may be liable for an illegal arrest of a passenger made by others which its agents in the exercise of due diligence under the circumstances could have prevented,⁹ although no obligation rests on the carrier or on its servants in charge of the transportation facilities to prevent an arrest by an officer duly empowered to make such arrest.¹⁰ Liability has, however, been imposed where the carrier's employee acting within the scope of his employment assists an officer in making an arrest in an unlawful manner,¹¹ instigates the arrest,^{11.5} or requests such officer to make the unlawful arrest.¹²

(e) Express Authority and Ratification

The carrier is responsible for a wrongful arrest by an employee which it expressly authorizes or subsequently ratifies.

Liability for an unlawful arrest may be imposed on a carrier if its express instructions to its employees are such that they can be interpreted to authorize them to cause arrests,¹³ or where it subsequently ratifies a wrongful arrest.¹⁴

b. Persons Losing or without Status as Passengers

Where the person wrongfully detained is not a passenger, or has lost his status as such, the carrier is liable only if the agents or employees causing the detention were acting within the scope of their employment or authority.

Although the relation of carrier and passenger has terminated, the carrier is responsible for a detention caused by an employee while acting within

3. Ark.—*Dickinson v. Muse*, 204 S. W. 609, 135 Ark. 76. 25 C.J. p 508 note 56.

4. N.Y.—*Palmeri v. Manhattan R. Co.*, 30 N.E. 1001, 133 N.Y. 261, 28 Am.S.R. 632, 16 L.R.A. 136. 25 C.J. p 508 note 57.

Special agents

Railway special agents, interviewing passenger regarding disappearance of goods, were held in "course of their employment."

Mo.—*Ledbetter v. St. Louis Southwestern Ry. Co.*, App., 293 S.W. 791.

5. N.Y.—*Mulligan v. New York & R. B. R. Co.*, 29 N.E. 952, 129 N.Y. 506, 26 Am.S.R. 539, 14 L.R.A. 791. 25 C.J. p 508 note 58.

6. N.Y.—*Hyatt v. New York Cent. & H. R. R. Co.*, 147 N.Y.S. 810, 162 App.Div. 367. 25 C.J. p 508 note 59.

7. Mass.—*Horgan v. Boston El. R. Co.*, 94 N.E. 386, 208 Mass. 287. 25 C.J. p 510 note 71—10 C.J. p 763 note 63.

25 C.J. p 510 note 71—10 C.J. p 763 note 63.

Ejecting for nonpayment of fare

A special police officer on defendant's street car who assists conductor in ejecting passenger for nonpayment of fare is acting as agent for defendant, rendering it liable.

Mich.—*Foster v. Grand Rapids R. Co.*, 104 N.W. 380, 140 Mich. 689.

8. N.H.—*Cordner v. Boston & M. R. Co.*, 57 A. 234, 72 N.H. 413. 25 C.J. p 510 note 72.

9. Ark.—*Mayfield v. St. Louis, I. M. & S. R. Co.*, 133 S.W. 168, 97 Ark. 24, 32 L.R.A., N.S., 525. 25 C.J. p 508 note 60.

10. Ark.—*Mayfield v. St. Louis, I. M. & S. R. Co.*, supra. 25 C.J. p 508 note 61.

11. S.C.—*Hodge v. Piedmont & N. R. Co.*, 95 S.E. 138, 109 S.C. 62.

Va.—*Norfolk & W. R. Co. v. Perdue*, 83 S.E. 1058, 117 Va. 111.

11.5 U.S.—*Williams v. Carolina Coach Co.*, D.C.Va., 111 F.Supp. 329, affirmed C.A., *Carolina Coach Co. v. Williams*, 207 F.2d 408.

12. Ky.—*Cincinnati, N. O. & T. P. Ry. Co. v. Roberts*, 249 S.W. 1012, 198 Ky. 710.

13. Kan.—*Whitman v. Atchison, T. & S. F. R. Co.*, 116 P. 234, 85 Kan. 150, 34 L.R.A., N.S., 1029, Ann.Cas. 1912D 722. 25 C.J. p 509 note 68.

14. U.S.—*Lezinsky v. Metropolitan St. R. Co.*, N.Y., 88 F. 437, 31 C.C.A. 573. 25 C.J. p 510 note 70.

the scope of his authority.¹⁵ It is otherwise if the act of causing the detention is beyond the scope of the employee's authority.¹⁶

Similarly, where the relationship of carrier and passenger is not established, the carrier is responsible where it is established that a wrongful arrest was caused by an employee while acting within the scope of his authority,¹⁷ and the cases frequently apply as a test the general rule that if the detention is caused to protect the business or property of the carrier the act is within the scope of the employee's authority and the carrier is liable,¹⁸ whereas if the arrest is caused for a past offense or to vindicate justice the act is not within the scope of the employee's authority, and the carrier is not responsible.¹⁹

§ 40(10). — Partners

A partnership and all of its members are liable for a wrongful detention caused by one of the partners in the scope of the partnership business, or in which they all participate.

The liability of a partnership or of the partners therein for an illegal arrest or detention made or caused by one of the partners depends on the doctrine of principal and agent,²⁰ and the general rule is that, although a willful tort of one partner is not

to be imputed to the firm,²¹ nevertheless liability may be imposed if the tort is within the scope of the partnership business.²²

One of several partners does not, merely because of the partnership relation, have authority to direct or make an unlawful arrest so as to bind the firm,²³ or other partners,²⁴ who are not connected with the detention²⁵ or shown to have received any benefit therefrom,²⁶ or to have afterward ratified it.²⁷ However, if all the partners join in making or causing an unlawful arrest or detention all of them,²⁸ as well as the partnership,²⁹ may be held responsible.

§ 40(11). — Client and Attorney

A client is responsible for a wrongful detention by his attorney if the wrongful acts are within the scope of the attorney's authority, or if such acts are expressly authorized or ratified.

As discussed in Attorney and Client §§ 67, 68, the relation between a client and his attorney is that of principal and agent, liability of the former for the wrongful acts of the latter depending on the rules governing such relationship. However, before liability may be imposed on such basis the relationship of attorney and client must be shown to exist.³⁰

15. Tex.—Texas & P. R. Co. v. Parker, 68 S.W. 831, 29 Tex.Civ.App. 264.

25 C.J. p 509 note 63.

16. La.—Lichtenstein v. New Orleans Ry. & Light Co., 103 So. 769, 158 La. 284.

25 C.J. p 509 note 64—10 C.J. p 763 note 65.

Conductor-motorman

Street railroad is not liable for conductor-motorman's act in causing arrest of passenger after passenger's voluntary departure from car.

Ark.—Arkansas Central Power Co. v. Hildreth, 296 S.W. 33, 174 Ark. 529.

17. U.S.—Director General of Railroads v. Kastenbaum, N.Y., 44 S.Ct. 52, 263 U.S. 25, 68 L.Ed. 146.

Delaware, L. & W. R. Co. v. Pittinger, C.C.A.N.J., 293 F. 853. 25 C.J. p 509 note 65.

18. U.S.—Delaware, L. & W. R. Co. v. Pittinger, C.C.A.N.J., 293 F. 853. Ala.—Southern Ry. Co. v. Beaty, 103 So. 658, 212 Ala. 608.

Ark.—Missouri Pac. R. Co. v. Yancey, 22 S.W.2d 408, 180 Ark. 684. 25 C.J. p 509 note 66.

19. Ala.—Southern Ry. Co. v. Beaty, 103 So. 658, 212 Ala. 608. 25 C.J. p 509 note 67.

Ticket agent

Where railway ticket agent received suspicious but valid currency

in selling plaintiff a ticket, and later made him exchange the bill for other money, and thereafter plaintiff was arrested for passing counterfeit money, defendant railway company was held not liable for illegal arrest and false imprisonment, the transaction between the railroad and purchaser having terminated before the arrest.

Mo.—Sacks v. St. Louis & S. F. R. Co., 192 S.W. 418.

20. Ga.—Martin v. Simkins, 42 S.E. 483, 116 Ga. 254.

Ill.—Rosenkrans v. Barker, 3 N.E. 93, 115 Ill. 331, 56 Am.R. 169. Liability of partnership or partners for wrongful acts of partners generally see Partnership § 168.

21. Ill.—Rosenkrans v. Barker, supra.

22. Ga.—Martin v. Simkins, 42 S.E. 483, 116 Ga. 254.

23. Md.—Bernheimer v. Becker, 62 A. 526, 102 Md. 250, 111 Am.S.R. 356, 3 L.R.A., N.S., 221. 28 C.J. p 510 note 77.

Under statute

Statute providing that partners are not responsible for torts committed by the other partners exempts the partnership also from liability.

Ga.—Martin v. Simkins, 42 S.E. 483, 116 Ga. 254.

24. Ill.—Rosenkrans v. Barker, 3 N.E. 93, 115 Ill. 331, 56 Am.R. 169.

Md.—Kirk v. Garrett, 35 A. 1089, 84 Md. 383.

25. Md.—Kirk v. Garrett, supra. 25 C.J. p 510 note 79.

26. Ill.—Rosenkrans v. Barker, 3 N.E. 93, 115 Ill. 331, 56 Am.R. 169.

27. Md.—Kirk v. Garrett, 35 A. 1089, 84 Md. 383.

28. Ga.—Page v. Citizens' Banking Co., 36 S.E. 418, 111 Ga. 73, 78 Am. S.R. 144, 51 L.R.A. 463.

Md.—Kirk v. Garrett, 35 A. 1089, 84 Md. 383. 25 C.J. p 510 note 82.

29. Ga.—Page v. Citizens' Banking Co., 36 S.E. 418, 111 Ga. 73, 78 Am. S.R. 144, 51 L.R.A. 463. 25 C.J. p 510 note 83.

30. Mass.—Jordan v. C. I. T. Corporation, 19 N.E.2d 5, 302 Mass. 281.

Nominal client

Nominal libelants in admiralty suit against carriers for damage to cargo consigned to nominal libelants sustained relation of clients to their attorney of record, so as to make nominal libelants liable for false imprisonment of witness against whom invalid body attachment was issued at attorney's request, notwithstanding nominal libelants had been reimbursed for damage to cargo by insurer and attorney was retained by insurer, where institution of suit in

Liability is, of course, imposed where the client instigates, advises, or directs the attorney to cause an unlawful detention.³¹ Where, however, the arrest is not made with the direct authority of the client, some cases have been decided on the theory that the scope of the attorney's authority is very broad and that he is invested with a liberal discretion and most ample power in everything pertaining to the matter in his hands,³² these cases indicating that the act of the attorney in arresting or causing the arrest of the party against whom the client has a claim is within the scope of the attorney's authority and if wrongful renders the client responsible.³³ Other cases, however, proceed on a narrower view of the scope of the attorney's authority, and hold that, where a client merely gives a claim to his attorney, the arrest of the debtor is not within the scope of his authority and the client is not responsible for a wrongful detention caused by him.³⁴

After a judgment has been obtained the great weight of authority is that the method of enforcing it is within the scope of the attorney's authority, and the client is accordingly responsible for an unlawful detention caused by him in enforcing it,³⁵ although the client did not specifically authorize the attorney's act,³⁶ or even know of the issuance of the process of arrest.³⁷

Ratification. The client may be held responsible also where, the arrest having been made for his benefit, he recognizes and ratifies the act of his attorney in causing it.³⁸

§ 41. Liability of Agent

- a. In general
- b. Attorneys

a. In General

The fact that an agent acts pursuant to authority from his principal does not excuse him from liability for a wrongful arrest.

An agent or employee who makes or causes an illegal arrest is not excused from liability because he acts pursuant to authority derived from his principal.³⁹

b. Attorneys

Ordinarily an attorney who procures, directs, or participates in an unlawful arrest or detention is liable therefor; this is not so as to an attorney who goes no further than advising that an arrest is justifiable and not participating therein.

If the circumstances are such that liability generally would be imposed because of procuring, directing, or participating in an unlawful arrest or detention, the attorney who procures, directs, or participates therein is liable⁴⁰ even though the judi-

their name was pursuant to their obligations under policy.

N.Y.—Otto v. Levy, 279 N.Y.S. 462, 244 App.Div. 349.

Attorney's liability see *infra* § 41 b.

31. Mo.—Monson v. Rouse, 86 Mo. App. 97.

25 C.J. p 511 note 96.

32. Vt.—Gibson v. Holmes, 62 A. 11, 78 Vt. 110, 4 L.R.A.N.S., 451.

25 C.J. p 511 note 97.

33. Vt.—Gibson v. Holmes, *supra*.
25 C.J. p 511 note 98.

34. N.C.—West v. A. P. Messick Grocery Co., 50 S.E. 565, 138 N.C. 166.
25 C.J. p 511 note 99.

Wrong person arrested

Where attorneys are employed to bring suit against A, and in the prosecution of that suit, by mistake, cause B to be wrongfully arrested, such act is beyond the scope of their authority which is only to sue A.

N.Y.—Gearon v. Savings Bank, 50 N.Y.Super. 264, 6 N.Y.Civ.Proc. 207.

35. N.Y.—Nossek v. A. H. Todd & Son, 290 N.Y.S. 253, 160 Misc. 528.
25 C.J. p 512 note 1.

Clerk of attorney

The act of the attorney's managing clerk in causing a wrongful arrest is to be treated as the act of the attorney.

Mass.—Shattuck v. Bill, 7 N.E. 39, 142 Mass. 56.

36. N.Y.—Nossek v. A. H. Todd & Son, 290 N.Y.S. 253, 160 Misc. 528.

37. N.Y.—Sleight v. Leavenworth, 12 N.Y.Super. 122.

38. Mass.—Shattuck v. Bill, 7 N.E. 39, 142 Mass. 56.

25 C.J. p 512 note 3.

39. Ky.—Great Atlantic & Pacific Tea Co. v. Smith, 136 S.W.2d 759, 281 Ky. 583.

N.Y.—Adams v. F. W. Woolworth Co., 257 N.Y.S. 776, 144 Misc. 27.

Tex.—Alamo Downs, Inc., v. Briggs, Civ.App., 106 S.W.2d 733, error dismissed.

Wash.—Wood v. Rolfe, 221 P. 982, 128 Wash. 55.

25 C.J. p 512 note 5.

"It would constitute no defense to . . . action for false imprisonment that defendant . . . was acting (as store manager) under the rules and directions of his employer, nor can such fact serve to extend to the employee the right to violate the legal right of appellee, protecting her against wrongful imprisonment and detention by defendant."

Ky.—Great Atlantic & Pacific Tea Co. v. Smith, 136 S.W.2d 759, 767, 281 Ky. 583.

Corporate officers who instituted

proceedings for arrest on behalf of their corporation have been held liable.

La.—Romaine v. Fairchild Motor Car Co., 97 So. 390, 154 La. 171.

Wash.—Hayes v. Hutchinson, 142 P. 865, 81 Wash. 394.

Personal liability of:

Agent for tort generally see Agency §§ 220–223.

Servants for torts see Master and Servant §§ 576–578.

40. Colo.—**Corpus Juris** cited in Pomeranz v. Class, 257 P. 1086, 1089, 82 Colo. 173.

N.Y.—Vernes v. Phillips, 194 N.E. 762, 266 N.Y. 298.

Otto v. Levy, 279 N.Y.S. 462, 244 App.Div. 349.

Nossek v. A. H. Todd & Son, 290 N.Y.S. 253, 160 Misc. 528.

Pa.—Pride v. Pride, 29 Del.Co. 352, 25 C.J. p 512 note 8.

Acts beyond scope of duties

Attorney who acts officiously and beyond scope of his duties as an attorney in ordering arrest.

N.Y.—Vernes v. Phillips, 194 N.E. 762, 266 N.Y. 298.

Complainant's liability on:

Directing arrest without process see *supra* § 24.

Participating in arrest:

With process see *supra* § 26.

Without process see *supra* § 21.

cial officer issuing a void process or serving or executing it is immune,⁴¹ and his honesty of purpose does not protect him.⁴² There is only slight authority for the proposition that an attorney who in issuing process acts in good faith and with the honest purpose of protecting his client is not liable if the arrest turns out to be wrongful.⁴³

On the other hand, an attorney who goes no further than advising that the case is one justifying arrest, but who does not participate therein, is not liable if the arrest turns out to have been unlawful.⁴⁴ So an attorney merely urging the law in connection with a contempt proceeding which the court finally determines is not liable for a false imprisonment resulting from the court's error,⁴⁵ and although an arrest was under an irregular and void warrant an attorney who after the arrest appeared to prosecute the cause was exonerated, where he had not officially interfered in directing the arrest.⁴⁶

He incurs no liability where the arrest or detention is lawful, as, for instance, where he issues valid process and delivers it to the officer for service,⁴⁷ although it is subsequently altered without his direction or advice,⁴⁸ or where the process procured by him is merely erroneous and not void.⁴⁹

District attorneys. In accord with general rules discussed in District and Prosecuting Attorneys § 16, a district attorney is not liable for false imprisonment for having appeared in a prosecution in the course of his official duties;⁵⁰ but it has been

stated that the mere fact that defendant is an assistant district attorney will not per se establish immunity, and relief may be granted plaintiff unless defendant acted lawfully with respect to plaintiff in participating in or causing his continued imprisonment.^{50.5}

§ 42. Superior Executive Officer and His Inferior or Deputy

- a. Liability of superior
- b. Liability of inferior or deputy

a. Liability of Superior

Generally, a superior officer is not responsible for a wrongful detention made by his inferior when the latter is not acting in his official capacity or by virtue of his office, unless he expressly authorizes, directs, or ratifies the action; but a superior officer is responsible for a wrongful detention made by his inferior when the latter is acting officially.

A superior officer is not liable for the alleged false arrest and false imprisonment committed by his subordinates in the absence of a showing that he took part in, commanded, or ratified the alleged trespass.^{50.50} Moreover, that an arresting or detaining officer is subject to the orders of his superior does not of itself render the latter liable for a wrongful arrest or detention,⁵¹ it being a general rule that a superior officer is not responsible for a wrongful arrest or detention made or caused by his inferior or deputy when not acting in his official capacity or by virtue of his office,⁵² although he is liable if he directed the wrongful acts to be done or

Complainant's liability on: Cont'd
Procuring:

Civil process of arrest see supra
§§ 27, 28.

Criminal process of arrest see
supra §§ 27, 28.

Liability of attorney to third persons in tort generally see Attorney and Client § 52 b.

41. Colo.—Pomeranz v. Class, 257 P. 1086, 82 Colo. 173.

42. Ky.—Revill v. Pettit, 3 Metc. 314.

Mo.—Tiede v. Fuhr, 175 S.W. 910, 264 Mo. 622.
25 C.J. p 512 note 9.

43. Mo.—Shull v. Boyd, 158 S.W. 313, 251 Mo. 452.
25 C.J. p 512 note 10.

44. D.C.—Benham v. Vernon, 16 D. C. 18.
25 C.J. p 513 note 16.

45. Wis.—Langen v. Borkowski, 206 N.W. 181, 188 Wis. 277, 43 A.L.R. 622.

46. N.Y.—Hunter v. Burtis, 10 Wend. 358.
25 C.J. p 513 note 15.

47. Vt.—McMullin v. Erwin, 38 A. 62, 69 Vt. 338.

25 C.J. p 513 note 11.

48. Vt.—McMullin v. Erwin, supra.

49. Md.—Roth v. Shupp, 50 A. 430, 94 Md. 55.

Mich.—Ward v. Cozzens, 3 Mich. 252.

50. U.S.—Reilly v. U. S. Fidelity & Guaranty Co., C.C.A.Cal., 15 F.2d 314.

D.C.—Fletcher v. McMahon, 121 F.2d 729, 73 App.D.C. 263, certiorari denied 62 S.Ct. 131, 314 U.S. 662, 86 L. Ed. 531.

50.5 U.S.—Fine v. Paramount Pictures, C.A.Ill., 171 F.2d 571.

50.50 R.I.—Giroux v. Murphy, 147 A. 2d 465.

Police commissioner

Newspaper account which did not disclose that commissioner issued or authorized alleged order directing indiscriminate arrests without warrant of all persons known to the police to have ever been convicted of crime could not be made the basis of action against the commissioner as an individual for false arrest of plaintiff

who was arrested in the police drive with which the newspaper account dealt.

N.Y.—Wassing v. Kennedy, 170 N.Y.S. 2d 58, 9 Misc.2d 672.

Chief of police

Cal.—Oppenheimer v. City of Los Angeles, 232 P.2d 26, 104 C.A.2d 545.

51. Cal.—Kenyon v. Hartford Accident & Indemnity Co., 260 P. 952, 86 C.A. 269.

52. Alaska.—Barlow v. Kuchenbacher, 7 Alaska 519—Yancey v. Brenneman, 6 Alaska 448.

Ky.—Jones v. Van Bever, 174 S.W. 795, 164 Ky. 80, L.R.A.1915E 172.
Tex.—Sheppard v. Gill, Civ.App., 53 S.W.2d 168, affirmed 90 S.W.2d 563, 126 Tex. 603.
25 C.J. p 513 note 23.

Arrest without warrant

An arrest made without warrant and in a manner not authorized by law is the deputy's individual and not his official act.

Alaska.—Yancey v. Brenneman, 6 Alaska 448.

gave express authority therefor,⁵³ or if he participated in⁵⁴ or ratified⁵⁵ it. The superior officer is not liable in the absence of liability on the part of the deputy.^{55.5}

On the other hand, a superior executive officer is responsible for a wrongful arrest or detention made or caused by his inferior or deputy when the latter is acting officially,⁵⁶ and this without regard to the superior's knowledge or participation therein.⁵⁷ Thus the superior is liable for the acts of his inferior where the inferior, acting under process, abuses it,⁵⁸ as, for instance, where a deputy, armed with a writ, arrests the wrong man by mistake,⁵⁹ and it has been held that a sheriff is liable for the act of his deputy in arresting a man under a void warrant.⁶⁰

The relation of a superior to, and his liability for the acts of, his inferior are analogous to the relations of a surety on the official bond to the officer

bonded.⁶¹

b. Liability of Inferior or Deputy

Ordinarily an inferior officer or deputy is personally liable for misconduct in making or causing a wrongful arrest, even though acting under the orders or directions of his superior.

An inferior officer or deputy is personally liable for any misconduct of which he may be guilty in making or causing a wrongful arrest or detention,⁶² that the arresting officer is acting under orders or directions of his superiors ordinarily being no defense;⁶³ and this is so where the illegality of the order arises from the fact that it is founded on an invalid law.⁶⁴ However, if the order to detain results in a detention which is not unlawful, no liability is incurred, although it has been suggested that the rule may be different if the power to arrest or detain cannot be delegated by the superior to the inferior.⁶⁵

Tex.—Sheppard v. Gill, Civ.App., 58 S.W.2d 168, affirmed 90 S.W.2d 563, 126 Tex. 603—McBeath v. Campbell, Civ.App., 4 S.W.2d 999, reversed in part on other grounds and affirmed in part, Com.App., 12 S.W.2d 118.

25 C.J. p 513 note 24.

53. Cal.—Oppenheimer v. City of Los Angeles, 232 P.2d 26, 104 C.A.2d 545—Kenyon v. Hartford Accident & Indemnity Co., 260 P. 952, 86 C.A. 269.

25 C.J. p 514 note 29.

City marshal

Cal.—Kenyon v. Hartford Accident & Indemnity Co., supra.

54. Cal.—Kenyon v. Hartford Accident & Indemnity Co., supra.

Tex.—McBeath v. Campbell, 4 S.W.2d 999, reversed in part on other grounds and affirmed in part, Com.App., 12 S.W.2d 118.

55. Wis.—Karney v. Boyd, 203 N.W. 371, 186 Wis. 594.

55.5 Fla.—Warren for Use and Benefit of Cronin v. Hall, 66 So.2d 230.

56. Fla.—Warren for Use and Benefit of Cronin v. Hall, supra.

Iowa.—Drake v. Keeling, 299 N.W. 919, 230 Iowa 1038.

25 C.J. p 513 note 18—57 C.J. p 799 note 80.

Test

(1) An official act is an act done in official capacity under color and by virtue of office.

Ariz.—Miles v. Wright, 194 P. 88, 22 Ariz. 73, 12 A.L.R. 970.

(2) It has been said that the test as to whether the inferior officer is acting by virtue of his office is whether he is armed with a valid writ, or has authority to make the

arrest without a writ, under a statute.

Ky.—Jones v. Van Bever, 174 S.W. 795, 164 Ky. 80, L.R.A.1915E 172.

25 C.J. p 513 note 19.

Liability of sheriff for acts of deputy see Sheriffs and Constables.

57. Fla.—Warren for Use and Benefit of Cronin v. Hall, 66 So.2d 230. Wash.—Ulvestad v. Dolphin, 278 P. 681, 683, 152 Wash. 580.

"As keeper of the city prison, the chief of police is bound in law to know who is confined therein, and bound to know the purpose for which any person confined therein is so confined. He cannot escape his obligations in this respect by placing the prison in the keeping of others. If he does so, such others are his agents and he is responsible for their acts."

Wash.—Ulvestad v. Dolphin, supra.

Knowledge inferred

There being no rules or regulations of a sheriff's office attempting to limit a deputy's authority to make arrests without warrant, but it being the custom or habit of deputies to act without warrant on a telephone message from another sheriff to make an arrest, the law would, if necessary to hold the sheriff responsible for such an act of his deputy, infer knowledge of the sheriff that this would be done.

Ariz.—Miles v. Wright, 194 P. 88, 22 Ariz. 73, 12 A.L.R. 970.

58. Ky.—Jones v. Van Bever, 174 S.W. 795, 164 Ky. 80, L.R.A.1915E 172.

25 C.J. p 513 note 20.

59. Ariz.—Miles v. Wright, 194 P. 88, 22 Ariz. 73, 12 A.L.R. 970.

Tex.—Hays v. Creary, 60 Tex. 445.

60. Kan.—Elwell v. Reynolds, 51 P. 578, 6 Kan.App. 545. 25 C.J. p 513 note 22.

61. U.S.—Reichman v. Harris, Tenn., 252 F. 371, 164 C.C.A. 295.

Ky.—Jones v. Van Bever, 174 S.W. 795, 164 Ky. 80, L.R.A.1915E 172.

62. U.S.—Fine v. Paramount Pictures, C.A. III., 171 F.2d 571.

Ky.—Jones v. Van Bever, 174 S.W. 795, 164 Ky. 80, L.R.A.1915E 172.

Unauthorized warrant

Where a deputy is called on by his superior to assist in an arrest under a warrant which is thereafter found to be unauthorized by law, the principle of respondeat superior applies and the deputy is not liable.

Pa.—Pride v. Pride, 29 Del.Co. 352.

Arrest by peace officers:

Under process void on its face see supra § 28.

Without process see supra § 22.

Liability of deputy sheriff generally see Sheriffs and Constables § 53.

63. Md.—Mason v. Wrightson, 109 A. 2d 128, 205 Md. 481.

N.J.—Collins v. Cody, 113 A. 709, 95 N.J.Law 65.

Ohio.—Johnson v. Reddy, App., 120 N.E.2d 459, reversed on other grounds 126 N.E.2d 911, 163 Ohio St. 347.

Or.—Christ v. McDonald, 52 P.2d 655, 152 Or. 494.

25 C.J. p 514 note 32.

64. Ind.—Griffin v. Wilcox, 21 Ind. 370.

Mich.—Swart v. Kimball, 5 N.W. 635, 43 Mich. 443.

25 C.J. p 514 note 33.

65. N.Y.—Cunningham v. Shea, 97 N.Y.S. 884, 111 App.Div. 624.

Where police regulations leave the incarceration of an arrested person to the officer in charge and to whom the prisoner is delivered, the arresting officer and his aids are not liable for the subsequent incarceration or detention.⁶⁶

§ 43. Private Persons Assisting Officer

Under statutes authorizing peace officers to call on private persons to assist in making an arrest, such persons are usually protected against liability for a false imprisonment. Apart from such statutes such persons are protected if assisting an officer acting under a valid warrant, or under circumstances rendering the arrest lawful.

Under statutes authorizing peace officers to summon private persons to assist them in making an arrest, discussed in Arrest § 16 a, it is ordinarily held that the private person is not to be held liable where he obeys such a summons coming from a known peace officer,⁶⁷ without regard to whether or not the officer was acting under a warrant,⁶⁸ or whether, if acting under a warrant, such warrant was valid or invalid,⁶⁹ or whether, if acting without warrant, the arrest was legal or illegal.⁷⁰

Irrespective of such statutes, a person who assists one who is in fact a peace officer in the service of a warrant, which is not void, is not liable,⁷¹ and does not become so if the arrest, although lawful in the first instance, becomes a trespass ab initio by

some subsequent misconduct of the officer.⁷² So, if an arrest without warrant is made under circumstances rendering it lawful, those summoned to aid the officer are equally protected with him.⁷³ It has been said that the person assisting the officer would not be liable in any event if he responded in good faith to the officer's summons and kept within his orders and directions,⁷⁴ at least where his acts are not wanton or beyond what he is required to do,^{74.5} or where he does not show malice or oppression against the person arrested.^{74.10}

However, it has been held that if the warrant is void the persons assisting are liable,⁷⁵ and that one who assists a police officer cannot justify the arrest, if the police officer himself acts without warrant and beyond the territorial limits within which he is authorized to act.⁷⁶

The principles protecting private persons acting at the summons of a known peace officer are not to be extended to cases where the one giving the summons is not in fact a public officer,⁷⁷ or only assumes to act in that particular case by special appointment,⁷⁸ or, it seems, where the officer is acting under civil process,⁷⁹ or where the private person assisting does so voluntarily and not because of the summons of the officer;⁸⁰ nor are such principles to be extended so as to protect a subordinate officer acting at the direction of his superior.⁸¹

66. Cal.—Van Fleet v. West American Ins. Co., 42 P.2d 378, 5 C.A.2d 125, rehearing denied 43 P.2d 557, 5 C.A.2d 125—Mackie v. Ambassador Hotel & Investment Corporation, 11 P.2d 8, 123 C.A. 215, followed in 11 P.2d 7, 123 C.A. 770—Gisske v. Sanders, 98 P. 48, 9 C.A. 13.

67. Cal.—Mackie v. Ambassador Hotel & Investment Corporation, 11 P.2d 8, 123 C.A. 215, followed in 11 P.2d 7, 123 C.A. 770.

Mont.—Plummer v. Northern Pac. Ry. Co., 255 P. 18, 79 Mont. 82.

Okl.—*Corpus Juris Secundum* quoted at length in Moyer v. Meier, 238 P. 2d 338, 340, 205 Okl. 405, 29 A.L.R. 2d 818.

25 C.J. p 514 note 37.

Request or persuasion

Private person who assists in the making of an arrest pursuant to request or persuasion of police officer is not liable, even though he was persuaded by police sergeant to sign citizen's arrest.

Cal.—Peterson v. Robison, 277 P.2d 19, 43 C.2d 690.

68. Mich.—Firestone v. Rice, 38 N. W. 885, 71 Mich. 377, 15 Am.S.R. 266.

Vt.—McMahan v. Green, 34 Vt. 69, 80 Am.D. 665.

69. Mich.—Firestone v. Rice, 38 N. W. 885, 71 Mich. 377, 15 Am.S.R. 266.

Vt.—McMahan v. Green, 34 Vt. 69, 71, 80 Am.D. 665.

25 C.J. p 514 note 39.

70. Mich.—Firestone v. Rice, 38 N. W. 885, 71 Mich. 377, 15 Am.S.R. 266.

Tex.—Presley v. Ft. Worth & D. C. R. Co., Civ.App., 145 S.W. 669.

25 C.J. p 514 note 40.

Contra Pow v. Beckner, 3 Ind. 475.

25 C.J. p 515 note 47.

71. N.Y.—Coyles v. Hurtin, 10 Johns. 85.

Okl.—*Corpus Juris Secundum* cited in Moyer v. Foster, 234 P.2d 415, 416, 205 Okl. 26.

25 C.J. p 478 note 77, p 514 note 41.

72. Mont.—*Corpus Juris* quoted in Plummer v. Northern Pac. Ry. Co., 255 P. 18, 19, 79 Mont. 82.

25 C.J. p 515 note 42.

73. Ill.—Main v. McCarty, 15 Ill. 441.

25 C.J. p 515 note 44.

Arrests by peace officers without warrant see supra § 22.

74. Ky.—Grau v. Forge, 209 S.W. 369, 183 Ky. 521, 3 A.L.R. 642.

Md.—Edger v. Burke, 54 A. 986, 96 Md. 715.

Okl.—*Corpus Juris Secundum* cited in Moyer v. Meier, 238 P.2d 338, 340, 205 Okl. 405, 29 A.L.R.2d 818.

74.5 Mich.—Firestone v. Rice, 38 N. W. 885, 71 Mich. 377.

Okl.—Moyer v. Meier, 238 P.2d 338, 205 Okl. 405, 29 A.L.R.2d 818.

74.10 Okl.—Moyer v. Meier, supra.

75. Ark.—Mitchell v. State, 12 Ark. 50, 56, 54 Am.D. 253.

25 C.J. p 515 note 43.

76. N.C.—Martin v. Houck, 54 S.E. 291, 141 N.C. 317, 7 L.R.A.N.S., 576.

77. Ky.—Cincinnati, N. O. & T. P. R. Co. v. Cundiff, 179 S.W. 615, 166 Ky. 594, Ann.Cas.1916C 513.

78. Ind.—Dietrichs v. Schaw, 43 Ind. 175.

25 C.J. p 515 note 50.

79. Vt.—McMahan v. Green, 34 Vt. 69, 80 Am.D. 665.

25 C.J. p 515 note 51.

80. S.C.—Hodge v. Piedmont & N. R. Co., 95 S.E. 138, 109 S.C. 62.

Tex.—Kirbie v. State, 5 Tex.App. 60, 25 C.J. p 515 note 52.

81. Ky.—Grau v. Forge, 209 S.W. 369, 183 Ky. 521, 3 A.L.R. 642.

25 C.J. p 515 note 53.

§ 44. Judicial Officers

- a. Rules of no liability
- b. Distinction between judges of courts of general and of limited jurisdiction
- c. Effect of malice or corruptness
- d. Clear absence of all jurisdiction
- e. Ministerial acts
- f. Causing detention for contempt

a. Rules of No Liability

A judicial officer is generally not liable for a false arrest or detention arising out of his official acts amounting to an excessive or erroneous exercise of jurisdiction where there is no clear absence of all jurisdiction.

Based on the principle that all judicial officers are protected by their official character from liability in tort, because of public conduct clearly within the pale of their authority, although involving demonstrable legal error,⁸² discussed fully in Judges §§ 62, 63, it is the general rule that a judicial officer is not liable for a false arrest or detention arising

out of acts done in his judicial capacity where there is not a clear absence of all jurisdiction over the subject matter and person, even though such acts constitute an excessive or erroneous exercise of jurisdiction or involve a decision that the officer had jurisdiction over the particular case where in fact he had none.⁸³ The rule is sometimes stated in somewhat different terms to the effect that a judicial officer is not liable when the arrest or detention is in a case belonging to a class over which he has cognizance, and is by complaint or other proceedings put at least colorably under his jurisdiction.⁸⁴

Erroneous exercise of jurisdiction. Once a judicial officer acquires jurisdiction, his subsequent acts are considered judicial for which he incurs no liability.⁸⁵ Accordingly if there is not a clear absence of all jurisdiction, and if the complaint or affidavit or other preliminary proceedings confer on him at least colorably the right to determine whether or not to act in the particular case, a judicial officer is not liable for his erroneous decision,⁸⁶

82. Cal.—Baer v. Smith, 157 P.2d 646, 68 C.A.2d 716.

Kan.—Corpus Juris cited in Brown v. Larimer, 294 P. 906, 907, 132 Kan. 81.

N.H.—Moore v. Cotton, 54 A.2d 167, 94 N.H. 387.

Ohio.—Click v. Parish, 98 N.E.2d 333, 89 Ohio App. 318, affirmed 98 N.E. 2d 293, 155 Ohio St. 84.

25 C.J. p 516 note 59.

"It is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge would be inconsistent with the possession of this freedom and would destroy that independence without which no judiciary can be either respectable or useful."

Miss.—DeWitt v. Thompson, 7 So.2d 529, 531, 192 Miss. 615.

"Immunity is not given by law to favor judges beyond other officials or merely to protect them from liability as individuals. The immunity is based upon considerations of public policy, on the theory that the public interest is best served when the judicial officer is free to act upon his independent conviction, unswayed by any consideration or apprehension of possible attendant personal consequences."

N.Y.—Bienenstock v. McCoy, 88 N.Y. S.2d 279, 283, 194 Misc. 927.

83. Cal.—Mackie v. Dyer, 316 P.2d 366, 154 C.A.2d 395.

35 C.J.S.—45

Del.—King v. Lank, 61 A.2d 402, 5 Terry 189.

D.C.—Fletcher v. McMahon, 121 F. 2d 729, 73 App.D.C. 263, certiorari denied 62 S.Ct. 131, 314 U.S. 662, 86 L.Ed. 531.

Idaho.—Waters v. Barclay, 64 P.2d 1079, 57 Idaho 376.

Mo.—Corpus Juris quoted in Ussery v. Haynes, 127 S.W.2d 410, 415, 344 Mo. 530.

Mont.—Shampagne v. Keplinger, 252 P. 803, 78 Mont. 114.

N.Y.—Mudge v. State, 68 N.Y.S.2d 388, 271 App.Div. 1039.

Corpus Juris Secundum cited in Reilly v. State, 76 N.Y.S.2d 38, 40, 190 Misc. 862.

Ohio.—Voll v. Steele, 47 N.E.2d 991, 141 Ohio St. 293—Stahl v. Currey, 20 N.E.2d 529, 135 Ohio St. 253.

Or.—Corpus Juris quoted in Shaw v. Moon, 245 P. 318, 320, 117 Or. 558, 45 A.L.R. 600.

25 C.J. p 515 note 55.

Excess and absence of jurisdiction distinguished

(1) It is stated in a number of decisions that there is a clear distinction between absence of all jurisdiction as to the subject matter and excess of jurisdiction.

D.C.—Bradley v. Fisher, D.C., 13 Wall. 335, 20 L.Ed. 646.

25 C.J. p 518 note 78.

(2) By excess of jurisdiction, as distinguished from the entire absence of jurisdiction, is meant that the act, although within the general power of the judge, is not authorized with respect to the particular case, because the conditions which alone authorize the exercise of his general

power in that particular case are wanting.

Ala.—Broom v. Douglass, 57 So. 860, 175 Ala. 268, 44 L.R.A., N.S., 164, Ann.Cas.1914C 1155.

(3) This distinction is not always clear in itself, nor is it consistently treated.

Ind.—State v. Wolever, 26 N.E. 762, 127 Ind. 306.

25 C.J. p 516 note 57.

84. N.D.—Landsidel v. Culeman, 181 N.W. 593, 47 N.D. 275, 13 A. L.R. 1339.

25 C.J. p 516 note 58.

85. Cal.—Ceinar v. Johnston, 25 P. 2d 28, 134 C.A. 166.

N.Y.—Mudge v. State, 68 N.Y.S.2d 388, 271 App.Div. 1039.

Fishbein v. State, 120 N.Y.S.2d 92, 204 Misc. 151, affirmed 125 N.Y. S.2d 845, 282 App.Div. 600, appeal denied 127 N.Y.S.2d 827, 282 App. Div. 1093—Bienenstock v. McCoy, 88 N.Y.S.2d 279, 194 Misc. 927.

Effect of suspension of sentence

Justice of peace suspending sentence, and thereafter indorsing commitment on abstract of proceedings, causing plaintiff's arrest and imprisonment, was held not liable for false imprisonment on ground that justice had divested himself of jurisdiction and then proceeded to act.

Cal.—Ceinar v. Johnston, 25 P.2d 28, 134 C.A. 166.

86. U.S.—Reilly v. U. S. Fidelity & Guaranty Co., C.C.A. Cal., 15 F.2d 314.

Cal.—Malone v. Carey, 62 P.2d 166, 17 C.A.2d 505—Rogers v. Marion, 54 P.2d 760, 11 C.A.2d 756—Ceinar

although his decision involves an error of law,⁸⁷ or of fact.⁸⁸

The rule has been applied to cases where the magistrate decides erroneously that the act committed was a crime,⁸⁹ improperly construes a statute,⁹⁰ or erroneously decides that an ordinance, for the violation of which the arrest is ordered, is valid,⁹¹ or applies to the alleged offender.⁹²

In cases over which the judicial officer has general jurisdiction, complaints, affidavits, or other preliminary proceedings have been held sufficient to protect him in acting thereunder where on a reasonable construction thereof the charge of an offense justifying arrest can be gathered,⁹³ or where there is presented even in a slight degree a question on which the judicial mind is called to act in determining whether a crime has been committed by the person charged.⁹⁴

The protection extends to erroneous procedure,⁹⁵ and errors of judgment resulting in improper detention after arrest,⁹⁶ and to a second arrest on proof of the insufficiency of bail offered after the first arrest.⁹⁷

Mistake as to evidence. A mistake concerning the just weight and importance of evidence presented is merely an erroneous decision for which the judicial officer is not liable,⁹⁸ nor is he liable if he draws stronger inferences from the testimony than it warrants.⁹⁹

Exceeding powers. Where jurisdiction has been

secured, the magistrate is not ordinarily liable, if in view of the situation he decides that he possesses greater power than he actually possesses.¹ For instance, the magistrate has been exonerated where, although he had authority to conduct only preliminary proceedings prior to trial, he erroneously decided that he had jurisdiction to try and convict² and, conversely, the magistrate has been exonerated where his duty was to try minor offenses immediately, and he erroneously decided to hold accused for trial by another court.³

Sentence. There is no liability on the part of the judicial officer for an excessive sentence, as the sentence is good only for the lawful time and the person detained would be entitled to a release at the end of the legal time.⁴ So the judge is not liable if in good faith he imposes a prison sentence without the alternative of a fine as required by the statute.⁵ Improper sentence as basis for liability is discussed infra subdivision d of this section.

b. Distinction between Judges of Courts of General and of Limited Jurisdiction

Generally the rules exempting judicial officers from liability for their official acts apply to judges of courts of limited jurisdiction as well as to judges of courts of general jurisdiction.

The rules as to exemption of judicial officers from liability for their official acts, while applied without exception to judges of courts of general jurisdiction,⁶ have not in all instances been applied

v. Johnston, 25 P.2d 28, 134 C.A. 166.

Miss.—DeWitt v. Thompson, 7 So.2d 529, 531, 192 Miss. 615.

Mo.—Corpus Juris quoted in Ussery v. Haynes, 127 S.W.2d 410, 416, 344 Mo. 530.

N.Y.—Mudge v. State, 68 N.Y.S.2d 388, 271 App.Div. 1039—Kischel v. Flamik, 23 N.Y.S.2d 264, 260 App. Div. 938, appeal dismissed 25 N.Y. S.2d 1000, 261 App.Div. 837.

25 C.J. p 521 note 24.

87. Mo.—Corpus Juris quoted in Ussery v. Haynes, 127 S.W.2d 410, 416, 344 Mo. 530.

25 C.J. p 521 note 25.

88. Del.—Bailey v. Wiggins, 5 Del. 462, 60 Am.D. 650.

Mo.—Corpus Juris quoted in Ussery v. Haynes, 127 S.W.2d 410, 416, 344 Mo. 530.

Utah.—Marks v. Sullivan, 33 P. 224, 9 Utah 12.

89. Ky.—Dixon v. Cooper, 58 S.W. 437, 109 Ky. 29, 22 Ky.L. 539.

25 C.J. p 521 note 27.

90. N.Y.—Austin v. Vrooman, 28 N. E. 477, 128 N.Y. 229, 14 L.R.A. 138.

25 C.J. p 521 note 28.

91. Mont.—Champagne v. Keplinger, 252 P. 803, 78 Mont. 114.

25 C.J. p 521 note 29.

92. U.S.—Cottam v. Oregon City, C. C.Or., 98 F. 570.

93. U.S.—Schneider v. Kessler, C.C. A.N.J., 97 F.2d 542.

Riegel v. Hygrade Seed Co., D.C. N.Y., 47 F.Supp. 290.

25 C.J. p 521 note 31.

94. N.Y.—Smith v. Bell & Fyfe Foundry Co., 111 N.Y.S. 202, 127 App.Div. 278.

95. Miss.—DeWitt v. Thompson, 7 So.2d 529, 531, 192 Miss. 615.

Ohio.—Stahl v. Currey, 20 N.E.2d 529, 135 Ohio St. 253.

25 C.J. p 522 note 36.

96. Okl.—Comstock v. Eagleton, 69 P. 955, 11 Okl. 487, error dismissed 25 S.Ct. 210, 196 U.S. 99, 49 L.Ed. 402.

25 C.J. p 522 note 37.

97. Ohio.—Carothers v. Scott, Tapp. 227.

98. Mich.—Johnson v. Morton, 53 N. W. 816, 94 Mich. 1.

99. Utah.—Marks v. Sullivan, 33 P. 224, 9 Utah 12.

1. La.—Berry v. Bass, 102 So. 76, 157 La. 81.

Ohio.—Corpus Juris quoted in Stahl v. Currey, 20 N.E.2d 529, 533, 135 Ohio St. 253.

25 C.J. p 522 note 39.

2. N.Y.—Austin v. Vrooman, 28 N.E. 477, 128 N.Y. 229, 14 L.R.A. 138.

25 C.J. p 522 note 40.

Contrary ruling

Mo.—Patzack v. Von Gerichten, 10 Mo.App. 424.

3. Iowa.—Londegan v. Hammer, 30 Iowa 508.

4. Mich.—Gardner v. Couch, 100 N. W. 673, 101 N.W. 802, 137 Mich. 358, 109 Am.S.R. 684.

5. La.—Berry v. Bass, 102 So. 76, 157 La. 81.

6. Idaho.—Waters v. Barclay, 64 P. 2d 1079, 57 Idaho 376.

25 C.J. p 516 note 61.

"Based on the question of jurisdiction, it is generally held that judges of courts of general jurisdiction are immune from personal liability. The reason for this is that the jurisdiction of such courts extends to all matters which may arise

to judges of inferior courts.⁷ However, the strong trend of authority has been to apply the same rules to judges of courts of general jurisdiction and to those of limited jurisdiction,⁸ such as justices of the peace,⁹ city magistrates,¹⁰ and other officers with special judicial functions,¹¹ when acting in a judicial capacity.¹²

A distinction may exist in the fact that a presumption exists in favor of a court of superior jurisdiction that such court has acted within its jurisdiction, unless the absence of all jurisdiction is shown,¹³ while such a presumption does not arise where the jurisdiction of the court is limited.¹⁴

Where there is a clear absence of all jurisdiction, the liability is the same as to both classes of officers,¹⁵ and honesty of purpose, while it may mitigate damages, cannot justify a clear usurpation of authority.¹⁶

c. Effect of Malice or Corruptness

Usually the rules of exemption of judicial officers for their official acts are not affected by the fact that they act maliciously or corruptly.

Where the circumstances are such that the judicial officer would otherwise be exempt from an ac-

tion for false imprisonment, he is not, according to the weight of authority, liable, although he has acted maliciously or corruptly.¹⁷ This is particularly true with respect to judges of courts of general jurisdiction,¹⁸ and where the point has been squarely raised the same rule has been, in the majority of cases, applied to judges of courts of limited jurisdiction,¹⁹ although some decisions may be found stating that if an inferior judge acts maliciously or corruptly, even in a matter in which he otherwise would be exonerated, he incurs liability.²⁰ If, however, a judicial officer has no jurisdiction of the subject matter or person he is civilly liable for his malicious and corrupt acts.²¹

Conspiracy. It has been held that if a justice, together with others, wrongfully and maliciously conspired to have one arrested for the purpose of harassing him, he may be liable.²²

d. Clear Absence of All Jurisdiction

A judicial officer is liable for a false arrest or imprisonment when he acts in the clear absence of all jurisdiction.

If a judicial officer acts in the clear absence of all jurisdiction and authority he incurs liability for a false arrest or imprisonment caused by him,²³ and

in court, and it is practically impossible for a question to be presented to the court with respect to which it does not have jurisdiction. This is not true, of course, of courts of limited jurisdiction, such as police courts, examining magistrates, justices of the peace, probate courts, and the like. Within the respective jurisdictions of such inferior courts, their judges are immune from personal liability, just as judges of courts of general jurisdiction are, but it is possible for a question to arise before the judges of such courts which is not within their jurisdiction. This necessarily follows from the fact that they are courts of limited jurisdiction."

Kan.—Brown v. Larimer, 294 P. 906, 907, 132 Kan. 81.

7. Conn.—Tracy v. Williams, 4 Conn. 107, 10 Am.D. 102.

Mass.—Piper v. Pearson, 2 Gray 120, 61 Am.D. 438.

25 C.J. p 516 note 62.

8. La.—Berry v. Bass, 102 So. 76, 157 La. 81.

N.D.—Landseidel v. Culeman, 181 N.W. 593, 47 N.D. 275, 13 A.L.R. 1339.

Or.—**Corpus Juris** cited in Shaw v. Moon, 245 P. 318, 319, 117 Or. 558, 45 A.L.R. 600.

25 C.J. p 516 note 63.

9. Cal.—Ceinar v. Johnston, 25 P.2d 28, 134 C.A. 166.

N.Y.—Mudge v. State, 68 N.Y.S.2d 388, 271 App.Div. 1039.

Bienenstock v. McCoy, 88 N.Y.S. 2d 279, 194 Misc. 927.

N.D.—Landseidel v. Culeman, 181 N.W. 593, 47 N.D. 275, 13 A.L.R. 1339.

Or.—Shaw v. Moon, 245 P. 318, 117 Or. 558, 45 A.L.R. 600.

Pa.—O'Donnell v. Rowe, 16 Pa. Dist. & Co. 212.

25 C.J. p 517 note 64.

10. U.S.—Reilly v. U. S. Fidelity & Guaranty Co., C.C.A. Cal., 15 F.2d 314.

Mont.—Shampagne v. Keplinger, 252 P. 803, 78 Mont. 114.

25 C.J. p 517 note 65.

11. N.Y.—Gibson v. McDonald, 123 N.Y.S. 504, 139 App.Div. 51.

Willis v. Havemeyer, 12 N.Y. Super. 447.

25 C.J. p 517 note 66.

Mayor acting judicially

La.—Berry v. Bass, 102 So. 76, 157 La. 81.

Ohio.—Voll v. Steele, 47 N.E.2d 991, 141 Ohio St. 293.

25 C.J. p 517 note 66 [a] (3).

12. Iowa.—Foft v. Hamilton, 153 N.W. 146, 170 Iowa 576.

13. U.S.—Cottam v. Oregon City, C. C.Or., 98 F. 570.

14. U.S.—Cottam v. Oregon City, supra.

Ind.—Poulk v. Slocum, 3 Blackf. 421.

15. U.S.—Cottam v. Oregon City, C. C.Or., 98 F. 570.

16. Ky.—Glazar v. Hubbard, 42 S.

W. 1114, 102 Ky. 68, 19 Ky.L. 1025, 80 Am.S.R. 340, 39 L.R.A. 210.

Ohio.—Truesdel v. Combs, 33 Ohio St. 186.

25 C.J. p 517 note 71.

17. Cal.—Rogers v. Marion, 54 P. 2d 760, 11 C.A.2d 750—Ceinar v. Johnston, 25 P.2d 28, 134 C.A. 166.

N.D.—Landseidel v. Culeman, 181 N.W. 593, 47 N.D. 275, 13 A.L.R. 1339.

Wis.—**Corpus Juris** cited in Langen v. Borkowski, 206 N.W. 181, 189, 188 Wis. 277, 43 A.L.R. 622.

25 C.J. p 517 note 73.

18. U.S.—Cooke v. Bangs, C.C.Minn., 31 F. 640.

25 C.J. p 517 note 74.

19. Ala.—Broom v. Douglass, 57 So. 860, 175 Ala. 268, 44 L.R.A., N.S., 164, Ann.Cas.1914C 1155.

25 C.J. p 517 note 75.

20. Wis.—Robertson v. Parker, 75 N.W. 423, 99 Wis. 652, 67 Am.S.R. 889.

25 C.J. p 518 note 76.

21. Kan.—Brown v. Larimer, 294 P. 906, 132 Kan. 81.

25 C.J. p 518 note 77.

22. Ky.—Read v. Shipley, 104 S.W. 1001, 31 Ky.L. 1258.

23. U.S.—Manning v. Ketcham, C.C. A.Ky., 58 F.2d 948.

Del.—King v. Lank, 61 A.2d 402, 5 Terry 189.

Fla.—**Corpus Juris Secundum** cited in Farish v. Smoot, 58 So.2d 534, 538

this is so even though his act involves his decision made in good faith that he had such jurisdiction,²⁴ and his honesty of purpose is not a defense to the action,²⁵ except, as discussed *infra* § 66, in mitigation of damages.

Absence of basis for jurisdiction. The general rule is that a judicial officer who acts on a complaint or affidavit containing allegations having no legal value or color of legal value to give him jurisdiction over the offense incurs liability.²⁶ Some fact or circumstance must appear tending to establish the guilt of accused,²⁷ and complaints on mere

hearsay or information and belief have been held insufficient to confer jurisdiction.²⁸ The general rule has been applied in some instances to cases where the complaint clearly sets forth no charge of the commission of a crime.²⁹

Process void on its face. A judicial officer who issues process void on its face is liable for an arrest or detention thereunder,³⁰ although he acted in good faith³¹ and had sufficient evidence before him on which to issue a valid process.³²

Issuance of warrant. A judicial officer has been

—Beckham v. Cline, 10 So.2d 419, 151 Fla. 481, 145 A.L.R. 705.

Gal.—Stembridge v. Wright, 124 S.E. 115, 32 Ga.App. 587.

Kan.—Brown v. Larimer, 294 P. 906, 132 Kan. 81.

Ky.—Cox v. Perkins, 185 S.W.2d 954, 299 Ky. 470, 173 A.L.R. 797.

Ohio.—Minor v. Seliga, 150 N.E.2d 852, 168 Ohio St. 1.

25 C.J. p 518 note 79, p 499 note 68.

Clear authority to imprison must exist.

Kan.—Brown v. Larimer, 294 P. 906, 132 Kan. 81.

Status as individual

Cal.—Ceinar v. Johnston, 25 P.2d 28, 134 C.A. 166.

Disqualification

It has been held that a judicial officer who acts as counsel for complainant disqualifies himself to act as judge, and this may be shown to establish want of jurisdiction to issue process.

Mich.—Stensrud v. Delamater, 22 N.W. 272, 56 Mich. 144.

Expiration of term

(1) An officer is liable if he issues process after his term of office has expired.

N.Y.—Stenson v. Koch, 46 N.E. 176, 152 N.Y. 87.

(2) This is so although he acted in good faith.

Me.—Grace v. Teague, 18 A. 289, 81 Me. 559.

Lack of territorial jurisdiction

(1) An officer has been held liable where he convicts and imprisons one for an offense committed in a locality over which he does not have jurisdiction.

N.Y.—McCarg v. Burr, 79 N.E. 715, 186 N.Y. 467, 17 N.Y. Ann. Cas. 96, 25 C.J. p 519 note 89.

(2) Similarly he is liable where he causes the arrest of a person beyond his jurisdiction.

N.Y.—McCarg v. Burr, *supra*, 25 C.J. p 519 note 90.

Loss of jurisdiction pendente lite

Judicial officer may be liable if he acts after he has lost jurisdiction in the case pendente lite.

Wis.—Holz v. Rediske, 92 N.W. 1105, 116 Wis. 353.

25 C.J. p 519 note 83.

Number entitled to act

(1) Where judicial power is by statute confided to a certain number, the exercise of such power by a lesser number may impose liability.

Ky.—Revill v. Pettit, 3 Metc. 314, 25 C.J. p 519 note 87.

(2) One issuing process who is not in fact invested with power to do so is not protected by the rule exempting judicial officers.

Ky.—Stephens v. Wilson, 72 S.W. 336, 115 Ky. 27, 24 Ky.L. 1832.

W.Va.—Howell v. Wysor, 82 S.E. 503, 74 W.Va. 589, Ann. Cas. 1916C 519.

25 C.J. p 519 note 88.

Unconstitutional statute

Liability has been imposed where the statute under which the officer acted was unconstitutional.

Mass.—Kelly v. Bemis, 4 Gray 83, 64 Am.D. 50.

Violation of other statutory conditions

(1) Liability has been imposed when the officer acts in violation of certain conditions prescribed by statute for the exercise of his jurisdiction.

Cal.—Fukumoto v. Marsh, 62 P. 303, 509, 130 C. 66, 80 Am.S.R. 73.

25 C.J. p 520 note 98.

(2) Failure to acquire jurisdiction over the person of accused in manner prescribed by statute may impose liability.

N.Y.—McCarg v. Burr, 94 N.Y.S. 675, 106 App.Div. 275, affirmed 79 N.E. 715, 186 N.Y. 467.

25 C.J. p 520 note 99.

(3) Ordering or permitting accused to be committed for examination on a subsequent day and not forthwith brought before him may impose liability.

U.S.—Von Arx v. Shafer, Alaska, 241 F. 649, 154 C.C.A. 407, L.R.A. 1917F 427.

N.Y.—Pratt v. Hill, 16 Barb. 303.

(4) Holding accused in prison pending the preliminary hearing for

a longer time than the statute permits may impose liability.

Ohio.—Washer v. Iler, 29 Ohio Cir. Ct. 319, affirmed 80 N.E. 1134, 75 Ohio St. 638.

Tenn.—Touhey v. King, 9 Lea 422.

(5) Liability was imposed where it appeared that the right to arrest was barred by the statute of limitations.

Vt.—Vaughn v. Congdon, 56 Vt. 111, 48 Am.R. 758.

(6) Other instances see 25 C.J. p 520 notes 4-9, 12, 13.

24. Ala.—Broom v. Douglass, 57 So. 860, 175 Ala. 268, 44 L.R.A., N.S., 164, Ann. Cas. 1914C 1155.

Blancett v. Wimberley, 78 So. 318, 16 Ala.App. 402.

25. U.S.—Manning v. Ketcham, C.C. A.Ky., 58 F.2d 948.

25 C.J. p 518 note 81.

26. N.Y.—McKelvey v. Marsh, 71 N.Y.S. 541, 63 App.Div. 396, 10 N.Y. Ann. Cas. 178.

25 C.J. p 520 note 18.

27. N.Y.—McKelvey v. Marsh, *supra*—Wilson v. Robinson, 6 How. Fr. 110.

28. N.Y.—McKelvey v. Marsh, 71 N.Y.S. 541, 63 App.Div. 396, 10 N.Y. Ann. Cas. 178.

25 C.J. p 520 note 20.

29. Ohio.—Kaptur v. Kaptur, 197 N.E. 496, 50 Ohio App. 91—Kuhn v. McNeal, 181 N.E. 153, 41 Ohio App. 485.

25 C.J. p 521 note 22.

30. Conn.—Grumon v. Raymond, 1 Conn. 40, 6 Am.D. 200.

N.M.—Vickrey v. Dunivan, 279 P.2d 853, 59 N.M. 90.

25 C.J. p 522 note 46.

Error in mittimus as immaterial where judgment is correct see *infra* subdivision e of this section.

31. Conn.—Grumon v. Raymond, 1 Conn. 40, 6 Am.D. 200.

N.Y.—Blythe v. Tompkins, 2 Abb.Pr. 468.

32. N.Y.—Blythe v. Tompkins, *supra*.

held liable where he issues a warrant unsupported by oath or affirmation³³ in violation of the Fourth Amendment to the United States Constitution,³⁴ or of the constitutional or statutory provisions of the state respecting the issuance of warrants of arrest.³⁵

Where a judicial officer issues a warrant of arrest based on a void affidavit^{35.5} or where he issues a warrant on the application of a person not authorized by statute to apply for one,³⁶ he has been held liable.

Sentence. A judicial officer has been held liable for false imprisonment where he imposes a sentence unwarranted by law, as, for example, where he sentences and imprisons accused without a trial and conviction for the offense,³⁷ or where he imposes a prison sentence, when the statute authorizes only a fine,³⁸ or, contrary to the ordinance governing the case, sentences the offender to immediate imprisonment in default of the payment of a fine.³⁹

Unofficial capacity. A judicial officer participating in an unlawful arrest or detention in an unofficial capacity is liable therefor.⁴⁰

e. Ministerial Acts

Ordinarily the rule exempting judicial officers from liability for false imprisonment arising out of their official acts does not apply to purely ministerial acts.

The rule of exemption in favor of judicial officers does not apply to acts which are not judicial but purely ministerial in character.⁴¹ For a detention

brought about by illegalities or irregularities in such duties they are liable in damages to the person arrested,⁴² and this is especially so where their acts are done with corrupt motives.⁴³

Although no distinct line of separation can be traced between ministerial and judicial action,⁴⁴ it has been said that the distinction between the two is that where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial, but where the act to be done involves the exercise of discretion or judgment, it is not to be deemed merely ministerial,⁴⁵ and that as safe a criterion as any other to ascertain whether a private suit would or would not lie is to adopt the rule which governs in cases in which a mandamus would or would not be granted,⁴⁶ as discussed in Mandamus § 72.

Although the magistrate's act in determining whether a warrant of arrest shall issue is judicial, it has been held that his act in making the warrant is ministerial,⁴⁷ and, as discussed supra subdivision d of this section, he is liable if he issues process void on its face. So also the act of issuing process of commitment⁴⁸ or of execution after final judgment has been treated as ministerial,⁴⁹ and it has been said that liability would arise if a judicial officer issued a commitment which was contrary to the statute,⁵⁰ or in violation of the rule of law that a commitment may never authorize a severer

33. N.J.—Shaefer v. Smith, 106 A. 21, 92 N.J.Law 267.
25 C.J. p 519 note 91.

34. Ky.—Clark v. Hampton, 174 S. W. 490, 163 Ky. 698.
N.C.—Brewer v. Wynne, 79 S.E. 629, 163 N.C. 319, Ann.Cas.1915B 319.

35. Pa.—Kossouf v. Knarr, 55 A. 854, 206 Pa. 146.
25 C.J. p 519 note 93.

Necessity for writing

(1) It is not necessary that the charge and oath be reduced to writing, unless the statute requires it.
Ky.—Clark v. Hampton, 174 S.W. 490, 163 Ky. 698.

Pa.—Kessler v. Hoffman, 9 Pa.Dist. 365.
25 C.J. p 519 note 95.

(2) It is presumed in the absence of proof to the contrary that the judicial officer complied with statutory requirements in this respect.
Ky.—Read v. Shipley, 104 S.W. 1001, 31 Ky.L. 1258.
N.Y.—Bradstreet v. Furgeson, 23 Wend. 638.

(3) However, a justice who had jurisdiction of the subject matter

was held not liable, although he made a mistake in failing to take an examination of complainant and his witnesses and reduce it to writing as required by statute.

N.Y.—Nowak v. Waller, 10 N.Y.S. 199, 56 Hun 647, affirmed 30 N.E. 868, 132 N.Y. 590.

35.5 Ohio.—Minor v. Seliga, 150 N. E.2d 852, 168 Ohio St. 1.

Justice of the peace

Ohio.—Minor v. Seliga, supra—Truesdell v. Combs, 33 Ohio St. 186.

36. Vt.—Goodell v. Tower, 58 A. 790, 77 Vt. 61, 107 Am.S.R. 745.
25 C.J. p 519 note 97.

37. Ky.—Glazar v. Hubbard, 42 S.W. 1114, 102 Ky. 68, 19 Ky.L. 1025, 80 Am.S.R. 340, 39 L.R.A. 210.
Mich.—Gardner v. Couch, 100 N.W. 673, 101 N.W. 802, 137 Mich. 358, 109 Am.S.R. 684.
25 C.J. p 520 note 15.

38. N.Y.—Stahl v. Roof, 58 N.E. 13, 164 N.Y. 162.
25 C.J. p 520 note 10.

39. Mich.—Sheldon v. Hill, 33 Mich. 171.

40. N.Y.—Richardson v. Dusenberry, 195 N.Y.S. 765.

41. Ga.—Wyatt v. Baker, 154 S.E. 816, 41 Ga.App. 750.
25 C.J. p 523 note 50.

42. U.S.—Weigel v. Brown, Ark., 194 F. 652, 115 C.C.A. 442.

Kan.—Mayberry v. Kelly, 1 Kan. 116.

43. Mass.—Fisher v. Deans, 107 Mass. 118.

44. Mich.—Guenther v. Whiteacre, 24 Mich. 504.

45. Tex.—Rains v. Simpson, 50 Tex. 495, 32 Am.R. 609.

46. Tex.—Rains v. Simpson, supra.
25 C.J. p 523 note 55.

47. N.Y.—Blythe v. Tompkins, 2 Abb.Pr. 468.

48. Ga.—Corpus Juris cited in Wyatt v. Baker, 154 S.E. 816, 818, 41 Ga.App. 750.

25 C.J. p 523 note 58.

49. Mass.—Sullivan v. Jones, 2 Gray 570.

N.Y.—Percival v. Jones, 2 Johns.Cas. 49.

50. U.S.—Weigel v. Brown, Ark., 194 F. 652, 115 C.C.A. 442.

25 C.J. p 523 note 60.

punishment than the judgment on which it is founded,⁵¹ or which was issued notwithstanding payment of the fine imposed by the judgment.⁵²

The act of approving or refusing to approve an appeal bond has also been held to be ministerial,⁵³ and liability has been imposed where detention resulted from wrongfully refusing to approve such a bond.⁵⁴

On the other hand, a judicial officer is not liable for his ministerial act in issuing process authorized by his judgment,⁵⁵ and where his act in issuing process at the request of a party is ministerial he has been exempted from liability,⁵⁶ provided he acted in good faith,⁵⁷ without knowledge that the issuance of the process was contrary to statutory provisions.⁵⁸

f. Causing Detention for Contempt

The rules governing the liability of a judicial officer for a wrongful detention based on an alleged contempt are the same as govern his liability for a wrongful detention based on other acts.

On principles similar to those already enumerated respecting the exemption of judicial officers from liability for their acts which cause the arrest or detention of another, such an officer is not liable for causing a detention for an alleged contempt when he has general jurisdiction over contempt,

and of the person of the offender, and facts arise before him giving him power to decide whether the offense has been committed,⁵⁹ irrespective of his motive in causing the detention.⁶⁰ However, liability has been imposed where his authority to act depends on his compliance with statutory provisions, and he acts in disregard thereof,⁶¹ as, for instance, where the proceedings must be founded on a preliminary oath, and none is made,⁶² or where notice or hearing is required, and no notice of hearing was had.⁶³

Where the power to punish for contempt is confined to the court against which the contempt is committed, a judicial officer not acting as judge of that court may incur liability by ordering a detention for a contempt thereof.⁶⁴

Liability has also been imposed where the magistrate orders the imprisonment of the offender when he has power only to fine,⁶⁵ or where his power depends on the pendency of the action before him, and he causes an imprisonment after the termination of the action.⁶⁶

Nonjudicial officers. Since the power to punish for contempt is a judicial power, as discussed in Contempt § 43 a, a nonjudicial officer, such as the mayor of a city⁶⁷ or a notary,^{67.5} who attempts to exercise such power may be held liable.

IV. WAIVER

§ 45. In General

One wrongfully arrested or detained may waive his right to sue or recover damages therefor by his conduct.

Although a person is subject to an illegal restraint that will support an action for false imprisonment, he may have waived his rights to pros-

51. U.S.—Weigel v. Brown, *supra*.
Mich.—La Roe v. Roeser, 8 Mich. 537.
25 C.J. p 523 note 61.

52. Ga.—Wyatt v. Baker, 154 S.E.
816, 41 Ga.App. 750.

53. N.Y.—Tompkins v. Sands, 8
Wend. 462, 24 Am.D. 46.
25 C.J. p 523 note 62.

54. N.Y.—Tompkins v. Sands, *supra*.

55. Mont.—Shampagne v. Keplinger,
252 P. 803, 78 Mont. 114.
25 C.J. p 523 note 64.

Nature of issuance of mittimus immaterial

(1) Whether issuance of mittimus was nonjudicial act is immaterial in determining whether magistrate was without jurisdiction where mittimus was not shown not to conform to judgment, since defendant is detained by virtue of judgment and mittimus merely carries it out.

Mont.—Shampagne v. Keplinger, *supra*.

(2) Error in mittimus as basis for

liability see *supra* subdivision d of this section.

56. N.Y.—Rogers v. Mulliner, 6
Wend. 597, 22 Am.D. 546.

57. N.Y.—Rogers v. Mulliner, *supra*.

58. N.Y.—Rogers v. Mulliner, *supra*.

59. U.S.—Connor v. Real Title Corp.,
C.C.A.Va., 165 F.2d 291.

Cal.—Perry v. Meikle, 228 P.2d 17,
102 C.A.2d 602.

Neb.—Kelsey v. Klabunde, 74 N.W.
1099, 54 Neb. 760.

25 C.J. p 523 note 69.

Void order

In absence of conclusive evidence to the contrary, judge granting void order adjudging person guilty of contempt is presumed not liable for false imprisonment.

Colo.—Pomeranz v. Class, 257 P. 1086,
82 Colo. 173.

Improper place of detention

It has been held that if a judicial officer commits a person for contempt to an improper place of detention he is not liable in damages thereof.

Wis.—Langen v. Borkowski, 206 N.
W. 181, 188 Wis. 277, 43 A.L.R.
622.

60. Wis.—Langen v. Borkowski, *supra*.
25 C.J. p 524 note 70.

61. Conn.—Church v. Pearne, 53 A.
955, 75 Conn. 350.
25 C.J. p 524 note 71.

62. Conn.—Church v. Pearne, *supra*.
25 C.J. p 524 note 72.

63. Kan.—Wheeler & Wilson Mfg.
Co. v. Boyce, 13 P. 609, 36 Kan. 350,
59 Am.R. 571.

64. Neb.—Johnson v. Bouton, 53 N.
W. 995, 35 Neb. 898.
23 C.J. p 524 note 74.

65. Ill.—Newton v. Locklin, 77 Ill.
103.

66. Mass.—Clarke v. May, 2 Gray
410, 61 Am.D. 470.

67. Ky.—Roberts v. Hackney, 58 S.
W. 810, 59 S.W. 328, 109 Ky. 265,
22 Ky.L. 975.

67.5 Ind.—Burt v. Pyle, 89 Ind. 398.

ecute such an action or he may as a result of his own conduct be precluded from recovering damages for the unlawful detention,⁶⁸ as where he voluntarily remains in custody, even under a mistaken view of legal conclusions.⁶⁹ However, a waiver is not always spelled out of the conduct of a person who impliedly consents to his arrest or detention,⁷⁰ it even having been said that, since one cannot consent to an unlawful restraint such consent is no defense to an action for false imprisonment based on a clear restraint of liberty.⁷¹

A plaintiff, surrendered by his surety on his bail, will not be deemed to have consented to his unlawful detention, in the absence of proof that the surrender was procured by plaintiff for the purpose of laying the foundation for an action in false imprisonment.⁷²

As to damages. A plaintiff may, at the beginning of a trial, waive his rights to all but compensatory damages.⁷³

§ 46. Particular Matters

- a. In general
- b. Plea of guilty
- c. Inducing arrest or detention
- d. Defects in process
- e. Delay or failure to arraign or bring before magistrate

a. In General

Various acts may or may not constitute a waiver, as for example, neglect or drunkenness prolonging a detention initially lawful.

Various matters have been urged and considered on the question whether the right of action for false imprisonment has been barred or waived,⁷⁴ as, for example, a plea of guilty considered *infra* subdivision b this section, and other matters considered in the succeeding subdivisions.

Conduct prolonging detention. A person, rightfully arrested, cannot complain of the continuance of a lawful detention occasioned by his own neg-

68. Cal.—Baer v. Smith, 157 P.2d 646, 68 C.A.2d 716.

La.—Corpus Juris Secundum cited in Banks v. Food Town, Inc., App., 98 So.2d 719, 722.

Ohio.—Ryan v. Conover, 18 N.E.2d 277, 59 Ohio App. 361.
25 C.J. p 524 note 81.

Submission to restraint with knowledge of illegality

Wis.—Gunderson v. Struebing, 104 N.W. 149, 125 Wis. 173.

Failure to claim privilege from arrest

Failure of the arrested party to claim exemption constitutes a waiver, so as to prevent recovery in a future action for false imprisonment based on an arrest in violation of the exemption.

R.I.—Crandall v. Gavitt, 39 A. 191, 20 R.I. 366.
25 C.J. p 458 note 42.

Failure to assert invalidity of ordinance

Mayor, acting as judge, and marshal are not liable for false arrest and imprisonment, after sentence was imposed and fully executed, on ground of unconstitutionality of ordinance under which plaintiff was convicted, without having challenged its validity at time of hearing in absence of evidence of malice.

La.—Berry v. Bass, 102 So. 76, 157 La. 81.

Volenti non fit injuria

Employee's consent to search by official of employer renders search harmless on principle of *volenti non fit injuria*, as regards such official's liability for false imprisonment.

N.C.—Parrish v. Boysell Mfg. Co., 188 S.E. 817, 211 N.C. 7.

69. N.Y.—Warne v. Constant, 4 Johns. 32.
S.C.—Moses v. Dubois, 23 S.C.L. 209.
Vt.—Kibling v. Clark, 53 Vt. 379.

70. Mich.—Porrett v. Lauer, 151 N.W. 619, 184 Mich. 497.
25 C.J. p 524 note 83.

Acceptance of witness fee held not to prevent recovery for unlawful restraint.

Wis.—Hadler v. Rhyner, 12 N.W.2d 693, 244 Wis. 448.

Waiver of extradition

A person who was wrongfully arrested for a crime committed in another state did not, by waiver of extradition, waive right to object to unlawfulness of arrest and illegal removal from state, especially when imprisonment continued after deputy sheriff stated that he was satisfied that they had the wrong man.

Iowa.—Drake v. Keeling, 287 N.W. 596.

Agreement with institution

The fact that plaintiff, on being admitted to an institution, signed an agreement that she would abide by the regulations of the institution including a power of involuntary detention is not a bar to an action for false imprisonment.

N.C.—Cook v. Highland Hospital, 84 S.E. 352, 168 N.C. 250, L.R.A.1915D 611, Ann.Cas.1917C 158.

71. U.S.—Meints v. Huntington, C. C.A.Minn., 276 F. 245, 19 A.L.R. 664.

72. Cal.—Neves v. Costa, 89 P. 860, 5 C.A. 111.

73. Iowa.—Holmes v. Blyler, 45 N.W. 756, 80 Iowa 365.

74. Acquiescence of parent

Where parent of child arrested for curfew violation acquiesced in officer's announced plan to hold child until morning, the further detention of the child did not render the original arrest unlawful, notwithstanding parents' statutory right to have child released in their custody on written promise to bring child to court at time fixed, since officer had no duty to inform of such right.

Utah.—Myers v. Collett, 268 P.2d 432, 1 Utah 2d 406.

Refund of money extracted

The fact that money, coerced from plaintiff as a result of his illegal arrest, was returned is not a bar to an action for false imprisonment.

N.Y.—Catlin v. Pond, 6 N.Y.St. 762.

Return

The arrested party may waive the strict fulfillment of the officer's duty to make a proper return.

N.H.—Clark v. Tilton, 68 A. 335, 74 N.H. 330—Poor v. Taggart, 37 N.H. 544.

Vt.—Gibson v. Holmes, 62 A. 11, 78 Vt. 110, 4 L.R.A., N.S., 451.

Place of confinement

The prisoner may by voluntary consent waive his right to confinement in a proper place.

Vt.—Ellis v. Cleveland, 54 Vt. 437.

Litigious and provocative attitude of citizen will not deprive him of his right to be protected against unlawful imprisonment.

N.Y.—Schildhaus v. City of New York, 163 N.Y.S.2d 201, 7 Misc.2d 859.

lect,⁷⁵ or his incapacity on account of drunkenness or by his own conduct generally.⁷⁶

b. Plea of Guilty

A plea of guilty does not as a general rule waive the right of action for an illegal arrest.

As a general rule, the liability for an illegal arrest is not waived by plaintiff pleading guilty of the offense for which the arrest was made,⁷⁷ especially where the proceedings were a nullity because the court was without jurisdiction to act in the matter.^{77.5} Where, however, an arrest is not void ab initio, but merely illegal because of some irregularity, its illegality may be impliedly waived by a plea of guilty.⁷⁸ So, where a plea of guilty constitutes an admission of facts authorizing an arrest without a warrant, it may amount to a bar.⁷⁹

c. Inducing Arrest or Detention

A person causing, provoking, or inducing his own arrest or detention has no cause of action for a false imprisonment.

Where a person is instrumental in causing or provoking his own arrest or detention, no liability attaches,⁸⁰ as where a warrant, alleged to be illegal, was placed in the hands of an officer at the request of the person against whom it was issued.⁸¹ So one cannot maintain an action for false imprisonment who by his own conduct or statements induces his arrest under a process not naming him correctly⁸² or which is not intended to describe him.⁸³

d. Defects in Process

Defects or irregularities in process or preliminary proceedings rendering them merely voidable are waived by a voluntary appearance and plea; this is not true as to defects going to the jurisdiction of the court.

Where a judicial officer possesses jurisdiction both of the crime and of the person of plaintiff, any defect or irregularity in the warrant or preliminary deposition is waived by voluntary appearance and plea,⁸⁴ but defects relating to the jurisdiction of the court are not so waived,⁸⁵ nor, it seems, are defects of such a substantial nature that they render the process void.⁸⁶ So, where an arrest is on civil process which is irregular but not void, such irregularities are waived by defendant, where he appears and gives bail without moving to be discharged.⁸⁷

An action for false imprisonment cannot be based on defects in mesne process which are due to the failure of the person arrested to make timely objection where he has had an opportunity to do so in the proceedings prior to its issuance.⁸⁸

e. Delay or Failure to Arraign or Bring before Magistrate

An arrested person may by agreement or conduct waive a delay or failure to bring him before an appropriate officer.

One arrested may excuse a delay in arraignment or in bringing him before the magistrate or other proper officer by express agreement⁸⁹ or by his

75. Ala.—Hayes v. Mitchell, 69 Ala. 452.

76. Ky.—Pepper v. Mayes, 81 Ky. 673.
25 C.J. p 526 note 7.

77. Idaho.—Corpus Juris Secundum cited in Anderson v. Foster, 252 P. 2d 199, 202, 73 Idaho 340.

Utah.—Oleson v. Pincock, 251 P. 23, 35, 68 Utah 507.

Wis.—Corpus Juris Secundum cited in Hotzel v. Simmons, 45 N.W.2d 683, 687, 258 Wis. 234.
25 C.J. p 525 note 86.

"The right to liberty is too sacred to permit an officer, or any one else . . . to interfere with it without authority of law. One may be illegally arrested and charged with having committed a misdemeanor, and, rather than defend the charge, the accused may plead guilty, and pay the fine imposed, and go about his business. It may be a very serious inconvenience to the person arrested, especially if he is away from home, to go through a trial, although he may feel certain of his innocence. He therefore pleads guilty, and submits to the imposi-

tion of a fine. The fact can, however, not palliate or atone for the serious wrong an officer may have committed in making an unlawful arrest, and of illegally depriving the citizen of his liberty."

Utah.—Oleson v. Pincock, 251 P. 23, 35, 68 Utah 507.

77.5 Crime committed in another state

Wis.—Hotzel v. Simmons, 45 N.W.2d 683, 258 Wis. 234.

78. Ohio.—Ryan v. Conover, 18 N.E. 2d 277, 59 Ohio App. 361.

79. U.S.—Erie R. Co. v. Reigherd, Ohio, 166 F. 247, 92 C.C.A. 590, 20 L.R.A., N.S., 295, 16 Ann.Cas. 459.
25 C.J. p 525 note 87.

80. Ohio.—Stork v. Evert, 191 N.E. 794, 47 Ohio App. 256.
25 C.J. p 525 note 88—5 C.J. p 395 note 21.

81. S.C.—Edmundson v. Frean, 20 S.C.L. 410.

82. Cal.—Kalish v. White, 173 P. 494, 36 C.A. 604.

83. Miss.—Vice v. Holley, 41 So. 7, 88 Miss. 572, 574.

Ohio.—Corpus Juris cited in Stork

v. Evert, 191 N.E. 794, 795, 47 Ohio App. 256.

25 C.J. p 525 note 91.

84. N.Y.—Jones v. Foster, 59 N.Y.S. 738, 43 App.Div. 33.

25 C.J. p 525 note 92.

85. Conn.—Church v. Pearne, 53 A. 955, 75 Conn. 350.

25 C.J. p 525 note 93.

86. Mass.—Lane v. Holman, 13 N.E. 602, 145 Mass. 221.

25 C.J. p 525 note 94.

87. Or.—Neimitz v. Conrad, 29 P. 548, 22 Or. 164.

88. Mass.—Smith v. Bowker, 1 Mass. 76.

25 C.J. p 525 note 96.

89. Mass.—Doherty v. Shea, 68 N. E.2d 707, 320 Mass. 173.

Tex.—Osoba v. Wilson, Civ.App., 56 S.W.2d 937.

Public policy not violated

In action for false arrest, plaintiff's agreement to waive examining trial was held not void on ground of public policy because it gave sheriff right to hold plaintiff in jail and to collect compensation from county for his support.

conduct.⁹⁰ So one may be precluded from basing an action of false imprisonment on the fact that he was not brought before the proper magistrate or other judicial officer by his own conduct in securing his release,⁹¹ or his consent to his release without arraignment,⁹² although the mere fact that plaintiff accepted his discharge without insisting on being brought before the magistrate does not, according to all authorities, constitute a waiver.⁹³

If a person under arrest desires to be taken be-

fore some magistrate other than the one nearest and most accessible, and the officer complies with such request, neither he nor one who advises him in so doing can be held liable for false imprisonment.⁹⁴

Under some statutes if a party voluntarily asks to be freed from an arrest without arraignment, and his discharge follows, he waives any claim for damages which otherwise he might have had against the officer.⁹⁵

V. ACTIONS

§ 47. Nature and Form

At common law the form of action for recovery of damages for false imprisonment is trespass, or trespass to the person *vi et armis*, but under statute case may lie, and, where forms of action have been abolished or modified by code or practice acts, the form of action becomes immaterial, even though substantive distinctions remain.

The form of action under which damages for false imprisonment are recoverable at common law, and under statutes declaratory thereof,⁹⁶ is trespass, or trespass to the person *vi et armis*.⁹⁷ It is neither trespass *quare clausum fregit* for injury to property,⁹⁸ nor trespass on the case,⁹⁹ except as trespass on the case may be authorized by statute.¹ An action for false arrest is a personal action,^{1,5} in the nature of a trespass for a direct wrong or il-

legal act.^{1,10} A suit against a sheriff and his official sureties for false imprisonment is in trespass and not in *assumpsit*.²

Although the substantive distinctions remain,³ the form of action has become unimportant in many jurisdictions which have modified or abolished forms of action under codes and special practice acts.⁴

In the *Philippine Islands* civil damages for the tort of false imprisonment were recoverable in a prosecution for the crime of false imprisonment.⁵

§ 48. Jurisdiction and Venue

An action for false imprisonment must be brought in a court of competent jurisdiction, and the venue may

Tex.—Cannon v. American Indemnity Co., Civ.App., 70 S.W.2d 815, error dismissed.

90. Ky.—Goins v. Hudson, 55 S.W. 2d 388, 246 Ky. 517.

Tenn.—Corpus Juris quoted in Reed v. Hutton & Long, 1 Tenn.App. 36, 43.

25 C.J. p 526 note 97.

Waiver as defense to action

Tex.—Osoba v. Wilson, Civ.App., 56 S.W.2d 937.

Consent to delay

Ky.—Goins v. Hudson, 55 S.W.2d 388, 246 Ky. 517.

91. Tenn.—Corpus Juris quoted in Reed v. Hutton, 1 Tenn.App. 36, 43.

25 C.J. p 526 note 98.

Request for release

N.Y.—Singerman v. William J. Burns International Detective Agency, 219 N.Y.S. 724, 219 App.Div. 291. 25 C.J. p 526 note 98 [b].

Release of claim

(1) Person can waive his right to be brought to court and secure his discharge from custody by signing a release.

Mass.—Doherty v. Shea, 68 N.E.2d 707, 320 Mass. 173.

(2) Question as to whether plaintiff knew his rights when he signed

release of claim for false arrest on being discharged from custody without being taken to court was held properly excluded.

Mass.—Shea v. Sullivan, 158 N.E. 771, 261 Mass. 255.

92. Mass.—Wax v. McGrath, 151 N.E. 317, 255 Mass. 340. 25 C.J. p 526 note 99.

93. Iowa.—Stewart v. Feeley, 92 N.W. 670, 118 Iowa 524. 25 C.J. p 526 note 1.

94. S.D.—Richardson v. Dybedahl, 84 N.W. 486, 14 S.D. 126.

95. Mass.—Horgan v. Boston El. R. Co., 94 N.E. 386, 208 Mass. 287.

96. Ala.—Hill v. Hyde, 121 So. 510, 219 Ala. 155.

Me.—Green v. Morse, 5 Me. 291.

Md.—Lewin v. Uzuber, 4 A. 285, 289, 65 Md. 341.

25 C.J. p 527 note 21.

97. U.S.—Patrick v. Esso Standard Oil Co., D.C.N.J., 156 F.Supp. 336. Pa.—Berry v. Hamill, 12 Serg. & R. 210.

25 C.J. p 527 note 22.

98. Mass.—Sawyer v. Ryan, 13 Metc. 144.

25 C.J. p 527 note 23.

99. Ala.—Holly v. Carson, 39 Ala. 345.

N.C.—Price v. Graham, 48 N.C. 545. 25 C.J. p 527 note 25.

1. Mich.—Moore v. Thompson, 52 N.W. 1000, 92 Mich. 498. 25 C.J. p 527 note 24.

1.5 Cal.—Coverstone v. Davies, 239 P.2d 876, 38 C.2d 315, certiorari denied 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

Ind.—Rogers v. Smith, 17 Ind. 323, 79 Am.D. 483.

La.—Sperier v. Ott, 41 So. 323, 116 La. 1087, 7 L.R.A., N.S., 518.

1.10 N.Y.—Schultz v. Greenwood Cemetery, 83 N.E. 41, 190 N.Y. 276. Vallon v. Ramage, 93 N.Y.S.2d 56, 196 Misc. 740.

2. Ala.—Hill v. Hyde, 121 So. 510, 219 Ala. 155.

3. S.D.—Cullen v. Dickinson, 144 N.W. 656, 33 S.D. 27, 50 L.R.A., N.S., 987, Ann.Cas.1916B 115. 25 C.J. p 527 note 26.

4. N.Y.—Johnson v. Girdwood, 28 N.Y.S. 151, 7 Misc. 651, affirmed 39 N.E. 211, 143 N.Y. 660.

Pa.—Patton v. Vucini, 167 A. 450, 109 Pa.Super. 530—Fendall v. Eckert, 90 Pa.Super. 305.

25 C.J. p 527 note 26, p 528 note 27.

5. Philippine.—U. S. v. Heery, 25 Philippine 600.

ordinarily be laid in the county in which the cause of action arose or in which defendant resides. The action is transitory in character and suit may be brought in one state for a false imprisonment occurring in another state.

An action for false imprisonment must be brought in a court of competent jurisdiction.⁶ The action is transitory and not local,⁷ and the courts of one state will entertain an action for a false imprisonment occurring in another.⁸

Venue. In accordance with local constitutional and statutory requirements, the action may generally be brought in the county in which the cause arose⁹ or in which defendant resides.¹⁰ Where the tort is continuous and parts of it occur in two or more counties, the action may be brought in any one of them.¹¹ Under an express statutory provision a common carrier may be sued in any county in which the wrong occurred.¹²

§ 49. Time to Sue and Limitations

A right of action for false imprisonment accrues at the beginning of the imprisonment but does not become complete until the termination thereof, and the action must be brought before the expiration of the time limited

by statute. Under some statutes notice of the action is a condition precedent.

The right of action for false imprisonment accrues at the beginning of the imprisonment but does not become complete until the termination thereof,¹³ the tort being regarded as divisible.¹⁴ Although there is authority to the contrary,¹⁵ it has been generally held that the action may lie irrespective of the termination of the suit or prosecution in which the false imprisonment occurred.¹⁶

Statutory notice. Where statutory provisions require notice of an action for false imprisonment, the giving of such notice in a case governed by the statute is a condition precedent to bringing the action,¹⁷ as in the case of actions for false imprisonment against legislative¹⁸ or judicial¹⁹ officers, and the form and indorsement of such notices should comply with statutory requirements.²⁰ It has been held that the right to notice is contingent on the good faith of the public officer.²¹

Limitations. A statute of limitations, if pleaded,²² constitutes a complete bar to an action for false

6. Mich.—Hill v. Taylor, 15 N.W. 899, 50 Mich. 549.
N.Y.—Rice v. Platt, 3 Den. 81.
25 C.J. p 529 note 50.

District court has jurisdiction of false imprisonment actions, statute providing that justices' courts have no jurisdiction of such actions not being impliedly applicable to district courts.

- Or.—McLean v. Sanders, 23 P.2d 321, 143 Or. 524, followed in Conrad v. Sanders, 23 P.2d 323, 143 Or. 531.

Meaning of "jurisdiction"

The term "jurisdiction," as used in cases relating to false arrest or imprisonment, includes not merely jurisdiction of the general subject matter to which cases of the character involved may belong, but also jurisdiction of the person and jurisdiction to enter the particular judgment in the particular case.

- Colo.—Pomeranz v. Class, 257 P. 1086, 82 Colo. 173.
7. N.H.—Henry v. Sargeant, 13 N. H. 321, 40 Am.D. 146.

8. N.H.—Henry v. Sargeant, supra.
N.Y.—Tupper v. Morin, 12 N.Y.S. 310, 25 Abb.N.Cas. 398.
25 C.J. p 529 note 49.

9. N.Y.—Tupper v. Morin, supra.
25 C.J. p 529 note 52.

10. Cal.—Ah Fong v. Sternes, 21 P. 381, 79 C. 30.
25 C.J. p 530 note 53.

11. N.Y.—Ellis v. Baker, 71 N.Y.S. 88, 62 App.Div. 542.
25 C.J. p 530 note 54.

12. Ga.—Summers v. Southern R. Co., 45 S.E. 27, 118 Ga. 174.

- Ky.—Evans v. Maysville & B. S. R. Co., 77 S.W. 708, 25 Ky.L. 1258.
25 C.J. p 530 note 55.

13. Neb.—Hackler v. Miller, 112 N. W. 303, 79 Neb. 206.

- N.Y.—Dusenbury v. Keiley, 8 Daly 537, 58 How.Pr. 286, affirmed 85 N. Y. 383, 61 How.Pr. 408.

- N.C.—*Corpus Juris Secundum* quoted in Mobley v. Broome, 102 S.E.2d 407, 409, 248 N.C. 54.

14. N.C.—*Corpus Juris Secundum* quoted in Mobley v. Broome, 102 S.E.2d 407, 409, 248 N.C. 54.

- W.Va.—Ruffner v. Williams, 3 W.Va. 243.
25 C.J. p 528 note 30.

15. Mich.—In re Kelley, How.N.P. 106.

- Pa.—Garren v. Garren, 1 Wkly.N.C. 9.
25 C.J. p 528 note 31.

Irregular or voidable writ

(1) Where writ or process under which one is arrested is irregular, but not absolutely void, a false imprisonment action will not lie until it is set aside but when it is set aside, it ceases to be a protection for acts done while it was in force.

- Mich.—Dallas v. Garras, 10 N.W.2d 897, 306 Mich. 313.

(2) Where plaintiff was arrested and imprisoned under a writ voidable for failure to comply with statutory requirements, it was held that an action for false imprisonment could not lie before the writ was quashed.

- N.H.—Blanchard v. Goss, 2 N.H. 491.

Void process

Where body execution was void, action for false imprisonment was not "premature," notwithstanding action was instituted prior to plaintiff's release from jail under habeas corpus.

- Mich.—Dallas v. Garras, 10 N.W.2d 897, 306 Mich. 313.

16. N.J.—Boesch v. Kick, 119 A. 1, 98 N.J.Law 183, 25 A.L.R. 1516.

- N.C.—*Corpus Juris Secundum* cited in Mobley v. Broome, 102 S.E.2d 407, 409, 248 N.C. 54.
25 C.J. p 528 note 32.

17. Pa.—Magnussen v. Shortt, 49 A. 783, 200 Pa. 257.

18. Pa.—Hodges v. McGovern, 79 A. 636, 230 Pa. 368.
25 C.J. p 528 note 35.

19. Pa.—Magnussen v. Shortt, 49 A. 783, 200 Pa. 257.
25 C.J. p 528 note 36.

20. Pa.—Kennedy v. Shoemaker, 1 Browne 61.
25 C.J. p 528 note 33 [a], [b].

Indorsement held sufficient

- Pa.—O'Donnell v. Rowe, 16 Pa.Dist. & Co. 212.

21. Pa.—Ross v. Hudson, 6 Pa.Super. 552, 42 Wkly.N.C. 43.
25 C.J. p 529 note 38.

22. U.S.—Lamar v. Dana, C.C.N.Y., 14 F.Cas.No.8,005, 10 Blatchf. 34—Lamar v. Dana, C.C.N.Y., 14 F.Cas. No.8,006, 18 Int.Rev.Rec. 163.

- Okl.—*Corpus Juris Secundum* quoted in Belflower v. Blackshire, 281 P. 2d 423, 425, 49 A.L.R.2d 917.

imprisonment begun after the prescribed period,²³ even if the proceedings in which the arrest took place are continued within the prescribed time.²⁴ Where the action, although described under another name, is in effect an action for false imprisonment, it is barred by the statute if the acts alleged occurred beyond the prescribed period.^{24.5}

Where two statutes of limitation are applicable to the facts, the action is governed by a statute specifically applying to false imprisonment in preference to a statute applying generally to a class of persons within which defendant is included,²⁵ or one applying to another offense connected with the false imprisonment.²⁶ In determining which of the two statutes of limitation is applicable to the facts alleged, the court will look at the nature of the action.^{26.5}

A statute fixing a particular limitation period for actions for false imprisonment may be impliedly repealed by a later statute fixing a different period for actions for injuries to the person.²⁷

Under statutes barring actions for false imprisonment begun more than a specified time after the accrual of the cause of action, the limitations be-

gin to run from the termination of the imprisonment.²⁸ The action for false imprisonment is to be regarded as begun at the time of filing the original declaration, notwithstanding an amended complaint amplifying the charge is later filed,²⁹ or under a saving statute, a second action is begun after dismissal of the first "otherwise than upon the merits."³⁰

§ 50. Parties

Persons jointly suffering a false imprisonment may join as parties plaintiff, and those jointly committing a false imprisonment may be joined as parties defendant. A superior officer is not a necessary party defendant to an action against his subordinate for a false imprisonment committed by the subordinate while acting beyond the scope of his official duties.

An action for false arrest does not give rise to a cause of action in any one other than the person directly aggrieved,^{30.50} although, under a survival statute, a personal representative may bring the action.^{30.55}

Where the allegations show that two or more persons were falsely imprisoned in connection with the same transaction and that the counts for each

Plea or answer in actions for false imprisonment see *infra* § 52.

23. U.S.—*Williams v. Strand*, C.A. Alaska, 239 F.2d 151—*Mohler v. Miller*, C.A.Mich., 235 F.2d 153.

Kenney v. Killian, D.C.Mich., 133 F.Supp. 571, affirmed, C.A., 232 F.2d 288, certiorari denied 77 S.Ct. 84, 352 U.S. 856, 1 L.Ed.2d 66, certiorari denied *Kenney v. Hatfield*, 77 S.Ct. 84, 352 U.S. 856, 1 L.Ed.2d 66.

Cal.—*Pulvermacher v. Los Angeles Coordinating Committee for Aid to Jewish Refugees*, 143 P.2d 974, 61 C.A.2d 704.

Me.—*Hickey v. Huse*, 56 Me. 493.

N.Y.—*Dusenbury v. Kelley*, 85 N.Y. 383, 61 How.Pr. 408.

Ohio.—*Maxey v. Gather*, 114 N.E.2d 607, 94 Ohio App. 115.

Okl.—*Corpus Juris Secundum* quoted in *Belflower v. Blackshire*, 281 P. 2d 423, 425, 49 A.L.R.2d 917.

24. N.Y.—*Dusenbury v. Kelley*, 8 Daly 537, 58 How.Pr. 286, affirmed 85 N.Y. 383, 61 How.Pr. 408.

N.C.—*Corpus Juris Secundum* cited in *Mobley v. Broome*, 102 S.E.2d 407, 409, 248 N.C. 54.

Okl.—*Corpus Juris Secundum* quoted in *Belflower v. Blackshire*, 281 P.2d 423, 425, 49 A.L.R.2d 917.

24.5 Ohio.—*A. L. Englander Motor Co. v. De Gaetano*, 166 N.E. 372, 120 Ohio St. 443.

25. U.S.—*Alexander v. Thompson*, Mich., 195 F. 31, 115 C.C.A. 33. 25 C.J. p 529 note 45.

Application of general statutes of limitation to actions for false imprisonment see *Limitations of Actions* § 73 et seq.

26. N.Y.—*Oakes v. Oakes*, 67 N.Y.S. 427, 55 App.Div. 576, affirmed 60 N.E. 1117, 167 N.Y. 625.

Vt.—*Taylor v. Coolidge*, 24 A. 656, 64 Vt. 506.

25 C.J. p 529 note 46.

False arrest action is limited by statute limiting actions for false imprisonment.

Ohio.—*Alter v. Paul*, 135 N.E.2d 73, 101 Ohio App. 139.

False imprisonment action is limited by statute limiting actions for false arrest.

Pa.—*Rhoads v. Reading Co.*, 83 Pa. Dist. & Co. 168.

26.5 Abuse of process, not false arrest

A complaint, alleging that defendant corporation caused filing of criminal complaint against plaintiff in a Kansas justice of the peace court for felony of drawing bank check on insufficient funds for part of plaintiff's debt to such defendant and issuance of warrant, on which plaintiff was arrested and required to give bond, for improper purpose of attempting to force him to pay debt after its discharge in bankruptcy, sought recovery for abuse of process, not false

arrest, and hence was not barred by Kansas one year statute of limitations governing actions for false arrest.

U.S.—*Gore v. Gorman's, Inc.*, D.C. Mo., 148 F.Supp. 241, appeal dismissed, C.A., 244 F.2d 716.

27. N.J.—*Tomlin v. Hildreth*, 47 A. 649, 65 N.J.Law 438.

25 C.J. p 529 note 47.

28. U.S.—*Alexander v. Thompson*, Mich., 195 F. 31, 115 C.C.A. 33.

Ind.—*Corpus Juris Secundum* cited in *Matovina v. Hult*, 123 N.E.2d 893, 897, 125 Ind.App. 236.

N.Y.—*Dusenbury v. Kelly*, 85 N.Y. 383, 61 How.Pr. 408.

Salerno v. Lansing, 55 N.Y.S.2d 482, 269 App.Div. 810.

Okl.—*Corpus Juris Secundum* quoted in *Belflower v. Blackshire*, 281 P. 2d 423, 425, 49 A.L.R.2d 917.

25 C.J. p 529 note 44.

29. Neb.—*Duffy v. Scheerger*, 136 N. W. 724, 91 Neb. 511.

30. Utah.—*Salisbury v. Poulson*, 172 P. 315, 51 Utah 552.

30.50 Cal.—*Coverstone v. Davies*, 239 P.2d 876, 38 C.2d 315, certiorari denied *Mock v. Davies*, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

Ind.—*Rogers v. Smith*, 17 Ind. 323, 79 Am.D. 483.

La.—*Sperier v. Ott*, 41 So. 323, 116 La. 1087, 7 L.R.A., N.S., 518.

30.55 U.S.—*Patrick v. Esso Standard Oil Co.*, D.C.N.J., 156 F.Supp. 336.

include a question of fact common to both, they are properly joined as parties plaintiff.³¹

Parties defendant. An action for false imprisonment may be brought against two or more defendants jointly,³² and plaintiff may elect to proceed against them jointly on a liability several as well as joint.³³ If an officer is acting within the scope of his official duties, his surety on the bond, his superior officer, and the surety of the latter are proper and necessary parties defendant;^{33.5} but where an officer acting beyond the scope of his official duties falsely imprisons a person, his superior officer is not a necessary party defendant to a suit against the inferior officer for false imprisonment.³⁴ In a libel action by an alien seaman for false imprisonment against a foreign navigation company and its local agent, the agent is not a proper party defendant where he has no managerial control or ownership of the vessel.^{34.5}

§ 51. Declaration, Complaint, or Petition

- a. In general
- b. Allegations as to particular matters

a. In General

The complaint in an action for false imprisonment should state the facts constituting the essential elements of the cause of action, and the presence or absence of allegations sufficient to show a malicious prosecution will not affect its sufficiency. Matters of defense need not be negated by the plaintiff.

General rules of pleading ordinarily apply in actions for false imprisonment.³⁵

The declaration, complaint, or petition must, in accordance with common-law rules³⁶ or the requirements of the codes and practice acts,³⁷ contain an allegation of the facts constituting the essential elements of the cause of action.³⁸ Facts as distin-

31. Cal.—Peters v. Bigelow, 30 P.2d 450, 137 C.A. 135.

32. Cal.—Oppenheimer v. City of Los Angeles, 232 P.2d 30, 104 C.A. 2d 551.

Iowa.—Drake v. Keeling, 299 N.W. 919, 230 Iowa 1038.

Pa.—Wood v. Gross, Com.Pl., 7 Bucks Co. 1.

25 C.J. p 530 note 56.

Persons responsible for false imprisonment see supra §§ 36-44.

Partners

Where plaintiff suing for alleged assault and false arrest alleged that defendant making assault and arrest was employee of partners operating pleasure beach and was acting in scope of employment, the joining of the partners as defendants was not a misjoinder.

N.C.—State ex rel. Cain v. Corbett, 69 S.E.2d 20, 235 N.C. 33.

Superior deputy sheriff and two deputies acting on his instructions, who arrested a man in Nebraska under warrant issued by Iowa court, brought him to Iowa, and placed him in county jail, were joint tort-feasors in performance of such acts and hence properly joined as defendants in his action for false arrest and imprisonment.

Iowa.—Drake v. Keeling, 299 N.W. 919, 230 Iowa 1038.

33. Wis.—Zeller v. Martin, 54 N.W. 330, 84 Wis. 4.

33.5 N.C.—State ex rel. Cain v. Corbett, 69 S.E.2d 20, 235 N.C. 33.

34. Alaska.—Kline v. Flannigan, 7 Alaska 577.

34.5 U.S.—Castillo v. Argonaut Trading Agency, Inc., D.C.N.Y., 156 F.Supp. 398.

35. U.S.—Seaboard Oil Co. v. Cun-

ningham, C.C.A.Fla., 57 F.2d 321, certiorari denied 52 S.Ct. 35, 284 U.S. 657, 76 L.Ed. 557.

36. Mo.—Corpus Juris cited in Burton v. Drennan, 58 S.W.2d 740, 741, 332 Mo. 512.

37. Mo.—Corpus Juris cited in Burton v. Drennan, 58 S.W.2d 740, 741, 332 Mo. 512.

25 C.J. p 530 note 60.

38. Cal.—Singer v. Bogen, 305 P.2d 893, 147 C.A.2d 515.

Mo.—Corpus Juris cited in Burton v. Drennan, 58 S.W.2d 740, 741, 332 Mo. 512.

N.Y.—Guzy v. Guzy, 184 N.Y.S.2d 161.

Pa.—Wood v. Gross, Com.Pl., 7 Bucks Co. 1.

Tex.—Neubert v. Chicago, R. I. & G. Ry. Co., Civ.App., 248 S.W. 141.

25 C.J. p 530 note 61.

Allegations held sufficient

(1) Generally.

U.S.—Fine v. Paramount Pictures, C.A.111, 171 F.2d 571.

Patrick v. Esso Standard Oil Co., D.C.N.J., 156 F.Supp. 336—Zimmerman v. Poindexter, D.C.Hawaii, 78 F.Supp. 421.

Ala.—Southern Ry. Co. v. Hall, 96 So. 73, 209 Ala. 237—Hotel Tutwiler Operating Co. v. Evans, 94 So. 120, 208 Ala. 252—Standard Oil Co. v. Humphries, 88 So. 855, 205 Ala. 529.

Cal.—Dragna v. White, 289 P.2d 428, 45 C.2d 469.

Parrott v. Bank of America Nat. Trust & Sav. Ass'n, 217 P.2d 89, 97 C.A.2d 14, 35 A.L.R.2d 263—Pulvermacher v. Los Angeles Coordinating Committee for Aid to Jewish Refugees, 143 P.2d 974, 61 C.A.2d 704.

Ga.—Smith v. Craft, 107 S.E.2d 255,

99 Ga.App. 19—Jackson v. Norton, 44 S.E.2d 269, 75 Ga.App. 650—Livingston v. Schneer's Atlanta, 7 S.E.2d 190, 61 Ga.App. 637—Huff v. National Accident & Health Ins. Co., 198 S.E. 296, 58 Ga.App. 355—Atlanta Guaranty Co. v. Benton, 150 S.E. 468, 40 Ga.App. 492.

Ill.—Povlich v. Glodich, 142 N.E. 466, 311 Ill. 149.

Ind.—Hall v. State ex rel. Freeman, 52 N.E.2d 370, 114 Ind.App. 328—Batten v. McCarty, 158 N.E. 583, 86 Ind.App. 462.

Kan.—Parmenter v. Morrison, 288 P. 582, 130 Kan. 707.

Mass.—Joyce v. Hickey, 147 N.E.2d 187.

N.Y.—Wallenstein v. Rosenbaum, 272 N.Y.S. 346, 241 App.Div. 374.

Francisco v. Little Falls Dairy Co., 296 N.Y.S. 956, 163 Misc. 165, 170, modified on other grounds 293 N.Y.S. 282, 249 App.Div. 922.

Ohio.—Lehman v. Harvey, 187 N.E. 28, 45 Ohio App. 215, error dismissed 187 N.E. 201, 127 Ohio St. 159.

Pa.—Snyder v. DiFillippo, Com.Pl., 7 Chest.Co. 1.

S.D.—Tredway v. Birks, 242 N.W. 590, 59 S.D. 649.

Tenn.—Rice v. Logan's Super Market, Inc., 310 S.W.2d 431.

Utah.—Oleson v. Pincock, 251 P. 23, 68 Utah 507.

Wis.—Rubin v. Pachefsky, 241 N.W. 370, 207 Wis. 375.

25 C.J. p 530 note 61 [a].

(2) Action against attorney.

N.Y.—Vernes v. Phillips, 194 N.E. 762, 266 N.Y. 298.

(3) Action against constable.

Mass.—Roseman v. Korb, 40 N.E.2d 255, 311 Mass. 75.

(4) Action against mayor, policemen, and sureties on official bonds.

guished from conclusions must be alleged.³⁹ Further, the allegations should be concise⁴⁰ and without an unnecessarily detailed description of the circumstances attending the imprisonment.⁴¹ Allegations immaterial to the cause of action for false imprisonment may be stricken on demurrer.⁴²

A complaint which substantially follows a form prescribed by statute is sufficient;⁴³ and after a

judgment by default, only substantial defects in the complaint may be taken advantage of.⁴⁴

In accordance with the general rules of construction of pleadings, particular petitions have been held to state a cause of action for false imprisonment instead of assault and battery,^{44.5} fraud,^{44.10} libel and slander,^{44.15} or malicious prosecution,^{44.20}

S.D.—Burkland v. Bliss, 252 N.W. 25, 62 S.D. 91.

(5) Action against sheriff.

N.Y.—Politano v. Jacoby, 265 N.Y.S. 653, 240 App.Div. 733, affirmed 189 N.E. 703, 263 N.Y. 573.

(6) Action against town marshal. Cal.—Miller v. Turner, 194 P. 66, 49 C.A. 653.

(7) Action against town marshal, jailer, and former's assistant. Ky.—Combs v. Collier, 294 S.W. 1069, 220 Ky. 246.

(8) Action for detention at police station.

S.D.—Culver v. Burnside, 179 N.W. 490, 43 S.D. 398.

Allegations held insufficient

(1) Generally.

U.S.—Gregoire v. Biddle, C.A.N.Y., 177 F.2d 579, certiorari denied 70 S.Ct. 803, 339 U.S. 949, 94 L.Ed. 1363.

Fla.—Fisher v. Payne, 113 So. 378, 93 Fla. 1085.

Ga.—Wilson v. Capital Automobile Co., 2 S.E.2d 147, 59 Ga.App. 834.

Kan.—Hill v. Day, 215 P.2d 219, 168 Kan. 604.
25 C.J. p 530 note 61 [b].

(2) Action against corporation.

Ky.—Ward v. Kentucky River Coal Corporation, 42 S.W.2d 530, 240 Ky. 423.

(3) Action against magistrate.

Ky.—Hogg v. Lorenz, 29 S.W.2d 17, 234 Ky. 751.

(4) To present case of mistreatment of prisoner lawfully arrested by failure forthwith to take him before magistrate.

Ky.—Hogg v. Lorenz, supra.

Counts for false arrest and false imprisonment stated only one cause of action for false imprisonment, the two not being distinguishable under the definition of "false imprisonment" as applied to the facts of the case.

Iowa.—Fox v. McCurnin, 218 N.W. 499, 205 Iowa 752.

39. Ky.—Hogg v. Lorenz, 29 S.W. 2d 17, 234 Ky. 751.

Mo.—**Corpus Juris** cited in Burton v. Drennan, 58 S.W.2d 740, 741, 332 Mo. 512.

25 C.J. p 530 note 62.

Statements of fact

(1) An allegation that an impris-

onment was "without any warrant" was plainly an allegation of fact, meaning that the arrest and imprisonment were without process, and properly pleaded the unlawful character of the imprisonment.

Mo.—Burton v. Drennan, 58 S.W.2d 740, 332 Mo. 512.

(2) Allegations that the arrest was "without warrant of law or any lawful process," "forcibly and against the will of plaintiff," and "without reasonable or probable cause" are averments of ultimate fact.

Ohio.—McCoy v. Baer, 136 N.E.2d 66, 100 Ohio App. 274.

(3) Other averments see 25 C.J. p 530 note 62 [a].

Conclusions

(1) If a plaintiff had merely alleged that his imprisonment was unlawful or illegal, there would have been ground for claiming that he had improperly alleged conclusions instead of facts.

Mo.—**Corpus Juris** cited in Burton v. Drennan, 58 S.W.2d 740, 741, 332 Mo. 512.

(2) An allegation that plaintiff was lodged in jail without any right or authority and against his will and consent is but a conclusion.

Idaho.—Jones v. Green, 168 P.2d 834, 66 Idaho 731.

(3) Allegations that defendants "wickedly conspired together to cause" plaintiff to be unlawfully arrested and imprisoned without any just cause and that they urged court to hold plaintiff in contempt and order him imprisoned were mere conclusions.

Ill.—Shemaitis v. Froemke, 127 N.E. 2d 648, 6 Ill.App.2d 323.

(4) Other conclusions see 25 C.J. p 530 note 62 [b].

40. Pa.—Torpey v. Bilmeyer, 18 Pa. Dist. 1082.
25 C.J. p 531 note 63.

Concise statement of facts sufficient

In action for unlawful arrest and false imprisonment, brought under an act abolishing distinctions between trespass and trespass on the case, plaintiff's statement of claim need only be concise statement of facts on which he seeks to recover.

Pa.—Patton v. Vucinic, 167 A. 450, 109 Pa.Super. 530.

41. Ark.—Akin v. Newell, 32 Ark. 605.

25 C.J. p 531 note 64.

42. Ga.—Stembridge v. Wright, 124 S.E. 115, 32 Ga.App. 587.

Violation of motor vehicle law by defendant

In suit against magistrate and police officer for alleged illegal arrest and imprisonment for violation of state statute prohibiting running of motor vehicle on highways without state license or license number plate, allegation in petition that one of defendants violated such law was irrelevant, and was properly stricken on demurrer.

Ga.—Stembridge v. Wright, supra.

43. Ala.—Deason v. Gray, 66 So. 646, 139 Ala. 672.

44. Ala.—Kelly v. Moore, 51 Ala. 364.

44.5 Only affecting recovery

(1) An allegation in petition of harsh and humiliating treatment accorded relator while in custody of state highway patrolmen, who allegedly struck and beat him to obtain confession, if found to be true, would not affect character of action as one for false imprisonment, or convert it into one for assault and battery, but would merely add to amount of damages which jury might fix, in their discretion, as fair compensation for the false imprisonment.

Mo.—State ex rel. Patterson v. Collins, App., 172 S.W.2d 284.

(2) In action for false arrest and imprisonment growing out of plaintiff's ejection from passenger train, allegation that officers had beaten and assaulted plaintiff was not an independent ground of complaint, but was merely to be considered as having been pleaded in aggravation of damages resulting from alleged false arrest and imprisonment.

Mo.—White v. Thompson, App., 176 S.W.2d 53.

44.10 Mo.—Richardson v. Empire Trust Co., 94 S.W.2d 966, 230 Mo. App. 580.

44.15 U.S.—Patrick v. Esso Standard Oil Co., D.C.N.J., 156 F.Supp. 336.

Mo.—Richardson v. Empire Trust Co., 94 S.W.2d 966, 230 Mo.App. 580.

44.20 Ill.—Weise v. Wachsmuth, 76 N.E.2d 532, 332 Ill.App. 662.

or have been held to state a cause of action other than for false imprisonment.^{44,25}

Negating defenses. Plaintiff is not bound to anticipate and negative all of the facts which may constitute a defense to his cause of action,⁴⁵ and, if matters in justification of an alleged illegal arrest exist, they must be affirmatively shown by defendant, as considered *infra* § 52, and not negated by plaintiff in his complaint.⁴⁶

Cure by answer. Allegations in the answer may cure an omission of an averment from the complaint.⁴⁷

Allegations as to malicious prosecution. The mere fact that the complaint contains allegations which would support an action for malicious prosecution will not render it fatally defective as a complaint for false imprisonment where it contains averments of a character sufficient to sustain it as such,⁴⁸ particularly where only a general demurrer is interposed;⁴⁹ and the fact that a count in a complaint is bad as one for malicious prosecution

will not necessarily render it defective as one for false imprisonment.⁵⁰

b. Allegations as to Particular Matters

- (1) Detention; venue
- (2) Unlawful character of detention
- (3) Defendant's responsibility for unlawful detention
- (4) Malice and want of probable cause
- (5) Damages

(1) Detention; Venue

The complaint for false imprisonment should allege a detention of the plaintiff, but the cause for, or the duration of, his detention need not be averred. An informal allegation of venue may be sufficient.

In an action for false imprisonment a complaint which fails to allege any actual restraint is fatally defective,⁵¹ but, if the facts alleged sufficiently show that plaintiff was in some manner actually detained or restrained, the complaint will be sufficient,⁵² even though there is no averment that plain-

Ohio.—Click v. Parish, 98 N.E.2d 333, 89 Ohio App. 318, affirmed 98 N.E. 2d 293, 155 Ohio St. 84.

44.25 Ga.—Peppas v. Miles, 61 S.E. 2d 429, 82 Ga.App. 438.

45. U.S.—Seaboard Oil Co. v. Cunningham, C.C.A.Fla., 51 F.2d 321, certiorari denied 52 S.Ct. 35, 284 U.S. 657, 76 L.Ed. 557.

Cal.—Corpus Juris Secundum cited in Kaufman v. Brown, 209 P.2d 156, 158, 93 C.A.2d 508.

Ga.—Sharpe v. Lowe, 106 S.E.2d 28, 214 Ga. 513.

Markovitz v. Blake, 105 S.E. 622, 26 Ga.App. 153.

Ohio.—Corpus Juris Secundum cited in McCoy v. Baer, 136 N.E.2d 66, 68, 100 Ohio App. 274.

Or.—Corpus Juris quoted in Knight v. Baker, 244 P. 543, 544, 117 Or. 492.

S.D.—Raymond v. Corrigan, 159 N. W. 131, 37 S.D. 609.

Demand for warrant

Complaint for false imprisonment need not show details as to whether plaintiff was committing, or attempting to commit, infraction of law when arrested; nor need it allege that he demanded a warrant authorizing his arrest.

Or.—Knight v. Baker, 244 P. 543, 117 Or. 492.

46. Cal.—Corpus Juris Secundum cited in Kaufman v. Brown, 209 P. 2d 156, 158, 93 C.A.2d 508—Pulvermacher v. Los Angeles Co-ordinating Committee for Aid to Jewish Refugees, 143 P.2d 974, 61 C. A.2d 704.

Mo.—Corpus Juris cited in Burton v. Dreunan, 58 S.W.2d 740, 741, 332

Mo. 512—Corpus Juris cited in Greaves v. Kansas City Junior Orpheum Co., 80 S.W.2d 228, 236, 229 Mo.App. 663.

Ohio.—Corpus Juris Secundum cited in McCoy v. Baer, 136 N.E.2d 66, 68, 100 Ohio App. 274.

Or.—Corpus Juris quoted in Knight v. Baker, 244 P. 543, 544, 117 Or. 492.

S.D.—Raymond v. Corrigan, 159 N. W. 131, 37 S.D. 609.

47. Idaho.—Ludwig v. Ellis, 126 P. 769, 22 Idaho 475.

Kan.—Arkansas City Bank v. McDowell, 52 P. 56, 7 Kan.App. 568. 25 C.J. p 531 note 70.

48. Cal.—Corpus Juris cited in Monk v. Ehret, 219 P. 452, 192 C. 186.

La.—Wells v. Johnston, 27 So. 185, 52 La.Ann. 713.

Allegations as surplusage

Where it is apparent from the face of a complaint that it was the purpose of the pleader to state a case of false imprisonment, surplusage allegation, usually found in actions for malicious prosecution, not necessary to a statement of the cause of action, will be disregarded.

Cal.—Monk v. Ehret, 219 P. 452, 192 C. 186.

Informalities

Where an informal pleading in a district court charged an unlawful arrest without a warrant and also an arrest with a warrant, the first should be construed as a count for false imprisonment and the second as one for malicious prosecution, as against the contention that the ac-

tion was only for malicious prosecution.

N.J.—Hesse v. Clark, 141 A. 570, 6 N. J.Misc. 421.

49. Ala.—Deason v. Gray, 66 So. 646, 189 Ala. 672.

Ga.—Smith v. Craft, 107 S.E.2d 255, 99 Ga.App. 19.

50. Ala.—Standard Oil Co. v. Humphries, 88 So. 855, 205 Ala. 529.

51. Ga.—Sinclair Refining Co. v. Meek, 10 S.E.2d 76, 62 Ga.App. 850.

Surveillance without restraint

Allegations that defendant requested third parties to keep plaintiff under surveillance while defendant went after the sheriff did not state cause of action for "false imprisonment."

Ga.—Sinclair Refining Co. v. Meek, *supra*.

Complaint held insufficient

D.C.—Hunt v. Calacino, D.C., 114 F. Supp. 254.

52. Ga.—Sinclair Refining Co. v. Meek, 10 S.E.2d 76, 62 Ga.App. 850.

Detention for search

Allegations that defendant accused plaintiff of stealing money from defendant's automobile and demanded that plaintiff be searched and that the manner of defendant's actions and tone of his voice made it clear that there would be serious trouble if plaintiff did not allow himself to be searched, and that plaintiff therefore permitted himself to be detained against his wishes and to be searched, stated cause of action for false imprisonment.

tiff made any physical effort to escape.^{52.5}

Allegations as to arrest and imprisonment. A mere allegation of wrongful arrest without allegation of detention or damage has been held demurrable,⁵³ but other authority holds that an allegation of illegal arrest is sufficient without an allegation of imprisonment, since such an arrest is both technically and factually an imprisonment or restraint.⁵⁴

Involuntary character of detention. It is not necessary that the declaration specifically allege that the imprisonment was against the will of plaintiff, where from the facts alleged it sufficiently appears that such was the case,⁵⁵ and it has been held that such an averment may be supplied by amendment at the close of the evidence.⁵⁶

Cause for detention. It is not necessary for the complaint to disclose the offense, if any, charged

against a plaintiff who is alleged to have been falsely imprisoned.⁵⁷

The duration of the imprisonment need not be alleged.⁵⁸

Venue. An informal allegation of venue may be sufficient.⁵⁹

(2) Unlawful Character of Detention

In an action for false imprisonment the complaint must allege that the restraint was unlawful.

As a general rule a plaintiff in an action for false imprisonment must aver that the detention or imprisonment was wrongful or unlawful, or the facts and circumstances showing the unlawfulness thereof,⁶⁰ and, where it affirmatively appears from the face of the complaint that the restraint of plaintiff was lawful, no cause of action for false imprisonment is stated.⁶¹ Where the facts alleged do

Ga.—Sinclair Refining Co. v. Meek, supra.

52.5 Ga.—Mansour v. Mobley, 101 S. E.2d 786, 96 Ga.App. 812.

53. N.Y.—Pease v. Freiwald, 80 N. Y.S. 402, 39 Misc. 549.

Or.—Bingham v. Lipman, 67 P. 98, 40 Or. 363.

54. Ala.—Strain v. Irwin, 70 So. 734, 195 Ala. 414.

False arrest and false imprisonment distinguished see supra § 2.

55. Va.—Bolton v. Vellines, 26 S.E. 847, 94 Va. 393, 64 Am.S.R. 737.

56. Ind.—Efroymsen v. Smith, 63 N. E. 328, 29 Ind.App. 451.

57. Ala.—Southern Ry. Co. v. Hall, 96 So. 73, 209 Ala. 237.

Allegation of defendant's responsibility for unlawful detention see infra subdivision b (3) of this section.

58. Ala.—Sokol Bros. Furniture Co. v. Gate, 93 So. 724, 208 Ala. 107. Time of detention generally see supra § 13.

Single moment of imprisonment

A count for false imprisonment, charging that defendants caused plaintiff to be illegally imprisoned on a specified date and confined in jail, states a cause of action, although the duration of the imprisonment is not alleged, as an illegal imprisonment for even a moment would be sufficient.

Ala.—Sokol Bros. Furniture Co. v. Gate, supra.

59. W.Va.—Galizian v. Henry, 76 S. E. 440, 71 W.Va. 292. 25 C.J. p 534 note 17.

60. Ala.—Buttrey v. Wilhite, 94 So. 585, 208 Ala. 573.

Ga.—Hughes v. Georgia Power Co., 15 S.E.2d 466, 65 Ga.App. 163.

Mo.—Thompson v. Farmers' Exchange Bank, 62 S.W.2d 803, 333 Mo. 437.

N.Y.—Devine v. Hammer, 222 N.Y.S. 290, 221 App.Div. 50.

Bienenfeld v. Mortgage Commission, 291 N.Y.S. 739, 161 Misc. 311. 25 C.J. p 532 note 99.

In California

(1) Where an arrest is made without process, it is unnecessary to allege that it was unlawful.

Cal.—Collins v. Owens, 176 P.2d 372, 77 C.A.2d 713—Peters v. Bigelow, 30 P.2d 450, 137 C.A. 135.

(2) Complaint alleging that defendants imprisoned plaintiffs in county jail without probable cause or authority and against their will was not insufficient because it failed to allege that imprisonment was unlawful.

Cal.—Peters v. Bigelow, supra.

(3) A complaint alleging that defendant seized plaintiff and called a police officer, and that defendant and the officer forced plaintiff into an automobile and took him to a police station where he was confined, stated a cause for action for false imprisonment, although it did not allege that the imprisonment was unlawful.

Cal.—Monk v. Ehret, 219 P. 452, 192 C. 186.

(4) Earlier California cases see 25 C.J. p 532 note 99.

(5) Alleging invalidity of process see infra notes 69–73.

61. U.S.—Giordano v. City of Asbury Park, C.C.A.N.J., 91 F.2d 455, certiorari denied 58 S.Ct. 267, 302 U.S. 745, 82 L.Ed. 576, rehearing denied 58 S.Ct. 363, 302 U.S. 779, 82 L.Ed. 602.

Fla.—Fisher v. Payne, 113 So. 378, 93 Fla. 1085.

La.—Johnson v. Hodges, App., 65 So. 2d 812.

Proper arrest as disorderly person

Under statute defining "disorderly persons," complaint charging that plaintiff was arrested by city officer without warrant after spending night in uninhabited house, and committed by city magistrate to city jail for few hours and to county jail for five days for observation, stated no cause of action for false arrest against arresting officer, magistrate, or city.

U.S.—Giordano v. City of Asbury Park, C.C.A.N.J., 91 F.2d 455, certiorari denied 58 S.Ct. 267, 302 U.S. 745, 82 L.Ed. 576, rehearing denied 58 S.Ct. 363, 302 U.S. 779, 82 L.Ed. 602.

Smoking on street car

A petition did not state cause of action for false imprisonment against street railroad whose officers detained plaintiff for smoking on street car, on theory that there was no state or municipal law prohibiting smoking on street car, where plaintiff nowhere alleged or inferred that such conduct was not in violation of a rule promulgated by street railroad for protection of its passengers and business, or that, if there were such rule, it was void for unreasonableness.

Ga.—Hughes v. Georgia Power Co., 15 S.E.2d 466, 65 Ga.App. 163.

Justice retaining jurisdiction to arrest

Charge that justice of peace indefinitely suspended sentence was in effect allegation that sentence was suspended for maximum term, so that justice causing plaintiff's arrest within such maximum term had not divested himself of jurisdiction and

not show that the acts complained of were unlawful or wrongful, it has been held that they are not shown to be so by a mere allegation that they are wrongful and unlawful,⁶² but there is also authority to the contrary.^{62.5}

The declaration, complaint, or petition, in order to be sufficient, must allege facts which negative any presumption of legality of the arrest,^{62.10} such as that the arrest was made without a warrant or legal process,^{62.15} that he had not committed a public of-

fense in the presence of the arresting officers,^{62.20} that the arresting officer had no reasonable grounds for believing that a felony had been committed,^{62.25} that he did not commit the acts with which he was charged and that such acts did not constitute a crime,^{62.30} or that there was an unnecessary delay in bringing plaintiff before a magistrate.^{62.35}

On the other hand, where the facts alleged show the unlawfulness of the imprisonment, the complaint may be sustained,⁶³ and, if such facts raise a

the arrest was not shown to be unlawful.

Cal.—Ceinar v. Johnston, 25 P.2d 28, 134 C.A. 166.

62. Cal.—Going v. Dinwiddie, 25 P. 129, 86 C. 633.

N.Y.—Pease v. Freiwald, 80 N.Y.S. 402, 39 Misc. 549.

Invalidity of warrant on face

In action for false imprisonment, complaint alleging that plaintiff was arrested under warrant charging offense for which he had previously served sentence on plea of guilty was insufficient to state cause of action against police officers executing warrant, in absence of allegation that warrant, was not valid on its face, notwithstanding allegation that imprisonment was unlawful and void. Cal.—Malone v. Carey, 62 P.2d 166, 17 C.A.2d 505.

62.5 U.S.—Castillo v. Argonaut Trading Agency, Inc., D.C.N.Y., 156 F.Supp. 398.

Manson v. Pucci, D.C.Mo., 7 F.R. D. 570.

Ala.—Fidelity & Deposit Co. of Maryland v. Adkins, 130 So. 552, 222 Ala. 17—Hotel Tutwiler Operating Co. v. Evans, 94 So. 120, 208 Ala. 252.

Ga.—Hill v. Henry, 82 S.E.2d 35, 90 Ga.App. 93.

62.10 Cal.—Stallings v. Foster, 259 P.2d 1006, 119 C.A.2d 614—Hill v. Levy, 256 P.2d 622, 117 C.A.2d 667—Dillon v. Haskell, 178 P.2d 462, 78 C.A.2d 814.

Ky.—Rosenberg v. Bax, 258 S.W.2d 458.

N.Y.—Zeichner v. Pludwin, 81 N.Y. S.2d 300.

62.15 Cal.—Dragna v. White, 289 P. 2d 428, 45 C.2d 469—Miller v. Glass, 282 P.2d 501, 44 C.2d 359.

Lincoln v. Grazer, 329 P.2d 928, 163 C.A.2d 758—Oppenheimer v. City of Los Angeles, 232 P.2d 30, 104 C.A.2d 551—Oppenheimer v. City of Los Angeles, 232 P.2d 26, 104 C.A.2d 545—Kaufman v. Brown, 209 P.2d 156, 93 C.A.2d 508—Dillon v. Haskell, 178 P.2d 462, 78 C.A.2d 814—Collins v. Owens, 176 P.2d 372, 77 C.A.2d 713.

Ga.—Duchess Chenilles, Inc. v. Masters, 67 S.E.2d 600, 84 Ga.App. 822.

N.Y.—Wickowski v. Montgomery Ward Co., 82 N.Y.S.2d 127.

Ohio.—McCoy v. Baer, 136 N.E.2d 66, 100 Ohio App. 274.

Arrest without process

(1) Allegation that plaintiff was imprisoned without process raises presumption of unlawful arrest, shifting burden to defendant to justify it by proving that it was lawful, for purpose of testing validity of complaint on demurrer and directed verdict, or on motion for nonsuit. Cal.—Wilson v. Loustalot, 193 P.2d 127, 85 C.A.2d 316.

(2) To charge unlawful arrest without legal process, only arrest without process, imprisonment, and damages need be alleged, as imprisonment is presumed to be unlawful and burden rests on defendants to allege and prove its lawfulness or justification.

Cal.—Kaufman v. Brown, 209 P.2d 156, 93 C.A.2d 508.

Failure to allege arrest by officers without warrant

Count of complaint, alleging that defendant prohibition administrator directed that plaintiff be held, without charging direction to hold him without warrant, stated no cause of action for false imprisonment, since there is a presumption, which prevails in the absence of a pleading to the contrary, that officers perform their duties legally.

U.S.—Mores v. Jackson, D.C.Wash., 60 F.2d 598.

62.20 Cal.—Miller v. Glass, 282 P. 2d 501, 44 C.2d 359.

Collins v. Owens, 176 P.2d 372, 77 C.A.2d 713.

Ky.—Rosenberg v. Bax, 258 S.W.2d 458—York v. Holliday, 223 S.W.2d 754, 311 Ky. 206.

False assertion of authority

Although a petition for false imprisonment failed to aver in so many words that plaintiff had committed no offense in the presence of the officer, or that the latter had no reasonable grounds for believing him guilty of a felony, it was sufficient to state a cause of action where it did charge that the officer falsely asserted that plaintiff had committed a breach of the peace in his presence

and wrongfully arrested him for that reason, the court saying: "In view of the specification of the very ground upon which the deputy constable assumed to act, it was necessary to negative only that particular assertion of authority."

Ky.—Hogg v. Lorenz, 29 S.W.2d 17, 19, 234 Ky. 751.

62.25 Ky.—Edens v. Hudson, 243 S. W.2d 501.

Ohio.—McCoy v. Baer, 136 N.E.2d 66, 100 Ohio App. 274.

62.30 U.S.—Hadley v. U. S., 101 Ct. Cl. 112, certiorari denied 65 S.Ct. 79, 323 U.S. 671, 89 L.Ed. 546.

62.35 Cal.—Dragna v. White, 289 P. 2d 428, 45 C.2d 469.

Lincoln v. Grazer, 329 P.2d 928, 163 C.A.2d 758.

Ga.—Duchess Chenilles, Inc. v. Masters, 67 S.E.2d 600, 84 Ga.App. 822.

Ky.—Rosenberg v. Bax, 258 S.W.2d 458.

N.Y.—Sutton v. Evans, 168 N.Y.S.2d 112, 4 A.D.2d 580.

Required additional allegations

Petition alleging that arresting officers had been guilty of false imprisonment for failure to take arrested person before magistrate forthwith was fatally defective in failing to state that magistrate was available at time plaintiff was arrested, or that plaintiff was in condition to be presented before magistrate, or length of time plaintiff was held before being taken before magistrate, or day or week on which arrest was made.

Ky.—Rosenberg v. Bax, 258 S.W.2d 458.

63. Ga.—Sheppard v. Hale, 197 S.E. 922, 58 Ga.App. 140—Markovitz v. Blake, 105 S.E. 622, 26 Ga.App. 153. N.Y.—Goldberg v. Kletz, 191 N.Y.S. 452, 199 App.Div. 186, 39 N.Y.Cr. 371.

Allegations of false charges

(1) Allegations of false charges, together with the claim of resulting arrest and confinement, are sufficient to constitute a claim for false imprisonment, the gist of which is unlawful detention.

Alaska.—Wilson v. Eberle, 15 Alaska 260.

presumption that the imprisonment was unlawful, it is unnecessary specifically to aver the conclusion that the restraint was illegal, unlawful, or without competent authority.⁶⁴

A mere allegation that plaintiff was discharged on the criminal trial for lack of sufficient cause to believe him guilty is not a sufficient averment to show that imprisonment was illegal or without a warrant,⁶⁵ and it is unnecessary to allege the result of a prosecution in the course of which plaintiff claims to have been falsely imprisoned.⁶⁶

Lawful arrest and unlawful detention. Where the arrest is legal, the complaint should allege a wrongful detention.⁶⁷ On the other hand, if the complaint sufficiently avers an unlawful detention after an arrest, it need not aver that the arrest itself was unlawful.⁶⁸

Invalidity of process. Where it appears from

the complaint that plaintiff was restrained under process, it must be shown by the allegations that such process was void⁶⁹ or illegal.^{69.5} In an action against an officer, where the complaint shows that the imprisonment was under process, plaintiff must set out in his complaint the fact that the warrant was irregular on its face.⁷⁰

Where the complaint itself affirmatively discloses the apparent validity of the process and proceedings, it does not state an action for false imprisonment;⁷¹ nor is a cause of action alleged if the complaint asserts that the restraint was under process not appearing to be void.⁷² Therefore, it can be said that, while it is not necessary to allege that the arrest was unlawful where no judicial proceeding was had, it is necessary to allege the facts constituting the invalidity of such proceeding where one was employed.^{72.5} An allegation that a warrant was issued without probable cause does not, with-

(2) A complaint alleging that defendants had falsely sworn to complaint and procured warrant for plaintiff's arrest, that plaintiff was arrested under warrant and confined in jail and that charges were later dismissed without a trial, stated a good case of false imprisonment. Ill.—Weise v. Wachsmuth, 76 N.E.2d 532, 332 Ill.App. 662.

Unreasonable character of restraint by store clerk sufficiently alleged
Fla.—Winn & Lovett Grocery Co. v. Archer, 171 So. 214, 126 Fla. 308.

64. Ariz.—Adair v. Williams, 210 P. 853, 24 Ariz. 422, 26 A.L.R. 278.
Ind.—Gallimore v. Ammerman, 39 Ind. 223.
25 C.J. p 532 note 99 [c], p 533 notes 1, 2.

Arrest at home while asleep

A complaint, alleging that plaintiffs, husband and wife, were arrested in the nighttime while sleeping together in the bedroom of their home, was sufficient to show the lawfulness of their conduct at the time of their arrest, and the consequent unlawfulness of their arrest and detention, and to require defendants to justify.

Ariz.—Adair v. Williams, 210 P. 853, 24 Ariz. 422, 26 A.L.R. 278.

65. Cal.—Stallings v. Foster, 259 P. 2d 1006, 119 C.A.2d 614.
N.Y.—Cousins v. Swords, 43 N.Y.S. 907, 14 App.Div. 338, affirmed 57 N.E. 1107, 162 N.Y. 625.

66. Cal.—Singleton v. Perry, 289 P. 2d 794, 45 C.2d 489.

Ga.—Atlanta Guaranty Co. v. Benton, 150 S.E. 468, 40 Ga.App. 492.

67. Colo.—Forman v. Central, 143 P. 573, 57 Colo. 535.

Pa.—Wood v. Gross, Com.Pl., 7 Bucks Co. 1.

25 C.J. p 531 note 76.

68. Mass.—Roseman v. Korb, 40 N. E.2d 255, 311 Mass. 75.

69. Cal.—Peters v. Bigelow, 30 P.2d 450, 137 C.A. 135.

N.Y.—Durante v. Onondaga County, 147 N.Y.S.2d 922, 3 Misc.2d 69.

Complaints held insufficient

(1) A complaint, which failed to allege that a warrant procured by defendants and under which plaintiff was committed to jail was void, failed to state a cause of action for false arrest.

S.D.—Stauffacher v. Brother, 292 N. W. 432, 67 S.D. 314, 128 A.L.R. 925.

(2) General allegations that defendants caused and procured plaintiff's arrest in conjunction with allegation that arrest was made after a magistrate had ordered a complaint were insufficient to state a cause of action for unlawful arrest and false imprisonment, in that they did not disclose whether arrest was under valid process or by police officer at instigation and procurement of defendants.

N.Y.—Kaye v. Shane, 118 N.Y.S.2d 592, 204 Misc. 82.

69.5 Idaho.—Jones v. Green, 168 P. 2d 834, 66 Idaho 731.

70. Cal.—Pankewicz v. Jess, 149 P. 997, 27 C.A. 340.

Allegations held insufficient

Complaint which did not allege that warrant served on plaintiff by defendant was not valid on its face did not state a cause of action for false imprisonment; and allegations that officers knew plaintiff was repre-

sented by counsel, that no attempt was made to serve his counsel with amended complaint filed against him, that no notice was given that plaintiff should appear or post bail, and that court never revoked its order releasing plaintiff on his own recognizance, only stated matters affecting proceedings leading up to issue of warrant of arrest, and did not state a cause of action.

Cal.—Barrier v. Alexander, 224 P.2d 436, 100 C.A.2d 497.

71. Ga.—Grist v. White, 80 S.E. 519, 14 Ga.App. 147.

Ill.—Love v. Goldenberg Furniture Co., 46 N.E.2d 111, 317 Ill.App. 381.

W.Va.—Vorholt v. Vorholt, 160 S.E. 916, 111 W.Va. 196.

Plea of not guilty

Where plaintiff, after being indicted for attempted arson, was committed as insane and sued for false imprisonment, allegations that he was at no time insane stated no cause of action, being inconsistent with his plea of indictment of not guilty by reason of insanity.

Cal.—Baer v. Smith, 157 P.2d 646, 68 C.A.2d 716.

72. S.D.—Just v. Martin Bros. Co., 159 N.W. 44, 37 S.D. 470.
25 C.J. p 533 note 14.

72.5 Cal.—Vallindras v. Massachusetts Bonding & Ins. Co., 265 P.2d 907, 42 C.2d 149.

Kaufman v. Brown, 209 P.2d 156, 93 C.A.2d 508—Collins v. Owens, 176 P.2d 372, 77 C.A.2d 713—Peters v. Bigelow, 30 P.2d 450, 137 C.A. 135—Ceinar v. Johnston, 25 P.2d 28, 134 C.A. 166—Lapique v. Agoure, 195 P. 1075, 51 C.A. 56.

Idaho.—Jones v. Green, 168 P.2d 834, 66 Idaho 731.

out averments as to the facts, show that it was illegally issued.⁷³

Want of jurisdiction. Where the alleged wrongful detention is pursuant to process, facts must be stated showing that it is extrajudicial⁷⁴ or without jurisdiction.⁷⁵ It is insufficient to allege merely that the court or defendant had no jurisdiction,⁷⁶ or that imprisonment under the guise of judicial action was unlawful and void.⁷⁷

A complaint which standing by itself contains sufficient allegations of facts to establish that a warrant on which defendant was arrested was invalid may be so qualified by statements made by plaintiff's counsel in his opening that the cause of action must be dismissed. However, where a complaint sets up two causes of action based on two separate warrants and the opening statement relates only to one of such causes of action, the complaint should not be dismissed as to both causes, although

the facts as to the invalidity of the warrants on which the causes of action were based are alleged in identical terms, and plaintiff should be permitted to go to trial on the other cause of action.⁷⁸

Exemption from arrest. A declaration which does not allege a privilege or exemption from arrest, when the arrest complained of was made on process regular on its face, is not sufficient to sustain an action for false imprisonment.⁷⁹

(3) Defendant's Responsibility for Unlawful Detention

In an action for false imprisonment the complaint must sufficiently allege the defendant's responsibility for the unlawful restraint.

In an action for false imprisonment the complaint should allege the personal participation of defendant in the unlawful imprisonment or otherwise set forth facts showing his responsibility therefor.⁸⁰

73. Ky.—Schooler v. Yancey, 118 S. W. 940, 133 Ky. 695.

Averments as to malice and want of probable cause generally see *infra* subdivision b (4) of this section.

Allegations held sufficient

Allegations, in defendant's counterclaim for damages for alleged false arrest, that plaintiffs falsified evidence by testifying that defendant had committed an assault on one of the plaintiffs, when, in fact, plaintiff's injuries were caused by an unavoidable accident, alleged sufficient facts to overcome *prima facie* showing of probable cause for defendant's arrest.

N.Y.—Zeichner v. Pludwin, 81 N.Y.S. 2d 300.

74. Wis.—King v. Johnston, 51 N.W. 1011, 81 Wis. 578.
25 C.J. p 533 note 7.

75. Alaska.—Yancey v. Brenneman, 6 Alaska 448.

Cal.—*Corpus Juris* cited in Foerst v. Hobro, 13 P.2d 1055, 1056, 125 C.A. 476—Burlingame v. Traeger, 281 P. 1051, 101 C.A. 365—Lapique v. Agoure, 195 P. 1075, 51 C.A. 56.

Mo.—Thompson v. Farmers' Exchange Bank, 62 S.W.2d 803, 333 Mo. 437.

N.Y.—Roe v. Laraway, 98 N.Y.S.2d 538, 277 App.Div. 922.

Pa.—Snyder v. DiFillippo, Com.Pl., 7 Chest.Co. 1.

25 C.J. p 533 note 8.

Judicial immunity not applicable

Where complaint of plaintiff for false arrest and imprisonment alleged that city judge in committing plaintiff to the county jail acted without any jurisdiction whatever, the doctrine of judicial immunity could not be applied as a matter of law.

N.Y.—Koepp v. City of Hudson, 95 N.Y.S.2d 700, 276 App.Div. 443.

Imprisonment on contempt charge

(1) To state cause of action for false imprisonment arising out of imprisonment on contempt charge, it is incumbent upon plaintiff to allege matter affirmatively showing want of jurisdiction in court which rendered judgment.

Mo.—Thompson v. Farmers' Exchange Bank, 62 S.W.2d 803, 333 Mo. 437.

(2) Complaint charging, in effect, that contempt proceedings against plaintiff were based on an oral order of court which was never reduced to writing and entered, that plaintiff was never placed on probation and that county probation officer had, without authority, issued warrants of commitment for detention of plaintiff who had been found guilty of contempt of court, contained all essential allegations to charge defendant with false imprisonment.

N.J.—Lakutis v. Greenwood, 87 A.2d 23, 9 N.J. 101.

(3) Allegations that judge was not acting in his capacity as such and that there was no session of court or formal proceeding pending before judge were sufficient to state a cause of action; and word "arbitrarily" added nothing to declaration count. Mass.—Joyce v. Hickey, 147 N.E.2d 187.

Complaint showing prima facie jurisdiction

Complaint for false imprisonment, alleging that defendant was acting as magistrate, raised presumption that acts were judicial, and allegations that the magistrate entertained prosecution for violation of ordinance *prima facie* showed jurisdiction and

made the complaint subject to dismissal.

Mont.—Shampagne v. Keplinger, 252 P. 803, 78 Mont. 114.

76. Cal.—*Corpus Juris* cited in Foerst v. Hobro, 13 P.2d 1055, 1056, 125 C.A. 476.
25 C.J. p 533 note 9.

77. Cal.—Lapique v. Agoure, 195 P. 1075, 51 C.A. 56.

78. N.Y.—Sweeney v. O'Dwyer, 90 N.E. 1129, 197 N.Y. 499.

79. R.I.—Crandall v. Gavitt, 39 A. 191, 20 R.I. 366.

80. U.S.—*Corpus Juris Secundum* cited in Burlington Transp. Co. v. Josephson, C.C.A.S.D., 153 F.2d 372, 376.

Alaska.—Wilson v. Eberle, 15 Alaska 260.

Cal.—Kaufman v. Brown, 209 P.2d 156, 93 C.A.2d 508—Dillon v. Haskell, 178 P.2d 462, 78 C.A.2d 814—Collins v. Owens, 176 P.2d 372, 77 C.A.2d 713—Downey v. Allen, 97 P. 2d 515, 36 C.A.2d 269—Lapique v. Agoure, 195 P. 1075, 51 C.A. 56.

Fla.—Beckham v. Cline, 10 So.2d 419, 151 Fla. 481, 145 A.L.R. 705—Goodrich v. Lawrence, 189 So. 233, 138 Fla. 287.

Idaho.—Jones v. Green, 168 P.2d 834, 66 Idaho 731.

Kan.—Wommack v. Lesh, 305 P.2d 854, 180 Kan. 548.

Ky.—Edens v. Hudson, 243 S.W.2d 501.

N.Y.—Levy v. Chasnoff, 283 N.Y.S. 891, 245 App.Div. 607.

Ohio.—McCoy v. Baer, 136 N.E.2d 66, 100 Ohio App. 274.

Pa.—Quick v. Lichtenwalner, 84 Pa. Dist. & Co. 546.

Tenn.—Stephens v. Hinds, 194 S.W.2d 483, 183 Tenn. 652.

25 C.J. p 531 note 79.

A complaint for false imprisonment otherwise sufficiently alleging defendant's participation in plaintiff's false imprisonment need not allege that defendant was plaintiff's jailer⁸¹ or a deputy sheriff.^{81.5} When an officer is liable for an illegal arrest made by his deputy without a warrant only where the arrest is made on charge of felony, a complaint for false arrest sufficiently avers that

the charge was a felony where it sets forth facts from which the inference of felony conclusively appears.⁸²

Acts of employees. Where an employer is sued for a false imprisonment alleged to have been committed by his employee, the complaint should aver the relation of employer and employee and the committing of the imprisonment by the employee while

Two alternatives

To support a judgment for damages for false imprisonment the plaintiff must plead one of two things, either that the defendant made the unlawful arrest and participated in the unlawful restraint or that the defendant affirmatively instigated, encouraged, or caused the unlawful arrest.

U.S.—*Burlington Transp. Co. v. Josephson*, C.C.A.S.D., 153 F.2d 372.

Authorization or direction of arrest

(1) A complaint in an action for false arrest, failing to allege that defendant authorized or directed the arrest of plaintiff without a warrant, was insufficient in law.

N.Y.—*Luhan v. Slavik*, 185 N.Y.S. 878, 194 App.Div. 728.

(2) A complaint is insufficient if plaintiff does not allege that defendant had any authority to direct police officers as to what they should or should not do in making search of premises or in their treatment of plaintiff during search.

U.S.—*Manaro v. Rosenberg*, C.A.III., 231 F.2d 305, certiorari denied 76 S.Ct. 1039, 351 U.S. 970, 100 L.Ed. 1489.

Concealment causing arrest

Where a petition for false imprisonment brought against a bank because of the arrest and confinement of plaintiff on a charge of negotiating a bad check was based on the alleged fraud of the bank in failing to disclose the full facts, which disclosure would have prevented plaintiff's arrest, the petition did not set forth a cause of action for false imprisonment against the bank where it failed to show the bank's duty to speak, and the absence of allegations to the effect that the bank sought or procured the arrest was fatal to the petition.

Mo.—*Richardson v. Empire Trust Co.*, 94 S.W.2d 966, 230 Mo.App. 580.

Confinement in insane asylum

(1) A complaint charging that city magistrate and physicians conspired to fix on plaintiff stigma and disability of mental unsoundness, that plaintiff was confined in state hospital for insane under statutory certificates of physicians that plaintiff "was in need of treatments," and that county paid for plaintiff's board, stated no cause of action for false

imprisonment against county, nor did it state a cause of action against magistrate, since he was not connected with plaintiff's confinement to hospital or against physicians, notwithstanding certificates were insufficient, since risk of proceeding thereon was on those in charge of hospital.

U.S.—*Giordano v. City of Asbury Park*, C.C.A.N.J., 91 F.2d 455, certiorari denied 58 S.Ct. 267, 302 U.S. 745, 82 L.Ed. 576, rehearing denied 58 S.Ct. 363, 302 U.S. 779, 82 L.Ed. 602.

(2) Declaration alleging that defendant, who was a physician, maliciously and in bad faith executed and signed a certificate for commitment of individuals to state institutions for the insane, when defendant knew or should have known that plaintiff was sane, was insufficient to allege a cause of action for false imprisonment, since one who procures confinement of another on lawful process is not liable, although he caused process to issue by means of false statements.

Mass.—*Mezullo v. Maletz*, 118 N.E.2d 356, 331 Mass. 231.

Allegations held sufficient

(1) To charge direct participation in unlawful arrest and confinement, as against contention that merely a conspiracy was alleged against defendants.

Tex.—*Castillo v. Canavati*, Civ.App., 152 S.W.2d 785, error refused.

(2) To show sheriff's responsibility for arrest and imprisonment by his deputy.

Ariz.—*Miles v. Wright*, 194 P. 88, 22 Ariz. 73, 12 A.L.R. 970.

(3) To amount to an allegation that defendants, through their agent, procured or directed plaintiff's arrest.

Ga.—*Webb v. Prince*, 9 S.E.2d 675, 62 Ga.App. 749.

Allegations held insufficient

(1) Complaint which alleged that plaintiff was arrested by two police officers without a warrant after defendant, who was plaintiff's former employer, had complained to police of alleged theft, and which further alleged that defendant had accompanied officers, was insufficient to state cause of action, in absence of any allegation that defendant knew that

officers did not have the necessary warrants.

U.S.—*Manaro v. Rosenberg*, C.A.III., 231 F.2d 305, certiorari denied 76 S.Ct. 1039, 351 U.S. 970, 100 L.Ed. 1489.

(2) Complaint against building inspector was insufficient, by reason of affirmatively showing that sheriff rather than defendant had arrested and imprisoned plaintiff.

Cal.—*Dawson v. Martin*, 309 P.2d 915, 150 C.A.2d 379.

(3) Allegation in complaint for damages for false imprisonment that chief of police had in effect ratified, condoned, and abetted actions of other individual police officers amounting to false imprisonment of plaintiff was insufficient as statement that chief had directed such acts or had personally co-operated in the false imprisonment in such manner as to make him liable for damages therefor.

Cal.—*Oppenheimer v. City of Los Angeles*, 232 P.2d 26, 104 C.A.2d 545.

81. Or.—*Knight v. Baker*, 244 P. 543, 117 Or. 492.

Active participants

Allegations that a prosecuting attorney and a deputy sheriff actively participated in the unlawful arrest and imprisonment of plaintiff were sufficient to show their responsibility therefor even though it appeared that a third person acted as his jailer.

Mo.—*Burton v. Drennan*, 58 S.W.2d 740, 332 Mo. 512.

81.5 Matter of defense

If person making arrest was a deputy sheriff, that fact was a matter for his defense in action for false imprisonment.

Ill.—*Sparacino v. Feron*, 117 N.E. 2d 320, 1 Ill.App.2d 227.

82. Ariz.—*Miles v. Wright*, 194 P. 88, 22 Ariz. 73, 12 A.L.R. 970.

Stealing "large sum of money"

The complaint on a sheriff's bond based on an arrest by his deputy of plaintiff without a warrant sufficiently states, as against a general demurrer, that the offense was a felony, by allegation that he arrested her on a charge of having stolen "a large sum of money."

Ariz.—*Miles v. Wright*, supra.

acting within the scope of his employment.⁸³ An averment to the general effect that defendant's agent committed the false imprisonment as an agent or employee of defendant and while acting within the scope of his employment is sufficient,⁸⁴ and it is unnecessary to add the further allegation that the imprisonment was committed in the interests of the master,⁸⁵ or that the principal aided in or ratified the false imprisonment.⁸⁶ As against a general demurrer a complaint in an action against a corporation is sufficient which shows that the warrant on which a false imprisonment is alleged was issued by the agent of the corporation and with its knowledge and connivance.⁸⁷

Conspiracy between joint defendants. In an ac-

tion against joint defendants it is unnecessary to allege that the acts of defendants were "wilful and concerted," etc., since it is not generally necessary to make out a conspiracy to maintain an action for false imprisonment,⁸⁸ although where a conspiracy is an essential part of the joint participation of defendants it must be alleged.⁸⁹

(4) Malice and Want of Probable Cause

In an action for false imprisonment the complaint ordinarily need not allege either the presence of malice or the want of probable cause.

Where malice or want of probable cause is not an essential element of the cause of action for false imprisonment, under the rules discussed supra § 7, it is not necessary for plaintiff to allege either the

83. Cal.—O'Moore v. Driscoll, 23 P. 2d 438, 135 C.A. 770.

Agent of religious order

Complaint in action for false imprisonment against incorporated religious order, not showing that tortious acts were done by its agents in accomplishment of its general religious purposes, was insufficient to state cause of action.

Cal.—O'Moore v. Driscoll, supra.

84. U.S.—Foster v. U. S., D.C.N.Y., 156 F.Supp. 421.

Ala.—Standard Oil Co. v. Humphries, 96 So. 629, 209 Ala. 493—Buttrey v. Wilhite, 94 So. 585, 208 Ala. 573.

Store customer

Petition, filed by customer in defendant's store, who was searched by police officers after an employee of defendant called them and informed them that a man was holding a gun on another employee and after their arrival pointed to customer as the man, stated a cause of action predicated on theory of false arrest, or on theory of defendant's failure to protect plaintiff as a customer, lawfully on defendant's property, from injury caused by misconduct of defendant's employee.

Ga.—Jacobs v. Owens, 99 S.E.2d 895, 96 Ga.App. 318.

Carrier

(1) In action against railway company, allegation that "defendant by and through its agents or servants, to wit . . . who were acting in line of duty or scope of their authority as such agents, imprisoned plaintiff without legal warrant," sufficiently charged the railway with legal responsibility for unlawful detention.

Ala.—Southern Ry. Co. v. Beaty, 103 So. 658, 212 Ala. 608.

(2) As a carrier is an insurer of the safety of its passengers against ill treatment by its servants, it is not necessary to allege that its agent in

charge of a train was acting within the scope of his authority in causing the arrest of a passenger.

Ark.—Moore v. Louisiana & A. R. Co., 137 S.W. 826, 99 Ark. 233, 34 L.R.A., N.S., 299.

(3) Petition which alleged that defendant had restrained plaintiff of his personal liberty by compelling him to remain in his seat aboard pullman car, sufficiently alleged cause of action for false imprisonment.

Mo.—Hays v. Missouri Pac. R. Co., 304 S.W.2d 800.

(4) Complaint, which alleged that plaintiffs had notified some unidentified uniformed agent of railroad of fact that plaintiffs were being transported under extradition warrant which contained errors which were pointed out to such person who disregarded plaintiffs' protest, and which failed to allege an assault or undue violence on part of any employee of the railroad, failed to state cause of action against railroad for damages for unlawful detention.

U.S.—Picking v. Pennsylvania R. Co., D.C.Pa., 3 F.R.D. 425, reversed on other grounds, C.C.A., 151 F.2d 240, rehearing denied 152 F.2d 753.

(5) In action by passenger against carrier and its agent for violation of carrier's duty to protect passenger from insult, injury, and mortification, pleadings, which revealed that passenger's arrest and prosecution under warrant taken out by agent was the result of agent's personal grievance, but which expressly disclaimed that the action was one for false imprisonment or malicious prosecution, failed to state cause of action against carrier for breach of its duty or against agent for malicious prosecution or false imprisonment, regardless of allegation that agent acted willfully and wantonly and without justification.

Ga.—Scholwin v. Wilbanks, 70 S.E. 2d 792, 86 Ga.App. 99.

Averments as to scope of authority

(1) Counts of declaration in action for false imprisonment and malicious prosecution, alleging that it was duty of defendant corporation's store manager to guard defendant's interests against passing of spurious coin and other misdemeanors liable to result in monetary loss to defendant and that, acting as such manager, he falsely pronounced bill, tendered by plaintiff in payment for goods purchased, counterfeit and caused her to be detained in store and given into policeman's custody, were not demurrable as failing to show that manager was acting within scope of his authority.

Fla.—S. H. Kress & Co. v. Powell, 180 So. 757, 132 Fla. 471.

(2) In malicious prosecution and false imprisonment action against apartment house desk clerk and manager and their corporate employers, complaint sufficiently charged apartment house desk clerk and manager had implied authority to cause arrest of plaintiff on disorderly conduct charge.

Ill.—Zimbon v. 1400 Lake Shore Drive Corp., 132 N.E.2d 51, 8 Ill. App.2d 542.

85. Ala.—Buttrey v. Wilhite, 94 So. 585, 208 Ala. 573.

86. Ala.—Epperson v. First Nat. Bank, 95 So. 343, 209 Ala. 12.

87. Ga.—Stevens v. Little-Cleckler Constr. Co., 89 S.E. 597, 18 Ga. App. 483.

88. Cal.—Oppenheimer v. City of Los Angeles, 232 P.2d 30, 104 C.A.2d 551 —Corpus Juris quoted in McAlmond v. Trippel, 269 P. 937, 938, 93 C.A. 584. 25 C.J. p 531 note 80.

89. Tex.—Miller v. Fenner, Beane & Ungerleider, Civ.App., 89 S.W.2d 506, error dismissed.

Necessity of submitting issue as to conspiracy see infra § 59.

presence of malice⁹⁰ or the absence of probable cause.⁹¹ An allegation of malice may form a basis for an aggravation of damages but it does not relate to the cause of action,⁹² and an allegation of malice in procuring a detention is not of itself sufficient to show that the detention was unlawful.⁹³

Where the gist of the action on fair interpretation of the whole pleading is false imprisonment, an allegation as to want of probable cause is immaterial,⁹⁴ and may be disregarded as surplusage,⁹⁵ although it has been held that a complaint is sufficient which merely states that at a specified time and place defendant imprisoned plaintiff without probable cause.⁹⁶

Allegations of malice and want of probable cause will not of necessity change the action into one for malicious prosecution⁹⁷ or render the pleading invalid.⁹⁸ However, where the complaint sets forth an arrest maliciously and without probable cause, imprisonment, and acquittal, and does not allege absence of a warrant or irregularity or illegality in a warrant, it shows that malicious prosecution and not

false imprisonment lies.⁹⁹ On the other hand, the allegation of absence of probable cause does not convert trespass quare clausum fregit into false imprisonment.¹

Malicious prosecution and false arrest. Where a plaintiff sues for a malicious prosecution and a false arrest he must allege both malice and want of probable cause, and it has been said that a general allegation that a prosecution was malicious and without probable cause is not a mere conclusion but is sufficient as an averment of an ultimate fact.²

(5) Damages

In an action for false imprisonment general damages need not be specifically set forth, but no recovery may be had for items of special damages unless they are particularly alleged.

Under the rules applicable to pleading damages generally, discussed in Damages §§ 129-140, in an action for false imprisonment general damages need not be specially pleaded,³ but allegations of special damages may be pleaded in support of general dam-

90. Cal.—Ah Fong v. Sternes, 21 P. 381, 79 C. 30.

Fla.—Johnson v. Weiner, 19 So.2d 699, 155 Fla. 169.

N.Y.—Jones v. Independent Fence Co., 173 N.Y.S.2d 684, 12 Misc.2d 413.

Guzy v. Guzy, 184 N.Y.S.2d 161.

Ohio.—Diehl v. Friester, 37 Ohio St. 473.

Va.—Parsons v. Harper, 16 Gratt. 64, 57 Va. 64.

25 C.J. p 532 note 87.

91. Ala.—Buttrey v. Wilhite, 94 So. 585, 208 Ala. 573.

Cal.—Kaufman v. Brown, 209 P.2d 156, 93 C.A.2d 508.

Ill.—Johnson v. Von Kettler, 84 Ill. 315.

Ky.—Southern R. Co. v. Shirley, 90 S.W. 597, 121 Ky. 865, 28 Ky.L. 860, 12 Ann.Cas. 33.

N.Y.—Jones v. Independent Fence Co., 173 N.Y.S.2d 684, 12 Misc.2d 413.

Ohio.—McCoy v. Baer, 136 N.E.2d 66, 100 Ohio App. 274.

Or.—Brown v. Meier & Frank Co., 86 P.2d 79, 160 Or. 608.

25 C.J. p 532 note 88.

However, it has been held that a complaint for false imprisonment, alleging that defendants conspired to institute prosecution and that plaintiff's conviction was reversed on review, but not alleging perjury or unfairness at trial, stated no cause of action, conviction showing probable cause notwithstanding reversal.

U.S.—Shaw v. Lindstrom, C.C.A.N.J., 71 F.2d 686.

92. Cal.—Donati v. Righetti, 97 P. 1128, 9 C.A. 45.

25 C.J. p 532 note 92.

Averment of malice in support of a plea for punitive damages see *infra* subdivision b (5) of this section.

93. N.Y.—Bienenfeld v. Mortgage Commission, 291 N.Y.S. 739, 161 Misc. 311.

25 C.J. p 533 note 4.

94. U.S.—Robinson v. Chicago Great Western Ry. Co., D.C.Mo., 144 F. Supp. 713.

Ill.—Johnson v. Von Kettler, 84 Ill. 315.

95. Ill.—Enright v. Gibson, 76 N.E. 689, 219 Ill. 550.

25 C.J. p 532 note 91.

Necessity of proving malice and want of probable cause where alleged see *infra* § 54.

96. Minn.—Nixon v. Reeves, 67 N.W. 989, 65 Minn. 159, 33 L.R.A. 506.

Mo.—Pogue v. Smallen, 285 S.W.2d 915.

97. N.Y.—Mulinos v. Walkof, 159 N.Y.S. 16, 95 Misc. 165.

25 C.J. p 532 note 93.

False imprisonment and malicious prosecution distinguished see *supra* § 4.

98. N.Y.—Sherman v. Grinnell, 24 N.Y.S. 59, 70 Hun 354.

25 C.J. p 532 note 94.

99. Mich.—Haskins v. Ralston, 37 N.W. 45, 69 Mich. 63, 13 Am.S.R. 376.

1. Mass.—Sawyer v. Ryan, 13 Metc. 144.

2. U.S.—Seaboard Oil Co. v. Cunningham, C.C.A.Fla., 51 F.2d 321, certiorari denied 52 S.Ct. 35, 284 U.S. 657, 76 L.Ed. 557.

Allegations of malice and want of probable cause in actions for malicious prosecution see *Malicious Prosecution* §§ 77, 78.

Waiver of preliminary examination

In action against F. B. I. agent for false arrest and malicious prosecution, fact that plaintiff, when brought before United States Commissioner, waived preliminary examination and was held until released by bail did not destroy general averments in complaint of want of probable cause for arrest of plaintiff, so as to bar plaintiff's claim.

U.S.—Kozlowski v. Ferrara, D.C.N.Y., 117 F.Supp. 650.

Allegations held sufficient

In malicious prosecution and false imprisonment action against apartment house desk clerk and manager and their employers, allegations that clerk had complained of plaintiff being abusive and insulting to her and that manager had signed complaint charging plaintiff with breach of peace for which he was tried and acquitted, sufficiently alleged malice and lack of probable cause.

Ill.—Zimbon v. 1400 Lake Shore Drive Corp., 132 N.E.2d 51, 8 Ill.App.2d 542.

3. S.C.—Westbrook v. Hutchison, 10 S.E.2d 145, 195 S.C. 101.

25 C.J. p 534 note 19.

Damages and penalties generally see *infra* §§ 63-70.

ages.^{3.5} On the other hand, a recovery can be had for items of special damages only when they are particularly averred,⁴ as, for example, attorneys' fees,⁵ expenses,⁶ injury to character and reputation,⁷ insufficient or improper food during confinement,⁸ unfit condition of place of confinement,⁹ sickness contracted during imprisonment,¹⁰ loss of employment,¹¹ interruption of business,¹² or loss of time.¹³

Punitive damages. A plaintiff seeking punitive damages for false imprisonment must plead malice on the part of defendant,¹⁴ or want of probable cause;^{14.5} but an express averment of malice is unnecessary where the facts alleged show the presence of malice.¹⁵

§ 52. Plea or Answer

- a. In general
- b. Sufficiency of pleas as to avoidance or justification
- c. Effect of plea of avoidance or justification
- d. Mitigation of damages

3.5 Allegations not remote

Where plaintiff, in his complaint for damages for malicious prosecution and false imprisonment, set forth cash loss for loss of time, for attorney's fees, and bondsman's fees, these allegations, in support of claim for general damages, that as a result of these cash losses plaintiff had been forced into bankruptcy, were not too remote and speculative. Ga.—Atlantic Coast Line R. Co. v. Wegner, 83 S.E.2d 58, 90 Ga.App. 267.

4. Cal.—Salo v. Smith, 143 P. 322, 25 C.A. 295.

Kan.—Atchison, T. & S. F. R. Co. v. Rice, 14 P. 229, 36 Kan. 503. 25 C.J. p 534 note 20.

5. Ala.—Williams v. Hayes, 77 So. 915, 16 Ala.App. 321. 25 C.J. p 534 note 21.

6. Del.—McCaffrey v. Thomas, 56 A. 382, 20 Del. 437.

7. Kan.—Comer v. Knowles, 17 Kan. 436.

Wis.—Bergeron v. Peyton, 82 N.W. 291, 106 Wis. 377, 80 Am.S.R. 33.

No pecuniary loss involved

Damages resulting from injury to reputation through false arrest and imprisonment, not involving pecuniary loss, constituted general damages which need not be specially pleaded.

Mo.—Burns v. Burns, App., 193 S.W. 2d 951.

8. Ill.—Miles v. Weston, 60 Ill. 361.

9. Ill.—Johnson v. Von Kettler, 84 Ill. 315—Miles v. Weston, 60 Ill. 361.

10. Kan.—Atchison, T. & S. F. R. Co. v. Rice, 14 P. 229, 36 Kan. 503.

11. Ind.—American Express Co. v. Patterson, 73 Ind. 430.

12. Mich.—Thompson v. Ellsworth, 39 Mich. 719—Fuller v. Bowker, 11 Mich. 204.

13. Mo.—Davis v. Chicago, R. I. & P. R. Co., 182 S.W. 826, 192 Mo. App. 419.

14. Mo.—Carter v. Casey, App., 153 S.W.2d 744—Greaves v. Kansas City Junior Orpheum Co., 80 S.W. 2d 228, 229 Mo.App. 663.

N.Y.—Gill v. Montgomery Ward & Co., 129 N.Y.S.2d 288, 284 App.Div. 36.

Sanders v. Rolnick, 67 N.Y.S.2d 652, 188 Misc. 627, affirmed 71 N.Y. S.2d 896, 272 App.Div. 803.

Tex.—Dallas Joint Stock Land Bank of Dallas v. Britton, 135 S.W.2d 981, 134 Tex. 529.

Averments as to malice and probable cause generally see supra subdivision b (4) of this section.

Allegations held sufficient

In action for false arrest, allegations that assault was done unlawfully, willfully, and maliciously for purpose of compelling plaintiff to surrender articles of merchandise in

a. In General

The plea or answer should conform to the general rules of pleading and statutory provisions. Affirmative defenses should be specially pleaded.

General rules relating to the plea or answer in civil actions usually apply in actions for false imprisonment.¹⁶ Under some statutes and rules of the court defendant may file a general denial only when he intends in good faith to controvert all of the allegations of the complaint, but must otherwise specially deny the allegations which he intends to controvert admitting the truth of the other allegations.¹⁷ The replication may cure a defect in the answer.¹⁸

Affirmative defenses. Defendant ordinarily must plead specially matter in confession and avoidance of a charge of false imprisonment, as discussed infra § 54. A special plea setting up matter provable under the general issue is demurrable.¹⁹

A notice accompanying the general issue will not be dismissed on the ground that it contains no matter of defense not provable under the general issue and contains immaterial and prejudicial statements of fact.²⁰

his possession which defendant's servant in charge of defendant's store had claimed that plaintiff had stolen, which charge plaintiff averred was untrue, were sufficient as pleading claim for punitive or exemplary damages.

Fla.—Setzer v. Tyre, 171 So. 224, 126 Fla. 139.

14.5 Ohio.—McCoy v. Baer, 136 N.E. 2d 66, 100 Ohio App. 274.

15. Mich.—Brushaber v. Stegemann, 22 Mich. 266. 25 C.J. p 534 note 32.

16. Ala.—Standard Oil Co. v. Davis, 94 So. 754, 208 Ala. 565.

17. Conn.—Church v. Pearne, 53 A. 955, 75 Conn. 350.

18. Md.—Edger v. Burke, 54 A. 986, 96 Md. 715.

19. Ala.—Standard Oil Co. v. Davis, 94 So. 754, 208 Ala. 565.

Defendant's nonparticipation in detention

Demurrers were properly sustained to special pleas setting up that the arrest complained of was made by the officer of his own volition, without direction or request from defendant.

Ala.—Standard Oil Co. v. Davis, supra.

20. Vt.—McMullin v. Erwin, 38 A. 62, 69 Vt. 333.

Joinder in plea. Where defendants plead jointly in justification, the plea if bad as to one defendant is bad as to all.²¹

b. Sufficiency of Pleas as to Avoidance or Justification

- (1) In general
- (2) Legal authority or process
- (3) Arrest without process

(1) In General

In an action for false imprisonment a plea or answer which seeks to justify the detention should allege facts constituting a justification and should set them forth clearly and in such a way as to identify the imprisonment justified with that charge.

General rules usually apply in testing the sufficiency of a plea or answer in avoidance or justification of a charge of false imprisonment.²² A plea of justification is bad where the facts set forth fall short of showing that the conduct of defendant was lawful.²³ Such a plea should set forth the facts of justification so that plaintiff may be informed of them and the court may judge as to their sufficiency,²⁴ and should do so without duplicity.²⁵ It must

sufficiently identify the arrest or imprisonment justified as that alleged in the complaint.²⁶

When the complaint alleges that plaintiff was imprisoned on more than one charge, an answer justifying the arrest on only one of the charges is bad.²⁷ A plea which professes to answer the whole declaration, but omits to justify the detention of plaintiff during some portion of the time, is bad.²⁸ A plea justifying the arrest or imprisonment of plaintiff on the ground that defendant was an officer at the time need not answer such matters set out in the declaration as would have given plaintiff a good cause of action against a private person.²⁹

An answer which denies an allegation of want of probable cause for arrest is not bad as failing to present an issue, although it admits the arrest was made without complaint or warrant, there being no inference that it was not a proper case for arrest without warrant.³⁰ A denial of charges as to the abuse and harsh treatment of plaintiff is broad enough to include an injury from the defective condition of a cell in which plaintiff was confined.³¹

Unreasonable detention. Where a charge of

21. N.Y.—Bissell v. Gold, 1 Wend. 210, 19 Am.D. 480.
25 C.J. p 537 note 76.

22. Denial of matters necessary to complete defense

An affirmative defense, consisting of new matter, under Code Civ.Proc. § 500, authorizing such defenses, should be based on the theory of confession and avoidance, and a denial has no place therein, except as to some matter of fact which must be denied to complete the defense; therefore, in determining the validity of the defense, all allegations of the complaint will be considered admitted, if not traversed by a denial in the defense, although traversed by separate denials.

N.Y.—Mulinos v. Walkof, 159 N.Y.S. 16, 95 Misc. 165.

Plea or answer held sufficient

(1) Answer averring arrest for operating automobile at excessive speed was sufficient on general demurrer. Utah.—Oleson v. Pincock, 251 P. 23, 68 Utah 507.

(2) In action for false imprisonment, answer alleging that plaintiff was guilty of obtaining or attempting to obtain property by false personation, and that acts were performed for protection of property and to obtain return thereof, sufficiently showed that plaintiff's detention for crime of personation was in defense of defendants' property.

Mo.—Teel v. May Department Stores Co., 176 S.W.2d 440, 352 Mo. 127.

Plea or answer held insufficient

(1) In action against county judge for false imprisonment for contempt, answer alleging that punishment for contempt was solely for disobedience of court's order would not support a judgment for defendant on ground that plaintiff had been guilty of contempt in that he had used disrespectful and insolent language in the presence of court.

Ky.—Casteel v. Sparks, 226 S.W.2d 533, 312 Ky. 99.

(2) Allegations of fraud and deceit and of nonfeasance were insufficient as defenses to plaintiff's causes for false arrest and malicious prosecution, since they did not purport to show that plaintiff's action was not maintainable or to show avoidance.

N.Y.—Jones v. Freeman's Dairy, 127 N.Y.S.2d 200, 283 App.Div. 667, opinion supplemented 129 N.Y.S. 2d 498, 283 App.Div. 806.

23. Ala.—Hill v. Wyrosdick, 113 So. 49, 216 Ala. 235.

N.Y.—Marks v. Baltimore & O. R. Co., 131 N.Y.S.2d 325, 284 App.Div. 251.
R.I.—Kominsky v. Durand, 12 A.2d 652, 64 R.I. 387.

Plea showing unlawful delay by arresting officer

A plea in false imprisonment action that officer arrested plaintiff on suspicion of having committed a felony and detained him for one and one-half hours while investigation establishing innocence was made,

whereupon plaintiff was discharged, was bad, since it was officer's duty to bring plaintiff before magistrate without unreasonable delay, as statute authorizing officer to discharge person detained when no ground for criminal complaint exists was inapplicable because it applies only to arrests made for offense committed in view of officer or person apprehended in act by any other person. R.I.—Kominsky v. Durand, supra.

24. Utah.—Oleson v. Pincock, 251 P. 23, 68 Utah 507.
25 C.J. p 535 note 53.

25. U.S.—Stanton v. Seymour, C.C. Mich., 22 F.Cas.No.13,293, 5 McLean 267.
Mass.—Jewett v. Locke, 6 Gray 233.

26. Ala.—Smith v. Roebuck, 46 So. 455, 155 Ala. 395.
Utah.—Oleson v. Pincock, 251 P. 23, 68 Utah 507.
25 C.J. p 535 note 55.

27. Ind.—Boaz v. Tate, 43 Ind. 60—Davis v. Bush, 4 Blackf. 330.

28. Vt.—Kent v. Miles, 33 A. 768, 68 Vt. 48.
25 C.J. p 535 note 59.

29. Ind.—Wiltse v. Holt, 95 Ind. 469.
Md.—Yingling v. Hoppe, 9 Gill 310.
25 C.J. p 536 note 60.

30. N.J.—McMichael v. Culliton, Sup., 104 A. 433.

31. Tex.—Bishop v. Lucy, 50 S.W. 1029, 51 S.W. 854, 21 Tex.Civ.App. 326.

false imprisonment is based on the failure to bring plaintiff promptly before a magistrate after his arrest, as discussed supra §§ 30, 31, the facts excusing the delay must be specifically alleged in a plea of justification.³²

(2) Legal Authority or Process

In an action for false imprisonment a plea or answer justifying the restraint by legal authority must set forth all facts essential to show the validity of the process or power invoked.

A pleading justifying the detention by legal authority must set forth all facts essential to the validity of process or power of a court.³³ An allegation that defendant was at the time of the acts charged a justice of the peace is a sufficient allegation of his official character.³⁴

(3) Arrest without Process

A plea of justification for an arrest and restraint without process must set forth the facts relied on as authority for such an arrest and restraint.

A plea in justification of an arrest without process must set forth, with sufficient detail, all facts necessary to the defense.³⁵ A plea justifying arrest on the ground of probable cause for suspecting plaintiff to be guilty of the offense for which he was imprisoned must state the reasons for such suspicion,³⁶ and mere allegations of reasonable and probable cause are insufficient.^{36.5} A plea that plaintiff committed the act for which he was arrested in the presence of a police officer is sufficient, and the officer's power to make the arrest is not affected by the fact that defendant advised him to do so.³⁷

c. Effect of Plea of Avoidance or Justification

A plea of justification admits the fact of detention but does not admit that the detention was wrongful.

A plea of justification admits the detention of plaintiff,³⁸ and where plaintiff is detained without a warrant, defendant, in order to overcome the prima facie case thus made, must plead facts, such as the commission of a crime in the presence of defendant or his agent, justifying the detention.³⁹ However, a plea of justification does not admit that the imprisonment was wrongful.⁴⁰ By such plea defendant becomes entitled to the privileges of one holding the affirmative of the issue.⁴¹

d. Mitigation of Damages

It is proper for the defendant to plead matter in mitigation of damages, such as the absence of malice on his part or the commission by the plaintiff of a crime other than that for which he was imprisoned.

Defendant in his answer may properly plead facts in mitigation of damages;⁴² this is true although the mitigation is only as to a part of the violence committed,⁴³ and even if the complaint states facts entitling plaintiff to exemplary damages.⁴⁴ An allegation that there were no damages is equivalent to a denial of damages and is not properly pleaded as an affirmative defense⁴⁵ or a partial defense.⁴⁶ An offense independent of the one for which the arrest complained of was made, but associated with it, may be pleaded not by way of justification but by way of mitigation of damages.⁴⁷

Absence of malice. Defendant, although he has been guilty of causing the illegal imprisonment of plaintiff, may allege and prove in mitigation of damages facts tending to show that what he did

32. Ill.—Markey v. Griffin, 109 Ill. App. 212.

33. Ala.—Smith v. Roebuck, 46 So. 455, 155 Ala. 395.

Ill.—Davis v. Wilson, 65 Ill. 525.

Ind.—Caldwell v. Kenworthy, 31 Ind. 238.

25 C.J. p 536 note 63.

34. Ill.—Kraft v. Porter, 76 Ill.App. 328.

35. Ala.—Mitchell v. Gambill, 37 So. 402, 140 Ala. 545.

Mich.—White v. McQueen, 55 N.W. 843, 96 Mich. 249.

Mo.—Engelbrecht v. Roworth, 157 S.W.2d 242, 236 Mo.App. 459.

N.Y.—Brown v. Chadsey, 39 Barb. 253.

La Curto v. Brooklyn Nat. League Baseball Club, Inc., 160 N.Y.S.2d 499, 6 Misc.2d 637.

25 C.J. p 536 note 65.

36. Tex.—Boynton v. Tidwell, 19 Tex. 118.

25 C.J. p 536 note 66.

36.5 Factual statement of a reasonable and probable cause to believe that a crime was committed is necessary.

N.Y.—Rifkin v. City of New York, 176 N.Y.S.2d 716, 12 Misc.2d 367.

37. Ala.—Gambill v. Cannon, 51 So. 755, 165 Ala. 570.

38. Ga.—Ocean SS. Co. v. Williams, 69 Ga. 251.

Savannah Electric Co. v. Lowe, 108 S.E. 313, 27 Ga.App. 350.

39. Ga.—Savannah Electric Co. v. Lowe, supra.

40. Ga.—Ocean SS. Co. v. Williams, 69 Ga. 251.

41. Ga.—Ocean SS. Co. v. Williams, supra.

Burden of proving justification see infra § 55.

42. N.Y.—Sanders v. Rolnick, 67 N.

Y.S.2d 652, 188 Misc. 627, affirmed 71 N.Y.S.2d 896, 272 App.Div. 803.

Beckett v. Lawrence, 7 Abb.Pr. N.S., 403.

Tex.—Newburn v. Durham, 32 S.W. 112, 10 Tex.Civ.App. 655.

25 C.J. p 537 note 77.

43. N.Y.—Foland v. Johnson, 16 Abb.Pr. 235.

44. Tex.—Newburn v. Durham, 32 S.W. 112, 10 Tex.Civ.App. 655.

45. N.Y.—Jones v. Pickard, 166 N.Y.S. 721, 101 Misc. 117.

46. N.Y.—MacDonnell v. McConville, 132 N.Y.S. 1085, 148 App.Div. 49, affirmed 103 N.E. 1126, 210 N.Y. 529.

Jones v. Pickard, 166 N.Y.S. 721, 101 Misc. 117.

47. W.Va.—Comisky v. Norfolk & W. R. Co., 90 S.E. 385, 79 W.Va. 148, L.R.A.1917D 220.

was done without malice.⁴⁸ However, if defendant denies malice, he must found his denial on some fact which will explain it.⁴⁹

Where exemplary damages are not claimed, allegations that defendant acted on advice of counsel are properly stricken out.⁵⁰

§ 53. Replication or Reply

General rules relating to replications or replies usually apply in actions for false imprisonment.

General rules governing replications or replies ordinarily apply in actions for false imprisonment.⁵¹ A replication to a plea of judicial authority to make the arrest is demurrable if it fails sufficiently to allege facts destroying the validity of such authority.⁵² A replication to the plea of justification which denies that the justification claimed by defendant covers all the trespasses set forth in the declaration is substantially a traverse in the form of a declaration, and is demurrable.⁵³ A replication to a plea setting up a warrant as justification, which avers that defendant retained the warrant until too late to reach the place at which the court was being held until after its adjournment, is bad unless it sets up such facts as would render defendant liable for abuse of process under a new assignment.⁵⁴

§ 54. Issues, Proof, and Variance

a. Issues

b. What must be proved

- c. Evidence admissible under pleadings
- d. Variance

a. Issues

The issues in an action for false imprisonment are confined to those raised by the pleadings. A general denial raises the whole issue on the complaint, but affirmative defenses must be specially pleaded.

The issues in an action for false imprisonment are confined to those raised by the pleadings.⁵⁵ No issue is raised if there is no question about a fact which is pleaded and admitted in evidence;^{55.5} but a claim for punitive or exemplary damages is properly in the case, although not explicitly pleaded, where the complaint alleges willful, malicious, and wrongful imprisonment.^{55.10} In the absence of such allegations^{55.15} or of setting forth facts from which such elements may be inferred,^{55.20} no question of exemplary damages is involved in the case.

Defendant's general denial in a false imprisonment action raises the whole issue on the complaint, including the force or lack of force used in effecting the restraint and the general circumstances;⁵⁶ but where the general denial is followed by special pleas which are a proper part of the statement of the defense, such pleas do not broaden the issues or the theory of recovery.^{56.5}

A general denial does not raise special defenses and some authorities regard justification as new matter which must be specially pleaded and as unavailable under the general issue.⁵⁷ The general

48. N.Y.—Marks v. Townsend, 97 N. Y. 590—Bradner v. Faulkner, 93 N. Y. 515.

49. N.Y.—Jones v. Pickard, 166 N.Y. S. 721, 101 Misc. 117.
25 C.J. p 537 note 85.

50. Tex.—Texas Midland R. Co. v. Dean, Civ.App., 82 S.W. 524, reversed on other grounds 85 S.W. 1135, 98 Tex. 517, 70 L.R.A. 943.
Effect of advice of counsel see supra § 7.

51. Claiming privilege from arrest
Where a plea in an action for false imprisonment sets up an arrest on an execution, plaintiff must, if she desires to take advantage of a privilege from arrest accorded to all females in suits founded on contract, set up the facts by reply.
Ohio.—O'Boyle v. Brown, Wright 465.

52. N.J.—Booth v. Kurrus, 26 A. 1013, 55 N.J.Law 370.
25 C.J. p 537 note 87.

53. Vt.—Kent v. Miles, 27 A. 194, 65 Vt. 582.

54. Vt.—Kent v. Miles, supra.

55. Ky.—Chesapeake & Ohio Ry. Co.

v. Welch, 103 S.W.2d 698, 268 Ky. 93.

Prior detention not in issue

A count of declaration for false arrest and imprisonment by police officer at defendant's direction on charge of stealing from defendant's store did not cover plaintiff's detention by defendant's agent before police officer's arrival.

Mass.—Pilos v. First Nat. Stores, 66 N.E.2d 576, 319 Mass. 475.

Delay in bringing plaintiff before magistrate

On appeal from judgment for false imprisonment in favor of person who had been arrested and jailed for train robbery by special railroad officers without a warrant, failure of officers to carry plaintiff forthwith before most convenient magistrate of county in which he was arrested, which was not mentioned in petition or made ground for recovery, would be eliminated from case.

Ky.—Chesapeake & Ohio Ry. Co. v. Welch, 103 S.W.2d 698, 268 Ky. 92.

55.5 Special officer

Where it appeared in evidence and

pleading, in action for false imprisonment, that the arresting defendant was commissioned as a special officer and plaintiff did not dispute this fact, no issue was raised.

Ga.—Atlantic Coast Line R. Co. v. Wegner, 83 S.E.2d 58, 90 Ga.App. 267.

55.10 N.Y.—Gill v. Montgomery Ward & Co., 129 N.Y.S.2d 288, 284 App.Div. 36.

55.15 Mont.—Cline v. Tait, 155 P.2d 752, 116 Mont. 571.

55.20 Mont.—Cline v. Tait, 129 P.2d 89, 113 Mont. 475.

56. N.Y.—East v. Brooklyn Heights R. Co., 101 N.Y.S. 364, 115 App.Div. 683.

25 C.J. p 535 note 47.

56.5 Mo.—White v. Thompson, App., 176 S.W.2d 53.

57. Cal.—Kaufman v. Brown, 209 P.2d 156, 93 C.A.2d 508.

Or.—Joseph v. Meier & Frank Co., 250 P. 739, 120 Or. 117.

25 C.J. p 534 note 39, p 535 note 41.

issue or general denial goes merely to the fact of an arrest or imprisonment and defendant's participation therein;⁵⁸ and, if defendant fails to plead justification for an alleged false imprisonment, the sole issue under the pleadings is whether plaintiff has in fact been falsely imprisoned and, if so, the amount of damages.⁵⁹

b. What Must Be Proved

Plaintiff must prove all of the essential allegations of his complaint, but ordinarily he need not prove matters which are not essential to the cause of action although, according to some authorities, he is obligated to prove an unnecessary allegation of malice or want of probable cause.

Plaintiff must prove every essential allegation of his complaint not admitted or deemed admitted by defendant.⁶⁰ Ordinarily he need not prove matters which are not essential to the cause of action,⁶¹ such as a conspiracy.^{61.5} In some jurisdictions it is sufficient to show that the imprisonment was unlawful.^{61.10} Where a complaint alleges conjunctively an unlawful arrest "and" imprisonment, it has been held that proof of both is essential to recovery.⁶²

Malice and want of probable cause. Malice and

want of probable cause usually are not essential elements of the cause of action for false imprisonment, as considered supra § 7, and according to some authorities an unnecessary allegation of malice or want of probable cause need not be proved by plaintiff.⁶³ Therefore, where plaintiff pleads malice as a basis for a recovery of exemplary damages, he need not prove the averment thereof in order to recover actual damages.⁶⁴ However, there is authority for the view that where a plaintiff unnecessarily alleges malice or want of probable cause in a false imprisonment action he must prove such allegation.⁶⁵

c. Evidence Admissible under Pleadings

Evidence should conform to the pleadings, and a plaintiff who has not pleaded special damage may not introduce evidence thereof. Under a general denial defendant may adduce evidence controverting the case made by plaintiff, but evidence of matters in confession and avoidance is ordinarily inadmissible unless specially pleaded.

As a general rule the proof, as in actions generally, considered in Pleading §§ 524-530, must correspond with, and be confined to, the issues raised by the pleadings.⁶⁶ If defendant admits the

Admissibility of evidence as to justification under general denial see infra subdivision c of this section.

58. N.Y.—Brown v. Chadsey, 39 Barb. 253.

59. Or.—Brown v. Meier & Frank Co., 86 P.2d 79, 160 Or. 608.

60. Ala.—Schillaci v. Curry, 195 So. 565, 29 Ala.App. 328.
Burden of proof see infra § 55.

61. Ky.—Cox v. Perkins, 185 S.W.2d 954, 299 Ky. 470, 173 A.L.R. 797.
Tex.—S. H. Kress & Co. v. Rust, Civ. App., 97 S.W.2d 997, affirmed 120 S.W.2d 425, 132 Tex. 89.
25 C.J. p 538 note 3 [b].

Allegations of indecent proposals and assaults while plaintiff was under restraint need not be proved to maintain action for false imprisonment.

Mass.—Cieplinski v. Severn, 168 N.E. 722, 269 Mass. 261.

Termination of proceeding in which plaintiff arrested

Customer was not precluded from recovering from store owner for false arrest and imprisonment on charge of theft on ground that no right of action accrued until customer had been legally acquitted of charge, or prosecution terminated by court order of dismissal, where case presented in pleadings was for false imprisonment which did not require such showing, and proof showed that whole proceedings taken

against customer were terminated before suit was filed.

Tex.—S. H. Kress & Co. v. Rust, Civ. App., 97 S.W.2d 997, affirmed 120 S.W.2d 425, 132 Tex. 89.

61.5 Cal.—Oppenheimer v. City of Los Angeles, 232 P.2d 30, 104 C.A. 2d 551.

61.10 Ga.—Smith v. Craft, 107 S.E. 2d 255, 99 Ga.App. 19.

62. Ala.—Davis & Allcott Co. v. Boozer, 110 So. 28, 215 Ala. 116.

63. Ill.—Hassenauer v. F. W. Woolworth Co., 41 N.E.2d 979, 314 Ill. App. 569.

N.D.—Haggard v. First Nat. Bank of Mandan, 8 N.W.2d 5, 72 N.D. 434.

Ohio.—Nappi v. Wilson, 155 N.E. 151, 22 Ohio App. 520.

Okl.—Clements v. Canon, 40 P.2d 640, 170 Okl. 340.
25 C.J. p 532 note 91.

64. Mo.—Carter v. Casey, App., 153 S.W.2d 744—Vaughn v. Hines, 230 S.W. 379, 206 Mo.App. 425—Hill v. S. S. Kresge Co., 217 S.W. 997, 202 Mo.App. 385.

65. Ala.—Wilson v. Orr, 97 So. 133, 210 Ala. 93—Murphy v. McAdory, 62 So. 706, 183 Ala. 209, 212.

Miss.—Simonton v. Moore, 38 So.2d 94, 204 Miss. 760.
25 C.J. p 532 notes 89, 90, p 538 note 7.

66. U.S.—Patrick v. Esso Standard Oil Co., D.C.N.J., 156 F.Supp. 336.
Ala.—Wilson v. Orr, 97 So. 133, 210 Ala. 93.

Mo.—Winegar v. Chicago, B. & Q. R. Co., App., 163 S.W.2d 357—Comstock v. Wells, App., 259 S.W. 500.
S.D.—Culver v. Burnside, 179 N.W. 490, 43 S.D. 398.

Character

(1) Where plaintiff in action for false imprisonment alleged that because thereof he had suffered great humiliation and shame, that he was of a sensitive nature and highly prized the good name he had borne among his acquaintances, and the defendants generally denied such allegations, nature of the suit was such that plaintiff's character was at issue and plaintiff was entitled to offer evidence of his good character.

Tex.—Fort Worth Hotel Co. v. Waggonman, Civ.App., 126 S.W.2d 578, error dismissed, judgment correct.

(2) Complaint for false arrest and imprisonment alleging pain of body and mind, humiliation and embarrassment as damages, and general denial, made humiliation, embarrassment and pain of mind one of the issues, and it thereby became permissible for defendants to prove that these elements were never actually suffered or that his suffering was not as severe as plaintiff claimed, and hence plaintiff's character became relevant.

S.D.—Bean v. Best, 93 N.W.2d 403.

Responsibility and damage

In an action for false imprisonment against a corporation tried on

arrest but fails to plead any justification, plaintiff is not entitled to have the evidence limited to the amount of damages where there are reasonable grounds to believe that he has violated the law.^{66.5}

Under the general issue or a general denial, defendant may adduce facts to controvert and disprove the case made by plaintiff,⁶⁷ but he is limited to such evidence as directly controverts the fact of his committing the acts complained of,⁶⁸ such as that he did not cause⁶⁹ or participate in⁷⁰ the imprisonment. The defendant may show under the general denial that he is not liable for the acts of the arresting officers under the rule of respondeat superior, unless such nonliability rests on foreign law, in which event the foreign law should be pleaded.^{70.5}

Evidence of matter in confession and avoidance is ordinarily inadmissible under the general issue or general denial but should be specially pleaded,⁷¹ although offered for the purpose of showing that defendant was not guilty of the trespass.⁷² Some

authorities permit defendant to offer evidence of justification under the general issue,⁷³ but others hold that such matter must be specially pleaded,⁷⁴ as, for instance, a claim of legal authority, such as restraint on lawful process⁷⁵ or circumstances authorizing an arrest without a warrant,⁷⁶ such as probable cause.⁷⁷ It has been held that one seeking to offer the defense that an agent committing false imprisonment was acting beyond the scope of his authority should plead such want of authority.⁷⁸

While there is authority holding that where plaintiff has averred lack of justification defendant relying on justification must nevertheless plead it specially,⁷⁹ it has also been held that where an issue is directly tendered by plaintiff, under a general issue defendant may introduce evidence to disprove plaintiff's averments, although it would under a different state of the pleadings amount to matter in justification.⁸⁰ This principle is applicable whether the matter in justification is shown by the plaintiff's own proof^{80.5} or by his pleading.^{80.10} It follows

a count alleging that defendant's agent or servant, while acting within the line and scope of his employment, wrongfully caused plaintiff's arrest, the only proper inquiries were as to defendant's responsibility for plaintiff's arrest, and, if responsible, the amount of damages to be awarded. Ala.—Standard Oil Co. v. Humphries, 96 So. 629, 209 Ala. 493.

66.5 Ariz.—Holmes v. Nester, 306 P. 2d 290, 81 Ariz. 372, 62 A.L.R.2d 1322.

67. Ariz.—Adair v. Williams, 210 P. 853, 24 Ariz. 422, 26 A.L.R. 278.

68. Ala.—Rhodes v. McWilson, 69 So. 69, 192 Ala. 675.

Ga.—Ocean S. S. Co. v. Williams, 69 Ga. 251.

69. Ala.—Bank of Cottonwood v. Hood, 149 So. 676, 227 Ala. 237—Standard Oil Co. v. Davis, 94 So. 754, 208 Ala. 565.
25 C.J. p 534 note 35.

70. Ill.—Feld v. Loftis, 140 Ill.App. 530.

N.Y.—Brown v. Chadsey, 39 Barb. 253.

70.5 N.Y.—Marks v. Baltimore & O. R. Co., 131 N.Y.S.2d 325, 284 App. Div. 251.

71. N.H.—Noyes v. Edgerly, 53 A. 311, 71 N.H. 500.

N.Y.—Gill v. Montgomery Ward & Co., 129 N.Y.S.2d 288, 284 App.Div. 36.

72. N.Y.—Coats v. Darby, 2 N.Y. 517.

25 C.J. p 535 note 40.

73. Tenn.—Travis v. Bacherig, 7 Tenn.App. 638.

74. Mo.—Corpus Juris cited in Greaves v. Kansas City Junior Orpheum Co., App., 80 S.W.2d 228, 236—Comstock v. Wells, App., 259 S.W. 500.

Or.—Brown v. Meier & Frank Co., 86 P.2d 79, 160 Or. 608—Christ v. McDonald, 52 P.2d 655, 152 Or. 494—Corpus Juris cited in Joseph v. Meier & Frank Co., 250 P. 739, 740, 120 Or. 117—Corpus Juris quoted in Knight v. Baker, 244 P. 543, 544, 117 Or. 492.

S.D.—Culver v. Burnside, 179 N.W. 490, 43 S.D. 398.

25 C.J. p 535 note 41.

Action against carrier

In an action against a carrier for false imprisonment of a passenger arrested at the instance of a conductor, where the only answer was a general denial, defendant's evidence, tending to justify the conductor's act, was properly excluded. Mo.—Vaughn v. Hines, 230 S.W. 379, 206 Mo.App. 425.

75. Md.—Edger v. Burke, 54 A. 986, 96 Md. 715.

Utah.—Yost v. Tracy, 45 P. 346, 13 Utah 431.

Vt.—Allen v. Parkhurst, 10 Vt. 557.
25 C.J. p 535 notes 42, 43.

76. Minn.—Evans v. Jorgenson, 234 N.W. 292, 182 Minn. 282.

Mo.—Corpus Juris cited in Burton v. Drennan, 58 S.W.2d 740, 741, 332 Mo. 512.

Engelbrecht v. Roworth, App., 157 S.W.2d 242.

S.D.—Culver v. Burnside, 179 N.W. 490, 43 S.D. 398—Raymond v. Corrigan, 159 N.W. 131, 37 S.D. 609.

77. Mo.—Thompson v. Buchholz, 81 S.W. 490, 107 Mo.App. 121.
25 C.J. p 535 note 45.

Probable cause as affording defense to action for false imprisonment see supra §§ 7 b, 25.

Probable cause for belief in commission of felony

Where a sheriff was sued for false imprisonment in detaining plaintiff without a warrant, he could not set up the defense that he had had probable cause to believe plaintiff guilty of a felony, where he had failed to plead such probable cause.

Mich.—White v. McQueen, 55 N.W. 843, 96 Mich. 249.

78. Mich.—Wachsmuth v. Merchants' Nat. Bank, 56 N.W. 9, 96 Mich. 426, 21 L.R.A. 278.

79. Or.—Joseph v. Meier & Frank Co., 250 P. 739, 120 Or. 117.

80. Ala.—Strain v. Irwin, 70 So. 734, 195 Ala. 414.

Tex.—Boynton v. Tidwell, 19 Tex. 118.

80.5 U.S.—Carr v. National Discount Corp., C.A.Mich., 172 F.2d 899, certiorari denied 70 S.Ct. 59, 338 U.S. 817, 94 L.Ed. 495.

80.10 Allegations held not to justify

Even if allegations in complaint that two days after his arrest plaintiff was charged under city ordinance, that he had posted bail, and that he did not appear on the charge and forfeited his bail amounted to an allegation that plaintiff had pleaded guilty to charge, allegations would not constitute a defense or justification as a matter of law, to charge of false arrest.

that evidence of lawful arrest for probable cause is admissible under the general issue where the complaint charged an unlawful arrest and imprisonment,⁸¹ that defendants are entitled to introduce a warrant where the petition alleges that there was no affidavit or warrant under which defendant acted,⁸² and that where the illegality of an arrest is alleged, its legality may be proved.⁸³

Where plaintiff alleges malice and want of probable cause, as in support of a claim for exemplary damages, it has been held that defendant may under the general issue adduce facts to controvert such allegations;⁸⁴ but there is also authority to the contrary.^{84.5}

Evidence of damages. A plaintiff who has not pleaded special damages may not introduce evidence thereof.⁸⁵ Although the pleading may not specifically mention the particular item, the language may be broad enough to permit evidence of special damage.⁸⁶ Matters tending to disprove compensatory damages, whether general or special, may be shown by defendant although not set up in the answer, it being sufficient that the answer puts in issue the existence of the cause of action asserted.^{86.5}

Statutes relating to public officers. By statute it has sometimes been provided that to prevent vexatious suits against justices of the peace, bailiffs,

constables, and other officers for acts done by them in fulfillment of and by virtue of the duties of their office, they may plead the general issue and under it give in evidence special matter of defense.⁸⁷

d. Variance

A material variance between the pleading and proof is fatal to recovery, but an immaterial variance is harmless.

In accordance with the general principles discussed in Pleading, §§ 531-546, ordinarily a material variance between the pleading and proof is fatal to recovery⁸⁸ but an immaterial variance is harmless.⁸⁹ An allegation that a false imprisonment was committed by defendants in person may be supported by evidence that the acts were done by their agents,⁹⁰ and an allegation of plaintiff's imprisonment without warrant by defendants may be supported by proof of his arrest by an officer under the direction of defendants.⁹¹

Since every false imprisonment includes at least a technical assault, as shown supra § 10, evidence of an assault in addition to an imprisonment or restraint does not constitute a variance;⁹² but a charge of false imprisonment may not be sustained by proof merely of an assault without a showing of some detention or restraint.⁹³

Cal.—Collins v. Owens, 176 P.2d 372, 77 C.A.2d 713.

81. Ala.—Hill v. Wyrosdick, 113 So. 49, 216 Ala. 235.

82. Tex.—Boynton v. Tidwell, 19 Tex. 118.

83. Ala.—Strain v. Irwin, 70 So. 734, 195 Ala. 414.

Mass.—Bassett v. Porter, 10 Cush. 418.

25 C.J. p 535 note 52.

84. Ariz.—Adair v. Williams, 210 P. 853, 24 Ariz. 422, 26 A.L.R. 278.

25 C.J. p 535 note 51, p 537 note 80.

84.5 N.Y.—Gill v. Montgomery Ward & Co., 129 N.Y.S.2d 288, 284 App. Div. 36.

Prior unsolved thefts

Evidence of prior losses of property and of attempts to ascertain who had been stealing was improperly admitted, since defendant, in order to be entitled to show circumstances evidencing good faith in mitigation of damages, was required to have affirmatively pleaded such circumstances.

N.Y.—Gill v. Montgomery Ward & Co., supra.

85. Ala.—Walling v. Fields, 96 So. 471, 209 Ala. 389.

Pleading special damages see supra § 51 b (5).

Injury to health

In an action for false imprisonment and malicious prosecution where the complaint did not claim special damages for plaintiff's being cold in jail, and injury to his health thereby, evidence thereof was inadmissible.

Ala.—Walling v. Fields, supra.

Publication of arrest

In an action for unlawful arrest where the fact of publication of the arrest was not pleaded, proof of publication in newspapers was inadmissible in support of a claim of special damages.

Ala.—Wilson v. Orr, 97 So. 133, 210 Ala. 93.

86. Iowa.—Young v. Gornley, 94 N. W. 922, 120 Iowa 372.

25 C.J. p 534 note 30.

86.5 N.Y.—Sanders v. Rolnick, 67 N. Y.S.2d 652, 188 Misc. 627, affirmed 71 N.Y.S.2d 896, 272 App.Div. 803.

87. U.S.—Ingram v. Butt, D.C., 12 F.Cas.No.7,047, 4 Cranch C.C. 701. S.C.—Isaacs v. Camplin, 17 S.C.L. 411.

88. D.C.—Palais Royal v. Orton, 65 F.2d 199, 62 App.D.C. 111.

89. Cal.—Sebring v. Harris, 128 P. 7, 20 C.A. 56.

25 C.J. p 538 note 3 [a].

Proof as to "constable" under allegation of "deputy sheriff"

Proofs that arresting officer was constable was not fatal variance from complaint in false imprisonment action designating him as deputy sheriff.

Minn.—Evans v. Jorgenson, 234 N.W. 292, 182 Minn. 282.

90. Cal.—Corpus Juris quoted in McAlmond v. Trippel, 269 P. 937, 938, 93 C.A. 584.

Ill.—Vrchotka v. Rothschild, 100 Ill. App. 268.

91. Ala.—Southern Ry. Co. v. Beaty, 103 So. 658, 212 Ala. 608.

Mode of arrest

In action against railway for false imprisonment of plaintiff through its agents, where complaint alleged that agents "imprisoned" plaintiff without a warrant, whether proof showed that plaintiff was arrested by agent personally, or by an officer under his direction, there could be no variance based on mode of arrest.

Ala.—Southern Ry. Co. v. Beaty, supra.

92. Ky.—Great Atlantic & Pacific Tea Co. v. Smith, 136 S.W.2d 759, 281 Ky. 583.

93. D.C.—Palais Royal v. Orton, 65 F.2d 199, 62 App.D.C. 111.

Where damages for malicious prosecution only are sought and plaintiff fails to prove his case he may not recover although defendant's act may lay the basis for an action alleging false imprisonment or civil liability.⁹⁴ A complaint which alleges a wrongful and unlawful imprisonment in a civil action is not supported by evidence of a lawful arrest which afterward became unlawful by reason of a refusal to receive bail.⁹⁵ A declaration against one is not supported by proof against another, there being no charge of conspiracy or that the persons are joint tort-feasors;⁹⁶ but where the complaint alleges a cause of action against defendants on the theory that they were joint tort-feasors, it is not necessary to allege conspiracy, since it can be proved without such an averment, and, if averred, need not be proved, because the gist of the action is not the conspiracy but the wrong done, which is the false imprisonment.^{96.5}

§ 55. Presumptions and Burden of Proof

Ordinarily plaintiff must prove all essential allegations of his complaint, including his unlawful arrest and imprisonment and defendant's connection therewith; and

the burden of proving justification rests on defendant unless the facts indicate legal authority for the detention, in which case plaintiff is required to prove the unlawfulness of the imprisonment.

Plaintiff must establish affirmatively and sufficiently⁹⁷ his case,^{97.5} or every essential allegation of his complaint.⁹⁸ Thus, the burden rests on plaintiff to prove that he was falsely arrested and imprisoned,⁹⁹ or, if the arrest was legal, that the circumstances of his detention or imprisonment were such as to constitute false imprisonment.^{99.5} He has the burden to prove facts and circumstances amounting to an unlawful restraint of liberty.^{99.10} Where plaintiff has alleged that defendant unlawfully caused his arrest and imprisonment on a specific charge, he has the burden to show that the arrest and imprisonment were on the charge specified.^{99.15}

Plaintiff also has the burden to establish that his arrest and imprisonment were by defendant, or on his authorization or instigation.¹ He has the burden of showing facts establishing the liability of defendant for the acts of an agent, such as the existence of express or implied authority² or that the act was

94. Cal.—Howe v. Owsley, 11 P.2d 663, 123 C.A. 550.

95. Or.—Neimitz v. Conrad, 29 P. 548, 22 Or. 164.

96. U.S.—Raphaer v. Leader, D.C. Ga., 203 F. 184.

96.5 Cal.—Peterson v. Cruickshank, 300 P.2d 915, 144 C.A.2d 148.

97. Cal.—Corpus Juris Secundum cited in Kaufman v. Brown, 209 P. 2d 156, 158, 93 C.A.2d 508.

Neb.—Dillon v. Sears-Roeback Co., 249 N.W. 604, 125 Neb. 269, reversed on other grounds 253 N.W. 331, 126 Neb. 357.

Utah.—Johnson v. Leigh, 279 P. 501, 74 Utah 286.

25 C.J. p 538 note 9.

97.5 Mo.—Royal v. Thompson, 212 S.W.2d 921.

98. Ala.—Schillaci v. Curry, 195 So. 565, 29 Ala.App. 328.

Wis.—Bursack v. Davis, 225 N.W. 738, 199 Wis. 115.

25 C.J. p 538 note 10.

99. Ky.—F. S. Marshall Co. v. Bra-shear, 37 S.W.2d 15, 238 Ky. 157.

Mo.—Frank v. Wabash R. Co., 295 S. W.2d 16.

Neb.—Jonson v. Heller, 6 N.W.2d 359, 142 Neb. 380.

25 C.J. p 538 note 11.

Time of detention

In action for false imprisonment of customer of store, who, when she was leaving store, was told by manager that bag containing articles bought elsewhere would have to be searched, plaintiff customer would

have burden of proving that time consumed in investigating her conduct was unreasonable if time became material.

Ohio.—Lester v. Albers Super Markets, Inc., 114 N.E.2d 529, 94 Ohio App. 313.

99.5 Denial of bail and delay in arraignment

Where arrest was legal, plaintiff has burden to establish that arresting officer had authority to take bail, that bail was offered and refused, and that officer failed to carry plaintiff immediately before nearest magistrate for examination.

Tex.—Ellis v. Glasgow, Civ.App., 168 S.W.2d 946.

99.10 Neb.—Barton v. Wilson, 96 N. W.2d 270, 168 Neb. 480.

99.15 Ala.—Crescent Amusement Co. v. Scott, 40 So.2d 882, 34 Ala.App. 335, certiorari denied 40 So.2d 886, 252 Ala. 296.

1. U.S.—Burlington Transp. Co. v. Josephson, C.C.A.S.D., 153 F.2d 372.

Ala.—Crescent Amusement Co. v. Scott, 40 So.2d 882, 34 Ala.App. 335, certiorari denied 40 So.2d 886, 252 Ala. 296.

Kan.—Hammargren v. Montgomery Ward & Co., 241 P.2d 1192, 172 Kan. 484.

Mo.—Checkeye v. John Bettendorf Market, Inc., App., 257 S.W.2d 202 —Hooock v. S. S. Kresge Co., App., 222 S.W.2d 568, affirmed 230 S.W. 2d 758.

Neb.—Jonson v. Heller, 6 N.W.2d 359, 142 Neb. 380.

N.Y.—Henebery v. Mahoney, 63 N.Y. S.2d 862.

Tex.—Citizens Hotel Co. v. Foley, Civ.App., 131 S.W.2d 402, error dismissed, judgment correct.

25 C.J. p 538 note 12.

Authorization of instigation sufficient

In action for false arrest or imprisonment, it is not essential that plaintiff prove that defendant actually ordered or directed his arrest and imprisonment, but he may make his case by showing that defendant merely instigated it.

Mo.—Jarrett v. St. Francois County Finance Co., App., 185 S.W.2d 855.

Causing arrest

Plaintiff, alleging defendant's agent caused him to be arrested and imprisoned on larceny charge, must prove such agent made such charge. Ala.—U. S. Cast Iron Pipe & Foundry Co. v. Henderson, 116 So. 915, 22 Ala.App. 448, certiorari denied 116 So. 917, 217 Ala. 520, and followed in U. S. Cast Iron Pipe & Foundry Co. v. Williams, 117 So. 927, 22 Ala.App. 695.

2. Mass.—Witham v. Gregory & Read Co., 137 N.E. 752, 243 Mass. 595.

Pa.—Bunting v. Goldstein, 129 A. 99, 283 Pa. 356.

25 C.J. p 538 note 14.

Position of assistant store manager is of sufficient importance to raise inference that he had authority to protect his employer's property against theft and acted within line of his duty and scope of his employ-

within the scope of the agent's authority.³ Where the arrest is made after the supposed crime has been committed, and not for the protection of the property or interests of the employer, the employee is presumed to have acted on his own account for the vindication of justice.^{3.5}

It has been stated that there is a presumption in favor of the legality of an arrest,^{3.10} that in a case of false imprisonment plaintiff must show, in addition to the arrest, that it was unlawful,^{3.15} and that where plaintiff was arrested by a policeman without a warrant the burden of proof on the issue of probable cause for arrest is on the plaintiff.^{3.20} As a general rule, however, any restraint by fear or force prima facie is unlawful and constitutes false imprisonment, as discussed infra § 57 a, and arrest

without a warrant establishes a prima facie case of false imprisonment.^{3.25} It is only necessary for plaintiff to show that he has been imprisoned and restrained of his liberty,^{3.30} and the imprisonment having been established, the law presumes that it was unlawful,⁴ where nothing more appears,^{4.5} or where there is no evidence by defendant in justification of the arrest.^{4.10} An allegation that plaintiff was arrested or imprisoned without process raises a presumption of unlawful arrest and shifts to defendant the burden to justify it by proving that it was lawful.^{4.15}

Where a prima facie case of unlawful arrest or false imprisonment has been established, the burden then rests on defendant of proving justification,⁵

ment in causing arrest of one suspected of stealing such property. U.S.—Montgomery Ward & Co. v. Medline, C.C.A.N.C., 104 F.2d 485.

Presumption of action in official capacity

(1) It being presumed that member of railroad company's police force, in arresting plaintiff for embezzlement and forgery not connected with railroad, was not acting on behalf of railroad, but as public police officer, burden was on plaintiff to prove that company either expressly authorized or subsequently ratified such act.

Pa.—Bunting v. Pennsylvania R. Co., 130 A. 306, 284 Pa. 117.

(2) The rule that, where agent may act in either of two capacities, as policeman for state or as servant for master, it will be presumed that he acted in former capacity, was inapplicable to agents not shown to have been public officers.

Ala.—Southern Ry. Co. v. Beaty, 103 So. 658, 212 Ala. 608.

(3) The rule was also held inapplicable where the agent was one having general duties with reference to the conduct of the business of defendant and had not acted as a police officer for some time in the past.

Cal.—Korkman v. Hanlon Dry Dock & Shipbuilding Co., 199 P. 880, 53 C.A. 147.

3. Mass.—Witham v. Gregory & Read Co., 137 N.E. 752, 243 Mass. 595.

Pa.—Sebastianelli v. Cleland Simpson Co., 31 A.2d 570, 152 Pa.Super. 203.

25 C.J. p 539 note 15.

3.5 Va.—Manuel v. Cassada, 59 S.E.

2d 47, 190 Va. 906, 18 A.L.R.2d 395.

3.10 Ky.—Rosenberg v. Bax, 258 S.

W.2d 458.

3.15 U.S.—Carr v. National Discount Corp., C.A.Mich., 172 F.2d 899, certiorari denied 70 S.Ct. 59, 338 U.S. 817, 94 L.Ed. 495.

3.20 Neb.—Barton v. Wilson, 96 N. W.2d 270, 168 Neb. 480.

3.25 Ariz.—Whitlock v. Boyer, 271

P.2d 484, 77 Ariz. 334.

Cal.—Hughes v. Oreb, 228 P.2d 550, 36 C.2d 854.

Onick v. Long, 316 P.2d 427, 154 C.A.2d 381.

Mo.—Frank v. Wabash R. Co., 295 S. W.2d 16.

State ex rel. Patterson v. Collins, App., 172 S.W.2d 284—Engelbrecht v. Roworth, 157 S.W.2d 242, 236 Mo.App. 459.

3.30 Mich.—Donovan v. Guy, 80 N. W.2d 190, 347 Mich. 457—Barker v. Anderson, 45 N.W. 1108, 81 Mich. 508.

4. Mich.—Donovan v. Guy, 80 N.W. 2d 190, 347 Mich. 457.

N.Y.—Cicurel v. Mollet, 149 N.Y.S. 2d 397, 1 A.D.2d 239, affirmed 153 N.Y.S.2d 60, 1 N.Y.2d 797, 135 N. E.2d 594—Bonnau v. State, 104 N. Y.S.2d 364, 278 App.Div. 181, affirmed 103 N.E.2d 340, 303 N.Y. 721.

Okl.—Alsups v. Skaggs Drug Center, 223 P.2d 530, 203 Okl. 525.

Or.—Brown v. Meier & Frank Co., 86 P.2d 79, 160 Or. 608—Knight v. Baker, 244 P. 543, 117 Or. 492.

Tex.—Hicks v. Matthews, Civ.App., 261 S.W.2d 207, reversed on other grounds 266 S.W.2d 846, 153 Tex. 177—**Corpus Juris Secundum cited in Price v. Durdin**, 207 S.W.2d 228, 230.

Wash.—**Corpus Juris** quoted in Larson v. Erickson, 252 P. 922, 142 Wash. 236.

25 C.J. p 539 note 16.

Confinement in county jail

In action for false imprisonment, committed by defendant's servants, servants are conclusively presumed to have known that under the circumstances law prohibited confinement of plaintiff in county jail without intervention of magistrate.

Ala.—Caudle v. Sears, Roebuck & Co., 182 So. 461, 236 Ala. 37.

Failure to appeal

Imprisonment resulting from order adjudging plaintiff guilty of contempt for failure to vacate premises purchased by defendant in partition sale will be presumed to have been under legal process, where plaintiff did not appeal from order.

Ill.—Shemaitis v. Froemke, 138 N.E. 2d 839, 12 Ill.App.2d 231.

4.5 Mo.—State ex rel. Patterson v. Collins, App., 172 S.W.2d 284.

Procedural presumption

The presumption that an arrest without warrant is unlawful is a "procedural presumption" which disappears when the evidence discloses the facts.

Mo.—Engelbrecht v. Roworth, 157 S. W.2d 242, 236 Mo.App. 459.

4.10 Mo.—Frank v. Wabash R. Co., 295 S.W.2d 16.

4.15 Cal.—Wilson v. Loustalot, 193 P.2d 127, 85 C.A.2d 316.

Presumption falls where plaintiff introduces evidence inconsistent with it, or where the evidence introduced by the opposing parties with respect to the lawfulness of the arrest is conflicting.

Cal.—Wilson v. Loustalot, supra.

5. U.S.—Director General of Railroads v. Kastenbaum, N.Y., 44 S. Ct. 52, 263 U.S. 25, 68 L.Ed. 146. Anderson v. Sager, C.A.S.D., 173 F.2d 794.

Watkins v. Oaklawn Jockey Club, D.C.Ark., 86 F.Supp. 1006, affirmed 183 F.2d 440.

Ala.—Caudle v. Sears, Roebuck & Co., 182 So. 461, 236 Ala. 37—Bright v. Sawyer, 159 So. 211, 229 Ala. 657.

Ariz.—**Corpus Juris Secundum cited in Whitlock v. Boyer**, 271 P.2d 484, 487, 77 Ariz. 334.

Ark.—Missouri Pac. R. Co. v. Yancey, 22 S.W.2d 408, 180 Ark. 684.

or lawful authority,^{5.5} or probable cause^{5.10} for the arrest, or reasonable ground for suspicion that plaintiff committed the crime.^{5.15} Thus, defendant has the burden of proving the existence of facts or circumstances authorizing an arrest made without a warrant.^{5.20} Before a private citizen can justify

Cal.—*Dragna v. White*, 289 P.2d 428, 45 C.2d 469—**Corpus Juris Secundum** cited in *Hughes v. Oreb*, 228 P.2d 550, 553, 36 C.2d 854.

Onick v. Long, 316 P.2d 427, 154 C.A.2d 381—*Coyne v. Nelson*, 237 P.2d 45, 107 C.A.2d 469—*Collins v. Jones*, 22 P.2d 39, 131 C.A. 747—*Mackie v. Ambassador Hotel & Investment Corporation*, 11 P.2d 3, 123 C.A. 215, followed in 11 P.2d 7, 123 C.A. 770.

D.C.—*Takahashi v. Hecht Co.*, 64 F.2d 710, 62 App.D.C. 72.

Fla.—*White v. Miami Home Milk Producers Ass'n*, 197 So. 125, 143 Fla. 518—*S. H. Kress & Co. v. Powell*, 180 So. 757, 132 Fla. 471.

Ga.—*Sharpe v. Lowe*, 106 S.E.2d 28, 214 Ga. 513.

Sheppard v. Hale, 197 S.E. 922, 58 Ga.App. 140—*Wyatt v. Baker*, 165 S.E. 133, 45 Ga.App. 448.

Iowa.—*Fox v. McCurnin*, 218 N.W. 499, 205 Iowa 752.

Ky.—*Wright & Taylor v. Leigh*, 16 S.W.2d 493, 229 Ky. 32.

Mass.—*Muniz v. Mehman*, 99 N.E.2d 37, 327 Mass. 353—*McDermott v. W. T. Grant Co.*, 49 N.E.2d 115, 313 Mass. 736—*Roseman v. Korb*, 40 N.E.2d 255, 311 Mass. 75—*Wax v. McGrath*, 151 N.E. 317, 255 Mass. 340.

Mich.—*Donovan v. Guy*, 80 N.W.2d 190, 347 Mich. 457.

Minn.—**Corpus Juris** cited in *Evans v. Jorgenson*, 234 N.W. 292, 293, 182 Minn. 282.

Miss.—*Howell v. Viener*, 176 So. 731, 179 Miss. 872—*Harris v. Sims*, 124 So. 325, 155 Miss. 207.

Mo.—*Frank v. Wabash R. Co.*, 295 S.W.2d 16.

State ex rel. *Patterson v. Collins*, App., 172 S.W.2d 284—*Engelbrecht v. Roworth*, 157 S.W.2d 242, 236 Mo.App. 459—*Oliver v. Kessler*, App., 95 S.W.2d 1226—*Adams v. St. Louis-San Francisco Ry. Co.*, App., 272 S.W. 984—*Comstock v. Wells*, App., 259 S.W. 500.

Mont.—*Harrer v. Montgomery Ward & Co.*, 221 P.2d 428, 124 Mont. 295.

N.H.—*Larrea v. First Nat. Stores*, 42 A.2d 288, 93 N.H. 375.

N.Y.—*Clark v. Nannery*, 54 N.E.2d 31, 292 N.Y. 105.

Cicurel v. Mollet, 149 N.Y.S.2d 397, 1 A.D.2d 239, affirmed 153 N.Y.S.2d 60, 1 N.Y.2d 797, 135 N.E.2d 594—*Bonnau v. State*, 104 N.Y.S.2d 364, 278 App.Div. 181, affirmed 103 N.E.2d 340, 303 N.Y. 721—*Freedman v. New York Soc. for Suppression of Vice*, 290 N.Y.S. 753, 248 App.Div. 517, affirmed 10 N.E.2d 550, 274 N.Y. 559.

Bass v. State, 92 N.Y.S.2d 42, 196 Misc. 177—*Francisco v. Little Falls*

Dairy Co., 296 N.Y.S. 956, 163 Misc. 165, 170, modified on other grounds 293 N.Y.S. 282, 249 App.Div. 922.

Ohio.—*Nappi v. Wilson*, 155 N.E. 151, 22 Ohio App. 520.

Okl.—*Alsup v. Skaggs Drug Center*, 223 P.2d 530, 203 Okl. 525.

Or.—*Christ v. McDonald*, 52 P.2d 655, 152 Or. 494.

Pa.—*Keidel v. Baltimore & O. R. Co.*, 126 A. 770, 281 Pa. 289.

Patton v. Vucinic, 167 A. 450, 109 Pa.Super. 530—*Baughn v. Benson & Fine*, 77 Pa.Super. 181—*Samuel v. Blackwell*, 76 Pa.Super. 540.

Long v. Great Atlantic & Pacific Tea Co., 29 Del.Co. 508.

S.D.—*Culver v. Burnside*, 179 N.W. 490, 43 S.D. 398.

Tex.—*Hicks v. Matthews*, Civ.App., 261 S.W.2d 207, reversed on other grounds 266 S.W.2d 846, 153 Tex. 177—*Foust v. Ford*, Civ.App., 209 S.W.2d 941—**Corpus Juris Secundum** cited in *Price v. Durdin*, Civ. App., 207 S.W.2d 228, 230—**Corpus Juris** cited in *Smith v. Burdett*, Civ.App., 114 S.W.2d 384, 385—*Alamo Downs, Inc. v. Briggs*, Civ. App., 106 S.W.2d 733, error dismissed—**Corpus Juris** cited in *Smith v. Bryson*, Civ.App., 33 S.W.2d 268, 271, error dismissed.

Wash.—**Corpus Juris** quoted in *Larson v. Erickson*, 252 P. 922, 142 Wash. 236.

25 C.J. p 539 note 17.

Arrest on reasonable information

Defendant has burden of proving that he acted on reasonable information in making the arrest and that following the arrest he took the plaintiff before a judge or magistrate with all the practicable speed and made complaint against him.

Ohio.—*Johnson v. Reddy*, 126 N.E.2d 911, 163 Ohio St. 347.

Ordinance authorizing arrest

(1) If there were a city ordinance authorizing arrest of plaintiffs under the circumstances, burden was on defendants of showing such fact by proper evidence, and in absence of such proof no such ordinance would be presumed to exist.

Tex.—*Castillo v. Canavati*, Civ.App., 152 S.W.2d 785, error refused.

(2) Plaintiff was not required to prove that city had not adopted an ordinance pursuant to statute granting municipalities power to establish rules authorizing arrest without warrant in specified instances, where both court and jury found on sufficient evidence that actual basis for such an arrest did not exist regardless of ordinance.

Tex.—*Price v. Durdin*, Civ.App., 207 S.W.2d 228.

5.5 Tex.—*Hicks v. Matthews*, Civ. App., 261 S.W.2d 207, reversed on other grounds 266 S.W.2d 846, 153 Tex. 177.

For arrest without warrant

Arresting officer has to establish necessary element of some offense committed by plaintiff for which his arrest without warrant would be sanctioned, and that such offense was committed under circumstances authorizing arrest without warrant or that some other fact situation authorizing arrest without warrant existed.

Tex.—*Hicks v. Matthews*, supra.

5.10 U.S.—*Carr v. National Discount Corp.*, C.A.Mich., 172 F.2d 899, certiorari denied 70 S.Ct. 59, 338 U.S. 817, 94 L.Ed. 495.

N.Y.—*Clark v. Nannery*, 54 N.E.2d 31, 292 N.Y. 105.

Vallon v. Ramage, 93 N.Y.S.2d 56, 196 Misc. 740.

Enos v. Panasci, 154 N.Y.S.2d 550.

Burden not on plaintiff

It is not necessary for a plaintiff claiming damages for false imprisonment to prove that there was no probable cause for his arrest, if he was arrested illegally.

Cal.—*Van Fleet v. West American Ins. Co.*, 42 P.2d 378, 5 C.A.2d 125, rehearing denied 43 P.2d 557, 5 C.A. 2d 125.

Ga.—*Atlantic Coast Line R. Co. v. Wegner*, 83 S.E.2d 58, 90 Ga.App. 267.

Mo.—*Teel v. May Department Stores Co.*, 155 S.W.2d 74, 137 A.L.R. 495, 348 Mo. 696.

5.15 N.Y.—*Vallon v. Ramage*, 93 N.Y.S.2d 56, 196 Misc. 740.

5.20 Ga.—*Duchess Chenilles, Inc. v. Masters*, 67 S.E.2d 600, 84 Ga.App. 822—*Vlass v. McCrary*, 5 S.E.2d 63, 60 Ga.App. 744—*Sheppard v. Hale*, 197 S.E. 922, 58 Ga.App. 140.

Ill.—*Levin v. Costello*, 214 Ill.App. 505.

Iowa.—*Fox v. McCurnin*, 218 N.W. 499, 205 Iowa 752.

Miss.—*Harris v. Sims*, 124 So. 325, 155 Miss. 207.

Mo.—*Greaves v. Kansas City Junior Orpheum Co.*, 80 S.W.2d 228, 229 Mo.App. 663.

N.Y.—*Gelles v. Rosenbaum*, 252 N.Y. S. 827, 141 Misc. 588.

Okl.—**Corpus Juris** cited in *Clements v. Canon*, 40 P.2d 640, 642, 170 Okl. 340.

25 C.J. p 539 note 17 [a].

Actual commission of offense

Where police officer, who stopped motorist to make investigation as to whether motorist was guilty of being

an arrest made by him without a warrant, he must show not only that a crime has in fact been committed, but that the person arrested is guilty.^{5,25} It will be presumed where a resident was arrested without a warrant on the misdemeanor charge of operating a business without a license that it would have been sufficient to follow the general practice and issue a summons to require him to appear in court.^{5,30} Defendant has the burden of proving an affirmative defense that he acted on the advice of counsel.^{5,35}

It has been held, however, that a different rule prevails in the case of a defendant on whose complaint plaintiff was illegally arrested, and who took no other part in the proceedings;⁶ and such a person is presumed to have acted with that good faith and probable cause essential to his justification.⁷

Burden where facts indicate lawful imprisonment.

drunk and of drunken driving, went further and arrested motorist, police officer, in action against him for false imprisonment, was required to justify his act by showing that motorist had in fact committed the offenses for which he was arrested.
Mass.—Muniz v. Mehlman, 99 N.E.2d 37, 327 Mass. 353.

5.25 Ill.—Gill v. Lewin, 53 N.E.2d 336, 321 Ill.App. 633.

5.30 Mich.—Odinetz v. Budds, 24 N.W.2d 193, 315 Mich. 512.

5.35 Ill.—Ferrell v. Livingston, 101 N.E.2d 599, 344 Ill.App. 483.

Proof required

Defendant has burden to make a clear showing that before arrest and swearing to the complaints, he sought advice of counsel and in good faith made a full, complete, and truthful statement of the facts and that he acted solely on such advice.
Ill.—Ferrell v. Livingston, supra.

6. Utah.—Smith v. Clark, 106 P. 653, 37 Utah 116, 26 L.R.A., N.S., 953, Ann.Cas.1912B 1366.
25 C.J. p 539 note 18.

7. U.S.—Raphaer v. Leader, D.C.Ga., 203 F. 184.
25 C.J. p 539 note 19.

Anticipation of illegal arrest

Even though defendant directed arrest of plaintiff in connection with search for money reported lost, it could not be assumed that he could foresee that officers would make an illegal arrest.

Tex.—Citizens Hotel Co. v. Foley, Civ.App., 131 S.W.2d 402, error dismissed, judgment correct.

8. Ala.—Bright v. Sawyer, 159 So. 211, 229 Ala. 657.

Mo.—Greaves v. Kansas City Junior

Orpheum Co., 80 S.W.2d 228, 229 Mo.App. 663.

N.Y.—Morgan v. New York Cent. R. Co., 9 N.Y.S.2d 339, 256 App.Div. 177.

Tex.—Citizens Hotel Co. v. Foley, Civ.App., 131 S.W.2d 402, error dismissed, judgment correct.
25 C.J. p 540 note 22.

Insanity

Plaintiff in action for false incarceration, alleging that, contrary to physicians' certificate, he was not insane on particular date, assumed burden of proof thereon.

Mo.—Rice v. Gray, 34 S.W.2d 567, 225 Mo.App. 390.

Jurisdiction of magistrate

Plaintiff, to recover for false imprisonment by magistrate, must overcome presumption of jurisdiction.

Mont.—Shampagne v. Keplinger, 252 P. 803, 78 Mont. 114.

9. U.S.—Alexander v. Thompson, Mich., 195 F. 31, 115 C.C.A. 33.

10. Cal.—Lapique v. Agoure, 195 P. 1075, 51 C.A. 56.

N.Y.—Damilitis v. Kerjas Lunch Corporation, 300 N.Y.S. 574, 165 Misc. 186.
25 C.J. p 540 note 24.

Where arrest is denied and no justification is attempted, plaintiff must prove that arrest was unlawful; and, where he shows arrest under a warrant, he must show that the warrant was spurious, invalid, or was abused, or other facts showing that arrest was unlawful.

Ala.—Bright v. Sawyer, 159 So. 211, 229 Ala. 657.

Sufficiency of complaint

It will be presumed, in the absence of contrary allegations, that com-

If to the bare fact of imprisonment there are added other facts indicating legal authority, the burden rests on plaintiff to prove the imprisonment nevertheless unlawful.⁸ It is immaterial whether plaintiff or defendant introduces such facts.⁹ In either event the burden will rest on plaintiff to rebut the presumption of legality arising from an apparently valid warrant¹⁰ or apparent compliance with common-law or statutory conditions authorizing arrest without warrant.¹¹ Where it appears that the arrest was lawful and there is evidence that plaintiff's detention after arrest and delay in taking him before a magistrate for arraignment were necessary or unavoidable, the burden shifts to plaintiff to refute such evidence.^{11.5} By a complaint alleging unlawful arrest and imprisonment, plaintiff anticipates the defense of justification and unnecessarily assumes the negative burden of proof.¹²

Character and reputation of plaintiff. In the ab-

plaint under which the warrant was issued stated facts proper to give the court jurisdiction to issue the process, and that the arrest and imprisonment were made in the legal execution of lawful authority.

Cal.—Lapique v. Agoure, 195 P. 1075, 51 C.A. 56.

11. Or.—Brown v. Meier & Frank Co., 86 P.2d 79, 160 Or. 608.
25 C.J. p 540 note 25.

Presumption disregarded

Where plaintiff's evidence tended to prove the lawfulness of the arrest, the question of the lawfulness of the arrest should have been determined as though no presumption that an arrest without warrant was unlawful had existed, and the proof of arrest without warrant should have assumed merely the character of evidence submitted to the jury with other evidence.

Mo.—Engelbrecht v. Roworth, 157 S.W.2d 242, 236 Mo.App. 459.

Detention for grand jury

Where plaintiff, after showing a false imprisonment, introduced evidence of being bound over to grand jury, such evidence overcame presumption that detention was unlawful, since being bound over to grand jury showed probable cause for arrest.

Or.—Brown v. Meier & Frank Co., 86 P.2d 79, 160 Or. 608.

11.5 Okl.—Ames v. Strain, 301 P.2d 641.

Plaintiff cannot recover where he fails to refute evidence that his detention and delay in taking him before a magistrate were necessary or unavoidable.

Okl.—Ames v. Strain, supra.

12. Ala.—King v. Robertson, 150 So. 154, 227 Ala. 378.

sence of evidence to the contrary, the presumption of law will be that plaintiff's character is good.¹³ It is not essential to plaintiff's right of recovery for false arrest on a disorderly conduct charge to prove allegations of the complaint as to his reputation.^{13.5}

Malice. It is not necessary for a plaintiff to prove malice in order to make a case of false imprisonment.^{13.10} In order to recover punitive damages for false arrest on the request of defendant's employee, however, it must be shown by plaintiff that the employee not only acted wrongfully but without just cause or excuse, and with the evil motive to injure and oppress, or at least with a reckless disregard of the rights of the person injured.^{13.15} Malice is generally inferred from want of probable cause, but it is not necessary to prove hatred or ill will or lack of probable cause in order to show malice.^{13.20} Where plaintiff was arrested without a warrant because of an offense committed in the presence of the arresting officers, it will not be presumed that they were impelled to make the arrest by motives wholly personal or to gratify their own feelings of resentment at plaintiff's improper and threatening language.^{13.25}

Damages. The burden is on plaintiff to establish the necessary elements of damage, to wit, mental

anguish, anxiety, and shame, resulting expense and trouble, and injury to reputation.¹⁴

Manner of prisoner's release need not be shown.^{14.5}

§ 56. Admissibility of Evidence

- a. In general
- b. Warrant or other process; return
- c. Record of proceedings on which charge is based
- d. Guilt or innocence of plaintiff; conviction or acquittal
- e. Character and reputation
- f. Malice, motive, or good faith
- g. Probable cause
- h. Damages

a. In General

Competent evidence which is material and relevant to the issues presented by the pleadings, such as with respect to the circumstances of the arrest or detention, its unlawfulness, and defendant's responsibility therefor, is admissible.

Under the rules applicable to civil actions generally, evidence to be admissible in an action for false imprisonment must be material and relevant to the issues presented by the pleadings,¹⁵ must

13. Tex.—Wolf v. Perryman, 17 S. W. 772, 82 Tex. 112.
25 C.J. p 540 note 26.

Ascertainable facts

Persons making arrest on which action is based must be held to have known ascertainable facts as to plaintiff's good character.

Mo.—Thompson v. St. Louis-San Francisco Ry. Co., Mo.App., 3 S.W. 2d 1033.

13.5 Ill.—Raucci v. Connelly, 91 N. E.2d 735, 340 Ill.App. 280.

13.10 Cal.—Van Fleet v. West American Ins. Co., 42 P.2d 378, 5 C.A.2d 125, rehearing denied 43 P.2d 557, 5 C.A.2d 125.

Mo.—Teel v. May Department Stores Co., 155 S.W.2d 74, 137 A.L.R. 495, 348 Mo. 696.

13.15 Md.—Dennis v. Baltimore Transit Co., 56 A.2d 813, 189 Md. 610.

13.20 Mo.—Jackson v. Thompson, App., 188 S.W.2d 853.

Want of probable cause not inferred from malice see supra § 25.

On command of commanding officer

Fact that arrest by police officer was made on command of his commanding officer, which command he was bound to obey, rebuts any presumption of malice in making such arrest.

Ohio.—Johnson v. Reddy, App., 120 N.E.2d 459, reversed on other grounds 126 N.E.2d 911, 163 Ohio St. 347.

13.25 Okl.—St. Clair v. Smith, 293 P.2d 597.

14. N.M.—Lozano v. Encinias, 218 P. 344, 29 N.M. 82.

Proof of damages generally see infra §§ 63-70.

Reputation

(1) The burden is on plaintiff to prove what his reputation was at the time of the arrest and that it had suffered injury warranting recovery of damages therefor.

Mo.—Schuler v. Hughes, App., 52 S.W. 2d 453.

(2) Reputation required to be proved was one which defendants would be expected to have known.
Mo.—Schuler v. Hughes, supra.

(3) Injury to plaintiff's reputation cannot be presumed from unlawful imprisonment.

Or.—Paget v. Cordes, 277 P. 101, 129 Or. 224.

14.5 Cal.—Wilson v. Loustalot, 193 P.2d 127, 85 C.A.2d 316.

15. U.S.—Andrews v. Hotel Sherman, C.C.A.III, 138 F.2d 524.

Ala.—Birmingham News Co. v. Browne, 153 So. 889, 228 Ala. 414

—Orr v. Burleson, 107 So. 825, 214 Ala. 257.

Ariz.—Platt v. Greenwood, 69 P.2d 1032, 50 Ariz. 158.

Cal.—Porter v. Granich, 29 P.2d 220, 136 C.A. 523.

Fla.—Goodrich v. Lawrence, 189 So. 233, 138 Fla. 287.

Ga.—Conoly v. Imperial Tobacco Co., 12 S.E.2d 398, 63 Ga.App. 880.

Ill.—Reell v. Petritz, 224 Ill.App. 65.

Ind.—Baltimore & O. R. Co. v. Applegate, 149 N.E. 651, 84 Ind.App. 192, rehearing denied 150 N.E. 794, 84 Ind.App. 794.

Iowa.—Comstock v. Maryland Casualty Co. of Baltimore, 179 N.W. 962.

Or.—Bowles v. Creason, 66 P.2d 1183, 156 Or. 278.

Pa.—Auslander v. Pennsylvania R. Co., 39 A.2d 595, 350 Pa. 473.

Tex.—Magnolia Petroleum Co. v. Guffey, Civ.App., 59 S.W.2d 174, reversed, Com.App., 95 S.W.2d 690, set aside 102 S.W.2d 408, 129 Tex. 293, affirmed 102 S.W.2d 408, 129 Tex. 293—Smith v. Bryson, Civ. App., 33 S.W.2d 268, error dismissed—Haverbekken v. Hollingsworth, Civ.App., 250 S.W. 261.
25 C.J. p 541 note 29.

Action against different defendant

In action against bank and officials

comply with other general rules such as those as to best and secondary evidence,¹⁶ as to contradicting official records,¹⁷ as to matters of opinion,¹⁸ or as to hearsay.¹⁹

Within these limitations evidence of all of the events occurring from the time of plaintiff's arrest until his discharge is admissible,²⁰ if the con-

nection of defendant therewith appears.²¹ It may be proper to introduce evidence as to the conduct of the parties immediately prior to the arrest,²² of prior unlawful occurrences bearing on the state of mind of defendant at the time of the arrest,^{22.5} as to the facts and circumstances of the arrest or detention,²³ that it was against the will of plain-

thereof for false imprisonment of bank teller on false charge of taking money erroneously claimed to have been deposited in bank by customer thereof, complaint in plaintiff's separate action against such customer for slander and compromise thereof were properly excluded from evidence as not alleviating defendants' wrongful acts or mitigating punitive damages.

Cal.—Parrott v. Bank of America Nat. Trust & Sav. Ass'n, 217 P.2d 89, 97 C.A.2d 14, 35 A.L.R.2d 263.

Newspaper account of another arrest

Newspaper article relating to an arrest of plaintiff about which he had been interrogated on cross-examination was not admissible.

Ohio.—Thomas v. F. & R. Lazarus & Co., App., 57 N.E.2d 103.

Evidence held relevant

Md.—Kennedy v. Crouch, 62 A.2d 582, 191 Md. 580.

Evidence held irrelevant

(1) Evidence of what plaintiff might have done under hypothetical state of facts.

Mo.—Teel v. May Department Stores Co., 176 S.W.2d 440, 352 Mo. 127.

(2) Evidence as to arrest of other persons.

Ala.—Orr v. Burleson, 107 So. 825, 214 Ala. 257.

(3) Evidence that plaintiff was subsequently and on a different occasion arrested a second time.

Ala.—Orr v. Burleson, supra.

(4) Evidence of prior losses of property not inferable to plaintiff.

N.Y.—Gill v. Montgomery Ward & Co., 129 N.Y.S.2d 288, 284 App.Div. 36.

(5) Testimony as to search of house after arrest on accused's insistence.

Ala.—Tolleson v. Jackson, 114 So. 801, 217 Ala. 66.

(6) Testimony as to defendant's threats against plaintiff on a prior occasion unconnected with the incident resulting in alleged false imprisonment.

Ala.—Walling v. Fields, 96 So. 471, 209 Ala. 389.

(7) County attorney's testimony that he dismissed assault prosecution against plaintiff after reversal because he deemed evidence insufficient.

Tex.—Smith v. Bryson, Civ.App., 33 S.W.2d 268, error dismissed.

(8) Words of reproach allegedly applied to customer by store authorities during period of their detention of him for investigation on charge of pilfering articles from store counters could not be considered.

Cal.—Collyer v. S. H. Kress Co., 54 P.2d 20, 5 C.2d 175.

(9) Proffered testimony that plaintiff would, on request by defendants, have assisted in securing return of merchandise and without necessity of any imprisonment was immaterial as to defendants' right to detain plaintiff a reasonable time for reasonable investigation.

Mo.—Teel v. May Department Stores Co., 176 S.W.2d 440, 352 Mo. 127.

16. Wis.—Bergeron v. Peyton, 82 N.W. 291, 106 Wis. 377, 80 Am.S.R. 33.

25 C.J. p 541 note 30.

Blotter entries

In an action for false arrest by a police officer without a warrant, police station blotter entries, reciting that plaintiff was arrested by defendant at plaintiff's residence, was inadmissible.

N.Y.—Luhan v. Slavik, 185 N.Y.S. 878, 194 App.Div. 728.

17. Md.—Baltimore, C. & A. R. Co. v. Twilley, 67 A. 265, 106 Md. 445. 25 C.J. p 541 note 31.

18. Mass.—Karjavainen v. Buswell, 194 N.E. 295, 289 Mass. 419. 25 C.J. p 541 note 32.

19. Kan.—Hammargren v. Montgomery Ward & Co., 241 P.2d 1192, 172 Kan. 484.

Ky.—Alexander v. Jones, 249 S.W.2d 35.

Mo.—Winegar v. Chicago, B. & Q. R. Co., App., 163 S.W.2d 357.

N.C.—Parrish v. Boysell Mfg. Co., 188 S.E. 817, 211 N.C. 7.

20. N.Y.—Taylor v. Erie R. Co., 270 N.Y.S. 514, 241 App.Div. 763, appeal dismissed 193 N.E. 290, 265 N.Y. 500, affirmed 198 N.E. 570, 268 N.Y. 711.

Ohio.—Thomas v. F. & R. Lazarus & Co., App., 57 N.E.2d 103.

25 C.J. p 541 note 33.

21. Or.—Bowles v. Creason, 66 P.2d 1183, 156 Or. 278.

25 C.J. p 541 note 34.

Co-conspirators

In husband's action for conspiracy

and false incarceration in insane asylum, evidence of wife's acts was admissible against her co-conspirators, notwithstanding such action is not maintainable against wife.

Mo.—Rice v. Gray, 34 S.W.2d 567, 225 Mo.App. 890.

Attorney

In action against corporate defendant, evidence that one of the attorneys, who allegedly instituted proceedings which resulted in plaintiff's arrest, informed plaintiff after the arrest that a mistake had been made was rightly excluded, where there was no evidence that attorney was acting for the corporation.

Mass.—Jordan v. C. I. T. Corporation, 19 N.E.2d 5, 302 Mass. 281.

22. Va.—Miller v. Harless, 149 S.E. 619, 153 Va. 228.

Evidence held not admissible

In action against bus company, its agents, and police officers for false imprisonment, based on plaintiff's unlawful arrest without a warrant and subsequent detention, where plaintiff limited his evidence to the events following the arrest, and by so doing no evidence was produced implicating the agent or the company in the unlawful arrest or showing that the agent or company instigated or induced the officer to make the arrest without a warrant, excluding evidence of disturbance of the peace by plaintiff before the officers made the arrest was not error.

U.S.—Burlington Transp. Co. v. Josephson, C.C.A.S.D., 153 F.2d 372.

22.5 Ky.—Alexander v. Jones, 249 S.W.2d 35.

23. Ala.—Wilson v. Orr, 97 So. 133, 210 Ala. 93.

N.Y.—Frost v. De Lury, 54 N.Y.Super. 113.

Conversation of police officers with plaintiff

Testimony of police officer with respect to his conversation with plaintiff regarding her race and color, where plaintiff contended she was arrested because of mistaken opinion of police officers that she was a white girl and in company of a negro, was admissible.

Iowa.—Dedman v. McKinley, 29 N.W. 2d 337, 238 Iowa 886.

Result of search

Evidence with respect to pistol found on searching plaintiff after

tiff,²⁴ its legality or illegality,²⁵ the connection of defendant therewith,²⁶ or the liability of defendant for the acts of his agents or employees,²⁷ the circumstances surrounding and characterizing the detention,²⁸ and the circumstances existing at the time plaintiff was arrested as well as those up to

the arrest was competent and admissible.

Ky.—DeHart v. Gray, 245 S.W.2d 434.

24. Ala.—Birmingham Ledger Co. v. Buchanan, 65 So. 667, 10 Ala.App. 527.

25 C.J. p 541 note 36.

25. Ill.—Komorowski v. Boston Store of Chicago, 263 Ill.App. 88.

Mo.—Newport v. Montgomery Ward & Co., 127 S.W.2d 687, 344 Mo. 646.

Tex.—Smith v. Bryson, Civ.App., 33 S.W.2d 268, error dismissed.

Wis.—Bursack v. Davis, 225 N.W. 738, 199 Wis. 115.

25 C.J. p 541 note 37.

Held admissible

(1) Evidence as to information on which defendant acted.

Va.—Miller v. Harless, 149 S.E. 619, 153 Va. 228.

(2) In action based on plaintiff's arrest in public street, evidence was properly received on issue, whether plaintiff was drunk as claimed by defense, or suffering from epilepsy as claimed by plaintiff.

Ala.—Burke v. Tidwell, 101 So. 599, 211 Ala. 673.

(3) In action against officer arresting person threatening to shoot him if he took property, replevin papers for such property were admissible on defendant's behalf.

Minn.—Stromberg v. Hansen, 225 N.W. 148, 177 Minn. 307.

(4) In an action for wrongful arrest and imprisonment on a charge of stealing from a car in defendant's train, it was not error to permit a witness for plaintiff to testify that the car, when inspected several hours before the arrest, showed signs of having been tampered with.

Ala.—Southern Ry. Co. v. Hall, 96 So. 73, 209 Ala. 237.

Held inadmissible

(1) Evidence as to other offenses.

Ala.—Great Atlantic & Pacific Tea Co. v. Smalley, 156 So. 639, 26 Ala. App. 176, certiorari denied 156 So. 641, 229 Ala. 289.

Iowa.—Schultz v. Enlow, 205 N.W. 972, 201 Iowa 1083—Comstock v. Maryland Casualty Co. of Baltimore, 179 N.W. 962.

Mont.—Folsom v. Fisco, 204 P. 367, 62 Mont. 194.

25 C.J. p 541 note 37 [b] (1).

(2) Other matters see 25 C.J. p 541 note 37 [b] (2)–(6).

Confinement as insane person

Relevant testimony on question of plaintiff's sanity is admissible.

Mass.—Karjavainen v. Buswell, 194 N.E. 295, 289 Mass. 419.

25 C.J. p 541 note 37 [d].

Ordinances

(1) The ordinance on a charge of violation of which plaintiff was arrested is admissible.

Mich.—Durham v. Feeney, 162 N.W. 79, 195 Mich. 318.

(2) So, ordinances referring to street car transfers are evidence to be produced in action for false arrest of passenger, whose transfer was rejected.

Va.—Virginia Electric & Power Co. v. Wynne, 141 S.E. 829, 149 Va. 882.

(3) Where, however, plaintiff was not charged with violating any ordinances of town where arrested, such ordinances were not admissible.

Ala.—Burk v. Knott, 101 So. 811, 20 Ala.App. 316.

26. Colo.—Union Pac. R. Co. v. Dennis, 213 P. 332, 73 Colo. 66.

Ga.—Central of Georgia Ry. Co. v. Dabney, 160 S.E. 818, 44 Ga.App. 143.

Tex.—Magnolia Petroleum Co. v. Guffey, Civ.App., 59 S.W.2d 174, reversed, Com.App., 95 S.W.2d 690, set aside 102 S.W.2d 408, 129 Tex. 293, affirmed 102 S.W.2d 408, 129 Tex. 293.

25 C.J. p 542 note 38.

Delayed arraignment

Objection to questions bearing on issue of whether defendant aided in denying plaintiff's right to arraignment before magistrate within reasonable time after arrest was held improperly sustained.

N.Y.—Taylor v. Erie R. Co., 270 N.Y. S. 514, 241 App.Div. 763, appeal dismissed 193 N.E. 290, 265 N.Y. 500, affirmed 198 N.E. 570, 268 N.Y. 711.

Rules of protective association relative to the conduct of a case after being placed in its hands and purporting to give it full and exclusive responsibility thereafter have no effect on plaintiff suing for false imprisonment and are not admissible.

Ohio.—Thomas v. F. & R. Lazarus & Co., App., 57 N.E.2d 103.

27. Ala.—Smith v. S. H. Kress & Co., 98 So. 378, 210 Ala. 436—Standard Oil Co. v. Humphries, 96 So. 629, 209 Ala. 493.

Ga.—McClure Ten Cent Co. v. Humphries, 127 S.E. 151, 33 Ga. App. 151.

Ill.—Komorowski v. Boston Store of Chicago, 263 Ill.App. 88.

N.C.—Parrish v. Boysell Mfg. Co., 188 S.E. 817, 211 N.C. 7.

25 C.J. p 542 note 39.

Testimony of employee or agent

(1) In actions against store owner for false imprisonment by owner's

alleged employees, testimony of employees that they were employed by the owner was competent to establish fact of agency.

Pa.—Sebastianelli v. Cleland Simpson Co., 31 A.2d 570, 152 Pa.Super. 203.

(2) Evidence of declarations made by employees when assaults were committed that "we are the Globe detectives" and that they told a policeman in presence of a plaintiff "We were following these people all day" was properly admitted.

Pa.—Sebastianelli v. Cleland Simpson Co., supra.

Instructions to employees

(1) Refusal to admit testimony that store had issued instructions that no employee should arrest or cause arrest of suspected or actual shoplifter was held proper, since violation of such instructions would not relieve store of liability.

Ky.—J. J. Newberry Co. v. Judd, 82 S.W.2d 359, 259 Ky. 309.

(2) It has been held on the other hand that defendant is entitled to show the particular instructions on the subject of causing arrests which he gave his employees.

N.Y.—Rudolph v. Shoemaker, 153 N.Y.S. 847.

Particular evidence held immaterial

on question whether agent acted within scope of employment.

N.C.—Lamm v. Charles Stores Co., 159 S.E. 444, 201 N.C. 134, 77 A.L.R. 923.

28. Ala.—Phillips v. Bailey, 104 So. 264, 213 Ala. 142—Phillips v. Morrow, 104 So. 260, 213 Ala. 139, 40 A.L.R. 285.

D.C.—Takahashi v. Hecht Co., 50 F. 2d 326, 60 App.D.C. 176.

Fla.—Goodrich v. Lawrence, 189 So. 233, 138 Fla. 287.

Iowa.—McVay v. Carpe, 29 N.W.2d 582, 238 Iowa 1131.

Or.—Bowles v. Creason, 78 P.2d 324, 159 Or. 129—Christ v. McDonald, 52 P.2d 655, 152 Or. 494.

25 C.J. p 542 note 40.

Instruction as to holding drunken prisoner

Evidence that justice of peace, who issued warrant for arrest of plaintiff for drunkenness, had instructed sheriff not to bring persons before justice in intoxicated condition, was inadmissible, since law charged sheriff with knowledge that he should not do so, in absence of extraordinary circumstances.

Tex.—Robinson v. Lovell, Civ.App., 238 S.W.2d 294, error refused no reversible error.

the disposition of the criminal charge against him;^{28.5} and it may be proper to introduce evidence as to the duration of the detention,²⁹ and the manner of its termination.³⁰ The reason of the court for the release of the plaintiff is generally immaterial.^{30.5}

Evidence on the part of plaintiff tending to show a legal arrest or detention is not relevant.³¹

b. Warrant or Other Process; Return

A warrant, commitment, or other process pleaded in justification of the arrest or imprisonment is admissible in evidence.

Where defendant justifies under a commitment, the commitment is admissible as proof thereof;³² and defendant who has pleaded justification under an executive warrant is entitled to introduce in evidence a properly certified copy of such warrant.³³ Plaintiff is entitled to introduce the execution on which he was taken into custody, although it appears to have been issued by defendants as executors.³⁴

The return of an officer on a warrant issued by a grand juror is prima facie evidence of an arrest under such warrant, as against the grand juror, as well as against the officer.³⁵ The officer's return is admissible in his favor to show that he had the warrant in his hands at the time of arrest,³⁶ but the

return is not conclusive.³⁷

c. Record of Proceedings on Which Charge Is Based

The record of the proceedings on which the charge of false imprisonment is based is admissible in evidence.

The record of the original proceedings on which the charge of false imprisonment is based is admissible in evidence in behalf of plaintiff³⁸ or of defendant.³⁹ If the circumstances are such that the record of a subsequent prosecution of plaintiff is admissible, the entire record should be produced and not merely the indictment.⁴⁰ It is permissible to introduce the complaint made against plaintiff after his arrest without warrant for the purpose of showing the cause of the arrest⁴¹ and for its bearing on the credibility of the evidence of defendants.⁴²

d. Guilt or Innocence of Plaintiff; Conviction or Acquittal

Generally evidence as to the guilt or innocence of the plaintiff of the charge on which he was detained, or as to the disposition of the charge, may be relevant and material where it bears on the legality of the arrest, but not otherwise.

Evidence as to the guilt or innocence of plaintiff of the charge on which he was detained may under certain circumstances be relevant and material,⁴³

Purpose of visit

Evidence that plaintiff visited scene of arrest and carefully searched ground five days afterward was admissible to refute his testimony that he made visit for purpose of driving stakes to mark his course on evening of arrest.

Wash.—Smith v. Drew, 26 P.2d 1040, 175 Wash. 11.

Evidence of officer's conduct provoking offensive remark causing arrest of plaintiff for which recovery is sought was erroneously excluded.

Wash.—Pavish v. Meyers, 225 P. 633, 129 Wash. 605, 34 A.L.R. 561.

28.5 Ohio.—Thomas v. F. & R. Lazarus & Co., App., 57 N.E.2d 103.

29. Ala.—Walling v. Fields, 96 So. 471, 209 Ala. 389.

25 C.J. p 542 note 41.

Documents prepared for signing during detention

In action for false imprisonment of plaintiff who aided her sister-in-law in obtaining merchandise by false personation, written statements prepared for their signature during their detention were properly admitted, since the type, kind, and length of statements were circumstances having some bearing on length of time required to prepare and sign them, and length of time was an issue in the case.

Mo.—Teel v. May Department Stores Co., 176 S.W.2d 440, 352 Mo. 127.

30. Or.—Bowles v. Creason, 78 P.2d 324, 159 Or. 129.
25 C.J. p 542 note 42.

30.5 Cal.—Wilson v. Loustalot, 193 P.2d 127, 85 C.A.2d 316.

31. Ala.—Holly v. Carson, 39 Ala. 345—Williams v. Ivey, 37 Ala. 244.

32. Fla.—Goodrich v. Lawrence, 189 So. 233, 138 Fla. 287.

Md.—Blake v. Burke, 42 Md. 45.

33. Tex.—Regan v. Jessup, 77 S.W. 972, 34 Tex.Civ.App. 74.

34. N.Y.—Sherman v. Grinnell, 24 N.Y.S. 59, 70 Hun 354.

35. Conn.—Allen v. Gray, 11 Conn. 95.

36. Tenn.—McCully v. Malcom, 9 Humphr. 187.

37. Mass.—Stone v. Dana, 5 Metc. 98.

25 C.J. p 543 note 49.

38. Tex.—Dallas Joint Stock Land Bank of Dallas v. Britton, 135 S.W.2d 981, 134 Tex. 529.
25 C.J. p 543 note 50.

Judgment discharging plaintiff

In suit by one who had been imprisoned for contempt, judgment of supreme court ordering his discharge in habeas corpus proceeding was admissible only to show that the im-

prisonment was illegal; court's opinion was inadmissible for any purpose.

Tex.—Dallas Joint Stock Land Bank of Dallas v. Britton, supra.

39. Iowa.—O'Neill v. Keeling, 288 N.W. 887, 227 Iowa 754, 127 A.L.R. 1050.

25 C.J. p 543 note 51.

Person intended by name used

Where defendants alleged that plaintiff was the person whom grand jury intended to indict and was the one for whom warrant was issued, what person was intended by the name used in the warrant could be shown by all competent facts surrounding the transaction out of which indictment arose and warrant issued.

Iowa.—O'Neill v. Keeling, supra.

40. Tenn.—McCully v. Malcom, 9 Humphr. 187.

41. Wis.—Schoette v. Drake, 120 N.W. 393, 139 Wis. 18.

42. Minn.—Stromberg v. Hansen, 225 N.W. 148, 177 Minn. 307.

Wis.—Schoette v. Drake, 120 N.W. 393, 139 Wis. 18.

43. Cal.—Collins v. Owen, 176 P.2d 372, 77 C.A.2d 713.

Md.—Fleisher v. Ensminger, 118 A. 153, 140 Md. 604.

as where it bears on the lawfulness of the arrest.⁴⁴ Where not bearing on the legality of the arrest, however, evidence as to the acquittal of plaintiffs on their trial of the offense for which they were arrested is not material.⁴⁵ Where the arrest is under process which is not void on its face, evidence as to the proceedings had before the grand jury on the charge preferred by defendant against plaintiff is not material;⁴⁶ and, where plaintiff is arrested on a void warrant, evidence as to the truth of the charge made in the warrant is immaterial.⁴⁷

Evidence is not as a rule admissible as to the conviction of plaintiff on a charge other than that on which the false imprisonment is based,⁴⁸ nor is the disposition of the charge on which the arrest is made material where the action is based on the wrongful conduct of the officer after the arrest,⁴⁹ or his lack of diligence in taking plaintiff before a committing magistrate.⁵⁰ According to

some authorities the judgment in a criminal prosecution is admissible in a civil case only to establish the fact of the rendition of the judgment and is not evidence of the guilt of accused justifying an arrest without warrant.⁵¹ In some jurisdictions plaintiff is not entitled to show the result of his trial after an alleged false imprisonment on an arrest without warrant.⁵²

e. Character and Reputation

While the plaintiff's character is ordinarily not in issue as respects the right to recover for false imprisonment, evidence thereof may be admissible on the question of damages or where material to a claim of justification arising from reasonable grounds for suspicion of the plaintiff's guilt, or where the nature of the false imprisonment directly involves his character.

The character of the person seeking damages in false imprisonment is not ordinarily in issue so far as mere right to recover is concerned.⁵³ It, however, may be made the subject of controversy and the

Ohio.—Thomas v. F. & R. Lazarus & Co., App., 57 N.E.2d 103.

As bearing on probable cause see infra subdivision g of this section.

Source of money

Where a saleswoman was seen to put money in her apron pocket and was thereafter detained, evidence showing how she came by part of the money in her pocket was properly admitted.

Md.—Fleisher v. Ensminger, 118 A. 153, 140 Md. 604.

44. Ark.—Arkansas Central Power Co. v. Hildreth, 296 S.W. 33, 174 Ark. 529.

45. Mass.—Pilos v. First Nat. Stores, 66 N.E.2d 576, 319 Mass. 475—Zygmuntowicz v. American Steel & Wire Co. of New Jersey, 134 N. E. 385, 240 Mass. 421—Fitzgerald v. Lewis, 41 N.E. 687, 164 Mass. 495.

Va.—Corpus Juris Secundum cited in Montgomery Ward & Co. v. Wickline, 50 S.E.2d 387, 389, 188 Va. 485.

Acquittal on subsequent trial

Where a suit for false arrest was based on a prosecution before a police magistrate, which was dismissed, it was not error to refuse the offer of defendant to prove the indictment of plaintiff and his trial and acquittal in the circuit court in a subsequent prosecution initiated by the state's attorney instead of defendant.

Ill.—Reell v. Petritz, 224 Ill.App. 65.

Detinue action for goods involved

In action for false arrest and imprisonment based on arrest and prosecution of plaintiff for theft of guns and other things, admission in evidence of judgment in favor of plaintiff against police officers in detinue

action to recover possession of the guns taken from him, which action had been instituted after theft charges against plaintiff had been dismissed for want of prosecution, was improper.

Ill.—Ferrell v. Livingston, 101 N.E. 2d 599, 344 Ill.App. 488.

46. Ala.—Holly v. Carson, 39 Ala. 345.

47. W.Va.—Howell v. Wysor, 82 S.E. 503, 74 W.Va. 589, Ann.Cas.1916C 519.

48. Wis.—Holz v. Rediske, 92 N.W. 1105, 116 Wis. 353.

49. N.Y.—Hopner v. McGowan, 22 N.E. 558, 116 N.Y. 405.

50. Ala.—E. I. DuPont de Nemours Powder Co. v. Hyde, 77 So. 733, 201 Ala. 207.

Ga.—Lamb v. Dillard, 21 S.E. 463, 94 Ga. 206.

51. N.Y.—Wilson v. Manhattan R. Co., 20 N.Y.S. 852, 2 Misc. 127, affirmed 39 N.E. 495, 144 N.Y. 632. 25 C.J. p 544 note 83.

52. Del.—McCaffrey v. Thomas, 56 A. 382, 20 Del. 437.

Va.—Corpus Juris Secundum cited in Montgomery Ward & Co. v. Wickline, 50 S.E.2d 387, 188 Va. 485.

Claim for damages

Where officers did not have warrant with them at time of arrest, court, on admitting warrant in evidence, properly refused to admit judgment of conviction on that warrant, or subsequent warrant, and judgment for resisting officers, no damages being claimed for anything that occurred after arrest, and no punitive damages being sought.

Va.—Crosswhite v. Barnes, 124 S.E. 242, 139 Va. 471, 40 A.L.R. 54.

Res inter alios

Complaints made by the deputy chief of police and the records of plaintiff's discharge in the district court were inadmissible as res inter alios.

Mass.—Zygmuntowicz v. American Steel & Wire Co. of New Jersey, 134 N.E. 385, 240 Mass. 421.

53. U.S.—Meints v. Huntington, C.C. A.Minn., 276 F. 245, 19 A.L.R. 664. Ala.—Phillips v. Morrow, 97 So. 130, 210 Ala. 34.

Central Iron & Coal Co. v. Wright, 101 So. 815, 20 Ala.App. 82, certiorari denied Ex parte Central Iron & Coal Co., 101 So. 824, 212 Ala. 130.

Ga.—Savannah Electric Co. v. Lowe, 108 S.E. 313, 27 Ga.App. 350.

Pa.—O'Donnell v. Rowe, 16 Pa.Dist. & Co. 212.

Tex.—S. H. Kress & Co. v. Lindley, Civ.App., 46 S.W.2d 379.

Va.—Dellastatious v. Boyce, 147 S. E. 267, 152 Va. 368—S. H. Kress & Co. v. Roberts, 129 S.E. 244, 143 Va. 71.

25 C.J. p 544 note 85.

Matters not raising issue

That plaintiff alleging false arrest was contradicted by number of witnesses as to vital facts, or that defendant's evidence tended to show that plaintiff alleging false arrest had violated law, did not put his character in issue, so as to permit evidence as to his good reputation.

Mo.—Humphreys v. St. Louis-San Francisco Ry. Co., App., 285 S.W. 738.

Sobriety

Testimony in action for wrongful arrest on charge of driving automobile while intoxicated that plaintiff had never been drunk as long as wit-

basis of testimony where the extent of recovery of damages involves its consideration,⁵⁴ as where humiliation, embarrassment, and pain of mind are in issue;^{54.5} and where evidence of plaintiff's bad character is admitted on the issue of the damages he actually suffered from humiliation, embarrassment, and emotional distress, the jury should be carefully admonished as to the limited character of such evidence.^{54.10} Evidence of plaintiff's character is admissible, where an attempted justification of the detention or of arrest without express legal authority is sought to be proved by the existence of reasonable grounds for suspicion of plaintiff's guilt, in view of his character and reputation.⁵⁵

Also, according to some decisions, evidence of plaintiff's good character, either for truth and veracity or honesty and fair dealing, is admissible where the nature of the false imprisonment action directly involves his character and where he was charged with the commission of a crime involving moral turpitude,^{55.5} and evidence of the susceptibility of plaintiff to coercion is admissible under a statute permitting consideration of the disposition of the injured person.^{55.10} It has been held improper to cross-examine plaintiff as to whether he has been in jail before the occasion in question.^{55.15} Evidence as to character may also be admissible

where his general reputation for truth and veracity is attacked, as considered in Witnesses §§ 532-535.

Reputation of house. In an action for illegal arrest and imprisonment of plaintiff on a charge of keeping a lewd house, evidence of the reputation of the house for lewdness is admissible on the issue of good faith and probable cause,^{55.20} and evidence of specific acts of lewdness is admissible for the purpose of proving that at the time they occurred the house was run as a lewd house, but not for the purpose of proving reputation;^{55.25} and the fact that such evidence was with respect to the reputation of, and occurrences in, the house several years prior to the arrest has been held not to make it too remote in point of time, where it appears that plaintiff owned the house and resided therein at such times and also at the time of the arrest.^{55.30}

f. Malice, Motive, or Good Faith

Generally evidence as to motive or malice of defendant is immaterial, but such evidence, if its connection with the transaction appears, may be admissible as bearing on the question of damages, particularly punitive or exemplary damages; and it may be material as an element of the illegality of the detention.

As a general rule evidence as to the motive of defendant in causing the illegal imprisonment is immaterial,⁵⁶ except in a case where the motive be-

ness knew him and that nobody could make her believe he was drunk, was held inadmissible as irrelevant. *Tex.—Jurach v. Cox*, Civ.App., 92 S.W.2d 1065.

54. Ga.—*Savannah Electric Co. v. Lowe*, 108 S.E. 313, 27 Ga.App. 350. Ky.—*Corpus Juris cited in J. J. Newberry Co. v. Judd*, 82 S.W.2d 359, 364, 259 Ky. 309.

Mo.—*Thompson v. St. Louis-San Francisco Ry. Co.*, App., 3 S.W.2d 1033.

Tex.—*Texas Midland R. Co. v. Dean*, 85 S.W. 1135, 98 Tex. 517, 70 L.R.A. 943.

Fort Worth Hotel Co. v. Waggonman, Civ.App., 126 S.W.2d 578, error dismissed, judgment correct, 25 C.J. p 544 note 87.

"The nature of the charge upon which the defendants sought to justify the plaintiff's arrest, as well as the humiliation and other effects of such embarrassing experience, would seem to involve the attribute of good character."

Ky.—*J. J. Newberry Co. v. Judd*, 82 S.W.2d 359, 364, 259 Ky. 309.

Reputation for sobriety

Where declaration alleged humiliation and damage to reputation, and officer testified that plaintiff was drunk, evidence regarding his reputation for sobriety was held competent.

Miss.—*Harris v. Sims*, 124 So. 325, 155 Miss. 207.

Evidence of bad reputation

Where plaintiff's character and reputation were direct issues and were presumed to be good, evidence was admissible to show that they were not good and that her humiliation and mental suffering were less than alleged; decree and pleadings in divorce action wherein plaintiff was charged with gross neglect were inadmissible to show her character. Ohio.—*Noll v. Wilson*, 190 N.E. 581, 47 Ohio App. 134.

Evidence as to specific acts is inadmissible to establish character. Va.—*Dellastatious v. Boyce*, 147 S.E. 267, 152 Va. 368.

54.5 S.D.—*Bean v. Best*, 93 N.W.2d 403.

54.10 S.D.—*Bean v. Best*, supra.

55. Ohio.—*Nappi v. Wilson*, 155 N.E. 151, 22 Ohio App. 520, 25 C.J. p 545 note 88.

55.5 Tex.—*Waggonman v. Fort Worth Well Machinery & Supply Co.*, 76 S.W.2d 1005, 124 Tex. 325.

S. H. Kress & Co. v. Rust, Civ. App., 97 S.W.2d 997, affirmed 120 S.W.2d 425, 132 Tex. 89.

55.10 Tex.—*Waggonman v. Fort Worth Well Machinery & Supply Co.*, 76 S.W.2d 1005, 124 Tex. 325.

Traits admissible

In determining whether language employed by officer in informing plaintiff that he would not be permitted to operate carnival was sufficient to intimidate plaintiff and prevent him from opening his carnival, court could consider plaintiff's disposition, whether passive, submissive, and easily influenced, or the opposite.

Tex.—*Priddy v. Bunton*, Civ.App., 177 S.W.2d 805, error refused.

55.15 Ga.—*Radney v. Levine*, 42 S.E. 2d 644, 75 Ga.App. 137.

55.20 Ga.—*Goodwin v. Allen*, 78 S.E. 2d 804, 89 Ga.App. 187.

55.25 Ga.—*Goodwin v. Allen*, supra.

55.30 Ga.—*Goodwin v. Allen*, supra. **56.** U.S.—*Manning v. Ketcham*, C.C. A.Ky., 58 F.2d 948.

Ariz.—*Adair v. Williams*, 210 P. 853, 24 Ariz. 422, 26 A.L.R. 276.

Cal.—*Singleton v. Perry*, 289 P.2d 794, 45 C.2d 489.

25 C.J. p 545 note 90.

Motive as an element of cause of action see supra § 7.

Different crime than charged

In action against police officers for arresting plaintiff without probable cause and wrongfully detaining him in police station on disorderly conduct charge, admission of testimony that plaintiff was arrested as a sus-

comes material as an element of the illegality of the detention,⁵⁷ or as bearing on the amount of damages,⁵⁸ or in mitigation of damages where punitive damages are sought.^{58.5}

Similarly, malice not being an element of the cause of action, as discussed supra § 7, evidence as to malice is ordinarily inadmissible,⁵⁹ and evidence of good faith is not admissible to defeat a recovery, or on the question of the lawfulness or unlawfulness of the arrest.^{59.5} Evidence with respect to malice or good faith, however, is admissible on the issue of the amount of recovery.^{59.10} Evidence of malice is admissible against the wrongdoer in aggravation of damages,⁶⁰ and evidence of good faith importing a lack of malice is admissible for the

purpose of obviating or mitigating exemplary damages;⁶¹ and it has been stated that such evidence is admissible on the question of damages generally, or in mitigation thereof,^{61.5} although other authority has stated that such evidence is not admissible to reduce the actual damages sustained.^{61.10}

To establish the absence of malice facts supporting defendant's belief in the charge may be admitted⁶² or it may be shown that he acted on legal advice;⁶³ but defendant cannot testify to the conclusion that he acted without malice.⁶⁴ The facts and circumstances accompanying the arrest are admissible for the purpose of showing malice where malice is properly in issue,⁶⁵ as are also facts showing the relationship, conduct, and attitude of the

pect in a murder case was prejudicial error in view of trial court's statement, in overruling an objection thereto, that defendants had right to offer such evidence as they saw fit to justify the arrest.

Ill.—Raucci v. Connelly, 91 N.E.2d 735, 340 Ill.App. 280.

Damages

Evidence as to motive is inadmissible in mitigation of actual damages. Wis.—Karney v. Boyd, 203 N.W. 371, 186 Wis. 594.

57. Tex.—Baker Co. v. Turpin, Civ. App., 53 S.W.2d 154, error dismissed.

25 C.J. p 545 note 91.

Evidence held admissible

(1) In action against policeman for wrongful arrest for conduct tending to disturb peace, which plaintiff claimed was provoked by the policeman's own conduct, evidence of the policeman's ill feeling toward plaintiff was erroneously excluded. Wash.—Pavish v. Meyers, 225 P. 633, 129 Wash. 605, 34 A.L.R. 561.

(2) Evidence that employer, desiring to prevent plaintiff maidservant from marrying guest, had motive in causing plaintiff's commitment to insane asylum was held competent. Mass.—Karjavainen v. Buswell, 194 N.E. 295, 289 Mass. 419.

58. Ariz.—Adair v. Williams, 210 P. 853, 24 Ariz. 422, 26 A.L.R. 278. 25 C.J. p 545 note 92.

Motive as essential to award of exemplary damages see infra § 67.

58.5 U.S.—Barnard v. Wabash R. Co., C.A.Mo., 208 F.2d 489.

Cal.—Singleton v. Perry, 289 P.2d 794, 45 C.2d 489.

59. Neb.—Corpus Juris quoted in Hall v. Rice, 223 N.W. 4, 6, 117 Neb. 813, 78 A.L.R. 1421.

Or.—Christ v. McDonald, 52 P.2d 655, 152 Or. 494. 25 C.J. p 545 note 93.

59.5 Cal.—Singleton v. Perry, 289 P.2d 794, 45 C.2d 489.

Ga.—Standard Sur. & Cas. Co. of N. Y. v. Johnson, 41 S.E.2d 576, 74 Ga. App. 823.

N.Y.—Sanders v. Rolnick, 67 N.Y.S. 2d 652, 188 Misc. 627, affirmed 71 N.Y.S.2d 896, 272 App.Div. 803.

N.C.—Alexander v. Lindsey, 55 S.E. 2d 470, 230 N.C. 663—Rhodes v. Collins, 150 S.E. 492, 198 N.C. 23.

59.10 Ky.—DeHart v. Gray, 245 S.W. 2d 434.

60. Ala.—Fidelity & Deposit Co. of Maryland v. Adkins, 130 So. 552, 222 Ala. 17—Phillips v. Morrow, 97 So. 130, 210 Ala. 34.

Cal.—Parrott v. Bank of America Nat. Trust & Sav. Ass'n, 217 P.2d 89, 97 C.A.2d 14, 35 A.L.R.2d 263.

Fla.—S. H. Kress & Co. v. Powell, 180 So. 757, 132 Fla. 471.

Ohio.—Thomas v. F. & R. Lazarus & Co., App., 57 N.E.2d 103.

61. Ala.—Phillips v. Morrow, 97 So. 130, 210 Ala. 34.

Corpus Juris cited in Burk v. Knott, 101 So. 811, 814, 20 Ala.App. 316.

Cal.—Singleton v. Perry, 289 P.2d 794, 45 C.2d 489.

Ill.—Lindquist v. Friedman's Inc., 8 N.E.2d 625, 366 Ill. 232.

Ky.—Shepherd v. City of Richmond, 208 S.W.2d 744, 306 Ky. 595.

Mich.—Crawford v. Huber, 184 N.W. 594, 215 Mich. 564, 39 A.L.R. 1392.

N.Y.—Gill v. Montgomery Ward & Co., 129 N.Y.S.2d 238, 284 App.Div. 36.

Sanders v. Rolnick, 67 N.Y.S.2d 652, 188 Misc. 627, affirmed 71 N.Y.S.2d 896, 272 App.Div. 803.

Or.—McNeff v. Heider, 337 P.2d 819—Christ v. McDonald, 52 P.2d 655, 152 Or. 494.

Tex.—Schnauffer v. Price, Civ.App., 124 S.W.2d 940, error refused. 25 C.J. p 545 note 95.

Basis for arrest

Where plaintiff sought punitive damages on charge that tort was maliciously committed, a so-called John Doe search warrant, although

invalid, was admissible to refute the charge of malice and wantonness; and this was true as to another search warrant, under which one of the defendants acted, although its period of validity had expired; where witness testified that he communicated to defendants information that plaintiff was transporting liquor, court properly refused to require witness to disclose the source of his information. U.S.—Elrod v. Moss, C.C.A.S.C., 278 F. 123.

61.5 Ga.—Goodwin v. Allen, 78 S.E. 2d 804, 89 Ga.App. 187—Standard Sur. & Cas. Co. of N. Y. v. Johnson, 41 S.E.2d 576, 74 Ga.App. 823. N.C.—Alexander v. Lindsey, 55 S.E. 2d 470, 230 N.C. 663—Rhodes v. Collins, 150 S.E. 492, 198 N.C. 23.

61.10 Cal.—Singleton v. Perry, 289 P.2d 794, 45 C.2d 489.

N.Y.—Sanders v. Rolnick, 67 N.Y.S. 2d 652, 188 Misc. 627, affirmed 71 N.Y.S.2d 896, 272 App.Div. 803.

62. Tex.—Schnauffer v. Price, Civ. App., 124 S.W.2d 940, error refused. 25 C.J. p 546 note 96.

63. Ala.—Phillips v. Morrow, 97 So. 130, 210 Ala. 34.

Tex.—Robinson v. Lovell, Civ.App., 238 S.W.2d 294, error refused no reversible error.

25 C.J. p 546 note 97.

Advice of one not an attorney is not admissible in evidence as advice of counsel.

Mich.—Livingston v. Burroughs, 33 Mich. 511.

Disclosure of facts

Evidence is admissible as bearing on the question whether advice of counsel was rendered after full disclosure of the facts.

Mich.—Bennett v. Eddy, 79 N.W. 481, 120 Mich. 300.

64. Kan.—Bell v. Day, 57 P. 1054, 9 Kan.App. 111.

25 C.J. p 546 note 98.

65. Or.—Spain v. Oregon-Washing-

defendant toward plaintiff during the time he is being prosecuted,^{65.5} and thereafter.^{65.10}

In order that evidence may be admissible as bearing on malice, its connection with the transaction involved must appear.⁶⁶ Prior unsolved thefts have been held admissible to show that defendant acted in good faith.^{66.5} The fact that the arrest was made by defendant at the direction of a superior police officer is admissible in mitigation of damages and to show no malice.^{66.10} An officer's mistake in arresting the wrong person may be shown to reduce damages and show want of malice.^{66.15} As bearing on the question of malice or ill will it is inadmissible to show previous statements of defendant, a village trustee, amounting simply to a direction by him to a police officer to enforce a village ordinance.⁶⁷

The motive of plaintiff in committing the wrongful act for which he was unlawfully arrested is immaterial,⁶⁸ although evidence tending to show motive has been held relevant and admissible as a circumstance bearing on the identity of plaintiff

as the perpetrator of the offense.^{68.5} Where the intent of plaintiff is an element of the crime for which he was arrested, evidence of such intent is admissible on the issue of whether or not a crime was committed.^{68.10}

g. Probable Cause

While evidence as to probable cause is not as a rule material, it may be admissible as bearing on the right to exemplary damages or as establishing justification for a detention, and evidence of the truth or falsity of the charge is relevant to the issue of probable cause.

Evidence as to probable cause is not as a rule material in an action for false imprisonment,⁶⁹ and may not be shown to defeat the action.^{69.5} It may be admissible, however, as bearing on the right to exemplary damages,⁷⁰ or in mitigation of damages,^{70.5} and proof of the reasonableness of defendant's conduct is relevant on the issue of punitive damages.^{70.10} Such evidence is also admissible as bearing on the question of whether or not a detention or arrest was justified.⁷¹ Evidence of previous conduct of plaintiff which was unknown to defend-

ton R. & Nav. Co., 153 P. 470, 78 Or. 355, Ann.Cas.1917E 1104.
25 C.J. p 546 note 99.

65.5 Ohio.—Thomas v. F. & R. Lazarus & Co., App., 57 N.E.2d 103.

65.10 Cal.—Parrott v. Bank of America Nat. Trust & Sav. Ass'n, 217 P.2d 89, 97 C.A.2d 14, 35 A.L.R.2d 263.

66. N.Y.—Grinnell v. Weston, 88 N.Y.S. 781, 95 App.Div. 454, 15 N.Y. Ann.Cas. 193.

25 C.J. p 546 note 1.

66.5 N.Y.—Gill v. Montgomery Ward & Co., 129 N.Y.S.2d 288, 284 App. Div. 36.

66.10 Ill.—Shelton v. Barry, 66 N.E.2d 697, 328 Ill.App. 497.

Ohio.—Johnson v. Reddy, App., 120 N.E.2d 459, reversed on other grounds 126 N.E.2d 911, 163 Ohio St. 347.

66.15 Tex.—Schnauffer v. Price, Civ. App., 124 S.W.2d 940, error refused.
Wis.—Wallner v. Fidelity & Deposit Co. of Md., 33 N.W.2d 215, 253 Wis. 66, 10 A.L.R.2d 745.

67. N.Y.—Fuller v. Redding, 43 N.Y.S. 96, 13 App.Div. 61.

68. N.Y.—Fuller v. Redding, 39 N.Y.S. 109, 16 Misc. 634, affirmed 43 N.Y.S. 96, 13 App.Div. 61.

68.5 Miss.—Gunter v. Reeves, 21 So. 2d 468, 198 Miss. 31.

68.10 Ohio.—Thomas v. F. & R. Lazarus & Co., App., 57 N.E.2d 103.

Intent to defraud

Evidence relevant to plaintiff's authority to write check is admissible on issue of her intent to defraud in

action for false arrest arising out of plaintiff's effort to cash check at defendant's store.

Ohio.—Thomas v. F. & R. Lazarus & Co., supra.

69. Ga.—Conoly v. Imperial Tobacco Co., 12 S.E.2d 398, 63 Ga.App. 880.

Iowa.—Sergeant v. Watson Bros. Transp. Co., 52 N.W.2d 86, 244 Iowa 185.

25 C.J. p 546 note 5.

Offer to withdraw charge

In action for false imprisonment based on arrest without warrant for alleged theft not committed in presence of arresting officer, evidence that defendant offered to withdraw charge of theft if plaintiff would admit guilt and pay for allegedly stolen article was improperly admitted.
Va.—Montgomery Ward & Co. v. Wickline, 50 S.E.2d 387, 188 Va. 485.

69.5 N.Y.—Sanders v. Rolnick, 67 N.Y.S.2d 652, 188 Misc. 627, affirmed 71 N.Y.S.2d 896, 272 App.Div. 803.

70. Ariz.—Adair v. Williams, 210 P. 853, 24 Ariz. 422, 26 A.L.R. 278.
Ga.—Conoly v. Imperial Tobacco Co., 12 S.E.2d 398, 63 Ga.App. 880.

Iowa.—Sergeant v. Watson Bros. Transp. Co., 52 N.W.2d 86, 244 Iowa 185.

N.Y.—Sanders v. Rolnick, 67 N.Y.S. 2d 652, 188 Misc. 627, affirmed 71 N.Y.S.2d 896, 272 App.Div. 803.

Va.—Montgomery Ward & Co. v. Wickline, 50 S.E.2d 387, 188 Va. 485.

25 C.J. p 546 note 6.

70.5 Ga.—Atlantic Coast Line R. Co. v. Wegner, 83 S.E.2d 58, 90 Ga.App. 267—Goodwin v. Allen, 78 S.E.2d 804, 89 Ga.App. 187—Conoly v. Imperial Tobacco Co., 12 S.E.2d 398, 63 Ga.App. 880.

Va.—Montgomery Ward & Co. v. Wickline, 50 S.E.2d 387, 188 Va. 485.

70.10 N.Y.—Gill v. Montgomery Ward & Co., 129 N.Y.S.2d 288, 284 App.Div. 36.

71. Ala.—Orr v. Burleson, 107 So. 825, 214 Ala. 257.

Ga.—Atlantic Coast Line R. Co. v. Wegner, 83 S.E.2d 58, 90 Ga.App. 267.

Or.—Allen v. William J. Burns International Detective Agency, 256 P. 197, 121 Or. 492.

25 C.J. p 546 note 7.

Proof by defendant of probable cause is material beyond its use in mitigation of punitive damages.

U.S.—Carr v. National Discount Corp., C.A.Mich., 172 F.2d 899, certiorari denied 70 S.Ct. 59, 388 U.S. 817, 94 L.Ed. 495.

Report of private investigator

Report of detective agency investigator investigating burglary for insurance company, which report was examined by police officers before plaintiff was arrested, was admissible as part of res gestae and as material in determining whether officers had reasonable grounds for making arrest.

Ill.—Shelton v. Barry, 66 N.E.2d 697, 328 Ill.App. 497.

ant at the time of the arrest is inadmissible to establish justification.^{71.5} Plaintiff may present evidence in opposition to evidence of probable cause introduced by defendant.^{71.10} Where the action is based on the alleged fraudulent procuring of the commitment of a person as insane, evidence as to the statements made by defendant to the examining physicians is admissible.⁷²

The truth or falsity of the charge is germane to the establishment of probable cause for the detention.^{72.5} Thus, a conviction of plaintiff may be admissible to show probable cause for his arrest;⁷³ and his acquittal may be shown to establish the absence of probable cause;⁷⁴ but plaintiff cannot show what the judge charged the jury on a criminal trial to show want of probable cause.⁷⁵

Commission of similar offenses. Where an arrest is made without warrant, evidence that plain-

tiff had been guilty of other offenses similar to that charged may be admitted for the purpose of showing probable cause.⁷⁶

h. Damages

As a general rule, plaintiff may introduce evidence of the extent of recoverable damages sustained by him, and defendant may present evidence in mitigation of damages even though such evidence is not admissible in justification.

Plaintiff is entitled to introduce evidence of the extent and amount of damages sustained by him if within the scope of his pleadings, subject to other restrictions generally applicable to the proof of damages.⁷⁷ Thus, he may show the condition of the jail in which he was imprisoned,^{77.5} and evidence relative to his being handcuffed by police officers at the time of his arrest is admissible to prove general damages, even though defendant was not pres-

71.5 U.S.—*Andrews v. Hotel Sherman*, C.C.A.Ill., 138 F.2d 524.

71.10 Ohio.—*Thomas v. F. & R. Lazarus & Co.*, App., 57 N.E.2d 103.

Prior similar conduct

In action for false imprisonment arising out of plaintiff's attempt to cash an allegedly worthless check at defendant's store, a check similar in form to the one involved, and which plaintiff testified she had previously cashed at the store, was properly admitted to show that plaintiff was not attempting to defraud defendant and that it did not have probable cause for its action in having her arrested.

Ohio.—*Thomas v. F. & R. Lazarus & Co.*, supra.

72. Miss.—*Bacon v. Bacon*, 24 So. 968, 76 Miss. 458.
25 C.J. p 546 note 8.

72.5 N.J.—*Jorgensen v. Pennsylvania R. Co.*, 118 A.2d 854, 38 N.J.Super. 317.

73. Pa.—*Perry v. Pennsylvania R. Co.*, 41 Pa.Super. 591.

74. Or.—*Allen v. William J. Burns International Detective Agency*, 256 P. 197, 121 Or. 492.

Pa.—*Butler v. Stockdale*, 19 Pa.Super. 98.

Nolle prosequi

Evidence that case made against plaintiff was nolle prossed was admissible to show that charge was not well grounded.

Ala.—*Fidelity & Deposit Co. of Maryland v. Adkins*, 130 So. 552, 222 Ala. 17.

75. Pa.—*Grohmann v. Kirschman*, 32 A. 32, 168 Pa. 189.

76. Kan.—*Smith v. Hern*, 170 P. 990, 102 Kan. 373.

77. Ala.—*Fidelity & Deposit Co. of*

Maryland v. Adkins, 130 So. 552, 222 Ala. 17.

Ark.—*Arkansas Central Power Co. v. Hildreth*, 296 S.W. 33, 174 Ark. 529.

Ill.—*Lindquist v. Friedman's Inc.*, 8 N.E.2d 625, 366 Ill. 232.

Iowa.—*McVay v. Carpe*, 29 N.W.2d 582, 238 Iowa 1131.
25 C.J. p 547 note 15.

Evidence held admissible

(1) Length of time of detention.
Ala.—*Walling v. Fields*, 96 So. 471, 209 Ala. 389.

(2) Number and circumstances of family.

Kan.—*Gariety v. Fleming*, 245 P. 1054, 121 Kan. 42.

Tex.—*Baker Co. v. Turpin*, Civ.App., 53 S.W.2d 154, error dismissed.
25 C.J. p 547 note 15 [e].

(3) Lost time of plaintiff in attending court to defend against prosecution and value thereof.

Ala.—*Fidelity & Deposit Co. of Maryland v. Adkins*, 130 So. 552, 222 Ala. 17.

(4) Talk among acquaintances about plaintiff's arrest.

Mo.—*Thompson v. St. Louis-San Francisco Ry. Co.*, App., 3 S.W.2d 1033.

(5) Where plaintiff sought recovery for mental anguish, pain, and humiliation, plaintiff's testimony on cross-examination, as to whether he had previously been in jail for breaches of peace, would be admissible on issue of damages.

Tex.—*Alamo Downs, Inc. v. Briggs*, Civ.App., 106 S.W.2d 733, error dismissed.

(6) Testimony of plaintiff's counsel as to conversations with the prosecutors in matters relating to the prosecution of plaintiff was com-

petent as enabling jury to fix the value of attorney's services, which were an element of damages.

Ohio.—*Thomas v. F. & R. Lazarus & Co.*, App., 57 N.E.2d 103.

Evidence as to improper elements of damage is inadmissible.

N.Y.—*Vitterio v. St. Regis Paper Co.*, 194 N.Y.S. 519, 202 App.Div. 775.

Mental and physical suffering

(1) Evidence held admissible generally.

Kan.—*Cordell v. Standard Oil Co.*, 289 P. 472, 131 Kan. 221.

25 C.J. p 547 note 15 [c] (1).

(2) Plaintiff's testimony as to wife's physical condition was admissible on issue of plaintiff's mental anguish and disturbance of family.

Va.—*Dellastatious v. Boyce*, 147 S.E. 267, 152 Va. 368.

(3) Evidence held inadmissible.

Ala.—*Burk v. Knott*, 101 So. 811, 20 Ala.App. 316.

Or.—*Joseph v. Meier & Frank Co.*, 250 P. 739, 120 Or. 117.

25 C.J. p 547 note 15 [c] (2).

Newspaper publications may be admissible.

Ala.—*Phillips v. Morrow*, 97 So. 130, 210 Ala. 34.

Cal.—*Kenyon v. Hartford Accident & Indemnity Co.*, 260 P. 952, 86 C.A. 269.

25 C.J. p 547 note 15 [d].

77.5 Ark.—*Missouri Pac. R. Co. v. Yancey*, 22 S.W.2d 408, 180 Ark. 684.

Iowa.—*McVay v. Carpe*, 29 N.W.2d 582, 238 Iowa 1131.—*Fox v. McCurnin*, 218 N.W. 499, 205 Iowa 752.

N.C.—*Brockwell v. Western Union Telegraph & Cable Co.*, 171 S.E. 784, 205 N.C. 474.

ent and directing the arrest.^{77.10} Evidence of the financial worth of defendant is admissible on the question of punitive damages.^{77.15} Matters not admissible in justification may be competent in mitigation of damages,⁷⁸ such as evidence of previous arrests and time spent in jail, where plaintiff claims that he was humiliated and upset.^{78.5} Proof of damages resulting from the wrongful act is admissible, although such damages manifest themselves after the filing of the suit.⁷⁹

§ 57. Weight and Sufficiency of Evidence

a. In general

77.10 Or.—McNeff v. Heider, 337 P. 2d 819.

77.15 U.S.—Atkinson v. Dixie Greyhound Lines, C.C.A.Miss., 143 F. 2d 477, certiorari denied 65 S.Ct. 92, 323 U.S. 758, 89 L.Ed. 607.

Cal.—Parrott v. Bank of America Nat. Trust & Sav. Ass'n, 217 P.2d 89, 97 C.A.2d 14, 35 A.L.R.2d 263.

Kan.—Hammargren v. Montgomery Ward & Co., 241 P.2d 1192, 172 Kan. 484.

Subject to safeguards

Testimony concerning defendants' financial worth may be received when in trial judge's opinion it is necessary in determining punitive damages, but its reception should be carefully safeguarded by the judge, so that injustice will not be done to defendants.

Pa.—Arye v. Dickstein, 12 A.2d 19, 337 Pa. 471.

78. U.S.—Elrod v. Moss, C.C.A.S.C., 278 F. 123.

Ala.—Central Iron & Coal Co. v. Wright, 101 So. 815, 20 Ala.App. 82, certiorari denied Ex parte Central Iron & Coal Co., 101 So. 824, 212 Ala. 130—Burk v. Knott, 101 So. 811, 20 Ala.App. 316.

Ariz.—Adair v. Williams, 210 P. 853, 24 Ariz. 422, 26 A.L.R. 278.

Ga.—Conoly v. Imperial Tobacco Co., 12 S.E.2d 398, 63 Ga.App. 880.

Mo.—Newport v. Montgomery Ward & Co., 127 S.W.2d 687, 344 Mo. 646.

N.D.—Mason v. Underwood, 183 N. W. 525, 529, 48 N.D. 122.

Or.—Christ v. McDonald, 52 P.2d 655, 152 Or. 494.

25 C.J. p 547 note 16.

Particular matters:

Character of plaintiff see supra subdivision e of this section.

Good faith see supra subdivision f of this section.

Probable cause see supra subdivision g of this section.

Evidence held admissible

(1) A warrant, although defective

in failing to state the crime with which plaintiff was charged, is admissible in evidence on the question of exemplary damages to show good faith of the defendant officer and absence of malice in making the arrest.

Tex.—Branch v. Guinn, Civ.App., 242 S.W. 482.

(2) Evidence as to honest mistake of officer in arresting the wrong person can be considered in mitigation of damages.

Tex.—Schnauffer v. Price, Civ.App., 124 S.W.2d 940, error refused.

Evidence held inadmissible

Court did not err in refusing to permit defendant to introduce, in mitigation of damages, conduct and language of plaintiff which caused criminal warrant to be issued for her arrest.

Va.—Crosswhite v. Barnes, 124 S.E. 242, 139 Va. 471, 40 A.L.R. 54.

Medical testimony

Testimony of hospital doctor who examined claimant on arrival at hospital would be admissible as bearing on amount of damages to be awarded for his false imprisonment therein.

N.Y.—Warner v. State, 79 N.E.2d 459, 297 N.Y. 395.

Liability to arrest

After unauthorized arrest for one offense, liability to arrest for different offense may be shown in mitigation of damages for wrongful arrest.

Okl.—Lyons v. Worley, 4 P.2d 3, 152 Okl. 57.

That no loss of employment resulted from wrongful arrest and imprisonment may be shown by defendant as bearing on question of damages.

N.C.—Butler v. Holt-Williamson Mfg. Co., 116 S.E. 726, 185 N.C. 250.

78.5 Ky.—Butcher v. Adams, 220 S. W.2d 398, 310 Ky. 205.

b. Acquittal or conviction, examination before magistrate; indictment

c. Malice and probable cause

a. In General

Plaintiff must establish his cause of action by a preponderance of the evidence, but circumstantial as well as direct evidence may suffice.

As in other civil actions plaintiff must establish his cause of action by a preponderance of the evidence.⁸⁰ Circumstantial as well as direct evidence may be sufficient to establish particular facts,⁸¹ such as the cause or basis for the arrest,^{81.5} defendant's connection with, or participation in, the arrest or imprisonment,^{81.10} or the direction or request that plaintiff be arrested,^{81.15} the agency of employees of

79. Mo.—Hutchinson v. Sunshine Oil Co., App., 218 S.W. 951.

80. Mass.—Mitchell v. Wall, 111 Mass. 492.

Mich.—Baker v. Steketee, 255 N.W. 197, 267 Mich. 304.

N.Y.—Carroll v. Gimbel Bros., New York, 186 N.Y.S. 737, 195 App.Div. 444.

Hook v. State, 181 N.Y.S.2d 621, 15 Misc.2d 672.

Utah.—Johnson v. Leigh, 279 P. 501, 74 Utah 286.

81. Iowa.—Klemm v. Adair, 179 N. W. 51, 189 Iowa 896.

Kan.—Hammargren v. Montgomery Ward & Co., 241 P.2d 1192, 172 Kan. 484.

Mo.—Jarrett v. St. Francois County Finance Co., App., 185 S.W.2d 855

—Thompson v. Fehlig Bros. Box & Lumber Co., App., 155 S.W.2d 279—Schuler v. Hughes, App., 52 S. W.2d 453—Peterson v. Fleming,

297 S.W. 163, 222 Mo.App. 296.

Pa.—Keidel v. Baltimore & O. R. Co., 126 A. 770, 281 Pa. 289.

Sebastianelli v. Cleland Simpson Co., 31 A.2d 570, 152 Pa.Super. 203.

25 C.J. p 547 note 21.

Alleged conspiracy to commit plaintiff to insane asylum could be proved either by direct or circumstantial evidence.

Mass.—Karjavainen v. Buswell, 194 N.E. 295, 289 Mass. 419.

81.5 Evidence held to show that arrest was not made on basis of complaints of informers but on basis of misdemeanor committed in presence of arresting officer.

Cal.—Dussault v. Condon, App., 339 P.2d 896.

81.10 Mont.—Harrer v. Montgomery Ward & Co., 221 P.2d 428, 124 Mont. 295.

R.I.—Sylvester v. Buerhaus, 45 A. 2d 150, 71 R.I. 335.

81.15 Tenn.—(Blue) Star Service, Inc. v. McCurdy, 251 S.W.2d 139, 36 Tenn.App. 1.

defendant,^{81.20} the scope of their authority,^{81.25} or that defendant or his agent or employees instigated the arrest.^{81.30}

Numerous decisions have adjudicated the sufficiency of the evidence to warrant a recovery for plaintiff for false imprisonment,⁸² to authorize or

81.20 Pa.—Sebastianelli v. Cleland Simpson Co., 31 A.2d 570, 152 Pa. Super. 203.

81.25 Pa.—Sebastianelli v. Cleland Simpson Co., supra.

81.30 Mo.—Wright v. Automobile Gasoline Co., 250 S.W. 368.

Jarrett v. St. Francois County Finance Co., App., 185 S.W.2d 855—Winegar v. Chicago, B. & Q. R. Co., App., 163 S.W.2d 357—Hunt v. Ruterbusch, App., 38 S.W.2d 503—Vimont v. S. S. Kresge Co., App., 291 S.W. 159—Wright v. Hoover, 241 S.W. 89, 211 Mo.App. 185.

82. Evidence held sufficient

(1) Generally.

U.S.—Milner Hotels Management Co. v. Hundley, C.A.Ky., 216 F.2d 613. Boice v. Bradley, D.C.Idaho, 92 F.Supp. 750, affirmed, C.A., Bradley Min. Co. v. Boice, 194 F.2d 80, certiorari denied 72 S.Ct. 1033, 343 U.S. 941, 96 L.Ed. 1347, motion denied 198 F.2d 790, order vacated 73 S.Ct. 797, 345 U.S. 932, 97 L.Ed. 1361, rehearing denied 205 F.2d 937, certiorari denied 74 S.Ct. 125, 346 U.S. 874, 98 L.Ed. 382.

Ark.—Missouri Pac. R. Co. v. Yancey, 10 S.W.2d 22, 178 Ark. 147.

Cal.—Onick v. Long, 316 P.2d 427, 154 C.A.2d 381—Schanafelt v. Seaboard Finance Co., 239 P.2d 42, 108 C.A.2d 420—Coyne v. Nelson, 237 P.2d 45, 107 C.A.2d 469—Parrott v. Bank of America Nat. Trust & Sav. Ass'n, 217 P.2d 89, 97 C.A. 2d 14, 35 A.L.R.2d 263—Hanna v. Raphael Weill & Co., 203 P.2d 564, 90 C.A.2d 461—Ware v. Dunn, 183 P.2d 128, 80 C.A.2d 936—Walton v. Will, 152 P.2d 639, 66 C.A.2d 509—Collins v. Jones, 22 P.2d 39, 131 C.A. 747—Murray v. Kunde, 267 P. 158, 91 C.A. 440.

Colo.—Union Pac. R. Co. v. Dennis, 213 P. 332, 73 Colo. 66.

Ga.—Radney v. Levine, 42 S.E.2d 644, 75 Ga.App. 137—Standard Sur. & Cas. Co. of N. Y. v. Johnson, 41 S.E.2d 576, 74 Ga.App. 823—Sheppard v. Hale, 197 S.E. 922, 58 Ga. App. 140—Wyatt v. Baker, 154 S.E. 816, 41 Ga.App. 750—Hines v. Adams, 107 S.E. 618, 27 Ga.App. 155, first case—Hines v. Adams, 107 S.E. 618, 27 Ga.App. 157, second case.

Idaho.—Anderson v. Foster, 252 P. 2d 199, 73 Idaho 340.

Ill.—Lindquist v. Friedman's Inc., 8 N.E.2d 625, 366 Ill. 232.

Shemaitis v. Collins, 109 N.E.2d 370, 348 Ill.App. 549—Bailey v. Welch, 30 N.E.2d 85, 307 Ill.App. 230—Carter v. Southern Limited, 25 N.E.2d 590, 303 Ill.App. 502—

Knorr v. Great Atlantic & Pacific Tea Co., 17 N.E.2d 629, 297 Ill.App. 641—Winans v. Congress Hotel Co., 227 Ill.App. 276.

Ind.—Matovina v. Hult, 123 N.E.2d 893, 125 Ind.App. 236—Baltimore & O. R. Co. v. Applegate, 149 N.E. 651, 84 Ind.App. 192, rehearing denied 150 N.E. 794, 84 Ind.App. 192. Kan.—Lewis v. Montgomery Ward & Co., 62 P.2d 875, 144 Kan. 656—Ward v. S. H. Kress & Co., 28 P. 2d 983, 138 Kan. 860.

Ky.—J. J. Newberry Co. v. Judd, 82 S.W.2d 359, 259 Ky. 309—Sternberg v. Hogg, 72 S.W.2d 421, 254 Ky. 761.

La.—Burton v. Llano Del Rio Co. of Nevada, 148 So. 259, 177 La. 366.

Mass.—McDermott v. W. T. Grant Co., 49 N.E.2d 115, 313 Mass. 736. Mich.—Odinetz v. Budds, 24 N.W.2d 193, 315 Mich. 512.

Minn.—Kleidon v. Glascock, 10 N.W. 2d 394, 215 Minn. 417—Anderson v. Averbek, 248 N.W. 719, 189 Minn. 224—Wallerick v. McGill Warner Co., 191 N.W. 604, 154 Minn. 341.

Mont.—Panisko v. Dreibelbis, 124 P. 2d 997, 113 Mont. 310—Kelly v. Kipp, 250 P. 819, 77 Mont. 110.

Neb.—Robertson v. Safe Way Stores, 264 N.W. 153, 130 Neb. 82—Dillon v. Sears-Roebeck Co., 249 N.W. 604, 125 Neb. 269, reversed on other grounds 253 N.W. 331, 126 Neb. 357.

N.J.—Vail v. Pennsylvania R. Co., 136 A. 425, 103 N.J.Law 213.

Walder v. Manahan, 29 A.2d 395, 21 N.J.Misc. 1—Sheean v. Holman, 141 A. 170, 6 N.J.Misc. 346. N.Y.—Warner v. State, 79 N.E.2d 459, 297 N.Y. 395.

Bernier v. Lawrensen, 283 N.Y.S. 452, 246 App.Div. 674.

Goldberg v. Fleischer's Confidence Food Stores, 102 N.Y.S.2d 176.

N.C.—Carson v. Doggett, 58 S.E.2d 609, 231 N.C. 629—Brockwell v. Western Union Telegraph & Cable Co., 171 S.E. 784, 205 N.C. 474.

Ohio.—Thomas v. F. & R. Lazarus & Co., App., 57 N.E.2d 103.

Okl.—Alsop v. Skaggs Drug Center, 223 P.2d 530, 203 Okl. 525—Thompson v. Burnett, 27 P.2d 1053, 167 Okl. 82.

Pa.—Sebastianelli v. Cleland Simpson Co., 31 A.2d 570, 152 Pa. Super. 203—Shields v. Patterson, 97 Pa. Super. 398.

Long v. Great Atlantic & Pacific Tea Co., 29 Del.Co. 508.

S.D.—Mannough v. J. C. Penney Co., 250 N.W. 38, 61 S.D. 550.

Tenn.—Deaderick v. Smith, 230 S.W. 2d 406, 33 Tenn.App. 151—Little

Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357.

Tex.—Heath v. Boyd, 175 S.W.2d 214, 141 Tex. 569.

Marsalis Motors v. Simmons; Civ.App., 303 S.W.2d 510, error refused no reversible error.

Va.—Montgomery Ward & Co. v. Wickline, 50 S.E.2d 387, 188 Va. 485—W. T. Grant Co. v. Owens, 141 S.E. 860, 149 Va. 906.

Wash.—Smith v. Drew, 26 P.2d 1040, 175 Wash. 11.

(2) To demand verdict for plaintiff.

Ga.—Goodwin v. Allen, 78 S.E.2d 804, 89 Ga.App. 187.

(3) To prove a technical case of false imprisonment entitling plaintiff to nominal compensatory damages.

Ohio.—Morton v. Murphy Lumber & Hardware Co., Com.Pl., 102 N.E.2d 744.

(4) To justify denial of recovery.

U.S.—Kofouros v. Giannoutsos, C.A. Va., 174 F.2d 477, rehearing denied Korthinos v. The Niarchos, 175 F.2d 734, certiorari denied 70 S.Ct. 239, 338 U.S. 894, 94 L.Ed. 550, rehearing denied 70 S.Ct. 344, 338 U.S. 939, 94 L.Ed. 579.

(5) To support verdict of no cause of action.

N.Y.—Bass v. Saratoga Harness Racing Ass'n, 143 N.Y.S.2d 31, 286 App.Div. 934.

(6) To establish that claimant's commitment to state hospital was in all respects legally accomplished. N.Y.—Morgan v. State, 105 N.Y.S.2d 793, 278 App.Div. 996, appeal denied 106 N.Y.S.2d 1015.

Evidence held insufficient

(1) Generally.

U.S.—Grivas v. Alianza Compania Armadora S. A., D.C.N.Y., 150 F. Supp. 708.

Ala.—American Ry. Express Co. v. Summers, 94 So. 737, 208 Ala. 531. Ariz.—Wisniski v. Ong, 329 P.2d 1097.

Cal.—Collyer v. S. H. Kress Co., 54 P.2d 20, 5 C.2d 175.

Colo.—Walker v. Tucker, 280 P.2d 649, 131 Colo. 198—Smith v. Phelps, 28 P.2d 1004, 94 Colo. 33.

Conn.—Roberts v. Paine, 199 A. 112, 124 Conn. 170.

D.C.—Palais Royal v. Orton, 65 F. 2d 199, 62 App.D.C. 111.

Fla.—Camp v. Silas, 151 So. 706, 113 Fla. 323.

Ky.—Kroger Grocery & Baking Co. v. Plaggenburg, 251 S.W. 650, 199 Ky. 551.

La.—Raggio v. Morgan's Louisiana &

require a verdict for defendant,⁸³ to establish a prima facie case of false imprisonment,⁸⁴ to establish a false or unlawful arrest or imprisonment,^{84.5} to establish a lawful arrest by a citizen,^{84.10} to show legal justification for plaintiff's detention,⁸⁵ or justification for plaintiff's removal from the

Texas R. & S. S. Co., 86 So. 747, 148 La. 209.

Mass.—Sweeney v. F. W. Woolworth Co., 142 N.E. 50, 247 Mass. 277, 31 A.L.R. 311.

Mich.—D'Hondt v. Slovekowski, 10 N.W.2d 332, 306 Mich. 156—Baker v. Stekete, 255 N.W. 197, 267 Mich. 304.

Minn.—Durgin v. Cohen, 209 N.W. 532, 168 Minn. 77.

Miss.—Thompson v. Chandler, 109 So. 865, 144 Miss. 366.

Mo.—Checkeye v. John Bettendorf Market, Inc., App., 257 S.W.2d 202 —Gould v. Skelly Oil Co., App., 50 S.W.2d 193.

Neb.—Edgar v. Omaha Public Power Dist., 89 N.W.2d 238, 166 Neb. 452.

N.J.—Russell v. Levinsohn, 138 A. 205, 5 N.J.Misc. 765.

N.Y.—Harris v. New York, W. & B. Ry. Co., 278 N.Y.S. 823, 244 App. Div. 252—Carroll v. Gimbel Bros., New York, 186 N.Y.S. 737, 195 App. Div. 444.

Dzulvelis v. Mays Fur & Ready to Wear, 18 N.Y.S.2d 106.

Ohio.—McFarland v. Shirkey, 151 N.E.2d 797, 106 Ohio App. 517, appeal dismissed 154 N.E.2d 83, 168 Ohio St. 283, rehearing denied 155 N.E.2d 468, 106 Ohio App. 517, motion to certify overruled 155 N.E.2d 925, 106 Ohio App. 517.

Pa.—Samuel v. Blackwell, 76 Pa.Super. 540.

Tex.—Walker v. Martin, Civ.App., 129 S.W.2d 1149.

Utah.—Hepworth v. Covey Bros. Amusement Co., 91 P.2d 507, 97 Utah 205.

(2) To justify award of damages against a physician as health commissioner for wrongfully committing plaintiff to an insane hospital. N.Y.—Conklin v. Van Hoesen, 71 N.Y.S.2d 367, 272 App.Div. 966.

(3) Where employees of defendant did nothing more than report facts to police.

Tex.—Zale Jewelry Co. v. Jarman, Civ.App., 227 S.W.2d 857, error dismissed.

83. Evidence held sufficient

U.S.—Livanos v. Pateras, C.A.Va., 192 F.2d 319, certiorari denied 72 S.Ct. 1042, 343 U.S. 950, 96 L.Ed. 1352.

Mihovilcevic v. U. S., D.C.Mass., 80 F.Supp. 77.

Cal.—Jackson v. Osborn, 254 P.2d 871, 116 C.A.2d 875—Griswold v. Hollywood Turf Club, 235 P.2d 656, 106 C.A.2d 578—Hill v. Nelson, 162 P.2d 927, 71 C.A.2d 528.

Ga.—Waddington v. Stores Mut. Protective Ass'n, 183 S.E. 143, 52 Ga.App. 331.

Minn.—Friedman v. Goffstein, 234 N.W. 596, 182 Minn. 396.

Pa.—McQuaid v. W. T. Grant Co., 9 A.2d 733, 336 Pa. 475.

S.D.—Kredit v. Ryan, 1 N.W.2d 813, 68 S.D. 274.

84. Evidence held sufficient

Cal.—Moffatt v. Buffums' Inc., 69 P.2d 424, 21 C.A.2d 371.

Iowa.—Fox v. McCurnin, 218 N.W. 499, 205 Iowa 752.

Mo.—Oliver v. Kessler, App., 95 S.W.2d 1226—Greaves v. Kansas City Junior Orpheum Co., 80 S.W.2d 228, 229 Mo.App. 663—Vaughn v. Hines, 230 S.W. 379, 206 Mo.App. 425.

Mont.—Harrer v. Montgomery Ward & Co., 221 P.2d 428, 124 Mont. 295.

N.Y.—Bonnau v. State, 104 N.Y.S.2d 364, 278 App.Div. 181, affirmed 103 N.E.2d 340, 303 N.Y. 721—Litrell v. Klein, 287 N.Y.S. 354, 248 App. Div. 592.

Okl.—Mayo Hotel Co. v. Cooper, 298 P.2d 443—S. H. Kress & Co. v. Bradshaw, 99 P.2d 508, 186 Okl. 588.

Pa.—Cohen v. Lit Bros., 70 A.2d 419, 166 Pa.Super. 206—Patton v. Vucinic, 167 A. 450, 109 Pa.Super. 530.

Tex.—Castillo v. Canavati, Civ.App., 152 S.W.2d 785, error refused.

84.5 Evidence held sufficient

U.S.—Bucher v. Krause, C.A.Ill., 200 F.2d 576, certiorari denied Krause v. Bucher, 73 S.Ct. 1141, 345 U.S. 997, 97 L.Ed. 1404, rehearing denied 74 S.Ct. 17, 346 U.S. 842, 98 L.Ed. 363.

Cal.—Onick v. Long, 316 P.2d 427, 154 C.A.2d 381.

Ind.—Scoopmire v. Taffinger, 52 N.E.2d 728, 114 Ind.App. 419.

Iowa.—Sergeant v. Watson Bros. Transp. Co., 52 N.W.2d 86, 244 Iowa 185.

Ky.—Gividen v. Sullenger, 243 S.W.2d 883—Louisville & N. R. Co. v. Vinson, 223 S.W.2d 89, 310 Ky. 854.

N.Y.—Cicurel v. Mollet, 149 N.Y.S.2d 397, 1 A.D.2d 239, affirmed 135 N.E.2d 594, 1 N.Y.2d 797, 153 N.Y. S.2d 60.

Goldberg v. Fleischer's Confidence Food Stores, 102 N.Y.S.2d 176.

Ohio.—Szymanski v. Great Atlantic & Pac. Tea Co., 74 N.E.2d 205, 79 Ohio App. 407.

S.C.—Wright v. Gilbert, 88 S.E.2d 72, 227 S.C. 334.

Wash.—Rogers v. Sears, Roebuck & Co., 297 P.2d 250, 48 Wash.2d 879.

Wis.—Hader v. Rhynier, 12 N.W.2d 693, 244 Wis. 448.

Evidence held insufficient

Mont.—Harrer v. Montgomery Ward & Co., 221 P.2d 428, 124 Mont. 295, N.Y.—Pope v. State, 79 N.Y.S.2d 466, 192 Misc. 587, affirmed 99 N.Y.S.2d 1019, 277 App.Div. 1015.

Henebery v. Mahoney, 63 N.Y.S.2d 862.

Tex.—J. C. Penney Co. v. Romero, Civ.App., 318 S.W.2d 129.

84.10 Evidence held sufficient

(1) To show that citizen had not unjustifiably delayed in making arrest.

Cal.—Ogulin v. Jeffries, 263 P.2d 75, 121 C.A.2d 211—Hill v. Levy, 256 P.2d 622, 117 C.A.2d 667.

(2) To sustain determination that private citizen arrested plaintiff and then turned him over to one of defendant officers.

Cal.—Ogulin v. Jeffries, 263 P.2d 75, 121 C.A.2d 211.

Evidence held insufficient

Cal.—Peterson v. Robison, 277 P.2d 19, 43 C.2d 690.

85. Evidence held sufficient

(1) Generally.

Ark.—Missouri Pac. R. Co. v. Quick, 137 S.W.2d 263, 199 Ark. 1134.

Cal.—Collyer v. S. H. Kress Co., 54 P.2d 20, 5 C.2d 175.

Cook v. Singer Sewing Mach. Co., 32 P.2d 430, 138 C.A. 418.

Ky.—McDonald v. Lunsford, 57 S.W.2d 1018, 247 Ky. 828.

La.—Levert v. Katz & Besthoff, 115 So. 281, 164 La. 1094.

Neb.—Martin v. Sanford, 261 N.W. 136, 129 Neb. 212, 100 A.L.R. 179.

S.C.—Burton v. McNeill, 13 S.E.2d 10, 196 S.C. 250, 133 A.L.R. 603.

(2) To sustain finding that arresting officers were authorized to arrest without a warrant under reasonable belief that plaintiff was in the act of committing an assault with a deadly weapon.

Cal.—Wilson v. Loustalot, 193 P.2d 127, 85 C.A.2d 316.

(3) To sustain finding that detention was not unreasonable or unlawful.

Tex.—Wroblewski v. Coleman, Civ. App., 283 S.W.2d 822.

(4) To show no justification.

N.Y.—Ward v. Grow, 179 N.Y.S.2d 191.

(5) To sustain finding that alleged belief of police officers that plaintiff was person they were seeking was not reasonably well founded.

U.S.—Bucher v. Krause, C.A.Ill., 200 F.2d 576, certiorari denied Krause v. Bucher, 73 S.Ct. 1141, 345 U.S. 997, 97 L.Ed. 1404, rehearing de-

premises,^{85.5} to establish care in the investigation of the charge against plaintiff,^{85.10} to show reasonable grounds for arresting officer to believe plaintiff guilty of a felony,^{85.15} to show defendant's participation in, or connection with, the arrest or

imprisonment, or his authorization or instigation of it,⁸⁶ or that defendant's agent was acting within the scope of his authority, or in the course of his employment,⁸⁷ to show that a crime was commit-

nied 74 S.Ct. 17, 346 U.S. 842, 98 L. Ed. 363.

(6) To justify plant protection officers, who held private police authority under certificate issued by city police chief, in stopping, on city street, truck of plaintiff and his companion and in searching the truck to confirm or refute their suspicions of theft of company property. Ohio.—Neapolitan v. U. S. Steel Corp., App., 149 N.E.2d 589, quoting 6 C.J.S. Arrest § 1.

Evidence held insufficient

Ariz.—Platt v. Greenwood, 69 P.2d 1032, 50 Ariz. 158.

Cal.—Hughes v. Oreb, 228 P.2d 550, 36 C.2d 854.

Ga.—Vlass v. McCrary, 5 S.E.2d 63, 60 Ga.App. 744.

Ill.—Crawford v. Brown, 151 N.E. 911, 321 Ill. 305, 45 A.L.R. 1457.

Me.—Stern v. Sullivan, 188 A. 719, 135 Me. 1.

N.Y.—Bonnau v. State, 104 N.Y.S.2d 364, 278 App.Div. 181, affirmed 103 N.E.2d 340, 303 N.Y. 721.

85.5 Evidence held sufficient

Nev.—Lemel v. Smith, 187 P.2d 169, 64 Nev. 545.

85.10 Evidence held insufficient

Cal.—Parrott v. Bank of America Nat. Trust & Sav. Ass'n, 217 P.2d 89, 97 C.A.2d 14, 35 A.L.R.2d 263.

85.15 Evidence held insufficient

Cal.—Hughes v. Oreb, 228 P.2d 550, 36 C.2d 854.

86. Evidence held sufficient

(1) Generally.

Cal.—Turner v. Elliott, 206 P.2d 48, 91 C.A.2d 901.

Ga.—Sharpe v. Frost, 95 S.E.2d 309, 94 Ga.App. 444—Conoly v. Imperial Tobacco Co., 12 S.E.2d 398, 63 Ga.App. 880.

Ill.—Aldridge v. Fox, 108 N.E.2d 139, 348 Ill.App. 96.

Mich.—Howard v. Burton, 61 N.W. 2d 77, 338 Mich. 178.

Miss.—McKee v. Assad, 153 So. 799, 169 Miss. 496.

Mo.—McGill v. Walnut Realty Co., 148 S.W.2d 131, 235 Mo.App. 874—Humphreys v. St. Louis-San Francisco Ry. Co., App., 286 S.W. 738—Wright v. Hoover, 241 S.W. 89, 211 Mo.App. 185—Hines v. Fireman's Fund Ins. Co., App., 235 S.W. 174—Martin v. Woodlea Inv. Co., 226 S.W. 650, 206 Mo.App. 33.

N.Y.—Cicurel v. Mollet, 149 N.Y.S.2d 397, 1 A.D.2d 239, affirmed 135 N.E. 2d 594, 1 N.Y.2d 797, 153 N.Y.S.2d 60—Luhan v. Slavik, 185 N.Y.S. 878, 194 App.Div. 728.

Davis v. Nadell, 138 N.Y.S.2d 50.

N.C.—Ford v. McAnally, 109 S.E. 91, 182 N.C. 419.

Ohio.—Szymanski v. Great Atlantic & Pac. Tea Co., 74 N.E.2d 205, 79 Ohio App. 407.

Or.—McNeff v. Heider, 337 P.2d 819. S.C.—Westbrook v. Hutchison, 10 S.E.2d 145, 195 S.C. 101—Whitmire v. Publix Theatre Corporation, 162 S.E. 753, 164 S.C. 487—Falls v. Palmetto Power & Light Co., 109 S.E. 93, 117 S.C. 327.

Tenn.—Streetmen v. Richardson, 266 S.W.2d 838, 37 Tenn.App. 524.

Tex.—Fort Worth Hotel Co. v. Waggonman, Civ.App., 126 S.W.2d 578, error dismissed, judgment correct—Alamo Downs, Inc., v. Briggs, Civ.App., 106 S.W.2d 733, error dismissed—Texas & N. O. Ry. Co. v. Martin, Civ.App., 32 S.W.2d 363, error refused—Modesett v. Emmons, Civ.App., 286 S.W. 276, reversed on other grounds, Com.App., 292 S.W. 855.

Utah.—Pixton v. Dunn, 238 P.2d 408, 120 Utah 658.

(2) To justify holding only sheriff and deputy sheriff liable for unlawful imprisonments.

Cal.—Onick v. Long, 316 P.2d 427, 154 C.A.2d 381.

Evidence held insufficient

(1) Generally.

U.S.—Papagianakis v. The Samos, C.A.Va., 186 F.2d 257, certiorari denied 71 S.Ct. 741, 341 U.S. 921, 95 L.Ed. 1354.

Ala.—Birmingham News Co. v. Browne, 153 So. 773, 228 Ala. 395—Orr v. Burleson, 107 So. 825, 214 Ala. 257.

Crescent Amusement Co. v. Scott, 40 So.2d 882, 34 Ala.App. 335, certiorari denied 40 So.2d 886, 252 Ala. 296.

Fla.—White v. Miami Home Milk Producers Ass'n, 197 So. 125, 143 Fla. 518.

Ga.—Niebuhr v. Pridgen Bros. Co., 193 S.E. 597, 56 Ga.App. 668.

Ky.—Louisville & N. R. Co. v. Vinson, 223 S.W.2d 89, 310 Ky. 854—Triangle Motors Co. v. Smith, 287 S.W. 914, 216 Ky. 479—Cope v. Askins, 270 S.W. 454, 208 Ky. 86—Illinois Cent. R. Co. v. Anderson, 256 S.W. 1113, 201 Ky. 408.

Mass.—Jordan v. C. I. T. Corporation, 19 N.E.2d 5, 302 Mass. 281—Witham v. Gregory & Read Co., 137 N.E. 752, 243 Mass. 595.

Miss.—Smith v. Patterson, 58 So.2d 64, 214 Miss. 87.

Mo.—Hoock v. S. S. Kresge Co., App., 222 S.W.2d 568, affirmed, Sup., 230 S.W.2d 758—Gould v. Skelly Oil Co., App., 50 S.W.2d 193.

Neb.—Edgar v. Omaha Public Power Dist., 89 N.W.2d 238, 166 Neb. 452.

N.M.—Vickrey v. Dunivan, 279 P.2d 853, 59 N.M. 90.

N.Y.—Francis v. Taft Cleaners & Dyers, Inc., 119 N.Y.S.2d 618, 281 App.Div. 893, reargument & appeal denied 121 N.Y.S.2d 259, 281 App. Div. 983—Freedman v. New York Soc. for Suppression of Vice, 290 N.Y.S. 753, 248 App.Div. 517, affirmed 10 N.E.2d 550, 274 N.Y. 559.

Pa.—Bunting v. Goldstein, 129 A. 99, 283 Pa. 356.

Tex.—El Paso Electric Ry. Co. v. Crews, Civ.App., 277 S.W. 732.

(2) To establish that corporation had participated in, authorized, or ratified tortious acts of employees. N.M.—Sanchez v. Securities Acceptance Corp., 260 P.2d 703, 57 N.M. 512.

Husband and wife

In action against husband and wife for false arrest, evidence showed that wife participated in false arrest to extent sufficient to authorize verdict against her, but was insufficient to show that husband participated therein, or that act was joint enterprise of both defendants, or that wife acted as his agent.

N.Y.—Regan v. Morgan, 207 N.Y.S. 395, 211 App.Div. 443.

Joint tort-feasors

In an action for false imprisonment brought against three defendants as joint tort-feasors, evidence was insufficient to support a recovery against one of them.

N.D.—Mason v. Underwood, 183 N.W. 525, 48 N.D. 122.

87. Evidence held sufficient

Ala.—Southern Ry. Co. v. Beaty, 103 So. 658, 212 Ala. 608.

Ark.—Missouri Pac. R. Co. v. Hill, 138 S.W.2d 783, 200 Ark. 253.

Colo.—Crews-Beggs Dry Goods Co. v. Bayle, 51 P.2d 1026, 97 Colo. 568.

D.C.—Chesapeake & Potomac Telephone Co. v. Lewis, 99 F.2d 424, 69 App.D.C. 191.

Ga.—Waddington v. Stores Mut. Protective Ass'n, 163 S.E. 313, 44 Ga. App. 826—Central of Georgia Ry. Co. v. Dabney, 160 S.E. 818, 44 Ga. App. 143—McClure Ten Cent Co. v. Humphries, 127 S.E. 151, 33 Ga. App. 523.

ted,^{87.5} to justify award of compensatory damages^{87.10} or of punitive or exemplary damages,^{87.15} and to sustain or require a finding or determination as to other particular matters.⁸⁸

Mo.—Hurst v. Montgomery Ward & Co., App., 107 S.W.2d 183.

Ohio.—Cleveland Ry. Co. v. Dur-schuk, 166 N.E. 909, 31 Ohio App. 248.

Pa.—Sebastianelli v. Cleland Simpson Co., 31 A.2d 570, 152 Pa.Super. 203.
S.C.—Whitmire v. Publix Theatre Corporation, 162 S.E. 753, 164 S.C. 487.

Va.—W. T. Grant Co. v. Owens, 141 S.E. 860, 149 Va. 906.

25 C.J. p 547 note 20 [a] (8).

Evidence held insufficient

Ala.—Wofford Oil Co. v. Stauter, 154 So. 124, 26 Ala.App. 112.

Tex.—Smith v. M. System Food Stores, Inc., 297 S.W.2d 112, 156 Tex. 484.

Use of employer's stationery was held not determinative of question whether employee acted within line of duty in procuring warrant for woman's arrest.

N.C.—Lamm v. Charles Stores Co., 159 S.E. 444, 201 N.C. 134, 77 A.L.R. 923.

87.5 Evidence held sufficient

(1) Generally.

Ill.—Watkins v. Sullivan, 136 N.E.2d 528, 11 Ill.App.2d 134.

(2) To show that felony was committed.

N.D.—Haggard v. First Nat. Bank of Mandan, 8 N.W.2d 5, 72 N.D. 434.

(3) To show that misdemeanor was committed in presence of arresting officer.

Okl.—St. Clair v. Smith, 293 P.2d 597.

87.10 Evidence held sufficient

(1) To sustain damages awarded.

Cal.—Schanafelt v. Seaboard Finance Co., 239 P.2d 42, 108 C.A.2d 420.

Or.—Bratt v. Smith, 197 P.2d 681, 184 Or. 266.

(2) To entitle plaintiff to nominal damages.

Okl.—Moyer v. Cordell, 228 P.2d 645, 204 Okl. 255.

Evidence held insufficient

To authorize compensatory damages awarded.

Okl.—Moyer v. Cordell, supra.

87.15 Evidence held sufficient

Cal.—Schanafelt v. Seaboard Finance Co., 239 P.2d 42, 108 C.A.2d 420—Porter v. Granich, 29 P.2d 220, 136 C.A. 523—Collins v. Jones, 22 P.2d 39, 131 C.A. 747.

Fla.—Farish v. Smoot, 58 So.2d 534.

Ill.—Lindquist v. Friedman's, Inc., 8 N.E.2d 625, 366 Ill. 232.

Okl.—Moyer v. Cordell, 228 P.2d 645, 204 Okl. 255.

Tex.—Alamo Downs, Inc., v. Briggs, Civ.App., 106 S.W.2d 733, error dismissed.

Or.—Bratt v. Smith, 197 P.2d 681, 184 Or. 266.

Evidence held insufficient

Colo.—Johnson v. Enlow, 286 P.2d 630, 132 Colo. 101.

Md.—Dennis v. Baltimore Transit Co., 56 A.2d 813, 189 Md. 610—Heinze v. Murphy, 24 A.2d 917, 180 Md. 423.

Ohio.—Thomas v. F. & R. Lazarus & Co., App., 57 N.E.2d 103.

88. Intent to defraud innkeeper

(1) Evidence that hotel guest several times promised to pay bill and obtained additional credit by representing that he owned a certain hotel was prima facie proof of intent to defraud the hotel.

U.S.—Andrews v. Hotel Sherman, C. C.A.111, 138 F.2d 524.

(2) Evidence that a guest left a hotel without paying his bill leaving baggage in his room and that a few days later a woman paid the bill and reclaimed the baggage was insufficient to show an intent to defraud an innkeeper.

U.S.—Andrews v. Hotel Sherman, supra.

Evidence held sufficient

(1) Generally.

Cal.—Allen v. McCoy, 28 P.2d 56, 135 C.A. 500—Frickstad v. Med-craft, 279 P. 840, 100 C.A. 188.

Ga.—Wyatt v. Baker, 154 S.E. 816, 41 Ga.App. 750.

Kan.—Cordell v. Standard Oil Co., 289 P. 472, 131 Kan. 221.

Ky.—Louisville & N. R. Co. v. Mason, 251 S.W. 184, 199 Ky. 337.

Mass.—Jacques v. Childs Dining Hall Co., 138 N.E. 843, 244 Mass. 438, 26 A.L.R. 1329.

N.J.—Pine v. Okzewski, 168 A. 48, 111 N.J.Law 172, reversed on other grounds 170 A. 825, 112 N.J.Law 429.

N.Y.—Morgan v. New York Cent. R. Co., 9 N.Y.S.2d 339, 256 App.Div. 177.

Jones v. Perry, 219 N.Y.S. 295, 128 Misc. 263.

Tex.—Cannon v. American Indemnity Co., Civ.App., 70 S.W.2d 815, error dismissed—Haverbekken v. Hollingsworth, Civ.App., 250 S.W. 261. 25 C.J. p 547 note 20 [a].

(2) To establish that plaintiff, an attorney, was not afforded opportunity to leave without seeing his client, but on contrary that he was to be held and searched regardless of whether he abandoned his intention to visit his client.

La.—Gladney v. deBretton, 49 So.2d 18, 218 La. 296.

(3) To sustain finding that plaintiff landlord was present in tenant's quarters without right after illegal entry as against contention that he was lawfully defending his own home and property.

Cal.—Wilson v. Loustalot, 193 P.2d 127, 85 C.A.2d 316.

(4) To sustain finding that plaintiff was not detained for a reasonable time and in a reasonable manner for the purpose of investigation.

Cal.—Alterauge v. Los Angeles Turf Club, 218 P.2d 802, 97 C.A.2d 735.

(5) To show that plaintiff had not been detained in jail an unreasonable length of time before he was taken before magistrate.

Cal.—Ogulin v. Jeffries, 263 P.2d 75, 121 C.A.2d 211.

(6) To sustain findings that sheriff informed plaintiff that he would not be permitted to operate carnival in county, and that plaintiff decided not to operate carnival for reason that he feared legal prosecution.

Tex.—Priddy v. Bunton, Civ.App., 177 S.W.2d 805, error refused.

(7) To sustain finding that plaintiff waived examining trial.

Tex.—Cannon v. American Indemnity Co., Civ.App., 70 S.W.2d 815, error dismissed.

(8) To show that physicians who signed statutory certificate of insanity, and others, were guilty of conspiracy.

Mo.—Rice v. Gray, 34 S.W.2d 567, 225 Mo.App. 890.

(9) To warrant belief that defendant store detective made an untrue statement to officer as to what had happened.

Kan.—Hammargren v. Montgomery Ward & Co., 241 P.2d 1192, 172 Kan. 484.

(10) To warrant finding that alleged confession of theft was signed under duress.

Cal.—Vandiveer v. Charters, 294 P. 440, 110 C.A. 347.

(11) To support finding that theft of property in plaintiff's place of business was due to defendant's failure to exercise reasonable care to protect plaintiff's property when plaintiff was confined and not in a position to take steps looking to safety of his property.

Okl.—Moyer v. Cordell, 228 P.2d 645, 204 Okl. 255.

Evidence held insufficient

(1) Generally.

Cal.—Perry v. Washington Nat. Ins. Co., 58 P.2d 701, 59 P.2d 158, 14 C.A. 2d 609.

Tex.—Hicks v. Matthews, Civ.App., 261 S.W.2d 207, reversed on other grounds 266 S.W.2d 846, 153 Tex. 177.

25 C.J. p 547 note 20 [b].

(2) To permit finding of conspiracy to effect plaintiff's arrest.

La.—Levert v. Katz & Besthoff, 115 So. 281, 164 La. 1094.

Mere arrest has been held not to establish a prima facie case of false imprisonment,^{88.5} and on the other hand it has been stated that prima facie, any restraint on the actions of another accomplished by fear or force is unlawful and constitutes false arrest.^{88.10}

b. Acquittal or Conviction; Examination Before Magistrate; Indictment

A dismissal of the charge or an acquittal is prima facie evidence of want of probable cause for the arrest of plaintiff, and a conviction is prima facie evidence of probable cause for the arrest.

Dismissal of the criminal charge on which plaintiff was arrested is prima facie evidence of want of probable cause for arrest,⁸⁹ but an acquittal is not conclusive of the fact that plaintiff was illegally arrested,⁹⁰ and it has been held to have no bearing on the legality of the arrest.^{90.5} On the other hand, a discharge on habeas corpus on the ground of the illegality of the arrest has been held conclusive;⁹¹ but the fact that a contempt order under which

plaintiff was imprisoned was held void in a habeas corpus proceeding does not establish as a matter of law that his arrest and detention were unlawful, thereby making the arresting officer liable for false imprisonment,^{91.5} and a discharge because of the unreasonable length of time for which plaintiff was detained is not conclusive as to the legality of his original arrest.⁹²

A conviction is prima facie evidence of probable cause,^{92.5} and it has been held conclusive as to the existence of reasonable grounds for an arrest.⁹³ A plea or verdict of guilty has been held not conclusive that there was justification for the arrest, where the arrest was without a warrant.^{93.5} The fact that plaintiff was held, or bound over for trial, by a magistrate after an examination of the facts or preliminary hearing is prima facie evidence that his arrest was with probable cause⁹⁴ and without malice,^{94.5} but not where there was no hearing or testimony before the magistrate.^{94.10}

(3) To establish that plaintiff committed misdemeanor for which he was arrested.

N.Y.—Rodney v. Interborough Rapid Transit Co., 267 N.Y.S. 86, 149 Misc. 271.

(4) To show that conviction of plaintiff was obtained by false testimony, corrupt practice, or unjustifiable means, and to rebut prima facie presumption of probable cause, although conviction was subsequently set aside.

Ill.—Galarza v. Sprague, 1 N.E.2d 275, 284 Ill.App. 254.

(5) To establish that plaintiff, who was arrested for fishing without a license, was a "lessee," so as not to be required to have a license.

Ky.—Giannini v. Garland, 177 S.W.2d 133, 296 Ky. 361.

(6) To sustain jury's finding that magistrates were in their offices or reasonably available for presentment of plaintiff.

Tex.—Hicks v. Matthews, 266 S.W.2d 846, 153 Tex. 177.

88.5 U.S.—Carr v. National Discount Corp., C.A.Mich., 172 F.2d 899, certiorari denied 70 S.Ct. 59, 338 U.S. 817, 94 L.Ed. 495.

88.10 Ill.—Schramko v. Boston Store of Chicago, 243 Ill.App. 251.
N.Y.—Ippisch v. Moricz-Smith, 144 N.Y.S.2d 505, 1 Misc.2d 120, modified on other grounds 150 N.Y.S.2d 419, 1 A.D.2d 968.

Tex.—Gold v. Campbell, 117 S.W. 463, 54 Tex.Civ.App. 269.

Against his will

Plaintiff made out prima facie case by showing that he had been arrest-

ed and deprived of his liberty against his will.

Tex.—Hicks v. Matthews, Civ.App., 261 S.W.2d 207, reversed on other grounds 266 S.W.2d 846, 153 Tex. 177.

89. Or.—Allen v. William J. Burns International Detective Agency, 256 P. 197, 121 Or. 492.

90. N.Y.—Loughman v. Long Island R. Co., 81 N.Y.S. 1097, 83 App.Div. 629.

90.5 Cal.—Coverstone v. Davies, 239 P.2d 876, 38 C.2d 315, certiorari denied Mock v. Davies, 73 S.Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

91. Me.—Turgeon v. Bean, 83 A. 557, 109 Me. 189, Ann.Cas.1913E 567.

91.5 Cal.—Vallindras v. Massachusetts Bonding & Ins. Co., 265 P.2d 907, 42 C.2d 149.

92. Mich.—Friesenhan v. Maines, 100 N.W. 172, 137 Mich. 10.

92.5 N.Y.—Senhouse v. May's Fur & Ready to Wear, 78 N.Y.S.2d 1, 273 App.Div. 968.

93. Ky.—Waddle v. Wilson, 175 S. W. 382, 164 Ky. 228.
25 C.J. p 548 note 23.

However, it has been held that a judgment of "guilty as charged," rendered in the absence of the person arrested, was not conclusive evidence that the officers had the right to make the arrest.

Miss.—Carlisle v. City of Laurel, 124 So. 786, 156 Miss. 410.

Conviction in federal court, after arrest by railroad detective, for possessing liquor, is not conclusive on question of legality of arrest.

Ky.—Louisville & N. R. Co. v. Creech, 291 S.W. 15, 218 Ky. 147.

Conviction after admissions in court

Where, in action purportedly based on the civil rights acts for false arrest and false imprisonment, record showed that plaintiff was convicted of murder, and that during such criminal proceedings, he freely testified in open court as to the details of the killing, and the part he played in the perpetration of the homicide, and admitted that no "third degree" methods had been employed by police officers, there was no basis on which any judgment against police officers for damages would be justified.

U.S.—Hampton v. De Blaay, C.A. Mich., 258 F.2d 790.

93.5 Cal.—Collins v. Owens, 176 P.2d 372, 77 C.A.2d 713.

94. N.Y.—Schultz v. Greenwood Cemetery, 83 N.E. 41, 190 N.Y. 276.
Morgan v. New York Cent. R. Co., 9 N.Y.S.2d 339, 256 App.Div. 177.

Vallon v. Ramage, 93 N.Y.S.2d 56, 196 Misc. 740.

Okl.—Ames v. Strain, 301 P.2d 641.

Record not conclusive

Plaintiff suing for unlawful arrest and false imprisonment was held not bound by record of magistrate as to nature of charge against plaintiff, where his testimony clearly established that he was incarcerated for at least twenty-four hours without information and warrant.

Pa.—Patton v. Vucinic, 167 A. 450, 109 Pa.Super. 530.

94.5 Okl.—Ames v. Strain, 301 P.2d 641.

94.10 N.Y.—Vallon v. Ramage, 93 N.Y.S.2d 56, 196 Misc. 740.

An indictment is prima facie evidence of probable cause;⁹⁵ but the effect of an indictment as prima facie evidence may be overcome by evidence showing that it was obtained by false or fraudulent testimony or through improper means,⁹⁶ or by evidence that defendant did not believe plaintiff to be guilty.⁹⁷ Where the case against one arrested under a warrant charging the issuance of a check without sufficient funds never reached the indictment stage because of payment of the check, the prosecution will be considered to have terminated favorably to plaintiff.^{97.5}

Waiver of examination. The fact that plaintiff waived preliminary examination after his arrest and was committed for trial is prima facie evidence of probable cause, but it is not conclusive,⁹⁸ but other authority has held that a waiver of examination before a magistrate does not establish prima facie evidence of probable cause.^{98.5}

Testimony of defendant's agent that he did not direct plaintiff's arrest is not conclusive, and it may be rebutted by circumstantial evidence in such a way as to raise an issue of fact for the jury.⁹⁹

Officer off duty. That the person making the

arrest was off duty as an officer of defendant and on duty as a policeman does not demand the inference that his agency for defendant had terminated, where his duties in both capacities were not inconsistent and could be performed simultaneously.¹

Seeking police aid. Mere exercise of rights to seek aid of police authorities in suppressing thefts of property does not warrant the inference that defendant or his agent requested or directed the unlawful arrest of the suspected offender.²

c. Malice and Probable Cause

An inference of malice may arise from proof of lack of probable cause.

An inference of malice may arise from proof of lack of probable cause,³ or from proof of willful, wanton, or reckless conduct or the obstinate refusal or negligent failure to make reasonable inquiry as to the guilt or innocence of plaintiff.^{3.4} The inference is one of fact which may be rebutted.⁴ Want of probable cause is evidence of malice but is not malice itself, hence it is for the jury to determine, on the evidence, the existence of malice.⁵ In the footnotes reference is made to cases considering the sufficiency of particular evidence to

95. N.Y.—Agar v. Kelsey, 300 N.Y.S. 630, 253 App.Div. 726.

96. Mo.—Steppuhn v. Chicago Great Western R. Co., 204 S.W. 579, 199 Mo.App. 571.

N.Y.—Agar v. Kelsey, 300 N.Y.S. 630, 253 App.Div. 726.

97. Mo.—Steppuhn v. Chicago Great Western R. Co., 204 S.W. 579, 199 Mo.App. 571.

97.5 Ky.—Rader v. Parks, 258 S.W. 2d 728.

98. U.S.—Seaboard Oil Co. v. Cunningham, C.C.A.Fla., 51 F.2d 321, certiorari denied 52 S.Ct. 35, 284 U.S. 657, 76 L.Ed. 557.

98.5 N.Y.—Vallon v. Ramage, 93 N.Y.S.2d 56, 196 Misc. 740.

99. Tex.—Citizens Hotel Co. v. Foley, Civ.App., 131 S.W.2d 402, error dismissed, judgment correct.

1. Ga.—Waddington v. Stores Mut. Protective Ass'n, 163 S.E. 313, 44 Ga.App. 826.

2. Tex.—Hamilton v. California Co., Civ.App., 103 S.W.2d 200, error dismissed.

3. U.S.—Seaboard Oil Co. v. Cunningham, C.C.A.Fla., 51 F.2d 321, certiorari denied 52 S.Ct. 35, 284 U.S. 657, 76 L.Ed. 557.

Ala.—Burk v. Knott, 101 So. 811, 20 Ala.App. 316.

D.C.—Arnaud v. Langellotti, 269 F. 857, 50 App.D.C. 205.

Ill.—Ferrell v. Livingston, 101 N.E.2d 599, 344 Ill.App. 488.

Mo.—Oliver v. Kessler, App., 95 S.W.2d 1226—Schuler v. Hughes, App., 52 S.W.2d 453—Thompson v. St. Louis-San Francisco Ry. Co., App., 3 S.W.2d 1033.

N.Y.—Vallon v. Ramage, 93 N.Y.S.2d 56, 196 Misc. 740.

Va.—Virginia Electric & Power Co. v. Wynne, 141 S.E. 829, 149 Va. 882. 25 C.J. p 548 note 31.

Want of probable cause not inferred from malice see supra § 25.

Arrest without probable cause would constitute legal malice.

Mo.—Winegar v. Chicago, B. & Q. R. Co., App., 163 S.W.2d 357.

Failure to investigate

Failure to investigate, resulting in unlawful imprisonment, connotes malice.

Ill.—Lindquist v. Friedman's, 1 N.E. 2d 529, 285 Ill.App. 71, affirmed 8 N.E.2d 625, 366 Ill. 232.

Failure to state facts fairly

Where, in action for false arrest and imprisonment and malicious prosecution, the uncontroverted evidence discloses that defendant, prior to charging plaintiff with larceny, neglected and refused to lay all the facts fairly and honestly before the county attorney or some competent attorney, malice is implied.

Okl.—Parsons v. Sims, 229 P. 1090, 104 Okl. 1.

Inference from unlawful arrest

Malice may be inferred from the fact of an unlawful arrest, if made without any probable cause for believing plaintiff guilty of the crime charged.

Ala.—Standard Oil Co. v. Davis, 94 So. 754, 208 Ala. 565.

No inference from acquittal

Malice may be inferred from want of probable cause, but want of probable cause and malice may not be inferred from the mere fact of acquittal.

Ala.—Standard Oil Co. v. Davis, supra.

Malice without hatred or ill will

To prove that defendant in false imprisonment action was motivated by malice, it is not necessary to prove hatred or ill will, but only to show the intentional doing of a wrongful act without just cause.

Mo.—Oliver v. Kessler, Mo.App., 95 S.W.2d 1226—Thompson v. St. Louis-San Francisco Ry. Co., Mo.App., 3 S.W.2d 1033.

3.4 Mo.—Winegar v. Chicago, B. & Q. R. Co., App., 163 S.W.2d 357.

4. Mo.—Peterson v. Fleming, 297 S.W. 163, 222 Mo.App. 236. 25 C.J. p 548 note 32.

5. N.Y.—Stevens v. O'Neill, 64 N.Y.S. 663, 51 App.Div. 364, affirmed 62 N.E. 424, 169 N.Y. 375. 25 C.J. p 548 note 33.

establish malice,⁶ willfulness,^{6.5} and probable cause for arrest,⁷ or want of probable cause.⁸

Where malice or want of probable cause becomes material in an action for false imprisonment, as on the issue of damages, lack of malice or the existence of probable cause may be shown by proof that defendant fairly and fully stated all material facts within his knowledge to a reputable attorney and acted on his advice.⁹

§ 58. Trial

Where the facts disclose a cause of action as a matter of law, the only question to be determined is the amount of damages. A defendant pleading justification has the right to open and close the argument.

Where the allegations of the complaint are suffi-

cient to constitute the basis for an action for false arrest or imprisonment as well as malicious prosecution, the trial of the action in conformity with evidence offered as to false arrest is permissible.^{9.50} The only question to be determined, where the facts disclose a cause of action for false arrest against defendant as a matter of law is the amount of damages.¹⁰

A defendant pleading justification has the right to open and conclude the argument of the case to the jury.¹¹

Defendant cannot, on a motion for a new trial, complain of the exclusion of evidence as to plaintiff's character where he did not, on the trial, question the court's ruling as to the measure of dam-

6. Evidence held sufficient

(1) Generally.

- U.S.—American Ry. Express Co. v. McDermott, C.C.A.Pa., 44 F.2d 955.
- Cal.—Parrott v. Bank of America Nat. Trust & Sav. Ass'n, 217 P.2d 89, 97 C.A.2d 14, 35 A.L.R.2d 263.
- Ill.—Ferrell v. Livingston, 101 N.E.2d 599, 344 Ill.App. 488.
- Ky.—Sternberg v. Hogg, 72 S.W.2d 421, 254 Ky. 761.
- La.—Rodi v. Sizeler, App., 145 So. 38.
- Md.—Heinze v. Murphy, 24 A.2d 917, 180 Md. 423.
- Mo.—Oliver v. Kessler, App., 95 S.W.2d 1226—Thompson v. St. Louis-San Francisco Ry. Co., App., 3 S.W.2d 1033.
- S.C.—Falls v. Palmetto Power & Light Co., 109 S.E. 93, 117 S.C. 327.
- Wash.—Wood v. Rolfe, 221 P. 982, 128 Wash. 55.

(2) To establish malice by plaintiff's brother who supplied information on which plaintiff was committed to mental hospital for observation.

- La.—O'Rourke v. O'Rourke, App., 69 So.2d 567, affirmed 79 So.2d 87, 227 La. 262.

(3) To sustain finding of no malice.

- Md.—Dennis v. Baltimore Transit Co., 56 A.2d 813, 189 Md. 610.

(4) To establish that coroner who recommended plaintiff's commitment to mental hospital for observation on information supplied by plaintiff's brother acted without malice.

- La.—O'Rourke v. O'Rourke, App., 69 So.2d 567, affirmed 79 So.2d 87, 227 La. 262.

Evidence held insufficient

- Cal.—McInerney v. United Railroads of San Francisco, 195 P. 958, 50 C.A. 538.
- Ill.—Horvat v. Opas, 42 N.E.2d 867, 315 Ill.App. 229.
- La.—Hardin v. Operating Co., 32 So.2d 893, 212 La. 467.

- Md.—Heinze v. Murphy, 24 A.2d 917, 180 Md. 423.

- Mich.—Merriam v. Continental Motors Corp., 64 N.W.2d 691, 339 Mich. 546.

- N.Y.—Van Buren v. Ford, 71 N.Y.S.2d 551, 189 Misc. 352.

- Or.—Brown v. Meier & Frank Co., 86 P.2d 79, 160 Or. 608.

6.5 Evidence held sufficient

- Fla.—Farish v. Smoot, 58 So.2d 534.

Evidence held insufficient

- Colo.—Johnson v. Enlow, 286 P.2d 630, 132 Colo. 101.

7. Evidence held sufficient

(1) Generally.

- Cal.—Michel v. Smith, 205 P. 113, 188 C. 199.

- Van Fleet v. West American Ins. Co., 43 P.2d 557, 5 C.A.2d 125—Allen v. McCoy, 27 P.2d 423, 135 C.A. 500, rehearing denied and modified on other grounds 28 P.2d 56, 135 C.A. 500—Dowdell v. Owl Drug Co., 8 P.2d 890, 121 C.A. 316.

- La.—Christian v. Leopold, 128 So. 513, 170 La. 552.

- N.M.—Cherry v. Williams, 316 P.2d 880, 63 N.M. 244.

- N.D.—Haggard v. First Nat. Bank of Mandan, 8 N.W.2d 5, 72 N.D. 434. 25 C.J. p 547 note 20 [a] (5).

(2) To establish that coroner who recommended plaintiff's commitment to mental hospital for observation on information supplied by plaintiff's brother acted with probable cause.

- La.—O'Rourke v. O'Rourke, App., 69 So.2d 567, affirmed 79 So.2d 87, 227 La. 262.

(3) Evidence that defendant in good faith fully and fairly stated all the material facts within his knowledge to the prosecutor and signed the complaint on the latter's advice.

- Mich.—Gooch v. Wachowiak, 89 N.W.2d 496, 352 Mich. 347.

Evidence held insufficient

- N.Y.—Goldberg v. Fleischer's Confidence Food Stores, 102 N.Y.S.2d 176.

8. Evidence held sufficient

(1) Generally.

- Cal.—Parrott v. Bank of America Nat. Trust & Sav. Ass'n, 217 P.2d 89, 97 C.A.2d 14, 35 A.L.R.2d 263 —Porter v. Granich, 29 P.2d 220, 136 C.A. 523—Collins v. Jones, 22 P.2d 39, 131 C.A. 747.

- Ill.—Ferrell v. Livingston, 101 N.E.2d 599, 344 Ill.App. 488.

- Tex.—S. H. Kress & Co. v. Rust, Civ. App., 97 S.W.2d 997, affirmed 120 S.W.2d 425, 132 Tex. 89.

(2) To establish that plaintiff's brother, who laid information before coroner on which coroner issued a recommendation which resulted in plaintiff's commitment for observation to mental hospital, acted without probable cause.

- La.—O'Rourke v. O'Rourke, App., 69 So.2d 567, affirmed 79 So.2d 87, 227 La. 262.

Evidence held insufficient

- La.—Martin v. Cappel, 106 So. 660, 160 La. 21.

- N.Y.—Senhouse v. May's Fur & Ready to Wear, 78 N.Y.S.2d 1, 273 App.Div. 968.

- 9. Ala.—Phillips v. Morrow, 97 So. 130, 210 Ala. 34.

- Mich.—Doak v. Springstead, 279 N.W. 898, 284 Mich. 459.

- 9.50 N.C.—Caudle v. Benbow, 45 S.E.2d 361, 228 N.C. 282—Rhodes v. Collins, 150 S.E. 492, 198 N.C. 23.

Submission of both counts

Where plaintiff alleged an illegal arrest in one count and false imprisonment in another count, in the absence of a demurrer or motion to dismiss, court properly submitted both counts to jury.

- Ga.—Standard Sur. & Cas. Co. of N.Y. v. Johnson, 41 S.E.2d 576, 74 Ga.App. 823.

- 10. N.Y.—Damilitis v. Kerjas Lunch Corporation, 300 N.Y.S. 574, 165 Misc. 186.

- 11. Ga.—Ocean SS. Co. v. Williams, 69 Ga. 251.

ages or urge plaintiff's character in mitigation of damages.¹²

§ 59. — Questions of Law and Fact

- a. In general
- b. Reasonableness of detention
- c. Probable or reasonable cause
- d. Malice and good faith
- e. Damages

a. In General

Controverted questions of fact, such as the existence and involuntary character of a detention, defendant's connection therewith, and facts relied on as a justification, must be submitted to the jury; questions of law are for the court.

As in other civil actions, where the trial of an action for false imprisonment is to the jury, it is for the jury to determine controverted questions of fact,¹³ while questions of law, where the trial of an

12. Pa.—O'Donnell v. Rowe, 16 Pa. Dist. & Co. 213.

13. Ala.—Nicholson v. Kilpatrick, 66 So. 8, 188 Ala. 258.
Badger v. Hollon, 175 So. 700, 27 Ala.App. 534.

Fla.—S. H. Kress & Co. v. Powell, 180 So. 757, 132 Fla. 471.

Ill.—Nusbaum v. Pennsylvania R. Co., 90 N.E.2d 921, 340 Ill.App. 131.

Iowa.—Norton v. Mathers, 271 N.W. 321, 222 Iowa 1170.

Ky.—Sternberg v. Hogg, 72 S.W.2d 421, 254 Ky. 761.

Me.—Stern v. Sullivan, 188 A. 719, 135 Me. 1.

Mich.—Hammit v. Straley, 61 N.W. 2d 641, 338 Mich. 587—Baker v. Steketee, 255 N.W. 197, 267 Mich. 304.

Miss.—Lenaz v. Conway, 105 So.2d 762—Howell v. Viener, 176 So. 731, 179 Miss. 872.

Pa.—Baughn v. Benson & Fine, 77 Pa.Super. 181—Tyler v. Philadelphia Ritz-Carlton Co., 73 Pa.Super. 427.

Tenn.—Little Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357.

Tex.—Gregg v. First State Bank of Bishop, Civ.App., 125 S.W.2d 319, error dismissed, judgment correct—Schnauffer v. Price, Civ.App., 124 S.W.2d 940, error refused—Lindsay v. Woods, Civ.App., 27 S.W.2d 263—Presley v. Ft. Worth & D. C. Ry. Co., Civ.App., 145 S.W. 669.

Wash.—Smith v. Drew, 26 P.2d 1040, 175 Wash. 11—Nunn v. Turner, 234 P. 443, 133 Wash. 654—Coles v. McNamara, 230 P. 430, 131 Wash. 377.

25 C.J. p 548 note 36.

Particular questions held for jury

(1) Whether plaintiff was trespasser.

Ala.—Central Iron & Coal Co. v. Wright, 101 So. 815, 20 Ala.App. 82, certiorari denied Ex parte Central Iron & Coal Co., 101 So. 824, 212 Ala. 130.

25 C.J. p 550 note 47 [b].

(2) Whether boundaries of property on which plaintiff was alleged to have trespassed were clearly marked. Cal.—Hill v. Nelson, 162 P.2d 927, 71 C.A.2d 528.

(3) Whether plaintiff was the person intended by the name used in a warrant.

Iowa.—O'Neill v. Keeling, 288 N.W. 387, 227 Iowa 754, 127 A.L.R. 1050—Drake v. Keeling, 287 N.W. 596.

(4) Whether police officer, in making arrest, acted under and in accordance with his authority.

Mass.—Wax v. McGrath, 151 N.E. 317, 255 Mass. 340.

(5) Whether officer possessed a warrant for plaintiff's arrest when he took him into custody.

Ky.—Hundley v. Gossett, 278 S.W.2d 65.

Tex.—Galveston, H. & S. A. Ry. Co. v. Harden, Civ.App., 236 S.W. 146.

(6) Whether a search was made within a reasonable time after the date of a search warrant.

U.S.—Elrod v. Moss, C.C.A.S.C., 278 F. 123.

(7) Whether sheriff established that person arrested without warrant was dangerously insane.

Ariz.—Christiansen v. Weston, 284 P. 149, 36 Ariz. 200.

(8) Whether plaintiff's explanations concerning his possession of property claimed to have been stolen were satisfactory.

Ga.—Hill v. Henry, 82 S.E.2d 35, 90 Ga.App. 93.

(9) Whether there had been a formal complaint against, and a trial and conviction of, plaintiff.

Ariz.—Crowley v. Rummel, 195 P. 986, 22 Ariz. 179.

(10) Whether the arrest was by one in whose presence the alleged offense was committed or by an officer of the law.

Ala.—Smith v. S. H. Kress & Co., 98 So. 378, 210 Ala. 436.

(11) Whether defendant relying on advice or acts of counsel or judge fully stated the facts to him.

U.S.—Seaboard Oil Co. v. Cunningham, C.C.A.Fla., 51 F.2d 321, certiorari denied 52 S.Ct. 35, 284 U.S. 657, 76 L.Ed. 557.

Ill.—Ferrell v. Livingston, 101 N.E. 2d 599, 344 Ill.App. 488—Galarza v. Sprague, 1 N.E.2d 275, 284 Ill.App. 254.

(12) Purpose of plaintiff in being at place where arrested.

U.S.—Barnard v. Wabash R. Co., C.A. Mo., 208 F.2d 489.

Evidence held to require submission to jury

U.S.—Montgomery Ward & Co. v. Freeman, C.A.Va., 199 F.2d 720.

Ala.—Lawrence v. Cranford, 44 So.2d 573, 253 Ala. 389.

D.C.—Jillson v. Caprio, 181 F.2d 523, 86 U.S.App.D.C. 169.

Ill.—Shemaitis v. Collins, 109 N.E.2d 370, 348 Ill.App. 549.

Iowa.—McVay v. Carpe, 29 N.W.2d 582, 238 Iowa 1131.

Ky.—Dickison v. Shumate, 262 S.W. 2d 695—Noe v. Meadows, 16 S.W.2d 505, 229 Ky. 53, 64 A.L.R. 648.

Md.—Safeway Stores, Inc. v. Barrack, 122 A.2d 457, 210 Md. 168.

Mass.—Muniz v. Mehlman, 99 N.E.2d 37, 327 Mass. 353.

Mich.—Dallas v. Garras, 10 N.W.2d 897, 306 Mich. 313.

Mo.—Jarrett v. St. Francois County Finance Co., App., 185 S.W.2d 855

—Winegar v. Chicago, B. & Q. R. Co., App., 163 S.W.2d 357—Lindhorst v. Curtis Mfg. Co., App., 105 S.W.2d 972—Cain v. Cap Sheaf Bread Co., App., 57 S.W.2d 763—Schuler v. Hughes, App., 52 S.W.2d 453.

N.J.—Jorgensen v. Pennsylvania R. Co., 118 A.2d 854, 38 N.J.Super. 317.

N.Y.—Konyon v. Ryther, 105 N.Y.S.2d 763, 278 App.Div. 996.

Ohio.—Thomas v. F. & R. Lazarus & Co., App., 57 N.E.2d 103.

Okl.—Swafford v. Vermillion, 261 P. 2d 187.

Tenn.—(Blue) Star Service, Inc. v. McCurdy, 251 S.W.2d 139, 36 Tenn. App. 1.

25 C.J. p 547 note 20 [c].

Evidence held insufficient to go to jury

(1) Generally.

Ariz.—Swetnam v. F. W. Woolworth Co., 318 P.2d 364, 83 Ariz. 189.

Colo.—Johnson v. Enlow, 286 P.2d 630, 132 Colo. 101.

Ky.—Noble v. Louisville Taxicab & Transfer Co., 255 S.W.2d 493.

N.C.—Munden v. Windholz, 199 S.E. 7, 214 N.C. 829.

(2) On question of false imprisonment on a void warrant.

Mich.—Gooch v. Wachowiak, 89 N.W. 2d 496, 352 Mich. 347.

(3) On question of trespass.

Ky.—Gray v. McAtee, 25 S.W.2d 65, 233 Ky. 97.

action for false imprisonment is to the jury, are for the court.¹⁴ For example, in the case of conflicting evidence it is for the jury to determine questions of

fact as to the existence and involuntary character of a detention,¹⁵ and it is for the jury to determine

(4) On question whether defendant's agent charged plaintiff with larceny.

Ala.—U. S. Cast Iron Pipe & Foundry Co. v. Henderson, 116 So. 915, 22 Ala.App. 448, certiorari denied 116 So. 917, 217 Ala. 520, and followed in U. S. Cast Iron Pipe & Foundry Co. v. Williams, 117 So. 927, 22 Ala.App. 695.

Issue as to conspiracy

Where a complaint for false imprisonment contains allegations of a conspiracy which are essential to set forth the cause of action, an issue as to conspiracy should be submitted to the jury, and where plaintiff, who has the burden of establishing a conspiracy, fails to request the submission of such issue he will be deemed to have waived it.

Tex.—Miller v. Fenner, Civ.App., 89 S.W.2d 506, error dismissed.

Plaintiff makes prima facie case of false imprisonment sufficient to go to jury by showing that sheriff arrested on suspicion of insanity without process.

Ariz.—Christiansen v. Weston, 284 P. 149, 36 Ariz. 200.

Where the trial is not to jury, questions of fact, such as the fact of a detention, are determined by the trial court.

Cal.—Vandiver v. Charters, 294 P. 440, 110 C.A. 347.

14. Iowa.—Dedman v. McKinley, 29 N.W.2d 337, 238 Iowa 886.
Mich.—Lynn v. Weaver, 231 N.W. 579, 251 Mich. 265.
25 C.J. p 548 note 37.

Whether a warrant sufficiently describes defendant to protect the officer is a question for the court where the facts are undisputed.

U.S.—Cox v. Durham, Mo., 128 F. 870, 63 C.C.A. 338.

Proximate consequence of imprisonment

Plaintiff's act in stepping from moving automobile to escape restraint could not be said, as matter of law, not to have been proximate consequence of false imprisonment.

Mass.—Cieplinski v. Severn, 168 N.E. 722, 269 Mass. 261.

Unlawful manner of operation

Whether, on basis of facts discovered on raid, night club was being operated as a public nuisance was a question of law for the court.

U.S.—Anderson v. Sager, C.A.S.D., 173 F.2d 794.

15. Idaho.—Corpus Juris cited in Griffin v. Clark, 42 P.2d 297, 302, 55 Idaho 364.

Pa.—Cohen v. Lit Bros., 70 A.2d 419, 166 Pa.Super. 206.

25 C.J. p 548 note 41, p 549 note 42.

Evidence held for jury

(1) On question of detention, or involuntary nature thereof, generally.

U.S.—Hundley v. Milner Hotel Management Co., D.C.Ky., 114 F.Supp. 206, affirmed, C.A., Milner Hotel Management Co. v. Hundley, 216 F.2d 613.

Ala.—J. J. Newberry Co. v. Smith, 149 So. 669, 227 Ala. 234—Smith v. S. H. Kress & Co., 98 So. 378, 210 Ala. 436.

Fla.—Lewis v. Atlantic Discount Co., App., 99 So.2d 241.

Ga.—Hale v. Eberhardt, 188 S.E. 53, 54 Ga.App. 395.

Kan.—Cordell v. Standard Oil Co., 289 P. 472, 131 Kan. 221.

Ky.—Ashland Dry Goods Co. v. Wages, 195 S.W.2d 312, 302 Ky. 577—Great Atlantic & Pacific Tea Co. v. Smith, 136 S.W.2d 759, 281 Ky. 583.
Md.—Mahan v. Adam, 124 A. 901, 144 Md. 355.

Mass.—Pilos v. First Nat. Stores, 66 N.E.2d 576, 319 Mass. 475—Zygmuntowicz v. American Steel & Wire Co. of New Jersey, 134 N.E. 385, 240 Mass. 421.

Mo.—Teel v. May Department Stores Co., 155 S.W.2d 74, 348 Mo. 696, 137 A.L.R. 495—Wright v. Automobile Gasoline Co., 250 S.W. 368.

State ex rel. Patterson v. Collins, App., 172 S.W.2d 284—Hurst v. Montgomery Ward & Co., App., 145 S.W.2d 992—Gust v. Montgomery Ward & Co., 136 S.W.2d 94, 234 Mo.App. 611—Hurst v. Montgomery Ward & Co., App., 107 S.W.2d 183—Daniel v. Phillips Petroleum Co., 73 S.W.2d 355, 220 Mo.App. 150.

Mont.—Panisko v. Dreibelbis, 124 P. 2d 997, 113 Mont. 310.

Neb.—Dillon v. Sears-Roebuck Co., 253 N.W. 331, 126 Neb. 357.

N.J.—Schantz v. Sears Roebuck & Co., 174 A. 162, 12 N.J.Misc. 689, affirmed 178 A. 768, 115 N.J.Law 174.

N.C.—Parrish v. Boysell Mfg. Co., 188 S.E. 817, 211 N.C. 7—Stancill v. Underwood, 124 S.E. 845, 188 N.C. 475.

Ohio.—Fitscher v. Rollman & Sons Co., 167 N.E. 469, 31 Ohio App. 340.
S.C.—Westbrook v. Hutchison, 10 S. E.2d 145, 195 S.C. 101—Westbrook v. Hutchison, 3 S.E.2d 207, 190 S. C. 414.

Tex.—Newton v. Rhoads Bros., Com. App., 24 S.W.2d 378.

Citizens Hotel Co. v. Foley, Civ. App., 131 S.W.2d 402, error dismissed, judgment correct—Chicago,

R. I. & G. Ry. Co. v. Neubert, Civ. App., 248 S.W. 139.

Wash.—Harris v. Stanioch, 273 P. 198, 150 Wash. 380.

25 C.J. p 547 note 20 [c] (2).

(2) On question as to what time and what ground the arrest was made, and as to what ground or under what charge the subsequent detention was imposed.

N.Y.—Clark v. Nannery, 54 N.E.2d 31, 292 N.Y. 105.

(3) On question whether or not acts of policemen amounted to false arrest or false imprisonment.

Neb.—Barton v. Wilson, 96 N.W.2d 270, 168 Neb. 480.

(4) On question as to whether plaintiff believed with reasonable cause that force would be used against him, or that other trouble would ensue, if he attempted to leave the place of the alleged detention.

Ga.—Sinclair Refining Co. v. Meek, 10 S.E.2d 76, 62 Ga.App. 850.

Md.—Fleisher v. Ensminger, 118 A. 153, 140 Md. 604.

Mo.—Titus v. Montgomery Ward & Co., 123 S.W.2d 574, 232 Mo.App. 987.

Okl.—Halliburton-Abbott Co. v. Hodge, 44 P.2d 122, 172 Okl. 175.

Utah.—Hepworth v. Covey Bros. Amusement Co., 91 P.2d 507, 97 Utah 205.

25 C.J. p 549 note 42 [a].

(5) On question whether submission was voluntary act or was brought about by fear that force would be used.

N.J.—Earl v. Winne, 101 A.2d 535, 14 N.J. 119.

(6) On question whether the arrest of plaintiff was lawful or unlawful.

Ala.—Casino Restaurant v. McWhorter, 46 So.2d 582, 35 Ala.App. 332.

Ky.—DeHart v. Gray, 245 S.W.2d 434.

(7) On question whether there was an unlawful restraint of plaintiff's liberty.

N.J.—Jorgensen v. Pennsylvania R. Co., 138 A.2d 24, 25 N.J. 541.

S.C.—Wingate v. Postal Telegraph & Cable Co., 30 S.E.2d 307, 204 S.C. 520.

Evidence held not to make case for jury

(1) Generally.

Ala.—Davis & Allcott Co. v. Boozer, 110 So. 28, 215 Ala. 116.

Ky.—F. S. Marshall Co. v. Brashear, 37 S.W.2d 15, 238 Ky. 157—Keel v. Steele Coal Co., 269 S.W. 531, 207 Ky. 431.

Wash.—James v. MacDougall &

questions of fact as to the period of detention,^{15.5} and to determine questions of fact as to the treatment accorded plaintiff.¹⁶

Also, it is for the jury on conflicting evidence to

determine the connection of defendant with the wrongful act,¹⁷ whether defendant, or his agent or employee, caused, instigated, participated or assisted in, or ratified the wrongful arrest or detention,^{17.5} and it is for the jury on conflicting evidence

Southwick Co., 235 P. 812, 134 Wash. 314.

(2) On issue whether plaintiff signed formal release or made written request for his discharge from custody.

Mass.—Doherty v. Shea, 68 N.E.2d 707, 320 Mass. 173.

(3) Evidence that customer, being accosted by store manager, reentered store for sole purpose of convincing manager that he had taken nothing for which he had not paid.

Mont.—Meinecke v. Skaggs, 213 P.2d 237, 123 Mont. 308.

(4) Where it is clear that there was reasonable apprehension of force, there is no issue to go to jury on question of false arrest.

U.S.—Pollack v. City of Newark, D.C.N.J., 147 F.Supp. 35, affirmed, C.A., 248 F.2d 543, certiorari denied 78 S.Ct. 554, 355 U.S. 964, 2 L.Ed.2d 539.

15.5 Cal.—Dragna v. White, 289 P.2d 428, 45 C.2d 469.

Ind.—Matovina v. Hult, 123 N.E.2d 893, 125 Ind.App. 236.

16. Mass.—Kerr v. Atwood, 74 N.E. 917, 188 Mass. 506.

25 C.J. p 549 note 43.

Denial of bail

Whether plaintiff was wrongfully denied opportunity to give bond and was thereafter imprisoned was for jury.

Mo.—Jackson v. Thompson, App., 188 S.W.2d 853.

Evidence held for jury on question of:

(1) Use of force or express or implied threat of force to extort confession from plaintiff.

Cal.—Parrott v. Bank of America Nat. Trust & Sav. Ass'n, 217 P.2d 89, 97 C.A.2d 14, 35 A.L.R.2d 263.

(2) Whether manner of arrest was illegal or whether arresting officers used excessive and unnecessary force.

Miss.—State for Use of Smith v. Broom, 58 So.2d 32.

(3) Whether officer in charge of police station was guilty of neglect of duty resulting in injury to plaintiff who claimed to be suffering from paralytic stroke at time of arrest.

Mich.—D'Hondt v. Slovekowski, 10 N.W.2d 332, 306 Mich. 156.

(4) Whether defendants were guilty of both assault and false imprisonment.

Ill.—Shaw v. Courtney, 46 N.E.2d 170, 317 Ill.App. 422, affirmed 53 N.E.2d 432, 385 Ill. 559.

17. Idaho.—Corpus Juris cited in

Griffin v. Clark, 42 P.2d 297, 302, 55 Idaho 364.

N.Y.—Ferguson v. Bank of Buffalo, 213 N.Y.S. 219, 214 App.Div. 436.

Tenn.—(Blue) Star Service, Inc. v. McCurdy, 251 S.W.2d 139, 36 Tenn. App. 1.

Wash.—Corpus Juris cited in Larson v. Erickson, 252 P. 922, 923, 142 Wash. 236.

25 C.J. p 549 note 44.

Defendant's acts as proximate cause of arrest

(1) It is sufficient if there is evidence that the acts of defendant were a proximate and sufficient cause of the arrest, even though it be not shown that he directly instigated it.

Iowa.—Klemm v. Adair, 179 N.W. 51, 189 Iowa 896.

(2) It could not be held, as a matter of law, that a bank's mistaken refusal to pay check, inducing payee to swear out warrant for depositor's arrest, was not proximate cause of depositor's arrest.

Ohio.—Mouse v. Central Savings & Trust Co., 167 N.E. 868, 120 Ohio St. 599.

Evidence held insufficient for submission to jury

(1) Generally.

Md.—Angelozzi v. Cossentino, 155 A. 178, 160 Md. 678—Day v. Weinstein, 128 A. 897, 148 Md. 104.

Mo.—Hoock v. S. S. Kresge Co., 230 S.W.2d 758.

Mason v. Down Town Garage Co., 53 S.W.2d 409, 227 Mo.App. 297.

N.C.—Ellis v. Farmers Bank & Trust Co., 183 S.E. 368, 209 N.C. 247.

Tex.—Hamilton v. California Co., Civ.App., 103 S.W.2d 200, error dismissed—Sutton v. Plaza Hotel Co., Civ.App., 90 S.W.2d 613, error dismissed.

(2) On issue as to whether defendant had cooperated in or countenanced the delay in bringing plaintiff before a magistrate.

Cal.—Kangieser v. Zink, 285 P.2d 950, 134 C.A.2d 559.

(3) With respect to liability of particular defendants.

Mich.—D'Hondt v. Slovekowski, 10 N.W.2d 332, 306 Mich. 156.

Miss.—Brown v. Clark, 27 So.2d 696.

17.5 Ala.—Bank of Cottonwood v. Hood, 149 So. 676, 227 Ala. 237—Standard Oil Co. v. Humphries, 96 So. 629, 209 Ala. 493—Standard Oil Co. v. Davis, 94 So. 754, 208 Ala. 565.

Casino Restaurant v. McWhorter, 46 So.2d 582, 35 Ala.App. 332

—Wood v. Hacker, 121 So. 437, 23 Ala.App. 12, certiorari denied 121 So. 441, 219 Ala. 139.

Ark.—Arkansas Central Power Co. v. Hildreth, 296 S.W. 33, 174 Ark. 529.

Cal.—Parrott v. Bank of America Nat. Trust & Sav. Ass'n, 217 P.2d 89, 97 C.A.2d 14, 35 A.L.R.2d 263

—Moffatt v. Buffums' Inc., 69 P.2d 424, 21 C.A.2d 371—Weir v. Continental Oil Co., 43 P.2d 375, 5 C.A. 2d 714.

D.C.—Takahashi v. Hecht Co., 64 F. 2d 710, 62 App.D.C. 72—Takahashi v. Hecht Co., 50 F.2d 326, 60 App. D.C. 176.

Ill.—Ferrell v. Livingston, 101 N.E. 2d 599, 344 Ill.App. 488—Lindquist v. Friedman's, 1 N.E.2d 529, 285 Ill.App. 71, affirmed 8 N.E.2d 625, 366 Ill. 232—Schramko v. Boston

Store of Chicago, 243 Ill.App. 251.

Kan.—Hammargren v. Montgomery Ward & Co., 241 P.2d 1192, 172 Kan. 484.

Ky.—Glickman v. Harlan Wallins Coal Co., 133 S.W.2d 718, 280 Ky. 477.

Mass.—Karjavainen v. Buswell, 194 N.E. 295, 289 Mass. 419.

Minn.—Jacobson v. Sorenson, 236 N. W. 922, 183 Minn. 425—Evans v. Jorgenson, 234 N.W. 292, 182 Minn. 282.

Miss.—Lenaz v. Conway, 105 So.2d 762.

Mo.—Harbison v. Chicago, R. I. & P. Ry. Co., 37 S.W.2d 609, 327 Mo. 440, 79 A.L.R. 1.

Thompson v. Fehlig Bros. Box & Lumber Co., App., 155 S.W.2d 279—Carter v. Casey, App., 153 S. W.2d 744—Steiner v. Degan, App., 101 S.W.2d 519—Greaves v. Kansas City Junior Orpheum Co., 80 S.W.2d 228, 229 Mo.App. 663—Daniel v. Phillips Petroleum Co., 73 S.W.2d 355, 220 Mo.App. 150—Hunt v. Ruterbusch, App., 38 S.W. 2d 503.

Mont.—Cline v. Tait, 155 P.2d 752, 116 Mont. 571.

Neb.—Jonson v. Heller, 6 N.W.2d 359, 142 Neb. 380.

N.J.—Schantz v. Sears Roebuck & Co., 174 A. 162, 12 N.J.Misc. 689, affirmed 173 A. 768, 115 N.J.Law 174.

N.Y.—Ferguson v. Bank of Buffalo, 213 N.Y.S. 219, 214 App.Div. 436—Rolnick v. Borden's Farm Products Co., 212 N.Y.S. 189, 214 App.Div. 259.

N.C.—Long v. Eagle, 5, 10 and 25¢ Store Co., 198 S.E. 573, 214 N.C. 146.

Ohio.—Farmers Nat. Bank of Spring-

to determine whether defendants acted in con- | causing the arrest and the scope of such person's
cert,^{17,10} the relationship to defendant of the person | authority,¹⁸ and the existence of facts relied on as a

- field, Ohio, v. Frazier, 13 Ohio App. 245.
- Okl.—Mayo Hotel Co. v. Cooper, 298 P.2d 443.
- R.I.—Sylvester v. Buerhaus, 45 A.2d 150, 71 R.I. 335.
- S.C.—Wingate v. Postal Telegraph & Cable Co., 30 S.E.2d 307, 204 S.C. 520—Mayrant v. National Bank of South Carolina of Sumter, 170 S. E. 140, 170 S.C. 186.
- Tex.—Newton v. Rhoads Bros., Com. App., 24 S.W.2d 378.
- Castillo v. Canavati, Civ.App., 152 S.W.2d 785, error refused—Citizens Hotel Co. v. Foley, Civ. App., 131 S.W.2d 402, error dismissed, judgment correct—Mitchell v. Heard, Civ.App., 98 S.W.2d 832.
- Wash.—Smith v. Drew, 26 P.2d 1040, 175 Wash. 11.
- 25 C.J. p 547 note 20 [c] (6)–(8).
- Submissible case**
- (1) In order to make a case properly submissible to jury, plaintiff is required to prove that he was unlawfully caused to be arrested by defendant and in so doing, while it is not necessary to present evidence that the arrest was specifically ordered by defendant, plaintiff is required to show that defendant instigated it, assisted in it, or by some manner directed, countenanced, or encouraged it.
- Mo.—Checkeye v. John Bettendorf Market, Inc., App., 257 S.W.2d 202.
- (2) A submissible case charging false imprisonment is made where it appears that defendant had countenanced, advised, encouraged or instigated the arrest of plaintiff by police.
- Mo.—Heinold v. Muntz T. V., Inc., 262 S.W.2d 32—Hoock v. S. S. Kresge Co., 230 S.W.2d 758.
- Evidence held insufficient**
- Evidence disclosing that all defendant did was to give information to the police and that arrest was made by police officers acting on their own responsibility was insufficient to take case to jury.
- Mo.—Clark v. Whitaker, App., 173 S.W.2d 586.
- 17.10 Cal.—Kaufman v. Brown, 209 P.2d 156, 93 C.A.2d 508.
- S.C.—Westbrook v. Hutchison, 10 S. E.2d 145, 195 S.C. 101—Westbrook v. Hutchison, 3 S.E.2d 207, 190 S. C. 414.
- 25 C.J. p 549 notes 44 [a], 45 [a] (1).
- Evidence held to present questions for jury**
- (1) Whether particular defendants were parties to wrongful acts of other defendants.
- U.S.—Ingo v. Koch, C.C.A.N.Y., 127 F.2d 667.
- (2) Whether officer participated in other officer's act in beating plaintiff.
- Or.—Bratt v. Smith, 175 P.2d 444, 180 Or. 50.
18. U.S.—Montgomery Ward & Co. v. Medline, C.C.A.N.C., 104 F.2d 485.
- Ala.—Southern Ry. Co. v. Beaty, 103 So. 658, 212 Ala. 608—Birmingham Ry. Light & Power Co. v. Crenshaw, 68 So. 327, 192 Ala. 462.
- Ark.—Missouri Pac. R. Co. v. Yancey, 10 S.W.2d 22, 178 Ark. 147.
- Cal.—Peckham v. Warner Bros. Pictures, 97 P.2d 472, 36 C.A.2d 214—Weir v. Continental Oil Co., 43 P.2d 375, 5 C.A.2d 714.
- Kan.—Cordell v. Standard Oil Co., 289 P. 472, 131 Kan. 221.
- Md.—McCrorry Stores Corporation v. Satchell, 129 A. 348, 148 Md. 279.
- Minn.—McDermott v. Minneapolis, St. P. & S. S. M. Ry. Co., 223 N. W. 94, 176 Minn. 203.
- Mo.—Wright v. Automobile Gasoline Co., 250 S.W. 368.
- Daniel v. Phillips Petroleum Co., 73 S.W.2d 355, 220 Mo.App. 150—Thompson v. St. Louis-San Francisco Ry. Co., App., 3 S.W.2d 1033.
- N.Y.—McLoughlin v. New York Edison Co., 169 N.E. 277, 252 N.Y. 202.
- Rolnick v. Borden's Farm Products Co., 212 N.Y.S. 189, 214 App. Div. 259.
- N.C.—Long v. Eagle, 5, 10 and 25¢ Store Co., 198 S.E. 573, 214 N.C. 146—Brockwell v. Western Union Telegraph & Cable Co., 171 S.E. 784, 205 N.C. 474.
- Ohio.—Farmers Nat. Bank of Springfield, Ohio, v. Frazier, 13 Ohio App. 245.
- Pa.—Keidel v. Baltimore & O. R. Co., 126 A. 770, 281 Pa. 289.
- Tex.—Magnolia Petroleum Co. v. Guffey, Civ.App., 59 S.W.2d 174, reversed on other grounds, Com.App., 95 S.W.2d 690, motion granted 102 S.W.2d 408, 129 Tex. 293—Galveston, H. & S. A. Ry. Co. v. Harden, Civ.App., 236 S.W. 146.
- 25 C.J. p 549 note 45.
- "To warrant a submission of the question to the jury, the evidence for the plaintiff, when viewed in its most favorable light, must be sufficient to make it appear that the false arrest was caused by an agent acting in the scope of his authority."**
- Ark.—Missouri Pac. R. Co. v. Yancey, 10 S.W.2d 22, 178 Ark. 147.
- Effect of contract fixing relationship**
- Even where a contract exists which assumes to determine the relationship to defendant of the person who caused the arrest, if the facts and circumstances in evidence tend to show the existence of a relationship other than that fixed by the contract, the question of the true relationship becomes one of fact for the jury, notwithstanding the contract.
- Ill.—Komorowski v. Boston Store of Chicago, 263 Ill.App. 88—Schramko v. Boston Store of Chicago, 243 Ill. App. 251.
- Evidence held for jury on question of:**
- (1) Authority of employee or representative.
- Ala.—Crescent Amusement Co. v. Scott, 40 So.2d 882, 34 Ala.App. 335, certiorari denied 40 So.2d 886, 252 Ala. 296.
- Ark.—Kroger Grocery & Baking Co. v. Waller, 189 S.W.2d 361, 208 Ark. 1063.
- Cal.—Hanna v. Raphael Weill & Co., 203 P.2d 564, 90 C.A.2d 461.
- D.C.—Safeway Stores v. Gibson, Mun. App., 118 A.2d 386, affirmed 237 F. 2d 592, 99 U.S.App.D.C. 111.
- Mass.—Pilos v. First Nat. Stores, 66 N.E.2d 576, 319 Mass. 475.
- Miss.—Brown v. Clark, 27 So.2d 696.
- Mo.—Steppuhn v. Chicago Great Western R. Co., 204 S.W. 579, 199 Mo.App. 571.
- Pa.—Sebastianelli v. Cleland Simpson Co., 31 A.2d 570, 152 Pa.Super. 203.
- S.C.—Wingate v. Postal Telegraph & Cable Co., 30 S.E.2d 307, 204 S.C. 520.
- 25 C.J. p 547 note 20 [c] (3)–(5).
- (2) Whether particular person was employee or agent of defendant.
- Miss.—Brown v. Clark, 27 So.2d 696.
- (3) Whether special officer or deputy sheriff was acting as agent or employee of defendant or as a peace officer and on behalf of public generally.
- Ala.—J. J. Newberry Co. v. Smith, 149 So. 669, 227 Ala. 234.
- Cal.—Korkman v. Hanlon Dry Dock & Shipbuilding Co., 199 P. 880, 53 C.A. 147.
- Ill.—Schramko v. Boston Store of Chicago, 243 Ill.App. 251.
- Mass.—Zygmuntowicz v. American Steel & Wire Co. of New Jersey, 134 N.E. 385, 240 Mass. 421.
- N.Y.—Kennedy v. Central R. Co. of New Jersey, 260 N.Y.S. 839, 236 App.Div. 478.
- N.C.—State ex rel. Cain v. Corbett, 69 S.E.2d 20, 235 N.C. 33—Butler v. Holt-Williamson Mfg. Co., 109 S.E. 559, 182 N.C. 547.
- 25 C.J. p 549 note 45 [c] (1).
- (4) Whether special police agent had express or implied authority from the defendant to arrest plaintiff.
- Ala.—Southern Ry. Co. v. Hall, 96 So. 73, 209 Ala. 237.

justification,¹⁹ such as the commission of acts by plaintiff constituting an offense.²⁰

The credibility of witnesses²¹ and the weight of the evidence²² are for the jury in an action for

(5) Whether acts of deputy sheriff in making arrest were done in his official capacity or in his individual capacity.

Ariz.—Miles v. Wright, 194 P. 88, 22 Ariz. 73, 12 A.L.R. 970.

Or.—Bowles v. Creason, 66 P.2d 1183, 156 Or. 278.

Wash.—Hayes v. Sears, Roebuck & Co., 209 P.2d 468, 34 Wash.2d 666.

(6) Whether conductor, motorman, or other railroad employee acted within authority in causing passenger's arrest.

Ark.—Arkansas Central Power Co. v. Hildreth, 296 S.W. 33, 174 Ark. 529.

Miss.—Wright v. Payne, 90 So. 248, 127 Miss. 565.

Mo.—Ledbetter v. St. Louis Southwestern Ry. Co., App., 293 S.W. 791—Comstock v. Wells, App., 259 S.W. 500.

Evidence held insufficient to go to jury

(1) On question of agency.

Ky.—Glickman v. Cornett Lewis Coal Co., 169 S.W.2d 599, 293 Ky. 523.

Pa.—Bunting v. Goldstein, 129 A. 99, 233 Pa. 356.

(2) On question whether defendant's agent acted in line and scope of employment.

Ala.—Birmingham News Co. v. Browne, 153 So. 889, 228 Ala. 414.

Tex.—Smith v. M. System Food Stores, Inc., 297 S.W.2d 112, 156 Tex. 484.

19. Ala.—Price v. McConnell, 36 So. 2d 80, 250 Ala. 686.

Idaho.—Corpus Juris cited in Griffin v. Clark, 42 P.2d 297, 302, 55 Idaho 364.

Mich.—Holland v. Spayer, 241 N.W. 225, 257 Mich. 280.

Miss.—Lenaz v. Conway, 105 So.2d 762.

Mo.—Engelbrecht v. Roworth, 157 S.W.2d 242, 236 Mo.App. 459.

Mont.—Cline v. Tait, 155 P.2d 752, 116 Mont. 571.

N.Y.—Clark v. Nannery, 54 N.E.2d 31, 292 N.Y. 105.

Jones v. City of Rochester, 134 N.Y.S.2d 912, 284 App.Div. 1029.

S.C.—Westbrook v. Hutchison, 10 S. E.2d 145, 195 S.C. 101.

25 C.J. p 549 note 46.
Good faith see infra subdivision d of this section.

Identification of accused

Where doubt existed as to whether plaintiff was man named in warrant and, after plaintiff was arrested, no effort was made by sheriff or police officials either to connect or disassociate plaintiff with person named in warrant, although there was opportunity for inquiry and investigation, whether sheriff and po-

lice officials failed to use required caution in performance of their duty in making the arrest was for jury.

Wis.—Wallner v. Fidelity & Deposit Co. of Md., 33 N.W.2d 215, 253 Wis. 66, 10 A.L.R.2d 745.

Consent to detention

Evidence held insufficient to take to jury issue as to consent by plaintiff to detention.

Wis.—Peloquin v. Hibner, 285 N.W. 380, 231 Wis. 77.

20. U.S.—Andrews v. Hotel Sherman, C.C.A.Ill., 138 F.2d 524.

Ala.—Price v. McConnell, 36 So.2d 80, 250 Ala. 686.

Casino Restaurant v. McWhorter, 46 So.2d 582, 35 Ala.App. 332.

Iowa.—Comstock v. Maryland Casualty Co. of Baltimore, 179 N.W. 962.

Minn.—Evans v. Jorgenson, 234 N.W. 292, 182 Minn. 282.

Miss.—Lenaz v. Conway, 105 So.2d 762.

Mo.—Engelbrecht v. Roworth, 157 S.W.2d 242, 236 Mo.App. 459.

N.J.—Jorgensen v. Pennsylvania R. Co., 118 A.2d 854, 38 N.J.Super. 317.

Pa.—Taylor v. Olschafsky, Com.Pl., 35 Del.Co. 393, 51 Lanc.Rev. 229.

Tex.—Osoba v. Wilson, Civ.App., 56 S.W.2d 937.

Wis.—Musk v. Apel, 232 N.W. 593, 203 Wis. 389.

25 C.J. p 550 note 47.

Questions held for jury

(1) Generally.

Tenn.—Rogers v. McDaniel, 253 S. W.2d 36, 36 Tenn.App. 189.

(2) Whether offense was committed in presence of officer.

Cal.—Roynon v. Battin, 132 P.2d 266, 55 C.A.2d 861.

(3) Whether plaintiff when arrested was engaged in actual commission of offense.

Miss.—State for Use of Smith v. Broom, 58 So.2d 32.

(4) Whether a federal prohibition officer had such direct personal knowledge, through his hearing, sight, or other sense, of the commission of the crime of transporting contraband liquor, as to justify his making a search and arrest without a warrant.

U.S.—Elrod v. Moss, C.C.A.S.C., 278 F. 123.

(5) Whether plaintiff, who was driving car prior to arrest, had failed to heed stop sign.

Iowa.—McVay v. Carpe, 29 N.W.2d 582, 238 Iowa 1131.

(6) Whether cause of arrest of plaintiffs who were riding in automobile prior to arrest was failure

to heed stop sign or suspicion that they may have been involved in breakings and enterings in the neighborhood.

Iowa.—McVay v. Carpe, supra.

(7) Whether plaintiff was drunk or intoxicated when arrested.

Ky.—Blue Diamond Coal Co. v. Campbell, 252 S.W.2d 421—Couch v. Vanhooose, 234 S.W.2d 169, 314 Ky. 36—Shepherd v. City of Richmond, 208 S.W.2d 744, 306 Ky. 595.

(8) Whether plaintiff was disorderly when arrested.

Ky.—Couch v. Vanhooose, 234 S.W.2d 169, 314 Ky. 36—Shepherd v. City of Richmond, 208 S.W.2d 744, 306 Ky. 595.

(9) Whether plaintiff resisted arrest.

Ky.—Couch v. Vanhooose, supra.

Evidence held insufficient to go to jury on issue of whether plaintiff when arrested was committing a public offense by entering a public park after prescribed time without special permission in violation of city ordinance.

Iowa.—Dedman v. McKinley, 29 N. W.2d 337, 238 Iowa 886.

21. U.S.—Seaboard Oil Co. v. Cunningham, C.C.A.Fla., 51 F.2d 321, certiorari denied 52 S.Ct. 35, 284 U.S. 657, 76 L.Ed. 557.

Ind.—Scoopmire v. Tafinger, 52 N. E.2d 728, 114 Ind.App. 419.

Ky.—National Bond & Investment Co. v. Whithorn, 123 S.W.2d 263, 276 Ky. 204.

Neb.—Doeschner v. Robinson, 271 N. W. 784, 132 Neb. 299.

Tex.—Schnauffer v. Price, Civ.App., 124 S.W.2d 940, error refused.

Choice between different contentions

Jury have right to accept plaintiff's testimony as to what occurred, instead of contrary testimony of defendant's employee.

Tenn.—Little Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357.

Rejection of testimony

Trial court, where it is the trier of the facts, may completely reject defendant's testimony if it feels impelled so to do.

Cal.—Coyne v. Nelson, 237 P.2d 45, 107 C.A.2d 469.

22. Ind.—Scoopmire v. Tafinger, 52 N.E.2d 728, 114 Ind.App. 419.

Md.—Fleisher v. Ensminger, 118 A. 153, 140 Md. 604.

Neb.—Doeschner v. Robinson, 271 N. W. 784, 132 Neb. 299.

Tenn.—Little Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357.

Tex.—Schnauffer v. Price, Civ.App., 124 S.W.2d 940, error refused.

false imprisonment. A question as to what is the duty of an officer executing a warrant is one of law.²³

Taking case from jury. A dismissal, nonsuit, peremptory instruction, or directed verdict in favor of a defendant is proper where there is an absence of the proof necessary to make out a case against him;²⁴ and a verdict should not be directed for defendant, or a nonsuit granted, or the case

otherwise taken from the jury, where the evidence is conflicting and, if determined in plaintiff's favor, would entitle him to recover.²⁵ Where plaintiff makes a prima facie case, however, he is entitled to go to the jury.^{25.5} Thus, where plaintiff presents evidence of arrest without a warrant and defendant presents evidence to show a justification for the arrest, the question of whether, under all the facts and circumstances shown by the evidence, the arrest

23. Vt.—Wright v. Templeton, 67 A. 817, 80 Vt. 358, 130 Am.S.R. 990.

24. Ariz.—Christiansen v. Weston, 284 P. 149, 36 Ariz. 200.

Fla.—Dodson v. Solomon, 183 So. 825, 134 Fla. 284.

Ga.—Strange v. Jewell, 172 S.E. 660, 48 Ga.App. 286—Irby v. J. P. Allen & Co., 126 S.E. 888, 33 Ga.App. 362, affirmed 131 S.E. 910, 161 Ga. 858.

Ill.—Rodak v. Cohen, 26 N.E.2d 174, 304 Ill.App. 257.

Iowa.—Klemm v. Adair, 179 N.W. 51, 189 Iowa 896.

Ky.—Shepherd v. City of Richmond, 208 S.W.2d 744, 306 Ky. 595—Brooks v. Madden, 248 S.W. 503, 198 Ky. 167.

Mass.—Shea v. Sullivan, 158 N.E. 771, 261 Mass. 255.

Mich.—Swank v. Croff, 224 N.W. 393, 245 Mich. 657.

Mont.—Meinecke v. Skaggs, 213 P.2d 237, 123 Mont. 308.

Tex.—McBeath v. Campbell, Civ. App., 4 S.W.2d 999, reversed in part on other grounds and affirmed in part, Com.App., 12 S.W.2d 118. 25 C.J. p 548 note 39 [a]–[c].

Directed verdict as only proper one

In action for false imprisonment, trial court properly directed verdict for defendants where it appeared that such verdict was the only one which could properly be reached and that any other verdict would have to be set aside.

Fla.—White v. Miami Home Milk Producers Ass'n, 197 So. 125, 143 Fla. 518.

Undisputed evidence of reasonable care

Verdict should be directed for defendant only when it appears from undisputed evidence that before procuring the arrest and prosecution of plaintiff, defendant endeavored, by exercise of reasonable diligence, to make such inquiry and investigation of facts touching probable guilt of plaintiff as an ordinarily prudent person would have made under same circumstances.

Tenn.—(Blue) Star Service, Inc. v. McCurdy, 251 S.W.2d 139, 36 Tenn. App. 1.

Lawful arrest

(1) "When an arrest is made upon lawful process, it is error to sub-

mit to the jury the question of false arrest."

W.Va.—Blevins v. Chesapeake & O. Ry. Co., 171 S.E. 813, 114 W.Va. 335.

(2) Where the undisputed proof shows a lawful arrest on probable cause, a peremptory instruction may be given against plaintiff.

Miss.—King v. Weaver Pants Corporation, 127 So. 718, 157 Miss. 77.

Absence of evidence of damages

Where plaintiff, in an action for wrongful arrest and imprisonment, fails to offer any evidence tending to establish damages by reason of mental anguish, anxiety, and shame, or needless expense and trouble and injury to his reputation, the court should dismiss his complaint.

N.M.—Lozano v. Encinias, 218 P. 344, 29 N.M. 82.

Direction of verdict for defendant, or dismissal, held proper

U.S.—Summers v. W. T. Grant Co., C.A.Tex., 178 F.2d 916.

Ind.—Scoopmire v. Tafinger, 52 N. E.2d 728, 114 Ind.App. 419.

Ky.—Rader v. Parks, 258 S.W.2d 728.

N.Y.—Squadrito v. Griebsch, 136 N. E.2d 504, 1 N.Y.2d 471, 154 N.Y.S. 2d 37.

25. Cal.—Moffatt v. Buffums' Inc., 69 P.2d 424, 21 C.A.2d 371.

Mass.—Zygmuntowicz v. American Steel & Wire Co. of New Jersey, 134 N.E. 385, 240 Mass. 421.

N.J.—Marmorstein v. State Theaters' Corporation, 140 A. 8, 6 N.J. Misc. 66, affirmed 146 A. 915, 106 N.J.Law 574.

N.C.—Houston v. De Herrodora, 136 S.E. 6, 192 N.C. 749.

Tenn.—Hertzka v. Ellison, 8 Tenn. App. 667.

Tex.—Central Motor Co. v. Robertson, Civ.App., 154 S.W.2d 180, affirmed 164 S.W.2d 524, 139 Tex. 562, 143 A.L.R. 1—Galveston, H. & S. A. Ry. Co. v. Harden, Civ.App., 236 S. W. 146.

25 C.J. p 548 note 39.

Demurrer to evidence held properly overruled.

Mo.—Humphreys v. St. Louis-San Francisco Ry. Co., App., 286 S.W. 738.

Consideration of all reasonable theories of evidence

The court has no right to instruct a verdict for defendant unless it appears that on no reasonable theory of the evidence can it be held that he has failed to establish his defense. Ariz.—Christiansen v. Weston, 284 P. 149, 36 Ariz. 200.

Failure to prove actual malice

A nonsuit cannot be sustained merely because the proof is insufficient to establish malice.

N.C.—Butler v. Holt-Williamson Mfg. Co., 116 S.E. 726, 185 N.C. 250.

Undisputed evidence of investigation by defendant

In an action for false imprisonment the verdict should be directed for defendant only when it appears from undisputed evidence that before procuring the arrest of plaintiff defendant endeavored, by the exercise of reasonable diligence, to make such inquiry and investigation of the facts touching the probable guilt of plaintiff as an ordinarily prudent person would have made under the same circumstances.

Tenn.—Travis v. Bacherig, 7 Tenn. App. 638.

Direction of verdict or nonsuit held not authorized or properly denied

Ariz.—Holmes v. Nester, 306 P.2d 290, 81 Ariz. 372.

Fla.—Lewis v. Atlantic Discount Co., App., 99 So.2d 241.

Ga.—Hill v. Henry, 82 S.E.2d 35, 90 Ga.App. 93.

Mass.—McDermott v. W. T. Grant Co., 49 N.E.2d 115, 313 Mass. 736.

Miss.—State, for Use of Kelley, v. Yearwood, 37 So.2d 174, 204 Miss. 181.

N.Y.—Clark v. Nannery, 54 N.E.2d 31, 292 N.Y. 105.

Sheets v. Hotels Statler Co., 146 N.Y.S.2d 289, 286 App.Div. 738.

R.I.—Sylvester v. D'Ambra, 54 A.2d 418, 73 R.I. 203.

S.C.—Wingate v. Postal Telegraph & Cable Co., 30 S.E.2d 307, 204 S.C. 520.

Tenn.—Rogers v. McDaniel, 253 S.W. 2d 36, 36 Tenn.App. 189.

Tex.—Hicks v. Matthews, 266 S.W. 2d 846, 153 Tex. 177.

25.5 Mo.—Frank v. Wabash R. Co. App., 295 S.W.2d 16.

was justified is a question for the jury.^{25.10} The presumption of illegality where there was an arrest without a warrant and a subsequent confinement does not warrant submission of the cause to the jury where the record demonstrates the legality of the arrest.^{25.15} Where the uncontroverted facts establish that the arrest was illegal and occasioned by defendant, the jury are properly directed to find for plaintiff and to assess his damages.²⁶

Election as to form of action. Where the action, as originally instituted, sounded in false arrest and imprisonment and malicious prosecution and plaintiff elected to prosecute it as one for false arrest and imprisonment, the sufficiency of the evidence must be measured by the requirements of the form which the action assumed by the election.^{26.5}

b. Reasonableness of Detention

The reasonableness of the detention of the plaintiff, including the question of what constitutes a reasonable

time for taking him before a magistrate, is for the court if the evidence thereon is uncontroverted; but if the facts are in dispute, or are susceptible of different inferences, the question is one for the jury.

The reasonableness of the detention of plaintiff,²⁷ including the question of what constitutes a reasonable time for taking him before a magistrate,^{27.5} is a question for the court, where there is no conflict in the evidence as to the length of time and the circumstances under which plaintiff was held. Where, however, the facts are in dispute,²⁸ or where different inferences may be drawn from the undisputed facts,^{28.5} it is for the jury, under proper instructions by the court, to determine the reasonableness of the detention, including the question of whether there was unnecessary delay in preferring charges against plaintiff,^{28.10} or whether an unreasonable period of time elapsed after the arrest of plaintiff before he was taken before a magistrate.^{28.15}

25.10 Mo.—Frank v. Wabash R. Co., supra.

25.15 Cal.—Coverstone v. Davies, 239 P.2d 876, 38 C.2d 315, certiorari denied Mock v. Davies, 73 S. Ct. 50, 344 U.S. 840, 97 L.Ed. 653.

26. Idaho.—Anderson v. Foster, 252 P.2d 199, 73 Idaho 340—**Corpus Juris** cited in Madsen v. Hutchison, 290 P. 208, 49 Idaho 358.

Ky.—Casteel v. Sparks, 226 S.W.2d 533, 312 Ky. 99.

Miss.—Laster v. Chanéy, 177 So. 524, 180 Miss. 110.

25 C.J. p 548 note 40.

Evidence held not to authorize direction of verdict for plaintiff against particular defendant.

U.S.—Burlington Transp. Co. v. Josephson, C.C.A.S.D., 153 F.2d 372.

26.5 Ky.—Rader v. Parks, 258 S.W. 2d 728.

27. Idaho.—**Corpus Juris** cited in Madsen v. Hutchison, 290 P. 208, 209, 49 Idaho 358.

Neb.—**Corpus Juris** cited in Kausgaard v. Endres, 252 N.W. 810, 812, 126 Neb. 129.

Okl.—**Corpus Juris** quoted in Clements v. Canon, 40 P.2d 640, 642, 170 Okl. 340.

25 C.J. p 550 note 51.

27.5 Idaho.—Anderson v. Foster, 252 P.2d 199, 73 Idaho 340.

Delay until office hours of magistrate

It is not unreasonable as a matter of law for an arresting officer to wait until ordinary office hours to take the person arrested before a magistrate.

Mont.—Cline v. Tait, 129 P.2d 89, 113 Mont. 475.

Detention for unreasonable time held not shown as matter of law

N.D.—Haggard v. First Nat. Bank

of Mandan, 8 N.W.2d 5, 72 N.D. 434.

28. U.S.—Montgomery Ward & Co. v. Freeman, C.A.Va., 199 F.2d 720. Idaho.—**Corpus Juris** cited in Madsen v. Hutchison, 290 P. 208, 209, 49 Idaho 358.

Mass.—Jacques v. Childs Dining Hall Co., 138 N.E. 843, 244 Mass. 438, 26 A.L.R. 1329.

Neb.—**Corpus Juris** cited in Kausgaard v. Endres, 252 N.W. 810, 812, 126 Neb. 129.

Okl.—**Corpus Juris** quoted in Clements v. Canon, 40 P.2d 640, 642, 170 Okl. 340.

Tex.—Smith v. Bryson, Civ.App., 33 S.W.2d 268, error dismissed.

25 C.J. p 550 note 52.

Particular questions held for jury as to reasonableness of detention

(1) Whether railroad policeman used more than reasonable force in making arrest.

Ky.—Johnson v. Chesapeake & O. Ry. Co., 83 S.W.2d 521, 259 Ky. 789.

(2) Whether officer was justified in placing handcuffs on plaintiff in making arrest.

Tex.—Smith v. Bryson, Civ.App., 33 S.W.2d 268, error dismissed.

(3) Whether period of detention was unreasonable.

Mich.—Leisure v. Hicks, 57 N.W.2d 473, 336 Mich. 148.

(4) Whether defendant's detention of plaintiff for investigation as to whether he paid for merchandise was reasonable.

Tenn.—Little Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357.

28.5 Mich.—Leisure v. Hicks, 57 N.W.2d 473, 336 Mich. 148.

28.10 Ill.—Hughes v. New York

Cent. System, 155 N.E.2d 809, 20 Ill.App.2d 224.

28.15 Cal.—Kaufman v. Brown, 209 P.2d 156, 93 C.A.2d 508—Roynon v. Battin, 132 P.2d 266, 55 C.A.2d 861—Peckham v. Warner Bros. Pictures, 97 P.2d 472, 36 C.A.2d 214.

Ga.—Duchess Chenilles, Inc. v. Masters, 67 S.E.2d 600, 84 Ga.App. 822.

Idaho.—Anderson v. Foster, 252 P. 2d 199, 73 Idaho 340.

Iowa.—Plinske v. Schoemaker, 298 N.W. 840, 230 Iowa 767.

Mich.—Leisure v. Hicks, 57 N.W.2d 473, 336 Mich. 148—Mooradian v. Davis, 5 N.W.2d 435, 302 Mich. 484.

Minn.—Evans v. Jorgenson, 234 N.W. 292, 182 Minn. 282—Stromberg v. Hansen, 225 N.W. 148, 177 Minn. 307.

Mont.—Cline v. Tait, 155 P.2d 752, 116 Mont. 571—Cline v. Tait, 129 P.2d 89, 113 Mont. 475.

N.D.—Haggard v. First Nat. Bank of Mandan, 8 N.W.2d 5, 72 N.D. 434.

Ohio.—Johnson v. Reddy, 126 N.E.2d 911, 163 Ohio St. 347.

Okl.—St. Clair v. Smith, 293 P.2d 597.

Or.—Brown v. Meier & Frank Co., 86 P.2d 79, 160 Or. 608—Bowles v. Creason, 78 P.2d 324, 159 Or. 129.

Intoxication of plaintiff

Question of intoxication of plaintiff as bearing on reasonableness of delay in bringing him before magistrate was held for jury.

Idaho.—Anderson v. Foster, 252 P. 2d 199, 73 Idaho 340.

Tex.—Robinson v. Lovell, Civ.App., 238 S.W.2d 294, error refused no reversible error.

c. Probable or Reasonable Cause

The question of probable cause for the detention of plaintiff is one of law for the court, where the evidence thereon is uncontroverted. If, however, the evidence conflicts it is a mixed question of law and fact, and the jury determine the existence of the circumstances relied on and the court determines their sufficiency to establish probable cause.

In general, if the evidence is uncontroverted, the

question of reasonable or probable cause for the detention of plaintiff is one of law for the court.²⁹ If the evidence conflicts, the question of probable cause is a mixed question of law and fact;³⁰ in that case, the question of the existence of the circumstances relied on as establishing probable cause is one of fact for the jury, under proper instructions from the court,³¹ while the question whether the

Waiver

Whether plaintiff waived right to be taken forthwith before magistrate is for jury.

Ky.—Sizemore v. Hoskins, 235 S.W. 2d 1011, 314 Ky. 436—Goins v. Hudson, 55 S.W.2d 388, 246 Ky. 517.

Before nearest magistrate

Whether plaintiff was treated as statute provided by being taken before nearest and most accessible magistrate in county in which arrest was made is for jury.

Iowa.—Norton v. Mathers, 271 N.W. 321, 222 Iowa 1170.

Evidence held insufficient for jury on issue as to whether plaintiff was brought before a magistrate without unnecessary delay.

Cal.—Kangieser v. Zink, 285 P.2d 950, 134 C.A.2d 559.

29. U.S.—Seaboard Oil Co. v. Cunningham, C.C.A.Fla., 51 F.2d 321, certiorari denied 52 S.Ct. 35, 284 U.S. 657, 76 L.Ed. 557.

Cal.—Aitken v. White, 208 P.2d 788, 93 C.A.2d 134—Hill v. Nelson, 162 P.2d 927, 71 C.A.2d 528—Van Fleet v. West American Ins. Co., 42 P.2d 378, 5 C.A.2d 125, rehearing denied 43 P.2d 557, 5 C.A.2d 125.

D.C.—Harper v. Strange, 158 F.2d 408, 81 U.S.App.D.C. 349.

Mich.—Gooch v. Wachowiak, 89 N.W.2d 496, 352 Mich. 347—Hammitt v. Straley, 61 N.W.2d 641, 338 Mich. 587.

Mont.—Harrer v. Montgomery Ward & Co., 221 P.2d 428, 124 Mont. 295.

N.Y.—Freedman v. New York Soc. for Suppression of Vice, 290 N.Y.S. 753, 248 App.Div. 517, affirmed 10 N.E.2d 550, 274 N.Y. 559.

Okl.—Parsons v. Sims, 229 P. 1090, 104 Okl. 1.

Pa.—Nielsen v. Devereux Foundations, Inc., Com.Pl., 4 Chest.Co. 368.

Wash.—Eberhart v. Murphy, 194 P. 415, 113 Wash. 449.

25 C.J. p 550 note 56.

Rule not absolute

Rule sometimes stated that question of probable cause for arrest without warrant is one of law for court, where facts are undisputed, does not establish a general test by which such question may be determined in all cases.

Mich.—Leisure v. Hicks, 57 N.W.2d 473, 336 Mich. 148.

30. U.S.—Director General of Railroads v. Kastenbaum, N.Y., 44 S.Ct. 52, 263 U.S. 25, 68 L.Ed. 146.

Bucher v. Krause, C.A.Ill., 200 F.2d 576, certiorari denied Krause v. Bucher, 73 S.Ct. 1141, 345 U.S. 997, 97 L.Ed. 1404, rehearing denied 74 S.Ct. 17, 346 U.S. 842, 98 L.Ed. 363—Carr v. National Discount Corp., C.A.Mich., 172 F.2d 899, certiorari denied 70 S.Ct. 59, 338 U.S. 817, 94 L.Ed. 495.
25 C.J. p 550 note 53.

31. U.S.—Director General of Railroads v. Kastenbaum, N.Y., 44 S.Ct. 52, 263 U.S. 25, 68 L.Ed. 146.
Seaboard Oil Co. v. Cunningham, C.C.A.Fla., 51 F.2d 321, certiorari denied 52 S.Ct. 35, 284 U.S. 657, 76 L.Ed. 557.

Ariz.—Holmes v. Nester, 306 P.2d 290, 81 Ariz. 372.

Cal.—Gibson v. J. C. Penney Co., App., 331 P.2d 1057—Roberson v. J. C. Penney Co., 288 P.2d 275, 136 C.A.2d 1—Aitken v. White, 208 P.2d 788, 93 C.A.2d 134—Murray v. Kunde, 267 P. 158, 91 C.A. 440.

Ill.—Hughes v. New York Cent. System, 155 N.E.2d 809, 20 Ill.App.2d 224.

Iowa.—Gripp v. Crittenden, 271 N.W. 599, 223 Iowa 240.

Mich.—Leisure v. Hicks, 57 N.W.2d 473, 336 Mich. 148.

Miss.—Howell v. Viener, 176 So. 731, 179 Miss. 872.

Mo.—Thompson v. St. Louis-San Francisco Ry. Co., App., 3 S.W.2d 1033.

Mont.—Harrer v. Montgomery Ward & Co., 221 P.2d 428, 124 Mont. 295.

N.Y.—Clark v. Nannery, 54 N.E.2d 31, 292 N.Y. 105.

Copeland v. Corn Exchange Bank Trust Co., 2 N.Y.S.2d 716, 254 App. Div. 568.

N.C.—Allen v. Gardner, 109 S.E. 260, 182 N.C. 425.

Pa.—Arye v. Dickstein, 12 A.2d 19, 337 Pa. 471—Keidel v. Baltimore & O. R. Co., 126 A. 770, 281 Pa. 289.

Samuel v. Blackwell, 76 Pa.Super. 540.

Wash.—Sennett v. Zimmerman, 314 P.2d 414, 50 Wash.2d 649—Eberhart v. Murphy, 194 P. 415, 113 Wash. 449.

25 C.J. p 550 note 54.

Ordinarily, probable cause is question for jury.

U.S.—J. C. Penney Co. v. O'Daniell, C.A.Okl., 263 F.2d 849.

As contrasted with rule in malicious prosecution

(1) It has been broadly stated that "the principle that the question of probable cause is a question of law for the court . . . is limited to suits for malicious prosecution, and is not applicable to actions for false imprisonment."

Ala.—Bank of Cottonwood v. Hood, 149 So. 676, 679, 227 Ala. 237.

(2) Other authority has stated that there is no material distinction in principle between issue of reasonable grounds for detention in false imprisonment and issue of probable cause in malicious prosecution, and procedure for submission of issue to jury should be same in both cases.

U.S.—Montgomery Ward & Co. v. Freeman, C.A.Va., 199 F.2d 720.

Evidence held for jury

(1) Generally.

U.S.—J. C. Penney Co. v. O'Daniell, C.A.Okl., 263 F.2d 849.

Ill.—Fulford v. O'Connor, 121 N.E.2d 767, 3 Ill.2d 490.

Howard v. Roche, 110 N.E.2d 643, 349 Ill.App. 387.

Ky.—Lancaster v. Langston, 36 S.W. 521, 18 Ky.L. 299.

Mass.—Krulvitz v. Eastern R. Co., 5 N.E. 500, 140 Mass. 573.

N.Y.—Seguin v. Myers, 108 N.Y.S.2d 28, 279 App.Div. 690.

Pa.—Cohen v. Lit Bros., 70 A.2d 419, 166 Pa.Super. 206.

Persinski v. Stryjewski, Com. Pl., 92 Pittsb.Leg.J. 421.

(2) On question whether prosecution was instituted without probable cause.

U.S.—Andrews v. Hotel Sherman, C.A.Ill., 138 F.2d 524.

(3) Jury should have been allowed to decide what, if any, inference could be drawn from fact that part of information obtained by store's employees had not been received by direct observation of defendant's employees.

U.S.—J. C. Penney Co. v. O'Daniell, C.A.Okl., 263 F.2d 849.

Evidence held insufficient for jury

U.S.—Carr v. National Discount Corp., C.A.Mich., 172 F.2d 899, cer-

existence of such circumstances would amount to probable cause is a question of law for the court.³² If the adjudication of a false imprisonment case depends on a finding of what is reasonable under the the circumstances and the law does not furnish a decisive criterion as to this, so that the matter must be determined by the conclusions of ordinary men, the case must be submitted to a jury for such determination, regardless of whether the facts are disputed.^{32.5}

The question of whether police officers acted reasonably when attempting to arrest a person without a warrant is a question of fact.^{32.10} Whether there was reasonable cause or grounds for suspecting that plaintiff had committed a crime, or was about to commit one, is for the jury,³³ except where the

facts are undisputed.³⁴ The intention of plaintiff, a mortgagor, in fleeing the state with mortgaged property is for the jury.^{34.5}

d. Malice and Good Faith

The existence of malice or good faith is generally for the jury.

As a general rule, the existence of malice is a question of fact for a jury,³⁵ as is the question whether a particular person acted willfully and intentionally,^{35.5} and whether defendant³⁶ or an officer³⁷ acted in good faith.

e. Damages

The amount of damages is a question for the jury or trier of facts, as is the existence of circumstances warranting the imposition of punitive damages.

tiorari denied 70 S.Ct. 59, 338 U.S. 817, 94 L.Ed. 495.
Mich.—Gooch v. Wachowiak, 89 N.W.2d 496, 352 Mich. 347.

32. Cal.—Collyer v. S. H. Kress Co., 54 P.2d 20, 5 C.2d 175.

Gibson v. J. C. Penney Co., App., 331 P.2d 1057—Roberson v. J. C. Penney Co., 288 P.2d 275, 136 C.A. 2d 1—**Corpus Juris** cited in Allen v. McCoy, 27 P.2d 423, 426, 135 C.A. 500.

25 C.J. p 550 notes 55, 57.

Jury to be instructed

When the facts are controverted or the evidence conflicting, then the determination of their legal effect by the court is necessarily hypothetical, and the jury are to be told that if they find the facts in a designated way, then such facts do or do not amount to probable cause.

Cal.—Aitken v. White, 208 P.2d 788, 93 C.A.2d 134—Hill v. Nelson, 162 P.2d 927, 71 C.A.2d 528.

32.5 Okl.—Swafford v. Vermillion, 261 P.2d 187.

32.10 U.S.—Bucher v. Krause, C.A. Ill., 200 F.2d 576, certiorari denied Krause v. Bucher, 73 S.Ct. 1141, 345 U.S. 997, 97 L.Ed. 1404, rehearing denied 74 S.Ct. 17, 346 U.S. 842, 98 L.Ed. 363.

33. Ark.—Kroger Grocery & Baking Co. v. Waller, 189 S.W.2d 361, 208 Ark. 1063.

Ill.—Ferrell v. Livingston, 101 N.E. 2d 599, 344 Ill.App. 488.

Iowa.—Comstock v. Maryland Casualty Co. of Baltimore, 179 N.W. 962.

Mo.—**Corpus Juris Secundum** cited in Parrish v. Herron, 225 S.W.2d 391, 398, 240 Mo.App. 1156.

N.J.—Jorgensen v. Pennsylvania R. Co., 118 A.2d 854, 38 N.J.Super. 317.

Okl.—Clements v. Canon, 40 P.2d 640, 170 Okl. 340.

Tex.—Citizens Hotel Co. v. Foley, Civ.App., 131 S.W.2d 402, error dismissed, judgment correct.

Wash.—Eberhart v. Murphy, 194 P. 415, 113 Wash. 449.

25 C.J. p 550 note 58.

Arrest without warrant

Whether a police officer had reasonable grounds for suspecting plaintiff of a crime, so as to authorize his arrest without a warrant, is for the jury.

Ill.—Fulford v. O'Connor, 121 N.E. 2d 767, 3 Ill.2d 490.

Ky.—Hundley v. Gossett, 278 S.W. 2d 65—Johnson v. Chesapeake & O. Ry. Co., 83 S.W.2d 521, 259 Ky. 789.

Mo.—Parrish v. Herron, 225 S.W.2d 391, 240 Mo.App. 1156.

Or.—Christ v. McDonald, 52 P.2d 655, 152 Or. 494.

34. Mo.—**Corpus Juris Secundum** cited in Parrish v. Herron, 225 S.W.2d 391, 398, 240 Mo.App. 1156.

Wash.—Eberhart v. Murphy, 194 P. 415, 113 Wash. 449.

25 C.J. p 551 note 59.

Description of person accused

Where the evidence established without dispute that plaintiff, who was arrested by defendant officers, answered the description of the person sought in connection with the commission of a felony, sufficient probable cause for making the arrest existed as a matter of law.

D.C.—Harper v. Strange, 158 F.2d 408, 81 U.S.App.D.C. 349.

34.5 Or.—McNeff v. Heider, 337 P. 2d 819.

35. Ala.—Wilson v. Orr, 97 So. 133, 210 Ala. 93—Phillips v. Morrow, 97 So. 130, 210 Ala. 34.

Ark.—Arnold v. State ex rel. Burton, 245 S.W.2d 818, 220 Ark. 25.

Ill.—Lindquist v. Friedman's, Inc., 8 N.E.2d 625, 366 Ill. 232.

Shaw v. Courtney, 46 N.E.2d 170, 317 Ill.App. 422, affirmed 53 N.E. 2d 432, 385 Ill. 559.

Md.—Dennis v. Baltimore Transit Co., 56 A.2d 813, 189 Md. 610.

Mo.—Oliver v. Kessler, App., 95 S.W.2d 1226—Greaves v. Kansas City Junior Orpheum Co., 80 S.W.2d 228, 229 Mo.App. 663—Thompson v. St. Louis-San Francisco Ry. Co., App., 3 S.W.2d 1033—Peterson v. Fleming, 297 S.W. 163, 222 Mo.App. 296—Martin v. Woodlea Inv. Co., 226 S.W. 650, 206 Mo.App. 33.

N.Y.—Copeland v. Corn Exchange Bank Trust Co., 2 N.Y.S.2d 716, 254 App.Div. 568.

N.C.—Allen v. Gardner, 109 S.E. 260, 182 N.C. 425—Ford v. McAnally, 109 S.E. 91, 182 N.C. 419.

Pa.—Arye v. Dickstein, 12 A.2d 19, 337 Pa. 471.

25 C.J. p 551 note 60.

Inference of malice from want of probable cause see supra § 57 c.

Evidence held for jury

Iowa.—Chambers v. Oehler, 77 N.W. 853, 107 Iowa 155.

Evidence held insufficient for jury

Mich.—Gooch v. Wachowiak, 89 N.W. 2d 496, 352 Mich. 347.

N.Y.—Van Buren v. Ford, 71 N.Y.S.2d 551, 189 Misc. 352.

35.5 Ark.—Arnold v. State ex rel. Burton, 245 S.W.2d 818, 220 Ark. 25.

36. Ala.—Phillips v. Morrow, 97 So. 130, 210 Ala. 34.

Ark.—Kroger Grocery & Baking Co. v. Waller, 189 S.W.2d 361, 208 Ark. 1063.

Iowa.—Gripp v. Crittenden, 271 N.W. 599, 223 Iowa 240.

25 C.J. p 551 note 61.

37. Ky.—Illinois Cent. R. Co. v. Dennington, 189 S.W. 217, 172 Ky. 326.

N.C.—Hicks v. Niven, 185 S.E. 469, 216 N.C. 44.

The question of the amount of damages to be recovered is one particularly for the jury³⁸ or trier of facts,^{38.5} as is the existence of particular elements of damages,³⁹ such as injury to reputation.^{39.5} No issue as to a particular element of damages, however, should be submitted to the jury in the absence of proof as to such element,⁴⁰ or where the evidence is such that the jury would be required to speculate and guess with respect thereto;^{40.5} but proof of plaintiff's previous good reputation is not a prerequisite to submission of injury to reputation.^{40.10} The decision of the jury as to the amount

of damages is generally conclusive,⁴¹ and will not be disturbed unless the award is so flagrantly large or small as to evince passion, partiality, or corruption.⁴²

Punitive damages. It is for the jury to say whether the circumstances of an arrest and imprisonment show malice, oppression, or wantonness so as to warrant a recovery in punitive damages;⁴³ but in the absence of a showing of such circumstances, no issue as to punitive damages should be submitted to the jury.⁴⁴

38. U.S.—Boice v. Bradley, D.C.Idaho, 92 F.Supp. 750, affirmed, C.A., Bradley Min. Co. v. Boice, 194 F.2d 80, certiorari denied 72 S.Ct. 1033, 343 U.S. 941, 96 L.Ed. 1347, and rehearing denied, C.A., 205 F.2d 937, certiorari denied 74 S.Ct. 125, 346 U.S. 874, 98 L.Ed. 382.

Ariz.—Ward v. Johnson, 232 P.2d 960, 72 Ariz. 213.

Cal.—Gibson v. J. C. Penney Co., App., 331 P.2d 1057.

D.C.—MacDonald v. Schenkel, 125 F.2d 737, 74 App.D.C. 346.

Iowa.—Gripp v. Crittenden, 271 N.W. 599, 223 Iowa 240.

Ky.—Great Atlantic & Pacific Tea Co. v. Smith, 136 S.W.2d 759, 281 Ky. 583.

Miss.—Harris v. Sims, 124 So. 325, 155 Miss. 207.

Mo.—Jarrett v. St. Francois County Finance Co., App., 185 S.W.2d 855—McGill v. Walnut Realty Co., 148 S.W.2d 131, 235 Mo.App. 874.

N.C.—Lowry v. Barker, 190 S.E. 341, 211 N.C. 613.

Mont.—Cline v. Tait, 155 P.2d 752, 116 Mont. 571.

Tenn.—(Blue) Star Service, Inc. v. McCurdy, 251 S.W.2d 139, 36 Tenn. App. 1—Little Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357.

Tex.—Heath v. Boyd, 175 S.W.2d 214, 141 Tex. 569.

Schnauffer v. Price, Civ.App., 124 S.W.2d 940, error refused.

Utah.—Hepworth v. Covey Bros. Amusement Co., 91 P.2d 507, 97 Utah 205.

25 C.J. p 551 note 62.

Instructions as to damages see infra § 60 b.

Control by judge's discretionary power

The assessment of unliquidated damages resulting from false imprisonment must rest with the jury, controlled by discretionary power of the trial judge.

Mo.—Oliver v. Kessler, App., 95 S.W. 2d 1226.

S.C.—Westbrook v. Hutchison, 10 S. E.2d 145, 195 S.C. 101.

Tenn.—Deaderick v. Smith, 230 S.W. 2d 406, 33 Tenn.App. 151.

38.5 N.Y.—Roher v. State, 112 N.Y. S.2d 603, 279 App.Div. 1116.

39. Ala.—Standard Oil Co. v. Humphries, 96 So. 629, 209 Ala. 493. 25 C.J. p 551 note 63.

Evidence held for jury

(1) As to whether plaintiff suffered mental pain, including nervousness and fright.

Ala.—Standard Oil Co. v. Humphries, 96 So. 629, 209 Ala. 493.

(2) As to whether false representations of officers at time of arrest of plaintiff that her child was in hospital in fact caused emotional distress to plaintiff and whether the distress was of such severity as to entitle plaintiff to recover damages.

Ariz.—Savage v. Boies, 272 P.2d 349, 77 Ariz. 355.

39.5 Mo.—Burns v. Burns, App., 193 S.W.2d 951—Schuler v. Hughes, App., 52 S.W.2d 453.

40. S.D.—Gamble v. Keyes, 178 N. W. 870, 43 S.D. 245.

25 C.J. p 552 note 69 [a] (3).

Evidence held insufficient for jury on issue of plaintiff's damages by unfavorable publicity, humiliation, and mental anguish and loss of employment.

Cal.—Roynon v. Battin, 132 P.2d 266, 55 C.A.2d 861.

40.5 Or.—Spain v. Oregon-Washington R. & Nav. Co., 153 P. 470, 78 Or. 355, Ann.Cas.1917E 1104.

40.10 Mo.—Burns v. Burns, App., 193 S.W.2d 951.

41. W.Va.—Floyd v. Chesapeake & O. Ry. Co., 164 S.E. 28, 112 W.Va. 66.

42. Cal.—Gibson v. J. C. Penney Co., App., 331 P.2d 1057.

Ky.—Great Atlantic & Pacific Tea Co. v. Smith, 136 S.W.2d 759, 281 Ky. 583.

Tenn.—Little Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357.

W.Va.—Floyd v. Chesapeake & O. Ry. Co., 164 S.E. 28, 112 W.Va. 66.

43. U.S.—Corpus Juris Secundum cited in Atkinson v. Dixie Greyhound Lines, C.C.A.Miss., 143 F.2d

477, 479, certiorari denied, 65 S. Ct. 92, 323 U.S. 758, 89 L.Ed. 607.

Ala.—Corpus Juris cited in Burk v. Knott, 101 So. 811, 814, 20 Ala. App. 316.

D.C.—Safeway Stores v. Gibson, Mun.App., 118 A.2d 386, affirmed 237 F.2d 592, 99 U.S.App.D.C. 111.

Fla.—Setzer v. Tyre, 171 So. 224, 126 Fla. 139.

Ill.—Shaw v. Courtney, 46 N.E.2d 170, 317 Ill.App. 422, affirmed 53 N.E.2d 432, 385 Ill. 559.

Miss.—Laster v. Chaney, 177 So. 524, 180 Miss. 110.

Mo.—Schuler v. Hughes, App., 52 S. W.2d 453—Thompson v. St. Louis-San Francisco Ry. Co., App., 3 S.W. 2d 1033—Martin v. Woodlea Inv. Co., 226 S.W. 650, 206 Mo.App. 33.

N.Y.—Goines v. Pennsylvania R. R., 143 N.Y.S.2d 576, 208 Misc. 103, reversed on other grounds 160 N. Y.S.2d 39, 3 A.D.2d 307, reargument denied 166 N.Y.S.2d 303, 4 A.D.2d 831.

N.C.—Ford v. McAnally, 100 S.E. 91, 182 N.C. 419.

Ohio.—Thomas v. F. & R. Lazarus & Co., App., 57 N.E.2d 116.

25 C.J. p 551 note 64.

Malice as question for jury generally see supra subdivision d of this section.

Defendant's belief as to authority

The question whether defendant believed that the necessary authority for the arrest existed should be submitted, where the question of punitive damages is submitted, for if defendant believed such authority existed, no such damage can be awarded.

S.D.—Gamble v. Keyes, 178 N.W. 870, 43 S.D. 245.

Evidence held sufficient

Cal.—Parrott v. Bank of America Nat. Trust & Sav. Ass'n, 217 P.2d 89, 97 C.A.2d 14, 35 A.L.R.2d 263.

44. Colo.—Walker v. Tucker, 280 P. 2d 649, 131 Colo. 198.

Fla.—Winn & Lovett Grocery Co. v. Archer, 171 So. 214, 126 Fla. 308.

Ky.—Ashland Dry Goods Co. v. Wages, 195 S.W.2d 312, 302 Ky. 577—Great Atlantic & Pacific Tea

§ 60. — Instructions

- a. In general
- b. Instructions as to damages

a. In General

The instructions in an action for false imprisonment must clearly set forth the rules of law applicable to the various issues, must define terms accurately, must be

supported by the evidence and be within the pleadings, and must not be misleading.

In accordance with the rules applicable generally to civil causes, instructions to the jury on the trial of an action for false imprisonment must substantially and clearly formulate the rules of law applicable to the issues,⁴⁵ such as the existence and involuntary nature of the detention,^{45.5} the legality of the arrest or detention,^{45.10} reasonable or prob-

Co. v. Smith, 136 S.W.2d 759, 281 Ky. 583.
Mo.—Schuler v. Hughes, App., 52 S.W.2d 453.

45. Ala.—Sokol Bros. Furniture Co. v. Gate, 93 So. 724, 208 Ala. 107.
Cal.—Korkman v. Hanlon Dry Dock & Shipbuilding Co., 199 P. 880, 53 C.A. 147.
Ohio.—Johnson v. Reddy, App., 120 N.E.2d 459, reversed on other grounds 126 N.E.2d 911, 163 Ohio St. 347.

25 C.J. p 551 note 66, p 552 note 67.

Circumstantial evidence

Instruction that defendants' connection with false arrest might be proved by circumstantial evidence is not error.

Mo.—Greaves v. Kansas City Junior Orpheum Co., 80 S.W.2d 228, 229 Mo.App. 663.

Instructions held proper or erroneously refused as to:

(1) Liability of less than all of defendants.

N.J.—Nelson v. Eastern Air Lines, 24 A.2d 371, 128 N.J.Law 46.

S.C.—Westbrook v. Hutchison, 10 S.E.2d 145, 195 S.C. 101.

Wash.—Smith v. Drew, 26 P.2d 1040, 175 Wash. 11.

(2) Force which officer might use to effect arrest.

Ky.—Johnson v. Chesapeake & O. Ry. Co., 83 S.W.2d 521, 259 Ky. 789.

Wash.—Smith v. Drew, 26 P.2d 1040, 175 Wash. 11.

(3) Other matters.

U.S.—Barnard v. Wabash R. Co., C.A.Mo., 208 F.2d 489.

Ariz.—Crowley v. Rummel, 195 P. 986, 22 Ariz. 179.

Cal.—Gibson v. J. C. Penney Co., App., 331 P.2d 1057.

Ga.—Garner v. Mears, 103 S.E.2d 610, 97 Ga.App. 506—Wyatt v. Baker, 154 S.E. 816, 41 Ga.App. 750

—Hines v. Adams, 107 S.E. 618, 27 Ga.App. 155.

Mass.—Shea v. Sullivan, 158 N.E. 771, 261 Mass. 255.

Mo.—Calloway v. Fogel, 213 S.W.2d 405, 358 Mo. 47—Teel v. May Department Stores Co., 176 S.W.2d 440, 352 Mo. 127.

Carter v. Casey, App., 153 S.W.2d 744—Vaughn v. Hines, 230 S.W. 379, 206 Mo.App. 425.

N.C.—Houston v. De Herrodora, 136 S.E. 6, 192 N.C. 749—Allen v. i

Gardner, 109 S.E. 260, 182 N.C. 425.

Or.—Bowles v. Creason, 66 P.2d 1183, 156 Or. 278.

Va.—Miller v. Harless, 149 S.E. 619, 153 Va. 228.

25 C.J. p 551 note 66 [a], p 553 note 71 [a].

Instructions held erroneous or properly refused as to:

(1) Liability of one or more, but less than all, of several defendants. Ala.—Sokol Bros. Furniture Co. v. Gate, 93 So. 724, 208 Ala. 107.

Ky.—Wilder v. Bailey, 25 S.W.2d 381, 233 Ky. 238.

Utah.—Johnson v. Leigh, 279 P. 501, 74 Utah 286.

(2) In action in which defendants were charged jointly and the evidence tended to establish joint commission, instruction submitting individual verdicts and the fixing of individual liability on each defendant. Colo.—Hart v. Herzig, 283 P.2d 177, 131 Colo. 458.

(3) Malice or good faith.

Ky.—Goins v. Hudson, 55 S.W.2d 388, 246 Ky. 517.

Neb.—Hall v. Rice, 223 N.W. 4, 117 Neb. 813, 78 A.L.R. 1421.

N.C.—Allen v. Gardner, 109 S.E. 260, 182 N.C. 425.

(4) Other matters.

U.S.—Montgomery Ward & Co. v. Freeman, C.A.Va., 199 F.2d 720—Montgomery Ward & Co. v. Medline, C.C.A.N.C., 104 F.2d 485.

Ala.—De Armond v. Saunders, 9 So. 2d 747, 243 Ala. 263.

Ky.—Wright & Taylor v. Leigh, 16 S.W.2d 493, 229 Ky. 32.

Mo.—Gust v. Montgomery Ward & Co., 136 S.W.2d 94, 234 Mo.App. 611.

Or.—Bowles v. Creason, 78 P.2d 324, 159 Or. 129—Bowles v. Creason, 66 P.2d 1183, 156 Or. 278.

Pa.—Socel v. Joseph Horne Co., Com.Pl., 93 Pittsb.Leg.J. 90.

S.C.—Cannon v. Haverty Furniture Co., 183 S.E. 469, 179 S.C. 1.

25 C.J. p 551 note 66 [b].

45.5 Instructions held proper or erroneously refused

(1) Generally.

Cal.—Gibson v. J. C. Penney Co., App., 331 P.2d 1057.

Conn.—Roberts v. Paine, 199 A. 112, 124 Conn. 170.

Hawaii.—Jacobson v. Yoon, 41 Hawaii 181.

Iowa.—Kelley v. Gardner, 238 N.W. 470, 213 Iowa 16.

Kan.—Gariety v. Fleming, 245 P. 1054, 121 Kan. 42.

Md.—Fleisher v. Ensminger, 118 A. 153, 140 Md. 604.

Or.—Shain v. Meier & Frank Co., 13 P.2d 360, 140 Or. 518.

(2) Instruction, in action to recover damages for alleged false imprisonment when clerk in store allegedly detained customer on suspicion of having stolen coat, that if the only act committed by the clerk was in asking customer if she had purchased the coat at the store, then customer would not be entitled to recover.

Ala.—Loveman, Joseph & Loeb v. Hitt, 57 So.2d 553, 257 Ala. 45.

(3) Instruction that defendants could detain plaintiff and her sister-in-law until defendants recovered all of merchandise obtained by sister-in-law by false personation, where, under evidence, plaintiff's recovery was restricted to period following return of the merchandise.

Mo.—Teel v. May Department Stores Co., 176 S.W.2d 440, 352 Mo. 127.

Instructions held erroneous or properly refused

Mo.—Gust v. Montgomery Ward & Co., 136 S.W.2d 94, 234 Mo.App. 611—Titus v. Montgomery Ward & Co., 123 S.W.2d 574, 232 Mo.App. 987—Hurst v. Montgomery Ward & Co., App., 107 S.W.2d 183.

Ohio.—Fitscher v. Rollman & Sons Co., 167 N.E. 469, 31 Ohio App. 340.

25 C.J. p 551 note 66 [b] (4).

45.10 Mich.—Leisure v. Hicks, 57 N.W.2d 473, 336 Mich. 148.

Power to make arrest

(1) In action against railroad for false arrest and imprisonment, instruction that railroad's private watchman had a commission from city, and had power under state law to arrest under his commission, was not erroneous.

U.S.—Barnard v. Wabash R. Co., C.A.Mo., 208 F.2d 489.

(2) Instruction that peace officer not armed with warrant cannot lawfully enter private house or enclosure for purpose of making arrest for a misdemeanor which he

able cause,^{45.15} the necessity of taking plaintiff before a judicial officer and the time within which he should have been so taken, or the duty to release him on bail,^{45.20} and defendant's connection with,

believes or suspects of being committed therein was not technically correct, and was properly refused.
Ga.—Goodwin v. Allen, 78 S.E.2d 804, 89 Ga.App. 187.

(3) Instruction that police officers may without legal process detain children alleged to be delinquent pending investigation was properly refused.

Iowa.—Dedman v. McKinley, 29 N.W.2d 337, 238 Iowa 886.

(4) Instruction defining duties of policemen should have stated that policemen had right to arrest plaintiff if they had reasonable grounds to believe and did believe in good faith that plaintiff at time of arrest was drunk or disorderly or was attempting to prevent arrest of third person.

Ky.—Couch v. Vanhooose, 234 S.W.2d 169, 314 Ky. 36.

Instructions held proper or erroneously refused

U.S.—Barnard v. Wabash R. Co., C.A.Mo., 208 F.2d 489.

Ala.—Sokol Bros. Furniture Co. v. Gate, 93 So. 724, 208 Ala. 107.

Ga.—Atlantic Coast Line R. Co. v. Wegner, 83 S.E.2d 58, 90 Ga.App. 267—Cobb v. Bailey, 133 S.E. 42, 35 Ga.App. 302.

Ind.—Scoopmire v. Tafinger, 52 N.E.2d 728, 114 Ind.App. 419.

Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Roberts, 249 S.W. 1012, 198 Ky. 710.

Miss.—Carlisle v. City of Laurel, 124 So. 786, 156 Miss. 410.

Mo.—Calloway v. Fogel, 213 S.W.2d 405, 358 Mo. 47.

Greaves v. Kansas City Junior Orpheum Co., 80 S.W.2d 228, 229 Mo.App. 663.

N.M.—Cave v. Cooley, 152 P.2d 886, 48 N.M. 478.

Or.—Shain v. Meier & Frank Co., 13 P.2d 360, 140 Or. 518.

S.C.—Westbrook v. Hutchison, 10 S.E.2d 145, 195 S.C. 101.

Tex.—Osoba v. Wilson, Civ.App., 56 S.W.2d 937.

25 C.J. p 551 note 66 [a].

Instructions held erroneous or properly refused

(1) Generally.

Ga.—Baker v. Wyatt, 175 S.E. 678, 49 Ga.App. 410.

Ill.—Crawford v. Brown, 151 N.E. 911, 321 Ill. 305, 45 A.L.R. 1457.

Ky.—Bailey v. Shrader, 97 S.W.2d 575, 265 Ky. 663—Goins v. Hudson, 55 S.W.2d 388, 246 Ky. 517—Gray v. McAtee, 25 S.W.2d 65, 233 Ky. 97—Louisville & N. R. Co. v. Creech, 291 S.W. 15, 218 Ky. 147.

Mo.—Teel v. May Department Stores Co., 155 S.W.2d 74, 348 Mo. 696, 137 A.L.R. 495.

Titus v. Montgomery Ward & Co., 123 S.W.2d 574, 232 Mo.App. 987.

25 C.J. p 551 note 66 [b].

(2) Instruction that advice of counsel after full disclosure was a good defense when acted on in good faith.

Mich.—Dallas v. Garras, 10 N.W.2d 897, 306 Mich. 313.

45.15 Tenn.—(Blue) Star Service, Inc. v. McCurdy, 251 S.W.2d 139, 36 Tenn.App. 1.

Criminal intent

Instruction given to allow jury to find whether there was probable cause for the arrest was not erroneous because it failed to include element of criminal intent on part of plaintiff.

U.S.—Barnard v. Wabash R. Co., C.A.Mo., 208 F.2d 489.

Instructions held proper or erroneously refused

U.S.—Barnard v. Wabash R. Co., supra.

Cal.—Gibson v. J. C. Penney Co., App., 331 P.2d 1057—Alterauge v. Los Angeles Turf Club, 218 P.2d 802, 97 C.A.2d 735.

Ky.—Sizemore v. Hoskins, 235 S.W.2d 1011, 314 Ky. 436.

Neb.—Barton v. Wilson, 96 N.W.2d 270, 168 Neb. 480.

Okl.—Swafford v. Vermillion, 261 P.2d 187.

Wash.—Sennett v. Zimmerman, 314 P.2d 414, 50 Wash.2d 649.

Instructions held erroneous or properly refused

(1) Generally.

Ala.—De Armand v. Saunders, 9 So.2d 747, 243 Ala. 263.

Ark.—Kroger Grocery & Baking Co. v. Waller, 189 S.W.2d 361, 208 Ark. 1063.

Ohio.—Thomas v. F. & R. Lazarus & Co., App., 57 N.E.2d 103.

(2) Instruction that falsity of charge had been established conclusively and need not be considered.
N.J.—Jorgensen v. Pennsylvania R. Co., 118 A.2d 854, 38 N.J.Super. 317.

(3) Instruction that probable or reasonable cause that would justify one in arresting another on criminal charge requires that there be a state of facts that would lead a man of ordinary care and prudence to believe, or entertain an honest or strong suspicion that person arrested is guilty, and that unwarranted suspicion is not sufficient to justify an arrest, was correct as an abstract proposition of law, but without further elaboration was faulty in not requiring jury to determine specific facts, the existence or nonexistence

of which would or would not constitute probable cause as matter of law.
Cal.—Gibson v. J. C. Penney Co., App., 331 P.2d 1057.

45.20 Ohio.—Johnson v. Reddy, App., 120 N.E.2d 459, reversed on other grounds 126 N.E.2d 911, 163 Ohio St. 347.

Instructions held proper or erroneously refused

(1) Generally.

U.S.—Janus v. U. S. ex rel. Humphrey, C.C.A.Idaho, 38 F.2d 431.

Cal.—Roynon v. Battin, 132 P.2d 266, 55 C.A.2d 861—Korkman v. Hanlon Dry Dock & Shipbuilding Co., 199 P. 880, 53 C.A. 147.

Ga.—Atlantic Coast Line R. Co. v. Wegner, 83 S.E.2d 58, 90 Ga.App. 267.

Mich.—Leisure v. Hicks, 57 N.W.2d 473, 336 Mich. 148.

N.J.—Nelson v. Eastern Air Lines, 24 A.2d 371, 128 N.J.Law 46.

Tex.—Haverbekken v. Hollingsworth, Civ.App., 250 S.W. 261.

(2) Instruction that if jury believed that plaintiff was drunk or disorderly and that arrest was made during the nighttime, police officers making arrest had right and duty to confine plaintiff in jail until next morning.

Ky.—Shepherd v. City of Richmond, 208 S.W.2d 744, 306 Ky. 595.

(3) Instruction to effect that it is a sheriff's duty to release on bond, within a reasonable time, one whom sheriff has arrested without a warrant for being drunk in a public place.

Miss.—Sheffield v. Reece, 28 So.2d 745, 201 Miss. 133.

(4) Instruction that on the finding that plaintiff was wrongfully denied opportunity of giving bond, jury should find for plaintiff, even if he was lawfully arrested, and irrespective of his guilt or innocence.

Mo.—Jackson v. Thompson, App., 188 S.W.2d 853.

Instructions held erroneous or properly refused

(1) Instructions on time within which plaintiff should have been taken before judicial officer.

Iowa.—Andersen v. Spencer, 294 N.W. 904, 229 Iowa 595.

Wis.—Geldon v. Finnegan, 252 N.W. 369, 213 Wis. 539.

(2) Where plaintiff based right of recovery on wrongful denial of opportunity to make bond, instructions on whether plaintiff was guilty of misdemeanors charged.

Mo.—Jackson v. Thompson, App., 188 S.W.2d 853.

and responsibility for, the arrest, or whether defendant's agent was acting within the scope of his authority.^{45,25}

An instruction dealing with the burden of proof

must place such burden on the proper party.⁴⁶ Instructions must not be confusing or misleading,⁴⁷ unsupported by the evidence,⁴⁸ or outside of the

45.25 Tenn.—(Blue) Star Service, Inc. v. McCurdy, 251 S.W.2d 139, 36 Tenn.App. 1.

Instructions held proper or erroneously refused

U.S.—Ingo v. Koch, C.C.A.N.Y., 127 F.2d 667.

Ala.—Southern Ry. Co. v. Beaty, 103 So. 658, 212 Ala. 608—Hotel Tutwiler Operating Co. v. Evans, 94 So. 120, 208 Ala. 252.

Wood v. Hacker, 121 So. 437, 23 Ala.App. 12, certiorari denied 121 So. 441, 219 Ala. 139.

Ark.—Missouri Pac. R. Co. v. Yancey, 22 S.W.2d 408, 180 Ark. 684.

Mo.—Parrish v. Herron, 225 S.W.2d 391, 240 Mo.App. 1136—Greaves v. Kansas City Junior Orpheum Co., 80 S.W.2d 228, 229 Mo.App. 663.

Pa.—Edmondson v. McSorley, 180 A. 95, 118 Pa.Super. 446.

25 C.J. p 551 note 66 [a].

Instructions held erroneous or properly refused

Ala.—Standard Oil Co. v. Humphries, 96 So. 629, 209 Ala. 493—Hotel Tutwiler Operating Co. v. Evans, 94 So. 120, 208 Ala. 252.

Mo.—Hurst v. Montgomery Ward & Co., App., 107 S.W.2d 183.

46. Miss.—Carlisle v. City of Laurel, 124 So. 786, 156 Miss. 410.

Instructions held proper

(1) Generally.

Mo.—Frank v. Wabash R. Co., 295 S.W.2d 16.

(2) As placing burden on defendant to show that arrest of plaintiff was lawful.

Ark.—Missouri Pac. R. Co. v. Yancey, 22 S.W.2d 408, 180 Ark. 684.

(3) As placing on defendant the burden of establishing the commission of a misdemeanor by plaintiff.

N.Y.—Dzulvelis v. Mays Fur & Ready to Wear, 18 N.Y.S.2d 106.

(4) As to burden of proving want of probable cause.

Ga.—Atlantic Coast Line R. Co. v. Wegner, 83 S.E.2d 58, 90 Ga.App. 267.

Instruction held erroneous with respect to burden of establishing justification.

Ariz.—Whitlock v. Boyer, 271 P.2d 484, 77 Ariz. 334.

47. Ala.—Standard Oil Co. v. Humphries, 96 So. 629, 209 Ala. 493—Standard Oil Co. v. Davis, 94 So. 754, 208 Ala. 565—Sokol Bros. Furniture Co. v. Gate, 93 So. 724, 208 Ala. 107.

Wood v. Hacker, 121 So. 437, 23 Ala.App. 12, certiorari denied 121 So. 441, 219 Ala. 139—Burk v.

Knott, 101 So. 811, 20 Ala.App. 316.

Ga.—Savannah Electric Co. v. Lowe, 108 S.E. 313, 27 Ga.App. 350.

Md.—Fleisher v. Ensminger, 118 A. 153, 140 Md. 604.

Mo.—Harbison v. Chicago, R. I. & P. Ry. Co., 37 S.W.2d 609, 327 Mo. 440, 79 A.L.R. 1.

25 C.J. p 552 note 68.

Instructions held misleading

Ala.—De Armand v. Saunders, 9 So. 2d 747, 243 Ala. 263.

Cal.—Jackson v. Osborn, 254 P.2d 871, 116 C.A.2d 875.

Ky.—Louisville & N. R. Co. v. Vinson, 223 S.W.2d 89, 310 Ky. 854—Southeastern Greyhound Lines v. Bradley, 174 S.W.2d 519, 295 Ky. 363.

Instructions held not misleading

Ga.—Atlantic Coast Line R. Co. v. Wegner, 83 S.E.2d 58, 90 Ga.App. 267—Cobb v. Bailey, 133 S.E. 42, 35 Ga.App. 302.

Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Roberts, 249 S.W. 1012, 198 Ky. 710.

Mo.—Teel v. May Department Stores Co., 176 S.W.2d 440, 352 Mo. 127—Ledbetter v. St. Louis Southwestern Ry. Co., App., 293 S.W. 791.

25 C.J. p 552 note 68 [b].

48. Cal.—Gibson v. J. C. Penney Co., App., 331 P.2d 1057.

Ky.—Sternberg v. Hogg, 72 S.W.2d 421, 254 Ky. 761.

25 C.J. p 552 notes 67, 69.

Reliance on presumption

In action for false arrest where defendant had not pleaded justification of the arrest and plaintiff relied on presumption that an arrest without warrant was unlawful, trial court could assume in an instruction that the arrest was unlawful.

Mo.—Engelbrecht v. Roworth, 157 S.W.2d 242, 236 Mo.App. 459.

Evidence held to warrant instructions

(1) Generally.

Cal.—Hill v. Nelson, 162 P.2d 927, 71 C.A.2d 528.

Conn.—Roberts v. Paine, 199 A. 112, 124 Conn. 170.

Ga.—Garner v. Mears, 103 S.E.2d 610, 97 Ga.App. 506.

Iowa.—McVay v. Carpe, 29 N.W.2d 582, 238 Iowa 1131—Andersen v. Spencer, 294 N.W. 904, 229 Iowa 595.

Mo.—Teel v. May Department Stores Co., 176 S.W.2d 440, 352 Mo. 127.

25 C.J. p 552 note 67 [c].

(2) As to malice.

Va.—Virginia Electric & Power Co.

v. Wynne, 141 S.E. 829, 149 Va. 882.

(3) As to probable cause.

Mich.—Leisure v. Hicks, 57 N.W.2d 473, 336 Mich. 148.

Va.—Virginia Electric & Power Co. v. Wynne, supra.

(4) As to right of defendant to detain person, believed to be stealing his property, for a reasonable length of time for purpose of investigation in a reasonable manner.

U.S.—Montgomery Ward & Co. v. Freeman, C.A.Va., 199 F.2d 720.

(5) As to defendant's connection with arrest, or his liability for acts of agent.

Ga.—Central of Georgia Ry. Co. v. Dabney, 160 S.E. 818, 44 Ga.App. 143.

Mo.—Parrish v. Herron, 225 S.W.2d 391, 240 Mo.App. 1136—Thompson v. Fehlig Bros. Box & Lumber Co., App., 155 S.W.2d 279.

(6) As to whether watchman, at time he arrested plaintiff, was acting in his capacity as a private watchman under his commission from city, or in his capacity as an employee of railroad.

U.S.—Barnard v. Wabash R. Co., C.A. Mo., 208 F.2d 489.

(7) As to definition of crimes which jury found plaintiff was attempting to commit when arrested.

Wash.—Smith v. Drew, 26 P.2d 1040, 175 Wash. 11.

Evidence held not to support instructions

(1) As to probable cause.

Kan.—Parmenter v. Morrison, 288 P. 582, 130 Kan. 707.

(2) As to fact of detention and illegal or involuntary nature thereof.

Ga.—Conoly v. Imperial Tobacco Co., 12 S.E.2d 398, 63 Ga.App. 880.

(3) As to authority of police officers to make arrest for crimes committed in their presence.

Ga.—Goodwin v. Allen, 64 S.E.2d 212, 83 Ga.App. 615.

(4) Instruction not to consider any question of plaintiff's race, where there was evidence that plaintiff was arrested because of mistaken opinion of police officers that she was a white girl and in the company of a Negro.

Iowa.—Dedman v. McKinley, 29 N.W. 2d 337, 238 Iowa 886.

(5) As to other matters.

Ky.—Louisville & N. R. Co. v. Vinson, 223 S.W.2d 89, 310 Ky. 854.

N.Y.—Phillipson v. Ninno, 135 N.E. 270, 233 N.Y. 223.

25 C.J. p 552 note 69 [a].

pleadings or issues;⁴⁹ nor may they invade the province of the jury.⁵⁰ An instruction which defines or explains terms must do so accurately.⁵¹ In referring to a party to the action the use of a word which may be considered by some to be a word of reproach should be avoided.^{51.5}

It is error to refuse to charge requests which are correct propositions of law,⁵² unless such propositions have previously been charged in substance.⁵³ The charge must be read in the light of the evidence

that has been received⁵⁴ and construed in its entirety.⁵⁵

b. Instructions as to Damages

In an action for false imprisonment, the instructions as to damages, both compensatory and punitive, must be in accordance with the pleadings and the facts proved. They should not permit a double recovery or punishment for the same acts.

The court should instruct the jury fully on the question of damages, according to the facts,⁵⁶ and

Lawfulness of arrest

In false arrest action, where plaintiff's evidence tended to prove that arrest complained of was lawful, it was error for trial court to give jury instructions which assumed that the arrest was unlawful.

Mo.—Engelbrecht v. Roworth, 157 S. W.2d 242, 236 Mo.App. 459.

49. Or.—Joseph v. Meier & Frank Co., 250 P. 739, 120 Or. 117.

25 C.J. p 551 note 66 [b] (10), p 552 note 67, p 553 note 70.

Pleadings held to justify instructions

(1) As to fact of detention and involuntary nature thereof.

Mo.—Gust v. Montgomery Ward & Co., 136 S.W.2d 94, 234 Mo.App. 611—Ledbetter v. St. Louis Southwestern Ry. Co., App., 293 S.W. 791.

(2) As to connection of defendant with wrongful acts.

Ga.—McClure Ten Cent Co. v. Humphries, 127 S.E. 151, 33 Ga. App. 523.

Mo.—Parrish v. Herron, 225 S.W.2d 391, 240 Mo.App. 1136—Burke v. Robinson, App., 271 S.W. 1005.

(3) As to wrongful detention by denial of opportunity to give bond.

Mo.—Jackson v. Thompson, App., 188 S.W.2d 853.

(4) As to other matters.

Ala.—Standard Oil Co. v. Davis, 94 So. 754, 208 Ala. 565.

Ga.—Cobb v. Bailey, 133 S.E. 42, 35 Ga.App. 302.

S.C.—Westbrook v. Hutchison, 10 S. E.2d 145, 195 S.C. 101.

Instructions held erroneous or properly refused under pleadings

Ala.—Simpson v. Boyd, 101 So. 664, 212 Ala. 14—Standard Oil Co. v. Humphries, 96 So. 629, 209 Ala. 493.

Burk v. Knott, 101 So. 811, 20 Ala.App. 316.

Mo.—White v. Thompson, App., 176 S.W.2d 53—Mason v. Down Town Garage Co., 53 S.W.2d 409, 227 Mo. App. 297.

50. Ala.—Kearley v. Cowan, 116 So. 145, 217 Ala. 295.

Ill.—Shaw v. Courtney, 46 N.E.2d 170, 317 Ill.App. 422, affirmed 53 N.E.2d 432, 385 Ill. 559.

51. Terms held properly defined or explained

(1) "Breach of the peace."
Ky.—Sternberg v. Hogg, 72 S.W.2d 421, 254 Ky. 761.

(2) "Conspiracy."
Mo.—Rice v. Gray, 34 S.W.2d 567, 225 Mo.App. 890.

(3) "Malice."
Mo.—Burke v. Robinson, App., 271 S. W. 1005.

Va.—Sands v. Norvell, 101 S.E. 569, 126 Va. 384—Bolton v. Vellines, 26 S.E. 847, 94 Va. 393, 64 Am.S.R. 737.

(4) "Probable cause."
Va.—Sands v. Norvell, supra.

Wash.—White v. Jansen, 142 P. 1140, 81 Wash. 435.

(5) "Scope of employment."
Tex.—Alamo Downs, Inc., v. Briggs, Civ.App., 106 S.W.2d 733, error dismissed.

Terms held erroneously defined or explained

(1) "Breach of the peace."
Wash.—Smith v. Drew, 26 P.2d 1040, 175 Wash. 11.

(2) "Forthwith."
Wis.—Geldon v. Finnegan, 252 N.W. 369, 213 Wis. 539.

(3) "Malice."
S.D.—Gamble v. Keyes, 178 N.W. 870, 43 S.D. 245.

Vt.—Parker v. Roberts, 131 A. 21, 99 Vt. 219, 49 A.L.R. 1382.

Necessity of defining phrase

(1) The failure of an instruction to define the phrase "acting within the scope of his employment and agency," as used in an instruction, is not error where no issue has been raised respecting the authority of the individual causing the arrest to bind defendant.

Mo.—Oliver v. Kessler, App., 95 S.W. 2d 1226.

(2) In action for false arrest and imprisonment of plaintiff on charge of keeping a lewd house, giving of charge defining crime of keeping a lewd house was proper, in that it went to question of lack of bad faith of the officers in making the illegal arrest, and thus in mitigation of damages.

Ga.—Goodwin v. Allen, 78 S.E.2d 804, 89 Ga.App. 187.

51.5 Or.—McNeff v. Heider, 337 P.2d 819.

"Moneylender" when referring to "mortgagee"

Or.—McNeff v. Heider, supra.

52. Ala.—Loveman, Joseph & Loeb v. Hitt, 57 So.2d 553, 257 Ala. 45. Tex.—Osoba v. Wilson, Civ.App., 56 S.W.2d 937.

Wash.—Sennett v. Zimmerman, 314 P.2d 414, 50 Wash.2d 649.

25 C.J. p 553 note 71.

53. Cal.—Gibson v. J. C. Penney Co., App., 331 P.2d 1057—Roynon v. Battin, 132 P.2d 266, 55 C.A.2d 861. Me.—Kittredge v. Frothingham, 96 A. 1063, 114 Me. 537.

Miss.—Bacon v. Bacon, 24 So. 968, 76 Miss. 458.

Ohio.—Thomas v. F. & R. Lazarus & Co., App., 57 N.E.2d 103.

64 C.J. p 893 note 7.

54. Or.—Bingham v. Lipman, 67 P. 98, 40 Or. 363.

25 C.J. p 553 note 73.

55. Conn.—Roberts v. Paine, 199 A. 112, 124 Conn. 170.

25 C.J. p 553 note 74.

Effect of particular instructions

Effect of charge that plaintiff's conviction before justice of the peace was prima facie evidence of probable cause for arrest notwithstanding subsequent reversal on appeal restricted jury to a determination of whether defendant, notwithstanding presumption of probable cause, instituted action maliciously by presentation of false testimony or by withholding from justice of peace facts which would explain suspicious appearance and exonerate plaintiff from criminal charge.

N.Y.—Van Buren v. Ford, 71 N.Y.S. 2d 551, 189 Misc. 352.

56. W.Va.—Howell v. Wysor, 82 S.E. 503, 74 W.Va. 589, Ann.Ces.1914C 519.

25 C.J. p 553 note 75.

Instructions held proper

(1) Generally.
U.S.—Ingo v. Koch. C.C.A.N.Y., 127 F.2d 667.

(2) As to plaintiff's claim of loss of job as result of false imprisonment.

Mass.—Bilodeau v. Maffei, 34 N.E.2d 687, 309 Mass. 237.

must not leave the jury to infer that they have a right to be governed by their arbitrary discretion in lieu of the facts.⁵⁷ Instructions which correctly state general principles of law may nevertheless be erroneous if they are not applicable to the facts of the case⁵⁸ and to the pleadings;⁵⁹ it is not error to refuse to charge requests that are not applicable to the facts of the case, although the requested instruction as an abstract proposition states a correct rule of law,⁶⁰ and a request only partly correct is properly modified.⁶¹

The instructions on damages must not be mis-

leading,⁶² but a proper instruction is not rendered erroneous by the mere fact that the reasons given for it are erroneous.⁶³ An instruction should not be so worded as to permit a double assessment of damages for the same thing.⁶⁴ In a case of joinder of causes of action, the judge should submit to the jury two issues, not only as to the respective causes of action, but also as to the respective damages therefor.⁶⁵

Exemplary or punitive damages. Instructions on the question of exemplary or punitive damages must be supported by the pleadings⁶⁶ and the evidence.⁶⁷

(3) As to the effect of defendant's good faith on the amount of damages.

N.C.—Lowry v. Barker, 190 S.E. 341, 211 N.C. 613.

(4) With respect to physical suffering.

Ky.—Gividen v. Sullenger, 243 S.W. 2d 883.

(5) Instruction that plaintiff, in order to lay basis for award of compensatory damages, was not required to prove express malice, but that malice might be inferred from the willful and purposeful doing of an unlawful act injurious to another.

N.C.—Caudle v. Benbow, 45 S.E.2d 361, 228 N.C. 282.

Instructions held erroneous or properly refused

Ky.—Couch v. Vanhooose, 234 S.W.2d 169, 314 Ky. 36.

57. Va.—Howell v. Wysor, 82 S.E. 503, 74 W.Va. 589, Ann.Cas.1916C 519.

25 C.J. p 553 note 76.

58. Ky.—Illinois Cent. R. Co. v. Dennington, 189 S.W. 217, 172 Ky. 326.

25 C.J. p 553 note 77.

Instructions held warranted by evidence

Cal.—Collins v. Jones, 22 P.2d 39, 131 C.A. 747.

25 C.J. p 553 note 77 [b].

Instructions held not warranted by evidence

(1) Instruction permitting the jury to consider the damage to plaintiff's reputation.
S.D.—Mannaugh v. J. C. Penney Co., 250 N.W. 38, 61 S.D. 550.

(2) Charge to consider worldly circumstances of parties in determining damages.
Ga.—Wyatt v. Baker, 154 S.E. 816, 41 Ga.App. 750.

(3) Instruction that jury, in estimating damages for false imprisonment, might consider attorney's fees paid by plaintiff to secure release from jail.
Tex.—Smith v. Bryson, Civ.App., 33 S.W.2d 268, error dismissed.

59. Wis.—Bergeron v. Peyton, 82 N.

W. 291, 106 Wis. 377, 80 Am.S.R. 33.

25 C.J. p 553 note 78.

Special damages

(1) An instruction that the jury should not award plaintiff any special damages is proper where there is neither pleading nor proof with respect thereto.

Ala.—Caudle v. Sears, Roebuck & Co., 182 So. 461, 236 Ala. 37.

(2) Instruction held not erroneous for failing to limit special damages to amount claimed in petition, where evidence showed that special damages sustained were less than those alleged, presumption being that jury allowed no more special damages than evidence justified.

Mo.—Greaves v. Kansas City Junior Orpheum Co., 80 S.W.2d 228, 229 Mo.App. 663.

60. Me.—Kittredge v. Frothingham, 96 A. 1063, 114 Me. 537.

On nominal damages

Where plaintiff sued for, and offered proof sufficient to authorize recovery of, special damages, instruction on rule allowing only nominal damages if injury is small or there are mitigating circumstances was properly refused.

Ga.—Sharpe v. Frost, 95 S.E.2d 309, 94 Ga.App. 444.

61. Md.—Kirk v. Garrett, 35 A. 1089, 84 Md. 383.

Tex.—Pincham v. Dick, 70 S.W. 333, 30 Tex.Civ.App. 230.

62. W.Va.—Davis v. Chesapeake & O. R. Co., 56 S.E. 400, 61 W.Va. 246, 9 L.R.A., N.S., 993.
25 C.J. p 554 note 81.

63. Mass.—Bilodeau v. Maffei, 34 N. E.2d 687, 309 Mass. 237.

64. Mo.—Greaves v. Kansas City Junior Orpheum Co., 80 S.W.2d 228, 229 Mo.App. 663.

Instructions held not improper as allowing double damages

Ga.—Garner v. Mears, 103 S.E.2d 610, 97 Ga.App. 506.

Instruction held not prejudicially erroneous

Instruction that, in determining compensatory damages for false ar-

rest, jury might consider plaintiff's mental anxiety and mental suffering was not prejudicially erroneous as permitting double damages for same thing, in view of modest verdict and the absence of any contention that it was excessive.

Mo.—Greaves v. Kansas City Junior Orpheum Co., 80 S.W.2d 228, 229 Mo.App. 663.

65. N.C.—Kelly v. Durham Tract Co., 45 S.E. 826, 133 N.C. 418.

66. Fla.—Margaret Ann Super Markets, Inc. v. Dent, 64 So.2d 291.

Mo.—Greaves v. Kansas City Junior Orpheum Co., 80 S.W.2d 228, 229 Mo.App. 663.

25 C.J. p 554 note 82.

67. Ky.—Ashland Dry Goods Co. v. Wages, 195 S.W.2d 312, 302 Ky. 577.

Va.—Hogg v. Plant, 133 S.E. 759, 145 Va. 175, 47 A.L.R. 308.

25 C.J. p 554 note 82.

Instructions held warranted by evidence

(1) Generally.

Fla.—Farish v. Smoot, 58 So.2d 534.

Ill.—Lindquist v. Friedman's, Inc., 8 N.E.2d 625, 366 Ill. 232.

Kan.—Hammargren v. Montgomery Ward & Co., 241 P.2d 1192, 172 Kan. 484.

Miss.—Laster v. Chaney, 177 So. 524, 180 Miss. 110.

(2) Instruction permitting jury to award plaintiff punitive damages, irrespective of legality of original arrest or probable cause therefor or malice of defendant in connection therewith.

Mo.—Jackson v. Thompson, App., 188 S.W.2d 853.

Instructions held not warranted or supported by evidence

Ill.—Shelton v. Barry, 66 N.E.2d 697, 328 Ill.App. 497.

Ky.—Jefferson Dry Goods Co. v. Stoess, 199 S.W.2d 994, 304 Ky. 73—Ashland Dry Goods Co. v. Wages, 195 S.W.2d 312, 302 Ky. 577.

Ohio.—Fitscher v. Rollman & Sons Co., 167 N.E. 469, 31 Ohio App. 340.

Va.—Hogg v. Plant, 133 S.E. 759, 145 Va. 175, 47 A.L.R. 308.

They should set forth the grounds for any award of such damages,⁶⁸ the nature of the malice required to support a recovery,⁶⁹ the effect of matter in mitigation,⁷⁰ the effect of good faith,⁷¹ and, where there is more than one defendant, the extent of the liability of each.⁷² An allowance of exemplary damages has been held proper notwithstanding a failure to give a specific instruction as to such damages.^{72.5}

Instructions must not authorize a double punishment for the same wrong; if they call for damages sufficiently punitive, it is error further to instruct the jury to add a sum as punitive damages; but it is proper to instruct, under justifying evidence, that if the jury find the compensatory damages as ascertained by them not sufficiently punitive, they may increase the sum until it becomes punitive.⁷³

§ 61. — Verdict and Findings

In accordance with the general rules with respect to the verdict and findings of juries in civil actions, any uncertainty in the findings will be construed so as to support the judgment rather than to defeat it, and a general verdict will, if possible, be harmonized with special findings.

General rules respecting the findings of juries in civil actions have been applied in actions for false imprisonment.⁷⁴ Where the jury find against plaintiff, they may render a single verdict for all defendants.⁷⁵ Where each of several defendants is liable for the same wrong, a verdict may properly be found against any or all of them.⁷⁶ In an action against several defendants for false imprisonment and other causes, a general verdict which fails to show how much of the judgment should be charged against each individual defendant fails to comply with a statutory provision requiring a finding by the jury on each separate cause of action.^{76.5} Where both of two defendants are liable if either is liable, and a verdict is found in favor of one and against the other, the latter has no standing to object on account of the inconsistency.⁷⁷

Any uncertainty in the findings will be construed so as to support the judgment rather than to defeat it, and even if the findings are to some extent inconsistent a judgment may not be set aside unless the conflict is clear and material and the findings incapable of being harmoniously construed.^{77.5} Every

68. Or.—Bowles v. Creason, 66 P.2d 1183, 156 Or. 278.
25 C.J. p 554 note 83.

Instructions held proper

U.S.—Ingo v. Koch, C.C.A.N.Y., 127 F.2d 667.

Mo.—Newport v. Montgomery Ward & Co., 127 S.W.2d 687, 344 Mo. 646.
25 C.J. p 554 note 83 [b].

Instruction held erroneous or properly refused

Where cause was submitted on issue whether plaintiff was denied opportunity to make bond, refusal to give instruction that no punitive damages could be awarded if jury believed there was probable cause that plaintiff was guilty of misdemeanors charged was proper.

Mo.—Jackson v. Thompson, App., 188 S.W.2d 853.

69. Mo.—Greaves v. Kansas City Junior Orpheum Co., 80 S.W.2d 228, 229 Mo.App. 663—Hill v. S. S. Kresge Co., 217 S.W. 997, 202 Mo. App. 385.

S.D.—Gamble v. Keyes, 178 N.W. 870, 43 S.D. 245.

Vt.—Parker v. Roberts, 131 A. 21, 99 Vt. 219, 49 A.L.R. 1382.

Instruction held proper or erroneously refused

Instruction that in determining whether there was actual malice, which would justify the award of punitive damages, jury had right to consider lack of probable cause, was not erroneous.

N.C.—Caudle v. Benbow, 45 S.E.2d 361, 228 N.C. 282.

70. Mo.—Wehmeyer v. Mulvihill, 130 S.W. 681, 150 Mo.App. 197.
25 C.J. p 554 note 84.

71. Vt.—Parker v. Roberts, 131 A. 21, 99 Vt. 219, 49 A.L.R. 1382.

72. Vt.—Parker v. Roberts, supra.

72.5 Ill.—Shemaitis v. Collins, 109 N.E.2d 370, 348 Ill.App. 549.

73. W.Va.—Claiborne v. Chesapeake & O. R. Co., 33 S.E. 262, 46 W.Va. 363.

Verdict held contrary to law

Ind.—Scoopmire v. Tafinger, 52 N. E.2d 728, 114 Ind.App. 419.

Failure to assess damages

Verdict finding for plaintiff against police officers in action for false arrest and imprisonment but assessing plaintiff's damages in no dollars was improper and, in absence of showing that damages were either fixed or undisputed, trial court should have refused to accept such verdict and sent jury back for further deliberation instead of granting judgment for plaintiff non obstante veredicto.

Ariz.—Ward v. Johnson, 232 P.2d 960, 72 Ariz. 213.

Finding construed

A finding that defendants arrested plaintiff for "use" of snag pole, did not negative possibility that the arrest was for "having and controlling" pole.

Wis.—Muska v. Apel, 232 N.W. 593, 203 Wis. 389.

75. Ky.—Wilder v. Bailey, 25 S.W. 2d 381, 233 Ky. 238.

76. Or.—Bingham v. Lipman, 67 P. 98, 40 Or. 363.
25 C.J. p 554 note 89.

Verdict as joint or separate; consolidation

(1) It has been held that a verdict may be properly found against each defendant and against all of them jointly.

Mass.—Bath v. Metcalf, 14 N.E. 133, 145 Mass. 274, 1 Am.S.R. 455.

(2) It has also been held, however, that a separate verdict must be returned as to each defendant against whom the verdict is rendered.

Ky.—Wilder v. Bailey, 25 S.W.2d 381, 233 Ky. 238.

(3) Where the action is against a justice of the peace and a constable, for issuing a warrant not authorized by law, and arresting defendant thereunder, and separate verdicts are rendered against each defendant, the court will consolidate the verdicts into one for the lowest amount, and require a remittitur by plaintiff or a new trial.

Pa.—Pride v. Pride, 29 Del.Co. 352.

76.5 Ind.—John's Cash Furniture Stores v. Mitchell, 125 N.E.2d 827, 126 Ind.App. 231, rehearing denied 127 N.E.2d 128, 126 Ind.App. 231.

77. Mich.—Burroughs v. Eastman, 59 N.W. 817, 101 Mich. 419, 45 Am. S.R. 419, 24 L.R.A. 859.

77.5 Cal.—Coyne v. Nelson, 237 P.2d 45, 107 C.A.2d 469.

Findings held not irreconcilable

(1) Generally.

Cal.—Coyne v. Nelson, supra.

reasonable presumption is indulged in favor of the general verdict, in an action for false arrest, and such verdict will, if possible, be harmonized with special findings.⁷⁸ Where the verdict is merely a general one and does not disclose what portion of the award is special and what portion general, defendant cannot contend that it includes special damages not recoverable in the action.^{78.5} If the question of exemplary damages is submitted, the jury

should be instructed to make special findings as to the compensatory and exemplary damages.^{78.10}

§ 62. Judgment and Review

The review of an action for false imprisonment is governed by the rules applicable to the review of civil actions generally.

The general rules as to the review of civil actions are applicable to the review of actions for false imprisonment.⁷⁹

VI. DAMAGES AND PENALTIES

§ 63. Nominal Damages

The fact of an illegal restraint raises the right to recover at least nominal damages.

The fact of an illegal restraint raises the right to recover at least nominal damages;⁸⁰ but there is no liability for even nominal damages where the restraint is not shown to be improper.⁸¹ To warrant a recovery of more than nominal damages, plaintiff must show that he has sustained actual damages,⁸² although he is not required to allege and prove special damages.⁸³

(2) Jury's finding that plaintiff's injuries were not caused by arresting officer's acts were held not in irreconcilable conflict with findings of jury that such officer used no more force than was reasonably necessary, that plaintiff resisted officer, and that his injuries were caused by his own acts in so resisting.
Tex.—*Jurach v. Cox*, Civ.App., 92 S. W.2d 1065.

(3) Where deputy sheriff arresting and imprisoning plaintiff was in the employ of a private person, finding of jury in action for false imprisonment that deputy was acting as agent of such person in making the arrest and imprisonment justified the application of the doctrine of "respondeat superior" under the evidence, although jury also found that deputy acted on the advice of assistant district attorney in making the arrest and filing criminal complaint against plaintiff.
Tex.—*Clement v. Emmons*, Civ.App., 170 S.W.2d 610, error refused.

73. *Kan.*—*Parmenter v. Morrison*, 288 P. 582, 130 Kan. 707.

Credit for set-off

General verdict for damages in action for false arrest was held properly to have given credit for set-off in accordance with special findings.

Kan.—*Parmenter v. Morrison*, *supra*.

Special findings held consistent with general verdict

Answer to a special interrogatory referring only to a portion of the evidence as to probable cause is not

conclusive as to the entire question, and, although favorable to defendant, is not inconsistent with a general verdict for plaintiff.

Wash.—*Eberhart v. Murphy*, 188 P. 17, 110 Wash. 158.

78.5 *Ga.*—*Atlantic Coast Line R. Co. v. Wegner*, 83 S.E.2d 58, 90 Ga.App. 267.

78.10 *N.Y.*—*Baird v. City of Horrell*, 185 N.Y.S.2d 933, 8 A.D.2d 766.

79. *N.Y.*—*Stearns v. Oppenheim*, 131 N.Y.S. 533, 146 App.Div. 651.

25 C.J. p 554 note 92, p 556 notes 11, 12.

Affirmance by evenly divided court

Where supreme court was evenly divided in opinion as to correctness of trial court's ruling, because one of its justices was not sitting, judgment would be affirmed without becoming a precedent.

N.C.—*Chesson v. Combs*, 68 S.E.2d 778, 235 N.C. 123.

80. *Idaho.*—*Corpus Juris cited in Madsen v. Hutchison*, 290 P. 208, 209, 49 Idaho 358.

Ill.—*Shelton v. Barry*, 66 N.E.2d 697, 328 Ill.App. 497.

Ky.—*Butcher v. Adams*, 220 S.W.2d 398, 310 Ky. 205.

Md.—*Mason v. Wrightson*, 109 A.2d 128, 205 Md. 481.

Mass.—*Cieplinski v. Severn*, 168 N. E. 722, 269 Mass. 261.

N.J.—*Collins v. Cody*, 113 A. 709, 95 N.J.Law 65.

Ohio.—*Morton v. Murphy Lumber & Hardware Co.*, Com.Pl., 102 N.E.2d 744.

§ 64. Compensatory Damages

A successful plaintiff is entitled to compensation for the injuries sustained by him, which are the proximate result of defendant's act and its natural and probable consequence.

The recovery of damages in actions for false imprisonment is governed by the usual rules relating to damages in civil actions.^{83.50} Accordingly, a successful plaintiff is entitled to compensation for the injuries shown to have been sustained by him,⁸⁴ which are the proximate result of defendant's

Or.—*McLean v. Sanders*, 7 P.2d 981, 139 Or. 144.

Utah.—*Corpus Juris cited in Johnson v. Leigh*, 279 P. 501, 502, 74 Utah 286.

W.Va.—*Noce v. Ritchie*, 155 S.E. 127, 109 W.Va. 391.

25 C.J. p 556 note 13.

81. *Tex.*—*Fouraker v. Kidd Springs Boating and Fishing Club*, Civ. App., 65 S.W.2d 796.

82. *Cal.*—*Bettolo v. Safeway Stores*, 54 P.2d 24, 11 C.A.2d 430.

Ky.—*Bradshaw v. Steiden Stores, Inc.*, 265 S.W.2d 64.

La.—*Trahan v. Breaux*, 32 So.2d 845, 212 La. 459.

Mass.—*Bilodeau v. Maffei*, 34 N.E.2d 687, 309 Mass. 237.

N.Y.—*Schildhaus v. City of New York*, 163 N.Y.S.2d 201, 7 Misc.2d 859.

Hook v. State, 181 N.Y.S.2d 621.

N.C.—*Lewis v. Clegg*, 26 S.E. 772, 120 N.C. 292.

83. *Mich.*—*Josselyn v. McAllister*, 22 Mich. 299.

25 C.J. p 556 note 15.

83.50 *Cal.*—*Vallindras v. Massachusetts Bonding & Ins. Co.*, 265 P.2d 907, 42 C.2d 149.

N.Y.—*Goines v. Pennsylvania R. R.*, 143 N.Y.S.2d 576, 208 Misc. 103, reversed on other grounds 160 N.Y. S.2d 39, 3 A.D.2d 307, reargument denied 166 N.Y.S.2d 303, 4 A.D.2d 831.

84. *Fla.*—*Corpus Juris cited in S. H. Kress & Co. v. Powell*, 180 So. 757, 763, 132 Fla. 471.

wrongful act⁸⁵ and its natural and probable consequence;⁸⁶ the injured person can recover only such damages as grow out of the illegal imprisonment.⁸⁷ As long as the causal connection between defendant's act and plaintiff's injury continues, defendant remains liable, although others participate;⁸⁸ for example, he may be liable for the neglect of prison officials;⁸⁹ but detention by the proper public authorities after an examination by them is not a proximate result of causing the injured party to be arrested and brought before such authorities, unless the detention is obtained by the instigation or urgency of the person causing the original arrest.⁹⁰

False imprisonment ends, as affecting recovery,

when the release of plaintiff's person occurs under reasonable circumstances.^{90.5} When an unlawful imprisonment is followed by a lawful one, recovery may be had only to the time of the lawful arrest;⁹¹ conversely, where the original restraint or imprisonment is lawful, but subsequently becomes unlawful, recovery can be had only for the period of the unlawful imprisonment, and not for the imprisonment in the first instance.⁹²

Where there have been two distinct and separate arrests of the same person, the wrongs inflicted are not merged, and plaintiff does not lose the right to recover damages for both of the periods during which he was falsely incarcerated.⁹³

La.—Girlinghouse v. Zwahlen, 3 La. App. 720.

Neb.—Dillon v. Sears-Roebeck Co., 253 N.W. 331, 126 Neb. 357.

N.Y.—Tierney v. State, 42 N.Y.S.2d 877, 266 App.Div. 434, affirmed 54 N.E.2d 207, 292 N.Y. 523.

Sanders v. Rolnick, 67 N.Y.S.2d 652, 188 Misc. 627, affirmed 71 N.Y.S.2d 896, 272 App.Div. 803.

N.C.—Rhodes v. Collins, 150 S.E. 492, 198 N.C. 23.

Pa.—Persinski v. Stryjewski, Com. Pl., 92 Pittsb.Leg.J. 421.

Tex.—Hicks v. Matthews, Civ.App., 261 S.W.2d 207, reversed on other grounds 266 S.W.2d 846, 153 Tex. 177.

Utah.—Corpus Juris cited in Johnson v. Leigh, 279 P. 501, 502, 74 Utah 286.

Va.—S. H. Kress & Co. v. Roberts, 129 S.E. 244, 143 Va. 71.

25 C.J. p 556 note 16.

Pleading damages see supra § 51.

For all injuries sustained

Mo.—Jarrett v. St. Francois County Finance Co., App., 185 S.W.2d 855.

"The gist of an action for false imprisonment is damage. Unless there was damage, the action cannot be maintained."

Or.—McLean v. Sanders, 7 P.2d 981, 139 Or. 144.

35. Ill.—Shelton v. Barry, 66 N.E. 2d 697, 328 Ill.App. 497.

Mass.—Bilodeau v. Maffei, 34 N.E.2d 687, 309 Mass. 237.

Mo.—Oliver v. Kessler, App., 95 S.W. 2d 1226.

Or.—Brown v. Meier & Frank Co., 86 P.2d 79, 160 Or. 608.

Tenn.—Little Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357.

25 C.J. p 556 note 17, p 557 note 29.

One who has custody of a person through his subordinates is responsible for injuries and indignities suffered in consequence of his neglect and omission to provide against them.

J.S.—McCall v. McDowell, C.C.Cal.,

15 F.Cas.No.8,673, 1 Abb. 212, Deady 233.

Speculative damages

(1) Damages which are merely speculative are not recoverable.

Ill.—Shelton v. Barry, 66 N.E.2d 697, 328 Ill.App. 497.

(2) Where plaintiff testified that money in his pocket was gone after he came out of jail but he did not know how it disappeared, such amount was improperly allowed as damages for false imprisonment.

Miss.—Carlisle v. City of Laurel, 124 So. 786, 156 Miss. 410.

86. Ark.—Missouri Pac. R. Co. v. Yancey, 10 S.W.2d 22, 178 Ark. 147.

Cal.—Collins v. Jones, 22 P.2d 39, 131 C.A. 747.

Ky.—Great Atlantic & Pacific Tea Co. v. Smith, 136 S.W.2d 759, 281 Ky. 583.

Mo.—McGill v. Walnut Realty Co., 148 S.W.2d 131, 235 Mo.App. 874—

Oliver v. Kessler, App., 95 S.W.2d 1226.

N.C.—Rhodes v. Collins, 150 S.E. 492, 198 N.C. 23.

Vt.—Simanton v. Caldbeck, 121 A. 411, 96 Vt. 523.

25 C.J. p 556 note 18, p 557 note 29.

Loss of consortium

In action by husband for false arrest, husband could not recover for loss of consortium and medical expenses incurred in attempting to cure his wife of mental illness which was allegedly caused by defendants' willful acts directed against plaintiff alone.

N.Y.—Balestrero v. Prudential Ins. Co. of America, 128 N.Y.S.2d 295,

283 App.Div. 794, affirmed 121 N.E. 2d 537, 307 N.Y. 709.

Publication of article concerning arrest was natural consequence of false imprisonment, as regards right to damages.

Cal.—Kenyon v. Hartford Accident & Indemnity Co., 260 P. 952, 86 C.A. 269.

87. N.Y.—Vitterio v. St. Regis Paper Co., 194 N.Y.S. 519, 202 App. Div. 775.

Utah.—Oleson v. Pincock, 251 P. 23, 68 Utah 507.

25 C.J. p 557 note 23.

88. Cal.—Collins v. Jones, 22 P.2d 39, 131 C.A. 747.

25 C.J. p 556 note 19.

89. Pa.—Abrahams v. Cooper, 81 Pa. 232.

25 C.J. p 557 note 20.

90. N.Y.—Newman v. New York, L. E. & W. R. Co., 7 N.Y.S. 560, 54 Hun 335.

90.5 Wis.—Hadler v. Rhyner, 12 N.

W.2d 693, 244 Wis. 448.

91. Ala.—Bank of Cottonwood v. Hood, 149 So. 676, 227 Ala. 237—

McPherson v. Gay, 117 So. 202, 217 Ala. 557.

Mass.—Jordan v. C. I. T. Corporation, 19 N.E.2d 5, 302 Mass. 281.

Utah.—Oleson v. Pincock, 251 P. 23, 68 Utah 507.

Wis.—Geldon v. Finnegan, 252 N.W. 369, 213 Wis. 539.

25 C.J. p 557 note 24.

Custody of officer possessing warrant

Where plaintiff was arrested for a misdemeanor and the warrant of arrest was in the possession of the sheriff, fourteen miles away, but plaintiff did not demand production of the warrant and made no request for his release other than to be given an opportunity to post bond, plaintiff could recover for unlawful arrest only such actual or compensatory damages as he sustained from the time of his arrest until placed in the custody of the sheriff who had possession of the warrant.

N.C.—Alexander v. Lindsey, 55 S.E.2d 470, 230 N.C. 663.

92. Mo.—Teel v. May Department Stores Co., 155 S.W.2d 74, 348 Mo. 696, 137 A.L.R. 495.

Or.—Brown v. Meier & Frank Co., 86 P.2d 79, 160 Or. 608.

93. Cal.—Vernon v. Plumas Lumber Co., 234 P. 869, 71 C.A. 112.

It has been held that a person who remains within the bounds of the prison limits, pursuant to a bond given under a void execution, is not entitled to recover for the time he thus remains within such limits, as he was presumed to know the law.⁹⁴

§ 65. — Measure and Elements

- a. In general
- b. Restraint
- c. Physical injury or suffering
- d. Mental suffering
- e. Loss of time
- f. Losses in business or employment
- g. Expenses incurred
- h. Injury to reputation

a. In General

The measure of damages is such a sum as will fairly and reasonably compensate the injured person for the injuries caused by defendant's wrongful act, including pecuniary loss.

The measure of damages for false imprisonment is such a sum as will fairly and reasonably compensate the injured person for the injuries caused by defendant's wrongful act,⁹⁵ including any special pecuniary loss which is a direct result of the false imprisonment,⁹⁶ whether or not such injuries could

have been anticipated.^{96.5} Defendant's wealth,⁹⁷ or his ability to pay, or the ultimate financial effect of payment on him,^{97.5} has no bearing on the amount of compensatory damages, nor has the poverty of plaintiff,⁹⁸ although there is authority to the effect that it is proper to consider plaintiff's occupation⁹⁹ and his condition in life.¹

b. Restraint

General damages follow from proof of an illegal restraint, but only the period for which the actual restraint continues is to be considered.

General damages will follow as a matter of course on proof of an illegal restraint of the personal liberty of the injured party,² but only the period for which the actual restraint continues is to be considered.³ The restraint has been considered to continue while the person released remains liable to be confined under proceedings pending under color of lawful authority.⁴

c. Physical Injury or Suffering

Plaintiff is entitled to recover for bodily injuries or illness, or physical suffering or discomfort, resulting from an unlawful imprisonment.

Plaintiff is entitled to recover for bodily injuries or physical suffering which result from an unlawful imprisonment,⁵ or is entitled to recover for illness

94. Mass.—Allen v. Shed, 10 Cush. 375.

Mich.—Fuller v. Bowker, 11 Mich. 204.

N.Y.—Allen v. Fromme, 126 N.Y.S. 520, 141 App.Div. 362.

95. Cal.—Gibson v. J. C. Penney Co., App., 331 P.2d 1057.

Baines v. Brady, 265 P.2d 194, 122 C.A.2d Supp. 957.

Ill.—Shelton v. Barry, 66 N.E.2d 697, 328 Ill.App. 497.

Md.—Dennis v. Baltimore Transit Co., 56 A.2d 813, 189 Md. 610.

Neb.—Doescher v. Robinson, 271 N.W. 784, 132 Neb. 299.

N.Y.—Nastasi v. State, 86 N.Y.S.2d 635, 194 Misc. 449, reversed on other grounds 90 N.Y.S.2d 377, 275 App.Div. 524, affirmed 88 N.E.2d 658, 300 N.Y. 473.

Goldberg v. Fleischer's Confidence Food Stores, 102 N.Y.S.2d 176.

Va.—S. H. Kress & Co. v. Roberts, 129 S.E. 244, 143 Va. 71.

25 C.J. p 557 note 29.

96. N.Y.—Nastasi v. State, 86 N.Y.S.2d 635, 194 Misc. 449, reversed on other grounds 90 N.Y.S.2d 377, 275 App.Div. 524, affirmed 88 N.E.2d 658, 300 N.Y. 473.

Wash.—Whitehead v. Stringer, 180 P. 486, 106 Wash. 501, 5 A.L.R. 358.

25 C.J. p 557 note 30.

96.5 Cal.—Gibson v. J. C. Penney Co., App., 331 P.2d 1057.

Baines v. Brady, 265 P.2d 194, 122 C.A.2d Supp. 957.

97. N.Y.—McConnell v. Hampton, 12 Johns. 234.

97.5 S.D.—Bean v. Best, 93 N.W.2d 403.

98. Ill.—Morse v. Peterson, 208 Ill. App. 291.

99. Mo.—McGill v. Walnut Realty Co., 148 S.W.2d 131, 235 Mo.App. 874.

Okl.—Holmes v. Le Fors, 129 P. 718, 36 Okl. 729.

1. Mo.—McGill v. Walnut Realty Co., 148 S.W.2d 131, 235 Mo.App. 874.

25 C.J. p 557 note 34.

2. Ala.—Corpus Juris cited in Burk v. Knott, 101 So. 811, 814, 20 Ala.App. 316.

Mo.—Jarrett v. St. Francois County Finance Co., App., 185 S.W.2d 855—Oliver v. Kessler, App., 95 S.W.2d 1226.

Ohio.—Mouse v. Central Savings & Trust Co., 167 N.E. 868, 120 Ohio St. 599.

25 C.J. p 540 note 27, p 557 note 35. Nominal damages see supra § 63.

3. La.—Escurix v. Daboval, 13 La. 87.

25 C.J. p 557 note 36.

Escorting to home

Where plaintiff, when released from false imprisonment, was not dependent on, or at the mercy of, defendants, or sick, disabled, or suffering physically, defendants would not be liable for damages inflicted in escorting her to her home, unless guilty of further tort other than false imprisonment, even though subsequent damages would not have occurred but for the false imprisonment.

Wis.—Hadler v. Rhyner, 12 N.W.2d 693, 244 Wis. 448.

4. N.Y.—Worden v. Davis, 88 N.E. 745, 195 N.Y. 391, 22 L.R.A., N.S., 1196.

5. Ark.—Missouri Pac. R. Co. v. Yancey, 10 S.W.2d 22, 178 Ark. 147.

Fla.—Margaret Ann Super Markets, Inc. v. Dent, 64 So.2d 291.

Ill.—Shelton v. Barry, 66 N.E.2d 697, 328 Ill.App. 497.

N.Y.—Tierney v. State, 34 N.Y.S.2d 749, 178 Misc. 421, modified on other grounds 42 N.Y.S.2d 877, 266 App.Div. 434, affirmed 54 N.E.2d 207, 292 N.Y. 523.

Tenn.—Little Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357.

Tex.—S. H. Kress & Co. v. Rust, Civ. App., 97 S.W.2d 997, affirmed 120 S.W.2d 425, 132 Tex. 89.

caused by unlawful imprisonment,⁶ although the injury to health may be due to mental suffering.⁷ Recovery may be had for physical inconveniences and discomforts,⁸ such as those suffered by reason of the condition of the place of plaintiff's confinement,⁹ or his treatment there.¹⁰ Recovery may be also had for the aggravation of personal injuries, sustained by claimant in a prior accident, from the failure to provide prompt medical attention.^{10.5}

Actual physical injury must be shown affirmatively,¹¹ and damages cannot be recovered for an injury the cause of which is wholly speculative.¹²

d. Mental Suffering

Mental suffering, including humiliation and injury to the feelings of the person unlawfully imprisoned, is a proper element of damage.

Mental suffering endured because of a false imprisonment is a proper element of damage.¹³ Humiliation, disgrace, and injury to the feelings of the person unlawfully imprisoned are proper elements of mental suffering,¹⁴ as are fright,¹⁵ embarrassment,^{15.5} deprivation of the society of one's family,¹⁶ and worry caused by enforced absence from family,¹⁷ although there is authority to the effect that the person causing the arrest is not responsible for

Va.—S. H. Kress & Co. v. Musgrove, 149 S.E. 453, 153 Va. 348—S. H. Kress & Co. v. Roberts, 129 S.E. 244, 143 Va. 71.
25 C.J. p 557 note 38.

Consent by wife to treatment of husband in mental hospital was not binding on him so as to preclude a recovery for injuries sustained.

N.Y.—Warner v. State, 68 N.Y.S.2d 60, 189 Misc. 51, reversed 71 N.Y.S.2d 559, 272 App.Div. 954, reversed 79 N.E.2d 459, 297 N.Y. 395.

6. Vt.—Mazzolini v. Gifford, 98 A. 904, 90 Vt. 352.

25 C.J. p 558 note 39.

7. Neb.—Van Dorn v. Kimball, 160 N.W. 953, 100 Neb. 590.

8. Cal.—Baines v. Brady, 265 P.2d 194, 122 C.A.2d Supp. 957.

Fla.—Margaret Ann Super Markets, Inc. v. Dent, 64 So.2d 291.

Me.—Jacques v. Parks, 52 A. 763, 96 Me. 263.

25 C.J. p 558 note 41.

9. Ala.—Fuqua v. Gambill, 37 So. 235, 140 Ala. 464.

Iowa.—**Corpus Juris cited in** Fox v. McCurnin, 218 N.W. 499, 501, 205 Iowa 752.

25 C.J. p 558 note 42.

10. Neb.—Scott v. Flowers, 84 N.W. 81, 60 Neb. 675.

25 C.J. p 558 note 43.

10.5 N.Y.—Tierney v. State, 42 N.Y.S.2d 877, 266 App.Div. 434, affirmed 54 N.E. 207, 292 N.Y. 523.

11. Ky.—Illinois Cent. R. Co. v. Dennington, 189 S.W. 217, 172 Ky. 326.

12. Or.—Spain v. Oregon-Washington R. & Nav. Co., 153 P. 470, 78 Or. 355, Ann.Cas.1917E 1104.

25 C.J. p 558 note 45.

13. Ala.—Standard Oil Co. v. Humphries, 96 So. 629, 209 Ala. 493.

Cal.—Baines v. Brady, 265 P.2d 194, 122 C.A.2d Supp. 957.

Iowa.—McVay v. Carpe, 29 N.W.2d 582, 238 Iowa 1131.

Ky.—Great Atlantic & Pacific Tea Co. v. Smith, 136 S.W.2d 759, 281 Ky. 583.

Mich.—**Corpus Juris cited in** Fisher v. Rumler, 214 N.W. 310, 311, 239 Mich. 224.

Mo.—Oliver v. Kessler, App., 95 S.W.2d 1226—Burke v. Robinson, App., 271 S.W. 1005.

Neb.—Dillon v. Sears-Roebeck Co., 253 N.W. 331, 126 Neb. 357.

N.Y.—Tierney v. State, 34 N.Y.S.2d 749, 178 Misc. 421, modified on other grounds 42 N.Y.S.2d 877, 266 App.Div. 434, affirmed 54 N.E.2d 207, 292 N.Y. 523.

Tenn.—Little Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357.

Tex.—S. H. Kress & Co. v. Rust, Civ. App., 97 S.W.2d 997, affirmed 120 S.W.2d 425, 132 Tex. 89—**Corpus Juris cited in** McDonald v. Henderson, Civ.App., 250 S.W. 463—Chicago, R. I. & G. Ry. Co. v. Neubert, Civ.App., 248 S.W. 139.

Va.—S. H. Kress & Co. v. Musgrove, 149 S.E. 453, 153 Va. 348—W. T. Grant Co. v. Owens, 141 S.E. 860, 149 Va. 906—S. H. Kress & Co. v. Roberts, 129 S.E. 244, 143 Va. 71.

W.Va.—Jones v. Hebdo, 106 S.E. 898, 88 W.Va. 386.

25 C.J. p 559 note 65.

Damages for mental pain and suffering are treated as actual and not punitive damages.

Iowa.—McVay v. Carpe, 29 N.W.2d 582, 238 Iowa 1131.

14. U.S.—Hundley v. Milner Hotel Management Co., D.C.Ky., 114 F. Supp. 206, affirmed, C.A., Milner Hotel Management Co. v. Hundley, 216 F.2d 613.

Ark.—Missouri Pac. R. Co. v. Yancey, 10 S.W.2d 22, 178 Ark. 147.

Cal.—Gibson v. J. C. Penney Co., App., 331 P.2d 1057—Schanafelt v. Seaboard Finance Co., 239 P.2d 42, 108 C.A.2d 420.

Fla.—Margaret Ann Super Markets, Inc. v. Dent, 64 So.2d 291—**Corpus Juris cited in** S. H. Kress & Co. v. Powell, 180 So. 757, 763, 132 Fla. 471.

Ill.—Shelton v. Barry, 66 N.E.2d 697, 328 Ill.App. 497.

Iowa.—McVay v. Carpe, 29 N.W.2d 582, 238 Iowa 1131.

Ky.—Sternberg v. Hogg, 72 S.W.2d 421, 254 Ky. 761.

Mo.—Jarrett v. St. Francois County Finance Co., App., 185 S.W.2d 855—Oliver v. Kessler, App., 95 S.W.2d 1226—Burke v. Robinson, App., 271 S.W. 1005.

N.Y.—Tierney v. State, 42 N.Y.S.2d 877, 266 App.Div. 434, affirmed 54 N.E.2d 207, 292 N.Y. 523.

Williams v. State, 168 N.Y.S.2d 163, 8 Misc.2d 390, affirmed 172 N.Y.S.2d 206, 5 A.D.2d 936.

S.D.—Bean v. Best, 93 N.W.2d 403.

Tenn.—Little Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357.

Tex.—S. H. Kress & Co. v. Rust, Civ. App., 97 S.W.2d 997, affirmed 120 S.W.2d 425, 132 Tex. 89.

Corpus Juris cited in McDonald v. Henderson, Civ.App., 250 S.W. 463.

Utah.—Hepworth v. Covey Bros. Amusement Co., 91 P.2d 507, 97 Utah 205.

Va.—W. T. Grant Co. v. Owens, 141 S.E. 860, 149 Va. 906.

W.Va.—Jones v. Hebdo, 106 S.E. 898, 88 W.Va. 386.

25 C.J. p 560 notes 67, 69.

Humiliation has been defined as a feeling of degradation or inferiority. S.D.—Bean v. Best, 93 N.W.2d 403.

15. Cal.—Gibson v. J. C. Penney Co., App., 331 P.2d 1057.

Tex.—S. H. Kress & Co. v. Rust, Civ. App., 97 S.W.2d 997, affirmed 120 S.W.2d 425, 132 Tex. 89.

15.5 Iowa.—McVay v. Carpe, 29 N.W.2d 582, 238 Iowa 1131.

16. Ala.—Walling v. Fields, 96 So. 471, 209 Ala. 493.

17. Ala.—Sloss-Sheffield Steel & Iron Co. v. Devaney, 60 So. 990, 7 Ala.App. 457.

Cal.—Gibson v. J. C. Penney Co., App., 331 P.2d 1057.

25 C.J. p 560 note 66.

any indignity caused by the wrong of the official having charge of the place of imprisonment.¹⁸

According to a number of authorities, it is not necessary, in order to sustain a recovery for mental suffering, to prove a physical injury;¹⁹ but it has been held that mental suffering alone will not sustain a recovery of damages,²⁰ although it can be the basis of a recovery when connected with a physical injury.²¹

e. Loss of Time

Loss of time occasioned by unlawful imprisonment is an element of damage.

Loss of time occasioned by the unlawful imprisonment is a proper element of damage.²²

f. Losses in Business or Employment

Losses in business or employment proximately resulting from false imprisonment are a proper element of damage.

A person subjected to a false imprisonment may recover, as part of his damages, for all losses sustained in his business or employment as a result of such imprisonment.²³ The injury to business must

be the proximate result of the imprisonment,²⁴ and must be more than mere speculative damage.²⁵

g. Expenses Incurred

Any reasonable and necessary expense incurred as a result of an unlawful imprisonment may constitute a proper item of damage.

Any reasonable and necessary expense incurred as a result of an unlawful imprisonment may constitute a proper item of damage,²⁶ such as the reasonable expenses of suit,^{26.5} the expense of procuring a discharge from arrest or imprisonment,²⁷ money paid to secure a release,²⁸ and even the expense incurred in curing bodily injuries,²⁹ or regaining health after illness,³⁰ caused by the false imprisonment; and the compensation of attorneys is commonly regarded as a recoverable expense,³¹ although it has been held that an attorney's fees are not recoverable unless his services were necessary to secure plaintiff's discharge from illegal arrest,³² and that, in the absence of facts which would warrant the granting of exemplary damages, the party injured cannot recover compensation paid to an attorney employed in legal proceedings re-

18. N.Y.—Baker v. Secor, 4 N.Y.S. 303.

19. Ky.—Great Atlantic & Pacific Tea Co. v. Smith, 136 S.W.2d 759, 281 Ky. 583.

Okl.—Halliburton-Abbott Co. v. Hodge, 44 P.2d 122, 172 Okl. 175.

Tex.—McDonald v. Henderson, Civ. App., 250 S.W. 463.

Va.—S. H. Kress & Co. v. Musgrove, 149 S.E. 453, 153 Va. 348. 25 C.J. p 560 note 70.

20. Conn.—Gibney v. Lewis, 36 A. 799, 68 Conn. 392.

21. Or.—Spain v. Oregon-Washington R. & Nav. Co., 153 P. 470, 78 Or. 355, Ann.Cas.1917E 1104.

22. Fla.—Margaret Ann Super Markets, Inc. v. Dent, 64 So.2d 291.

Ill.—Shelton v. Barry, 66 N.E.2d 697, 328 Ill.App. 497.

Tenn.—Little Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357.

Va.—S. H. Kress & Co. v. Roberts, 129 S.E. 244, 143 Va. 71. 25 C.J. p 558 note 46.

23. Fla.—Margaret Ann Super Markets, Inc. v. Dent, 64 So.2d 291.

Ill.—Shelton v. Barry, 66 N.E.2d 697, 328 Ill.App. 497.

Mass.—Conklin v. Consolidated R. Co., 82 N.E. 23, 196 Mass. 302, 13 Ann.Cas. 857.

N.Y.—Warner v. State, 68 N.Y.S.2d 60, 189 Misc. 51, reversed 71 N.Y.S.2d 559, 272 App.Div. 954, reversed 79 N.E.2d 459, 297 N.Y. 395.

Tenn.—Little Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357. 25 C.J. p 558 note 48.

Loss of earning capacity

N.Y.—Williams v. State, 168 N.Y.S. 2d 163, 8 Misc.2d 390, affirmed 172 N.Y.S.2d 206, 5 A.D.2d 936.

24. Tex.—Gold v. Campbell, 117 S. W. 463, 54 Tex.Civ.App. 269.

25. Mich.—Bennett v. Eddy, 79 N.W. 481, 120 Mich. 300. 25 C.J. p 558 note 50.

26. Fla.—Margaret Ann Super Markets, Inc. v. Dent, 64 So.2d 291.

Ga.—Ocean SS. Co. v. Williams, 69 Ga. 251.

Ill.—Shelton v. Barry, 66 N.E.2d 697, 328 Ill.App. 497.

N.Y.—Nastasi v. State, 86 N.Y.S.2d 635, 194 Misc. 449, reversed on other grounds 90 N.Y.S.2d 377, 275 App.Div. 524, affirmed 88 N.E.2d 658, 300 N.Y. 473.

Tenn.—Little Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357.

25 C.J. p 558 note 51.

Expenses incident to arrest on void process

Vt.—Simanton v. Caldbeck, 121 A. 411, 96 Vt. 523.

26.5 Ga.—Sharpe v. Lowe, 106 S.E. 2d 28, 214 Ga. 513.

27. N.Y.—Nastasi v. State, 86 N.Y.S. 2d 635, 194 Misc. 449, reversed on other grounds 90 N.Y.S.2d 377, 275 App.Div. 524, affirmed 88 N.E.2d 658, 300 N.Y. 473.

N.Y.—Nossek v. A. H. Todd & Son, 290 N.Y.S. 253, 160 Misc. 528.

Tex.—Corpus Juris cited in McDonald v. Henderson, Civ.App., 250 S. W. 463.

25 C.J. p 558 note 32.

Fee expended in procuring bail and discharge from imprisonment was held proper element of damages for false imprisonment.

Ala.—Fidelity & Deposit Co. of Maryland v. Adkins, 130 So. 552, 222 Ala. 17.

28. Vt.—Taylor v. Coolidge, 24 A. 656, 64 Vt. 506.

25 C.J. p 559 note 54.

29. Cal.—Nelson v. Kellogg, 123 P. 1115, 162 C. 621, Ann.Cas.1913D 759.

30. D.C.—Kilbourn v. Thompson, 11 D.C. 401.

31. Ala.—Corpus Juris cited in Fidelity & Deposit Co. of Maryland v. Adkins, 130 So. 552, 553, 222 Ala. 17.

Ga.—Sharpe v. Lowe, 106 S.E.2d 28, 214 Ga. 513.

N.Y.—Vallon v. Ramage, 93 N.Y.S. 2d 56, 196 Misc. 740—Warner v. State, 68 N.Y.S.2d 60, 189 Misc. 51, reversed 71 N.Y.S.2d 559, 272 App. Div. 954, reversed 79 N.E.2d 459, 297 N.Y. 395.

Va.—S. H. Kress & Co. v. Roberts, 129 S.E. 244, 143 Va. 71. 25 C.J. p 559 note 53.

32. Ala.—Fidelity & Deposit Co. of Maryland v. Adkins, 130 So. 552, 222 Ala. 17.

sulting in a release from the illegal arrest.³³ Legal expenses incurred by a volunteer for the benefit of the injured party, without his express or implied consent, are not a proper element of damage.³⁴

While some authorities regard the period in which expenses, to be recoverable, must have been incurred as not limited to the period of actual restraint if the expenses follow as the natural and proximate result of the wrong,³⁵ it has been held that expenses incurred after the actual restraint ceases³⁶ or becomes legal³⁷ cannot be recovered.

Necessity of actual payment. Where an expense is a lawful element of damages, the incurring of a legal liability has been held sufficient, although actual payment has not been made.³⁸

h. Injury to Reputation

Injury to reputation resulting from an unlawful imprisonment is a proper element of damage.

A person who has suffered a false imprisonment may recover damages for an injury to his reputation resulting therefrom,³⁹ and also for injury to his social position,⁴⁰ although it appears to have been held that damages for injury to reputation are limited to cases in which such injury results in a pecuniary loss.⁴¹ and that in the absence of circumstances authorizing the recovery of exemplary damages, damages to character and reputation cannot be recovered.⁴²

In assessing damages to reputation, it is presumed that plaintiff had a good character and reputation.⁴³

§ 66. — Mitigation and Aggravation

- a. Mitigation
- b. Aggravation

a. Mitigation

Strictly, matter in mitigation, such as the absence of malice and the existence of probable cause, cannot be considered in determining the amount of plaintiff's actual damages; but in a number of cases the consideration of such mitigating circumstances, or of matter showing that plaintiff's injury is not as great as he claims, has been held proper.

Strictly speaking, matter in mitigation, such as the absence of malice and the existence of probable cause, cannot be considered in determining the amount to be awarded plaintiff as actual damages,⁴⁴ although, as appears *infra* § 67, it is to be considered on the question of exemplary damages. However, even without regard to the distinction between punitive and compensatory damages, the amount of plaintiff's recovery is, according to many authorities, to be determined with regard to mitigating circumstances negating malice and showing reasonable ground for the wrong done,⁴⁵ or showing probable cause,^{45.5} or showing mistake, such as a mistake of identity,⁴⁶ or provocation,⁴⁷ or showing that the person sought to be charged acted in good faith or on proper, although insufficient, legal authority,⁴⁸

33. Ohio.—Sly v. Robinson, 20 Ohio Cir.Ct., N.S., 297—Williams v. Morris, 14 Ohio Cir.Ct., N.S., 353, 32 Ohio Cir.Ct. 453.

34. Mich.—Freisenhan v. Maines, 100 N.W. 172, 137 Mich. 10. 25 C.J. p 559 note 58.

35. Vt.—Simanton v. Caldbeck, 121 A. 411, 96 Vt. 523. 25 C.J. p 559 note 59.

36. Mass.—Lane v. Holman, 13 N.E. 602, 145 Mass. 221.

N.Y.—Allen v. Fromme, 126 N.Y.S. 520, 141 App.Div. 362. 25 C.J. p 559 note 60.

Attorney's fees for defending against prosecution incurred after discharge from imprisonment were held not proper element of damage. Ala.—Fidelity & Deposit Co. of Maryland v. Adkins, 130 So. 552, 222 Ala. 17.

37. D.C.—Zinkhan v. District of Columbia, 271 F. 542, 50 App.D.C. 312.

38. Cal.—Nelson v. Kellogg, 123 P. 1115, 162 C. 621, Ann.Cas.1913D 759.

25 C.J. p 559 note 63.

39. Fla.—Margaret Ann Super Markets, Inc. v. Dent, 64 So.2d 291.

Ill.—Shelton v. Barry, 66 N.E.2d 697, 328 Ill.App. 497.

Iowa.—McVay v. Carpe, 29 N.W.2d 582, 238 Iowa 1131.

Mo.—Jarrett v. St. Francois County Finance Co., App., 185 S.W.2d 855 —Oliver v. Kessler, App., 95 S.W. 2d 1226.

Tenn.—Little Stores v. Isenberg, 172 S.W.2d 13, 26 Tenn.App. 357.

25 C.J. p 560 note 76.

40. Ind.—Stewart v. Maddox, 63 Ind. 51.

41. Kan.—Comer v. Knowles, 17 Kan. 436.

42. Kan.—Comer v. Knowles, *supra*.

43. Tex.—Wolf v. Perryman, 17 S. W. 772, 82 Tex. 112.

44. N.Y.—Vultz v. Blackmar, 64 N. Y. 440.

Rifkin v. City of New York, 176 N.Y.S.2d 716, 12 Misc.2d 367.

Goldberg v. Fleisher's Confidence Food Stores, 102 N.Y.S.2d 176.

S.D.—Bean v. Best, 93 N.W.2d 403.

Va.—Montgomery Ward & Co. v. Wickline, 50 S.E.2d 387, 188 Va. 485.

25 C.J. p 561 note 82.

Arrest under two warrants

In an action against a tax assessor for an illegal arrest, no reduction should be made in the damages recoverable because of the fact that

the arrest was also based on another warrant from a second assessment board.

Me.—Allison v. Hobbs, 51 A. 245, 96 Me. 26.

Duty to fight extradition proceedings

Pa.—Kelley v. Laurito, Com.Pl., 94 Pittsb.Leg.J. 399.

45. Ky.—Garvin v. Muir, 306 S.W.2d 256.

Mo.—Titus v. Montgomery Ward & Co., 123 S.W.2d 574, 232 Mo.App. 987

—Rice v. Gray, 34 S.W.2d 567, 225 Mo.App. 890.

N.Y.—Sanders v. Rolnick, 67 N.Y.S. 2d 652, 188 Misc. 627, affirmed 71 N.Y.S.2d 896, 272 App.Div. 803.

25 C.J. p 561 note 84.

45.5 Ga.—Hill v. Henry, 82 S.E.2d 35, 90 Ga.App. 93.

46. Miss.—Vice v. Holley, 41 So. 7, 88 Miss. 572, 575.

25 C.J. p 561 note 88.

47. U.S.—McCall v. McDowell, C.C. Cal., 15 F.Cas.No.8,673, 1 Abb. 212, Deady 233.

25 C.J. p 562 note 89.

48. N.C.—Corpus Juris cited in Lowry v. Barker, 190 S.E. 341, 343, 211 N.C. 613.

25 C.J. p 561 note 85.

or on legal advice,⁴⁹ or that the person seeking recovery was guilty of misconduct,⁵⁰ or, where the ground of action is detention for an unreasonable time, that he was guilty of the offense for which he was legally arrested.⁵¹ Matter is also properly considered which goes to show that plaintiff's injury is not so great as is claimed by him,⁵² such as facts indicating lack of damage to the reputation of the injured party,⁵³ or proof of his general bad character,⁵⁴ or proof that he voluntarily remained in prison when by seeking the proper remedy he might have obtained his release.⁵⁵ A release from actual confinement, as on bail, will operate to lessen the damage.⁵⁶

b. Aggravation

Such circumstances as those tending to show malice and the absence of probable cause may be considered as increasing the damages to be awarded in an action for false imprisonment.

Matters in aggravation of an illegal restraint may usually be considered in determining the amount of damages to which plaintiff is entitled.⁵⁷ Thus, as increasing the amount of damages to be awarded, the jury may consider circumstances tending to show malice and the absence of probable cause,⁵⁸ the circumstances under which the arrest was made,⁵⁹ proof of conspiracy to procure the imprisonment,⁶⁰ the conduct of the person making, or responsible for, the arrest,⁶¹ allegations in the pleading or the manner of conducting the defense against

the action brought by the injured party to recover damages,⁶² the conditions of the place of his imprisonment,⁶³ duress during imprisonment,⁶⁴ or publicity given to the imprisonment by publication of accounts thereof in the public newspapers.⁶⁵ Where a person who is liable for damages for a false imprisonment is entirely blameless of an independent wrong committed by another person in connection with the arrest, evidence of the independent wrong cannot be used to aggravate the damages for which the former person may be liable.⁶⁶

§ 67. Exemplary or Punitive Damages

- a. In general
- b. Absence of malice and aggravating circumstances
- c. Absence of actual damage
- d. Liability of employer or principal
- e. Determination of amount
- f. Mitigation

a. In General

An award of exemplary or punitive damages is generally regarded as permissible where the essential circumstances are present.

While the contrary is true in some jurisdictions,⁶⁷ as a general rule, where the accompanying circumstances are such as to warrant them, exemplary or punitive damages may be properly awarded in an action for false imprisonment.⁶⁸ To authorize such

Honesty of purpose held to constitute mitigation:

- (1) Generally.
Mo.—Rice v. Gray, 34 S.W.2d 567, 225 Mo.App. 890—Dunlevy v. Wolf-erman, 79 S.W. 1165, 106 Mo.App. 46.
 - (2) On part of justice of the peace.
Ohio.—Truesdel v. Combs, 33 Ohio St. 186.
 49. La.—Mortimer v. Thomas, 23 La.App. 165.
25 C.J. p 450 note 59 [a].
 50. Ky.—Botts v. Williams, 17 B. Mon. 687.
25 C.J. p 561 note 86.
 51. Ala.—Long v. Mann, 65 So.2d 500, 259 Ala. 17.
Mich.—Friesenhan v. Maines, 100 N. W. 172, 137 Mich. 10.
 52. W.Va.—George v. Norfolk & W. R. Co., 88 S.E. 1036, 78 W.Va. 345.
- Employment record generally not good**
- N.Y.—Waterman v. State, 138 N.Y.S. 2d 854, 207 Misc. 773, affirmed 149 N.Y.S.2d 381, 1 A.D.2d 235, affirmed 140 N.E.2d 551, 2 N.Y.2d 803, 159 N.Y.S.2d 702.

53. Pa.—Winebiddle v. Porterfield, 9 Pa. 137.
25 C.J. p 562 note 92.
 54. Tex.—Dunn v. Cole, 2 Willson, Civ.Cas.Ct.App., § 821.
 55. U.S.—Barnes v. Viall, C.C.R.I., 6 F. 661.
 56. Cal.—Neves v. Costa, 89 P. 860, 5 C.A. 111.
25 C.J. p 562 note 94.
 57. Ga.—Turney v. Rhodes, 155 S.E. 112, 42 Ga.App. 104.
 - Mass.—Cieplinski v. Severn, 168 N.E. 722, 269 Mass. 261.
 58. N.C.—Jackson v. American Tel. & Tel. Co., 51 S.E. 1015, 139 N.C. 347, 70 L.R.A. 738.
25 C.J. p 562 note 95.
 59. Iowa.—Young v. Gormley, 94 N. W. 922, 120 Iowa 372.
25 C.J. p 562 note 96.
 60. U.S.—Davis v. Johnson, Va., 101 F. 952, 42 C.C.A. 111.
 61. Ga.—Turney v. Rhodes, 155 S.E. 112, 42 Ga.App. 104.
25 C.J. p 562 note 97.
- Indecent proposals and assaults** while plaintiff was under restraint, if proved, might be considered in aggravation of damages.

- Mass.—Cieplinski v. Severn, 168 N. E. 722, 269 Mass. 261.
62. R.I.—Smith v. Macomber, 66 A. 570, 28 R.I. 248.
25 C.J. p 562 note 98.
- Unsustained plea of justification**
Ga.—Ocean SS. Co. v. Williams, 69 Ga. 251.
63. Ala.—Fuqua v. Gambill, 37 So. 235, 140 Ala. 464, 467.
25 C.J. p 563 note 99.
64. U.S.—Harris v. Louisville, N. O. & T. R. Co., C.C.Tenn., 35 F. 116.
25 C.J. p 563 note 1.
65. Wash.—Duval v. Inland Nav. Co., 155 P. 768, 90 Wash. 149.
25 C.J. p 563 note 2.
66. Tenn.—Shepherd v. Slaten, 5 Heisk. 79.
67. Neb.—Hall v. Rice, 223 N.W. 4, 117 Neb. 813, 78 A.L.R. 1421.
- Wash.—Ulvestad v. Dolphin, 292 P. 106, 158 Wash. 629.
25 C.J. p 563 note 6.
68. U.S.—Atkinson v. Dixie Greyhound Lines, C.C.A.Miss., 143 F.2d 477, certiorari denied 65 S.Ct. 92, 323 U.S. 758, 89 L.Ed. 607.
- Ala.—Southern Ry. Co. v. Hall, 96 So. 73, 209 Ala. 237.

an award the arrest or imprisonment must have been accompanied by circumstances of aggravation,⁶⁹ as where the unlawful detention was malicious.⁷⁰ In awarding punitive damages, the nature, extent, and enormity of the wrong committed may be considered, as may also all of the surrounding facts and circumstances.^{70.5} Actual ill will or vindictive-

ness of purpose is not as a rule required;⁷¹ and exemplary damages have been frequently awarded when the imprisonment was accompanied by circumstances of fraud,⁷² recklessness,⁷³ wantonness,⁷⁴ corrupt⁷⁵ or ulterior⁷⁶ motives, bad faith,⁷⁷ circumstances of oppression,⁷⁸ unnecessary violence,⁷⁹ in-

Ga.—Sharpe v. Lowe, 106 S.E.2d 28, 214 Ga. 513—McClure Ten Cent Co. v. Humphries, 127 S.E. 151, 33 Ga. App. 523.

Ill.—Lindquist v. Friedman's Inc., 8 N.E.2d 625, 366 Ill. 232. Shemaitis v. Collins, 109 N.E.2d 370, 348 Ill.App. 549.

Iowa.—Schultz v. Enlow, 205 N.W. 972, 201 Iowa 1083.

Ky.—National Bond & Investment Co. v. Whithorn, 123 S.W.2d 263, 276 Ky. 204.

Md.—Safeway Stores, Inc. v. Barrack, 122 A.2d 457, 210 Md. 168—Dennis v. Baltimore Transit Co., 56 A.2d 813, 189 Md. 610.

Miss.—Laster v. Chaney, 177 So. 524, 180 Miss. 110.

Mo.—Peterson v. Fleming, 297 S.W. 163, 222 Mo.App. 296—Martin v. Woodlea Inv. Co., 226 S.W. 650, 206 Mo.App. 33.

N.J.—Collins v. Cody, 113 A. 709, 95 N.J.Law 65.

N.Y.—Adams v. F. W. Woolworth Co., 257 N.Y.S. 776, 144 Misc. 27. Ratoff v. Central Smelting Co., 56 N.Y.S.2d 858, reversed on other grounds 61 N.Y.S.2d 376, 270 App.Div. 838, appeal dismissed 61 N.Y.S.2d 377, 270 App.Div. 838—Vuolo v. North Shore Bus Co., 41 N.Y.S.2d 453.

Ohio.—Nappi v. Wilson, 155 N.E. 151, 22 Ohio App. 520.

S.C.—Whitmire v. Publix Theatre Corporation, 162 S.E. 753, 164 S.C. 487.

W.Va.—Jones v. Hebdo, 106 S.E. 898, 88 W.Va. 386. 25 C.J. p 563 note 5.

Breach of duty to protect

A party on whom is imposed a duty to afford protection may be liable for punitive damages if through a breach of that duty a person entitled to protection is arrested.

W.Va.—George v. Norfolk & W. R. Co., 88 S.E. 1036, 78 W.Va. 345. 25 C.J. p 565 note 32.

69. U.S.—Williams v. Carolina Coach Co., D.C.Va., 111 F.Supp. 329, affirmed, C.A., Carolina Coach Co. v. Williams, 207 F.2d 408.

Ark.—Missouri Pac. R. Co. v. Yancey, 10 S.W.2d 22, 178 Ark. 147.

Ill.—Lindquist v. Friedman's, Inc., 8 N.E.2d 625, 366 Ill. 232.

Md.—Heinze v. Murphy, 24 A.2d 917, 180 Md. 423.

S.D.—Gamble v. Keyes, 178 N.W. 870, 43 S.D. 245.

Va.—Virginia Electric & Power Co.

v. Wynne, 141 S.E. 829, 149 Va. 882.

25 C.J. p 563 note 7.

70. Ill.—Shelton v. Barry, 66 N.E. 2d 697, 328 Ill.App. 497.

Ky.—Jefferson Dry Goods Co. v. Stoess, 199 S.W.2d 994, 304 Ky. 73.

Md.—Bernheimer v. Becker, 62 A. 526, 102 Md. 250, 111 Am.S.R. 356, 3 L.R.A., N.S., 221.

N.Y.—Gill v. Montgomery Ward & Co., 129 N.Y.S.2d 288, 284 App.Div. 36, 49 A.L.R.2d 1052.

25 C.J. p 564 note 8.

Actual ill will or express malice or circumstances from which malice may be inferred as a matter of law will support such an award.

Ala.—Burk v. Knott, 101 So. 811, 20 Ala.App. 316.

Ariz.—Adair v. Williams, 210 P. 853, 24 Ariz. 422, 26 A.L.R. 278.

Ky.—Sternberg v. Hogg, 72 S.W.2d 421, 254 Ky. 761.

Md.—Fleisher v. Ensminger, 118 A. 153, 140 Md. 604.

N.Y.—Adams v. F. W. Woolworth Co., 257 N.Y.S. 776, 144 Misc. 27.

Va.—Virginia Electric & Power Co. v. Wynne, 141 S.E. 829, 149 Va. 882. 25 C.J. p 564 notes 9, 10.

Desire to injure

Punitive damages can be awarded only when there was an actual desire to injure.

S.D.—Gamble v. Keyes, 178 N.W. 870, 43 S.D. 245.

Intent may be considered.

Kan.—Hammargren v. Montgomery Ward & Co., 241 P.2d 1192, 172 Kan. 484.

70.5 Kan.—Hammargren v. Montgomery Ward & Co., supra.

71. Fla.—Farish v. Smoot, 58 So.2d 534.

Mo.—Jackson v. Thompson, App., 188 S.W.2d 853.

Ohio.—Nappi v. Wilson, 155 N.E. 151, 22 Ohio App. 520.

25 C.J. p 565 note 26.

Improper motive may constitute malice, even though it is not prompted by anger, malevolence, or vindictiveness, and may be inferred from a wrongful act based on no reasonable ground.

Va.—Bolton v. Vellines, 26 S.E. 847, 94 Va. 393, 64 Am.S.R. 737.

72. Kan.—Wiley v. Keokuk, 6 Kan. 94.

73. Colo.—Johnson v. Enlow, 286 P. 2d 630, 132 Colo. 101.

Ill.—Aldridge v. Fox, 108 N.E.2d 139, 348 Ill.App. 96—Shelton v. Barry,

66 N.E.2d 697, 328 Ill.App. 497.

Iowa.—Schultz v. Enlow, 205 N.W. 972, 201 Iowa 1083.

Mo.—Martin v. Woodlea Inv. Co., 226 S.W. 650, 206 Mo.App. 33.

Ohio.—Nappi v. Wilson, 155 N.E. 151, 22 Ohio App. 520.

S.C.—Whitmire v. Publix Theatre Corporation, 162 S.E. 753, 164 S.C. 487.

W.Va.—Jones v. Hebdo, 106 S.E. 898, 88 W.Va. 386.

25 C.J. p 564 note 13.

74. Colo.—Johnson v. Enlow, 286 P. 2d 630, 132 Colo. 101.

Ill.—Lindquist v. Friedman's, Inc., 8 N.E.2d 625, 366 Ill. 232.

Iowa.—Schultz v. Enlow, 205 N.W. 972, 201 Iowa 1083.

Ky.—Jefferson Dry Goods Co. v. Stoess, 199 S.W.2d 994, 304 Ky. 73—National Bond & Investment Co. v. Whithorn, 123 S.W.2d 263, 276 Ky. 204.

Md.—Fleisher v. Ensminger, 118 A. 153, 140 Md. 604.

Miss.—Laster v. Chaney, 177 So. 524, 180 Miss. 110.

Ohio.—Nappi v. Wilson, 155 N.E. 151, 22 Ohio App. 520.

W.Va.—Jones v. Hebdo, 106 S.E. 898, 88 W.Va. 386.

25 C.J. p 564 note 14.

75. U.S.—Beckwith v. Bean, Vt., 98 U.S. 266, 25 L.Ed. 124.

McCall v. McDowell, C.C.Cal., 15 F.Cas.No.8,673, 1 Abb. 212, Deady 233.

Colo.—Johnson v. Enlow, 286 P.2d 630, 132 Colo. 101.

76. Wis.—Hamlin v. Spaulding, 27 Wis. 360.

25 C.J. p 564 note 16.

77. Colo.—Johnson v. Enlow, 286 P. 2d 630, 132 Colo. 101.

Mich.—Brushhaber v. Stegemann, 22 Mich. 266.

N.Y.—Williams v. Garrett, 12 How. Pr. 456.

Wis.—Hadler v. Rhyner, 12 N.W.2d 693, 244 Wis. 448.

78. Ill.—Lindquist v. Friedman's, Inc., 8 N.E.2d 625, 366 Ill. 232.

Shelton v. Barry, 66 N.E.2d 697, 328 Ill.App. 497.

Ky.—National Bond & Investment Co. v. Whithorn, 123 S.W.2d 263, 276 Ky. 204.

25 C.J. p 565 note 19.

79. N.Y.—Beardsley v. Soper, 171 N.Y.S. 1043, 184 App.Div. 399.

sult or outrage,⁸⁰ willful injury,⁸¹ or a wrongful act without a reasonable excuse,^{81.5} or where an arrest was made for the purpose of testing or obtaining a construction of the law,⁸² or in known violation of law.⁸³

A lunatic cannot be assessed with punitive damages.⁸⁴

Negligence alone will not support an award of exemplary damages,⁸⁵ except perhaps where it amounts to a wrong so reckless and wanton as to be without palliation or excuse.⁸⁶

Probable cause. While a lack of probable cause does not in itself establish malice,⁸⁷ it has been held very important on the issue of exemplary damages,^{87.5} and legal malice sufficient to justify an award of punitive damages may in a proper case be inferred from the fact that the arrest or detention was without probable cause.⁸⁸ Malice in law authorizing an award of punitive damages may also exist without regard to whether there is or is not a

want of probable cause.⁸⁹

Acts punishable as crime. Under the general rules as to the award of punitive damages in cases of acts punishable as crimes, which are discussed in Damages § 122, there will, in some jurisdictions, be no award of exemplary damages in such cases.⁹⁰

b. Absence of Malice and Aggravating Circumstances

Exemplary damages are not allowed where the false imprisonment was brought about innocently, in good faith, and without malice in fact or law.

Exemplary damages are never allowed where the false imprisonment was brought about innocently, in good faith,⁹¹ and without malice in fact or in law,⁹² wantonness,^{92.5} or oppression,^{92.10} by public officers in the belief that they were performing their public duties,⁹³ or private persons acting in honest mistake with a reasonably founded belief in the lawfulness of the act,⁹⁴ whether the public interest be involved,⁹⁵ as in the apprehension of supposed wrong-

Or.—Bratt v. Smith, 175 P.2d 444, 180 Or. 50.
25 C.J. p 565 note 20.

80. Ala.—Rhodes v. McWilson, 69 So. 69, 192 Ala. 675.

Ill.—Shelton v. Barry, 66 N.E.2d 697, 328 Ill.App. 497.

25 C.J. p 565 note 21.

81. Ill.—Shelton v. Barry, supra.
Ky.—Jefferson Dry Goods Co. v. Stoess, 199 S.W.2d 994, 304 Ky. 73.

N.Y.—Gill v. Montgomery Ward & Co., 129 N.Y.S.2d 288, 284 App.Div. 36, 49 A.L.R.2d 1052.

W.Va.—Davis v. Chesapeake & O. R. Co., 56 S.E. 400, 61 W.Va. 246, 9 L.R.A.N.S., 993.

25 C.J. p 565 note 22.

81.5 Fla.—Farish v. Smoot, 58 So. 2d 534.

82. N.Y.—Kolzem v. Broadway & Seventh Ave. R. Co., 20 N.Y.S. 700, 1 Misc. 148.

83. Ala.—Rhodes v. McWilson, 69 So. 69, 192 Ala. 675.

84. N.Y.—Krom v. Schoonmaker, 3 Barb. 647.

85. Ark.—Missouri Pac. R. Co. v. Yancey, 10 S.W.2d 22, 178 Ark. 147.

86. Mich.—Ross v. Leggett, 28 N.W. 695, 61 Mich. 445, 1 Am.S.R. 608.
25 C.J. p 564 note 12.

87. Ala.—Southern Ry. Co. v. Hall, 96 So. 73, 209 Ala. 237.

Mo.—Jackson v. Thompson, App., 188 S.W.2d 853.

87.5 Iowa.—Sergeant v. Watson Bros. Transp. Co., 52 N.W.2d 86, 244 Iowa 185.

88. Ala.—Southern Ry. Co. v. Hall, 46 So. 73, 209 Ala. 237.

Ill.—Aldridge v. Fox, 108 N.E.2d 139, 348 Ill.App. 96.

Mo.—Newport v. Montgomery Ward & Co., 127 S.W.2d 687, 344 Mo. 646.

Jackson v. Thompson, App., 188 S.W.2d 853—McGill v. Walnut Realty Co., 148 S.W.2d 131, 235 Mo.App. 874—Peterson v. Fleming, 297 S.W. 163, 222 Mo.App. 296.

Tex.—S. H. Kress & Co. v. Rust, 120 S.W.2d 425, 132 Tex. 89.
25 C.J. p 564 note 18.

89. Mo.—Hutchinson v. Sunshine Oil Co., App., 218 S.W. 951.

90. Ind.—Stewart v. Maddox, 63 Ind. 51.

91. Ark.—Kroger Grocery & Baking Co. v. Waller, 189 S.W.2d 361, 208 Ark. 1063.

Colo.—Walker v. Tucker, 280 P.2d 649, 131 Colo. 198.

Ill.—Shelton v. Barry, 66 N.E.2d 697, 328 Ill.App. 497.

Kan.—Comer v. Knowles, 17 Kan. 436.

Md.—Dennis v. Baltimore Transit Co., 56 A.2d 813, 189 Md. 610.

Exemplary damages held not recoverable under circumstances

Ark.—Kroger Grocery & Baking Co. v. Waller, 189 S.W.2d 361, 208 Ark. 1063.

92. Ark.—Kroger Grocery & Baking Co. v. Waller, 189 S.W.2d 361, 208 Ark. 1063—**Corpus Juris** cited in Missouri Pac. R. Co. v. Yancey, 10 S.W.2d 22, 24, 178 Ark. 147.

Colo.—Walker v. Tucker, 280 P.2d 649, 131 Colo. 198.

Md.—Dennis v. Baltimore Transit Co., 56 A.2d 813, 189 Md. 610—

Corpus Juris quoted in Heinze v.

Murphy, 24 A.2d 917, 920, 180 Md. 423.

92.5 Ark.—Kroger Grocery & Baking Co. v. Waller, 189 S.W.2d 361, 208 Ark. 1063.

Colo.—Walker v. Tucker, 280 P.2d 649, 131 Colo. 198.

92.10 Ark.—Kroger Grocery & Baking Co. v. Waller, 189 S.W.2d 361, 208 Ark. 1063.

93. Md.—**Corpus Juris** quoted in Heinze v. Murphy, 24 A.2d 917, 920, 180 Md. 423.

N.Y.—Tierney v. State, 34 N.Y.S.2d 749, 178 Misc. 421, modified on other grounds 42 N.Y.S.2d 877, 266 App.Div. 434, affirmed 54 N.E.2d 207, 292 N.Y. 523.

Or.—Martin v. Cambas, 293 P. 601, 134 Or. 257.

Vt.—Parker v. Roberts, 131 A. 21, 99 Vt. 219, 49 A.L.R. 1382.

25 C.J. p 565 note 35.

Servants of a corporation who wrongfully caused the imprisonment of a woman without intervention of a magistrate, on corporation's behalf and in corporation's interest, were not "public officers" within rule stated in text.

Ala.—Caudle v. Sears, Roebuck & Co., 182 So. 461, 236 Ala. 37.

94. U.S.—Williams v. Carolina Coach Co., D.C.Va., 111 F.Supp. 329, affirmed, C.A., Carolina Coach Co. v. Williams, 207 F.2d 408.

Ark.—Missouri Pac. R. Co. v. Yancey, 10 S.W.2d 22, 178 Ark. 147.
25 C.J. p 565 notes 37, 38, p 566 note 39.

95. Mich.—Hill v. Taylor, 15 N.W. 899, 50 Mich. 549.

W.Va.—Claiborne v. Chesapeake &

doers,⁹⁶ or merely private interests.⁹⁷ Where a party is legally liable for false imprisonment as a consequence of an unauthorized order of a judge, he should not be penalized because such order may have been prompted in some degree by a spirit of tyranny on the part of the judge.⁹⁸ However, the fact that the wrong was done with good motives will not protect the wrongdoer from liability for punitive damages if he knowingly acts illegally.⁹⁹

c. Absence of Actual Damage

Usually there must be some actual damage to sustain an award of punitive damages.

In accordance with the rules governing the award of punitive damages in actions generally, which are discussed in Damages § 118, it is usually required that there be some actual damage to sustain an award of punitive damages.¹ Thus a judgment on a verdict awarding punitive but no actual damages has been held error.² However, an instruction that, if plaintiff sustained no actual damages, he cannot recover punitive damages in any event has been held properly refused;³ and it has been said that in cases of this kind it is not necessary to prove any compensatory damages.⁴ Nominal compensatory damages will support a verdict for punitive damages.⁵

d. Liability of Employer or Principal

In a proper case a master or principal may be liable

in exemplary damages for a false imprisonment occasioned by his servant or agent.

Under the rules applicable to the recovery of exemplary damages generally, which are discussed in Damages § 125, a master or principal may be liable in exemplary damages for a false imprisonment occasioned by his servant or agent,⁶ although in some jurisdictions he must be shown to have participated in the wrongful act,⁷ or expressly or impliedly authorized or ratified it,⁸ or, prior to the act, have had knowledge of the unfitness or incompetency of the servant or agent.⁹ If a corporation through its responsible officers participates in or directs the unlawful acts, the corporation will be liable for exemplary damages.¹⁰

e. Determination of Amount

While the amount awarded as exemplary damages is not dependent on the amount of the general or actual damages, it must be reasonable and not an arbitrary award.

As is discussed supra § 59, the amount to be awarded as exemplary damages is ordinarily a question for the jury. While the amount of the award is not limited by, or dependent on, the amount of the general or actual damages,¹¹ it must be reasonable according to the circumstances of the case,¹² and not an arbitrary award.¹³ Plaintiff's social and

O. R. Co., 33 S.E. 262, 46 W.Va. 363.

25 C.J. p 566 note 37.

96. Ark.—Missouri Pac. R. Co. v. Yancey, 10 S.W.2d 22, 178 Ark. 147. Mo.—Steiner v. Degan, App., 101 S.W.2d 519.

25 C.J. p 565 note 38.

97. W.Va.—Ogg v. Murdock, 25 W.Va. 139.

25 C.J. p 566 note 39.

98. Tex.—Dallas Joint Stock Land Bank of Dallas v. Britton, 135 S.W.2d 981, 134 Tex. 529.

99. Ala.—Corpus Juris quoted in Caudle v. Sears, Roebuck & Co., 182 So. 461, 463, 236 Ala. 37.

1. Miss.—Lenaz v. Conway, 105 So. 2d 762.

Tex.—Piper v. Duncan, Civ.App., 131 S.W.2d 397, error refused.

25 C.J. p 566 note 41.

2. Mo.—Hoagland v. Forest Park Highlands Amusement Co., 70 S.W. 873, 170 Mo. 335, 94 Am.S.R. 740.

3. Ala.—Burk v. Knott, 101 So. 811, 20 Ala.App. 316.

4. N.J.—Hesse v. Clark, 141 A. 570, 571, 6 N.J.Misc. 421.

5. Mo.—Davis v. Chicago, R. I. & P. R. Co., 182 S.W. 826, 192 Mo. App. 419.

6. Ala.—Standard Oil Co. v. Davis, 94 So. 754, 208 Ala. 565.

Md.—Safeway Stores, Inc. v. Barrack, 122 A.2d 457, 210 Md. 168.

Tex.—S. H. Kress & Co. v. Rust, 120 S.W.2d 425, 132 Tex. 89.

Va.—Virginia Electric & Power Co. v. Wynne, 141 S.E. 829, 149 Va. 882.

25 C.J. p 566 note 45.

Receiver may be liable in his official capacity for the willful, wanton, oppressive, or malicious acts of his employees.

Miss.—Gardner v. Martin, 85 So. 182, 123 Miss. 218.

Mo.—Comstock v. Wells, App., 259 S.W. 500.

7. D.C.—Woodward v. Ragland, 5 App.D.C. 220.

25 C.J. p 566 note 46.

8. N.Y.—Cope v. John Wanamaker of New York, 292 N.Y.S. 51, 249 App.Div. 747, motion denied 6 N.E.2d 428, 273 N.Y. 510, and affirmed 10 N.E.2d 581, 274 N.Y. 622—Walker v. Lord & Taylor, 258 N.Y.S. 96, 236 App.Div. 111.

Ohio.—Morton v. Murphy Lumber & Hardware Co., Com.Pl., 102 N.E. 2d 744.

R.I.—Staples v. Schmid, 26 A. 193, 18 R.I. 224, 19 L.R.A. 824.

Tex.—S. H. Kress & Co. v. Lindley, Civ.App., 46 S.W.2d 379.

Va.—Hogg v. Plant, 133 S.E. 759, 145 Va. 175, 47 A.L.R. 308.

25 C.J. p 566 note 47.

Batification shown

Street car company reporting passenger's arrest to attorneys for prosecution ratified conductor's tortious conduct and was subject to punitive damages.

Va.—Virginia Electric & Power Co. v. Wynne, 141 S.E. 829, 149 Va. 882.

9. N.Y.—Kastner v. Long Island R. Co., 78 N.Y.S. 469, 78 App.Div. 323, 12 N.Y.Ann.Cas. 77.

25 C.J. p 566 note 48.

10. Ala.—Standard Oil Co. v. Davis, 94 So. 754, 208 Ala. 565.

25 C.J. p 566 note 49.

11. Mo.—McGill v. Walnut Realty Co., 148 S.W.2d 131, 235 Mo.App. 874.

Or.—Shain v. Meier & Frank Co., 13 P.2d 360, 140 Or. 518.

12. Mo.—Corpus Juris cited in Newport v. Montgomery Ward & Co., 127 S.W.2d 687, 691, 344 Mo. 646. 25 C.J. p 566 note 51.

13. N.Y.—Brown v. Chadsey, 39 Barb. 253.

economic status,^{13.5} as well as defendant's wealth,¹⁴ may be considered in fixing the amount of punitive damages.

Excessive and inadequate damages are considered *infra* § 68.

f. Mitigation

Matters in mitigation may be properly considered for the purpose of reducing the amount of punitive damages.

In those cases in which punitive damages may be awarded, it is proper to admit evidence of mitigating circumstances warranting a reduction of such damages,¹⁵ as, for example, defendant's good faith¹⁶ or the absence of actual malice.¹⁷ Other matters, such as personal courtesy shown the injured party,¹⁸ that the action complained of was taken on advice of counsel,¹⁹ probable cause,²⁰ proof of plaintiff's own misconduct,²¹ or provocation,²² may also be shown.

Effect of secondary liability. Proof that a person other than the person doing the wrong will be compelled to pay the damages assessed is not proper as a matter in mitigation of damages.²³

§ 68. Excessive and Inadequate Damages

Unless an abuse of discretion is shown, the verdict of the jury will not usually be disturbed on the ground of its inadequacy or excessiveness.

The law does not prescribe a definite rule for the ascertainment of the exact amount of damages recoverable for false imprisonment,²⁴ such question being primarily one for the determination of the jury, or for the trial court sitting without a jury, as is discussed *supra* § 59. In fixing the amount of damages a jury are justified in exercising a liberal discretion, taking into consideration all the items for which damages may properly be awarded.²⁵ Although many items of damage sustained by reason of a false imprisonment are not capable of being measured accurately in money value, they are still proper items of compensation, and the jury, after considering the facts of each case, may properly award such amount of damages as in their fair judgment they consider will properly compensate the injured person.²⁶

As a general rule the verdict of a jury will not be interfered with because of its inadequacy except

13.5 U.S.—Boice v. Bradley, D.C. Idaho, 92 F.Supp. 750, affirmed, C.A., Bradley Min. Co. v. Boice, 194 F.2d 80, certiorari denied 72 S.Ct. 1033, 343 U.S. 941, 96 L.Ed. 1347, and rehearing denied, C.A., 205 F.2d 937, certiorari denied 74 S.Ct. 125, 346 U.S. 874, 98 L.Ed. 382.

Financial condition of parties as bearing on exemplary damages generally see Damages § 126 b.

14. U.S.—Boice v. Bradley, D.C. Idaho, 92 F.Supp. 750, affirmed, C.A., Bradley Min. Co. v. Boice, 194 F.2d 80, certiorari denied 72 S.Ct. 1033, 343 U.S. 941, 96 L.Ed. 1347, and rehearing denied, C.A., 205 F.2d 937, certiorari denied 74 S.Ct. 125, 346 U.S. 874, 98 L.Ed. 382.

Mo.—McGill v. Walnut Realty Co., 148 S.W.2d 131, 235 Mo.App. 874, 25 C.J. p 566 note 54.

15. Ky.—Corpus Juris Secundum cited in Shepherd v. City of Richmond, 208 S.W.2d 744, 747, 306 Ky. 595.

Mo.—Titus v. Montgomery Ward & Co., 123 S.W.2d 574, 232 Mo.App. 987—Vaughn v. Hines, 230 S.W. 379, 206 Mo.App. 425.

25 C.J. p 566 note 57.

Mitigation equivalent of avoidance

The word "mitigation" is sometimes used as meaning the avoidance of punitive damages.

Ky.—Roberts v. Hackney, 58 S.W. 810, 59 S.W. 328, 109 Ky. 265, 22 Ky.L. 975.

S.D.—Cullen v. Dickinson, 144 N.W.

656, 33 S.D. 27, 50 L.R.A., N.S., 987, Ann.Cas.1916B 115.

Due process

The fact that conspiracy and false incarceration in insane asylum were according to "due process" goes only in mitigation where jury find malice. Mo.—Rice v. Gray, 34 S.W.2d 567, 225 Mo.App. 890.

16. S.D.—Cullen v. Dickinson, 144 N.W. 656, 33 S.D. 27, 50 L.R.A., N.S., 987, Ann.Cas.1916B 115, 25 C.J. p 567 note 58.

17. Mo.—Corpus Juris cited in Newport v. Montgomery Ward & Co., 127 S.W.2d 687, 691, 344 Mo. 646. N.Y.—Sanders v. Rolnick, 67 N.Y.S. 2d 652, 188 Misc. 627, affirmed 71 N.Y.S.2d 896, 272 App.Div. 803, 25 C.J. p 567 note 59.

18. Ill.—Field v. Kane, 99 Ill.App. 1. Mo.—Tiede v. Fuhr, 175 S.W. 910, 264 Mo. 622.

19. Tex.—Taylor v. Hearn, 133 S.W. 301, 63 Tex.Civ.App. 333, 25 C.J. p 567 note 61.

20. Mo.—Titus v. Montgomery Ward & Co., 123 S.W.2d 574, 232 Mo.App. 987.

N.Y.—Jones v. Freeman's Dairy, 127 N.Y.S.2d 200, 283 App.Div. 667, opinion supplemented 129 N.Y.S.2d 498, 283 App.Div. 806.

Sanders v. Rolnick, 67 N.Y.S.2d 652, 188 Misc. 627, affirmed 71 N.Y.S.2d 896, 272 App.Div. 803.

21. La.—O'Malley v. Whitaker, 43 So. 545, 118 La. 906, 25 C.J. p 567 note 62.

22. Del.—Petit v. Colmery, 55 A. 344, 20 Del. 266, 25 C.J. p 567 note 63.

23. La.—Russell v. Beyle, 5 La.App. Orleans, 98, 25 C.J. p 567 note 64.

24. U.S.—Boice v. Bradley, D.C. Idaho, 92 F.Supp. 750, affirmed, C.A., Bradley Min. Co. v. Boice, 194 F.2d 80, certiorari denied 72 S.Ct. 1033, 343 U.S. 941, 96 L.Ed. 1347, and rehearing denied 205 F.2d 937, certiorari denied 74 S.Ct. 125, 346 U.S. 874, 98 L.Ed. 382.

Neb.—Doeschner v. Robinson, 271 N. W. 784, 132 Neb. 299. Va.—Hogg v. Plant, 133 S.E. 759, 145 Va. 175, 47 A.L.R. 308.

25. U.S.—Boice v. Bradley, D.C. Idaho, 92 F.Supp. 750, affirmed, C.A., Bradley Min. Co. v. Boice, 194 F.2d 80, certiorari denied 72 S.Ct. 1033, 343 U.S. 941, 96 L.Ed. 1347, and rehearing denied, C.A., 205 F.2d 937, certiorari denied 74 S.Ct. 125, 346 U.S. 874, 98 L.Ed. 382.

Cal.—Miller v. Turner, 194 P. 66, 49 C.A. 653.

Baines v. Brady, 265 P.2d 194, 122 C.A.2d Supp. 957.

Ill.—Shelton v. Barry, 66 N.E.2d 697, 328 Ill.App. 497, 25 C.J. p 568 note 81.

26. Iowa.—Young v. Gormley, 94 N. W. 922, 120 Iowa 372, 25 C.J. p 568 note 83.

where it is entirely too small to compensate for the injury,²⁷ even though in the opinion of the court the jury should have awarded heavier damages;²⁸ nor will it be disturbed because excessive, even

though the court would on the evidence have favored a smaller verdict, unless it appears that the discretion of the jury has been abused,²⁹ or unless

27. Tex.—Schnauffer v. Price, Civ. App., 124 S.W.2d 940, error refused. 25 C.J. p 568 note 84.

Amounts held adequate

(1) Nominal damages.

N.J.—Miller v. Borough of Belmar, 135 A. 795, 5 N.J.Misc. 224. 25 C.J. p 568 note 84 [a] (1), (2).

(2) \$50.

Tex.—Taylor v. Davis, 13 S.W. 642.

(3) \$100.

U.S.—Elman v. Moller, C.C.A.Va., 11 F.2d 55, certiorari denied 46 S.Ct. 488, 271 U.S. 675, 70 L.Ed. 1145. Young v. Rossi, D.C.N.Y., 30 F. 231.

Mo.—Heffer v. Hunt, 112 A. 675, 120 Me. 10.

Tex.—Schnauffer v. Price, Civ.App., 124 S.W.2d 940, error refused.

(4) \$250.

La.—Gladney v. deBretton, 49 So.2d 18, 218 La. 296—Burton v. Llano Del Rio Co. of Nevada, 148 So. 259, 177 La. 366—Thomas v. Henderson, 51 So. 202, 125 La. 292. N.Y.—Bass v. State, 92 N.Y.S.2d 42, 196 Misc. 177.

Ward v. Grow, 179 N.Y.S.2d 191, 14 Misc.2d 844.

(5) \$300.

Or.—Paget v. Cordes, 277 P. 101, 129 Or. 224.

(6) \$500.

Md.—Dennis v. Baltimore Transit Co., 56 A.2d 813, 189 Md. 610.

(7) \$1,000.

Colo.—Johnson v. Enlow, 286 P.2d 630, 132 Colo. 101.

La.—O'Rourke v. O'Rourke, App., 69 So.2d 567, affirmed 79 So.2d 87, 227 La. 262.

N.Y.—Roher v. State, 112 N.Y.S.2d 603, 279 App.Div. 1116.

Vallon v. Ramage, 93 N.Y.S.2d 56, 196 Misc. 740.

Davis v. Nadell, 138 N.Y.S.2d 50.

(8) \$1,500.

N.Y.—Dailey v. State, 75 N.Y.S.2d 40, 190 Misc. 542.

(9) \$2,000.

N.Y.—Bonnau v. State, 104 N.Y.S.2d 364, 278 App.Div. 181, affirmed 103 N.E.2d 340, 303 N.Y. 721.

(10) \$3,000.

N.Y.—Cicurel v. Mollet, 149 N.Y.S.2d 397, 1 A.D.2d 239, affirmed 135 N.E.2d 594, 1 N.Y.2d 797, 153 N.Y.S.2d 60.

(11) \$3,500.

N.Y.—Waterman v. State, 149 N.Y. S.2d 381, 1 A.D.2d 235, affirmed 140 N.E.2d 551, 2 N.Y.2d 803, 159 N.Y. S.2d 702.

(12) \$4,000.

N.Y.—Williams v. State, 172 N.Y.S. 2d 206, 5 A.D.2d 936.

(13) Other amounts.

U.S.—Williams v. Carolina Coach Co., 111 F.Supp. 329, affirmed, C.A., Carolina Coach Co. v. Williams, 207 F.2d 408.

N.Y.—Hoffner v. State, 142 N.Y.S.2d 630, 207 Misc. 1070.

Amounts held inadequate

(1) \$1.

Kan.—Burt v. Orr, 244 P. 1044, 120 Kan. 719.

(2) \$25.

Ga.—Potter v. Swindle, 3 S.E. 94, 77 Ga. 419.

(3) \$250.

La.—Russell v. Beyle, 5 La.App., Orleans, 98.

N.Y.—Tierney v. State, 42 N.Y.S.2d 877, 266 App.Div. 434, affirmed 54 N.E.2d 207, 292 N.Y. 523.

28. Ga.—Potter v. Swindle, 3 S.E. 94, 77 Ga. 419.

Tex.—Taylor v. Davis, 13 S.W. 642.

29. U.S.—Boice v. Bradley, D.C.Idaho, 92 F.Supp. 750, affirmed, C.A., Bradley Min. Co. v. Boice, 194 F.2d 80, certiorari denied 72 S.Ct. 1033, 343 U.S. 941, 96 L.Ed. 1347, and rehearing denied 205 F.2d 937, certiorari denied 74 S.Ct. 125, 346 U.S. 874, 98 L.Ed. 382.

Cal.—Collins v. Jones, 22 P.2d 39, 131 C.A. 747.

Ga.—Hines v. Adams, 107 S.E. 618, 27 Ga.App. 155, first case.

Ind.—Baltimore & O. R. Co. v. Apple-gate, 149 N.E. 651, 84 Ind.App. 192, rehearing denied 150 N.E. 794, 84 Ind.App. 215.

Iowa.—Corpus Juris Secundum cited in McVay v. Carpe, 29 N.W.2d 582, 587, 238 Iowa 1131.

Kan.—Corpus Juris cited in Lewis v. Montgomery Ward & Co., 62 P.2d 875, 879, 144 Kan. 656.

Ky.—National Bond & Investment Co. v. Whithorn, 123 S.W.2d 263, 276 Ky. 204.

Mich.—Corpus Juris cited in Fisher v. Rumler, 214 N.W. 310, 311, 239 Mich. 224.

Mo.—Peterson v. Fleming, 297 S.W. 163, 222 Mo.App. 296.

Mont.—Cline v. Tait, 155 P.2d 752, 116 Mont. 571—Panisko v. Dreibel-bis, 124 P.2d 997, 113 Mont. 310.

Pa.—Pride v. Pride, 29 Del.Co. 352. 25 C.J. p 568 notes 86, 87.

"The amount may be so large as to exceed any compensation that a jury could reasonably allow under the circumstances of the case. In such case, the verdict is excessive."

Va.—Hogg v. Plant, 133 S.E. 759, 761, 145 Va. 175, 47 A.L.R. 308.

Amounts held excessive

(1) \$250.

La.—Girlinghouse v. Zwahlen, 3 La. App. 720.

(2) \$500.

La.—Sweeten v. Friedman, 118 So. 787, 9 La.App. 44.

Pa.—Nielsen v. Devereux Founda-tions, Inc., Com.Pl., 4 Chest.Co. 368 —Persinski v. Stryjewski, Com. Pl., 92 Pittsb.Leg.J. 421.

(3) \$572.40.

Wash.—Nunn v. Turner, 234 P. 443, 133 Wash. 654.

(4) \$750.

R.I.—Ungaro v. Ciccio, 104 A.2d 240, 81 R.I. 432.

Tex.—Chicago, R. I. & G. Ry. Co. v. Neubert, Civ.App., 248 S.W. 139.

(5) \$1,000.

Ind.—Baltimore & O. R. Co. v. Apple-gate, 149 N.E. 651, 84 Ind.App. 192, rehearing denied 150 N.E. 794, 84 Ind.App. 215.

Ky.—Couch v. Vanhooose, 234 S.W.2d 169, 314 Ky. 36.

La.—Healey v. Playland Amuse-ments, App., 199 So. 682.

Md.—Heinze v. Murphy, 24 A.2d 917, 180 Md. 423.

Mich.—Fisher v. Rumler, 214 N.W. 310, 239 Mich. 224.

Mo.—Vaughn v. Hines, 230 S.W. 379, 206 Mo.App. 425.

25 C.J. p 568 note 86 [a] (9).

(6) Amount in excess of \$1,500.

Ala.—Gadsden General Hospital v. Hamilton, 103 So. 553, 212 Ala. 531, 40 A.L.R. 294.

(7) \$2,000.

Ky.—Blue Diamond Coal Co. v. Campbell, 252 S.W.2d 421.

Mich.—D'Hondt v. Slovekowski, 10 N.W.2d 332, 306 Mich. 156.

Mo.—Thompson v. St. Louis-San Francisco Ry. Co., App., 3 S.W.2d 1033.

25 C.J. p 568 note 86 [a] (15).

(8) \$2,500.

Ky.—Illinois Cent. R. Co. v. Ander-son, 256 S.W. 1113, 201 Ky. 408.

Va.—Hogg v. Plant, 133 S.E. 759, 145 Va. 175, 47 A.L.R. 308.

Wis.—Hotzel v. Simmons, 45 N.W.2d 683, 258 Wis. 234.

25 C.J. p 568 note 86 [a] (16).

(9) \$2,650.

Ala.—Bank of Cottonwood v. Hood, 149 So. 676, 227 Ala. 237.

(10) \$3,000.

Ala.—Standard Oil Co. v. Humphries, 96 So. 629, 209 Ala. 493.

Mo.—Gust v. Montgomery Ward & Co., 136 S.W.2d 94, 234 Mo.App. 611.

Neb.—Dillon v. Sears-Roebuck Co., 253 N.W. 331, 126 Neb. 357.
25 C.J. p 568 note 86 [a] (18).

(11) \$4,000.

N.Y.—Lomonaco v. Village of Canastota, 134 N.Y.S.2d 282, 284 App. Div. 926.

(12) \$4,500.

Mont.—Cline v. Tait, 155 P.2d 752, 116 Mont. 571.

(13) \$5,000.

Kan.—Lewis v. Montgomery Ward & Co., 62 P.2d 875, 144 Kan. 656.

N.J.—Hough v. Ogden, 133 A. 73, 4 N.J.Misc. 455.

Tex.—Hicks v. Matthews, Civ.App., 261 S.W.2d 207, reversed on other grounds 266 S.W.2d 846, 153 Tex. 177.

(14) Amount in excess of \$5,000.

N.Y.—Peabody v. Westchester Racing Ass'n, 135 N.Y.S.2d 252, 284 App.Div. 946—Dumas v. Erie R. Co., 278 N.Y.S. 197, 243 App.Div. 792.

(15) \$6,000.

Mont.—Cline v. Tait, 129 P.2d 89, 113 Mont. 475.

Pa.—Arye v. Dickstein, 12 A.2d 19, 337 Pa. 471.

(16) \$6,500.

Iowa.—Sergeant v. Watson Bros. Transp. Co., 52 N.W.2d 86, 244 Iowa 185.

(17) \$7,500.

Kan.—Hammargren v. Montgomery Ward & Co., 241 P.2d 1192, 172 Kan. 484.

Tenn.—Streetmen v. Richardson, 266 S.W.2d 838, 37 Tenn.App. 524.

Tex.—A. Harris & Co. v. Caldwell, Civ.App., 276 S.W. 298.

(18) \$9,000.

Tex.—Marsalis Motors v. Simmons, Civ.App., 303 S.W.2d 510, error refused no reversible error.

(19) \$10,000.

Kan.—Hammargren v. Montgomery Ward & Co., 241 P.2d 1192, 172 Kan. 484.

Tex.—Hicks v. Matthews, Civ.App., 261 S.W.2d 207, reversed on other grounds 266 S.W.2d 846, 153 Tex. 177.

(20) \$11,000.

S.D.—Gamble v. Keyes, 206 N.W. 477, 49 S.D. 39.

(21) \$12,000.

Mo.—Newport v. Montgomery Ward & Co., 127 S.W.2d 687, 344 Mo. 646.

(22) \$25,000.

Ill.—Montgomery v. Harms, 110 N.E. 2d 522, 349 Ill.App. 245.

(23) \$40,000.

N.Y.—Baird v. City of Hornell, 185 N.Y.S.2d 933.

(24) Other amounts see 25 C.J. p 568 note 86 [a].

Amounts held not excessive

(1) \$25.

Cal.—Baines v. Brady, 265 P.2d 194, 122 C.A.2d Supp. 957.

(2) \$100.

Ky.—Gividen v. Sullenger, 243 S.W. 2d 883.

Neb.—Robertson v. Safe Way Stores, 264 N.W. 155, 130 Neb. 85.

25 C.J. p 568 note 86 [b] (1).

(3) \$125.

La.—Rodi v. Sizeler, App., 145 So. 38.

25 C.J. p 568 note 86 [b] (4).

(4) \$150.

Me.—Stern v. Sullivan, 188 A. 719, 135 Me. 1.

(5) \$250.

Ill.—Hassenauer v. F. W. Woolworth Co., 41 N.E.2d 979, 314 Ill.App. 569.

N.Y.—Damilitis v. Kerjas Lunch Corporation, 300 N.Y.S. 574, 165 Misc. 186.

Tenn.—Deaderick v. Smith, 230 S.W. 2d 406, 33 Tenn.App. 151.

Tex.—Price v. Durdin, Civ.App., 207 S.W.2d 228.

25 C.J. p 568 note 86 [b] (7).

(6) \$300.

Neb.—Robertson v. Safe Way Stores, 264 N.W. 153, 130 Neb. 82.

25 C.J. p 568 note 86 [b] (8).

(7) \$350.

N.Y.—Grago v. Vassello, 19 N.Y.S.2d 34, 173 Misc. 736.

(8) \$400.

W.Va.—Clark v. Kelly, 133 S.E. 365, 101 W.Va. 650, 46 A.L.R. 799.

25 C.J. p 568 note 86 [b] (10).

(9) \$450.

Cal.—Miller v. Turner, 194 P. 66, 49 C.A. 653.

25 C.J. p 568 note 86 [b] (11).

(10) \$500.

Ala.—Kearley v. Cowan, 116 So. 145, 217 Ala. 295.

Cal.—Shanafelt v. Seaboard Finance Co., 239 P.2d 42, 108 C.A.2d 420—

Coyne v. Nelson, 237 P.2d 45, 107 C.A.2d 469.

Kan.—Cordell v. Standard Oil Co., 289 P. 472, 131 Kan. 221.

Ky.—Gividen v. Sullenger, 243 S.W. 2d 883—Noe v. Meadows, 16 S.W. 2d 505, 229 Ky. 53, 64 A.L.R. 648—

Wright & Taylor v. Leigh, 16 S. W.2d 493, 229 Ky. 32—Louisville & N. R. Co. v. Offutt, 263 S.W. 665, 204 Ky. 51.

Mo.—Thompson v. St. Louis-San Francisco Ry. Co., App., 3 S.W.2d 1033—Peterson v. Fleming, 297 S. W. 163, 222 Mo.App. 296.

Pa.—Nielsen v. Devereux Foundations, Inc., Com.Pl., 4 Chest.Co. 368—Long v. Great Atlantic & Pacific Tea Co., 29 Del.Co. 508.

Va.—Crosswhite v. Barnes, 124 S.E. 242, 139 Va. 471, 40 A.L.R. 54.

Wash.—Wood v. Rolfe, 221 P. 982, 128 Wash. 55.

25 C.J. p 568 note 86 [b] (12).

(11) \$600.

Ark.—Arkansas Central Power Co. v. Hildreth, 296 S.W. 33, 174 Ark. 529.

(12) \$650.

Iowa.—Dedman v. McKinley, 29 N. W.2d 337, 238 Iowa 886.

(13) \$700.

Ky.—National Bond & Investment Co. v. Whithorn, 123 S.W.2d 263, 276 Ky. 204.

25 C.J. p 568 note 86 [b] (15).

(14) \$750.

Cal.—Coyne v. Nelson, 237 P.2d 45, 107 C.A.2d 469—Vandiveer v. Charters, 294 P. 440, 110 C.A. 347.

Ga.—Standard Sur. & Cas. Co. of N. Y. v. Johnson, 41 S.E.2d 576, 74 Ga.App. 823—Hines v. Adams, 107 S.E. 618, 27 Ga.App. 155, second case.

Ill.—Lindquist v. Friedman's, 1 N.E. 2d 529, 285 Ill.App. 71, affirmed 8 N.E.2d 625, 366 Ill. 232.

Va.—S. H. Kress & Co. v. Musgrove, 149 S.E. 453, 153 Va. 348.

25 C.J. p 568 note 86 [b] (16).

(15) \$850.

N.Y.—Regan v. Morgan, 207 N.Y.S. 395, 211 App.Div. 443.

25 C.J. p 568 note 86 [b] (19).

(16) \$900.

Va.—W. T. Grant Co. v. Owens, 141 S.E. 860, 149 Va. 906.

25 C.J. p 568 note 86 [b] (20).

(17) \$1,000.

Cal.—Turner v. Elliott, 206 P.2d 48, 91 C.A.2d 901—Kenyon v. Hartford Accident & Indemnity Co., 260 P. 952, 86 C.A. 269.

Iowa.—McVay v. Carpe, 29 N.W.2d 582, 238 Iowa 1131.

Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Roberts, 249 S.W. 1012, 198 Ky. 710.

Minn.—Wallerick v. McGill Warner Co., 191 N.W. 604, 154 Minn. 341.

Mo.—Jarrett v. St. Francois County Finance Co., App., 185 S.W.2d 855—Vaughn v. Hines, 230 S.W. 379, 206 Mo.App. 425.

Neb.—Doescher v. Robinson, 271 N. W. 784, 132 Neb. 299.

S.C.—Wright v. Gilbert, 88 S.E.2d 72, 227 S.C. 334.

Va.—Young v. Merritt, 29 S.E.2d 834, 182 Va. 605.

25 C.J. p 568 note 86 [b] (23).

(18) \$1,089.05.

Me.—Bragg v. Hatfield, 130 A. 233, 124 Me. 391.

(19) \$1,200.

Cal.—Turner v. Elliott, 206 P.2d 48, 91 C.A.2d 901.

(20) \$1,500.

Ark.—Arnold v. State ex rel. Burton, 245 S.W.2d 818, 220 Ark. 25—Missouri Pac. R. Co. v. Hill, 138 S.W. 2d 783, 200 Ark. 253.

Cal.—Gooding v. McAlister, 299 P. 774, 114 C.A. 284.

Iowa.—Schultz v. Enlow, 205 N.W. 972, 201 Iowa 1083.

Mo.—Oliver v. Kessler, App., 95 S.W. 2d 1226.

it appears, in view of all the facts and circumstances, that they have acted under a mistake,³⁰ or under the influence of passion or prejudice,³¹ or other improper influence.³² When the court determines the quantum of damages, it is vested with the same discretion a jury would have had if the case had been tried before a jury,³³ and its decision as to the amount of damages to be awarded will be interfered

with only where a verdict of a jury would be.³⁴

§ 69. Joint Tort-Feasors

Damages cannot be recovered against defendants jointly unless growing out of matters occurring after joint participation begins. The cases are not in accord as to whether a finding against joint defendants should be in a single amount or in separate amounts.

Damages cannot be recovered against defend-

Ohio.—Nappi v. Wilson, 155 N.E. 151, 22 Ohio App. 520.
25 C.J. p 568 note 86 [b] (25).

(21) \$2,000.

Cal.—Schanafelt v. Seaboard Finance Co., 239 P.2d 42, 108 C.A.2d 420.

Mich.—Odinetz v. Budds, 24 N.W.2d 193, 315 Mich. 512.

Mont.—Panisko v. Dreibelbis, 124 P. 2d 997, 113 Mont. 310.

N.Y.—Saurel v. Sellick, 279 N.Y.S. 323, 244 App.Div. 845.

S.C.—Falls v. Palmetto Power & Light Co., 109 S.E. 93, 117 S.C. 327.
25 C.J. p 568 note 86 [b] (29).

(22) \$2,250.

U.S.—Burke v. New York, N. H. & H. R. Co., C.A.N.Y., 267 F.2d 894.

Kan.—Gariety v. Fleming, 245 P. 1054, 121 Kan. 42.

(23) \$2,500.

Ill.—Aldridge v. Fox, 108 N.E.2d 139, 348 Ill.App. 96.

Mich.—Howard v. Burton, 61 N.W.2d 77, 338 Mich. 178.

N.Y.—Thomas v. First Nat. Bank of Lisbon, 33 N.Y.S.2d 500, 263 App. Div. 476.

Okl.—Halliburton-Abbott Co. v. Hodge, 44 P.2d 122, 172 Okl. 175.

Tenn.—(Blue) Star Service, Inc. v. McCurdy, 251 S.W.2d 139, 36 Tenn. App. 1—Deaderick v. Smith, 230 S.W.2d 406, 33 Tenn.App. 151.
25 C.J. p 568 note 86 [b] (31).

(24) \$2,515.

Cal.—Bate v. Jolin, 274 P. 971, 206 C. 504.

(25) \$2,725.

W.Va.—Jones v. Hebdo, 106 S.E. 898, 88 W.Va. 386.

(26) \$2,950.

Colo.—Union Pac. R. Co. v. Dennis, 213 P. 332, 73 Colo. 66.

(27) \$3,000.

Ark.—Missouri Pac. R. Co. v. Yancey, 22 S.W.2d 408, 180 Ark. 684.

Mich.—Howard v. Burton, 61 N.W.2d 77, 338 Mich. 178—Odinetz v. Budds, 24 N.W.2d 193, 315 Mich. 512.

S.C.—Westbrook v. Hutchison, 10 S. E.2d 145, 195 S.C. 101.

25 C.J. p 568 note 86 [b] (32).

(28) \$3,079.

N.C.—Ford v. McAnally, 109 S.E. 91, 182 N.C. 419.

(29) \$3,500.

Cal.—Peckham v. Warner Bros. Pictures, 108 P.2d 699, 42 C.A.2d 187.
25 C.J. p 568 note 86 [b] (33).

(30) \$3,750.

Mo.—McGill v. Walnut Realty Co., 148 S.W.2d 131, 235 Mo.App. 874.

(31) \$4,000.

Ind.—Matovina v. Hult, 123 N.E.2d 893, 123 Ind.App. 236.

(32) \$4,500.

Mo.—Schuler v. Hughes, App., 52 S. W.2d 453.

25 C.J. p 568 note 86 [b] (35).

(33) \$5,000.

U.S.—Jackson v. Duke, C.A.Tex., 259 F.2d 3—Ingo v. Koch, C.C.A.N.Y., 127 F.2d 667.

Cal.—Gibson v. J. C. Penney Co., App., 331 P.2d 1057.

Mo.—Daniel v. Phillips Petroleum Co., 73 S.W.2d 355, 220 Mo.App. 150.

Okl.—Mayo Hotel Co. v. Cooper, 298 P.2d 443.

25 C.J. p 568 note 86 [b] (36).

(34) \$5,500.

Cal.—Peckham v. Warner Bros. Pictures, 108 P.2d 699, 42 C.A.2d 187.

(35) \$5,600.

Ga.—McClure Ten Cent Co. v. Humphries, 127 S.E. 151, 33 Ga. App. 523.

(36) \$8,000.

Ala.—Southern Ry. Co. v. Beaty, 103 So. 658, 212 Ala. 608.

Mont.—Kelly v. Kipp, 250 P. 819, 77 Mont. 110.

(37) \$8,500.

N.J.—Boesch v. Kick, 116 A. 796, 97 N.J.Law 92.

(38) \$10,000.

Ga.—Central of Georgia Ry. Co. v. Dabney, 160 S.E. 818, 44 Ga.App. 143.

(39) \$10,000 general damages, and \$500 exemplary damages.

Cal.—Collins v. Jones, 22 P.2d 39, 131 C.A. 747.

(40) \$12,000.

Mo.—Newport v. Montgomery Ward & Co., 127 S.W.2d 687, 344 Mo. 646.

(41) \$15,000.

Ill.—Ferrell v. Livingston, 101 N.E. 2d 599, 344 Ill.App. 488.

(42) \$24,000.

S.C.—Wright v. Gilbert, 88 S.E.2d 72, 227 S.C. 334.

(43) \$25,000.

Cal.—Peterson v. Cruickshank, 300 P.2d 915, 144 C.A.2d 148.

N.J.—Sheean v. Holman, 141 A. 170, 6 N.J.Misc. 346.

(44) Other amounts.

U.S.—Hundley v. Milner Hotel Management Co., D.C.Ky., 114 F.Supp. 206, affirmed, C.A., Milner Hotel Management Co. v. Hundley, 216 F.2d 613—Boice v. Bradley, D.C. Idaho, 92 F.Supp. 750, affirmed, C. A., Bradley Min. Co. v. Boice, 194 F.2d 80, certiorari denied 72 S.Ct. 1033, 343 U.S. 941, 96 L.Ed. 1347, and rehearing denied, C.A., 205 F.2d 937, certiorari denied 74 S.Ct. 125, 346 U.S. 874, 98 L.Ed. 382.

Cal.—Alterauge v. Los Angeles Turf Club, 218 P.2d 802, 97 C.A.2d 735—Parrott v. Bank of America Nat. Trust & Sav. Ass'n, 217 P.2d 89, 97 C.A.2d 14, 35 A.L.R.2d 263.

Ill.—Shemaitis v. Collins, 109 N.E.2d 370, 348 Ill.App. 549.

Pa.—Nielsen v. Devereux Foundations, Inc., Com.Pl., 4 Chest.Co. 368—Kelley v. Laurito, Com.Pl., 94 Pittsb.Leg.J. 399.

25 C.J. p 568 note 86 [b].

30. Ala.—Gadsden General Hospital v. Hamilton, 103 So. 553, 212 Ala. 531, 40 A.L.R. 294.

Wis.—Marshall v. Heller, 13 N.W. 236, 55 Wis. 392.

31. U.S.—U. S. ex rel. Humphrey v. Janus, D.C.Idaho, 30 F.2d 530, reversed on other grounds, C.C.A., Janus v. U. S. ex rel. Humphrey, 38 F.2d 431.

Ala.—Standard Oil Co. v. Humphries, 96 So. 629, 209 Ala. 493.

Cal.—Collins v. Jones, 22 P.2d 39, 131 C.A. 747.

Ky.—Great Atlantic & Pacific Tea Co. v. Smith, 136 S.W.2d 759, 281 Ky. 533—Illinois Cent. R. Co. v. Anderson, 256 S.W. 1113, 201 Ky. 408.

Mo.—Gust v. Montgomery Ward & Co., 136 S.W.2d 94, 234 Mo.App. 611.

Mont.—Cline v. Tait, 155 P.2d 752, 116 Mont. 571.

25 C.J. p 571 note 89.

Verdicts held not result of passion or prejudice

Cal.—Turner v. Elliott, 206 P.2d 48, 91 C.A.2d 901.

32. Mont.—Cline v. Tait, 155 P.2d 752, 116 Mont. 571.

Vt.—Mazzolini v. Gifford, 98 A. 904, 90 Vt. 352.

25 C.J. p 571 note 90.

33. Cal.—Salo v. Smith, 143 P. 322, 25 C.A. 295.

34. Cal.—Salo v. Smith, supra.

ants jointly unless growing out of matters occurring after joint participation begins.³⁵

According to one view in the case of joint defendants each is liable for all of the damages sustained, and the verdict should be for one amount against all defendants for such sum as the most guilty ought to pay.³⁶ According to this view, however, where exemplary damages are claimed, they must be assessed according to the acts of the most innocent of defendants,³⁷ and, if any defendant is not liable for exemplary damages, none should be included in the verdict.³⁸ In such case if plaintiff desires exemplary damages he must proceed against the person who should be punished by the award of such damages.³⁹ According to another view the

finding against joint defendants may be in separate amounts,⁴⁰ and one or more of defendants may be assessed with exemplary damages, while only compensatory are allowed as against the rest.⁴¹

§ 70. Statutory Penalty

Under a statute fixing damages for false imprisonment by a peace officer in a given penal sum, proof of actual damage is unnecessary.

Where a statute fixes damages in a given penal sum for false imprisonment by a peace officer, proof of actual damage is unnecessary.⁴² Plaintiff recovers the given penal sum as liquidated damages merely on proof of the conditions prescribed in the statute as warranting a recovery.⁴³

VII. CRIMINAL RESPONSIBILITY

§ 71. Offenses and Responsibility Therefor

- a. Definition and nature of offense
- b. Defenses
- c. Persons liable

a. Definition and Nature of Offense

False imprisonment, as a criminal offense, is the actual and unlawful restraint or detention of one person

against his will by another, by actual or reasonably apprehended force.

False imprisonment was indictable as a specific crime at common law,⁴⁴ and this doctrine still applies in states where the common law has been adopted.⁴⁵ It is also made a crime by statute in many states.⁴⁶ The gist of the offense is the actual and unlawful restraint or detention of one person against his will by another,⁴⁷ without authority of

35. Mass.—*Martin v. Golden*, 62 N. E. 977, 180 Mass. 549.

36. Me.—*Allison v. Hobbs*, 51 A. 245, 96 Me. 26.

Pa.—*McCarthy v. De Armit*, 99 Pa. 63.

Separate awards of differing amounts held inconsistent and invalid.

Colo.—*Walker v. Tucker*, 280 P.2d 649, 131 Colo. 198.

37. Pa.—*McCarthy v. De Armit*, 99 Pa. 63.

38. Pa.—*McCarthy v. De Armit*, supra. 25 C.J. p 567 note 68.

39. Va.—*Norfolk & W. R. Co. v. Perdue*, 83 S.E. 1058, 117 Va. 111. 25 C.J. p 567 note 69.

40. Minn.—*Rauma v. Lamont*, 85 N. W. 236, 82 Minn. 477. 25 C.J. p 567 note 70.

41. N.Y.—*Latasa v. Aron*, 109 N.Y. S. 744, 59 Misc. 26. 25 C.J. p 567 note 71.

42. Neb.—*Hier v. Hutchings*, 78 N. W. 638, 58 Neb. 334.

43. Neb.—*Hier v. Hutchings*, supra.

44. Md.—*Midgett v. State*, 139 A.2d 209, 216 Md. 26.

Pa.—*Corpus Juris* quoted in *Commonwealth v. Brewer*, 167 A. 386, 389, 109 Pa.Super. 429. 25 C.J. p 571 note 91.

45. Pa.—*Corpus Juris* quoted in *Commonwealth v. Brewer*, 167 A. 386, 109 Pa.Super. 429.

46. Cal.—*People v. Agnew*, 107 P.2d 601, 16 C.2d 655. 25 C.J. p 571 note 92.

Abduction in the broad sense of carrying a person away wrongfully is the most aggravated species of "false imprisonment" included within the statute making it a felony to arrest or imprison another otherwise than according to law, but under circumstances not constituting kidnaping and holding for ransom.

Ky.—*Tarrence v. Commonwealth*, 265 S.W.2d 40, certiorari denied *Tarrence v. Commonwealth of Ky.*, 75 S.Ct. 220, 348 U.S. 899, 99 L.Ed. 706.

Purpose

The article of criminal code dealing with false imprisonment was intended to cover cases of false imprisonment, which are not included in the aggravated or simple kidnaping articles.

La.—*State v. Logan*, 34 So.2d 921, 213 La. 451.

Statutory definitions

(1) "The unlawful violation of the personal liberty of another."

Cal.—*People v. Zillbauer*, 279 P.2d 534, 44 C.2d 43—*People v. Agnew*, 107 P.2d 601, 16 C.2d 655.

People v. Hernon, 235 P.2d 614,

106 C.A.2d 638—*Parrott v. Bank of America Nat. Trust & Sav. Ass'n*, 217 P.2d 89, 97 C.A.2d 14, 35 A.L.R. 2d 263—*Dillon v. Haskell*, 178 P. 2d 462, 78 C.A.2d 814.

Mont.—*Kroeger v. Passmore*, 93 P. 805, 36 Mont. 504, 14 L.R.A., N.S., 988.

(2) Similar definitions.

Ga.—*Henderson v. State*, 99 S.E.2d 270, 95 Ga.App. 830.

Ill.—*People v. Cohoon*, 42 N.E.2d 969, 315 Ill.App. 259. 25 C.J. p 571 note 92 [a] (1), (2).

47. Cal.—*People v. Filbauer*, 279 P. 2d 534, 44 C.2d 43.

Ill.—*Corpus Juris* cited in *People v. Cohoon*, 42 N.E.2d 969, 970, 315 Ill. App. 259.

Md.—*Midgett v. State*, 139 A.2d 209, 216 Md. 26.

Neb.—*Grebe v. State*, 202 N.W. 909, 113 Neb. 327.

Pa.—*Commonwealth v. Brewer*, 167 A. 386, 109 Pa.Super. 429. 25 C.J. p 571 note 93.

The offense consists of two elements, the violation of another's personal liberty, and the unlawfulness of such violation.

Cal.—*People v. Agnew*, 107 P.2d 601, 16 C.2d 655.

Ill.—*People v. Cohoon*, 42 N.E.2d 969, 315 Ill.App. 259.

The word "detention," as used in statute defining "false imprison-

law,^{47.5} by actual force or reasonably apprehended force,⁴⁸ although actual force is not necessary.⁴⁹ False imprisonment constitutes an aggravated assault.^{49.5}

The detention must be willful and against the consent of the person detained, and by some conduct which prevents him from moving from one place to another.⁵⁰ The mere fact that a person considers himself under arrest is not sufficient,⁵¹ although it has been held that one who wrongfully orders another to leave a certain place, and who is obeyed but not through fear of violence, is guilty of false imprisonment.⁵² One who induces another, by fraud, but without any restraint, to go to a certain place does not commit the offense.⁵³ An arrest may be legal in its inception but subsequently become illegal by a detention for an unreasonable length of time.⁵⁴

Grade of offense. Under some statutes the offense is either a misdemeanor or a felony as dependent on the nonuse or use of violence.⁵⁵

Coercion. In some states the statutory offense of "coercion" is analogous to that of false imprisonment.⁵⁶

Under the Philippine Penal Code false imprisonment, as a crime, could be "detención ilegal," which was the unlawful locking up or detaining of another, or in any manner wrongfully depriving him of his liberty, by a private individual,⁵⁷ or could be "detención arbitraria" which was the same as "detención ilegal" except that the former was committed by a public officer as distinguished from a private individual,⁵⁸ or could be "coacción" which was the unlawful and forcible coercion of another's will with or without detention.⁵⁹ A judicial officer

ment," which definition is embraced in statute defining "kidnapping," does not mean mere "seizure," but "detention" is a keeping back, confinement, or restraint, or a keeping in possession for some period of time, whereas "seizure" means to take possession of forcibly, to grasp, to snatch, or to put in possession. Tex.—Hardie v. State, 144 S.W.2d 571, 140 Tex.Cr. 368.

47.5 Ga.—Henderson v. State, 99 S. E.2d 270, 95 Ga.App. 830. Ky.—Commonwealth v. Caudill, 234 S.W.2d 499, 314 Ky. 129.

"Willfully and wrongfully"

Statute defining offense of willfully and wrongfully placing or attempting to place another in a hospital for the insane by any method other than as prescribed in certain other statutes is not a "malum prohibitum law," and the words "willfully and wrongfully" imply an intent to injure or harass or in some manner wrong the person so placed in asylum.

S.D.—State v. Halladay, 5 N.W.2d 42, 68 S.D. 547.

48. Cal.—People v. Zilbauer, 279 P. 2d 534, 44 C.2d 43.

Ill.—Corpus Juris cited in People v. Cohoon, 42 N.E.2d 969, 970, 315 Ill. App. 259.

Tex.—Meyer v. State, Cr., 49 S.W. 600.

Herring v. State, 3 Tex.App. 108. 25 C.J. p 571 note 94.

Where accused is forcibly brought into judicial district for trial, officers may be subject to criminal prosecution.

U.S.—U. S. ex rel. Voigt v. Toombs, C.C.A.Tex., 67 F.2d 744, appeal dismissed 54 S.Ct. 442, 291 U.S. 686, 78 L.Ed. 1072.

Where no threat was employed, the facts that persons appointed by deputy state law enforcement officer found one in possession of intoxicating liquor contrary to law, directed him, in presence of deputy sheriff eyewitness to misdemeanor, to appear next day at sheriff's office and his appearance did not render such persons guilty of false imprisonment.

Neb.—Grebe v. State, 202 N.W. 909, 113 Neb. 327.

49. Cal.—People v. Agnew, 107 P.2d 601, 16 C.2d 655.

Ill.—Corpus Juris cited in People v. Cohoon, 42 N.E.2d 969, 970, 315 Ill. App. 259.

Tenn.—Smith v. State, 7 Humphr. 43.

49.5 Ill.—People v. Cohoon, 42 N. E.2d 969, 315 Ill.App. 259.

50. Ala.—Doss v. State, 123 So. 237, 23 Ala.App. 168, certiorari denied 123 So. 231, 220 Ala. 30, 68 A.L.R. 712.

Tex.—Rezeau v. State, 254 S.W. 574, 95 Tex.Cr. 323.

25 C.J. p 571 note 92 [a] (1).

51. Tex.—McClure v. State, 9 S.W. 353, 26 Tex.App. 102.

Impressions or beliefs of party complaining of false imprisonment, unless belief was induced by defendant's statement or act justifying such feeling, are insufficient to justify conviction that complaining party was being detained or restrained by defendant.

Pa.—Commonwealth v. Brewer, 167 A. 386, 109 Pa.Super. 429.

52. Tex.—Woods v. State, 3 Tex. App. 204.

25 C.J. p 571 note 97.

53. N.C.—State v. Lunsford, 81 N.C. 528.

25 C.J. p 572 note 98.

54. Ga.—Lavina v. State, 63 Ga. 513.

Subsequent restraint unauthorized

Where statute prohibited officer in arresting motorist for violation of speed laws from detaining motorist except to obtain necessary information and to issue citation to appear at fixed future time and place, officer who refused to issue citation and directed motorist to follow him to office of justice of the peace, and who on motorist's failure to follow obtained warrant and arrested motorist thereunder, was guilty of false imprisonment.

Tex.—Montgomery v. State, 170 S.W. 2d 750, 145 Tex.Cr. 606.

55. Ariz.—Wiley v. State, 170 P. 869, 19 Ariz. 346, L.R.A.1918D 373.

Cal.—People v. Agnew, 107 P.2d 601, 16 C.2d 655.

Ex parte Dillon, 186 P. 170, 44 C.A. 239.

Felony

False imprisonment effected by violence or menace is a felony.

Cal.—People v. Zilbauer, 279 P.2d 534, 44 C.2d 43.

56. N.Y.—People v. Hamilton, 170 N.Y.S. 705, 183 App.Div. 55.

57. Philippine.—U. S. v. Herrera, 3 Philippine 515. 25 C.J. p 572 note 3.

58. Philippine.—U. S. v. Batallones, 23 Philippine 46.

59. Philippine.—U. S. v. Quevengco, 2 Philippine 412. 25 C.J. p 572 note 5.

Detención ilegal could not be committed without committing that form of coacción which consisted in compelling one to do what he did not wish to do.

Philippine.—U. S. v. Quenvengco, supra.

who caused a detention without justification could be criminally liable.⁶⁰

b. Defenses

It is a valid defense to a charge of false imprisonment that the arrest was justified or the imprisonment was lawful. The motive and good faith of defendant are also matters of defense to be considered.

The defenses applicable to the criminal offense are mutatis mutandis governed by substantially the same principles as the tort, considered supra §§ 5-35. That the arrest was justified or the imprisonment lawful constitutes a valid defense;⁶¹ but it is no defense that the other person was also engaged in an unlawful act.⁶² Consent to the act constitutes a defense.^{62.5} Authority to arrest and turn in deserters and stragglers affords no justification where a man arrested as a straggler, instead of being immediately turned over to the proper authorities, is forcibly and unlawfully detained and prevented from returning.⁶³

Under Philippine Penal Code. Where the facts and circumstances furnished reasonable grounds to suspect the guilt of the person arrested, a judicial or peace officer was not liable for an arrest⁶⁴ or detention.⁶⁵ The fact that the arrested person answered the description of a criminal wanted justified an arrest.⁶⁶ However, municipal police officers who made an arrest in violation of their duty were

liable,⁶⁷ as was a private person who made an arrest without a warrant for any misdemeanor which would not have justified a peace officer in so doing;⁶⁸ but one who requested a peace officer to make an arrest was not criminally liable therefor where the officer acted on his own initiative and judgment.⁶⁹

Motive or malice; good faith. Although the guilt of defendant is generally determined irrespective of the motive with which the imprisonment was committed,⁷⁰ the motive and good faith of defendant may be important parts of his defense, and as such are legitimate matters to be considered by the jury.⁷¹ On the other hand, the absence of good faith or probable cause in causing the wrongful detention furnishes the willful intent required for a conviction, under some statutes.⁷² Where there was an imprisonment by a private person consequent on an arrest without a warrant under circumstances not justifying such a course, the bona fide belief of defendant that a crime had been committed and that the prosecutor was the guilty person might go in mitigation of the punishment.⁷³

c. Persons Liable

Any person who causes or participates in an unlawful arrest or detention is guilty of false imprisonment.

Any person who causes an unlawful detention or arrest⁷⁴ and all persons participating in an unlawful arrest or detention⁷⁵ are liable. It is not nec-

60. Philippine.—U. S. v. Batallones, 23 Philippine 46.

25 C.J. p 572 note 6.

61. Ill.—Slomer v. People, 25 Ill. 70, 76 Am.D. 786.

25 C.J. p 572 note 8.

62. Tex.—Gilbert v. State, 181 S.W. 200, 78 Tex.Cr. 441.

62.5 Ill.—People v. Cohoon, 42 N.E. 2d 969, 315 Ill.App. 259.

63. N.Y.—People v. Hamilton, 170 N.Y.S. 705, 183 App.Div. 55. 25 C.J. p 572 note 12.

64. Philippine.—U. S. v. Batallones, 23 Philippine 46—U. S. v. Figueroa, 23 Philippine 19.

25 C.J. p 572 notes 13 [b], 14, p 573 note 15 [b].

65. Philippine.—U. S. v. Sanchez, 27 Philippine 442.

25 C.J. p 573 note 15.

66. Philippine.—U. S. v. Sanchez, supra.

25 C.J. p 573 note 16.

67. Philippine.—U. S. v. Braganza, 10 Philippine 79—U. S. v. Agravante, 10 Philippine 46.

25 C.J. p 573 note 18.

68. Philippine.—U. S. v. Fontanilla, 11 Philippine 233.

25 C.J. p 573 note 19.

69. Philippine.—U. S. v. Burgueta, 10 Philippine 188.

70. Tex.—Staples v. State, 14 Tex. App. 136.

Motive as to crimes generally see Criminal Law § 31.

71. Cal.—People v. Hernon, 235 P.2d 614, 106 C.A.2d 638.

Ga.—Henderson v. State, 99 S.E.2d 270, 95 Ga.App. 830.

Pa.—Commonwealth v. Trunk, 167 A. 333, 311 Pa. 555.

Assistant district attorney prosecuted for false imprisonment could show that he believed he had right to hold complaining witness in lock-up for specified time while investigating witness' complicity in crime. Pa.—Commonwealth v. Trunk, supra.

A patrolman of a railroad yard detaining a trespasser or intruder in the yard to ascertain his purpose and to prevent depredations on such property, and using no force or violence, is not guilty of false imprisonment.

Tex.—Rezeau v. State, 254 S.W. 574, 95 Tex.Cr. 323.

72. Ky.—Begley v. Commonwealth, 60 S.W. 847, 22 Ky.L. 1546.

Tex.—Giroux v. State, 40 Tex. 97. Rezeau v. State, 254 S.W. 574, 95

Tex.Cr. 323—Smyth v. State, 103 S.W. 899, 51 Tex.Cr. 408.

25 C.J. p 573 note 22.

73. Tex.—Staples v. State, 14 Tex. App. 136.

74. Cal.—People v. Agnew, 107 P.2d 601, 16 C.2d 655.

Ky.—Commonwealth v. White, 101 S. W. 331, 30 Ky.L. 1322.

That accused did not lay hands on person arrested under citizen's arrest or did not expressly direct action of officers in detaining such person and causing him to be booked at police station did not preclude prosecution for "false imprisonment," since such detention was the natural consequence of accused's announced arrest of such person and was clearly at accused's implied request and direction.

Cal.—People v. Agnew, 107 P.2d 601, 16 C.2d 655.

75. Ill.—Slomer v. People, 25 Ill. 70, 76 Am.D. 786.

25 C.J. p 573 note 24.

Transportation

The fact that deputy constable did not participate in the arrest of those who were arrested and imprisoned would not relieve him from guilt under statute punishing the unlaw-

essary that defendant be present at the time of the arrest, provided it was done under his procurement.⁷⁶ However, the mere observation of what is going on and the fact that defendant did nothing to prevent the commission of the offense is not sufficient to impose liability.⁷⁷ A person rendering aid to an officer in the safekeeping of a prisoner does so at his peril; he is bound to know whether or not the officer acts under legal and valid process.⁷⁸ A parent may be liable criminally for false imprisonment of a child.⁷⁹ An arrest by a police officer without a warrant for the violation of an invalid municipal ordinance renders him criminally liable.⁸⁰ One invested with limited judicial discretion, who in causing an arrest acts clearly without his jurisdiction, is liable.⁸¹

Under the Philippine penal code, in order to support a prosecution for "detención ilegal," it was necessary that defendant committed the wrong in person.⁸²

§ 72. Prosecution and Punishment

The rules obtaining in criminal prosecutions generally apply in a prosecution for false imprisonment with respect to the indictment or information, the evidence, the trial, and the punishment.

An indictment at common law for false imprison-

ment must negative the legality of the detention⁸³ by alleging facts and circumstances which show an unlawful arrest.^{83.5} Under some statutes it is defective if it fails to allege that the detention was without lawful authority,⁸⁴ although it concludes "contrary to the form of the statute, etc."⁸⁵ The indictment or information should follow the statute in every essential particular, such as alleging wrongful intent,⁸⁶ although an information charging the offense under the common law may be sufficient under the statute.⁸⁷ The indictment must show in what county the offense charged was committed.⁸⁸

Under some statutes it should allege the mode in which the detention was effected,⁸⁹ as by assault, actual violence, threats, or the like, in the language of the statute,⁹⁰ but the detention need not be further particularized.⁹¹ The prosecution is confined to the kind of detention alleged, and proof of a detention by assault will not support an allegation of detention by threats.⁹² A justice of the peace indicted for false imprisonment under color of legal process is not entitled to the right of appearance and of being heard before the grand jury when the indictment is found.⁹³

Burden of proof and presumptions. The burden is on the prosecution to prove the material allegations of the indictment or information,⁹⁴ such as

ful arresting, imprisoning, or transporting of another, or the aiding and abetting in such acts, where deputy constable did not dispute that he actively participated in the imprisonment of the arrested victims by transporting them by automobile from the point where they were arrested to the county jail.

Ky.—*Roberts v. Commonwealth*, 144 S.W.2d 811, 284 Ky. 365.

76. Ark.—*Floyd v. State*, 12 Ark. 43, 54 Am.D. 250.

Mass.—*Commonwealth v. Nickerson*, 5 Allen 518.

77. Tex.—*Walker v. State*, 8 S.W. 647, 25 Tex.App. 443.

78. Ark.—*Mitchell v. State*, 12 Ark. 50, 54 Am.D. 253.

79. Ill.—*Fletcher v. People*, 52 Ill. 395.

Mass.—*Commonwealth v. Nickerson*, 5 Allen 518.

25 C.J. p 573 note 28.

80. N.C.—*State v. Hunter*, 11 S.E. 366, 106 N.C. 796, 8 L.R.A. 529.

81. Tex.—*Smyth v. State*, 103 S.W. 899, 51 Tex.Cr. 408.

25 C.J. p 573 note 30.

82. Philippine.—*U. S. v. Cornel*, 17 Philippine 633.

25 C.J. p 573 note 31.

83. Tex.—*Smyth v. State*, 103 S.W. 899, 51 Tex.Cr. 408.

Wis.—*Smith v. State*, 23 N.W. 879, 63 Wis. 453.

25 C.J. p 574 note 33.

83.5 Ky.—*Lewis v. Commonwealth*, 299 S.W.2d 635—*Kimble v. Commonwealth*, 269 S.W.2d 273.

84. Fla.—*Barber v. State*, 13 Fla. 675.

25 C.J. p 574 note 34.

85. Tex.—*Redfield v. State*, 24 Tex. 133.

86. Fla.—*Ross v. State*, 15 Fla. 55.

25 C.J. p 574 note 36.

Intent to secretly imprison

In order to charge an offense under the statute providing punishment for unlawfully imprisoning another with intent to cause the other to be secretly confined and imprisoned against his will, it is necessary to allege an intent to secretly imprison.

Fla.—*State v. Register*, 9 So.2d 804,

152 Fla. 239—*Holroyd v. State*, 172 So. 700, 127 Fla. 152—*Ross v. State*, 15 Fla. 55.

87. Tex.—*Smyth v. State*, 103 S.W. 899, 51 Tex.Cr. 408.

Wis.—*Davies v. State*, 38 N.W. 722, 72 Wis. 54.

25 C.J. p 574 note 37.

88. Fla.—*Barber v. State*, 13 Fla. 675.

25 C.J. p 574 note 38.

89. Tex.—*Maner v. State*, 8 Tex. App. 361.

25 C.J. p 574 note 39.

Refusal to stop motor vehicle

Complaint and information, alleging that accused willfully detained named person against her consent by refusing to stop motor vehicle in which she was riding and by operating it at such rate of speed that it would have been dangerous to life to have attempted to alight therefrom, were sufficient to charge offense of false imprisonment as defined by statute.

Tex.—*McDaniel v. State*, 166 S.W.2d 138, 145 Tex.Cr. 115.

90. Tex.—*Maner v. State*, 8 Tex.App. 361.

25 C.J. p 574 note 40.

91. Tex.—*Maner v. State*, supra.

25 C.J. p 574 note 41.

92. Tex.—*Maner v. State*, supra.

93. Ga.—*Campbell v. State*, 48 Ga. 353.

94. Fla.—*Holroyd v. State*, 172 So. 700, 127 Fla. 152.

Intent

In prosecution for unlawfully imprisoning another with intent to cause the other to be secretly confined and imprisoned against his will, state had burden of proving that accused had intent to cause the other

willful and wrongful detention^{94.5} and lack of consent.^{94.10} Generally it is required to prove only the detention⁹⁵ in the county, as averred in the indictment or information,⁹⁶ since the detention is presumed to be unlawful,⁹⁷ and such presumption exists notwithstanding it is not specifically enumerated among those found in a statute defining disputable presumptions.⁹⁸

After proof of the confinement or detention, the burden of establishing its lawfulness⁹⁹ or its justification¹ is on defendant, unless the evidence introduced by the prosecution tends to show such facts.² If the arrest was made with process defendant must show that it was properly issued and legal on its face³ and if it is made without process he must show the grounds justifying it.⁴ A person causing an illegal restraint of another is presumed, but not conclusively, to have intended the ordinary and natural consequences of his own act.⁵

Admissibility of evidence. Under the rules applicable to criminal prosecution generally the evidence must be pertinent to the issues.⁶ Evidence of defendant's good faith and the absence of malice is admissible to mitigate the punishment,⁷ although inadmissible on the issue of justification.⁸ The illegal act of the prosecuting witness has been held inadmissible to mitigate the penalty.⁹ Evidence of statements and acts of the person assisting in making the arrest, showing that he and defendant acted together throughout the entire proceeding, is admissible.¹⁰

In the Philippines evidence of civil damages was admissible in a criminal action based on the same state of facts.¹¹

The weight and sufficiency of the evidence is governed by the rules relating to the weight and sufficiency of the evidence in criminal prosecutions generally.¹² A conviction for false imprisonment

to be secretly confined against his will.

Fla.—Holroyd v. State, supra.

94.5 S.D.—State v. Halladay, 5 N. W.2d 42, 68 S.D. 547.

94.10 Tex.—McKinney v. State, 191 S.W.2d 27, 149 Tex.Cr. 46.

95. Cal.—People v. Sagehorn, 294 P. 2d 1062, 140 C.A.2d 138.

Tex.—Gilbert v. State, 181 S.W. 200, 78 Tex.Cr. 441.

25 C.J. p 574 note 45.

96. Tex.—Maner v. State, 8 Tex.App. 361.

25 C.J. p 574 note 46.

97. Tex.—Gilbert v. State, 181 S.W. 200, 78 Tex.Cr. 441.

25 C.J. p 574 note 47.

98. Cal.—People v. Agnew, 107 P.2d 601, 16 C.2d 655.

99. Cal.—People v. Sagehorn, 294 P. 2d 1062, 140 C.A.2d 138.

Tex.—Gilbert v. State, 181 S.W. 200, 78 Tex.Cr. 441.

25 C.J. p 574 note 48.

Degree of proof

In prosecution arising out of defendant's making a citizen's arrest of person charging such person with perjury, instruction that unless jury found that person had actually committed perjury the arrest was not lawful was erroneous as placing an undue burden on defendant and depriving him of benefit of reasonable doubt as to lawfulness of the arrest, since instruction was required to be treated as though it expressly declared that burden was upon defendant to prove lawfulness of arrest by preponderance of the evidence.

Cal.—People v. Agnew, 107 P.2d 601, 16 C.2d 655.

1. Cal.—Corpus Juris Secundum cited in Hughes v. Oreb, 228 P.2d

550, 553, 36 C.2d 854—People v. Agnew, 107 P.2d 601, 16 C.2d 655.

People v. Sagehorn, 294 P.2d 1062, 140 C.A.2d 138.

25 C.J. p 574 note 49.

2. Cal.—People v. Agnew, 107 P.2d 601, 16 C.2d 655.

If prosecution's evidence tends to show that arrest was lawful, no presumption of unlawfulness should arise and no burden should be cast on defendant.

Cal.—People v. Agnew, supra.

3. Ark.—Mitchell v. State, 12 Ark. 50, 54 Am.D. 253.

25 C.J. p 572 note 9.

4. Tex.—Beville v. State, 16 Tex. App. 70.

25 C.J. p 572 note 10.

5. Mass.—Commonwealth v. Nickerson, 5 Allen 518.

25 C.J. p 574 note 50.

6. S.C.—State v. Hill, 29 S.C.L. 150.

Tex.—Gilbert v. State, 181 S.W. 200, 78 Tex.Cr. 441.

25 C.J. p 574 note 52.

Occurrences in other counties

In prosecution of constable for false imprisonment of motorist, matters occurring in counties other than county of motorist's last detention, which were inseparably connected with final arrest, were admissible if they were pertinent as to whether constable committed an offense in county in which motorist was finally arrested.

Tex.—Montgomery v. State, 170 S.W. 2d 750, 145 Tex.Cr.R. 606.

7. Tex.—Gilbert v. State, 181 S.W. 200, 78 Tex.Cr. 441.

25 C.J. p 574 note 53.

8. Tex.—Staples v. State, 14 Tex. App. 136.

9. Tex.—Gilbert v. State, 181 S.W. 200, 78 Tex.Cr. 441.

10. Tex.—Sumrall v. State, 284 S. W. 957, 104 Tex.Cr. 485.

11. Philippine.—U. S. v. Heery, 25 Philippine 600.

25 C.J. p 575 note 56.

Recovery of civil damages in prosecution see supra § 47.

12. Pa.—Commonwealth v. Brewer, 167 A. 386, 109 Pa.Super. 429.

25 C.J. p 575 note 57.

Evidence held sufficient

(1) To sustain conviction.

Cal.—People v. Hernon, 235 P.2d 614, 106 C.A.2d 638.

Ga.—Davis v. State, 33 S.E.2d 728, 72 Ga.App. 347.

(2) To sustain conviction of deputy sheriff of false arrest, imprisonment, or transportation of another.

Ky.—Parsons v. Commonwealth, 148 S.W.2d 301, 285 Ky. 472—Roberts v. Commonwealth, 144 S.W.2d 811, 284 Ky. 365.

(3) To sustain conviction of "false imprisonment" arising out of defendant's making a citizen's arrest of person under statute, charging such person with perjury.

Cal.—People v. Agnew, 107 P.2d 601, 16 C.2d 655.

(4) To establish absence of justification.

Cal.—People v. Sagehorn, 294 P.2d 1062, 140 C.A.2d 138.

Evidence held insufficient

(1) To sustain conviction.

Tex.—Morris v. State, 235 S.W.2d 452, 155 Tex.Cr. 357.

(2) To sustain conviction for unlawfully imprisoning another with intent to confine or imprison him secretly.

will be set aside and a new trial granted for insufficiency of evidence as in other criminal cases.¹³

Trial. The instructions in the charge to the jury must substantially and clearly formulate the rules of law applicable to the offense,¹⁴ such as those dealing with willful and wrongful imprisonment,^{14.5} and absence or presence of reasonable grounds for arrest.^{14.10} An incorrect request to charge should be correctly modified or rejected.¹⁵ It is not prejudicial error to charge all the acts mentioned in the statute by which false imprisonment might be committed, instead of limiting the charge to the acts alleged.¹⁶ In rulings on evidence and instructions, the law is more liberal in a criminal prosecution for false imprisonment than in a civil action for the

same offense,¹⁷ particularly as to officials charged with the enforcement of the criminal law.¹⁸

The fact of the false imprisonment,¹⁹ of lack of consent,^{19.5} the good faith of the officers charged therewith,²⁰ and probable cause for making the arrest^{20.5} are generally questions for the jury.

Punishment. The punishment to be imposed on a conviction is usually regulated by statute.^{20.10} The punishment inflicted should not be excessive,²¹ but if a fine imposed is considered excessive it may be reduced in the discretion of the reviewing court.²² Where the statute provides that a person guilty of false imprisonment shall be fined, and may be confined, the jury cannot assess a punishment of a jail sentence without assessing a fine.²³

FALSELY. The word "falsely" is an adverb,^{0.1} which may be used merely to mean in opposition to the truth,¹ not true, erroneous, or incorrect;^{1.5} and is defined in this sense merely to mean erroneously; not truly; in a false manner;² inaccurate, erroneous, faulty.³

While the word "falsely" is sometimes used as not

implying scienter,⁴ it is recognized that the term may mean something more than mistakenly or untruly,^{4.5} and it has been said that it usually imports somewhat more than the vernacular sense of erroneous or untrue, that it is oftenest used to characterize a wrongful or criminal act, such as involves an error or untruth, intentionally or knowingly put

Fla.—Holroyd v. State, 172 So. 700, 127 Fla. 152.

Iowa.—State v. Beddard, 195 N.W. 214.

(3) To establish willful and wrongful detention.
S.D.—State v. Halladay, 5 N.W.2d 42, 68 S.D. 547.

13. Cal.—People v. Wheeler, 14 P. 796, 13 C. 252.
25 C.J. p 575 note 57.

14. Ga.—Seals v. State, 128 S.E. 224, 33 Ga.App. 818.

Pa.—Commonwealth v. Trunk, 167 A. 333, 311 Pa. 555.
25 C.J. p 575 note 59.

Instruction held erroneous

Where complaining witnesses were informed that diamond was stolen property, and complaining witnesses, admitting that they had diamond, failed to surrender it to officers, officer had duty to take possession of diamond even without a search warrant, so that in subsequent prosecution of defendant for false imprisonment charge on provisions of general search and seizure law was error.
Tex.—Moore v. State, 193 S.W.2d 204, 149 Tex.Cr.R. 229.

Instruction held prejudicial

That reliance on warden's custom of releasing prisoners to district attorney for questioning could not be considered by jury in determining assistant district attorney's and detectives' guilt in false imprisonment prosecution.

Pa.—Commonwealth v. Trunk, 167 A. 333, 311 Pa. 555.

Instruction held not prejudicial

Where court charged that detention must have been by legal authority, and that officer had no more right than any other man, if he has no warrant for arrest of person, unless crime be committed in his presence, failure to charge that there was likelihood to be failure of justice for want of officer to issue warrant was without harm to defendant.
Ga.—Seals v. State, 128 S.E. 224, 33 Ga.App. 818.

14.5 Ky.—Kimbler v. Commonwealth, 269 S.W.2d 273.

14.10 Ga.—Henderson v. State, 99 S.E.2d 270, 95 Ga.App. 830.

Ky.—Kimbler v. Commonwealth, 269 S.W.2d 273.

15. Mass.—Commonwealth v. Blodgett, 12 Metc. 56.

Tex.—McKinney v. State, 191 S.W.2d 27, 149 Tex.Cr. 46.

16. Tex.—Meyer v. State, Cr., 49 S. W. 600.

17. Pa.—Commonwealth v. Trunk, 167 A. 333, 311 Pa. 555.

18. Pa.—Commonwealth v. Trunk, supra.

19. Tex.—Sumrall v. State, 284 S. W. 957, 104 Tex.Cr. 485.

19.5 Tex.—McKinney v. State, 191 S.W.2d 27, 149 Tex.Cr. 46.

20. Pa.—Commonwealth v. Trunk, 167 A. 333, 311 Pa. 555.

20.5 Ga.—Henderson v. State, 99 S. E.2d 270, 95 Ga.App. 830.

20.10 Aggravated assault
False imprisonment is punishable merely as an aggravated assault.
Md.—Midgett v. State, 139 A.2d 209, 216 Md. 26.

21. Ky.—Parsons v. Commonwealth, 148 S.W.2d 301, 285 Ky. 472.

22. Philippine.—U. S. v. Batallones, 23 Philippine 46.
25 C.J. p 575 note 63.

23. Tex.—Sumrall v. State, 284 S.W. 957, 104 Tex.Cr. 485.

0.1 N.J.—Dombroski v. Metropolitan Life Ins. Co., 19 A.2d 678, 680, 126 N.J.Law 545.

1. U.S.—U. S. v. Hartman, D.C.Mo., 65 F. 490, 491.

1.5 Mo.—State v. Foster, 197 S.W. 2d 313, 324, 355 Mo. 577.

2. N.J.—Dombroski v. Metropolitan Life Ins. Co., 19 A.2d 678, 680, 126 N.J.Law 545.

3. Iowa.—Hatcher v. Dunn, 71 N.W. 343, 344, 102 Iowa 411, 36 L.R.A. 689.

4. La.—State v. Brown, 34 So. 698, 700, 110 La. 591.

4.5 Iowa.—State v. Brady, 69 N.W. 290, 294, 100 Iowa 191, 62 Am.S.R. 560, 36 L.R.A. 693.

forward.⁵ Thus the word may be construed to mean something designedly untrue or deceitful, and as involving an intention to perpetrate some fraud.^{5,5} In this sense "falsely" is defined as meaning perfidiously or treacherously.^{5,10}

In a particular connection the word "falsely" refers to the act of making a false writing as distinguished from the falsity of its contents.⁶

The term has sometimes been used as synonymous

with "erroneously" see the C.J.S. definition of that term, and "mistakenly."⁷

It has also been compared with, or distinguished from, "corruptly" see the C.J.S. definition Corruptly, "mistakenly," "untruthfully,"⁸ and "willfully."⁹

Phrases employing the word are set out in the note.¹⁰ Other phrases as to which more recent adjudications have not been found see 25 C.J. p 575 notes 4-10.

5. Ga.—Laughlin v. Bon Air Hotel, 68 S.E.2d 186, 189, 85 Ga.App. 43.

Ohio.—Fouts v. State, 149 N.E. 551, 554, 113 Ohio St. 450.

In its juristic uses, "falsely" frequently implies something more than mere untruth.

N.J.—Corpus Juris cited in Dombroski v. Metropolitan Life Ins. Co., 19 A.2d 678, 680, 126 N.J.Law 545.

Something more than mere untruth
U.S.—Corpus Juris Secundum cited in U. S. v. Achtner, C.C.A.N.Y., 144 F.2d 49, 52.

5.5 Iowa.—State v. Brady, 69 N.W. 290, 294, 100 Iowa 191, 62 Am.S.R. 560, 36 L.R.A. 693.

Ohio.—Fouts v. State, 149 N.E. 551, 554, 113 Ohio St. 450.

With intent to defraud

U.S.—U. S. v. Achtner, C.C.A.N.Y., 144 F.2d 49, 52.

5.10 U.S.—Corpus Juris Secundum cited in U. S. v. Achtner, C.C.A.N.Y., 144 F.2d 49, 52.

N.J.—Dombroski v. Metropolitan Life Ins. Co., 19 A.2d 678, 680, 126 N.J. Law 545.

Ohio.—Fouts v. State, 149 N.E. 551, 554, 113 Ohio St. 450.

6. Ill.—People v. Kramer, 185 N.E. 590, 592, 352 Ill. 304.

7. Minn.—State v. Henderson, 74 N.W. 1014, 1015, 72 Minn. 74.

8. Iowa.—State v. Brady, 69 N.W. 290, 294, 100 Iowa 191, 62 Am.S.R. 560, 36 L.R.A. 693.

Ohio.—Fouts v. State, 149 N.E. 551, 554, 113 Ohio St. 450.

9. Ind.—Pennsylvania Co. v. Reesor, 108 N.E. 983, 986, 60 Ind.App. 636.

Pa.—Steinman v. McWilliams, 6 Pa. 170, 178.

10. Phrases construed

(1) "Falsely and fraudulently."

Vt.—McDonald v. McNeil, 104 A. 337, 339, 92 Vt. 356.

(2) "Falsely personate."

Colo.—People v. Horkans, 123 P.2d 824, 826, 109 Colo. 177.

(3) "Falsely represented and warranted."

Utah.—Anglo-California Trust Co. v. Hall, 211 P. 991, 993, 61 Utah 223.

(4) "Falsely swearing" is knowingly affirming without probable cause.

Ga.—Laughlin v. Bon Air Hotel, 68 S.E.2d 186, 189, 85 Ga.App. 43.

(5) "Feloniously, falsely, or corruptly."

Ky.—Gatewood v. Commonwealth, 285 S.W. 193, 194, 215 Ky. 360.

(6) "Feloniously, willfully, corruptly, and falsely," and "knowingly, or corruptly and falsely" see the C.J.S. definition Corruptly.

(7) "Sworn falsely," as equivalent to "sworn willfully."

Cal.—People v. Luchetti, 51 P. 707, 709, 119 C. 501—People v. Righetti, 4 P. 1185, 1186, 66 C. 184.

(8) "Testified falsely . . . in material particulars," as importing consciousness of guilt.

Mass.—City of Boston v. Santosuosso, 30 N.E.2d 278, 304, 307 Mass. 302.

(9) "Willfully, corruptly and falsely," and "willfully, falsely, and corruptly" see the C.J.S. definition Corruptly.

(10) "Willfully, knowingly, maliciously, and falsely."

Md.—State v. Bixler, 62 Md. 354, 357.

"Corruptly" necessarily involved see the C.J.S. definition Corruptly.

FALSE PERSONATION

This Title includes deception by assuming and acting in the character of another person, or by assuming to be a public officer, or a person having any special authority or privilege, and acting in such assumed capacity; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

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See also descriptive word index in the back of this Volume

§ 1. Definition

"False personation" may be broadly defined as an offense consisting in pretending, without lawful authority, to be a particular person in order to deceive others.

"False personation" may be defined as the criminal offense of falsely representing some other person and acting in the character thus unlawfully assumed, in order to deceive others and thereby gain some profit or advantage or enjoy some right or privilege belonging to the one so personated or subject him to some expense, charge, or liability.¹ Historically, fake personation was not made an offense merely for the protection of the person impersonated.²

"To falsely impersonate" may mean to pretend to be a particular person without lawful authority.³

False personation is in the nature of positive aggressions or invasions, such as constitute common-law offenses.^{3,5}

§ 2. As Common-Law and Statutory Offense

- a. At common law
- b. Under statutes

a. At Common Law

Apart from the species of cheat or fraud accomplished through the false personation of another, or where there is a conspiracy, the mere fact of personating another is not a common-law offense.

Apart from the species of cheat or fraud at common law accomplished through the false personation of another, considered in False Pretenses § 4, or where there is a conspiracy, considered in Conspiracy § 54, it seems that the mere fact of personating another is not an offense at common law.⁴

b. Under Statutes

The offense of false personation is now generally defined by statutes, which vary in the different jurisdictions as to the circumstances constituting the offense. They should be construed in harmony with their aim.

The statutes of England early began to distinguish

1. Black L.D.

Other definitions see 25 C.J. p 576 note 1.

2. Colo.—People v. Horkans, 123 P. 2d 824, 109 Colo. 177.

Under federal statute

The aim of the federal statute is not merely to protect innocent persons from actual loss through reliance on false assumptions of federal authority, but to maintain the general good repute and dignity of the service itself.

U.S.—U. S. v. Barnow, Pa., 36 S.Ct. 19, 239 U.S. 74, 60 L.Ed. 155.
Russell v. U. S., C.C.A.Wash., 271 F. 684.

A cheat or fraud

A species of cheat or fraud at common law was accomplished through the false personation of another.
Or.—State v. Renick, 56 P. 275, 33 Or. 584, 72 Am.S.R. 758, 44 L.R.A. 266.

3. Colo.—People v. Horkans, 123 P. 2d 824, 109 Colo. 177.

"To personate" defined

(1) To pass one's self off as another, having a certain identity.

U.S.—Lane v. U. S., C.C.A.Ohio, 17 F. 2d 923.

(2) Early cases see 25 C.J. p 576 note 1 [b].

3.5 D.C.—Levine v. U. S., 261 F.2d 747, 104 U.S.App.D.C. 281.

4. 2 East P.C. p 1010.
25 C.J. p 576 note 5.

between the different species of cheat, and to carve out a distinct offense for obtaining money or property by falsely personating another.⁵ In the United States such an offense has been widely defined by statutes, which declare false personation to be an offense in a variety of circumstances, such as falsely to personate an officer or a class of officers, or a government employee,⁶ or a voter at an election, see Elections § 323, or a lodge member.⁷

Other statutes make it an offense to personate another, and in such assumed character to receive property intended for the party personated with intent to convert it to the recipient's own use,⁸ falsely to personate another, and, in such assumed character, receive any property of any description intended to be delivered to the person so personated,⁹ falsely to personate another, and in such assumed character to do any act whereby any benefit might accrue to the offender or to another person,¹⁰ falsely to personate another and in such assumed character to become bail or surety for any party,¹¹ false-

ly to personate another and in such assumed character execute any written instrument in the name of another person with the intent that it shall be used as true,¹² falsely to personate another, and in such assumed character, subscribe, verify, publish, acknowledge, or prove, in the name of another person, any written instrument with intent that it may be delivered or used as true,¹³ or falsely to personate another and in such assumed character execute an instrument for registration.¹⁴

Still other statutes make it an offense falsely to personate another, and under an assumed name give authority to some person to sign such assumed name to anything, which, if genuine, would create, increase, diminish, or discharge any pecuniary obligation,¹⁵ falsely to personate another with the effect of making the one personated liable to any suit or prosecution or to pay any sum of money, or to incur any charge or forfeiture, whereby any benefit might accrue to accused or to any other person,¹⁶

5. Or.—State v. Renick, 56 P. 275, 33 Or. 584, 72 Am.S.R. 758, 44 L.R. A. 266.

6. U.S.—U. S. v. Lepowitch, Mo., 63 S.Ct. 914, 318 U.S. 702, 87 L.Ed. 1091, rehearing denied 63 S.Ct. 1171, 319 U.S. 783, 87 L.Ed. 1727—Pierce v. U. S., Tenn., 62 S.Ct. 237, 314 U.S. 306, 86 L.Ed. 226.
Kane v. U. S., C.C.A.Mo., 120 F. 2d 990.

25 C.J. p 576 note 7.

Law enforcement officer

Colo.—Martin v. People, 154 P.2d 1006, 113 Colo. 50.

United States statute

(1) The statute, 18 U.S.C.A. § 912, and former similar statutes, prescribing punishment for falsely pretending to be a United States officer or employee, defined distinct offenses, one, with fraudulent intent pretending to be a federal officer or agent and undertaking to act as such, and the other, with such intent and in such pretended character, demanding or obtaining any money, paper, document, or other valuable thing.
U.S.—Kane v. U. S., C.C.A.Mo., 120 F.2d 990—Elliott v. Hudspeth, C.C. A.Kan., 110 F.2d 389—Baas v. U. S., C.C.A.La., 25 F.2d 294.

U. S. v. Pierce, D.C.Tenn., 13 F. Supp. 301, reversed on other grounds, C.C.A., Pierce v. U. S., 86 F.2d 949.

25 C.J. p 576 note 7 [a].

(2) Purpose of the false personation statute is to maintain the general good repute and dignity of the government service.

U.S.—U. S. v. Lepowitch, Mo., 63 S.Ct. 914, 318 U.S. 702, 87 L.Ed. 1091,

rehearing denied 63 S.Ct. 1171, 319 U.S. 783, 87 L.Ed. 1727.

U. S. v. Wight, C.A.N.Y., 176 F. 2d 376, certiorari denied 70 S.Ct. 478, 338 U.S. 950, 94 L.Ed. 586.

(3) Purpose of the statute has also been held to be to protect innocent persons from actual loss through reliance on false assumption of federal authority.

U.S.—U. S. v. Wight, supra.

(4) The offense defined in 18 U.S.C.A. § 912, and in former similar statutes, prescribing punishment for falsely pretending to be a United States officer or employee and undertaking to act as such, is separate and distinct from the offense defined in 18 U.S.C.A. § 661, and in former similar statutes, prescribing punishment for theft of personal property in the jurisdiction of the United States.
U.S.—Laing v. U. S., C.C.A.Mich., 145 F.2d 111.

(5) Under the statute, the demanding and the obtaining of money or other thing of value are separate and distinct offenses.

U.S.—Ekberg v. U. S., C.C.A.Puerto Rico, 167 F.2d 380.

(6) One who falsely pretends to be a United States senator and assumes authority as such violates the false personation statute, notwithstanding the authority assumed is not within the power of a senator to exercise.

U.S.—Thomas v. U. S., C.A.Wash., 213 F.2d 30.

Excess or genuine jurisdiction

Statute penalizing false representation of a person as police officer

is a protection of the citizenry against exercise of excess jurisdiction by an impostor as well as impersonation in the genuine jurisdiction which might have been exercised by a legitimate officer.

D.C.—Taylor v. U. S., 167 F.2d 752, 83 U.S.App.D.C. 215.

Chief of police of a city is a policeman within statute declaring one exercising functions of policeman without authority guilty of a misdemeanor.

Ga.—Burke v. State, 47 S.E.2d 116, 76 Ga.App. 612.

7. Mont.—State v. Holland, 96 P. 719, 37 Mont. 393.
25 C.J. p 577 note 10.

8. Fla.—Goodson v. State, 10 So. 738, 29 Fla. 511, 30 Am.S.R. 135.
25 C.J. p 577 note 11.

9. Tenn.—Sloan v. State, 79 S.W.2d 1021, 168 Tenn. 573, 97 A.L.R. 1505.

10. Colo.—People v. Horkans, 123 P. 2d 824, 109 Colo. 177.

11. Cal.—People v. Knox, 51 P. 19, 119 C. 73.

12. Cal.—People v. Maurin, 19 P. 832, 77 C. 436.
25 C.J. p 577 note 15.

13. Okl.—Raymer v. State, 228 P. 500, 27 Okl.Cr. 398.

14. Tex.—Freeman v. State, 20 Tex. App. 558.
25 C.J. p 577 note 17.

15. Tex.—Thompson v. State, Cr., 24 S.W. 298.

16. Cal.—People v. Chin You, 157 P. 523, 30 C.A. 18.

N.Y.—People v. Mallon, 181 N.Y.S. 487, 191 App.Div. 443.

falsely to personate another and in such assumed character to do any act in the course of any suit or prosecution whereby any person may be injured or his interests affected,¹⁷ falsely to personate another and in such assumed character marry or sustain the married relation toward another,¹⁸ or falsely to personate the true and lawful holder of, or the person entitled to, a debt due from the United States and receive or endeavor to receive the money due on such debt,¹⁹ or for a person applying to be admitted as a citizen or appearing as a witness for such person falsely to personate any other than himself.²⁰

It is within the police power of the state, and constitutional, to prohibit the wearing or display of badges and insignia of a secret society of which one is not a member.^{20.5}

Construction. Such statutes should be construed in harmony with their aim.²¹

§ 3. Elements of Offense and Persons Liable

- a. In general
- b. Consummation of offense
- c. Persons liable

a. In General

To constitute the offense, there must be an untrue or false personation of the officer or person designated in the statute, with, ordinarily, an intent to defraud. The representations need not, unless the statute requires, be such as are reasonably calculated to deceive, and may consist of verbal declarations or the exhibition of a badge or certificate.

To constitute the offense there must be an untrue or false personation under circumstances covered by the statute.²²

A statute providing for the punishment of every person who falsely personates another is intended to cover acts done by one person while representing himself to be a different person,²³ and it does not refer to a case where accused falsely assumes an official character,²⁴ or authority,²⁵ or an assumed

17. Ill.—People v. Snyder, 117 N.E. 119, 279 Ill. 435.

Tenn.—Edgar v. State, 36 S.W. 379, 96 Tenn. 690.

18. N.Y.—Hodecker v. Strickler, 46 N.Y.S. 808, 20 App.Div. 245.

19. U.S.—Lane v. U. S., C.C.A.Ohio, 17 F.2d 923.

20. U.S.—U. S. v. York, C.C.N.Y., 131 F. 323.

20.5 Kan.—State v. Turner, 328 P.2d 733, 183 Kan. 496.

21. U.S.—Russell v. U. S., C.C.A. Wash., 271 F. 684.

"Intent to defraud"

Words "intent to defraud," within statute providing that whoever with intent to defraud shall falsely pretend to be an officer or employee acting under authority of the United States or any department or any officer of the government shall be guilty of a crime, do not require more than that defendants have, by artifice and deceit, sought to cause the deceived person to follow some course which he would not have pursued but for the deceitful conduct. U.S.—U. S. v. Lepowitch, 63 S.Ct. 914, 318 U.S. 702, 87 L.Ed. 1091, rehearing denied 63 S.Ct. 1171, 319 U.S. 783, 87 L.Ed. 1727.

Interpolation of "and" or "or"

Statute providing that any person who shall, without due authority, exercise or attempt to exercise authority of a peace officer of state, county, town or "city who shall claim, pretend, or hold himself out to be such officer" shall be guilty of a misdemeanor, can be reasonably construed only by interpolating ei-

ther "and" or "or" after the word "city."

Colo.—Martin v. People, 154 P.2d 1006, 113 Colo. 50.

22. U.S.—Shepherd v. U. S., C.A. Kan., 177 F.2d 938—U. S. v. Wight, C.A.N.Y., 176 F.2d 376, certiorari denied 70 S.Ct. 478, 338 U.S. 950, 94 L.Ed. 586—U. S. v. McNaugh, C.C. A.N.Y., 42 F.2d 835.

U. S. v. Lepowitch, D.C.Mo., 48 F.Supp. 846, reversed on other grounds 63 S.Ct. 914, 318 U.S. 702, 87 L.Ed. 1091, rehearing denied 63 S.Ct. 1171, 319 U.S. 783, 87 L.Ed. 1727.

Okl.—Raymer v. State, 228 P. 500, 27 Okl.Cr. 398.

25 C.J. p 577 note 22.

Essence of the offense

(1) The essence of the offense of false personation is that the party charged must falsely personate another, and in such assumed character do either of the acts provided under the statute.

Okl.—Raymer v. State, supra.

(2) The essence of the offense is the falsely assuming or pretending to be an officer or employee of the United States and the taking of a thing of value in such pretended character.

U.S.—Shepherd v. U. S., C.A.Kan., 177 F.2d 938.

(3) The statute condemning the false impersonation of a United States officer does not make the wearing of the uniform of the impersonated officer an essential element of the offense charged.

U.S.—Shepherd v. U. S., supra.

Motives immaterial

The fact that defendant's motives in going to a house which had been burglarized and asking permission to see if anything had been stolen may have been sinister and that he may have been a confederate of the burglar will not justify conviction for false personation of an officer. Tex.—Walker v. State, 229 S.W. 853, 89 Tex.Cr. 180.

Representation

Defendant, by going to the apartment of prosecuting witness, showing a badge, stating that he understood that the witness had liquor in his apartment, and starting to search the place, represented that he was an officer acting under the authority of the government to search premises for intoxicating liquors.

U.S.—Russell v. U. S., C.C.A.Wash., 271 F. 684.

Different government department

(1) An employee of one department of the government may be held guilty of falsely impersonating an officer of another department. U.S.—Russell v. U. S., supra.

(2) Where defendant represented that he was authorized to search for intoxicating liquors, and by such representation obtained money from the prosecuting witness, it was no defense that he was an employee of the navy department. U.S.—Russell v. U. S., supra.

23. Cal.—People v. Knox, 51 P. 19, 119 C. 73.

24. Cal.—People v. Knox, supra.

25. U.S.—Lane v. U. S., C.C.A.Ohio, 17 F.2d 923.

name,²⁶ or personates an organization;²⁷ and a statute punishing the false personation of a certain officer or class of officers is not to be applied to the false personation of a different officer or class of officers,²⁸ or where a person represents himself as an officer, but not as a particular officer.²⁹

Ordinarily there cannot be a personation of a supposititious individual who never existed,³⁰ or of an officer where there is no legally appointed officer of the character which accused was assuming to personate;³¹ but under a statute punishing one assuming to be an officer of the government, the offense may be committed even though the offender assumes to hold an office which has no legal existence.³² The offense may be committed even though the person whose name and character are assumed is dead.³³ It has been held that a mere unwarranted exercise of authority by an officer under a misconception of his powers,³⁴ or an obtaining of money with fraudulent intent by an officer acting under an apparent authority,³⁵ does not constitute a false personation.

The representations need not, unless the statute so requires, be such as are reasonably calculated to deceive,³⁶ as reliance is not an element of the statutory offense.^{36.5} Verbal declarations may constitute a false pretending or impersonation equally with the exhibition of a counterfeited badge or a false certificate of authority.³⁷

Intent. The intent to misrepresent,³⁸ and generally,³⁹ but not under all statutes,⁴⁰ the intent to defraud, are essential elements of the offense.

b. Consummation of Offense

The offense must be consummated in accordance with the terms and meaning of the statute.

The offense must be consummated in accordance with the terms and meaning of the statute;⁴¹ so, the false pretense of being a person of the class or character designated in the statute is the gist of the action.⁴² To consummate the crime something beyond the false pretense has been required; there

26. Mo.—State v. Miller, 3 Mo.App. 584.
25 C.J. p 578 note 25.

27. Okl.—Raymer v. State, 228 P. 500, 27 Okl.Cr. 398.

28. Kan.—State v. Rose, 150 P. 601, 96 Kan. 347.

25 C.J. p 578 note 26.

Officer of the United States

The statute making it an offense falsely to impersonate an "officer or employee acting under the authority of the United States" does not include within its scope false impersonation of officers or employees of a government corporation such as the Tennessee Valley Authority.

U.S.—Pierce v. U. S., Tenn., 62 S.Ct. 237, 314 U.S. 306, 86 L.Ed. 226.

Statute applicable

Where defendants made an arrest for selling liquor by falsely pretending that they were United States revenue agents, they violated Pen. L. § 931, prohibiting personation of a public officer, but not § 1846, as a revenue agent is not a "peace officer," within Code Cr.Proc. §§ 154, 960, in view of Greater New York Charter § 339.

N.Y.—People v. Chesnik, 205 N.Y.S. 146, 123 Misc. 509, 40 N.Y.Cr. 159.

29. N.C.—State v. Church, 87 S.E. 2d 256, 242 N.C. 230.

Tex.—Walker v. State, 229 S.W. 853, 89 Tex.Cr. 180.

30. Or.—State v. Renick, 56 P. 275, 33 Or. 584, 72 Am.S.R. 758, 44 L.R.A. 266.

25 C.J. p 578 note 27.

31. Ill.—Dutcher v. People, 11 Ill. App. 312.

Wis.—State v. Hackbarth, 41 N.W.2d 594, 256 Wis. 545, rehearing denied 42 N.W.2d 358, 256 Wis. 545.

32. U.S.—Lamar v. U. S., N.Y., 36 S.Ct. 535, 241 U.S. 103, 60 L.Ed. 912—U. S. v. Barnow, Pa., 36 S.Ct. 19, 239 U.S. 74, 60 L.Ed. 155.

33. Colo.—Corpus Juris cited in People v. Horkans, 123 P.2d 824, 826, 109 Colo. 177.

25 C.J. p 578 note 30.

34. Tenn.—State v. Withers, 7 Baxt. 16.

25 C.J. p 578 note 31.

35. S.C.—State v. Robertson, 130 S. E. 212, 133 S.C. 126.

36. U.S.—Pierce v. U. S., C.C.A. Tenn., 86 F.2d 949.

Impersonation of officer

Statute respecting impersonation of government officer does not confine its prohibition to those representations or pretenses which are sufficiently convincing to deceive only those least gullible.

U.S.—Pierce v. U. S., supra.

36.5 D.C.—Levine v. U. S., 261 F.2d 747, 104 U.S.App.D.C. 281.

37. U.S.—Pierce v. U. S., C.C.A. Tenn., 86 F.2d 949.

38. U.S.—U. S. v. Larson, D.C.Alaska, 125 F.Supp. 360—U. S. v. Lepowitch, 48 F.Supp. 846, reversed on other grounds 63 S.Ct. 914, 318 U.S. 702, 87 L.Ed. 1091, rehearing denied 63 S.Ct. 1171, 319 U.S. 783, 87 L.Ed. 1727.

N.C.—State v. Church, 87 S.E.2d 256, 242 N.C. 230.

Ohio.—Fouts v. State, 149 N.E. 551, 113 Ohio St. 450.

Tex.—Stahmann v. State, 70 S.W.2d 709, 126 Tex.Cr. 192.

39. Tex.—Thompson v. State, Cr., 24 S.W. 298.

25 C.J. p 578 note 32.

40. Tenn.—Sloan v. State, 79 S.W. 2d 1021, 168 Tenn. 578, 97 A.L.R. 1505.

United States statute

(1) The statute, 18 U.S.C.A. § 912, does not now require an intent to defraud as an element of the offense. U.S.—U. S. v. Meeker, D.C.Alaska, 110 F.Supp. 743.

(2) Formerly, the statute required the intent to defraud as an essential element of the crime.

U.S.—Kane v. U. S., C.C.A.Mo., 120 F.2d 990.

U. S. v. Lepowitch, D.C.Mo., 48 F.Supp. 846, reversed on other grounds 63 S.Ct. 914, 318 U.S. 702, 87 L.Ed. 1091, rehearing denied 63 S.Ct. 1171, 319 U.S. 783, 87 L.Ed. 1727.

(3) However, intent to defraud has been referred to in cases decided since the amendment of the statute in 1948.

U.S.—Dickson v. U. S., C.A.Colo., 182 F.2d 131—U. S. v. Wight, C.A.N.Y., 176 F.2d 376, certiorari denied 70 S.Ct. 478, 338 U.S. 950, 94 L.Ed. 586.

41. U.S.—Dickson v. U. S., C.A.Colo., 182 F.2d 131.

Kan.—State v. Bishop, 160 P.2d 658, 160 Kan. 233.

Tex.—Thompson v. State, Cr., 24 S.W. 298.

25 C.J. p 579 note 36.

42. U.S.—Pierce v. U. S., C.C.A.

must be some act in keeping with the offense,⁴³ and an overt act in furtherance of the false personation.⁴⁴ Under other authority, the statute may be violated by either an act or a pretense.^{44.5}

It has been held not necessary that the person impersonated or defrauded be actually injured.⁴⁵ In cases where the receipt of money or property by the impersonator is a part of the offense, it seems that the person defrauded must have paid the money because of the false personation.⁴⁶

It has been held that, if one falsely pretends to be a designated officer, and in such character performs an act claiming it to be official, he is guilty of false personation, whether or not such act be one which would be required of such officer, or be legal if done by him in a bona fide official capacity.⁴⁷

c. Persons Liable

A person who is an officer, or has a character, as he claims, cannot be guilty of false personation of such officer or character, but he may be guilty of the crime of aiding and abetting another in the commission of such crime.

A person who is an officer, or has a character, such as he claims is incapable of committing the crime of false personation of such officer or character,⁴⁸ but he can be guilty of the crime of being an aider and abettor of another in the commission of such crime, even though the statute makes an aider

or abettor a principal.⁴⁹

§ 4. Prosecution and Punishment

The rules governing the indictment or information, evidence, and trial in the prosecution and punishment of the offense of false personation are discussed in the following sections.

Examine Pocket Parts for later cases.

§ 5. — Indictment or Information

- a. In general
- b. Variance

a. In General

The indictment, information, or complaint must directly and positively allege the facts of the crime charged with such particularity that the accused is notified of the offense with which he is charged, is able to prepare his defense, and will be protected against another prosecution. All the elements of the offense should be alleged, but only one offense should be charged in a count.

Conformably to the rules applicable in criminal proceedings generally, see Indictments and Informations §§ 98-106, an indictment, information, or complaint for false personation must directly and positively allege all the facts necessary to constitute the crime with which defendant is charged, with such particularity that accused is notified with reasonable certainty of the precise offense with which he is charged,⁵⁰ may be advised of what he must an-

Tenn., 86 F.2d 949—U. S. v. McNaugh, C.C.A.N.Y., 42 F.2d 835.

43. U.S.—U. S. v. Barnow, Pa., 36 S.Ct. 19, 239 U.S. 74, 60 L.Ed. 155.
U. S. v. Lepowitch, D.C.Mo., 48 F.Supp. 846, reversed on other grounds 63 S.Ct. 914, 318 U.S. 702, 87 L.Ed. 1091, rehearing denied 63 S.Ct. 1171, 319 U.S. 783, 87 L.Ed. 1727.

Action in assumed character

Such a statute does not attempt to punish any person for falsely assuming to be any of the officers named in the section, but for assuming and taking on himself to act as such.

Mich.—People v. Cronin, 45 N.W. 479, 80 Mich. 646.

44. U.S.—Dickson v. U. S., C.A.Colo., 182 F.2d 131—Baas v. U. S., C.C.A. La., 25 F.2d 294.

U. S. v. Larson, D.C.Alaska, 125 F.Supp. 360.

N.C.—*Corpus Juris Secundum* cited in State v. Church, 87 S.E.2d 256, 257, 242 N.C. 230, 257.

- 44.5 Colo.—Martin v. People, 154 P.2d 1006, 113 Colo. 50.

45. U.S.—U. S. v. Barnow, Pa., 36 S.Ct. 19, 239 U.S. 74, 60 L.Ed. 155. 25 C.J. p 579 note 34.

No valuable thing demanded or obtained

An act in the pretended character of a federal officer or employee will constitute an offense under 18 U.S.C.A. § 912, and under former similar statutes, even though the act is neither the demanding nor the obtaining of a valuable thing.

U.S.—U. S. v. Lepowitch, Mo., 63 S.Ct. 914, 318 U.S. 702, 87 L.Ed. 1091, rehearing denied 63 S.Ct. 1171, 319 U.S. 783, 87 L.Ed. 1727.

Ekberg v. U. S., C.C.A.Puerto Rico, 167 F.2d 380—Laing v. U. S., C.C.A.Mich., 145 F.2d 111.

U. S. v. Meeker, D.C.Alaska, 110 F.Supp. 743.

46. Ga.—Jackson v. State, 44 S.E. 833, 118 Ga. 125.

47. Tex.—Walker v. State, 229 S.W. 853, 89 Tex.Cr. 180.

48. S.C.—State v. Robertson, 130 S. E. 212, 133 S.C. 126.

49. U.S.—Haggerty v. U. S., C.C.A. Ill., 5 F.2d 224.

50. Ill.—People v. Snyder, 117 N.E. 119, 279 Ill. 435.

Indictment held sufficient

(1) Indictment accusing defendant of exercising or attempting to exer-

cise without authority the functions of police officer.

Ga.—Loomis v. State, 51 S.E.2d 13, 78 Ga.App. 153.

(2) Indictment held sufficiently to allege nature of offense where it charged that on a certain date, at a certain place, defendants, knowingly and with intent to defraud a named person, falsely assumed and pretended to be officers and employees of the United States, acting under authority of the United States, namely, immigrant inspectors of the department of labor of the United States, and took on themselves to act as such officers, when in truth they were not agents or employees of the government.

U.S.—Heskett v. U. S., C.C.A.Cal., 58 F.2d 897, certiorari denied 53 S. Ct. 89, 287 U.S. 643, 77 L.Ed. 556.

(3) Indictment charging defendant with falsely impersonating federal employee and obtaining money by reason thereof sufficiently charged violation of federal law.

U.S.—U. S. v. Ford, D.C.Pa., 58 F.2d 1029.

(4) Indictment alleging that accused exercised and attempted to exercise the authority of a peace officer without alleging that he pre-

swer,⁵¹ and be able to prepare his defense,⁵² and so that it will constitute a sufficient foundation for a judgment,⁵³ and that the judgment may be a bar to any other prosecution for the same offense.⁵⁴ However, in testing the sufficiency of an indictment after verdict to determine whether it constitutes a sufficient foundation for a judgment and adequately protects defendant against another prosecution for the same offense, it may be aided by reasonable inferences and clear implications from the allegations made.⁵⁵

At common law, it was necessary that the several elements of the offense should be alleged with due particularity;⁵⁶ and, in indictments on statutes, it has been held that the facts should be given as minutely and particularly as would be required by

common-law rules.⁵⁷ The indictment should set forth affirmatively all the elements constituting the statutory offense.⁵⁸ Nevertheless, a general allegation of the impersonation of a government official has been held sufficiently to charge the offense under a statute.^{58.5}

An indictment is insufficient where it is susceptible of two different constructions, under neither of which a complete offense is stated.⁵⁹ It is not necessary to state anything in the indictment which it is not necessary to prove.⁶⁰ An information for false personation of an officer must set out the pretense charged with sufficient particularity to enable accused to know what office he is charged with assuming;⁶¹ and, under statutes which are construed to refer only to the personation of another

tended to be such officer was sufficient to charge the offense of impersonating an officer.

Colo.—Martin v. People, 154 P.2d 1006, 113 Colo. 50.

51. Ark.—Kirtley v. State, 38 Ark. 543.

Tex.—Martin v. State, 1 Tex.App. 586.

52. U.S.—Kane v. U. S., C.C.A.Mo., 120 F.2d 990.

Tex.—Martin v. State, 1 Tex.App. 586.

53. U.S.—Kane v. U. S., C.C.A.Mo., 120 F.2d 990.

54. U.S.—Kane v. U. S., supra.
Tex.—Martin v. State, 1 Tex.App. 586.

55. U.S.—Kane v. U. S., C.C.A.Mo., 120 F.2d 990.

Direct statement unnecessary

There is no sound reason why all the facts and elements of the crime should be required to be stated directly.

U.S.—Kane v. U. S., supra.

Indictment held sufficient

An indictment, which specifically alleged that accused falsely and feloniously pretended to be an agent of the department of justice and by false representations sought and obtained a written signed statement from named person contrary to the form of the statute, was sufficient to charge offense of falsely impersonating officer or employee of the United States with intent to defraud, as against attack made after conviction that indictment was fatally defective for failure to charge that accused's acts were done with intent to defraud.

U.S.—Kane v. U. S., supra.

56. Ark.—Kirtley v. State, 38 Ark. 543.

57. Ark.—Kirtley v. State, supra—Treadaway v. State, 37 Ark. 443.

58. U.S.—Kane v. U. S., C.C.A.Mo.,

120 F.2d 990—Baas v. U. S., C.C.A.La., 25 F.2d 294.

25 C.J. p 579 note 49.

Language of statute

(1) Indictment or information which charges the offense in the language of the statute, or which substantially follows its wording, is sufficient.

U.S.—Garrison v. Hudspeth, C.C.A.Kan., 108 F.2d 733.

Ariz.—Midkiff v. State, 30 P.2d 1057, 43 Ariz. 323.

Tex.—Yoes v. State, 254 S.W.2d 141, 158 Tex.Cr. 201.

(2) It is usually sufficient to follow the statute provided doing so sets forth every element of the offense and the indictment alleges enough to advise accused of what he has to meet to present his defense.

U.S.—Baas v. U. S., C.C.A.La., 25 F.2d 294.

(3) Necessity and sufficiency of employing language of statute in criminal proceedings generally see Indictments and Informations § 139.

Falsity of pretense

An indictment charging that defendants did assume and pretend to be United States revenue officers sufficiently charges that they falsely assumed or pretended to be officers, since the word "pretend," in the connection in which it is used, implies the putting forward of a false appearance of being officers, the simulating or feigning to be officers.

U.S.—King v. U. S., C.C.A.Fla., 279 F. 103.

Intent to defraud

The indictment must allege an intent to defraud in fairly specific terms.

U.S.—Kane v. U. S., C.C.A.Mo., 120 F.2d 990.

Overt act

(1) Good pleading requires that the act committed which completes

the offense be set out with reasonable certainty and not by inference in order to charge the offense.

U.S.—Baas v. U. S., C.C.A.La., 25 F.2d 294.

(2) It is not sufficient to charge that accused falsely pretended to be an officer of the United States with intent to defraud a named person. It is necessary to charge in addition that accused did something in his pretended character, or at least demanded something of value while so pretending. This is a matter of substance and not of form.

U.S.—Baas v. U. S., supra.

Complete offense

Indictment alleging that on certain day in certain city accused willfully, unlawfully, feloniously, and falsely impersonated another, and in such assumed character took a civil service examination for the position of policeman in the city, and by reason thereof received a certain sum of money from the one falsely impersonated, sufficiently stated a complete offense under false impersonation statute.

Colo.—People v. Horkans, 123 P.2d 824, 109 Colo. 177.

Indictment or information held insufficient

U.S.—Ekberg v. U. S., C.C.A.Puerto Rico, 167 F.2d 380.

U. S. v. Larson, D.C.Alaska, 125 F.Supp. 360.

Kan.—State v. Bishop, 160 P.2d 658, 160 Kan. 233.

58.5 U.S.—U. S. v. Lepowitch, Mo., 63 S.Ct. 914, 318 U.S. 702, 87 L.Ed. 1091, rehearing denied 63 S.Ct. 1171, 319 U.S. 783, 87 L.Ed. 1727.

59. Cal.—People v. Knox, 51 P. 19, 119 C. 73.

25 C.J. p 580 note 50.

60. Tex.—Martin v. State, 1 Tex.App. 586.

61. Tex.—Reid v. State, 80 S.W.2d 961, 128 Tex.Cr. 261—Walker v.

particular individual, it has been held that the indictment is demurrable if it does not state the name of the individual personated;⁶² but it is not necessary to state his whereabouts or residence.⁶³ An indictment has been held not demurrable on the ground that the thing demanded is not a valuable thing within the meaning of the statute, since someone may be defrauded even though he parts with something of no measurable value.^{63.5}

Applying the general rule that two or more distinct and substantive offenses cannot be charged in the same count, see Indictments and Informations § 162, an indictment for false personation is not only not defective where it fails to charge both of two distinct offenses provided for in a statute,⁶⁴ but it is insufficient where it undertakes to charge two separate offenses in a single count.⁶⁵ Since the federal statute on the subject defines two separate offenses, an indictment charging two separate offenses in separate counts is proper.^{65.5} However, where the statute enumerates several acts which, either separately or together, constitute the crime, the information in describing the crime may charge its commission by one or all of the acts enumerated.⁶⁶

State, 229 S.W. 853, 89 Tex.Cr. 180.

Information held insufficient

Information, charging defendant with assuming and pretending to be "a certain officer from Dallas county, Texas," was held insufficient to sustain conviction for failure to designate officer alleged to have been personated.

Tex.—Reld v. State, 80 S.W.2d 961, 128 Tex.Cr. 261.

62. Cal.—People v. Knox, 51 P. 19, 119 C. 73.

63. Tex.—Freeman v. State, 20 Tex. App. 558.

63.5 U.S.—U. S. v. Lepowitch, Mo., 63 S.Ct. 914, 318 U.S. 702, 87 L.Ed. 1091, rehearing denied 63 S.Ct. 1171, 319 U.S. 783, 87 L.Ed. 1727.

64. U.S.—Kane v. U. S., C.C.A.Mo., 120 F.2d 990.

65. U.S.—U. S. v. Taylor, D.C.Mo., 108 F. 621.

65.5 U.S.—Shepherd v. U. S., C.A. Kan., 191 F.2d 682.

66. Ariz.—Midkiff v. State, 30 P.2d 1057, 43 Ariz. 323.

67. Ill.—People v. Snyder, 117 N.E. 119, 279 Ill. 435.

68. Tex.—Butts v. State, 84 S.W. 586, 47 Tex.Cr. 494.
25 C.J. p 580 note 59.

Proof held not to support information

An information, charging defend-

ant with falsely pretending to be an executive officer of the state, county, and city, namely a deputy sheriff, a constable, deputy constable and a policeman, was not supported by proof that he said he was an "officer," there being many other officers besides state officers.

Tex.—Walker v. State, 229 S.W. 853, 89 Tex.Cr. 180.

Fatal variance held not shown

D.C.—Taylor v. U. S., 167 F.2d 752, 83 U.S.App.D.C. 215.

69. Tex.—Butts v. State, 84 S.W. 586, 47 Tex.Cr. 494.
25 C.J. p 581 note 60.

70. Tex.—Stahmann v. State, 70 S.W.2d 709, 126 Tex.Cr. 192.
25 C.J. p 581 note 61.

Burden of proof

(1) The government has the burden of proof.

D.C.—Taylor v. U. S., 167 F.2d 752, 83 U.S.App.D.C. 215.

(2) Once the state has proved its case, the burden of proof is on accused to bring himself within one of the exceptions of the law.

Ga.—Loomis v. State, 51 S.E.2d 13, 78 Ga.App. 153.

Falseness of claimed character

(1) Evidence is insufficient where there is failure of proof that accused persons were not in fact officers or employees of the federal government such as they pretended.

Where accessories before the fact are declared by statutory provisions to be principals, an indictment may state the circumstances as in an indictment against an accessory before the fact; but it must contain an allegation charging accused as principal.⁶⁷

b. Variance

The allegations in the indictment which are descriptive of the offense must be proved as made.

Conformably to the rule applicable in criminal proceedings generally that a variance in a material matter is fatal and entitles defendant to an acquittal, see Indictments and Informations § 254, in a prosecution for false personation all allegations of the indictment which are descriptive of the offense must be proved as made;⁶⁸ and this is so even though it was not necessary to have made the allegation in the manner in which it was made.⁶⁹

§ 6. — Evidence

Every element of the offense must be proved by competent evidence and beyond a reasonable doubt.

To warrant a conviction under an indictment for the offense of false personation, it is essential that every element of the offense shall be proved,⁷⁰ by

U.S.—U. S. v. McNaugh, C.C.A.N.Y., 42 F.2d 835.

(2) In prosecution for falsely assuming to be United States prohibition agent and obtaining certain amount from certain person as such, evidence was held to warrant finding that defendant was not prohibition agent.

U.S.—Haggerty v. U. S., C.C.A.Ill., 5 F.2d 224.

Intent

(1) Proof of criminal intent is required.

D.C.—Levine v. U. S., 261 F.2d 747, 104 U.S.App.D.C. 281.

(2) Evidence was held insufficient to support conviction for false personation of deputy constable when accused honestly believed himself entitled to such office.

Tex.—Stahmann v. State, 70 S.W.2d 709, 126 Tex.Cr. 192.

Reliance on the representations made need not be proved where it is not an element of the offense.

D.C.—Levine v. U. S., 261 F.2d 747, 104 U.S.App.D.C. 281.

Venue and corpus delicti

In false personation prosecution, state proved corpus delicti where evidence disclosed that crime was committed in Nashville when accused obtained automobile on rental contract from rental agency by representing that he was another person.

Tenn.—Sloan v. State, 79 S.W.2d 1021, 168 Tenn. 573, 97 A.L.R. 1505.

competent evidence,⁷¹ and the guilt of accused must be established by more than a mere presumption;⁷² as in other criminal prosecutions, the guilt of accused must be established beyond a reasonable doubt.⁷³

Circumstantial evidence may be sufficient to prove the offense.^{73.5}

§ 7. — Trial and Review

It is the duty of the court properly to instruct the

jury as to the law of the case, and it is for the jury to determine the guilt of accused. The verdict should be in proper form.

As is true in criminal cases generally, see Criminal Law § 1189, on the trial of one accused of the offense of false personation it is the duty of the trial court to instruct the jury distinctly and precisely on the law of the case;⁷⁴ and, under proper instructions, it is for the jury to determine whether the actions of accused were such as to render him guilty.⁷⁵

71. Evidence held admissible

(1) In a prosecution for falsely and fraudulently impersonating and representing to be another to a bank and its cashier with intent fraudulently to obtain money from them, the check which the cashier swore that accused signed and presented to him for payment was admissible.

Ga.—Sturdivant v. State, 103 S.E. 837, 25 Ga.App. 428.

(2) Evidence that defendants were prepared to dynamite a Negro convention has been held admissible to show their willingness to use such methods to usurp police power, in a prosecution for exercising policeman's functions without authority. Ga.—Burke v. State, 47 S.E.2d 116, 76 Ga.App. 612.

(3) Other evidence. Pa.—Commonwealth v. Downer, 49 A.2d 516, 159 Pa.Super. 626.

72. Mo.—State v. Shelley, 66 S.W. 430, 166 Mo. 616.
25 C.J. p 581 note 62.

Unfavorable presumption

Where accused is charged with falsely impersonating an officer, and fails to produce evidence showing he is such an officer, presumption arises that evidence, if produced, would be unfavorable to him.

D.C.—Taylor v. U. S., 167 F.2d 752, 83 U.S.App.D.C. 215.

73. Mo.—State v. Nolan, 68 S.W. 346, 168 Mo. 446, 90 Am.S.R. 466.
25 C.J. p 581 note 63.

Degree of proof generally see Criminal Law §§ 910-913.

Credulity of victim

Evidence is not rendered insufficient to sustain a conviction for impersonating a police officer because statements of accused to victim were such that only a very credulous person would believe them.

Pa.—Commonwealth v. Downer, 49 A. 2d 516, 159 Pa.Super. 626.

Evidence held sufficient

(1) To support conviction for pretending to be an attorney. Ariz.—Midkiff v. State, 30 P.2d 1057, 43 Ariz. 323.

(2) To sustain conviction of falsely personating federal immigrant

inspectors, although defendants did not expressly represent themselves as "United States" immigration officers.

U.S.—Heskett v. U. S., C.C.A.Cal., 58 F.2d 897, certiorari denied 53 S.Ct. 89, 287 U.S. 643, 77 L.Ed. 556.

(3) To support conviction for false personation of an officer.

Tex.—Yoes v. State, 254 S.W.2d 141, 158 Tex.Cr. 201.

(4) To warrant conviction under law relating to intent to defraud by falsely assuming to be officer or employee of United States.

U.S.—Shepherd v. U. S., C.A.Kan., 177 F.2d 938—U. S. v. Ham, C.C.A.N.J., 160 F.2d 738—Kelly v. U. S., C.C.A. N.J., 46 F.2d 286.

D.C.—Taylor v. U. S., 167 F.2d 752, 83 U.S.App.D.C. 215.

(5) To support conviction of falsely personating an agent of the Federal Bureau of Investigation.

U.S.—Thayer v. U. S., C.C.A.Wyo., 168 F.2d 247—Haid v. U. S., C.C.A. Wash., 157 F.2d 630.

(6) To support conviction of falsely personating naval officer.

U.S.—Conley v. U. S., C.A.Cal., 170 F.2d 702.

(7) To sustain conviction for aiding, abetting, counseling, commanding, inducing, and procuring another to falsely personate an agent of the Internal Revenue Bureau.

U.S.—Colosacco v. U. S., C.A.Colo., 196 F.2d 165.

(8) To sustain conviction for falsely and fraudulently impersonating and representing himself to a bank and its cashier to be another, with intent fraudulently to obtain money from them.

Ga.—Sturdivant v. State, 103 S.E. 837, 25 Ga.App. 428.

(9) To establish, in prosecution for falsely pretending to be federal prohibition agents, that defendants were not such officers.

U.S.—Scala v. U. S., C.C.A.Ill., 54 F. 2d 608, certiorari denied 52 S.Ct. 411, 285 U.S. 554, 76 L.Ed. 943.

(10) Early cases see 25 C.J. p 581 note 63 [a].

Evidence held insufficient

(1) To support conviction on in-

dictment charging that defendant falsely represented himself and assumed to act as city detective.

Pa.—Commonwealth v. Brewer, 167 A. 386, 109 Pa.Super. 429.

(2) To support finding that accused falsely impersonated state motor vehicle inspector, and threatened to make arrest unless given money. N.Y.—People v. Nastri, 221 N.Y.S. 182, 220 App.Div. 141.

(3) To support conviction on indictment charging that accused falsely impersonated an agent of Federal Bureau of Investigation.

U.S.—Massengale v. U. S., C.A.Ohio, 240 F.2d 781, certiorari denied 77 S.Ct. 1269, 354 U.S. 909, 1 L.Ed.2d 1428, rehearing adhered to 77 S.Ct. 1400, 354 U.S. 936, 1 L.Ed.2d 1542.

(4) To support conviction of impersonating a police officer.

N.Y.—People v. Petosa, 116 N.Y.S. 2d 146, 280 App.Div. 957.

(5) Other evidence.

Wis.—State v. Hackbarth, 41 N.W.2d 594, 256 Wis. 545, rehearing denied 42 N.W.2d 358, 256 Wis. 545.

(6) Early case see 25 C.J. p 581 note 63 [b].

73.5 D.C.—Taylor v. U. S., 167 F.2d 752, 83 U.S.App.D.C. 215.

74. Mo.—State v. Cutter, 1 S.W.2d 96, 318 Mo. 687.
25 C.J. p 581 note 65.

Instruction held proper where it enumerated the acts and elements necessary to commit the offense charged.

Ga.—Loomis v. State, 51 S.E.2d 13, 78 Ga.App. 153.

Instruction held not misleading

Instruction referring by innuendo to impersonation of another in executing "recognizance or bail bond" was held not misleading, especially in view of repeated use of word "bond."

Mo.—State v. Cutter, 1 S.W.2d 96, 318 Mo. 687.

Instructions held improperly refused D.C.—Levine v. U. S., C.A., 261 F.2d 747, 104 U.S.App.D.C. 281.

75. Ohio.—Fouts v. State, 149 N.E. 551, 113 Ohio St. 450.

25 C.J. p 581 note 66.

Conformably to the rule applicable in criminal actions generally, see Criminal Law § 1393 a, a verdict on which a judgment properly rendered will bar another prosecution for the same offense is sufficient.⁷⁶

Questions held for jury

(1) Whether a federal offense was involved.

U.S.—Dickson v. U. S., C.A.Colo., 182 F.2d 131.

(2) Whether those to whom representations were made believed them and whether accused acted as officer in addition to representing himself as such.

D.C.—Axelbank v. U. S., 189 F.2d 18, 88 U.S.App.D.C. 147.

Submission to jury held proper

(1) Evidence of guilty knowledge that principal on bail bond was impersonating another authorized submission to jury of surety's guilt of aiding and abetting.

Mo.—State v. Cutter, 1 S.W.2d 96, 318 Mo. 687.

(2) Evidence held sufficient to warrant submission of case to jury generally.

U.S.—U. S. v. Ham, C.C.A.N.J., 160 F.2d 738.

Directed verdict held improper

U.S.—Westenrider v. U. S., C.C.A. Nev., 134 F.2d 772.

76. Ariz.—Midkiff v. State, 30 P.2d 1057, 43 Ariz. 323.

Verdict held sufficient

Verdict finding defendant, not a licensed attorney, guilty of holding himself out as practicing "or" entitled to practice law, was not fatally defective.

Ariz.—Midkiff v. State, supra.

FALSE PRETENSES

This Title includes fraudulently obtaining or attempting to obtain from another personal property, or the making or indorsement by him of a negotiable instrument, or the execution of any instrument in writing, or any benefit or advantage, by false tokens or representations; nature and elements of the crimes of cheating, swindling, obtaining money or goods by false pretenses, larceny by false pretenses, etc.; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. OFFENSES AND RESPONSIBILITY THEREFOR**§ 1. Definitions**

A criminal false pretense is a false representation of a past or existing fact, which is calculated and intended to deceive, and does in fact deceive, and by means of which one person obtains value from another without compensation.

A criminal false pretense may be defined to be

the false representation of a past or existing fact, whether by oral or written words or conduct, which is calculated to deceive, intended to deceive, and does in fact deceive, and by means of which one person obtains value from another without compensation.¹ "False pretense" and "false representa-

1. Cal.—People v. Cale, 288 P. 430, 106 C.A., Supp., 777.
Ind.—Corpus Juris Secundum quoted in Beck v. State, 149 N.E.2d 695, 697.

Iowa.—Corpus Juris Secundum cited in State v. Comes, 62 N.W.2d 753, 755, 245 Iowa 485.
La.—Corpus Juris cited in State v.

Hendon, 128 So. 286, 289, 170 La. 488.
Me.—State v. Vallee, 12 A.2d 421, 136 Me. 432.

tion" are held to be synonymous.^{1,5}

§ 2. Origin and History

Because the early common-law crime of cheating was confined to certain types of frauds, several English statutes were enacted to broaden the offense, and out of these statutes arose the crime now commonly known as false pretenses. Some states still recognize the common-law offense of cheating; and a number of jurisdictions have adopted the English statutory modifications or enacted statutes substantially similar.

The crime of obtaining property by false pretenses was unknown in the early common law.^{1,50}

As appears *infra* § 4, while cheating was an indictable offense at common law, no fraud could be the object of a criminal prosecution unless it was of a kind which in its nature was calculated to defraud numbers, as by the use of false weights or measures, false dice and the like. For this reason it was early perceived that some statutory provision was necessary in order to punish the great variety

of frauds which could be practiced with impunity under the common law,² and a partial provision on the subject was made by the statute of 33 Henry VIII c 1.³

As this statute extended only to frauds committed by the use of some visible sign or token, as discussed *infra* § 4, there was enacted the statute of 30 George II c 24, which provided that all persons who knowingly and designedly by false pretenses should obtain from any person money or goods with the intent to cheat or defraud any person of the same should be deemed offenders; as a result of this provision, or equivalent provisions, in state statutes, persons could be prosecuted even where there was no visible token, but merely verbal pretenses.⁴ It was this statute that created the crime now commonly known as obtaining goods under false pretenses.⁵ Several English statutes were thereafter enacted to supply defects found therein,⁶ among them the statute of 52 George III c 64 § 1, under

Mont.—State v. Woolsey, 259 P. 826, 84 Mont. 141.

N.C.—State v. Davenport, 42 S.E.2d 686, 700, 227 N.C. 475—State v. Howley, 16 S.E.2d 705, 220 N.C. 113.

Pa.—**Corpus Juris** quoted in Commonwealth v. Johnson, 167 A. 344, 345, 312 Pa. 140, 89 A.L.R. 333.

Commonwealth v. Prep, 142 A.2d 460, 462, 186 Pa.Super. 442—Commonwealth v. Sherman, 126 A.2d 480, 483, 182 Pa.Super. 319—Commonwealth v. Thomas, 70 A.2d 458, 459, 166 Pa.Super. 214—Commonwealth v. Gross, 56 A.2d 303, 306, 161 Pa.Super. 613—**Corpus Juris** quoted in Commonwealth v. Goldberg, 196 A. 538, 542, 130 Pa.Super. 252—Commonwealth v. Forney, 88 Pa.Super. 451.

Commonwealth v. Wright, 69 Pa. Dist. & Co. 418, 65 Montg.Co. 332.

Commonwealth v. Stone, Quar. Sess., 71 Dauph.Co. 213, modified on other grounds 144 A.2d 610, 187 Pa.Super. 236—Commonwealth v. White, Quar.Sess., 35 Del.Co. 473—Commonwealth v. Gross, O. & T. 33 North.Co. 43.

S.D.—**Corpus Juris** quoted in State v. Alick, 252 N.W. 644, 646, 62 S.D. 220.

Va.—**Corpus Juris Secundum** quoted in Hubbard v. Commonwealth, 109 S.E.2d 100, 104.

25 C.J. p 589 note 86.

Other definitions

(1) Such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value.

Ala.—Whately v. State, 31 So.2d 662,

666, 33 Ala.App. 124, reversed on other grounds 31 So.2d 664, 249 Ala. 355, 174 A.L.R. 169.

Ark.—Karr v. State, 301 S.W.2d 442, 444, 227 Ark. 777—Fisher v. State, 256 S.W. 858, 161 Ark. 586—Higgins v. State, 217 S.W. 809, 141 Ark. 633.

Cal.—People v. Staver, 252 P.2d 700, 703, 115 C.A.2d 711.

Idaho.—State v. Barr, 117 P.2d 282, 63 Idaho 59.

Iowa.—State v. Hixson, 217 N.W. 814, 205 Iowa 1321.

Mo.—State v. Houchins, 46 S.W.2d 891.

25 C.J. p 589 note 86 [a] (1).

(2) Any designed misrepresentation of an existing fact or condition by which a party obtains property of another.

Ill.—People v. Martin, 24 N.E.2d 380, 372 Ill. 484—People v. Gould, 2 N.E.2d 324, 363 Ill. 348—People ex rel. Courtney v. Sullivan, 1 N.E.2d 206, 363 Ill. 34—People v. Gruber, 200 N.E. 483, 362 Ill. 278—People v. Cohn, 193 N.E. 150, 358 Ill. 326—People v. Blume, 178 N.E. 48, 345 Ill. 524—People v. Drury, 167 N.E. 823, 335 Ill. 539—People v. Peers, 139 N.E. 13, 307 Ill. 539.

(3) Any misrepresentation of a past fact, knowingly made to induce another to part with his property.

Ill.—People v. Martin, 24 N.E.2d 380, 372 Ill. 484—People v. Schneider, 158 N.E. 448, 327 Ill. 270.

(4) A false representation, designedly made to cheat and defraud, and having that effect.

Kan.—State v. Aiken, 254 P.2d 264, 174 Kan. 162—State v. Nash, 204 P. 736, 110 Kan. 550.

(5) A representation of some fact or circumstance, calculated to mislead, which is not true.

Cal.—People v. Schmitt, 317 P.2d 673, 687, 155 C.A.2d 87—People v. Martin, 314 P.2d 493, 499, 153 C.A.2d 275.

Mass.—Commonwealth v. McKnight, 195 N.E. 499, 289 Mass. 530—Commonwealth v. Jacobson, 157 N.E. 583, 260 Mass. 311.

25 C.J. p 589 note 86 [a] (2).

(6) In false pretenses money or other personal property is obtained from owner by means of fraud.

Md.—MacEwen v. State, 71 A.2d 464, 469, 194 Md. 492.

1.5 Ga.—Ricks v. State, 69 S.E. 576, 8 Ga.App. 449.

Iowa.—State v. Joaquin, 43 Iowa 131.

1.50 Cal.—People v. Ashley, 267 P.2d 271, 42 C.2d 240.

2. U.S.—**Corpus Juris Secundum** quoted at length in U. S. v. Park Motors, D.C.Tenn., 107 F.Supp. 168, 175.

Cal.—People v. Garnett, 35 C. 470, 95 Am.D. 125.

25 C.J. p 584 note 4.

3. Miss.—Courtney v. State, 164 So. 227, 174 Miss. 147.

N.J.—State v. Vanderbilt, 27 N.J. Law 328.

25 C.J. p 584 note 5.

4. N.J.—State v. Vanderbilt, *supra*. R.I.—State v. Colangelo, 179 A. 147, 55 R.I. 170—State v. McMahon, 140 A. 359, 49 R.I. 107.

25 C.J. p 584 note 7.

5. R.I.—State v. McMahon, *supra*. 25 C.J. p 584 note 8.

6. U.S.—Biddle v. U. S., China, 156 F. 759, 84 C.C.A. 415.

which the obtaining of choses in action as well as other property was included.⁷

In those jurisdictions of the United States in which the common law is in force, the common-law crime of cheating exists, with the same limitations as in England.⁸ In some jurisdictions, the statute of 33 Henry VIII,⁹ or subsequent English statutes,¹⁰ have been adopted as part of the common law, but in at least one jurisdiction it has been expressly held that, while common-law cheating has been recognized, the statutory modifications thereof have not been adopted.¹¹

It has been decided that a federal statute making the common law applicable to criminal offenses includes the statute of 30 George II c 24 and such amendments thereto as were enacted before the American Revolution.¹² In most jurisdictions there

are statutes modeled on the English statutes, with minor differences,¹³ and, as will appear in appropriate places in this title, in a number of jurisdictions provisions have been added to these statutes, or additional statutes enacted punishing analogous frauds of various kinds. In other jurisdictions statutes more restricted in their operation than the English ones have been enacted.¹⁴

The offense of obtaining money or property by false pretenses has in some jurisdictions been included within the broader offense of swindling¹⁵ or theft,¹⁶ or assimilated to the crime of larceny,¹⁷ while in other jurisdictions a new statutory crime has been said to be created which includes false pretenses.^{17.5} Where the larceny or theft charged under such statutes is founded on false pretenses, the essential elements of the latter offense are not changed,¹⁸ nor are the rules of pleading it altered.¹⁹

7. N.C.—State v. Freeman, 90 S.E. 507, 172 N.C. 925.

8. N.Y.—People v. Babcock, 7 Johns. 201, 5 Am.D. 256.
25 C.J. p 584 note 11.

9. Mass.—Commonwealth v. Warren, 6 Mass. 72.
S.C.—State v. Middleton, 23 S.C.L. 275.

10. R.I.—State v. Colangelo, 179 A. 147, 55 R.I. 170—State v. McMahon, 140 A. 359, 49 R.I. 107.

11. Pa.—Commonwealth v. Smith, 1 Clark 400, 3 Pa.L.J. 34—Commonwealth v. Hutchinson, 2 Pars.Eq. Cas. 309, 1 Clark 302, 2 Pa.L.J. 241.

12. U.S.—Biddle v. U. S., China, 156 F. 759, 84 C.C.A. 415.

13. Miss.—Courtney v. State, 164 So. 227, 174 Miss. 147.
25 C.J. p 585 note 15.

The California statute, like that of most American states, is directly traceable to 30 Geo. II c 24 § 1 (22 Statutes-at-Large 114, 1757).

Cal.—People v. Ashley, 267 P.2d 271, 42 Cal.2d 240.

The Hawaii statute is modeled on the statute of 30 Geo. II c 24.
Hawaii.—Territory v. Taok, 33 Hawaii 560.

14. Ind.—Shaffer v. State, 82 Ind. 221.
25 C.J. p 585 note 17.

15. Tex.—Allen v. State, 126 S.W. 571, 58 Tex.Cr. 494.
25 C.J. p 585 note 18.

The object of the statute defining the crime of swindling is to codify and expand the common law on the subject of cheats so as to reach cheats and swindlers of all kinds.
Minn.—State v. Yurkiewicz, 292 N. W. 782, 208 Minn. 71.

16. Cal.—In re Hallinan, 272 P.2d 768, 43 C.2d 243—People v. Ashley,

267 P.2d 271, 42 C.2d 246, certiorari denied Ashley v. People of State of California, 75 S.Ct. 222, 348 U.S. 900, 99 L.Ed. 707—People v. Jones, 224 P.2d 353, 36 C.2d 373.

People v. Goodman, 323 P.2d 536, 159 C.A.2d 54—People v. Chapman, 319 P.2d 8, 156 C.A.2d 151—People v. Otterman, 316 P.2d 85, 154 C.A.2d 193—People v. Massey, 312 P.2d 365, 151 C.A.2d 623—People v. Hunter, 305 P.2d 608, 147 C.A.2d 472—People v. Reinschreiber, 297 P.2d 658, 141 C.A.2d 688—People v. Bartges, 273 P.2d 49, 126 C.A.2d 763, amended on other grounds 275 P.2d 518, 128 C.A.2d 496—People v. Sears, 269 P.2d 683, 124 C.A.2d 839—People v. Corenevsky, 267 P.2d 1048, 124 C.A.2d 19—People v. Davis, 246 P.2d 160, 112 C.A.2d 286—People v. Hewlett, 239 P.2d 150, 108 C.A.2d 358, certiorari denied Hewlett v. People of State of California, 72 S.Ct. 1084, 343 U.S. 981, 96 L.Ed. 1372, rehearing denied 73 S. Ct. 50, 344 U.S. 849, 97 L.Ed. 660, rehearing denied 73 S.Ct. 173, 344 U.S. 882, 97 L.Ed. 683—People v. Moorhead, 232 P.2d 268, 104 C.A.2d 688—People v. Daniels, 192 P.2d 788, 85 C.A.2d 186—People v. Cravens, 180 P.2d 453, 79 C.A.2d 658—People v. Cannon, 176 P.2d 409, 77 C.A.2d 678—People v. Pillsbury, 138 P.2d 320, 59 C.A.2d 107—People v. Tullos, 134 P.2d 280, 57 C.A.2d 233—People v. Alexander, 128 P.2d 923, 54 C.A.2d 393—People v. Brown, 126 P.2d 406, 52 C.A.2d 428—People v. Selk, 115 P.2d 607, 46 C.A.2d 140—People v. Jackson, 74 P.2d 1085, 24 C.A.2d 182—People v. Breyer, 34 P.2d 1065, 139 C.A. 547, hearing denied 34 P.2d 1067, 139 C. A. 547—People v. Edwards, 24 P.2d 183, 133 C.A. 335—People v. Carter, 21 P.2d 129, 131 C.A. 177—People v. Robinson, 290 P. 470, 107 C.

A. 211—People v. Leaverton, 289 P. 890, 107 C.A. 51—People v. Stevenson, 284 P. 487, 103 C.A. 82.

People v. Fawver, 77 P.2d 325, 29 C.A.2d Supp. 775.

La.—State v. Dabbs, 84 So.2d 601, 228 La. 960—State v. Pollard, 41 So.2d 465, 215 La. 655.

17. Mass.—Commonwealth v. Mycock, 52 N.E.2d 377, 315 Mass. 262.
N.Y.—People v. Krumme, 292 N.Y.S. 657, 161 Misc. 278.
25 C.J. p 585 note 19.

Purpose

(1) "The obvious purpose of this merger is to avoid the pitfalls of pleading whereby a defendant might escape a conviction for one offense by proof that he had committed another."

U.S.—Crabb v. Zerbst, C.C.A.Ga., 99 F.2d 562.

(2) The purpose of statute consolidating crimes of larceny by trick and device, and of obtaining property by false pretenses, into single crime of theft was to remove technicalities that existed in pleading and proof of the consolidated crimes at common law.

Cal.—People v. Ashley, 267 P.2d 271, 42 C.2d 246, certiorari denied Ashley v. People of State of California, 75 S.Ct. 222, 348 U.S. 900, 99 L.Ed. 707.

17.5 U.S.—Flores v. U. S., C.A.Hawaii, 260 F.2d 179.

18. Cal.—People v. Jones, 224 P.2d 353, 36 C.2d 373.

People v. Cravens, 180 P.2d 453, 79 C.A.2d 658—People v. Tullos, 134 P.2d 280, 57 C.A.2d 233—People v. Selk, 115 P.2d 607, 46 C.A.2d 140.
N.Y.—People v. Krumme, 292 N.Y.S. 657, 161 Misc. 278.
25 C.J. p 585 note 20.

19. N.Y.—People v. Krumme, supra

§ 3. Distinguished from Other Offenses

Obtaining under false pretenses has been distinguished from other offenses, such as bribery, forgery, larceny, and robbery.

Obtaining under false pretenses has been distinguished from various other offenses.^{19.50}

Bribery. The distinction between bribery and false pretenses is referred to in Bribery § 1.

Embezzlement is distinguished from swindling and obtaining money by false pretenses in Embezzlement § 1.

Forgery. A forgery is necessarily also a false pretense,²⁰ but the latter, when embodied in a writing, does not necessarily involve the former.²¹ False pretense and forgery are closely akin, both belonging historically to the family of offenses known to the common law as "cheats," and now so classed.^{21.5} False pretense is the heart of forgery, the essence of its being.^{21.10} The principal difference between the two, historically developed in the common law, is that forgery exclusively pertains to a writing, while false pretense covers fraudulent deceits by parol.^{21.15}

There is a marked distinction between forgery and obtaining property by a false writing.²² To sustain an indictment for forgery the instrument must be

one which, if genuine, would create some right or liability, or, in other words, be of some legal effect;²³ to sustain an indictment for false pretense this is not necessary,²⁴ but the false writing need only be adapted to induce another to part with his property.²⁵

With respect to intent, a distinction is made between forgery and the obtaining of money by false pretenses, for while in a prosecution for false pretense it is necessary, in addition to proving the false pretenses, to show that they were made with an intent to cheat and defraud, in a prosecution for forgery the criminal intent to defraud goes with the act as an ingredient and a component part of it.²⁶ If, in signing another's name to an instrument, there is no intent on the part of accused to deceive others as to whose signature it is, but merely a misrepresentation as to authority, the offense is not forgery but "false pretenses."²⁷

Fraudulent conversion. The crimes of fraudulent conversion of property and of cheating by fraudulent pretenses are separate and distinct offenses.^{27.5}

Larceny; theft. The crime of obtaining money or goods by false pretenses is closely allied, or analogous, to that of larceny,²⁸ and it has been said

—People v. Hart, 71 N.Y.S. 492, 35 Misc. 182.

19.50 U.S.—U. S. v. Carpenter, C.C. A.III., 143 F.2d 47.

Technical distinctions eliminated

Purpose of statute with respect to statutory crime of stealing is to eliminate the technical distinctions between offenses of larceny, embezzlement, and obtaining money under false pretenses.

Mo.—State v. Woolsey, 324 S.W.2d 753—State v. Gale, 322 S.W.2d 852—State v. Zammar, 305 S.W.2d 441.

20. N.Y.—Mann v. People, 15 Hun 155, affirmed 75 N.Y. 484, 31 Am.R. 482.

Acts constituting both offenses

(1) Forgery and swindling may be committed in one transaction.

Tex.—Scott v. State, 48 S.W. 523, 40 Tex.Cr. 105.

(2) It has been held that where such is the case the prosecution should be for forgery and not for swindling.

Tex.—Ashmore v. State, 150 S.W. 196, 67 Tex.Cr. 502.
25 C.J. p 659 note 41.

(3) One who knowingly presents forged check to bank, and obtains money thereon from bank, is guilty of obtaining money by false pre-

tense, although he may also be guilty of forgery.

Okl.—Loughridge v. State, 72 P.2d 513, 63 Okl.Cr. 33.

(4) One falsely impersonating another in signing name to false document may be guilty of both forgery and false pretenses.

Okl.—Cornelius v. State, 227 P. 845, 27 Okl.Cr. 331.

21. N.Y.—Mann v. People, 15 Hun 155, affirmed 75 N.Y. 484, 31 Am.R. 482.

26 C.J. p 896 note 4 [d] (2).

21.5 N.C.—Peoples Bank & Trust Co. v. Fidelity & Cas. Co. of N. Y., 57 S.E.2d 809, 231 N.C. 510, 15 A.L.R. 2d 996.

21.10 N.C.—Peoples Bank & Trust Co. v. Fidelity & Cas. Co. of N. Y., supra.

21.15 N.C.—Peoples Bank & Trust Co. v. Fidelity & Cas. Co. of N. Y., supra.

22. N.Y.—Mann v. People, 15 Hun 155, affirmed 75 N.Y. 484, 31 Am.R. 482.

Tenn.—Corpus Juris Secundum cited in Mallory v. State, 168 S.W.2d 787, 788, 179 Tenn. 617.

25 C.J. p 653 note 35.

23. Minn.—State v. Henn, 40 N.W. 564, 39 Minn. 464.

N.D.—State v. Stewart, 83 N.W. 869, 9 N.D. 409.

26 C.J. p 896 note 4 [d] (1).

24. Tex.—Escue v. State, 227 S.W. 483, 88 Tex.Cr. 447.

25 C.J. p 658 note 37—26 C.J. p 896 note 4 [d] (3).

Stolen weigher's certificate may be a false pretense although it has not the effect in law of a warehouseman's receipt.

Tex.—Nash v. State, 31 S.W.2d 445, 116 Tex.Cr. 607.

25. N.D.—State v. Stewart, 83 N.W. 869, 9 N.D. 409.

25 C.J. p 658 note 38.

26. N.Y.—People v. Weaver, 81 N.Y. S. 519, 81 App.Div. 567, reversed on other grounds 69 N.E. 1094, 177 N.Y. 434.

27. Ga.—Morgan v. State, 48 S.E.2d 115, 77 Ga.App. 164.

Mo.—State v. Miller, 292 S.W. 440.

27.5 Pa.—Commonwealth v. Tarilla, 74 Pa.Dist. & Co. 527, 41 Luz.Leg. Reg. 317.

Commonwealth v. Hancock, Quar. Sess., 64 Dauph.Co. 372.

28. Ala.—Corpus Juris Secundum quoted at length in Hufstetler v. State, 63 So.2d 730, 731, 37 Ala.App. 71—Corpus Juris Secundum quoted at length in Murchison v. State, 26 So.2d 622, 624, 32 Ala.App. 427.

that the statutes denouncing it and like offenses were designed for the fuller protection of personal property and in aid of the laws against larceny and theft.²⁹ However, the two offenses are generally distinguishable,³⁰ although the distinction is very fine where the obtaining of the money or property is accomplished by fraud, trick, or device.³¹

The distinction between the crimes of obtaining by false pretenses and larceny lies in the intention with

which the owner parts with the property; if the owner, in parting with the property, intends to invest accused with the title as well as the possession, the latter has committed the crime of obtaining the property by false pretenses, provided the means by which it is acquired are such as in law are false pretenses, but if the intention of the owner is to invest accused with the mere possession of the property, and the latter, with the requisite intent, receives it and converts it to his own use, the crime is larceny.³² In a

Cal.—People v. Rabe, 261 P. 303, 202 C. 409.

Iowa.—State v. Chamberlain, 245 N. W. 277, 215 Iowa 273—State v. Eno, 109 N.W. 119, 131 Iowa 619, 9 Ann.Cas. 856.

Md.—Simmons v. State, 167 A. 60, 165 Md. 155.

29. Iowa.—State v. Eno, 109 N.W. 119, 131 Iowa 619, 9 Ann.Cas. 856.

30. Cal.—People v. Barnett, 88 P.2d 172, 31 C.A.2d 173.

Miss.—Courtney v. State, 164 So. 227, 174 Miss. 147.

Mo.—State v. Ewing, App., 270 S.W. 116.

Wis.—State v. Burke, 207 N.W. 406, 189 Wis. 641.

25 C.J. p 657 note 24.

Common-law larceny charge cannot be sustained by proof of statutory offense of false pretenses.

N.Y.—People v. Brady, 249 N.Y.S. 715, 139 Misc. 597.

31. U.S.—U. S. v. Mangus, D.C.Ind., 33 F.Supp. 596.

Iowa.—Cedar Rapids Nat. Bank v. American Surety Co. of New York, 195 N.W. 253, 197 Iowa 878.

Md.—Simmons v. State, 167 A. 60, 165 Md. 155.

N.Y.—People v. Stiller, 7 N.Y.S.2d 865, 255 App.Div. 480, affirmed 19 N.E.2d 923, 280 N.Y. 519.

Okl.—**Corpus Juris Secundum** cited in Welch v. State, 146 P.2d 141, 146, 78 Okl.Cr. 180—Riley v. State, 78 P.2d 712, 64 Okl.Cr. 183.

"Where possession of money is obtained by fraud, trick or device, a question whether the crime, if any there be, is larceny or false pretenses often depends upon a nice analysis of facts and legal principles."

Cal.—People v. Selk, 115 P.2d 607, 611, 46 C.A.2d 140.

32. U.S.—Ackerson v. U. S., C.A. Ark., 185 F.2d 485—U. S. v. Patton, C.C.A.Pa., 120 F.2d 73.

U. S. v. One 1941 Chrysler Brougham Sedan, D.C.Mich., 74 F. Supp. 970, affirmed, C.A., Tennyson v. U. S., 171 F.2d 549.

Ala.—Murchison v. State, 26 So.2d 622, 32 Ala.App. 427.

Cal.—People v. Nor Woods, 233 P.2d 897, 37 C.2d 584.

People v. Otterman, 316 P.2d 85, 154 C.A.2d 193—People v. Hodges,

315 P.2d 38, 153 C.A.2d 788—People v. Cravens, 180 P.2d 453, 79 C.A. 2d 658—People v. Beilfuss, 138 P. 2d 332, 59 C.A.2d 83, certiorari denied 64 S.Ct. 529, 321 U.S. 746, 88 L.Ed. 1048—People v. Santora, 125 P.2d 606, 51 C.A.2d 707—People v. Selk, 115 P.2d 607, 46 C.A.2d 140—People v. Brennan, 106 P.2d 36, 41 C.A.2d 143—People v. Barnett, 88 P.2d 172, 31 C.A.2d 173—People v. Curran, 75 P.2d 1090, 24 C.A.2d 673—People v. Schwartz, 185 P. 686, 43 C.A. 696.

People v. Fawver, 77 P.2d 325, 29 C.A.2d Supp. 775.

D.C.—Graham v. U. S., 187 F.2d 87, 88 U.S.App.D.C. 129, certiorari denied 71 S.Ct. 741, 341 U.S. 920, 95 L.Ed. 1353.

Great Am. Indem. Co. v. Yoder, Mun.App., 131 A.2d 401.

Ga.—Thompson v. State, 19 S.E.2d 777, 67 Ga.App. 240.

Ind.—Johnson v. State, 54 N.E.2d 273, 222 Ind. 473—Kramien v. State, 195 N.E. 74, 208 Ind. 154.

Iowa.—State v. Quinn, 64 N.W.2d 323, 245 Iowa 846—**Corpus Juris** cited in State v. Chamberlain, 245 N.W. 277, 278, 215 Iowa 273—State v. Reysa, 199 N.W. 1000, 198 Iowa 496—Cedar Rapids Nat. Bank v. American Surety Co. of New York, 195 N.W. 253, 197 Iowa 878.

Kan.—**Corpus Juris** cited in State v. Tower, 251 P. 401, 403, 122 Kan. 165, 52 A.L.R. 1160.

Md.—Simmons v. State, 167 A. 60, 165 Md. 155.

Minn.—**Corpus Juris** cited in Crosby v. Paine, 211 N.W. 947, 948, 170 Minn. 43.

Miss.—**Corpus Juris Secundum** cited in Wilkinson v. State, 60 So.2d 786, 789, 215 Miss. 327—Garvin v. State, 43 So.2d 209, 207 Miss. 751—Alford v. State, 8 So.2d 508, 193 Miss. 153—Rory v. State, 170 So. 304, 176 Miss. 835—**Corpus Juris** cited in Courtney v. State, 164 So. 227, 228, 174 Miss. 147.

Mo.—State v. Scott, 256 S.W. 745, 301 Mo. 409.

State v. Ewing, App., 270 S.W. 116.

N.Y.—People v. Stiller, 7 N.Y.S. 2d 865, 255 App.Div. 480, affirmed 19 N.E.2d 923, 280 N.Y. 519.

Ohio.—Hoynes v. Buckeye Union Cas. Co., App., 69 N.E.2d 153.

Okl.—Bourbonnais v. State, 248 P. 2d 640, 96 Okl.Cr. 28—Warren v. State, 241 P.2d 410, 95 Okl.Cr. 160—Abbott v. State, 149 P.2d 514, 78 Okl.Cr. 407, modified on other grounds 155 P.2d 267, 79 Okl.Cr. 377—Hagan v. State, 134 P.2d 1042, 76 Okl.Cr. 127—Dobson v. State, 126 P.2d 95, 74 Okl.Cr. 341—Riley v. State, 78 P.2d 712, 64 Okl.Cr. 183. Or.—**Corpus Juris** quoted in Nugent v. Union Automobile Ins. Co., 13 P.2d 343, 344, 140 Or. 61.

W.Va.—**Corpus Juris** quoted in State v. Martin, 137 S.E. 885, 886, 103 W.Va. 446.

Wis.—Whitmore v. State, 298 N.W. 194, 238 Wis. 79, 134 A.L.R. 872—State v. Burke, 207 N.W. 406, 189 Wis. 641.

25 C.J. p 657 note 25—36 C.J. p 778 note 22.

Held obtaining by false pretenses

(1) Payment of money without any condition attached to payment passed complete title, although made for nonexistent consideration, and established offense of obtaining money by false pretenses and not larceny.

Cal.—People v. Beilfuss, 138 P.2d 332, 59 C.A.2d 83, certiorari denied 64 S.Ct. 529, 321 U.S. 746, 88 L.Ed. 1048.

(2) Other circumstances.

Okl.—Warren v. State, 226 P.2d 320, 93 Okl.Cr. 166.

Held larceny by fraud

Where complaining witness was led to believe that defendant could change denominations of currency and was induced to provide three thousand dollars for such purpose on promise to return the money and five hundred dollars for use thereof, but defendant kept the money, offense committed was larceny by fraud and not obtaining money by false pretenses.

Okl.—Welch v. State, 146 P.2d 141, 78 Okl.Cr. 180.

Obtaining by trick or device

(1) If the possession of property is obtained by trick or device and the owner of it intends to part with his title when he gives up possession, the offense is obtaining by false pretense.

few cases the test applied has been not the intent of the owner to pass title, but whether he in fact passed title;³³ and in at least one jurisdiction the distinction has been held to rest in the time of forming the criminal intent.^{33.5}

When the property is delivered to accused by an-

other than the owner, the question whether the obtaining constitutes larceny or false pretense depends not only on the intent with which such person delivers the property but also on his authority over it; if he intends to pass the title and has authority to do so, the obtaining with intent to convert it is the crime of obtaining by false pretense,³⁴ the intent

U.S.—*U. S. v. Mangus*, D.C.Ind., 33 F.Supp. 596.

Cal.—*People v. Leach*, 290 P. 131, 106 C.A. 442, dismissed *Leach v. People of State of California*, 51 S.Ct. 646, 283 U.S. 808, 75 L.Ed. 1427—*People v. Shearer*, 256 P. 611, 83 C.A. 321.

Mo.—*State v. Hartwell*, 293 S.W.2d 313—*State v. Scott*, 256 S.W. 745, 301 Mo. 409.

State v. Ewing, App., 270 S.W. 116.

25 C.J. p 657 note 25 [b] (1).

(2) But where the possession is obtained through a trick or device with the intent, at the time the person receives it, to convert it to his own use, and the owner of the property parts with the possession and not with the title, the offense is larceny.

U.S.—*U. S. v. Mangus*, supra.

Cal.—*People v. Shearer*, supra.

Iowa.—*State v. Chamberlain*, 245 N.W. 277, 215 Iowa 273.

Mo.—*State v. Scott*, supra.

State v. Ewing, supra.

Ohio.—*State v. Singleton*, 87 N.E.2d 358, 85 Ohio App. 245.

25 C.J. p 657 note 25 [b] (2).

Swindling and theft by false pretext in Texas

(1) In a number of cases in Texas, or applying the law of Texas, it has been held that the distinction between the offense of swindling and theft by false pretext depends on whether the injured person was induced, or intended, to part with both title and possession of his property, in which event the case is swindling, or whether he intended to part only with possession, in which event it will be theft by false pretext.

U.S.—*Akers v. Schofield*, C.C.A.Tex., 167 F.2d 718, certiorari denied 69 S.Ct. 47, 335 U.S. 823, 93 L.Ed. 378.

Tex.—*Forrest v. State*, 34 S.W.2d 1102, 117 Tex.Cr. 556—*Pittman v. State*, 27 S.W.2d 240, 115 Tex.Cr. 424—*Elbury v. State*, 25 S.W.2d 846, 114 Tex.Cr. 269—*Alvarez v. State*, 2 S.W.2d 849, 109 Tex.Cr. 62—*Segal v. State*, 265 S.W. 911, 98 Tex.Cr. 485, 35 A.L.R. 1331.

25 C.J. p 657 note 25 [d].

(2) However, it has been said that the statement that if title was intended to pass the offense cannot be theft is necessarily true only where the question is whether the offense is theft by a bailee or swindling, and that nearly all the cases making

such statement involve that question.

Tex.—*Sherman v. State*, 62 S.W.2d 146, 124 Tex.Cr. 146—*Contreras v. State*, 39 S.W.2d 62, 118 Tex.Cr. 626—*Anderson v. State*, 177 S.W. 85, 77 Tex.Cr. 31.

(3) In accordance with the latter view, it has been held that the fact that title was intended to pass does not prevent the offense from being theft by false pretext, where the representations are as to future happenings, and thus will not support a charge of swindling but will support a charge of theft by false pretext.

Tex.—*Bomar v. Insurors Indem. & Ins. Co.*, 242 S.W.2d 160, 150 Tex. 484.

Harkins v. Indiana Lumbermens Mut. Ins. Co. of Indianapolis, Ind., Civ.App., 234 S.W.2d 430.

Johnson v. State, 162 S.W.2d 980, 144 Tex.Cr. 392—*Roe v. State*, 144 S.W.2d 1104, 140 Tex.Cr. 387—*Rumfield v. State*, 141 S.W.2d 630, 139 Tex.Cr. 599—*Dix v. State*, 124 S.W.2d 998, 136 Tex.Cr. 296—*Baldwin v. State*, 104 S.W.2d 872, 132 Tex.Cr. 427—*New v. State*, 83 S.W.2d 668, 129 Tex.Cr. 16—*Haley v. State*, 75 S.W.2d 272, 127 Tex.Cr. 177—*Sherman v. State*, 62 S.W.2d 146, 124 Tex.Cr. 273—*Contreras v. State*, 39 S.W.2d 62, 118 Tex.Cr. 626—*De Blanc v. State*, 37 S.W.2d 1024, 118 Tex.Cr. 628—*Anderson v. State*, 177 S.W. 85, 77 Tex.Cr. 31.

(4) The fact that the statutes overlap to a certain extent is recognized by the statutory provision that, where property is taken in such a manner as to come within the meaning of theft, the swindling statute shall not be deemed to take the case out of the operation of the theft statute.

Tex.—*King v. State*, 213 S.W.2d 541, 152 Tex.Cr. 255—*McCuistion v. State*, 158 S.W.2d 527, 143 Tex.Cr. 283, 141 A.L.R. 205—*Baldwin v. State*, 104 S.W.2d 872, 132 Tex.Cr. 427—*New v. State*, 83 S.W.2d 668, 129 Tex.Cr. 16—*Davenport v. State*, 78 S.W.2d 605, 127 Tex.Cr. 552—*De Blanc v. State*, 37 S.W.2d 1024, 118 Tex.Cr. 628.

(5) In view of the latter statutory provision, it is held that, if property is obtained in such manner as to come within the meaning of theft or some other offense, the prosecution should be for theft or

such other offense and not for swindling.

Tex.—*Gibbs v. State*, 253 S.W.2d 1002, 158 Tex.Cr. 145—*McCuistion v. State*, supra—*De Blanc v. State*, supra.

(6) But where the intent to part with title is present, and the representation is as to an existing fact, the offense is still held to be swindling rather than theft.

Tex.—*Rumfield v. State*, 141 S.W.2d 630, 139 Tex.Cr. 599—*Dix v. State*, 124 S.W.2d 998, 136 Tex.Cr. 296—*Speckels v. State*, 95 S.W.2d 122, 130 Tex.Cr. 639.

(7) On amendment of art. 1549, P.C., by the enactment of c 240, Reg. Session, p. 362, Vernon's Ann.P.C. art. 1549, where property, money, or other articles of value enumerated in the definition of swindling are obtained in such manner that the acquisition thereof constitutes both swindling and some other offense, the party thus offending is amenable to prosecution at the state's election for either swindling or such other offense.

Tex.—*Whitehead v. State*, 185 S.W. 2d 725, 148 Tex.Cr. 190.

(8) The statute is aimed at acquisition of property by criminally deceitful pretenses which are relied on by persons swindled and which are inducement moving such person to part with his property.

U.S.—*Westfall Oldsmobile, Inc. v. U. S.*, C.A.Tex., 243 F.2d 409.

(9) The crime of theft by false pretext is considered generally in the C.J.S. title Larceny.

Larceny by bailee

The mere delivery of property into the possession of a bailee and the bailee's subsequent conversion of the property to his own use constitutes "larceny by bailee" and not the offense of "obtaining money by false pretenses."

Wis.—*Whitmore v. State*, 298 N.W. 194, 238 Wis. 79, 134 A.L.R. 872. 36 C.J. p 778 notes 23–25.

33. Ind.—*Johnson v. State*, 54 N.E. 2d 273, 222 Ind. 473.

N.J.—*State v. Deutsch*, 72 A. 5, 77 N.J.Law 292.

36 C.J. p 778 note 18 [a] (1).

33.5 Mo.—*State v. Russell*, 265 S.W. 2d 379, 45 A.L.R.2d 617.

34. Cal.—*People v. Beifuss*, 138 P. 2d 332, 59 C.A.2d 83, certiorari de-

of the acting victim being imputed to the other.^{34.5}

If a loan of money is obtained by false pretenses, under an agreement for the return of the identical money, and the borrower feloniously converts it, he is guilty of larceny, as the owner did not intend to part with the title to the money lent;³⁵ but if the lender did not expect to receive back the money lent, but only an equal amount in other money, then the conversion would constitute the crime of obtaining by false pretense.³⁶

The doctrine of asportation in larceny has no place in the offense of obtaining by false pretense.³⁷

Robbery. The crime of robbery and the crime of obtaining property under false pretenses are distinguishable in that in the former property is obtained from the owner by means of force or violence, actual or constructive, whereas in the latter the owner parts with the title to the property voluntarily, under false pretenses.³⁸

§ 4. Common-Law Offense of Cheating and Statutory Modification Thereof

Cheating was an offense at common law where the act was of such a nature as to affect the public and that common prudence could not guard against it. To constitute a public cheat any fraudulent device was sufficient; but to constitute a private cheat the use of a false token or symbol was essential. The false token originally required had to be such as, when not false, was commonly accepted by the public for what it purported to be, but this requirement was abolished by a statute making counterfeit letters or false privy tokens sufficient.

The crime of cheating was not very clearly defined in the early common law, the term "cheating" being applied to defrauding, and even to the attempt to defraud, by means of any artful device

whatever.³⁹ While cheating was in proper cases an indictable offense,⁴⁰ the offense by no means included all cheating.⁴¹ To bring an act within the offense, two things were necessary: (1) The act must have been of such a nature as to affect the public.⁴² (2) It must have been of such a nature that common prudence could not have guarded against it.⁴³

In other cases in which a person was defrauded, the transaction was considered to amount only to an unfair dealing and an imposition on a particular individual by which he would not have suffered but for his own carelessness, and such person could look only to his civil remedy for the redress of his injury.⁴⁴ Thus, it is apparent that common-law cheating is a distinct offense from what is now the offense of obtaining goods by false pretenses.⁴⁵

In a prosecution for cheating it was necessary to allege and prove an intent to cheat and defraud.⁴⁶ Although, as previously stated, the term "cheating" was, in the early common law, applied even to an attempt to defraud, it has been held essential to a cheat that some one be actually defrauded.⁴⁷ It has also been held that the obtaining of only such property as is the subject of larceny will render a person indictable for a cheat;⁴⁸ thus, the offense does not include a case where the property of which the owner was deprived is real property.⁴⁹

A cheat at common law is a misdemeanor.⁵⁰

Common-law cheats have been divided into two classes: (1) Those directed against the government or immediately injuring the interests of the public,

nied 64 S.Ct. 529, 321 U.S. 746, 88 L.Ed. 1048.

Or.—**Corpus Juris** quoted in *Nugent v. Union Automobile Ins. Co.*, 13 P. 2d 343, 344, 140 Or. 61. 25 C.J. p 658 note 26.

34.5 Cal.—*People v. Beilfuss*, 138 P. 2d 332, 59 C.A.2d 83, certiorari denied 64 S.Ct. 529, 321 U.S. 746, 88 L.Ed. 1048.

35. Tex.—*Porter v. State*, 4 S.W. 889, 23 Tex.App. 295.

36. Cal.—*People v. Reed*, 248 P.2d 510, 113 C.A.2d 339.

Iowa.—*State v. Detloff*, 205 N.W. 534, 201 Iowa 159. 25 C.J. p 658 note 28.

37. Mo.—*State v. Fraker*, 49 S.W. 1017, 148 Mo. 143. 25 C.J. p 658 note 29.

38. Fla.—*Simmons v. State*, 25 So. 881, 41 Fla. 316. 25 C.J. p 658 note 30.

39. S.C.—*State v. Middleton*, 23 S. C.L. 275.

25 C.J. p 585 note 22—11 C.J. p 747 note 15.

40. Ill.—*People v. Konkowski*, 39 N. E.2d 13, 378 Ill. 616.

Miss.—**Corpus Juris** cited in *Courtney v. State*, 164 So. 227, 228, 174 Miss. 147. 25 C.J. p 584 note 2.

41. Mass.—*Commonwealth v. Hearsey*, 1 Mass. 137. 25 C.J. p 586 note 23.

42. Miss.—**Corpus Juris** cited in *Courtney v. State*, 164 So. 227, 228, 174 Miss. 147.

N.Y.—*People v. Conger*, 1 Wheel.Cr. 448. 25 C.J. p 586 note 24—11 C.J. p 747 note 15.

43. Ind.—*Blanchard v. State*, 29 N. E. 783, 3 Ind.App. 395. 25 C.J. p 586 note 25.

44. S.C.—*State v. Middleton*, 23 S. C.L. 275.

25 C.J. p 586 note 26.

45. Ill.—*People v. Konkowski*, 39 N. E.2d 13, 378 Ill. 616.

Historical development of crime of false pretenses from common-law cheating see *supra* § 2.

46. Ill.—*People v. Warfield*, 103 N. E. 979, 261 Ill. 293.

47. Pa.—*Commonwealth v. Steen*, 1 Pa.Super. 624.

48. Pa.—*Commonwealth v. Woodrun*, 4 Clark 207, 7 Pa.L.J. 362.

49. Ga.—**Corpus Juris** quoted in *Manning v. State*, 166 S.E. 658, 659, 175 Ga. 875, answers to certified questions conformed to 167 S.E. 119, 46 Ga.App. 139.

25 C.J. p 608 note 99. Inclusion in false pretense statutes see *infra* § 26.

50. R.I.—*State v. McMahon*, 140 A. 359, 49 R.I. 107. 25 C.J. p 586 notes 33, 34.

usually denominated "public cheats." (2) Those employed directly against individuals, or what are commonly termed "private cheats."⁵¹

In public cheats the use of any fraudulent device was sufficient to constitute the crime at common law,⁵² and it was not necessary that a false symbol or token should have been utilized.⁵³ Comprehended within the class of frauds of a public nature are cheats by officials,⁵⁴ and frauds immediately injuring the interests of the government or the public, although arising in the course of some particular transaction or contract with private individuals.⁵⁵

A private cheat, at common law, may be defined as the defrauding of any person by means of a false symbol or token, such as would commonly be accepted by the public for what it purports to represent;⁵⁶ it is such a cheat as arises in the course of dealings with individuals by the use of false tokens or symbols having the semblance of public authenticity and calculated to deceive the public at large.⁵⁷

False token as element of private cheat generally. As indicated by the preceding definitions, in order to constitute the crime of cheating at common law in the class of cases known as private cheats, a false token or symbol was necessary.⁵⁸ The symbol or token used to defraud must be of such a character as, when not false, is commonly accepted by the public for what it purports to represent.⁵⁹ So, the use of a false trade-mark to defraud the buyer,⁶⁰ the selling of goods by false or counterfeit marks,⁶¹ the

use of false weights and measures,⁶² and playing with false dice⁶³ are indictable. On the other hand, the drawing of a check on a bank in which one has no funds is not, under the common law, a cheat,⁶⁴ and this is the rule also as to the passing of a false promissory note;⁶⁵ but, since bank notes pass currently, the passing of a false bank note is a cheat.⁶⁶

False personation as token. It has been said that if one represents himself to be another person, by which representation he accomplishes a cheat, his visible presence is a false token.⁶⁷ It has been held, however, that where a married man pretended, under a fictitious name, to an unmarried woman, that he was single, and by this means, together with his promise to marry her, obtained money from her, he was not a false token.⁶⁸

Words as token. Mere words do not, under the common law, amount to a token.⁶⁹ Accordingly, a fraud effected by false affirmation or naked lie was not an indictable cheat at common law,⁷⁰ it being at most a mere private injury.⁷¹

Statutory modification as to token. As appears supra § 2, in order to remedy the defect in the common law which punished only such frauds of a private nature as were effected by a symbol or token calculated to defraud the public, the statute of 33 Henry VIII c 1 was enacted, making it an indictable offense for any person falsely and deceitfully to obtain money or goods in another man's name by color or means of counterfeit letter or false privy

51. S.C.—State v. Wilson, 9 S.C.L. 135.

52. Eng.—Rex v. Jones, 2 East P.C. 822.

53. U.S.—U. S. v. Watkins, D.C., 28 F.Cas.No.16,649, 3 Cranch C.C. 441.

54. U.S.—U. S. v. Watkins, supra.

55. Cal.—People v. Garnett, 35 C. 470, 95 Am.D. 125.

56. Or.—State v. Renick, 56 P. 275, 33 Or. 584, 72 Am.S.R. 758, 44 L.R. A. 266.

12 C.J. p 203 note 15—25 C.J. p 587 note 41.

A broader definition of common-law cheating, possibly in the sense in which it was understood after the enactment of the English statute of 30 George II c 24, referred to in § 2 supra, as the fraudulent obtaining of the property of another by any deceitful and illegal practice or token not amounting to a felony, which affects or may affect the public, has been held not to require the use of symbol or token.

Or.—State v. Renick, 56 P. 275, 33 Or. 584, 72 Am.S.R. 758, 44 L.R.A. 266.

R.I.—State v. Colangelo, 179 A. 147, 55 R.I. 170—State v. McMahon, 140 A. 359, 49 R.I. 107.

57. S.C.—State v. Stroll, 30 S.C.L. 244.

58. R.I.—State v. Colangelo, 179 A. 147, 55 R.I. 170.

25 C.J. p 587 note 43.

59. Ind.—Wagoner v. State, 90 Ind. 504.

Or.—State v. Miller, 233 P.2d 786, 192 Or. 188.

25 C.J. p 587 note 44.

60. Eng.—Rex v. Edwards, 2 East P.C. 820.

61. Ont.—Rex v. Austin, 25 Ont.L. 69, 3 Ont.W.N. 225, 20 Ont.W.R. 390.

62. Mass.—Commonwealth v. Warren, 6 Mass. 72.

25 C.J. p 587 note 49.

63. U.S.—Respublica v. Teischer, Pa., 1 Dall. 335, 1 L.Ed. 163.

N.Y.—People v. Gates, 13 Wend. 311.

64. Ariz.—Williams v. Territory, 108 P. 243, 13 Ariz. 27, 27 L.R.A.,N.S., 1032.

Miss.—Broadus v. State, 38 So.2d 692, 205 Miss. 147.

W.Va.—State v. Stout, 95 S.E.2d 639, 59 A.L.R.2d 1154.

Worthless check as false pretense see infra § 21.

65. N.C.—State v. Patillo, 11 N.C. 348.

S.C.—State v. Middleton, 23 S.C.L. 275.

66. N.C.—State v. Patillo, 11 N.C. 348.

25 C.J. p 587 note 52.

67. Vt.—State v. Marshall, 59 A. 916, 77 Vt. 262.

False personation as false pretense see infra § 33.

68. Or.—State v. Renick, 56 P. 275, 33 Or. 584, 72 Am.S.R. 758, 44 L.R. A. 266.

69. Or.—State v. Renick, supra.

25 C.J. p 588 note 57.

70. Mass.—Commonwealth v. Warren, 6 Mass. 72.

25 C.J. p 588 note 58.

71. Mass.—Commonwealth v. Warren, supra.

25 C.J. p 588 note 59.

token. Under this and similar statutes, a false token of some kind was still necessary to constitute cheating,⁷² and a fraud perpetrated by mere false words alone was a civil injury only and not indictable;⁷³ and, inasmuch as the statute related to "privy tokens and counterfeit letters in other men's names," it has been held that even a writing would not suffice unless it was in the name of another, and of such a character as to afford more credit than the mere assertion of the party defrauding.⁷⁴ As appears supra § 2, the subsequent English statute of 30 George II c 24 abolished the need for a visible token, and created the crime that is now commonly known as obtaining money or property by false pretenses.

§ 5. Statutory Provisions

- a. In general; validity
- b. Construction, operation, and effect

a. In General; Validity

Statutes denouncing the crime of obtaining property by false pretenses, and analogous offenses, have been variously held either constitutional or unconstitutional.

The crime of obtaining property by false pretenses,

as has already been stated in § 2, was created by the statute of 30 George II c 24 § 1, was extended in its operation by subsequent English statutes, and is an offense in the various jurisdictions in the United States under statutory provisions based generally on these English statutes, with certain modifications, sometimes enlarging and sometimes restricting its scope.

Constitutionality and validity of statutes. The constitutionality and validity of a number of statutes denouncing as a crime the obtaining of money or property by false pretenses, and analogous offenses, have been upheld as against a variety of contentions,⁷⁵ as, for example, that they offended against the due process clause⁷⁶ or the provision against slavery or involuntary servitude,⁷⁷ that they denied equal protection,⁷⁸ or that they violated provisions respecting imprisonment for debt.⁷⁹ So, a statute making the execution of a check with knowledge of the insufficiency of funds,⁸⁰ or the failure to pay such draft within a stated period after notice of dishonor,⁸¹ prima facie evidence of intent to defraud has been held not unconstitutional.

On the other hand, various statutes or provisions have been held invalid or unconstitutional,⁸² in-

72. N.J.—State v. Vanderbilt, 27 N. J. Law 328.
R.I.—State v. Colangelo, 179 A. 147, 55 R.I. 170.
25 C.J. p 584 note 6, p 588 note 64.
73. N.J.—State v. Vanderbilt, 27 N. J. Law 328.
25 C.J. p 588 notes 65, 66.
74. N.Y.—People v. Gates, 13 Wend. 311.
25 C.J. p 588 note 67.
75. Ala.—Goolsby v. State, 104 So. 901, 213 Ala. 351.
Nix v. State, 166 So. 716, 27 Ala. App. 94, certiorari denied 166 So. 719, 232 Ala. 53—Chambers v. State, 153 So. 665, 26 Ala.App. 89—Frazier v. State, 135 So. 409, 24 Ala.App. 353—Caughlan v. State, 114 So. 280, 22 Ala.App. 220—Goolsby v. State, 104 So. 906, 20 Ala. App. 654.
Cal.—Ex parte Shackelford, 220 P. 430, 64 C.A. 78.
Fla.—Ennis v. State, 95 So.2d 20, certiorari denied 78 S.Ct. 117, 355 U.S. 868, 2 L.Ed.2d 74—McQuagge v. State, 87 So. 60, 80 Fla. 768.
Ga.—Carter v. Lowry, 151 S.E. 23, 169 Ga. 515—Nissenbaum v. State, 146 S.E. 189, 167 Ga. 495.
Kan.—Application of Windle, 294 P. 2d 213, 179 Kan. 239.
Ky.—Hughes v. Commonwealth, 46 S. W.2d 783, 242 Ky. 412.
La.—State ex rel. Kavanaugh v. Mitchiner, 15 So.2d 809, 204 La. 415.
- Md.—Schanker v. State, 116 A.2d 363, 208 Md. 15.
Tex.—Prince v. State, 247 S.W. 863, 93 Tex.Cr. 230—Krueger v. State, 199 S.W. 629, 82 Tex.Cr. 404.
- Hot-check law**
(1) The hot-check law is valid when check or draft is given with an "intent to defraud."
Tex.—Kuykendall v. State, 233 S.W. 2d 580, 581, 155 Tex.Cr. 237.
(2) Worthless check statutes generally see infra § 21.
76. U.S.—Kay v. U. S., N.Y., 58 S. Ct. 468, 303 U.S. 1, 82 L.Ed. 607.
Fla.—State ex rel. McLaughlin v. Karel, 129 So. 703, 100 Fla. 388.
Ga.—Taylor v. State, 13 S.E.2d 647, 191 Ga. 682—Nissenbaum v. State, 146 S.E. 189, 167 Ga. 495.
77. Ga.—Taylor v. State, 13 S.E.2d 647, 191 Ga. 682.
78. Ga.—Taylor v. State, supra—Nissenbaum v. State, 146 S.E. 189, 167 Ga. 495.
Ind.—Wilkoff v. State, 185 N.E. 642, 206 Ind. 142.
79. Ariz.—State v. Meeks, 247 P. 1099, 30 Ariz. 436.
Fla.—Ennis v. State, 95 So.2d 20, certiorari denied 78 S.Ct. 117, 355 U.S. 868, 2 L.Ed.2d 74.
Ga.—Taylor v. State, 13 S.E.2d 647, 191 Ga. 682—Hollis v. State, 108 S.E. 783, 152 Ga. 182.
Kan.—Application of Windle, 294 P. 2d 213, 179 Kan. 239—State v.
- Avery, 207 P. 838, 111 Kan. 588, 23 A.L.R. 453.
Mo.—State v. Brookshire, 325 S.W.2d 497.
Neb.—White v. State, 280 N.W. 433, 135 Neb. 154.
N.C.—State v. Yarbboro, 140 S.E. 216, 194 N.C. 498.
- Reason for rule**
It is not the nonpayment of debt which is punished, but the fraudulent act in giving the checks.
Tex.—Colin v. State, 168 S.W.2d 500, 145 Tex.Cr. 371.
80. Ga.—Carter v. Lowry, 151 S.E. 23, 169 Ga. 515.
81. La.—State v. Elkin, 148 So. 668, 177 La. 427.
82. S.D.—State v. Portwood, 238 N. W. 879, 59 S.D. 179.
Tex.—Moody v. State, 213 S.W.2d 539, 152 Tex.Cr. 265—Mayes v. State, 167 S.W.2d 745, 145 Tex.Cr. 295.
- Giving jury power to determine law**
In so far as statute making it offense to obtain money for corporate stock by swindling or cheating attempts to confer on jury power to determine law, it is violative of constitution.
Colo.—Dill v. People, 29 P.2d 1035, 94 Colo. 230, appeal dismissed Dill v. People of State of Colorado, 54 S.Ct. 781, 292 U.S. 609, 78 L.Ed. 1470.

cluding a statute making it unlawful to obtain money or credit by check or order which is not paid and making the fact that there are not sufficient funds on deposit at the time of presentation prima facie evidence of fraudulent intent at the time of issuance,⁸³ although there is authority to the contrary,⁸⁴ and statutes denouncing the execution of a check without sufficient funds regardless of fraudulent intent or knowledge of the insufficiency⁸⁵ and providing for the dismissal of the prosecution on payment of the check.⁸⁶ A bad-check statute is invalid in so far as it authorizes guilt to be predicated on acts of third parties not connected with the alleged crime and over which accused has no control.^{86.5}

b. Construction, Operation, and Effect

Statutes denouncing the obtaining of property by false pretenses, being penal in nature, are to be strictly construed in favor of accused. General principles of statutory construction, including the principle of *ejusdem generis*, have been applied to such statutes.

Statutes denouncing the obtaining of money or property by false pretenses or the commission of similar offenses, being penal in nature, are to be strictly construed in favor of accused;⁸⁷ and although such statutes are very general in their character and very broad in their provisions, they are not intended to include every case of fraud and dishonesty by which one person gets advantage over another.⁸⁸ It has been said, however, to be the true policy neither to restrict the interpretation of such

a statute within too narrow limits nor to explain it away to the encouragement of fraud;⁸⁹ and such a statute will be so construed as to give it effect rather than to render it meaningless.⁹⁰

An amendment of a bad-check statute has been held to have no retroactive application to crimes committed prior thereto or to judgments which have become final.^{90.5}

Ejusdem generis. Where a statute enumerates certain kinds of false pretenses and adds "or by any other false pretenses," the "other" pretenses intended by the statute are only those of a kindred nature to those which are enumerated.⁹¹ This rule has no application where the statute does not attempt an enumeration of the pretenses that shall be held criminal;⁹² and so, where a statute punishing the obtaining of a thing by a false symbol or token, or false writing, etc., also contains a general clause against obtaining it by "any false pretense," or a clause of equivalent import, the offense may be committed in words, without the use of such false symbol or token or false writing, etc.⁹³

Writing. The word "writing," as used in such a statute, means some instrument, or at least a letter, or something in writing, purporting to be the act of another, or certainly of some person;⁹⁴ and it includes printing, lithographing, or other modes of representing words and letters.⁹⁵ The term "false writing" will not be construed to mean an unwarranted or false use of a genuine writing.⁹⁶

83. Ala.—Goolsby v. State, 104 So. 901, 213 Ala. 351.

Goolsby v. State, 104 So. 906, 20 Ala.App. 654.

Tex.—Mayes v. State, 167 S.W.2d 745, 145 Tex.Cr. 295.

84. Okl.—Gunther v. State, 276 P. 237, 42 Okl.Cr. 129, followed in 276 P. 239, 42 Okl.Cr. 320.

85. Ky.—Ward v. Commonwealth, 15 S.W.2d 276, 228 Ky. 468—Burnam v. Commonwealth, 15 S.W.2d 256, 228 Ky. 410.

Miss.—State v. Johnson, 141 So. 338, 163 Miss. 521.

86. Miss.—State v. Johnson, supra. S.D.—State v. Portwood, 238 N.W. 879, 59 S.D. 179—State v. Nelson, 237 N.W. 766, 58 S.D. 562, 76 A. L.R. 1226.

86.5 Tex.—Moody v. State, 213 S.W. 2d 539, 152 Tex.Cr. 265—Mayes v. State, 167 S.W.2d 745, 145 Tex.Cr. 295.

87. Ark.—Cousins v. State, 151 S.W. 2d 658, 202 Ark. 500.

Fla.—Nash v. State, 160 So. 385, 118 Fla. 875.

Ga.—Walker v. State, 78 S.E.2d 545, 89 Ga.App. 101.

Ill.—People v. Gould, 2 N.E.2d 324, 363 Ill. 348.

Mich.—People v. Lee, 243 N.W. 227, 259 Mich. 355.

Miss.—Johnson v. State, 132 So. 330, 159 Miss. 703.

Okl.—Simpson v. State, Cr., 267 P.2d 1008.

Pa.—Commonwealth v. Rush & Harnett, 78 Pa.Super. 404.

Utah.—State v. Casperson, 262 P. 294, 71 Utah 68.

25 C.J. p 588 note 70.

88. Mo.—State v. Aikins, 180 S.W. 848, L.R.A.1916C 1101.

N.J.—State v. Lamoreaux, 80 A.2d 213, 13 N.J.Super. 99.

Okl.—Simpson v. State, Cr., 267 P.2d 1008.

25 C.J. p 589 note 71.

Intention of legislature governs as to applicable statute.

Mo.—State v. Griggs, 236 S.W.2d 588, 361 Mo. 758.

Confidence game and other offense provided for

Okl.—Riddle v. State, 261 P.2d 469, 97 Okl.Cr. 206.

89. N.J.—Robinson v. State, 20 A. 753, 53 N.J.Law 41.

25 C.J. p 589 note 72.

90. Iowa.—State v. Quinn, 47 Iowa 368.

La.—State v. Mestayer, 80 So. 891, 144 La. 601.

90.5 Cal.—People v. Mason, 329 P.2d 614, 163 C.A.2d 630.

91. Ark.—McKenzie v. State, 11 Ark. 594.

Vt.—State v. Sumner, 10 Vt. 587, 33 Am.D. 219.

92. Iowa.—State v. Quinn, 47 Iowa 368.

Mich.—Higler v. People, 6 N.W. 664, 44 Mich. 299, 38 Am.R. 267.

93. Ill.—People v. Mutchler, 140 N. E. 820, 309 Ill. 207, 35 A.L.R. 339—People v. Shaw, 133 N.E. 208, 300 Ill. 451.

25 C.J. p 589 note 77.

94. Cal.—**Corpus Juris Secundum** quoted in People v. Katcher, 217 P.2d 757, 760, 97 C.A.2d 209.

N.Y.—People v. Gates, 13 Wend. 311. False token or writing in general as form of pretense see infra § 20.

95. Ind.—Jones v. State, 50 Ind. 473.

96. Cal.—**Corpus Juris Secundum** quoted in People v. Whitlow, 249 P.2d 35, 37, 113 C.A.2d 804.

Ind.—Shaffer v. State, 82 Ind. 221.

Person or corporation. "Person," in the statutory clause "obtained from any person," includes banks,⁹⁷ corporations,⁹⁸ public officials,⁹⁹ and counties.¹ "Person or corporation" includes a board of county commissioners.²

"Under" and "by" false pretenses have been held to mean the same thing.³

Effect on other statutes. The operation and effect of statutes dealing with the crimes under consideration on other statutes of a similar nature, or related statutes, have been determined in several jurisdictions.⁴

§ 6. Elements of Offenses in General

To constitute the crime of obtaining property by false pretenses, there must be a false representation of a

past or existing fact, made by the accused or someone instigated by him with knowledge of its falsity, and intended and adapted to deceive, a reliance thereon, an actual defrauding, and an obtaining of something of value without compensation.

Generally speaking, to constitute the crime of obtaining property by false pretenses there must be a false representation or statement of a past or existing fact, made by accused or someone instigated by him, with knowledge of its falsity and with intent to deceive and defraud, and adapted to deceive the person to whom it is made; and there must be, further, a reliance on such false representation or statement, an actual defrauding, and an obtaining of something of value by accused or someone in his behalf, without compensation to the person from whom it is obtained.⁵ Another statement is that

97. Va.—Commonwealth v. Swinney, 1 Va.Cas. (3 Va.) 146, 5 Am.D. 512.

98. Tex.—Cochrain v. State, 248 S. W. 43, 93 Tex.Cr. 483.
25 C.J. p 589 note 82.

99. Del.—State v. Hartnett, 74 A. 82, 23 Del. 204—State v. Lynn, 51 A. 878, 19 Del. 316.

1. Del.—State v. White, 54 A. 956, 20 Del. 6.
Confidence of body politic see *infra* § 32.

2. N.C.—State v. Wilkerson, 3 S.E. 683, 98 N.C. 696.

3. La.—State v. Ritchie, 136 So. 11, 172 La. 942.

4. Statutes held not impliedly repealed

N.J.—State v. Fary, 108 A.2d 593, 16 N.J. 317.

Wash.—State v. Becker, 234 P.2d 897, 39 Wash.2d 94.

In Alabama, Acts Spec.Sess.1921 p 47, making it "unlawful . . . to obtain money or other property or credit by check, draft or order which is not paid," and expressly repealing conflicting acts, does not repeal the provision of Acts 1915 p 319, prohibiting "the obtaining of money, property, or thing of value, or the making, uttering or delivery of any check . . . with intent to defraud," as applied to the fraudulent issuance of a check.

Ala.—Gustin v. State, 99 So. 54, 19 Ala.App. 558, followed in 99 So. 925, 19 Ala.App. 682.

In California

(1) The statute defining the crime of grand theft has in effect repealed the identical provisions of the statute denouncing the crime of obtaining money or property by false pretenses.

Cal.—People v. Jackson, 74 P.2d 1085, 24 C.A.2d 182—People v. Carter, 21 P.2d 129, 131 C.A. 177.

(2) It likewise superseded provi-

sions of the statute respecting false financial statements.

Cal.—People v. Breyer, 34 P.2d 1065, 139 C.A. 547, hearing denied 34 P.2d 1067, 139 C.A. 547.

(3) However, the change did not repeal the provision as to the quantum of evidence required for a conviction for that variety of grand theft consisting of obtaining money or property by false pretenses.

Cal.—People v. Edwards, 24 P.2d 183, 133 C.A. 335—People v. Carter, *supra*.

People v. Fawver, 77 P.2d 325, 29 C.A.2d, *Supp.*, 775.

(4) The amendment to the forgery statute did not affect the statute relating to uttering fictitious instruments.

Cal.—People v. Carmona, 251 P. 315, 80 C.A. 159.

In Kentucky statute against obtaining money by false pretenses is repealed by subsequent criminal statute dealing with giving worthless checks, to extent to which the two statutes conflict, but no further.

Ky.—Tartar v. Commonwealth, 102 S.W.2d 971, 267 Ky. 502.

In Missouri the statute providing for punishment of one who utters a check knowing that he has not sufficient funds in bank to cover it takes that particular offense out of the operation of statute providing generally with respect to offense of obtaining property by false pretenses.

Mo.—State v. Richman, 148 S.W.2d 796, 347 Mo. 595.

In South Carolina an indictment under Cr.Code 1912 § 208, making it a misdemeanor to draw a check when drawer has no funds on deposit, was held invalid, as Act March 1, 1923, 33 U.S.St. at L. p 120, making fraudulent intent an element of that offense, repealed that section.

S.C.—State v. Moore, 122 S.E. 672, 128 S.C. 192.

In Tennessee the code provision respecting the obtaining of money by false pretenses, in so far as it dealt with fraudulent checks, was superseded and repealed by the act covering the entire field of the fraudulent obtaining of money or property by means of a worthless check.

Tenn.—Williams v. State, 281 S.W.2d 41, 198 Tenn. 439—State v. Seawell, 227 S.W.2d 777, 190 Tenn. 77—Halley v. State, 299 S.W. 799, 156 Tenn. 85.

5. Ala.—Phillips v. State, 91 So.2d 518, 38 Ala.App. 632—Holloway v. State, 64 So.2d 115, 37 Ala.App. 96, certiorari denied 64 So.2d 121, 258 Ala. 558—Whatley v. State, 31 So. 2d 662, 33 Ala.App. 124, reversed on other grounds, 31 So.2d 664, 249 Ala. 255, 174 A.L.R. 169—Couch v. State, 20 So.2d 57, 31 Ala.App. 586.

Cal.—People v. Ashley, 267 P.2d 271, 42 C.2d 240—People v. Jones, 224 P.2d 353, 36 C.2d 373.

People v. Krupnick, 332 P.2d 720, 165 C.A.2d 755—People v. Chapman, 319 P.2d 8, 156 C.A.2d 151—People v. Schmitt, 317 P.2d 673, 155 C.A.2d 87—People v. Massey, 312 P. 2d 365, 151 C.A.2d 623—People v. Baird, 286 P.2d 832, 135 C.A.2d 109—People v. Rocha, 279 P.2d 836, 130 C.A.2d 656—People v. Nesseth, 274 P.2d 479, 127 C.A.2d 712—People v. Platt, 268 P.2d 529, 124 C.A. 2d 123—People v. Frankfort, 251 P.2d 401, 114 C.A.2d 680—People v. Abbott, 223 P. 77, 65 C.A. 120—People v. Neetens, 184 P. 27, 42 C.A. 596.

Fla.—Ex parte Stirrup, 19 So.2d 712, 155 Fla. 173—Finlay v. State, 12 So.2d 112, 152 Fla. 396, 145 A.L.R. 299—State ex rel. Warren v. Sweat, 185 So. 453, 135 Fla. 661—Clifton v. State, 79 So. 707, 76 Fla. 244.

Ga.—Diamond v. State, 182 S.E. 813, 52 Ga.App. 184.

there must be an attempt or intent to defraud, actual fraud, use of false pretenses, and the obtaining of property through the medium of such false pretenses.⁶

The gist of the offense has been held to be the felonious taking and conversion of the property of

another,^{6.5} the obtaining of the property of another by false pretenses, with intent to cheat and defraud,^{6.10} or fraud and deception by the perpetrator, his motives, and the resulting fact that a person was deceived and defrauded.^{6.15}

While it has been held that the elements of the

Iowa.—**Corpus Juris Secundum** cited in *State v. Comes*, 62 N.W.2d 753, 755, 245 Iowa 485.
 Kan.—*State v. Handke*, 340 P.2d 877.
 Ky.—*Dennis v. Thomson*, 43 S.W.2d 18, 240 Ky. 727.
 Mass.—*Commonwealth v. Green*, 94 N.E.2d 260, 326 Mass. 344.
 Mich.—*People v. Larco*, 49 N.W.2d 358, 331 Mich. 420—*People v. Bagwell*, 295 N.W. 207, 295 Mich. 412.
 Minn.—*State v. Nuser*, 271 N.W. 811, 199 Minn. 315—**Corpus Juris** quoted in *State v. Anderson*, 199 N.W. 6, 7, 159 Minn. 245.
 Miss.—**Corpus Juris Secundum** cited in *Breland v. State*, 77 So.2d 300, 301, 222 Miss. 792.
 Mo.—*State v. Samis*, 246 S.W. 956, 296 Mo. 471.
 Mont.—*State v. Bratton*, 186 P. 327, 56 Mont. 563.
 N.Y.—*People v. Lehrer*, 45 N.Y.S. 2d 170, 182 Misc. 645.
 N.C.—*State v. Mayer*, 146 S.E. 64, 196 N.C. 454—*State v. Johnson*, 142 S.E. 775, 195 N.C. 506—*State v. Roberts*, 126 S.E. 161, 189 N.C. 93—*State v. McFarland*, 105 S.E. 179, 180 N.C. 726.
 Ohio.—*State v. Joseph*, 152 N.E. 186, 115 Ohio St. 127.
 Okl.—*Reeves v. State*, 96 P.2d 536, 68 Okl.Cr. 163—*Rhodes v. State*, 49 P.2d 226, 58 Okl.Cr. 1—*Helsey v. State*, 193 P. 50, 18 Okl.Cr. 98, 17 A.L.R. 197.
 Pa.—*Commonwealth v. Schmidt*, 95 Pa.Super. 102.
 Commonwealth v. Anselmi, Quar. Sess., 61 Dauph.Co. 120.
 S.D.—*State v. Wood*, 86 N.W.2d 530—**Corpus Juris** cited in *State v. Alick*, 252 N.W. 644, 646, 62 S.D. 220.
 Tenn.—*Beck v. State*, 315 S.W.2d 254.
 Tex.—*Speckels v. State*, 95 S.W.2d 122, 130 Tex.Cr. 639—*Cochrain v. State*, 248 S.W. 43, 93 Tex.Cr. 483.
 Utah.—*Ballaine v. District Court of First Judicial District for Box Elder County*, 153 P.2d 265, 107 Utah 247.
 W.Va.—**Corpus Juris** quoted in *State v. Augustine*, 171 S.E. 111, 112, 114 W.Va. 143.
 Wis.—*Palotta v. State*, 199 N.W. 72, 184 Wis. 290—**Corpus Juris** cited in *Corscot v. State*, 190 N.W. 465, 467, 178 Wis. 661.
 25 C.J. p 589 note 87.
Rule at common law
 N.Y.—*People v. Sloane*, 300 N.Y.S. 1032, 165 Misc. 444.

"The gravamen of the offense is making a false representation and thereby obtaining money."

Mont.—*State v. Woolsey*, 259 P. 826, 832, 80 Mont. 141.

Statutory requisites considered together

In determining whether case falls within statute respecting obtaining property by false pretense, statutory requisites should be considered together, not separately.

Pa.—*Commonwealth v. Brady*, 101 Pa. Super. 336.

Benefit and injury

(1) Benefit to accused is not an element of the offense.

Ala.—*Carroll v. State*, 94 So. 194, 18 Ala.App. 649.

Cal.—*People v. Ashley*, 267 P.2d 271, 42 C.2d 240.

Tex.—*Mowrey v. State*, 55 S.W.2d 816, 122 Tex.Cr. 456.

(2) To support swindling charge, no injury to person intended to be defrauded need have resulted, if there was a willful design on the part of defendant to receive benefit or cause injury.

Tex.—*Mowrey v. State*, supra.

(3) Intent of accused to derive advantage see infra § 7.

Actual defrauding held shown

Kan.—*State v. Handke*, 340 P.2d 877.

Cheating and swindling by false representations

That knowingly and designedly false representations relating to existing fact or past event were made with intent to deceive and defraud, that they did deceive and defraud, and that party to whom false statements were made, relying on their truth, was thereby induced to part with his property constitute the essential requisites of the offense of cheating and swindling by false representations.

Ga.—*Wilson v. State*, 67 S.E.2d 164, 84 Ga.App. 703—*Chandler v. State*, 56 S.E.2d 794, 80 Ga.App. 550.

Elements of crime of "estafa" under Philippine penal code are deceit employed to defraud another and injury caused thereby.

Philippine.—*U. S. v. Berry*, 5 Philippine 370—*U. S. v. Mendezona*, 2 Philippine 353.

6. Cal.—*People v. Leaverton*, 289 P. 890, 107 C.A. 51—*People v. Harrington*, 267 P. 942, 92 C.A. 245.
 People v. Armstrong, 224 P.2d 490, 100 C.A.2d Supp. 852—*People*

v. Cale, 288 P. 430, 106 C.A.Supp. 777.

Idaho.—*State v. McCallum*, 295 P.2d 259, 77 Idaho 489—*State v. Whitney*, 254 P. 525, 43 Idaho 745.

Md.—*Willis v. State*, 106 A.2d 85, 205 Md. 118—*Simmons v. State*, 167 A. 60, 165 Md. 155.

Mass.—*Commonwealth v. Levine*, 181 N.E. 851, 280 Mass. 83.

Mich.—*People v. Lee*, 243 N.W. 227, 259 Mich. 355.

N.H.—*State v. Skaff*, 54 A.2d 155, 94 N.H. 402.

Pa.—*Commonwealth v. Stone*, 144 A. 2d 610, 187 Pa.Super. 236, affirmed 150 A.2d 870, 395 Pa. 583—*Commonwealth v. Hancock*, 112 A.2d 407, 177 Pa.Super. 585—*Commonwealth v. Campbell*, 176 A. 246, 116 Pa.Super. 180—*Commonwealth v. Johnson*, 157 A. 625, 104 Pa.Super. 96, reversed on other grounds 167 A. 344, 312 Pa. 140, 89 A.L.R. 333—*Commonwealth v. Brady*, 101 Pa. Super. 336.

Commonwealth v. Miller, 39 Pa. Dist. & Co. 433, 49 Dauph.Co. 141.

Commonwealth v. Baird, O. & T., 15 Beaver 78—*Commonwealth v. Walker*, Quar.Sess., 50 Berks Co. 126—*Commonwealth v. Prep*, Quar. Sess., 71 Dauph.Co. 246, affirmed 142 A.2d 460, 186 Pa.Super. 442—*Commonwealth v. White*, Quar.Sess., 35 Del.Co. 473—*Commonwealth v. Gross*, O. & T., 33 North.Co. 43.

Tex.—*Redding v. State*, 265 S.W.2d 811, 159 Tex.Cr. 535, certiorari denied *Redding v. State of Texas*, 75 S.Ct. 38, 348 U.S. 838, 99 L.Ed. 661—*Bomar v. Insurers Indem. & Ins. Co.*, 242 S.W.2d 160, 150 Tex. 484.
 Dixon v. State, 215 S.W.2d 181, 152 Tex.Cr. 504—*King v. State*, 213 S.W.2d 541, 152 Tex.Cr. 255.

Utah.—*State v. Morris*, 38 P.2d 1097, 85 Utah 210—*State v. Howd*, 188 P. 628, 55 Utah 527.

Wis.—*State v. Hintz*, 229 N.W. 54, 200 Wis. 636.

6.5 Iowa.—*State v. Quinn*, 64 N.W. 2d 323, 245 Iowa 846.

6.10 Neb.—*Dwoskin v. State*, 74 N.W.2d 847, 161 Neb. 793, certiorari denied *Dwoskin v. State of Nebraska*, 77 S.Ct. 61, 352 U.S. 840, 1 L.Ed.2d 57, rehearing denied 77 S.Ct. 219, 352 U.S. 937, 1 L.Ed.2d 170.

6.15 Ky.—*Lee v. Commonwealth*, 242 S.W.2d 984—*Frazier v. Commonwealth*, 165 S.W.2d 33, 291 Ky. 467.

offense must coexist,^{6,20} they need not all occur at the same time.^{6,25} A false pretense is essential,⁷ the criminal character of the act alleged to constitute a crime being determined by the means used in obtaining the property.⁸ False pretense has been held to include the elements of trick, cunning, dissembling, and unfair ways by which another is deceived.^{8,5}

The transactions between the parties must be considered as a whole in determining whether the essential elements of the offense of obtaining by false pretenses are present and coexisting.^{8,10}

§ 7. Intent

A specific intent to defraud is commonly regarded as essential; but the intent need not be to accomplish the particular result achieved, or, except where the statute so requires, to cause ultimate loss to the victim. The intent must exist when the representations are made or the property is obtained; it need not be directed against the legal owner.

A specific intent to cheat and defraud is commonly regarded as essential to the commission of the crime of obtaining property by false pretenses.⁹ Misrepresentation of facts, therefore, made innocently or inadvertently cannot form the basis for

6.20 Pa.—Commonwealth v. Thomas, 70 A.2d 453, 166 Pa.Super. 214—Commonwealth v. Gross, 56 A.2d 303, 161 Pa.Super. 613.
Commonwealth v. Hancock, 1 Pa. Dist. & Co.2d 363, 66 Dauph.Co. 314, affirmed 112 A.2d 407, 177 Pa.Super. 585.

6.25 Pa.—Commonwealth v. Hancock, supra.

7. Cal.—People v. Davis, 30 P.2d 573, 137 C.A. 378—People v. Bocchio, 251 P. 672, 80 C.A. 138.

Iowa.—State v. Neuhart, 292 N.W. 791, 228 Iowa 1055.

Tex.—Williams v. State, 211 S.W.2d 951, 152 Tex.Cr. 233—Robertson v. State, 132 S.W.2d 276, 137 Tex.Cr. 535.

Utah.—State v. Casperson, 262 P. 294, 296, 71 Utah 68.

Wash.—State v. Knutson, 12 P.2d 923, 168 Wash. 633.

False pretense within statute held shown

Ga.—Suggs v. State, 25 S.E.2d 532, 69 Ga.App. 383.

8. Iowa.—State v. Neuhart, 292 N.W. 791, 228 Iowa 1055.

Mich.—People v. Lintz, 232 N.W. 404, 251 Mich. 367.

8.5 Cal.—People v. Massey, 312 P.2d 365, 151 C.A.2d 623.

8.10 Pa.—Commonwealth v. Gross, 56 A.2d 303, 161 Pa.Super. 613.

9. U.S.—Bonney v. C. I. R., C.A.2, 247 F.2d 237, certiorari denied 78 S.Ct. 333, 355 U.S. 906, 2 L.Ed.2d 261.

Ark.—Utley v. State, 238 S.W. 607, 152 Ark. 407.

Cal.—People v. Christenbery, App., 334 P.2d 978—People v. Simms, 300 P.2d 898, 144 C.A.2d 189—People v. Henderson, 179 P.2d 406, 79 C.A.2d 94—People v. Burnett, 69 P.2d 1028, 21 C.A.2d 613—People v. Boyd, 227 P. 783, 67 C.A. 292.

Colo.—Roberts v. People, 205 P. 272, 71 Colo. 198.

D.C.—Nelson v. U. S., 227 F.2d 21, 97 U.S.App.D.C. 6, 53 A.L.R.2d 1206, certiorari denied 76 S.Ct. 700, 351 U.S. 910, 100 L.Ed. 1445.

Ill.—People v. Marmon, 59 N.E.2d

808, 389 Ill. 478, certiorari denied 66 S.Ct. 30, 326 U.S. 725, 90 L.Ed. 430, rehearing denied 66 S.Ct. 136, 326 U.S. 808, 90 L.Ed. 492—People v. Scowley, 187 N.E. 415, 353 Ill. 330.

Ind.—Knopp v. State, 120 N.E.2d 268, 233 Ind. 435.

Iowa.—State v. Comes, 62 N.W.2d 753, 245 Iowa 485—State v. Detloff, 205 N.W. 534, 201 Iowa 159.

Ky.—Sanson v. Commonwealth, 233 S.W.2d 258, 313 Ky. 631, 20 A.L.R.2d 1262—Sweeton v. Commonwealth, 275 S.W. 827, 210 Ky. 340.

La.—State v. Wilson, 125 So. 854, 169 La. 684.

Md.—Simmons v. State, 167 A. 60, 165 Md. 155.

Mass.—Commonwealth v. Aronson, 44 N.E.2d 679, 312 Mass. 347.

Mich.—People v. Lee, 243 N.W. 227, 259 Mich. 355.

Minn.—State v. Monson, 210 N.W. 108, 168 Minn. 381.

Mo.—State v. Zingher, 259 S.W. 451, 302 Mo. 650.

Neb.—Brennan v. State, 3 N.W.2d 217, 141 Neb. 205—Eselin v. State, 205 N.W. 570, 113 Neb. 839—Thompson v. State, 199 N.W. 806, 112 Neb. 389.

N.J.—State v. Greco, 148 A.2d 164, 29 N.J. 94.

N.M.—State v. Ferguson, 244 P.2d 783, 56 N.M. 398.

N.Y.—People v. Williams, 249 N.Y.S. 425, 140 Misc. 85.

N.C.—State v. Johnson, 142 S.E. 775, 195 N.C. 506—State v. McFarland, 105 S.E. 179, 180 N.C. 726.

Ohio.—State v. Joseph, 152 N.E. 186, 115 Ohio St. 127.

Okl.—McLemore v. State, 27 P.2d 172, 55 Okl.Cr. 155.

Pa.—Commonwealth v. Campbell, 176 A. 246, 116 Pa.Super. 180.

Commonwealth v. Miller, 39 Pa. Dist. & Co. 433, 49 Dauph.Co. 141.

R.I.—State v. Considine, 186 A. 676, 56 R.I. 456.

S.C.—Turner v. Montgomery Ward & Co., 163 S.E. 796, 165 S.C. 253.

Tenn.—Kimsey v. State, 241 S.W.2d 514, 192 Tenn. 421.

Tex.—Coffee v. State, 184 S.W.2d 278, 148 Tex.Cr. 71.

Wash.—State v. Peterson, 70 P.2d 306, 190 Wash. 668.

W.Va.—State v. Cobb, 7 S.E.2d 443, 122 W.Va. 97.

Wis.—State ex rel. Brill v. Spieker, - 72 N.W.2d 906, 271 Wis. 237—State v. Hintz, 229 N.W. 54, 200 Wis. 636.

25 C.J. p 602 note 7, p 603 note 8.
Intent in passing worthless checks see infra § 21.

Gist or gravamen of the offense is the intent to defraud.

Ga.—McElmurray v. State, 47 S.E.2d 139, 76 Ga.App. 604—De Loach v. State, 13 S.E.2d 44, 64 Ga.App. 285—State v. Ricks, 144 S.E. 137, 38 Ga.App. 370.

Idaho.—State v. Barr, 117 P.2d 282, 63 Idaho 59—State v. Whitney, 254 P. 525, 43 Idaho 745.

Ky.—Caldwell v. Commonwealth, 298 S.W. 681, 221 Ky. 232.

25 C.J. p 603 note 8 [a], [b].

General malice or criminal intent is insufficient; specific intent to defraud must be present.

Iowa.—State v. Huckins, 234 N.W. 554, 212 Iowa 283.

Aiding and abetting

Intent being a necessary element of offense of obtaining money and property by false representations and pretenses, it is likewise a necessary element of the offense of aiding and abetting another in obtaining money and property by false representations and pretenses.

Mich.—People v. Smith, 260 N.W. 911, 271 Mich. 553.

Encumbrance on property

(1) Intent is an essential element of the offense of obtaining money by false pretense or representation that property is unencumbered.

Mass.—Commonwealth v. Bannon, 150 N.E. 7, 254 Mass. 320.

(2) Gist of offense of obtaining money or property through false pretenses, based on failure to notify purchaser of lien or encumbrance, was the intent of seller to cheat and defraud purchaser.

Miss.—Simmons v. State, 135 So. 196, 160 Miss. 582.

prosecution for obtaining property by false pretenses.^{9.5} Under a few statutes, however, such intent has not been deemed to be an ingredient of the crime,¹⁰ it being sufficient if the act be done designedly.¹¹

The intent to defraud need not be directed against any particular person;¹² thus, it need not be directed against the legal owner, it being sufficient if directed against any one who is in lawful possession of the goods, or who parts with property in reliance on the pretense.¹³

It is not necessary that the intent be to accomplish the particular result achieved; if the particular result fails and another thing of value is obtained by means of the false representations, it is sufficient;¹⁴ nor, except where the statute requires such intent,¹⁵ need the intent be to cause ultimate loss to the victim, since he is defrauded by the mere obtaining of his property by a false pretense, although he may not suffer an ultimate loss.¹⁶

It is essential that the fraudulent intent shall have existed at the time the fraudulent representation or pretenses were made or when the thing of value was obtained by reason of such pretenses.¹⁷ The

false pretense need not originally have been made for the purpose of defrauding, if it is reiterated for that purpose.¹⁸ Since the intent provided for by the statutes is the intent to defraud another, and not to benefit accused, it is no defense that accused did not intend to derive any advantage from the obtaining of the property.¹⁹ Under at least one statute, it has been held that if there was a willful design to receive a benefit or cause an injury, it is immaterial that when the property is obtained it actually produces no benefit or injury.²⁰

It has been held that, where all the elements are present, the intention with which the victim parted with his property is immaterial.²¹

§ 8. Nature of Pretense or Fact Represented

Unless the statute provides otherwise, the pretense must be a representation as to an existing fact or past event, and not as to something to take place in the future; and it must be a representation as to a material fact. Only a single fact need be misrepresented.

Except where the statute provides otherwise,^{21.50} the pretense relied on to establish the offense must be a representation as to a present or existing fact, or a past fact or event, and may not be as to something to take place in the future.²² If, however, the

9.5 Cal.—*People v. Ashley*, 267 P.2d 271, 42 C.2d 246, certiorari denied *Ashley v. People of State of California*, 75 S.Ct. 222, 348 U.S. 900, 99 L.Ed. 707.

10. N.Y.—*People v. Webster*, 40 N.Y.S. 1135, 17 Misc. 410, 11 N.Y.Cr. 340.

25 C.J. p 603 note 9.

11. S.D.—*State v. Taylor*, 183 N.W. 998, 44 S.D. 332.

"Designedly false" in statute prohibiting obtaining of property by designedly false pretenses means in substance willfully, knowingly, and intentionally false.

S.D.—*State v. Lien*, 30 N.W.2d 12, 72 S.D. 94.

12. Colo.—*Schayer v. People*, 37 P. 43, 5 Colo.App. 75.

Ky.—*Commonwealth v. Johnson*, 181 S.W. 368, 167 Ky. 727, L.R.A.1916D 267.

Mo.—*State v. Scott*, 48 Mo. 422.

13. Ky.—*Commonwealth v. Johnson*, 181 S.W. 368, 167 Ky. 727, L.R.A. 1916D 267.

25 C.J. p 603 note 10.

14. Ind.—*Todd v. State*, 31 Ind. 514.

Mass.—*Commonwealth v. Hutchison*, 114 Mass. 325.

15. Wash.—*State v. Cook*, 194 P. 401, 115 Wash. 391.

16. Miss.—*Odom v. State*, 94 So. 233,

130 Miss. 643, suggestion of error overruled 95 So. 253, 132 Miss. 3.

25 C.J. p 603 note 12.

17. N.Y.—*People v. Pierce*, 218 N.Y. S. 249, 218 App.Div. 254.

25 C.J. p 603 note 13.

Absence of intent when pretenses are made is immaterial if there is fraudulent intent when the property is obtained as a result of the pretenses theretofore made.

Okl.—*Troup v. State*, 2 P.2d 591, 51 Okl.Cr. 438.

Nonperformance of promise

In considering intent to defraud, nonperformance of promise is a circumstance to be considered with all others in deciding whether the intent to perform was absent at time of making promise.

Cal.—*People v. Otterman*, 316 P.2d 85, 154 C.A.2d 193.

18. Colo.—*Clarke v. People*, 171 P. 69, 64 Colo. 164.

Iowa.—*State v. Detloff*, 205 N.W. 534, 201 Iowa 159.

19. Mich.—*People v. Lennox*, 64 N.W. 488, 106 Mich. 625.

25 C.J. p 604 note 15.

20. Tex.—*Overall v. State*, 128 S.W. 2d 1194, 137 Tex.Cr. 303—*Mowrey v. State*, 55 S.W.2d 816, 122 Tex.Cr. 456.

Loss to prosecutor generally see infra § 28.

21. Cal.—*People v. Haskins*, 194 P. 43, 49 C.A. 640.

21.50 U.S.—*Application of Kaufman*, D.C.N.J., 136 F.Supp. 626.

22. U.S.—*Smith v. Fontana*, D.C.N.Y., 48 F.Supp. 55.

Ala.—*Jones v. State*, 182 So. 404, 236 Ala. 30.

Alaska.—*U. S. v. Pearce*, 7 Alaska 246.

Ariz.—*Maseeh v. State*, 47 P.2d 423, 46 Ariz. 94—*Corpus Juris cited in Willis v. State*, 271 P. 725, 726, 34 Ariz. 363—*Jacobson v. State*, 209 P. 310, 24 Ariz. 402.

Ark.—*James v. State*, 236 S.W.2d 429, 218 Ark. 335.

Cal.—*People v. Mason*, 195 P.2d 60, 86 C.A.2d 445—*People v. Ames*, 143 P.2d 92, 61 C.A.2d 522—*People v. Jackson*, 74 P.2d 1085, 24 C.A.2d 182—*People v. Downing*, 58 P.2d 657, 14 C.A.2d 392—*People v. Reese*, 29 P.2d 450, 136 C.A. 657—*People v. Robinson*, 290 P. 470, 107 C.A. 211—*People v. Moore*, 256 P. 266, 82 C.A. 739.

People v. Cale, 288 P. 430, 106 C.A., Supp., 777.

Conn.—*State v. Robington*, 75 A.2d 394, 137 Conn. 140.

D.C.—*Chaplin v. U. S.*, 157 F.2d 697, 81 U.S.App.D.C. 80, 168 A.L.R. 828.

Ga.—*Powell v. State*, App., 108 S.E.2d 817—*Gilligan v. State*, 13 S.E.2d 112, 64 Ga.App. 311—*Summers v. State*, 11 S.E.2d 409, 63 Ga.App. 445—*Spivey v. State*, 8 S.E.2d 677, 62 Ga.App. 507—*Carr v. State*, 4 S.E.2d 500, 60 Ga.App. 590—*Scar-*

representation is of an existing fact, it is none the less within the statute because it relates to a future

- borough v. State, 181 S.E. 230, 51 Ga.App. 667—Vaughan v. State, 137 S.E. 854, second case, 36 Ga. App. 675.
- Hawaii.—Territory v. Taok, 33 Hawaii 560.
- Ind.—Greening v. State, 153 N.E. 412, 198 Ind. 706.
- Iowa.—*Corpus Juris Secundum* cited in State v. Comes, 62 N.W.2d 753, 755, 245 Iowa 485—State v. Doudna, 284 N.W. 113, 226 Iowa 351.
- Kan.—State v. Handke, 340 P.2d 877—State v. Beezley, 239 P. 998, 119 Kan. 300.
- Ky.—Slaughter v. Commonwealth, 300 S.W. 619, 222 Ky. 225, 56 A.L.R. 1209—*Corpus Juris* cited in Commonwealth v. Harper, 243 S.W. 1053, 1054, 195 Ky. 843.
- La.—State v. Ritchie, 136 So. 11, 172 La. 942—State v. Antoine, 98 So. 861, 155 La. 120.
- Mich.—People v. Morrison, 81 N.W. 2d 667, 348 Mich. 88—People v. Widmayer, 251 N.W. 540, 265 Mich. 547.
- Miss.—*Corpus Juris Secundum* cited in Button v. State, 42 So.2d 773, 774, 207 Miss. 582.
- Mo.—State v. Neal, 169 S.W.2d 686, 350 Mo. 1002—State v. Wren, 62 S.W.2d 853, 333 Mo. 575—State v. Houchins, 46 S.W.2d 891—State v. Holbrook, 289 S.W. 560—State v. Mullins, 237 S.W. 502, 292 Mo. 44.
- Mont.—State v. Foot, 48 P.2d 1113, 100 Mont. 33.
- Neb.—Hameyer v. State, 29 N.W.2d 458, 148 Neb. 798—Brennan v. State, 3 N.W.2d 217, 141 Neb. 205—Potard v. State, 299 N.W. 362, 140 Neb. 116.
- N.J.—State v. Lamoreaux, 80 A.2d 213, 13 N.J.Super. 99—State v. Pasquale, 68 A.2d 488, 5 N.J.Super. 91.
- N.Y.—People v. Burgess, 155 N.E. 745, 244 N.Y. 472.
- People v. Sloane, 4 N.Y.S.2d 784, 254 App.Div. 780, affirmed 18 N.E.2d 679, 279 N.Y. 724.
- People v. Krumme, 292 N.Y.S. 657, 161 Misc. 278—People v. Williams, 238 N.Y.S. 712, 135 Misc. 564.
- Ohio.—Harris v. State, 181 N.E. 104, 125 Ohio St. 257.
- State v. Singleton, 87 N.E.2d 358, 85 Ohio App. 245.
- Okl.—Bopst v. State, 248 P.2d 658, 96 Okl.Cr. 28—Welch v. State, 146 P.2d 141, 78 Okl.Cr. 180—Oliver v. State, 130 P.2d 321, 75 Okl.Cr. 244—Huckaby v. State, 211 P. 525, 22 Okl.Cr. 376—Helsey v. State, 193 P. 50, 18 Okl.Cr. 98, 17 A.L.R. 197.
- Pa.—Commonwealth v. Gross, 56 A.2d 303, 161 Pa.Super. 613—Commonwealth v. Becker, 30 A.2d 195, 151 Pa.Super. 169—Commonwealth v. Johnson, 157 A. 625, 104 Pa.Super. 96, reversed on other grounds 167 A. 344, 312 Pa. 140, 89 A.L.R. 333—Commonwealth v. Mauk, 79 Pa.Super. 153.
- Commonwealth v. Miller, 39 Pa. Dist. & Co. 433, 49 Dauph.Co. 141.
- Commonwealth v. Conlon, 1 Fay. L.J. 142—Commonwealth v. Ganey, 35 Luz.Leg.Reg. 216.
- S.D.—State v. Alick, 252 N.W. 644, 62 S.D. 220.
- Tenn.—Cook v. State, 94 S.W.2d 386, 170 Tenn. 245—State v. Higgins, 256 S.W. 875, 148 Tenn. 609.
- Tex.—Whitehead v. State, 185 S.W. 2d 725, 148 Tex.Cr. 190—Rumfield v. State, 141 S.W.2d 630, 139 Tex. Cr. 599—Bond v. State, 136 S.W.2d 865, 138 Tex.Cr. 394—Dix v. State, 124 S.W.2d 998, 136 Tex.Cr. 296—Baldwin v. State, 104 S.W.2d 872, 132 Tex.Cr. 427—Speckels v. State, 95 S.W.2d 122, 130 Tex.Cr. 639—New v. State, 83 S.W.2d 668, 129 Tex.Cr. 16—Contreras v. State, 39 S.W.2d 62, 118 Tex.Cr. 626—Lamkin v. State, 260 S.W. 567, 97 Tex.Cr. 189.
- Va.—*Corpus Juris Secundum* cited in Hubbard v. Commonwealth, 109 S. E.2d 100, 104.
- 25 C.J. p 590 note 93.
- Definition of offense see supra § 1.
- Elements of offense in general see supra § 6.
- Gist of offense** is false representation as to any material existing fact.
- Iowa.—State v. Comes, 62 N.W.2d 753, 245 Iowa 485.
- Tex.—Green v. State, 161 S.W.2d 114, 144 Tex.Cr. 186.
- Subsequent act within same transaction**
- "Present time" usually means a period of appreciable and generally considerable duration within which certain transactions are to take place, while "future time" usually means a period to come after the present time; hence, where complaining witness surrendered to defendant a bond on his promise, "I will give you" certain stock as security, and immediately thereafter defendant gave complaining witness an envelope containing other and worthless stock, with the remark, "The stock is in there," defendant's promise referred to an existing fact, and not a future event, his last-quoted remark being equivalent to "I am giving you" the security mentioned.
- Wis.—Corscot v. State, 190 N.W. 465, 468, 178 Wis. 661.
- Representations held to be of present or past facts**
- (1) That defendant, selling interest in healing business, had enough patients to fill an eleven-room house.
- Cal.—People v. Walker, 244 P. 94, 76 C.A. 192.
- (2) That accused had order for barrel of oil.
- Cal.—People v. Fisher, 2 P.2d 564, 116 C.A. 243.
- (3) That defendant had wired offer to property owner and received reply.
- S.D.—State v. Holland, 235 N.W. 609, 58 S.D. 205.
- (4) That land was a loam soil and that defendant had paid a stated sum for it.
- Wis.—State v. Hintz, 229 N.W. 54, 200 Wis. 636.
- (5) Defendant's representation that it was impossible to buy corporate stock, while at very time he was purchasing stock for less than one-fourth price at which he was selling it.
- Cal.—People v. Lesser, 11 P.2d 668, 123 C.A. 489.
- (6) Other representations.
- Ariz.—State v. Freeman, 279 P.2d 443, 78 Ariz. 286, followed in 279 P.2d 447, 78 Ariz. 291.
- Ark.—Lamb v. State, 155 S.W.2d 49, 202 Ark. 931.
- Cal.—People v. Rabe, 261 P. 303, 202 C. 409.
- People v. Cravens, 180 P.2d 453, 79 C.A.2d 658—People v. Gordon, 163 P.2d 110, 71 C.A.2d 606—People v. Bianchi, 205 P. 884, 56 C.A. 579.
- Fla.—Finlay v. State, 12 So.2d 112, 152 Fla. 396, 145 A.L.R. 299.
- Mo.—State v. Mandell, 133 S.W.2d 59, 353 Mo. 502.
- Neb.—Hameyer v. State, 29 N.W.2d 458, 148 Neb. 798.
- N.J.—State v. Lamoreaux, 80 A.2d 213, 13 N.J.Super. 99.
- N.Y.—People v. Lehrer, 45 N.Y.S.2d 170, 182 Misc. 645.
- N.C.—State v. Roberts, 126 S.E. 161, 189 N.C. 93.
- Pa.—Commonwealth v. Heintz, 126 A.2d 498, 182 Pa.Super. 331.
- Commonwealth v. Johnson, Quar. Sess., 21 Lehigh.L.J. 369.
- Tex.—Massey v. State, 266 S.W.2d 880, 160 Tex.Cr. 49.
- 25 C.J. p 590 note 93 [a].
- Representations held to be of future events**
- (1) Representations that defendant represented an insolvent health association which owned lands from which a purchaser would realize an oil royalty each month.
- Cal.—People v. Daniels, 76 P.2d 556, 25 C.A.2d 64.
- (2) Other representations.
- Conn.—State v. Robington, 75 A.2d 394, 137 Conn. 140.
- Iowa.—State v. Comes, 62 N.W.2d 753, 245 Iowa 485.
- Pa.—Commonwealth v. Becker, 30 A.2d 195, 151 Pa.Super. 169.
- 25 C.J. p 590 note 93 [b].
- No misrepresentation of existing fact**
- Pa.—Commonwealth v. Thomas, 70 A.2d 458, 166 Pa.Super. 214.

event;²³ and if several false pretenses are made, some of which refer to existing facts or past events, while others refer solely to future events, a conviction may be had if it is shown that any of the representations as to existing facts induced the complaining witness to part with his property.²⁴

A representation, to constitute a false pretense, must also be one of a material fact.²⁵ It has been further held sufficient if only a single fact is misrepresented.^{25.5}

Particular representations. Other elements of the offense appearing, a person renders himself criminally liable if he assumes a fictitious name,²⁶ or

represents that he has performed services which he has not in fact performed,²⁷ or that he has knowledge which he does not in fact have,²⁸ or makes a false statement as to his age²⁹ or as to the validity of a claim for money or of a right on which to predicate such a claim,³⁰ or submits false proofs of loss of property,³¹ or a false claim for personal injuries.³²

Likewise, a person may be liable if he misreads a deed to an illiterate person,³³ or represents that he has telegraphic communication with a race track and is receiving information as to the results of the races,³⁴ or makes false representations as to the title or ownership of property,³⁵ or falsely repre-

23. Tex.—Mitner v. State, 273 S.W. 565, 100 Tex.Cr. 455.
25 C.J. p 592 note 94.

Nonexistent principal

Representation of salesman, claiming to represent company not in existence, that company would deliver stove on certain date, which he knew could not be done, was "false representation" within statute.

Kan.—State v. Driscoll, 8 P.2d 335, 134 Kan. 671.

24. Mich.—People v. Segal, 146 N.W. 644, 180 Mich. 316.

Va.—*Corpus Juris Secundum* cited in Hubbard v. Commonwealth, 109 S.E.2d 100, 104.

Promise coupled with representation of fact see *infra* § 9.

25. Cal.—People v. Schmitt, 317 P.2d 673, 155 C.A.2d 87—People v. Martin, 314 P.2d 493, 153 C.A.2d 275.

D.C.—Nelson v. U. S., 227 F.2d 21, 53 A.L.R.2d 1206, 97 U.S.App.D.C. 6, certiorari denied 76 S.Ct. 700, 351 U.S. 910, 100 L.Ed. 1445.

Iowa.—State v. Comes, 62 N.W.2d 753, 245 Iowa 485.

Ky.—Sweeton v. Commonwealth, 275 S.W. 827, 210 Ky. 340.

Mass.—Commonwealth v. Jacobson, 157 N.E. 583, 260 Mass. 311.

Miss.—Button v. State, 42 So.2d 773, 207 Miss. 582.

Tex.—Green v. State, 161 S.W.2d 114, 144 Tex.Cr. 186.

Utah.—*Corpus Juris Secundum* cited in Ballaine v. District Court of First Judicial District for Box Elder County, 153 P.2d 265, 268, 107 Utah 247.

25 C.J. p 592 note 95.

Materiality consists in the tendency of a statement to influence the conduct of party who has an interest in the statement and to whom it is addressed.

D.C.—Nelson v. U. S., 227 F.2d 21, 97 U.S.App.D.C. 6, 53 A.L.R.2d 1206, certiorari denied 76 S.Ct. 700, 351 U.S. 910, 100 L.Ed. 1445.

Collateral matter

A false statement as to collateral matter is no ground for indictment. Pa.—Commonwealth v. Gouley, 5 Pa. Dist. & Co. 41.

25 C.J. p 592 note 95 [a].

Representations held material

U.S.—Todorow v. U. S., C.A.Cal., 173 F.2d 439, certiorari denied 69 S.Ct. 1169, 337 U.S. 925, 93 L.Ed. 1733.

Cal.—People v. Walker, 231 P. 572, 69 C.A. 475.

25.5 Cal.—People v. Schmitt, 317 P.2d 673, 155 C.A.2d 87—People v. Martin, 314 P.2d 493, 153 C.A.2d 275—People v. Cravens, 180 P.2d 453, 79 C.A.2d 658.

26. Iowa.—Munson v. Hollowell, 214 N.W. 733.

25 C.J. p 592 note 96.

False personation of officer or another see *infra* § 33.

27. N.J.—State v. Torrance, 125 A.2d 403, 41 N.J.Super. 445.

Tex.—Rumfield v. State, 141 S.W.2d 630, 139 Tex.Cr. 599.

25 C.J. p 592 note 99.

28. Iowa.—State v. Huckins, 234 N.W. 554, 559, 212 Iowa 283.

29. Ky.—Commonwealth v. Ferguson, 121 S.W. 967, 135 Ky. 32, 24 L.R.A., N.S., 1101, 21 Ann.Cas. 434.

30. Mass.—Commonwealth v. Fuller, 157 N.E. 588, 260 Mass. 329.

Pa.—Commonwealth v. Letteer, 69 Pa. Dist. & Co. 201, 60 Dauph. Co. 212—Commonwealth v. Miller, 39 Pa. Dist. & Co. 433, 49 Dauph. Co. 141.

Tex.—Dixon v. State, 215 S.W.2d 181, 152 Tex.Cr. 504.

25 C.J. p 592 note 1.

False entries

City employee, who made fraudulent entries in city's books, as to weight of coal delivered to city pursuant to conspiracy with coal company, was properly convicted of obtaining money under false pretenses. Mo.—State v. Rosenheim, 261 S.W. 95, 303 Mo. 553.

31. Ky.—Saylor v. Commonwealth, 148 S.W. 6, 149 Ky. 152.
25 C.J. p 592 note 2.

32. Mass.—Commonwealth v. Burton, 67 N.E. 419, 183 Mass. 461.

33. N.Y.—Webster v. People, 92 N.Y. 422.

34. Fla.—Griswold v. State, 82 So. 44, 77 Fla. 505.

35. Cal.—People v. Alexander, 128 P.2d 923, 54 C.A.2d 393—People v. Nye, 273 P. 837, 96 C.A. 186.

Del.—State v. Pierson, 91 A.2d 541, 8 Terry 397.

Ga.—Kemp v. State, 6 S.E.2d 196, 61 Ga.App. 337—Diamond v. State, 182 S.E. 813, 52 Ga.App. 184—James v. State, 158 S.E. 644, 43 Ga.App. 324.

Ill.—People v. Schneider, 158 N.E. 448, 327 Ill. 270.

Pa.—Commonwealth v. Fay, 74 Pa. Super. 103.

Commonwealth v. Walker, Quar. Sess., 50 Berks Co. 126.

Tex.—Burck v. State, 106 S.W.2d 709, 132 Tex.Cr. 628.

25 C.J. p 592 note 7.

Mere equity of redemption

Where defendant, prosecuted for obtaining money under false pretenses, gave a mortgage on an automobile then in possession of another holding under a bill of sale to secure a former loan, it was held, notwithstanding defendant had an equity of redemption in the former mortgage, that his representation as to ownership constituted a false pretense. Nev.—State v. Bacha, 194 P. 1066, 44 Nev. 373.

Option to purchase

In a prosecution for obtaining money under false pretenses by selling real estate to another on the false pretense of ownership, defendant is not relieved of criminal liability by the fact that he had an option to purchase the property on which he made default, if the purchaser was induced to buy and part with his money on the faith of the representation of ownership.

sents that property is unencumbered,³⁶ or that certain land is open to homestead entry,³⁷ or, on the sale of a mortgage, falsely represents that it is a first lien on the mortgaged property,³⁸ or that it is a lien on a dwelling house,³⁹ or makes false representations as to his business⁴⁰ or business connections,⁴¹ as where he represents himself to be in a situation or business in which he is not.^{41.5}

A false representation as to an act done or omitted by the prosecutor himself,⁴² or the advisability of the prosecutor's doing an act,⁴³ has been held not within the statute.

Warranty or contract combined with representation of fact. An indictment will not lie on a mere false warranty, or on representations to be implied from mere promises or contract obligations.⁴⁴ Where there is a warranty or contract on the part of accused, and there are also false representations of fact, an indictment will lie, provided the representations, and not the warranty or contract, induced the act of the other party.⁴⁵ There are, however, earlier cases holding that if a warranty is added to the false pretense the offense is not com-

mitted.⁴⁶

Failure to perform contract. The mere fact that one does not return money after failing to perform a contract, for the performance of which the money was paid in advance, does not constitute theft by false pretenses.^{46.5}

Puffing statements. Persons selling or exchanging property do not commit an offense merely by making use of "puffing" statements or "seller's talk."⁴⁷

A misrepresentation of price has been held an element of false pretense.^{47.5}

§ 9. — Simple Promise or Promise Combined with Representation of Fact

Under most authorities, a promise, although false, will generally not serve as a pretense; but, where a promise is combined with a representation of fact, there is a sufficient pretense unless the prosecutor relied wholly on the promise and not at all on the representation.

Since it relates to a future event, a promise to do something, even though false, or made without the intention of performing it, is generally not sufficient to serve as a pretense,⁴⁸ however false or

Kan.—State v. Stanley, 227 P. 263, 116 Kan. 449.

Defective title

Where accused's title to land is defective and unmarketable, his representation of ownership will not warrant a conviction.

Fla.—Criner v. State, 109 So. 417, 92 Fla. 483.

36. Fla.—Smith v. State, 98 So. 586, 86 Fla. 525.

Ky.—Slaughter v. Commonwealth, 300 S.W. 619, 222 Ky. 225, 56 A.L.R. 1209.

Mich.—People v. Lee, 243 N.W. 227, 259 Mich. 355.

Minn.—State v. Anderson, 199 N.W. 6, 159 Minn. 245.

Tex.—Mount v. State, Cr., 317 S.W. 2d 212.

Wis.—Frank v. State ex rel. Meiers, 12 N.W.2d 923, 244 Wis. 658. 25 C.J. p 593 note 8.

Note constituting mortgage

In prosecution for cheating and swindling by false representation that realty mortgaged was free from encumbrances, a note given by defendant on back of which appeared "This note is to bear interest at the rate of seven per cent. Said note is given against my residence at 10 Candler Road—Brookhaven, Georgia," followed by signature of defendant, was sufficient to constitute a mortgage.

Ga.—Daniel v. State, 10 S.E.2d 80, 63 Ga.App. 12.

37. Wash.—State v. Millroy, 174 P. 10, 103 Wash. 193.

38. N.Y.—People v. Sully, Sheld. 17, 5 Park.Cr. 142.

Pa.—Commonwealth v. Kohler & Unangst, 84 Pa.Super. 301.

39. Pa.—Commonwealth v. Kohler & Unangst, 84 Pa.Super. 304.

40. Cal.—People v. Helmlinger, 230 P. 675, 69 C.A. 139.

Iowa.—Murphy v. Hollowell, 214 N.W. 734, 204 Iowa 64.

25 C.J. p 593 note 11.

41. Mass.—Commonwealth v. Her-shell, Thach.Cr. 70.

N.Y.—People v. Kirkup, 149 N.E.2d 866, 4 N.Y.2d 209, 173 N.Y.S.2d 574.

25 C.J. p 593 note 12.

41.5 Kan.—State v. Handke, 340 P. 2d 877.

42. Mass.—Commonwealth v. Norton, 11 Allen 266.

25 C.J. p 593 note 13.

43. Pa.—Commonwealth v. Springer, 8 Pa.Co. 115.

25 C.J. p 593 note 14.

44. Ind.—McCran v. State, 128 N.E. 848, 189 Ind. 677.

25 C.J. p 595 note 26.

45. Minn.—State v. Butler, 50 N.W. 532, 47 Minn. 483.

25 C.J. p 595 note 27.

46. Mo.—State v. Chunn, 19 Mo. 233. 25 C.J. p 595 note 28.

46.5 Tex.—Hesbrook v. State, 194 S.W.2d 260, 149 Tex.Cr. 310.

47. Ala.—Corpus Juris quoted in McKee v. State, 164 So. 305, 306, 26 Ala.App. 589.

Kan.—State v. Nash, 204 P. 736, 110 Kan. 550.

Mass.—Commonwealth v. Coshneare, 194 N.E. 900, 289 Mass. 516.

N.C.—State v. Roberts, 126 S.E. 161, 189 N.C. 93.

25 C.J. p 597 notes 52, 53.

Puffing statements as to value see infra § 14.

Statements held not "puffing"

Cal.—People v. Davis, 246 P.2d 160, 112 C.A.2d 286.

47.5 Kan.—State v. Aiken, 254 P.2d 264, 174 Kan. 162.

48. U.S.—Smith v. Fontana, D.C.N.Y., 48 F.Supp. 55.

Ala.—McKee v. State, 155 So. 888, 26 Ala.App. 208.

Alaska.—U. S. v. Pearce, 7 Alaska 246.

Ariz.—Maseeh v. State, 47 P.2d 423, 46 Ariz. 94—Corpus Juris cited in Willis v. State, 271 P. 725, 726, 34 Ariz. 363.

Ark.—Lamb v. State, 155 S.W.2d 49, 202 Ark. 931.

Colo.—Chilton v. People, 35 P.2d 870, 95 Colo. 268.

Conn.—State v. Robington, 75 A.2d 394, 137 Conn. 140.

Fla.—Finlay v. State, 12 So.2d 112, 152 Fla. 396, 145 A.L.R. 299.

Ga.—Vaughan v. State, 137 S.E. 854, second case, 36 Ga.App. 675—

Stephens v. Milikin, 133 S.E. 67, 35 Ga.App. 287.

fraudulent it may be;⁴⁹ and this is the rule even though the defrauded party was induced by such promise to part with his property.⁵⁰

Under some statutes, however, obtaining prop-

erty by means of false promises, or promises made without the intention of performing them, may be indictable.⁵¹ This is on the ground that such a promise is a misrepresentation of a state of mind, and thus a misrepresentation of existing fact.^{51.5}

- Ind.—Pierce v. State, 79 N.E.2d 903, 226 Ind. 312.
- Iowa.—State v. Doudna, 284 N.W. 113, 226 Iowa 351.
- La.—State v. Ritchie, 136 So. 11, 172 La. 942.
- Mich.—People v. Widmayer, 251 N.W. 540, 265 Mich. 547.
- Mo.—State v. Craft, 126 S.W.2d 177, 344 Mo. 269—State v. Wren, 62 S.W.2d 853, 333 Mo. 575—**Corpus Juris cited in** State v. Holbrook, 289 S.W. 560, 561—State v. Ruwwe, 242 S.W. 936—State v. Mullins, 237 S.W. 502, 292 Mo. 44.
- Neb.—Hameyer v. State, 29 N.W.2d 458, 148 Neb. 798.
- N.Y.—People v. Sloane, 4 N.Y.S.2d 784, 254 App.Div. 780, affirmed 18 N.E.2d 679, 279 N.Y. 724—People v. Mazeloff, 242 N.Y.S. 623, 229 App. Div. 451.
- People v. Brady, 249 N.Y.S. 715, 139 Misc. 597—People v. Williams, 238 N.Y.S. 712, 135 Misc. 564—People v. Cory, 208 N.Y.S. 768, 124 Misc. 532.
- Ohio.—Harris v. State, 181 N.E. 104, 125 Ohio St. 257.
- Earp v. State, 153 N.E. 245, 21 Ohio App. 417.
- Okl.—Welch v. State, 146 P.2d 141, 78 Okl.Cr. 180—Huckaby v. State, 211 P. 525, 22 Okl.Cr. 376.
- Pa.—Commonwealth v. Gross, 56 A.2d 303, 161 Pa.Super. 613—Commonwealth v. Becker, 30 A.2d 195, 151 Pa.Super. 169—Commonwealth v. Johnson, 157 A. 625, 104 Pa.Super. 96, reversed on other grounds 167 A. 344, 312 Pa. 140, 89 A.L.R. 333—Commonwealth v. Forney, 88 Pa. Super. 451—Commonwealth v. Mauk, 79 Pa.Super. 153.
- Commonwealth v. Conlon, 1 Fay. L.J. 142—Commonwealth v. Johnson, Quar.Sess., 21 Lehl.J. 369—Commonwealth v. Ganey, 35 Luz. Leg.Reg. 216.
- S.D.—State v. Alick, 252 N.W. 644, 62 S.D. 220.
- Tenn.—Cook v. State, 94 S.W.2d 386, 170 Tenn. 245.
- Tex.—Carter v. State, 203 S.W.2d 540, 150 Tex.Cr. 448—McCuiston v. State, 158 S.W.2d 527, 71 Tex.Cr. 261—Bond v. State, 136 S.W.2d 865, 138 Tex.Cr. 394—Dix v. State, 124 S.W.2d 993, 136 Tex.Cr. 296—Mitner v. State, 273 S.W. 565, 100 Tex. Cr. 455—Rundell v. State, 235 S.W. 908, 90 Tex.Cr. 410.
- Utah.—Ballaine v. District Court of First Judicial District for Box Elder County, 153 P.2d 265, 107 Utah 247—State v. Howd, 188 P. 628, 55 Utah 527.
- Va.—Hubbard v. Commonwealth, 109 S.E.2d 100.
- Wis.—Frank v. State ex rel. Meiers, 12 N.W.2d 923, 244 Wis. 658.
- 25 C.J. p 593 note 15, p 594 note 18.
- A concealed intent not to keep a promise as to future action is not a "false pretense" within the meaning of the statute.**
- N.H.—State v. Shevlin, 123 A. 233, 81 N.H. 121.
- Statute held not to alter rule**
- N.Y.—People v. Karp, 81 N.E.2d 817, 298 N.Y. 213.
- Representations held to be promises**
- (1) Defendant's false and fraudulent representation that he could obtain a magic or mineral rod which would locate hidden treasure, that he would produce the magic rod within thirty days, and locate treasure, which he would divide with certain parties from whom he thereby obtained money.
- La.—State v. Antoine, 98 So. 861, 155 La. 120.
- (2) Representation that note to which defendant obtained the signature of prosecutor was a renewal of a note previously executed.
- Tenn.—State v. Higgins, 256 S.W. 875, 148 Tenn. 609.
- (3) Other representations.
- Ariz.—Jacobson v. State, 209 P. 310, 24 Ariz. 402.
- Del.—State v. Pierson, 91 A.2d 541, 8 Terry 397.
- 25 C.J. p 593 note 15 [a].
49. Ga.—Powell v. State, App., 108 S.E.2d 817—Spivey v. State, 8 S.E. 2d 677, 62 Ga.App. 507—Scarborough v. State, 181 S.E. 230, 51 Ga. App. 667.
- Hawaii.—Territory v. Taok, 33 Hawaii 560.
- Neb.—Hameyer v. State, 29 N.W.2d 458, 148 Neb. 798—Brennan v. State, 3 N.W.2d 217, 141 Neb. 205.
- N.C.—State v. Phillips, 82 S.E.2d 762, 240 N.C. 516.
- 25 C.J. p 594 note 16.
50. N.Y.—People v. Cory, 208 N.Y. S. 768, 124 Misc. 532.
- Tex.—New v. State, 83 S.W.2d 668, 129 Tex.Cr. 16.
- 25 C.J. p 594 note 17.
51. Ga.—Banks v. State, 52 S.E. 74, 124 Ga. 15, 2 L.R.A.N.S., 1007.
- 25 C.J. p 594 note 19.
- In California and New Jersey**
- (1) The text rule now prevails.
- Cal.—People v. Ashley, 267 P.2d 271, 42 C.2d 246, certiorari denied Ashley v. People of State of California, 75 S.Ct. 222, 348 U.S. 900, 99 L.Ed. 707.
- People v. Otterman, 316 P.2d 85, 154 C.A.2d 193—People v. Hodges, 315 P.2d 38, 153 C.A.2d 788—People v. Simms, 300 P.2d 898, 144 C.A.2d 189—People v. Staver, 252 P. 2d 700, 115 C.A.2d 711—People v. Frankfort, 251 P.2d 401, 114 C.A.2d 680—People v. Davis, 246 P.2d 160, 112 C.A.2d 286—People v. Chamberlain, 214 P.2d 600, 96 C.A.2d 178—People v. Mason, 195 P.2d 60, 86 C.A.2d 445—People v. Gordon, 163 P. 2d 110, 71 C.A.2d 606.
- N.J.—State v. Kaufman, 112 A.2d 721, 18 N.J. 75.
- (2) Violation of false pretenses statute arises from existence of present intention not to perform when the promise is made, and an intention not to perform formulated subsequent to the promise and after receipt of the consideration therefor would not create the criminal liability contemplated by the statute.
- N.J.—State v. Pearson, 120 A.2d 468, 39 N.J.Super. 50.
- (3) Fact that statute making it a crime to conspire to obtain property by false pretenses also makes it a crime to obtain property by false promises does not indicate that legislature did not regard false promises as "false pretenses" within larceny and false pretense statutes.
- Cal.—People v. Ashley, 267 P.2d 271, 42 C.2d 246, certiorari denied Ashley v. People of State of California, 75 S.Ct. 222, 348 U.S. 900, 99 L. Ed. 707.
- (4) Formerly, the rule was that a promise to do something in the future was not sufficient to serve as a false pretense.
- Cal.—People v. Selk, 115 P.2d 607, 46 C.A.2d 140—People v. Daniels, 76 P.2d 556, 25 C.A.2d 64—People v. Jackson, 74 P.2d 1085, 24 C.A.2d 182—People v. Downing, 58 P.2d 657, 14 C.A.2d 392—People v. Reese, 29 P.2d 450, 136 C.A. 657—People v. Moore, 256 P. 266, 82 C.A. 739—People v. Walker, 244 P. 94, 76 C.A. 192—People v. Mace, 234 P. 841, 71 C.A. 10.
- People v. Cale, 288 P. 430, 106 C. A., Supp., 777.
- N.J.—State v. Lamoreaux, 80 A.2d 213, 13 N.J.Super. 99—State v. Pasquale, 68 A.2d 488, 5 N.J.Super. 91.
- 51.5 Cal.—People v. Ashley, 267 P. 2d 271, 42 C.2d 246, certiorari denied Ashley v. People of State of California, 75 S.Ct. 222, 348 U.S. 900, 99 L.Ed. 707.

Promise combined with representation of fact. While, as shown above, the crime is not committed by a mere false promise, a false statement of fact may become effective only by being coupled with a false promise.⁵² Where this is the case, the mere fact that the false representation of fact is accompanied by a promise does not render it innocuous or relieve it of its criminal character;⁵³ the statement of fact and the promise may be considered as together constituting the false pretense and a conviction may follow, or, if the statement of fact and the promise can be separated, and prosecutor relied in part on the former, the promise may be disregarded and accused may be convicted on the statement of fact,⁵⁴ notwithstanding he may also have relied in part on the promise and would not have yielded to the false statement alone.⁵⁵

On the other hand, even though the promise is coupled with a statement of an existing fact, yet if the property was obtained by reason of the prosecutor's reliance on the promise as the sole inducement, no offense is committed.⁵⁶

§ 10. — Statement of Intention, Expectation, or Desire

Authorities disagree as to whether a false statement as to accused's intention is a false pretense as to an existing fact. A false statement of expectation or desire, or a mere prediction, is not a false pretense.

Some authorities hold that a state of mind is a fact, and that, therefore, a false statement as to the intention of accused is a false pretense as to an existing fact,⁵⁷ while others regard a representation of intention as not within the statute.⁵⁸ Neverthe-

People v. Chamberlain, 214 P.2d 600, 96 C.A.2d 178—People v. Gordon, 163 P.2d 110, 71 C.A.2d 606.
N.J.—State v. Kaufman, 112 A.2d 721, 18 N.J. 75.
State v. Pearson, 120 A.2d 468, 39 N.J.Super. 50.
False statement as to intention generally see *infra* § 10.

Belief in possibility of performance

Promise made without a bona fide belief in its possibility of performance is a misrepresentation of a present fact.

Cal.—People v. Chamberlain, 214 P.2d 600, 96 C.A.2d 178.

52. N.C.—*Corpus Juris Secundum* quoted at length in State v. Phillips, 82 S.E.2d 762, 765, 240 N.C. 516.

Ohio.—Earp v. State, 153 N.E. 245, 21 Ohio App. 417.
25 C.J. p 594 note 21.

53. Cal.—People v. Davis, 246 P.2d 160, 112 C.A.2d 286—People v. Cravens, 180 P.2d 453, 79 C.A.2d 658—People v. Gordon, 163 P.2d 110, 71 C.A.2d 606—People v. Ames, 143 P.2d 92, 61 C.A.2d 522—People v. Moore, 256 P. 266, 82 C.A. 739.

Fla.—Finlay v. State, 12 So.2d 112, 152 Fla. 396, 145 A.L.R. 299.
Ga.—Smith v. State, 42 S.E. 766, 116 Ga. 587.

Suggs v. State, 25 S.E.2d 532, 69 Ga.App. 383.

Kan.—State v. Handke, 340 P.2d 877—State v. Beezley, 239 P. 998, 119 Kan. 300—State v. Mathes, 196 P. 607, 108 Kan. 488.

Mo.—State v. Neal, 169 S.W.2d 686, 350 Mo. 1002—State v. Wren, 62 S.W.2d 853, 333 Mo. 575.

Mont.—*Corpus Juris* cited in State v. Foot, 48 P.2d 1113, 1118, 100 Mont. 33.

Neb.—Brennan v. State, 3 N.W.2d 217, 141 Neb. 205.

Pa.—Commonwealth v. Gross, 56 A.2d 303, 161 Pa.Super. 613.

Tex.—Carter v. State, 203 S.W.2d 540, 150 Tex.Cr. 448—McCuiston v. State, 158 S.W.2d 527, 71 Tex. Cr. 261.

Wis.—Frank v. State ex rel. Meiers, 12 N.W.2d 923, 244 Wis. 658—Palotta v. State, 199 N.W. 72, 184 Wis. 290.

25 C.J. p 595 note 23.

54. Hawaii.—Territory v. Taok, 33 Hawaii 560.

N.Y.—People v. Sloane, 4 N.Y.S.2d 784, 254 App.Div. 780, affirmed 18 N.E.2d 679, 279 N.Y. 724.

Ohio.—*Corpus Juris* cited in Earp v. State, 153 N.E. 245, 246, 21 Ohio App. 417.

25 C.J. p 594 note 22.

Ownership of bonds; promise to repay out of proceeds

False representation that accused owned bonds and had arranged with bank to handle them, coupled with promise to repay money given accused out of proceeds of bonds, was held to support conviction of obtaining money under false pretenses as against contention that conviction could not be sustained because there was no representation of existing fact.

Tenn.—Cook v. State, 94 S.W.2d 386, 170 Tenn. 245.

55. Cal.—People v. Selk, 115 P.2d 607, 46 C.A.2d 140.

Ga.—Smith v. State, 42 S.E. 766, 116 Ga. 587.

Summers v. State, 11 S.E.2d 409, 63 Ga.App. 445—Oliver v. State, 65 S.E. 843, 6 Ga.App. 791.

Mo.—State v. Wren, 62 S.W.2d 853, 333 Mo. 575.

Mont.—State v. Foot, 48 P.2d 1113, 100 Mont. 33.

Ohio.—Earp v. State, 153 N.E. 245, 21 Ohio App. 417.

Wash.—*Corpus Juris* cited in State v. Parkinson, 41 P.2d 1095, 1097, 181 Wash. 69.

56. Ga.—Oliver v. State, 65 S.E. 843, 6 Ga.App. 791.

25 C.J. p 595 note 25.

57. Iowa.—State v. Huckins, 234 N.W. 554, 212 Iowa 283.

Mass.—Commonwealth v. Green, 94 N.E.2d 260, 326 Mass. 344—Commonwealth v. Knight, 195 N.E. 499, 289 Mass. 530—Commonwealth v. Morrison, 147 N.E. 588, 252 Mass. 116.

N.J.—State v. Trypuc, 146 A.2d 503, 53 N.J.Super. 6.

R.I.—State v. McMahon, 140 A. 359, 49 R.I. 107.

25 C.J. p 595 note 29.

Promise made without intention to perform see *supra* § 9.

In California

(1) The text rule has been followed.

Cal.—People v. Rocha, 279 P.2d 836, 130 C.A.2d 656—People v. Ames, 143 P.2d 92, 61 C.A.2d 522.

(2) It has also been held that such a representation is not within the statute.

Cal.—People v. White, 259 P. 76, 85 C.A. 241.

58. N.J.—State v. Lamoreaux, 80 A.2d 213, 13 N.J.Super. 99.

N.Y.—People v. Sloane, 300 N.Y.S. 1032, 165 Misc. 444, modified on other grounds 4 N.Y.S.2d 784, 254 App.Div. 780, affirmed 18 N.E.2d 679, 279 N.Y. 724.

Okl.—Welch v. State, 146 P.2d 141, 78 Okl.Cr. 180.

Pa.—Commonwealth v. Mauk, 79 Pa. Super. 153.

Tex.—Bond v. State, 136 S.W.2d 865, 138 Tex.Cr. 394—New v. State, 83 S.W.2d 668, 129 Tex.Cr. 16.

Va.—Hubbard v. Commonwealth, 109 S.E.2d 100.

25 C.J. p 595 note 30.

Representations held statements of intention

D.C.—Chaplin v. U. S., 157 F.2d 697, 81 U.S.App.D.C. 80, 168 A.L.R. 828.

less, the mere fact that a false representation of fact is accompanied by a representation of intention does not render the false assertion ineffective.^{58,5}

Statement of expectation. A false statement of an expectation is not a false pretense;⁵⁹ but, where such a statement is coupled with a statement as to an existing fact, the offense may be committed.⁶⁰

Statement of desire. A false representation of a desire is not within the statute.⁶¹

Predictions as to future events are not within the statute.⁶²

§ 11. — Statement of Opinion

The statement of an opinion or judgment, if understood to be such, will not sustain a prosecution for obtaining property by false pretenses.

The statement of an opinion, judgment, or estimate,⁶³ if understood to be such,⁶⁴ will not sustain a prosecution for obtaining property by false pretenses. However, the mere coupling of expressions of opinion with false representations of fact does

not relieve from responsibility for the representations,⁶⁵ and an indictment for the offense may be predicated on a representation relating partly to matters of fact and partly to matters of opinion, where it appears that the loss ensued through acting on the representation as to the fact.⁶⁶ Where one represents as true a thing which he knows not to be true, such a representation falls within the statute, even though in some situations the truth or untruth of the statement might be a matter of opinion.⁶⁷

Where the facts are inaccessible to the hearer, a false statement of opinion will fall within the statute.^{67,5}

§ 12. — Statement as to Authority or Power

A false pretense of having authority or power to do an act, or to act for another, is within the statute.

A false pretense of having authority or power to do an act is within the statute, and to obtain property by such means is indictable.⁶⁸ So, a false as-

58.5 Pa.—Commonwealth v. Hancock, 112 A.2d 407, 177 Pa.Super. 585.

59. U.S.—Biddle v. U. S., China, 156 F. 759, 84 C.C.A. 415.
25 C.J. p 595 note 31.

60. Iowa.—State v. Fooks, 21 N.W. 773, 65 Iowa 452—State v. Fooks, 21 N.W. 561, 65 Iowa 196.
25 C.J. p 595 note 32.

61. N.Y.—People v. Hart, 71 N.Y.S. 492, 35 Misc. 182, 15 N.Y.Cr. 483.
25 C.J. p 595 note 36.

62. Cal.—People v. Jackson, 74 P.2d 1085, 24 C.A.2d 182—People v. White, 259 P. 76, 85 C.A. 241.
"The charge . . . would not be sustained by proof that the defendant was a false prophet."
N.Y.—People v. Burgess, 155 N.E. 745, 746, 244 N.Y. 472.

63. Ala.—Whitley v. State, 31 So.2d 664, 249 Ala. 355, 174 A.L.R. 169—Jones v. State, 182 So. 404, 236 Ala. 30.

Alaska.—U. S. v. Pearce, 7 Alaska 246.

Cal.—People v. Daniels, 76 P.2d 556, 25 C.A.2d 64—People v. Jackson, 74 P.2d 1085, 24 C.A.2d 182—People v. Downing, 58 P.2d 657, 14 C.A.2d 392—People v. Reese, 29 P.2d 450, 136 C.A. 657—People v. White, 259 P. 76, 85 C.A. 241—People v. Moore, 256 P. 266, 82 C.A. 739.

Colo.—Chilton v. People, 35 P.2d 870, 95 Colo. 268—Morton v. People, 216 P. 703, 73 Colo. 576.

Ga.—Carr v. State, 4 S.E.2d 500, 60 Ga.App. 590.

Iowa.—State v. Comes, 62 N.W.2d 753, 245 Iowa 485.

Ky.—Corpus Juris cited in Slaughter v. Commonwealth, 300 S.W. 619, 621, 222 Ky. 225, 56 A.L.R. 1209.

Mo.—Corpus Juris quoted in State v. Zingher, 259 S.W. 451, 452, 302 Mo. 650.

N.Y.—People v. Clarke, 297 N.Y.S. 776, 252 App.Div. 122.
25 C.J. p 595 note 33.

Opinion as to:

Financial condition see infra § 13.
Quality or value see infra § 14.

Statements held expressions of opinion

(1) That the guarantee of a mortgage guarantee company was issued only on mortgages carefully and wisely selected, and that such mortgages were absolutely safe.
N.Y.—People v. Clarke, supra.

(2) That a certain profit could and would be realized from the business being sold.
Cal.—People v. Walker, 244 P. 94, 76 C.A. 192.

(3) Alleged representation by accused that burial benefit society business was incorporated for profit was as to a legal opinion and could not be subject of false pretense, so long as facts themselves were not misrepresented.

Iowa.—State v. Comes, 62 N.W.2d 753, 245 Iowa 485.

(4) Other statements.

Cal.—People v. Cale, 288 P. 430, 106 C.A., Supp., 777.

Pa.—Commonwealth ex rel. Sawyer v. Hess, Com.Pl., 27 Erie Co. 11.

Tex.—Smith v. State, 274 S.W.2d 549, 161 Tex.Cr. 21.

25 C.J. p 595 note 33 [a].

64. Kan.—State v. Nash, 204 P. 736, 110 Kan. 550.

Miss.—State v. Grady, 111 So. 148, 147 Miss. 446.

65. Kan.—State v. Nash, 204 P. 736, 110 Kan. 550.

66. Ga.—Whitaker v. State, 75 S. E. 253, 11 Ga.App. 208, affirmed 75 S.E. 254, 138 Ga. 139.

Kan.—State v. Terrill, 125 P. 65, 87 Kan. 745.

Mo.—Corpus Juris Secundum cited in State v. Smith, 324 S.W.2d 702, 705.

67. Ala.—Whitley v. State, 31 So.2d 664, 249 Ala. 355, 174 A.L.R. 169.
Cal.—People v. Staver, 252 P.2d 700, 115 C.A.2d 711—People v. Gordon, 163 P.2d 110, 71 C.A.2d 606.

Ga.—Holton v. State, 34 S.E. 358, 109 Ga. 127.

25 C.J. p 595 note 35.

"If one knows an opinion to be erroneous, the matter is as to him not an opinion but a subsisting fact, and, if he makes a statement contrary to what he knows to be the fact, it would seem that he should not be allowed to escape the consequences on the theory that his statement concerns a matter of opinion.
Miss.—State v. Grady, 111 So. 148, 149, 147 Miss. 446.

67.5 Cal.—People v. Gordon, 163 P. 2d 110, 71 C.A.2d 606.

68. Ind.—Greening v. State, 153 N. E. 412, 198 Ind. 706.

Mo.—State v. Samis, 246 S.W. 956, 296 Mo. 471.

Tex.—Burck v. State, 106 S.W.2d 709, 132 Tex.Cr. 628.

sertion that one has the ability to secure a position for another is a false pretense,⁶⁹ as is a false assertion that one is the servant, representative, or agent of another, implying as it does that he has power to act for another.⁷⁰

In every offer to sell goods of any kind, there is a representation by the seller that he has the right to sell them so as to make the seller liable for false pretenses where, in fact, he does not have the right.^{70.5}

Supernatural power. A false pretense of possessing supernatural power, made for the purpose of obtaining money or goods, is, in general, indictable.⁷¹

§ 13. — Statement as to Financial Ability or Condition

False representations as to the financial ability or pecuniary condition of accused or of a third person are within the statutes in their usual form; and particular types of such statements are embraced within express statutory provisions.

False representations as to the financial ability or pecuniary condition of accused,⁷² or of a third person,⁷³ are within the statutes in their usual form, unless they are merely expressions of opinion.⁷⁴ The false pretense may be based on the representation of a lack of financial ability.⁷⁵

Under express statutory provisions in some jurisdictions, it is an offense to obtain any money in whole or in part on the faith of a written statement of the financial condition or responsibility of the person so obtaining such money,⁷⁶ to make, or cause to be made, false statements in writing with respect to the financial condition or means or ability to pay of the person himself or any other person, firm, or corporation, in whom or which he is interested or for whom or which he is acting,⁷⁷ to cause or procure others to report falsely as to one's wealth or mercantile character,⁷⁸ to obtain credit by false representations as to wealth or mercantile correspondence and connections,⁷⁹ or to induce another to become bail, indorser, or security on any instrument for the payment of money or performance of any personal duty by false representations as to solvency.⁸⁰ Such statutes are not intended to be used as a cloak for imprisonment for debt.^{80.5}

§ 14. — Statement as to Value, Quality, Quantity, Nature, or Condition

Whether or not statements as to the value, quality, quantity, nature, or condition of property constitute false pretenses depends largely on whether they are statements of fact or opinion.

A statement as to the quality, quantity, nature, condition, or other incidents of a thing offered for sale may constitute a false pretense⁸¹ where the

Utah.—State v. Jenson, 280 P. 1046, 74 Utah 527.

25 C.J. p 596 note 37.

69. Cal.—People v. Haskins, 194 P. 43, 49 C.A. 640.

Miss.—Corpus Juris Secundum quoted in Fuller v. State, 72 So.2d 454, 455, 221 Miss. 247.

Wash.—State v. Parkinson, 41 P.2d 1095, 181 Wash. 69.

25 C.J. p 596 note 38.

70. Miss.—Corpus Juris Secundum quoted in Fuller v. State, 72 So.2d 454, 455, 221 Miss. 247.

N.C.—State v. Dixon, 7 S.E. 870, 101 N.C. 741.

25 C.J. p 596 note 39.

70.5 N.D.—State v. Hastings, 41 N. W.2d 305, 77 N.D. 146.

71. Cal.—People v. Walker, 231 P. 572, 69 C.A. 475.

25 C.J. p 596 note 40.

72. Wash.—State v. Hooker, 170 P. 374, 99 Wash. 661.

25 C.J. p 596 note 41.

73. Wash.—State v. Hooker, supra.

25 C.J. p 596 note 42.

74. Mo.—State v. Zingher, 259 S. W. 451, 302 Mo. 650.

N.Y.—People v. Clarke, 297 N.Y.S. 776, 252 App.Div. 122.

25 C.J. p 595 note 33 [a] (5), (7).

Statement of opinion generally see supra § 11.

75. N.J.—State v. Tomlin, 29 N.J. Law 13.

25 C.J. p 596 notes 44, 45.

76. N.J.—State v. Fenn, 85 A. 454, 83 N.J. Law 794.

77. Ky.—Commonwealth v. Boyd, 205 S.W. 390, 181 Ky. 382.

25 C.J. p 596 note 48.

Purpose

In passing the statute, the legislature had primarily in mind the kind of written statement as to financial condition which is ordinarily referred to as a "financial statement" wherein are set forth all assets and liabilities of the person or corporation making the statement.

Okl.—Group v. State, 236 P.2d 997, 94 Okl. Cr. 401.

"False financial statement" defined

Under statute making it an offense for any person knowingly to make a "false financial statement" for purpose of procuring credit, quoted words mean false statement of assets and liabilities knowingly made and calculated to defraud.

Tenn.—Kimsey v. State, 241 S.W.2d 514, 192 Tenn. 421.

Statement as to ownership and management of a business held not a

false statement of assets and liabilities made and calculated to defraud. Tenn.—Kimsey v. State, supra.

Worthless check

(1) Statute held inapplicable to worthless check, as it primarily applies to financial statements.

Okl.—Group v. State, 236 P.2d 997, 94 Okl. Cr. 401.

(2) Worthless checks generally see infra § 21.

78. Cal.—People v. Jordan, 4 P. 773, 66 C. 10, 56 Am.R. 73.

25 C.J. p 596 note 49.

79. Ga.—Branham v. State, 22 S.E. 957, 96 Ga. 307.

25 C.J. p 596 note 50.

80. Ga.—Christian v. State, 69 S.E. 29, 8 Ga.App. 371.

80.5 Tenn.—Kimsey v. State, 241 S. W.2d 514, 192 Tenn. 421.

81. Miss.—State v. Grady, 111 So. 148, 147 Miss. 446.

25 C.J. p 597 note 57.

Grade of lumber

Ariz.—State v. Freeman, 279 P.2d 443, 78 Ariz. 286, followed in 279 P.2d 447, 78 Ariz. 291.

Oil on land

(1) A conviction of grand theft based on representations allegedly made by defendant to the effect that

statement is more than a mere opinion and involves a statement of fact known to be false.⁸² A misrepresentation as to the identity or species of a thing is a false pretense within the statute;⁸³ but it has been held that a mere misnaming of property offered in exchange, its value in nowise depending on its name, is not a false pretense.⁸⁴

Where a person sells an article by weight and falsely represents the weight to be greater than it is, and thereby obtains payment for a quantity greater than that delivered, he commits the offense, especially if some token or artifice is used to throw the buyer off his guard.⁸⁵

Patent and latent defects. If the defect in quality or condition of the thing sold is visible or discoverable by ordinary observation, it has been held the representation is not a false pretense; in such case the purchaser is not deceived and the rule caveat emptor applies.⁸⁶ However, where visible defects are called to the seller's attention at the time of the sale, and he makes a false statement in reference to the character or cause of such defects, for the purpose of dissipating doubt or suspicion in the mind of the purchaser, which statement induces

the purchase, there is a false pretense.⁸⁷ If the defect is not visible, or cannot be discovered by ordinary observation, and the false representation induces the purchase, other elements of the offense being present, there is a false pretense, and in such case the rule of caveat emptor does not apply.⁸⁸

Nature or capacity of animals. It has been held indictable to represent falsely that a cow has a certain milk-yielding capacity,⁸⁹ or that a horse or cow is sound,⁹⁰ or sound and gentle.⁹¹

Statements as to the value or worth of the thing given in exchange for the property of the prosecutor, although false, will not, if falling within the category of "puffing" statements or "seller's talk," sustain an indictment for false pretense;⁹² and where a statement of value is given as an opinion merely, it cannot be regarded as a foundation for such an indictment.⁹³ However, where one makes a representation of value as an existing fact, other elements of the offense being present, there is a false pretense.⁹⁴ Whether or not an assertion of value is to be regarded as an expression of opinion or a statement of fact depends on circumstances.⁹⁵

the land being sold was at that time producing oil, which was false, and that a purchaser would realize income therefrom, was authorized. Cal.—People v. Daniels, 76 P.2d 556, 25 C.A.2d 64.

(2) Other statements.

Cal.—People v. Gordon, 163 P.2d 110, 71 C.A.2d 606.

82. Cal.—*Corpus Juris Secundum* cited in People v. Platt, 268 P.2d 529, 535, 124 C.A.2d 123.

Mo.—State v. Mandell, 183 S.W.2d 59, 353 Mo. 502.

N.Y.—People v. Peckens, 47 N.E. 883, 153 N.Y. 576.

25 C.J. p 597 note 59.

Statement of opinion generally see supra § 11.

Volume of business

Representations as to the volume of a business are statements of present or past facts, in determining the crime of grand theft sounding in false pretenses.

Cal.—People v. Platt, 268 P.2d 529, 124 C.A.2d 123.

83. Me.—State v. Mills, 17 Me. 211.

84. Tex.—State v. Dyer, 41 Tex. 520.

85. Ga.—Jones v. State, 25 S.E. 617, 99 Ga. 46.

86. Ga.—Odum v. State, 72 S.E. 511, 10 Ga.App. 27.

25 C.J. p 597 note 65.

Effectiveness of pretense and reliance see infra § 22.

87. N.Y.—People v. Crissie, 4 Den. 525.

N.C.—State v. Wilkerson, 9 S.E. 415, 103 N.C. 337.

88. N.C.—State v. Jones, 70 N.C. 75, 25 C.J. p 597 note 67.

89. Ga.—Parks v. State, 20 S.E. 430, 94 Ga. 601.

90. Ky.—Commonwealth v. Watson, 142 S.W. 200, 146 Ky. 83, Ann.Cas. 1913C 272.

25 C.J. p 598 note 69.

91. N.C.—State v. Burke, 12 S.E. 1000, 108 N.C. 750.

25 C.J. p 598 note 70.

92. Mass.—Commonwealth v. Coshnear, 194 N.E. 900, 289 Mass. 516.

Minn.—State v. Sack, 229 N.W. 801, 179 Minn. 502.

25 C.J. p 597 note 54.

Puffing statements generally see supra § 8.

93. Fla.—Criner v. State, 109 So. 417, 92 Fla. 483.

Ga.—Carr v. State, 4 S.E.2d 500, 60 Ga.App. 590.

Kan.—*Corpus Juris* cited in State v. Nash, 204 P. 736, 739, 110 Kan. 550.

Mass.—Commonwealth v. Coshnear, 194 N.E. 900, 289 Mass. 516.

Mo.—State v. Zingher, 259 S.W. 451, 302 Mo. 650.

25 C.J. p 597 note 55.

Value of prosecutor's property

Statement by defendant that certain property, for which he sought to exchange his own, was not worth more than a certain price, being a

statement of opinion, was not a false pretense.

Ky.—Slaughter v. Commonwealth, 300 S.W. 619, 222 Ky. 225, 56 A.L.R. 1209.

94. Kan.—*Corpus Juris* cited in State v. Nash, 204 P. 736, 739, 110 Kan. 550.

Mass.—Commonwealth v. Stuart, 93 N.E. 825, 207 Mass. 563.

25 C.J. p 597 note 56.

"Where statements as to value . . . are made by a person knowing them to be untrue, with an intent to deceive and mislead the one to whom they are made, and he is thus induced to forbear making inquiries which he otherwise would have made, the statements may amount to an affirmation of fact." Miss.—State v. Grady, 111 So. 143, 149, 147 Miss. 446.

Value of stocks or bonds

Colo.—*Corpus Juris* quoted in People v. Martin, 240 P. 695, 696, 78 Colo. 200.

Mass.—Commonwealth v. Coshnear, 194 N.E. 900, 289 Mass. 516.

95. Kan.—State v. Nash, 204 P. 736, 739, 110 Kan. 550.

"If a farmer were to ask a grain dealer what wheat is worth today, the answer would not express an opinion. If the grain dealer were to ask the farmer what his farm is worth today, the answer would express an opinion. In one instance value would be understood to be known market price; in the other

§ 15. — Tendency to Deceive

The early rule that the pretense must be calculated to impose on a person of ordinary prudence and caution is not now usually recognized as correct, the general rule now being that if the pretense did deceive the victim or was calculated to deceive one of his capacity in the same situation, it is sufficient; and it is not necessary that the injured person should have made an investigation as to the falsity of the pretense, to make it indictable.

Although the language of many of the statutes, such as those denouncing the obtaining of property "by any false pretense," is so broad that taken literally it would include every misrepresentation, however absurd or irrational, and however easily detected, courts, in the construction of such statutes, have, to a greater or less degree, narrowed their scope,⁹⁶ and laid down the broad rule that

the elements of value would be so numerous and varied that farmers and real estate men would differ in their estimates."

Kan.—State v. Nash, *supra*.

96. Mass.—Commonwealth v. Norton, 11 Allen 266.
25 C.J. p 598 note 71.

97. Iowa.—*Corpus Juris Secundum* cited in State v. Comes, 62 N.W.2d 753, 755, 245 Iowa 485.

Minn.—State v. Nuser, 271 N.W. 811, 199 Minn. 315—State v. Anderson, 199 N.W. 6, 159 Minn. 245.

Mo.—State v. Herman, 162 S.W.2d 873.

N.C.—State v. Roberts, 126 S.E. 161, 189 N.C. 93—State v. McFarland, 105 S.E. 179, 180 N.C. 726.

S.D.—State v. Alick, 252 N.W. 644, 62 S.D. 220.

W.Va.—State v. Augustine, 171 S.E. 111, 114 W.Va. 143.

Wis.—Corscot v. State, 190 N.W. 465, 178 Wis. 661.

Deception is of the essence of the crime.

Cal.—People v. Harrington, 267 P. 942, 92 C.A. 245.

Fla.—Antrobus v. State, 135 So. 396, 101 Fla. 669.

98. Wis.—State v. Kube, 20 Wis. 217, 91 Am.D. 390.
25 C.J. p 598 note 75.

So at common law

Mont.—State v. Foot, 48 P.2d 1113, 100 Mont. 33.

99. Fla.—State ex rel. McLaughlin v. Karel, 129 So. 703, 100 Fla. 388.
Ga.—Walker v. State, 78 S.E.2d 545, 89 Ga.App. 101.

Ind.—Greening v. State, 153 N.E. 412, 198 Ind. 706.

Ky.—Slaughter v. Commonwealth, 300 S.W. 619, 222 Ky. 225, 56 A.L.R. 1209—Sweeton v. Commonwealth, 275 S.W. 827, 210 Ky. 340—Finney v. Commonwealth, 227 S.W. 999, 190 Ky. 536.

Mo.—*Corpus Juris Secundum* cited in State v. Smith, 324 S.W.2d 702, 705.

Mont.—*Corpus Juris* cited in State v. Foot, 48 P.2d 1113, 1115, 100 Mont. 33.

N.D.—State v. Hastings, 41 N.W.2d 305, 77 N.D. 146.

Pa.—Commonwealth v. Johnson, 167 A. 344, 312 Pa. 140, 189 A.L.R. 133.

Tenn.—McClure v. State, 124 S.W.2d 240, 174 Tenn. 140—Cook v. State, 94 S.W.2d 386, 170 Tenn. 245—Rowe v. State, 51 S.W.2d 505, 164 Tenn. 571.

Tex.—Nash v. State, 31 S.W.2d 445, 116 Tex.Cr. 607.

Wis.—State ex rel. Hull v. Larson, 277 N.W. 101, 226 Wis. 585—Palotta v. State, 199 N.W. 72, 184 Wis. 290.

25 C.J. p 598 note 76.

Old rule held repudiated

Iowa.—State v. Comes, 62 N.W.2d 753, 245 Iowa 485.

1. Cal.—People v. Pearson, 231 P. 612, 69 C.A. 524.

Okl.—Mathews v. State, 198 P. 112, 19 Okl.Cr. 153.

2. Cal.—*Corpus Juris Secundum* cited in People v. Gilliam, 297 P.2d 468, 470, 141 C.A.2d 749.

Fla.—State ex rel. McLaughlin v. Karel, 129 So. 703, 100 Fla. 388.

Ky.—Slaughter v. Commonwealth, 300 S.W. 619, 222 Ky. 225, 56 A.L.R. 1209—Finney v. Commonwealth, 227 S.W. 999, 190 Ky. 536.

Mont.—*Corpus Juris* cited in State v. Foot, 48 P.2d 1113, 1115, 100 Mont. 33.

Pa.—Commonwealth v. Johnson, 167 A. 344, 312 Pa. 140, 89 A.L.R. 333.

Commonwealth v. Johnson, Quar. Sess., 21 Lehl.L.J. 369.

Tenn.—Beck v. State, 315 S.W.2d 254—McClure v. State, 124 S.W.2d 240, 174 Tenn. 140.

Wis.—Palotta v. State, 199 N.W. 72, 184 Wis. 290.

25 C.J. p 598 note 77.

the false pretense must be calculated to deceive.⁹⁷

According to some of the decisions, especially the earlier ones, the pretense, to be indictable, must be such as is calculated to impose on a person of ordinary prudence and caution;⁹⁸ but this is not now usually recognized as the correct rule,⁹⁹ although it is still true that a pretense calculated to impose on a prudent person is sufficiently deceptive.¹ The view now generally taken is that false pretense statutes are designed to protect not only the ordinarily wary and prudent, but also the ignorant, credulous, and foolish,² so that if the pretense did in fact deceive the person to whom it was made,³ or was calculated to deceive one of the capacity and understanding, and in the situation, of the complaining witness,⁴ it is sufficient, it being said that prac-

3. Ala.—Carroll v. State, 94 So. 194, 18 Ala.App. 649.

Kan.—State v. Nash, 204 P. 736, 110 Kan. 550.

Ky.—Commonwealth v. Miller, 286 S.W. 691, 215 Ky. 547.

N.D.—State v. Hastings, 41 N.W.2d 305, 77 N.D. 146.

Tenn.—McClure v. State, 124 S.W.2d 240, 174 Tenn. 140—Cook v. State, 94 S.W.2d 386, 170 Tenn. 245—Rowe v. State, 51 S.W.2d 505, 164 Tenn. 571.

Wis.—Palotta v. State, 199 N.W. 72, 184 Wis. 290.

25 C.J. p 599 note 81.

"It does not lie in the mouth of a wrongdoer to assert that a person ought not to have been deceived by a lie told for the very purpose of deceiving him."

Ga.—Ryan v. State, 30 S.E. 678, 680, 104 Ga. 78.

Expectation of belief

A wrongdoer will not be allowed to assert that he did not expect to be believed.

D.C.—Nelson v. U. S., 227 F.2d 21, 97 U.S.App.D.C. 6, 53 A.L.R.2d 1206, certiorari denied 76 S.Ct. 700, 351 U.S. 910, 100 L.Ed. 1445.

Folly of prosecuting witness in relying on representations does not exonerate defendant.

N.Y.—People v. Von Brandenburg, 149 N.E. 221, 241 N.Y. 128.

4. Ky.—Slaughter v. Commonwealth, 300 S.W. 619, 222 Ky. 225, 56 A.L.R. 1209—Finney v. Commonwealth, 227 S.W. 999, 190 Ky. 536.

Mo.—*Corpus Juris Secundum* cited in State v. Smith, 324 S.W.2d 702, 705.

Pa.—Commonwealth v. Johnson, Quar.Sess., 21 Lehl.L.J. 369.

Wis.—State ex rel. Hull v. Larson, 277 N.W. 101, 226 Wis. 585.

Caveat emptor

Where worthless certificates "were ingeniously designed and calculated

tically it is impossible to estimate a false pretense otherwise than by its effect.⁵

Even under this view, however, it is generally held that, where the pretense is not calculated to deceive, but is absurd, incredible, or irrational,⁶ as where it is an improbable lie,⁷ or a mere idle tale, or a device so shallow as to be incapable of imposing on any person,⁸ it is insufficient.

A number of cases have held that if the person injured had, at the very time the representation was made and acted on, the means at hand of detecting its falsity, there is no false pretense within the statute,⁹ unless some pretense, device, or trick was used to prevent his using the means he had;¹⁰ but it is generally regarded as not necessary that the injured party should have conducted an investiga-

tion as to the falsity of the pretense, to make it indictable.¹¹

Capacity of party defrauded, and surrounding circumstances. With reference to the deceptiveness of the pretense, the ability of the person to whom it was made to detect its falsity,¹² which is to be determined from his age, mental condition, and station in life,¹³ is to be considered, as are the relations between accused and the person defrauded,¹⁴ and the general circumstances under which the representations were made.¹⁵

§ 16. Falsity of Pretense

The pretense must be false at the time it is made and the property is obtained.

The pretense, to be indictable, must be false;¹⁶ and the falsity must be subjective as well as ob-

to mislead and deceive the purchaser, and would deceive a person of ordinary prudence, and the circumstances surrounding the sale were purposely arranged to deceive, the rule of caveat emptor will not apply."

Okl.—Mathews v. State, 198 P. 112, 118, 19 Okl.Cr. 153.

5. Minn.—State v. Southall, 79 N.W. 1007, 77 Minn. 296.
25 C.J. p 599 note 82.

6. Mo.—State v. Keyes, 93 S.W. 801, 196 Mo. 136, 6 L.R.A., N.S., 369, 7 Ann.Cas. 23.

N.D.—State v. Hastings, 41 N.W.2d 305, 77 N.D. 146.

Pa.—Commonwealth v. Johnson, Quar.Sess., 21 Lehl.L.J. 369.
25 C.J. p 598 note 78.

7. N.J.—State v. Vanderbilt, 27 N.J. Law 328.

8. Fla.—State ex rel. McLaughlin v. Karel, 129 So. 703, 100 Fla. 388—*Corpus Juris cited in Braham v. State*, 114 So. 781, 782, 94 Fla. 918.
25 C.J. p 598 note 74.

"There may be representations so utterly and palpably absurd that the court may decide as a matter of law that they could not deceive the most credulous."

Wis.—Palotta v. State, 199 N.W. 72, 74, 184 Wis. 290.

9. Mass.—Commonwealth v. Drew, 19 Pick. 179.

Mo.—State v. Neal, 169 S.W.2d 686, 350 Mo. 1002—*Corpus Juris cited in State v. Herman*, 162 S.W.2d 873, 874.
25 C.J. p 599 note 79.

10. Cal.—People v. Skidmore, 55 P. 984, 123 C. 267.
25 C.J. p 599 note 80.

11. Ala.—Carroll v. State, 94 So. 194, 18 Ala.App. 649.

Ga.—Ryan v. State, 30 S.E. 678, 104 Ga. 78.

Walker v. State, 78 S.E.2d 545, 89 Ga.App. 101—*De Krasner v. State*, 187 S.E. 402, 54 Ga.App. 41.

Kan.—State v. Nash, 204 P. 736, 110 Kan. 550.

Mo.—State v. Neal, 169 S.W.2d 686, 350 Mo. 1002—*Corpus Juris cited in State v. Herman*, 162 S.W.2d 873, 874.

Mont.—State v. Foot, 48 P.2d 1113, 100 Mont. 33.

Nev.—State v. Bacha, 194 P. 1066, 44 Nev. 373.

N.Y.—People, on Complaint of McGovern, v. Weisbard, 248 N.Y.S. 399, 139 Misc. 385.

N.D.—State v. Hastings, 41 N.W.2d 305, 77 N.D. 146.

Okl.—*Corpus Juris Secundum cited in Lazar v. State*, Cr., 275 P.2d 1003, 1018, appeal dismissed 75 S.Ct. 581, 349 U.S. 902, 99 L.Ed. 1240.

Pa.—Commonwealth v. Johnson, Quar.Sess., 21 Lehl.L.J. 369.

Wis.—State ex rel. Hull v. Larson, 277 N.W. 101, 226 Wis. 585—*Palotta v. State*, 199 N.W. 72, 184 Wis. 290.
25 C.J. p 599 note 83.

"In the absence of known facts or suspicious circumstances, which are sufficient to put a reasonably prudent person on inquiry, a person may assume that honesty rather than fraud or deception controls in such business transactions. Under such circumstances, a person has a right to rely on material representations expressly made or reasonably and necessarily implied."

R.I.—State v. Considine, 186 A. 676, 677, 56 R.I. 456.

Examination of records

Conviction may be had for obtaining money by false representation as to the title to property or as to encumbrances thereon, although an examination of the records would have disclosed the falsehood.

Fla.—Smith v. State, 98 So. 586, 86 Fla. 525.

Ky.—Slaughter v. Commonwealth, 300 S.W. 619, 222 Ky. 225, 56 A.L.R. 1209.

Tenn.—McClure v. State, 124 S.W.2d 240, 174 Tenn. 140.

25 C.J. p 599 note 83 [a].

12. Ky.—Finney v. Commonwealth, 227 S.W. 999, 190 Ky. 536.
25 C.J. p 599 note 85.

13. Ind.—Lefler v. State, 54 N.E. 439, 153 Ind. 82, 74 Am.S.R. 300, 45 L.R.A. 424.

25 C.J. p 599 note 86.

14. Fla.—Bowman v. State, 45 So. 308, 54 Fla. 16.

N.Y.—People v. Monroe, 71 N.Y.S. 803, 64 App.Div. 130.

15. Ga.—Ryan v. State, 30 S.E. 678, 104 Ga. 78.

25 C.J. p 599 note 88.

16. Ark.—Anderson v. State, 290 S.W.2d 846, 226 Ark. 498.

Cal.—People v. Brody, 83 P.2d 952, 29 C.A.2d 6—*People v. Burnett*, 69 P.2d 1028, 21 C.A.2d 613—*People v. Neetens*, 184 P. 27, 42 C.A. 596.
People v. Cale, 288 P. 430, 106 C.A., Supp., 777.

Fla.—State ex rel. Warren v. Sweat, 185 So. 453, 135 Fla. 661—*Criner v. State*, 109 So. 417, 92 Fla. 483—*Clifton v. State*, 79 So. 707, 76 Fla. 244.

Ga.—Suggs v. State, 25 S.E.2d 532, 69 Ga.App. 383—*Diamond v. State*, 182 S.E. 813, 52 Ga.App. 184—*Elliot v. State*, 111 S.E. 63, 28 Ga.App. 334.

Idaho.—State v. Whitney, 254 P. 525, 43 Idaho 745.

Ind.—Anderson v. State, 32 N.E.2d 705, 218 Ind. 299.

Iowa.—State v. Huckins, 234 N.W. 554, 212 Iowa 283—*State v. Sherman*, 166 N.W. 674, 183 Iowa 42.

Ky.—Dennis v. Thomson, 43 S.W.2d 18, 240 Ky. 727.

La.—State v. Hendon, 128 So. 286, 170 La. 488.

jective.^{16,5} If the pretense is not false, the crime is not committed, even though accused believed it to be false at the time he made it.¹⁷ If the representation is true when made, it is not a basis for a charge of the offense, although it is no longer true when the property is obtained,¹⁸ unless accused has, in the meantime, either expressly or impliedly reaffirmed its truth.¹⁹

Since the crime consists not only in making false representations but in obtaining property thereby, it follows that, although the pretense is false when made, yet if it becomes true at the time when the prosecutor relies thereon and the property is obtained, the crime is not committed.²⁰ The fact that accused might be estopped from denying the truth of his representation, does not render it true,

as respects his criminal liability for obtaining property by false pretenses.²¹

§ 17. Form of Pretense

A false pretense may consist in any act, word, symbol, or token calculated and intended to deceive; it may be made expressly or by implication, and where it is expressed in words, the words may be oral, as well as written, unless the statute requires them to be in writing.

Quoted in: Idaho.—State v. Larsen, 286 P.2d 646, 648, 76 Idaho 528.

A false representation may be made in any of the ways in which ideas may be communicated from one person to another.^{21,50} A false pretense may consist in any act, word, symbol, or token calculated and intended to deceive.²² It may be made either expressly²³ or by implication.²⁴ Where the pre-

Md.—Simmons v. State, 167 A. 60, 165 Md. 155.

Mass.—Commonwealth v. Jacobson, 157 N.E. 583, 260 Mass. 311.

Mich.—People v. Bagwell, 295 N.W. 207, 295 Mich. 412.

Minn.—State v. Nuser, 271 N.W. 811, 199 Minn. 315—State v. Anderson, 199 N.W. 6, 159 Minn. 245.

Mont.—State v. Hale, 291 P.2d 229, 129 Mont. 449—State v. Bratton, 186 P. 327, 56 Mont. 563.

N.J.—State v. Greco, 148 A.2d 164, 29 N.J. 94.

State v. Samurine, 135 A.2d 574, 47 N.J.Super. 172, reversed on other grounds 142 A.2d 612, 27 N.J. 322—State v. Mitchell, 117 A.2d 525, 37 N.J.Super. 425.

N.Y.—People v. Krumme, 292 N.Y.S. 657, 161 Misc. 278—People v. Brady, 249 N.Y.S. 715, 139 Misc. 597.

N.C.—State v. Mayer, 146 S.E. 64, 196 N.C. 454—State v. Johnson, 142 S.E. 775, 195 N.C. 506—State v. Roberts, 126 S.E. 161, 189 N.C. 93—State v. McFarland, 105 S.E. 179, 180 N.C. 726.

Okl.—Reeves v. State, 96 P.2d 536, 68 Okl.Cr. 163—Rhodes v. State, 49 P. 2d 226, 58 Okl.Cr. 1—Helsey v. State, 193 P. 50, 18 Okl.Cr. 98, 17 A.L.R. 197.

Pa.—Commonwealth v. Schmidt, 95 Pa.Super. 102.

Commonwealth v. Sullum, 35 Luz.Leg.Reg. 30.

S.D.—State v. Alick, 252 N.W. 644, 62 S.D. 220.

Tex.—Speckels v. State, 95 S.W.2d 122, 130 Tex.Cr. 639—Nash v. State, 29 S.W.2d 359, 115 Tex.Cr. 324.

Utah.—State v. Casperson, 262 P. 294, 71 Utah 68.

W.Va.—State v. Augustine, 171 S.E. 111, 114 W.Va. 143.

Wis.—Corcoran v. State, 190 N.W. 465, 178 Wis. 661.

25 C.J. p 590 note 88.

"The gist of the crime is the falsehood of the pretence."

U.S.—U. S. v. Watkins, D.C., 28 F. Cas.No.16,649, 3 Cranch C.C. 441.

Partial truth of statement will not aid defendant if the complaining party relied on the whole statement.

Tex.—Green v. State, 161 S.W.2d 114, 144 Tex.Cr. 186.

Substitution of one false token for another

Where one falsely represented to a railroad agent that he had loaded a car with pipe, thereby obtaining a bill of lading thereon, every step thereafter based on such bill was fraudulent, so that when he presented it to the agent at the point of destination the issuance by the latter, believing the bill was genuine, of another bill for reshipment to a consignee at a third point was but a substitution of one fraudulent bill for another, and its use in obtaining property from another was use of a false pretense; as against the contention that the state was estopped from setting up the false and fraudulent character of the bills of lading on the ground that they were in fact issued by agents of the company, and were to that extent genuine.

Tex.—Taylor v. State, 232 S.W. 525, 89 Tex.Cr. 618.

Representations held not false

Pa.—Commonwealth v. Gross, O. & T., 33 North.Co. 43.

16.5 N.J.—State v. Greco, 148 A.2d 164, 29 N.J. 94.

17. Ark.—Fox v. State, 145 S.W. 228, 102 Ark. 451.

25 C.J. p 590 note 89.

18. Ga.—Drought v. State, 28 S.E. 1013, 101 Ga. 544.

25 C.J. p 590 note 90.

19. N.C.—State v. Wilkinson, 3 S. E. 683, 98 N.C. 696.

20. La.—Corpus Juris cited in State v. Hendon, 128 So. 286, 289, 170 La. 488.

25 C.J. p 590 note 92.

21. Mass.—Commonwealth v. Jacobson, 157 N.E. 583, 260 Mass. 311.

21.50 N.Y.—People v. Lehrer, 45 N. Y.S.2d 170, 182 Misc. 645.

22. Cal.—Corpus Juris quoted in People v. Mace, 234 P. 841, 845, 71 C.A. 10.

Ga.—Hadden v. State, 35 S.E.2d 518, 73 Ga.App. 23.

Idaho.—Corpus Juris Secundum quoted in State v. Larsen, 286 P.2d 646, 648, 76 Idaho 528.

Ky.—Corpus Juris quoted in Commonwealth v. Harper, 243 S.W. 1053, 1055, 195 Ky. 843.

Miss.—Corpus Juris Secundum quoted in Fuller v. State, 72 So.2d 454, 455, 221 Miss. 247.

25 C.J. p 610 note 22.

23. Cal.—Corpus Juris quoted in People v. Mace, 234 P. 841, 845, 71 C.A. 10.

Idaho.—State v. Davis, 336 P.2d 692—Corpus Juris Secundum quoted in State v. Larsen, 286 P.2d 646, 648, 76 Idaho 528.

Ky.—Corpus Juris quoted in Commonwealth v. Harper, 243 S.W. 1053, 1055, 195 Ky. 843.

Miss.—Corpus Juris Secundum quoted in Fuller v. State, 72 So.2d 454, 455, 221 Miss. 247.

25 C.J. p 610 note 23.

24. Cal.—Corpus Juris quoted in People v. Mace, 234 P. 841, 845, 71 C.A. 10.

Colo.—Johnson v. People, 133 P.2d 789, 110 Colo. 283.

Idaho.—State v. Davis, 336 P.2d 692—Corpus Juris Secundum quoted in State v. Larsen, 286 P.2d 646, 648, 76 Idaho 528.

Ky.—Corpus Juris quoted in Commonwealth v. Harper, 243 S.W. 1053, 1055, 195 Ky. 843.

Mass.—Commonwealth v. Morrison, 147 N.E. 588, 252 Mass. 116.

Miss.—Corpus Juris Secundum quoted in Fuller v. State, 72 So.2d 454, 455, 221 Miss. 247.

tense consists in words, they may be oral,²⁵ as well as written,²⁶ unless it is prescribed by statute that they shall be in writing;²⁷ if in writing, it is not necessary that the false pretext or devise be complete in form.^{27.5}

The form of words in which the pretense is couched is immaterial; if they are intended to create and do create the impression that defendant is making a representation as to a present or past fact, the pretense is within the statute.²⁸ It has been said, however, that a mere naked lie is insuffi-

cient,²⁹ and that the statute requires some artifice, some descriptive contrivance which would be likely to mislead a person or throw him off guard.³⁰

§ 18. — Acts or Conduct

It is frequently stated that a false pretense may be made by act or conduct as well as by word, but some authorities hold this to be true only when some symbol or token is used in connection with the conduct.

That a false pretense or representation may be made by act or conduct as well as by word has been frequently stated;³¹ but according to some of the

Utah.—State v. Jenson, 280 P. 1046, 74 Utah 527.

Wash.—State v. Moore, 66 P.2d 836, 189 Wash. 680.
25 C.J. p 610 note 24.

Implication from expense accounts

In prosecution of county engineer for perjury in swearing to each of eleven expense accounts and of grand larceny in their collection, where no other method of public transportation than by air charged the rate which appeared in seventeen out of the thirty trips listed in the expense accounts, appearance of such rates in the expense accounts was equivalent to a representation that the trips were made by airplane.

Wash.—State v. Dodd, 74 P.2d 497, 193 Wash. 26.

25. Idaho.—**Corpus Juris Secundum** quoted in State v. Larsen, 286 P. 2d 646, 648, 76 Idaho 528.

Mass.—Commonwealth v. Levine, 181 N.E. 851, 280 Mass. 83.
25 C.J. p 610 note 25.

26. Idaho.—**Corpus Juris Secundum** quoted in State v. Larsen, 286 P.2d 646, 648, 76 Idaho 528.

Pa.—Commonwealth v. Dougherty, 84 Pa.Super. 319.
25 C.J. p 610 note 26.

27. Idaho.—**Corpus Juris Secundum** quoted in State v. Larsen, 286 P.2d 646, 648, 76 Idaho 528.

Ky.—Combs v. Commonwealth, 124 S. W.2d 64, 276 Ky. 260.
25 C.J. p 610 note 27.

Representations as to financial standing and ability to pay

(1) Under statutes so providing, it is no crime to make a purchase or obtain credit by means of false representations as to financial condition or ability to pay, unless such representations are in writing.

N.Y.—People v. Williams, 238 N.Y.S. 712, 135 Misc. 564—People v. Wagner, 198 N.Y.S. 65, 120 Misc. 214, 40 N.Y.Cr. 243, affirmed 203 N.Y.S. 946, 208 App.Div. 828.

Utah.—State v. Hill, 116 P.2d 392, 100 Utah 456.

(2) Obtaining money by orally misrepresenting one's ability to re-

pay it is a "purchase of property," within such a statute.

N.Y.—People v. Wagner, supra.

(3) Such a provision does not protect one making oral false statements concerning another's character, credit, and financial ability to obtain something for himself.

Mass.—Commonwealth v. Levine, 181 N.E. 851, 280 Mass. 83.

(4) Misrepresentations made to sell corporate stock that the pump manufactured by the corporation was protected by patents in all countries, and that for every pump made a stated sum in cash was set aside for the stockholders, and that the receipts from the sale of stock above the commission allowed went into the treasury of the company to expand its business, related to the financial condition of the company, so that no prosecution could be maintained therefor under such a statute, unless the misrepresentations were in writing.

Ky.—Commonwealth v. Dant, 240 S. W. 359, 194 Ky. 691.

(5) Other holdings.
Minn.—State v. Harris, 133 N.W. 980, 116 Minn. 401.
25 C.J. p 610 note 27 [a].

27.5 Tex.—Redding v. State, 265 S. W.2d 811, 159 Tex.Cr. 535, certiorari denied Redding v. State of Texas, 75 S.Ct. 38, 348 U.S. 838, 99 L.Ed. 661.

28. Cal.—**Corpus Juris Secundum** quoted in People v. Staver, 252 P. 2d 700, 704, 115 C.A.2d 711—**Corpus Juris** quoted in People v. Mace, 234 P. 841, 845, 71 C.A. 10.

Pa.—Commonwealth v. Dougherty, 84 Pa.Super. 319.
25 C.J. p 610 note 28.

29. Okl.—Taylor v. Territory, 99 P. 628, 2 Okl.Cr. 1.
25 C.J. p 598 note 72.

30. Mass.—Commonwealth v. Drew, 19 Pick. 179.

Okl.—Taylor v. Territory, 99 P. 628, 2 Okl.Cr. 1.

31. Ga.—Hadden v. State, 35 S.E.2d 518, 73 Ga.App. 23.

Idaho.—**Corpus Juris Secundum** cited

in State v. Larsen, 286 P.2d 646, 648, 76 Idaho 528.

Ill.—People v. Gruber, 200 N.E. 483, 362 Ill. 278.

Iowa.—State v. Huckins, 234 N.W. 554, 212 Iowa 283.

Ky.—Commonwealth v. Harper, 243 S.W. 1053, 195 Ky. 843.

La.—State v. Dabbs, 84 So.2d 601, 228 La. 960.

Mass.—Commonwealth v. Morrison, 147 N.E. 588, 252 Mass. 116.

Mich.—People v. Etzler, 290 N.W. 879, 292 Mich. 489—People v. Clark, 10 Mich. 310.

Miss.—Fuller v. State, 72 So.2d 454, 221 Miss. 247—**Corpus Juris** cited in Hinman v. State, 176 So. 264, 179 Miss. 503.

Neb.—Brennan v. State, 3 N.W.2d 217, 141 Neb. 205.

N.M.—State v. Kelly, 202 P. 524, 27 N.M. 412, 21 A.L.R. 156.

N.Y.—People v. Lehrer, 45 N.Y.S.2d 170, 182 Misc. 645.

Pa.—Commonwealth v. Dougherty, 84 Pa.Super. 319.

Commonwealth v. Sullum, 35 Luz. Leg.Reg. 30.

Tex.—Dixon v. State, 215 S.W.2d 181, 152 Tex.Cr. 504.

Utah.—State v. Jenson, 280 P. 1046, 74 Utah 527.

W.Va.—State v. Augustine, 171 S.E. 111, 114 W.Va. 143.

Wis.—Corscot v. State, 190 N.W. 465, 178 Wis. 661.

25 C.J. p 611 note 29.

Words or acts or both

Where one intentionally creates a belief as to an existing fact which is false and with intent to defraud another of his property and does so, it is immaterial whether the erroneous belief was induced by words or acts or both.

Ky.—Lee v. Commonwealth, 242 S. W.2d 984.

Presenting forged check

Where defendant, knowing that indorsement on check was forged, presented check to bank for purpose of obtaining money on it, he was guilty of false pretenses, since by his conduct he thereby represented that he was lawful holder of check, legal assignee of true payee, and that he

authorities this is not a clear statement of the rule, and it is only when some symbol or token is used in connection with misleading conduct that a false statement in words is not essential.³²

Since promises are not within the statute, see supra § 9, if the act of accused implies only a promise it is not indictable.³³

§ 19. — Nondisclosure of Truth

Mere silence or suppression of the truth, or withholding of knowledge, is generally held insufficient to constitute a false pretense; but it has also been held that suppression of a fact by one who should disclose it is sufficient.

It is generally held that mere silence or suppression of the truth, or a mere withholding of knowledge on which another may act, is not sufficient to constitute false pretense;³⁴ there must be active, affirmative, false representations.³⁵ On the other hand, it has been held that the suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mis-

lead for want of communication of that fact, is a false pretense.³⁶

Where, after learning of the falsity of a representation made by him innocently, accused obtains property on the strength of that misrepresentation, his nondisclosure of the truth amounts to a false pretense.³⁷

§ 20. — False Token or Writing in General

Under the usual form of statute, no false token or writing is required for the commission of the offense.

To constitute the offense under the usual form of the statutes, no false token or writing need be used, the general rule being, as appears supra §§ 17, 18, that the offense may be committed by mere words or acts.³⁸ It is common, however, for the statutes to provide specifically against obtaining by a false symbol or token or false or counterfeit writing;³⁹ and under some statutes, if a false pretense is expressed in language and is not accompanied by a false token

was entitled to possession of check and money that it represented.
Wash.—State v. Moore, 66 P.2d 836, 189 Wash. 680.

Presenting bogus bond

The presentation of a bogus bond to the state's agent for redemption is a false pretense, where the parties presenting the bond know that it is spurious.

N.M.—State v. Kelly, 202 P. 524, 27 N.M. 412, 21 A.L.R. 156.

32. Ala.—Eaton v. State, 78 So. 321, 16 Ala.App. 405.
25 C.J. p 611 note 30.

33. Mich.—Tefft v. Windsor, 17 Mich. 486.

34. Ark.—McCorkle v. State, 278 S. W. 965, 170 Ark. 105.

Idaho.—Corpus Juris Secundum cited in State v. Larsen, 286 P.2d 646, 648, 76 Idaho 528.
25 C.J. p 611 note 33.

Failure to disclose employment

Accused was not guilty of false representations as would warrant conviction for cheating by fraudulent pretense, on ground that she certified in relief checks that she had notified county board of assistance of all changes in facts as stated in application which would affect eligibility for public assistance and did not disclose employment obtained since filing of application, where it did not appear from application that she was asked any question concerning her employment.

Pa.—Commonwealth v. Thomas, 70 A.2d 458, 166 Pa.Super. 214.

Failure to disclose chattel mort-

gage on property sold is not a false pretense.

Colo.—Stumpff v. People, 117 P. 134, 51 Colo. 202.

35. Ark.—McCorkle v. State, 278 S. W. 965, 170 Ark. 105.

N.Y.—People v. Johnson, 150 N.Y.S. 331, 87 Misc. 89.

36. Cal.—People v. Mace, 234 P. 841, 71 C.A. 10.

Colo.—Montez v. People, 132 P.2d 970, 110 Colo. 208.

Idaho.—Corpus Juris Secundum cited in State v. Larsen, 286 P.2d 646, 648, 76 Idaho 528.

Mich.—People v. Etzler, 290 N.W. 879, 292 Mich. 489.

Utah.—Ballaine v. District Court of First Judicial District for Box Elder County, 153 P.2d 265, 107 Utah 247.

37. Ga.—Crawford v. State, 43 S.E. 762, 117 Ga. 247.

38. Kan.—State v. Terrill, 125 P. 65, 87 Kan. 745.
25 C.J. p 613 note 59.

39. Or.—State v. Cody, 241 P. 983, 116 Or. 509.
25 C.J. p 588 note 64 [a], p 613 note 60.

Writing in construction, operation, and effect of statutory provisions generally see supra § 5 b.

Unauthorized indorsement of bank check by fictitious name of purported secretary of payee association held "writing" within statute relating to obtaining goods on false "writing."

Ga.—Brent v. State, 163 S.E. 319, 44 Ga.App. 777.

Conditional sales contract can constitute a "false token" or writing within meaning of statute dealing with false pretenses.

Cal.—People v. Cheeley, 236 P.2d 22, 106 C.A.2d 748.

Written release of fictitious claim against victims purportedly signed by fictitious claimants and shown to victims to induce payment to reimburse accused for payment supposedly made by him in settlement of claim was a "false token" sufficient to sustain conviction of grand theft.

Cal.—People v. Beilfuss, 138 P.2d 332, 59 C.A.2d 83, certiorari denied 64 S.Ct. 529, 321 U.S. 746, 88 L.Ed. 1048.

Trust deed

Where vendors believed that they were selling their property directly to purchaser unencumbered and did not know that they had signed title over to realty broker who caused trust deed to be placed on the property, trust deed was part and parcel of a false scheme and was false token.

Cal.—People v. Pugh, 289 P.2d 826, 137 C.A.2d 226, appeal dismissed 77 S.Ct. 141, 352 U.S. 885, 1 L.Ed. 2d 83.

An agreed stipulation of facts and conclusions of law thereon in civil lawsuit, O.K'd by record attorneys for parties plaintiff and defendant, was not such a "false token or writing" that, to secure signature of judge thereon, could sustain charge of obtaining signature of judge by false pretenses.

or writing, a greater quantum of evidence is required than if such token or writing were present.⁴⁰

As appears supra § 3, where the crime is committed by means of a false writing, it is not necessary that the writing should be such as, if genuine, would be of legal validity; but a writing which is genuine and contains no false statements of fact cannot be a false token or writing.^{40.5}

§ 21. — Worthless Checks, Orders, Bank Bills, Etc.

- a. In general
- b. Worthless check statutes generally
- c. Present or past consideration; past indebtedness
- d. Postdated check
- e. Stopping payment

a. In General

The giving of a worthless check with knowledge of its worthlessness is generally deemed a false pretense.

The presentation of false warrants or orders, or

certain warrants or other instruments illegally obtained,⁴¹ and the passing of worthless bank notes or bank bills,⁴² constitute false pretenses. So, too, the passing of Confederate paper money,⁴³ accompanied by representations that such money is good and lawful money of the United States,⁴⁴ is within the statute against false pretenses.

The specific acts of making, uttering, and delivering a worthless check did not constitute a crime at common law.^{44.5} Whether a prosecution for issuing, uttering, passing, or delivering a worthless check is brought under a statute such as those discussed hereafter in this section, or under a more general statute denouncing the obtaining of money or property by false pretenses, it is usually held essential that the acts involved constitute some form of false representation.⁴⁵ According to most authorities, the giving of a worthless check or draft, or a check or draft which the accused has no reason to suppose will be honored, is a false pretense,⁴⁶ even though no verbal misrepresentation is made as to the instrument,⁴⁷ the giving of such check or draft being itself a representation, symbol, or token

Ind.—State v. Huebner, 104 N.E.2d 385, 230 Ind. 461.

40. Utah.—State v. Hill, 116 P.2d 392, 100 Utah 456.

Receipt

Where defendant contractor paid lumber bill by check on insufficient bank account, obtained receipt, and then stopped payment on his check, it was held that the receipt, when presented to prosecuting witness, who paid defendant a balance under his contract in reliance thereon, was a "false token."

Cal.—People v. Pearson, 231 P. 612, 69 C.A. 524.

40.5 Cal.—People v. Whitlow, 249 P. 2d 35, 113 C.A.2d 804—People v. Beilfuss, 138 P.2d 332, 59 C.A.2d 83, certiorari denied 64 S.Ct. 529, 321 U.S. 746, 88 L.Ed. 1048.

Draft given by accused to auctioneer in payment of cattle bid on by accused, which contained nothing false within itself, was not an accompanying "false token or writing" within statute precluding conviction for obtaining property under false pretenses unless statement of a pretense is accompanied by use of a false token or writing, except by production of specified evidence. Cal.—People v. Katcher, 217 P.2d 757, 97 C.A.2d 209.

Check issued by victims

The check by which victims paid to accused the money obtained by false pretenses was not a "false token or writing" within statute requiring corroboration of complaining

witness' testimony to sustain conviction of grand theft, where money was obtained by false pretenses expressed in language unaccompanied by such token or writing.

Cal.—People v. Beilfuss, 138 P.2d 332, 59 C.A.2d 83, certiorari denied 64 S.Ct. 529, 321 U.S. 746, 88 L.Ed. 1048.

A written list of accused's debts, which he used in applying to prosecuting witness for a loan, held not a "false token."

Cal.—People v. Mace, 234 P. 841, 71 C.A. 10.

41. Mich.—People v. Luttermoser, 81 N.W. 565, 122 Mich. 562.

25 C.J. p 613 note 47.

42. Mass.—Commonwealth v. Hulbert, 12 Metc. 446.

25 C.J. p 613 note 48.

43. Ind.—Pinney v. State, 59 N.E. 383, 156 Ind. 167.

Ky.—Commonwealth v. Beckett, 84 S.W. 758, 119 Ky. 817, 27 Ky.L. 265, 115 Am.S.R. 285, 68 L.R.A. 638.

44. Ind.—Pinney v. State, 59 N.E. 383, 156 Ind. 167.

44.5 W.Va.—State v. Stout, 95 S.E. 2d 639, 59 A.L.R.2d 1154.

45. Mich.—People v. Jacobson, 227 N.W. 781, 248 Mich. 639.

Tex.—Lloyd v. State, 266 S.W. 785, 98 Tex.Cr. 504.

Utah.—State v. Trogstad, 100 P.2d 564, 98 Utah 565.

46. Ark.—Mortensen v. State, 217 S.W.2d 325, 214 Ark. 528.

D.C.—Clagett v. U. S., 289 F. 532, 53 App.D.C. 134.

Idaho.—State v. Davis, 336 P.2d 692 —State v. Larsen, 286 P.2d 646, 76 Idaho 528.

Ky.—Tartar v. Commonwealth, 102 S.W.2d 971, 267 Ky. 502.

Miss.—*Corpus Juris Secundum* quoted in Blakeney v. State, 62 So.2d 313, 314, 216 Miss. 211.

Or.—State v. Cody, 241 P. 983, 116 Or. 509.

Tex.—Harbin v. State, 60 S.W.2d 775, 124 Tex.Cr. 147.

W.Va.—State v. Augustine, 171 S.E. 111, 114 W.Va. 143.

25 C.J. p 612 note 36.

Signing fictitious names

D.C.—U. S. v. Greever, D.C., 116 F. Supp. 755.

47. Cal.—People v. Boyce, 197 P.2d 842, 87 C.A.2d 828.

Ky.—Tartar v. Commonwealth, 102 S.W.2d 971, 267 Ky. 502.

Miss.—*Corpus Juris Secundum* quoted in Blakeney v. State, 62 So.2d 313, 314, 216 Miss. 211.

Mo.—State v. Griggs, 236 S.W.2d 588, 361 Mo. 758.

Tex.—Harbin v. State, 60 S.W.2d 775, 124 Tex.Cr. 147.

25 C.J. p 612 note 37.

Extrinsic representation unnecessary

In a bogus check prosecution, state need not show that specific false representations extrinsic to the check itself were made when the check was passed.

Ariz.—State v. Ellis, 189 P.2d 717, 67 Ariz. 7.

that accused has money or credit with the drawee,⁴⁸ to the amount of its face value,⁴⁹ and, therefore, a false representation of the existence of a present fact.^{49.5}

According to other authorities, however, simply giving a check on a bank without any representation by the drawer that he has funds in the bank on which the check is drawn, or that the check will be paid by the bank on presentation, does not constitute a criminal offense.⁵⁰ Some authorities have held that the mere giving of a check on a bank in which there are no funds for its payment will not constitute a criminal false pretense when the person giving it has reason to believe that it will be honored on presentation.⁵¹

Where the giving of a worthless check or draft is accompanied by false representations as to its payment, accused is guilty.⁵² A sight draft drawn by accused on himself in payment of goods bought amounts only to a representation of future ability to pay, although it carries with it the implied rep-

resentation of ability to pay, and a seller parting with his goods on the strength thereof does not rely on a false representation constituting a false pretense.⁵³

b. Worthless Check Statutes Generally

- (1) In general
- (2) Elements of offense

(1) In General

According to the varying language of particular statutes, it may be made a crime to draw, utter, pass, or deliver, with knowledge or fraudulent intent, a check for which there are insufficient funds on deposit, or without reasonable grounds for believing that it will be paid, or to obtain money or property by means of a worthless, false, or bogus check, or to pass fictitious checks or drafts.

The effect of specific statutes in a number of jurisdictions is to make it a crime to draw, utter, pass, or deliver, with intent to defraud, or at least knowingly and purposely, a check or draft on a bank, where the drawer has not sufficient funds on deposit, or credit with the bank, to meet the check or draft,⁵⁴

Mo.—State v. Hartman, 273 S.W.2d 198, 364 Mo. 1109.

48. Ala.—Elliott v. Caheen Bros., 153 So. 613, 228 Ala. 432.

Ariz.—Corpus Juris Secundum cited in State v. Ellis, 189 P.2d 717, 719, 67 Ariz. 7.

Iowa.—State v. Doudna, 284 N.W. 113, 226 Iowa 351.

Ky.—Tartar v. Commonwealth, 102 S.W.2d 971, 267 Ky. 502—Hughes v. Commonwealth, 18 S.W.2d 880, 230 Ky. 37.

Miss.—Corpus Juris Secundum quoted in Blakeney v. State, 62 So.2d 313, 314, 216 Miss. 211.

Tex.—Brigham v. State, 16 S.W.2d 243, 112 Tex.Cr. 281—Noblitt v. State, 281 S.W. 849, 103 Tex.Cr. 550.

25 C.J. p 612 note 38.

Presenting check to drawee bank

One who presents his own check to a bank in which he keeps an account but in which he knows he has no funds, and receives the money therefor, is not criminally liable, since such act implies only a request to pay.

Mass.—Commonwealth v. Drew, 19 Pick. 179.

49. Cal.—People v. Rose, 183 P. 874, 42 C.A. 540.

Miss.—Corpus Juris Secundum quoted in Blakeney v. State, 62 So.2d 313, 314, 216 Miss. 211.

N.J.—State v. Barone, 118 A. 779, 98 N.J.Law 9.

W.Va.—Corpus Juris cited in State v. Augustine, 171 S.E. 111, 113, 114 W.Va. 143.

49.5 U.S.—Fidelity & Cas. Co. of N. Y. v. Bank of Altenburg, C.A.Mo.,

216 F.2d 294, certiorari denied 75 S.Ct. 440, 348 U.S. 952, 99 L.Ed. 744.

Idaho.—State v. Larsen, 286 P.2d 646, 76 Idaho 528.

50. Ga.—Williams v. State, 73 S.E. 424, 10 Ga.App. 395.

25 C.J. p 612 note 40.

51. Iowa.—State v. Foxton, 147 N.W. 347, 166 Iowa 181, 52 L.R.A., N.S., 919, Ann.Cas.1916E 727.

Ohio.—Corpus Juris Secundum cited in State v. Stemen, 106 N.E.2d 662, 667, 90 Ohio App. 309.

25 C.J. p 612 note 42.

52. Iowa.—State v. Cooper, 151 N.W. 835, 169 Iowa 571.

25 C.J. p 612 note 44.

53. Cal.—People v. Green, 133 P. 334, 22 C.A. 45.

54. Ala.—Elliott v. Caheen Bros., 153 So. 613, 228 Ala. 432.

Phillips v. State, 136 So. 480, 24 Ala.App. 456.

Ariz.—State v. Meeks, 247 P. 1099, 30 Ariz. 436.

Ark.—Smith v. State, 226 S.W. 531, 147 Ark. 49.

Cal.—People v. Megladdery, 105 P.2d 385, 40 C.A.2d 643—People v. Silverman, 92 P.2d 507, 33 C.A.2d 1

—People v. Zimmer, 73 P.2d 923, 23 C.A.2d 581—People v. Becker,

30 P.2d 562, 137 C.A. 349—Ex parte Leuschen, 25 P.2d 243, 134 C.A. 246

—People v. Monks, 24 P.2d 508, 133 C.A. 440—People v. Bullock, 11 P.

2d 441, 123 C.A. 299—People v. Oliver, 2 P.2d 450, 115 C.A. 677—

People v. Cortez, 290 P. 1083, 108 C.A. 111—Ex parte Scott, 259 P.

101, 85 C.A. 170—Ex parte Griffin, 257 P. 458, 83 C.A. 779—People

v. Wilkins, 228 P. 367, 67 C.A. 758—People v. King, 219 P. 753, 63 C.A. 674.

People v. Radich, 294 P. 1, 111 C.A.Supp. 779.

Del.—Laird v. Employers Liability Assur. Corporation, Limited, of London, England, 18 A.2d 861, 2 Terry 216.

Fla.—Anderson v. Bryson, 115 So. 505, 94 Fla. 1165.

Ga.—Berry v. State, 111 S.E. 669, 153 Ga. 169.

Spivey v. State, 8 S.E.2d 677, 62 Ga.App. 507—Highsmith v. State,

143 S.E. 445, 38 Ga.App. 192—Strickland v. State, 110 S.E. 39, 27

Ga.App. 772.

Ind.—Huffman v. State, 185 N.E. 131, 205 Ind. 75.

Kan.—State v. Bechtelheimer, 100 P. 2d 657, 151 Kan. 582.

Ky.—Tartar v. Commonwealth, 102 S.W.2d 971, 267 Ky. 502—Hughes v.

Commonwealth, 18 S.W.2d 880, 230 Ky. 37.

Mich.—People v. Jacobson, 227 N.W. 781, 248 Mich. 639.

Miss.—Hammack v. State, 75 So. 436, 114 Miss. 611.

Mont.—State v. Patterson, 243 P. 355, 75 Mont. 315.

Neb.—Haines v. State, 281 N.W. 860, 135 Neb. 433—White v. State, 280

N.W. 433, 135 Neb. 154.

N.J.—State v. Barone, 118 A. 779, 98 N.J.Law 9.

N.Y.—People v. Nibur, 264 N.Y.S. 148, 238 App.Div. 233—People v.

Mazeloff, 242 N.Y.S. 623, 229 App. Div. 451—People v. Humphries, 234

N.Y.S. 688, 226 App.Div. 500.

People v. Ledwell, 14 N.Y.S.2a 371.

or where the party so doing does not have any reasonable grounds for believing that the check will be

N.C.—State v. Byrd, 167 S.E. 626, 204 N.C. 162—State v. Crawford, 152 S.E. 504, 198 N.C. 522.
N.D.—State v. Schock, 226 N.W. 525, 58 N.D. 340, 72 A.L.R. 888.
Or.—State v. Cody, 241 P. 983, 116 Or. 509.
Pa.—Commonwealth v. Massaro, 97 Pa.Super. 149—Commonwealth v. Rush & Harnett, 78 Pa.Super. 404.
Commonwealth v. Lewis, 22 Pa. Dist. & Co. 589.
Commonwealth v. Levin, 29 Berks Co. 317.
Tenn.—Sears, Roebuck & Co. v. Steele, 130 S.W.2d 160, 23 Tenn. App. 275.
Utah.—State v. Trogstad, 100 P.2d 564, 98 Utah 565.
Wash.—State v. Bradley, 69 P.2d 819, 190 Wash. 538.
Wis.—Merkel v. State, 167 N.W. 802, 167 Wis. 512.
7 C.J. p 675 notes 7, 8.

Purpose of statute

(1) The statute is specifically aimed at discouraging the giving of bad checks for what purports to be a cash purchase when the drawer has, instead of the present means, only a vague intention to make the check good at some future time.
Va.—Cook v. Commonwealth, 16 S. E.2d 635, 178 Va. 251.

(2) The statute was enacted in furtherance of public policy to punish a special sort of commercial fraud, whether it be committed in an individual or official capacity.
Del.—Clifton v. State, 145 A.2d 392.

(3) The purpose is to facilitate commerce and banking by averting the inconvenience and expense of handling worthless checks through banking channels, and by averting difficulty of collecting bills from those who give worthless checks, as well as to reduce hazard of loss of merchandise obtained by such checks.
Md.—Kaufman v. State, 85 A.2d 446, 199 Md. 35.

(4) Purpose of statute is to discourage overdrafts and resulting bad banking, to stop practice of "check-kiting," and to avert mischief to trade, commerce, and banking caused by circulation of worthless checks.
Kan.—Application of Windle, 294 P. 2d 213, 179 Kan. 239.

(5) The nuisance to trade and commerce of worthless checks condemned by statute is the giving of a worthless check and its consequent disturbance of business integrity.
N.C.—State v. Jackson, 90 S.E.2d 507, 243 N.C. 216—State v. White, 53 S.E.2d 436, 230 N.C. 513.

Gravamen of offense is the issuing and delivering of the check.

Ky.—Hughes v. Commonwealth, 22 S.W.2d 618, 232 Ky. 232.
Pa.—Commonwealth v. Rush & Harnett, 78 Pa.Super. 404.

Limited application of statute

Fraudulent Check Act concerns cases where there is in fact a maker or drawer of instrument, and it is limited to cases where accused knew at time of making, drawing, uttering, or delivering, that maker or drawer of check, draft, or order did not have sufficient funds in, or credit with, bank, depository, person, firm, or corporation for payment thereof in full on its presentation.

Ind.—Hazelgrove v. State, 145 N.E. 2d 13, certiorari denied 78 S.Ct. 1141, 356 U.S. 977, 2 L.Ed.2d 1150.

Distinction from forgery

(1) The statute denouncing forgery denounces an entirely different crime from the statute denouncing the drawing of a check with knowledge of the insufficiency of funds.

Ky.—White v. Commonwealth, 244 S. W. 54, 196 Ky. 64—Siegel v. Commonwealth, 197 S.W. 467, 176 Ky. 772.

(2) Hence the latter statute is not invalid as defining the same offense as the first but providing a different penalty.

Ky.—Siegel v. Commonwealth, supra.

"Funds" and "credit" distinguished

While abstractly the word "funds" is of broad significance, within the meaning of the statute requiring an insufficiency of funds or credit, it means money, and is not synonymous with "credit."

Del.—State v. Vandenburg, 193 A. 701, 9 W.W.Harr. 320.

Meaning of "utter"

(1) The word "utter," as used in the statute means to declare or assert directly or indirectly by words or actions that a thing offered is genuine or good; to make use of, to offer, to pass off, or to put in circulation, and usually, merely to offer a check to a person is to "utter" it, whether it be accepted by that person or not.

Del.—State v. Vandenburg, 2 A.2d 916, 9 W.W.Harr. 498.

(2) The word "utter" means to put in circulation as money or currency, to cause to pass in trade, and "utterance" means putting in circulation, as false coin or forged notes.

Cal.—People v. Descant, 124 P.2d 864, 867, 51 C.A.2d 343.

Nonexistence of funds or credit is an essential element of the crime of giving a false or bogus check with intent to defraud.

Okl.—Kilgore v. State, 219 P. 160, 25 Okl.Cr. 69.

Instruments included

(1) A check drawn to cash or bearer.
Cal.—People v. Freeman, 156 P. 994, 29 C.A. 543.

(2) A check payable to the maker's order, although given to a third party without endorsement.

Cal.—People v. Wilbur, 165 P. 729, 33 C.A. 511.

(3) In view of the fact that the statute covers both checks and drafts, where defendant wrote "draft" on one corner of check drawn on bank and purported to insert name of certain person in space designated for branch of bank, he could not avoid criminal responsibility for issuing a worthless check on theory that instrument was a draft and had not been presented to drawee when there appeared to be no person or branch of bank bearing the inserted name.
Cal.—People v. Silverman, 92 P.2d 507, 33 C.A.2d 1.

Check drawn by another

(1) One who, by indorsement or otherwise, with intent to defraud, uses check or draft, knowing at time that maker or drawer has not sufficient funds on deposit to pay same when presented, is guilty of the offense.

Ky.—Siegel v. Commonwealth, 197 S. W. 809, 177 Ky. 232—Siegel v. Commonwealth, 197 S.W. 467, 176 Ky. 772.

(2) However, an indorser of a check drawn upon a bank to be criminally responsible must be shown to have been criminally connected with the proposition to defraud.

Tex.—Dawson v. State, 185 S.W. 875, 79 Tex.Cr. 371.

(3) Where accused made no representations, but merely presented a valid negotiable instrument in due course duly indorsed by the payee who received the money for which the instrument called, and its non-payment was in consequence of the subsequent act of the drawer, who stopped payment of the check at the bank on which it was drawn, accused was not guilty of obtaining money on false pretenses.

Ala.—Whately v. State, 31 So.2d 664, 249 Ala. 355, 174 A.L.R. 169.

(4) Where accused persons did not execute or deliver, or authorize the execution and delivery, of the check, their ratification of the wrong and their attempts to procure funds for payment of the check could not render them guilty.

Pa.—Commonwealth v. Rush & Harnett, 78 Pa.Super. 404.

Location of drawee bank

(1) The term "any bank," as used in statute defining offense of issu-

paid.⁵⁵ The offense is one against the public,^{55,5} and consists not in presently obtaining something of value by deceit, but in putting into circulation worthless commercial paper which will ultimately result in financial loss.^{55,10} Within such a statute, a check may be a completed check notwithstanding the name of the payee is in blank.^{55,15} The making,

uttering, issuing, and delivering of a worthless check constitute a crime regardless of the consent of anyone,^{55,20} each act being a separate offense.^{55,25}

In some jurisdictions, statutes make it a crime to obtain money or property by means of a worthless, false, or bogus check,⁵⁶ the word "false," in such a

ing a check on any bank without sufficient funds or credit, includes any bank whether located within or without the state, and is not limited to a bank located within the state. Idaho.—State v. Campbell, 219 P.2d 956, 70 Idaho 408.

(2) Under former Arkansas statute, the check was required to be drawn on a bank within the state, and one who, while outside the state, drew a check on a foreign bank and mailed it into the state was not guilty, even though the check was deposited for collection with a local bank.

Ark.—Cousins v. State, 151 S.W.2d 658, 202 Ark. 500.

(3) By Act 232 of the Acts of 1943, the law was amended to cover checks or drafts drawn on banks or other institutions outside the state. Ark.—Mortensen v. State, 217 S.W. 2d 325, 214 Ark. 528.

Establishing validity of check

In prosecution for issuing check without sufficient funds, validity of check given for automobile was sufficiently established, where defendant received possession of car, notwithstanding failure to deliver bill of sale.

Ohio.—Gutridge v. State, 173 N.E. 447, 37 Ohio App. 1, error dismissed 174 N.E. 140, 122 Ohio St. 623.

Draft on nonbanking institution

Drawing of check on institution which is not depository of money, such as packing company, when drawer has no funds or credit there to meet check, is not violation of worthless check act.

Kan.—State v. Williams, 42 P.2d 561, 141 Kan. 732.

55. N.D.—State v. Schock, 226 N.W. 525, 58 N.D. 340, 72 A.L.R. 888.

Tex.—Krueger v. State, 199 S.W. 629, 82 Tex.Cr. 404—Dawson v. State, 185 S.W. 875, 79 Tex.Cr. 371.

7 C.J. p 675 note 8.

Essential element

It is essential to prove that one drawing a check on a bank not only had no funds in the bank, but also that he had no good reason to believe that the check would be paid.

Fla.—Whitney v. State, 58 So. 230, 63 Fla. 53.

Tex.—Pruitt v. State, 202 S.W. 81, 83 Tex.Cr. 148.

Expectation of meeting check

(1) A reasonable expectation that the check will be paid when presented, based on the intention of depositing sufficient funds before presentation, has been held sufficient to exonerate defendant.

Cal.—People v. Griffith, 262 P.2d 355, 120 C.A.2d 873—People v. Becker, 30 P.2d 562, 137 C.A. 349.

N.D.—State v. Schock, 226 N.W. 525, 58 N.D. 340, 72 A.L.R. 888.

Ohio.—State v. Stemen, 106 N.E.2d 662, 90 Ohio App. 309.

(2) There is a contrary dictum in People v. King, 219 P. 753, 63 C.A. 674.

(3) The crime of obtaining money through false pretenses is not committed, even though a check is drawn on an account by one who knows that he has no funds to his credit with which to pay it, provided he has the honest and reasonable expectation that the check or draft will be paid on presentation.

Ark.—Mortensen v. State, 217 S.W. 2d 325, 214 Ark. 528.

Actual deposit of sufficient funds to meet the check before its presentation exonerates defendant.

Tex.—Dawson v. State, 185 S.W. 875, 79 Tex.Cr. 371.

Offer of repayment before time for presentment

Where defendant issued a check knowing there were no funds in the bank to meet it, and because of intervening holidays the check could not be presented for payment for several days, so that he could have deposited funds on the first banking day thereafter to meet the check, but instead of doing so he offered to repay the amount of the check the day after it was issued, a violation of the bad-check law was not shown to have been committed.

Tex.—Arrington v. State, 296 S.W. 568, 107 Tex.Cr. 422.

55.5 N.C.—State v. Levy, 18 S.E.2d 355, 220 N.C. 812—State v. Yarboro, 140 S.E. 216, 194 N.C. 498.

55.10 N.C.—State v. Levy, 18 S.E. 2d 355, 220 N.C. 812—State v. Yarboro, 140 S.E. 216, 194 N.C. 498.

Agreement not to deposit

If worthless checks were issued by accused, fact that he had an agreement with payee's agent not to deposit them "until the following Saturday" would not exculpate him from

having issued checks knowing at the time that he did not have sufficient funds on deposit in, or credit with, drawee bank with which to pay checks on presentation.

N.C.—State v. Levy, 18 S.E.2d 355, 220 N.C. 812.

55.15 Idaho.—State v. Campbell, 219 P.2d 956, 70 Idaho 408.

55.20 N.C.—State v. Jackson, 90 S. E.2d 507, 243 N.C. 216.

55.25 Cal.—People v. Descant, 124 P.2d 864, 51 C.A.2d 343.

56. Ala.—Elliott v. Caheen Bros., 153 So. 613, 228 Ala. 432.

Cal.—People v. Kemp, 269 P.2d 186, 124 C.A.2d 683.

Ill.—People v. Westerdahl, 146 N.E. 737, 316 Ill. 86.

Ind.—Borton v. State, 106 N.E.2d 392, 230 Ind. 679.

Iowa.—State v. McCutchan, 259 N. W. 23, 219 Iowa 1029.

Ky.—Hatcher v. Commonwealth, 5 S. W.2d 882, 224 Ky. 131.

Miss.—Blakeney v. State, 62 So.2d 313, 216 Miss. 211—McBride v. State, 104 So. 454, 141 Miss. 186.

Mo.—State v. Kaufman, App., 308 S.W.2d 333.

N.Y.—People v. Whiteman, 76 N.Y.S. 211, 72 App.Div. 90.

Okl.—Bright v. State, 134 P.2d 150, 76 Okl.Cr. 67—Stevens v. State, 124 P.2d 426, 74 Okl.Cr. 194—Armstrong v. State, 122 P.2d 823, 74 Okl.Cr. 42—Loughridge v. State, 72 P.2d 513, 63 Okl.Cr. 33—Beach v. State, 230 P. 753, 28 Okl.Cr. 348.

Tenn.—Malkemus v. State, 129 S.W. 2d 201, 174 Tenn. 547.

Tex.—King v. State, 213 S.W.2d 541, 152 Tex.Cr. 255—Currlin v. State, 6 S.W.2d 767, 110 Tex.Cr. 18.

25 C.J. p 613 note 57.

Purpose of the bad check law and its successive amendments is to discourage the giving of bad checks for what purport to be cash purchases.

Va.—Page v. Wilson, 191 S.E. 678, 168 Va. 447.

Gravamen or gist of offense

(1) "The gravamen of the charge . . . is not the issuance of a check, but is the obtaining, with fraudulent intent, money or other property or credit by means of a check. The 'bad check' is merely the prohibited means of accomplishing the fraud."

Tenn.—Malkemus v. State, 129 S.W. 2d 201, 174 Tenn. 547—State v.

statute, denoting intentional, deliberate, and willful untruth, something beyond mere inaccuracy,^{56.5} and "bogus check" meaning a check drawn on a nonexistent bank or by, or payable to, a fictitious person.^{56.10} It is not necessary that the check or draft used to obtain possession of money or merchandise be complete in form in order to constitute a crime.^{56.15}

The giving of a check without sufficient funds in order to obtain property, and the giving of such

a check in payment of an obligation have been held, under statute, distinct offenses.^{56.20}

Under some statutes it is a crime to pass fictitious checks or drafts.⁵⁷

(2) Elements of Offense

Under the bad-check statutes, intent to defraud and knowledge of the insufficiency of funds at the time the check is issued are generally essential elements of the offense. Under some statutes, it is immaterial whether payment or restitution is subsequently made; under oth-

Cooley, 206 S.W. 182, 183, 141 Tenn. 33.

(2) The gravamen of the offense of unlawfully obtaining money or property by any false or bogus check is not so much by what means the victim was filched, but the intent of the perpetrator in effecting his objective, the essence of the offense being the plan and purpose of perpetrator to swindle another of his money or property.

Colo.—McBride v. People, 248 P.2d 725, 126 Colo. 277.

(3) The gist of the crime is obtaining with fraudulent intent money, property, or a valuable thing by means or use of a bogus check.

Okl.—Simpson v. State, Cr., 267 P. 2d 1008.

No single definition can cover the range of possibilities of the offense of unlawfully obtaining money by means of false or bogus checks, but each case depends on its peculiar circumstances.

Colo.—McBride v. People, 248 P.2d 725, 126 Colo. 277.

Offenses distinguished

(1) "Obtaining goods by means of worthless check" and "uttering worthless check, with knowledge of worthlessness," are not synonymous offenses.

N.C.—State v. Martin, 155 S.E. 447, 199 N.C. 636.

(2) Under statute punishing the issuing of a fraudulent check, the giving of a check without sufficient funds in payment of an obligation, and the giving of such a check to obtain property, are distinct offenses.

Ind.—Tullis v. State, 103 N.E.2d 353, 230 Ind. 311.

(3) Where provision which made it a felony to obtain money or property by use of check drawn on bank in which drawer knew he had no funds was added to statute which made it a felony to obtain money by means of false or bogus check, the legislature distinguished a genuine check drawn on a bank in which the drawer knew he had no funds from a check drawn on a nonexistent bank or by or payable to a fictitious person.

Mo.—State v. Bird, 242 S.W.2d 576.

Instruments included

(1) The word "check," within statute, includes any instrument similar to bank check or draft in nature of commercial paper, such as express company money order.

Ill.—People v. Sceri, 95 N.E.2d 80, 407 Ill. 90.

(2) An instrument designed to simulate a check but to have effect of a note, with "will" inserted in small print before "pay to the order" and "payable at" inserted above name of bank, was nevertheless a "check" within purview of statutes penalizing false uttering of bank check.

Iowa.—State v. Doudna, 284 N.W. 113, 226 Iowa 351.

Obtaining money by check without funds constituted obtaining of money or property on "false or bogus check."

Okl.—Gunther v. State, 276 P. 237, 42 Okl.Cr. 129, followed in 276 P. 239, 42 Okl.Cr. 320.

25 C.J. p 613 note 57 [a].

Statute held not violated

Ark.—Sharpensteen v. State, 261 S. W.2d 537, 222 Ark. 519.

Two checks as single transaction

Tenn.—Williams v. State, 281 S.W.2d 41, 198 Tenn. 439.

Facts also showing forgery

Conviction under bogus check statute for obtaining money by means of false or bogus check would not be reversed on ground that check was forged rather than bogus, since prosecution may be had under such statute either for altered or forged check.

Okl.—Loughridge v. State, 72 P.2d 513, 63 Okl.Cr. 33.

56.5 Colo.—McBride v. People, 248 P.2d 725, 126 Colo. 277.

56.10 Mo.—State v. Robinson, 255 S. W.2d 811.

Check drawn without funds

A check given by a person on a bank in which he has no funds and which he has no reason to suppose will be honored is "bogus" within statute making it unlawful to obtain money or property by use of any false or bogus check.

Colo.—McBride v. People, 248 P.2d 725, 126 Colo. 277.

Insufficient funds statute not applicable

Where defendant had a checking account in bank under one name and wrote a check in excess of such account in another name, and there was no arrangement with bank to pay check signed in such other name out of her account, check was false and bogus and prosecution was properly brought under statute prohibiting obtaining of money by means of a false and bogus check issued with intent to defraud and not under statute dealing with checks drawn on insufficient funds with intent to defraud.

Ariz.—State v. Wittman, 337 P.2d 280, 85 Ariz. 292.

56.15 Tex.—King v. State, Cr., 308 S.W.2d 40—Redding v. State, 265 S. W.2d 811, 159 Tex.Cr. 535.

56.20 Ind.—Rogers v. State, 44 N.E. 2d 343, 220 Ind. 443, 143 A.L.R. 1074.

57. Utah.—State v. Tinnin, 232 P. 543, 64 Utah 587, 43 A.L.R. 46. 7 C.J. p 675 note 10.

Essence of offense of passing fictitious check with intent to defraud is the passing, with intent to defraud, to another of fictitious check purporting to be check for payment of money of nonexistent individual, knowing check to be fictitious.

Cal.—People v. Roche, 241 P. 279, 74 C.A. 556.

Mere nonexistence of drawee of draft does not make it a fictitious or bogus draft.

Ariz.—Patterson v. State, 215 P. 1096, 25 Ariz. 276, 35 A.L.R. 366.

Prosecution as forgery

In view of the amendment of the forgery statute to include the signing of the name of a fictitious person, the making and passing of a fictitious instrument may be prosecuted either under the forgery statute or the statute relating to the uttering of fictitious instruments.

Cal.—People v. Carmona, 251 P. 315, 80 C.A. 159.

ers, the drawer has a prescribed time within which to pay and thereby escape being held guilty of the offense.

Although certain distinctions have been indicated,⁵⁸ the crimes denounced by worthless-check statutes are generally regarded as more or less akin to

the broader offense of obtaining money or property by false pretenses,⁵⁹ and the elements are to a certain extent the same.⁶⁰ Thus, an intent to defraud is generally held to be an essential element of the offense under such statute;⁶¹ so, too, are knowl-

58. Ariz.—*Corpus Juris Secundum* quoted in *State v. Ellis*, 189 P.2d 717, 719, 67 Ariz. 7.
Cal.—*People v. Radich*, 294 P. 1, 111 C.A., Supp., 779.
Or.—*State v. Cody*, 241 P. 983, 116 Or. 509.
S.D.—*State v. Bundrock*, 207 N.W. 484, 49 S.D. 483.

59. Ariz.—*Corpus Juris Secundum* quoted in *State v. Ellis*, 189 P.2d 717, 719, 67 Ariz. 7.

Del.—*Laird v. Employers Liability Assur. Corporation, Limited*, of London, England, 18 A.2d 861, 2 Terry 216.

Ind.—*Huffman v. State*, 185 N.E. 131, 205 Ind. 75.

Tenn.—*Malkemus v. State*, 129 S.W. 2d 201, 174 Tenn. 547.

Different degree

The offense defined in the "cold check law" is merely a degree of the statutory offense of obtaining money or property by false pretenses.

Ky.—*Tartar v. Commonwealth*, 102 S.W.2d 971, 267 Ky. 502.

Bogus-check statute

(1) One giving checks without sufficient funds cannot be prosecuted for felony under false pretense statute, crime being only a misdemeanor under bogus-check statute.

Iowa.—*State v. Marshall*, 211 N.W. 252, 202 Iowa 954.

(2) However, where property is obtained by means of a forged order or spurious check, accused is properly prosecuted for felony under the statute relating to the obtaining of property by false pretense.

Iowa.—*Winfield v. Hollowell*, 214 N.W. 491, 204 Iowa 179—*Schnepf v. Hollowell*, 212 N.W. 572—*Humphrey v. Hollowell*, 212 N.W. 570, 203 Iowa 221.

60. Ariz.—*Corpus Juris Secundum* quoted in *State v. Ellis*, 189 P.2d 717, 719, 67 Ariz. 7.

Ky.—*Tartar v. Commonwealth*, 102 S.W.2d 971, 267 Ky. 502.

Tex.—*Redding v. State*, 265 S.W.2d 811, 159 Tex.Cr. 535, certiorari denied *Redding v. State of Texas*, 75 S.Ct. 38, 348 U.S. 838, 99 L.Ed. 661—*Ex parte Schellinger*, 256 S.W.2d 577, 158 Tex.Cr. 438.

61. U.S.—*U. S. v. Broxmeyer*, C.A. N.Y., 192 F.2d 230.

Ala.—*Nix v. State*, 166 So. 716, 27 Ala.App. 94, certiorari denied 166 So. 719, 232 Ala. 53—*Carpenter v. State*, 136 So. 491, 24 Ala.App. 468—*Phillips v. State*, 136 So. 480, 24 Ala.App. 456.

Ariz.—*Corpus Juris Secundum* quoted in *State v. Ellis*, 189 P.2d 717, 719, 67 Ariz. 7—*State v. Meeks*, 247 P. 1099, 30 Ariz. 436.

Ark.—*Smith v. State*, 174 S.W.2d 555, 206 Ark. 154.

Cal.—*People v. Rush*, App., 341 P.2d 788—*People v. Lane*, 300 P.2d 321, 144 C.A.2d 87—*People v. Oster*, 278 P.2d 39, 129 C.A.2d 688—*People v. Griffith*, 262 P.2d 355, 120 C.A.2d 873—*People v. Payton*, 246 P.2d 978, 112 C.A.2d 648—*People v. Gaines*, 234 P.2d 702, 106 C.A.2d 176—*People v. Wellington*, 193 P. 2d 30, 85 C.A.2d 310—*People v. Megladdery*, 105 P.2d 385, 40 C.A. 2d 643—*People v. Becker*, 30 P.2d 562, 137 C.A. 349—*Ex parte Leuschen*, 25 P.2d 243, 134 C.A. 246—*People v. Bullock*, 11 P.2d 441, 123 C. A. 299—*Ex parte Scott*, 259 P. 101, 85 C.A. 170—*People v. Wilkins*, 228 P. 367, 67 C.A. 758—*People v. Wilbur*, 165 P. 729, 33 C.A. 511—*People v. Freeman*, 156 P. 994, 29 C.A. 543—*People v. Radich*, 294 P. 1, 111 C.A., Supp., 779.

Colo.—*McBride v. People*, 248 P.2d 725, 126 Colo. 277—*Moore v. People*, 235 P.2d 798, 124 Colo. 197.

Del.—*State v. Vandenburg*, 2 A. 2d 916, 9 W.W.Harr. 498—*State v. Vandenburg*, 198 A. 701, 9 W.W. Harr. 320.

Fla.—*Anderson v. Bryson*, 115 So. 505, 94 Fla. 1165.

Ga.—*Berry v. State*, 111 S.E. 669, 153 Ga. 169.

Crain v. State, 52 S.E.2d 577, 78 Ga.App. 806—*Meena v. State*, 17 S. E.2d 86, 66 Ga.App. 99—*Spivey v. State*, 8 S.E.2d 677, 62 Ga.App. 507—*Mathewson v. Ruben*, 191 S.E. 499, 55 Ga.App. 837—*Highsmith v. State*, 143 S.E. 445, 38 Ga.App. 192—*Neidlinger v. State*, 88 S.E. 687, 17 Ga.App. 811.

Idaho.—*State v. Eikelberger*, 239 P. 2d 1069, 72 Idaho 245, 29 A.L.R.2d 1176—*State v. Campbell*, 219 P.2d 956, 70 Idaho 408—*State v. Bell*, 210 P.2d 392, 69 Idaho 485.

Ind.—*Borton v. State*, 106 N.E.2d 392, 230 Ind. 679.

Iowa.—*State v. Lansman*, 60 N.W.2d 815, 245 Iowa 102—*State v. Doudna*, 284 N.W. 113, 226 Iowa 351—*State v. McCutchan*, 259 N.W. 23, 219 Iowa 1029.

Ky.—*Maggard v. Commonwealth of Kentucky*, 262 S.W.2d 672—*Commonwealth v. Bandy*, 165 S.W.2d 337, 291 Ky. 721—*Hughes v. Commonwealth*, 18 S.W.2d 880, 230 Ky. 37—*Commonwealth v. Hammock*, 250 S.W. 85, 198 Ky. 785.

La.—*State v. Alphonse*, 98 So. 430, 154 La. 950.

Md.—*Kaufman v. State*, 85 A.2d 446, 199 Md. 35.

Mich.—*People v. Jacobson*, 227 N.W. 781, 248 Mich. 639.

Mo.—*State v. Hartman*, 273 S.W.2d 198, 364 Mo. 1109.

State v. Felman, App., 50 S.W.2d 683.

Neb.—*White v. State*, 280 N.W. 433, 135 Neb. 154.

N.M.—*State v. Davis*, 194 P. 882, 26 N.M. 523.

N.Y.—*People v. Will*, 46 N.E.2d 498, 289 N.Y. 413.

People v. Roach, 249 N.Y.S. 517, 231 App.Div. 622—*People v. Humphries*, 234 N.Y.S. 688, 226 App.Div. 500.

People v. Miller, 89 N.Y.S.2d 790.

Ohio.—*State v. Stemen*, 106 N.E.2d 662, 90 Ohio App. 309.

State v. Vice, Com.Pl., 70 N.E.2d 125.

Okl.—*Moore v. State*, 250 P.2d 46, 96 Okl.Cr. 118—*Stevens v. State*, 124 P.2d 426, 74 Okl.Cr. 194—*Armstrong v. State*, 122 P.2d 823, 74 Okl.Cr. 42—*Beach v. State*, 230 P. 758, 28 Okl.Cr. 348.

Pa.—*Commonwealth v. Massaro*, 97 Pa.Super. 149—*Commonwealth v. Rush & Harnett*, 78 Pa.Super. 404.

Commonwealth v. Lewis, 22 Pa. Dist. & Co. 539—*Commonwealth v. Spohn*, 20 Pa.Dist. & Co. 318, 38 Dauph.Co. 99, 48 York Leg.Rec. 23—*Commonwealth v. Glancy*, 9 Pa. Dist. & Co. 721.

S.C.—*State v. Sutton*, 89 S.E.2d 874, 228 S.C. 314.

Tenn.—*Malkemus v. State*, 129 S.W. 2d 201, 174 Tenn. 547.

Tex.—*Wright v. State*, Cr., 324 S.W. 2d 883—*McCormick v. State*, Cr., 323 S.W.2d 462—*Hutson v. State*, 227 S.W.2d 813, 154 Tex.Cr. 380—*Coffee v. State*, 184 S.W.2d 278, 148 Tex.Cr. 71—*Kuykendall v. State*, 160 S.W.2d 525, 143 Tex.Cr. 607.

Utah.—*State v. Trogstad*, 100 P.2d 564, 98 Utah 565.

Va.—*Cook v. Commonwealth*, 16 S.E. 2d 635, 178 Va. 251.

Wash.—*State v. Bradley*, 69 P.2d 819, 190 Wash. 538.

7 C.J. p 675 note 6.

Intent as element of obtaining by false pretenses generally see *supra* § 7.

Gravamen of crime

La.—*State v. Clayton*, 110 So.2d 111, 236 La. 1093.

Va.—*Rosser v. Commonwealth*, 66 S. E.2d 851, 192 Va. 813.

edge by accused of the insufficiency of the funds or lack of credit,⁶² willfulness on his part,^{62.5} and the securing of money, credit, or other thing of value.^{62.10}

If the payee or holder of the check has knowledge,

or an understanding, at the time the check is drawn or uttered that it is not then collectible, as where he is given a promise that a deposit will be made to meet it, the offense is generally held not to have been committed,⁶³ because the fraudulent intent is lack-

Intent independently of success

The intent of the person who issues a check without sufficient funds cannot be made to depend on the success of his enterprise for which he seeks to obtain the money represented by the check.

Cal.—People v. Croxton, 327 P.2d 611, 162 C.A.2d 187—People v. Gaines, 234 P.2d 702, 106 C.A.2d 176.

Intent to pay for property in future

Under statute penalizing the obtaining of money or other property by check, draft, or other order which is not paid, intent to defraud is not limited to intent to obtain goods and never pay for them.

Ala.—Elliott v. Cahen Bros., 153 So. 613, 228 Ala. 432.

Time of intent

The intent to defraud must exist at the time the check is given or the property obtained.

Ala.—Nix v. State, 166 So. 716, 27 Ala.App. 94, certiorari denied 166 So. 719, 232 Ala. 53.

La.—State v. Alphonse, 98 So. 430, 154 La. 950.

Mass.—Fuller v. Home Indem. Co., 60 N.E.2d 1, 318 Mass. 37.

Tex.—Kuykendall v. State, 160 S.W. 2d 525, 143 Tex.Cr. 607.

Small amount on deposit

In prosecution for obtaining one hundred twelve dollars by a false check or by a confidence game, that accused had two dollars and twenty cents on deposit with drawee bank when check was drawn is of no particular importance, and would only be relevant to show intent.

La.—State v. Courreges, 9 So.2d 453, 201 La. 62.

62. Ariz.—*Corpus Juris Secundum* quoted in State v. Ellis, 189 P.2d 717, 719, 67 Ariz. 7.

Ark.—Smith v. State, 174 S.W.2d 555, 206 Ark. 154.

Cal.—People v. Rush, App., 341 P.2d 788—People v. Lane, 300 P.2d 321, 144 C.A.2d 87—People v. Wellington, 193 P.2d 30, 85 C.A.2d 310—People v. Megladdery, 105 P.2d 385, 40 C.A.2d 643—Ex parte Leuschen, 25 P.2d 243, 134 C.A. 246—Ex parte Scott, 259 P. 101, 85 C.A. 170.

People v. Radich, 294 P. 1, 111 C. A., Supp., 779.

Idaho.—State v. Campbell, 219 P.2d 956, 70 Idaho 408.

Ind.—Borton v. State, 106 N.E.2d 392, 230 Ind. 679—Huffman v. State, 185 N.E. 131, 205 Ind. 75.

Iowa.—State v. Lansman, 60 N.W.2d 815, 245 Iowa 102—State v. Mc-

Cutchan, 259 N.W. 23, 219 Iowa 1029.

Neb.—White v. State, 280 N.W. 433, 135 Neb. 154.

N.Y.—People v. Whiteman, 76 N.Y.S. 211, 72 App.Div. 90.

People v. Miller, 89 N.Y.S.2d 790.

Tex.—Browder v. State, 292 S.W.2d 342, 163 Tex.Cr. 375—Glover v. State, 256 S.W.2d 107, 158 Tex.Cr. 428—Pallage v. State, 253 S.W.2d 47, 158 Tex.Cr. 41—Coffee v. State, 184 S.W.2d 278, 148 Tex.Cr. 71.

Wash.—State v. Bradley, 69 P.2d 819, 190 Wash. 538.

Unawareness of balance

The crime is not committed by one who, unaware of his balance, draws a check in excess of balance.

Ark.—Mortensen v. State, 217 S.W. 2d 325, 214 Ark. 528.

Knowledge alone insufficient

That the funds are insufficient will not alone suffice, in absence of intent to defraud, if accused planned and expected to be able to meet all checks at presentment time.

U.S.—U. S. v. Broxmeyer, C.A.N.Y., 192 F.2d 230.

Where information charges false pretenses generally rather than violation of bad check law, knowledge of the insufficiency of funds is immaterial.

S.D.—State v. Bundrock, 207 N.W. 484, 49 S.D. 483.

Knowledge of agent

Principal could not be convicted where his agent issued check in absence of principal, there being no evidence that principal had knowledge of insufficiency of funds.

N.C.—State v. Baker, 155 S.E. 249, 199 N.C. 578.

62.5 Del.—Mumford v. State, 144 A. 2d 150.

62.10 Iowa.—State v. Lansman, 60 N.W.2d 815, 245 Iowa 102.

Obtaining of property generally see infra §§ 24–27.

A "check kite" is a scheme whereby false credit is obtained by exchange and passing of worthless checks between two banks.

U.S.—Falconi v. Federal Deposit Ins. Corp., C.A.Pa., 257 F.2d 287.

Gist of crime of passing false and bogus checks is in obtaining, with fraudulent intent, money, property, or a valuable thing by means of or use of bogus check; unless giving of a check is an inducement for change of possession, or passing of title to money or property, no offense has

been committed under the bogus-check act.

Okl.—Snider v. State, Cr., 338 P.2d 892.

63. Cal.—People v. Burnett, 247 P.2d 828, 39 C.2d 556.

Ex parte Griffin, 257 P. 458, 83 C.A. 779—People v. Wilkins, 228 P. 367, 67 C.A. 758.

Ga.—Highsmith v. State, 143 S.E. 445, 38 Ga.App. 192.

Iowa.—State v. Doudna, 284 N.W. 113, 226 Iowa 351.

Ky.—Hughes v. Commonwealth, 18 S.W.2d 880, 230 Ky. 37—King v. Commonwealth, 261 S.W. 1096, 203 Ky. 163.

Mich.—People v. Jacobson, 227 N.W. 781, 248 Mich. 639.

Miss.—Hammack v. State, 75 So. 436, 114 Miss. 611.

Ohio.—State v. Vice, Com.Pl., 70 N.E. 2d 125.

Okl.—Huckaby v. State, 211 P. 525, 22 Okl.Cr. 376.

Utah.—State v. Trostad, 100 P.2d 564, 98 Utah 565.

Va.—*Corpus Juris Secundum* cited in Hubbard v. Commonwealth, 109 S. E.2d 100, 104.

Personal knowledge is equivalent to express notice within proviso that statute making it offense to draw check without sufficient funds does not apply, where payee has been expressly notified of such fact prior to drawing of check; hence if payee agreed, as by implication, to accept checks, knowing they might not then be good and to extend credit until paid on redeposit, drawer's act in giving checks without sufficient funds on deposit did not constitute offense.

U.S.—Seaboard Oil Co. v. Cunningham, C.C.A.Fla., 51 F.2d 321, certiorari denied 52 S.Ct. 35, 284 U.S. 657, 76 L.Ed. 557.

Knowledge of corrupt agent

Where defendant bribed employees of a bank to cash worthless checks drawn by defendant on other banks, the knowledge of such employees was not knowledge of the defrauded bank so as to relieve defendant of liability.

Cal.—People v. Zimmer, 73 P.2d 923, 23 C.A.2d 581.

Request or agreement to defer presentment

(1) Several authorities have held that where the parties agree at the time the check is issued that it shall not be presented for payment until a later day, and the fair implication is that there are not sufficient funds

ing, the transaction being in its essential nature an extension of credit to the drawer.^{63.5}

In at least one jurisdiction, however, the offense of issuing a check with knowledge of the insufficiency of funds is held to be unrelated to the false-pretense, false-token, or bogus-check group of crimes,⁶⁴ so that an intent to defraud,⁶⁵ or the accomplishment of the fraud,^{65.5} is not an element of the offense, and the knowledge of the person to whom the check is issued of the insufficiency of the funds is immaterial.⁶⁶

Under most authorities, to constitute the crime, the insufficiency of the funds must exist at the time the check is issued.⁶⁷ If there were sufficient funds on deposit at that time, the offense is not committed,

even though by subsequent changes the funds were rendered insufficient;⁶⁹ but this is not true where the drawer knows that other checks which he has drawn, but which have not yet cleared, will deplete the fund before the check in question can be presented.⁷⁰ It has also been held that the sufficiency of funds or credit is determinable at the time of presentment of the check for payment.^{70.5} If accused had credit with the bank, or an arrangement or understanding with it that the check would be paid despite the insufficiency of the funds on deposit, the offense is not committed.⁷¹

Under a number of worthless-check statutes, the crime is complete, if it has been committed at all, when the making, delivery, or uttering of the check takes place,⁷² and it is immaterial whether payment

at the time of presentation, the offense is not committed.

N.Y.—People on Complaint of Indig v. Kapitoofsky, 258 N.Y.S. 861, 144 Misc. 543.

Tex.—Lloyd v. State, 266 S.W. 785, 98 Tex.Cr. 504.

(2) However, it has been held that the giving of a check with a request to withhold presentment may, under certain circumstances, constitute a false pretense under the general false pretense statute.

W.Va.—State v. Augustine, 171 S.E. 111, 114 W.Va. 143.

(3) In North Carolina, an agreement to withhold depositing the check until a later date does not exculpate the drawer.

N.C.—State v. Jackson, 90 S.E.2d 507, 243 N.C. 216—State v. Levy, 18 S.E.2d 355, 220 N.C. 812.

(4) Earlier authority was to the contrary effect.

N.C.—State v. Tatum, 172 S.E. 405, 205 N.C. 784.

Giving of undated check in settlement of running account and for additional goods, date to be inserted on presentation because of insufficient funds to cover when given, and presentment at different times and non-payment, was insufficient to justify conviction for intent to defraud, where maker had at different times after delivery of check sufficient money on deposit to cover.

Mo.—State v. Humphrey, App., 74 S.W.2d 86.

63.5 Ariz.—State v. Ellis, 189 P.2d 717, 67 Ariz. 7.

Idaho.—State v. Eikelberger, 239 P.2d 1069, 72 Idaho 245, 29 A.L.R.2d 1176.

64. Kan.—State v. Avery, 207 P. 838, 111 Kan. 588, 23 A.L.R. 453.

65. Kan.—State v. Beam, 267 P.2d 509, 175 Kan. 814—State v. Bechtelheimer, 100 P.2d 657, 151 Kan. 582—State v. Gillen, 99 P.2d 832,

151 Kan. 359—State v. Avery, 207 P. 838, 111 Kan. 588, 23 A.L.R. 453.

65.5 Kan.—State v. Beam, 267 P.2d 509, 175 Kan. 814.

66. Kan.—State v. Avery, 207 P. 838, 111 Kan. 588, 23 A.L.R. 453.

Agreement to treat check as note

An understanding between the maker and payee of a no-fund check that the check is to be held and treated as a note does not constitute in itself a defense in a prosecution for violation of the no-fund check statute.

Kan.—State v. Doyle, 199 P.2d 164, 166 Kan. 5—State v. Marshall, 106 P.2d 688, 152 Kan. 607.

67. Ala.—Padgett v. State, 131 So. 3, 24 Ala.App. 133.

Cal.—People v. Lane, 300 P.2d 321, 144 C.A.2d 87—People v. Wellington, 193 P.2d 30, 85 C.A.2d 310.

Fla.—Wolfe v. State, 79 So. 449, 76 Fla. 168.

Ga.—Spivey v. State, 8 S.E.2d 677, 62 Ga.App. 507.

68. Ala.—Padgett v. State, 131 So. 3, 24 Ala.App. 133.

Bank's refusal to honor check

Where two partners made bank deposit to credit of partnership, and bank's employees honored ten checks, signed by both partners in firm name but not signed as indicated on bank's signature card, and refused to honor similarly signed subsequent check although there were sufficient funds to partnership's credit, partner was not guilty of issuing check without sufficient funds.

Ky.—Mullins v. Commonwealth, 233 S.W.2d 97, 313 Ky. 525.

69. Ga.—Spivey v. State, 8 S.E.2d 677, 62 Ga.App. 507.

Charge against account

Where drawer has sufficient funds to his credit at the time of issuing the check but the amount is rendered insufficient by reason of a

charge against the drawer in the amount of a check deposited by him which had been dishonored, he is not guilty.

Fla.—Wolfe v. State, 79 So. 449, 76 Fla. 168.

Involuntary bankruptcy of drawer

Under a statute making it a misdemeanor to give a check in payment of farm products, etc., when payment thereon is refused by drawee and seller sustains loss, the drawer is not guilty where payment was refused solely because after the giving of the check and prior to its presentation he was placed in involuntary bankruptcy and funds sufficient to pay the check were seized by the receiver in bankruptcy.

Ga.—Oetgen v. State, 107 S.E. 885, 27 Ga.App. 177.

70. Ind.—Huffman v. State, 185 N.E. 131, 205 Ind. 75.

Tex.—Browder v. State, 292 S.W.2d 342, 163 Tex.Cr. 375.

Condition of account not conclusive

The condition of drawer's account at time check was issued is not conclusive as to his knowledge or lack of knowledge as to whether he had sufficient funds in bank to pay check in full on presentment, and the question, in prosecution for obtaining property under false pretenses by use of false and fraudulent check, is, had he already drawn, or did he thereafter draw or authorize an agent to draw, check against the fund in an amount sufficient to deplete it before the check would, in due course, be presented for payment.

Okl.—Moore v. State, 250 P.2d 46, 96 Okl.Cr. 118.

70.5 Ohio.—State v. De Nicola, 126 N.E.2d 62, 163 Ohio St. 140.

71. Del.—State v. Vandenburg, 198 A. 701, 9 W.W.Harr. 320.

72. Cal.—People v. Zimmer, 73 P.2d 923, 23 C.A.2d 581—People v.

or restitution is subsequently made.⁷³ However, some of the statutes give the drawer thereof a prescribed time, after notice given him, within which to pay it and thereby escape being held to have committed any offense, the absence of such notice preventing conviction;⁷⁴ but such a provision does

Cortze, 290 P. 1083, 108 C.A. 111—
People v. Williams, 230 P. 667, 69
C.A. 169.

Idaho.—State v. Larsen, 286 P.2d
646, 76 Idaho 528.

Kan.—State v. Brennan, 285 P.2d 786,
178 Kan. 313.

Ky.—Hatcher v. Commonwealth, 5 S.
W.2d 882, 224 Ky. 131.

Neb.—Haines v. State, 281 N.W. 860,
135 Neb. 433.

N.Y.—People v. Ledwell, 14 N.Y.S.2d
371.

Okl.—Beach v. State, 230 P. 758, 28
Okl.Cr. 348.

Pa.—Commonwealth v. Rush & Har-
nett, 78 Pa.Super. 404.

Va.—Rosser v. Commonwealth, 66 S.
E.2d 851, 192 Va. 813—Cook v. Com-
monwealth, 16 S.E.2d 635, 178 Va.
251.

Wis.—Merkel v. State, 167 N.W. 802,
167 Wis. 512.

Underlying principle

The so-called "cold check law" is based on the principle that the drawing or uttering of a check is an implied representation that the drawer has present funds on deposit to meet it, and by its provisions if such funds are not present, and this is done with the intent to defraud, a crime is committed.

Ky.—Commonwealth v. Bandy, 165 S.
W.2d 337, 291 Ky. 721.

Presentation to bank unnecessary

Actual presentation of no-fund check by payee to bank was unnecessary in order to make the one who executed the check chargeable with issuing a no-fund check.

Cal.—People v. Ekberg, 211 P.2d 316,
94 C.A.2d 613, certiorari denied 70
S.Ct. 988, 339 U.S. 969, 94 L.Ed.
1377.

By whom and where cashed

It is immaterial that defendant signed checks and delivered them to another person to be cashed, and that they were cashed at places other than bank on which they were drawn.

Cal.—People v. Philbrook, 93 P.2d
577, 34 C.A.2d 449.

Rejection by payee

The making or uttering of check without sufficient funds or credit was sufficient to establish offense of issuing a check without sufficient funds or credit, even though payee rejected the check and there was no completed delivery.

Idaho.—State v. Campbell, 219 P.2d
956, 70 Idaho 408.

73. Cal.—People v. Zimmer, 73 P.2d
923, 23 C.A.2d 581.

Fla.—Shargaa v. State, 84 So.2d 42.

Mo.—State v. Kaufman, App., 308
S.W.2d 333.

Neb.—Haines v. State, 281 N.W. 860,
135 Neb. 433.

Va.—Cook v. Commonwealth, 16 S.E.
2d 635, 178 Va. 251.

Wash.—State v. Carr, 294 P. 1016,
160 Wash. 83.

Giving security

The fact that accused, in a prosecution for obtaining money by means of a bogus check, subsequently gave the prosecuting witness security for the debt owing him, by reason of the transaction, does not affect his guilt.

Okl.—Beach v. State, 230 P. 758, 28
Okl.Cr. 348.

Defendant is entitled to trial if he demands it, notwithstanding he has paid the amount of the check and costs.

S.C.—State v. Lackey, 140 S.E. 232,
142 S.C. 62.

74. Ark.—Patterson v. State, 107 S.
W.2d 545, 194 Ark. 488.

Fla.—Grantham v. State, 90 So. 697,
83 Fla. 16—Wolfe v. State, 79 So.
449, 76 Fla. 168.

Ky.—Siegel v. Commonwealth, 197
S.W. 467, 176 Ky. 772.

Miss.—Johnson v. State, 132 So. 330,
159 Miss. 703.

Tenn.—Malkemus v. State, 129 S.W.
2d 201, 174 Tenn. 547.

W.Va.—State v. Ambrogio, 138 S.E.
322, 103 W.Va. 594—State v. Cun-
ningham, 111 S.E. 835, 90 W.Va.
806.

25 C.J. p 613 note 53.

Constitutionality of such provisions
see supra § 5.

Purpose and intent

(1) Such a provision is a declaration that payment is evidence of a lack of fraudulent intent.

W.Va.—State v. Price, 97 S.E. 582, 83
W.Va. 71, 5 A.L.R. 1247.

(2) It is not intended to destroy or weaken the public policy against the use of criminal processes for collecting debts.

Tenn.—Sears, Roebuck & Co. v.
Steele, 130 S.W.2d 160, 23 Tenn.
App. 275.

Character of notice

(1) Written notice required.

Fla.—Grantham v. State, 90 So. 697,
83 Fla. 16.

Miss.—Johnson v. State, 132 So. 330,
159 Miss. 703.

Tenn.—Jones v. State, 277 S.W.2d
371, 197 Tenn. 667—Payne v. State,
12 S.W.2d 528, 158 Tenn. 209.

Dunn v. Alabama Oil & Gas Co.,
App., 299 S.W.2d 25—Hunter v.
Moore, 276 S.W.2d 754, 38 Tenn.
App. 533.

(2) "Verbal or written notice" re-
quired.

W.Va.—State v. Cunningham, 111 S.
E. 835, 90 W.Va. 806.

Personal service of notice re-
quired.

Miss.—Johnson v. State, 132 So. 330,
159 Miss. 703.

What constitutes payment

(1) Accord and satisfaction for the purpose of payment amounts to payment.

W.Va.—State v. Cunningham, 111 S.
E. 835, 90 W.Va. 806.

(2) Since defendant may avoid conviction by paying the check after dishonor, he may do so by depositing sufficient funds before presentment, and where he makes such a deposit, but the bank diverts the funds to another purpose, defendant is not guilty.

W.Va.—State v. Price, 97 S.E. 582,
83 W.Va. 71, 5 A.L.R. 1247.

(3) A partial belated payment of fifteen dollars on worthless check for two hundred dollars does not render accused immune to criminal prosecution.

Kan.—Ex parte Myers, 237 P. 1026,
119 Kan. 270.

(4) Discharge in bankruptcy of offender is equivalent of payment of civil liability to payee, and may be pleaded as payment, whereby he may procure abatement of criminal prosecution and discharge.

Kan.—Ex parte Myers, supra.

(5) However, a settlement on a credit basis has been held insufficient to exculpate accused, cash payment being required.

N.J.—State v. Parsons, 140 A. 13, 6
N.J.Misc. 76, affirmed 142 A. 918,
105 N.J.Law 253.

Time for presentment and protest

(1) Protest within a reasonable time is ordinarily required.

W.Va.—State v. Ambrogio, 138 S.E.
322, 103 W.Va. 594—State v. Cun-
ningham, 111 S.E. 835, 90 W.Va.
806.

(2) However, it has been held that failure of payee to present check within a reasonable time will not affect the liability of the drawer where the drawer loses nothing by reason of failure to present the check earlier.

W.Va.—State v. Price, 97 S.E. 582, 83
W.Va. 71, 5 A.L.R. 1247.

Aider and abettor

One prosecuted for counseling, aiding, or abetting commission of offense denounced by the worthless check law may procure abatement of the prosecution in the same manner as though he were principal.

Kan.—State v. Johnson, 226 P. 758,
116 Kan. 390.

not protect accused from arrest prior to the expiration of such period.⁷⁵ A provision that failure to make good within a stated period after receipt of notice of dishonor shall be prima facie evidence of certain elements of the crime has been held to be merely a rule of evidence and not to make such failure an element of the offense.⁷⁶

A criminal prosecution under a bad-check statute is not a substitute for an accounting of a joint venture.^{76.5}

c. Present or Past Consideration; Past Indebtedness

Under some statutes the giving of a worthless check for a past indebtedness is not an offense; but this is not true under other bad-check statutes.

Under some statutes denouncing the obtaining of money or property by false pretense or token, the

mere uttering or passing of a worthless check in payment of a past indebtedness does not constitute such crime.⁷⁷ This has also been held true under a statute denouncing the giving of a worthless check with intent to defraud,⁷⁸ because in the absence of simultaneously obtaining money or property there is no intent to defraud;^{78.5} while the giving of a worthless check for past consideration does not ipso facto negative the element of fraud, it is a controlling circumstance where no other element of fraud exists.^{78.10} On the other hand, if the intent to defraud exists, the crime is committed even though the check is given for past consideration.^{78.15}

Under other statutes denouncing the uttering or passing of worthless checks, the obtaining of a present financial consideration is not an ingredient of the crime, the crime being committed even where the check is given for a past-due debt.⁷⁹

Proceedings for abatement of prosecution

Under a statute so providing, defendant is entitled to an abatement of the prosecution on a showing that he had an account at the bank within a stated period prior to the issuance of the check, and that the check was issued without intent to defraud, and if the court finds the facts to be so, defendant is entitled to be discharged on payment into court of the amount of the check and costs. On application for such abatement, the judge has full jurisdiction to hear evidence and determine therefrom existence or nonexistence of the material facts, and the burden is on defendant to establish such facts; and the trial judge may consider all the circumstances and form an opinion respecting the credibility of witnesses, and he and the reviewing court are not obligated to believe defendant's testimony, although it is not positively contradicted.

S.D.—State v. Circuit Court of Minnehaha County, 235 N.W. 509, 58 S.D. 152.

Under former Mississippi statute, failure to pay within such period merely constituted prima facie evidence of guilt, and failure to give notice did not prevent conviction. Miss.—McBride v. State, 104 So. 454, 141 Miss. 186.

75. Ark.—Brewer v. State, 112 S.W. 2d 976, 195 Ark. 477.

Tex.—Brigham v. State, 16 S.W.2d 243, 112 Tex.Cr. 281.

76. Miss.—State v. Puckett, 90 So. 113, 127 Miss. 415.

Mo.—State v. Kaufman, App., 308 S.W.2d 333.

Okl.—Gunther v. State, 276 P. 237, 42 Okl.Cr. 129, followed in 276 P. 239, 42 Okl.Cr. 320.

Pa.—Commonwealth v. Chappell,

Quar.Sess., 7 Pa.Dist. & Co.2d 370, 18 Cambria 92.

Va.—Cook v. Commonwealth, 16 S.E. 2d 635, 178 Va. 251.

Wis.—Merkel v. State, 167 N.W. 802, 167 Wis. 512.

76.5 N.Y.—People v. Stand, 88 N.Y. S.2d 592, 275 App.Div. 153.

77. Or.—State v. Cody, 241 P. 983, 116 Or. 509.

Tex.—Allen v. State, 126 S.W. 571, 58 Tex.Cr. 494.

Where goods are delivered prior to issuance of check, the offense is not committed.

Alaska.—U. S. v. Pearce, 7 Alaska 246.

Miss.—Broadus v. State, 38 So.2d 692, 205 Miss. 147.

S.D.—State v. Bundrock, 207 N.W. 484, 49 S.D. 483.

Entry of item of credit on pre-existing debt

W.Va.—State v. Stout, 95 S.E.2d 639, 59 A.L.R.2d 1154.

78. Ala.—Phillips v. State, 136 So. 480, 24 Ala.App. 456.

Colo.—Moore v. People, 235 P.2d 798, 124 Colo. 197.

Ga.—Berry v. State, 111 S.E. 669, 153 Ga. 169.

Vasser v. Berry, 69 S.E.2d 701, 85 Ga.App. 435.

Ky.—Maggard v. Commonwealth of Kentucky, 262 S.W.2d 672—Tartar v. Commonwealth, 102 S.W.2d 971, 267 Ky. 502—Commonwealth v. Hammock, 250 S.W. 85, 198 Ky. 785.

La.—State v. McLean, 44 So.2d 698, 216 La. 670.

Miss.—Broadus v. State, 38 So.2d 692, 205 Miss. 147.

N.M.—State v. Davis, 194 P. 882, 26 N.M. 523.

Okl.—Sharkey v. State, Cr., 329 P.2d 682.

Pa.—Commonwealth v. Martin, 13 Pa. Dist. & Co.2d 612.

Tex.—Colin v. State, 168 S.W.2d 500, 145 Tex.Cr. 371.

W.Va.—State v. Pishner, 78 S.E. 752, 72 W.Va. 603.

78.5 Ky.—Maggard v. Commonwealth of Kentucky, 262 S.W.2d 672.

N.J.—State v. Riccardo, 107 A.2d 807, 32 N.J.Super. 89.

Tex.—Colin v. State, 168 S.W.2d 500, 145 Tex.Cr. 371.

Concurrence in time

The offense of issuing worthless checks in exchange for anything of value with intent to defraud is committed only when there is a concurrence in point of time of an intent to defraud, the receipt of title and possession of a thing of value, and the giving of the worthless check in payment therefor, and it does not include the giving of a check for an antecedent debt.

La.—State v. McLean, 44 So.2d 698, 216 La. 670.

78.10 N.J.—State v. Goerdes, 137 A. 2d 100, 48 N.J.Super. 293—State v. Riccardo, 107 A.2d 807, 32 N.J.Super. 89.

78.15 N.J.—State v. Goerdes, 137 A. 2d 100, 48 N.J.Super. 293.

One of typical instances in which the giving of a check for past consideration might be tainted with intent to defraud is where the maker obtains extension of credit or relief from threatened legal action.

N.J.—State v. Goerdes, supra—State v. Riccardo, 107 A.2d 807, 32 N.J.Super. 89.

79. Ariz.—State v. Meeks, 247 P. 1099, 30 Ariz. 436.

Ark.—Smith v. State, 174 S.W.2d 555, 206 Ark. 154.

Cal.—People v. Williams, 230 P. 667,

d. Postdated Check

The authorities differ as to whether the fact that a check is postdated relieves accused of criminal liability.

Some authorities hold that the fact that a worthless check is postdated does not protect accused,⁸⁰ even if the payee has actual knowledge that there are not sufficient funds on deposit at the time of issuance.⁸¹

Other authorities hold that the crime is not made out where the payee knows that there are not sufficient funds, but takes the check in reliance on the

drawer's promise that there will be sufficient funds on the date of the check,⁸² or where the maker calls to the attention of the payee that the check is postdated or makes with him an arrangement to hold it.^{82.5} A number of authorities go even further, and, on the theory that postdating a check implies the present insufficiency of funds, hold that in any such case the offense is not committed,⁸³ unless such circumstances or additional representations are involved as to negative the implication of insufficiency,⁸⁴ or hold that a postdated check, being

69 C.A. 169—*People v. Khan*, 182 P. 803, 41 C.A. 393.

D.C.—*Clarke v. U. S.*, Mun.App., 140 A.2d 181.

Fla.—*Shargaa v. State*, 84 So.2d 42. Mo.—*State v. Taylor*, 73 S.W.2d 378, 335 Mo. 460, 95 A.L.R. 476.

N.Y.—*People v. Nibur*, 264 N.Y.S. 148, 238 App.Div. 233—*People v. Humphries*, 234 N.Y.S. 688, 226 App.Div. 500.

Ohio.—*State v. Lowenstein*, 142 N.E. 897, 109 Ohio St. 393, 35 A.L.R. 361.

Gutridge v. State, 173 N.E. 447, 37 Ohio App. 1, error dismissed 174 N.E. 140, 122 Ohio St. 623.

Or.—*State v. Cody*, 241 P. 983, 116 Or. 509.

Wash.—*State v. Bradley*, 69 P.2d 819, 190 Wash. 538.

Statute held constitutional

Mo.—*State v. Brookshire*, 325 S.W. 2d 497.

Under former Missouri law, giving a check in payment of a past-due account, without funds to meet it, was not an offense.

Mo.—*State v. Hack*, App., 284 S.W. 842.

80. Ark.—*Patterson v. State*, 107 S.W.2d 545, 194 Ark. 488.

Cal.—*People v. Weaver*, 274 P. 361, 96 C.A. 1.

Idaho.—**Corpus Juris Secundum cited in** *State v. Eikelberger*, 239 P.2d 1069, 1071, 72 Idaho 245, 29 A.L.R. 2d 1176.

Ill.—*People v. Westerdahl*, 146 N.E. 737, 316 Ill. 86.

Kan.—*Application of Windle*, 294 P. 2d 213, 179 Kan. 239—*State v. Avery*, 207 P. 838, 111 Kan. 588, 23 A.L.R. 453.

Mo.—*State v. Taylor*, 73 S.W.2d 378, 335 Mo. 460, 95 A.L.R. 476.

Neb.—*White v. State*, 280 N.W. 433, 135 Neb. 154.

Ohio.—*State v. De Nicola*, 126 N.E. 2d 62, 163 Ohio St. 140.

Tex.—**Corpus Juris Secundum quoted in** *Carter v. State*, 203 S.W.2d 540, 543, 150 Tex.Cr. 448.

25 C.J. p 613 note 52.

Legislative purpose in enacting bogus-check statute should not be defeated by an interpretation which

would permit one bent on fraud to protect himself by using a postdate on the check, and if other requirements of statute are met, one who criminally defrauds with a postdated check should be held as responsible as one who knowingly passes a bad check with a current date.

Utah.—*State v. Bruce*, 262 P.2d 960, 1 Utah 2d 136.

Sufficiency of funds when drawn

Where the drawer had sufficient funds when he drew a postdated check, and payee changed the date and presented the check before the original date, the drawer having meanwhile withdrawn part of the funds so that the balance was insufficient, the drawer could not, before the date originally appearing on the check, be held for fraudulently issuing a worthless check.

Cal.—*Ex parte Scott*, 259 P. 101, 85 C.A. 170.

Former Arkansas statute was held inapplicable to a postdated check.

Ark.—*Smith v. State*, 226 S.W. 531, 147 Ark. 49.

81. Kan.—*State v. Johnson*, 226 P. 758, 116 Kan. 390.

Mo.—*State v. Taylor*, 73 S.W.2d 378, 335 Mo. 460, 95 A.L.R. 476.

82. Fla.—*Anderson v. Bryson*, 115 So. 505, 94 Fla. 1165.

Ga.—*Strickland v. State*, 110 S.E. 39, 27 Ga.App. 772.

Mont.—*State v. Patterson*, 243 P. 355, 75 Mont. 315.

N.Y.—*People v. Blanchard*, 90 N.Y. 314.

Pa.—*Commonwealth v. Massaro*, 97 Pa.Super. 149.

Tenn.—*Cook v. State*, 94 S.W.2d 386, 170 Tenn. 245.

Utah.—*State v. Bruce*, 262 P.2d 960, 1 Utah 2d 136.

82.5 Idaho.—*State v. Eikelberger*, 239 P.2d 1069, 72 Idaho 245, 29 A.L.R.2d 1176.

Tex.—*Carter v. State*, 203 S.W.2d 540, 150 Tex.Cr. 448.

Check no more than note

(1) Where payee takes a postdated check with full knowledge that it is postdated, and it is not represented by the maker as being good at time

given, and there is merely a representation that money will be deposited in bank at some future date, the check is no more than a note, and is not a representation on which a charge of false pretense can be successfully based.

Ark.—*James v. State*, 236 S.W.2d 429, 218 Ark. 335.

(2) Where seller had accepted buyer's postdated check for goods sold and seller applied subsequent part payments as credit on check, check was given as promissory note to be paid on a future date and therefore, buyer had not issued a cold and worthless check within meaning of statute, and cold-check statute does not apply to drawer of note who fails to make payment at maturity. Ky.—*Gibbs v. Commonwealth*, 273 S.W.2d 583.

83. Ga.—*Neidlinger v. State*, 88 S.E. 687, 17 Ga.App. 811.

Ind.—*Nedderman v. State*, 152 N.E. 800, 198 Ind. 187.

Iowa.—*State v. Doudna*, 284 N.W. 113, 226 Iowa 351.

N.J.—*State v. Barone*, 118 A. 779, 98 N.J.Law 9.

N.Y.—*People v. Mazeloff*, 242 N.Y.S. 623, 229 App.Div. 451.

Azzarello v. Richards, 99 N.Y.S. 2d 597, 198 Misc. 723—*People on Complaint of Indig v. Kapitofsky*, 258 N.Y.S. 861, 144 Misc. 543.

Pa.—*Commonwealth v. Martin*, 13 Pa. Dist. & Co.2d 612.

Tenn.—*Cook v. State*, 94 S.W.2d 386, 170 Tenn. 245.

Effect of postdating

Postdating of check merely implies or constitutes a promise that on its date drawer will have, or expects to have, funds in bank sufficient to insure its payment.

Ind.—*Brown v. State*, 76 N.E. 881, 166 Ind. 85, 8 Ann.Cas. 1068.

N.C.—*State v. Crawford*, 152 S.E. 504, 198 N.C. 522.

Giving postdated checks for past account

does not authorize conviction under worthless check statute. N.C.—*State v. Byrd*, 167 S.E. 626, 204 N.C. 162.

84. N.J.—*State v. Barone*, 118 A. 779, 98 N.J.Law 9.

merely an obligation in the future, is not a violation of the statute.^{84.5} However, a check not dated is not equivalent to a postdated check.^{84.10}

e. Stopping Payment

The question whether an accused is guilty of an offense when he stops payment on a check depends on the sufficiency of funds or credit in the bank at the time the instrument is made or uttered.

It has been held that stopping payment on a check does not alter the offense of making, uttering, or delivering a check with intent to defraud and without sufficient funds in the bank on which it is drawn.⁸⁵ On the other hand, where defendant stops payment on a good check, the crime of obtaining money or property by false pretenses cannot be made out on the theory that the undisclosed intention to stop payment constituted a false pretense;⁸⁶ nor does stopping payment of a good check given for a past-due debt constitute the offense of swindling by obtaining money or property through the use of a worthless check,⁸⁷ or the offense of withdrawing deposits with intent to defeat payment of a check.⁸⁸

One stopping payment on a check after obtaining a benefit thereunder and with intent to defraud may be guilty of cheating and swindling, but is not guilty of uttering a bad check.^{88.5}

However, where instructions were given to the bank before the check was issued to refuse payment of any check made out in the manner of the one given the prosecutor, the effect is the same as if defendant had not sufficient credit with the bank, even though actually there were sufficient funds on deposit.⁸⁹

§ 22. Effectiveness of Pretense; Reliance Thereon

To create an offense, it is not sufficient that there is a false pretense; the pretense must be an effective cause in inducing the owner to part with his property, although it need not be the sole inducing cause. It must have been made before the property was obtained.

A false pretense is not penal until the crime is completed by the prosecutor being led into believing it;^{89.50} but it is not necessary that the person defrauded should have exercised diligence,^{89.55} or made any investigation which would have showed him the true state of the case, as discussed *supra* § 15.

To create an offense, it is not sufficient that there is a false pretense; the owner of the property must rely on it, and it must be an effective or moving cause in inducing him to part with his property,⁹⁰

Check dated next day

Where check issued after banking hours was dated the next day, and maker gave the reason that it was too late to cash it on that day, the fact that check was postdated did not bar prosecution for false uttering of bank check.

Iowa.—State v. Doudna, 284 N.W. 113, 226 Iowa 351.

84.5 Ind.—Moss v. State, 159 N.E.2d 119.

84.10 Pa.—Commonwealth v. Martin, 13 Pa. Dist. & Co.2d 612.

85. Pa.—Commonwealth v. Levin, 29 Berks Co. 317.

86. S.D.—State v. Alick, 252 N.W. 644, 62 S.D. 220.

Statement of intention as pretense generally see *supra* § 10.

87. Tex.—Currelin v. State, 6 S.W.2d 767, 110 Tex. Cr. 18.

88. Fla.—Nash v. State, 160 So. 385, 118 Fla. 875.

88.5 Ga.—Downs v. State, 107 S.E.2d 569, 99 Ga. App. 43.

89. Cal.—People v. Khan, 182 P. 803, 41 C.A. 393.

89.50 Ga.—Walker v. State, 78 S.E. 2d 545, 89 Ga. App. 101.

89.55 Ga.—Walker v. State, *supra*—Suggs v. State, 25 S.E.2d 532, 69 Ga. App. 383.

90. U.S.—Bank of Altenburg v. Fi-

delity & Cas. Co. of New York, D.C. Mo., 118 F.Supp. 529, affirmed, C.A., Fidelity & Cas. Co. of New York v. Bank of Altenburg, 216 F.2d 294, certiorari denied 75 S.Ct. 440, 348 U.S. 952, 99 L.Ed. 744.

Ala.—Primus v. State, 111 So. 194, 21 Ala. App. 630.

Ariz.—Maseeh v. State, 47 P.2d 423, 46 Ariz. 94.

Cal.—People v. Weitz, 267 P.2d 295, 42 C.2d 338, certiorari denied 74 S. Ct. 859, 347 U.S. 993, 98 L.Ed. 1126 —Parks v. Superior Court in and for Alameda County, 241 P.2d 521, 38 C.2d 609.

People v. Robertson, App., 334 P.2d 938—People v. Andrews, 332 P.2d 408, 165 C.A.2d 626—People v. Platt, 268 P.2d 529, 124 C.A.2d 123—People v. Schmitt, 317 P.2d 673, 155 C.A.2d 87—People v. Frankfort, 251 P.2d 401, 114 C.A.2d 680 —People v. Alba, 117 P.2d 63, 46 C.A.2d 859—People v. Foster, 3 P. 2d 586, 117 C.A. 252—People v. Leaverton, 289 P. 890, 107 C.A. 51 —People v. Harrington, 267 P. 942, 92 C.A. 245—People v. Daniels, 222 P. 387, 64 C.A. 514—People v. Has-kins, 194 P. 43, 49 C.A. 640—Peo-ple v. Neetens, 184 P. 27, 42 C.A. 596.

People v. Cale, 288 P. 430, 106 C. A.Supp. 777.

Fla.—Ex parte Stirrup, 19 So.2d 712, 155 Fla. 173—State ex rel. Warren

v. Sweat, 185 So. 453, 135 Fla. 661 —Clifton v. State, 79 So. 707, 79 Fla. 244.

Ga.—Diamond v. State, 182 S.E. 813, 52 Ga. App. 184.

Idaho.—State v. Stratford, 37 P.2d 681, 55 Idaho 65—State v. Whitney, 254 P. 525, 43 Idaho 745.

Ill.—People v. Blume, 178 N.E. 48, 345 Ill. 524.

Ind.—Harrod v. State, 161 N.E. 3, 200 Ind. 24—Gillespie v. State, 142 N.E. 220, 194 Ind. 154—McCann v. State, 128 N.E. 848, 189 Ind. 677.

Kan.—State v. Handke, 340 P.2d 877.

Ky.—Sweeton v. Commonwealth, 275

S.W. 827, 210 Ky. 340.

Md.—Simmons v. State, 167 A. 60, 165 Md. 155.

Mass.—Commonwealth v. Levine, 181 N.E. 851, 280 Mass. 83.

Mich.—People v. Lee, 243 N.W. 227, 259 Mich. 355.

Minn.—State v. Nuser, 271 N.W. 811, 199 Minn. 315—State v. Anderson, 199 N.W. 6, 159 Minn. 245.

Miss.—*Corpus Juris Secundum* cited in Breland v. State, 77 So.2d 300, 301, 222 Miss. 792—Martin v. State, 28 So.2d 169, 200 Miss. 142—King v. State, 86 So. 874, 124 Miss. 477.

Mo.—State v. Neal, 169 S.W.2d 686, 350 Mo. 1002—State v. Herman, 162 S.W.2d 873.

Mont.—*Corpus Juris* quoted in State v. Foot, 48 P.2d 1113, 1115, 106

and there must be a causal relation between the representation made and the delivery of the property.^{90.5} Therefore, the offense is not committed if the owner has knowledge of the truth or does not believe the pretense,⁹¹ or does not part with his

money in reliance thereon,^{91.5} or, although believing it, yet parts with the property on some other inducement,⁹² or investigates it and parts with the property, relying entirely on the results of his investigation.⁹³ Although the owner makes some investiga-

Mont. 33—State v. Bratton, 186 P. 327, 56 Mont. 563.

Neb.—**Corpus Juris Secundum** cited in *Beyl v. State*, 85 N.W.2d 653, 659, 165 Neb. 260—**Corpus Juris** quoted in *Brennan v. State*, 3 N.W.2d 217, 222, 141 Neb. 205—**Corpus Juris** quoted in *Goldman v. State*, 260 N.W. 373, 376, 128 Neb. 684.

N.J.—State v. Kaufman, 106 A.2d 333, 31 N.J.Super. 225, modified on other grounds 112 A.2d 721, 18 N.J. 75.

N.Y.—Kean v. Maryland Casualty Co., 223 N.Y.S. 373, 221 App.Div. 184, affirmed 162 N.E. 514, 248 N.Y. 534.

People v. Leibowitz, 176 N.Y.S.2d 141, 12 Misc.2d 553—People v. Rossi, 169 N.Y.S.2d 686, 9 Misc.2d 913, reversed in part on other grounds 180 N.Y.S.2d 348, 7 A.D.2d 648—People v. Krumme, 292 N.Y.S. 657, 161 Misc. 278.

N.C.—State v. Howley, 16 S.E.2d 705, 220 N.C. 113—State v. Corey, 153 S.E. 923, 199 N.C. 209—State v. Poe, 150 S.E. 25, 197 N.C. 601—State v. McFarland, 105 S.E. 179, 180 N.C. 726.

Okl.—Oliver v. State, 130 P.2d 321, 75 Okl.Cr. 244—Nemecek v. State, 114 P.2d 492, 72 Okl.Cr. 195, 135 A.L.R. 1149—Hawkins v. State, 32 P.2d 101, 55 Okl.Cr. 396—Helsey v. State, 193 P. 50, 18 Okl.Cr. 98, 17 A.L.R. 197.

Pa.—Commonwealth v. Johnson, 167 A. 344, 312 Pa. 140, 89 A.L.R. 333. Commonwealth v. Mann, 86 Pa. Super. 464.

S.D.—State v. Bundrock, 207 N.W. 484, 49 S.D. 483.

Tex.—Eason v. State, Cr., 320 S.W.2d 11—Parks v. State, 166 S.W.2d 704, 145 Tex.Cr. 150—Nash v. State, 29 S.W.2d 359, 115 Tex.Cr. 324—Noblett v. State, 281 S.W. 849, 103 Tex. Cr. 550—Whitley v. State, 236 S.W. 470, 90 Tex.Cr. 503—Taylor v. State, 232 S.W. 525, 89 Tex.Cr. 618—Escue v. State, 227 S.W. 483, 88 Tex.Cr. 447.

Utah.—State v. Trogstad, 100 P.2d 564, 98 Utah 565—State v. Morris, 38 P.2d 1097, 85 Utah 210.

Wis.—Corseot v. State, 190 N.W. 465, 173 Wis. 661.

25 C.J. p 599 note 89.

Creation of credit

The essential element of the offense of obtaining goods by false pretenses is that the false pretense creates the credit.

Tenn.—Ownbey v. State, 253 S.W.2d 726, 194 Tenn. 500.

Under worthless check act

(1) It is essential to conviction under worthless check act that person who received worthless check relied on representations of accused and was thereby fraudulently induced to part with his money or property.

Md.—Kaufman v. State, 85 A.2d 446, 199 Md. 35.

Miss.—Broadus v. State, 38 So.2d 692, 205 Miss. 147.

Okl.—Simpson v. State, Cr., 267 P. 2d 1008.

(2) Worthless check statutes generally see supra § 21.

Counterfeit letter

To authorize a conviction of obtaining money by color of a counterfeit letter, there must be some evidence that money obtained by defendant from alleged victim was by color of counterfeit letter.

Ga.—Shackleford v. State, 47 S.E.2d 890, 77 Ga.App. 31.

Complainant's following a natural course of conduct does not show absence of reliance.

R.I.—State v. Considine, 186 A. 676, 56 R.I. 456.

Allaying suspicion

The fact that the victim at some stage in the transaction became suspicious will not prevent conviction where accused by his conduct allayed the suspicions so that the victim continued to rely on the representations.

Tex.—Gerber v. State, 232 S.W. 334, 90 Tex.Cr. 37.

90.5 Fla.—Ex parte Stirrup, 19 So.2d 712, 155 Fla. 173.

91. Cal.—People v. Alba, 117 P.2d 63, 46 C.A.2d 859.

Colo.—Bomareto v. People, 137 P.2d 402, 111 Colo. 99.

Ga.—**Corpus Juris Secundum** cited in Walker v. State, 78 S.E.2d 545, 548, 89 Ga.App. 101.

Ind.—Knopp v. State, 120 N.E.2d 268, 233 Ind. 435.

Miss.—Overall v. State, 90 So. 484, 128 Miss. 59.

Mont.—State v. Foot, 48 P.2d 1113, 100 Mont. 33.

Neb.—**Corpus Juris Secundum** cited in *Beyl v. State*, 85 N.W.2d 653, 659, 165 Neb. 260—*Goldman v. State*, 260 N.W. 373, 128 Neb. 684.

Pa.—Commonwealth v. Johnson, 167 A. 344, 312 Pa. 140, 89 A.L.R. 333. S.D.—State v. Lien, 30 N.W.2d 12, 72 S.D. 94.

Tex.—Eason v. State, Cr., 320 S.W.2d 11—Scott v. State, 228 S.W. 1099, 89 Tex.Cr. 70.

25 C.J. p 600 note 90.

Knowledge of worthlessness of check see supra § 21.

Correction of misstatement

Defendant was held not guilty of false pretense in telling son that father agreed to accept defendant's check, where father told son otherwise.

N.C.—State v. Poe, 150 S.E. 25, 197 N.C. 601.

Constructive notice by reason of public records does not prevent reliance sufficient to warrant conviction.

Cal.—People v. Mace, 234 P. 841, 71 C.A. 10.

Okl.—Hawkins v. State, 32 P.2d 101, 55 Okl.Cr. 396.

Entrapment

Where the prosecutor does not believe the pretense, but parts with his property in order to trap defendant into the commission of the offense, defendant is not guilty.

Tex.—Thorpe v. State, 50 S.W. 383, 40 Tex.Cr. 346.

91.5 Cal.—People v. Frankfort, 251 P.2d 401, 114 C.A.2d 680.

92. Mont.—State v. Foot, 48 P.2d 1113, 100 Mont. 33.

Neb.—**Corpus Juris Secundum** cited in *Beyl v. State*, 85 N.W.2d 653, 659, 165 Neb. 260—**Corpus Juris** quoted in *Brennan v. State*, 3 N.W.2d 217, 222, 141 Neb. 205—*Goldman v. State*, 260 N.W. 373, 128 Neb. 684.

S.D.—State v. Lien, 30 N.W.2d 12, 72 S.D. 94.

25 C.J. p 600 note 91.

93. Cal.—People v. Daniels, 222 P. 387, 64 C.A. 514.

Mont.—**Corpus Juris** quoted in *State v. Foot*, 48 P.2d 1113, 1115, 100 Mont. 33.

Neb.—**Corpus Juris Secundum** cited in *Beyl v. State*, 85 N.W.2d 653, 659, 165 Neb. 260—**Corpus Juris** quoted in *Brennan v. State*, 3 N.W.2d 217, 222, 141 Neb. 205—**Corpus Juris** quoted in *Goldman v. State*, 260 N.W. 373, 376, 128 Neb. 684.

25 C.J. p 600 note 92.

Opportunity to investigate; withdrawal of representations

One accused of false pretenses cannot escape conviction on the ground that his victim was given an opportunity to make an investigation which would have disclosed the fraud, and was told by the former not to rely on his representations, unless it further appears that the victim accepted the withdrawal of

tion of the representations made by accused, to ascertain their truth, yet if he nevertheless would not have parted with the goods but for such representations, believing them true, accused is guilty.⁹⁴

Where the false representation is as to a matter of law, it has been held that the person to whom it was made must have known that it was false and so could not have been induced by it to have parted with his property.⁹⁵

A corporation may be held to have actual knowledge of the alleged false pretense where its agent has knowledge;^{95.5} but knowledge of an agent of the owner of the falsity of the pretense will not be imputed to the owner where accused and the agent conspired to defraud by false pretense;⁹⁶ and the same rule applies where accused, with the collusion of a public official, obtains public funds by false pretense.⁹⁷

Pretense after property obtained. For the reason that the pretense must be effective cause in inducing the owner to part with his property, there can

be no conviction based on a pretense made after the property was obtained.⁹⁸

Other inducements operating. Although the pretense must be an inducing cause of the owner's parting with his property, it need not be the sole inducing cause; it is sufficient if it had a material influence in inducing the owner to part with his property, although he was also influenced in part by other causes.⁹⁹

Remoteness of pretense. In a number of cases it has been held that, although false pretenses were made and property obtained, the pretenses were too remote from the obtaining of the property to sustain an indictment,¹ as, for instance, where a contract has been entered into under false representations and property obtained under the contract.² It has been said, however, that, if a causal relation exists between the contract and the false pretense, the fact that the property was obtained immediately through the contract to which the false pretenses induced the prosecutor to consent is no defense.³

the representations and assumed to act on his own judgment.
D.C.—Partridge v. U. S., 39 App.D.C. 571, Ann.Cas.1917D 622.

94. Mich.—People v. Luttermoser, 81 N.W. 565, 122 Mich. 562.

Mont.—Corpus Juris quoted in State v. Foot, 48 P.2d 1113, 1115, 100 Mont. 33.

Neb.—Corpus Juris Secundum cited in Beyl v. State, 85 N.W.2d 653, 659, 165 Neb. 260—Corpus Juris quoted in Goldman v. State, 260 N.W. 373, 376, 128 Neb. 684.

N.C.—State v. Howley, 16 S.E.2d 705, 220 N.C. 113.

95. Minn.—State v. Edwards, 227 N.W. 495, 178 Minn. 446, 65 A.L.R. 1253.

25 C.J. p 601 note 95.

95.5 Ga.—Walker v. State, 78 S.E. 2d 545, 89 Ga.App. 101.

96. Iowa.—State v. McCutchan, 259 N.W. 23, 219 Iowa 1029.

Mo.—State v. Pierce, 7 S.W.2d 269, 320 Mo. 209.

25 C.J. p 601 note 96.

97. Ky.—Rand v. Commonwealth, 195 S.W. 802, 176 Ky. 343.

S.C.—State v. Talley, 67 S.E. 618, 77 S.C. 99, 122 Am.S.R. 559, 11 L.R.A., N.S., 938.

98. S.D.—State v. Bundrock, 207 N.W. 484, 49 S.D. 483.

25 C.J. p 601 note 99.

Repeating representation after obtaining property

Corporation organizer's similar representations a year after his agent's representations had induced the purchase of stock held not to authorize his conviction.

Mont.—State v. Woolsey, 259 P. 826, 84 Mont. 141.

99. Ala.—Corpus Juris cited in Jones v. State, 182 So. 404, 405, 236 Ala. 30.

Cal.—People v. Weitz, 267 P.2d 295, 42 C.2d 338, certiorari denied Weitz v. People of State of California, 74 S.Ct. 859, 347 U.S. 993, 98 L.Ed. 1126—People v. Ashley, 267 P.2d 271, 42 C.2d 246, certiorari denied Ashley v. People of State of California, 75 S.Ct. 222, 348 U.S. 900, 99 L.Ed. 707.

People v. Robertson, App., 334 P.2d 938—People v. Schmitt, 317 P.2d 673, 155 C.A.2d 87—People v. Staver, 252 P.2d 700, 115 C.A.2d 711—People v. Chamberlain, 214 P.2d 600, 96 C.A.2d 178—Corpus Juris Secundum cited in People v. Chait, 159 P.2d 445, 452, 69 C.A.2d 503—People v. Fisher, 2 P.2d 564, 116 C.A. 243—Corpus Juris cited in People v. Steffner, 227 P. 690, 696, 67 C.A. 1—People v. Whiteside, 208 P. 132, 58 C.A. 33.

Idaho.—Corpus Juris cited in State v. Stratford, 37 P.2d 681, 685, 55 Idaho 65.

Ind.—Greening v. State, 153 N.E. 412, 198 Ind. 706.

Kan.—State v. Handke, 340 P.2d 877—State v. Faulkner, 33 P.2d 175, 139 Kan. 665.

Mass.—National Shawmut Bank of Boston v. Johnson, 58 N.E.2d 849, 317 Mass. 485—Commonwealth v. Steinberg, 163 N.E. 646, 265 Mass. 45—Commonwealth v. Jacobson, 157 N.E. 583, 260 Mass. 311—Commonwealth v. Morrison, 147 N.E. 588, 252 Mass. 116.

Mo.—State v. Neal, 169 S.W.2d 686, 350 Mo. 1002—State v. Wren, 62 S.W.2d 853, 333 Mo. 575.

Neb.—Brennan v. State, 3 N.W.2d 217, 141 Neb. 205.

Nev.—State v. Bacha, 194 P. 1066, 44 Nev. 373.

N.Y.—People v. Burgess, 155 N.E. 745, 244 N.Y. 472.

People v. Lehrer, 45 N.Y.S.2d 170, 182 Misc. 645.

N.C.—State v. McFarland, 105 S.E. 179, 180 N.C. 726.

Okl.—Nemecek v. State, 114 P.2d 492, 72 Okl.Cr. 195, 135 A.L.R. 1149.

Pa.—Commonwealth v. Johnson, Quar.Sess., 21 Lehl.J. 369.

S.D.—State v. Lien, 30 N.W.2d 12, 72 S.D. 94.

Tex.—Green v. State, 161 S.W.2d 114, 144 Tex.Cr. 186—Nash v. State, 31 S.W.2d 445, 116 Tex.Cr. 607—Nob-

litt v. State, 281 S.W. 849, 103 Tex. Cr. 550.

Wash.—State v. Peterson, 70 P.2d 306, 190 Wash. 668.

Wis.—Whitmore v. State, 298 N.W. 194, 238 Wis. 79, 134 A.L.R. 872.

25 C.J. p 601 note 1.

1. Ark.—Morgan v. State, 42 Ark. 131, 48 Am.R. 55.

25 C.J. p 602 note 2.

2. N.Y.—People, on Complaint of McGovern v. Weisbard, 248 N.Y.S. 399, 139 Misc. 385.

25 C.J. p 602 note 3.

3. Cal.—People v. Martin, 36 P. 952, 102 C. 553.

Mass.—Commonwealth v. Morrison, 147 N.E. 588, 252 Mass. 116.

Mich.—People v. Mears, 232 N.W. 353, 251 Mich. 359.

It would seem that if the false pretense is the operative cause of the transfer of the property, and if there is a casual relation between the pretense and the transfer which directly causes the transfer, the remoteness of the pretense is immaterial.⁴

Continuing pretense; lapse of time. A number of cases have based the criminal liability of accused on the doctrine of continuing pretenses, under which, if the pretense is the inducing cause, it is immaterial that there has been a lapse of time between the pretense and the obtaining of the property;⁵ and the representations will be treated as continuing so as to cover any money, property, or services received as a result thereof.^{5.5}

Merger of prior negotiations into contract. The rule applicable in civil cases that all prior negotiations are merged into a subsequent contract in writing is not applicable in a prosecution for obtaining money under false pretenses involving the issue

whether certain false representations were made, were relied on, and resulted in money loss.^{5.10}

§ 23. Knowledge of Accused of Falsity of Pretense and of Reliance Thereon

To constitute the crime of false pretenses, there must be knowledge on the part of accused of the falsity of his pretense and knowledge, or reason to believe, that his representations are relied on as the ground of credit.

Since there can be no intent to obtain property by means of a false pretense unless accused knows the pretense to be untrue, such knowledge on his part is essential to the commission of the crime;⁶ so, if accused believes in the truth of the representation made, although it is untrue, the offense is not committed.⁷ However, making a statement recklessly and without information justifying a belief in its truth has been held tantamount to the utterance of a statement knowing it to be false;⁸ but there

4. Cal.—People v. Martin, 36 P. 952, 102 C. 558.

Mass.—Commonwealth v. Lee, 21 N. E. 299, 149 Mass. 179.

5. Cal.—People v. Ashley, 267 P.2d 271, 42 C.2d 246, certiorari denied Ashley v. People of State of California, 75 S.Ct. 222, 348 U.S. 900, 99 L.Ed. 707—People v. Rabe, 261 P. 303, 202 C. 409.

People v. Frankfort, 251 P.2d 401, 114 C.A.2d 680—People v. Breyer, 34 P.2d 1065, 139 C.A. 547, hearing denied 34 P.2d 1067, 139 C.A. 547.

Ga.—De Krasner v. State, 187 S.E. 402, 54 Ga.App. 41.

Ill.—People v. Gruber, 200 N.E. 483, 362 Ill. 278.

Okl.—*Corpus Juris* quoted in Troup v. State, 2 P.2d 591, 592, 51 Okl. Cr. 438.

25 C.J. p 602 note 6.

5.5 Cal.—People v. Adams, 290 P.2d 944, 137 C.A.2d 660—People v. Frankfort, 251 P.2d 401, 114 C.A.2d 680—People v. Davis, 246 P.2d 160, 112 C.A.2d 286.

5.10 N.J.—State v. Hubschman, 45 A. 2d 316, 133 N.J.Law 520.

6. Cal.—People v. Davis, 246 P.2d 160, 112 C.A.2d 286—People v. Burnett, 69 P.2d 1028, 21 C.A.2d 613—People v. Neetens, 184 P. 27, 42 C.A. 596.

Fla.—State ex rel. Warren v. Sweat, 185 So. 453, 135 Fla. 661.

Ga.—Kemp v. State, 6 S.E.2d 196, 61 Ga.App. 337—Diamond v. State, 182 S.E. 813, 52 Ga.App. 337—James v. State, 153 S.E. 644, 43 Ga.App. 324.

Ill.—People v. Schneider, 158 N.E. 448, 327 Ill. 270.

Ind.—Anderson v. State, 32 N.E.2d 705, 218 Ind. 299.

Iowa.—State v. Huckins, 234 N.W. 554, 212 Iowa 283—State v. Hixson, 217 N.W. 814, 205 Iowa 1321—State v. Sherman, 166 N.W. 674, 183 Iowa 42.

Minn.—State v. Nuser, 271 N.W. 811, 199 Minn. 315—State v. Anderson, 199 N.W. 6, 159 Minn. 245.

Miss.—King v. State, 86 So. 874, 124 Miss. 477.

Mo.—State v. Houchins, 46 S.W.2d 891.

Mont.—State v. Foot, 48 P.2d 1113, 100 Mont. 33—State v. Bratton, 186 P. 327, 56 Mont. 563.

N.J.—*Corpus Juris Secundum* cited in State v. Greco, 148 A.2d 164, 167, 29 N.J. 94.

State v. Samurine, 135 A.2d 574, 47 N.J.Super. 172, reversed on other grounds 142 A.2d 612, 27 N.J. 322.

N.Y.—People v. Burgess, 155 N.E. 745, 244 N.Y. 472.

N.C.—State v. McFarland, 105 S.E. 179, 180 N.C. 726.

Pa.—Commonwealth v. Ferguson, 95 Pa.Super. 153—Commonwealth v. Schmidt, 95 Pa.Super. 102.

S.D.—State v. Lien, 30 N.W.2d 12, 72 S.D. 94.

Wis.—Corscot v. State, 190 N.W. 465, 178 Wis. 661.

25 C.J. p 604 note 16.

Accused's knowledge of worthlessness of check see supra § 21.

Intent to defraud see supra § 7.

"From the earliest days of the common law, the element of scienter, the willful and corrupt mind, has been of the essence of the crime of obtaining money or property by false pretenses."

S.D.—State v. Pickus, 257 N.W. 284, 289, 63 S.D. 209.

Falsity by operation of law

Where noncompliance with the

Bulk Sales Law resulted in the attachment of creditors' liens and in the injury complained of, and neither of the parties knew of such law, a representation by defendant, made during negotiations for the sale of a business, that the goods were free from liens did not involve the requisite intent to defraud to constitute the offense of obtaining money by false pretenses.

Colo.—Roberts v. People, 205 P. 272, 71 Colo. 198.

"**Designedly false**" means, in substance, willfully, knowingly, and intentionally false, and false pretense is "designedly" made, as required by statute to constitute such crime, when made with knowledge of its falsity.

S.D.—State v. Lien, 30 N.W.2d 12, 72 S.D. 94—State v. Pickus, 257 N.W. 284, 63 S.D. 209.

7. Iowa.—State v. Huckins, 234 N. W. 554, 212 Iowa 283.

25 C.J. p 604 note 17.

8. Cal.—People v. Davis, 246 P.2d 160, 112 C.A.2d 286.

N.Y.—People v. Burgess, 155 N.E. 745, 244 N.Y. 472.

N.C.—State v. McFarland, 105 S.E. 179, 180 N.C. 726.

25 C.J. p 604 note 18.

Accused chargeable with knowledge

In prosecution of cashier and general manager for sale of stock in failing bank by false pretenses, accused was chargeable with knowledge of conditions obvious in records of bank and responsible for representations made with intent to deceive and defraud purchaser, regardless of whether he knew of conditions disclosed by records.

Kan.—State v. Lintner, 41 P.2d 1036, 141 Kan. 505.

is authority to the contrary,⁹ particularly where the statute requires the false statement to have been "designedly" made.¹⁰

There can be no conviction under the statute against obtaining goods by false pretenses unless accused knows, or has reason to believe, that his representations are relied on as the ground of credit.¹¹

§ 24. Obtaining of Property

The false pretense having been made, the offense is complete when, and only when, property is obtained as a result of it; title as well as possession must pass, although the title may be only voidable.

9. S.D.—State v. Pickus, 257 N.W. 284, 63 S.D. 209.

10. S.D.—State v. Pickus, supra.

11. Ga.—Treadwell v. State, 27 S.E. 785, 99 Ga. 779.
25 C.J. p 604 note 19.

12. Cal.—People v. Rabe, 261 P. 303, 202 C. 409.

People v. Miles, 99 P.2d 551, 37 C.A.2d 373.

Fla.—State ex rel. Warren v. Sweat, 185 So. 453, 135 Fla. 661.

Ga.—Diamond v. State, 182 S.E. 813, 52 Ga.App. 184.

La.—Corpus Juris cited in State v. Hendon, 128 So. 286, 289, 170 La. 488.

Minn.—State v. Nuser, 271 N.W. 811, 199 Minn. 315—State v. Anderson, 199 N.W. 6, 159 Minn. 245.

Mont.—State v. Bratton, 186 P. 327, 56 Mont. 563.

N.C.—State v. Johnson, 142 S.E. 775, 195 N.C. 506—State v. Roberts, 126 S.E. 161, 189 N.C. 93.

Pa.—Commonwealth v. Schmidt, 95 Pa.Super. 102.

Commonwealth v. Miller, 39 Pa. Dist. & Co., 433, 49 Dauph.Co. 141.
Commonwealth v. Stone, Quar. Sess., 71 Dauph.Co. 213.

S.D.—State v. Alick, 252 N.W. 644, 62 S.D. 220.

Tex.—Cochrain v. State, 248 S.W. 43, 93 Tex.Cr. 483.

Wash.—State v. Knutson, 12 P.2d 923, 168 Wash. 633.

Wis.—Corsoot v. State, 190 N.W. 465, 178 Wis. 661.

25 C.J. p 604 note 20.

Worthless check statutes see supra § 21 b (2).

The gist of the offense of "cheating by false pretenses" is the felonious taking and conversion of the property of another.

Iowa.—State v. Neuhart, 292 N.W. 791, 228 Iowa 1055.

No expectation of return

Evidence must show that owner was induced to part with his money, without any expectation that it would be returned to him.

Ind.—Pierce v. State, 79 N.E.2d 903, 226 Ind. 312.

13. Ala.—Prentice v. State, 139 So. 437, 24 Ala.App. 587—Cook v. State, 104 So. 837, 20 Ala.App. 622, certiorari denied Ex parte Cook, 104 So. 838, 213 Ala. 323.

Ark.—Fisher v. State, 256 S.W. 858, 161 Ark. 586.

Cal.—People v. Andrews, 332 P.2d 408, 165 C.A.2d 626—People v. Kemp, 269 P.2d 186, 124 C.A.2d 683—People v. Wynn, 112 P.2d 979, 44 C.A.2d 723—People v. Hand, 16 P. 2d 156, 127 C.A. 484—People v. Moore, 256 P. 266, 82 C.A. 739—People v. Whiteside, 208 P. 132, 58 C.A. 33—People v. Evanoff, 187 P. 54, 45 C.A. 108.

Colo.—Updike v. People, 18 P.2d 472, 92 Colo. 125—Pepper v. People, 225 P. 846, 75 Colo. 348.

D.C.—Clagett v. U. S., 289 F. 532, 53 App.D.C. 134.

Ga.—Green v. State, 182 S.E. 74, 52 Ga.App. 18—Zipperer v. State, 160 S.E. 103, 43 Ga.App. 783, followed in 161 S.E. 168, 44 Ga.App. 242.

Ill.—People v. Shapiro, 20 N.E.2d 107, 299 Ill.App. 255.

Iowa.—State v. Neuhart, 292 N.W. 791, 228 Iowa 1055.

La.—State v. Hart, 196 So. 62, 195 La. 184, followed in State v. Weiss, 196 So. 70, 195 La. 208—Corpus Juris cited in State v. Hendon, 128 So. 286, 289, 170 La. 488.

Mass.—Commonwealth v. Fuller, 157 N.E. 588, 260 Mass. 329—Commonwealth v. Jacobson, 157 N.E. 583, 260 Mass. 311.

Minn.—State v. Talcott, 227 N.W. 893, 178 Minn. 564.

Miss.—Odom v. State, 94 So. 233, 130 Miss. 643, suggestion of error overruled 95 So. 253, 132 Miss. 3.

Mo.—State v. Whitledge, 269 S.W.2d 748.

N.Y.—People v. Von Brandenburg, 149 N.E. 221, 241 N.Y. 128.

Pa.—Commonwealth v. Gross, 56 A.2d 303, 161 Pa.Super. 613—Commonwealth v. Landis, 101 Pa.Super. 524.

Quoted in: Ind.—Beck v. State, 149 N.E.2d 695, 697.

Iowa.—State v. Quinn, 64 N.W.2d 323, 324, 245 Iowa 846, 43 A.L.R.2d 1240.

In order for the offense to arise, property must have been actually obtained,¹² the offense being complete when, and only when, the property is obtained after the false pretense has been made.¹³ Except where the usual rule is changed by statute,¹⁴ in order for such an obtaining to arise, accused must acquire at least a voidable title to the property, that is, the owner must intend to invest him with the title, as distinguished from the mere custody or possession of the property;¹⁵ and according to some authorities accused is in no case required to obtain

Tex.—Shelton v. Thomas, Civ.App., 11 S.W.2d 254.

West v. State, 145 S.W.2d 580, 140 Tex.Cr. 493.

Utah.—State v. Casperson, 262 P. 294, 71 Utah 68.

Wash.—State v. Knutson, 12 P.2d 923, 168 Wash. 633.

25 C.J. p 605 note 22.

Effect of rule on venue see Criminal Law § 185 n.

Intent to appropriate does not suffice

Tex.—Schoenbeck v. State, 288 S.W. 2d 121, 163 Tex.Cr. 14.

Deposit or payment of check or draft

(1) The depositing of a check in a bank to accused's credit is equivalent to securing the money; hence the crime is complete on such deposit.

Cal.—People v. Steffner, 227 P. 690, 67 C.A. 1.

(2) When a draft or check obtained by false pretense is paid the offense is committed.

Wis.—Bates v. State, 103 N.W. 251, 124 Wis. 612, 4 Ann.Cas. 365.

Where property is taken at different times, even though obtained on the same false representation, separate crimes have been committed.

Cal.—People v. Rabe, 261 P. 303, 202 C. 409.

People v. Serna, 110 P.2d 492, 43 C.A.2d 106—People v. Miles, 99 P. 2d 551, 37 C.A.2d 373—People v. Ellison, 79 P.2d 733, 26 C.A.2d 496.

14. Ga.—Morse v. State, 71 S.E. 699, 9 Ga.App. 424.

25 C.J. p 605 note 23.

15. Iowa.—State v. Reysa, 199 N.W. 1000, 198 Iowa 496.

N.Y.—People v. Cory, 208 N.Y.S. 768, 124 Misc. 532.

25 C.J. p 605 note 24.

Intent to pass title as distinctive feature of offense see supra § 3.

"Obtain" defined

(1) "Obtain" means not to acquire the mere possession of property, but to acquire the title thereto or the ownership thereof."

absolute title, a voidable title being sufficient in all cases.¹⁶

When accused is in possession of the property at the time, the intent to invest title in him will be sufficient;¹⁷ but when he is not already in possession he must, in addition to acquiring title, obtain actual possession of the property, either in person or by his agent.¹⁸ It follows that to complete the offense both title to, and possession of, the property must have been obtained,¹⁹ and where accused does not obtain title to the property he is not guilty of the offense.^{19.5}

Transfer for limited time or purpose. Generally, where property is parted with for only a limited time or for a special purpose the offense is not committed;²⁰ however, as appears supra § 3, obtaining a loan of money is a sufficient obtaining to con-

stitute the offense, where the lender does not expect the return of the identical money lent.

From whom obtained; necessity of ownership. To constitute the offense, the money or property obtained need not belong to the person defrauded.^{20.5} Thus, actual ownership of the money or goods by the person on whom the fraud is practiced is not essential; it is sufficient if he had lawful possession and dominion thereof.²¹

Where accused solicits money from a person who directs another to deliver the former's money to accused, the money is deemed to have been obtained from the first person.²² A partner cannot be guilty of obtaining money by false pretenses where the money belonged to the partnership,²³ but obtaining money from one with whom accused has entered in-

Miss.—Courtney v. State, 164 So. 227, 228, 174 Miss. 147.

(2) "Obtain," as used in statute, means not so much a defrauding or depriving another of his property as an obtaining of some benefit to party making false pretenses, Pa.—Commonwealth v. Stone, 144 A. 2d 610, 187 Pa.Super. 236.

Payment by check

Payment for fraudulent invoice by check, charged to account of complaining witness, and credited to account of accused's company held sufficient to pass title to money so as to sustain charges of obtaining money under false pretenses.

Idaho.—State v. Stratford, 37 P.2d 681, 55 Idaho 65.

16. Ind.—Chappell v. State, 25 N.E. 2d 999, 216 Ind. 666.

Iowa.—State v. Quinn, 64 N.W.2d 323, 245 Iowa 846.

Reason for rule

The doctrine that one must obtain title and possession in order to be guilty of the crime of false pretenses cannot mean an absolute title, because any title obtained by fraud is voidable and such requirement would make it impossible for the crime to be consummated.

Wis.—Whitmore v. State, 298 N.W. 194, 238 Wis. 79, 134 A.L.R. 872.

Interest obtained under conditional sale

(1) Where the buyer of an automobile, sold under a conditional sales contract, was put in possession thereof on delivery of a worthless check as down payment, and the legal title was retained by seller merely for purposes of security, the property interest obtained by buyer was sufficient to support a conviction for obtaining money by false pretenses.

Wis.—Whitmore v. State, supra.

(2) In determining whether ac-

cused committed offense, fact, if true that chattel mortgage to two television sets, which were purchased after he made misrepresentation as to indebtedness on automobile given as security for the purchase, would have to be construed as conditional sales contract, which would preclude accused from having received title to them, was irrelevant.

D.C.—Nelson v. U. S., 227 F.2d 21, 97 U.S.App.D.C. 6, 53 A.L.R.2d 1206, certiorari denied 76 S.Ct. 700, 351 U.S. 910, 100 L.Ed. 1445.

17. Ohio.—Corpus Juris cited in Allen v. State, 153 N.E. 218, 219, 21 Ohio App. 403.
25 C.J. p 605 note 25.

18. Pa.—Commonwealth v. Randle, 180 A. 720, 119 Pa.Super. 217.
25 C.J. p 605 note 26.

The word "obtain" within meaning of definition of "obtaining" money by false pretenses means to get hold of, to gain possession of, or to acquire.

Ill.—People v. Shapiro, 20 N.E.2d 107, 299 Ill.App. 255.

19. Ala.—Jackson v. State, 31 So.2d 514, 33 Ala.App. 42, certiorari denied 31 So.2d 519, 249 Ala. 348.

Cal.—People v. Ashley, 267 P.2d 271, 42 C.2d 246, certiorari denied Ashley v. People of State of California, 75 S.Ct. 222, 348 U.S. 900, 99 L.Ed. 707.

People v. Krupnick, App., 332 P. 2d 720, 165 C.A.2d 755—People v. Reinschreiber, 297 P.2d 658, 141 C.A.2d 688—People v. Pugh, 289 P. 2d 826, 137 C.A.2d 226, appeal dismissed 77 S.Ct. 141, 352 U.S. 885, 1 L.Ed.2d 83—People v. Barnett, 88 P.2d 172, 31 C.A.2d 173.

Iowa.—State v. Quinn, 64 N.W.2d 323, 245 Iowa 846.

Miss.—Jones v. State, 79 So.2d 273, 223 Miss. 812, appeal dismissed and certiorari denied 76 S.Ct. 116, 350

U.S. 869, 100 L.Ed. 770, rehearing denied 76 S.Ct. 192, 350 U.S. 919, 100 L.Ed. 805.

Ohio.—Allen v. State, 153 N.E. 218, 21 Ohio App. 403.

Okl.—Warren v. State, 241 P.2d 410, 95 Okl.Cr. 160—Reeves v. State, 96 P.2d 536, 68 Okl.Cr. 163.

Pa.—Commonwealth v. Hancock, Quar.Sess., 64 Dauph.Co. 372.

Tex.—Shelton v. Thomas, Civ.App., 11 S.W.2d 254.

25 C.J. p 605 note 27.

19.5 Cal.—People v. Pillsbury, 138 P.2d 320, 59 C.A.2d 107.

Miss.—Jones v. State, 79 So.2d 273, 223 Miss. 812, appeal dismissed and certiorari denied 76 S.Ct. 116, 350 U.S. 869, 100 L.Ed. 770, rehearing denied 76 S.Ct. 192, 350 U.S. 919, 100 L.Ed. 805.

20. Mo.—State v. Anderson, 84 S. W. 946, 186 Mo. 25.

25 C.J. p 605 note 28.

20.5 Mont.—State v. Hanks, 153 P. 2d 220, 116 Mont. 399.

21. Nev.—Corpus Juris quoted in Kelly v. State, 89 P.2d 1, 3, 5 Nev. 190.

Okl.—Moore v. State, 250 P.2d 46, 90 Okl.Cr. 118.

25 C.J. p 607 note 92.

Garnishee's interest

Deprivation of garnishee's whole indefeasible interest in subject matter is sufficient for offense of obtaining it by false pretenses, full ownership not being essential.

Md.—Delbert v. State, 133 A. 847, 150 Md. 687.

22. Colo.—Vigil v. People, 86 P.2d 253, 103 Colo. 327.

23. Iowa.—Corpus Juris Secundum quoted in State v. Quinn, 64 N.W.2d 323, 245 Iowa 846, 43 A.L.R.2d 1240.

Mont.—State v. Foot, 48 P.2d 1113, 100 Mont. 33.

to an executory agreement to form a partnership is not within this principle.²⁴

§ 25. — By and for Whom Obtained

To convict of the offense, it is necessary that the property should have been obtained by or for the accused; but it may be obtained by another on his account, or for another's benefit.

To convict of obtaining property by false pretenses, it is necessary that the property obtained, or some part thereof, should have been obtained by or for accused.²⁵ The property need not be delivered to accused himself; it is sufficient if it is obtained by another on his account.²⁶ Further, the property need not be obtained by accused for himself, it being sufficient if, as a result of his false representations, it is delivered either for the benefit of accused or for another's benefit.²⁷

Money is not obtained by accused where the prosecuting witness pays it to a partnership of which he and accused are partners.²⁸

§ 26. — Property Obtained in General

The property obtained must generally be a thing of

value, or something the deprivation of which may cause the owner a loss; according to some authorities the thing must have a physical attribute and be more than a mere pecuniary advantage. Whether particular things are within the statute depends on the language thereof; real property is usually, but not always, excluded.

The property included in the first English statute as to false pretenses was limited to "money, goods, wares or merchandise."²⁹ In later statutes, chattels, valuable securities, and choses in action were included.³⁰ Many of the American statutes have transcribed the enumeration contained in the first English statute;³¹ but a number have added to this enumeration other kinds of property, such as valuable securities, credit, chattels or property generally, or have, after particularizing certain kinds of property added, "other thing of value," "other effects," "other property," or similar general words or terms.³² It may be stated, as a general rule, that the property obtained must be such that the owner's deprivation of it may, by possibility at least, be a cause of loss to him.³³ The property must be a thing of value;³⁴ it has been held that it must be such a thing as is, or may be, the subject of larceny,³⁵ and that obtaining a mere pecuniary advan-

24. Mass.—Commonwealth v. Brown, 45 N.E. 1, 167 Mass. 144.

Mont.—State v. Foot, 48 P.2d 1113, 100 Mont. 33.

25. Cal.—People v. Cravens, 180 P.2d 453, 79 C.A.2d 658—People v. Pillsbury, 138 P.2d 320, 59 C.A.2d 107. Miss.—Bracey v. State, 8 So. 165, 64 Miss. 26.

N.Y.—Willis v. People, 19 Hun 84. Pa.—Commonwealth v. Baird, O. & T., 15 Beaver 78.

26. Cal.—Corpus Juris cited in People v. Coffelt, 35 P.2d 374, 376, 140 C.A. 444.

Colo.—Whitfield v. People, 244 P. 470, 79 Colo. 108.

Md.—Corpus Juris cited in Simmons v. State, 167 A. 60, 63, 165 Md. 155. Pa.—Commonwealth v. Dempsey, 22 A.2d 76, 146 Pa.Super. 124.

25 C.J. p 606 note 31.

"The absolution of the necessity for actual physical tradition from the accuser to the defendant personally was early relaxed to the extent of holding that a delivery to a person designated by the defendant to receive for his benefit would suffice."

Tenn.—Corpus Juris cited in Rowe v. State, 51 S.W.2d 505, 507, 164 Tenn. 571.

27. Cal.—Corpus Juris quoted in People v. Woods, 212 P. 41, 42, 59 C.A. 740.

Idaho.—Corpus Juris cited in State v. Stratford, 37 P.2d 681, 683, 55 Idaho 65.

Iowa.—State v. Doudna, 284 N.W.

113, 226 Iowa 351—State v. Reysa, 199 N.W. 1000, 198 Iowa 496.

Pa.—Commonwealth v. Altieri & Greeby, 78 Pa.Super. 80, 85.

Tenn.—Ownbey v. State, 253 S.W.2d 726, 194 Tenn. 500—Rowe v. State, 51 S.W.2d 505, 164 Tenn. 571.

Tex.—Nash v. State, 29 S.W.2d 359, 115 Tex.Cr. 324.

25 C.J. p 606 note 32.

Checks made payable to company of which accused was an officer and agent.

Ga.—Kemp v. State, 6 S.E.2d 196, 61 Ga.App. 337.

28. Mo.—State v. Woerth, 256 S.W. 456.

Partnership interest acquired by payment

The rule stated in the text applies where the prosecuting witness first acquires his interest in the partnership on payment of the money. Mo.—State v. Smalley, 252 S.W. 443.

29. Kan.—State v. Tower, 251 P. 401, 122 Kan. 165, 52 A.L.R. 1160.

30. Kan.—State v. Tower, supra. 25 C.J. p 606 note 34.

English decisions construing "valuable security" see 25 C.J. p 606 notes 50-57.

31. Kan.—State v. Tower, supra.

32. Ark.—Judkins v. State, 184 S. W. 407, 123 Ark. 28.

"Because of the rapid multiplication and growing importance of new forms of personality, the enumeration of 'goods, wares, and merchandise' was manifestly too restricted,

and subsequent statutes made various additions."

Kan.—State v. Tower, 251 P. 401, 403, 122 Kan. 165, 52 A.L.R. 1160.

33. Ark.—Higgins v. State, 217 S. W. 809, 141 Ark. 633.

25 C.J. p 606 note 37.

34. Ala.—Phillips v. State, 136 So. 480, 24 Ala.App. 456.

Iowa.—State v. Evans, 295 N.W. 433, 229 Iowa 932.

La.—State v. Eichler, 140 So. 498, 174 La. 344.

Mo.—State v. Martin, 151 S.W. 504, 167 Mo.App. 346.

Pa.—Commonwealth ex rel. Sirignano v. Banmiller, Quar.Sess., 50 Berks Co. 173.

35. Kan.—State v. Tower, 251 P. 401, 122 Kan. 165, 52 A.L.R. 1160.

Tenn.—State v. Nelson, 260 S.W.2d 170, 195 Tenn. 441.

W.Va.—State v. Pietrantoni, 72 S.E.2d 617, 137 W.Va. 477.

25 C.J. p 606 note 38.

Release of lien

Tenn.—State v. Nelson, 260 S.W.2d 170, 195 Tenn. 441.

Assumption of contract obligation under a contract into which complainant was induced to enter by false pretenses cannot be the subject of larceny by false pretenses.

N.Y.—People, on Complaint of McGovern v. Weisbard, 248 N.Y.S. 399, 139 Misc. 385.

Or.—State v. Miller, 233 P.2d 786, 192 Or. 188.

tage is not sufficient, since the thing obtained must have a physical attribute.³⁶

The term "property" has been held, in this connection, to mean worldly goods or possessions, tangible things, and things which have exchangeable or commercial value;³⁷ it must be something capable of being possessed and title to which can be transferred.^{37.5} It includes promissory notes binding on the maker,³⁸ checks,³⁹ drafts,⁴⁰ stock certificates,⁴¹ and generally all commercial paper.⁴² In confidence-game statutes the term is used in its broadest sense and includes any property other than money.⁴³

On the other hand, as the term is ordinarily used in false pretense or kindred statutes, it does not include credit⁴⁴ or the obtaining of an indorsement or credit on a note,⁴⁵ the oral guaranty of an indebtedness,^{45.5} the renewal of a note,⁴⁶ patronage,⁴⁷ board and lodging,⁴⁸ or services rendered.⁴⁹ In

several jurisdictions, however, as appears in Innkeepers § 28, the obtaining of board and lodging in hotels or boarding houses by false representations or tricks is an indictable offense.

Moreover, the categories of intangible personal property set out in a civil statute cannot be imported into a criminal statute for the purpose of expanding the word "property" beyond its established meaning when used in connection with the crime of false pretenses.^{49.5}

The term "money," as used in false pretense statutes, has been held to have its ordinary meaning, namely, the medium of exchange recognized by the law of the country,⁵⁰ and every deposit which any person owning it is entitled to withdraw in money on demand.⁵¹ It has been held not to include promissory notes,⁵² certificates of deposit,⁵³ checks,⁵⁴ drafts,⁵⁵ orders to pay money,⁵⁶ credit,⁵⁷ the extension of credit on a note,⁵⁸ the extension of

36. Kan.—State v. Tower, 251 P. 401, 122 Kan. 165, 52 A.L.R. 1160.
La.—State v. Smith, 197 So. 429, 195 La. 783—State v. Eicher, 140 So. 498, 174 La. 344.

The thing procured must actually pass from the hand of the defrauded person; there must be actual physical tradition.
Or.—State v. Miller, 233 P.2d 786, 192 Or. 188.
Wis.—Lochner v. State, 261 N.W. 227, 218 Wis. 472.

37. La.—State v. Smith, 197 So. 429, 195 La. 783—State v. Eicher, 140 So. 498, 174 La. 344.
Or.—Corpus Juris Secundum cited in State v. Miller, 233 P.2d 786, 790, 192 Or. 188.

County warrant directing that certain moneys be paid to a named person can be the subject of a swindle.
Tex.—Parish v. State, 165 S.W.2d 748, 145 Tex.Cr. 117.

37.5 Or.—State v. Miller, 233 P.2d 786, 192 Or. 188.

38. Wis.—Clawson v. State, 109 N. W. 578, 129 Wis. 650, 116 Am.S.R. 972, 9 Ann.Cas. 966.
25 C.J. p 606 note 39.

Note and chattel mortgage
Okl.—Bright v. State, 134 P.2d 150, 76 Okl.Cr. 67.

39. Colo.—Roll v. People, 243 P. 641, 78 Colo. 589.
N.J.—State v. Fary, 108 A.2d 593, 16 N.J. 317.
25 C.J. p 606 note 40.

Uncashed check is within the statute.

Okl.—Reeves v. State, 96 P.2d 536, 68 Okl.Cr. 163.

40. Iowa.—State v. Patty, 66 N.W. 727, 97 Iowa 373.
25 C.J. p 606 note 41.

41. Ala.—Jones v. State, 182 So. 404, 236 Ala. 30.

42. Ill.—People v. Miller, 116 N.E. 131, 278 Ill. 490, L.R.A.1917E 797—People v. Bertsche, 106 N.E. 823, 265 Ill. 272, Ann.Cas.1916A 729.

Trade acceptance
N.J.—State v. Pincus, 125 A.2d 420, 41 N.J.Super. 454.

43. Ill.—People v. Miller, 116 N.E. 131, 278 Ill. 490, L.R.A.1917E 797.
"Any object of value that a person may lawfully acquire and hold, or any valuable interest therein or thereto."
La.—State v. Smith, 197 So. 429, 431, 195 La. 783—State v. Eicher, 140 So. 498, 499, 174 La. 344—State v. Frusha, 91 So. 430, 431, 150 La. 995, 24 A.L.R. 394.

44. Wis.—Lochner v. State, 261 N. W. 227, 218 Wis. 472.

45. Iowa.—State v. Moore, 15 Iowa 412.
W.Va.—State v. Pietranton, 72 S.E.2d 617, 137 W.Va. 477.

45.5 Or.—State v. Miller, 233 P.2d 786, 192 Or. 188.

46. La.—State v. Eicher, 140 So. 498, 174 La. 344.

Confidence-game
La.—State v. Frusha, 91 So. 430, 150 La. 995, 24 A.L.R. 394.

47. Ark.—Morgan v. State, 42 Ark. 131, 48 Am.R. 55.

48. Wis.—State v. Black, 44 N.W. 635, 75 Wis. 490.
25 C.J. p 606 note 47.

49. La.—State v. Smith, 197 So. 429, 195 La. 783.

Me.—Carville v. Lane, 101 A. 968, 116 Me. 332.

49.5 Or.—State v. Miller, 233 P.2d 786, 192 Or. 188.

Revenue and taxation code
Or.—State v. Miller, 233 P.2d 786, 192 Or. 188.

50. La.—State v. Smith, 197 So. 429, 195 La. 783—State v. Eicher, 140 So. 498, 174 La. 344.

Okl.—Mason v. State, 212 P. 1028, 23 Okl.Cr. 111.

Bank bills or other circulating medium current as money are specifically included under some statutes.
Tex.—Baxter v. State, 105 S.W. 195, 51 Tex.Cr. 576.

51. Okl.—Mason v. State, 212 P. 1028, 23 Okl.Cr. 111.

52. Mich.—People v. Johnson, 156 N. W. 449, 190 Mich. 170.
N.C.—State v. Gibson, 85 S.E. 7, 169 N.C. 318.

53. Mass.—Commonwealth v. Howe, 132 Mass. 250.

54. Ala.—Hendrix v. State, 82 So. 564, 17 Ala.App. 116.

Check cashed in due course
Check which is received and cashed in due course held the equivalent of money.

Miss.—Martin v. State, 26 So.2d 169, 200 Miss. 142.

55. N.D.—State v. Henderson, 176 N. W. 126, 45 N.D. 19.
25 C.J. p 607 note 76.

56. Wis.—Bates v. State, 103 N.W. 251, 124 Wis. 612, 4 Ann.Cas. 365.

57. Wis.—Lochner v. State, 261 N. W. 227, 218 Wis. 472.
25 C.J. p.607 note 79.

58. Okl.—Midgley v. State, 232 P. 967, 29 Okl.Cr. 108.

indebtedness,⁵⁹ or the extension of time for the payment of money;⁶⁰ but under some statutes it is an offense to procure credit or extension of credit by false statements.⁶¹ It has been held that the term "money," as used in the statutes, does not include bank notes,⁶² but there is authority to the contrary.⁶³

The term "other valuable thing" has been held to include everything of value,⁶⁴ provided it has a physical attribute and is not merely a pecuniary advantage.⁶⁵ The term does not qualify the words "money, goods or property," but enlarges the class of personal things which it is made penal to obtain;⁶⁶ nevertheless, under the doctrine of ejusdem generis, the additional things embraced by the term must be of the same general kind and class as the specific things enumerated.⁶⁷

The term includes a promissory note,⁶⁸ whether the maker is solvent or insolvent,⁶⁹ a check representing funds in bank,⁷⁰ indorsement of a check by which the indorser is rendered liable,⁷¹ and the signature of a person to a note whereby he becomes a surety, although the note and the paper on which it is written are the property of accused.⁷² Likewise, it includes the obtaining of lodgings,⁷³ and, it has been held, professional services,⁷⁴ although there is authority to the contrary.⁷⁵ It does not include a receipt for a debt,⁷⁶ the settlement of an

account,⁷⁷ an unenforceable contract,⁷⁸ credit,⁷⁹ or an extension of time for paying a debt.⁸⁰

The term "or thing of value," as used in a false pretense statute, following the words "money, bond, bill, receipt, promissory note, draft, or check," has been held to have an unquestioned and unchallenged meaning, not limited by the rule of ejusdem generis to like things of value.^{80.5} Under another statute, the extension of time for the repayment of an existing loan, even for only a day or an hour, would constitute a thing of value;^{80.10} and under a statute making it unlawful for any person to obtain a thing of value by giving or drawing a check, draft, or order if such person does not have sufficient funds, a deposit slip evidencing a credit to his account received by defendant after presentation of a check to the bank was held a thing of value.^{80.15}

The term "valuable right" embraces the securing of the signature of a person to a note which he was subsequently required to pay,⁸¹ and the obtaining of a certified copy of a petition and citation from the court clerk;⁸² but a chance in a raffle is not included.⁸³

Real property. As appears supra in § 4, at common law the offense of cheating did not apply to a fraudulent transaction whereby the owner of land was deprived of it; and statutes as to false pretenses do not usually apply to real property,⁸⁴ but

59. Okl.—Midgley v. State, supra.

60. Pa.—Commonwealth v. Chambers, 2 Chest.Co. 63.

61. Wis.—Lochner v. State, 261 N. W. 227, 218 Wis. 472.
25 C.J. p 607 note 80.

Extension of time to pay honest debt
Obtaining by fraud an extension of time for the payment of a pre-existing debt honestly incurred by purchasing merchandise on credit is not a violation of the statute condemning the obtaining of credit by false pretenses.

Neb.—Dill v. State, 191 N.W. 646, 109 Neb. 402.

62. U.S.—U. S. v. Wells, D.C., 28 F. Cas.No.16,661, 2 Cranch C.C. 43.

Va.—Commonwealth v. Swinney, 1 Va.Cas. (3 Va.) 150.

63. Okl.—Mason v. State, 212 P. 1028, 23 Okl.Cr. 111.

Wis.—State v. Kube, 20 Wis. 217, 91 Am.D. 390.

64. N.J.—State v. Thatcher, 35 N.J. Law 445.

65. Kan.—State v. Tower, 251 P. 401, 122 Kan. 165, 52 A.L.R. 1160.
Tex.—Shelton v. Thomas, Civ.App., 11 S.W.2d 254.

66. N.C.—State v. Gillespie, 80 N.C. 396.

25 C.J. p 607 note 59.

67. Tex.—Shelton v. Thomas, Civ. App., 11 S.W.2d 254.

68. Mo.—State v. Porter, 75 Mo. 171. 25 C.J. p 607 note 60.

69. Ga.—Holton v. State, 34 S.E. 358, 109 Ga. 127.

James v. State, 158 S.E. 644, 43 Ga.App. 324.

70. Kan.—State v. Holmes, 157 P. 412, 98 Kan. 174, L.R.A.1916E 1104.
Ohio.—Tarbox v. State, 38 Ohio St. 581.

71. Colo.—Miller v. People, 211 P. 380, 72 Colo. 375.

72. N.J.—State v. Thatcher, 35 N.J. Law 445.

73. U.S.—U. S. v. Ballard, D.C.Mo., 118 F. 757.

74. Miss.—State v. Ball, 75 So. 373, 114 Miss. 505, L.R.A.1917E 1046.

75. Okl.—Ex parte Wheeler, 124 P. 764, 7 Okl.Cr. 562.

Attorney's advice is not within the statute.

Tex.—Shelton v. Thomas, Civ.App., 11 S.W.2d 254.

76. Pa.—Moore v. Commonwealth, 8 Pa. 260.

77. Ark.—McLain v. State, 27 S.W. 2d 518, 181 Ark. 730.

78. Mo.—State v. Clay, 13 S.W. 827, 100 Mo. 571.

79. Ark.—McLain v. State, 27 S.W. 2d 518, 181 Ark. 730.

80. Kan.—State v. Tower, 251 P. 401, 122 Kan. 165, 52 A.L.R. 1160.

80.5 Ind.—Woods v. State, 140 N.E. 2d 752, 236 Ind. 423.

Shotgun held "thing of value"
Ind.—Woods v. State, supra.

80.10 Pa.—Commonwealth v. Stone, 144 A.2d 610, 187 Pa.Super. 236.

80.15 Tex.—Jones v. State, 226 S.W. 2d 437, 154 Tex.Cr. 241.

81. Tex.—Johnson v. State, 123 S. W. 143, 57 Tex.Cr. 347.

82. Tex.—Overall v. State, 128 S.W. 2d 1194, 137 Tex.Cr. 303.

Return of citation to court does not negative any obtaining, since the copies of the petition and citation were presumably left with the person served.

Tex.—Overall v. State, supra.

83. Tex.—Rosales v. State, 3 S.W. 344, 22 Tex.App. 673.

84. Or.—Corpus Juris Secundum cited in State v. Miller, 233 P.2d 786, 789, 192 Or. 188.

Tex.—Hesbrook v. State, 202 S.W.2d 677, 150 Tex.Cr. 476—Luce v. State, 224 S.W. 1095, 88 Tex.Cr. 46.
25 C.J. p 608 note 1.

may operate on the deed itself.^{84.5} On the other hand, some statutes are broad enough to include real property or any interest therein.⁸⁵

Other matters subject of offense. Within the term "other effects" are a promissory note⁸⁶ and a bill of exchange.⁸⁷

Under the term "thing in action" is included the certification of a check.⁸⁸ "Chattels" includes a letter.⁸⁹

The word "whatsoever," in the phrase "any money or property whatsoever," in a statute has been held to have no greater significance than that no property, as that term is understood in connection with false pretenses, is to be excepted.^{89.5}

The lien of a mortgage being effective between the parties, it constitutes a criminal offense to obtain its release by means of false representations, even though the mortgage was not properly recorded.⁹⁰ One who obtains from another, by false pre-

tense, the surrender and release of a written obligation which on its face constitutes a valuable right of action, cannot be heard to say that it is no offense under the law because the right could be avoided by a plea of usury.⁹¹

The value or quantity of the property obtained is immaterial,⁹² except in so far as it may affect the degree of the crime, see *infra* § 35, or the punishment, see *infra* § 56.

§ 27. — Written Instruments and Signatures Thereto

Under some statutes, obtaining a person's signature to a written instrument by false pretenses is an offense. The instrument must be one of value, must have been delivered or be binding when signed, and must be such as might cause loss to the signer; but there need not have been actual loss.

Obtaining the signature of a person to a written instrument by false pretenses is expressly made an indictable offense by some statutes.⁹³ The instru-

Reason for rule

Land being "incapable of larcenous asportation, it was not regarded as requiring at the hands of the criminal law the same protection as personalty. Since it could not be carried away and dissipated like chattels, although a man might be deprived of his landed estate by means of fraudulent practices and devices, yet the property was bound to remain stationary and accessible to the reach of the law, and he was relegated to the civil courts for his redress of the wrong."

Wash.—State v. Klinkenberg, 136 P. 692, 693, 76 Wash. 466, 49 L.R.A., N.S., 965, Ann.Cas.1915D 468.

84.5 Tex.—Luce v. State, 224 S.W. 1095, 88 Tex.Cr. 46.

85. Ohio.—State v. Toney, 90 N.E. 142, 81 Ohio St. 130, 18 Ann.Cas. 395.

25 C.J. p 608 note 2.

In California

(1) It was held in an early case that the statute did not include real property.

Cal.—People v. Cummings, 46 P. 284, 114 C. 437.

(2) Subsequently, an amendment added, after the word "property," the words "whether real or personal," but in view of a provision in the statute making the offense punishable as for larceny, the amendment was held meaningless, since larceny does not cover real property, and the early rule was adhered to.

Cal.—People v. Folcey, 247 P. 916, 78 C.A. 62.

(3) Later cases, however, have construed the statute so as to give

effect to the words "whether real or personal," holding that real property may be the subject of the offense.

Cal.—People v. Rabe, 261 P. 303, 202 C. 409.

People v. Pugh, 289 P.2d 826, 137 C.A.2d 226, appeal dismissed 77 S. Ct. 141, 352 U.S. 885, 1 L.Ed.2d 83—People v. Maddux, 282 P. 996, 102 C.A. 169.

86. N.Y.—People v. Stone, 9 Wend. 182.

87. Mo.—State v. Newell, 1 Mo. 248.

88. N.Y.—People v. Ward, 3 N.Y. Cr. 433.

89. Pa.—Commonwealth v. Springs, 2 Leg.Gaz. 93.

89.5 Or.—State v. Miller, 233 P.2d 786, 192 Or. 188.

90. Ark.—Judkins v. State, 184 S.W. 407, 123 Ark. 28.

91. Ark.—Judkins v. State, *supra*.

92. Tex.—Burck v. State, 106 S.W.2d 709, 132 Tex.Cr. 628.

So as to confidence game

Ill.—People v. Bimbo, 17 N.E.2d 573, 369 Ill. 618, certiorari denied Bimbo v. People of State of Illinois, 59 S.Ct. 365, 305 U.S. 661, 83 L.Ed. 429.

The value of deed for purpose of swindling statute depends, not only on value of the property described in it, but on its efficacy as a transfer of the property.

Tex.—Hesbrook v. State, 202 S.W.2d 677, 150 Tex.Cr. 476—Luce v. State, 224 S.W. 1095, 88 Tex.Cr. 46.

93. Ala.—Harrison v. State, 129 So. 718, 24 Ala.App. 9.

Ark.—State v. Bond, 235 S.W. 801, 151 Ark. 203.

Ill.—People v. Gruber, 200 N.E. 483, 362 Ill. 278.

Ind.—Gillespie v. State, 142 N.E. 220, 194 Ind. 154.

Iowa.—State v. Reysa, 199 N.W. 1000, 198 Iowa 496.

Ky.—Sweeton v. Commonwealth, 275 S.W. 827, 210 Ky. 340.

Ohio.—State v. Aughinbaugh, App. 32 N.E.2d 478.

25 C.J. p 607 note 93.

Inducing another to take lease held within statute.

N.Y.—People, on Complaint of McGovern v. Weisbard, 248 N.Y.S. 399, 139 Misc. 385.

Forgery

(1) Under some statutes it is an indictable offense to obtain a signature to any written instrument the false making of which would be punishable as forgery.

Iowa.—State v. La Vere, 191 N.W. 93, 194 Iowa 1373.

Ky.—Commonwealth v. Mirandi, 50 S.W.2d 13, 243 Ky. 823.

Mich.—People v. Larson, 196 N.W. 412, 225 Mich. 355.

Tenn.—Austin v. State, 228 S.W. 60, 143 Tenn. 300, 14 A.L.R. 311.

25 C.J. p 607 note 93 [a].

(2) The forgery referred to in such a statute has been held to be common-law, rather than statutory, forgery.

Me.—State v. Kerr, 103 A. 585, 117 Me. 254.

(3) In such statute, the word forgery is used in the sense that the writing would not have been signed but for fraud, rather than in the complete technical sense of the word.

Ky.—Greenwell v. Commonwealth, 317 S.W.2d 859.

ment signed must be such as might possibly cause loss or injury to the person signing it,⁹⁴ but it is not essential that actual loss or injury be sustained.⁹⁵ The mere obtaining of a signature is not an offense; it is necessary that the signature be attached to some written instrument of value,⁹⁶ and that there be a delivery of the instrument,⁹⁷ or that the instrument be of such a character as exposes the signer to liability as soon as it is signed.⁹⁸ The offense is complete when the instrument is signed⁹⁹ and delivered.¹

The fact that the instrument recites that accused had made no representations does not absolve him from responsibility if he in fact obtained the signature by false pretenses.²

§ 28. Loss to Prosecutor

Under most authorities, the crime is not committed unless the person from whom the property is obtained is defrauded; but it is not necessary that he suffer actual pecuniary loss, it being sufficient if he does not receive the thing promised or represented. If accused gets only what is justly due him, he is held not guilty by some authorities, but others oppose this view.

In order for the offense to arise, a detriment or injury to the prosecutor has been required.^{2,50} Thus, while the statutes do not in express language require that the person from whom the property is obtained should be defrauded thereby, but only that it be obtained with intent to defraud him, nevertheless it is a general rule that the crime is not committed unless he is in fact defrauded,³ although under some statutes it has been said to be unnecessary

Separate offenses

The obtaining of money by false pretenses and the obtaining of a signature on a note or other written instrument by false pretenses are separate offenses under statute.

Neb.—Pettijohn v. State, 27 N.W.2d 380, 148 Neb. 336.

94. Ind.—Gillespie v. State, 142 N.E. 220, 194 Ind. 154.

25 C.J. p 608 note 94, p 609 note 7.

95. Ind.—Gillespie v. State, 142 N.E. 220, 194 Ind. 154.

Iowa.—State v. La Vere, 191 N.W. 93, 194 Iowa 1373.

Neb.—Pettijohn v. State, 27 N.W.2d 380, 148 Neb. 336.

N.Y.—People, on Complaint of McGovern v. Weisbard, 248 N.Y.S. 399, 139 Misc. 385.

Ohio.—State v. Aughinbaugh, App., 32 N.E.2d 478.

25 C.J. p 608 note 95.

96. Kan.—In re Payson, 23 Kan. 757. N.Y.—Fenton v. People, 4 Hill 126.

97. Iowa.—State v. McGinnis, 33 N.W. 338, 71 Iowa 685.

25 C.J. p 608 note 97.

Delivery to another immaterial

The essence of the wrong is in fraudulently procuring or inducing the complaining witness to sign and deliver the instrument, and, if the act in that respect was part of a corrupt scheme to accomplish the fraud, it was immaterial that the note obtained was made and delivered to another.

Iowa.—State v. La Vere, 191 N.W. 93, 194 Iowa 1373.

98. Mass.—Commonwealth v. Hutchison, 114 Mass. 325.

Or.—State v. Leonard, 144 P. 113, 681, 73 Or. 451.

A written offer to convey real estate, which, on its acceptance by the adverse party, is convertible into a binding contract, is an "instrument

of apparent legal efficacy" within the statute.

Ky.—Commonwealth v. Mirandi, 50 S.W.2d 13, 243 Ky. 823.

99. Ind.—Gillespie v. State, 142 N.E. 220, 194 Ind. 154.

Neb.—Pettijohn v. State, 27 N.W.2d 380, 148 Neb. 336.

1. Iowa.—State v. Reysa, 199 N.W. 1000, 198 Iowa 496—State v. La Vere, 191 N.W. 93, 194 Iowa 1373.

Mo.—State v. Clice, 252 S.W. 465.

2. N.Y.—People, on Complaint of McGovern v. Weisbard, 248 N.Y.S. 399, 139 Misc. 385.

2.50 Ga.—Walker v. State, 78 S.E.2d 545, 89 Ga.App. 101.

Miss.—Bruce v. State, 64 So.2d 332, 217 Miss. 368.

3. Ala.—Phillips v. State, 136 So. 480, 24 Ala.App. 456.

Cal.—People v. Leaverton, 289 P. 890, 107 C.A. 51—People v. Harrington, 267 P. 942, 92 C.A. 245.

People v. Cale, 288 P. 430, 106 C.A., Supp., 777.

Colo.—Moore v. People, 235 P.2d 798, 124 Colo. 197.

Ga.—Thompson v. State, 69 S.E.2d 206, 85 Ga.App. 298—Wilson v. State, 67 S.E.2d 164, 84 Ga.App. 703.

—Douglas v. State, 57 S.E.2d 438, 80 Ga.App. 761—Daniel v. State, 10 S.E.2d 80, 63 Ga.App. 12—Diamond v. State, 182 S.E. 813, 52 Ga.App. 184.

Idaho.—State v. Whitney, 254 P. 525, 43 Idaho 745.

Ind.—State v. Huebner, 104 N.E.2d 385, 230 Ind. 461.

Iowa.—State v. McCutchan, 259 N.W. 23, 219 Iowa 1029.

Md.—Summons v. State, 144 A. 497, 156 Md. 382.

Mass.—Commonwealth v. Levine, 181 N.E. 851, 280 Mass. 83.

Mich.—People v. Bagwell, 295 N.W.

207, 295 Mich. 412—People v. Lee, 243 N.W. 227, 259 Mich. 355.

Minn.—State v. Nuser, 271 N.W. 811, 199 Minn. 315—State v. Talcott, 227 N.W. 893, 178 Minn. 893—State v. Anderson, 199 N.W. 6, 159 Minn. 245.

Miss.—Simmons v. State, 135 So. 196, 160 Miss. 582—Overall v. State, 90 So. 484, 128 Miss. 59.

Mo.—Corpus Juris quoted in State v. Zingher, 259 S.W. 451, 453, 302 Mo. 650.

N.C.—State v. Johnson, 142 S.E. 775, 195 N.C. 506.

S.D.—State v. Alick, 252 N.W. 644, 62 S.D. 220.

Utah.—State v. Morris, 38 P.2d 1097, 85 Utah 210—Corpus Juris quoted in State v. Casperson, 262 P. 294, 296, 71 Utah 68.

Wash.—Corpus Juris quoted in State v. Sargent, 97 P.2d 692, 693, 2 Wash.2d 190, opinion adhered to 100 P.2d 20, 2 Wash.2d 190.

Wis.—State v. Hintz, 229 N.W. 54, 200 Wis. 636—Corcoran v. State, 190 N.W. 465, 178 Wis. 661.

Wyo.—Anderson v. State, 196 P. 1047, 27 Wyo. 345.

25 C.J. p 608 note 3.

Receipt and surrender of property

Where defendant and another, having induced the complaining witness to give his notes on a stock subscription, which they were unable to negotiate, fraudulently induced him to give his note to a third person for an automobile, representing that they could sell it for cash and use the proceeds for his benefit, with no intention of doing so, and, after obtaining the automobile, converted it to their own use, it was immaterial that the complaining witness received the automobile for his note, although as between him and the seller of the automobile the note was voluntary and binding.

Iowa.—State v. La Vere, 191 N.W. 93, 194 Iowa 1373.

that the victim be actually defrauded or injured.⁴ Hence, as a rule, the crime is not committed if the prosecutor gets out of the transaction just what he bargained for.⁵

Except under a few statutes,⁶ it is not necessary, to constitute an offense, that the prosecutor has suffered, or will necessarily suffer, actual pecuniary loss;⁷ if he has been placed by the fraud of accused in such a position that he may eventually suffer loss,⁸ or if he does not receive for the money or property parted with the thing promised or represented by accused, even though he receives something else, regardless of whether such thing received is of equal value, less value, or no value at all,⁹ it is sufficient. Accused is not relieved from criminal liability by the fact that the person defrauded may eventually make himself whole in some mode not contemplated at the time he parted with the property;¹⁰ and, as appears infra § 37, it is no defense that the prosecutor has recovered, or may

eventually recover, for any loss sustained.

A prosecutor may be none the less defrauded even though the property parted with was applied by accused to the purpose for which it was delivered;¹¹ and the fact that the victim was defrauded of only part of the money parted with, the remainder being applied for the purpose for which it was delivered, does not affect guilt.¹² Thus, a complete loss of property need not be shown.^{12.5}

Failure to deliver articles under ban of law. Even where intoxicating liquor is contraband and without market value, it is a thing of value, and one who has by false pretenses induced another to part with his money for such liquor is guilty if he fails to deliver it or delivers something else in its place;¹³ but, where one by reason of false representations parts with his money in order to obtain counterfeit money, no offense is committed if such counterfeit money is not delivered, as it is not a thing of value and the possession of it would have been criminal.¹⁴

4. Ariz.—Martinez v. State, 176 P. 582, 20 Ariz. 29.
Mo.—State v. Wilson, 66 Mo.App. 540.
25 C.J. p 608 note 3 [c], [d].

Offense of issuing check without sufficient funds is complete when the check is issued with intent to defraud even though no one is defrauded thereby.

Cal.—People v. Kitchens, App., 331 P.2d 127—People v. Freedman, 245 P.2d 45, 111 C.A.2d 611—People v. Porter, 222 P.2d 151, 99 C.A.2d 506.

5. Minn.—State v. Talcott, 227 N.W. 893, 178 Minn. 564.

Miss.—Bruce v. State, 64 So.2d 332, 217 Miss. 368.

Tex.—Waghalter v. State, 70 S.W.2d 420, 126 Tex.Cr. 89.

Utah.—**Corpus Juris** quoted in State v. Casperson, 262 P. 294, 296, 71 Utah 68.

Wash.—**Corpus Juris** quoted in State v. Sargent, 97 P.2d 692, 693, 2 Wash.2d 190, opinion adhered to 100 P.2d 20, 2 Wash.2d 190.

25 C.J. p 609 note 4.

Purchase of contract

Where purchaser permitted dealer's agent to sign sale contract in his name if he would not be liable, company purchasing contract from dealer did not obtain what it contracted for, as regards dealer's defense in prosecution for grand theft.

Cal.—People v. Cordish, 294 P. 456, 110 C.A. 486.

6. Ga.—Wilson v. State, 67 S.E.2d 164, 84 Ga.App. 703—Daniel v. State, 10 S.E.2d 80, 63 Ga.App. 12.
25 C.J. p 609 note 5.

Under statute denouncing obtaining of credit by false pretenses, it is

essential that the victim suffer a loss.

Wis.—Lochner v. State, 261 N.W. 227, 218 Wis. 472.

7. Ala.—Elliott v. Caheen Bros., 153 So. 613, 228 Ala. 432.

Ariz.—State v. Meeks, 247 P. 1099, 30 Ariz. 436.

Ark.—Moss v. State, 108 S.W.2d 782, 194 Ark. 524—Fisher v. State, 256 S.W. 858, 161 Ark. 586.

Cal.—People v. Schmidt, 305 P.2d 215, 147 C.A.2d 222—People v. Raines, 153 P.2d 424, 66 C.A.2d 960—People v. Bullock, 11 P.2d 441, 123 C.A. 299—People v. Oliver, 2 P.2d 450, 115 C.A. 677—People v. Cortze, 290 P. 1083, 108 C.A. 111—People v. Williams, 230 P. 667, 69 C.A. 169.

Colo.—People v. Bartels, 238 P. 51, 77 Colo. 498—**Corpus Juris** cited in Pepper v. People, 225 P. 846, 848, 75 Colo. 348.

D.C.—Nelson v. U. S., 227 F.2d 21, 97 U.S.App.D.C. 6, 53 A.L.R.2d 1206, certiorari denied 76 S.Ct. 700, 351 U.S. 910, 100 L.Ed. 1445.

Wash.—Jeane v. Smith, 210 P.2d 127, 34 Wash.2d 826—**Corpus Juris** quoted in State v. Sargent, 97 P.2d 692, 693, 2 Wash.2d 190, opinion adhered to 100 P.2d 20, 2 Wash.2d 190.

Wyo.—Anderson v. State, 196 P. 1047, 27 Wyo. 345.

25 C.J. p 609 note 6.

Worthless checks given for past-due debts see supra § 21.

Under the Texas statute as to swindling, it is not necessary that any benefit accrue to the guilty party or injury to the person intended to be defrauded.

Tex.—Green v. State, 161 S.W.2d 114, 144 Tex.Cr. 186—Overall v. State, 128 S.W.2d 1194, 137 Tex.Cr. 303—

Mowrey v. State, 55 S.W.2d 816, 122 Tex.Cr. 456.

25 C.J. p 608 note 3 [e].

8. Wash.—**Corpus Juris** quoted in State v. Sargent, 97 P.2d 692, 693, 2 Wash.2d 190, opinion adhered to 100 P.2d 20, 2 Wash.2d 190.

25 C.J. p 609 note 7.

Loss from signature to written instrument see supra § 27.

9. R.I.—State v. Considine, 186 A. 676, 56 R.I. 456.

Wash.—**Corpus Juris** quoted in State v. Sargent, 97 P.2d 692, 693, 2 Wash.2d 190, opinion adhered to 100 P.2d 20, 2 Wash.2d 190.

25 C.J. p 609 note 8.

10. Cal.—People v. Moore, 256 P. 266, 82 C.A. 739—People v. White-side, 208 P. 132, 58 C.A. 33.

Minn.—State v. Talcott, 227 N.W. 893, 178 Minn. 564.

Tex.—Mitner v. State, 273 S.W. 565, 100 Tex.Cr. 455.

25 C.J. p 609 note 11.

"The actual fraud and prejudice required . . . is determined according to the situation of the victim immediately after he parts with his property."

Utah.—State v. Casperson, 262 P. 294, 296, 71 Utah 68.

11. Mich.—People v. Lennox, 64 N. W. 488, 106 Mich. 625.

25 C.J. p 609 note 12.

12. Ill.—People v. Gruber, 200 N.E. 483, 362 Ill. 278.

12.5 Cal.—People v. Jones, 224 P.2d 353, 36 C.2d 373.

13. Cal.—People v. Abbott, 223 P. 77, 65 C.A. 120.

25 C.J. p 610 note 13.

14. Ga.—Foster v. State, 68 S.E. 739, 8 Ga.App. 119.

Obtaining what is justly due. It has been held that, regardless of the fraudulent means or devices employed, accused is not guilty where he gets only what is due him,¹⁵ as where he procures the payment of a debt due,¹⁶ or possession of property to which he is entitled,¹⁷ for the reason that no injury is done,¹⁸ or that there is a want of fraudulent intent,¹⁹ or for both reasons.²⁰ However, other decisions criticize and greatly limit this rule,²¹ or deny it entirely;²² and certainly the rule cannot exonerate accused where the facts do not come within it.²³

§ 29. To Whom Pretense Made

The false pretense need not be made directly to the person from whom the property is obtained, and is sufficient if made to an agent or the public generally. Authorities differ as to the sufficiency of a pretense made to a third person.

It is not necessary that the false pretense be made directly to the person from whom the property is obtained;²⁴ it is sufficient if it is made to an agent,²⁵ or even to the public generally by an advertisement.²⁶ It has also been held sufficient if the pretense is made to a third person;²⁷ but under other authority a representation made to a third person is insufficient even if it is intended to be ultimately reported to the victim.²⁸ If the false pretense is made to an agent who has authority to part with the property obtained, it is sufficient, even though the principal does not act thereon otherwise than through the agent.²⁹

The offense of obtaining goods from a firm by false pretense may be committed by pretenses made to one partner.³⁰ A representation to an officer or agent of a corporation to obtain money from the corporation is a representation to the corporation;³¹ and a corporation may be the victim of swindling.³² Moreover, the confidence of a body politic may be imposed on, just as may that of a private person or a private corporation.^{32.5}

Testimony in judicial inquiry. A prosecution for obtaining money by false pretense cannot be predicated on false testimony given in a judicial inquiry.³³

§ 30. Particular Acts, Transactions, or Subject Matters

In a number of jurisdictions, various acts or transactions, such as the making of false statements to federal agencies or relief authorities, constitute, by reason of express statutory provisions, offenses more or less closely allied to that of obtaining money or property by false pretenses.

In a number of jurisdictions, various acts or transactions, by reason of express statutory provisions, constitute offenses more or less closely allied to that of obtaining money or property by false pretenses.³⁴ Such offenses include obtaining money or other property by means of games, tricks, or devices;³⁵ obtaining money or goods on representations of ownership of personal property, which is pledged for the payment of the debt so created and

15. Kan.—In re Cameron, 24 P. 90, 44 Kan. 64, 21 Am.S.R. 262.

25 C.J. p 610 note 15.

16. Pa.—Commonwealth v. Thompson, Quar.Sess., 2 Pa.L.J.R. 33, 3 Pa.L.J. 250.

25 C.J. p 610 note 16.

17. Kan.—In re Cameron, 24 P. 90, 44 Kan. 64, 21 Am.S.R. 262.

18. Kan.—In re Cameron, supra.

19. W.Va.—State v. Williams, 69 S. E. 474, 68 W.Va. 86, 32 L.R.A., N.S., 420.

25 C.J. p 610 note 19.

20. N.Y.—People v. Thomas, 3 Hill 169.

Pa.—Commonwealth v. Thompson, Quar.Sess., 2 Pa.L.J.R. 33, 3 Pa. L.J. 250.

21. Mass.—Commonwealth v. Burton, 67 N.E. 419, 183 Mass. 461, criticizing Commonwealth v. McDuffy, 126 Mass. 467.

25 C.J. p 610 note 21.

22. Pa.—Commonwealth v. Coleman, 60 Pa.Super. 512, 518.

25 C.J. p 610 note 21.

Reason for rule

"The issue on trial was between the Commonwealth of Pennsylvania

and the defendant at the bar of a criminal court. It was in no sense the function of such a court in such a proceeding to ascertain the state of the accounts between the firms or corporations. . . . Even if it be conceded that the firm . . . was indebted to the . . . company, that fact in no sense justified or excused the alleged criminal act of the defendant in obtaining from them money or valuable securities by false pretenses."

Pa.—Commonwealth v. Coleman, supra.

23. Cal.—People v. Pearson, 231 P. 612, 69 C.A. 524.

24. Ky.—Commonwealth v. Johnson, 181 S.W. 368, 167 Ky. 727, L.R.A. 1916D 267.

25 C.J. p 614 note 62.

25. Ala.—Couch v. State, 78 So.2d 817, 38 Ala.App. 134—Young v. State, 116 So. 709, 22 Ala.App. 443.

25 C.J. p 614 note 64.

26. Ill.—Jackson v. People, 18 N.E. 286, 126 Ill. 139.

25 C.J. p 614 note 67.

27. N.C.—State v. Hargrave, 9 S.E. 406, 103 N.C. 328.

25 C.J. p 614 note 65.

28. Ala.—Young v. State, 116 So. 709, 22 Ala.App. 443.

29. Mich.—People v. Wakely, 28 N. W. 871, 62 Mich. 297.

30. Mass.—Commonwealth v. Moorar, Thach.Cr. 410.

31. N.Y.—People v. Eaton, 107 N.Y. S. 849, 122 App.Div. 706, affirmed 84 N.E. 1116, 192 N.Y. 542.

Mo.—State v. Turley, 44 S.W. 267, 142 Mo. 403.

32. Tex.—Roach v. State, 35 S.W.2d 713, 117 Tex.Cr. 534.

32.5 Ill.—People v. Gibbs, 108 N.E. 2d 446, 413 Ill. 154.

County

Colo.—Montez v. People, 132 P.2d 970, 110 Colo. 208.

33. N.M.—State v. Kelly, 202 P. 524, 27 N.M. 412, 21 A.L.R. 156.

34. La.—*Corpus Juris* quoted in State v. Matheny, 193 So. 587, 588, 194 La. 198.

Pa.—Commonwealth v. Mull, Quar. Sess., 51 Lanc.Rev. 121.

35. Minn.—State v. Yurkiewicz, 292 N.W. 782, 208 Minn. 71.

25 C.J. p 659 note 47.

Confidence game see *infra* § 32.

Games see *infra* § 31.

otherwise disposing of such property;³⁶ obtaining property on a contract to perform services with intent to defraud;³⁷ obtaining property under false color of carrying on business;³⁸ obtaining materials for one building and using them for another without the written consent of the seller and with intent to defraud him;³⁹ obtaining the transportation of goods at less than the legal rate by false representations as to the contents of the package;⁴⁰ obtaining employment by false statements in writing as to identity;⁴¹ obtaining a signature to any instrument by false pretenses with intent to defraud,^{41.5} and defrauding by assuming to have secret, advance, or inside information.⁴²

Other offenses include engaging in fraudulent or deceptive practices as to spiritualism;⁴³ publishing false or misleading advertisements;⁴⁴ purchasing goods to be paid for on delivery, and disposing of or secreting them without having paid therefor;⁴⁵ unlawfully and knowingly exposing for sale an article of merchandise the character of which is misrepresented;⁴⁶ writing or printing, either in whole or in part, any letter, telegram, or other instrument

with intent fraudulently to obtain anything of value;⁴⁷ presenting false claims for insurance;⁴⁸ knowingly permitting one's name to be carried on a public pay roll and receiving salary or pay for services not actually rendered;⁴⁹ wrongfully obtaining public money;⁵⁰ fraudulently exhibiting false samples;⁵¹ and fraudulently packing or baling articles of merchandise, or putting therein foreign substances, or substances of a quality inferior to that with which the package or bale is apparently filled.⁵²

Still other offenses include selling or offering for sale or having in possession with intent to sell any article of merchandise marked "sterling" or "sterling silver" unless the article contains a certain proportion of pure silver;⁵³ fraudulently and falsely representing to the purchaser of property that it is not subject to a lien;⁵⁴ giving false information as to an existing lien, when giving a landlord's lien, if interrogated as to the facts;⁵⁵ making a deed or other writing for the conveyance or assurance of property previously conveyed or encumbered by the grantor, without reciting therein the former conveyance or encumbrance, with intent to defraud;⁵⁶

36. N.C.—State v. Mooney, 92 S.E. 610, 173 N.C. 798—State v. Torrence, 37 S.E. 268, 127 N.C. 550.

37. Ga.—Patterson v. State, 58 S.E. 284, 1 Ga.App. 782.

25 C.J. p 659 note 49.

38. Mass.—Commonwealth v. Drew, 27 N.E. 593, 153 Mass. 588—Commonwealth v. Walker, 108 Mass. 309.

39. Mo.—State v. Gregory, 71 S.W. 170, 170 Mo. 598.

40. U.S.—U. S. v. Sterling Salt Co., D.C.N.Y., 200 F. 593.

41. N.Y.—Morgan Munitions Supply Co. v. Studebaker Corp., 166 N.Y.S. 645, 100 Misc. 408, modified on other grounds 168 N.Y.S. 37, 180 App. Div. 530.

41.5 Ill.—People v. Dolan, 157 N.E. 2d 817, 21 Ill.App.2d 312.

42. Fla.—State ex rel. McLaughlin v. Karel, 129 So. 703, 100 Fla. 388.

"Defrauding" as here used means to cheat and swindle. Fla.—State ex rel. McLaughlin v. Karel, supra.

43. Ill.—Chicago v. Westergren, 173 Ill.App. 562—Chicago v. Payne, 160 Ill.App. 641.

44. Neb.—State v. Krasne, 170 N.W. 494, 103 Neb. 11. 25 C.J. p 659 note 63.

45. Mo.—State v. Rosenberg, 62 S. W. 435, 982, 162 Mo. 358.

"Produce"

Alleged refusal of purchasers to pay for onion sets which were grown

and sold for purposes of propagation, rather than for consumption as food products, was held not an offense under statute making cash buyer's refusal to pay for produce an offense, since sets were not "vegetables" within common meaning of that term as plants cultivated for food, and therefore were not "produce," which statute defined as including vegetables.

Or.—State v. Hurst, 41 P.2d 1079, 149 Or. 519.

46. N.Y.—People v. Goldstein, 166 N. Y.S. 374, 175 App.Div. 503.

47. Ohio.—People v. Hofman, 2 Ohio S. & C. P. 206, 1 Ohio N.P. 190.

48. Cal.—People v. Panagoit, 143 P. 70, 25 C.A. 158.

Okl.—Nemecek v. State, 114 P.2d 492, 72 Okl.Cr. 195, 135 A.L.R. 1149.

49. La.—State v. Farrell, 57 So. 898, 130 La. 238.

The chief factor of the offense is receiving salary or pay for services not actually rendered, and permitting one's name to be carried on public pay roll is simply the means by which the offense is accomplished; hence the offense is not committed unless one receives salary or pay for services not actually rendered either by himself or by some other person.

La.—State v. Matheny, 193 So. 587, 194 La. 198.

50. N.Y.—People v. Reilly, 6 N.Y.S. 2d 161, 255 App.Div. 109, affirmed 19 N.E.2d 919, 280 N.Y. 509.

Persons other than officers may be guilty of the crime under a statutory provision that "a person who, being or acting as a public officer or otherwise," wrongfully obtains public money, shall be guilty of felony. N.Y.—People v. Reilly, supra.

51. Ala.—McGee v. State, 23 So. 797, 117 Ala. 229—Cowles v. State, 50 Ala. 454.

52. Tex.—Anderson v. State, 18 S.W. 866, 30 Tex.App. 699. 25 C.J. p 660 note 74.

Plating cotton bale

A ginner is guilty of unlawfully plating bale of cotton if, with intent to deceive, he puts higher grade cotton on outside and lower grade on inside; and one is a ginner within the statute, although a corporation owns the gin, where he and his wife are the chief stockholders.

Tex.—Jacobs v. State, 91 S.W.2d 348, 129 Tex.Cr. 617.

53. N.Y.—People v. Webster, 40 N.Y. S. 1135, 17 Misc. 410.

54. Ga.—Mathis v. State, 80 S.E. 695, 14 Ga.App. 241. 25 C.J. p 660 note 81.

Lien on property waived

Miss.—Dickerson v. State, 80 So.2d 74, 224 Miss. 305.

55. Ga.—Brown v. State, 64 S.E. 1001, 6 Ga.App. 329—Jacobs v. State, 61 S.E. 924, 4 Ga.App. 509.

56. Mo.—State v. Clark, 76 S.W. 1007, 178 Mo. 20. 25 C.J. p 660 note 85½.

and knowingly taking or receiving such second deed or writing.⁵⁷

While a collection made for the purposes of a bona fide religious corporation would not be a violation of a statute prohibiting the fraudulent obtaining of property for charitable purposes,^{57.5} women who dressed to simulate nuns in order to solicit funds, and kept all money so collected, except for a small amount, were guilty of a fraud and of violating the statute.^{57.10}

Elsewhere in this title reference is made to statutes denouncing the fraudulent obtaining of credit, see supra § 26, the making, or procuring the making, of false reports or representations as to financial condition or mercantile character and the like, see supra § 13, the issuing of checks or drafts on a bank in which the drawer has no funds, see supra § 21, and bunco steering, see infra § 32. Analogous crimes treated in other titles are the false impersonation of another, see False Personation; making, procuring, or presenting false claims against the United States, see United States §§ 168-174; adulteration, see Adulteration; selling misbranded

or unbranded fertilizer, see Agriculture § 23; selling food imitations, see Food §§ 17-20; and various other fraudulent practices, see Fraud § 154.

False statements to federal agencies. The making of any statement, with knowledge of its falsity, in any matter within the jurisdiction of any department or agency of the United States,⁵⁸ or, more specifically, the making of any such statement for the purpose of influencing the Home Owners' Loan Corporation,⁵⁹ the Federal Home Loan Bank,⁶⁰ the Federal Housing Administration,⁶¹ or the War Assets Administration,^{61.5} is a federal offense.

Application for relief. The making of a false representation by an applicant for relief, or by any person to secure relief for another person, may be made a crime.⁶² Under a statute of this type, a showing that accused is employed would not establish his ineligibility, since one can be employed and still be eligible for assistance.^{62.5}

"Estafa." In the Philippines, where one obtains property by false pretenses, the offense is known as "estafa."⁶³

57. Kan.—State v. Rhodes, 93 P. 610, 77 Kan. 202.

57.5 N.Y.—People v. Le Grande, 131 N.E.2d 712, 309 N.Y. 420.

57.10 N.Y.—People v. Le Grande, supra.

58. U.S.—U. S. v. Mellon, C.C.A.N.Y., 96 F.2d 462, certiorari denied Mellon v. U. S., 58 S.Ct. 1061, 304 U.S. 586, 82 L.Ed. 1547.

Loss to the government is not an essential ingredient of the crime.

U.S.—U. S. v. Goldsmith, C.C.A.N.Y., 108 F.2d 917, certiorari denied 60 S.Ct. 715, 309 U.S. 678, 84 L.Ed. 1022, rehearing denied 60 S.Ct. 1073, 310 U.S. 657, 84 L.Ed. 1420, and 61 S.Ct. 956, 313 U.S. 599, 85 L.Ed. 1551—U. S. v. Mellon, C.C.A.N.Y., 96 F.2d 462, certiorari denied Mellon v. U. S., 58 S.Ct. 1061, 304 U.S. 586, 82 L.Ed. 1547.

59. U.S.—Kay v. U. S., N.Y., 58 S.Ct. 468, 303 U.S. 1, 82 L.Ed. 607.

The validity of such a provision is not subject to attack on the ground that the Home Owners' Loan Act is unconstitutional.

U.S.—Kay v. U. S., supra.

A promise to perform an act in the future is within the meaning of the word "statement" as used in the statute.

U.S.—U. S. v. Kreidler, D.C.Iowa, 11 F.Supp. 402.

Effectiveness of false statement; intent

(1) Actual damage to the Home

Owners' Loan Corporation is not a necessary ingredient, and the fact that the statement is not influential or important is no defense. U.S.—Kay v. U. S., N.Y., 58 S.Ct. 468, 303 U.S. 1, 82 L.Ed. 607.

(2) Whether person making false statements received or intended to receive the fruits of the misstatement is irrelevant to a prosecution. U.S.—U. S. v. Kay, C.C.A.N.Y., 101 F.2d 270, certiorari denied Kay v. U. S., 59 S.Ct. 789, 306 U.S. 660, 83 L.Ed. 1056.

Statements not false when made are not within the statute.

U.S.—U. S. v. Clawson, D.C.Wyo., 13 F.Supp. 178.

60. U.S.—Reass v. U. S., C.C.A.W.Va., 99 F.2d 752.

Purpose of statute

The statute was passed to protect the Federal Home Loan Banks from fraudulent attempts to secure favorable action on applications for loans and like matters.

U.S.—Reass v. U. S., supra.

The meaning of the word "make,"

as used in the statute is, to put forth, give out, deliver, as to make a speech; the mere assembling of the material and its arrangement in a written composition containing the misrepresentations of fact can have no effect, and it is only when they are communicated to the lending bank that the crime takes place.

U.S.—Reass v. U. S., supra.

61. U.S.—Hartwell v. U. S., C.C.A. Ala., 107 F.2d 359.

61.5 U.S.—Todorow v. U. S., C.A. Cal., 173 F.2d 439, certiorari denied 69 S.Ct. 1169, 337 U.S. 925, 93 L.Ed. 1733.

62. N.Y.—People v. La Face, 266 N.Y.S. 458, 148 Misc. 238.

"Home relief" and "work relief" are both included.

N.Y.—People v. La Face, supra.

Effectiveness of misrepresentation

The essence of the crime is misrepresentation in the relief application, not consummation of the fraud, and it is immaterial whether relief is actually obtained or obtainable; hence defendant, if falsely representing lack of bank account when applying to public welfare department for work relief, could be convicted notwithstanding work relief was obtainable only from emergency work bureau.

N.Y.—People v. La Face, supra.

Provision held not repealed

Portion of old age assistance statute relating to false representations has been held not impliedly repealed by the new statute on the subject. Wash.—State v. Becker, 234 P.2d 897, 39 Wash.2d 94.

62.5 Pa.—Commonwealth v. Thomas, 70 A.2d 458, 166 Pa.Super. 214.

63. Philippine.—U. S. v. Parcon, 11 Philippine 323.

25 C.J. p 661 note 86½.

§ 31. — Cheating or Fraudulent Practices in Sports or Games

Cheating or defrauding another in, or by means of, certain games may be indictable under express statutory provision.

Under express statutory provision, a person who cheats or defrauds another in, or by means of, certain games may be guilty of an offense analogous to that of obtaining by false pretenses.⁶⁴

§ 32. — Confidence Game

A confidence game, within the meaning of statutes directed against it, is any scheme whereby a swindler wins the confidence of his victim and, by taking advantage of such confidence, swindles him out of his money or property. The confidence must be won by a trick, device, false representation, or swindling operation, and the property must be obtained by a betrayal of the confidence won. A token or symbol, as distinguished from mere words, is required by some statutes.

Statutes in several jurisdictions are directed

against the obtaining of money or property by the form of swindling known as the "confidence game."⁶⁵ The purpose of these statutes is to provide for a class of false representations not included in other statutes,^{65.5} and where a statute provides that it is to be liberally construed, care should be exercised so that its purpose and usefulness will not be defeated by illogical construction or loose language.^{65.10}

The term "confidence game" cannot easily be defined so as to cover all the cases falling within it, since schemes devised for the swindling of others "are as various as the mind of man is suggestive;"⁶⁶ the term has a relative and variable meaning,^{66.5} each case depending on its peculiar circumstances.^{66.10}

A confidence game has been held to be an elaborate scheme developed to play on the credulity, sym-

64. Cal.—*People v. Frigerio*, 40 P. 107, 107 C. 151.

25 C.J. p 659 note 47.

Obtaining property by "confidence game" see *infra* § 32.

Three-card monte

A statute condemning the dealing, playing, or practicing of the confidence game or swindle known as three-card monte, or of any such game, does not apply to five-card stud poker.

Kan.—*State v. Terry*, 44 P.2d 258, 141 Kan. 922.

65. Colo.—*Peiffer v. People*, 107 P. 2d 799, 106 Colo. 533.

La.—*State v. Pollard*, 41 So.2d 465, 215 La. 655.

Okl.—**Corpus Juris Secundum** cited in *Rucker v. State*, 195 P.2d 299, 304, 88 Okl.Cr. 15, rehearing denied 199 P.2d 221, 88 Okl.Cr. 15.

25 C.J. p 661 note 87.

Statute held constitutional

La.—*State ex rel. Kavanaugh v. Mitchiner*, 15 So.2d 809, 204 La. 415.

"The crime is analogous to the crime of obtaining money or property by false pretenses."

La.—*State v. Hart*, 196 So. 62, 65, 195 La. 184, followed in *State v. Weiss*, 196 So. 70, 195 La. 208.

The statutes were intended to reach the class of offenders known as "confidence men."

Ariz.—*Clark v. State*, 89 P.2d 1077, 53 Ariz. 416.

Ill.—*People v. Jackson*, 122 N.E.2d 813, 4 Ill.2d 296—*People v. Brand*, 114 N.E.2d 370, 415 Ill. 329, certiorari denied *Brand v. People of State of Ill.*, 74 S.Ct. 709, 347 U.S. 959, 98 L.Ed. 1103—*People v. Marmion*, 58 N.E.2d 603, 389 Ill. 19, certiorari denied 66 S.Ct. 21, 326 U.S. 717, 90 L.Ed. 424, rehearing de-

nied 66 S.Ct. 135, 326 U.S. 807, 90 L.Ed. 492—*People v. Rogers*, 30 N.E.2d 77, 375 Ill. 54—*People v. Martin*, 24 N.E.2d 380, 372 Ill. 484—*People v. Gould*, 2 N.E.2d 324, 363 Ill. 348—*People v. Schachter*, 198 N.E. 683, 361 Ill. 573—*People v. Angelica*, 193 N.E. 606, 358 Ill. 621—*People v. Snyder*, 158 N.E. 677, 327 Ill. 402, 56 A.L.R. 722.

Mo.—**Corpus Juris Secundum** quoted at length in *State v. Weber*, 298 S.W.2d 403, 406—*State v. Griggs*, 236 S.W.2d 588, 361 Mo. 758—*State v. Herman*, 162 S.W.2d 873—*State v. Block*, 62 S.W.2d 428, 333 Mo. 127, followed in *State v. Block*, 62 S.W.2d 432, 333 Mo. 134.

Mont.—*State v. Moran*, 182 P. 110, 56 Mont. 94.

Okl.—*Rucker v. State*, 195 P.2d 299, 88 Okl.Cr. 15, rehearing denied 199 P.2d 221, 88 Okl.Cr. 15.

25 C.J. p 661 note 87 [a].

Whether money or property is obtained is immaterial; the crime is the same in either case.

La.—*State v. Hart*, 196 So. 62, 195 La. 184, followed in *State v. Weiss*, 196 So. 70, 195 La. 208.

65.5 Mo.—*State v. Weber*, 298 S.W.2d 403—*State v. Herman*, 162 S.W.2d 873.

65.10 Colo.—*Patterson v. People*, 333 P.2d 1047—*McBride v. People*, 248 P.2d 725, 126 Colo. 277.

66. Ariz.—**Corpus Juris** quoted in *Clark v. State*, 89 P.2d 1077, 1081, 53 Ariz. 416.

Colo.—*McBride v. People*, 248 P.2d 725, 126 Colo. 277—*Peiffer v. People*, 107 P.2d 799, 106 Colo. 533.

Ill.—*People v. Jackson*, 122 N.E.2d 813, 4 Ill.2d 296—*People v. Brand*, 114 N.E.2d 370, 415 Ill. 329, certiorari denied *Brand v. People of*

State of Ill., 74 S.Ct. 709, 347 U.S. 959, 98 L.Ed. 1103—*People v. Rogers*, 30 N.E.2d 77, 375 Ill. 54—*People v. Martin*, 24 N.E.2d 380, 372 Ill. 484—*People v. Gould*, 2 N.E.2d 324, 363 Ill. 348—*People v. Schachter*, 198 N.E. 683, 361 Ill. 573—*People v. Angelica*, 193 N.E. 606, 358 Ill. 621—*People v. Snyder*, 158 N.E. 677, 327 Ill. 402, 56 A.L.R. 722—*People v. Peers*, 139 N.E. 13, 307 Ill. 539.

Mont.—*State v. Moran*, 182 P. 110, 56 Mont. 94.

Okl.—**Corpus Juris Secundum** cited in *Rucker v. State*, 195 P.2d 299, 304, 88 Okl.Cr. 15, rehearing denied 199 P.2d 221, 88 Okl.Cr. 15.

25 C.J. p 661 note 88.

The distinctive feature of confidence games is that their authors obtain from their victims money or property without any intention of ever returning to them anything whatever, or anything at all equivalent in commercial value to that which the authors of the scheme receive.

U.S.—*Rosenberger v. Harris*, C.C.Mo., 136 F. 1001, reversed on other grounds 145 F. 449, 76 C.C.A. 225, 13 L.R.A., N.S., 752, certiorari denied 27 S.Ct. 778, 203 U.S. 591, 51 L.Ed. 331.

Practice in large cities

The confidence game is a kind of swindle practiced principally in large cities on unwary strangers.

Colo.—*Wheeler v. People*, 113 P. 312, 49 Colo. 402, Ann.Cas.1912A 755.

12 C.J. p 419 note 51.

66.5 Colo.—*McBride v. People*, 248 P.2d 725, 126 Colo. 277.

La.—*State v. Courreges*, 9 So.2d 453, 201 La. 62.

66.10 Colo.—*McBride v. People*, 248 P.2d 725, 126 Colo. 277.

pathy, or other trait of the victim and often requiring detailed and complex plots and time to support and mature the scheme.^{66,15} Generally speaking, a confidence game is any trick, device, or swindling operation by means of which advantage is taken of the confidence reposed by the victim in the swin-

dler,⁶⁷ or any scheme whereby a swindler wins the confidence of his victim and swindles him out of his money or property by taking advantage of such confidence.⁶⁸ There must be a trick, device, false representation, or swindling operation,⁶⁹ by means of which the confidence of the victim is won;⁷⁰ a

66.15 Mont.—State v. Hale, 328 P.2d 930.

67. Colo.—McBride v. People, 248 P.2d 725, 126 Colo. 277—People v. Lindsay, 202 P.2d 951, 119 Colo. 248—Olde v. People, 145 P.2d 100, 112 Colo. 15.

Ill.—People v. Jackson, 122 N.E.2d 813, 4 Ill.2d 296—People v. Brand, 114 N.E.2d 370, 415 Ill. 329, certiorari denied Brand v. People of State of Ill., 74 S.Ct. 709, 347 U.S. 959, 98 L.Ed. 1103—People v. West, 93 N.E.2d 370, 406 Ill. 249—People v. Priola, 70 N.E.2d 46, 395 Ill. 296—People v. Marmon, 58 N.E.2d 603, 389 Ill. 19, certiorari denied 66 S.Ct. 21, 326 U.S. 717, 90 L.Ed. 424, rehearing denied 66 S.Ct. 135, 326 U.S. 807, 90 L.Ed. 492—People v. Gair, 41 N.E.2d 502, 379 Ill. 458—People v. Westrup, 25 N.E.2d 16, 372 Ill. 517, certiorari denied Westrup v. People of State of Illinois, 60 S.Ct. 1089, 310 U.S. 642, 84 L.Ed. 1410—People v. Angelica, 193 N.E. 606, 358 Ill. 621—People v. Blume, 178 N.E. 48, 345 Ill. 524—People v. Epstein, 170 N.E. 678, 338 Ill. 631—People v. Visconte, 158 N.E. 149, 326 Ill. 496—People v. Benton, 155 N.E. 308, 324 Ill. 331, 56 A.L.R. 725—People v. Rosenbaum, 143 N.E. 859, 312 Ill. 330—People v. Massie, 142 N.E. 503, 311 Ill. 319—People v. Mutchler, 140 N.E. 820, 309 Ill. 207, 35 A.L.R. 339—People v. Shaw, 133 N.E. 208, 300 Ill. 451—People v. Sawhill, 132 N.E. 477, 299 Ill. 393.

La.—State v. Courreges, 9 So.2d 453, 201 La. 62—State v. Echeverria, 111 So. 474, 163 La. 13.

Okl.—Corpus Juris Secundum cited in Rucker v. State, 195 P.2d 299, 304, 88 Okl.Cr. 15, rehearing denied 199 P.2d 221, 88 Okl.Cr. 15.

12 C.J. p 419 note 50—25 C.J. p 661 note 89.

Devices commonly used include cards, dice, and checks.

Ill.—Juretech v. People, 79 N.E. 181, 223 Ill. 484, 486.

Transaction held confidence game Colo.—Patterson v. People, 333 P.2d 1047.

Ill.—People v. Priola, 70 N.E.2d 46, 395 Ill. 296.

Mo.—State v. Weber, 298 S.W.2d 403.

Okl.—Lazar v. State, Cr., 275 P.2d 1003, appeal dismissed 75 S.Ct. 581, 349 U.S. 902, 99 L.Ed. 1240.

Transactions held not confidence games

(1) Selling car on which engine

number has been removed, etc., contrary to the provisions of the Motor Vehicle Act, does not justify conviction under indictment for confidence game.

Ill.—People v. Beal, 145 N.E. 695, 315 Ill. 71.

(2) Proof of violation of law, with respect to sale of stock of unlicensed foreign corporation that had received no certificate of qualification under state securities law, was not sufficient to constitute crime of "obtaining money by means and by use of confidence game."

Ill.—People v. Riedel, 21 N.E.2d 735, 371 Ill. 561.

(3) Other transaction.

Colo.—Bomareto v. People, 137 P.2d 402, 111 Colo. 99.

68. Ariz.—Corpus Juris quoted in Clark v. State, 89 P.2d 1077, 1081, 53 Ariz. 416.

Colo.—Kelly v. People, 215 P.2d 336, 121 Colo. 243.

Ill.—People v. Jackson, 122 N.E.2d 813, 4 Ill.2d 296—People v. Mero, 122 N.E.2d 796, 4 Ill.2d 327—People v. Brand, 114 N.E.2d 370, 415 Ill. 329, certiorari denied Brand v. People of State of Ill., 78 S.Ct. 709, 347 U.S. 959, 98 L.Ed. 1103—People v. Glenn, 112 N.E.2d 133, 415 Ill. 47, certiorari denied Glenn v. People of State of Ill., 74 S.Ct. 120, 346 U.S. 871, 98 L.Ed. 380—People v. Sceri, 95 N.E.2d 80, 407 Ill. 90—People v. West, 93 N.E.2d 370, 406 Ill. 249—People v. Priola, 70 N.E.2d 46, 395 Ill. 296—People v. Marmon, 58 N.E.2d 603, 389 Ill. 19, certiorari denied 66 S.Ct. 21, 326 U.S. 717, 90 L.Ed. 424, rehearing denied 66 S.Ct. 135, 326 U.S. 807, 90 L.Ed. 492—People v. Rogers, 30 N.E.2d 77, 375 Ill. 54—People v. Martin, 24 N.E.2d 380, 372 Ill. 484—People v. Bimbo, 17 N.E.2d 573, 369 Ill. 618, certiorari denied Bimbo v. People of State of Illinois, 59 S.Ct. 365, 305 U.S. 661, 83 L.Ed. 429—People v. Burley, 192 N.E. 689, 357 Ill. 584—People v. Dore, 171 N.E. 554, 339 Ill. 415—People v. Snyder, 158 N.E. 677, 327 Ill. 402, 56 A.L.R. 722—People v. Heinsius, 149 N.E. 783, 319 Ill. 168—People v. Harrington, 142 N.E. 246, 310 Ill. 613—People v. Peers, 139 N.E. 13, 307 Ill. 539.

La.—State v. Courreges, 9 So.2d 453, 201 La. 62.

Mont.—Corpus Juris cited in State v. Moran, 182 P. 110, 112, 56 Mont. 94.

Okl.—Corpus Juris Secundum cited in Rucker v. State, 195 P.2d 299, 304, 88 Okl.Cr. 15, rehearing denied 199 P.2d 221, 88 Okl.Cr. 15.

12 C.J. p 419 note 52—25 C.J. p 661 note 90.

69. Ariz.—State v. Ellis, 189 P.2d 717, 67 Ariz. 7—Clark v. State, 89 P.2d 1077, 53 Ariz. 416.

Ill.—People v. Sceri, 95 N.E.2d 80, 407 Ill. 90—People v. Gair, 41 N.E.2d 502, 379 Ill. 458—People v. Bimbo, 17 N.E.2d 573, 369 Ill. 618—People v. Gould, 2 N.E.2d 324, 363 Ill. 348—People v. Schachter, 198 N.E. 683, 361 Ill. 573—People v. Shepard, 193 N.E. 447, 358 Ill. 338—People v. Friedlander, 159 N.E. 187, 328 Ill. 35—People v. Benton, 155 N.E. 308, 324 Ill. 331, 56 A.L.R. 725.

"A mere confidence reposed without a swindling operation does not constitute the confidence game."

Ill.—People v. Epstein, 170 N.E. 678, 679, 338 Ill. 631.

The exercise of bad judgment by one in whom the victim has confidence does not make him guilty of obtaining money or property by means of the confidence game.

Ill.—People v. Miller, 176 N.E. 736, 344 Ill. 556—People v. Klapperich, 170 N.E. 202, 338 Ill. 406—People v. Snyder, 158 N.E. 677, 327 Ill. 402, 56 A.L.R. 722.

70. Ariz.—State v. Ellis, 189 P.2d 717, 67 Ariz. 7—Clark v. State, 89 P.2d 1077, 53 Ariz. 416.

Ill.—People v. Krazik, 73 N.E.2d 297, 397 Ill. 202—People v. Marmon, 58 N.E.2d 603, 389 Ill. 19, certiorari denied 66 S.Ct. 21, 326 U.S. 717, 90 L.Ed. 424, rehearing denied 66 S.Ct. 135, 326 U.S. 807, 90 L.Ed. 492—People v. Chronister, 41 N.E.2d 750, 379 Ill. 617—People v. Martin, 24 N.E.2d 380, 372 Ill. 484—People v. Bimbo, 17 N.E.2d 573, 369 Ill. 618, certiorari denied Bimbo v. People of State of Illinois, 59 S.Ct. 365, 305 U.S. 661, 83 L.Ed. 429—People v. Schachter, 198 N.E. 683, 361 Ill. 573—People v. Angelica, 193 N.E. 606, 358 Ill. 621—People v. Shepard, 193 N.E. 447, 358 Ill. 338—People v. Burley, 192 N.E. 689, 357 Ill. 584—People v. Parker, 190 N.E. 318, 356 Ill. 138—People v. Sullivan, 182 N.E. 619, 349 Ill. 509—People v. Klapperich, 170 N.E. 202, 338 Ill. 406—People v. Schneider, 158 N.E. 448, 327 Ill. 270—People v. Heinsius, 149 N.E. 783, 319 Ill. 168—People v. Har-

confidence-game statute is not violated by a breach of confidence honestly obtained, as through regular business dealings.⁷¹ Further, the money or property must be obtained by the betrayal of the confidence so won, for no swindling operation or fraudulent obtaining of another's property can constitute a confidence game unless the element of abuse of confidence is a part thereof.⁷²

Inasmuch as a confidence game does not include every fraud,^{72.5} obtaining money or property by false pretenses is not enough to convict of obtaining

it by the confidence game,⁷³ for the crime of obtaining by false pretenses is distinct from the crime of obtaining by confidence game,⁷⁴ the distinction lying in the means employed,⁷⁵ although the element of false pretenses obviously enters into the confidence game.⁷⁶

If the transaction is in fact a swindling operation, its form is immaterial;^{76.5} consequently, it is immaterial that the form assumed is that of a lawful contract or business transaction,⁷⁷ that a corporate

rington, 142 N.E. 246, 310 Ill. 613—*People v. Peers*, 139 N.E. 13, 307 Ill. 539—*People v. Perlmutter*, 138 N.E. 152, 306 Ill. 495.
La.—*State v. Courreges*, 9 So.2d 453, 201 La. 62.

Okl.—*Corpus Juris Secundum* cited in *Rucker v. State*, 195 P.2d 299, 304, 88 Okl.Cr. 15, rehearing denied 199 P.2d 221, 88 Okl.Cr. 15.

Intent is an essential element.

Ill.—*People v. Kratz*, 142 N.E. 561, 311 Ill. 118.

71. Colo.—*Graham v. People*, 248 P. 2d 730, 126 Colo. 351—*Bomareto v. People*, 137 P.2d 402, 111 Colo. 99.

Ill.—*People v. Brand*, 114 N.E.2d 370, 415 Ill. 329, certiorari denied *Brand v. People of State of Ill.*, 74 S.Ct. 709, 347 U.S. 959, 98 L.Ed. 1103—*People v. West*, 93 N.E.2d 370, 406 Ill. 249—*People v. Marmon*, 58 N.E.2d 603, 389 Ill. 19, certiorari denied 66 S.Ct. 21, 326 U.S. 717, 90 L.Ed. 424, rehearing denied 66 S.Ct. 135, 326 U.S. 807, 90 L.Ed. 492—*People v. Gair*, 41 N.E.2d 502, 379 Ill. 458—*People v. Gould*, 2 N.E.2d 324, 363 Ill. 348—*People v. Miller*, 176 N.E. 736, 344 Ill. 556—*People v. Epstein*, 170 N.E. 678, 338 Ill. 631—*People v. Friedlander*, 159 N.E. 187, 328 Ill. 35—*People v. Snyder*, 158 N.E. 677, 327 Ill. 402, 56 A.L.R. 722—*People v. Perlmutter*, 138 N.E. 152, 306 Ill. 495.

Contra *People v. Emmel*, 127 N.E. 53, 292 Ill. 477.

72. Ariz.—*Corpus Juris* quoted in *Clark v. State*, 89 P.2d 1077, 1081, 53 Ariz. 416.

Colo.—*Bomareto v. People*, 137 P.2d 402, 111 Colo. 99.

Ill.—*People v. Jackson*, 122 N.E.2d 813, 4 Ill.2d 296—*People v. West*, 93 N.E.2d 370, 406 Ill. 249—*People v. Marmon*, 58 N.E.2d 603, 389 Ill. 19, certiorari denied 66 S.Ct. 21, 326 U.S. 717, 90 L.Ed. 424, rehearing denied 66 S.Ct. 135, 326 U.S. 807, 90 L.Ed. 492—*People v. Gair*, 41 N.E.2d 502, 379 Ill. 458—*People v. Martin*, 24 N.E.2d 380, 372 Ill. 484—*People v. Riedel*, 21 N.E.2d 735, 371 Ill. 561—*People v. Gould*, 2 N.E.2d 324, 363 Ill. 348—*People v. Schachter*, 198 N.E. 683,

361 Ill. 573—*People v. Shepard*, 193 N.E. 447, 358 Ill. 338—*People v. Burley*, 192 N.E. 689, 357 Ill. 584—*People v. Parker*, 190 N.E. 318, 356 Ill. 138—*People v. Sullivan*, 182 N.E. 619, 349 Ill. 509—*People v. Miller*, 176 N.E. 736, 344 Ill. 556—*People v. Epstein*, 170 N.E. 678, 338 Ill. 631—*People v. Fosnacht*, 166 N.E. 37, 334 Ill. 351—*People v. Friedlander*, 159 N.E. 187, 328 Ill. 35—*People v. Schneider*, 158 N.E. 448, 327 Ill. 270—*People v. Harrington*, 142 N.E. 246, 310 Ill. 613—*People v. Ingravallo*, 141 N.E. 176, 309 Ill. 498—*People v. Peers*, 139 N.E. 13, 307 Ill. 539.

Mont.—*State v. Hale*, 328 P.2d 930.

Okl.—*Corpus Juris Secundum* cited in *Rucker v. State*, 195 P.2d 299, 304, 88 Okl.Cr. 15, rehearing denied 199 P.2d 221, 88 Okl.Cr. 15.
25 C.J. p 661 note 91.

Confidence in device rather than in swindler is sufficient to bring a case within the definition of the crime.

Ill.—*People v. Shaw*, 133 N.E. 208, 300 Ill. 451.

Okl.—*Rucker v. State*, 195 P.2d 299, 88 Okl.Cr. 15, rehearing denied 199 P.2d 221, 88 Okl.Cr. 15.

Confidence in innocent third person

Where accused induced a bank to cash for him a check drawn by one who had, to accused's knowledge, insufficient funds on deposit in bank on which check was drawn, it was no defense that the paying bank paid the check, not because of its confidence in accused, but because of its confidence in an innocent third party who stated to the bank that he was positive the check was all right, which representation accused adopted by his presence and silence.

Ill.—*People v. Mutchler*, 140 N.E. 820, 309 Ill. 207, 35 A.L.R. 339.

72.5 Colo.—*Olde v. People*, 145 P.2d 100, 112 Colo. 15—*Shepherd v. People*, 129 P.2d 104, 109 Colo. 582.

73. Ariz.—*State v. Freeman*, 279 P. 2d 443, 78 Ariz. 286, followed in 279 P.2d 447, 78 Ariz. 291—*Clark v. State*, 89 P.2d 1077, 53 Ariz. 416.
Colo.—*White v. People*, 249 P.2d 823, 126 Colo. 865.

Ill.—*People v. Marmon*, 58 N.E.2d 603, 389 Ill. 19, certiorari denied 66 S.Ct. 21, 326 U.S. 717, 90 L.Ed. 424, rehearing denied 66 S.Ct. 135, 326 U.S. 807, 90 L.Ed. 492—*People v. Martin*, 24 N.E.2d 380, 372 Ill. 484—*People v. Gould*, 2 N.E.2d 324, 363 Ill. 348—*People v. Snyder*, 158 N.E. 677, 327 Ill. 402, 56 A.L.R. 722—*People v. Schneider*, 158 N.E. 448, 327 Ill. 270—*People v. Ingravallo*, 141 N.E. 176, 309 Ill. 498—*People v. Koelling*, 119 N.E. 993, 284 Ill. 118.

Mont.—*State v. Allen*, 275 P.2d 200, 128 Mont. 306.

Okl.—*Rucker v. State*, 195 P.2d 299, 88 Okl.Cr. 15, rehearing denied 199 P.2d 221, 88 Okl.Cr. 15.

Fraudulent claim of loss

The mere fraudulent filling out claim for loss under an insurance policy issued just subsequent to the loss was not a use of the confidence game.

Ill.—*People v. Peers*, 139 N.E. 13, 307 Ill. 539.

74. Ill.—*People v. Gould*, 2 N.E.2d 324, 363 Ill. 348—*People v. Peers*, 139 N.E. 13, 307 Ill. 539.

Mont.—*State v. Allen*, 275 P.2d 200, 128 Mont. 306.

75. Ariz.—*Clark v. State*, 89 P.2d 1077, 53 Ariz. 416.

Ill.—*People v. Drury*, 167 N.E. 823, 335 Ill. 539.

76. Ill.—*People v. Gould*, 2 N.E.2d 324, 363 Ill. 348.

Okl.—*Rucker v. State*, 195 P.2d 299, 88 Okl.Cr. 15, rehearing denied 199 P.2d 221, 88 Okl.Cr. 15.

"In every confidence game a false pretense of some sort is involved, but every false pretense does not involve a confidence game."

Ariz.—*Clark v. State*, 89 P.2d 1077, 1081, 53 Ariz. 416.

76.5 Ill.—*People v. Jackson*, 122 N.E.2d 813, 4 Ill.2d 296—*People v. West*, 93 N.E.2d 370, 406 Ill. 249.

77. Ill.—*People v. Brand*, 114 N.E. 2d 370, 415 Ill. 329, certiorari denied *Brand v. People of State of Ill.*, 74 S.Ct. 709, 347 U.S. 959, 98 L.Ed. 1103—*People v. Glenn*, 112 N.E.2d 133, 415 Ill. 47—*People v. West*, 93 N.E.2d 370, 406 Ill. 249—

device is used,^{77.5} or that the participants are available at a place of business.^{77.10}

The statutes do not apply to transactions between persons dealing with each other on an equal footing,⁷⁸ as there should be a confidential relation between the two parties.^{78.5} The character of the crime is not affected by the amount, kind, or value of the money obtained.^{78.10}

Under some of the statutes, something more than mere words must be employed, that is, some false or bogus means, token, symbol, or device must have been used,⁷⁹ but under others this is not necessary;⁸⁰ and, where the statute enumerates certain false or bogus tokens, the crime may be committed by the use of other devices embraced within the general language of the statute,⁸¹ as well as by the use of

People v. Marmon, 58 N.E.2d 603, 389 Ill. 19, certiorari denied 66 S. Ct. 21, 326 U.S. 717, 90 L.Ed. 424, rehearing denied 66 S.Ct. 135, 326 U.S. 807, 90 L.Ed. 492—People v. Westrup, 25 N.E.2d 16, 372 Ill. 517, certiorari denied Westrup v. People of State of Illinois, 60 S.Ct. 1089, 310 U.S. 643, 84 L.Ed. 1410—People v. Martin, 24 N.E.2d 380, 372 Ill. 484—People v. Burley, 192 N.E. 689, 357 Ill. 584—People v. Dore, 171 N.E. 554, 339 Ill. 415—People v. Epstein, 170 N.E. 678, 338 Ill. 631—People v. Drury, 167 N.E. 823, 335 Ill. 539—People v. Heinsius, 149 N.E. 783, 319 Ill. 168—People v. Kratz, 142 N.E. 561, 311 Ill. 118—People v. Harrington, 142 N.E. 246, 310 Ill. 613—People v. Poole, 141 N.E. 730, 310 Ill. 345—People v. Mutchler, 140 N.E. 820, 309 Ill. 207, 35 A.L.R. 339—People v. Peers, 139 N.E. 13, 207 Ill. 539—People v. Robinson, 132 N.E. 803, 299 Ill. 617, error dismissed Robinson v. People of State of Illinois, 43 S.Ct. 163, 260 U.S. 756, 67 L.Ed. 498—People v. Sawhill, 132 N.E. 477, 299 Ill. 393.
Minn.—State v. Yurkiewicz, 292 N. W. 782, 208 Minn. 71.
Mo.—State v. Griggs, 236 S.W.2d 588, 361 Mo. 758.
Okl.—Lazar v. State, 275 P.2d 1003, appeal dismissed 75 S.Ct. 581, 349 U.S. 902, 99 L.Ed. 1240—Rucker v. State, 195 P.2d 299, 88 Okl.Cr. 15, rehearing denied 199 P.2d 221, 88 Okl.Cr. 15.
25 C.J. p 661 note 93.

Breach of contract

That there is a breach of contract is immaterial where it is a mere incident to a fraudulent scheme.

Okl.—Rucker v. State, 195 P.2d 299, 88 Okl.Cr. 15, rehearing denied 199 P.2d 221, 88 Okl.Cr. 15.

77.5 Ill.—People v. Glenn, 112 N.E. 2d 133, 415 Ill. 47, certiorari denied Glenn v. People of State of Ill., 74 S.Ct. 120, 346 U.S. 871, 98 L.Ed. 380.

77.10 Ill.—People v. Glenn, 112 N. E.2d 133, 415 Ill. 47, certiorari denied Glenn v. People of State of Ill., 74 S.Ct. 120, 346 U.S. 871, 98 L.Ed. 380.

78. Colo.—Bomareto v. People, 137 P.2d 402, 111 Colo. 99.

Ill.—People v. Sullivan, 182 N.E. 619,

349 Ill. 509—People v. Miller, 176 N.E. 736, 344 Ill. 556—People v. Schneider, 158 N.E. 448, 327 Ill. 270—People v. Robinson, 132 N.E. 803, 299 Ill. 617, error dismissed Robinson v. People of State of Illinois, 43 S.Ct. 163, 260 U.S. 756, 67 L.Ed. 498.

Mo.—State v. Block, 62 S.W.2d 428, 333 Mo. 127, followed in State v. Block, 62 S.W.2d 432, 333 Mo. 134. 25 C.J. p 661 note 94.

78.5 Mo.—State v. Herman, 162 S. W.2d 873—State v. Block, 62 S.W. 2d 428, 333 Mo. 127, followed in State v. Block, 62 S.W.2d 432, 333 Mo. 134.

78.10 Ill.—People v. Sceri, 95 N.E.2d 80, 407 Ill. 90.

79. Colo.—White v. People, 249 P. 2d 823, 126 Colo. 365—People v. Dolph, 239 P.2d 312, 124 Colo. 553—Shepherd v. People, 129 P.2d 104, 109 Colo. 582—Davis v. People, 40 P.2d 968, 96 Colo. 212—Chilton v. People, 35 P.2d 870, 95 Colo. 268.

25 C.J. p 661 note 95.

Device and words combined may constitute the deception required.

Colo.—Roll v. People, 243 P. 641, 78 Colo. 589.

Sufficiency of device

(1) Where accused obtained stock in return for purported note which bore printed heading and signature of a company with its address so as to create impression of a substantial business location, and which accused signed in pencil ostensibly as a minor representative, but accused was the company, and room at stated address had been rented for a few days only, the purported note was a "false token" or a "bogus token."

Colo.—Peiffer v. People, 107 P.2d 799, 106 Colo. 533.

(2) Selling a worthless or nonexisting business not by mere words alone but by employing in addition the instrumentality of an office furnished in a manner which would lead the prosecutor to believe that the representations of accused with respect to the business were true.

Colo.—Elliott v. People, 138 P. 39, 56 Colo. 236.

80. Ill.—People v. Rosenbaum, 143 N.E. 859, 312 Ill. 330—People v.

Bertsche, 106 N.E. 823, 265 Ill. 272, Ann.Cas.1916A 729.

Under the Minnesota swindling statute, which does not in terms refer to the confidence game but denounces the obtaining of money or property by means of three-card monte, or of any other form or device, sleight of hand, or other means, by use of cards or instruments of like character, or by any other instrument, trick, or device, the rule stated in the text has been followed.

Minn.—State v. Yurkiewicz, 292 N.W. 782, 208 Minn. 71.

False representation or pretense

(1) A false representation or pretense may alone constitute the means of obtaining the confidence through the betrayal of which the property is obtained.

Ill.—People v. Burley, 192 N.E. 689, 357 Ill. 584—People v. Klapperich, 170 N.E. 202, 338 Ill. 406—People v. Schneider, 158 N.E. 448, 327 Ill. 270—People v. Harrington, 142 N. E. 246, 310 Ill. 613.

Utah.—State v. Scott, 175 P.2d 1016, 111 Utah 9.

(2) However, it has been held that a false pretense which is sufficient to authorize conviction under the statute relating to fraud by false pretenses will not sustain conviction under the statute relating to confidence game unless a trick or device is employed to gain the confidence of the victim, although the trick need not involve a token or symbol as distinguished from mere statements, made in connection with acts done with the intent to cheat and defraud.

Ariz.—Clark v. State, 89 P.2d 1077, 53 Ariz. 416.

81. Express money order

Obtaining money by a bogus express money order is within the statute defining as a crime the obtaining or attempting to obtain money by means of any false or bogus check "or by any other means, instrument or device commonly called the confidence game," the statute including any instrument similar to a bank check or draft of the nature of commercial paper for the payment of money.

Ill.—People v. Shaw, 133 N.E. 208, 300 Ill. 451.

the tokens specifically named.⁸²

Accordingly, a bogus check has been held sufficient to convict one under the statute;^{82.5} but it has also been held that the manner of passing the check and other circumstances surrounding the transaction must be shown before it may be considered as part of a confidence game,^{82.10} and under some circumstances the drawing of a check on a bank in which the drawer has no funds,^{82.15} or insufficient funds,^{82.20} or his innocent possession of a fictitious check,^{82.25} without more does not constitute a crime under the statute. It has been further held that accused need not be a confidence man to be convicted for a violation of a statute punishing the obtaining of money by use of the confidence game by means of a false or bogus check.^{82.30}

The confidence of a body politic may be imposed on, so as to warrant prosecution for the confidence game, just as may that of a person or a private corporation.^{82.35}

Bunco and bunco-steering. "Bunco" is a name applied to certain types of confidence games.⁸³ A bunco game has been held separate and distinct from the crime of obtaining money or property by false pretenses^{83.5} and from the crime of obtaining or attempting to obtain money by the use of a confidence game.^{83.10}

The word "game," as used in this connection, means a gambling device contrived, although masked

as a legitimate operation, to bilk the victim of his wager by manipulation.^{83.15} The statute defining the offense is aimed at the swindler rather than against the inanimate paraphernalia so used, and the user's design and conduct give the game its character.^{83.20} It is not an essential element of the offense that the victim shall have reposed confidence in the swindler.^{83.25}

In at least one jurisdiction, whoever lures, entices, or persuades another to any place, on any pretense, and then by duress or fraud compels such person to win or lose, or to advance or loan money, or to execute or give his note or other obligation, either for money or anything of value, or to part with anything of value on any game or wager, or by means of any trick, device, or artifice is guilty of bunco steering.⁸⁴ Under such a statute, the word "part" means to relinquish a connection of any kind; it is not necessary under such a statute that the victim part with title, nor is it essential that he should have had legal title to the thing parted with.⁸⁵

§ 33. — False Personation of Officer or Another Person

One who obtains money or property by falsely personating, or representing himself to be, another, or an officer, may be guilty of obtaining property by false pretenses.

One who obtains money or property by falsely personating, or representing himself to be, another,⁸⁶ or an officer,⁸⁷ or falsely representing that

82. Ill.—People v. Cathony, 33 N.E. 2d 473, 376 Ill. 260.

82.5 Colo.—Chasse v. People, 201 P. 2d 378, 119 Colo. 160. Worthless checks generally see supra § 21.

82.10 Colo.—People v. Lindsay, 202 P.2d 951, 119 Colo. 248.

Transaction held confidence game
Colo.—McBride v. People, 248 P.2d 725, 126 Colo. 277.

Swindling operation

Where confidence of one is obtained through the conduct and representations of another, who obtains money or property of his victim by means of a false check, such action constitutes a swindling operation within contemplation of statute making it unlawful to obtain or attempt to obtain money or property by means of any false or bogus check. Colo.—McBride v. People, supra.

82.15 Colo.—People v. Lindsay, 202 P.2d 951, 119 Colo. 248.

82.20 Colo.—People ex rel. Metzger v. District Court of City and County of Denver, 208 P.2d 79, 119 Colo. 451, followed in 208 P.2d 82, 120

Colo. 195—Shepherd v. People, 129 P.2d 104, 109 Colo. 582.

Check not bogus

Although the statute expressly names bogus checks as one of the devices by which the crime may be committed, the fact that a check was regularly signed by the maker, who had some funds on deposit in drawee bank, and was not a bogus check, was not a defense to indictment charging confidence game.

Ill.—People v. Mutchler, 140 N.E. 820, 309 Ill. 207, 35 A.L.R. 339.

82.25 Ill.—People v. Chronister, 41 N.E.2d 750, 379 Ill. 617.

82.30 Colo.—Shepherd v. People, 129 P.2d 104, 109 Colo. 582.

82.35 Ill.—People v. Gibbs, 108 N.E. 2d 446, 413 Ill. 154.

Person or corporation generally see supra § 5 b.

83. Cal.—People v. Mason, 45 P. 182, 113 C. 76.

"Morocco"

Mont.—State v. Hale, 328 P.2d 930.

83.5 Mont.—State v. Allen, 275 P.2d 200, 128 Mont. 306.

83.10 Mont.—State v. Hale, 328 P. 2d 930.

83.15 Mont.—State v. Hale, supra.

83.20 Mont.—State v. Hale, supra.

83.25 Mont.—State v. Hale, supra.

84. Ind.—Fleming v. State, 91 N.E. 1085, 174 Ind. 264.
9 C.J. p 1004 note 45.

85. Ind.—Popovich v. State, 177 N. E. 458, 202 Ind. 630.

86. Iowa.—State v. Goble, 15 N.W. 272, 60 Iowa 447.

25 C.J. p 592 note 96—36 C.J. p 778 note 22.

87. Ind.—Greening v. State, 153 N. E. 412, 198 Ind. 706.

25 C.J. p 592 note 97—36 C.J. p 778 note 25.

Personation not shown

Where it appeared that the prosecuting witness, when confronted by his creditor and defendant and told that he "had better settle up," may have yielded his property through fear of arrest, knowing that defendant occasionally made arrests, it was held that, where defendant made no threats of arrest or accusations, and did not say that he was an officer,

he belongs to an organization,^{87.5} or that he has a warrant for the arrest of the prosecutor,⁸⁸ is, if all the other essential elements are present, guilty of obtaining money or property by false pretenses. In this connection it may be noted that, as appears in False Personation, in some jurisdictions it is made a crime, distinct from obtaining money or property by false pretenses, to personate another or to personate a public officer.

§ 34. — Fraudulent Presentation of Claims to Public Officers

Presenting false claims to public officers for allowance or payment is an offense under express statutes, as well as under general statutes as to false pretenses.

In some jurisdictions it is an offense, under express statutes, to present false claims to public officers for allowance or payment.⁸⁹ The authority of the officer to pay such a claim has been held to be an essential element of such offense.⁹⁰ For the offense to be committed, the claim must be presented,⁹¹ although it need not be regular in form⁹² and need not be presented or verified in the statutory manner;⁹³ and the crime is complete when the claim has been presented, even though no money

has been obtained thereby.⁹⁴

Where accused had approved a false claim against the county which was presented by claimant to the county clerk, who issued a warrant on which claimant obtained money from the county treasurer, the clerk, and not the treasurer, was the person deceived, so as to justify conviction of accused as an accomplice to the swindle of the clerk.^{94.5}

Aside from such special statutes, one who with an intent to defraud obtains, or attempts to obtain, money by presenting a false claim to a public official is indictable under the general statutes as to false pretenses.⁹⁵

§ 35. Degrees of Offenses

At common law, the offense is not a felony; under some statutes it is a misdemeanor, under others a felony. Under some the degree of the offense depends on the character or value of the property obtained or the method of obtaining it; under others the degree does not depend on such value, or the degree may be made discretionary with the judge.

At common law, the obtaining of goods by false pretenses is not a felony.^{95.50} Under some statutes, this and like offenses are misdemeanors;⁹⁶ under others they are felonies.⁹⁷ Under the statutes in

his acts did not constitute the crime charged.

Ark.—Shaw v. State, 243 S.W. 859, 155 Ark. 10.

87.5 N.Y.—People v. Le Grande, 131 N.E.2d 712, 309 N.Y. 420.

88. Pa.—Commonwealth v. Henry, 22 Pa. 253.
25 C.J. p 592 note 98.

89. Ariz.—Harris v. State, 17 P.2d 1098, 41 Ariz. 311.
25 C.J. p 661 note 97.

False statements to federal agencies and relief authorities see supra § 30.

Public officers or bodies included

(1) Board of education.
Cal.—People v. Ralph, 227 P. 642, 67 C.A. 270.

(2) County boards and officers are within the phrase "state boards and officers."

Cal.—People v. Richards, 260 P. 582, 86 C.A. 86.

"Allowance" means determination of the validity of the claim.

Cal.—People v. Ralph, 227 P. 642, 67 C.A. 270.

Falsity or fraudulent character of claim

(1) To be "false or fraudulent," as contemplated by statute, a claim must be for services or materials not actually rendered or furnished.
N.Y.—People v. Dally, 24 N.Y.S.2d 692, 175 Misc. 280.

(2) The presentation of a bill con-

taining items which are correct and properly chargeable, but the prices for which are excessive, is not indictable under a statute making it a felony to present a false and fraudulent bill for audit, with intent to defraud.

N.Y.—People v. King, 43 N.Y.S. 975, 19 Misc. 98, affirmed 44 N.Y.S. 287, 15 App.Div. 84—People ex rel. Greene v. Swasey, 203 N.Y.S. 22, 122 Misc. 388.

(3) The fact that such a claim is not verified as required does not make it a false or fraudulent claim.
N.Y.—People ex rel. Greene v. Swasey, supra.

90. Cal.—People v. McCord, 59 P.2d 587, 15 C.A.2d 136.

Utah.—State ex rel. Welling v. Third Judicial District Court in and for Salt Lake County, 49 P.2d 950, 87 Utah 416.

91. Ind.—Pontarelli v. State, 176 N.E. 696, 203 Ind. 146.

92. Ind.—Nordyke v. State, 11 N.E. 2d 165, 213 Ind. 243—Pontarelli v. State, 176 N.E. 696, 203 Ind. 146.

93. Ind.—Pontarelli v. State, supra.
Utah.—State ex rel. Welling v. Third Judicial District Court in and for Salt Lake County, 49 P.2d 950, 87 Utah 416.

94. R.I.—State v. Barrette, 124 A. 657.

94.5 Tex.—Parish v. State, 165 S.W. 2d 748, 145 Tex.Cr. 117.

95. N.M.—State v. Kelly, 202 P. 524, 27 N.M. 412, 21 A.L.R. 156.

Or.—Sprague v. City of Astoria, 195 P. 789, 100 Or. 298.
25 C.J. p 662 note 98.

95.50 N.Y.—I-Land Auto Sales, Inc. v. Valle, 175 N.Y.S.2d 732, 12 Misc. 2d 1091.

Grade of offense of attempt see infra § 36.

96. Md.—MacEwen v. State, 71 A. 2d 464, 194 Md. 492.

N.C.—Oates v. Wachovia Bank & Trust Co., 169 S.E. 869, 205 N.C. 14.

25 C.J. p 614 note 71.

97. Cal.—People v. Revley, 227 P. 957, 67 C.A. 553.

Ky.—Tartar v. Commonwealth, 102 S.W.2d 971, 267 Ky. 502.

N.D.—State v. Feist, 93 N.W.2d 646.

W.Va.—Ex parte Chalfant, 93 S.E. 1032, 81 W.Va. 93.

25 C.J. p 614 note 72.

Check kiting

That the misdemeanor offense of giving a check with insufficient funds in bank to meet it is one of the series of acts in "check kiting" does not take "check kiting" out of the definition of the felony offenses defined by statutes relating to false pretenses and confidence games or fraudulent checks.

U.S.—Fidelity & Cas. Co. of N. Y. v. Bank of Altenburg, C.A.Mo., 216 F. 2d 294, certiorari denied 75 S.Ct. 440, 348 U.S. 952, 99 L.Ed. 744.

at least one jurisdiction, defendant may be prosecuted either as a cheat and punished as a misdemeanor, or he may be prosecuted as for larceny.⁹⁸

Under some statutes, the degree of the offense depends on the character or value of the property obtained⁹⁹ or the method of obtaining it;¹ but under others it has been expressly decided that the degree of the offense does not depend on the value of the property obtained.² It has been held that the value of the property obtained, as fixing the degree of the offense, is to be measured by the actual loss suffered by the prosecutor in the transaction,³ but according to other authority the value of the property acquired is the test.⁴ Under one statute, it is discretionary with the judge, depending on the penalty he imposes, whether the offense is a felony or a misdemeanor.^{4.5}

Intent has been held immaterial in determining the

degree of the offense.^{4.10}

§ 36. Attempts

An attempt to commit the crime of obtaining property by false pretenses is an offense, the elements of which are an intent to obtain by false pretense, the doing of an overt act toward obtaining the property by means of the pretense, and the failure so to obtain it.

An attempt to commit the crime of obtaining property by false pretenses, or a like crime, is an indictable offense.⁵ Such an attempt consists in an intent to obtain by the false pretense, or the like; the doing of some overt act toward obtaining the property by means of the false pretense, or the like; and the failure so to obtain the property.⁶ The act or acts which defendant has performed must be more than merely preparatory; they must reach far enough toward the accomplishment of the desired result to amount to the commencement of the consummation of the crime,⁷ and they must

98. R.I.—State v. McMahon, 140 A. 359, 49 R.I. 107.

99. Ariz.—Clark v. State, 89 P.2d 1077, 53 Ariz. 416.

Mo.—State v. Hollbrook, 289 S.W. 560.

Tex.—Perry v. State, 46 S.W. 816, 39 Tex.Cr. 495.

25 C.J. p 614 note 73.

Punishment as depending on value of property see *infra* § 56.

Rule under worthless check law

The offense defined in the worthless check law is a degree of the statutory offense of obtaining money or property by false pretenses, even though it is an offense under a separate statute.

Ky.—Daily v. Commonwealth, 248 S.W.2d 425—Tartar v. Commonwealth, 102 S.W.2d 971, 267 Ky. 502.

Aggregate of separate amounts or items

(1) Where defendant obtains a sum of money by means of a false representation, and subsequently obtains other sums by reason of the same representation, each time he receives a sum of money a separate offense is committed, and if the sum received each time is less than the amount required to constitute a felony, defendant is guilty only of several misdemeanors and not of a felony, although the aggregate of the amounts received would be sufficient to make the crime a felony.

Cal.—People v. Serna, 110 P.2d 492, 43 C.A.2d 106—People v. Miles, 99 P.2d 551, 37 C.A.2d 373.

(2) Conviction of felony of swindling by securing check for more than fifty dollars by fraudulent representations that accused was agent of an insurance company was not

erroneous because check represented premiums on two policies for two different persons, each premium being less than fifty dollars.

Tex.—Mitner v. State, 273 S.W. 565, 100 Tex.Cr. 455.

(3) Under the statute penalizing the willful intent to defraud by drawing or uttering a check for payment of money, knowing at the time that the maker has not sufficient funds in the bank for the payment thereof, and providing that if the total amount of all such checks does not exceed fifty dollars the offense is punishable only by imprisonment in the county jail for not more than one year, each violation of the statute may be a felony regardless of the amount of the individual check, but the offense is not punishable as a felony unless the aggregate of the bad checks involved in the offenses is more than fifty dollars.

Cal.—People v. Johnson, App., 330 P.2d 894.

1. Mo.—State v. Martin, 126 S.W. 442, 226 Mo. 538.

25 C.J. p 614 note 73.

2. Ky.—Jones v. Commonwealth, 108 S.W.2d 1021, 269 Ky. 795—Tartar v. Commonwealth, 102 S.W.2d 971, 267 Ky. 502.

25 C.J. p 614 note 74.

3. Ga.—Berry v. State, 23 S.E. 833, 97 Ga. 202.

4. Tex.—La Moynes v. State, 111 S.W. 950, 53 Tex.Cr. 221, overruling Lively v. State, Cr., 74 S.W. 321—Perry v. State, 46 S.W. 816, 39 Tex.Cr. 495—Gaskins v. State, Cr., 38 S.W. 470.

25 C.J. p 614 note 76.

4.5 Ariz.—State v. Lubetkin, 276 P. 2d 520, 78 Ariz. 91.

4.10 Okl.—Rucker v. State, 195 P.

2d 299, 88 Okl.Cr. 15, rehearing denied 199 P.2d 221, 88 Okl.Cr. 15.

5. Cal.—People v. Grossman, 82 P. 2d 76, 28 C.A.2d 193.

People v. Heinrich, 224 P. 466, 65 C.A. 510.

Miss.—State v. Fitzgerald, 117 So. 517, 151 Miss. 229.

Mo.—State v. Howell, 300 S.W. 807, 318 Mo. 772.

N.Y.—People v. Siman, 197 N.Y.S. 713, 119 Misc. 635.

Okl.—Nemecek v. State, 114 P.2d 492, 72 Okl.Cr. 195, 135 A.L.R. 1149.

Pa.—Corpus Juris quoted in Commonwealth v. Johnson, 167 A. 344, 345, 312 Pa. 140, 89 A.L.R. 333.

25 C.J. p 614 note 78.

6. Pa.—Corpus Juris quoted in Commonwealth v. Johnson, 167 A. 344, 345, 312 Pa. 140, 89 A.L.R. 333.

25 C.J. p 614 note 79.

7. Mo.—State v. Fraker, 49 S.W. 1017, 148 Mo. 143.

Okl.—Nemecek v. State, 114 P.2d 492, 72 Okl.Cr. 195, 135 A.L.R. 1149.

Acts held sufficient

(1) Insuring one of defendants and later, after pronouncing his death, attempting to collect insurance.

Mo.—State v. Howell, 300 S.W. 807, 318 Mo. 772.

(2) Where thief writes false pretense, and mails it to his victim, mailing is part of group or aggregate of acts which together make crime, and is an attempt.

N.Y.—People v. Werblow, 148 N.E. 786, 241 N.Y. 55.

(3) Attempt to commit larceny by means of worthless checks may be based on the mere drawing, uttering, or delivering of a check, draft, or order, without sufficient funds or

be adapted to secure that end.⁸ If accused has proceeded thus far, and has not consummated the crime, he is guilty of the attempt,⁹ even though it develops that for some reason unknown to him he could not have completed the crime,¹⁰ or although the reason for his failure is that the person intended to be defrauded is unable or unwilling to part with the property sought to be obtained.¹¹

It is not necessary, in order to establish an intent, that the prosecutor should have been deceived,¹² or should have relied on the false pretenses¹³ and have parted with his property;¹⁴ indeed, if property is actually obtained in consequence of the prosecutor's reliance on the false pretenses, the offense is complete and an indictment for an attempt will not lie.¹⁵ Accused cannot be convicted of an attempt to obtain money or property by false pretenses where, had he succeeded in what he attempted, he would not be guilty of the crime of obtaining by false pretenses,¹⁶ as where the conduct involved is not prohibited by law.^{16.5}

Where an order or warrant has been obtained by fraudulent representations, in order to sustain a conviction for an attempt it must be conceded that such order or warrant was not a legal obligation,

for if it was a legal one there could be no such thing as an attempt to secure it.¹⁷

Grade of offense. In some jurisdictions an attempt to commit the offense is a misdemeanor;¹⁸ in others it is a felony,¹⁹ or the grade depends on what the punishment would have been if the crime had been consummated.²⁰

§ 37. Defenses

As a general rule, it is no defense that accused made, offered to make, or intended to make, restitution to the prosecutor, or that the latter condoned the crime, or was himself guilty of a wrong or was negligent; and the prosecutor's motives are generally immaterial.

On the principle that the injury is to the state, accused cannot plead that the prosecutor has condoned the crime and settled with accused,²¹ unless the statute permits such a settlement.²² Where one is indicted for presenting a false claim, an offer made by him to change or correct it, after it has been presented, is immaterial as to his guilt.²³ The fact that accused was entitled to a part of the money obtained by false pretenses does not excuse him;²⁴ nor is it a defense that accused believed that the money he obtained was a fair compensation for

credit to meet it, and with intent to defraud.

N.Y.—*People v. Siman*, 197 N.Y.S. 713, 119 Misc. 635.

(4) Other acts.

U.S.—*Lemke v. U. S.*, C.A. Alaska, 211 F.2d 73, certiorari denied 74 S.Ct. 866, 347 U.S. 1013, 98 L.Ed. 1136.

Kan.—*State v. Visco*, 331 P.2d 318, 183 Kan. 562.

8. Mo.—*Corpus Juris* quoted in *State v. Howell*, 300 S.W. 807, 811, 318 Mo. 772.

25 C.J. p 615 note 87.

9. Ga.—*Parker v. State*, 113 S.E. 218, 29 Ga.App. 26.

10. Cal.—*People v. Heinrich*, 224 P. 466, 65 C.A. 510.

Mo.—*Corpus Juris* quoted in *State v. Howell*, 300 S.W. 807, 811, 318 Mo. 772.

Pa.—*Corpus Juris* quoted in *Commonwealth v. Johnson*, 167 A. 344, 345, 312 Pa. 140, 89 A.L.R. 333. 25 C.J. p 615 note 84.

11. Mo.—*Corpus Juris* quoted in *State v. Howell*, 300 S.W. 807, 811, 318 Mo. 772.

Pa.—*Corpus Juris* quoted in *Commonwealth v. Johnson*, 167 A. 344, 345, 312 Pa. 140, 89 A.L.R. 333. Philippine.—*U. S. v. Villanueva*, 1 Philippine 370.

12. Cal.—*People v. Wallace*, 178 P. 2d 771, 78 C.A.2d 726.

Ga.—*De Krasner v. State*, 187 S.E. 402, 54 Ga.App. 41.

Kan.—*State v. Visco*, 331 P.2d 318, 183 Kan. 562.

Pa.—*Commonwealth v. Johnson*, 167 A. 344, 312 Pa. 140, 89 A.L.R. 333.

13. Cal.—*People v. Wallace*, 178 P. 2d 771, 78 C.A.2d 726—*People v. Grossman*, 82 P.2d 76, 28 C.A.2d 193.

Minn.—*State v. Smith*, 255 N.W. 826, 192 Minn. 237, followed in *State v. Ginsberg*, 255 N.W. 828, 192 Minn. 241.

25 C.J. p 615 note 80.

14. Ga.—*De Krasner v. State*, 187 S.E. 402, 54 Ga.App. 41. 25 C.J. p 615 note 81.

15. Ill.—*Graham v. People*, 55 N.E. 179, 181 Ill. 477, 47 L.R.A. 731. 25 C.J. p 615 note 82.

That defendant received part of money which he sought to obtain by false pretenses did not preclude conviction for attempt.

Pa.—*Commonwealth v. Johnson*, 167 A. 344, 312 Pa. 140, 89 A.L.R. 333.

16. N.H.—*State v. Ellsworth*, 124 A. 2d 203, 100 N.H. 301.

Okl.—*Nemecsek v. State*, 114 P.2d 492, 72 Okl.Cr. 195, 135 A.L.R. 1149.

Pretense not inducement

If the false pretense would not have been the inducing cause of defendant's obtaining the money had he obtained it, he cannot be guilty of an attempt to obtain money by false pretenses.

Okl.—*Nemecsek v. State*, supra.

16.5 Colo.—*People v. Dolph*, 239 P. 2d 812, 124 Colo. 553.

17. Mo.—*State v. Lawrence*, 77 S. W. 497, 178 Mo. 350.

18. Pa.—*Commonwealth v. KoEune*, 26 Pa.Dist. 546.

Symon's Case, 29 Pa.Co. 606.

Degree of offenses generally see supra § 35.

19. Tenn.—*Rafferty v. State*, 16 S. W. 728, 91 Tenn. 655.

20. Mo.—*State v. Scroggs*, 70 S.W. 480, 170 Mo. 153.

16 C.J. p 56 note 70 [f].

21. Ga.—*Lowe v. State*, 36 S.E. 856, 111 Ga. 650.

25 C.J. p 615 note 91.

22. Pa.—*Geier v. Shade*, 109 Pa. 180.

25 C.J. p 615 note 92.

Discretion

Dismissal of the prosecution on a proper showing that the injured party has received satisfaction is discretionary.

Wash.—*State v. Carr*, 294 P. 1016, 160 Wash. 83.

23. Del.—*State v. Hartnett*, 74 A. 82, 23 Del. 204.

24. Ark.—*Lamb v. State*, 155 S.W.2d 49, 202 Ark. 931.

25 C.J. p 616 note 5.

Obtaining what is justly due see supra § 28.

injuries he had received through the negligence of prosecutor.²⁵

Where intent is a constituent element of an offense, facts showing lack or nonexistence of the intent constitute a defense;^{25.5} but wrongful acts which are knowingly or intentionally committed cannot be justified or excused on the ground of an innocent intent, since the color of the act determines the complexion of the intent.^{25.10}

It is not a defense that the prosecutor has signed a paper stating that he did not rely on the pretense, if it appears that he did, in fact, rely on it in parting with his property, and signed the paper thereafter.²⁶ One who has made false representations in regard to the title of real estate and has induced another to exchange property of value therefor by reason of such false representations cannot escape criminal liability by having an agent deliver the deed instead of delivering it in person.²⁷ Where all of the essential elements are present, it is not a defense that accused had an option to buy the property on which he defaulted;^{27.5} and where false representations are orally made by accused as to the absence of encumbrances, it is not a defense that a subsequent written contract contains a provision guarding against any encumbrances, thus nullifying the previous oral statements.^{27.10} The Factor's Act has been held inapplicable to these cases as a defense.^{27.15} The fact that the acts and conduct of an

individual may result in imposing civil liability for damages on him,^{27.20} or that the victim tries by means of civil action to recover his losses,^{27.25} does not preclude prosecution for a criminal offense committed in connection with such acts and conduct. The fact that accused was paid the money involved as wages pursuant to a contractual relationship between employer and employee does not preclude a determination that money is obtained under false pretenses.^{27.30}

In a prosecution for the making, uttering, and delivering of a worthless check, a statutory requirement of a certain number of days written notice, or demand, to pay has been held met, or accused, by his conduct and promises, may be held to have waived the notice.^{27.35}

Recovery, restitution, or repayment. Since, as appears supra § 28, it is not essential that the prosecutor should have suffered, or have been put in a position where he will necessarily suffer, actual loss, it is no defense that the prosecutor has recovered,²⁸ or could recover,²⁹ for any loss which he has sustained, or that he has regained possession of the property.³⁰ Likewise, in accordance with the statement, supra § 24, that the offense is complete when the property is obtained, it is no defense that accused has returned,³¹ intends to return,^{31.5} or has offered to return,³² the property obtained, or that he has paid for it³³ or offered to pay for it.³⁴

25. Mass.—Commonwealth v. Burton, 67 N.E. 419, 183 Mass. 461.
- 25.5 Tex.—Coffee v. State, 184 S.W. 2d 278, 148 Tex.Cr. 71.
- 25.10 D.C.—Nelson v. U. S., 227 F.2d 21, 97 U.S.App.D.C. 6, 53 A.L.R.2d 1206, certiorari denied 76 S.Ct. 700, 351 U.S. 910, 100 L.Ed. 1445.
26. Ill.—Jackson v. People, 18 N.E. 286, 126 Ill. 139.
27. Mo.—State v. Loesch, 180 S.W. 875.
- 27.5 Neb.—Dwoskin v. State, 74 N.W.2d 847, 161 Neb. 793, certiorari denied Dwoskin v. State of Nebraska, 77 S.Ct. 61, 352 U.S. 840, 1 L.Ed.2d 57, rehearing denied 77 S.Ct. 219, 352 U.S. 937, 1 L.Ed.2d 170.
- 27.10 N.J.—State v. Hubschman, 45 A.2d 316, 133 N.J.Law 520.
- 27.15 N.Y.—People v. Rosenfeld, 83 N.Y.S.2d 691, 193 Misc. 277.
- 27.20 Cal.—People v. Kemp, 269 P.2d 186, 124 C.A.2d 683.
- Mich.—People v. Cole, 84 N.W.2d 711, 349 Mich. 175.
- 27.25 Tex.—Glover v. State, 225 S.W. 2d 195, 154 Tex.Cr. 86.
- 27.30 N.J.—State v. Torrance, 125 A.2d 403, 41 N.J.Super. 445.
- 27.35 Pa.—Commonwealth v. Martin, 13 Pa.Dist. & Co.2d 612.
28. Ark.—Moss v. State, 108 S.W.2d 782, 194 Ark. 524.
- Kan.—*Corpus Juris Secundum* cited in State v. Aiken, 254 P.2d 264, 268, 174 Kan. 162.
- Mo.—State v. Michels, 255 S.W.2d 760—State v. Zingher, 259 S.W. 451, 302 Mo. 650.
- Pa.—Commonwealth v. Stone, Quar. Sess., 71 Dauph.Co. 213, modified on other grounds 144 A.2d 610, 187 Pa.Super. 236.
- Tex.—Taylor v. State, 232 S.W. 525, 89 Tex.Cr. 618.
- 25 C.J. p 615 notes 93, 1.
29. Kan.—*Corpus Juris Secundum* cited in State v. Aiken, 254 P.2d 264, 268, 174 Kan. 162.
- Mo.—*Corpus Juris* cited in State v. Zingher, 259 S.W. 451, 453, 302 Mo. 650—State v. Richardson, 228 S.W. 789.
- R.I.—State v. Considine, 186 A. 676, 56 R.I. 456.
- 25 C.J. p 615 note 94.
30. Cal.—People v. Wynn, 112 P.2d 979, 44 C.A.2d 723.
- 25 C.J. p 615 note 99.
31. Ark.—Bruce v. State, 265 S.W. 2d 956, 223 Ark. 357.
- Cal.—People v. Wynn, 112 P.2d 979, 44 C.A.2d 723—People v. Hand, 16 P.2d 156, 127 C.A. 484.
- Ga.—Green v. State, 182 S.E. 74, 52 Ga.App. 18.
- Miss.—Odom v. State, 94 So. 233, 130 Miss. 643, suggestion of error overruled 95 So. 253, 132 Miss. 3.
- 25 C.J. p 615 note 98.
- 31.5 Okl.—Moore v. State, 250 P.2d 46, 96 Okl.Cr. 118.
32. N.Y.—People v. Reiss, 99 N.Y.S. 1002, 114 App.Div. 431.
- Okl.—Moore v. State, 250 P.2d 46, 96 Okl.Cr. 118.
- 25 C.J. p 615 note 97.
33. Ala.—Cook v. State, 104 So. 837, 20 Ala.App. 622, certiorari denied Ex parte Cook, 104 So. 838, 213 Ala. 328.
- Cal.—People v. Wynn, 112 P.2d 979, 44 C.A.2d 723—People v. Hand, 16 P.2d 156, 127 C.A. 484.
- Mo.—State v. Zingher, 259 S.W. 451, 302 Mo. 650.
- Utah.—State v. Morris, 38 P.2d 1097, 85 Utah 210.
- 25 C.J. p 615 note 96.
34. Mo.—*Corpus Juris* cited in State v. Zingher, 259 S.W. 451, 453, 302 Mo. 650.
- 25 C.J. p 615 note 95.

Where money has been obtained, it is no defense that accused is able and willing to repay it,³⁵ intends to repay it,^{35.5} or has repaid it.³⁶ It is no defense that accused has offered in good faith to make good his representations³⁷ or has applied the money toward making them good.³⁸

Since, as appears *supra* § 7, the intent of accused need not be to cause the prosecutor ultimate loss, it is no defense that, when he committed the crime, he intended to return the property,³⁹ to repay the money,⁴⁰ or to make good his representations,⁴¹ at some future time.

The effect of payment of a worthless check after its issuance and dishonor is considered *supra* § 21.

Contributory guilt of prosecutor. A crime being an act directed against the state, the state cannot be estopped from prosecuting it by the act of any individual, and hence the fact that the party defrauded by the false pretense was himself guilty of some fraud or wrong in the transaction is no defense to accused, according to most of the authorities,⁴² as where the victim was willing to engage in the criminal activity;^{42.5} but there is authority to the contrary.⁴³

Negligence or carelessness of prosecutor. Where the negligence of the prosecutor, or his failure to exercise due diligence, is interposed as a defense, it is, where unmixed with other considerations, generally held to be immaterial.⁴⁴ However, it has been

35. Cal.—*People v. Porter*, 222 P.2d 151, 99 C.A.2d 506—*People v. Miles*, 99 P.2d 551, 37 C.A.2d 373.
Md.—*Delcher v. State*, 158 A. 37, 161 Md. 475.

Okl.—*Moore v. State*, 250 P.2d 46, 96 Okl.Cr. 113.

25 C.J. p 615 note 2.

35.5 Okl.—*Moore v. State*, *supra*.

36. Ark.—*Bruce v. State*, 265 S.W. 2d 956, 223 Ark. 357—*Moss v. State*, 108 S.W.2d 782, 194 Ark. 524.

Cal.—*People v. Pond*, 284 P.2d 793, 44 C.2d 665.

People v. Porter, 222 P.2d 151, 99 C.A.2d 506—*People v. Wynn*, 112 P.2d 979, 44 C.A.2d 723—*People v. Hand*, 16 P.2d 156, 127 C.A. 484.

Colo.—*Corpus Juris* cited in *Pepper v. People*, 225 P. 846, 848, 75 Colo. 348.

D.C.—*Clagett v. U. S.*, 289 F. 532, 53 App.D.C. 134.

Ga.—*Green v. State*, 182 S.E. 74, 52 Ga.App. 18.

Miss.—*Odum v. State*, 94 So. 233, 130 Miss. 643, suggestion of error overruled 95 So. 253, 132 Miss. 3.

Pa.—*Commonwealth v. Stone*, 144 A. 2d 610, 187 Pa.Super. 236, affirmed, Sup., 150 A.2d 870.

Partial restitution is not ground of defense.

Cal.—*People v. Miles*, 99 P.2d 551, 37 C.A.2d 373.

Pa.—*Commonwealth v. Gross*, 56 A. 2d 303, 161 Pa.Super. 613.

Pa.—*Commonwealth v. Stone*, Quar. Sess., 71 Dauph.Co. 213, modified on other grounds 144 A.2d 610, 187 Pa.Super. 236, affirmed, Sup., 150 A.2d 870.

Payment of some of several checks

Where defendant issued several worthless checks at the same time, the fact that he took up and paid some of them before the prosecution was commenced does not relieve his acts of criminality.

Cal.—*People v. Weaver*, 274 P. 361, 96 C.A. 1.

37. Cal.—*People v. Moore*, 256 P. 266, 82 C.A. 739.

38. Cal.—*People v. Hand*, 16 P.2d 156, 127 C.A. 484.

39. Miss.—*Odum v. State*, 94 So. 233, 130 Miss. 643, suggestion of error overruled 95 So. 253, 132 Miss. 3.

40. Colo.—*Corpus Juris* cited in *Pepper v. People*, 225 P. 846, 848, 75 Colo. 348.

D.C.—*Clagett v. U. S.*, 289 F. 532, 53 App.D.C. 134.

Miss.—*Odum v. State*, 94 So. 233, 130 Miss. 643, suggestion of error overruled 95 So. 253, 132 Miss. 3.

R.I.—*State v. Considine*, 186 A. 676, 56 R.I. 456.

25 C.J. p 615 note 3.

41. U.S.—*Slaten v. U. S.*, C.A.Ga., 209 F.2d 590.

Kan.—*State v. Stanley*, 227 P. 263, 116 Kan. 449.

42. Cal.—*People v. Hall*, 23 P.2d 783, 133 C.A. 40.

Ill.—*People v. Koscielniak*, 257 Ill. App. 514.

Ind.—*Greening v. State*, 153 N.E. 412, 198 Ind. 706.

Minn.—*State v. Wolf*, 210 N.W. 589, 168 Minn. 505.

N.M.—*Corpus Juris* cited in *State v. Foster*, 37 P.2d 541, 38 N.M. 540, 95 A.L.R. 1247.

Or.—*State v. Mellenberger*, 95 P.2d 709, 163 Or. 233, 128 A.L.R. 1506, overruling *State v. Alexander*, 148 P. 1136, 76 Or. 329.

25 C.J. p 616 note 9.

Defrauding punchboard operator

Accused could not escape punishment for obtaining punchboard prize money by falsely pretending to hold winning number and presenting to punchboard operator an altered non-winning number because of fact that operation of punchboard constituted violation of state law, since doctrine of *particeps criminis* was inapplicable.

Or.—*State v. Mellenberger*, 95 P.2d 709, 163 Or. 233, 128 A.L.R. 1506.

Failure to register trade-mark

In prosecution for cheating and swindling, noncompliance of person allegedly swindled with act requiring registration of trade-name constituted no defense, although such noncompliance would preclude him from maintaining civil suit.

Ga.—*Cary v. State*, 189 S.E. 625, 55 Ga.App. 167.

That it is illegal to possess whisky is not a defense to prosecution for a worthless check given in payment for it.

Kan.—*State v. Doyle*, 199 P.2d 164, 166 Kan. 5.

42.5 Ky.—*Frazier v. Commonwealth*, 165 S.W.2d 33, 291 Ky. 467.

Traffic in contraband goods

Ky.—*Frazier v. Commonwealth*, *supra*.

43. Wis.—*State v. Crowley*, 41 Wis. 271, 22 Am.R. 719.

44. Ga.—*Suggs v. State*, 25 S.E.2d 532, 69 Ga.App. 383—*De Krasner v. State*, 187 S.E. 402, 54 Ga.App. 41.

Ill.—*People v. Gruber*, 200 N.E. 483, 362 Ill. 278.

Nev.—*State v. Bacha*, 194 P. 1066, 44 Nev. 373.

Tenn.—*McClure v. State*, 124 S.W.2d 240, 174 Tenn. 140—*Cook v. State*, 94 S.W.2d 386, 170 Tenn. 245—*Rowe v. State*, 51 S.W.2d 505, 164 Tenn. 571.

Wis.—*State ex rel. Hull v. Larson*, 277 N.W. 101, 226 Wis. 585—*Palotta v. State*, 199 N.W. 72, 184 Wis. 290.

25 C.J. p 616 note 11.
Tendency of pretense to deceive see *supra* § 15.

Warning by attorney

It is no defense that victim was advised and warned by her attorney that he was suspicious of transaction.

indicated that there may be such carelessness as to prevent conviction,⁴⁵ as in the case of carelessness so gross that the law will impute consent to the person parting with his property,⁴⁶ or so gross as to amount to fraud and work an estoppel.⁴⁷

The motive of the prosecutor in procuring the institution of the prosecution is immaterial,⁴⁸ and, consequently, it is no defense that his object is to collect a debt or obtain restitution,⁴⁹ although the courts look with grave disapproval on prosecutions which are thus inspired.⁵⁰

The motive with which the money or property was parted with by its owner is also immaterial,⁵¹ and it is usually held that it is no defense that the object of the prosecutor in parting with his money was charitable and not mercenary,⁵² the statute not being purely for the protection of persons in commercial dealings,⁵³ but there is authority to the contrary.⁵⁴

§ 38. Persons Liable

- a. In general
- b. Aiders, abettors, and accessories

a. In General

One who commits the offense through an innocent agent is solely guilty; one who has obtained by false pretenses is not relieved of liability by the fact that he acted as agent or attorney, and one may be liable under a bad-check statute whether he drew the check on his personal account or in a representative capacity.

When one commits the crime by means of an innocent agent, he,⁵⁵ and he alone,⁵⁶ is guilty; but

the false representations of an agent cannot be imputed to his principal in the absence of conspiracy or authorization,⁵⁷ and one who has obtained property by false pretenses cannot be relieved of criminal liability on the ground that he was acting as an agent in obtaining possession of such property.⁵⁸ The fact that one submitting a false claim is acting as attorney for claimant,⁵⁹ or that one obtaining money by false representations is acting as attorney for the person to whom he makes the representations,⁶⁰ does not relieve him of liability.

As appears in Corporations § 1364 e, a corporation may be convicted of obtaining property or money by means of false pretense; and, as appears in Infants § 95, an infant may be liable.

A cropper who is himself to perform services and labor in making the crop is within the provisions of a statute making it illegal to procure property on a contract to perform services with intent to defraud.⁶¹

Worthless checks. Under a statute making it an offense to obtain property with fraudulent intent by means of a bad check, one who thus obtains property is criminally liable regardless of whether he draws the check on his personal account or in some representative capacity.⁶² The endorser of a bad check is also liable under the statute if he is in some way connected with the scheme to defraud.^{62.5} When the offense is committed, the owner of the firm on whose account the check is drawn is the principal, even though an agent delivers the check.^{62.10}

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| Mo.—State v. Mandell, 183 S.W.2d 59, 353 Mo. 502.
Prosecutrix' failure to read mortgage handed to her by defendants was held no defense.
Pa.—Commonwealth v. Conroy, 167 A. 407, 109 Pa.Super. 274.
45. N.C.—State v. Wilkerson, 9 S.E. 415, 103 N.C. 337.
46. Mass.—Commonwealth v. Norton, 11 Allen 266.
25 C.J. p 616 note 13.
47. Ga.—Ryan v. State, 30 S.E. 678, 104 Ga. 78.
48. Iowa.—State v. Jackson, 105 N. W. 51, 128 Iowa 543.
25 C.J. p 616 note 16.
49. Iowa.—State v. Jackson, supra.
Pa.—Commonwealth v. Singer, 2 Del. Co. 182.
50. Ga.—Drought v. State, 28 S.E. 1013, 101 Ga. 544.
25 C.J. p 616 note 18.
51. Ind.—Greening v. State, 153 N. E. 412, 198 Ind. 706.
25 C.J. p 616 note 19. | 52. Wash.—State v. Swan, 104 P. 145, 55 Wash. 97, 133 Am.S.R. 1024, 24 L.R.A.,N.S., 575, 19 Ann.Cas. 1129.
25 C.J. p 616 note 20.
53. N.J.—State v. Worman, 97 A. 31, 88 N.J.Law 463.
54. N.Y.—People v. Clough, 17 Wend. 351, 31 Am.D. 303.
55. Colo.—Whitfield v. People, 244 P. 470, 79 Colo. 108.
Ind.—Nordyke v. State, 11 N.E.2d 165, 213 Ind. 243.
Instigating another to make pretense imposes criminal liability on instigator.
Ky.—Commonwealth v. Harper, 243 S.W. 1053, 195 Ky. 843.
56. Mo.—State v. Rosenberg, 62 S. W. 435, 982, 162 Mo. 358.
25 C.J. p 618 note 45.
57. Mont.—State v. Woolsey, 259 P. 826, 84 Mont. 141.
58. Iowa.—State v. Chingren, 74 N. W. 946, 105 Iowa 169. | Wash.—State v. Mendenhall, 63 P. 1109, 24 Wash. 12.
59. Ga.—De Krasner v. State, 187 S.E. 402, 54 Ga.App. 41.
60. N.Y.—People v. Colmey, 102 N. Y.S. 714, 117 App.Div. 462, affirmed 80 N.E. 1115, 188 N.Y. 573. People v. Reavey, 39 Hun 364.
61. Ga.—Vinson v. State, 52 S.E. 79, 124 Ga. 19.
62. Tenn.—State v. Cooley, 206 S. W. 182, 141 Tenn. 33.
Signing check as manager
In prosecution for false uttering of bank check, that defendant signed check as manager of business operated by him was no defense.
Cal.—People v. Weiss, 266 P.2d 924, 123 C.A.2d 487.
Iowa.—State v. Doudna, 284 N.W. 113, 226 Iowa 351.
62.5 Md.—Kaufman v. State, 85 A. 2d 446, 199 Md. 35.
62.10 Minn.—State v. Billington, 36 N.W.2d 393, 228 Minn. 79. |
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A corporate officer has been held criminally liable for uttering and delivering a check of the corporation with knowledge of its worthlessness;⁶³ but there is authority for the view that an officer who signs a corporation's worthless checks in a representative capacity cannot be prosecuted as "maker," "drawer," "utterer," or "deliverer" thereof.⁶⁴

b. Aiders, Abettors, and Accessories

Where the offense is a misdemeanor, all engaged are principals, and under statutory provision this may be true where it is a felony. A participant with others in a scheme or agreement to obtain property by false pretenses is chargeable with the acts of the other participants in furtherance thereof.

Where the offense is a misdemeanor, all engaged are principals,⁶⁵ and this is also true where it is a felony and the distinctions between principals and accessories in cases of felony have been abrogated by statute.⁶⁶

A participant with others in a scheme to obtain property by false pretenses is chargeable with the acts of the other participants in furtherance of the scheme.⁶⁷ Thus, false pretenses made by one of several in pursuance of an agreement between them

are chargeable to all;⁶⁸ and, where accused was a party to a scheme or transaction entered into to defraud by false pretenses, and shares or is interested in the fruits thereof, he is none the less guilty because he was not present when the false pretenses were made,⁶⁹ or when the property was delivered,⁷⁰ or because he never actually met with the other persons accused.⁷¹

So, too, the mere fact that one of several persons obtaining the property by agreement received no share of the property,⁷² or that the false pretense was made for the benefit of another and not for accused,^{72.5} does not make him the less a party.

However, one does not commit the crime by merely being present when the property is received by another and taking part of the property;⁷³ and mere knowledge on the part of one person that certain representations made by another are false, without aiding and abetting therein, will not render such person criminally liable,⁷⁴ although if such person, being present, encourages and corroborates the statements of the other, with knowledge of their falsity, he is liable.⁷⁵

A person may be guilty of "aiding and abetting"

63. Del.—Clifton v. State, 145 A.2d 392.

N.C.—State v. Dowless, 9 S.E.2d 18, 217 N.C. 589.

Ohio.—In re Hertz, 117 N.E.2d 925, 161 Ohio St. 70, certiorari denied Hertz v. Alvis, 74 S.Ct. 685, 347 U.S. 957, 98 L.Ed. 1102.

State v. Stemen, 106 N.E.2d 662, 90 Ohio App. 309.

Tenn.—State v. Cooley, 206 S.W. 182, 141 Tenn. 33.

Criminal responsibility of officers and agents of corporations generally see Corporations §§ 931, 932.

64. N.Y.—People v. Fleishman, 232 N.Y.S. 187, 133 Misc. 288.

65. U.S.—Jones v. U. S., D.C., 13 F. Cas.No.7,499, 5 Cranch C.C. 647. Md.—Felkner v. State, 146 A.2d 424, 218 Md. 300. 25 C.J. p 617 note 38.

66. Cal.—People v. Descant, 124 P. 2d 864, 51 C.A.2d 343—People v. Revley, 227 P. 957, 67 C.A. 553.

67. U.S.—Todorow v. U. S., C.A.Cal., 173 F.2d 439, certiorari denied 69 S.Ct. 1169, 337 U.S. 925, 93 L.Ed. 1733.

Cal.—People v. Breitenstein, 296 P. 87, 111 C.A. 746.

Idaho.—State v. So, 231 P.2d 734, 71 Idaho 324.

Miss.—Fuller v. State, 72 So.2d 454, 221 Miss. 247.

Pa.—Commonwealth v. Johnson, Quar.Sess., 21 LeH.L.J. 369.

Acts before entry into conspiracy

One who had knowledge that principals intended to obtain money by conspiracy and false representation, and who aided and encouraged it, adopted the acts of the principals which preceded his entry into the scheme.

Tex.—Gerber v. State, 232 S.W. 334, 90 Tex.Cr. 37.

68. Ark.—Webb v. State, 176 S.W.2d 915, 206 Ark. 640.

Cal.—People v. Breitenstein, 296 P. 87, 111 C.A. 746.

Ga.—Turnipseed v. State, 185 S.E. 403, 53 Ga.App. 194.

Idaho.—State v. So, 231 P.2d 734, 71 Idaho 324.

Ky.—Lee v. Commonwealth, 242 S.W. 2d 984.

Mass.—Commonwealth v. Mycock, 52 N.E.2d 377, 315 Mass. 262—Commonwealth v. Morrison, 147 N.E. 588, 252 Mass. 116.

Tex.—West v. State, 145 S.W.2d 580, 140 Tex.Cr. 493.

25 C.J. p 617 note 39. Conspiracy to obtain by false pretense see Conspiracy § 54 a (2).

Each of coschemers in a confidence game is liable for the acts and representations of his associates.

Ill.—People v. Rogers, 30 N.E.2d 77, 375 Ill. 54—People v. Harrington, 142 N.E. 246, 310 Ill. 613.

69. U.S.—Todorow v. U. S., C.A.Cal., 173 F.2d 439, certiorari denied 69 S.Ct. 1169, 337 U.S. 925, 93 L.Ed. 1733.

Pa.—Commonwealth v. Williams, 176 A. 251, 116 Pa.Super. 177.

70. U.S.—Jones v. U. S., D.C., 13 F. Cas.No.7,499, 5 Cranch C.C. 647.

Cal.—People v. Revley, 227 P. 957, 67 C.A. 553.

Tex.—Holt v. State, 160 S.W.2d 944, 144 Tex.Cr. 62.

71. Mass.—Commonwealth v. Quinn, 111 N.E. 405, 222 Mass. 504.

72. U.S.—Lemke v. U. S., C.A.Alaska, 211 F.2d 73, certiorari denied 74 S.Ct. 866, 347 U.S. 1013, 98 L.Ed. 1136.

Griggs v. U. S., Alaska, 158 F. 572, 85 C.C.A. 596.

Ill.—People v. Johnson, 103 N.E.2d 479, 411 Ill. 276, certiorari denied Johnson v. People of State of Ill., 72 S.Ct. 1045, 343 U.S. 951, 96 L.Ed. 1352—People v. Krazik, 73 N.E.2d 297, 397 Ill. 202.

Ky.—**Corpus Juris Secundum** cited in Lee v. Commonwealth, 242 S.W.2d 984, 986.

Pa.—Commonwealth v. Johnson, Quar.Sess., 21 LeH.L.J. 369. 25 C.J. p 617 note 41.

72.5 Tenn.—Ownbey v. State, 253 S.W.2d 726, 194 Tenn. 500.

73. Mich.—People v. Cline, 6 N.W. 671, 44 Mich. 290. 25 C.J. p 617 note 43.

74. Ind.—Clarke v. State, 32 Ind. 67.

75. Ky.—Finney v. Commonwealth, 227 S.W. 999, 190 Ky. 536.

in the commission of the offense without being guilty of "conspiring" its commission.⁷⁶ In a state having no crime of conspiracy as such, a person may be prosecuted for obtaining money by false pretenses, although his codefendants or co-conspirators are acquitted or discharged.⁷⁷

II. PROSECUTION AND PUNISHMENT

A. INDICTMENT OR INFORMATION

§ 39. Requisites and Sufficiency in General

- a. In general
- b. Language of statute

a. In General

An indictment or information for obtaining property by false pretense or false token, or for a similar offense, must allege with precision and certainty every fact necessary to be proved in order to convict accused of the crime.

An indictment or information for obtaining property by false pretense or false token, or for a similar offense under special statutes, must allege with precision and certainty every fact necessary to be proved in order to convict accused of the crime;⁷⁸ in the application of this principle, various indictments or informations have been held sufficient,^{78.5} while other indictments or informations have been

76. Cal.—People v. Huling, 234 P. 924, 71 C.A. 144.

77. Kan.—State v. Robinson, 259 P. 691, 124 Kan. 245.

Effect of acquittal or nolle prosequi of co-conspirators in prosecution for conspiracy see Conspiracy § 94 c.

78. Ala.—Hutcherson v. State, 147 So. 208, 25 Ala.App. 380.

Ark.—Fisher v. State, 256 S.W. 858, 161 Ark. 586.

Cal.—People v. Schmidt, 249 P. 832, 79 C.A. 413, rehearing denied 250 P. 1104, 79 C.A. 413.

Ga.—McElmurray v. State, 47 S.E.2d 139, 76 Ga.App. 604—Summers v. State, 11 S.E.2d 409, 63 Ga.App. 445.

—Fischer v. State, 167 S.E. 200, 46 Ga.App. 207, followed in Kramer v. State, 167 S.E. 201, 46 Ga.App. 210.

Ind.—Compton v. State, 170 N.E. 325, 201 Ind. 535.

Miss.—State v. Cohan, 83 So.2d 827, 226 Miss. 212.

Mo.—State v. Robinson, 255 S.W.2d 811—State v. Hoffman, 297 S.W. 388.

N.Y.—People v. Sloane, 300 N.Y.S. 1032, 165 Misc. 444, modified on other grounds 4 N.Y.S.2d 784, 254 App.Div. 780, affirmed 18 N.E.2d 679, 279 N.Y. 724—People v. Auerbach, 252 N.Y.S. 282, 140 Misc. 767—People v. Siman, 197 N.Y.S. 713, 119 Misc. 635.

Tex.—Browder v. State, 292 S.W.2d 342, 163 Tex.Cr. 375—McCustion v. State, 158 S.W.2d 527, 143 Tex.Cr. 283, 141 A.L.R. 205—Greeson v. State, 147 S.W.2d 804, 141 Tex.Cr. 115.

25 C.J. p 618 note 47—31 C.J. p 653 note 12 [a] (2), (4).

Crime held charged under particular statute

Information charging that accused fraudulently obtained automobile in exchange for realty described by him as free from encumbrances, but in

fact encumbered by two mortgages, charged crime under statute relating to obtaining property by false pretenses, and not under that relating to confidence game and bogus checks. Okl.—Ex parte Harman, 247 P.2d 302, 95 Okl.Cr. 411.

Fictitious or worthless checks

(1) Essential elements to be alleged in information charging issuance of fictitious check are uttering and publishing of check, knowing it to be fictitious.

Cal.—People v. Carmona, 251 P. 315, 80 C.A. 159.

(2) An information charging defendant with obtaining money from A. by making, uttering, and delivering to her a draft on a firm named knowing there was no such firm and that said draft was false and fictitious, held not to charge an offense of making a false and fictitious bill, note, or check, but the offense charged, if any, was under the swindling statute relating to obtaining money by means of a false or bogus check or written instrument. Ariz.—Patterson v. State, 215 P. 1096, 25 Ariz. 276, 35 A.L.R. 366.

(3) Indictment held to charge offense of uttering forged instrument and not that of obtaining money or property by false pretenses. Iowa.—Lewis v. Hollowell, 227 N.W. 140—Plants v. Hollowell, 214 N.W. 552.

(4) Indictment for obtaining money by false pretenses, showing merely representation that check was good, charged "misdemeanor."

Iowa.—Woods v. Hollowell, 214 N.W. 675, 204 Iowa 186.

(5) Information charging that defendant obtained money by false representation that his check was good held to charge unindictable misdemeanor.

Iowa.—Conkling v. Hollowell, 214 N.W. 717, 203 Iowa 1374.

(6) In prosecution for giving or drawing check without sufficient funds, with intent to defraud, the word "or" should not have been used in complaint alleging that defendant "gave or drew" a check.

Tex.—Greeson v. State, 147 S.W.2d 804, 141 Tex.Cr. 115.

(7) Indictment charging that defendant uttered and delivered check, knowing that "he had not sufficient funds in or credit with" bank for payment thereof, without alleging that he drew the check, or that he knew that drawer thereof did not have sufficient funds available for its payment, held insufficient.

Ala.—Parker v. State, 103 So. 76, 20 Ala.App. 470.

(8) An indictment alleging that accused obtained possession of an automobile by false pretenses and fraudulent representations in giving and drawing a check on a named bank without sufficient funds therein to pay such check, and setting out a check signed by another, but failing to allege that accused indorsed the check or that the drawer had no funds in the bank, or that accused represented that she did, held vulnerable to demurrer.

Tex.—James v. State, 257 S.W. 886, 96 Tex.Cr. 308.

(9) Indictment for obtaining waiver of lien by worthless check, not alleging knowledge of insufficiency of funds was insufficient, although it alleged fraudulent intent.

Ill.—People v. Balalas, 166 N.E. 47, 334 Ill. 444.

(10) Failure of indictment to allege nonpayment of check on presentation held not fatal defect, in prosecution for issuing check with insufficient funds.

Ala.—Caughlan v. State, 114 So. 280, 22 Ala.App. 220.

78.5 U.S.—Shayne v. U. S., C.A.Cal., 255 F.2d 739.

- Ala.—*Earnest v. State*, App., 113 So. 2d 517—*Bosworth v. State*, 189 So. 794, 28 Ala.App. 538—*Jones v. State*, 182 So. 402, 28 Ala.App. 254, certiorari denied 182 So. 404, 236 Ala. 30—*Coggins v. State*, 125 So. 201, 23 Ala.App. 332.
- Ariz.—*Maseeh v. State*, 47 P.2d 423, 46 Ariz. 94.
- Ark.—*State v. Bond*, 235 S.W. 801, 151 Ark. 203.
- Cal.—*People v. Ames*, 143 P.2d 92, 61 C.A.2d 522—*People v. Rubens*, 54 P.2d 98, 11 C.A.2d 576, hearing denied 54 P.2d 1107, 11 C.A.2d 576—*People v. Shearer*, 256 P. 611, 83 C.A. 321—*Ex parte Shackleford*, 220 P. 430, 64 C.A. 78.
- Conn.—*State v. Davis*, 106 A.2d 159, 141 Conn. 319.
- D.C.—*Randle v. U. S.*, 113 F.2d 945, 72 App.D.C. 368, certiorari denied 61 S.Ct. 64, 311 U.S. 683, 85 L.Ed. 440.
- Fla.—*Inman v. State*, 191 So. 13, 139 Fla. 792—*Inman v. State*, 191 So. 12, 139 Fla. 789.
- Ga.—*Wilson v. State*, 67 S.E.2d 164, 84 Ga.App. 703—*Cox v. State*, 21 S.E.2d 283, 67 Ga.App. 618—*Thompson v. State*, 19 S.E.2d 777, 67 Ga.App. 240, certiorari denied *Thompson v. State of Georgia*, 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536, rehearing denied 63 S.Ct. 200, 317 U.S. 709, 87 L.Ed. 565—*Scott v. State*, 185 S.E. 131, 53 Ga.App. 61, affirmed 190 S.E. 582, 184 Ga. 164—*Phillips v. State*, 149 S.E. 157, 40 Ga.App. 141—*Lucas v. State*, 144 S.E. 138, 38 Ga.App. 449—*Nissenbaum v. State*, 143 S.E. 776, 38 Ga. App. 253, affirmed 146 S.E. 189, 167 Ga. 495—*Sturdivant v. State*, 103 S.E. 837, 25 Ga.App. 428.
- Idaho.—*State v. So*, 231 P.2d 734, 71 Idaho 324—*State v. Barr*, 117 P.2d 282, 63 Idaho 59—*State v. Stevens*, 282 P. 93, 48 Idaho 335.
- Ill.—*People v. Gruber*, 200 N.E. 483, 362 Ill. 278—*People v. Scowley*, 187 N.E. 415, 353 Ill. 330—*People v. Epstein*, 163 N.E. 346, 332 Ill. 100.
- Ind.—*Woods v. State*, 140 N.E.2d 752, 236 Ind. 423—*Coppock v. State*, 140 N.E.2d 102, 236 Ind. 341—*Crouch v. State*, 97 N.E.2d 860, 229 Ind. 326—*Garrison v. State*, 193 N.E. 587, 208 Ind. 690—*Wilkoff v. State*, 185 N.E. 642, 206 Ind. 142.
- Iowa.—*Murphy v. Hollowell*, 214 N.W. 734, 204 Iowa 64—*Munson v. Hollowell*, 214 N.W. 733.
- Kan.—*State v. Aiken*, 254 P.2d 264, 174 Kan. 162—*State v. Faulkner*, 33 P.2d 175, 139 Kan. 665—*State v. Mathes*, 196 P. 607, 108 Kan. 488.
- Ky.—*Chapman v. Commonwealth*, 239 S.W.2d 974—*Hatcher v. Commonwealth*, 5 S.W.2d 882, 224 Ky. 131.
- Md.—*Schanker v. State*, 116 A.2d 363, 208 Md. 15—*Simmons v. State*, 167 A. 60, 165 Md. 155.
- Mich.—*People v. Cole*, 84 N.W.2d 711, 349 Mich. 175.
- Minn.—*State v. Joyce*, 84 N.W.2d 893, 250 Minn. 456—*State v. Heffelfinger*, 274 N.W. 234, 200 Minn. 268.
- Miss.—*Odum v. State*, 94 So. 233, 130 Miss. 643, suggestion of error overruled 95 So. 253, 132 Miss. 3.
- Mo.—*State v. Michels*, 255 S.W.2d 760—*State v. Montgomery*, 116 S.W.2d 72—*State v. Smith*, 252 S.W. 662.
- Mont.—*State v. Hanks*, 153 P.2d 220, 116 Mont. 399.
- Nev.—*State v. Hurley*, 210 P.2d 922, 66 Nev. 350.
- N.J.—*State v. Torrance*, 125 A.2d 403, 41 N.J.Super. 445.
State v. Zeek, 3 A.2d 574, 121 N.J.Law 584—*State v. Bromley*, 138 A. 923, 104 N.J.Law 186.
- N.Y.—*People v. Auerbach*, 252 N.Y.S. 282, 140 Misc. 767.
- N.C.—*State v. Davenport*, 42 S.E.2d 686, 227 N.C. 475—*State v. Howley*, 16 S.E.2d 705, 220 N.C. 113.
- N.D.—*State v. Hastings*, 41 N.W.2d 305, 77 N.D. 146.
- Ohio.—*State v. Whitehead*, 107 N.E. 2d 892, 91 Ohio App. 156.
- Okl.—*Strong v. State*, 163 P.2d 242, 81 Okl.Cr. 263—*Rhodes v. State*, 49 P.2d 226, 58 Okl.Cr. 1.
- Or.—*State v. Jaynes*, 107 P.2d 528, 165 Or. 321.
- Pa.—*Commonwealth v. Hancock*, 112 A.2d 407, 177 Pa.Super. 585—*Commonwealth v. Campbell*, 176 A. 246, 116 Pa.Super. 180—*Commonwealth v. Brady*, 101 Pa.Super. 336.
- Tenn.—*Beck v. State*, 315 S.W.2d 254.
- Tex.—*Thorneberry v. State*, Cr., 311 S.W.2d 858—*Green v. State*, 161 S.W.2d 114, 144 Tex.Cr. 186—*Burck v. State*, 106 S.W.2d 709, 132 Tex. Cr. 628—*Mowrey v. State*, 55 S.W. 2d 816, 122 Tex.Cr. 456—*Mayer v. State*, 42 S.W.2d 65, 118 Tex.Cr. 612—*Ratcliff v. State*, 38 S.W.2d 326, 118 Tex.Cr. 616—*Cochrain v. State*, 248 S.W. 43, 93 Tex.Cr. 483—*Scott v. State*, 228 S.W. 1099, 89 Tex.Cr. 70.
- Utah.—*Ballaine v. District Court of First Judicial District for Box Elder County*, 153 P.2d 265, 107 Utah 247—*State v. Jensen*, 280 P. 1046, 74 Utah 527.
- Wash.—*State v. Adams*, 258 P. 23, 144 Wash. 363, adhered to 263 P. 746, 146 Wash. 696—*State v. Fluhart*, 212 P. 245, 123 Wash. 175—*State v. Cook*, 194 P. 401, 115 Wash. 391.
- 25 C.J. p 618 note 47 [j]—42 C.J. p 1389 note 4.
- Cheating and swindling**
- Ga.—*Powell v. State*, App., 108 S.E. 2d 817.
- Confidence game**
- Mo.—*State v. Weber*, 302 S.W.2d 919—*State v. Weber*, 298 S.W.2d 403.
- Okl.—*Rucker v. State*, 195 P.2d 299, 88 Okl.Cr. 15, rehearing denied 199 P.2d 221, 88 Okl.Cr. 15.
- Fictitious or worthless checks**
- Ala.—*Kinsaul v. State*, 173 So. 895, 27 Ala.App. 453—*Nix v. State*, 166 So. 716, 27 Ala.App. 94, certiorari denied 166 So. 719, 232 Ala. 53.
- Cal.—*People v. Weiss*, 266 P.2d 924, 123 C.A.2d 487—*People v. Megladdery*, 105 P.2d 385, 40 C.A.2d 643—*People v. Carmona*, 251 P. 315, 80 C.A. 159—*People v. Weir*, 159 P. 442, 30 C.A. 766.
- Del.—*State v. Vandenburg*, 2 A.2d 916, 9 W.W.Harr. 498.
- Fla.—*Ennis v. State*, 95 So.2d 20, certiorari denied 78 S.Ct. 117, 355 U.S. 868, 2 L.Ed.2d 74—*Shargaa v. State*, 84 So.2d 42—*State v. Pound*, 49 So.2d 521.
- Iowa.—*Shufeldt v. Hollowell*, 214 N.W. 531.
- Kan.—*State v. Gillen*, 99 P.2d 832, 151 Kan. 359.
- Ky.—*Grisson v. Commonwealth*, 203 S.W. 1075, 181 Ky. 189.
- Mo.—*State v. Moss*, App., 94 S.W.2d 920.
- N.J.—*State v. Helms*, 186 A. 463, 14 N.J.Misc. 564.
- N.Y.—*People v. Ledwell*, 14 N.Y.S.2d 371.
- Ohio.—*State v. Hertz*, App., 135 N.E. 2d 781.
- Okl.—*Snider v. State*, Cr., 338 P.2d 892.
- Tex.—*Hutson v. State*, 227 S.W.2d 813, 154 Tex.Cr. 380—*Smith v. State*, 128 S.W.2d 39, 137 Tex.Cr. 107—*Nash v. State*, 31 S.W.2d 445, 116 Tex.Cr. 607—*Nash v. State*, 29 S.W.2d 359, 115 Tex.Cr. 324—*Rutherford v. State*, Cr., 290 S.W. 534—*Whaley v. State*, 263 S.W. 287, 98 Tex.Cr. 131.
- Indictments under Home Owners' Loan Act**
- U.S.—*U. S. v. Kay*, C.C.A.N.Y., 89 F. 2d 19, vacated on other grounds *Kay v. U. S.*, 58 S.Ct. 468, 303 U.S. 1, 82 L.Ed. 607.
U. S. v. Kreidler, D.C.Iowa, 11 F.Supp. 402.
- Particular allegations**
- (1) Complaint charging that defendant falsely represented to banks that he was worth certain sum and on basis of such representation received money to banks' prejudice held sufficient to charge felony and misdemeanor.
- Wis.—*Pepin v. State ex rel. Chambers*, 259 N.W. 410, 217 Wis. 568.
- (2) Indictment, alleging false representation that defendants would convey lot when complaining witness paid stated sum, sufficiently alleged when promises were to be performed.
- Cal.—*People v. Moore*, 256 P. 266, 82 C.A. 739.
- (3) Count in information held to charge substantive felony of accessory before the fact to the crime of obtaining money and property by false pretenses, as against motion to quash.
- Fla.—*Varnum v. State*, 188 So. 346, 137 Fla. 438.

held insufficient.^{78,10} It must be directly alleged in the indictment or information that the person accused committed the acts constituting the offense,⁷⁹ but no allegations as to how the property was obtained from the prosecutor, whether as a gift, a loan, or otherwise, are necessary.⁸⁰ The state does not have to plead its evidence,⁸¹ and immaterial facts need not be alleged.⁸²

Matters which may constitute a defense need not be negated in the indictment where there is no such exception or proviso in the statute defining the offense,⁸³ especially where such matter would not constitute a defense;⁸⁴ and, where an exception is contained in a proviso and not in the enacting

clause, it is not necessary to negative the exception in the indictment.⁸⁵

b. Language of Statute

It is sufficient to charge the offense of obtaining property by false pretenses in the language, or substantially in the language, of the statute creating it where the statute sets forth with the requisite precision and certainty all the elements of the offense.

In accordance with the general rule, it is sufficient to charge the offense in the language, or substantially in the language, of the statute creating it, where the statute sets forth with the requisite precision and certainty all the elements of the offense;⁸⁶ but, where the statute does not describe and define

Aiding and abetting

Under a statute which removes the distinction between an accessory before the fact and a principal, an indictment for larceny by false pretenses in obtaining an automobile is not insufficient because it did not allege that defendant was actually present to aid codefendant in making false pretenses and in getting possession of the vehicle.

Wash.—State v. Wilson, 251 P. 859, 142 Wash. 19.

78.10 Alaska.—U. S. v. Pearce, 7 Alaska 246—U. S. v. Pearce, 7 Alaska 241.

Cal.—People v. Walther, 81 P.2d 452, 27 C.A.2d 583.

Fla.—State ex rel. Wall v. Coleman, 166 So. 219, 122 Fla. 830.

Ill.—People v. Dolan, 157 N.E.2d 817, 21 Ill.App.2d 312.

Ind.—Robinson v. State, 112 N.E.2d 861, 232 Ind. 396.

La.—State v. Glaser, 162 So. 622, 182 La. 787.

Me.—State v. Vallee, 12 A.2d 421, 136 Me. 432.

N.Y.—People v. Werblow, 148 N.E. 786, 241 N.Y. 55.

N.C.—State v. Reed, 145 S.E. 691, 196 N.C. 357.

Tex.—Griffith v. State, 191 S.W.2d 740, 149 Tex.Cr. 73—Thompson v. State, 50 S.W.2d 304, 121 Tex.Cr. 573—Mathis v. State, 18 S.W.2d 920, 113 Tex.Cr. 164.

25 C.J. p 618 note 47 [k].

25 C.J. p 618 note 47 [k].

Fictitious or worthless checks

Fla.—Ex parte Garvey, 94 So. 381, 84 Fla. 583.

Ind.—McCormick v. State, 119 N.E.2d 5, 233 Ind. 281.

Ky.—Commonwealth v. Bandy, 165 S.W.2d 337, 291 Ky. 721—Hughes v. Commonwealth, 15 S.W.2d 421, 226 Ky. 730.

Md.—Willis v. State, 106 A.2d 85, 205 Md. 118.

N.C.—State v. Banks, 174 S.E. 306, 206 N.C. 479—State v. Edwards, 130 S.E. 10, 190 N.C. 322.

Tex.—Wright v. State, Cr., 324 S.W. 2d 883—McCormick v. State, Cr.,

323 S.W.2d 462—Kuykendall v. State, 233 S.W.2d 580, 155 Tex.Cr. 237—Whitehead v. State, 35 S.W.2d 730, 117 Tex.Cr. 538—Grayson v. State, 277 S.W. 1064, 102 Tex.Cr. 288.

W.Va.—State v. Stout, 95 S.E.2d 639, 59 A.L.R.2d 1154—State v. Pietranton, 72 S.E.2d 617, 137 W.Va. 477.

79. Tex.—Dwyer v. State, 5 S.W. 662, 24 Tex.App. 132.

80. Pa.—Commonwealth v. White, 24 Pa.Super. 178.

81. Del.—State v. Vandenburg, 198 A. 701, 9 W.W.Harr. 320.

N.H.—State v. Story, 83 A.2d 142, 97 N.H. 141.

Tex.—Ratcliff v. State, 38 S.W.2d 326, 118 Tex.Cr. 616.

Matters in the statute which deal only with a rule of evidence need not be set out in the indictment.

Va.—Cook v. Commonwealth, 16 S.E. 2d 635, 178 Va. 251.

82. Ga.—Turnipseed v. State, 185 S. E. 403, 53 Ga.App. 194.

Ind.—Borton v. State, 106 N.E.2d 392, 230 Ind. 679.

Mich.—People v. Cole, 84 N.W.2d 711, 349 Mich. 175.

Miss.—McBride v. State, 104 So. 454, 141 Miss. 186.

Mo.—State v. Clice, 252 S.W. 465.

Tex.—Jones v. State, 72 S.W.2d 260, 126 Tex.Cr. 469.

Utah.—Ballaine v. District Court of First Judicial District for Box Elder County, 153 P.2d 265, 107 Utah 247.

Secreting automobile

Where an information for larceny by false pretenses alleged that defendants obtained an automobile and "unlawfully secreted, withheld, and appropriated it to their own use," the failure to allege the place of such secretion or withholding does not invalidate the information, and the addition of such an averment will be considered as mere harmless surplusage.

Wash.—State v. Wilson, 251 P. 859, 142 Wash. 19.

83. Wash.—State v. Cook, 194 P. 401, 115 Wash. 391.

84. Fla.—Henson v. State, 192 So. 163, 140 Fla. 412.

85. Ark.—Collier v. State, 40 S.W.2d 455, 183 Ark. 1057.

N.J.—State v. Cohen, 131 A. 675, 4 N.J.Misc. 59, affirmed 134 A. 919, 103 N.J.Law 205.

86. Ala.—Huddleston v. State, 64 So. 2d 90, 37 Ala.App. 57, certiorari denied 64 So.2d 102, 258 Ala. 579—

Mann v. State, 30 So.2d 738, 33 Ala.App. 148—Couch v. State, 20 So.2d 57, 31 Ala.App. 586—McKee

v. State, 155 So. 888, 26 Ala.App. 208—Foxy v. State, 154 So. 912, 26 Ala.App. 146—Hammett v. State,

146 So. 884, 25 Ala.App. 371—Bates v. State, 137 So. 465, 24 Ala.App. 507, first case, certiorari denied

137 So. 465, 223 Ala. 527, second case—Carpenter v. State, 136 So.

491, 24 Ala.App. 468—Frazier v. State, 135 So. 409, 24 Ala.App. 353

—Robinson v. State, 129 So. 717, 24 Ala.App. 29—Peden v. State, 124

So. 282, 23 Ala.App. 264, certiorari denied 124 So. 284, 220 Ala. 112.

Cal.—People v. Torp, 104 P.2d 542, 40 C.A.2d 187—People v. Larue, 83

P.2d 725, 28 C.A.2d 748.

Fla.—King v. State, 95 So. 567, 85 Fla. 257.

Ga.—Hadden v. State, 35 S.E.2d 518, 73 Ga.App. 23.

La.—State v. Echeverria, 111 So. 474, 163 La. 13.

Minn.—State v. Yurkiewicz, 292 N.W. 782, 208 Minn. 71.

N.J.—Joseph L. Sigretto & Sons v. State, 24 A.2d 199, 127 N.J.Law 578.

N.Y.—People v. Wright, 173 N.Y.S.2d 160, 12 Misc.2d 961—People v. Si-

man, 197 N.Y.S. 713, 119 Misc. 635.

S.D.—State v. Holland, 235 N.W. 609, 58 S.D. 205.

Tex.—Kuykendall v. State, 160 S.W. 2d 525, 143 Tex.Cr. 607.

W.Va.—State v. Paulian, 197 S.E. 728, 120 W.Va. 265.

the offense, an indictment following the language of the statute is insufficient.⁸⁷ More particularity of statement is required where some intended element of the crime is omitted,⁸⁸ or where, by following the language of the statute, the indictment would not show prima facie that any crime had been committed,⁸⁹ or where the indictment would not sufficiently apprise accused of the charge against him.⁹⁰

The indictment need not charge the offense in the language of the statute, as it is sufficient if words of similar import are used,⁹¹ or if the indictment describes the offense with more particularity than the statute.⁹²

The indictment need not charge a conclusion of law, even though the conclusion is part of the statutory definition of the offense,⁹³ but it must state all the circumstances which constitute the definition of the crime in the statute, so as to bring accused pre-

cisely within it,⁹⁴ and where the indictment fails to follow the statute in substance and as to substantial requisites it is bad.⁹⁵ An indictment is likewise bad which does not follow, but enlarges, the statute.⁹⁶

§ 40. Particular Averments

Particular matters which must be alleged in an indictment for obtaining property by false pretenses and the sufficiency thereof are considered *infra* §§ 41-47.

Examine Pocket Parts for later cases.

§ 41. — Intent

Where a specific intent is an element of the offense, that intent must be alleged in the indictment or information.

When the statute makes a certain intent an element of the offense, that intent must be averred in the indictment by a proper affirmative allegation,⁹⁷

Wis.—*Spoo v. State*, 262 N.W. 696, 219 Wis. 285.
25 C.J. p 622 note 74.

Confidence game

Colo.—*Wright v. People*, 181 P.2d 447, 116 Colo. 306.
Ill.—*People v. Gibbs*, 108 N.E.2d 446, 413 Ill. 154.

Fictitious or worthless checks

Idaho.—*State v. Campbell*, 219 P.2d 956, 70 Idaho 408—*State v. Sedam*, 107 P.2d 1065, 62 Idaho 26.

Ind.—*Borton v. State*, 106 N.E.2d 392, 230 Ind. 679.

Miss.—*Moore v. State*, 38 So.2d 693, 205 Miss. 151.

Mo.—*State v. Kaufman, App.*, 308 S.W.2d 333.

Tex.—*Jones v. State*, 226 S.W.2d 437, 154 Tex.Cr. 241.

Information held based on statute

Where information was in language of statute relating to obtaining money by false pretenses, information would be held based on such statute.

Okl.—*Welch v. State*, 146 P.2d 141, 78 Okl.Cr. 180.

87. Cal.—*People v. Walther*, 81 P.2d 452, 27 C.A.2d 583.
25 C.J. p 622 note 76.

88. W.Va.—*State v. Hurst*, 11 W.Va. 54.
25 C.J. p 622 note 77.

89. Mo.—*State v. Cameron*, 22 S.W. 1024, 117 Mo. 371.
25 C.J. p 622 note 78.

90. Ind.—*Johns v. State*, 65 N.E. 287, 159 Ind. 413, 59 L.R.A. 789.
25 C.J. p 622 note 79.

91. Ill.—*People v. White*, 36 N.E.2d 341, 377 Ill. 251—*People v. Wester-dahl*, 146 N.E. 737, 316 Ill. 86.

People v. White, 30 N.E.2d 782, 307 Ill.App. 528.

Pa.—*Commonwealth v. Viscount*, 179 A. 858, 118 Pa.Super. 595—*Commonwealth v. Campbell*, 176 A. 246, 116 Pa.Super. 180.
25 C.J. p 622 note 80.

92. U.S.—*Bargie v. U. S.*, C.C.D.C., 30 F.Cas.No.18,229, 2 Hayw. & H. 357.
Nev.—*In re Crane*, 163 P. 246, 40 Nev. 338.

93. Ky.—*Commonwealth v. Scroggin*, 60 S.W. 528, 22 Ky.L. 1338.
25 C.J. p 623 note 82.

94. Del.—*State v. Vandenburg*, 198 A. 701, 9 W.W.Harr. 320.
25 C.J. p 623 note 83.

95. Tenn.—*State v. Crockett*, 195 S.W. 583, 137 Tenn. 679.
25 C.J. p 623 note 84.

96. Mass.—*Commonwealth v. Parker*, 117 Mass. 112.
25 C.J. p 623 note 85.

97. Ga.—*McCard v. State*, 187 S.E. 850, 54 Ga.App. 339—*Sims v. State*, 142 S.E. 464, 37 Ga.App. 821.

Ky.—*Hughes v. Commonwealth*, 15 S.W.2d 421, 226 Ky. 730.

La.—*State v. Clayton*, 110 So.2d 111, 236 La. 1093—*State v. McLean*, 44 So.2d 698, 216 La. 670—*State v. Brackin*, 107 So. 105, 160 La. 268—*State v. Alphonse*, 98 So. 430, 154 La. 950.

Miss.—*McBride v. State*, 104 So. 454, 141 Miss. 186—*Herron v. State*, 79 So. 289, 118 Miss. 420.

N.C.—*State v. Horton*, 155 S.E. 866, 199 N.C. 771.

Tex.—*Whitehead v. State*, 35 S.W.2d 730, 117 Tex.Cr. 538.

W.Va.—*State v. McGinnis*, 181 S.E. 820, 116 W.Va. 473.

25 C.J. p 635 note 14.

General words sufficient

The rule that in an indictment for an offense done with intent to defraud, it is sufficient to aver in the general words that it was done "with intent to defraud" applies to statutory offenses as well as to other offenses.

Del.—*State v. Vandenburg*, 2 A.2d 916, 9 W.W.Harr. 498.

"Willfully and unlawfully"

Allegation in information that accused "willfully and unlawfully" committed alleged act was same as allegation required by statute that accused "knowingly" commit such act.

Okl.—*Group v. State*, 236 P.2d 997, 94 Okl.Cr. 401.

Intent to defraud; complaint

In prosecution for giving worthless check, failure of complaint to allege that check was given with intent to defraud rendered it invalid.

Tex.—*Martinez v. State, Cr.*, 325 S.W. 2d 145—*McCormick v. State, Cr.*, 323 S.W.2d 462.

Indictments and informations held sufficient

(1) In general.

Ill.—*People v. Dee*, 142 N.E.2d 811, 14 Ill.App.2d 96.

Ind.—*Crouch v. State*, 97 N.E.2d 860, 229 Ind. 326.

Moore v. State, 168 N.E. 202, 92 Ind.App. 150, transfer denied In re Petition to Transfer Appeals, 174 N.E. 812, 202 Ind. 365.

Iowa.—*State v. Steckel*, 200 N.W. 235, 198 Iowa 759.

Ky.—*Commonwealth v. Mirandi*, 50 S.W.2d 13, 14, 243 Ky. 823.

Okl.—*Rucker v. State*, 195 P.2d 299,

but such an intent need not be alleged where it is not a necessary element of the crime.⁹⁸ Where the crime is a felony, the intent must be alleged to have been felonious,⁹⁹ but this allegation is unnecessary where the crime is not a felony.¹

Under statutes making an intent to defraud a particular person² or to accomplish a particular result³ an element of the crime, the intent to defraud the one or to accomplish the other must be averred; but under other statutes it is not necessary for the indictment to charge an intent to defraud the one or to accomplish the other.⁴ Also, under statutes as to certain analogous offenses, an averment of intent is unnecessary.⁵ Under a statute, modeled after 30 Geo. II c 24 § 1, making it an element of the offense that the property is "designedly" obtained, the indictment must allege that the property was "designedly" obtained or some word equivalent to or broad enough to include the statutory word must be used.⁶

§ 42. — Pretense or Token

a. In general

b. By and to whom made, and who injured

88 Okl.Cr. 15, rehearing denied 199 P.2d 221, 88 Okl.Cr. 15.

25 C.J. p 635 note 14 [b]—31 C.J. p 716 note 20 [e].

(2) It is sufficient to allege such intent in connection with allegation of making false pretense, and allegation need not be repeated in connection with allegation of unlawfully obtaining property.

Ohio.—State v. Joseph, 152 N.E. 186, 115 Ohio St. 127.

Indictments or informations held insufficient

(1) In general.

Ill.—People v. Moore, 54 N.E.2d 259, 322 Ill.App. 280.

N.M.—State v. Ferguson, 244 P.2d 783, 56 N.M. 398.

N.C.—State v. Phillips, 45 S.E.2d 535, 228 N.C. 446.

(2) In prosecution for making and issuing a worthless check, bare allegation that accused did make or draw a check payable to the order of a specified person without allegation of delivery of check to payee would not be a sufficient allegation of intent to defraud within statute penalizing issuance of checks without sufficient funds.

Del.—State v. Vandenburg, 2 A.2d 916, 9 W.W.Harr. 498.

Prima facie evidence of intent to defraud

The rule that making of check with insufficient funds in bank is prima facie evidence of intent to de-

fraud is rule of evidence and not of pleading, and does not obviate necessity of alleging intent to defraud in information.

N.Y.—People v. Miller, 89 N.Y.S.2d 790.

98. S.D.—State v. Taylor, 183 N.W. 998, 44 S.D. 332.

99. Mo.—State v. Turley, 44 S.W. 267, 142 Mo. 403.
25 C.J. p 636 note 15.

Language of statute

An indictment which follows the language of the statute is sufficient although the word "feloniously" is omitted.

Vt.—State v. Switzer, 22 A. 724, 63 Vt. 604, 25 Am.S.R. 789.

1. Tex.—Robinson v. State, 33 Tex. 341.

2. Iowa.—State v. Hazen, 73 N.W. 359, 104 Iowa 16.
25 C.J. p 636 note 18.

Persons unknown

An indictment charging an intent to cheat and defraud persons unknown, without naming anyone, has been held sufficient.

N.C.—State v. Hedgecock, 117 S.E. 47, 185 N.C. 714.

3. Ind.—Todd v. State, 31 Ind. 514.
Mass.—Commonwealth v. O'Brien, 52 N.E. 77, 172 Mass. 248.

4. Ala.—Bazzell v. State, 81 So. 183, 16 Ala.App. 663.
25 C.J. p 626 note 18, p 636 note 20.

c. Falsity of pretense and knowledge thereof

d. Effectiveness

a. In General

(1) General rules

(2) Where pretense in writing

(3) Where several pretenses employed

(1) General Rules

The indictment, as a general rule, must set out the false pretense with such particularity as to enable the court to determine whether it is such a pretense as comes within the statute, and as to apprise the accused of the charge against him.

Although there is authority to the effect that where a charge is in the form set out in the statute, it is not necessary to recite the false pretenses employed,^{6,50} it is the general rule that it is not sufficient merely to aver in the indictment that accused obtained the property by a false pretense; the pleader must go further and not only set out the pretense, but set it out with such particularity as to enable the court to determine whether it is such a pretense as comes within the statute, and as to apprise accused of the charge against him.⁷ This requirement will

5. Colo.—Dill v. People, 29 P.2d 1035, 94 Colo. 230, appeal dismissed Dill v. People of State of Colorado, 54 S.Ct. 781, 292 U.S. 609, 78 L.Ed. 1470.

25 C.J. p 636 note 21.

6. Ariz.—Clark v. State, 89 P.2d 1077, 53 Ariz. 416.

25 C.J. p 636 note 22.

Equivalent words sufficient

(1) The word "designedly," although used in the statute, is not necessary in the indictment if words equivalent are used.

Ariz.—Clark v. State, supra.

Ill.—People v. White, 36 N.E.2d 341, 377 Ill. 251.

Iowa.—State v. Grant, 53 N.W. 120, 86 Iowa 216.

(2) An information charging that defendant "willfully, unlawfully and feloniously" obtained property by false pretenses was sufficient to charge that defendant obtained property by "designedly false" pretenses.

S.D.—State v. Lien, 30 N.W.2d 12, 72 S.D. 94.

6.50 Ark.—Mortensen v. State, 217 S.W.2d 325, 214 Ark. 528.

7. U.S.—Boatright v. U. S., C.C.A. Mo., 105 F.2d 737.

Cal.—Corpus Juris cited in People v. Walther, 81 P.2d 452, 454, 27 C. A.2d 583.

Me.—State v. Vallee, 12 A.2d 421, 136 Me. 432.

N.Y.—People v. Cooper, 229 N.Y.S. 748, 224 App.Div. 145.

be dispensed with if it is averred in the indictment that the grand jury is unable to give a more particular description of the pretense,⁸ unless such description could have been given by the exercise of ordinary diligence.⁹ It is not necessary to describe the false token or pretense with greater particularity than the description employed by accused at the time he used it, if, as so described, it appears to be within the statute;¹⁰ and where the false pretense consists in words, it is sufficient to set them out as uttered,

without explaining their meaning.¹¹

It is not necessary that the very words of the pretense be set out; it is sufficient to state the effect of the pretense correctly; hence the indictment need not allege whether the pretense was spoken or written,¹² unless the statute requires that the representations be in writing.¹³ The indictment must charge representations relating to present or past facts as distinguished from something to take place in the future.¹⁴ If the pretense is described more

Pa.—Commonwealth v. Brady, 101 Pa.Super. 336.

Commonwealth v. Keresty, 54 Pa.Dist. & Co. 353.

Tex.—Garrett v. State, 68 S.W.2d 507, 125 Tex.Cr. 351—Mathis v. State, 18 S.W.2d 920, 113 Tex.Cr. 164.

W.Va.—State v. Simmons, 129 S.E. 757, 99 W.Va. 702.
25 C.J. p 623 note 86.

Indictments or informations held sufficient

(1) In general.

Ala.—Campbell v. State, 195 So. 775, 29 Ala.App. 343.

Cal.—People v. Moore, 256 P. 266, 82 C.A. 739—People v. Carmona, 251 P. 315, 80 C.A. 159.

Ga.—Turnipseed v. State, 185 S.E. 403, 53 Ga.App. 194—Fischer v. State, 167 S.E. 200, 46 Ga.App. 207, followed in Kramer v. State, 167 S.E. 201, 46 Ga.App. 210.

Ind.—Crouch v. State, 97 N.E.2d 860, 229 Ind. 326—Garrison v. State, 193 N.E. 587, 208 Ind. 690—Popovich v. State, 177 N.E. 458, 202 Ind. 630.

Iowa.—State v. Detloff, 205 N.W. 534, 201 Iowa 159.

Kan.—State v. Lintner, 41 P.2d 1036, 141 Kan. 505.

Minn.—State v. Yurkiewicz, 292 N.W. 782, 208 Minn. 71—State v. Scott, 252 N.W. 225, 190 Minn. 462—State v. Taran, 222 N.W. 906, 176 Minn. 175—State v. Anderson, 199 N.W. 6, 159 Minn. 245.

Mo.—State v. Wren, 62 S.W.2d 853, 333 Mo. 575—State v. Pierce, 7 S.W.2d 269, 320 Mo. 209.

N.Y.—People v. Auerbach, 252 N.Y. S. 282, 140 Misc. 767.

Tex.—Overall v. State, 128 S.W.2d 1194, 137 Tex.Cr. 303—Hix v. State, 263 S.W. 299, 97 Tex.Cr. 578.

Wash.—State v. Sargent, 97 P.2d 692, 2 Wash.2d 190, opinion adhered to 100 P.2d 20, 2 Wash.2d 190.

25 C.J. p 623 note 86 [f]—31 C.J. p 716 note 20 [a] (2).

(2) Indictment for swindling containing allegations that accused falsely represented contents of a barrel and thereby acquired property of another held properly predicated on false representation and not on

assumption of ownership or right to dispose of property.

Tex.—Jones v. State, 72 S.W.2d 260, 126 Tex.Cr. 469.

Indictments held insufficient

Fla.—Ex parte Stirrup, 19 So.2d 712, 155 Fla. 173.

Miss.—State v. Cohran, 83 So.2d 827, 226 Miss. 212.

Pa.—Commonwealth v. Yetsko, Quar. Sess., 4 Lycoming 254.

Nature and substance

It is only necessary to set out the representation in such manner that its nature and substance can be known from the averment.

Tex.—Rumfield v. State, 141 S.W.2d 630, 139 Tex.Cr. 599.

Statement of opinion

An indictment which did not exclude the idea that the representations made by defendant were only a statement of an opinion has been held insufficient.

Ga.—Carr v. State, 4 S.E.2d 500, 60 Ga.App. 590.

Subsequent acts

Averments as to representations and conduct occurring after the property had been obtained have been held improper.

Tex.—Garrett v. State, 68 S.W.2d 507, 125 Tex.Cr. 351.

8. Mass.—Commonwealth v. Ashton, 125 Mass. 384.

Minn.—State v. Gray, 12 N.W. 455, 29 Minn. 142.

9. Mo.—State v. Stowe, 33 S.W. 799, 132 Mo. 199.

10. Cal.—People v. White, 259 P. 76, 85 C.A. 241.

25 C.J. p 624 note 89.

11. N.H.—State v. Call, 48 N.H. 126.

12. Ga.—**Corpus Juris** quoted in De Krasner v. State, 187 S.E. 402, 403, 54 Ga.App. 41—**Corpus Juris** quoted in Turnipseed v. State, 185 S.E. 403, 406, 53 Ga.App. 194.

Contra Goddard v. State, 107 S.E. 888, 27 Ga.App. 226.

Mont.—**Corpus Juris** cited in State v. Foot, 48 P.2d 1113, 1118, 100 Mont. 33.

25 C.J. p 624 note 91.

13. Ky.—Combs v. Commonwealth, 124 S.W.2d 64, 276 Ky. 260.

14. D.C.—Randle v. U. S., 113 F.2d

945, 72 App.D.C. 368, certiorari denied 61 S.Ct. 64, 311 U.S. 683, 85 L.Ed. 440.

Ga.—Gilligan v. State, 13 S.E.2d 112, 64 Ga.App. 311.

Hawaii.—Territory v. Taok, 33 Hawaii 560.

N.J.—State v. Mitchell, 117 A.2d 525, 37 N.J.Super. 425.

Ohio.—Harris v. State, 181 N.E. 104, 125 Ohio St. 257.

State v. Aughinbaugh, App., 32 N.E.2d 478.

Present state of mind

Indictment charging that accused falsely represented to victim that if she would give him money he intended to go into partnership charged a crime, under false pretense statute, notwithstanding representation was one as to accused's present state of mind.

N.J.—State v. Kaufman, 112 A.2d 721, 18 N.J. 75.

Representations as to present and future

An indictment for swindling may contain allegations that the crime was committed by fraudulent representations of facts relating both to the present or past and to the future.

Minn.—State v. Yurkiewicz, 292 N.W. 782, 208 Minn. 71.

Tex.—McCouston v. State, 158 S.W. 2d 527, 143 Tex.Cr. 283, 141 A.L.R. 205.

Indictments and informations held sufficient

(1) In general.

U.S.—Smith v. Fontana, D.C.N.Y., 48 F.Supp. 55.

Ala.—Jones v. State, 182 So. 404, 236 Ala. 30.

Ariz.—State v. Freeman, 279 P.2d 440, 78 Ariz. 281, followed in 279 P.2d 446, 78 Ariz. 291.

Cal.—People v. Schwarz, 248 P. 990, 78 C.A. 561.

Ill.—People v. Koscielniak, 257 Ill. App. 514.

Ind.—Meland v. State, 146 N.E. 746, 195 Ind. 630.

Kan.—State v. Mathes, 196 P. 607, 108 Kan. 488.

Mo.—State v. Wren, 62 S.W.2d 853, 333 Mo. 575.

N.J.—State v. Kaufman, 112 A.2d 721, 18 N.J. 75.

minutely than is necessary, such description is part of the indictment and cannot be treated as surplusage.¹⁵

Trick or game. As a general rule, where obtaining property by a trick or game is charged, the indictment must set forth with particularity the trick or game practiced.¹⁶ In some jurisdictions, however, this rule has been changed by statutory provisions as to what is known as "the confidence game," as discussed supra § 32, and an indictment in the language of the statute is generally held sufficient;¹⁷ but there is authority to the contrary.¹⁸

(2) Where Pretense in Writing

It is ordinarily sufficient to set out the purport of a written instrument constituting the false pretense.

When the false pretense is in writing or consists wholly or in part in the use of a written instrument, the writing need not be set out in *hæc verba*, it being sufficient, as in the case of a verbal pretense, to set out the purport of it,¹⁹ unless some question turns on the form or construction of the instrument,²⁰ or some legal description of it is given in the indictment, the accuracy of which it may be material for the court to determine.²¹ It has been held, however, that where a written instrument is the decisive inducement, the real false pretense that

caused the owner to part with his property, and constitutes the substantive part of the offense, it should be set forth in the indictment.²²

Where a written instrument is only a step in the transaction, or an incident of the offense, it need not be set out,²³ nor is a particular description of it necessary.²⁴ An indictment for cheating by false pretenses, setting forth a certificate of stock as the false token with which the fraud was committed, need not set forth in what manner the certificate could be used to deceive;²⁵ and, where an indictment for obtaining money by the use of a false writing sets forth the writing in full, the fact that it does not charge in detail how the fraud is committed does not vitiate it.²⁶

(3) Where Several Pretenses Employed

An indictment need not aver all the pretenses used to obtain the property.

The indictment need not aver all the pretenses used, it being sufficient if it alleges one pretense which was an inducing cause of the imposition.²⁷ Also, the fact that some of the matters alleged do not constitute false pretenses will not render the indictment defective, where other matters are alleged which constitute false pretenses.²⁸

State v. Torrance, 125 A.2d 403, 41 N.J.Super. 445—State v. Pasquale, 68 A.2d 488, 5 N.J.Super. 91.

(2) Information charging that accused unlawfully and fraudulently, with intent to defraud by means of false pretense, represented that he would deliver property to complaining witness, which witness was willing to purchase, and that witness was induced to deliver money to accused, and that accused delivered other property to witness, held not void as charging promise to do future act.

Ill.—People ex rel. Courtney v. Sullivan, 1 N.E.2d 206, 363 Ill. 34.

Indictments held insufficient

U.S.—Bonney v. U. S., C.A.Alaska, 254 F.2d 392.

Ala.—Whatley v. State, 31 So.2d 664, 249 Ala. 355, 174 A.L.R. 169.

N.Y.—People v. Simons, 36 N.Y.S.2d 229, 264 App.Div. 943.

15. Ala.—Cook v. State, 50 So. 319, 162 Ala. 90.

Tex.—Cowan v. State, 56 S.W. 751, 41 Tex.Cr. 617.

16. Mo.—State v. Pickett, 74 S.W. 844, 174 Mo. 663.

Ohio.—In re Trick Game, 5 Ohio S. & C.P. 572, 5 Ohio N.P. 604.

Description unknown

An indictment alleging that de-

fendant attempted to commit the crime of swindling by means of a trick and scheme in law called the "fake horse race scheme," a more particular description of such trick or scheme being to the grand jury unknown, stated a public offense. Minn.—State v. Brooks, 187 N.W. 607, 151 Minn. 502.

Allegations held insufficient to charge crime of "confidence game," since representations did not constitute "trick" or "device" but were mere false and fraudulent representations within purview of statute relating to fraud by false pretenses. Ariz.—Clark v. State, 89 P.2d 1077, 53 Ariz. 416.

17. Colo.—People v. Martin, 240 P. 695, 78 Colo. 200.

Ill.—People v. Epstein, 170 N.E. 678, 338 Ill. 631.

La.—State v. Simpson, 165 So. 708, 184 La. 190—State v. Hill, 107 So. 433, 160 La. 579.

25 C.J. p 624 notes 96, 97.

18. Mo.—Ex parte Pelinski, 213 S. W. 809.

25 C.J. p 624 note 98.

19. Miss.—State v. Fitzgerald, 117 So. 517, 151 Miss. 229.

Tex.—Redding v. State, 265 S.W.2d 811, 159 Tex.Cr. 535, certiorari

denied Redding v. State of Tex., 75 S.Ct. 38, 348 U.S. 838, 99 L.Ed. 661.

25 C.J. p 625 note 1.

20. U.S.—Bargie v. U. S., C.C.D.C., 30 F.Cas.No.18,229, 2 Hayw. & H. 357.

Miss.—State v. Tatum, 50 So. 490, 96 Miss. 430.

21. Miss.—State v. Tatum, supra.

22. Tex.—Dunn v. State, 114 S.W.2d 1177, 134 Tex.Cr. 150—Earles v. State, 263 S.W. 281, 97 Tex.Cr. 555—Cochrain v. State, 248 S.W. 43, 93 Tex.Cr. 483.

25 C.J. p 625 note 4.

23. Ill.—Moore v. People, 60 N.E. 535, 190 Ill. 331.

Tex.—Raymond v. State, 33 S.W.2d 192, 116 Tex.Cr. 595—Cochrain v. State, 248 S.W. 43, 93 Tex.Cr. 483.

24. Ark.—Norris v. State, 280 S.W. 398, 170 Ark. 484.

25 C.J. p 625 note 6.

25. Mass.—Commonwealth v. Coe, 115 Mass. 481.

26. N.Y.—People v. Elite Distributing Co., 137 N.Y.S. 235, 76 Misc. 577, 27 N.Y.Cr. 345.

27. Ill.—Cowen v. People, 14 Ill. 348. 25 C.J. p 625 note 10.

28. Ala.—McKee v. State, 155 So. 888, 26 Ala.App. 203.

b. By and to Whom Made, and Who Injured

Ordinarily, an indictment for obtaining property by false pretenses must allege that the accused made the pretense in question, and name the person to whom it was made, as well as the person injured thereby.

An indictment for obtaining property by false pretense must allege specifically that accused made the pretense in question;²⁹ and, while an allegation in an indictment against several defendants that defendants made the false pretenses is a sufficient allegation that each of them made the false pretenses,³⁰ where two persons acting in concert obtain property by false pretenses the indictment must allege which, if only one, made the false pretenses.³¹

The indictment must also state to whom the pretense was made,³² and who was defrauded thereby,³³ unless his name is unknown,³⁴ in which case that fact should be averred as a reason for not setting

it out.³⁵ If the false pretenses are not made to the person from whom the goods are obtained, the indictment must show the relation between them so that it may appear how the pretenses could have caused the injury.³⁶

Under some statutes, an indictment need not allege whether the injured party was a corporation, etc.,³⁷ but under other statutes, where the party injured is not an individual, it is necessary to state whether it is a corporation, partnership, or joint-stock association.³⁸ In such jurisdictions it is sufficient to allege that the pretense was made to, or that the person defrauded was, a corporation, either private³⁹ or municipal,⁴⁰ and it is not necessary to state the name or names of the person or persons connected with the corporation to whom the false representations were made⁴¹ where no verbal representations were made,⁴² or where it would be impracticable to

29. Tex.—Dwyer v. State, 5 S.W. 662, 24 Tex.App. 132.

25 C.J. p 625 note 11.

Indictment held sufficient

Ind.—Crouch v. State, 97 N.E.2d 860, 229 Ind. 326.

30. N.Y.—People v. Jefferey, 31 N.Y.S. 267, 82 Hun 409.

31. Ark.—Kirtley v. State, 38 Ark. 543.

32. Tex.—Mathis v. State, 18 S.W. 2d 920, 113 Tex.Cr. 164.
25 C.J. p 625 note 14.

Indictments and informations held sufficient

Ind.—Crouch v. State, 97 N.E.2d 860, 329 Ind. 326.

Mo.—State v. Rosenheim, 261 S.W. 95, 303 Mo. 553.

S.C.—State v. Gellis, 155 S.E. 849, 158 S.C. 471.

31 C.J. p 716 note 20 [c].

33. Ala.—Harrison v. State, 129 So. 718, 24 Ala.App. 9.

Ill.—People v. Epstein, 163 N.E. 346, 332 Ill. 100.

Iowa.—State v. Neuhart, 292 N.W. 791, 228 Iowa 1055.

Miss.—Bruce v. State, 64 So.2d 332, 217 Miss. 368—Pippin v. State, 88 So. 502, 126 Miss. 146.

Tex.—Greenson v. State, 147 S.W.2d 804, 141 Tex.Cr. 115.
25 C.J. p 625 note 15.

Averment of agency not necessary

Indictment for swindling held not vitiated by failure to aver that person receiving bad check was agent of injured person.

Tex.—Reese v. State, 44 S.W.2d 679, 119 Tex.Cr. 582.

Mere clerical or formal error has been held not to render indictment insufficient.

Ark.—Spears v. State, 294 S.W. 66, 173 Ark. 1071.

N.Y.—People v. La Face, 266 N.Y. S. 458, 148 Misc. 238.

Indictments and informations held sufficient

(1) In general.

Tex.—Templeton v. State, 105 S.W. 2d 1100, 132 Tex.Cr. 577.

(2) Indictment, charging defendant with obtaining the signature of a person to a check by false pretenses was held not defective for failure to allege the name of the owner of the money obtained by the false pretense.

Ind.—Gillespie v. State, 142 N.E. 220, 194 Ind. 154.

(3) The use of initial of the Christian name of a person from whom the property was obtained has been held not to render the indictment demurrable.

Ala.—Caughlan v. State, 114 So. 280, 22 Ala.App. 220.

(4) An indictment, alleging the obtaining of money from L, by a false statement of defendant that he was the owner of certain property, and by giving a lien thereon to secure payment of the money so obtained, sufficiently states the offense of swindling although the deed of trust to C as trustee, set out in the indictment, given to secure the payment, recites that it was given for and in consideration of a sum paid by C, trustee, it further reciting that it was given to secure the payment of a note due L.

Tex.—Robinson v. State, 139 S.W. 978, 63 Tex.Cr. 212.

34. Ill.—People v. Epstein, 163 N.E. 346, 332 Ill. 100.

25 C.J. p 626 note 16.

35. Ill.—People v. Epstein, supra.
25 C.J. p 626 note 17.

36. Ala.—Bazzell v. State, 81 So. 183, 16 Ala.App. 663.

25 C.J. p 626 note 23.

37. Ky.—McClanahan v. Commonwealth, 247 S.W. 369, 197 Ky. 457.
La.—State v. Solomon, 121 So. 607, 168 La. 158.

38. Tex.—Reese v. State, 44 S.W.2d 679, 119 Tex.Cr. 582.

25 C.J. p 625 note 15 [b].

39. Fla.—Whitmee v. Albritton, 187 So. 370, 136 Fla. 863.

25 C.J. p 626 note 20.

Sufficiency of particular averments

(1) In indictment for swindling, use of letters "Inc.," after name of injured party held not sufficient as averment that such party was a corporation.

Tex.—Reese v. State, 44 S.W.2d 679, 119 Tex.Cr. 582.

(2) In prosecution for obtaining money by false pretense, banking institution alleged to have been defrauded was sufficiently described as the "First National Bank of Union Springs, Alabama," without additional averment concerning corporate character of bank, a national bank being a "banking corporation" which is created under and governed by federal law.

Ala.—Campbell v. State, 195 So. 775, 29 Ala.App. 343.

40. Mo.—State v. Rosenheim, 261 S.W. 95, 303 Mo. 553.

25 C.J. p 626 note 21.

41. Ga.—De Krasner v. State, 187 S.E. 402, 54 Ga.App. 41—Turnipseed v. State, 185 S.E. 403, 53 Ga.App. 194.

Okl.—Mathews v. State, 198 P. 112, 19 Okl.Cr. 153.

25 C.J. p 626 note 20 [a].

42. Tex.—West v. State, 145 S.W.2d 580, 140 Tex.Cr. 493.

do so.⁴³

Partnership. According to some of the authorities, it is sufficient to allege that the false pretenses were made to a partnership by its firm name;⁴⁴ but according to others, where the persons alleged to have been defrauded compose a partnership, the indictment must contain the names of the individuals composing the partnership,⁴⁵ or a proper excuse for the omission.⁴⁶ Also, it has been held that an allegation in an indictment that false representations were made to a firm composed of certain persons, whose names are given, is not sufficiently definite, but the name of the specific person to whom such representations were made is necessary.⁴⁷

43. Tex.—Cochrain v. State, 248 S. W. 43, 93 Tex.Cr. 483.

Better practice

Although it is better practice for an indictment for swindling a corporation to allege the name of the individual to whom the representations were made, it may properly be alleged that the representations were made to the corporation, where the facts justify it.

Tex.—Cochrain v. State, supra.

44. Ind.—State v. Williams, 2 N.E. 585, 103 Ind. 235.

Ohio.—Stoughton v. State, 2 Ohio St. 562.

45. Miss.—State v. Grady, 111 So. 148, 147 Miss. 446.

25 C.J. p 626 note 26.

The christian names and surnames of the individuals composing the partnership must be given.

Miss.—State v. Grady, supra—State v. Tatum, 50 So. 490, 96 Miss. 430.

46. Miss.—State v. Tatum, supra.

47. Ga.—McLendon v. State, 85 S.E. 200, 16 Ga.App. 262.

48. Fla.—Walls v. State, 120 So. 848, 97 Fla. 382.

Ind.—Coppock v. State, 140 N.E.2d 102, 236 Ind. 341.

Ky.—Burnley v. Commonwealth, 117 S.W.2d 1008, 274 Ky. 18—Commonwealth v. Wilson, 229 S.W. 60, 190 Ky. 813.

Miss.—State v. Cochran, 83 So.2d 827, 226 Miss. 212.

Mo.—State v. Strack, 292 S.W. 63, 316 Mo. 591—State v. Ruwwe, 242 S.W. 936.

N.Y.—People v. Cooper, 229 N.Y.S. 748, 224 App.Div. 145.

Ohio.—**Corpus Juris quoted in** Harris v. State, 181 N.E. 104, 105, 125 Ohio St. 257.

State ex rel. Leichner v. Alvis, App., 114 N.E.2d 861—Campfield v. State, 105 N.E.2d 661, 91 Ohio App. 74.

Tex.—Green v. State, Cr., 161 S.W.2d 106—Mathis v. State, 18 S.W.2d 920, 113 Tex.Cr. 164.

25 C.J. p 626 note 29.

False or worthless checks

(1) Information for obtaining money by false and bogus check held not insufficient for failure to allege in what way check was false and bogus.

Okl.—State v. Baxley, 269 P. 326, 40 Okl.Cr. 361.

(2) An indictment is defective if it fails to charge that defendant did not in fact have sufficient funds in or credit with the bank on which the check is drawn for the payment thereof in full on its presentation, and that the same was not, and has not been, paid; and an allegation that the check was returned marked "No funds" is insufficient to charge such fact.

Miss.—State v. Puckett, 90 So. 113, 127 Miss. 415.

(3) Indictment for swindling by giving check held fatally defective, where there was no positive allegation that defendant did not have on deposit with drawee bank sufficient funds to pay check.

Tex.—Whitehead v. State, 35 S.W.2d 730, 117 Tex.Cr. 538.

(4) Information charging, in prosecution for issuing and passing fictitious checks, that checks purported to be those of certain produce companies, and that no such persons, or individuals or firms, or corporations or copartnerships were in existence, held sufficient.

Cal.—People v. Menne, 41 P.2d 383, 4 C.A.2d 91.

(5) As used in statute defining offense of obtaining money under false pretenses, the phrase "by means or use of any false or bogus checks" is descriptive of the offense and is an essential element of the crime, and the state must allege and prove the false and bogus character of the check.

Okl.—Ex parte Bumgarner, 246 P.2d 387, 95 Okl.Cr. 379—Clark v. State, 91 P.2d 686, 66 Okl.Cr. 255.

c. Falsity of Pretense and Knowledge Thereof

(1) In general

(2) Knowledge of falsity

(1) In General

The indictment must negative by special averment the truth of the pretenses alleged, in such a manner as to enable accused to prepare his defense intelligently.

The indictment must negative by special averment the truth of the pretense alleged.⁴⁸ While it has been held not essential that the indictment should aver, in express terms, that the pretense was "false,"⁴⁹ such averments must be certain, specific, and distinct⁵⁰ so as to enable accused to prepare his

(6) Information properly charged that accused knew that purported author of check had no funds in bank, as against contention that information should have charged that accused knew that he had no money in bank.

Mo.—State v. Polakoff, 237 S.W.2d 173, 361 Mo. 929.

Indictment held sufficient

Colo.—Montez v. People, 132 P.2d 970, 110 Colo. 208.

49. Ky.—Jones v. Commonwealth, 108 S.W.2d 1005, 269 Ky. 791.

Tenn.—Britt v. State, 9 Humphr. 31.

50. Ky.—Burnley v. Commonwealth, 117 S.W.2d 1008, 274 Ky. 18.

Tex.—Green v. State, Cr., 161 S.W.2d 106—Sasse v. State, 22 S.W.2d 941, 113 Tex.Cr. 513.

25 C.J. p 627 note 31.

Averments held sufficient

Cal.—People v. Moore, 256 P. 266, 82 C.A. 739.

Colo.—Johnson v. People, 133 P.2d 789, 110 Colo. 283.

Kan.—State v. Lintner, 41 P.2d 1036, 141 Kan. 505.

Ohio.—State ex rel. Leichner v. Alvis, App., 114 N.E.2d 861.

Pa.—Commonwealth v. Johnson, Quar.Sess., 21 Lehl.L.J. 369.

S.C.—State v. Gellis, 155 S.E. 849, 158 S.C. 471.

Tenn.—Rowe v. State, 51 S.W.2d 505, 164 Tenn. 571.

Tex.—Prince v. State, 247 S.W. 863, 93 Tex.Cr. 230.

25 C.J. p 627 note 31 [a]—31 C.J. p 716 note 20 [b] (1).

Indictment held insufficient

Ohio.—Campfield v. State, 105 N.E. 2d 661, 91 Ohio App. 74.

Suggestio falsis distinguished from suppressio veri

Essential fact of misrepresentation must, under the terms of the indictment, be made in words suggestio falsis rather than suppressio veri.

N.C.—State v. Yancey, 45 S.E.2d 348, 228 N.C. 313.

defense intelligently.⁵¹

Although it has been held that the indictment must allege the particulars in which the pretenses are false,⁵² and that a general averment that accused "falsely" represented, etc., is insufficient,⁵³ it has also been held that a general averment of falsity is sufficient,⁵⁴ unless the pretenses are of such nature that a negation of truth requires allegations affirmatively showing in what the falsehood consisted.⁵⁵ However, in alleging the falsity of the pretense, it is not necessary that all the facts be set forth in detail;⁵⁶ but negations which are in the nature of negatives pregnant and admit an implication which destroys or renders immaterial the effect of the pretenses charged are insufficient.⁵⁷

A general averment that the pretense was false

will be deemed sufficient after verdict.⁵⁸

Several pretenses. Where several pretenses are alleged, they need not all be negated; as only one need be proved to convict, so only the one relied on for conviction need be negated;⁵⁹ but a conviction on a finding that a pretense relied on was false cannot be sustained under an indictment not alleging the falsity of such pretense.⁶⁰

(2) Knowledge of Falsity

Ordinarily, the indictment must allege that the accused knew the pretense to be false.

Except in cases where the very nature of the pretense averred precludes the possibility of his ignorance of its falsity,⁶¹ the indictment must allege that accused knew the pretense to be false.⁶² A specific

51. N.J.—State v. Murphy, 52 A. 279, 68 N.J.Law 235.
25 C.J. p 628 note 32.

52 La.—State v. Brackin, 107 So. 105, 160 La. 268.

53. Ky.—Burnley v. Commonwealth, 117 S.W.2d 1008, 274 Ky. 18—Commonwealth v. Wilson, 229 S.W. 60, 190 Ky. 813.

Mont.—**Corpus Juris Secundum** cited in State v. Hale, 291 P.2d 229, 232, 129 Mont. 449.

25 C.J. p 628 notes 33–35.

54. Cal.—People v. Moore, 256 P. 266, 82 C.A. 739.

Tex.—Anderson v. State, 57 S.W.2d 118, 122 Tex.Cr. 663—Wimer v. State, 48 S.W.2d 296, 120 Tex.Cr. 576—Raymond v. State, 33 S.W.2d 192, 116 Tex.Cr. 595.

55. Tex.—**Corpus Juris** cited in Anderson v. State, 57 S.W.2d 118, 119, 122 Tex.Cr. 663—**Corpus Juris** cited in Wimer v. State, 48 S.W. 2d 296, 299, 120 Tex.Cr. 576—**Corpus Juris** cited in Raymond v. State, 33 S.W.2d 192, 194, 116 Tex. Cr. 595.

25 C.J. p 628 note 37.

Indictment held insufficient

An indictment for swindling, which alleged that the property was obtained by representations that the notes given therefor were a first and only lien on certain land, is insufficient, where such representation was traversed in general terms, but no prior or additional lien was described. Tex.—Luce v. State, 224 S.W. 1095, 88 Tex.Cr. 46.

56. Mont.—State v. Phillips, 92 P. 299, 36 Mont. 112.

57. Colo.—**Corpus Juris** cited in La Shar v. People, 223 P. 59, 61, 74 Colo. 503.

25 C.J. p 628 note 36.

58. N.J.—State v. Luxton, 48 A. 535, 65 N.J.Law 605.

59. Ky.—Wells v. Commonwealth,

263 S.W.2d 721—Burnley v. Commonwealth, 117 S.W.2d 1008, 274 Ky. 18—Commonwealth v. Miller, 286 S.W. 691, 215 Ky. 547.

N.Y.—People v. Cooper, 229 N.Y.S. 748, 224 App.Div. 145.

25 C.J. p 628 note 40.

60. N.Y.—People v. Cooper, *supra*.

61. Okl.—Robinson v. State, 289 P. 785, 48 Okl.Cr. 87.
25 C.J. p 636 note 23.

62. Fla.—State ex rel. Warren v. Sweat, 185 So. 453, 135 Fla. 661.

Ind.—Coppock v. State, 140 N.E.2d 102, 236 Ind. 341.

Ky.—Burnley v. Commonwealth, 117 S.W.2d 1008, 274 Ky. 18.

Miss.—State v. Cohran, 83 So.2d 827, 226 Miss. 212.

Mo.—State v. Norman, 232 S.W. 452.

Okl.—Ex parte Bumgarner, 246 P.2d 387, 95 Okl.Cr. 379—Robinson v. State, 289 P. 785, 48 Okl.Cr. 87.

25 C.J. p 636 note 24.

Indictments held sufficient

Ariz.—Ex parte Harrison, 101 P.2d 457, 55 Ariz. 347.

Colo.—Montez v. People, 132 P.2d 970, 110 Colo. 208.

Ga.—Turnipseed v. State, 185 S.E. 403, 53 Ga.App. 194.

Ind.—Crouch v. State, 97 N.E.2d 860, 229 Ind. 326—Gillespie v. State, 142 N.E. 220, 194 Ind. 154.

Ky.—Greenwell v. Commonwealth, 317 S.W.2d 859—Caldwell v. Commonwealth, 298 S.W. 681, 221 Ky. 232.

Minn.—State v. Gottwalt, 295 N.W. 67, 209 Minn. 4.

Mo.—State v. Hoffman, 297 S.W. 388.

25 C.J. p 636 note 24 [a].

False or worthless checks

(1) Under at least one statute, it is unnecessary to allege that the drawer of a check had knowledge he had insufficient funds in the drawee bank.

Fla.—Roberts v. Dean, 187 So. 571, 133 Fla. 47, 136 Fla. 421.

(2) Under other statutes, an indictment has been held fatally defective where it did not allege that accused had knowledge of the insufficiency of funds.

Ky.—Ward v. Commonwealth, 15 S.W.2d 276, 228 Ky. 468.

N.C.—State v. Franklin, 167 S.E. 569, 204 N.C. 157.

Tex.—Browder v. State, 292 S.W.2d 342, 163 Tex.Cr. 375—Glover v. State, 256 S.W.2d 107, 158 Tex.Cr. 428—Porter v. State, 254 S.W.2d 516, 158 Tex.Cr. 237, followed in

254 S.W.2d 518, 158 Tex.Cr. 235—Knight v. State, 254 S.W.2d 113, 158 Tex.Cr. 158—Pallage v. State, 253 S.W.2d 47, 158 Tex.Cr. 41.

(3) The state must allege and prove that the false and bogus character of the check was well known to accused at the time he issued it for a fraudulent purpose.

Okl.—Ex parte Bumgarner, 246 P.2d 387, 95 Okl.Cr. 379—Clark v. State, 91 P.2d 686, 66 Okl.Cr. 255.

(4) It has also been held that the indictment must allege that accused knew, when making and delivering the check, that he did not have sufficient funds in, or credit with, the bank on which it is drawn for its payment in full on presentation.

Miss.—State v. Puckett, 90 So. 113, 127 Miss. 415.

S.D.—State v. Mondry, 203 N.W. 468, 48 S.D. 189.

(5) An indictment substantially following the language of the statute has been held sufficient.

Kan.—State v. Goodrich, 15 P.2d 434, 136 Kan. 277.

(6) Indictment, charging that accused, with intent to defraud, signed as president of corporation checks on named bank knowing that he had no funds and credit with such bank, did not state an offense.

W.Va.—Cassis v. Fair, 29 S.E.2d 245, 126 W.Va. 557, 151 A.L.R. 233.

allegation of the knowledge of the falsity of the representations made is not necessary, and words of similar import may be used.⁶³

Under statutes as to certain analogous offenses, it is not necessary to allege guilty knowledge of accused.⁶⁴

d. Effectiveness

The indictment or information must charge in terms or in substance that the property was obtained by means of the false pretense alleged.

The indictment or information must show that the property was obtained by means of the false pretense alleged.⁶⁵ While it should charge in terms or in substance that the person defrauded relied on the truth of the false statement, pretense, or token, and was induced thereby to part with his money or property,⁶⁶ no particular form of words is necessary for this purpose,⁶⁷ and any words that express this idea, or from which it can be clearly inferred, have been

held sufficient.⁶⁸

An allegation that "by means of the false pretense," or "relying on the false pretense," or the like, is sufficient where it is apparent that the delivery of the property was the natural result of the pretense alleged.⁶⁹ However, when there appears to be no natural connection between the pretense and the delivery of the property, such additional facts as are necessary to show the relation must be alleged.⁷⁰

While in some jurisdictions it has been usual to allege specifically that the prosecutor believed the false representations to be true,⁷¹ this is not essential under the common form of statute.⁷² An averment of the prosecutor's belief, if necessary at all,⁷³ is sufficient without alleging that he believed such representations "to be true."⁷⁴ It has been held, however, that the indictment should directly and clearly allege that the person from whom the mon-

63. Okl.—Robinson v. State, 289 P. 785, 48 Okl.Cr. 87.

64. N.Y.—People v. Webster, 40 N. Y.S. 1135, 17 Misc. 410. 25 C.J. p 637 note 25.

65. Fla.—Randall v. State, 89 So. 875, 83 Fla. 333.

Idaho.—State v. So, 231 P.2d 734, 71 Idaho 324.

Ind.—Compton v. State, 170 N.E. 325, 201 Ind. 535.

Miss.—State v. Cohran, 83 So.2d 827, 226 Miss. 212.

Mo.—State v. Bowdry, 145 S.W.2d 127, 346 Mo. 1090—State v. Robinson, 14 S.W.2d 452—State v. Workman, 199 S.W. 131.

Neb.—Anthony v. State, 192 N.W. 206, 109 Neb. 608.

Tex.—McGinty v. State, 245 S.W. 924, 93 Tex.Cr. 160.

Utah.—State v. Fisher, 8 P.2d 589, 79 Utah 115.

25 C.J. p 628 note 42.

Indictments and informations held sufficient

Ala.—Jones v. State, 182 So. 404, 236 Ala. 30.

Carpenter v. State, 136 So. 491, 24 Ala.App. 468.

Ariz.—Willis v. State, 271 P. 725, 34 Ariz. 363.

Ark.—Norris v. State, 280 S.W. 398, 170 Ark. 484—Holden v. State, 247 S.W. 768, 156 Ark. 521.

Cal.—People v. Randlee, 241 P. 892, 75 C.A. 38—People v. Pearson, 231 P. 612, 69 C.A. 524—People v. Flowers, 201 P. 468, 54 C.A. 214—People v. Moore, 191 P. 980, 48 C.A. 245.

Colo.—Whitfield v. People, 244 P. 470, 79 Colo. 108.

Ga.—Turnipseed v. State, 185 S.E.

403, 53 Ga.App. 194—Davis v. State, 107 S.E. 883, 27 Ga.App. 195.

Ind.—Moore v. State, 168 N.E. 202, 92 Ind.App. 150, transfer denied In re Petition to Transfer Appeals, 174 N.E. 812, 202 Ind. 365.

Miss.—State v. Grady, 111 So. 148, 147 Miss. 446.

N.C.—State v. Dale, 12 S.E.2d 556, 218 N.C. 625.

Tex.—Templeton v. State, 105 S.W.2d 1100, 132 Tex.Cr. 577—Kimbrell v. State, 31 S.W.2d 821, 116 Tex.Cr. 603.

25 C.J. p 628 note 42 [a].

Bad check

Information alleging that accused passed a bogus check with intent to cheat and defraud and received specified articles of value for such check was insufficient, in that it failed to allege that such articles of value were obtained by means or by use of bogus check.

Okl.—Simpson v. State, Cr., 267 P.2d 1008.

66. Ariz.—Willis v. State, 271 P. 725, 34 Ariz. 363.

Ga.—Walker v. State, 78 S.E.2d 545, 89 Ga.App. 101.

Ind.—Coppock v. State, 140 N.E.2d 102, 236 Ind. 341—**Corpus Juris** quoted in Greening v. State, 153 N.E. 412, 416, 198 Ind. 706.

Ky.—Sanford v. Commonwealth, 280 S.W. 106, 212 Ky. 758.

Okl.—Phenis v. State, 229 P. 652, 28 Okl.Cr. 142.

Tex.—Mathis v. State, 18 S.W.2d 920, 113 Tex.Cr. 164.

25 C.J. p 629 note 43.

67. Ky.—Smith v. Commonwealth, 133 S.W. 228, 141 Ky. 534.

Okl.—Ireton v. State, 233 P. 771, 29 Okl.Cr. 266.

68. Colo.—Montez v. People, 132 P. 2d 970, 110 Colo. 208.

Ky.—Sanford v. Commonwealth, 280 S.W. 106, 212 Ky. 758—Finney v. Commonwealth, 227 S.W. 999, 190 Ky. 536—Smith v. Commonwealth, 133 S.W. 228, 141 Ky. 534.

N.Y.—People v. Leibowitz, 176 N.Y. S.2d 141, 12 Misc.2d 553.

Okl.—Ireton v. State, 233 P. 771, 29 Okl.Cr. 266—Mathews v. State, 198 P. 112, 19 Okl.Cr. 153.

Tex.—Atwood v. State, 211 S.W.2d 177, 152 Tex.Cr. 27.

Bad check

It has been held that an information based on a "bad check" statute need not charge in specific terms that the person defrauded relied on the false representations made.

Okl.—Bennett v. State, 204 P. 462, 21 Okl.Cr. 27.

69. Cal.—People v. Haskins, 194 P. 43, 49 C.A. 640.

Minn.—State v. Gottwalt, 295 N.W. 67, 209 Minn. 4.

25 C.J. p 629 note 46.

70. Cal.—People v. Haskins, 194 P. 43, 49 C.A. 640.

Fla.—Ex parte Stirrup, 19 So.2d 712, 155 Fla. 173.

25 C.J. p 629 note 47.

71. Mass.—Commonwealth v. Dunleay, 26 N.E. 870, 153 Mass. 330. 25 C.J. p 630 note 48.

72. Ind.—State v. Williams, 2 N.E. 585, 103 Ind. 235.

25 C.J. p 630 note 49.

73. Mass.—Commonwealth v. Sessions, 47 N.E. 1034, 169 Mass. 329.

74. Kan.—State v. Balliet, 66 P. 1005, 63 Kan. 707.

25 C.J. p 630 note 51.

ey or other thing of value was received was deceived by the false pretense or false token.⁷⁵

It is not necessary to allege specifically that the prosecutor relied on the pretense, if the connection between the pretense and the obtaining is otherwise sufficiently shown by the indictment;⁷⁶ nor is it necessary to allege specifically how the false pretense was calculated to induce the prosecutor to part with his property,⁷⁷ or that the false pretense was capable of inducing him to do so,⁷⁸ or that, except for the false pretense, the prosecutor would not have parted with it.⁷⁹ Where an indictment alleges a false statement, and the statement relates to a number of different facts, it is not necessary that the indictment should allege that loss resulted from each and all of these statements which proved untrue, but, if it is alleged that any one of the material false statements resulted in loss, the indictment will be sufficient.⁸⁰

The same general rules apply when the false pretense used is a token; the indictment must show

that it was by means of the falseness of the token that accused was able to perpetrate the fraud,⁸¹ and these rules apply also to indictments for obtaining the signature of another by false pretenses,⁸² or for obtaining property by a promise of service.⁸³

An allegation of a false promise, as well as of a false pretense, as an inducement for parting with the property, will not invalidate the indictment.⁸⁴

A defect in the indictment arising from failure to show the connection between the false pretense and the obtaining is a material one,⁸⁵ and is not cured by verdict.⁸⁶

§ 43. — Obtaining Property

An indictment or information must allege, in terms or in substance, that accused obtained property.

It must be alleged in the indictment or information, in terms or in words equivalent thereto, that accused obtained property, since the obtaining is an essential element of the crime.⁸⁷

75. Fla.—*Antrobus v. State*, 135 So. 396, 101 Fla. 669—*Lopez v. State*, 119 So. 137, 96 Fla. 813.

Ga.—*Walker v. State*, 78 S.E.2d 545, 89 Ga.App. 101.

Okl.—*Phenis v. State*, 229 P. 652, 28 Okl.Cr. 142.
25 C.J. p 630 note 52.

76. Colo.—*Johnson v. People*, 133 P. 2d 789, 110 Colo. 283.

La.—*State v. Smith*, 106 So. 324, 159 La. 840.

S.D.—*Corpus Juris Secundum* cited in *State v. Wood*, 86 N.W.2d 530, 532.

Tex.—*Bennett v. State*, 253 S.W. 289, 95 Tex.Cr. 198.
25 C.J. p 630 note 53.

77. Ga.—*Turnipseed v. State*, 185 S. E. 403, 53 Ga.App. 194.

N.Y.—*Thomas v. People*, 34 N.Y. 351.
Okl.—*Ireton v. State*, 233 P. 771, 29 Okl.Cr. 266.

78. Ala.—*Meek v. State*, 23 So. 155, 117 Ala. 116.

79. Ky.—*Smith v. Commonwealth*, 133 S.W. 228, 141 Ky. 534, overruling *Bryant v. Commonwealth*, 47 S.W. 578, 104 Ky. 593.

S.D.—*Corpus Juris Secundum* cited in *State v. Wood*, 86 N.W.2d 530, 532.

80. Ga.—*Whitaker v. State*, 75 S.E. 258, 11 Ga.App. 208.

81. N.C.—*State v. Boon*, 49 N.C. 463.
25 C.J. p 630 note 58.

82. Ill.—*Simmons v. People*, 58 N.E. 384, 187 Ill. 327.
25 C.J. p 630 note 59.

83. Ala.—*Tennyson v. State*, 12 So. 391, 97 Ala. 78.
25 C.J. p 630 note 60.

84. N.Y.—*People v. Sattlekau*, 104 N.Y.S. 805, 120 App.Div. 42.
25 C.J. p 630 note 61.

85. Ark.—*Roberts v. State*, 108 S. W. 842, 85 Ark. 435.
25 C.J. p 630 note 62.

86. Mich.—*Enders v. People*, 20 Mich. 233.
25 C.J. p 631 note 63.

87. Miss.—*State v. Cohran*, 83 So. 2d 827, 226 Miss. 212.

Neb.—*Corpus Juris* cited in *Anthony v. State*, 192 N.W. 206, 207, 109 Neb. 608.

N.C.—*State v. Horton*, 155 S.E. 866, 199 N.C. 771.

Tex.—*Lewis v. State*, 43 S.W.2d 937, 119 Tex.Cr. 580—*Brown v. State*, 255 S.W. 750, 95 Tex.Cr. 664.
25 C.J. p 631 note 64.

"Induced"

The use of the word "induced" in an indictment has been held sufficient to show that the property was obtained by accused.

Cal.—*People v. Whiteside*, 208 P. 132, 58 C.A. 33.

Idaho.—*State v. Stratford*, 37 P.2d 681, 55 Idaho 65.
25 C.J. p 631 note 64 [c].

"Received"

Charge, in information for obtaining money by false pretenses, that defendant received sum of money is equivalent to charge that he obtained money.

Neb.—*MacDonald v. State*, 246 N.W. 716, 124 Neb. 332.

Ohio.—*In re Fitzpatrick*, 21 Ohio Cir.Ct. 519, 11 Ohio Cir.Dec. 695.

Indictments and informations held sufficient

(1) In general.

Ala.—*Carpenter v. State*, 136 So. 491, 24 Ala.App. 468.

Kan.—*State v. Gillen*, 99 P.2d 832, 151 Kan. 359.

La.—*State v. Kavanaugh*, 13 So.2d 366, 203 La. 1.

Mo.—*State v. Bowdry*, 145 S.W.2d 127, 346 Mo. 1090—*State v. Samis*, 246 S.W. 956, 296 Mo. 471.

N.J.—*State v. Fary*, 108 A.2d 593, 16 N.J. 317.

Tex.—*Jones v. State*, 72 S.W.2d 260, 126 Tex.Cr. 469.

25 C.J. p 631 note 64 [j]—31 C.J. p 716 note 20 [b] (2).

(2) Indictment charging that defendant made false statement for purpose of procuring credit was held not defective for failure to state that credit was procured for defendant's own benefit.

Mo.—*State v. Hoffman*, 297 S.W. 388.

(3) Indictment for swindling was held not defective for not alleging custom of trade or dealing by which defendant obtained bank cashier's check for draft with attached weight certificate representing cotton.

Tex.—*Nash v. State*, 29 S.W.2d 359, 115 Tex.Cr. 324.

Indictments held insufficient

(1) In general.

N.H.—*State v. Ellsworth*, 124 A.2d 203, 100 N.H. 301.

(2) An indictment which charged that accused uttered a counterfeit check to be cashed with intent to defraud, but failed to allege that any

Delivery. If the indictment avers that accused obtained the property, it need not allege that the property was delivered to him.⁸⁸ An indictment for obtaining a signature to an instrument by false pretenses must state that the instrument was delivered to accused, or, what is equivalent, that the signature was obtained by him.⁸⁹

§ 44. — Property, Instrument, or Signature Obtained

- a. Description
- b. Ownership
- c. Quantity or number and value

a. Description

- (1) In general
- (2) Money, bank notes, and certificates of deposit
- (3) Instruments, signatures, etc.

(1) In General

The property alleged to have been obtained must be described with such certainty and particularity as to en-

able the jury to determine whether the property proved to have been obtained is the same as that on which the indictment was founded.

The property alleged to have been obtained must be described with such certainty and particularity as to enable the jury to determine whether the property proved to have been obtained is the same as that on which the indictment was founded, and to enable accused to make his defense intelligently,⁹⁰ and, although there is some authority to the contrary,⁹¹ it has been held to be the rule that the same certainty of description is required as is essential in indictments for larceny.⁹² However, the description is required to be only as particular as the nature of the case will admit,⁹³ and the property need not be described by its legal name;⁹⁴ but the description should not be in the alternative.⁹⁵

(2) Money, Bank Notes, and Certificates of Deposit

Where money is alleged to have been obtained, the indictment should describe it at least by the amount; money is not sufficiently described as "goods."

Where money is alleged to have been obtained,

money or other thing of value was received therefor, was insufficient to set out an offense.

Ga.—Curtis v. State, 55 S.E.2d 758, 80 Ga.App. 244.

88. Mo.—State v. Marion, 138 S.W. 491, 235 Mo. 359.
25 C.J. p 631 note 65.

89. Tex.—Templeton v. State, 105 S.W.2d 1100, 132 Tex.Cr. 577.
25 C.J. p 631 note 66.

Sufficient to allege execution

In an indictment for obtaining a signature to an instrument through false pretenses, an averment that the instrument was "executed" includes everything necessary to its full execution.

Ind.—Gillespie v. State, 142 N.E. 220, 194 Ind. 154.

Minn.—State v. Butler, 50 N.W. 532, 47 Minn. 483.

Indictments and informations held sufficient

Ark.—State v. Bond, 235 S.W. 801, 151 Ark. 203.

Minn.—State v. Gottwalt, 295 N.W. 67, 209 Minn. 4.

Ohio.—State v. Aughinbaugh, App., 32 N.E.2d 478.

90. Tenn.—Malkemus v. State, 129 S.W.2d 201, 174 Tenn. 547.

Tex.—Bland v. State, 130 S.W.2d 292, 137 Tex.Cr. 486, rehearing denied 132 S.W.2d 274, 137 Tex.Cr. 486.

25 C.J. p 631 note 67—31 C.J. p 716 note 20 [b].

Fraudulent check

What accused obtains by means of a fraudulent check is a material

and essential allegation of crime charged under statute relating to fraudulent checks.

Ind.—McCormick v. State, 127 N.E. 2d 341, 234 Ind. 393.

Confidence game

Under the statute as to confidence games, words of general description have been held sufficient.

Ill.—People v. Sawhill, 132 N.E. 477, 299 Ill. 393.
25 C.J. p 631 note 67 [f].

Descriptions held sufficient

Ala.—Carpenter v. State, 136 So. 491, 24 Ala.App. 468.

Ark.—Wilkerson v. State, 21 S.W.2d 183, 180 Ark. 280.

25 C.J. p 631 note 67 [a].

Descriptions held insufficient

(1) In general.

Iowa.—State v. Hixson, 210 N.W. 423, 202 Iowa 431.

Miss.—State v. Collins, 191 So. 126, 186 Miss. 448.

Pa.—Commonwealth v. Yetsko, Quar. Sess., 4 Lycoming 254.

Tenn.—State v. Seawell, 227 S.W.2d 777, 190 Tenn. 77.

Tex.—Luce v. State, 224 S.W. 1095, 88 Tex.Cr. 46.

25 C.J. p 631 note 67 [b].

(2) An information alleging the fraudulent acquisition from another of personal property of the value of six dollars was too general by reason of failure to allege that the property was six dollars in money.

Tex.—Howk v. State, 135 S.W.2d 719, 138 Tex.Cr. 275.

(3) Information charging swindling, which described goods obtained

as "Groceries, amount and kind unknown, and balance in cash of value of Fifteen and 8/100 dollars," was held insufficient.

Tex.—Trigg v. State, 34 S.W.2d 878, 117 Tex.Cr. 536.

Indictment held not invalidated

Failure of indictment, which charged that accused obtained necessities by means of certain false pretenses, to particularize the word necessities would not invalidate the indictment but would make the indictment subject to motion to make definite and certain.

Ohio.—State ex rel. Leichter v. Alvis, App., 114 N.E.2d 861.

91. Okl.—Mason v. State, 212 P. 1028, 23 Okl.Cr. 111.

92. Ala.—Johnson v. State, 76 So.2d 351, 38 Ala.App. 82.

Iowa.—State v. Hixson, 210 N.W. 423, 202 Iowa 431.

Miss.—**Corpus Juris cited in** Hales v. State, 191 So. 273, 186 Miss. 413.

Tex.—Bland v. State, 130 S.W.2d 292, 137 Tex.Cr. 486, rehearing denied 132 S.W.2d 274, 137 Tex.Cr. 486—

Trigg v. State, 34 S.W.2d 878, 117 Tex.Cr. 536—Mathis v. State, 18 S.W.2d 920, 113 Tex.Cr. 164.

25 C.J. p 632 note 68.

93. Tenn.—Malkemus v. State, 129 S.W.2d 201, 174 Tenn. 547.

25 C.J. p 632 note 69.

94. Tenn.—Malkemus v. State, supra.

25 C.J. p 632 note 70.

95. Tenn.—Malkemus v. State, supra.

25 C.J. p 631 note 67 [d].

the indictment should describe it at least by the amount,⁹⁶ and it has been held sufficient to describe the money as a certain amount of the lawful money of prosecutor without stating the denomination of the various pieces, their number, or whether they were notes or coin,⁹⁷ especially when aided by an allegation that a more particular description is, to the grand jury, unknown.⁹⁸ However, in some jurisdictions a more particular description has been required,⁹⁹ unless it is specifically alleged that a more particular description is unknown to the grand jury,¹ it being held that the indictment should describe the money obtained with the same particularity and certainty as in an indictment for larceny.²

Money, being itself a measure of value, cannot be rendered more definite by an averment of value; hence an averment that accused obtained a certain number of dollars in money is sufficiently certain without alleging the value of the money.³ Where it is charged that accused obtained a certain sum of money indicated by figures preceded by a dollar mark, it will be assumed that the money so described is money of the United States and not money of a foreign country.⁴

While money has been held not sufficiently described as "goods,"⁵ or a certificate of deposit as

"money,"⁶ an information describing the property procured as a certain amount of currency at one place and in another as a deposit slip for such amount was held not fatally defective.⁷

(3) Instruments, Signatures, Etc.

When the thing obtained is a written instrument or a signature thereto, ordinarily it must be described with such certainty as to identify it when produced in evidence, and to enable the court to determine that it possessed legal efficacy.

While it has been held that an indictment for procuring the execution of a written instrument or signature thereto by false pretenses must set out a copy of the instrument,⁸ it has also been held that it is not necessary in describing the instrument to set it out in *hæc verba*,⁹ although it must be described with such certainty as to identify it when produced in evidence,¹⁰ so that accused may not subsequently be indicted for the same offense,¹¹ and to enable the court to determine that it possessed legal efficacy and therefore some value.^{11.5} An indictment for larceny, in obtaining a deed by false pretenses, sufficiently sets out the deed when it contains a description of the premises, a statement of the consideration, the names of the grantor and grantee, and the value of the deed.¹²

96. N.C.—State v. Smith, 14 S.E.2d 36, 219 N.C. 400.

97. Ky.—Hayes v. Commonwealth, 190 S.W. 700, 173 Ky. 188. 25 C.J. p 632 note 71.

98. N.Y.—People v. Dimick, 14 N.E. 178, 107 N.Y. 13.

W.Va.—State v. Hurst, 11 W.Va. 54.

99. Ind.—Smith v. State, 33 Ind. 159. 25 C.J. p 632 note 73.

1. Fla.—Smith v. State, 77 So. 274, 74 Fla. 594—Sullivan v. State, 32 So. 106, 44 Fla. 155.

2. Ark.—Maxey v. State, 108 S.W. 1135, 85 Ark. 499, 14 Ann.Cas. 509. 25 C.J. p 633 note 75.

3. Cal.—People v. Alba, 117 P.2d 63, 46 C.A.2d 859.

Tex.—Ratcliff v. State, 38 S.W.2d 326, 118 Tex.Cr. 616—Raymond v. State, 33 S.W.2d 192, 116 Tex.Cr. 595.

25 C.J. p 633 note 76.

4. Cal.—People v. Rogers, 169 P. 399, 35 C.A. 123.

Tex.—Raymond v. State, 33 S.W.2d 192, 116 Tex.Cr. 595.

Lawful money of United States

The phrase "in the lawful money of the United States of America" in an indictment charging crime of fraudulently obtaining a sum of money does not mean necessarily that money was obtained in form of cur-

rency or coin or both currency and coin but means merely that amount which was fraudulently obtained represented that amount of real money of the United States and not any other kind of money or money of a foreign country.

La.—State v. Hart, 196 So. 62, 195 La. 184, followed in State v. Weiss, 196 So. 70, 195 La. 208.

5. N.C.—State v. Smith, 14 S.E.2d 36, 219 N.C. 400.

Ohio.—Schleisinger v. State, 11 Ohio St. 669.

6. Mass.—Commonwealth v. Howe, 132 Mass. 250.

7. Fla.—Henson v. State, 192 So. 163, 140 Fla. 412.

8. Ind.—Kreig v. State, 190 N.E. 181, 206 Ind. 464.

9. Minn.—State v. Gottwalt, 295 N. W. 67, 209 Minn. 4.

Tex.—Fleenor v. State, 22 S.W.2d 676, 113 Tex.Cr. 546.

Wyo.—Anderson v. State, 196 P. 1047, 27 Wyo. 345.

25 C.J. p 633 note 81.

Indictments or informations held sufficient

(1) In general.

Ariz.—Clark v. State, 89 P.2d 1077, 53 Ariz. 416.

25 C.J. p 633 note 81 [a].

(2) Indictment for obtaining check by false pretenses, alleging that it

was made payable to third person, was held not defective on demurrer. Ark.—Norris v. State, 280 S.W. 398, 170 Ark. 484.

10. Ala.—Johnson v. State, 76 So.2d 351, 38 Ala.App. 82.

Wyo.—Anderson v. State, 196 P. 1047, 27 Wyo. 345.

25 C.J. p 633 note 82—36 C.J. p 820 note 57 [g].

Indictment held insufficient

An indictment alleging that defendants obtained a certain check for the payment of money, namely, for the sum of one thousand seven hundred and fifty dollars of the moneys, goods, chattels, and property of the said E., but not giving the name of the maker or payees or bank on which drawn, or any indorsements, was insufficient for matter of description.

Del.—State v. Moore, 115 A. 308, 1 W. W.Harr. 498.

11. Ala.—Langford v. State, 45 Ala. 26.

N.Y.—Dord v. People, 9 Barb. 671.

11.5 Ala.—Johnson v. State, 76 So. 2d 351, 38 Ala.App. 82.

Information held insufficient

Ill.—People v. McConnell, 137 N.E.2d 558, 11 Ill.App.2d 370.

12. N.Y.—People v. Peckens, 47 N. E. 883, 153 N.Y. 576.

b. Ownership

Ordinarily, an indictment for obtaining property by false pretenses must allege to whom the property obtained belonged, and the omission of such an allegation may render it fatally defective.

While, under some statutes relating to the obtaining of property by false pretenses and kindred offenses, it has been held not necessary to allege ownership of the property obtained,¹³ ordinarily the indictment must state to whom the property obtained belonged,¹⁴ or explain the absence of such averment.¹⁵ Also, it has been held that the indictment should substantially set up the ownership of accused of property had or claimed to be had by him and which the injured party believed he was getting.¹⁶

Where an allegation of ownership is necessary, it has been held by some authorities that the averment must be made with the same particularity and certainty as in the case of larceny,¹⁷ and the indictment should specifically allege that the ownership of the property is in the person alleged to have been deceived or in some one for whom such person was acting,¹⁸ as it is not sufficient that it may be gathered by inference from the other necessary averments that the ownership of the property is in some person named.¹⁹ According to other authorities, however, the ownership need not be stated by a direct allegation if facts are alleged which show the ownership clearly.²⁰ Names used in indictments

with reference to the ownership of property will be taken to indicate persons.²¹

Alleging ownership of particular persons. It has been held sufficient to allege ownership in a person in possession of the goods,²² or in a person with authority to sell them,²³ and the ownership may properly be laid in a mortgagee.²⁴ Where property is obtained from an agent, ownership may be alleged to be in his principal,²⁵ and an indictment for obtaining money from the teller of a bank should allege ownership to be in the bank, instead of in the teller, as the money belongs to the bank.²⁶

An indictment for obtaining money from a railway company is sufficient, although title to the money is alleged to be in such company and not in receivers who are operating such railway.²⁷ By virtue of statutory provisions in some jurisdictions, where property is owned in common or jointly, the ownership may be alleged to be in all or either of the owners.²⁸ Where the property obtained belongs to a partnership, it is sufficient to charge the ownership of the goods to be in the partnership by its firm name,²⁹ or, under some statutes, ownership may be alleged in any one or more of the partners.³⁰

Effect of omitting averment. An averment of ownership of the property obtained is one not affecting the form by the substance of an indictment,³¹ and the omission of such an averment renders the indictment fatally defective,³² unless the indictment

13. Nev.—*Kelly v. State*, 89 P.2d 1, 59 Nev. 190.

25 C.J. p 634 note 3.

Confidence game

Information for obtaining money by confidence game, substantially following terms of statute, was held not defective in not alleging ownership of money.

Colo.—*Arnett v. People*, 11 P.2d 806, 91 Colo. 56.

14. Fla.—*Silberstein v. State*, 111 So. 350, 93 Fla. 110.

Ga.—*Scott v. State*, 185 S.E. 131, 53 Ga.App. 61, affirmed 190 S.E. 582, 184 Ga. 164.

Ind.—*Kreig v. State*, 190 N.E. 181, 206 Ind. 464—*Compton v. State*, 170 N.E. 325, 201 Ind. 535.

25 C.J. p 633 note 85—31 C.J. p 716 note 20 [d].

Determination of sufficiency

Whether indictment sufficiently identifies owners of money obtained is determined by whether acquittal or conviction could be pleaded in bar. Ill.—*People v. Epstein*, 163 N.E. 346, 332 Ill. 100.

Allegations held sufficient

Cal.—*People v. Raplee*, 241 P. 892, 75 C.A. 38.

25 C.J. p 633 note 85 [c].

Indictments held insufficient

Ga.—*McElmurray v. State*, 47 S.E.2d 139, 76 Ga.App. 604.

Mont.—*State v. Hanks*, 153 P.2d 220, 116 Mont. 399.

15. Ind.—*Kreig v. State*, 190 N.E. 181, 206 Ind. 464—*Compton v. State*, 170 N.E. 525, 201 Ind. 535.

16. Tex.—*Jones v. State*, 72 S.W.2d 260, 126 Tex.Cr. 469.

17. Md.—*State v. Blizzard*, 17 A. 270, 70 Md. 385, 14 Am.S.R. 366. 25 C.J. p 634 note 86.

18. Fla.—*Webb v. State*, 68 So. 943, 69 Fla. 697.

Iowa.—*State v. Clark*, 119 N.W. 719, 141 Iowa 297.

19. Fla.—*Moulie v. State*, 20 So. 554, 37 Fla. 321. 25 C.J. p 634 note 88.

20. Ga.—*Scott v. State*, 185 S.E. 131, 53 Ga.App. 61, affirmed 190 S.E. 582, 184 Ga. 164.

Okl.—*Ireton v. State*, 233 P. 771, 29 Okl.Cr. 266—*Midgley v. State*, 232 P. 967, 29 Okl.Cr. 108.

Utah.—*State v. Timmerman*, 55 P.2d 1320, 56 P.2d 1354, 88 Utah 481.

25 C.J. p 634 note 89.

21. Fla.—*Smith v. State*, 77 So. 274, 74 Fla. 594.

22. N.D.—*State v. Hopkins*, 252 N.W. 48, 64 N.D. 301. 25 C.J. p 634 note 92.

23. Mass.—*Commonwealth v. Blanchette*, 32 N.E. 658, 157 Mass. 486.

24. N.Y.—*Barber v. People*, 17 Hun 366.

25. Mass.—*Commonwealth v. Call*, 21 Pick. 515.

26. Fla.—*Jones v. State*, 22 Fla. 532.

27. Mo.—*State v. Small*, 199 S.W. 127, 272 Mo. 507.

28. Tex.—*Snover v. State*, 238 S.W. 919, 91 Tex.Cr. 269.

29. Ind.—*State v. Williams*, 2 N.E. 585, 103 Ind. 235.

30. Ala.—*Gardner v. State*, 58 So. 1001, 4 Ala.App. 131.

Tex.—*Palmer v. State*, 245 S.W. 238, 92 Tex.Cr. 640.

31. Fla.—*Webb v. State*, 68 So. 943, 69 Fla. 697.

32. Fla.—*Silberstein v. State*, 111 So. 350, 93 Fla. 110.

Ind.—*Compton v. State*, 170 N.E. 325, 201 Ind. 535.

25 C.J. p 634 note 1.

contains a legal excuse for the omission of such an averment.³³ However, it has been held that an erroneous allegation as to ownership of the property would not be fatal where there is sufficient certainty in the allegation to identify the act on which the prosecution is based.³⁴

c. Quantity or Number and Value

A statement of quantity or number is not essential if of no benefit to the accused. The value of the property obtained must be alleged where such value is made an element of the offense and the punishment therefor depends on such value.

Where a statement of the quantity or number of the articles taken would not benefit accused, such statement is not essential;³⁵ but, where such statement is made, it should be certain and not in the disjunctive.³⁶

Value. It has been held that the value of the property obtained need not be stated in the indictment,³⁷ and that an indictment alleging in substance that defendant obtained something of value is sufficient;³⁸ but under other authority the value of the property must be alleged where value is made an element of the offense, and the punishment therefor depends on such value.³⁹ Where accused is charged with obtaining several articles, it is not necessary to state specifically the value of each article.⁴⁰

§ 45. — Loss to Prosecutor

While an allegation of loss may or may not be essential under the statute, the indictment or information should set forth facts sufficient to show that the prosecutor suffered a legal injury.

An indictment for obtaining property by false pretenses need not allege specifically that prosecutor suffered loss by reason of the false pretense,⁴¹ except when, as under a few statutes, actual loss is an element of the offense;⁴² but it must set forth

33. N.M.—Territory v. Hubbell, 86 P. 747, 13 N.M. 579, 13 Ann.Cas. 848.

Vt.—State v. Lathrop, 15 Vt. 279.

34. Okl.—Ireton v. State, 233 P. 771, 29 Okl.Cr. 266.

35. N.J.—Hagerman v. State, 23 A. 357, 54 N.J.Law 104.

36. Pa.—Commonwealth v. France, 2 Brewst. 568.

37. N.H.—State v. Story, 83 A.2d 142, 97 N.H. 141.

N.Y.—People v. Jefferey, 31 N.Y.S. 267, 82 Hun 409.
25 C.J. p 634 note 6.

38. Iowa.—State v. Evans, 295 N.W. 433, 229 Iowa 932.

Indictment held sufficient

A complaint and warrant charging offense of obtaining money from county by false pretenses did not fail to charge a crime on ground that it appeared that checks obtained from county were of no value to defendant if delivered to him by county, where fact that checks were property of value was sufficiently alleged by statement in each count that county's check for specified sum was obtained by defendant and that county was defrauded of specified sum by means of defendant's false pretenses. Wis.—State ex rel. Hull v. Larson, 277 N.W. 101, 226 Wis. 585.

39. Cal.—Corpus Juris cited in People v. Barnard, 219 P. 756, 760, 63 C.A. 562.

La.—State v. Wilson, 91 So. 249, 150 La. 873.

Tex.—Edmondson v. State, 64 S.W. 2d 795, 124 Tex.Cr. 549—Roberts v. State, 13 S.W.2d 863, 112 Tex.Cr. 15—Luce v. State, 224 S.W. 1095, 88 Tex.Cr. 46.

25 C.J. p 634 note 7.

Not a constituent element

The value of property obtained is not constituent element of felony of swindling, but merely controls punishment which may be inflicted. Tex.—Burek v. State, 106 S.W.2d 709, 132 Tex.Cr. 628.

Obtaining a deed

(1) Indictment charging obtaining of deed by swindling, merely stating value of land, without averring value of deed, has been held fatally defective.

Tex.—Sasse v. State, 22 S.W.2d 941, 113 Tex.Cr. 513—Roberts v. State, 13 S.W.2d 863, 112 Tex.Cr. 15.

(2) However, an indictment for obtaining a deed by false pretenses, which alleges the value of the land conveyed by the deed, but not the value of the deed itself, was held sufficient under a statute making it larceny to obtain the signature to a written instrument by false pretenses, since to hold that the value of the writing is limited to its intrinsic value, apart from the land conveyed, would be to nullify the statute.

Ark.—State v. Bond, 235 S.W. 801, 151 Ark. 203.

Note or check, etc.

(1) Allegation as to value of note which party was induced to indorse was held a sufficient allegation of value of the indorsement.

Tex.—Fleenor v. State, 22 S.W.2d 676, 113 Tex.Cr. 546.

(2) Where indictment alleged acquisition of money by false pretenses and check was but means of accomplishing design of obtaining money, averment of value of check was held unnecessary.

Tex.—Raymond v. State, 33 S.W.2d 192, 116 Tex.Cr. 595.

(3) In view of a statute, by which

various kinds of choses in action are made the subject of larceny, and the money due thereon shall be deemed prima facie evidence of the value of the article so stolen, in an indictment for obtaining a draft for a specified amount by false pretenses, it was unnecessary to aver that the draft was a thing of value.

Mo.—State v. Clice, 252 S.W. 465.

40. Ark.—Wilkerson v. State, 21 S.W.2d 183, 180 Ark. 280.

N.J.—Hagerman v. State, 23 A. 357, 54 N.J.Law 104.

41. Fla.—Henson v. State, 192 So. 163, 140 Fla. 412.

Ky.—Chapman v. Commonwealth, 239 S.W.2d 974.

La.—State v. Smith, 106 So. 324, 159 La. 840.

Neb.—Corpus Juris quoted in Donald v. State, 246 N.W. 716, 717, 124 Neb. 332.

25 C.J. p 635 note 9.

In Texas, under a statute providing that it is not necessary to constitute the offense of swindling that any benefit accrue to the guilty party or injury to the person intended to be defrauded, it is not necessary to allege that prosecuting witness has suffered loss.

Tex.—Robinson v. State, 148 S.W.2d 205, 141 Tex.Cr. 18—Fleenor v. State, 22 S.W.2d 676, 113 Tex.Cr. 546.

25 C.J. p 635 note 9 [a].

42. Ill.—People v. Holtzman, 112 N.E. 370, 272 Ill. 447.

25 C.J. p 635 note 10.

Indictment held sufficient

Accusation charging defendant with false identification whereby bank was defrauded in certain sum sufficiently alleged loss.

facts sufficient to show that he suffered a legal injury, as that term is understood in the law of false pretense, or else it fails to charge an offense.⁴³

It should appear, in an indictment for obtaining a signature to an instrument, that such instrument is one which might work injury to the person signing it.⁴⁴ An indictment for fraudulently procuring advances other than money on a contract of labor should contain an allegation that accused did not return the things so advanced or pay for them.⁴⁵

§ 46. — False Personation of Officer or Another Person

General rules apply to indictments or informations for obtaining property by false personation of an officer or another person.

The general rules stated supra §§ 39-45 apply to indictments or informations for obtaining property by false personation of an officer or another person.⁴⁶ An indictment charging accused with false personation of an officer of a department or agency of the government with intent to defraud has been held sufficient regardless of whether there was such

a department or agency of government.⁴⁷

§ 47. — Presentation of Fraudulent Claim

An indictment or information for presenting a fraudulent claim should set forth the facts constituting the offense with certainty and particularity.

An indictment or information for the presentation of a fraudulent claim should set forth the facts constituting the offense with certainty and particularity.⁴⁸ It should show wherein the claim is false and fraudulent,⁴⁹ and that accused had knowledge of such falsity.⁵⁰ However, it has been held that a copy of the claim presented need not be set out in the indictment.⁵¹

§ 48. Attempt

An indictment for attempting to obtain property by false pretenses must state the facts constituting the offense with sufficient particularity to inform accused and the court of the accusation.

An indictment for attempting to obtain property by false pretenses must, like any indictment, state the facts constituting the offense with sufficient particularity to inform accused and the court of the ac-

Ga.—Lucas v. State, 144 S.E. 138, 38 Ga.App. 449.

Accusation held insufficient

Ga.—Wilson v. State, 67 S.E.2d 164, 84 Ga.App. 703.

43. Ala.—Johnson v. State, 76 So.2d 351, 38 Ala.App. 82.

Del.—State v. Vandenburg, 2 A.2d 916, 9 W.W.Harr. 498.

Mont.—Corpus Juris cited in State v. Brantingham, 212 P. 499, 504, 66 Mont. 1.

Tex.—Beam v. State, 292 S.W. 239, 106 Tex.Cr. 341—Allen v. State, 261 S.W. 770, 97 Tex.Cr. 343.

25 C.J. p 635 note 11.

Allegation held sufficient

Wyo.—Anderson v. State, 196 P. 1047, 27 Wyo. 345.

44. Minn.—State v. Butler, 50 N.W. 532, 47 Minn. 483.

25 C.J. p 635 note 12.

Indictment held sufficient

Indictment for procuring signature under false pretenses to offer to convey realty located in another state was held not defective because omitting allegations concerning laws of other state governing validity of offer.

Ky.—Commonwealth v. Mirandi, 50 S.W.2d 13, 243 Ky. 823.

45. Ga.—Long v. State, 61 S.E. 1053, 4 Ga.App. 571.

46. U.S.—Shepherd v. U. S., C.A. Kan., 191 F.2d 682—U. S. v. Wight, C.A.N.Y., 176 F.2d 376, certiorari denied 70 S.Ct. 478, 338 U.S. 950, 94 L.Ed. 586—Ekberg v. U. S., C.C.A. Puerto Rico, 167 F.2d 380.

False personation generally see False Personation.

Indictments and informations held sufficient

U.S.—U. S. v. Lepowitch, Mo., 63 S.Ct. 914, 318 U.S. 702, 87 L.Ed. 1091, rehearing denied 63 S.Ct. 1171, 319 U.S. 783, 87 L.Ed. 1727.

Elliott v. Hudspeth, C.C.A.Kan., 110 F.2d 389.

Lowe v. Hiatt, D.C.Pa., 77 F. Supp. 303.

Mo.—State v. Michels, 255 S.W.2d 760.

Okl.—Booth v. State, 118 P.2d 274, 73 Okl.Cr. 85.

47. U.S.—Elliott v. Hudspeth, C.C.A. Kan., 110 F.2d 389.

48. Okl.—Chappell v. State, 124 P.2d 742, 74 Okl.Cr. 213.

25 C.J. p 618 note 47 [i].

Indictments and informations held sufficient

(1) In general.

U.S.—U. S. v. Selph, D.C.Cal., 82 F. Supp. 56.

Cal.—People v. Ralph, 227 P. 642, 67 C.A. 270.

Ind.—Bell v. State, 195 N.E. 274, 208 Ind. 361—Lund v. State, 190 N.E. 850, 207 Ind. 347.

25 C.J. p 618 note 47 [i] (5).

(2) Indictment for presenting false claim against city need not show manner and conditions of city's liability to claimant.

Ind.—Pontarelli v. State, 176 N.E. 696, 203 Ind. 146.

(3) Indictment charging defendant with presenting false proofs in

support of a claim on it in an insurance policy need not allege that the contract of insurance was in force at the time the proof of loss was presented.

Cal.—People v. Lauman, 201 P. 459, 187 C. 214.

Indictments or informations held insufficient

Cal.—People v. Benner, 278 P.2d 18, 130 C.A.2d 67.

Ind.—State v. Brown, 196 N.E. 696, 208 Ind. 562.

Language of statute

(1) An indictment substantially in the language of the statute which is fully descriptive of the offense is sufficient.

U.S.—Hammert v. U. S., C.C.A.Okl., 14 F.2d 827—Summers v. U. S., C.C.A.Va., 11 F.2d 583, certiorari denied 46 S.Ct. 632, 271 U.S. 681, 70 L.Ed. 1149.

Minn.—State v. Jansen, 290 N.W. 557, 207 Minn. 250.

(2) However, where the statute defines the offense in generic terms, an indictment charging the offense in the language of the statute is insufficient.

Ind.—State v. Metsker, 83 N.E. 241, 169 Ind. 555.

49. Ohio.—De Brul v. State, 87 N.E. 837, 80 Ohio St. 52.

50. Ariz.—Ex parte Harrison, 101 P.2d 457, 55 Ariz. 347.

25 C.J. p 618 note 47 [i] (4).

51. Ind.—Nurdyke v. State, 11 N.E.2d 165, 213 Ind. 243.

25 C.J. p 625 note 1 [b].

cusation against him.⁵² The same allegations are necessary as in an indictment for the completed offense,⁵³ with the exception of the averments as to belief and reliance⁵⁴ and completion of the fraud.⁵⁵ Such an indictment must show the means which accused proposed to use to obtain the property,⁵⁶ and aver that the representations were not true,⁵⁷ and an overt act must be alleged.⁵⁸

Such an indictment is not insufficient because it fails to allege in express terms that accused failed in the perpetration of the principal offense, or that he was prevented or intercepted in the perpetration of it.⁵⁹

§ 49. Issues, Proof, and Variance

a. In general

52. Mo.—State v. Woodward, 56 S. W. 880, 156 Mo. 143.

Indictment held sufficient

(1) In general.
N.Y.—People v. Siman, 197 N.Y.S. 713, 119 Misc. 635.

(2) Indictment charging attempt to obtain money by false pretenses was held to charge member of board of supervisors as well as road contractor with false pretenses.
Miss.—State v. Fitzgerald, 117 So. 517, 151 Miss. 229.

53. Miss.—State v. Fitzgerald, supra.
25 C.J. p 637 note 28.

Averment of intent not necessary

Under a statute making it unlawful to defraud or attempt to defraud, when a person is charged with an attempt to defraud, it has been held not necessary to allege any intent.
Fla.—King v. State, 95 So. 567, 85 Fla. 257.

Indictments held sufficient

Mo.—State v. Howell, 300 S.W. 807, 318 Mo. 772.
25 C.J. p 637 note 28 [b].

Indictment held insufficient

N.H.—State v. Ellsworth, 124 A.2d 203, 100 N.H. 301.

54. Ga.—De Krasner v. State, 187 S.E. 402, 54 Ga.App. 41.
25 C.J. p 637 note 29.

55. Ga.—De Krasner v. State, supra.
25 C.J. p 637 note 30.

56. Miss.—State v. Fitzgerald, 117 So. 517, 151 Miss. 229.
25 C.J. p 637 note 31.

Indictment held insufficient

Indictment charging attempt to obtain money by false pretenses by virtue of contract with county was held fatally defective because not setting forth contract.
Miss.—State v. Fitzgerald, supra.

57. Mont.—State v. Phillips, 92 P. 299, 36 Mont. 112.

Wash.—State v. Riddell, 74 P. 477, 33 Wash. 324.

58. Mo.—State v. Block, 62 S.W.2d 428, 333 Mo. 127, followed in 62 S.W.2d 432, 333 Mo. 134.

Allegations held sufficient

(1) An averment that false representations were made has been held a sufficient charge of an overt act.
Minn.—State v. Wolf, 210 N.W. 589, 168 Minn. 505.

(2) Allegation that alleged false account by contractor was prepared, signed, and approved, and filed with board of supervisors, charged overt act in alleged attempt to obtain money by false pretenses.
Miss.—State v. Fitzgerald, 117 So. 517, 151 Miss. 229.

Indictment held insufficient

Mo.—State v. Block, 62 S.W.2d 428, 333 Mo. 127, followed in 62 S.W.2d 432, 333 Mo. 134.

59. Kan.—State v. Decker, 14 P. 283, 36 Kan. 717.

Mo.—State v. Howell, 300 S.W. 807, 318 Mo. 772.

Indictment held sufficient

Allegation that defendants "would" feloniously obtain money, in indictment charging attempt to obtain money by false pretenses, was held not prejudicial error.
Miss.—State v. Fitzgerald, 117 So. 517, 151 Miss. 229.

59.50 Ala.—Littlefield v. State, 63 So.2d 573, 258 Ala. 532.

Cal.—People v. Schmidt, 305 P.2d 215, 147 C.A.2d 222.

D.C.—McGuinness v. U. S., Mun.App., 77 A.2d 22.

Idaho.—State v. Campbell, 219 P.2d 956, 70 Idaho 408.

Ill.—People v. Mero, 122 N.E.2d 796, 4 Ill.2d 327.

Mo.—State v. Polakoff, 237 S.W.2d 173, 361 Mo. 929—State v. Mandell, 183 S.W.2d 59, 353 Mo. 502.

- b. Pretense and intent
- c. Property obtained
- d. Person to whom pretense was made
- e. Person from whom property was obtained
- f. Person obtaining property
- g. Ownership of property obtained

a. In General

Matters not in issue need not be alleged or proved; but the proof must correspond with, and support, the material averments of the indictment.

Matters which are not in issue, within the scope of the indictment, need not be alleged or proved;^{59,50} but in accordance with general rules, the proof must correspond with, and support, the material averments of the indictment or information,⁶⁰ and an

Issues stated

In prosecution of subcontractor who had falsely assured contractor that no bills for labor or materials were outstanding, and who had thereupon been given a check in full settlement, whether subcontractor, by false statements, obtained contractor's signature to check, whether at time of making such statements he knew they were false, and whether by virtue of such representations, if false, he obtained certain sum on check, were the issues in the case.
Ark.—Schultz v. State, 242 S.W.2d 131, 219 Ark. 217.

60. Ind.—McCormick v. State, 127 N.E.2d 341, 234 Ind. 393—Crouch v. State, 97 N.E.2d 860, 229 Ind. 326.
Miss.—Waggoner v. State, 184 So. 633, 183 Miss. 510—State v. Puckett, 90 So. 113, 127 Miss. 415.
Mo.—State v. Scott, 230 S.W.2d 764.
Mont.—State v. Woolsey, 259 P. 826, 80 Mont. 141.
N.J.—State v. Mitchell, 117 A.2d 525, 37 N.J.Super. 425.
N.Y.—People ex rel. Jaffe v. Jennings, 236 N.Y.S. 429, 227 App.Div. 758, affirmed 173 N.E. 851, 254 N.Y. 528.

People v. Sloane, 300 N.Y.S. 1032, 165 Misc. 444, modified on other grounds 4 N.Y.S.2d 784, 254 App. Div. 780, affirmed 18 N.E.2d 679, 279 N.Y. 724—People v. Krumme, 292 N.Y.S. 657, 161 Misc. 278.
Okl.—Clark v. State, 91 P.2d 686, 66 Okl.Cr. 255—Bennett v. State, 204 P. 462, 21 Okl.Cr. 27.
Tex.—Hearrean v. State, 146 S.W.2d 379, 140 Tex.Cr. 527—Prince v. State, 247 S.W. 863, 93 Tex.Cr. 230.
25 C.J. p 637 note 36.

Matters to be proved

(1) In prosecution for swindling by use of a bad check, proof should be made as to whether there were sufficient funds in the bank to have paid the check at the time it was passed.

indictment is not supported by proof of a different offense.⁶¹ An allegation which is not descriptive of the offense need not be proved, but may be rejected as surplusage;⁶² but a descriptive allegation, although unnecessarily particular, must be proved as laid.⁶³ Where obtaining property by false pretenses is by statute a larceny, evidence disclosing that the property was obtained by false pretense with intent to defraud is admissible under a count for simple larceny;⁶⁴ but an indictment charging that accused "unlawfully and feloniously did steal, take and carry away" the property described

is not sustained by proof that accused obtained possession of the property by false and fraudulent representations.⁶⁵ Evidence as to collateral matters is admissible, although not alleged.⁶⁶

Fatal variance. A material variance between allegations and proof is fatal.^{66.5} A variance between the indictment and proof is not fatal where it is not material to the merits of the case or prejudicial to the defense.⁶⁷

b. Pretense and Intent

The proof must correspond with, and support, the

Tex.—Howk v. State, 135 S.W.2d 719, 138 Tex.Cr. 275.

(2) In statute making it a felony to obtain money or property "by means or use of any false or bogus checks," quoted phrase is descriptive of the offense and describes an essential element of the offense which state must allege and prove. Okl.—Simpson v. State, Cr., 267 P.2d 1008.

(3) In criminal prosecution under statute providing that the making, uttering, and issuing and delivering of worthless check shall be a crime, the state must prove that the maker of the check had neither sufficient funds on deposit in, nor credit with, the bank on which the check was drawn, to pay it on presentation. Ky.—Daily v. Commonwealth, 248 S.W.2d 425.

N.C.—State v. Jackson, 90 S.E.2d 507, 243 N.C. 216.

(4) It is necessary, in charging offense of obtaining money or other thing of value under false pretense, to prove a false representation of a material existing fact, a denial of the truth of the representation, to whom made, knowledge of its falsity, intent to defraud, reliance by victim or victims on false representation, that victim or victims were deceived, to whom money or other thing of value belonged, and surrender thereof to accused because of false representation.

Ind.—Coppock v. State, 140 N.E.2d 102, 236 Ind. 341—Crouch v. State, 97 N.E.2d 860, 229 Ind. 326.

(5) To support a conviction for obtaining money or property by false pretenses, state must adduce competent evidence to effect that the owner relied on such representations believing them to be true, and was induced thereby to part with his money or property.

Neb.—Beyl v. State, 85 N.W.2d 653, 165 Neb. 260.

(6) Where it was neither alleged in indictment or proved at trial that accused had obtained money, property, or anything whatsoever within the false pretenses statute, no of-

fense was charged under statute, and accused could not have been convicted of an attempt to commit such offense.

N.H.—State v. Ellsworth, 124 A.2d 203, 100 N.H. 301.

(7) Where complaint and information, in prosecution for violation of the "hot check" law, charged presentation of the check to a bank, state was required to prove such presentation and could not rely on the statutory presumption for proof of presentation.

Tex.—Colin v. State, 168 S.W.2d 500, 145 Tex.Cr. 371.

Evidence inadmissible

Evidence that a check was presented and payment refused at a bank other than one alleged has been held inadmissible.

Tex.—Ariola v. State, 289 S.W. 385, 105 Tex.Cr. 563.

Immaterial variance

Cal.—People v. Raplee, 241 P. 892, 75 C.A. 38.

Mich.—People v. Larco, 49 N.W.2d 353, 331 Mich. 420.

Mo.—State v. Green, 305 S.W.2d 863, 25 C.J. p 637 note 36 [f].

No variance

(1) In prosecution for obtaining money by means of a bogus check, fact that proof showed that accused indorsed the check, whereas no indorsement was alleged in information, would not be a variance.

Mo.—State v. Polakoff, 237 S.W.2d 173, 361 Mo. 929.

(2) Evidence in support of allegations of indictment jointly charging two defendants with crime of violating the confidence game was not at variance with allegations on theory that dealings of the two defendants with the victim were not connected.

Ill.—People v. Glenn, 112 N.E.2d 133, 415 Ill. 47, certiorari denied Glenn v. People of State of Ill., 74 S.Ct. 120, 346 U.S. 871, 98 L.Ed. 380.

(3) Other circumstances.

N.H.—State v. Story, 83 A.2d 142, 97 N.H. 141.

61. Ill.—People v. Martin, 24 N.E. 2d 380, 372 Ill. 484.

N.C.—State v. Martin, 155 S.E. 447, 199 N.C. 636.

25 C.J. p 638 note 39.

Confidence game

An indictment for obtaining property by a confidence game is not sustained by proof that defendant obtained the property by false pretenses.

Ill.—People v. Gould, 2 N.E.2d 324, 363 Ill. 348—People v. Schneider, 158 N.E. 448, 327 Ill. 270.

Mont.—State v. Allen, 275 P.2d 200, 128 Mont. 306.

62. Fla.—Henson v. State, 192 So. 163, 140 Fla. 412.

Ky.—Hatcher v. Commonwealth, 5 S.W.2d 882, 224 Ky. 131.

25 C.J. p 638 note 37.

63. Colo.—Schayer v. People, 37 P. 43, 5 Colo.App. 75.

Tex.—Robinson v. State, 148 S.W.2d 205, 141 Tex.Cr. 318.

Effect of advertisement

Where an information charging the offense of false advertising purports to set forth the effect of the advertisement, the prosecution is confined to the effect of the advertisement as set forth.

Wash.—State v. Massey, 163 P. 7, 95 Wash. 1.

64. Tex.—McIlvain v. State, 239 S.W. 959, 91 Tex.Cr. 443.

W.Va.—State v. Lilly, 164 S.E. 242, 112 W.Va. 231.

65. Mont.—State v. Lund, 18 P.2d 603, 93 Mont. 169.

25 C.J. p 638 note 44.

66. Ark.—Norris v. State, 280 S.W. 398, 170 Ark. 484.

D.C.—Moffatt v. U. S., 46 F.2d 616, 60 App.D.C. 35.

Mass.—Commonwealth v. Green, 94 N.E.2d 260, 326 Mass. 344.

Tex.—Mount v. State, Cr., 317 S.W.2d 212—Cochrain v. State, 248 S.W. 43, 93 Tex.Cr. 483.

66.5 N.J.—State v. Mitchell, 117 A.2d 525, 37 N.J.Super. 425.

Variance held fatal

N.C.—State v. Yancey, 45 S.E.2d 348, 228 N.C. 313.

67. Mo.—State v. Smith, 252 S.W. 662.

avermments as to the pretense, but there is no variance when several pretenses are alleged and only one is proved where such pretense was a material inducement to the prosecutor's parting with his property.

The proof must correspond with, and support, the

avermments as to the pretense,⁶⁸ and accused's knowledge of the falsity thereof;⁶⁹ but under the general rule governing such cases, an immaterial variance is not fatal.⁷⁰

68. Ala.—Hammett v. State, 146 So. 884, 25 Ala.App. 371—Robinson v. State, 129 So. 717, 24 Ala.App. 29.
 Ariz.—State v. Ellis, 189 P.2d 717, 67 Ariz. 7.
 Cal.—People v. Frey, 131 P. 127, 165 C. 140.
 Ill.—People v. Koscielniak, 257 Ill. App. 514.
 Mo.—**Corpus Juris** cited in State v. Zingher, 259 S.W. 451, 454, 302 Mo. 650.
 N.J.—State v. Barone, 118 A. 779, 98 N.J.Law 9.
 N.Y.—People v. Cooper, 229 N.Y.S. 748, 224 App.Div. 145—People v. Demasco, 209 N.Y.S. 665, 213 App. Div. 310.
 Okl.—Ex parte Bumgarner, 246 P.2d 387, 95 Okl.Cr. 379—Clark v. State, 91 P.2d 686, 66 Okl.Cr. 255.
 Tex.—Goodwin v. State, Cr., 320 S.W. 2d 852—King v. State, 253 S.W.2d 434, 158 Tex.Cr. 98—Whitley v. State, 236 S.W. 470, 90 Tex.Cr. 503—Dawson v. State, 185 S.W. 875, 79 Tex.Cr. 371.
 Utah.—State v. Hill, 116 P.2d 392, 100 Utah 456.
 25 C.J. p 638 note 46.

Particular matters

(1) In an indictment for obtaining an automobile by false pretenses, the state must show the pretense.
 Tex.—McIlvain v. State, 239 S.W. 959, 91 Tex.Cr. 443.

(2) An indictment alleging that accused obtained property by giving a worthless check, knowing that he did not have sufficient funds or credit with the bank to pay it, is not supported by proof that the check was drawn by another person.
 N.C.—State v. Dowless, 9 S.E.2d 18, 217 N.C. 589.
 Tex.—James v. State, 257 S.W. 886, 96 Tex.Cr. 308.

(3) Where swindling indictment averred that draft was drawn by defendant on his father, and on bank, and that payment was refused, failure to prove that defendant's father refused to pay draft was held fatal to conviction.
 Tex.—Boone v. State, 61 S.W.2d 103, 124 Tex.Cr. 174.

(4) Where information charged that defendant gave a check as guardian without sufficient funds, and proof merely showed that she had no funds in her personal account, and that payment of check as guardian was refused for different reason, it was held that there was a variance.
 Tex.—Clark v. State, 277 S.W. 132, 102 Tex.Cr. 88.

(5) Where an information charged defendant with obtaining money from A by making, uttering, and delivering to her a draft on a non-existent drawee, evidence that he procured A to indorse the draft and that he then obtained the money from a bank in which she had no account and which was not then charged to A, although she later repaid the bank, was a fatal variance.
 Ariz.—Patterson v. State, 215 P. 1096, 25 Ariz. 276, 35 A.L.R. 366.

(6) Conviction of giving worthless check was unauthorized on evidence that check indictment mentioned was one given state's witness.
 N.C.—State v. Franklin, 167 S.E. 569, 204 N.C. 157.

(7) Proof that defendant stated that he owned land was held insufficient to sustain charge of false pretenses in representing himself as owner of record title.
 Neb.—Graf v. State, 225 N.W. 466, 118 Neb. 485.

(8) Where there was no allegation that defendant represented property to be free from encumbrance, evidence that the property was encumbered has been held not admissible.
 Ala.—Prentice v. State, 139 So. 437, 24 Ala.App. 587.
 Mo.—State v. Norman, 232 S.W. 452.

(9) Other instances.
 25 C.J. p 638 note 46 [a].

No variance

(1) In general.
 Miss.—Fuller v. State, 72 So.2d 454, 221 Miss. 247.
 Tex.—Fleenor v. State, 22 S.W.2d 676, 113 Tex.Cr. 546.

(2) Allegation that sewer contractor presented false claim for construction of concrete mat was held supported by proof of claim for sum due because of quicksand.
 Ind.—Pontarelli v. State, 176 N.E. 696, 203 Ind. 146.

(3) In prosecution for misdemeanor swindling, for obtaining money by executing check drawn on bank in which defendant had no funds, check was properly introduced in evidence, and testimony of prosecuting witness that defendant executed and delivered check to her did not result in variance, where check was payable to "O. K. Restaurant or bearer," and information alleged that it was delivered to prosecuting witness, but did not allege that it was payable to her.
 Tex.—Harlin v. State, 272 S.W. 448, 100 Tex.Cr. 156.

(4) In a prosecution for fraudu-

lently obtaining goods in which accusation recited that defendant mortgaged to seller of goods and created a lien thereon, admission in evidence of a written instrument promising payment for the goods sold and reciting reservation of title as to such goods and mortgage on other property was not error as constituting a variance because the accusation contained no allegation of reservation of title.

Ga.—Taylor v. State, 105 S.E. 651, 26 Ga.App. 74.

(5) Evidence of accused's false statements regarding details of negotiations she was charged with having represented herself as making was held properly admitted as proof of allegations in indictment.

N.J.—State v. Bennett, 138 A. 923, 104 N.J.Law 186.

(6) In prosecution for false pretense testimony showing defendant's representation that check was valid was held admissible under allegation that check was false.

Ark.—Wilkerson v. State, 21 S.W.2d 183, 180 Ark. 280.

(7) Other instances see 25 C.J. p 638 note 46 [b].

69. Iowa.—State v. Hixson, 217 N. W. 814, 205 Iowa 1321.

N.J.—State v. Samurine, 135 A.2d 574, 47 N.J.Super. 172, reversed on other grounds 142 A.2d 612, 27 N.J. 322.

Okl.—Ex parte Bumgarner, 246 P.2d 387, 95 Okl.Cr. 379—Clark v. State, 91 P.2d 686, 66 Okl.Cr. 255.

70. Cal.—People v. Harrington, 267 P. 942, 92 C.A. 245—People v. White, 259 P. 76, 85 C.A. 241—People v. Revley, 227 P. 957, 67 C.A. 553.

Mass.—Commonwealth v. Bannon, 150 N.E. 7, 254 Mass. 320.

Mo.—State v. Brickey, 152 S.W.2d 1055, 348 Mo. 248.
 25 C.J. p 639 note 47.

Variances held immaterial

(1) In prosecution for uttering worthless check, proof that check was drawn on "First National Bank of Ocilla" was held not "substantial variance" from allegation of indictment that check was headed "Ocilla, Ga.," and drawn on "First National Bank."

Ga.—Dixon v. State, 176 S.E. 893, 50 Ga.App. 73.

(2) In a prosecution for passing a false or worthless check, a variance between the date line of the check as set out in the indictment and as offered in evidence has been held immaterial.

Accused cannot be convicted on proof of pretenses not alleged in the indictment,⁷¹ and, if the indictment alleges a single representation made of a single inseparable fact, and the proof is of a single representation variant from that charged, the variance is fatal;⁷² but, where the pretense is charged as a single pretense, proof of a double and separable representation, one part of which alone might constitute this element of the offense and which corresponds with the pretense charged, is no variance.⁷³

The prosecution is not precluded from showing the falsity of any or all of the pretenses alleged,⁷⁴ provided the truth thereof is negated in the indictment.⁷⁵ There is no variance when several representations are alleged and only one is proved, where such pretense was a material inducement to the prosecutor's parting with his property.⁷⁶ However, the allegation as to the pretense which was relied on must be proved as laid, a variance in this respect being fatal.⁷⁷

Where a statute sets out different methods of obtaining money or property with intent to cheat and defraud and makes the use of each method an offense, only one method need be charged, but the particular method used and charged in the information must be proved.^{77.5}

Where the main pretense is charged, evidence is admissible of minor pretenses which may have exercised some influence in producing the result,⁷⁸ and proof of other concurring causes does not constitute a fatal variance.⁷⁹

Time of pretense. The date on which the pretense was made being immaterial, a variance as to the date is not fatal.⁸⁰

Intent. In accordance with general rules as to intent, discussed supra § 7, proof of an intent to defraud may be required,^{80.5} although it need not be proved that the intent was to defraud the particular person named in the indictment.⁸¹ Where, how-

Cal.—People v. Weaver, 274 P. 361, 96 C.A. 1—People v. Freeman, 156 P. 994, 29 C.A. 543.

(3) In grand larceny prosecution designation in information of check used to obtain money as No. 2, while check introduced in evidence was numbered 21, was held not variance, since discrepancy was not material, defendants were not prejudiced, and jury were not misled.

Wash.—State v. Lindsey, 61 P.2d 293, 187 Wash. 364, certiorari granted Lindsey v. State of Washington, 57 S.Ct. 752, 300 U.S. 652, 81 L.Ed. 863, reversed on other grounds 57 S.Ct. 797, 301 U.S. 397, 81 L.Ed. 1182.

(4) Other variances.

Ga.—Floyd v. State, 98 S.E.2d 161, 95 Ga.App. 536.
25 C.J. p 639 note 47 [a].

71. Mo.—State v. Sherill, 278 S.W. 992.

N.Y.—People v. Karp, 81 N.E.2d 817, 298 N.Y. 213.

Tex.—King v. State, 253 S.W.2d 434, 158 Tex.Cr. 98.

25 C.J. p 640 note 48.

Written statement of financial standing

Where, in a prosecution for swindling W out of an automobile, based on false statements made by accused as to his financial standing when he bought the car, by giving a worthless check and executing notes, the indictment did not set out the written financial statement signed by accused, or allege that W relied on it when he sold the car, admission in evidence of such written statement was held reversible error, as constituting a variance.

Tex.—Earles v. State, 263 S.W. 281, 97 Tex.Cr. 555.

72. Ala.—O'Connor v. State, 30 Ala. 9.
25 C.J. p 640 note 49.

73. Ala.—Beasley v. State, 59 Ala. 20.
25 C.J. p 640 note 50.

74. Ariz.—Thomas v. Territory, 89 P. 591, 11 Ariz. 184.

75. Ind.—State v. Long, 3 N.E. 169, 103 Ind. 481.

Tex.—Salter v. State, 38 S.W. 212, 36 Tex.Cr. 501.

76. Ala.—McKee v. State, 155 So. 888, 26 Ala.App. 208.

Cal.—People v. Rabe, 261 P. 303, 202 C. 409.

People v. Fisher, 2 P.2d 564, 116 C.A. 243—People v. Harrington, 267 P. 942, 92 C.A. 245—People v. White, 259 P. 76, 85 C.A. 241—People v. Fraser, 253 P. 340, 81 C. A. 281—People v. Walker, 244 P. 94, 76 C.A. 192—People v. Revley, 227 P. 957, 67 C.A. 553.

Ga.—Kemp v. State, 6 S.E.2d 196, 61 Ga.App. 337.

Idaho.—State v. McCallum, 295 P.2d 259, 77 Idaho 489—**Corpus Juris** cited in State v. Stevens, 282 P. 93, 98, 48 Idaho 335.

Kan.—State v. Addington, 147 P.2d 367, 158 Kan. 276—State v. Beezley, 239 P. 998, 119 Kan. 300—State v. Mathes, 196 P. 607, 108 Kan. 488.

Mo.—State v. Montgomery, 116 S.W. 2d 72.

N.J.—State v. Lamoreaux, 80 A.2d 213, 13 N.J.Super. 99.

25 C.J. p 640 note 53.

77. Ala.—**Corpus Juris Secundum** cited in Holloway v. State, 64 So. 2d 115, 121, 37 Ala.App. 96, cer-

tiorari denied 64 So.2d 121, 258 Ala. 558.

Tex.—Dechard v. State, Cr., 57 S.W. 813.
25 C.J. p 640 note 54.

77.5 Mo.—State v. Robinson, 255 S. W.2d 811—State v. Scott, 230 S. W.2d 764.

78. Cal.—People v. Donaldson, 171 P. 442, 36 C.A. 63.

79. Wash.—State v. Elliott, 123 P. 1089, 68 Wash. 603.

80. Cal.—People v. Adams, 290 P. 2d 673, 137 C.A.2d 660—People v. Baker, 76 P.2d 715, 25 C.A.2d 120. Idaho.—State v. Larsen, 286 P.2d 646, 76 Idaho 528.

Pa.—Commonwealth v. Ackerman, 106 A.2d 886, 176 Pa.Super. 80, certiorari denied 75 S.Ct. 438, 348 U. S. 951, 99 L.Ed. 743.

Commonwealth v. Heintz, 43 Del. Co. 168, 70 York 67, affirmed 126 A.2d 498, 182 Pa.Super. 331.

25 C.J. p 642 note 82.

80.5 Kan.—State v. Handke, 340 P. 2d 877.

La.—State v. Clayton, 110 So.2d 111, 236 La. 1093—State v. McLean, 44 So.2d 698, 216 La. 670—State v. Alphonse, 98 So. 430, 154 La. 950.

81. Ohio.—State v. Aughinbaugh, App., 32 N.E.2d 478.

25 C.J. p 642 note 73.

Variance not fatal

Where information charged that defendant issued worthless check with intent to cheat and defraud a certain person and a bank, proof that check was cashed at a hotel was not a fatal variance, where cashier at hotel was person named in information as one whom defendant intended to cheat and defraud, and trans-

ever, an allegation of intent is not required in a prosecution for an attempt to defraud, it is not necessary to prove any intent.⁸²

c. Property Obtained

The proof must correspond with the allegations as to the property obtained; under most authorities, an averment of obtaining a certain sum of money is sustained by proof of obtaining a check, draft, etc., which is afterward paid or honored.

The allegata and probata as to the property obtained must correspond;⁸³ but an immaterial variance will not be fatal.⁸⁴ In general, it is not necessary to prove that the amount of money obtained

was precisely the same as that alleged in the indictment,⁸⁵ and proof that some definite portion of the goods was obtained by means of the alleged false pretense is sufficient.⁸⁶

Proof of the obtaining of a smaller sum of money, or a smaller quantity of property than that alleged, is not a fatal variance,⁸⁷ and, if the proof shows that accused obtained the property alleged, proof that he also obtained other property not alleged is not a variance.⁸⁸ While evidence of the value of property has been held necessary, at least to sustain a felony conviction,⁸⁹ where the jury and the

action was set forth in such manner as sufficiently to inform defendant of charges to enable him to present any defense and by proper plea defend himself from subsequent prosecution for same offense.

Cal.—People v. Silverman, 92 P.2d 507, 33 C.A.2d 1.

82. Fla.—King v. State, 95 So. 567, 85 Fla. 257.

83. Miss.—Corpus Juris cited in Hales v. State, 191 So. 273, 186 Miss. 413.

Neb.—Corpus Juris Secundum cited in Pettijohn v. State, 27 N.W.2d 380, 382, 148 Neb. 336.
25 C.J. p 640 note 56.

Money or signature

Under Code 1907 §§ 6920, 6921, the offenses of obtaining money by false pretenses and of obtaining the signature to written instrument by false pretenses are separate and distinct, and proof of the latter will not warrant conviction under count charging the former.

Ala.—Pollock v. State, 97 So. 237, 19 Ala.App. 156, certiorari denied Ex parte State, 97 So. 240, 210 Ala. 69.

Description of money

(1) In Arkansas, proof is unnecessary whether "lawful money of the United States," within indictment for false pretenses, was gold, silver, or paper.

Ark.—Spears v. State, 294 S.W. 66, 173 Ark. 1071.

(2) However, in earlier cases it was held that, under an indictment charging defendant with having procured by false pretenses "\$300 in gold, silver, and paper money, of the value of \$300," the ownership and description of the money alleged to have been obtained were material allegations of the indictment, which must be proved before defendant could be convicted, and the court should have so charged.

Ark.—Long v. State, 255 S.W. 300, 160 Ark. 607.

25 C.J. p 640 note 56 [a] (1).

Variance held fatal

(1) In general.

Ind.—Tullis v. State, 103 N.E.2d 353, 230 Ind. 311—Rogers v. State, 44 N.E.2d 343, 220 Ind. 443, 143 A.L.R. 1074.

Pa.—Commonwealth v. Becker, 30 A.2d 195, 151 Pa.Super. 169.

Tex.—King v. State, 253 S.W.2d 434, 158 Tex.Cr. 98—Jacobs v. State, 91 S.W.2d 348, 129 Tex.Cr. 617.

(2) Where indictment alleged that defendant fraudulently obtained a specified automobile by issuance of a bad check and proof showed that he obtained a different automobile, the variance between the indictment and proof justified reversal of a conviction since a conviction under the indictment would afford defendant no protection in a later prosecution for obtaining the alleged automobile on the faith of the bad check.

Tenn.—Malkemus v. State, 129 S.W.2d 201, 174 Tenn. 547.

No variance

Where a bogus bond is presented to an agent of the state authorized to act in the premises for payment or refunding, by a letter of transmittal, there is no variance because the letter refers to a territorial bond and the bond in question was a county indebtedness which the state had assumed, in the prosecution.

N.M.—State v. Kelly, 202 P. 524, 27 N.M. 412, 21 A.L.R. 156.

Evidence admissible

In a prosecution for swindling by obtaining drafts by false pretenses, if it became necessary, in order to sustain the allegation of value of the drafts, to prove their execution by a bank or some person having authority from it, such proof was admissible under the general allegation of value of the instruments in the indictments.

Tex.—Escue v. State, 227 S.W. 483, 88 Tex.Cr. 447.

84. Ala.—Caughlan v. State, 114 So. 280, 22 Ala.App. 220.

Okl.—Rhodes v. State, 49 P.2d 226, 58 Okl.Cr. 1.

25 C.J. p 640 note 57.

Variance held immaterial

Where information charged accused with crime of obtaining money by means of a false and bogus check, but proof showed that he gave check payable to auctioneer for cattle belonging to customer who was paid in cash by auctioneer, there was no material variance.

Okl.—Hunter v. State, 264 P.2d 997, 97 Okl.Cr. 402.

85. Cal.—People v. Baker, 76 P.2d 715, 25 C.A.2d 120.

Idaho.—State v. Sheehan, 196 P. 532, 33 Idaho 553.

Ill.—People v. De Felice, 33 N.E.2d 475, 376 Ill. 312.

Iowa.—State v. McCutchan, 259 N.W. 23, 219 Iowa 1029.

Tex.—Taylor v. State, 232 S.W. 525, 89 Tex.Cr. 618.

25 C.J. p 641 note 58, p 638 note 37 [c].

Value and denomination

In prosecution for grand theft accomplished by obtaining three hundred dollars in money as a purported loan, by means of false representations, it was not necessary to prove specifically that the loan of three hundred dollars "in money" was actually worth that sum, nor was it necessary to prove that it was paid in coin or currency or what the denomination of the separate pieces of money was.

Cal.—People v. Alba, 117 P.2d 63, 46 C.A.2d 859.

86. Mont.—Corpus Juris quoted in State v. Mason, 204 P. 358, 359, 62 Mont. 180.

25 C.J. p 641 note 59.

87. Ga.—Kemp v. State, 6 S.E.2d 196, 61 Ga.App. 337.

Iowa.—State v. McCutchan, 259 N.W. 23, 219 Iowa 1029.

25 C.J. p 641 note 60.

88. Mass.—Commonwealth v. Brown, 46 N.E. 1, 167 Mass. 144.

25 C.J. p 641 note 61.

89. Tex.—Gillette v. State, 49 S.W.2d 455, 120 Tex.Cr. 572—Williams v. State, 43 S.W.2d 935, 119 Tex. Cr. 587.

trial court knew that the value of the property obtained was sufficient to constitute the offense a felony, formal evidence of the value of the property has been held not necessary.⁹⁰

According to a number of decisions, an averment of obtaining a certain sum of money is sustained by proof of obtaining a check, draft, warrant, order, or the like, which is afterward paid or honored;⁹¹ but there is authority to the contrary.⁹² Also, it has been held that there is a fatal variance where the indictment charges accused with obtaining money by false pretenses and the proof is that he obtained a note,⁹³ or the satisfaction of a debt,⁹⁴ but that proof that a draft, by which accused secured other drafts and a deposit credit, was obtained is not at fatal variance with an indictment alleging that accused obtained "current and genuine money."⁹⁵

d. Person to Whom Pretense Was Made

Allegation and proof as to the person to whom the false pretense was made must correspond.

The proof as to the person to whom the false

pretense was made must correspond with the allegation in the indictment;⁹⁶ but since pretenses may be indirectly made, there is no variance between an allegation that the pretenses were made to a person named and proof that they were made to another person and by him communicated to the person named,⁹⁷ or where the representations were made to a third person, but in the presence of the prosecutor who acted on them.⁹⁸ If the allegation is that the false pretense was made to several persons, there is a variance in proof that it was made to one of the persons named.⁹⁹

e. Person from Whom Property Was Obtained

The allegations and proof as to the person from whom the property was obtained must correspond.

The proof must correspond to the allegations of the indictment as to the person from whom the property was obtained.¹ However, while there is authority to the contrary,² it has been held that there is no variance where it is alleged that the property was obtained from a certain person and the proof shows that it was delivered to accused by the agent

90. Kan.—State v. Mathes, 196 P. 607, 108 Kan. 488.

91. Ariz.—Clark v. State, 89 P.2d 1077, 53 Ariz. 46.

Ark.—State v. Boatright, 96 S.W.2d 775, 192 Ark. 1100.

Colo.—Updike v. People, 18 P.2d 472, 92 Colo. 125—Arnett v. People, 11 P.2d 806, 91 Colo. 56.

Ga.—Kemp v. State, 6 S.E.2d 196, 61 Ga.App. 337.

Idaho.—State v. Stevens, 282 P. 93, 48 Idaho 335—State v. Sheehan, 196 P. 532, 33 Idaho 553.

Iowa.—State v. Detloff, 205 N.W. 534, 201 Iowa 159.

Mo.—State v. Gilpin, 320 S.W.2d 498—State v. Rosenheim, 261 S.W. 95, 303 Mo. 553—State v. Bowman, 247 S.W. 143.

Mont.—State v. Brantingham, 212 P. 499, 66 Mont. 1.

Neb.—Hameyer v. State, 29 N.W.2d 458, 148 Neb. 798.

Ohio.—State v. Joseph, 152 N.E. 186, 115 Ohio St. 127.

Okl.—Mason v. State, 212 P. 1028, 23 Okl.Cr. 111.

Tex.—Paiz v. State, Cr., 320 S.W.2d 827—Wimer v. State, 48 S.W.2d 296, 120 Tex.Cr. 576.

25 C.J. p 641 note 62.

Obtaining credit by bank

(1) It has been held that proof that the amount of a check was passed to the credit of accused by bank and drawn on by him in favor of other parties will not sustain an indictment for obtaining money.

Ark.—Maxey v. State, 108 S.W. 1135, 85 Ark. 499, 14 Ann.Cas. 509.

(2) However, the contrary has also been held.

Mont.—State v. Mason, 204 P. 358, 62 Mont. 180.

Proof that check was cashed

Where defendant made no claim that he did not receive money under check which he obtained, he could not complain of failure to prove cashing of check.

Cal.—People v. Rabe, 261 P. 303, 202 C. 409.

92. Ill.—People v. Tratner, 166 N.E. 34, 334 Ill. 564.

People v. Stoltz, 34 N.E.2d 123, 310 Ill.App. 391.

25 C.J. p 641 note 63.

In Alabama

(1) The rule stated in the text has been followed.

Ala.—O'Brien v. State, 191 So. 391, 238 Ala. 189.

Hendrix v. State, 82 So. 564, 17 Ala.App. 116.

(2) However, the practicality of the rule therein stated has been seriously questioned and it has been held that evidence that accused obtained a deposit slip and checked out the amount of the deposit was not a fatal variance from an allegation of the receipt of money.

Ala.—Simmons v. State, 4 So.2d 905, 242 Ala. 105.

Pirkle v. State, 129 So. 707, 24 Ala.App. 19.

93. N.C.—State v. Gibson, 85 S.E. 7, 169 N.C. 318.

94. S.C.—State v. Daniel, 65 S.E. 236, 83 S.C. 309.

95. Minn.—State v. Cary, 151 N.W. 186, 128 Minn. 481.

96. Ga.—McLendon v. State, 85 S. E. 200, 16 Ga.App. 262.

Ind.—Corpus Juris Secundum cited in, Crouch v. State, 97 N.E.2d 860, 863, 229 Ind. 326.

25 C.J. p 641 note 68.

97. N.Y.—People v. Genet, 19 Hun 91, affirmed 83 N.Y. 436.

25 C.J. p 641 note 69.

98. Ga.—Foss v. State, 83 S.E. 880, 15 Ga.App. 478.

Tex.—James v. State, 269 S.W. 788, 99 Tex.Cr. 395.

99. Tex.—Pilgrim v. State, 150 S. W. 1170, 68 Tex.Cr. 175.

25 C.J. p 642 note 71.

1. Miss.—Bruce v. State, 64 So.2d 332, 217 Miss. 368.

Tex.—McGinty v. State, 245 S.W. 924, 93 Tex.Cr. 160.

25 C.J. p 642 note 74.

2. Tex.—Nichols v. State, 123 S.W. 2d 672, 136 Tex.Cr. 41.

Obviating variance

A variance between information charging that accused obtained possession of property from owner and delivered bad check to owner, and proof that accused obtained possession of property from owner's father and delivered check to father, could be obviated by charging that father acted as agent for owner, which fact was well-known to accused, and that check was made payable to owner but delivered to owner's father as agent.

Tex.—Nichols v. State, supra.

of such person or by some third person on his request or order.³

Under a statute requiring that the property be obtained from any person, firm, or corporation, an information charging that accused obtained property from the prosecuting witness has been held not at variance with proof that the property belonged to someone other than the prosecuting witness.^{3.5}

f. Person Obtaining Property

Ordinarily, proof that the property was received by a third person will not support an averment that accused obtained it.

Where it is charged that accused obtained certain property, proof that it was received by a third person will not suffice.⁴ However, the fact that the proof

shows that accused never obtained the property, but that it was obtained, if at all, by a company for which he acted as agent, does not constitute a fatal variance;⁵ nor does proof that the property was delivered to another at accused's request, or in accordance with his wishes, constitute a material variance.⁶

g. Ownership of Property Obtained

While a material variance as to the title or ownership of the property obtained is fatal, proof of the actual or constructive possession of the property by the one alleged to be the owner has been held sufficient.

A material variance between the indictment and proof as to the title or ownership of the property obtained is fatal.⁷ Proof of the actual or construc-

3. Ala.—Pirkle v. State, 129 So. 707, 24 Ala.App. 19.
Cal.—People v. Woodson, 54 P.2d 33, 11 C.A.2d 604.
Iowa.—State v. Neuhart, 292 N.W. 791, 228 Iowa 1055.
Mo.—State v. Price, 238 S.W.2d 397, 361 Mo. 1034.
25 C.J. p 642 note 75.

Employee

There was no fatal variance between indictment charging that accused took a motor from named person and proof that it was an employee who actually made the sale to accused.

Tex.—Westover v. State, Cr., 322 S.W.2d 279.

- 3.5 Okl.—Moore v. State, 250 P.2d 46, 96 Okl.Cr. 118.

4. Mo.—State v. Bowman, 247 S.W. 143.
25 C.J. p 642 note 76.

Automobile

In a prosecution for obtaining an automobile by false pretenses the state must identify accused as the party who made the pretenses and who thereby gained possession.

Tex.—McIlvain v. State, 239 S.W. 959, 91 Tex.Cr. 443.

Payment to partnership

(1) An information charging that defendant and another conspired to obtain money by false pretenses does not authorize a conviction on the theory that, although the money was paid by the prosecuting witness to a partnership of which he became a member, the partnership was merely an artifice or scheme to defraud the prosecuting witness and the money was converted by defendant to his own use where the information did not so charge.

Mo.—State v. Smalley, 252 S.W. 443.

(2) In prosecution for swindling, although indictment did not allege that accused and another were partners, testimony that amount of draft

drawn by accused was deposited to credit of him and another was held admissible.

Tex.—Krueger v. State, 199 S.W. 629, 82 Tex.Cr. 404.

5. Ark.—Fisher v. State, 256 S.W. 858, 161 Ark. 586.

Wash.—State v. Mendenhall, 63 P. 1109, 24 Wash. 12.

6. Cal.—People v. Rabe, 261 P. 303, 202 C. 409.

Kan.—State v. Balliet, 66 P. 1005, 63 Kan. 707.

Mo.—State v. Rosenheim, 261 S.W. 95, 303 Mo. 553—State v. Clice, 252 S.W. 465.

7. Ga.—Farris v. State, 99 S.E.2d 911, 96 Ga.App. 320—Henley v. State, 2 S.E.2d 139, 59 Ga.App. 595.

Ill.—People v. Koscielniak, 257 Ill. App. 514.

25 C.J. p 642 notes 79, 80.

Allegation as surplusage

Under a statute providing that an indictment for obtaining goods by false pretenses need not allege the ownership of the goods, the allegation of ownership in an indictment is mere surplusage, which need not be proved.

N.C.—State v. Ridge, 34 S.E. 440, 125 N.C. 658.

Name by which usually known

It has been held sufficient to prove that the person is known by the name alleged, although such name is not his true name.

Ill.—People v. Marek, 156 N.E. 772, 326 Ill. 11.

Christian name unknown

Where the evidence before the grand jury did not show the Christian name of one of the parties defrauded, the mere fact that such party testified on the trial of defendant for obtaining money under false pretenses, giving his full name, did not establish that his Christian name was not unknown to the grand jury

using his initials in the indictment, so as to constitute a fatal variance. Ind.—Small v. State, 130 N.E. 401, 190 Ind. 406.

Corporation or partnership

(1) Where count in swindling prosecution averred that individual was owner of, and parted with, title to, and possession of, check, proof showing that individual acted merely as agent for corporation constituted fatal variance.

Tex.—Brown v. State, 44 S.W.2d 721, 119 Tex.Cr. 578.

(2) When the indictment in a prosecution for obtaining money or goods under false pretenses charges that a particular person named was the owner of the money or goods obtained, and the proof shows that it was obtained from a firm composed of two or more persons, the variance is fatal.

Miss.—Pippin v. State, 88 So. 502, 126 Miss. 146.

(3) However, where it is not necessary that the indictment allege that the owner of the property obtained is a corporation or partnership, supra § 42 b, an indictment for false pretenses was held not bad, because it described the injured party as "C. & Co.," without alleging whether it was a corporation or a partnership, and without giving the names of the partners, and there was no variance, although the proof showed that such company was a partnership.

Ky.—McClanahan v. Commonwealth, 247 S.W. 369, 197 Ky. 457.

Immaterial variance

Wife's interest in community property, consisting of a bank account in the name of herself and husband, against which each was authorized to check, was such as to support a criminal charge of obtaining it from her by false representations, constituting grand larceny.

Wash.—State v. Cook, 194 P. 401, 115 Wash. 391.

tive possession of the property by the one alleged in the indictment to be the owner thereof has been held sufficient;⁸ and a variance as to the ownership of the property obtained has been held not fatal where it is not material to the merits of the case or prejudicial to the defense,⁹ as where the offense was sufficiently described in other respects to identify the act.¹⁰

Under an indictment for obtaining property by

means of the confidence game, it is sufficient to allege that the property obtained was either that of the general owner or his agent in possession of it and to prove that the confidence game was practiced either on the owner or the agent.¹¹ However, a failure to prove the name of the injured person as alleged in the indictment, or a name idem sonans, is not a mere variance, but is a fatal lack of evidence to prove the crime charged.¹²

B. EVIDENCE

§ 50. Presumptions and Burden of Proof

The burden rests on the prosecution to prove beyond a reasonable doubt every essential element of the crime charged, except in so far as express statutory provisions have created presumptions as to the existence of specified elements, such as the intent to defraud, from proof of enumerated facts. The accused has the burden of proving affirmative matters of defense.

Technical ownership immaterial

The technical ownership of the money paid out by a bank on a check drawn on another bank is not material; hence there is no variance between an information charging that payee was defrauded and proof that the money was that of the collecting bank, particularly where the proof also showed that the payee was compelled to repay the money to the bank.

Wash.—State v. Pilling, 102 P. 230, 53 Wash. 464, 132 Am.S.R. 1080.

Community property

In prosecution under charge that accused defrauded store clerk, where testimony of prosecution showed that clerk was married and living with husband and that both owned the store, property obtained by accused was community property with ownership in husband, and conviction would be reversed for failure of proof to correspond to allegations.

Tex.—Bundage v. State, 215 S.W.2d 339, 152 Tex.Cr.R. 497.

8. Tex.—Barnett v. State, 216 S.W. 2d 218, 152 Tex.Cr. 626.

W.Va.—State v. Cobb, 7 S.E.2d 443, 122 W.Va. 97.

Custody or possession

Fatal variance existed between indictment charging that accused obtained property of hotel clerk through presentation of counterfeit check, and proof that accused obtained hotel's money from the clerk to whom the check was presented, since clerk had mere "custody" of money of the hotel which retained "possession" thereof.

Ga.—Henley v. State, 2 S.E.2d 139, 59 Ga.App. 595.

9. Mo.—State v. Smith, 252 S.W. 662.

25 C.J. p 642 note 79 [a].

10. Okl.—Hawkins v. State, 32 P.2d 101, 55 Okl.Cr. 396.

11. Ill.—People v. Cathony, 33 N.E. 2d 473, 376 Ill. 260—People v. Golub, 165 N.E. 196, 333 Ill. 554—People v. Emmel, 127 N.E. 53, 292 Ill. 477.

Part owner

Judgment of conviction for receiving money by means of a confidence game would not be reversed because defendant was indicted for obtaining money of the prosecuting witness in the sum of two thousand eight hundred dollars when the proof showed that only two thousand dollars of the money belonged to the prosecuting witness and eight hundred dollars to his wife, since, if money is obtained by means of a confidence game, the offense is complete without reference to the amount, kind, or value.

Ill.—People v. De Felice, 33 N.E.2d 475, 376 Ill. 312.

12. Ill.—People v. Novotny, 137 N. E. 394, 305 Ill. 549.

13. Iowa.—State v. Cotton, 33 N.W. 2d 880, 240 Iowa 609.

Ky.—Sanson v. Commonwealth, 233 S.W.2d 258, 313 Ky. 631, 20 A.L.R. 2d 1262.

N.C.—State v. Anderson, 139 S.E. 701, 194 N.C. 377.

14. U.S.—U. S. v. Clawson, D.C.Wyo., 13 F.Supp. 178.

La.—State v. Hart, 196 So. 62, 195 La. 184, followed in State v. Weiss, 196 So. 70, 195 La. 208.

Mass.—Commonwealth v. Orler, 147 N.E. 548, 252 Mass. 55.

Mo.—State v. Scott, 230 S.W.2d 764.

Tex.—Kuykendall v. State, 160 S.W. 2d 525, 143 Tex.Cr. 607.

Weight and sufficiency of evidence see *infra* § 52.

Burden never shifts

The burden of establishing the

Conformably to the rule applicable in criminal prosecutions generally, discussed in Criminal Law § 566, in a prosecution for false pretenses the burden rests on the state¹³ to prove beyond a reasonable doubt¹⁴ every essential element of the crime charged.¹⁵ It must prove that the alleged repre-

facts necessary to a conviction beyond a reasonable doubt remains with the commonwealth throughout the trial and never shifts to accused. Ky.—Commonwealth v. Gentry, 88 S. W.2d 273, 261 Ky. 564.

Prima facie case does not shift burden

Although statute makes delivery of check without sufficient funds prima facie evidence of intent to defraud, such prima facie evidence does not take from state burden of proving guilt beyond reasonable doubt.

Ind.—Huffman v. State, 185 N.E. 131, 205 Ind. 75.

15. Ky.—Commonwealth v. Gentry, 88 S.W.2d 273, 261 Ky. 564.

Md.—Willis v. State, 106 A.2d 85, 205 Md. 118.

Mass.—Commonwealth v. McHugh, 54 N.E.2d 934, 316 Mass. 15.

N.J.—State v. Pearson, 120 A.2d 468, 39 N.J.Super. 50.

N.Y.—People v. Brady, 249 N.Y.S. 715, 139 Misc. 597.

Ohio.—State v. De Nicola, 126 N.E.2d 62, 163 Ohio St. 140.

Okl.—Kilgore v. State, 219 P. 160, 25 Okl.Cr. 69.

25 C.J. p 642 note 85.

Matter to be proved in prosecution for obtaining property by false pretenses generally

(1) That the crime charged was committed by accused.

La.—State v. Hart, 196 So. 62, 195 La. 184, followed in State v. Weiss, 196 So. 70, 195 La. 208.

Tex.—Phillips v. State, 297 S.W.2d 134, 164 Tex.Cr. 78.

(2) That the crime was committed in the parish where the venue was laid.

La.—State v. Hart, 196 So. 62, 195 La. 184, followed in State v. Weiss, 196 So. 70, 195 La. 208.

(3) That person defrauded intend-

sensation or pretense was made,¹⁶ that it was false,¹⁷ | that accused knew it to be false,¹⁸ that the person

ed to pass title to accused at time he obtained the property.

Iowa.—State v. Evans, 295 N.W. 433, 229 Iowa 932.

(4) Absence of indebtedness between employer and employee, in prosecution of employee, who received and cashed check from employer, for obtaining money under false pretenses, where representation of existing indebtedness between employer and employee could have been implied.

Utah.—State v. Timmerman, 55 P.2d 1320, 56 P.2d 1354, 88 Utah 481.

Matters to be proved in prosecution for issuing bad check

(1) All essential elements of offense.

Md.—Willis v. State, 106 A.2d 85, 205 Md. 118.

Mo.—State v. Scott, 230 S.W.2d 764.

Pa.—Commonwealth v. Chappell, 7 Pa. Dist. & Co.2d 370, 18 Cambria 92.

Tex.—Moody v. State, 213 S.W.2d 539, 152 Tex.Cr. 265.

25 C.J. p 642 note 85 [e] (2).

(2) That accused had neither funds nor credit with the bank to meet the check.

Cal.—People v. Frey, 131 P. 127, 165 C. 140.

People v. Schneider, 15 P.2d 540, 126 C.A. 749—People v. Owens, 206 P. 473, 57 C.A. 84.

Fla.—Grantham v. State, 90 So. 697, 83 Fla. 16.

Ky.—Commonwealth v. Gentry, 88 S.W.2d 273, 261 Ky. 564.

N.M.—State v. Thompson, 20 P.2d 1030, 37 N.M. 229.

(3) That accused gave the check for something of value.

Fla.—Grantham v. State, 90 So. 697, 83 Fla. 16.

(4) That accused failed to make restitution or pay the money within twenty-four hours after notice had been brought to him of the refusal of the bank to pay the check.

Fla.—Grantham v. State, supra.

(5) That husband of accused was insane when checks were issued.

Cal.—People v. Monks, 24 P.2d 508, 133 C.A. 440.

(6) Where lack of arrangement, understanding or funds to meet the check was sufficiently shown, proof of presentment and protest was not necessary.

Iowa.—State v. Doudna, 284 N.W. 113, 226 Iowa 351.

(7) State must prove that accused did not have sufficient funds on deposit with bank to pay check, drawn by him against his account therein, when it should have reached bank through ordinary channels, regardless of how many checks were drawn and paid since such check was given.

Tex.—Kuykendall v. State, 160 S.W. 2d 525, 143 Tex.Cr. 607.

In prosecution for uttering draft without funds

(1) The state had burden of proving that, prior to or at time accused executed draft in payment for cattle, accused had not made arrangements for its payment if presented within a reasonable time to person on whom it was drawn.

Ga.—Spivey v. State, 8 S.E.2d 677, 62 Ga.App. 507.

(2) State had burden to support allegation that accused drawing draft on his father and on bank had no good reason to believe father would pay draft when presented.

Tex.—Boone v. State, 61 S.W.2d 103, 124 Tex.Cr. 174.

(3) State, alleging that payment of draft accused drew on his father and bank was refused, had duty to prove both father and bank refused payment of draft when presented.

Tex.—Boone v. State, supra.

Matters to be proved in prosecution for swindling

(1) In prosecution for cheating and swindling by false representation that realty mortgaged was free from encumbrances, burden is on state, not only to establish misrepresentation made and credit given, but likewise a loss by mortgagee.

Ga.—Daniel v. State, 10 S.E.2d 80, 63 Ga.App. 12.

(2) In prosecution for cheating and swindling by false representations that personalty mortgaged was free from encumbrances, state was not required to prove extent of damage to persons swindled.

Ga.—Bolton v. State, 159 S.E. 910, 43 Ga.App. 759—Tribble v. State, 126 S.E. 272, 33 Ga.App. 370.

(3) Prior cases see 25 C.J. p 642 note 85 [e].

Proof of value of money not required

When object of misrepresentations is to acquire money, presumption will be indulged that by term "money" is meant United States money and no proof of the value of the money is required further than to designate the sum in dollars and cents.

Tex.—Raymond v. State, 33 S.W.2d 192, 116 Tex.Cr. 595.

Value of deed

Under indictment alleging that accused and his co-principal, by means of false pretenses and devices and fraudulent representations, knowingly and fraudulently made by them to certain persons, did acquire from them a certain mineral deed which was of the value of five hundred dollars, burden was on the state to

show that instrument was of the value of fifty dollars or more.

Tex.—Hesbrook v. State, 202 S.W.2d 677, 150 Tex.Cr. 476.

16. Ala.—Young v. State, 116 So. 709, 22 Ala.App. 443.

Ga.—Ray v. State, 163 S.E. 861, 44 Ga.App. 763.

N.Y.—People v. Brady, 249 N.Y.S. 715, 139 Misc. 597.

Pa.—Commonwealth v. Becker, 30 A. 2d 195, 151 Pa.Super. 169.

17. Ark.—Karr v. State, 301 S.W.2d 442, 227 Ark. 777—Anderson v. State, 290 S.W.2d 846, 226 Ark. 498.

Cal.—People v. White, 259 P. 76, 85 C.A. 241.

Ga.—Ray v. State, 162 S.E. 861, 44 Ga.App. 763.

Mo.—State v. Bauman, 293 S.W.2d 389.

Mont.—State v. Brantingham, 212 P. 499, 66 Mont. 1.

N.Y.—People v. Brady, 249 N.Y.S. 715, 139 Misc. 597.

Utah.—State v. Timmerman, 55 P.2d 1320, 56 P.2d 1354, 88 Utah 481.

Va.—Hagy v. Commonwealth, 190 S. E. 144, 168 Va. 663.

25 C.J. p 642 note 85 [b], p 643 note 99.

Absence of alternative hypothesis

In prosecution against trustee for building and loan association for overstating to Home Owners' Loan Corporation amounts due on mortgages which corporation was asked to take over, government was required to prove beyond reasonable doubt that mortgagors' separate stock and budget accounts should have been applied to reduction of mortgage debt and that there was no other reasonable hypothesis on which trustee might have based contention that accounts were not so applicable at time statements were made.

U.S.—U. S. v. Clawson, D.C.Wyo., 13 F.Supp. 178.

Matters which must be proved

(1) Where information charged that accused told complaining witness that it was necessary for him to give accused thirty-five dollars to pay for deed and abstract to lots which complaining witness purportedly won, where accused had performed all conditions required of him by memorandum of lot sale given to complaining witness and signed by both parties, burden of proof was on state to establish lack of necessity to expend thirty-five dollars.

Tex.—Baum v. State, 111 S.W.2d 278, 133 Tex.Cr. 349.

(2) Prior cases see 25 C.J. p 643 note 99 [a].

18. Mo.—State v. Bauman, 293 S.W. 2d 389.

defrauded relied on the truth of the pretense and that it induced him to part with his property,¹⁹ and that the purpose to defraud was accomplished.²⁰

The prosecution is not, however, required to prove elements not specifically included within the definition of the offense.²¹ On a prosecution for selling land without having title thereto, the state must prove want of title in accused to the property conveyed;²² but in a prosecution for obtaining property by a false pretense of ownership of land it is not necessary for the prosecution to prove, as in larceny, title in another to land which accused falsely represented he owned, it being sufficient if the evidence establishes that accused had no title himself.²³ If the information charges two separate things, first, that accused did not own the land to which he gave deed, and, second, that he had no authority from the owner to convey it, it is accused's duty to present evidence in support of his contention that he

was authorized to convey.²⁴

The court will indulge in appropriate presumptions or inferences arising from the facts which have been proved.^{24.5}

Intent. The burden is on the state to prove a fraudulent intent on the part of accused.²⁵ As a general rule such intent must be specifically proved,²⁶ but specific proof has also been held not required.²⁷ Such intent is not an inference of law and will not be presumed;²⁸ it cannot be implied from the fact that the pretense alleged was made,²⁹ that it was false,³⁰ and that accused knew it to be false;³¹ nor will the court hold that if certain facts be proved they constitute an intent to defraud.³²

While the burden of proving intent is on the prosecution,³³ under some statutory provisions proof of the issuance of a check by accused without sufficient funds in, or credit with, the bank on which it was drawn,³⁴ or proof of his issuance of such a

N.J.—State v. Greco, 148 A.2d 164, 29 N.J. 94.

State v. Samurine, 135 A.2d 574, 47 N.J.Super. 172, reversed on other grounds 142 A.2d 612, 27 N.J. 322.

Utah.—State v. Timmerman, 55 P.2d 1320, 56 P.2d 1354, 88 Utah 481. 25 C.J. p 642 note 85 [c].

Prosecution for issuing bad check

In prosecution for violation of "the Cold Check Law" burden is on the commonwealth to show that drawer of check knew he had not sufficient funds in the bank for the payment of the check.

Ky.—Wright v. Commonwealth, 133 S.W.2d 525, 280 Ky. 368.

19. Ga.—Davis v. State, 107 S.E. 883, 27 Ga.App. 195.

Mass.—Commonwealth v. Orler, 147 N.E. 548, 252 Mass. 55.

N.C.—State v. Davis, 64 S.E. 498, 150 N.C. 851.

Utah.—State v. Timmerman, 55 P.2d 1320, 56 P.2d 1354, 88 Utah 481.

20. Mass.—Commonwealth v. Orler, 147 N.E. 548, 252 Mass. 55.

Va.—Hagy v. Commonwealth, 190 S.E. 144, 168 Va. 663.

21. Wash.—State v. Pettviel, 169 P. 977, 99 Wash. 434.

25 C.J. p 643 note 86.

22. Or.—State v. Byam, 32 P. 623, 23 Or. 568.

23. Colo.—Shemwell v. People, 161 P. 157, 62 Colo. 146.

24. Colo.—Shemwell v. People, supra.

24.5 N.Y.—People v. Le Grande, 131 N.E.2d 712, 309 N.Y. 420.

That named church is bona fide religious corporation

N.Y.—People v. Le Grande, supra.

25. Cal.—People v. Rose, 48 P.2d 1009, 9 C.A.2d 174.

Ga.—Ray v. State, 162 S.E. 861, 44 Ga.App. 763.

Iowa.—State v. Lansman, 60 N.W.2d 815, 245 Iowa 102.

Ky.—Wright v. Commonwealth, 133 S.W.2d 525, 280 Ky. 368.

Mass.—Commonwealth v. Orler, 147 N.E. 548, 252 Mass. 55.

N.Y.—People v. Will, 46 N.E.2d 498, 289 N.Y. 413.

Tex.—Kuykendall v. State, 160 S.W.2d 525, 143 Tex.Cr. 607—Freeman v. State, 147 S.W.2d 1095, 141 Tex. Cr. 158—Taylor v. State, 232 S.W. 525, 89 Tex.Cr. 618.

Utah.—State v. Timmerman, 55 P.2d 1320, 56 P.2d 1354, 88 Utah 481.

Va.—Rosser v. Commonwealth, 68 S.E.2d 851, 192 Va. 813—Hagy v. Commonwealth, 190 S.E. 144, 168 Va. 663.

Wis.—State v. Hintz, 229 N.W. 54, 200 Wis. 636.

25 C.J. p 643 note 90.

26. Iowa.—State v. Chambers, 161 N.W. 470, 179 Iowa 436.

25 C.J. p 643 note 91.

Specific intent

Specific intent to defraud must be proved.

La.—State v. Wilson, 125 So. 854, 169 La. 684.

27. La.—State v. Wilson, supra.

28. Cal.—People v. Griffith, 262 P.2d 355, 120 C.A.2d 873—People v. Becker, 30 P.2d 562, 137 C.A. 349.

N.Y.—People v. Baker, 96 N.Y. 340, 2 N.Y.Cr. 218.

25 C.J. p 643 note 98.

29. Iowa.—State v. Chambers, 161 N.W. 470, 179 Iowa 436.

25 C.J. p 643 note 92.

30. N.Y.—People v. Baker, 96 N.Y. 340, 2 N.Y.Cr. 218.

31. N.Y.—People v. Baker, supra.

32. Ark.—Woodruff v. State, 32 S.W. 102, 61 Ark. 157.

33. Cal.—People v. Rose, 48 P.2d 1009, 9 C.A.2d 174.

Ky.—Wright v. Commonwealth, 133 S.W.2d 525, 280 Ky. 368.

Tex.—Freeman v. State, 147 S.W.2d 1095, 141 Tex.Cr. 158.

34. Ga.—Berry v. State, 111 S.E. 669, 153 Ga. 169.

Mo.—State v. Price, 238 S.W.2d 397, 361 Mo. 1034.

N.Y.—People v. Nibur, 264 N.Y.S. 148, 238 App.Div. 233.

Ohio.—State v. Stemen, 106 N.E.2d 662, 90 Ohio App. 309.

Burden of proof unchanged

Under statutes penalizing the making or issuing of check without sufficient funds with intent to defraud and making delivery of check without sufficient funds to meet it prima facie evidence of intent to defraud, the burden is on the state to prove beyond a reasonable doubt that those accused entertained a criminal intent to defraud, in spite of statutory presumptions.

N.J.—State v. Riccardo, 107 A.2d 807, 32 N.J.Super. 89.

Prima facie case

(1) Refusal of drawee bank to pay check on account of insufficient funds is prima facie evidence of intent to defraud.

Ala.—Holloway v. State, 88 So.2d 700, 38 Ala.App. 501—Padgett v. State, 131 So. 3, 24 Ala.App. 133.

(2) Where president of corporation, in his capacity as president, on November 3, executed a check, which was dated November 5, and at time

check and his failure to pay it within a specified time after he has been given notice of its nonpayment,³⁵ which notice must, in some states, be written notice,³⁶ is prima facie evidence of intent to defraud. Under some statutes the intent to defraud cannot be presumed until it is shown by the evidence that accused did not have sufficient funds in, or credit with, the bank on which the check was drawn to pay it at the time it was presented for payment.^{36.5} Before a presumption of intent may be invoked from the prima facie evidence it must appear that

the check was the inducing cause for parting with money or property.^{36.10}

Such evidence, or the presumption arising therefrom, is rebuttable,³⁷ the burden of doing so being on accused,^{37.5} and is overcome by proof in the defense of a lack of intent to defraud.³⁸ If evidence of intent to defraud is rebutted,³⁹ or if no prima facie case arose because the check was never presented to the bank and payment refused,^{39.5} or because of the failure to give accused the required notice of the check's dishonor,⁴⁰ it is necessary for

of delivery of check, neither president nor corporation had any funds in drawee bank, and never had any funds therein, and made no deposit in bank prior to date of check, there was prima facie evidence of fraud within meaning of statute making it an offense to draw check or draft without credit and with intent to defraud.

Ohio.—State v. De Nicola, 126 N.E.2d 62, 163 Ohio St. 140.

(3) Under statute providing that delivery of a check which is dishonored because of insufficient funds shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds, fact that there is no formal protest does not destroy effectiveness of statute.

Okl.—Sharkey v. State, Cr., 329 P.2d 682.

35. Miss.—Cooper v. State, 127 So. 684, 157 Miss. 1.

S.C.—State v. Sutton, 89 S.E.2d 374, 228 S.C. 314.

Va.—Cook v. Commonwealth, 16 S.E. 2d 635, 178 Va. 251.

Prima facie case

(1) Provision in bad check statute, that failure of person drawing check to pay or have paid amount of it within ten days after notification of nonpayment on presentation shall be prima facie evidence of obtaining amount thereof under false pretenses, is mere rule of evidence, not conclusive of guilt, and does not constitute definition of offense.

Miss.—McBride v. State, 104 So. 454, 141 Miss. 186.

(2) The giving of a check, which is not paid on account of insufficient funds, is prima facie evidence of intent.

Okl.—Loughridge v. State, 72 P.2d 513, 63 Okl.Cr. 33.

(3) The indorsement of a check by drawee "insufficient funds" is "prima facie evidence" of intent by drawer to defraud, provided drawer does not pay drawee amount of check with protest fees within five days from date of presentment thereof for payment, and such presentment is made within thirty days from date of delivery of check.

Okl.—Moore v. State, 250 P.2d 46, 96 Okl.Cr. 118—Stevens v. State, 124 P.2d 426, 74 Okl.Cr. 194—Armstrong v. State, 122 P.2d 823, 74 Okl.Cr. 42.

Payment

(1) That payee of check agreed to accept weekly payments, and gave credit for such payments before giving written notice of dishonor, did not vitiate the prima facie presumption of fraudulent intent.

Va.—Cook v. Commonwealth, 16 S.E. 2d 635, 178 Va. 251.

(2) Note is not "payment" within meaning of statute relating to presumption from uttering bad checks. N.J.—State v. Parsons, 140 A. 13, 6 N.J.Misc. 76, affirmed 142 A. 918, 105 N.J.Law 253.

(3) Payment totaling twenty-two dollars on a check for five hundred eighty-eight dollars and eighty cents was not payment of the "amount due thereon" within meaning of statute providing for prima facie evidence of intent to defraud unless such payment be made.

Va.—Cook v. Commonwealth, supra.

36. Miss.—Cooper v. State, 127 So. 684, 157 Miss. 1.

Statute held not to require written notice

Mo.—State v. Kaufman, App., 308 S.W.2d 333.

36.5 Ga.—Cosby v. State, 64 S.E.2d 595, 83 Ga.App. 682—Crain v. State, 52 S.E.2d 577, 78 Ga.App. 806.

36.10 Okl.—Simpson v. State, Cr., 267 P.2d 1008.

37. Ga.—Berry v. State, 111 S.E. 669, 153 Ga. 169.

Ky.—Commonwealth v. Bandy, 165 S.W.2d 337, 291 Ky. 721.

Md.—Kaufman v. State, 85 A.2d 446, 199 Md. 35.

N.Y.—People v. Will, 46 N.E.2d 498, 289 N.Y. 413.

People v. Nibur, 264 N.Y.S. 148, 238 App.Div. 233.

People on Complaint of Indig v. Kapitoofsky, 258 N.Y.S. 861, 144 Misc. 543.

Okl.—Simpson v. State, Cr., 267 P.2d 1008.

Pa.—Commonwealth v. Chappell, 7

Pa.Dist. & Co.2d 370, 18 Cambria 92.

Va.—Cook v. Commonwealth, 16 S.E. 2d 635, 178 Va. 251.

How rebutted

(1) While Ky.St. § 1213a makes uttering of check without funds to cover prima facie evidence of intent to defraud, such prima facie case may be rebutted by facts and circumstances.

Ky.—King v. Commonwealth, 261 S.W. 1096, 203 Ky. 163.

(2) The presumption is destroyed where the state's own evidence shows there was no intent to defraud.

Ga.—Berry v. State, 111 S.E. 669, 153 Ga. 169.

(3) A lack of funds does not create a presumption of fraudulent intent where the payee was informed that there were no funds on deposit and took check under an agreement to hold it until a later date.

Va.—Turner v. Brenner, 121 S.E. 510, 138 Va. 232.

(4) In prosecution for checking on bank with insufficient funds or credit, evidence that bank had previously permitted accused to overdraw his bank account was insufficient to destroy or rebut prima facie showing made by state of his intent to defraud and knowledge of insufficient funds or credit because of his failure to pay check within five days after notice of dishonor where another check drawn payable to same individual at same time was also subsequently dishonored.

Mo.—State v. Kaufman, App., 308 S.W.2d 333.

37.5 Okl.—Sharkey v. State, Cr., 329 P.2d 682.

38. Md.—Willis v. State, 106 A.2d 85, 205 Md. 118—Kaufman v. State, 85 A.2d 446, 199 Md. 35.

N.Y.—People v. Roach, 249 N.Y.S. 517, 231 App.Div. 622.

39. N.Y.—People on Complaint of Indig v. Kapitoofsky, 258 N.Y.S. 861, 144 Misc. 543.

39.5 Va.—Rosser v. Commonwealth, 66 S.E.2d 851, 192 Va. 813.

40. Tex.—Miller v. State, Cr., 317 S.W.2d 542—Thompson v. State, Cr., 308 S.W.2d 512.

the prosecution to prove affirmatively, by independent evidence, accused's intent to defraud.

Knowledge of insufficient funds to meet check. In a prosecution for issuing checks without sufficient funds or credit to cover them the unpaid checks, with the protests, may, under the statute, constitute presumptive evidence of accused's knowledge of the insufficiency of funds or credit with the bank on which they were drawn;⁴¹ and he is presumed to know that checks issued by him without sufficient funds will be returned unpaid.⁴²

Motive. The state is not required to prove the motive, if any, which induced the commission of the offense.⁴³

Matters of defense. The burden is on accused to prove matters of defense,⁴⁴ and to overcome a prima facie case that a check which he obtained by false pretenses was paid,⁴⁵ or, where the state proves facts which raise a presumption that a check issued by accused without funds was with intent to defraud, the burden is then on accused to prove that it was not issued with intent to defraud.⁴⁶ Where a false belief was created in the mind of a

person defrauded by accused the burden is on accused to show that such false belief was removed, or it will be presumed, in the absence of proof to the contrary, to have influenced the actions of the person defrauded in his subsequent dealings with accused.⁴⁷

§ 51. Admissibility

- a. In general
- b. As to falsity of pretense
- c. As to knowledge and intent
- d. As to reliance on pretense

a. In General

In accordance with the general rules as to relevancy, competency, and materiality of evidence in criminal cases generally, any evidence which tends to prove or disprove any element of the crime is admissible.

Subject to the general rules governing the admissibility of evidence in criminal cases, discussed in Criminal Law §§ 600-899, on a trial for obtaining property by false pretense, and analogous offenses, any competent and material evidence which tends to prove any element of the crime is admissible on the part of the prosecution.⁴⁸ Likewise, and with the

Va.—Rosser v. Commonwealth, 66 S. E.2d 851, 192 Va. 813—Cook v. Commonwealth, 16 S.E.2d 635, 178 Va. 251.

Proof of notice not essential element

Statute providing that failure of maker or drawer to pay check within five days after notice that check has been dishonored shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, bank or other depository is rule of evidence, and proof of giving such notice is not an essential element of offense of checking on bank with insufficient funds or credit, but failure to give notice would merely prohibit state from availing itself of presumption created by statute, and payment by maker or drawer within five days would only abrogate presumption and would not be a defense to charge.

Mo.—State v. Kaufman, App., 308 S.W.2d 333.

41. Cal.—People v. Monks, 24 P.2d 508, 133 C.A. 440.

Prima facie case

The giving of a check which is not paid on account of insufficient funds is prima facie evidence of knowledge. Okl.—Loughridge v. State, 72 P.2d 513, 63 Okl. 33.

Staleness

Lapse of time between the issuance of the checks and their protest will not prevent the operation of the statutory presumption where the delay was brought about by accused. Cal.—People v. Monks, 24 P.2d 508, 133 C.A. 440.

42. Cal.—People v. Bullock, 11 P.2d 441, 123 C.A. 299.

43. Ill.—People v. Dore, 171 N.E. 554, 339 Ill. 415.

44. Ark.—Collier v. State, 40 S.W.2d 455, 183 Ark. 1057.

Affirmative defense

In prosecution for knowingly issuing a check without sufficient funds, that accused had an arrangement with brother for checking on brother's account was an affirmative defense, which accused had the burden of proving.

Kan.—State v. Ferris, 84 P.2d 949, 148 Kan. 663.

Failure to give notice of dishonor

In a prosecution for giving a bad check under a statute which excepts from its operation persons who, when notified that their check was not paid, immediately make a deposit to cover it, facts bringing accused within the exception are matters of defense, so that, when the state has made a prima facie case by proving that a check drawn by accused was not paid, the burden is on accused to show that no notice was given him so that he might make a deposit to cover it.

Ark.—Collier v. State, 40 S.W.2d 455, 183 Ark. 1057.

45. Cal.—People v. Steffner, 227 P. 690, 67 C.A. 1.

46. Colo.—Moore v. People, 235 P.2d 798, 124 Colo. 197.

Ga.—Berry v. State, 111 S.E. 669, 153 Ga. 169.

Md.—Kaufman v. State, 85 A.2d 446, 199 Md. 35.

47. Cal.—People v. Rabe, 261 P. 303, 202 C. 409.

48. Md.—Corpus Juris cited in Simmons v. State, 167 A. 60, 66, 165 Md. 155—Delcher v. State, 158 A. 37, 161 Md. 475.

25 C.J. p 644 notes 2, 3.

Evidence held admissible

(1) Evidence that maker of check instructed bank to require positive identification of payee, in prosecution for making fraudulent identification.

Ga.—Lucas v. State, 144 S.E. 138, 38 Ga.App. 449.

(2) Credit card issued by oil company to show general type of card used by accused.

Okl.—Byers v. State, 147 P.2d 185, 78 Okl.Cr. 267.

(3) Testimony that death claims were settled through local agent, in prosecution for attempting to collect insurance on life of living assured. La.—State v. Solomon, 121 So. 607, 168 La. 158.

(4) Testimony of conversation between witness and accused in which accused stated that the property involved had been given him by another.

Md.—Moore v. State, 131 A. 452, 149 Md. 298.

(5) Testimony as to profits and how they were arrived at in trust interests sold by false pretenses.

Cal.—People v. Ferguson, 24 P.2d 965, 133 C.A. 41.

same limitations, any evidence that legitimately [tends to disprove any of the elements of the crime

(6) Testimony as to fictitious offers and inquiries for lease instigated by accused and co-conspirators to induce additional investments by pretense that it was constantly increasing in value.

Kan.—State v. Robinson, 259 P. 691, 124 Kan. 245.

(7) Testimony on identity of weight certificates attached to draft obtained by false pretenses.

Tex.—Nash v. State, 31 S.W.2d 445, 116 Tex.Cr. 607.

(8) Where accused contractor contended that prosecuting witness had received all she bargained for, and had not been prejudiced by reliance on receipted lumber bill fraudulently presented to her, evidence of other unpaid bills on dwelling accused contracted to erect, required to be paid by prosecuting witness.

Cal.—People v. Pearson, 231 P. 612, 69 C.A. 524.

(9) Identification of parties to attachment proceeding and record, in prosecution for obtaining money by falsely representing to bank that check of corporation was not for money due certain stockholder whose interest in corporation's deposit had been attached.

Md.—Deibert v. State, 133 A. 847, 150 Md. 687.

(10) Detailed statement furnished by accused of his purchases and sales of stock, including stocks described in indictment, on orders of decedent, in prosecution for larceny of corporation stocks by false pretenses from woman, deceased at time of trial.

Mass.—Commonwealth v. Orler, 147 N.E. 548, 252 Mass. 55.

(11) Testimony of officer that he had seen accused shortly prior to date fixed in information at designated place in city and warned him not to play the town, as against contention that time had not been definitely fixed, in prosecution for grand larceny committed by trick, device, and bunco game.

Wash.—State v. Larson, 59 P.2d 1119, 187 Wash. 96.

(12) Evidence of fight over division of money obtained from victims on question whether game was fair game of chance or bunco game, in prosecution for grand larceny by trick, device, and bunco game.

Wash.—State v. Larson, supra.

(13) A school catalog, although general and covering all such schools, given to complaining witness as special inducement to enroll in local school, in prosecution for obtaining money by false representations that local trade school had a number of tractors and a radio.

Wash.—State v. Kreiss, 233 P. 649, 133 Wash. 256.

(14) Testimony of officers of drawee banks that banks had no accounts in names of drawers of checks.

Cal.—People v. Menne, 41 P.2d 383, 4 C.A.2d 91.

(15) Testimony of bank officer that account of accused charged with passing worthless check was correctly kept and amount to his credit.

Tex.—Mayes v. State, 42 S.W.2d 65, 118 Tex.Cr. 612.

(16) Testimony in behalf of state by payee that payee had not written the words "no acct." on check which was returned to payee unpaid.

Mo.—State v. Scott, 230 S.W.2d 764.

(17) Evidence that accused, charged as principal with issuing and passing fictitious checks through accomplice, had prepared way for payee's acceptance of checks by representing to payee that third person, claimed to be accomplice, would give good checks in payment for payee's produce.

Cal.—People v. Menne, supra.

(18) Evidence of nonpayment of fictitious check, purporting to have been signed and indorsed by a third person on a designated bank, and of the fact that the third person did not have an account with such bank.

Cal.—People v. Walker, 114 P. 1009, 15 C.A. 400.

(19) Time that elapsed from date check was issued until its protest merely goes to weight of evidence and not to its admissibility.

Cal.—People v. Monks, 24 P.2d 508, 133 C.A. 440.

(20) Other evidence.

Ga.—Glosson v. State, 49 S.E.2d 691, 77 Ga.App. 705.

Kan.—State v. Visco, 331 P.2d 318, 183 Kan. 562.

Mass.—Commonwealth v. Green, 94 N.E.2d 260, 326 Mass. 344.

Mo.—State v. Gilpin, 320 S.W.2d 498

—State v. Green, 305 S.W.2d 863—

State v. Michels, 255 S.W.2d 760.

N.J.—State v. Zeek, 199 A. 713, 120

N.J.Law 322, affirmed 3 A.2d 574,

121 N.J.Law 584.

N.Y.—People v. Lehrer, 45 N.Y.S.2d

170, 182 Misc. 645.

Pa.—Commonwealth v. Neuman, 30

A.2d 698, 151 Pa.Super. 642—Com-

monwealth v. Viscount, 179 A. 858,

118 Pa.Super. 595.

25 C.J. p 644 note 3 [a].

Evidence held inadmissible

Ala.—McKee v. State, 155 So. 888,

26 Ala.App. 208—Bradford v. State,

113 So. 650, 22 Ala.App. 171.

Kan.—State v. Bechtelheimer, 100 P.

2d 657, 151 Kan. 582.

Ky.—Hatcher v. Commonwealth, 5 S.

W.2d 882, 224 Ky. 131.

Md.—Deibert v. State, 133 A. 847, 150

Md. 687.

Or.—State v. Bosch, 7 P.2d 554, 139 Or. 150.

Tex.—Martin v. State, 213 S.W.2d 689, 152 Tex.Cr. 309—Scott v. State, 228 S.W. 1099, 89 Tex.Cr. 70.

Wash.—State v. Seidenschwarz, 70 P. 2d 780, 191 Wash. 111.

25 C.J. p 644 note 3 [g].

Discovery of fraud

In prosecution for cheating and swindling a discount company in connection with sale of automobiles, evidence that notices were sent that past due monthly installments were due on automobiles was admissible, since it would explain how the company happened to discover that people on notes were not bona fide purchasers as represented by defendant.

Ga.—Kemp v. State, 6 S.E.2d 196, 61

Ga.App. 337.

Indorsement on check

The indorsement on a check purporting to have been written by accused is not admissible against him until it is shown to have been in his handwriting.

Hawaii.—Territory v. Alohihea, 24 Hawaii 570.

Injury to person defrauded

(1) Evidence that stock sold was of less value than represented is admissible to show loss from false pretenses.

Md.—Summons v. State, 144 A. 497, 156 Md. 382.

(2) Evidence that stock sold by false pretenses had no market value held admissible.

Md.—Summons v. State, supra.

(3) Checks drawn on bank in which falsely uttered check was deposited held admissible to establish amount of loss caused to bank on account of falsely issued check.

Iowa.—State v. McCutchan, 259 N.W. 23, 219 Iowa 1029.

(4) In prosecution for obtaining signatures of persons to partnership agreement by false pretenses, the admission of testimony that the men as a consequence of the false pretenses lost their farms and other property in addition to the amount lost by contribution to the copartnership held error.

Mich.—People v. Larson, 196 N.W. 412, 225 Mich. 355.

Scheme to defraud

Cal.—People v. Shaffer, 101 P.2d 560, 38 C.A.2d 421—People v. Cordish, 294 P. 456, 110 C.A. 486.

Colo.—Fischer v. People, 335 P.2d 871.

N.J.—State v. Zeek, 199 A. 713, 120 N.J.Law 322, affirmed 3 A.2d 574, 121 N.J.Law 584.

Pa.—Commonwealth v. Viscount, 179 A. 858, 118 Pa.Super. 595—Commonwealth v. Altieri & Greeby, 78 Pa.Super. 80, 85.

25 C.J. p 644 note 3 [b].

is admissible on the part of accused.⁴⁹ Evidence of [the circumstances connected with the transaction,⁵⁰

Subsequent acts

(1) In prosecution for drawing and Mich.—People v. Smith, 260 N.W. 911, 271 Mich. 553.

uttering worthless check, drawer's acts in his dealings with holder after issuing the check are relevant only in so far as they tend to prove or disprove the actual commission of the crime when the check was drawn. Va.—Cook v. Commonwealth, 16 S.E. 2d 635, 178 Va. 251.

(2) In prosecution for obtaining signatures by false pretenses, defendant's subsequent acts with reference to instruments can be shown. Mich.—People v. Mears, 232 N.W. 358, 251 Mich. 359.

(3) Prosecuting witness' testimony regarding conversation with defendant after false pretenses were made held admissible. Idaho.—State v. Stevens, 282 P. 93, 48 Idaho 335.

Subsequent misrepresentations

(1) Subsequent misrepresentations, whereby person inducing contract by false pretenses secures benefit thereof, are admissible against him.

Md.—Summons v. State, 144 A. 497, 156 Md. 382.

(2) False representation as to third person's subscription to stock, made for the purpose of inducing the prosecuting witness to carry out terms of his original stock subscription, which had been procured by false pretenses, is admissible. Md.—Summons v. State, supra.

(3) Defendant's statements with respect to transaction after he obtained jewelry on memorandum held competent in prosecution for larceny by false pretenses. Mass.—Commonwealth v. Steinberg, 163 N.E. 646, 265 Mass. 45.

Testimony in former proceeding

Testimony of false representations could not be excluded because given in former proceeding in which defendant was acquitted.

Pa.—Commonwealth v. Forney, 88 Pa.Super. 451.

Value

(1) Telegrams through which stock was purchased and individual sales of stock held competent in determining market value of stocks purchased and sold.

Cal.—People v. Schwarz, 248 P. 990, 78 C.A. 561.

(2) Proof of wholesale price of articles procured by defendant with worthless check held inadmissible, since reasonable market value was test of value of property procured by swindling.

Tex.—Brigham v. State, 16 S.W.2d 243, 112 Tex.Cr. 281.

(3) In prosecution for false pre-

tense by falsely representing properties were free from encumbrances, excluding proof of market value of properties held not error.

Pa.—Commonwealth v. Conroy, 167 A. 407, 109 Pa.Super. 274.

(4) Other cases see 25 C.J. p 644 note 3 [h].

49. Cal.—People v. Becker, 30 P.2d 562, 137 C.A. 349.

La.—Corpus Juris cited in State v. Hendon, 128 So. 286, 290, 170 La. 488.

25 C.J. p 645 note 4.

Restoration of property

(1) Under statute providing that the jury, on conviction, must ascertain and declare in their verdict the value of the property taken and the amount restored, if any, and its value, "but their failure to do so does not affect the validity of their verdict," the court, notwithstanding the concluding words, must admit defendant's evidence of the amount and value of the property restored by him after wrongful taking. Mont.—State v. Mason, 204 P. 358, 62 Mont. 180.

(2) In prosecution for theft on theory of false pretenses, trial court properly excluded evidence in behalf of accused relating to restoration, since it is not a defense to a charge of theft, that after the thief is caught, he attempts restoration of stolen goods.

Cal.—People v. Cheeley, 236 P.2d 22, 106 C.A.2d 748.

Evidence held admissible or erroneously excluded

(1) In prosecution for issuing worthless check, evidence tending to prove an accord and satisfaction made within twenty days is admissible.

W.Va.—State v. Cunningham, 111 S. E. 835, 90 W.Va. 806.

(2) In prosecution for worthless check, evidence that check was dated ahead.

S.C.—State v. Winter, 82 S.E. 419, 98 S.C. 294.

(3) Other evidence.

Ill.—People v. Poole, 141 N.E. 730, 310 Ill. 345.

La.—State v. Hendon, 128 So. 286, 170 La. 488.

Minn.—State v. Eldsvold, 216 N.W. 316, 173 Minn. 23.

S.C.—State v. Sutton, 89 S.E.2d 874, 228 S.C. 314.

Utah.—State v. Timmerman, 55 P.2d 1320, 56 P.2d 1354, 88 Utah 481.

Wash.—State v. Fluhart, 212 P. 245, 123 Wash. 175.

Wyo.—State v. Posey, 314 P.2d 833, 77 Wyo. 258.

25 C.J. p 645 note 4 [a].

Evidence held not admissible

(1) Evidence of offers by accused

and attempts to pay for cattle which he had previously obtained by falsely representing himself as the purchasing agent of others is not admissible.

Cal.—People v. Moore, 191 P. 980, 48 C.A. 245.

(2) Evidence as to value of mine subsequent to making of representations, and at time company had lost rights therein, was properly rejected in prosecution for obtaining money by false pretenses as to ownership of stock and worth thereof.

Cal.—People v. Raplee, 241 P. 892, 75 C.A. 38.

(3) Evidence that accused made some restitution while criminal proceeding was pending.

Cal.—People v. Bernstein, 199 P.2d 22, 88 C.A.2d 522.

(4) Other evidence.

U.S.—Christensen v. U. S., C.C.A. Wis., 90 F.2d 152.

Minn.—State v. Anderson, 208 N.W. 415, 166 Minn. 453.

Mo.—State v. Richardson, 228 S.W. 789.

Tex.—Templeton v. State, 105 S.W. 2d 1100, 132 Tex.Cr. 577.

25 C.J. p 645 note 4 [c].

Self-serving declarations

In prosecution for false pretenses against one charged with representing that he could collect substantial portion of face value of building and loan certificates, with obtaining certificates and with failing to account for proceeds, exclusion of testimony concerning whether accused at time of investing money in oil wells stated that it was his own or that he was investing it for others was not erroneous, where court, in excluding it, stated that it might be admitted if accused desired to show an accounting for all money received.

Utah.—Green v. U. S., C.C.A.Utah, 93 F.2d 537.

Cross-examination

(1) Where false pretenses indictment alleged accused caused complaining witness to pay mortgage, excluding cross-examination as to what was paid to discharge mortgage held prejudicial error.

Ill.—People v. Scowley, 187 N.E. 415, 353 Ill. 330.

(2) In prosecution for obtaining money by false pretenses from city, exclusion of cross-examination of member of city council, as to correctness of estimates of work, held improper.

Colo.—White v. People, 245 P. 349, 79 Colo. 261.

50. Cal.—People v. Pugh, 289 P.2d 826, 137 C.A.2d 226, appeal dismissed 77 S.Ct. 141, 352 U.S. 885, 1 L.Ed.2d 83—People v. Staver, 252

preparation for the commission of the crime,⁵¹ accused's declarations to third persons,⁵² and the entire conduct of accused,⁵³ is admissible, as are also false tokens⁵⁴ and printed or written instruments, documents, and letters⁵⁵ made use of or

connected with the commission of the offense. Everything tending to show the interest, motive, and purpose of the prosecutor may be shown for the purpose of affecting his credibility as a witness and testing the truth of his testimony.⁵⁶ Incompetent,⁵⁷

P.2d 700, 115 C.A.2d 711—People v. Wymer, 199 P. 815, 53 C.A. 204.

Idaho.—State v. Stevens, 282 P. 93, 48 Idaho 335.

Md.—Harris v. State, 31 A.2d 609, 182 Md. 27.

Mo.—State v. Mandell, 183 S.W.2d 59, 353 Mo. 502.

Tex.—Barnett v. State, 216 S.W.2d 218, 152 Tex.Cr. 626.

Conduct of co-conspirator

Tex.—Grant v. State, 143 S.W.2d 383, 140 Tex.Cr. 46.

Incriminating circumstances

Ala.—Peden v. State, 124 So. 282, 23 Ala.App. 264, certiorari denied 124 So. 284, 220 Ala. 112.

Tex.—Cochrain v. State, 248 S.W. 43, 93 Tex.Cr. 483.

Bank deposits

(1) In prosecution against public officer for false pretenses in approving contractor's excessive account, evidence concerning accused's bank deposits commencing more than five years before occurrence of facts alleged in indictment, as bearing on question whether he benefited from the alleged false pretenses, held inadmissible.

S.D.—State v. Egbert, 258 N.W. 283, 63 S.D. 324.

(2) Other cases see 25 C.J. p 644 note 3 [a] (18).

51. La.—State v. Hill, 107 So. 433, 160 La. 579.

52. Cal.—People v. Wymer, 199 P. 815, 53 C.A. 204.

Idaho.—State v. Stevens, 282 P. 93, 48 Idaho 335.

To agent

Evidence of representations by accused to son of prosecuting witness, the son acting as his father's agent, in absence of prosecuting witness and at a time later than the representations made to him personally, is admissible.

Mo.—State v. Richardson, 228 S.W. 789.

53. Cal.—People v. Wymer, 199 P. 815, 53 C.A. 204.

Idaho.—State v. Stevens, 282 P. 93, 48 Idaho 335.

54. Or.—State v. Whitaker, 129 P. 534, 64 Or. 297.

Tex.—Newberry v. State, Cr., 22 S.W. 1041.

55. Idaho.—State v. Stevens, 282 P. 93, 48 Idaho 335.

Md.—Corpus Juris cited in Simmons v. State, 167 A. 60, 66, 165 Md. 155.

Mass.—Commonwealth v. Orlor, 147 N.E. 548, 252 Mass. 55.

25 C.J. p 646 note 6.

Advertisements employed

Idaho.—State v. Stevens, 282 P. 93, 48 Idaho 335.

25 C.J. p 646 note 6 [b].

Defective instrument

Mortgage given by accused and relied on and accepted by the injured person in handing over his property is admissible, although the description of the property in the mortgage was not such as to make out a flawless contract.

Tex.—Escue v. State, 227 S.W. 483, 88 Tex.Cr. 447.

Defective protests

(1) In prosecution for false uttering of bank check, certificates of protest which substantially complied with statutory requirements were not vulnerable to objection that they were not in proper form.

Iowa.—State v. Doudna, 284 N.W. 113, 226 Iowa 351.

(2) In prosecution under fraudulent check act, fact that notary who protested checks did not comply with law held not to affect admissibility of checks, since offense was complete when accused issued check in question.

Ind.—Huffman v. State, 185 N.E. 131, 205 Ind. 75.

Evidence held admissible

(1) Charge or credit ticket, drawn in accused's favor against corporation's deposit account in bank, checks drawn by accused on bank without sufficient funds therein, and bank's by-laws prescribing accused's duties as president thereof.

Md.—Simmons v. State, 167 A. 60, 165 Md. 155.

(2) Checks signed in name of corporation by accused as vice-president and secretary and treasurer.

Ga.—Thompson v. State, 69 S.E.2d 206, 85 Ga.App. 298.

(3) Notations and indorsements on check which had been made thereon after its execution and delivery to payee.

Kan.—State v. Ferris, 84 P.2d 949, 148 Kan. 663.

(4) Prospectus containing false representations as to stock sold through false pretenses.

Cal.—People v. Bocchio, 251 P. 672, 80 C.A. 138.

(5) Where prosecution for cheating and swindling, making false pretenses, and using a confidence game was based on dealings whereby accused induced victim to exchange stock for stock of corporation of

which accused was a director, prospectuses of two other companies which were intimately connected with such corporation for purpose of presenting an accurate picture of the status of such corporation.

Cal.—Torbert v. People, 156 P.2d 128, 113 Colo. 294.

(6) Other evidence.

Cal.—People v. Leaverton, 289 P. 890, 107 C.A. 51.

Ind.—Bell v. State, 195 N.E. 274, 208 Ind. 361.

Tex.—Escue v. State, 227 S.W. 483, 88 Tex.Cr. 447.

Evidence held inadmissible

In prosecution for false pretenses in selling used car, an affidavit as to the previous history of the car, which was not made by accused, was not admissible where no proof was offered to show that accused knew what the affidavit contained.

Pa.—Commonwealth v. Altieri & Greeby, 78 Pa.Super. 80, 85.

56. Iowa.—State v. Jackson, 105 N.W. 51, 128 Iowa 543.

57. Ark.—Norris v. State, 280 S.W. 398, 170 Ark. 484.

Pa.—Commonwealth v. Anselmi, Quar.Sess., 61 Dauph.Co. 120.

Evidence held incompetent

(1) In prosecution for having made false financial statement to secure credit extension, oral evidence that bank promised forbearance of demand notes replacing accused's prior notes.

Or.—State v. Bosch, 7 P.2d 554, 139 Or. 150.

(2) In prosecution for obtaining money by falsely pretending that a spell had been cast on a person and that accused could remove it, where victim testified that accused had said that a named woman was responsible for the spell, exclusion of evidence by named woman's son that he and his mother, or at least witness, had had no part in putting any spell on accused's victim.

Pa.—Commonwealth v. Viscount, 179 A. 858, 118 Pa.Super. 595.

(3) In prosecution for swindling by giving worthless check, evidence that accused had given prosecuting witness mortgage shortly before trial.

Tex.—Mayes v. State, 42 S.W.2d 65, 118 Tex.Cr. 612.

(4) In prosecution for obtaining money under false pretenses as to ownership of stock sold and worth of mine, evidence of profits from operation of adjoining mine.

irrelevant,⁵⁸ and immaterial⁵⁹ matters are excluded. In some jurisdictions evidence to show that the aggrieved person has been fully reimbursed is admissible, not to be considered in justification of the act, but to be considered in mitigation of the punishment.⁶⁰

Statutory provisions. In some jurisdictions there are statutes regulating the admissibility of evidence as to false pretenses.⁶¹

b. As to Falsity of Pretense

Subject to the general rules of evidence, any evidence tending to prove or disprove the falsity of the pretense is admissible.

Subject to the general rules of evidence, any evidence tending either by itself or in connection with other evidence in the case to prove or disprove that the pretenses made were false is admissible.⁶² Such evidence is admissible as to the falsity of pre-

Cal.—People v. Raplee, 241 P. 892, 75 C.A. 38.

58. Me.—State v. Hume, 164 A. 198, 131 Me. 458.

Md.—Simmons v. State, 167 A. 60, 165 Md. 155.

Mo.—State v. Sherrill, 278 S.W. 992.

N.J.—State v. Henig, 157 A. 85, 9 N. J. Misc. 1156.

Tex.—Glover v. State, 225 S.W.2d 195, 154 Tex. Cr. 86.

25 C.J. p 647 note 17.

Collateral matters

Me.—State v. Hume, 164 A. 198, 131 Me. 458.

Representations

The evidence must be relevant to the specific facts embraced in the representations.

Md.—Simmons v. State, 167 A. 60, 165 Md. 155.

Evidence held irrelevant

Ala.—McKee v. State, 155 So. 888, 26 Ala. App. 208—Whitlow v. State, 134 So. 36, 24 Ala. App. 271.

D.C.—Randle v. U. S., 113 F.2d 945, 72 App. D.C. 368, certiorari denied 61 S.Ct. 64, 311 U.S. 683, 85 L.Ed. 440.

Md.—Simmons v. State, 167 A. 60, 165 Md. 155.

Mo.—State v. Weber, 298 S.W.2d 403—State v. McLane, 278 S.W. 683.

N.Y.—People v. Von Brandenburg, 149 N.E. 221, 241 N.Y. 128.

Tex.—Floyd v. State, 299 S.W. 263, 108 Tex. Cr. 114—Whitehead v. State, 279 S.W. 850, 103 Tex. Cr. 78.

59. Ala.—Primus v. State, 111 So. 194, 21 Ala. App. 630.

Ariz.—Harris v. State, 17 P.2d 1098, 41 Ariz. 311.

Mich.—People v. Kayne, 255 N.W. 758, 268 Mich. 186.

25 C.J. p 647 note 18.

Evidence held immaterial

Ga.—Hollis v. State, 108 S.E. 783, 152 Ga. 182.

Kan.—State v. Goodrich, 15 P.2d 434, 136 Kan. 277.

S.D.—State v. Egbert, 258 N.W. 283, 63 S.D. 324.

Tex.—Nash v. State, 31 S.W.2d 445, 116 Tex. Cr. 607—Nash v. State, 29 S.W.2d 359, 115 Tex. Cr. 324.

25 C.J. p 647 note 18 [a].

60. Okl.—Ridgeway v. State, 218 P. 900, 25 Okl. Cr. 41.

61. Or.—State v. Keep, 166 P. 936, 85 Or. 265.

25 C.J. p 647 note 21.

62. Cal.—People v. Burnett, 69 P.2d 1028, 21 C.A.2d 613—People v. Reid, 237 P. 824, 72 C.A. 611.

Mass.—Commonwealth v. Levine, 181 N.E. 851, 280 Mass. 83.

Pa.—Commonwealth v. Ferguson, 95 Pa. Super. 153.

25 C.J. p 647 note 22.

Condition of property after misrepresentation

Cal.—People v. Currie, 39 P.2d 215, 3 C.A.2d 31.

Suppression of facts

In prosecution for false pretenses, suppression by accused of fact material to transaction is proper subject of proof.

Cal.—People v. Gordon, 163 P.2d 110, 71 C.A.2d 606.

Evidence held admissible

(1) Testimony of chairman of investigation committee that records failed to show corporation received proceeds of stock was relevant to prove falsity of representations of stock salesman.

Md.—Summons v. State, 144 A. 497, 156 Md. 382.

(2) Testimony of witness having charge of records that accused was not employed by: certain employer was admissible to prove falsity of representation he was.

Idaho.—State v. Stevens, 282 P. 93, 48 Idaho 335.

(3) Testimony regarding mining activities in vicinity of C was admissible on issue of falsity of accused's representation regarding opening mine around C.

Idaho.—State v. Stevens, supra.

(4) Testimony of witnesses that accused had treated them for physical ills, and they had not benefited thereby, was admissible on issue of falsity of his representations that he was a divine healer.

Cal.—People v. Walker, 231 P. 572, 69 C.A. 475.

(5) In prosecution for obtaining a school district warrant by false pretenses by president of board of education, who had handled finances of school district, admission in evidence of testimony of certified public accountant concerning amounts paid

out on account of bonds, notes, and interest, and amount which had become due and payable during such period, and that there was an excess of payments was proper.

Mo.—State v. Brickey, 152 S.W.2d 1055, 348 Mo. 248.

(6) In prosecution for selling ore taken from abandoned dumps as high grade ore by causing high grade gold and silver ore to be placed in samples, gold and silver content of which formed basis for payment for car-load lots of ore, reports made by accused to treasury department which reports falsely stated that ore was newly mined ore were admissible.

Tex.—West v. State, 145 S.W.2d 580, 140 Tex. Cr. 493.

(7) In prosecution of county officer for collection of false expense accounts, the state could meet the burden imposed on it of proving a negative by showing that trips for which expenses were claimed were not made or, if made, that they were not made on county business, by showing that they were made for other reasons.

Wash.—State v. Dodd, 74 P.2d 497, 193 Wash. 26.

(8) Any evidence to show that a romantic attachment rather than county business prompted the trips on which the purported official expenditures were incurred was admissible in prosecution of officer for collection of false expense accounts.

Wash.—State v. Dodd, supra.

(9) Where accused was charged with having held himself out to the prosecuting witness as secretary of the "Fort Worth Exchange," trial court properly permitted a witness to testify that he was secretary of the "Fort Worth Grain and Cotton Exchange" at the time in question, and that accused was not an employee of such exchange, it being the claim of the state that there was no such institution as the "Fort Worth Exchange," but that it was the purpose of accused to mislead the injured person into believing the former to be a bona fide officer of an exchange in the city of Fort Worth.

Tex.—Gerber v. State, 232 S.W. 334, 90 Tex. Cr. 37.

(10) In prosecution for cheating by fraudulent pretenses, larceny,

tenses of ownership of property,⁶³ as to the falsity of pretenses that property is unencumbered,⁶⁴ and as to the falsity of pretenses as to financial condition and ability.⁶⁵ Evidence of the individual indebtedness of the members of a partnership is not admissible to prove that representations as to the solvency of the partnership are false.⁶⁶ On a prosecution for obtaining money by falsely pretending to be the owner of property, the proceedings and judgment in a claim suit interposed in an action against

accused are properly excluded as *res inter alios acta*.⁶⁷

c. As to Knowledge and Intent

Any competent evidence which legitimately tends to prove or disprove knowledge by the accused of the falsity of his representations or an intent to defraud is admissible.

As a general rule any competent evidence which has a legitimate tendency to prove or disprove that accused knew his representations to be false is admissible,⁶⁸ and the same is true of any evidence

fraudulent conversion, and embezzlement by agent, commonwealth witness who had dealt with accused in sale of kind of stock which was subject matter of prosecution was properly called to show that he had sold the stock for accused and transmitted the proceeds to accused pursuant to their previous agreement. Pa.—Commonwealth v. Neuman, 30 A.2d 698, 151 Pa.Super. 642.

Evidence held inadmissible

(1) In prosecution for obtaining money by false pretenses that defendant was divine healer, evidence that in her absence accused usually allowed her fourteen year old daughter to conduct healing operations was not admissible as tending to show that accused did not possess power of divine healing.

Cal.—People v. Walker, 231 P. 572, 69 C.A. 475.

(2) Evidence of value of leases is not relevant to issue that accused misrepresented price paid therefor. Pa.—Commonwealth v. Forney, 88 Pa. Super. 451.

63. Cal.—People v. Reid, 237 P. 824, 72 C.A. 611.
25 C.J. p 648 note 23.

Evidence held admissible

In prosecution for obtaining money by false pretenses that certain check of corporation was not for money due stockholder whose interest in corporation's deposit had been attached, corporation's records showing preliminary distribution to stockholders were admissible to establish falsity of representation.

Md.—Deibert v. State, 133 A. 847, 150 Md. 687.

Property subsequently owned

In prosecution for obtaining loan under false pretense that accused owned and possessed a certain number of hogs, admitting testimony that he had only fifty to seventy-five hogs between certain dates was not erroneous on ground that it related to matters subsequent to giving of chattel mortgage on hogs, where testimony showed that number of hogs possessed by accused was less than number represented. he admitted that he did not have all hogs listed, and other witnesses tes-

tified that accused had only fifty to seventy hogs.

Mo.—State v. Nienaber, 148 S.W.2d 1024, 347 Mo. 615.

64. Cal.—People v. Reid, 237 P. 824, 72 C.A. 611.

Mass.—Commonwealth v. Bannon, 150 N.E. 7, 254 Mass. 320.
25 C.J. p 648 note 24.

Invalid encumbrance

In prosecution for obtaining money under false pretenses by inducing buyer of automobile to part with money without disclosing the existence of an encumbrance on automobile, admission in evidence of chattel mortgage purporting to cover automobile was an error fatal to conviction, where mortgage was executed pursuant to power of attorney giving authority to make, draw, sign, or endorse bills of exchange or promissory notes, since that authority did not give authority to sign chattel mortgages.

Mich.—People v. Etzler, 290 N.W. 879, 292 Mich. 489.

65. Mich.—People v. Smith, 260 N.W. 911, 271 Mich. 553.
25 C.J. p 648 note 25.

Bank account

(1) In prosecution for passing fictitious check, testimony that check deposited in accused's account was taken for collection only and so did not constitute an amount on deposit to his credit for the purpose of drawing checks is admissible.

Cal.—People v. Bowles, 280 P. 184, 100 C.A. 464.

(2) Evidence showing withdrawal of entire deposit on date worthless check was given was admissible.

Tex.—Brigham v. State, 16 S.W.2d 243, 112 Tex.Cr. 281.

Bankruptcy proceedings

A certified copy of bankruptcy proceedings, showing that the drawer was adjudged an involuntary bankrupt and a receiver appointed after the giving of check not paid on presentation, although not in itself showing that the drawer had enough funds to pay the check, was admissible as tending to corroborate accused's statement that the drawer did have sufficient funds.

Ga.—Oetgen v. State, 107 S.E. 885, 27 Ga.App. 177.

Condition of corporation

In prosecution for false pretenses as to value of stock of corporation which was purported to own pipe line, admission of contract relating to lease of pipes which showed that corporation had no property interest in pipe and that corporation was doing business on shoestring, and comments of prosecuting attorney on contract, held not error.

Mich.—People v. Smith, 260 N.W. 911, 271 Mich. 553.

Financial condition of third person

In prosecution of bank officer, testimony relating to financial responsibility of person whom accused allegedly falsely represented to bank directors as being interested in corporation seeking loan from bank held admissible.

Md.—Delcher v. State, 158 A. 37, 161 Md. 475.

Subsequent statement

Where complaining witness was induced to purchase interest in corporation by means of a written statement, represented as taken from the books of the corporation, a second statement prepared at the instance of the accused, after the purchase by complaining witness, and given to him for the express purpose of showing the assets of the corporation, and which showed such assets to be less than shown in the first statement, was admissible as evidence of the falsity of the first statement.

Cal.—People v. Daniels, 222 P. 387, 64 C.A. 514.

66. Mass.—Commonwealth v. Davidson, 1 Cush. 33.

67. Ala.—Frederick v. State, 39 So. 915.

68. Ark.—Wilkerson v. State, 21 S.W.2d 183, 180 Ark. 280.

Cal.—People v. Leon, 329 P.2d 996, 163 C.A.2d 791—People v. Oster, 278 P.2d 39, 129 C.A.2d 688—People v. Gordon, 163 P.2d 110, 71 C.A.2d 606.

Ind.—Lund v. State, 190 N.E. 850, 207 Ind. 347.

Iowa.—State v. George, 221 N.W. 344, 206 Iowa 826.

which tends to prove or to disprove a guilty intent.⁶⁹ | Evidence of acts and conduct of accused before the

Mass.—Commonwealth v. Levine, 181 N.E. 851, 280 Mass. 83.

Mo.—**Corpus Juris Secundum** cited in State v. Hartman, 273 S.W.2d 198, 204, 364 Mo. 1109.

N.Y.—People v. Lehrer, 45 N.Y.S.2d 170, 182 Misc. 645.

Pa.—Commonwealth v. Ferguson, 95 Pa.Super. 153.

25 C.J. p 648 note 28.

Grounds for belief

Trial judge, admitting accused's testimony in trial for stealing goods shipped to corporation, that he believed his statements to latter's salesman were true, properly excluded grounds for such belief.

Mass.—Commonwealth v. Levine, 181 N.E. 851, 280 Mass. 83.

Nonpayment of prior checks

(1) In prosecution for issuing worthless checks, where accused claimed to have had a prearranged credit with bank on which checks were drawn, evidence taken from records of bank concerning approximately two hundred forty five of accused's checks which bank had rejected for insufficient funds over a two-year period, and showing that accused had been notified by bank concerning rejection of such checks, was admissible to prove his knowledge that he did not have sufficient credit with bank to meet checks involved in indictment, although the state did not prove that the two hundred forty five checks were written by accused or to whom they were payable or delivered.

Cal.—People v. Megladdery, 105 P.2d 385, 40 C.A.2d 643.

(2) In prosecution for issuing checks without sufficient funds, where charges were based on numerous instances in which checks of accused were returned from various banks for insufficient funds, the different checks were competent to establish his knowledge of lack of sufficient funds.

Cal.—People v. Adams, App., 340 P.2d 677.

Evidence not admissible

In a prosecution for drawing a draft without sufficient funds on deposit to meet it, or reason to believe that it would be paid, evidence of the nonpayment of drafts subsequently drawn by accused and payable to others besides the complaining witness is not admissible, where there is only slight affirmative evidence that accused did not have reason to believe the draft in controversy would be paid.

Fla.—Denton v. State, 62 So. 914, 66 Fla. 87.

69. Cal.—People v. Rush, App., 341 P.2d 788—People v. Schmitt, 317 P.2d 673, 155 C.A.2d 87—People v.

Urban, 317 P.2d 636, 155 C.A.2d 284.

Ill.—People v. Marmon, 59 N.E.2d 808, 389 Ill. 478, certiorari denied 66 S.Ct. 30, 326 U.S. 725, 90 L.Ed. 430, rehearing denied 66 S.Ct. 136, 326 U.S. 808, 90 L.Ed. 492.

Ind.—Lund v. State, 190 N.E. 850, 207 Ind. 347.

Iowa.—State v. George, 221 N.W. 344, 206 Iowa 826—State v. Detloff, 205 N.W. 534, 201 Iowa 159.

Kan.—State v. Stanley, 227 P. 263, 116 Kan. 449.

La.—**Corpus Juris** cited in State v. Hendon, 128 So. 286, 288, 170 La. 488.

Mass.—Commonwealth v. Levine, 181 N.E. 851, 280 Mass. 83.

Mo.—State v. Green, 305 S.W.2d 863.

Ohio.—State v. Singleton, 87 N.E.2d 358, 85 Ohio App. 245.

Wash.—State v. Jeane, 213 P.2d 633, 35 Wash.2d 423.

25 C.J. p 649 note 29.

Widest latitude is allowed in presenting proof respecting intent to defraud.

La.—State v. Hendon, 128 So. 286, 170 La. 488.

Wash.—State v. Sedam, 284 P.2d 292, 46 Wash.2d 725.

Financial ability of accused

(1) Evidence of accused's solvency or insolvency and capacity or incapacity of accused or another, on whose credit money is procured, to repay it is ordinarily admissible to prove accused's good or bad faith.

Md.—Simmons v. State, 167 A. 60, 165 Md. 155.

(2) Evidence of accused's assets and liabilities is inadmissible where the representation did not involve his financial ability to pay.

Md.—Simmons v. State, supra.

(3) Under statute prohibiting overdrafts, the essentials of intent to defraud and knowledge of insufficient funds may be shown by refusal of payment by the drawee bank and by failure of drawer to make the check good within ten days after notice.

Ark.—Smith v. State, 174 S.W.2d 555, 206 Ark. 154.

(4) In prosecution for obtaining money through false pretenses, checks which were drawn on bank by accused's employee allegedly acting under his instructions, were cashed at trust company, and the proceeds of which were remitted by employee by wire to accused's account at bank on which checks were drawn, which subsequently dishonored the checks, were admissible as corroborating employee's testimony as to the transaction, and as showing the scheme or plan which accused employed in obtaining the money from the trust company.

Ark.—Mortensen v. State, 217 S.W. 2d 325, 214 Ark. 528.

(5) In prosecution for issuing checks without sufficient funds, where charges were based on numerous instances in which checks of accused were returned from various banks for insufficient funds, the different checks were competent to establish his intent to defraud.

Cal.—People v. Adams, App., 340 P. 2d 677.

(6) In prosecution for grand theft, where intent to defraud was a necessary element of the theft and accused testified that he intended to pay for the merchandise he had obtained on numerous charge accounts, testimony of the inability of accused to make such payments because of his general financial condition was admissible as tending to negative the effect of his denial of any criminal intention.

Cal.—People v. Robertson, App., 334 P.2d 938.

(7) Other cases see 25 C.J. p 649 note 29 [f].

To disprove intent

(1) It is error to exclude evidence negating the existence of a fraudulent intent.

La.—State v. Alphonse, 98 So. 430, 154 La. 950.

(2) Where accused was being prosecuted for issuing check without sufficient funds with intent to defraud, refusal to permit him to testify as to alleged arrangement made with third person on day before issuance of check to deposit money in bank next day to accused's credit was prejudicial error.

Cal.—People v. Gaines, 234 P.2d 702, 106 C.A.2d 176.

(3) In prosecution of contractor for wrongfully obtaining money by false pretense with intent to cheat or defraud in securing payment for work on the representation that work had been completed, evidence of contractor's checks dishonored by bank, admitted for limited purpose of showing contractor's lack of financial responsibility at the time, became competent on issue of intent in light of respondent's evidence that checks were made good, which went beyond limited purpose.

N.H.—State v. Skaff, 54 A.2d 155, 94 N.H. 402.

(4) Under such circumstances, evidence that note was ostensibly drafted for immediate, rather than deferred, discount and that there was a partial performance of contract by respondent after money was paid and before any claim of wrongful conduct was asserted, supported respondent's position that he acted in

good faith and was entitled to consideration by jury under appropriate instructions on issue of whether respondent acted with criminal intent.

N.H.—State v. Skaff, *supra*.

(5) Accused may rebut or controvert evidence tending to establish specific intent, and may introduce other pertinent, independent evidence to establish affirmatively lack of criminal intent.

Cal.—People v. Becker, 30 P.2d 562, 137 C.A. 349.

(6) Accused's evidence that he believed check given would be paid was admissible.

Tex.—Wooten v. State, 4 S.W.2d 563, 109 Tex.Cr. 325.

(7) One charged with violating bad check law may establish that he had sufficient credit with bank to warrant its payment to rebut prima facie evidence of intent to defraud arising from refusal of payment on presentation of check.

Ala.—Bates v. State, 137 So. 465, first case, 24 Ala.App. 507, certiorari denied 137 So. 465, second case, 223 Ala. 527.

(8) In prosecution for issuing bank check with intent to defraud, excluding testimony showing accused made arrangements to obtain money and expected to open account in bank on following business day to cover check was error.

Cal.—People v. Becker, 30 P.2d 562, 137 C.A. 349.

(9) Accused's testimony that he had deposited substantial sums in bank and did not know, but believed, that he had drawn only two small checks was admissible to show absence of fraudulent intent when check was executed and delivered.

Tex.—Freeman v. State, 147 S.W.2d 1095, 141 Tex.Cr. 158.

(10) In prosecution for giving fraudulent check, rejection of accused's evidence that, after drawee bank's refusal to accept his proffered deposit of cashier's check, he deposited it in another bank, was error.

N.Y.—People v. Hasto, 260 N.Y.S. 97, 236 App.Div. 533.

(11) Evidence for accused that he gave another check payable in future, and which was paid, held admissible.

Tex.—Morrow v. State, 31 S.W.2d 636, 116 Tex.Cr. 605.

(12) Testimony that accused, when delivering check, stated that funds were insufficient for payment and that check should not be deposited until further notice is admissible.

N.Y.—People v. Olans, 191 N.E. 494, 264 N.Y. 420.

(13) Testimony that accused tendered payment of check refused payment for insufficient funds before prosecution thereon is admissible.

Tex.—Armstrong v. State, 59 S.W.2d 140, 123 Tex.Cr. 372.

(14) Testimony that bank which refused payment under agreement to limit withdrawals had honored checks exceeding agreed amount was admissible.

Tex.—Wooten v. State, 4 S.W.2d 563, 109 Tex.Cr. 325.

(15) Evidence that proceeds of note were used in paying bill incurred in work for which note was given was admissible in prosecution for grand theft in obtaining note.

Cal.—People v. Hand, 16 P.2d 156, 127 C.A. 484.

Evidence held admissible

(1) Agreement required by state banking department of directors of bank in which falsely uttered check was deposited that accused's paper should not become part of assets of bank without approval of department.

Iowa.—State v. McCutchan, 259 N.W. 23, 219 Iowa 1029.

(2) Evidence concerning respondent's dealings with third persons, so far as it tended to accomplish limited purpose of proving intent to defraud.

N.H.—State v. Skaff, 54 A.2d 155, 94 N.H. 402.

(3) Evidence of nonpayment of check.

Ala.—Caughlan v. State, 114 So. 280, 22 Ala.App. 220.

(4) Evidence of falsity of check.

Or.—State v. Robinson, 252 P. 951, 120 Or. 508.

(5) Evidence of the fact that accused told the complaining witness nothing whatever concerning his transaction with a third person to whom he had given a bill of sale of the car he represented as owning as security for a loan.

Nev.—State v. Bacha, 194 P. 1066, 44 Nev. 373.

(6) Permit to sell worthless stock at certain price per share, which was greatly below its represented value.

Cal.—People v. Burns, 16 P.2d 1015, 128 C.A. 226.

(7) Testimony that car for which bill of lading was issued was empty.

Tex.—Taylor v. State, 232 S.W. 525, 89 Tex.Cr. 618.

(8) In prosecution for filing false valuations of property destroyed by fire and items not destroyed, an inventory booklet, wherein items lost had been listed at instance of accused and which was filed along with proof of loss.

Or.—State v. Jaynes, 107 P.2d 528, 165 Or. 321.

(9) In prosecution for issuing fictitious checks, other postdated checks given as part of same transactions.

Cal.—People v. Alexander, 246 P. 147, 77 C.A. 231.

(10) In prosecution for obtaining a loan from a bank under false pretense that accused owned and possessed a certain number of hogs, where defendant admitted that he had only a part of the hogs at a certain time, his statement that he had sold "what hogs he had" bore on original criminal intent, and fact that hogs sold were mortgaged was ineffective to make the testimony concerning sale, otherwise competent, inadmissible.

Mo.—State v. Nienaber, 148 S.W.2d 1024, 347 Mo. 615.

(11) In prosecution for obtaining a school district warrant by false pretenses by president of board of education, who had handled finances of school district, evidence of testimony of certified public accountant concerning amounts paid out on account of bonds, notes and interest and amount which had become due and payable and that there was an excess of payments.

Mo.—State v. Brickey, 152 S.W.2d 1055, 348 Mo. 248.

(12) In prosecution for procuring money on false representation that it would be used in a business venture or the like, evidence of expenditures and gifts made by accused for merely personal purposes.

Cal.—People v. Crandall, 110 P.2d 682, 43 C.A.2d 238.

(13) In prosecution for selling ore taken from abandoned dumps as high grade ore by causing high grade gold and silver ore to be placed in samples, gold and silver content of which formed basis for payment for carload lots of ore, reports made by accused to treasury department which reports falsely stated that ore was newly mined ore.

Tex.—West v. State, 145 S.W.2d 580, 140 Tex.Cr. 493.

(14) In prosecution of contractor for receiving money, on false pretenses that material and labor claims on building constructed had been paid, building permit showing that accused had given prosecuting witness' address improperly thereon.

Cal.—People v. Pearson, 231 P. 612, 69 C.A. 524.

(15) After state has made out prima facie case of guilt, it may offer evidence, if relevant to question of intent, that prisoner committed other acts of false pretenses, where prosecutor was victim or other persons were victims of false pretenses and it may also be shown that accused committed other similar crimes so connected with crime charged that they would afford a fair inference that he intended to commit crime for which he was on trial.

Md.—MacEwen v. State, 71 A.2d 464, 194 Md. 492.

crime is, in general, admissible to show guilty intent;⁷⁰ and evidence of his acts and conduct at and after the commission of the crime is admissible as bearing on intent.⁷¹ Evidence of a secondary purpose of the criminal act, which purpose is lawful, is not admissible.⁷²

d. As to Reliance on Pretense

The general rules governing the admissibility of evi-

dence control on the issue of reliance on the false pretense. The prosecutor may testify as to his reliance on the pretenses made.

The general rules governing the admissibility of evidence apply to evidence offered on the issue of whether prosecutor relied on the false pretense.⁷³ The prosecutor may testify that he was induced to part with the property by the false pretenses.⁷⁴

(16) Other evidence see 25 C.J. p 649 note 29 [a].

Evidence not admissible

(1) It is not error to exclude testimony of accused that after check issued without funds was dishonored and demand made on him for payment he was forced into bankruptcy. W.Va.—State v. Price, 97 S.E. 582, 83 W.Va. 71, 5 A.L.R. 1247.

(2) In prosecution for swindling by worthless check, where accused wrote dishonored check against deposit of another check drawn against a bank in another city before its collection, evidence that his bank previously notified accused that a foreign check was not subject to withdrawal until collected, was without probative value to show intent to write worthless check, since accused had a right to assume that if a deposit was not subject to check, his bank would so advise him.

Tex.—Moody v. State, 213 S.W.2d 539, 152 Tex.Cr. 265.

70. Mass.—Commonwealth v. McHugh, 54 N.E.2d 934, 316 Mass. 15. S.C.—State v. Gellis, 155 S.E. 849, 158 S.C. 471.

25 C.J. p 650 note 35.

Telephone conversation

Testimony, in prosecution for obtaining money by false pretenses, involving sale of stock with respect to prior representations made over telephone was properly admitted. S.C.—State v. Gellis, supra.

71. S.C.—State v. Gellis, supra. 25 C.J. p 650 note 36.

Only purpose

Subsequent acts of drawer are of evidential value only in helping to establish the operative fact of fraudulent intent. Va.—Cook v. Commonwealth, 16 S.E. 2d 635, 178 Va. 251.

Financial statement

Signed financial statement which misrepresented accused's financial condition, given after procurement of additional loan, is admissible in prosecution for false representation in procurement of prior loan.

Iowa.—State v. Detloff, 205 N.W. 534, 201 Iowa 159.

To disprove intent

(1) In prosecution for obtaining indorsement to note by false pretense, evidence that accused confessed

judgment on note and delivered property to indorser is admissible. N.C.—State v. Johnson, 142 S.E. 775, 195 N.C. 506.

(2) In prosecution for making, drawing, uttering, and delivering a check with intent to defraud, evidence as to fact that check was paid by accused within a day after delivery, although no defense to prosecution if he had necessary intention to defraud at time check was issued, would be admissible as tending to prove that there was no intention to defraud.

Utah.—State v. Scott, 140 P.2d 929, 105 Utah 31.

Evidence held inadmissible

(1) In prosecution for issuing fictitious checks, complaining witness' testimony that accused had telephoned her to hold check as he could pay cash was properly stricken as not tending to show honest intent.

Cal.—People v. Alexander, 246 P. 147, 77 C.A. 231.

(2) In prosecution for obtaining money by false pretenses, when accused in mortgaging his property misrepresented his title thereto, evidence tending to show accused's intention to make payments on indebtedness at a time subsequent to transaction was inadmissible.

Ala.—Cook v. State, 104 So. 837, 20 Ala.App. 622, certiorari denied Ex parte Cook, 104 So. 838, 213 Ala. 328.

72. Cal.—People v. Bullock, 11 P.2d 441, 123 C.A. 299.

73. N.J.—State v. Hubschman, 45 A. 2d 316, 133 N.J.Law 520.

Tex.—Palmer v. State, 245 S.W. 238, 92 Tex.Cr. 640. 25 C.J. p 650 note 38.

Evidence held admissible

(1) In prosecution for obtaining money by false pretense that check of corporation was not for money due stockholder whose interest in corporation's deposit had been attached, testimony as to stockholder's indebtedness to bank and value of collateral pledged to secure it was proper.

Md.—Deibert v. State, 133 A. 847, 150 Md. 687.

(2) In bad check prosecution, evidence that the person swindled did not know that the entries in accus-

ed's bank book shown to him were forged is admissible.

Tex.—Palmer v. State, 245 S.W. 238, 92 Tex.Cr. 640.

(3) In prosecution for false pretenses in obtaining state relief, testimony of accused's wife pertaining to her conversation with case worker of state relief administration when he called to verify information given by accused, and testimony of accused as to conversation with employee at state relief administration headquarters when he filled out application were admissible for purpose of showing whether relief administrator relied on written information given in application or on other representations, or on independent investigation of his own, in making relief payments.

Cal.—People v. Miles, 99 P.2d 551, 37 C.A.2d 373.

74. Cal.—People v. Moore, 191 P. 980, 48 C.A. 245.

Kan.—State v. Nash, 204 P. 736, 110 Kan. 550.

Md.—Summons v. State, 144 A. 497, 156 Md. 382.

Mass.—Commonwealth v. Jacobson, 157 N.E. 583, 260 Mass. 311.

Pa.—Commonwealth v. Mann, 86 Pa. Super. 464.

Tex.—Grant v. State, 143 S.W.2d 383, 140 Tex.Cr. 46.

25 C.J. p 650 note 39.

Representative or agent

(1) Persons authorized to act for commonwealth may testify as to effect of false representations on their official action.

Mass.—Commonwealth v. Jacobson, 157 N.E. 583, 260 Mass. 311.

(2) In prosecution for obtaining money by false pretenses by assignment to finance company of false conditional sales contract, testimony of secretary of finance company that in accepting the financing papers he relied on them as being genuine was material and competent although they were connected with an earlier promise that the contracts which accused would in the future send to finance company would be as they appeared on their face.

Iowa.—State v. Peck, 291 N.W. 439, 228 Iowa 1061.

(3) In prosecution for selling forged automobile sale contract, sustaining objection to cross-examina-

§ 52. Weight and Sufficiency

- a. In general
- b. As to pretense and its falsity
- c. As to intent to defraud and knowledge of falsity
- d. As to reliance on pretense
- e. Accomplishment of fraud; extent of loss; ownership and value of property obtained

tion of purchaser's agent whose duty was merely clerical, seeking to show whether purchaser of alleged forged conditional sale contract relied on false representations, held proper. Cal.—People v. Cordish, 294 P. 456, 110 C.A. 486.

Representations securing payment from county

In swindling prosecution, testimony of members of commissioners' court that they would not have approved accused's report of right of way purchase had they known that not all the money paid out would be used therefor was not erroneous, although order approving accused's report had not been set aside. Tex.—Mowrey v. State, 55 S.W.2d 816, 122 Tex.Cr. 456.

Cross-examination

Cross-examination of complaining witness as to whether he made independent investigation of the matters represented, and as to whether he did not rely on such investigation, irrespective of accused's statements, is permissible. Cal.—People v. Daniels, 222 P. 387, 64 C.A. 514.

75. U.S.—U. S. v. Clawson, D.C. Wyo., 13 F.Supp. 178.

Ga.—Spivey v. State, 8 S.E.2d 677, 62 Ga.App. 507.

N.Y.—People v. Krumme, 292 N.Y.S. 657, 161 Misc. 278.

25 C.J. p 650 note 42.

Evidence held sufficient to sustain conviction

(1) Generally.

U.S.—Flores v. U. S., C.A.Hawaii, 260 F.2d 179—U. S. v. Berg, C.C.A.N.J., 144 F.2d 173—McIntosh v. People of Virgin Islands, C.C.A.Virgin Islands, 83 F.2d 380.

Brifford v. U. S., C.C.A.Tenn., 259 F. 511, 171 C.C.A. 7.

Ala.—Phillips v. State, 91 So.2d 518, 38 Ala.App. 632—Littlefield v. State, 63 So.2d 565, 36 Ala.App. 507, certiorari denied 63 So.2d 573, 258 Ala. 532.

Ariz.—Maseeh v. State, 47 P.2d 423, 46 Ariz. 94.

Ark.—Moss v. State, 108 S.W.2d 782, 194 Ark. 524—Norris v. State, 280 S.W. 398, 170 Ark. 484—Fisher v. State, 256 S.W. 858, 161 Ark. 586—Holden v. State, 247 S.W. 768, 156 Ark. 521.

Cal.—People v. Pond, 284 P.2d 793, 44 C.2d 665—People v. Weitz, 267 P.2d 295, 42 C.2d 338, certiorari denied Weitz v. People of State of Cal., 74 S.Ct. 859, 347 U.S. 993, 98 L.Ed. 1126—People v. Ashley, 267 P.2d 271, 42 C.2d 246—People v. Jones, 224 P.2d 353, 36 C.2d 373—People v. Rabe, 261 P. 303, 202 C. 409.

People v. Robertson, App., 334 P.2d 938—People v. Barber, App., 333 P.2d 777—People v. Krupnick, App., 332 P.2d 720—People v. Chapman, 319 P.2d 8, 156 C.A.2d 151—People v. Urban, 317 P.2d 636, 155 C.A.2d 284—People v. Hodges, 315 P.2d 38, 153 C.A.2d 788—People v. Martin, 314 P.2d 493, 153 C.A.2d 275—People v. Massey, 312 P.2d 365, 151 C.A.2d 623—People v. Powell, 302 P.2d 17, 145 C.A.2d 115—People v. Gilliam, 297 P.2d 468, 141 C.A.2d 749—People v. Adams, 290 P.2d 944, 137 C.A.2d 660—People v. Pugh, 289 P.2d 826, 137 C.A.2d 226, appeal dismissed 77 S.Ct. 141, 352 U.S. 885, 1 L.Ed.2d 83—People v. Lamb, 283 P.2d 727, 133 C.A.2d 179, certiorari denied 76 S.Ct. 316, 350 U.S. 941, 100 L.Ed. 821—People v. Nesseth, 274 P.2d 479, 127 C.A.2d 712—People v. Kemp, 269 P.2d 186, 124 C.A.2d 683—People v. Bennett, 264 P.2d 664, 122 C.A.2d 244—People v. Silva, 260 P.2d 251, 119 C.A.2d 863—People v. Owens, 255 P.2d 114, 117 C.A.2d 121—People v. Staver, 252 P.2d 700, 115 C.A.2d 711—People v. Frankfort, 251 P.2d 401, 114 C.A.2d 680—People v. Waxman, 250 P.2d 339, 114 C.A.2d 399—People v. Davis, 246 P.2d 160, 112 C.A.2d 286—People v. Simon, 236 P.2d 855, 107 C.A.2d 105, certiorari denied Simon v. Supreme Court of Cal., 72 S.Ct. 645, 345 U.S. 911, 96 L.Ed. 1327—People v. Cheeley, 236 P.2d 22, 106 C.A.2d 748—People v. Mendoza, 229 P.2d 83, 103 C.A.2d 113—People v. Gloster, 228 P.2d 578, 102 C.A.2d 872—People v. Glenn, 216 P.2d 457, 96 C.A.2d 859—People v. Mason, 195 P.2d 60, 86 C.A.2d 445—People v. Daniels, 192 P.2d 788, 85 C.A.2d 182—People v. Henderson, 179 P.2d 406, 79 C.A.2d 94—People v. Wallace, 178 P.2d 771, 78 C.A.2d 726—People v. Gordon, 163 P.2d 110, 71 C.A.2d 606—People v. Kingsbury, 160 P.2d 587,

a. In General

The evidence must be sufficient to establish the guilt of the accused beyond a reasonable doubt.

In accordance with the rule as to crimes generally, in order to convict one of obtaining property by false pretenses or the like the jury must be satisfied beyond a reasonable doubt of his guilt;⁷⁵ and it has been said that the courts hold the prosecu-

70 C.A.2d 128—People v. Raines, 153 P.2d 424, 66 C.A.2d 960—People v. Caldwell, 130 P.2d 495, 55 C.A.2d 238—People v. Alexander, 128 P.2d 923, 54 C.A.2d 393—People v. Dunkin, 127 P.2d 291, 53 C.A.2d 99—People v. Brown, 126 P.2d 406, 52 C.A.2d 428—People v. Allen, 118 P.2d 927, 47 C.A.2d 735—People v. Alba, 117 P.2d 63, 46 C.A.2d 859—People v. Flumerfelt, 115 P.2d 215, 46 C.A.2d 1—People v. Crandall, 110 P.2d 682, 43 C.A.2d 238—People v. Rinesmith, 105 P.2d 1021, 40 C.A.2d 786—People v. Melton, 82 P.2d 609, 28 C.A.2d 387—People v. La France, 82 P.2d 465, 28 C.A.2d 152—People v. Gilbert, 78 P.2d 770, 26 C.A.2d 1—People v. Walker, 62 P.2d 163, 17 C.A.2d 372—People v. Ilderton, 58 P.2d 986, 14 C.A.2d 647—People v. McCarthy, 35 P.2d 621, 140 C.A. 386—People v. Reese, 29 P.2d 450, 136 C.A. 657—People v. Ferguson, 24 P.2d 965, 133 C.A. 41—People v. Burns, 16 P.2d 1015, 128 C.A. 226—People v. Hand, 16 P.2d 156, 127 C.A. 484—People v. Bender, 15 P.2d 763, 127 C.A. 331—People v. Foster, 3 P.2d 586, 117 C.A. 252—People v. Ingles, 3 P.2d 341, 117 C.A. 22—People v. Munson, 2 P.2d 227, 115 C.A. 694—People v. Leach, 290 P. 131, 106 C.A. 442, dismissed Leach v. People of State of California, 51 S.Ct. 646, 283 U.S. 808, 75 L.Ed. 1427—People v. Leaverton, 289 P. 890, 107 C.A. 51—People v. Knocke, 270 P. 468, 94 C.A. 55—People v. Harrington, 267 P. 942, 92 C.A. 245—People v. Shearer, 256 P. 611, 83 C.A. 321—People v. Ballard, 241 P. 596, 75 C.A. 29—People v. Mace, 234 P. 841, 71 C.A. 10—People v. Heinrich, 224 P. 466, 65 C.A. 510.

Colo.—Montez v. People, 132 P.2d 970, 110 Colo. 208—Updike v. People, 18 P.2d 472, 92 Colo. 125—Pepper v. People, 225 P. 846, 75 Colo. 348.

D.C.—Nelson v. U. S., 227 F.2d 21, 97 U.S.App.D.C. 6, 53 A.L.R.2d 1206, certiorari denied 76 S.Ct. 700, 351 U.S. 910, 100 L.Ed. 1445.

Fla.—Inman v. State, 191 So. 12, 139 Fla. 789—Campbell v. State, 173 So. 677, 127 Fla. 399.

Ga.—Glosson v. State, 49 S.E.2d 691, 77 Ga.App. 705—Thompson v. State, 19 S.E.2d 777, 67 Ga.App. 240

tion probably to stricter and more satisfactory proof | of false pretenses than of crimes more dangerous

- Adams v. State, 13 S.E.2d 521, 64 Ga.App. 439—Summers v. State, 11 S.E.2d 409, 63 Ga.App. 445—Kemp v. State, 6 S.E.2d 196, 61 Ga.App. 337—Dwight v. State, 3 S.E.2d 468, 60 Ga.App. 205—Blocker v. State, 199 S.E. 444, 58 Ga.App. 560—Turnipseed v. State, 185 S.E. 403, 53 Ga.App. 194.
- Idaho.—State v. Davis, 336 P.2d 692—State v. McCallum, 295 P.2d 259, 77 Idaho 489—State v. Dunn, 94 P. 2d 779, 60 Idaho 568.
- Ill.—People v. Dustin, 52 N.E.2d 224, 385 Ill. 68—People v. Gruber, 200 N.E. 483, 362 Ill. 278—People v. Blume, 178 N.E. 48, 345 Ill. 524.
- Ind.—Moss v. State, 159 N.E.2d 119—Woods v. State, 140 N.E.2d 752, 236 Ind. 423—Pierce v. State, 79 N.E.2d 903, 226 Ind. 312—Garrison v. State, 193 N.E. 587, 208 Ind. 690—Small v. State, 130 N.E. 401, 190 Ind. 406.
- Moore v. State, 168 N.E. 202, 92 Ind.App. 150, transfer denied, see 174 N.E. 812, 202 Ind. 365.
- Iowa.—State v. Neuhart, 292 N.W. 791, 228 Iowa 1055—State v. Backman, 201 N.W. 25, 198 Iowa 1300.
- Kan.—State v. Handke, 340 P.2d 877—State v. Visco, 331 P.2d 318, 183 Kan. 562—State v. Addington, 147 P.2d 367, 158 Kan. 276—State v. Barger, 83 P.2d 648, 148 Kan. 590—State v. Dreiling, 78 P.2d 4, 147 Kan. 482—State v. Driscoll, 8 P.2d 335, 134 Kan. 671—State v. Beezley, 239 P. 998, 119 Kan. 300—State v. Stanley, 227 P. 263, 116 Kan. 449.
- Ky.—Lee v. Commonwealth, 242 S.W. 2d 984—Frazier v. Commonwealth, 165 S.W.2d 33, 291 Ky. 467—Finney v. Commonwealth, 227 S.W. 999, 190 Ky. 536.
- Me.—State v. Hume, 164 A. 198, 131 Me. 458.
- Mass.—Commonwealth v. McHugh, 54 N.E.2d 934, 316 Mass. 15—Commonwealth v. Aronson, 44 N.E.2d 679, 312 Mass. 347—Commonwealth v. Anthony, 28 N.E.2d 542, 306 Mass. 470—Commonwealth v. McKnight, 195 N.E. 499, 289 Mass. 530, certiorari dismissed McKnight v. Commonwealth of Massachusetts, 56 S.Ct. 245, 296 U.S. 660, 80 L.Ed. 470—Commonwealth v. Levine, 181 N.E. 851, 280 Mass. 83—Commonwealth v. Morrison, 147 N.E. 588, 252 Mass. 116.
- Mich.—People v. Larco, 49 N.W.2d 358, 331 Mich. 420—People v. Miller, 3 N.W.2d 23, 301 Mich. 93—People v. Sachse, 233 N.W. 227, 252 Mich. 275.
- Minn.—State v. Smith, 255 N.W. 826, 192 Minn. 237, followed in State v. Ginsberg, 255 N.W. 828, 192 Minn. 241—State v. Brooks, 187 N.W. 607, 151 Minn. 502—State v. Friedman, 178 N.W. 895, 146 Minn. 373, re-hearing denied 184 N.W. 272, 146 Minn. 373.
- Miss.—Fuller v. State, 72 So.2d 454, 221 Miss. 247—Dunbar v. State, 94 So. 224, 130 Miss. 317.
- Mo.—State v. Smith, 324 S.W.2d 702—State v. Gilpin, 320 S.W.2d 498—State v. Hartman, 273 S.W.2d 198, 364 Mo. 1109—State v. Hartman, 272 S.W.2d 276—State v. Whitley, 269 S.W.2d 748—State v. Whitley, 266 S.W.2d 616—State v. Griggs, 236 S.W.2d 588, 361 Mo. 758—State v. Mandell, 183 S.W.2d 59, 353 Mo. 502—State v. Nienaber, 153 S.W.2d 360—State v. Montgomery, 116 S.W.2d 72—State v. Kleine, 263 S.W. 114—State v. Rosenheim, 261 S.W. 95, 303 Mo. 553—State v. Mullins, 237 S.W. 502, 292 Mo. 44.
- Mont.—State v. Allen, 275 P.2d 200, 128 Mont. 306.
- Neb.—Mason v. State, 270 N.W. 661, 132 Neb. 7.
- Nev.—Kelly v. State, 89 P.2d 1, 39 Nev. 190.
- N.M.—State v. Garcia, 256 P.2d 532, 57 N.M. 166—State v. Gilmore, 134 P.2d 541, 47 N.M. 59, appeal dismissed Gilmore v. State of New Mexico, 64 S.Ct. 193, 320 U.S. 710, 88 L.Ed. 417.
- N.Y.—People v. White, 140 N.E.2d 258, 2 N.Y.2d 220, 159 N.Y.S.2d 168, appeal dismissed and certiorari denied 77 S.Ct. 1061, 355 U.S. 969, 1 L.Ed.2d 1133—People v. Riccardi, 32 N.E.2d 776, 285 N.Y. 21, reargument denied 34 N.E.2d 917, 285 N.Y. 775.
- People v. Ackley, 62 N.Y.S.2d 771, 270 App.Div. 958, affirmed 70 N.E. 2d 544, 296 N.Y. 731, motion denied 72 N.E.2d 16, 296 N.Y. 825, certiorari denied 67 S.Ct. 1081, 330 U.S. 846, 91 L.Ed. 1290—People v. Fogg, 13 N.Y.S.2d 728, 257 App.Div. 1067—People v. Demasco, 209 N.Y.S. 665, 213 App.Div. 310.
- N.C.—State v. Davenport, 42 S.E.2d 686, 227 N.C. 475—State v. Roberts, 126 S.E. 161, 189 N.C. 93.
- N.D.—State v. Hopkins, 252 N.W. 48, 64 N.D. 301.
- Ohio.—State v. Aughinbaugh, App., 32 N.E.2d 478.
- Okl.—Riddle v. State, 261 P.2d 469, 97 Okl.Cr. 206—Moore v. State, 250 P.2d 46, 96 Okl.Cr. 118—Hunter v. State, 141 P.2d 855, 78 Okl.Cr. 52—Rollins v. State, 54 P.2d 224, 58 Okl.Cr. 400—Massey v. State, 49 P.2d 812, 58 Okl.Cr. 76—Rhodes v. State, 49 P.2d 226, 58 Okl.Cr. 1—Anthony v. State, 28 P.2d 1115, 55 Okl.Cr. 260—Wagner v. State, 17 P.2d 525, 54 Okl.Cr. 251.
- Or.—State v. Mellenberger, 95 P.2d 709, 163 Or. 233, 128 A.L.R. 1506.
- Pa.—Commonwealth v. Gross, 56 A. 2d 303, 161 Pa.Super. 613—Commonwealth v. Goldberg, 196 A. 538, 130 Pa.Super. 252—Commonwealth v. Landis, 101 Pa.Super. 524—Commonwealth v. Schmidt, 95 Pa.Super. 102—Commonwealth v. Clement, 94 Pa.Super. 460—Commonwealth v. Dougherty, 84 Pa.Super. 319.
- Commonwealth v. Zurcher, 45 Pa. Dist. & Co. 555—Commonwealth v. Miller, 39 Pa. Dist. & Co. 433, 49 Dauph.Co. 141.
- Commonwealth v. Walker, Quar. Sess., 50 Berks Co. 126—Commonwealth v. Rogers, Quar.Sess., 62 Dauph.Co. 426—Commonwealth v. Anselmi, Quar.Sess., 61 Dauph.Co. 120.
- Tenn.—Beck v. State, 315 S.W.2d 254—Cook v. State, 94 S.W.2d 386, 170 Tenn. 245.
- Tex.—Elliott v. State, Cr., 317 S.W. 2d 532—Mount v. State, Cr., 317 S.W.2d 212—Thorneberry v. State, Cr., 311 S.W.2d 858—Walker v. State, 271 S.W.2d 286, 160 Tex.Cr. 383—Massey v. State, 266 S.W.2d 880, 160 Tex.Cr. 49—Redding v. State, 265 S.W.2d 811, 159 Tex.Cr. 535, certiorari denied Redding v. State of Texas, 75 S.Ct. 38, 348 U.S. 838, 99 L.Ed. 661—Dorgan v. State, Cr., 231 S.W.2d 422—Dixon v. State, 215 S.W.2d 181, 152 Tex. Cr. 504—Martin v. State, 213 S.W.2d 689, 152 Tex.Cr. 309—Parish v. State, 165 S.W.2d 748, 145 Tex. Cr. 117—Parten v. State, 160 S.W. 2d 935, 144 Tex.Cr. 12—Smith v. State, 128 S.W.2d 39, 137 Tex.Cr. 107—Templeton v. State, 105 S.W. 2d 1100, 132 Tex.Cr. 577—Nash v. State, 29 S.W.2d 359, 115 Tex.Cr. 324—Fleenor v. State, 22 S.W.2d 676, 113 Tex.Cr. 546—Connolly v. State, 252 S.W. 515, 94 Tex.Cr. 446—Snover v. State, 238 S.W. 919, 91 Tex.Cr. 269—Whitley v. State, 236 S.W. 470, 90 Tex.Cr. 503.
- Va.—Hubbard v. Commonwealth, 109 S.E.2d 100.
- Wash.—State v. Reynolds, 322 P.2d 356, 51 Wash.2d 830—State v. Sedam, 284 P.2d 292, 46 Wash.2d 725—State v. Sargent, 97 P.2d 692, 2 Wash.2d 190, adhered to 100 P.2d 20, 2 Wash.2d 190—State v. Seidenschwarz, 70 P.2d 780, 191 Wash. 111—State v. Wilson, 251 P. 859, 142 Wash. 19—State v. Cormier, 209 P. 674, 121 Wash. 554.
- Wis.—Corscot v. State, 190 N.W. 465, 178 Wis. 661.
- 25 C.J. p 650 note 42 [a].
- (2) For aiding and assisting another to obtain an old age assistance certificate in violation of statute.
- Minn.—State v. Jansen, 290 N.W. 557, 207 Minn. 250.
- (3) For being common cheat.
- R.I.—State v. Colangelo, 179 A. 147, 55 R.I. 170—State v. McMahon, 140 A. 359, 49 R.I. 107.

(4) For defrauding by use of confidence game.

Cal.—People v. Lakenan, 214 P. 1021, 61 C.A. 368.

Colo.—Fischer v. People, 335 P.2d 871—Bledsoe v. People, 335 P.2d 284—Bevins v. People, 330 P.2d 709—Munsell v. People, 222 P.2d 615, 122 Colo. 420—Arnett v. People, 11 P.2d 806, 91 Colo. 56—Stewart v. People, 283 P. 47, 86 Colo. 456—Todd v. People, 261 P. 661, 82 Colo. 541—Roll v. People, 243 P. 641, 78 Colo. 589.

Ill.—People v. Jackson, 122 N.E.2d 813, 4 Ill.2d 296—People v. Mero, 122 N.E.2d 796, 4 Ill.2d 327—People v. Brand, 114 N.E.2d 370, 415 Ill. 329, certiorari denied Brand v. People of State of Ill., 74 S.Ct. 709, 347 U.S. 959, 98 L.Ed. 1103—People v. Glenn, 112 N.E.2d 133, 415 Ill. 47, certiorari denied Glenn v. People of State of Ill., 74 S.Ct. 120, 346 U.S. 871, 98 L.Ed. 380—People v. Johnson, 103 N.E.2d 479, 411 Ill. 276, certiorari denied Johnson v. People of State of Ill., 72 S.Ct. 1045, 343 U.S. 951, 96 L.Ed. 1352—People v. Sceri, 95 N.E.2d 80, 407 Ill. 90—People v. West, 93 N.E.2d 370, 406 Ill. 249—People v. Priola, 70 N.E.2d 46, 395 Ill. 296—People v. Marmon, 59 N.E.2d 808, 389 Ill. 478, certiorari denied 66 S.Ct. 30, 326 U.S. 725, 90 L.Ed. 430, rehearing denied 66 S.Ct. 136, 326 U.S. 808, 90 L.Ed. 492—People v. Dustin, 52 N.E.2d 224, 385 Ill. 68—People v. Bara, 37 N.E.2d 344, 377 Ill. 591—People v. Rogers, 30 N.E.2d 77, 375 Ill. 54—People v. Champeau, 25 N.E.2d 798, 373 Ill. 235—People v. Westrup, 25 N.E.2d 16, 372 Ill. 517, certiorari denied Westrup v. People of State of Illinois, 60 S.Ct. 1089, 310 U.S. 642, 84 L.Ed. 1410—People v. Bimbo, 17 N.E.2d 573, 369 Ill. 618, certiorari denied Bimbo v. People of State of Illinois, 59 S.Ct. 365, 305 U.S. 661, 83 L.Ed. 429—People v. Angelica, 193 N.E. 606, 358 Ill. 621—People v. Shepard, 193 N.E. 447, 358 Ill. 338—People v. Blume, 178 N.E. 48, 345 Ill. 524—People v. Dore, 171 N.E. 554, 339 Ill. 415—People v. Golub, 165 N.E. 196, 333 Ill. 554—People v. Visconte, 158 N.E. 149, 326 Ill. 496—People v. Marek, 156 N.E. 772, 326 Ill. 11—People v. Laboda, 154 N.E. 446, 324 Ill. 21—People v. Harrington, 142 N.E. 246, 310 Ill. 613—People v. Novotny, 137 N.E. 394, 305 Ill. 549—People v. Shaw, 133 N.E. 208, 300 Ill. 451—People v. Robinson, 132 N.E. 803, 299 Ill. 617, error dismissed Robinson v. People of State of Illinois, 43 S.Ct. 163, 260 U.S. 756, 67 L.Ed. 498—People v. Davidson, 131 N.E. 640, 298 Ill. 455.

Mo.—State v. Weber, 298 S.W.2d 403.

Mont.—State v. Hale, 328 P.2d 930.

Okl.—Lazar v. State, 275 P.2d 1003,

appeal dismissed 75 S.Ct. 581, 349 U.S. 902, 99 L.Ed. 1240—Rucker v. State, 195 P.2d 299, 88 Okl.Cr. 15, rehearing denied 199 P.2d 221, 88 Okl.Cr. 15—Berryhill v. State, 3 P.2d 456, 52 Okl.Cr. 187.

Utah.—State v. Scott, 175 P.2d 1016, 111 Utah 9.

(5) For designedly and by false pretense obtaining the signature of a certain person to a promissory note.

Ark.—Karr v. State, 301 S.W.2d 442, 227 Ark. 777.

Iowa.—State v. La Vere, 191 N.W. 93, 194 Iowa 1373.

Ky.—Greenwell v. Commonwealth, 317 S.W.2d 859.

(6) For false pretenses in obtaining loan.

Ala.—Simmons v. State, 4 So.2d 903, 30 Ala.App. 211, certiorari denied, 4 So.2d 905, 242 Ala. 105.

Cal.—People v. Wynn, 112 P.2d 979, 44 C.A.2d 723—People v. Sewall, 265 P. 1040, 90 C.A. 476—People v. Boyd, 227 P. 783, 67 C.A. 292.

Fla.—Henson v. State, 192 So. 163, 140 Fla. 412.

Kan.—State v. Addington, 147 P.2d 367, 158 Kan. 276.

(7) For false pretenses in obtaining unemployment compensation.

Idaho.—State v. Barr, 117 P.2d 282, 63 Idaho 59.

(8) For false representation that property was not encumbered.

Cal.—People v. Talbott, 151 P.2d 317, 65 C.A.2d 654, certiorari denied 65 S.Ct. 677, 324 U.S. 845, 89 L.Ed. 1406.

Ga.—Beaty v. State, 79 S.E.2d 831, 89 Ga.App. 478—Oglesby v. State, 54 S.E.2d 331, 79 Ga.App. 771—McElmurray v. State, 192 S.E. 641, 56 Ga.App. 392.

N.J.—State v. Hubschman, 45 A.2d 316, 133 N.J.Law 520.

Pa.—Commonwealth v. Conroy, 167 A. 407, 109 Pa.Super. 274.

Tex.—Mount v. State, Cr., 317 S.W. 2d 212—Shatto v. State, 249 S.W. 2d 212, 157 Tex.Cr. 446—Crossland v. State, 109 S.W.2d 174, 133 Tex. Cr. 78.

Wash.—State v. Phillips, 253 P.2d 919, 42 Wash.2d 137.

(9) For false statements in application for a loan insured under National Housing Act.

U.S.—U. S. v. Uram, C.C.A.N.Y., 148 F.2d 187—U. S. v. Mellon, C.C.A.N.Y., 96 F.2d 462, certiorari denied Mellon v. U. S., 58 S.Ct. 1061, 304 U.S. 586, 82 L.Ed. 1547.

(10) For filing false claim.

Cal.—People v. Wilder, 287 P.2d 854, 135 C.A.2d 742.

Ind.—Shneider v. State, 40 N.E.2d 322, 220 Ind. 28—Nordyke v. State, 11 N.E.2d 165, 213 Ind. 243—Lund v. State, 190 N.E. 850, 207 Ind. 347.

Mo.—State v. Brickey, 152 S.W.2d 1055, 348 Mo. 248.

N.H.—State v. Story, 83 A.2d 142, 97 N.H. 141.

(11) For fraudulently representing another to be payee of check inducing bank to cash it.

Ga.—Lucas v. State, 144 S.E. 138, 38 Ga.App. 449.

(12) For issuing check without sufficient funds or credit.

Ala.—Holloway v. State, 88 So.2d 700, 38 Ala.App. 501—Nix v. State, 166 So. 716, 127 Ala.App. 94, certiorari denied 166 So. 719, 232 Ala. 53—Sealey v. State, 118 So. 232, 22 Ala. App. 600, reversed on other grounds 118 So. 233, 218 Ala. 167.

Ariz.—State v. Ellis, 189 P.2d 717, 67 Ariz. 7.

Ark.—Smith v. State, 174 S.W.2d 555, 206 Ark. 154—Guise v. State, 131 S.W.2d 631, 198 Ark. 767.

Cal.—People v. Adams, App., 340 P. 2d 677—People v. Harding, App., 340 P.2d 656—People v. Leon, 329 P.2d 996, 163 C.A.2d 791—People v. Choate, 321 P.2d 815, 157 C.A.2d 782—People v. Whisenhunt, 318 P. 2d 153, 155 C.A.2d 534—People v. Long, 313 P.2d 174, 152 C.A.2d 716—People v. Burgess, 305 P.2d 937, 147 C.A.2d 786—People v. Markos, 303 P.2d 363, 146 C.A.2d 82—People v. Lane, 300 P.2d 321, 144 C.A. 2d 87—People v. Pflug, 292 P.2d 286, 138 C.A.2d 538—People v. Montgomery, 287 P.2d 520, 135 C.A.2d 507—People v. Oster, 278 P. 2d 39, 129 C.A.2d 688—People v. Kennedy, 262 P.2d 24, 120 C.A.2d 793—People v. Payton, 246 P.2d 978, 112 C.A.2d 648—People v. Hutchinson, 245 P.2d 45, 111 C.A.2d 592—People v. Wheeler, 241 P.2d 276, 109 C.A.2d 714—People v. Bowen, 237 P.2d 318, 107 C.A.2d 558—People v. Porter, 222 P.2d 151, 99 C.A.2d 506—People v. Youders, 215 P.2d 743, 96 C.A.2d 562—People v. Ekberg, 211 P.2d 316, 94 C.A.2d 613, certiorari denied 70 S.Ct. 988, 339 U.S. 969, 94 L.Ed. 1377—People v. Bernstein, 199 P.2d 22, 88 C.A.2d 522—People v. Wellington, 193 P. 2d 30, 85 C.A.2d 310—People v. Brown, 165 P.2d 707, 72 C.A.2d 717—People v. Dunkin, 127 P.2d 291, 53 C.A.2d 99—People v. Silverman, 92 P.2d 507, 33 C.A.2d 1—People v. Larue, 83 P.2d 725, 28 C.A.2d 748—People v. Zimmer, 73 P.2d 923, 23 C.A.2d 581—People v. Rose, 48 P.2d 1009, 9 C.A.2d 174—People v. Bullock, 11 P.2d 441, 123 C.A. 299—People v. Thompson, 299 P. 821, 114 C.A. 258—People v. Cortze, 290 P. 1083, 108 C.A. 111—People v. Sherman, 280 P. 708, 100 C.A. 587—People v. Del Corro, 263 P. 548, 88 C.A. 403—People v. Alexander, 246 P. 147, 77 C.A. 231—People v. Freeman, 156 P. 994, 29 C.A. 543.

Fla.—Shargaa v. State, 84 So.2d 42—Grantham v. State, 90 So. 697, 83 Fla. 16.

Ga.—Gibson v. State, 48 S.E.2d 483,

- 77 Ga.App. 270—Minich v. State, 47 S.E.2d 920, 77 Ga.App. 157—Cannon v. State, 10 S.E.2d 74, 63 Ga.App. 73—Spivey v. State, 9 S.E. 2d 716, 62 Ga.App. 683—Owens v. State, 8 S.E.2d 662, 62 Ga.App. 521—Maples v. State, 158 S.E. 762, 43 Ga.App. 295—Dent v. State, 158 S.E. 62, 43 Ga.App. 153—Barfield v. State, 153 S.E. 433, 41 Ga.App. 476.
- Idaho.—State v. Sedam, 107 P.2d 1065, 62 Idaho 26.
- Ill.—People v. Stills, 23 N.E.2d 822, 302 Ill.App. 302.
- Ind.—Huffman v. State, 185 N.E. 131, 205 Ind. 75.
- Iowa.—State v. Lansman, 60 N.W. 2d 815, 245 Iowa 102—State v. Doudna, 284 N.W. 113, 226 Iowa 351—State v. McCutchan, 259 N.W. 23, 219 Iowa 1029.
- Kan.—State v. Morrow, 292 P.2d 1094, 179 Kan. 63—State v. Beam, 267 P. 2d 509, 175 Kan. 814—State v. Ferris, 84 P.2d 949, 148 Kan. 663.
- Ky.—Daily v. Commonwealth, 248 S.W.2d 425—Grisson v. Commonwealth, 203 S.W. 1075, 181 Ky. 189.
- Md.—Kaufman v. State, 85 A.2d 446, 199 Md. 35.
- Minn.—State v. Scott, 252 N.W. 225, 190 Minn. 462.
- Miss.—Blakeney v. State, 62 So.2d 313, 216 Miss. 211.
- Mo.—State v. Taylor, 73 S.W.2d 378, 235 Mo. 460, 95 A.L.R. 476.
- State v. Kaufman, App., 308 S.W.2d 333—State v. Moss, App., 94 S.W.2d 920.
- Neb.—White v. State, 280 N.W. 433, 135 Neb. 154—Lahners v. State, 223 N.W. 951, 118 Neb. 184.
- N.J.—State v. Goerdes, 137 A.2d 100, 48 N.J.Super. 293.
- State v. Cohen, 131 A. 675, 4 N.J.Misc. 59, affirmed 134 A. 919, 103 N.J.Law 205.
- Ohio.—State v. Stemen, 106 N.E.2d 662, 90 Ohio App. 309—Johns v. State, 163 N.E. 579, 30 Ohio App. 440.
- Okl.—Sharkey v. State, Cr., 329 P.2d 682—Stevens v. State, 124 P.2d 426, 74 Okl.Cr. 194—Armstrong v. State, 122 P.2d 823, 74 Okl.Cr. 42—Clark v. State, 91 P.2d 686, 66 Okl.Cr. 255—Hudlin v. State, 297 P. 818, 50 Okl.Cr. 320.
- Pa.—Commonwealth v. Bushkoff, 110 A.2d 834, 177 Pa.Super. 231.
- Commonwealth v. Mellinger, 17 Pa.Dist. & Co. 561, 80 Pittsb.Leg. J. 488, 43 Lanc.L.Rev. 263—Commonwealth v. Rogowski, 6 Pa.Dist. & Co. 628, 38 York Leg.Rec. 145, 73 Pittsb.Leg.J. 75, 6 Erie Co. 269, 23 Luz.Leg.Reg. 368.
- Tex.—Dooley v. State, 279 S.W.2d 872, 162 Tex.Cr. 11—Watson v. State, 229 S.W.2d 621, 154 Tex.Cr. 616—Coffee v. State, 184 S.W.2d 278, 148 Tex.Cr. 71—Bland v. State, 130 S.W.2d 292, 137 Tex.Cr. 486, rehearing denied 132 S.W.2d 274, 137 Tex.Cr. 486—Reed v. State, 118 S.W.2d 606, 135 Tex.Cr. 270—Harbin v. State, 60 S.W.2d 775, 124 Tex.Cr. 147—Watson v. State, 45 S.W.2d 1022, 119 Tex.Cr. 585—Noblitt v. State, 281 S.W. 1062, 103 Tex.Cr. 655.
- Utah.—State v. Prettyman, 191 P.2d 142, 113 Utah 36.
- Va.—Cook v. Commonwealth, 16 S.E. 2d 635, 178 Va. 251.
- 7 C.J. p 675 note 8 [e].
- (13) For issuing draft without sufficient funds or credit.
- Cal.—People v. Gorham, 66 P.2d 1241, 20 C.A.2d 406.
- Tex.—King v. State, Cr., 308 S.W.2d 40.
- (14) For making false statement to obtain credit.
- Minn.—State v. Eidsvold, 215 N.W. 206, 172 Minn. 208.
- Ohio.—State v. Kollar, App., 128 N.E.2d 669.
- Tenn.—Ownbey v. State, 253 S.W.2d 726, 194 Tenn. 500.
- (15) For misrepresentation as to agency for sale of property.
- S.D.—State v. Holland, 235 N.W. 609, 58 S.D. 205.
- (16) For misrepresentation as to motor number in sale of stolen automobile.
- Ga.—Diamond v. State, 182 S.E. 813, 52 Ga.App. 184.
- (17) For misrepresentation as to title of property sold.
- Cal.—People v. Nor Woods, 233 P.2d 897, 37 C.2d 584.
- W.Va.—State v. Lilly, 164 S.E. 242, 112 W.Va. 231.
- (18) For misrepresentation in sale of corporate stock.
- Kan.—State v. Lintner, 41 P.2d 1036, 141 Kan. 505—State v. Bell, 193 P. 373, 107 Kan. 707.
- Minn.—State v. Heffelfinger, 274 N.W. 234, 200 Minn. 268—State v. Hacker, 191 N.W. 37, 153 Minn. 538.
- Pa.—Commonwealth v. Ferguson, 95 Pa.Super. 153.
- (19) For misrepresentation in sale of trust interests.
- Cal.—People v. Ferguson, 24 P.2d 965, 133 C.A. 41.
- (20) For misrepresenting property sold.
- Cal.—People v. Bellew, 203 P.2d 822, 90 C.A.2d 801—People v. Shaffer, 101 P.2d 560, 38 C.A.2d 421—People v. Wilson, 20 P.2d 748, 130 C.A. 760.
- Ga.—DeLoach v. State, 14 S.E.2d 602, 65 Ga.App. 36.
- Mo.—State v. Hotenspiller, 224 S.W. 2d 1014, 359 Mo. 1031.
- (21) For obtaining money by false, bogus, or counterfeit check.
- Ariz.—Tate v. State, 106 P.2d 487, 56 Ariz. 194.
- Ga.—Zipperer v. State, 160 S.E. 103, 43 Ga.App. 783, followed in 161 S.E. 168, 44 Ga.App. 242.
- Mo.—State v. Polakoff, 237 S.W.2d 173, 361 Mo. 929.
- Ohio.—State v. Whitehead, 107 N.E. 2d 892, 91 Ohio App. 156.
- S.C.—State v. Jenkins, 72 S.E.2d 829, 222 S.C. 359.
- (22) For obtaining money by orders for goods given to induce purchase by victim from confederate.
- Mass.—Commonwealth v. Morrison, 147 N.E. 588, 252 Mass. 116.
- (23) For obtaining money of board of education by falsely representing to custodian of funds that a certain bill had been approved for payment.
- N.J.—State v. Zeek, 199 A. 713, 120 N.J.Law 322, affirmed 3 A.2d 574, 121 N.J.Law 584.
- (24) For obtaining the proceeds of a policy insuring the life of defendant by false representations to the insurance company that he was dead.
- Tex.—Cochrain v. State, 248 S.W. 43, 93 Tex.Cr. 483.
- (25) For passing fictitious check.
- Cal.—People v. Graff, 230 P.2d 654, 104 C.A.2d 32—People v. Menne, 41 P.2d 383, 4 C.A.2d 91—People v. Roche, 241 P. 279, 74 C.A. 556.
- Ga.—Sims v. State, 148 S.E. 769, 40 Ga.App. 10.
- Ill.—People v. Kosearas, 102 N.E.2d 534, 410 Ill. 456.
- (26) For presenting bogus bond to state board of loan commissioners for payment or redemption.
- N.M.—State v. Kelly, 202 P. 524, 27 N.M. 412, 21 A.L.R. 156.
- (27) For purchasing livestock with insufficient funds check.
- Tex.—Roe v. State, 157 S.W.2d 907, 143 Tex.Cr. 213—Roe v. State, 144 S.W.2d 1104, 140 Tex.Cr. 387.
- (28) For sale of property not owned.
- Ala.—Bright v. State, 34 So.2d 318, 33 Ala.App. 445.
- Ark.—Bruce v. State, 265 S.W.2d 956, 223 Ark. 357.
- Cal.—People v. Schmidt, 249 P. 832, 79 C.A. 413, rehearing denied 250 P. 1104, 79 C.A. 413.
- Ga.—Green v. State, 182 S.E. 74, 52 Ga.App. 18—Ray v. State, 149 S.E. 64, 40 Ga.App. 145.
- Okl.—Bopst v. State, 248 P.2d 658, 96 Okl.Cr. 28.
- Tex.—Young v. State, 151 S.W.2d 842, 142 Tex.Cr. 161—Gillette v. State, 49 S.W.2d 455, 120 Tex.Cr. 572.
- (29) For securing loan by mortgage or other lien on property not owned.
- Tex.—Hodges v. State, 135 S.W.2d 996, 138 Tex.Cr. 296—Walkup v. State, 25 S.W.2d 864, 114 Tex.Cr. 151.
- (30) Of an accomplice.
- Cal.—People v. Revley, 227 P. 957, 67 C.A. 553.

(31) Of grand theft as against contention that transaction was a loan.

Cal.—People v. Harrman, 104 P.2d 1063, 40 C.A.2d 487—People v. Harden, 58 P.2d 675, 14 C.A.2d 489.

(32) On counts charging falsification of corporate records and on other counts charging commission of grand theft.

Cal.—People v. Comstock, 305 P.2d 228, 147 C.A.2d 287.

(33) For an attempt to obtain money by false pretenses.

Cal.—People v. Von Hecht, 283 P.2d 764, 133 C.A.2d 25.

Ill.—People v. Mero, 122 N.E.2d 796, 4 Ill.2d 327.

Kan.—State v. Borserine, 337 P.2d 697, 184 Kan. 405.

N.J.—State v. Struck, 129 A.2d 910, 44 N.J.Super. 274.

Evidence held insufficient to sustain conviction

(1) Generally.

Ala.—Holloway v. State, 64 So.2d 115, 37 Ala.App. 96, certiorari denied 64 So.2d 121, 258 Ala. 558—McKee v. State, 164 So. 305, 26 Ala.App. 589—Pollock v. State, 97 So. 237, 19 Ala.App. 156, certiorari denied Ex parte State, 97 So. 240, 210 Ala. 69.

Ark.—James v. State, 236 S.W.2d 429, 218 Ark. 335—McLain v. State, 27 S.W.2d 518, 181 Ark. 730—Shaw v. State, 243 S.W. 859, 155 Ark. 10.

Cal.—People v. Ashley, 267 P.2d 271, 42 C.2d 246—People v. Werner, 105 P.2d 927, 16 C.2d 216.

People v. Andrews, App., 332 P.2d 408—People v. Comstock, 305 P.2d 228, 147 C.A.2d 287—People v. Gould, 270 P.2d 551, 125 C.A.2d 447—People v. Cravens, 180 P.2d 453, 79 C.A.2d 658—People v. Henderson, 179 P.2d 406, 79 C.A.2d 94—People v. Bellfuss, 138 P.2d 332, 59 C.A.2d 83, certiorari denied 64 S.Ct. 529, 321 U.S. 746, 88 L.Ed. 1048—People v. Selk, 115 P.2d 607, 46 C.A.2d 140—People v. Ferguson, 24 P.2d 965, 133 C.A. 41—People v. Leach, 290 P. 131, 106 C.A. 442, dismissed Leach v. People of State of California, 51 S.Ct. 646, 283 U.S. 808, 75 L.Ed. 1427.

People v. Chamness, 288 P. 20, 109 C.A., Supp., 778.

Fla.—Deese v. State, 173 So. 439, 127 Fla. 583—Braham v. State, 114 So. 781, 94 Fla. 918.

Ga.—Chandler v. State, 56 S.E.2d 794, 80 Ga.App. 550—Shackelford v. State, 47 S.E.2d 890, 77 Ga.App. 31—Still v. State, 22 S.E.2d 409, 68 Ga.App. 117.

Ind.—Crouch v. State, 97 N.E.2d 860, 229 Ind. 326.

Ky.—Sanson v. Commonwealth, 233 S.W.2d 258, 313 Ky. 631, 20 A.L.R. 2d 1262—Caldwell v. Commonwealth, 298 S.W. 681, 221 Ky. 232.

Mo.—State v. Bauman, 293 S.W.2d

389—State v. Herman, 162 S.W.2d 873.

Neb.—Hameyer v. State, 29 N.W.2d 458, 143 Neb. 798—Pettijohn v. State, 27 N.W.2d 380, 148 Neb. 336—Brennan v. State, 299 N.W. 525, 140 Neb. 277.

N.J.—State v. Devens, 138 A.2d 551, 48 N.J.Super. 539—State v. Struck, 129 A.2d 910, 44 N.J.Super. 274—State v. Mitchell, 117 A.2d 525, 37 N.J.Super. 425.

N.Y.—People v. Norman, 182 N.E. 676, 260 N.Y. 75.

People v. Kimmelblat, 269 N.Y.S. 108, 240 App.Div. 216.

N.C.—State v. Yancey, 45 S.E.2d 348, 228 N.C. 313.

Pa.—Commonwealth v. Evans, Quar. Sess., 72 Dauph.Co. 31—Commonwealth v. Turner, Quar.Sess., 41 Del.Co. 111, affirmed 107 A.2d 136, 176 Pa.Super. 32.

Tex.—McKinzie v. State, Cr., 320 S.W.2d 674—Beard v. State, 287 S.W.2d 667, 162 Tex.Cr. 509—Williams v. State, 211 S.W.2d 951, 152 Tex.Cr. 233—Ellis v. State, 200 S.W.2d 633, 150 Tex.Cr. 199—Parks v. State, 166 S.W.2d 704, 145 Tex.Cr. 150—Bond v. State, 136 S.W.2d 865, 138 Tex.Cr. 394—Rasbury v. State, 126 S.W.2d 972, 136 Tex.Cr. 506—Baum v. State, 111 S.W.2d 278, 133 Tex.Cr. 349—Brigham v. State, 17 S.W.2d 1073, 112 Tex.Cr. 477—Lamkin v. State, 260 S.W. 567, 97 Tex. Cr. 189.

Va.—Hubbard v. Commonwealth, 109 S.E.2d 100—Hagy v. Commonwealth, 190 S.E. 144, 168 Va. 663.

Wash.—State v. Polet, 258 P. 501, 144 Wash. 629.

25 C.J. p 650 note 42 [b].

(2) For defrauding by means of confidence game.

Colo.—Lane v. People, 257 P.2d 578, 127 Colo. 468.

Ill.—People v. Livermore, 60 N.E.2d 413, 390 Ill. 85—People v. Gair, 41 N.E.2d 502, 379 Ill. 458—People v. Riedel, 21 N.E.2d 735, 371 Ill. 561—People v. Burley, 192 N.E. 689, 357 Ill. 584—People v. Parker, 190 N.E. 318, 356 Ill. 138—People v. Sullivan, 182 N.E. 619, 349 Ill. 509—People v. Foshnacht, 166 N.E. 37, 334 Ill. 351—People v. Epstein, 163 N.E. 346, 332 Ill. 100—People v. Schneider, 158 N.E. 448, 327 Ill. 270—People v. Marek, 156 N.E. 772, 326 Ill. 11—People v. Heinsius, 149 N.E. 783, 319 Ill. 168—People v. Bischoff, 149 N.E. 756, 319 Ill. 262—People v. Poole, 141 N.E. 730, 310 Ill. 345.

Mont.—State v. Allen, 275 P.2d 200, 128 Mont. 306.

(3) For drawing draft without funds or credit.

Ga.—Spivey v. State, 13 S.E.2d 107, 64 Ga.App. 309—Spivey v. State, 11 S.E.2d 50, 63 Ga.App. 281—Spivey v. State, 8 S.E.2d 677, 62 Ga.App. 507

(4) For false representation that property was unencumbered.

Ga.—Daniel v. State, 10 S.E.2d 80, 63 Ga.App. 12.

(5) For false statement as to assets or liabilities for the purpose of procuring credit.

Minn.—State v. Eidsvold, 216 N.W. 316, 173 Minn. 23.

Wis.—Pepin v. State ex rel. Chambers, 259 N.W. 410, 217 Wis. 568.

(6) For giving encumbrance on property not owned.

Miss.—Lee v. State, 103 So. 366, 138 Miss. 705.

(7) For issuing check without sufficient funds or credit.

Colo.—Isaacs v. People, 247 P. 1061, 79 Colo. 654.

Ga.—Downs v. State, 107 S.E.2d 569, 99 Ga.App. 43—Crain v. State, 52 S.E.2d 577, 78 Ga.App. 806—Driskell v. State, 171 S.E. 389, 47 Ga. App. 741—White v. State, 110 S.E. 40, 27 Ga.App. 774—Neidlinger v. State, 88 S.E. 687, 17 Ga.App. 811.

Ind.—Nedderman v. State, 152 N.E. 800, 198 Ind. 187.

Minn.—State v. Billington, 36 N.W. 2d 393, 228 Minn. 79.

Mo.—State v. Robinson, 255 S.W.2d 811.

N.Y.—People v. Stand, 88 N.Y.S.2d 592, 275 App.Div. 153—People v. Evans, 281 N.Y.S. 153, 224 App. Div. 415.

N.C.—State v. Banks, 174 S.E. 306, 206 N.C. 479—State v. Franklin, 167 S.E. 569, 204 N.C. 157.

Ohio.—State v. Stemen, 106 N.E.2d 662, 90 Ohio App. 309.

Pa.—Commonwealth v. Massaro, 97 Pa.Super. 149—Commonwealth v. Rush & Harnett, 78 Pa.Super. 404.

Tex.—Goodwin v. State, Cr., 320 S.W.2d 852—Colin v. State, 168 S.W. 2d 500, 145 Tex.Cr. 371—Mayes v. State, 167 S.W.2d 745, 145 Tex.Cr. 295—Hearrean v. State, 146 S.W.2d 379, 140 Tex.Cr. 527—Baker v. State, 82 S.W.2d 677, 128 Tex.Cr. 509—Fortune v. State, 66 S.W.2d 304, 125 Tex.Cr. 11—Jones v. State, 59 S.W.2d 418, 123 Tex.Cr. 137—Parrott v. State, 5 S.W.2d 156, 109 Tex.Cr. 375—Pruitt v. State, 202 S.W. 81, 83 Tex.Cr. 148.

Utah.—State v. Trostad, 100 P.2d 564, 98 Utah 565.

Va.—Rosser v. Commonwealth, 66 S.E.2d 851, 192 Va. 813.

W.Va.—State v. Ambrogio, 138 S.E. 322, 103 W.Va. 594.

(8) For making false financial reports.

N.Y.—People v. Lebauer, 154 N.E. 617, 243 N.Y. 589.

(9) For misrepresentation in sale of property.

Ga.—Bird v. State, 14 S.E.2d 611, 65 Ga.App. 29—Ray v. State, 162 S.E. 861, 44 Ga.App. 763.

Mich.—People v. Widmayer, 251 N.W. 540, 265 Mich. 547.

to the safety of the person or the property of the citizen.⁷⁶

In general the testimony of a single witness may suffice as evidence on which to found a verdict.⁷⁷ Direct evidence is not necessary; circumstantial evidence is sufficient,⁷⁸ provided it excludes every reasonable hypothesis save that of accused's guilt.⁷⁹ It is not sufficient to prove accused guilty of such acts and fraudulent practices only as would subject him to liability in a civil action.⁸⁰ Under the general rule in criminal prosecutions as to the proof requisite to establish the corpus delicti, considered in

Criminal Law § 916 b, extrajudicial admissions, declarations, or confessions of accused are not of themselves sufficient to establish the essential elements of the offense.⁸¹ Evidence which shows only intent and preparation is insufficient to sustain a conviction for an attempt to obtain money by false pretenses.⁸²

On preliminary hearing. On the preliminary hearing the state, in order that accused may be legally bound over and held for trial, is not required to prove beyond a reasonable doubt that accused com-

(10) For sale of property not owned.

N.Y.—*People v. De Goode*, 196 N.Y. S. 418, 203 App.Div. 35, 40 N.Y.Cr. 145, affirmed 142 N.E. 305, 236 N.Y. 613.

Tex.—*Dunn v. State*, 114 S.W.2d 1177, 134 Tex.Cr. 150.

(11) For soliciting contributions for charitable purposes without authorization from corporation conducting hospital.

Pa.—*Commonwealth v. Goldberg*, 196 A. 538, 130 Pa.Super. 252.

Evidence held sufficient to show particular facts

(1) Identity of person committing crime.

Wash.—*State v. Peterson*, 186 P. 264, 109 Wash. 25, 8 A.L.R. 652.

(2) That money was lawful money of United States.

Ill.—*People v. Marek*, 156 N.E. 772, 326 Ill. 11.

(3) In a prosecution for drawing a check upon a banking corporation in which accused had insufficient funds, it is sufficient to prove the de facto existence of the banking corporation.

Cal.—*People v. Patterson*, 183 P. 209, 42 C.A. 37.

(4) In prosecution for obtaining third person's property by forged checks, drawees' corporate existence is sufficiently shown by testimony of cashier and of pay teller that drawees were banking corporations which, although in conservators' hands, were carrying trust deposits and paying checks drawn thereon.

Vt.—*State v. Conley*, 176 A. 300, 107 Vt. 72.

(5) In prosecution for checking on bank with insufficient funds, evidence established that check was returned because of insufficient funds in defendant's bank account even though check returned by bank was marked as drawn against uncollected funds.

Mo.—*State v. Kaufman*, App., 308 S.W.2d 333.

(6) Other facts.

Cal.—*People v. Barber*, App., 333 P.2d 777.

Evidence held insufficient to show particular facts

(1) To show drawer's lack of authority from drawee to draw drafts.

Ga.—*Elliott v. State*, 111 S.E. 63, 28 Ga.App. 334.

(2) To show that accused's wife offered to reimburse bank with which check was deposited, within twenty days after accused learned of dishonor.

Ky.—*Siegel v. Commonwealth*, 197 S.W. 809, 177 Ky. 232.

(3) To sustain allegation of information that check was delivered to named corporation.

Tex.—*Smith v. State*, Cr., 323 S.W.2d 441.

(4) To sustain conviction for obtaining money by false pretenses from Blue Shield, on theory that defendant misrepresented any facts in his service report to Blue Shield.

Pa.—*Commonwealth v. Litman*, 144 A.2d 592, 187 Pa.Super. 537.

(5) To show that check was inadvertently written on the wrong bank.

Kan.—*State v. Doyle*, 199 P.2d 164, 166 Kan. 5.

(6) In prosecution for giving check drawn on "Fidelity Trust Bank of Houston" without sufficient funds and with intent to defraud, evidence was insufficient to warrant an inference that "The Fidelity Bank and Trust," to which check was presented for payment and by which payment was refused, was the bank on which check was drawn.

Tex.—*Miller v. State*, Cr., 317 S.W.2d 542.

(7) Other facts.

Cal.—*People v. Benner*, 278 P.2d 18, 130 C.A.2d 67.

76. Colo.—*Morris v. People*, 35 P. 188, 4 Colo.App. 136.

77. Kan.—*State v. Barger*, 83 P.2d 648, 148 Kan. 590.

Corroboration as to making of pretense see infra subdivision b of this section.

Perjury corroboration rule inapplicable

U.S.—*Shayne v. U. S.*, C.A.Cal., 255 F.2d 739.

78. Cal.—*People v. Cook*, 303 P.2d 35, 146 C.A.2d 1.

Idaho.—*State v. Stevens*, 282 P. 93, 48 Idaho 335.

Ind.—*Nordyke v. State*, 11 N.E.2d 165, 213 Ind. 243.

Necessity for circumstantial evidence

Where direct evidence is available there is no need to resort to circumstantial evidence.

Tex.—*Taylor v. State*, 232 S.W. 525, 89 Tex.Cr. 618.

Conviction on general principles improper

In prosecution for larceny in collection of expense accounts under information containing twenty-two counts, conviction on counts as to which there was no direct evidence and on which jury apparently found defendant guilty on general principles after finding him guilty on other counts was unauthorized.

Wash.—*State v. Dodd*, 74 P.2d 497, 193 Wash. 26.

Concert of action

In prosecution for obtaining money by false pretenses, where accused was alleged to have acted with two others, concert of action in the consummation of the offense could be established by circumstantial evidence.

Mo.—*State v. Montgomery*, 116 S.W. 2d 72.

Evidence held insufficient

Circumstantial evidence was insufficient to sustain conviction of television repairman who allegedly cheated and swindled television set owner by placing parts which were not needed in the television set and making charges therefor to the owner.

Ga.—*Farris v. State*, 99 S.E.2d 911, 96 Ga.App. 320.

79. Ga.—*Haynie v. State*, 167 S.E. 612, 46 Ga.App. 310.

80. Ill.—*People v. Miller*, 176 N.E. 736, 344 Ill. 556.

81. Cal.—*People v. Ward*, 79 P. 448, 145 C. 736.

25 C.J. p 651 note 44.

82. Mont.—*State v. Tripp*, 199 P. 716, 60 Mont. 421.

mitted the offense complained of, but only that there is probable cause to believe that he did.⁸³

b. As to Pretense and Its Falsity

The proof must establish beyond a reasonable doubt

that the pretense was made, that it was made by accused, that it was false, and that it related to an existing or past fact.

The state must prove beyond a reasonable doubt that accused made the pretense,⁸⁴ and that it was

83. Kan.—State v. Gillen, 99 P.2d 832, 151 Kan. 359.

Evidence held sufficient to establish that instrument drawn without sufficient funds to pay therefor was a check.

Kan.—State v. Gillen, *supra*.

84. Ala.—Young v. State, 116 So. 709, 22 Ala.App. 443.

Cal.—People v. Rocha, 279 P.2d 836, 130 C.A.2d 656.

Mont.—State v. Brantingham, 212 P. 499, 66 Mont. 1.

N.J.—State v. Mitchell, 117 A.2d 525, 37 N.J.Super. 425.

N.Y.—People v. Brady, 249 N.Y.S. 715, 139 Misc. 597.
25 C.J. p 651 note 46.

Circumstantial or direct evidence

(1) Where direct evidence is available it is not necessary to resort to circumstantial evidence.

Tex.—Taylor v. State, 232 S.W. 525, 89 Tex.Cr. 618.

(2) Implied agreement to take postdated checks or to redeposit checks not paid when first presented avoids statute against issuing checks without sufficient funds, and may be shown by circumstances and course of conduct.

U.S.—Seaboard Oil Co. v. Cunningham, C.C.A.Fla., 51 F.2d 321, certiorari denied 52 S.Ct. 35, 284 U.S. 657, 76 L.Ed. 557.

Denial of memory

Denial of recollection of conversation in which alleged false representation was made was not denial that false representation was made.

Cal.—People v. Fisher, 2 P.2d 564, 116 C.A. 243.

Bad check as sufficient representation

In prosecution for swindling by giving check without sufficient funds or credit, it is not necessary for the state to prove that some false or fraudulent representation was made by accused, it being sufficient to show that he gave a check when without funds in the bank on which it was drawn and without good reason to believe that it would be paid.

Tex.—McGinty v. State, 245 S.W. 924, 93 Tex.Cr. 160.

Evidence held sufficient to show representation

(1) Generally.

Cal.—People v. Baird, 286 P.2d 832, 135 C.A.2d 109—People v. Bennett, 264 P.2d 664, 122 C.A.2d 244—People v. Andary, 261 P.2d 791, 120 C.A.2d 675—People v. Walker, 244 P. 94, 76 C.A. 192.

Colo.—Peiffer v. People, 107 P.2d 799, 106 Colo. 533.

Del.—State v. Pierson, 91 A.2d 541, 8 Terry 397.

Kan.—State v. Aiken, 254 P.2d 264, 174 Kan. 162.

N.M.—State v. Kelly, 202 P. 524, 27 N.M. 412, 21 A.L.R. 156.

Okl.—Reeves v. State, 96 P.2d 536, 68 Okl.Cr. 163—Bozarth v. State, 41 P.2d 924, 56 Okl.Cr. 424.

Tex.—Westover v. State, Cr., 322 S.W.2d 279—Snover v. State, 238 S.W. 919, 91 Tex.Cr. 269.

(2) That bonds offered for sale were genuine.

Mo.—State v. Bowdry, 145 S.W.2d 127, 346 Mo. 1090.

(3) That check signed by third person under fictitious name was good.

Iowa.—State v. Neuhart, 292 N.W. 791, 228 Iowa 1055.

(4) That property was free of encumbrances.

Iowa.—State v. Krittenbrink, 192 N.W. 157, 197 Iowa 968.

Minn.—State v. Anderson, 208 N.W. 415, 166 Minn. 453.

(5) That third person was fictitious.

Iowa.—State v. Neuhart, 292 N.W. 791, 228 Iowa 1055.

Evidence held insufficient to show representation

(1) Generally.

Cal.—People v. Walker, 231 P. 572, 69 C.A. 475.

Fla.—Scales v. State, 83 So.2d 17.

Ky.—Slaughter v. Commonwealth, 300 S.W. 619, 222 Ky. 225, 56 A.L.R. 1209.

Mo.—State v. Mullins, 237 S.W. 502, 292 Mo. 44.

Pa.—Commonwealth v. Goldberg, 196 A. 538, 130 Pa.Super. 252.

Tex.—McIlvain v. State, 239 S.W. 959, 91 Tex.Cr. 443.

(2) To show misrepresentation by broker to purchaser of price seller was to receive for property.

Cal.—People v. Davis, 30 P.2d 573, 137 C.A. 378.

(3) To show that bad check was issued with accused's knowledge and participation.

Miss.—Lovelace v. State, 2 So.2d 796, 191 Miss. 62.

Evidence held sufficient to show pretense was by accused

(1) Evidence held to establish accused's guilty connection with the fraud or pretense.

U.S.—U. S. v. Uram, C.C.A.N.Y., 148 F.2d 187.

Cal.—People v. Anderson, 94 P.2d 627, 35 C.A.2d 23—People v. Coffelt, 35 P.2d 374, 140 C.A. 444.

Ind.—Coppock v. State, 140 N.E.2d 102, 236 Ind. 341.

Mo.—State v. Samis, 246 S.W. 956, 296 Mo. 471.

(2) Evidence held to show that accused authorized misrepresentations.

Cal.—People v. Ferguson, 24 P.2d 965, 133 C.A. 41—People v. Moore, 256 P. 266, 82 C.A. 739.

N.M.—State v. Kelly, 202 P. 524, 27 N.M. 412, 21 A.L.R. 156.

(3) Evidence held to show that worthless check was issued or delivered by accused.

Cal.—People v. Fuller, 104 P.2d 109, 40 C.A.2d 18—People v. Schneider, 98 P.2d 215, 36 C.A.2d 292—People v. Kasch, 28 P.2d 936, 136 C.A. 585.

(4) In prosecution for making false claim for indemnity under fire insurance policy, evidence that allegedly false proof of loss was signed and sworn to by accused before insurance company's agent and left with the agent was sufficient to warrant finding that proof of loss was delivered to the insurance company by accused.

Or.—State v. Jaynes, 107 P.2d 528, 165 Or. 321.

(5) A truck owner charged with obtaining money from county by falsifying entries in time sheets regarding trucking service rendered to county was not entitled to be released from custody on ground that there was no proof of direct delivery of statements to county or of delivery of county's checks to him, where evidence justified finding that truck owner's time sheets were submitted to county employees and that truck owner retained amounts of checks after deducting amount he owed for wages to truck driver.

Wis.—State ex rel. Hull v. Larson, 277 N.W. 101, 226 Wis. 585.

Evidence held insufficient to show pretense was by accused

(1) Evidence held not to identify accused as the person who made the representation.

Tex.—McIlvain v. State, 239 S.W. 959, 91 Tex.Cr. 443.

(2) Evidence held not to show that accused authorized or consented to representations.

Mont.—State v. Woolsey, 259 P. 826, 80 Mont. 141.

(3) Evidence held not to show that accused signed or authorized the

false,⁸⁵ and, likewise, must prove beyond a reasonable doubt that it related to an existing or past

signing of a check which was issued without sufficient funds.

Pa.—Commonwealth v. Rush, 78 Pa. Super. 404.

(4) Evidence showing no false representation of facts by accused or with his knowledge or assistance held insufficient to support conviction under count charging grand theft in sale of stock.

Cal.—People v. Leach, 290 P. 131, 106 C.A. 442, dismissed Leach v. People of State of California, 51 S. Ct. 646, 283 U.S. 808, 75 L.Ed. 1427.

(5) Evidence that sheep dealer recommended by accused misrepresented sheep sold to complaining witness held insufficient to sustain conviction of accused for obtaining property by false pretenses.

Mo.—State v. Houchins, 46 S.W.2d 891.

(6) In a prosecution of a man and wife for obtaining property by false pretenses, evidence held insufficient to connect the husband with the fraudulent scheme in which his wife was engaged.

Mo.—State v. Samis, 246 S.W. 956, 296 Mo. 471.

(7) Evidence held insufficient to convict broker of obtaining property by confidence game, stocks being sold by salesman and broker making no representations.

Ill.—People v. Klapperich, 170 N.E. 202, 338 Ill. 406.

85. Cal.—People v. Potter, 265 P. 365, 90 C.A. 94.

Ind.—Anderson v. State, 32 N.E.2d 705, 218 Ind. 299.

Miss.—Button v. State, 42 So.2d 773, 207 Miss. 582.

Mont.—State v. Brantingham, 212 P. 499, 66 Mont. 1.

N.Y.—People v. Cohen, 167 N.Y.S.2d 371, 4 A.D.2d 557, amended on other grounds 172 N.Y.S.2d 575, 5 A.D.2d 958, motion denied 150 N.E.2d 718, 4 N.Y.2d 880, 174 N.Y.S.2d 251, and motion denied 185 N.Y.S.2d 248, 8 A.D.2d 587.

Va.—Hagy v. Commonwealth, 190 S. E. 144, 168 Va. 663.
25 C.J. p 651 note 47.

Evidence held sufficient to show falsity

(1) Generally.

Cal.—People v. Reed, 248 P.2d 510, 113 C.A.2d 339—People v. Chamberlain, 214 P.2d 600, 96 C.A.2d 178—People v. Cravens, 180 P.2d 453, 79 C.A.2d 658—People v. Harden, 58 P.2d 675, 14 C.A.2d 489—People v. Hall, 23 P.2d 783, 133 C.A. 40—People v. Fisher, 2 P.2d 564, 116 C.A. 243.

Iowa.—State v. Huckins, 234 N.W. 554, 212 Iowa 283.

Okl.—Reeves v. State, 96 P.2d 536 68 Okl.Cr. 163.

25 C.J. p 651 note 47 [b].

(2) Of representation as to cause of injuries for which suit was brought.

N.J.—State v. Harris, 187 A. 761, 14 N.J.Misc. 851, affirmed 191 A. 776, 118 N.J.Law 179.

(3) Of representation as to ownership of corporate stock.

Mont.—State v. Brantingham, 212 P. 499, 66 Mont. 1.

(4) Of representation as to ownership of property.

Tex.—Green v. State, 161 S.W.2d 114, 144 Tex.Cr. 186.

(5) Of representation as to property not being encumbered.

Minn.—State v. Anderson, 208 N.W. 415, 166 Minn. 453.

(6) Of representation as to use in tractors of gasoline for which claim was made for refund of motor fuel tax.

Tex.—Leitner v. State, 123 S.W.2d 664, 136 Tex.Cr. 103.

(7) Of representations as to value of corporate stock.

Cal.—People v. Murray, 261 P. 740, 87 C.A. 145.

(8) Of representations as to value of mine.

Cal.—People v. Allen, 118 P.2d 927, 47 C.A.2d 735.

(9) Of telegram shown prosecuting witness, even though it was not produced and the prosecution did not prove that no such telegram had been received at the telegraph office.

Mo.—State v. Smith, 252 S.W. 662.

Evidence held insufficient to show falsity

(1) Generally.

Ark.—Anderson v. State, 290 S.W.2d 846, 226 Ark. 498.

Cal.—People v. Potter, 265 P. 365, 90 C.A. 94.

Ga.—Kirkland v. State, 146 S.E. 327, 39 Ga.App. 137.

Ind.—Knopp v. State, 120 N.E.2d 268, 233 Ind. 435—Anderson v. State, 32 N.E.2d 705, 218 Ind. 299.

Iowa.—State v. George, 221 N.W. 344, 206 Iowa 826.

N.J.—State v. Lamoreaux, 102 A.2d 68, 29 N.J.Super. 204, affirmed 107 A.2d 729, 16 N.J. 167.

N.Y.—People v. Brady, 249 N.Y.S. 715, 139 Misc. 597.

Tex.—Hesbrook v. State, 194 S.W.2d 262, 149 Tex.Cr. 314—Hesbrook v. State, 194 S.W.2d 260, 149 Tex.Cr. 310—Baum v. State, 111 S.W.2d 278, 133 Tex.Cr. 349.

25 C.J. p 651 note 47 [c].

(2) Of representation as to condition of property.

Minn.—State v. Sack, 229 N.W. 801, 179 Minn. 502.

(3) Of representations as to earnings and dividend payments by corporation in which interest was sold.

Cal.—People v. White, 259 P. 76, 85 C.A. 241.

(4) Of representation as to value of property sold.

Cal.—People v. White, supra.

(5) Of accused's representations as to where he resided, owned, and kept his property.

Ala.—Prentice v. State, 139 So. 437, 24 Ala.App. 587.

Evidence as to particular matters

(1) Evidence held to show no funds or credit in bank.

Cal.—People v. Oliver, 2 P.2d 450, 115 C.A. 677—People v. Weaver, 274 P. 361, 96 C.A. 1—People v. Thal, 214 P. 296, 61 C.A. 48—People v. Hamby, 202 P. 907, 55 C.A. 37.

Tex.—Overall v. State, 128 S.W.2d 1194, 137 Tex.Cr. 303—James v. State, 269 S.W. 788, 99 Tex.Cr. 395—Prince v. State, 247 S.W. 863, 93 Tex.Cr. 230.

Wash.—State v. Stevens, 237 P. 723, 135 Wash. 361.

(2) Evidence held not to show insufficiency of funds or credit to pay check.

N.M.—State v. Thompson, 20 P.2d 1030, 37 N.M. 229.

Okl.—Kilgore v. State, 219 P. 160, 25 Okl.Cr. 69.

(3) Evidence held to show fictitious character of check.

Cal.—People v. Menne, 41 P.2d 383, 4 C.A.2d 91—People v. Roche, 241 P. 279, 74 C.A. 556—People v. Thal, 214 P. 296, 61 C.A. 48—People v. Hamby, 202 P. 907, 55 C.A. 37.

(4) Corpus delicti in prosecution for issuing fictitious checks is established by testimony that bank had no account under name used on checks.

Cal.—People v. Carmona, 251 P. 315, 80 C.A. 159.

(5) Evidence that cattle owner told state veterinarian he had claim on cattle did not authorize finding that commonwealth was notified that he was owner.

Mass.—Commonwealth v. Jacobson, 157 N.E. 583, 260 Mass. 311.

(6) Jury cannot find false pretenses as to book value of corporate stock in absence of proof of what book value was.

Pa.—Commonwealth v. Davidow, 86 Pa.Super. 434.

(7) Accused's representation that income of property involved in exchange was sufficient to meet carrying charges was substantially true.

fact.⁸⁶ Under some statutes, if the pretense is evidenced by a token or writing the token or writing is sufficient proof of the pretense,⁸⁷ but if the pretense was oral it must be proved by two witnesses or by one witness and corroborating circumstances.⁸⁸ The falsity of the pretense need not be

Minn.—State v. Sack, 229 N.W. 801, 179 Minn. 502.

86. Kan.—State v. Mathes, 196 P. 607, 108 Kan. 488.

Evidence held sufficient to show representation of past or existing fact

(1) Generally.

Cal.—People v. Reed, 248 P.2d 510, 113 C.A.2d 339—People v. Harden, 58 P.2d 675, 14 C.A.2d 489.

Idaho.—State v. Stevens, 282 P. 93, 48 Idaho 335.

Kan.—State v. Visco, 331 P.2d 318, 183 Kan. 562—State v. Mathes, 196 P. 607, 108 Kan. 488.

Me.—State v. Albee, 132 A.2d 559, 152 Me. 425.

Pa.—Commonwealth v. Daugherty, 84 Pa.Super. 319.

Commonwealth v. Evans, Quar. Sess., 72 Dauph.Co. 31.

(2) Of power to revoke license.

Mass.—Commonwealth v. Crowley, 154 N.E. 326, 257 Mass. 590.

(3) As against contention that purchases of trust interests were made through reliance on promises of future profits.

Cal.—People v. Ferguson, 24 P.2d 965, 133 C.A. 41.

(4) Where county official fraudulently read before county commissioners a blank bid for printing of election material as a bid for fixed sum and contract was awarded to person submitting blank bid, a false representation of an existing fact was made.

Pa.—Commonwealth v. Campbell, 176 A. 246, 116 Pa.Super. 180.

Evidence held insufficient to show representation as to past or existing fact

Mont.—State v. Woolsey, 259 P. 826, 80 Mont. 141.

As to future events

(1) Evidence of representations looking to the future alone is insufficient to sustain conviction.

Cal.—People v. Jackson, 74 P.2d 1085, 24 C.A.2d 182—People v. Reese, 29 P.2d 450, 136 C.A. 657.

(2) Evidence that named person parted with his property as result of false promises made by accused as to her future conduct was insufficient to warrant conviction for obtaining money under false pretenses.

Conn.—State v. Robington, 75 A.2d 394, 137 Conn. 140.

87. Cal.—People v. Andrews, App., 332 P.2d 408—People v. McCabe, 141 P.2d 54, 60 C.A. 492—People v. Beilfuss, 138 P.2d 332, 59 C.A.2d 83, certiorari denied 64 S.Ct. 529, 321 U.S. 746, 88 L.Ed. 1048—People v. Curran, 75 P.2d 1090, 24 C.A.

2d 673—People v. Walker, 231 P. 572, 69 C.A. 475.

Mont.—State v. Brantingham, 212 P. 499, 66 Mont. 1.

25 C.J. p 651 note 45 [a] (1).

Sufficiency of token or writing

(1) A memorandum in writing executed by accused, which served to carry out the false pretense, contained some statement thereof, and was based on the false pretense, is sufficient.

Cal.—People v. Payton, 96 P.2d 991, 36 C.A.2d 41.

(2) Receipted bill held sufficient.

Cal.—People v. Pearson, 231 P. 612, 69 C.A. 524.

(3) Deed executed by accused reciting that conveyance was made subject to mortgages totaling four thousand six hundred dollars was sufficient written evidence of false pretense that accused had reduced indebtedness against farm to four thousand six hundred dollars.

Okl.—Hawkins v. State, 32 P.2d 101, 55 Okl.Cr. 396.

(4) In prosecution for obtaining loans on wrecked automobiles which finance company did not inspect, conditional sales contracts, executed by accused, and chattel mortgages on wrecked automobiles were sufficient writing or memorandum to comply with requirements of statute.

Cal.—People v. Wynn, 112 P.2d 979, 44 C.A.2d 723.

(5) Box, in which accused pretended to place prosecuting witness' money, and contents found therein, when opened at bank after accused's departure, were held sufficient showing of false token, and entries on register of hotel, to which box was brought, sufficient showing of false writing.

Cal.—People v. Perrin, 227 P. 924, 67 C.A. 612.

(6) Other cases see 25 C.J. p 651 note 45 [a] (4).

88. Cal.—People v. Weitz, 267 P.2d 295, 42 C.2d 338, certiorari denied Weitz v. People of State of Cal., 74 S.Ct. 859, 347 U.S. 993, 98 L.Ed. 1126—People v. Ashley, 267 P.2d 271, 42 C.2d 246.

People v. Beilfuss, 138 P.2d 332, 59 C.A.2d 83, certiorari denied 64 S.Ct. 529, 321 U.S. 746, 88 L.Ed. 1048—People v. Leach, 290 P. 131, 106 C.A. 442, dismissed Leach v. People of State of California, 51 S.Ct. 646, 283 U.S. 808, 75 L.Ed. 1427—People v. Walker, 231 P. 572, 69 C.A. 475.

Idaho.—State v. Whitney, 254 P. 525, 43 Idaho 745.

Mont.—State v. Brantingham, 212 P. 499, 66 Mont. 1.

25 C.J. p 651 note 45 [a] (1).

Husband and wife as witnesses

In prosecution for grand theft on the theory of obtaining money by false pretenses, statutory requirement, that under certain circumstances the pretense must be proved by the testimony of two witnesses, was complied with when husband and wife testified as to the false pretenses, since husband and wife would be considered as two witnesses rather than as one witness.

Cal.—People v. Nesselth, 274 P.2d 479, 127 C.A.2d 712.

Corroboration required

(1) It is not required that the false pretenses be established by two witnesses.

Cal.—People v. La France, 82 P.2d 465, 28 C.A.2d 152.

(2) The corroborating circumstances may be proved by circumstantial evidence.

Cal.—People v. Murray, 261 P. 740, 87 C.A. 145.

(3) It is sufficient if the testimony of the person defrauded is satisfactorily corroborated by material circumstances.

Cal.—People v. Payton, 96 P.2d 991, 36 C.A.2d 41—People v. La France, 82 P.2d 465, 28 C.A.2d 152.

(4) All the circumstances connected with the transaction, the conduct of accused, and his declarations to other persons, may be looked to in order to furnish corroborative evidence.

Cal.—People v. Frankfort, 251 P.2d 401, 114 C.A.2d 680—People v. Knoke, 270 P. 468, 94 C.A. 55—People v. Harrington, 267 P. 942, 92 C.A. 245—People v. Murray, 261 P. 740, 87 C.A. 145—People v. Mace, 234 P. 841, 71 C.A. 10—People v. Helmlinger, 230 P. 675, 69 C.A. 139—People v. Wymer, 199 P. 815, 53 C.A. 204.

Idaho.—State v. Stevens, 282 P. 93, 48 Idaho 335.

(5) The corroboration may consist of statements made to others similar in character to the fraudulent ones relied on by the prosecuting witness.

Cal.—People v. Munson, 2 P.2d 227, 115 C.A. 694—People v. Helmlinger, 267 P. 942, 92 C.A. 245—People v. Whiteside, 208 P. 132, 58 C.A. 33.

(6) It is only the pretenses which must be corroborated.

Cal.—People v. Andrews, App., 332 P.2d 408—People v. Reinschreiber, 313 P.2d 890, 152 C.A.2d 750.

(7) Corroboration is not required to prove theft by trick and device.

proved by direct evidence, but may be established | by circumstantial evidence;⁸⁹ it is sufficient if the

Cal.—People v. Reinschreiber, 297 P. 2d 658, 141 C.A.2d 638.

Corroboration held sufficient

(1) Generally.

Cal.—People v. Pond, 284 P.2d 793, 44 C.2d 665—People v. Weitz, 267 P.2d 295, 42 C.2d 338, certiorari denied Weitz v. People of State of Cal., 74 S.Ct. 859, 347 U.S. 993, 98 L.Ed. 1126—People v. Ashley, 267 P.2d 271, 42 C.2d 246—People v. Jones, 224 P.2d 353, 36 C.2d 373.

People v. Andrews, App., 332 P.2d 408—People v. Reinschreiber, 313 P.2d 890, 152 C.A.2d 750—People v. Adams, 290 P.2d 944, 137 C.A.2d 660—People v. Pugh, 289 P.2d 826, 137 C.A.2d 226, appeal dismissed 77 S.Ct. 141, 352 U.S. 885, 1 L.Ed.2d 83—People v. Rocha, 279 P.2d 836, 130 C.A.2d 717—People v. Bennett, 264 P.2d 664, 122 C.A.2d 244—People v. Frankfort, 251 P.2d 401, 114 C.A.2d 680—People v. Reed, 248 P.2d 510, 113 C.A.2d 339—People v. Cheeley, 236 P.2d 22, 106 C.A.2d 748—People v. McCabe, 141 P.2d 54, 60 C.A.2d 492—People v. Brennan, 106 P.2d 36, 41 C.A.2d 143—People v. La France, 82 P.2d 465, 28 C.A.2d 152—People v. Kimball, 72 P.2d 157, 23 C.A.2d 32—People v. Ferguson, 24 P.2d 965, 133 C.A. 41—People v. Knocke, 270 P. 468, 94 C.A. 55—People v. Harrington, 267 P. 942, 92 C.A. 245—People v. Murray, 261 P. 740, 87 C.A. 145—People v. Raplee, 241 P. 892, 75 C.A. 38—People v. Pearson, 231 P. 612, 69 C.A. 524—People v. Helmlinger, 230 P. 675, 69 C.A. 139—People v. Wymer, 199 P. 815, 53 C.A. 204—People v. Haskins, 194 P. 43, 49 C.A. 640.

Idaho.—State v. Stevens, 282 P. 93, 48 Idaho 335.

Okl.—Booth v. State, 118 P.2d 274, 73 Okl.Cr. 85.

(2) Complaining witness is held corroborated by similar representation to another, accused's admissions, conduct in face of accusatory statements, and evasive, contradictory, and impeached testimony.

Cal.—People v. Fisher, 2 P.2d 564, 116 C.A. 243.

(3) Corroborative evidence need only tend to connect accused with offenses charged, and circumstances connected with transactions and the entire conduct of accused are proper matters for consideration of jury and may be looked to to furnish corroborative evidence.

Cal.—People v. Andrews, App., 332 P. 2d 408.

(4) Other cases see 25 C.J. p 651 note 45 [a] (3).

Corroboration held insufficient

(1) Generally.

Cal.—People v. Edwards, 24 P.2d 183, 133 C.A. 335.

(2) Where only evidence of representation was testimony of one witness.

Cal.—People v. Leach, 290 P. 131, 106 C.A. 442, dismissed Leach v. People of State of California, 51 S.Ct. 646, 283 U.S. 808, 75 L.Ed. 1427.

People v. Fawver, 77 P.2d 325, 29 C.A.2d, Supp., 775.

Mont.—State v. Brantingham, 212 P. 499, 66 Mont. 1.

Okl.—Lee v. State, 212 P. 142, 22 Okl.Cr. 452.

(3) Testimony of complaining witness is insufficiently corroborated by testimony of another witness which referred to a different transaction by accused.

Cal.—People v. Curran, 75 P.2d 1090, 24 C.A.2d 673.

(4) In prosecution for grand theft by obtaining money by false pretenses, in absence of showing that certain person, who might be expected to support accused's views, had knowledge that would have thrown light on whether representations had been made, accused's failure to call such person as a witness could not be considered corroboration of state's evidence as to the representations.

Cal.—People v. Ashley, 267 P.2d 271, 42 C.2d 246.

(5) Other cases see 25 C.J. p 651 note 45 [a] (2).

89. Cal.—People v. Beilfuss, 138 P. 2d 332, 59 C.A.2d 83, certiorari denied 64 S.Ct. 529, 321 U.S. 746, 88 L.Ed. 1048—People v. Perrin, 227 P. 924, 67 C.A. 612.

Idaho.—Corpus Juris quoted in State v. Stevens, 282 P. 93, 97, 48 Idaho 335.

Ill.—People v. Harrington, 142 N.E. 246, 310 Ill. 613.

Iowa.—State v. Huckins, 234 N.W. 554, 212 Iowa 283.

Mass.—Commonwealth v. Morrison, 147 N.E. 588, 252 Mass. 116.

Mont.—Corpus Juris cited in State v. Brantingham, 212 P. 499, 503, 66 Mont. 1.

N.J.—State v. Trypuc, 146 A.2d 503—State v. Lamoreaux, 80 A.2d 213, 13 N.J.Super. 99.

N.Y.—People v. Sloane, 4 N.Y.S.2d 784, 254 App.Div. 780, affirmed 18 N.E.2d 679, 279 N.Y. 724. 25 C.J. p 652 note 48.

Evidence considered

(1) All of the circumstances may be considered.

Cal.—People v. Perrin, 227 P. 924, 67 C.A. 612.

(2) The acts of accused at the time of, and following the commission of, the offense may constitute proof of the falsity of the representations.

Cal.—People v. Perrin, supra.

(3) Formal presentation of check to bank is not necessary to establish want of funds or that check will not be paid, since it may be shown by more direct testimony.

Wash.—State v. Stevens, 237 P. 723, 135 Wash. 361.

Prima facie evidence

(1) Testimony that person whose name was signed to check had neither account nor credit with bank on which it was drawn is prima facie evidence of fictitious character of check.

Cal.—People v. Schneider, 98 P.2d 215, 36 C.A.2d 292—People v. Menne, 41 P.2d 383, 4 C.A.2d 91—People v. Roche, 241 P. 279, 74 C.A. 556—People v. Thal, 214 P. 296, 61 C.A. 48.

(2) Testimony of officer that person named as drawer of check could not be found in place where accused stated he lived, was held prima facie to establish that no person of that name existed.

Cal.—People v. Roche, 241 P. 279, 74 C.A. 556.

(3) Word "presentation," in statute, declaring return of check, not paid on presentation, prima facie evidence, means only presentation for payment to bank on which check was drawn.

Tex.—Fortune v. State, 66 S.W.2d 304, 125 Tex.Cr. 11.

(4) In prosecution for obtaining a county warrant payable to order of a certain party by false pretense that such party had sold or furnished lumber to the county or that county was indebted to such party for lumber, evidence presented by state tending to show that accused did falsely pretend to court of county commissioners that certain party had sold or furnished lumber to county or that county was indebted to such party for lumber in a certain amount or value, and by means of such false pretenses obtained from county a check or warrant drawn on the gasoline fund payable to order of such party, as charged in indictment, sufficiently made out a prima facie case against accused.

Ala.—Littlefield v. State, 63 So.2d 565, 36 Ala.App. 507, certiorari denied 63 So.2d 573, 258 Ala. 532.

Evidence held sufficient to support inference

(1) From the fact that a month after the making of the representation that an oil well derrick had been, or was being, erected on the land, there was no derrick thereon or evidence of the construction of one, the jury were entitled to infer that no erection had been made or commenced.

Cal.—People v. Woods, 213 P. 951, 190 C. 513.

evidence establish such facts as tend legitimately to show its falsity;⁹⁰ and since accused is usually in a position to know the truth or falsity of the representation, slight evidence of its falsity is sufficient for a conviction, in the absence of countervailing evidence of its truth.⁹¹

c. As to Intent to Defraud and Knowledge of Falsity

The intent to defraud and knowledge of the falsity of the pretense must be proved beyond a reasonable doubt, but they may be shown by circumstantial evidence.

The fraudulent intent of accused must be shown by the state beyond a reasonable doubt.⁹² It need

(2) Evidence that accused claiming car to have been stolen obtained license in another state on same make of car with same motor number warranted inference that car was not stolen.

Ark.—Knego v. State, 283 S.W. 27, 171 Ark. 58.

90. Cal.—People v. Walker, 231 P. 572, 69 C.A. 475—People v. Perrin, 227 P. 924, 67 C.A. 612.

Idaho.—*Corpus Juris* quoted in State v. Stevens, 282 P. 93, 97, 48 Idaho 335.

Mont.—*Corpus Juris* cited in State v. Brantingham, 212 P. 499, 503, 66 Mont. 1.

25 C.J. p 652 note 48.

Fair and natural tendency

The falsity of the alleged pretense or misrepresentation may be established by proof of any fact having a fair and natural tendency to prove that the alleged statements and representations were not true and that accused knew it.

Iowa.—State v. La Vere, 191 N.W. 93, 194 Iowa 1373.

Evidence held insufficient

Failure of accused to begin work on construction of house was not of itself evidence of the falsity of pretense, charged in indictment for obtaining money by false pretenses, that he had sufficient finances, materials, and labor available immediately to commence construction of house.

N.J.—State v. Lamoreaux, 80 A.2d 213, 13 N.J.Super. 99.

91. Idaho.—*Corpus Juris* quoted in State v. Stevens, 282 P. 93, 97, 48 Idaho 335.

Mont.—State v. Brantingham, 212 P. 499, 66 Mont. 1.

25 C.J. p 652 note 49.

92. Cal.—People v. Ashley, 267 P.2d 271, 42 C.2d 246.

Ga.—Cosby v. State, 64 S.E.2d 595, 83 Ga.App. 682.

Ill.—People v. West, 93 N.E.2d 370, 406 Ill. 249—People v. Heinsius, 149 N.E. 783, 319 Ill. 168—People v. Bischoff, 149 N.E. 756, 319 Ill. 262—People v. Massie, 142 N.E. 503, 311 Ill. 319.

La.—State v. Hendon, 128 So. 286, 170 La. 488.

Minn.—State v. Billington, 36 N.W.2d 393, 228 Minn. 79.

Neb.—Thompson v. State, 199 N.W. 806, 112 Neb. 389.

N.J.—State v. Devens, 138 A.2d 551, 48 N.J.Super. 539.

Tex.—Kuykendall v. State, 160 S.W. 2d 525, 143 Tex.Cr. 607.

Wash.—State v. O'Dell, 279 P.2d 1087, 46 Wash.2d 206.

Va.—Hagy v. Commonwealth, 190 S. E. 144, 168 Va. 663.

25 C.J. p 652 note 50.

Presumption of intent from issuance of check without sufficient funds see supra § 50.

Subject of evidence

Intent to defraud is the subject of evidence in same manner and to same extent, and depends on same general rules of procedure, as any other necessary fact in the case.

Cal.—People v. Oster, 278 P.2d 39, 129 C.A.2d 688—People v. Gaines, 234 P.2d 702, 106 C.A.2d 176.

Statutory presumption or prima facie case

(1) The jury are entitled to consider statutory presumption that the giving of a check, draft, or order, payment of which is refused by the drawee because of lack of funds or credit, shall be presumptive evidence of intent to defraud.

Neb.—Haines v. State, 281 N.W. 860, 135 Neb. 433.

(2) Presumption under statute, providing that fact that payment on check, draft, or written order when presented in usual course of business shall be refused by bank, person or corporation on which it is drawn, shall be material and competent evidence of lack of funds in prosecution under false check statute, may be overcome by showing that, without accused's knowledge, bank applied funds of defendant on some indebtedness owing to bank, or that his account had been sequestered by legal proceedings, or that a check or draft deposited by him had been unpaid and so charged back.

Iowa.—State v. Lansman, 60 N.W.2d 815, 245 Iowa 102.

(3) Statutory presumption is not rebutted by showing, either by state or by accused, that there were sufficient funds in bank to pay check at time it was written.

Iowa.—State v. Lansman, supra.

(4) Proof that accused gave another authority to deliver checks signed by accused to any seller as consideration for automobiles purchased jointly for accused and such other, and that bank on which checks were

drawn refused payment for insufficient funds, made out a prima facie case of intent to defraud under statute which in absence of other evidence, would authorize judge sitting without a jury to find accused guilty.

Ga.—Minich v. State, 47 S.E.2d 920, 77 Ga.App. 157.

(5) In prosecution for acquiring automobile with intent to defraud by giving check on a certain bank, where owner of automobile proved directly that accused had no account with bank on which check was drawn, and hence prosecution did not rely on presumptions arising by reason of nonpayment of check after presentation for payment, proof of presentment of check for payment was not required.

Tex.—Watson v. State, 229 S.W.2d 621, 154 Tex.Cr. 616.

Prima facie case not conclusive

Although statute makes delivery of check without sufficient funds prima facie evidence of intent to defraud, such prima facie evidence does not require verdict.

Ind.—Huffman v. State, 185 N.E. 131, 205 Ind. 75.

Proof necessary to make prima facie case

In prosecution for feloniously uttering a check with intent to defraud payee, in order to make a prima facie showing of fraudulent intent it is necessary for state to show that accused uttered the check and that he knew at the time that he had neither funds nor credit with the drawee to pay check in full.

Wyo.—State v. Posey, 314 P.2d 833.

General intent insufficient

Proof of general malice or general criminal intent is insufficient.

Iowa.—State v. Comes, 62 N.W.2d 753, 245 Iowa 485—State v. Huckins, 234 N.W. 554, 212 Iowa 283.

Time of intent

In prosecution for drawing check without sufficient funds in bank for payment thereof state must prove facts from which intent to defraud when check was given is deducible beyond reasonable doubt to justify conviction.

Tex.—Kuykendall v. State, 160 S.W. 2d 525, 143 Tex.Cr. 607.

Evidence held sufficient to show fraudulent intent

(1) Generally.

Cal.—People v. Jones, 224 P.2d 353, 36 C.2d 373.

not be proved by direct and positive evidence;⁹³ it | may be proved by circumstantial evidence,⁹⁴ but

People v. Rush, App., 341 P.2d 788—People v. Christenbery, App., 334 P.2d 978—People v. Rocha, 279 P.2d 836, 130 C.A.2d 656—People v. Weiss, 266 P.2d 924, 123 C.A.2d 487—People v. Frankfort, 251 P.2d 401, 114 C.A.2d 680—People v. Ryan, 230 P.2d 359, 103 C.A.2d 904—People v. Gordon, 163 P.2d 110, 71 C.A.2d 606.

People v. Armstrong, 224 P.2d 490, 100 C.A.2d Supp. 852. Ill.—People v. Glenn, 112 N.E.2d 133, 415 Ill. 47, certiorari denied Glenn v. People of State of Ill., 74 S.Ct. 120, 346 U.S. 871, 98 L.Ed. 380. Miss.—Hinman v. State, 176 So. 264, 179 Miss. 503.

Ohio.—State v. Singleton, 87 N.E.2d 358, 85 Ohio App. 245.

Okl.—Reeves v. State, 96 P.2d 536, 68 Okl.Cr. 163.

Tex.—Wade v. State, 275 S.W.2d 665, 161 Tex.Cr. 195.

Utah.—State v. Scott, 175 P.2d 1016, 111 Utah 9.

Wash.—State v. Cormier, 209 P. 674, 121 Wash. 554.

Wis.—State ex rel. Hull v. Larson, 277 N.W. 101, 226 Wis. 585.

25 C.J. p 652 note 50 [a].

(2) In false representation that property was free of encumbrances. Minn.—State v. Anderson, 208 N.W. 415, 166 Minn. 453.

(3) In issuance of check without sufficient funds or credit.

U.S.—Kite v. U. S., C.A.Va., 216 F.2d 802.

Ariz.—State v. Wilson, 325 P.2d 416, 84 Ariz. 165.

Ark.—Smith v. State, 174 S.W.2d 555, 206 Ark. 154.

Cal.—People v. Roberts, App., 334 P.2d 164—People v. Stein, 320 P.2d 519, 157 C.A.2d 259—People v. Watts, 272 P.2d 814, 126 C.A.2d 659—People v. Wheeler, 241 P.2d 276, 109 C.A.2d 714—People v. Boyce, 197 P.2d 842, 87 C.A.2d 828—People v. Schneider, 98 P.2d 215, 36 C.A.2d 292—People v. Payton, 44 P.2d 376, 6 C.A.2d 198—People v. Oliver, 2 P.2d 450, 115 C.A. 677—People v. Weaver, 274 P. 361, 96 C.A. 1.

Idaho.—State v. Davis, 336 P.2d 692—State v. Eikelberger, 239 P.2d 1069, 72 Idaho 245, 29 A.L.R.2d 1176.

Miss.—Russell v. State, 169 So. 654, 176 Miss. 853.

Okl.—Loughridge v. State, 72 P.2d 513, 63 Okl.Cr. 33.

Tenn.—Jones v. State, 277 S.W.2d 371, 197 Tenn. 667.

Tex.—Bradshaw v. State, 235 S.W.2d 148, 155 Tex.Cr. 345.

(4) In issuance of fictitious check. Cal.—People v. Hamby, 202 P. 907, 55 C.A. 37.

(5) In securing allowance of false claim. Ariz.—Harris v. State, 17 P.2d 1098, 41 Ariz. 311.

Evidence held insufficient to show fraudulent intent

(1) Generally.

Cal.—People v. Christenbery, App., 334 P.2d 978.

Ill.—People v. Heinsius, 149 N.E. 783, 319 Ill. 168.

Iowa.—State v. Comes, 62 N.W.2d 753, 245 Iowa 485.

Neb.—Thompson v. State, 199 N.W. 806, 112 Neb. 389.

N.J.—State v. Trypuc, 146 A.2d 503.

Tex.—Arnwine v. State, Cr., 320 S. W.2d 813, 154 Tex.Cr. 380.

25 C.J. p 652 note 50 [b].

(2) In issuing check without sufficient funds or credit.

Ala.—Caughlan v. State, 114 So. 280, 22 Ala.App. 220.

Cal.—People v. Griffith, 262 P.2d 355, 120 C.A.2d 873.

Del.—State v. Vandenburg, 2 A.2d 916, 9 W.W.Harr. 498.

Ga.—Berry v. State, 111 S.E. 669, 153 Ga. 169.

Thompson v. State, 69 S.E.2d 206, 85 Ga.App. 298—Meena v. State, 17 S.E.2d 86, 66 Ga.App. 99.

Md.—Willis v. State, 106 A.2d 85, 205 Md. 118.

Mo.—State v. Robinson, 255 S.W.2d 811—State v. Mullins, 237 S.W. 502, 292 Mo. 44.

N.Y.—People v. Weiss, 189 N.E. 686, 263 N.Y. 537.

People v. Nibur, 264 N.Y.S. 148, 238 App.Div. 233—People v. Hasto, 260 N.Y.S. 97, 236 App.Div. 533—People v. Humphries, 234 N.Y.S. 688, 226 App.Div. 500.

Okl.—Hudlin v. State, 297 P. 818, 50 Okl.Cr. 320.

Tenn.—Jones v. State, 277 S.W.2d 371, 197 Tenn. 667.

Tex.—Miller v. State, Cr., 317 S.W. 2d 542—Thompson v. State, Cr., 308 S.W.2d 512—Moody v. State, 213 S. W.2d 539, 152 Tex.Cr. 265—Colin v. State, 168 S.W.2d 500, 145 Tex.Cr. 371—Jones v. State, 59 S.W.2d 418, 123 Tex.Cr. 137—Jarvis v. State, 53 S.W.2d 475, 122 Tex.Cr. 17—Morrow v. State, 31 S.W.2d 636, 116 Tex.Cr. 605—Clark v. State, 277 S. W. 132, 102 Tex.Cr. 88.

Wyo.—State v. Posey, 314 P.2d 833.

(3) In issuing draft without sufficient funds or credit.

Ga.—Spivey v. State, 13 S.E.2d 107, 64 Ga.App. 309.

(4) In procuring execution of chattel mortgage.

Iowa.—State v. Steckel, 200 N.W. 235, 198 Iowa 759.

(5) In procuring loan.

Ill.—People v. Kratz, 142 N.E. 561, 311 Ill. 118.

(6) In representation as to ownership of property mortgaged as security.

Iowa.—State v. George, 221 N.W. 344, 206 Iowa 826.

(7) In sale of mortgage.

Ohio.—Reeves v. State, 155 N.E. 649, 116 Ohio St. 111.

(8) In sale of oil stock.

Ill.—People v. Massie, 142 N.E. 503, 311 Ill. 319.

(9) In prosecution for drawing check without sufficient funds in bank for payment thereof, in absence of affirmative evidence that accused's bank account was not reduced or depleted by payment of checks drawn after alleged bad check was given. Tex.—Kuykendall v. State, 160 S.W. 2d 525, 143 Tex.Cr. 607.

(10) Accused contracting to sell land as unencumbered, without disclosing that mortgage had been foreclosed and period of redemption was about to expire, is not guilty of larceny by false pretenses, if when he procured first payment he hoped and in good faith intended to use money, with other expected income to make good title in time for conveyance, however groundless his expectations were.

Minn.—State v. Monson, 210 N.W. 108, 168 Minn. 381.

93. Wis.—State ex rel. Brill v. Spieker, 72 N.W.2d 906, 271 Wis. 237—State v. Hintz, 229 N.W. 54, 200 Wis. 636.

Persuasive evidence

Although notice of nonpayment of a check is not essential to prosecution for delivering a check with intent to defraud, in all cases, and prosecution might be had prior to expiration of ten days after such a notice, fact that the statute allows a period of ten days following notice of nonpayment of a check for maker to pay holder amount due in order for delivery of check and nonpayment to be prima facie evidence of intent to defraud and of knowledge of insufficient funds, is persuasive in determining sufficiency of evidence to sustain a conviction.

Tex.—Thompson v. State, Cr., 308 S.W.2d 512.

94. Cal.—People v. Adams, App., 340 P.2d 677—People v. Harding, App., 340 P.2d 656—People v. Roberts, App., 334 P.2d 164—People v. Leon, 329 P.2d 996, 163 C.A.2d 791—People v. Croxton, 327 P.2d 611, 162 C.A.2d 187—People v. Markos, 303 P.2d 363, 146 C.A.2d 82—People v. Lane, 300 P.2d 321, 144 C.A.2d 87—

where the evidence as to intent is wholly circumstantial it must be sufficient to exclude every reasonable hypothesis save that of guilt in order to authorize conviction.⁹⁵

Lack of intent is not shown by evidence that ac-

cused intended to apply the money and in fact applied it to the object for which it was given.⁹⁶ Accused's knowledge of the falsity of the pretense must be established beyond any other reasonable hypothesis.⁹⁷ Such knowledge may be shown by

People v. Oster, 278 P.2d 39, 129 C.A.2d 688—People v. Weiss, 266 P.2d 924, 123 C.A.2d 487—People v. Henderson, 179 P.2d 406, 79 C.A.2d 94—People v. Brown, 165 P.2d 707, 73 C.A.2d 717—People v. Dunkin, 127 P.2d 291, 53 C.A.2d 99.

Ill.—People v. Blume, 178 N.E. 48, 345 Ill. 524.

Iowa.—State v. Comes, 62 N.W.2d 753, 245 Iowa 485—State v. Huckins, 234 N.W. 554, 212 Iowa 283—State v. La Vere, 191 N.W. 93, 194 Iowa 1373.

La.—State v. Wilson, 125 So. 854, 169 La. 684.

Mo.—State v. Scott, 230 S.W.2d 764. Neb.—Haines v. State, 281 N.W. 860, 135 Neb. 433—White v. State, 230 N.W. 433, 135 Neb. 154.

Wash.—State v. O'Dell, 279 P.2d 1087, 46 Wash. 206—State v. Peterson, 70 P.2d 306, 190 Wash. 668.

Wis.—State ex rel. Brill v. Spieker, 72 N.W.2d 906, 271 Wis. 237—State ex rel. Hull v. Larson, 277 N.W. 101, 226 Wis. 585.

25 C.J. p 652 note 51.

As of what time

Circumstances prior to, after, and at time of transaction are to be considered in determining intent of accused.

Tex.—Hoovel v. State, 69 S.W.2d 104, 125 Tex.Cr. 545.

Determined from all evidence

(1) Intent is to be determined on all the facts and circumstances disclosed by the evidence.

Cal.—People v. Rose, 48 P.2d 1009, 9 C.A.2d 174.

Wis.—State v. Hintz, 229 N.W. 54, 200 Wis. 636.

25 C.J. p 643 note 96.

(2) Intent may be inferred from the facts and circumstances disclosed by the evidence.

Cal.—People v. Rose, 48 P.2d 1009, 9 C.A.2d 174.

Neb.—Haines v. State, 281 N.W. 860, 135 Neb. 433.

25 C.J. p 643 note 97.

(3) Gravamen of offense of passing worthless check is intent to defraud, which must be determined from all evidence adduced and submitted.

Ala.—Coggins v. State, 125 So. 201, 23 Ala.App. 332.

Inference from other elements of crime

(1) Proof of the other elements of the crime is sufficient to justify an inference that an intent to defraud existed.

Wis.—State v. Hintz, 229 N.W. 54, 200 Wis. 636.

(2) Intent to defraud may be inferred from the false representations. Wash.—State v. Peterson, 70 P.2d 306, 190 Wash. 668.

Evidence negating intent

In prosecution against mortgagor for obtaining money under false pretenses, evidence that he had cultivated the land and had paid existing mortgage, taxes, and drainage assessments thereon, together with interest on the loan, tended to negative but not to rebut completely the inference of intent to defraud arising from proof of the other elements of the crime.

Wis.—State v. Hintz, 229 N.W. 54, 200 Wis. 636.

Unqualified statement

Unqualified statement, for purpose of being acted on, of existence of fact is evidence of intent to defraud. Iowa.—State v. Huckins, 234 N.W. 554, 212 Iowa 283.

Evidence held insufficient

That Indianapolis grocer charged with having by false pretense obtained Center township trustee's signature to a certificate of correctness of a certain pretended claim in writing against township was friendly with trustee, had luncheon with him frequently, and saw him every day, required no imputation of fraud, particularly where trustee's own testimony as a witness for the state disclosed no acquaintance with any facts on which fraud was predicated. Ind.—Anderson v. State, 32 N.E.2d 705, 218 Ind. 299.

95. Ga.—State v. Ricks, 144 S.E. 137, 38 Ga.App. 370.

96. Mich.—People v. Lennox, 64 N.W. 488, 106 Mich. 625.

97. Ind.—Anderson v. State, 32 N.E. 2d 705, 218 Ind. 299.

Mo.—State v. Scott, 230 S.W.2d 764, 25 C.J. p 652 note 53.

Reasonable explanation must be overcome

In prosecution against county engineer for obtaining money by false pretenses by approving bridge contractor's excessive account, where accused was not required to know of his own knowledge what materials went into bridge and there was no direct evidence of his knowledge of falsity of account, accused's claim that he relied on written statement of foreman held reasonable, requiring such claim to be overcome by inconsistent circumstances.

S.D.—State v. Egbert, 258 N.W. 283, 63 S.D. 324.

Statutory presumption; prima facie evidence

(1) The jury are entitled to consider the statutory presumption that the giving of a check, draft, or order, payment of which is refused by the drawee because of lack of funds or credit, shall be presumptive evidence of knowledge of insufficient funds in, or credit with, such bank.

Neb.—Haines v. State, 281 N.W. 860, 135 Neb. 433.

(2) Under worthless check statute providing that introduction in evidence of any unpaid and dishonored check with drawee's refusal to pay stamped thereon shall be prima facie evidence of knowledge of insufficient funds in, or on credit with, such drawer, the prima facie presumption goes only to establish guilty knowledge and not corpus delicti of the crime.

Fla.—Shargaa v. State, 84 So.2d 42.

(3) Last portion of statutory provision that in prosecution as against maker or drawer of worthless check, the making, uttering, or delivering of check, payment of which is refused by drawee, because of lack of funds or credit, shall be prima facie evidence of intent to defraud, provided that maker or drawer shall not have paid the drawee thereof the amount due thereon, within five days after receiving notice that such check has not been paid by the drawee, has to do only with the evidence which is sufficient to make out a prima facie case of intent to defraud.

Mont.—State v. Zumwalt, 291 P.2d 257, 129 Mont. 529.

Presumption no substitute

Any presumption that in the ordinary course of banking business check drawn by accused and returned to payee unpaid had been presented to bank on which it was drawn and had been dishonored because accused had no funds in such bank could not be substituted for required proof that accused had no funds in bank on which check was drawn and knew that he had no funds in such bank. Mo.—State v. Scott, 230 S.W.2d 764.

Facts showing knowledge

(1) Refusal of drawee bank to pay check on account of insufficient funds is prima facie evidence of knowledge of insufficient funds.

Ala.—Padgett v. State, 131 So. 3, 24 Ala.App. 133.

(2) In prosecution under fraudulent

circumstances,⁹⁸ including the opportunities which accused had to ascertain the facts.⁹⁹ To overcome the statutory presumption of fraud arising from the dishonor of a check for lack of funds or credit the evidence must tend to negative the intentional giving of a bad check.¹

d. As to Reliance on Pretense

Reliance on the pretense must be established by sufficient evidence, either direct or circumstantial.

lent check act, condition of drawer's account when check is issued is not conclusive as to knowledge of sufficiency of funds in, or credit with, drawee bank.

Ind.—Huffman v. State, 185 N.E. 131, 205 Ind. 75.

(3) In prosecution under fraudulent check act, where accused had in drawee bank, on day check in question was drawn, funds in greater amount, prima facie case held not established until state introduced evidence of other checks showing accused knew that he had insufficient funds or credits with drawee.

Ind.—Huffman v. State, supra.

(4) Where accused obtained a load of lumber from injured party for which he gave a check which was not paid by bank as accused did not at the time have on deposit in bank sufficient funds with which to pay check, facts showed prima facie case of guilty of offense charged in indictment under hot check law.

Tex.—Tadlock v. State, 227 S.W.2d 545, 154 Tex.Cr. 434.

Evidence held sufficient to show knowledge

(1) Generally.

Cal.—People v. Ryan, 230 P.2d 359, 103 C.A.2d 904.

Idaho.—State v. So, 231 P.2d 734, 71 Idaho 324.

N.J.—State v. Pincus, 125 A.2d 420, 41 N.J.Super. 454.

(2) Of falsity of representations regarding corporate stock.

Cal.—People v. Lesser, 11 P.2d 668, 123 C.A. 489.

(3) Of falsity of representations regarding corporate stock which accused may have authorized his salesman to make.

Cal.—People v. Schwarz, 248 P. 990, 78 C.A. 561.

(4) Of falsity of representation as to cause of injuries for which suit was brought.

N.J.—State v. Harris, 187 A. 761, 14 N.J.Misc. 851, affirmed 191 A. 776, 118 N.J.Law 179.

(5) Of falsity of representation as to soundness of animal sold.

Tex.—Felton v. State, 127 S.W.2d 893, 137 Tex.Cr. 16.

(6) Of insufficiency of funds or credit to pay check.

Ark.—Mortensen v. State, 217 S.W.2d

325, 214 Ark. 528—Quillin v. State, 239 S.W.2d 5, 218 Ark. 878—Collier v. State, 40 S.W.2d 455, 183 Ark. 1057.

Cal.—People v. Yrigoyen, 286 P.2d 1, 45 C.2d 46.

People v. Arrellano, App., 325 P. 2d 1033—People v. Megladdery, 105 P.2d 385, 40 C.A.2d 643—People v. Schneider, 98 P.2d 215, 36 C.A.2d 292—People v. Weaver, 274 P. 361, 96 C.A. 1.

Fla.—Williams v. State, App., 105 So. 2d 505.

Idaho.—State v. Eikelberger, 230 P.2d 696, 71 Idaho 282.

Ind.—Borton v. State, 106 N.E.2d 392, 230 Ind. 679—Huffman v. State, 185 N.E. 131, 205 Ind. 75.

Mo.—State v. Blake, 309 S.W.2d 632. State v. Kaufman, App., 308 S.W. 2d 333.

Tex.—Gossett v. State, 282 S.W.2d 59, 162 Tex.Cr. 52—James v. State, 269 S.W. 788, 99 Tex.Cr. 395—Prince v. State, 247 S.W. 863, 93 Tex.Cr. 230.

(7) That bonds offered for sale were forged.

Mo.—State v. Bowdry, 145 S.W.2d 127, 346 Mo. 1090.

(8) In a prosecution for obtaining money by false pretenses, evidence held to warrant the jury in finding that accused had received from an insurance company a check in full settlement of the appraised loss on property before he induced the owner of the property to settle for a smaller sum by representations that if she did not take the smaller sum she would have to bring suit.

Mo.—State v. Smith, 252 S.W. 662.

Evidence held insufficient to show knowledge

(1) Generally.

Ind.—Anderson v. State, 32 N.E.2d 705, 218 Ind. 299.

Fla.—Scales v. State, 83 So.2d 17.

Miss.—King v. State, 86 So. 874, 124 Miss. 477.

Mo.—State v. Scott, 230 S.W.2d 764.

Pa.—Commonwealth v. Chappell, 7 Pa. Dist. & Co.2d 370, 18 Cambria 92.

Wash.—State v. O'Dell, 279 P.2d 1087, 46 Wash.2d 206.

(2) Of falsity of representation as to ownership of property mortgaged as security, under evidence showing two conflicting chains of title under overlapping abstracts.

Since reliance on the pretense is an essential element of the offense of obtaining property by false pretenses, considered supra § 22, the proof in each case must be sufficient to establish that the prosecutor relied on the pretense and that it was the effective cause of inducing him to part with his property;² it is not necessary that the fact of reliance on the pretense should be established by the

Iowa.—State v. George, 221 N.W. 344, 206 Iowa 826.

(3) Of falsity of representation as to value of mine.

Cal.—People v. Allen, 118 P.2d 927, 47 C.A.2d 735.

98. Cal.—People v. Adams, App., 340 P.2d 677—People v. Harding, App., 340 P.2d 656—People v. Dunkin, 127 P.2d 291, 53 C.A.2d 99—People v. Schwarz, 248 P. 990, 78 C.A. 561—People v. Roche, 241 P. 279, 74 C.A. 556.

Ga.—Ricks v. State, 84 S.E. 86, 15 Ga.App. 645.

Ind.—Lund v. State, 190 N.E. 850, 207 Ind. 347.

Iowa.—State v. Huckins, 234 N.W. 554, 212 Iowa 283.

Wash.—State v. O'Dell, 279 P.2d 1087, 46 Wash.2d 206.

Other transactions

Evidence of other similar transactions, especially when it is shown that accused had knowledge of the falsity of the claim in the other transaction, may be a sufficient circumstance, standing alone, to convince the jury that he had guilty knowledge concerning the claim in question.

Ind.—Lund v. State, 190 N.E. 850, 207 Ind. 347.

Unqualified statement

Unqualified statement, for purpose of being acted on, of existence of fact, is evidence of intent to be understood as speaking from own knowledge.

Iowa.—State v. Huckins, 234 N.W. 554, 212 Iowa 283.

99. Ga.—Ricks v. State, 84 S.E. 86, 15 Ga.App. 645.

1. Ala.—Elliott v. Caheen Bros., 153 So. 613, 228 Ala. 432.

Evidence required

The drawer of the check must show sufficient funds when check was drawn, ignorance or exhaustion of account, or such "credit" as to lead to bona fide and reasonable belief that check would be honored by way of overdraft.

Ala.—Elliott v. Caheen Bros., supra.

2. Ind.—Crouch v. State, 97 N.E.2d 860, 229 Ind. 326.

Mont.—State v. Brantingham, 212 P. 499, 66 Mont. 1.

direct evidence of the prosecutor himself,³ but it may be inferred from the other facts and circumstances established in the case.⁴

e. Accomplishment of Fraud; Extent of Loss; Ownership and Value of Property Obtained

When necessary to sustain a conviction of the offense charged, the evidence must be sufficient to establish beyond a reasonable doubt the accomplishment of the fraud, loss or injury to the person defrauded, a transfer of possession or title to the property involved, the obtaining

by the accused of at least a portion of the property involved, and the ownership and value of the property involved.

The commission of an actual fraud by means of the false pretenses charged must be shown by the state beyond a reasonable doubt.⁵ Although it is held in some jurisdictions that evidence is not insufficient to sustain a conviction because it fails to show that loss or damage was actually suffered by the prosecutor in the particular transaction involved,⁶ in others it is held that in order to sustain

Evidence held sufficient to show reliance on pretense

(1) Generally.
Cal.—People v. Jones, 224 P.2d 353, 36 C.2d 373.

People v. Andary, 261 P.2d 791, 120 C.A.2d 675—People v. Frankfort, 251 P.2d 401, 114 C.A.2d 680—People v. Cravens, 180 P.2d 453, 79 C.A.2d 658—People v. Alba, 117 P.2d 63, 46 C.A.2d 859—People v. Steffner, 227 P. 690, 67 C.A. 1.

Del.—State v. Pierson, 91 A.2d 541, 8 Terry 397.

Ga.—Deraney v. State, 198 S.E. 556, 58 Ga.App. 380.

Ind.—Harrod v. State, 161 N.E. 3, 200 Ind. 24—Gillespie v. State, 142 N.E. 220, 194 Ind. 154.

Kan.—State v. Handke, 340 P.2d 877. Mass.—Commonwealth v. Jacobson, 157 N.E. 583, 260 Mass. 311—Commonwealth v. Crowley, 154 N.E. 326, 257 Mass. 590.

Mo.—State v. Bowdry, 145 S.W.2d 127, 346 Mo. 1090.

Mont.—State v. Foot, 48 P.2d 1113, 100 Mont. 33.

N.D.—State v. Hastings, 41 N.W.2d 305, 77 N.D. 146.

Ohio.—Renner v. State, 153 N.E. 757, 22 Ohio App. 310.

Wis.—Corcott v. State, 190 N.W. 465, 178 Wis. 661.
25 C.J. p 653 note 58 [a].

(2) As to condition of corporation.
Cal.—People v. Coffelt, 35 P.2d 374, 140 C.A. 444.

(3) On check issued without sufficient funds or credit.
Ill.—People v. Westerdahl, 146 N.E. 737, 316 Ill. 86.

Miss.—Moore v. State, 38 So.2d 693, 205 Miss. 151.

(4) Accused could be convicted of obtaining money by false pretenses by which he induced insured to accept in settlement a smaller amount than the insurance company had paid, even though insured actually indorsed the draft of the insurance company for the payment, where she testified that accused presented several papers to her to sign to effect the settlement and she signed them without reading them.

Mo.—State v. Smith, 252 S.W. 662.

Evidence held insufficient to show reliance on pretense

(1) Generally.
Ala.—Primus v. State, 111 So. 194, 21 Ala.App. 630.

Cal.—People v. Schroeder, 281 P.2d 297, 132 C.A.2d 1—People v. Cale, 288 P. 430, 106 C.A. 777.

Ind.—McCann v. State, 128 N.E. 848, 189 Ind. 677.

Miss.—Breland v. State, 77 So.2d 300, 222 Miss. 792.

S.D.—State v. Lien, 30 N.W.2d 12, 72 S.D. 94.

25 C.J. p 653 note 58 [b].

(2) That accused was able and willing to pay for medical, nursing and hospital services.

Ga.—Davis v. State, 107 S.E. 883, 27 Ga.App. 195.

Fraudulently obtaining credit

Evidence held insufficient to sustain conviction for obtaining credit fraudulently, where it appeared loan was made in reliance on two personal cosigners on note rather than in reliance on statements in written application for loan.

Okl.—Oliver v. State, 130 P.2d 321, 75 Okl.Cr. 244.

Confidence game

(1) To justify conviction for practicing confidence game, proof must show that by means of false representations or other fraudulent means accused secured victim's confidence and thereby obtained his money, property, or credit.

Ill.—People v. Burley, 192 N.E. 689, 357 Ill. 584—People v. Sullivan, 182 N.E. 619, 349 Ill. 509.

(2) Under indictment charging confidence game, proof merely that accused is guilty of obtaining money by false pretenses does not sustain the charge. It must further appear that as an element of the transaction accused obtained the confidence of his victim or victims by some false representation or device and swindled them.

Ill.—People v. Schneider, 158 N.E. 448, 327 Ill. 270.

(3) Evidence held to show that in confidence game accused gained the confidence of his victim.

Ill.—People v. Krazik, 73 N.E.2d 297,

397 Ill. 202—People v. DeFelice, 33 N.E.2d 475, 376 Ill. 312.

(4) Evidence held insufficient.
Ill.—People v. Schachter, 198 N.E. 683, 361 Ill. 573—People v. Miller, 176 N.E. 736, 344 Ill. 556.

3. Cal.—People v. Schmidt, 305 P. 2d 215, 147 C.A.2d 222—People v. Adams, 290 P.2d 944, 132 C.A.2d 1—People v. Frankfort, 251 P.2d 401, 114 C.A.2d 680—People v. Gordon, 163 P.2d 110, 71 C.A. 606—People v. Perrin, 227 P. 924, 67 C.A. 612—People v. Steffner, 227 P. 690, 67 C.A. 1.

25 C.J. p 652 note 57.

Conclusiveness

In prosecution for false pretenses, prosecutor's testimony as to what induced him to part with money was not conclusive.

Pa.—Commonwealth v. Mann, 86 Pa. Super. 464.

4. Cal.—People v. Schmidt, 305 P.2d 215, 147 C.A.2d 222—People v. Adams, 290 P.2d 944, 132 C.A.2d 1—People v. Frankfort, 251 P.2d 401, 114 C.A.2d 680—People v. Gordon, 163 P.2d 110, 71 C.A.2d 606—People v. Perrin, 227 P. 924, 67 C.A. 612—People v. Steffner, 227 P. 690, 67 C.A. 1.

Wis.—Corcott v. State, 190 N.W. 465, 178 Wis. 661.

25 C.J. p 653 note 58.

Reliance on unindictable representation

Testimony by complaining witness that he paid money on representation that he could make large profits, which is not an indictable representation, held not to show him solely influenced by such representation, where other representations led him to expect large profits.

Cal.—People v. Walker, 244 P. 94, 76 C.A. 192.

5. Va.—Hagy v. Commonwealth, 190 S.E. 144, 168 Va. 663.

6. Cal.—People v. Wynn, 112 P.2d 979, 44 C.A.2d 723—People v. Fisher, 53 P.2d 769, 11 C.A.2d 232—People v. Oliver, 2 P.2d 450, 115 C.A. 677—People v. Sherman, 280 P. 708, 100 C.A. 587.

Iowa.—State v. La Vere, 191 N.W. 93, 194 Iowa 1373.

a conviction the evidence must show that the prosecuting witness was in fact defrauded, that he suffered loss.⁷

Dependent on whether a transfer of title is an essential element of the offense or if a transfer of possession only is sufficient, considered supra § 24, the evidence must establish beyond a reasonable doubt that the prosecuting witness parted with the title or the possession of the property of which he was defrauded.⁸

In conformity to whether a necessary element of

the offense charged is or is not the obtaining by accused of at least a portion of the property of which the prosecuting witness was defrauded, considered supra § 25, the proof must,⁹ or need not,¹⁰ be sufficient to satisfactorily establish that accused received at least a portion of such property. The fact of the obtaining of the property by accused may be proved by circumstantial evidence.¹¹

In the absence of evidence raising any question of ownership, proof that property was in possession of the prosecutor is sufficient proof of his owner-

Loss to prosecutor as element of crime see supra § 28.

7. Colo.—*Roberts v. People*, 205 P. 272, 71 Colo. 198.
Ga.—*Daniel v. State*, 10 S.E.2d 80, 63 Ga.App. 12.
Utah.—*State v. Morris*, 38 P.2d 1097, 85 Utah 210.

Evidence held to show loss

(1) In prosecution of city employee for obtaining money by false pretenses in making false entries for benefit of coal company, evidence held to sustain allegation as to amount of coal which city did not receive, but paid for because of such fraudulent entries.

Mo.—*State v. Rosenheim*, 261 S.W. 95, 303 Mo. 553.

(2) In prosecution for false accident claim loss was shown, although the claim was actually paid by the defrauded party's insurer, where it also appeared that payment of the claim increased premium rate of party at end of year.

Ga.—*Turnipseed v. State*, 185 S.E. 403, 53 Ga.App. 194.

(3) Evidence held to justify jury's conclusion that official of company cashing check drawn by accused, which official took up check when unpaid, was defrauded as charged.

N.J.—*State v. Parsons*, 140 A. 13, 6 N.J.Misc. 76, affirmed 142 A. 918, 105 N.J.Law 253.

(4) In a prosecution for obtaining property by a fraudulent brokerage business, evidence that the stock delivered by prosecuting witness to accused for sale by him was pledged immediately after its receipt for the use of accused, and that the prosecuting witness was never thereafter able to recover either the stock or its selling price, was sufficient to show that the prosecuting witness was defrauded by the fraudulent scheme, even though it was not shown when and how the stock was finally disposed of.

Wash.—*State v. Whitehouse*, 212 P. 1043, 123 Wash. 461.

Evidence held insufficient to show loss

Ga.—*Wilson v. State*, 67 S.E.2d 164,

84 Ga.App. 703—*Dinkins v. State*, 133 S.E. 272, 35 Ga.App. 394.
Utah.—*State v. Morris*, 38 P.2d 1097, 85 Utah 210.

8. Cal.—*People v. Jones*, 224 P.2d 353, 36 C.2d 373.

Iowa.—*State v. Reysa*, 199 N.W. 1000, 198 Iowa 496.

Prima facie evidence

In prosecution for obtaining money under false pretenses, evidence that the one to whom accused made alleged false pretenses gave accused a bank check, that check was indorsed by him, and that check was paid by bank and charged against account of one to whom pretenses were made, established prima facie that one to whom pretenses were allegedly made had parted with money.

Neb.—*Hameyer v. State*, 29 N.W.2d 458, 148 Neb. 798.

Transfer of possession

Evidence held sufficient to support conviction for crime of bunko-steering by enticing another by false pretense to part with money even though legal title was not transferred.

Ind.—*Popovich v. State*, 177 N.E. 458, 202 Ind. 630.

Transfer of title

(1) In prosecution for designedly and by false pretense obtaining signature to notes, evidence held to justify finding that prosecuting witness intentionally parted with title and ownership.

Iowa.—*State v. Reysa*, 199 N.W. 1000, 198 Iowa 496.

(2) In prosecution for false pretenses in sale of partnership interest, evidence that witness gave accused a certified check, but not until the partnership papers were executed, showed that he intended to pass title to the money represented by the check.

Cal.—*People v. Curran*, 75 P.2d 1090, 24 C.A.2d 673.

9. Fla.—*Smith v. State*, 98 So. 586, 86 Fla. 525.

Evidence held sufficient

Ill.—*People v. DeFelice*, 33 N.E.2d 475, 376 Ill. 312.

Miss.—*Martin v. State*, 26 So.2d 169, 200 Miss. 142.

Tex.—*Mount v. State*, Cr., 317 S.W. 2d 212—*Connelly v. State*, 252 S.W. 515, 94 Tex.Cr. 446.

Evidence held insufficient

(1) To show that accused received any part of the money of which the prosecuting witness was defrauded by the false pretenses.

Fla.—*Smith v. State*, 98 So. 586, 86 Fla. 525.

(2) Evidence failing to show appropriation of property held not to authorize conviction for theft by false pretense of property.

Tex.—*Black v. State*, 149 S.W.2d 968, 141 Tex.Cr. 468.

10. Tex.—*Overall v. State*, 128 S.W. 2d 1194, 137 Tex.Cr. 303.

Parting with title by prosecutor sufficient

(1) Evidence that accused purchased goods under guise of corporation and received them as on cash sale justified conviction of larceny by false pretenses as against contention that there was bona fide sale to corporation, resulting in passage of title thereto or retention of title by seller until payment, intent of seller to part with its title being sufficient.

Mass.—*Commonwealth v. Levine*, 181 N.E. 851, 280 Mass. 83.

(2) In prosecution for issuing non-fund check to clerk of district court inducing delivery to accused of certified copy of original petition and issuance of citation, accused's contention that facts failed to show offense charged because title to documents did not pass to him could not be sustained where clerk testified he was induced to part with title and possession of documents by worthless check given by accused.

Tex.—*Overall v. State*, 128 S.W.2d 1194, 137 Tex.Cr. 303.

11. Cal.—*People v. Harrington*, 267 P. 942, 92 C.A. 245.
25 C.J. p 653 note 59.

Evidence held sufficient to show transfer of title

Cal.—*People v. Harrington*, supra.

ship.¹² In a prosecution for securing by false pretenses a signature to a deed, oral testimony by the prosecuting witness that he and the other signers of the deed owned the land, which was admitted without objection, is sufficient proof of the title.¹³

In some jurisdictions, at least under certain cir-

cumstances, as where the amount involved or the value of the property obtained determines the character or degree of the crime, considered *supra* § 35, the value of the property obtained must be established by satisfactory evidence;¹⁴ and, where material, it may be established by circumstantial evidence.¹⁵

C. TRIAL, SENTENCE, AND PUNISHMENT

§ 53. Questions of Law and Fact

Questions of law are for the determination of the court and questions of fact are for the determination of the jury, or for the court where trial is without a jury, in prosecutions for obtaining property by false pretenses and in like prosecutions.

In accordance with the rule applicable in criminal cases generally, set forth in Criminal Law § 1118, questions of law are for the determination of

the court.¹⁶ It is for the court to decide as to sufficiency of the indictment,¹⁷ the materiality or necessity of a particular allegation in the indictment,¹⁸ and the legal effect of undisputed matters.¹⁹

In accordance with the rule applicable in criminal cases generally, set forth in Criminal Law § 1120, questions of fact are for the determination of the jury,²⁰ or for the court when it sits without a

12. Mo.—State v. Starr, 148 S.W. 862, 244 Mo. 161.
25 C.J. p 653 note 60.

13. Or.—State v. Hammer, 145 P. 35, 74 Or. 426.

14. Cal.—People v. Leach, 290 P. 131, 106 C.A. 442, dismissed Leach v. People of State of California, 51 S.Ct. 646, 283 U.S. 808, 75 L.Ed. 1427.

Evidence of debt

(1) In some jurisdictions it is held in accordance with express statutory provisions so providing that if the thing stolen consists of any evidence of debt, or other written instrument, the amount of money due thereon, or secured to be paid thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, is the value of the thing stolen.

Cal.—People v. Leach, *supra*.

(2) In swindling prosecution for obtaining note by false representations, evidence held insufficient to prove value of note.

Tex.—Williams v. State, 43 S.W.2d 935, 119 Tex.Cr. 587.

Value of money

(1) When the object of the fraudulent representation is to acquire a sum of money, the presumption will be indulged, in the absence of averment to the contrary, that by the term money is meant United States money, and that under such circumstances no proof of the value of the money is required further than to designate the sum in dollars and cents.

Tex.—Raymond v. State, 33 S.W.2d 192, 116 Tex.Cr. 595.

(2) Proof that accused procured by means of fraud the sum of three hundred dollars in money, established fact that the "money" was circu-

lating medium of the United States of that specified value.

Cal.—People v. Alba, 117 P.2d 63, 46 C.A.2d 859.

(3) Evidence that the money obtained was accepted by accused at the full value was sufficient to establish that it was of that actual value.

Cal.—People v. Alba, *supra*.

Evidence of amount held sufficient

(1) Evidence that injured person parted with fifty dollars relying on accused's representations that he would get barrel of Coca-Cola, whereas he received water, sustained conviction for swindling, in absence of evidence that barrel was of any value to injured person or that he did in fact receive barrel, reducing loss to less than fifty dollars.

Tex.—Jones v. State, 72 S.W.2d 260, 126 Tex.Cr. 469.

(2) Where articles alleged to have been wrongfully obtained by false pretenses were ostensibly bona fide purchases at retail in usual course of business, *prima facie* their value was the price at which sale was made, and further identification of goods for purpose of establishing value was not necessary.

Mo.—State v. Michels, 255 S.W.2d 760.

Evidence held insufficient

Tex.—Hesbrook v. State, 202 S.W.2d 677, 150 Tex.Cr. 476.

15. Wis.—State v. Labuwi, 178 N.W. 479, 172 Wis. 204.

16. Cal.—People v. Fleshman, 148 P. 805, 26 C.A. 788.

Utah.—State v. Jenson, 280 P. 1046, 74 Utah 527.

25 C.J. p 653 note 65.

17. N.Y.—Smith v. People, 47 N.Y. 303.

18. Cal.—People v. Harrington, 267 P. 942, 92 C.A. 245.

19. Iowa.—State v. Chambers, 161 N.W. 470, 179 Iowa 436.

20. Ala.—Bonner v. State, 62 So. 337, 8 Ala.App. 236.

Cal.—People v. Wallin, 215 P.2d 1, 34 C.2d 777.

People v. Ames, 143 P.2d 92, 61 C.A.2d 522.

Iowa.—State v. Baker, 80 N.W.2d 749.

Mass.—Commonwealth v. Ries, 150 N.E.2d 527.

Mo.—State v. Green, 305 S.W.2d 863.

N.H.—State v. Story, 83 A.2d 142, 97 N.H. 141.

N.Y.—People v. Will, 46 N.E.2d 498, 289 N.Y. 413.

Ohio.—Williams v. State, 83 N.E. 802, 77 Ohio St. 468, 14 L.R.A., N.S., 1197.

Okl.—Bright v. State, 134 P.2d 150, 76 Okl.Cr. 67.

Pa.—Commonwealth v. Ludwig, Quar. Sess., 42 Berks Co. 244.

25 C.J. p 653 note 69.

What offense committed

In view of a statute providing that, whenever larceny, embezzlement, obtaining by false pretenses, or swindling is charged, a verdict of guilty of any one of these offenses is responsive, in a prosecution under an information charging embezzlement it was for the jury to determine whether the acts of accused, under the circumstances disclosed, constituted embezzlement, larceny, or obtaining by false pretenses, or swindling, under proper instructions by the court as to the law applicable. La.—State v. Ritchie, 136 So. 11, 172 La. 942.

Insanity of signer of check

Presenting to jury, in prosecution for issuing checks without sufficient funds, fact that accused's husband who signed check was insane, after

jury.²¹ It is usually the province of the jury to determine whether or not the representations or pretenses as charged were made²² by accused,^{22.5} whether they were false,²³ whether accused knew of their falsity,²⁴ whether accused honestly believed them to be true,^{24.5} whether they were made with intent to defraud,²⁵ and whether they were relied

on by the prosecutor so as to be the inducing cause of the transfer of the property.²⁶

It is usually held that whether the pretenses or representations were calculated to deceive is for the jury to determine,²⁷ unless they are in their nature so absurd and incredible that a conviction would not

court on voir dire examination had declared husband incompetent to testify, was not error, where husband's insanity was vital question in determining codefendant's guilt.
Cal.—People v. Monks, 24 P.2d 508, 133 C.A. 440.

Particular questions held for jury

(1) Whether date of fictitious check was changed, in determining whether check proved was check alleged in information.

Cal.—People v. Weaver, 274 P. 361, 96 C.A. 1.

(2) In prosecution for obtaining money under false pretenses when accused's agent drew worthless checks and remitted proceeds to his account in bank, whether employee was acting for accused and under his orders.

Ark.—Mortensen v. State, 217 S.W.2d 325, 214 Ark. 528.

(3) Whether accused had knowledge of condition of his bank account.

Idaho.—State v. Eikelberger, 230 P. 2d 696, 71 Idaho 282.

(4) When check allegedly issued without sufficient funds was in fact issued and whether there was any arrangement to hold check for a few days.

Idaho.—State v. Eikelberger, 239 P. 2d 1069, 72 Idaho 245, 29 A.L.R.2d 1176.

(5) Whether payee in usual course of business accepted check as a post-dated check or promised to hold it for a few days and rely on drawer's promise to pay in the future.

Idaho.—State v. Eikelberger, 239 P. 2d 1069, 72 Idaho 245, 29 A.L.R.2d 1176.

(6) Other matters see 25 C.J. p 653 note 69 [a].

21. U.S.—Kite v. U. S., C.A.Va., 216 F.2d 802.

Okl.—Armstrong v. State, 122 P.2d 823, 74 Okl.Cr. 42.

22. Mo.—State v. Keyes, 93 S.W. 801, 196 Mo. 136, 6 L.R.A.N.S., 369, 7 Ann.Cas. 23.

N.Y.—People v. Lehrer, 45 N.Y.S.2d 170, 182 Misc. 645.

Pa.—Commonwealth v. Rogers, Quar. Sess., 62 Dauph.Co. 426.

Tex.—Roe v. State, 144 S.W.2d 1104, 140 Tex.Cr. 387.

22.5 Kan.—State v. Visco, 331 P.2d 318, 183 Kan. 562.

23. Cal.—People v. Rocha, 279 P.2d

836, 130 C.A.2d 656—People v. Allen, 118 P.2d 927, 47 C.A.2d 735.

Mass.—Commonwealth v. Green, 94 N.E.2d 260, 326 Mass. 344.

25 C.J. p 653 note 71.

24. Cal.—People v. Henderson, 179 P.2d 406, 79 C.A.2d 94.

N.Y.—People v. Rosenfeld, 83 N.Y.S. 2d 691, 193 Misc. 277.

S.D.—State v. Pickus, 257 N.W. 284, 63 S.D. 209.

25 C.J. p 653 note 72.

Issuing bad check

(1) Question as to knowledge of insufficiency of funds was one of fact in prosecution for issuing a check against insufficient funds in violation of statute, notwithstanding check was for a past consideration.

Ohio.—State v. Lowenstein, 142 N.E. 897, 109 Ohio St. 393, 35 A.L.R. 361.

(2) Under worthless check statute, fact that checks were given in payment of antecedent debt did not destroy presumption of fraudulent intent, and evidence as to issuance of two checks which were dishonored for lack of sufficient funds established prima facie case authorizing submission of case to jury in absence of any evidence by accused on the point.

D.C.—Clarke v. U. S., Mun.App., 140 A.2d 181.

24.5 Mass.—Commonwealth v. Green, 94 N.E.2d 260, 326 Mass. 344.

25. Cal.—People v. Christenbery, App., 334 P.2d 978—People v. Roberts, App., 334 P.2d 164—People v. Andrews, App., 332 P.2d 408—People v. Leon, App., 329 P.2d 996, 163 C.A.2d 791—People v. Schmitt, 317 P.2d 673, 155 C.A.2d 87—People v. Otterman, 316 P.2d 85, 154 C.A.2d 193—People v. Frankfort, 251 P.2d 401, 114 C.A.2d 680—People v. Gordon, 163 P.2d 110, 71 C.A.2d 606—People v. Breitenstein, 296 P. 87, 111 C.A. 746—People v. Moore, 256 P. 266, 82 C.A. 739—People v. Ballard, 241 P. 596, 75 C.A. 29—People v. Boyd, 227 P. 783, 67 C.A. 292—People v. Flowers, 201 P. 468, 54 C.A. 214.

D.C.—Clarke v. U. S., C.A., 263 F.2d 269.

Kan.—State v. Addington, 147 P.2d 367, 158 Kan. 276.

Ky.—Sanson v. Commonwealth, 233 S.W.2d 258, 313 Ky. 631, 20 A.L.R. 2d 1262.

La.—State v. Ritchie, 136 So. 11, 172 La. 942.

Mo.—State v. Page, App., 186 S.W.2d 503.

Neb.—Potard v. State, 299 N.W. 362, 140 Neb. 116.

Ohio.—State v. Vice, Com.Pl., 70 N.E. 2d 125.

Tex.—Johnson v. State, 162 S.W.2d 980, 144 Tex.Cr. 392.

W.Va.—State v. Laskey, 7 S.E.2d 439, 122 W.Va. 93.

25 C.J. p 653 note 73.

Issuing, uttering, or depositing bad or fictitious check

Cal.—People v. Lane, 300 P.2d 321, 144 C.A.2d 87—People v. Oster, 278 P.2d 39, 129 C.A.2d 688—People v. Walker, 114 P. 1009, 15 C.A. 400.

Ohio.—State v. Lowenstein, 142 N.E. 897, 109 Ohio St. 393, 35 A.L.R. 361.

S.C.—State v. Sutton, 89 S.E.2d 874, 228 S.C. 314.

Wash.—State v. Lindsey, 61 P.2d 293, 187 Wash. 364, reversed on other grounds Lindsey v. State of Washington, 57 S.Ct. 797, 301 U.S. 397, 81 L.Ed. 1182.

7 C.J. p 675 note 10 [c].

Intention as to future obligation

In prosecution for offense of being a common cheat, question as to intention not to meet future obligation is question for jury.

R.I.—State v. McMahon, 140 A. 359, 49 R.I. 107.

26. Cal.—People v. Gordon, 163 P.2d 110, 71 C.A.2d 606.

Iowa.—State v. Carter, 83 N.W. 715, 112 Iowa 15.

N.Y.—People v. Rosenfeld, 83 N.Y.S. 2d 691, 193 Misc. 277—People v. Lehrer, 45 N.Y.S.2d 170, 182 Misc. 645.

N.D.—State v. Hastings, 41 N.W.2d 305, 77 N.D. 146—State v. Stewart, 83 N.W. 869, 9 N.D. 409.

25 C.J. p 653 note 74.

Meaning of testimony

The meaning of prosecuting witness' responses to questions on cross-examination as to his reliance on defendant's pretenses was question for determination by jury.

Neb.—Brennan v. State, 3 N.W.2d 217, 141 Neb. 205.

27. Ky.—Commonwealth v. Watson, 142 S.W. 200, 146 Ky. 83, Ann.Cas. 1913C 272.

N.D.—State v. Stewart, 83 N.W. 869, 9 N.D. 409.

25 C.J. p 654 note 75.

be sustained,²⁸ and there is authority for the view that, as a question of evidence, it is one of fact, but that, as a question of pleading, as, for example, on a motion to quash, the question is one of law,²⁹ but, according to some cases, the question is one of law for the court.³⁰ The materiality and influence of a false representation are questions for the jury,³¹ unless upon the face of the indictment the representation appears clearly to be immaterial.³²

It has been held or recognized that it is for the jury to determine what impression the words used by accused were intended to convey, and did convey,³³ and also whether certain representations were intended to be and were only statements of opinion or were statements of existing facts.³⁴ Under some circumstances, however, the question as to the meaning of the statement or representation and as to whether it constitutes a statement of fact or of opinion has apparently been regarded as one of law to be determined by the court,³⁵ and there is authority for the view that whether the representations made, as indicated by the evidence, are representations which are within the statute defining the offense, in view of the surrounding circumstances,

is a legal question which is to be determined by the court.³⁶

In a jurisdiction in which the jury are judges both of the law and of the facts, the view has been expressed that, where the indictment contains counts for obtaining money by false pretenses and counts for larceny, it is for the jury to determine, on the evidence adduced, of which offense, if either, accused is guilty.³⁷

Matters of evidence. In accordance with rules applicable in criminal cases generally, stated in Criminal Law §§ 1138, 1139, the trial court determines as a legal question whether the evidence is sufficient to authorize submission of the case to the jury for determination,³⁸ but, where it has been determined by the court that evidence is admissible and sufficient to go to the jury, the question as to its weight and sufficiency to establish the facts or issues is for the jury,³⁹ and this rule includes the determination of the credibility of witnesses.⁴⁰

Questions which are usually questions for the determination of the jury may and should be submitted to the jury where the pertinent evidence is conflicting,⁴¹ where different inferences may be drawn

Demurrer to indictment

Court will not determine on demurrer to indictment whether the alleged pretense was a sufficient inducement when the other requirements exist, except that it will determine whether the alleged pretense appears on its face to have been frivolous, and, therefore, incapable of inducing one to part with his property.
Ala.—Jones v. State, 182 So. 404, 236 Ala. 30.

28. N.D.—State v. Stewart, 83 N. W. 869, 9 N.D. 409.

29. Other statement

"It is not the policy of the law to punish as crimes mere civil wrongs, and there may be representations so utterly and palpably absurd that the court may decide as a matter of law that they could not deceive the most credulous."
Wis.—Palotta v. State, 199 N.W. 72, 74, 184 Wis. 290.

30. Ind.—State v. Burnett, 21 N.E. 972, 119 Ind. 392.

Mo.—State v. Starr, 148 S.W. 862, 244 Mo. 161—State v. Keyes, 93 S. W. 801, 196 Mo. 136, 6 L.R.A., N.S., 369, 7 Ann.Cas. 23.

31. Cal.—People v. Schmitt, 317 P.2d 673, 155 C.A.2d 87—People v. Martin, 314 P.2d 493, 153 C.A.2d 275.
N.Y.—People v. Cerrato, 165 N.Y.S. 694, 99 Misc. 256.
25 C.J. p 654 note 78.

32. N.Y.—People v. Peckens, 47 N. E. 883, 153 N.Y. 576.
People v. Cerrato, 165 N.Y.S. 694, 99 Misc. 256.

33. Iowa.—State v. Chambers, 161 N.W. 470, 179 Iowa 436.
Mich.—People v. Bagwell, 295 N.W. 207, 295 Mich. 412.

Wyo.—Martins v. State, 98 P. 709, 17 Wyo. 319, 22 L.R.A., N.S., 645.
25 C.J. p 654 note 80.

34. Colo.—People v. Martin, 240 P. 695, 78 Colo. 200.

Kan.—State v. Nash, 204 P. 736, 110 Kan. 550.

Me.—State v. Albee, 132 A.2d 559, 152 Me. 425.

Miss.—State v. Grady, 111 So. 148, 147 Miss. 446.
25 C.J. p 654 notes 78, 80.

35. Prosecution under statute as to false and misleading advertisements

N.Y.—People v. Clarke, 297 N.Y.S. 776, 252 App.Div. 122.

36. Mo.—State v. Keyes, 93 S.W. 801, 196 Mo. 136, 6 L.R.A., N.S., 369, 7 Ann.Cas. 23.

37. Md.—Delcher v. State, 158 A. 37, 161 Md. 475.

38. Mo.—State v. Keyes, 93 S.W. 801, 196 Mo. 136, 6 L.R.A., N.S., 369, 7 Ann.Cas. 23.

Sufficiency of evidence in general see supra § 52.

39. Ala.—Nix v. State, 166 So. 716, 27 Ala.App. 94, certiorari denied 166 So. 719, 232 Ala. 53.

Cal.—People v. Ashley, 267 P.2d 271, 42 C.2d 246.

People v. Tracy, 123 P.2d 138, 50 C.A.2d 460.

Mich.—People v. Bagwell, 295 N.W. 207, 295 Mich. 412—People v. Lee, 243 N.W. 227, 259 Mich. 355.

Wis.—State v. Hintz, 229 N.W. 54, 200 Wis. 636.
25 C.J. p 654 note 81.

40. Ala.—Nix v. State, 166 So. 716, 27 Ala.App. 94, certiorari denied 166 So. 719, 232 Ala. 53.

Cal.—People v. Tracy, 123 P.2d 138, 50 C.A.2d 460—People v. Breitenstein, 296 P. 87, 111 C.A. 746—People v. Flowers, 201 P. 468, 54 C.A. 214.

Pa.—Commonwealth v. Neuman, 30 A.2d 698, 151 Pa.Super. 642.

Wash.—State v. Moore, 66 P.2d 836, 189 Wash. 680.

41. Ala.—Ballinger v. State, 166 So. 439, 27 Ala.App. 103—Peden v. State, 124 So. 282, 23 Ala.App. 264, certiorari denied 124 So. 284, 220 Ala. 112—Donegan v. State, 95 So. 826, 19 Ala.App. 171—Pritchett v. State, 93 So. 341, 18 Ala.App. 628.
Ark.—Hadley v. State, 117 S.W.2d 352, 196 Ark. 307.

Cal.—People v. Tracy, 123 P.2d 138, 50 C.A.2d 460—People v. Bullock, 11 P.2d 441, 123 C.A. 299.

Me.—State v. Hume, 164 A. 198, 131 Me. 458.

Mich.—People v. Lintz, 222 N.W. 201, 244 Mich. 603.

from the evidence,⁴² or, according to some cases, if there is any evidence introduced by the prosecution tending to prove the charge as laid;⁴³ and, under varying circumstances, the evidence has been regarded as sufficient to authorize or require submission of the case or issues to the jury for determination.⁴⁴ Accordingly, it has been held or

recognized that, in the particular case, the evidence was sufficient to authorize or require submission to the jury of such questions as that as to whether the representation and pretense as charged was made;⁴⁵ as to the falsity of the representation or pretense;⁴⁶ as to knowledge of falsity of the rep-

N.C.—State v. Anderson, 129 S.E. 701, 194 N.C. 377.

Okl.—Chaney v. State, 113 P.2d 607, 72 Okl.Cr. 120.

Pa.—Commonwealth v. Gross, 56 A.2d 303, 161 Pa.Super. 613—Commonwealth v. Forney, 88 Pa.Super. 451.

Wis.—State v. Hintz, 229 N.W. 54, 200 Wis. 636.

25 C.J. p 653 note 69.

Place of commission of offense

In prosecution for obtaining money by false pretenses by forged check drawn against an account in a Delaware bank, detectives' testimony that accused admitted check was deposited in Maryland bank for collection created conflict in evidence for jury, as to whether check was sold or deposited for collection, so that whether alleged offense was committed in Delaware so as to give Delaware court jurisdiction was for the jury.

Del.—Hudson v. State, 156 A. 881, 5 W.W.Harr. 23, 80 A.L.R. 219.

Matters of defense

Ky.—Tartar v. Commonwealth, 102 S.W.2d 971, 267 Ky. 502—Hatcher v. Commonwealth, 5 S.W.2d 882, 224 Ky. 131.

Wash.—State v. Carr, 294 P. 1016, 160 Wash. 83.

42. Ala.—Bonner v. State, 62 So. 337, 8 Ala.App. 236.

On demurrer to evidence

In prosecution for crime of confidence game, where accused did not testify in his own behalf but rested his case on a demurrer to the evidence, jury had right to make logical deductions and draw reasonable inferences from the evidence thus offered.

Okl.—Rucker v. State, 195 P.2d 299, 88 Okl.Cr. 15, rehearing denied 199 P.2d 221, 88 Okl.Cr. 15.

43. S.C.—State v. Gellis, 155 S.E. 849, 158 S.C. 471.

44. Ala.—Mann v. State, 30 So.2d 738, 33 Ala.App. 148.

Ark.—Anderson v. State, 290 S.W.2d 846, 226 Ark. 498—Shepherd v. State, 252 S.W.2d 621, 221 Ark. 191—Smith v. State, 174 S.W.2d 555, 206 Ark. 154—Moss v. State, 108 S.W.2d 782, 194 Ark. 524—Spears v. State, 294 S.W. 66, 173 Ark. 1071.

Cal.—People v. Pond, 284 P.2d 793, 44 C.2d 665—People v. Bechtel, 260 P. 2d 31, 41 C.2d 441.

People v. Brown, 249 P.2d 595, 114 C.A.2d 52—People v. Roth, 31 P.2d 813, 137 C.A. 592—People v. Cordish, 294 P. 456, 110 C.A. 486.

D.C.—Cooper v. U. S., Mun.App., 123 A.2d 918—Randle v. U. S., 113 F.2d 945, 72 App.D.C. 363, certiorari denied 61 S.Ct. 64, 311 U.S. 683, 85 L. Ed. 440.

Idaho.—State v. Stevens, 282 P. 93, 48 Idaho 335.

Iowa.—State v. Lansman, 60 N.W.2d 815, 245 Iowa 102—State v. McCutchan, 259 N.W. 23, 219 Iowa 1029.

Mass.—Commonwealth v. Jacobson, 157 N.E. 583, 260 Mass. 311.

Mich.—People v. Lee, 243 N.W. 227, 259 Mich. 355.

Mo.—State v. Smith, 324 S.W.2d 702—State v. Nienaber, 148 S.W.2d 1024, 347 Mo. 615—State v. Montgomery, 116 S.W.2d 72—State v. Pierce, 7 S.W.2d 269, 320 Mo. 209.

Neb.—Dwoskin v. State, 74 N.W.2d 847, 161 Neb. 793, certiorari denied Dwoskin v. State of Nebraska, 77 S.Ct. 61, 352 U.S. 840, 1 L.Ed.2d 57, rehearing denied 77 S.Ct. 219, 352 U.S. 937, 1 L.Ed.2d 170.

N.J.—State v. Samurine, 142 A.2d 612, 27 N.J. 322.

State v. Bennett, 138 A. 923, 104 N.J.Law 186.

N.C.—State v. Phillips, 82 S.E.2d 762, 240 N.C. 516—State v. Howley, 16 S.E.2d 705, 220 N.C. 113.

Pa.—Commonwealth v. Viscount, 179 A. 858, 118 Pa.Super. 595.

S.C.—State v. Jenkins, 72 S.E.2d 829, 222 S.C. 359.

Tenn.—Rowe v. State, 51 S.W.2d 505, 164 Tenn. 571.

Tex.—Coffee v. State, 184 S.W.2d 278, 148 Tex.Cr. 71—Overall v. State, 128 S.W.2d 1194, 137 Tex.Cr. 303—Smith v. State, 128 S.W.2d 39, 137 Tex.Cr. 107.

Utah.—State v. Bruce, 262 P.2d 960, 1 Utah 2d 136.

Wash.—State v. Moore, 66 P.2d 836, 189 Wash. 680—State v. Price, 21 P.2d 1038, 173 Wash. 108—State v. Adams, 258 P. 23, 144 Wash. 363, opinion adhered to 263 P. 746, 146 Wash. 696.

25 C.J. p 653 note 69, p 654 note 81.

Swindling or cheating with regard to corporate stock

Cal.—Torbert v. People, 156 P.2d 128, 113 Colo. 294—Dill v. People, 29 P.2d 1035, 94 Colo. 230, appeal dismissed and certiorari denied Dill v. People of State of Colorado,

54 S.Ct. 781, 292 U.S. 609, 78 L.Ed. 1470.

Prosecution for aiding and abetting

Mich.—People v. Smith, 260 N.W. 911, 271 Mich. 553.

Matters constituting defense

In prosecution under bad check law it was for the jury to determine whether there was an agreement that the check was to be held by the person to whom it was given and presented at a future date, in view of accused's evidence tending to show such agreement.

N.C.—State v. Tatum, 172 S.E. 405, 205 N.C. 784.

45. Ala.—Ballinger v. State, 166 So. 439, 27 Ala.App. 103—Pritchett v. State, 93 So. 341, 18 Ala.App. 628.

Me.—State v. Hume, 164 A. 198, 131 Me. 458.

Mass.—Commonwealth v. Levenson, 146 N.E. 5, 250 Mass. 440.

Mich.—People v. Lintz, 222 N.W. 201, 244 Mich. 603.

Mo.—State v. Gilpin, 320 S.W.2d 504—State v. Pierce, 7 S.W.2d 269, 320 Mo. 209.

Neb.—Brennan v. State, 3 N.W.2d 217, 141 Neb. 205.

Pa.—Commonwealth v. Forney, 88 Pa.Super. 451.

Commonwealth v. White, Quar. Sess., 35 Del.Co. 473.

54 S.Ct. 781, 292 U.S. 609, 78 L.Ed. 1470.

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Matters constituting defense

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Mass.—Commonwealth v. Levenson, 146 N.E. 5, 250 Mass. 440.

Mich.—People v. Lintz, 222 N.W. 201, 244 Mich. 603.

Mo.—State v. Gilpin, 320 S.W.2d 504—State v. Pierce, 7 S.W.2d 269, 320 Mo. 209.

Neb.—Brennan v. State, 3 N.W.2d 217, 141 Neb. 205.

Pa.—Commonwealth v. Forney, 88 Pa.Super. 451.

Commonwealth v. White, Quar. Sess., 35 Del.Co. 473.

Various representations or statements

Where there was sufficient evidence adduced to establish a misrepresentation by accused of a past event, or existing fact on which the defrauded person relied, the issue was for the jury, even though false representations as to future transactions were also made and relied on by the person defrauded.

Neb.—Potard v. State, 299 N.W. 362, 140 Neb. 116.

46. Ala.—Ballinger v. State, 166 So. 439, 27 Ala.App. 103—Donegan v. State, 95 So. 826, 19 Ala.App. 171.

Ark.—Long v. State, 255 S.W. 300, 160 Ark. 607.

Colo.—Vigil v. People, 86 P.2d 253, 103 Colo. 327.

Ky.—Sanford v. Commonwealth, 280 S.W. 106, 212 Ky. 758.

Mass.—Commonwealth v. Levenson, 146 N.E. 5, 250 Mass. 440.

Mich.—People v. Perry, 163 N.W. 478, 197 Mich. 47.

25 C.J. p 653 note 71.

representation or pretense;⁴⁷ as to whether the representation was one of fact;⁴⁸ as to intent to defraud;⁴⁹ as to the prosecutor's reliance on the representation or pretense;⁵⁰ as to the consummation of the fraudulent purpose;⁵¹ as to whether money was received by accused;⁵² as to the amount of

money obtained, and not accounted for, by accused;⁵³ and as to participation of accused in the commission of the offense charged.⁵⁴

Accused is not entitled to a directed verdict, peremptory instruction, or a general affirmative charge in his favor,⁵⁵ and neither is the accused en-

Issuing check without funds in bank

In prosecution for passing fictitious checks, question as to accused's knowledge of the fictitious character of the check was for the jury under the evidence.

Cal.—People v. Roche, 241 P. 279, 74 C.A. 556.

Prosecution under Home Owners' Loan Act, 12 U.S.C.A. § 1467 (a)

U.S.—U. S. v. Kay, C.C.A.N.Y., 101 F.2d 270, certiorari denied Kay v. U. S., 59 S.Ct. 789, 306 U.S. 660, 83 L.Ed. 1056.

Attempt

(1) In prosecution for attempt to obtain money by false pretenses by framing cause of action against owner of premises on which one accused allegedly fell, sustaining injuries, whether accident occurred as alleged by accused in suit for damages was for the jury under the evidence.

N.J.—State v. Harris, 187 A. 761, 14 N.J.Misc. 851, affirmed 191 A. 776, 118 N.J.Law 179.

(2) In prosecution against a county officer under an indictment based on Code 1930 § 896 for attempt to defraud county by inducing it to pay money to named persons to whom the county was not indebted, whether accused knew that the county did not owe the amounts in question was for the jury under the evidence.

Mass.—Heard v. State, 171 So. 775, 177 Miss. 661.

47. N.J.—State v. Parsons, 140 A. 13, 6 N.J.Misc. 76, affirmed 142 A. 918, 105 N.J.Law 253.

Wash.—State v. Lindsey, 61 P.2d 293, 187 Wash. 364, reversed on other grounds Lindsey v. State of Washington, 57 S.Ct. 797, 301 U.S. 397, 81 L.Ed. 1182.
25 C.J. p 653 note 72.

Uttering bad check

Whether statutory presumption that accused's uttering check not paid showed knowledge of insufficient funds was overcome by evidence introduced was for jury.

N.J.—State v. Parsons, 140 A. 13, 6 N.J.Misc. 76, affirmed 142 A. 918, 105 N.J.Law 253.

Prosecution under Home Owners' Loan Act, 12 U.S.C.A. § 1467 (a)

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Attempt

In prosecution for attempt to ob-

tain money by false pretenses by framing cause of action against owner of premises on which one accused allegedly fell, sustaining injuries, whether certain of the accused persons believed that the accident occurred as another accused alleged was for jury under the evidence.

N.J.—State v. Harris, 187 A. 761, 14 N.J.Misc. 851, affirmed 191 A. 776, 118 N.J.Law 179.

48. Mass.—Commonwealth v. Levenson, 146 N.E. 5, 250 Mass. 440.

N.Y.—People v. Peckens, 47 N.E. 883, 153 N.Y. 576.

49. Ala.—Ballinger v. State, 166 So. 439, 27 Ala.App. 103—Pearce v. State, 164 So. 114, 26 Ala.App. 492, certiorari denied 164 So. 118, 231 Ala. 150.

Ark.—Schultz v. State, 242 S.W.2d 131, 219 Ark. 217—Utley v. State, 238 S.W. 607, 152 Ark. 407.

Cal.—People v. Croxton, App., 327 P. 2d 611—People v. Roth, 31 P.2d 813, 137 C.A. 592.

Mich.—People v. Guise, 247 N.W. 111, 262 Mich. 72.

Neb.—Brennan v. State, 3 N.W.2d 217, 141 Neb. 205.

Wash.—State v. Navone, 58 P.2d 1208, 186 Wash. 532.

W.Va.—State v. Paulian, 197 S.E. 728, 120 W.Va. 265.
25 C.J. p 653 note 73.

Evidence of want of intent to defraud

Where the evidence introduced by the prosecution was sufficient to justify a finding of intent to defraud, evidence on behalf of accused tending to negative a guilty intent merely introduced into the case a set of conflicting circumstances and the question of intent was for the jury.

Issuing or uttering bad or fictitious check

(1) Question as to intent to defraud has been regarded as one for the jury under the evidence in various prosecutions for issuing or uttering checks in violation of statute.

Cal.—People v. Roche, 241 P. 279, 74 C.A. 556.

Ky.—Hughes v. Commonwealth, 46 S.W.2d 783, 242 Ky. 412.

Neb.—Haines v. State, 281 N.W. 860, 135 Neb. 433.

Okl.—Moore v. State, 250 P.2d 46, 96 Okl.Cr. 118.

(2) In prosecution for making and

issuing a check without funds in

the bank to pay it, defendant's denial of intent to defraud, which is a necessary ingredient of the offense under statute, raised an issue of fact for the jury.

Idaho.—State v. Sedam, 107 P.2d 1065, 62 Idaho 26.

(3) Whether statutory presumption that accused's uttering check not paid showed intent to defraud was overcome by evidence introduced was for jury.

N.J.—State v. Parsons, 140 A. 13, 6 N.J.Misc. 76, affirmed 142 A. 918, 105 N.J.Law 253.

(4) On a trial by the court sitting without a jury in a prosecution for fraudulently obtaining property by means of a bogus check, the question as to the intent of accused was one of fact for the court where the state made a prima facie case and accused presented evidence purporting to show want of intent to defraud.

Okl.—Armstrong v. State, 122 P.2d 823, 74 Okl.Cr. 42.

50. Ark.—Wilkerson v. State, 21 S.W.2d 183, 180 Ark. 280.

Mass.—Commonwealth v. Orler, 147 N.E. 548, 252 Mass. 55.

Neb.—Brennan v. State, 3 N.W.2d 217, 141 Neb. 205.

Tenn.—Rowe v. State, 51 S.W.2d 505, 164 Tenn. 571.

25 C.J. p 653 note 74.

51. Mich.—People v. Guise, 247 N.W. 111, 262 Mich. 72.

52. Ala.—Fritchett v. State, 93 So. 341, 18 Ala.App. 628.

53. Colo.—Vigil v. People, 86 P.2d 253, 103 Colo. 327.

54. Ala.—Pearce v. State, 164 So. 114, 26 Ala.App. 492, certiorari denied 164 So. 118, 231 Ala. 150.

Cal.—People v. Piascik, 323 P.2d 1032, 159 C.A.2d 622—People v. Simms, 300 P.2d 898, 144 C.A.2d 189.

55. Ala.—Couch v. State, 20 So.2d 57, 31 Ala.App. 586—Pearce v. State, 164 So. 114, 26 Ala.App. 492, certiorari denied 164 So. 118, 231 Ala. 150—Donegan v. State, 95 So. 826, 19 Ala.App. 171.

Ark.—Long v. State, 255 S.W. 300, 160 Ark. 607.

Colo.—Dill v. People, 29 P.2d 1035, 94 Colo. 230, appeal dismissed and certiorari denied Dill v. People of State of Colorado, 54 S.Ct. 781, 292 U.S. 609, 78 L.Ed. 1470.

D.C.—Randle v. U. S., 113 F.2d 945,

titled to a nonsuit,⁵⁶ on the theory that the evidence is insufficient to show guilt or to show the existence of a particular element of the offense charged, where the evidence in that regard is sufficient to take the case to the jury, and a demurrer to the evidence is properly overruled where there is sufficient evidence to support all the elements of the offense charged.⁵⁷

On the other hand, where supporting evidence to

warrant submission to the jury for determination is wholly lacking or insufficient, it is improper to submit the question as to the guilt of accused or as to the existence of an essential element of the offense,⁵⁸ and an issue should not be left to the jury for determination where it is conclusively settled by undisputed testimony.⁵⁹ The trial court may and should direct a verdict, or give a general affirmative charge, in favor of accused in jurisdictions in

72 App.D.C. 368, certiorari denied 61 S.Ct. 64, 311 U.S. 683, 85 L.Ed. 440.

Ky.—*Sanford v. Commonwealth*, 280 S.W. 106, 212 Ky. 758.

Me.—*State v. Hume*, 164 A. 198, 131 Me. 458.

Mass.—*Commonwealth v. Levenson*, 146 N.E. 5, 250 Mass. 440.

Mich.—*People v. Lintz*, 222 N.W. 201, 244 Mich. 603.

N.J.—*State v. Parsons*, 140 A. 13, 6 N.J.Misc. 76, affirmed 142 A. 918, 105 N.J.Law 253.

S.C.—*State v. Gellis*, 155 S.E. 849, 158 S.C. 471.

Tex.—*Adams v. State*, 225 S.W.2d 568, 156 Tex.Cr. 63, opinion supplemented 229 S.W.2d 64, 156 Tex.Cr. 63—*Square v. State*, 167 S.W.2d 192, 145 Tex.Cr. 219—*Brigham v. State*, 16 S.W.2d 243, 112 Tex.Cr. 281—*James v. State*, 269 S.W. 788, 99 Tex.Cr. 395.

Wash.—*State v. Adams*, 258 P. 23, 144 Wash. 363, opinion adhered to 263 P. 746, 146 Wash. 696.

25 C.J. p 654 note 81.

Advising acquittal

In a case in which accused had been convicted of obtaining property by means of false pretenses and in which it was held that an assignment of error based on trial court's denial of motion to advise jury to return a verdict in favor of accused was without merit, the court said that it is never proper to advise the jury to acquit if the court believes that there is sufficient evidence to take the case to the jury.

S.D.—*State v. Alick*, 252 N.W. 644, 62 S.D. 220.

Passing or issuing check

(1) Affirmative charge for accused in prosecution for passing worthless check was properly refused, where there was some evidence tending to establish charge.

Ala.—*Coggins v. State*, 125 So. 201, 23 Ala.App. 332.

(2) In such case accused was not entitled to an affirmative charge on the theory that the evidence did not show criminal intent, where the evidence was sufficient to satisfy a statutory provision as to what shall constitute prima facie evidence of intent to defraud.

Ala.—*Nix v. State*, 166 So. 716, 27

Ala.App. 94, certiorari denied 166 So. 719, 232 Ala. 53.

(3) The trial court properly denied accused's motion for a directed verdict in his favor in a prosecution for giving a check without sufficient funds in the bank to pay the check, where no evidence was offered to overcome the prima facie showing of intent to defraud which was made, in accordance with the statute, by proof of accused's failure to pay the amount of the check within the specified period after notice of nonpayment by the drawee.

Ark.—*Brewer v. State*, 112 S.W.2d 976, 195 Ark. 477.

(4) So it was held that, where the statute provided that the uttering and delivering of a check which is refused by the drawee shall be prima facie evidence of intent to defraud and knowledge of insufficient funds, it was held that it was not proper for the court to take the case from the jury by directing a verdict of not guilty, on the admission by the prosecuting attorney, in his opening statement, that the check was given for a past consideration.

Ohio.—*State v. Lowenstein*, 142 N.E. 897, 109 Ohio St. 393, 35 A.L.R. 361.

Prosecution for aiding and abetting
Mich.—*People v. Smith*, 260 N.W. 911, 271 Mich. 553.

56. N.C.—*State v. Howley*, 16 S.E. 2d 705, 220 N.C. 113—*State v. Lewis*, 116 S.E. 259, 185 N.C. 640.

57. Kan.—*State v. Robinson*, 259 P. 691, 124 Kan. 245.

Mo.—*State v. Montgomery*, 116 S.W. 2d 72.

58. Ky.—*Lovings v. Commonwealth*, 220 S.W.2d 868, 310 Ky. 315.

N.J.—*State v. Greco*, 148 A.2d 164, 29 N.J. 94.

Pa.—*Commonwealth v. Thomas*, 70 A. 2d 458, 166 Pa.Super. 214.

Utah.—*State v. Bruce*, 262 P.2d 960, 1 Utah 2d 136.

Falsity of representation

Mo.—*State v. McLane*, 278 S.W. 683.

N.Y.—*People v. Clarke*, 297 N.Y.S. 776, 252 App.Div. 122.

Tex.—*Dixon v. State*, 215 S.W.2d 181, 152 Tex.Cr. 504.

Intent to defraud

U.S.—*U. S. v. Long*, D.C.Mass., 14 F. Supp. 29.

Del.—*State v. Vandenburg*, 2 A.2d 916, 9 W.W.Harr. 498.

N.J.—*State v. Pearson*, 120 A.2d 468, 39 N.J.Super. 50.

Deception of prosecutor

N.C.—*State v. Mayer*, 146 S.E. 64, 196 N.C. 454.

Connection of accused with criminal transaction

Mo.—*State v. Robinson*, 14 S.W.2d 452.

False advertisements and the like

In a prosecution under Pen.Code § 421, it was held that it was improper to submit to the jury the question as to whether certain statements contained in a booklet which had been circulated by the officers of a corporation were statements of fact, in view of the trial court's action in withdrawing from the jury the question as to the good faith of accused; the appellate court took the view that the statements in question constituted mere expressions of opinion.
N.Y.—*People v. Clarke*, 297 N.Y.S. 776, 252 App.Div. 122.

Other instances in which submission not proper

(1) Prosecution for offense of confidence game.

Colo.—*Davis v. People*, 40 P.2d 968, 96 Colo. 212.

(2) Prosecution under 18 U.S.C.A. § 80 for making false statement in application for loan insured under provisions of National Housing Act, 12 U.S.C.A. § 1703.

U.S.—*U. S. v. Mellon*, C.C.A.N.Y., 96 F.2d 462, certiorari denied *Mellon v. U. S.*, 58 S.Ct. 1061, 304 U.S. 586, 82 L.Ed. 1547.

(3) In prosecution under 18 U.S.C.A. § 80 for causing to be used a false pay roll in a matter within the jurisdiction of an agency of the United States.

U.S.—*U. S. v. Long*, D.C.Mass., 14 F. Supp. 29.

59. Idaho.—*State v. Curtis*, 161 P. 758, 29 Idaho 724.

Iowa.—*State v. Lansman*, 60 N.W.2d 815, 245 Iowa 102.

Falsity of representation

Tex.—*Williams v. State*, 43 S.W.2d 935, 119 Tex.Cr. 587.

which such procedure is permissible, where evidence to show the guilt of accused, including evidence of the existence of an essential element of the offense charged, is wholly lacking or insufficient⁶⁰ or where undisputed and conclusive evidence shows the non-existence of an essential element;⁶¹ and, under such circumstances, the trial court may and should grant a nonsuit⁶² or sustain a demurrer to the evidence.⁶³ The court may determine a question adversely to accused, as a matter of law, where the evidence in support of such determination is not disputed.⁶⁴

The trial court should not direct the jury to find a verdict of guilty if they believe all the evidence beyond a reasonable doubt where there is evidence which, if believed, would show that accused is not

guilty.⁶⁵

§ 54. Instructions

- a. General considerations
- b. Elements of offense; defenses

a. General Considerations

Rules governing instructions in criminal cases generally apply in prosecutions for obtaining property by false pretenses and in like prosecutions.

Rules governing instructions in criminal cases generally discussed in Criminal Law §§ 1189-1229, apply in prosecutions for obtaining property by false pretenses and the like.⁶⁶

Instructions should not be given which are misleading,⁶⁷ confusing,⁶⁸ contradictory,⁶⁹ argumenta-

60. U.S.—U. S. v. Mellon, C.C.A.N.Y., 96 F.2d 462, certiorari denied Mellon v. U. S., 58 S.Ct. 1061, 304 U.S. 586, 82 L.Ed. 1547.

U. S. v. Long, D.C.Mass., 14 F. Supp. 29.

Del.—State v. Vandenburg, 2 A.2d 916, 9 W.W.Harr. 498.

Pa.—Commonwealth v. Mauk, 79 Pa. Super. 153.

S.C.—State v. Poe, 110 S.E. 118, 118 S.C. 144.

Instruction that state had not proved its case

Utah.—State v. Timmerman, 55 P.2d 1320, 56 P.2d 1354, 88 Utah 481.

Issuing or uttering check

(1) Defendant charged with uttering worthless check was entitled to general charge, in absence of any evidence to support an essential averment of the indictment descriptive of the offense charged.

Ala.—Thomas v. State, 129 So. 308, 23 Ala.App. 550.

(2) Where evidence in prosecution for violation of Cold Check Law showed that drawer had no intention to defraud when he delivered check to drawee and that he employed every means reasonably necessary to provide for payment of the check when he was informed that there were not sufficient funds in his account at the bank, overruling of motion for directed verdict of acquittal was error.

Ky.—Wright v. Commonwealth, 133 S.W.2d 525, 280 Ky. 368.

Variance

(1) Where there is a fatal variance between the allegations of the indictment and the proof, the trial court may and should direct a verdict of not guilty.

N.C.—State v. Corpening, 133 S.E. 14, 191 N.C. 751.

Pa.—Commonwealth v. Davidow, 86 Pa.Super. 434.

(2) One accused of obtaining money by false pretense would be entitled to general charge, where indictment charged obtaining of check,

while paper introduced was draft.

Ala.—Harrison v. State, 129 So. 718, 24 Ala.App. 9.

61. Ky.—King v. Commonwealth, 261 S.W. 1096, 203 Ky. 163.

62. N.C.—State v. Mayer, 146 S.E. 64, 196 N.C. 454.

63. Mo.—State v. McLane, 278 S.W. 683.

64. Utah.—State v. Jenson, 280 P. 1046, 74 Utah 527.

65. N.C.—State v. Tatum, 172 S.E. 405, 205 N.C. 784.

66. Colo.—Clarke v. People, 171 P. 69, 64 Colo. 164.

Pa.—Commonwealth v. Letter, 69 Pa. Dist. & Co. 201, 60 Dauph.Co. 212, 25 C.J. p 654 note 84.

Limiting purpose and effect of evidence

(1) Where evidence of a similar transaction has been admitted, the court should in its charge limit the purpose and object of the evidence to the question of intent.

Tex.—Martin v. State, 35 S.W. 976, 36 Tex.Cr. 125.

(2) But the view has been taken that failure to limit the purpose and effect of evidence is not necessarily fatal to a conviction.

Tex.—Brown v. State, Cr., 43 S.W. 986.

Instructions held sufficient or not erroneous

(1) As to method and sufficiency of proof of conspiracy.

Cal.—People v. Revley, 227 P. 957, 67 C.A. 553.

(2) As against objection that an abandoned count in the indictment was submitted to jury.

Tex.—Noblitt v. State, 281 S.W. 849, 103 Tex.Cr. 550.

(3) Charge stating facts authorizing acquittal.

Ga.—Brent v. State, 163 S.E. 319, 44 Ga.App. 777.

(4) Instruction which followed the

charge in indictment and was supported by the evidence.

Mo.—State v. Weber, 298 S.W.2d 403.

(5) Instruction that acts of persons other than accused were immaterial, where, despite what other parties might have done, jury could find accused guilty.

Mo.—State v. Whitledge, 269 S.W.2d 748.

67. Ark.—Uitley v. State, 238 S.W. 607, 152 Ark. 407.

Ill.—People v. Perlmutter, 138 N.E. 152, 306 Ill. 495.

25 C.J. p 654 note 85.

Instruction held not misleading

Cal.—People v. Whisenhunt, 318 P. 2d 153, 155 C.A.2d 534.

Kan.—State v. Stanley, 227 P. 263, 116 Kan. 449.

Ky.—Caldwell v. Commonwealth, 298 S.W. 681, 221 Ky. 232.

Mo.—State v. Blake, 309 S.W.2d 632.

N.J.—State v. Harris, 187 A. 761, 14 N.J.Misc. 851, affirmed 191 A. 776, 118 N.J.Law 179.

68. Ala.—McGee v. State, 23 So. 797, 117 Ala. 229.

Cal.—People v. Cravens, 180 P.2d 453, 79 C.A.2d 658.

Ill.—People v. Livermore, 60 N.E.2d 413, 390 Ill. 85.

Mo.—State v. Gilpin, 320 S.W.2d 504

—State v. Steele, 126 S.W. 406, 226 Mo. 583.

Giving explanatory instruction

In a prosecution of one charged with the substantive felony of accessory before the fact to the crime of obtaining money and property by false pretenses, it was said that, in view of the surrounding circumstances it was possible that the jury would have been better informed if the court had given a charge or instruction, requested by counsel for accused, explaining a charge given by the court.

Fla.—Varnum v. State, 188 So. 346, 137 Fla. 438.

69. Ill.—People v. Emmel, 127 N.E. 53, 292 Ill. 477.

tive,⁷⁰ immaterial to the issues,⁷¹ or which do not state correctly the law applicable,⁷² which are not warranted by the evidence,⁷³ which exclude the consideration of relevant evidence,⁷⁴ which invade the province of the jury,⁷⁵ which assume the existence of facts in issue,⁷⁶ or which authorize the jury to find accused guilty notwithstanding there is a fatal variance between allegations of the indictment and the proof.⁷⁷

Where all the matters on which a prosecution is predicated are admitted by all parties to have occurred on a certain date, an instruction limiting the jury to what occurred on that date is not erroneous.⁷⁸ An instruction proffered for the purpose of preventing an inconsistent verdict, where the indictment contains charges of false pretenses in one count, and of separate and distinct charges in another, should be given.⁷⁹ On the trial of one charged with a violation of a statute, as to de-

ceiving with regard to the existence of a lien, the court is not required to instruct the jury as to what is a valid lien.⁸⁰

Where the punishment depends on the value of the property obtained, the court should specifically instruct the jury as to the punishment they should assess.⁸¹ Accused is not entitled to have given an instruction as to the penalty under a particular statute where it is clear and not doubtful that another statute imposing a greater penalty is applicable to the prosecution.⁸²

b. Elements of Offense; Defenses

Instructions should cover all the essential elements of the offense and such matters of defense as are supported by evidence, and should state correctly the law applicable.

The court should instruct the jury as to every essential element of the offense,⁸³ and instructions

Mo.—State v. Lawrence, 77 S.W. 497, 178 Mo. 350.

Ohio.—Koenig v. State, 167 N.E. 385, 121 Ohio St. 147.

Instructions held not contradictory
Cal.—People v. Smith, 84 P. 449, 3 C.A. 62.

70. Ala.—Gardner v. State, 58 So. 1001, 4 Ala.App. 131.

71. Cal.—People v. Nor Woods, 233 P.2d 897, 37 C.2d 584.

Mass.—Commonwealth v. Burton, 67 N.E. 419, 183 Mass. 461.

Requested instruction properly refused

Cal.—People v. Caldwell, 130 P.2d 495, 55 C.A.2d 238—People v. Cicchitti, 290 P. 600, 107 C.A. 631.

Iowa.—State v. Krittenbrink, 192 N.W. 157, 197 Iowa 968.

72. Cal.—People v. Frey, 131 P. 127, 165 C. 140.

People v. Harrman, 104 P.2d 1063, 40 C.A.2d 487.

Requested instruction properly refused

Ala.—Littlefield v. State, 63 So.2d 565, 36 Ala.App. 507, certiorari denied 63 So.2d 573, 258 Ala. 532.

Ill.—People v. Dore, 171 N.E. 554, 339 Ill. 415.

Mo.—State v. Smith, 324 S.W.2d 702—State v. Mandell, 183 S.W.2d 59, 353 Mo. 502.

Ohio.—State v. De Nicola, 126 N.E.2d 62, 163 Ohio St. 140.

Tex.—Nash v. State, 29 S.W.2d 359, 115 Tex.Cr. 324.

Requested instruction erroneously refused

In prosecution for theft by false pretext of check based on alleged representation of accused to another that he could get criminal charge against him dismissed, wherein accused testified he cashed check for

other person as an accommodation, testimony of accused authorized instruction that if accused cashed check for such other person or if jury had reasonable doubt thereof to find him not guilty, and refusal of court to give the requested instruction constituted reversible error.

Tex.—Barefield v. State, Cr., 309 S.W. 2d 451.

73. Ga.—Berry v. State, 111 S.E. 669, 153 Ga. 169.

N.Y.—People v. De Goode, 196 N.Y.S. 418, 203 App.Div. 35, 40 N.Y.Cr. 145, affirmed 142 N.E. 305, 236 N.Y. 613.

25 C.J. p 655 note 90.

Requested instruction properly refused

Colo.—Rogers v. People, 230 P. 391, 76 Colo. 181.

Tex.—Adams v. State, 225 S.W.2d 568, 156 Tex.Cr. 63, opinion supplemented 229 S.W.2d 64, 156 Tex.Cr. 63—Raymond v. State, 33 S.W.2d 192, 116 Tex.Cr. 595.

Instructions held not erroneous

Cal.—People v. Gordon, 163 P.2d 110, 71 C.A.2d 606.

Mo.—State v. Smith, 324 S.W.2d 702.

74. Ala.—Fields v. State, 25 So. 726, 121 Ala. 16.

Ark.—Utley v. State, 238 S.W. 607, 152 Ark. 407.

75. D.C.—Robinson v. U. S., 42 App. D.C. 186.

Mo.—State v. Steele, 126 S.W. 406, 226 Mo. 583.

25 C.J. p 655 note 92. See also 25 C.J. p 653 note 73 [a].

76. Mo.—State v. Norman, 232 S.W. 452.

W.Va.—State v. Laskey, 7 S.E.2d 439, 122 W.Va. 93.

Instructions held not to assume facts in dispute

Mo.—State v. Craft, 126 S.W.2d 177, 344 Mo. 269.

77. Miss.—Pippin v. State, 88 So. 502, 126 Miss. 146.

78. Ill.—Moore v. People, 60 N.E. 535, 190 Ill. 331.

79. D.C.—Davis v. U. S., 37 App.D.C. 126.

80. Ga.—Portwood v. State, 89 S.E. 591, 18 Ga.App. 502.

81. Mo.—State v. McBrien, 178 S.W. 489, 265 Mo. 594.

82. Okl.—Bennett v. State, 204 P. 462, 21 Okl.Cr. 27.

83. Ga.—Sessions v. State, 59 S.E. 196, 3 Ga.App. 13.

N.H.—State v. Skaff, 54 A.2d 155, 94 N.H. 402.

Tex.—Jones v. State, Cr., 49 S.W. 387.

25 C.J. p 654 note 84, p 655 notes 2-6.

Explanation of terms used

Where the word "dividends" was used in an indictment in different senses, it was improper for the court, in instructing as to the term with relation to alleged misrepresentations, to refer to the term only in the sense of dividends on corporate stock, without indicating the sense in which it was used; in reaching this conclusion the court said that "the term 'dividends' is not limited in its significance to the earnings on corporation stock, but is one of quite general meaning."

Cal.—People v. White, 259 P. 76, 81, 85 C.A. 241.

Instructions as to distinct statutes

Where each of two statutory provisions defined a crime committed by the fraudulent issuance or passage of a check, and one or both

requested or given with regard to the elements of | the offense must state correctly the law applicable⁸⁴

statutes might have been violated by accused, it was proper to instruct the jury as to both statutes.

Wash.—State v. Lindsey, 61 P.2d 293, 187 Wash. 364, reversed on other grounds Lindsey v. State of Washington, 57 S.Ct. 797, 301 U.S. 397, 81 L.Ed. 1182.

Nature of misrepresentation

(1) Court committed error in failing to instruct that conviction must rest on misrepresentations of an existing fact, in view of statutory provision requiring the court to instruct the jury on all questions of law arising in a felony case.

Mo.—State v. Mullins, 237 S.W. 502.

(2) In prosecution for grand larceny based on obtaining property by false pretenses, refusal of requested instruction that a conviction could not be based on "intention" or on "a state of facts not then in existence," and that, to convict, jury must find that accused "falsely misrepresented an existing fact," was error.

N.Y.—People v. Karp, 81 N.E.2d 817, 298 N.Y. 213.

Necessity of corroboration

(1) In cases of grand theft involving the elements of obtaining money or property by false pretenses, the jury must be instructed as to requirements of Pen.Code § 1110 that, under certain circumstances, the false pretense must be proved by two witnesses or by one witness and corroborating circumstances.

Cal.—People v. Tennant, 88 P.2d 937, 32 C.A.2d 1—People v. Curran, 75 P.2d 1090, 24 C.A.2d 673—People v. Carter, 21 P.2d 129, 131 C.A. 177.

(2) The necessity for giving an instruction as to such requirements has been asserted notwithstanding one of the persons charged with the offense stated that he never had any intention of paying a promissory note which was given and signed by all the persons so charged on obtaining the property involved, since such note was genuine and did not constitute a "false token" accompanying the pretense within the meaning of the above mentioned section of the Penal Code.

Cal.—People v. Carter, *supra*.

(3) In prosecution for obtaining property under false pretenses, failure of trial judge to give instruction informing jury of subject matter of statute precluding conviction for obtaining property under false pretenses unless statement of a pretense is accompanied by use of a false token or writing, except by production of specified evidence, was prejudicial error.

Cal.—People v. Katcher, 217 P.2d 757, 97 C.A.2d 209.

Obtaining thing of value

Where the statute defining the offense, which referred to "any money, goods, or other property," contemplated, as an essential element of the offense, that the thing obtained by reason of false pretenses should be something of value, it was held that an instruction that it was necessary for the jury to find that the trust note obtained from the victim was the "property" of the latter advised them that they must find that it was something of value; in reaching this conclusion, the court quoted the definition of "property" found in Webster New Int. D., as follows: "The exclusive right to possess, enjoy, and dispose of, a thing; ownership; in a broad sense, any valuable right or interest considered primarily as a source or element of wealth."

Iowa.—State v. Evans, 295 N.W. 433, 229 Iowa 932.

"Scheme to defraud"

In prosecution for obtaining money by false pretenses, where evidence showed a planned fraud, instruction was not erroneous because using the phrase "scheme to defraud," notwithstanding the word "scheme" did not appear in Code D.C.1929 tit 6 § 85, defining the offense; in this connection it was said that the statute is broad enough to cover a scheme to defraud and that a "scheme is a plan or design."

D.C.—Randle v. U. S., 113 F.2d 945, 72 App.D.C. 368, certiorari denied 61 S.Ct. 64, 311 U.S. 683, 85 L.Ed. 440.

Single instruction

Where the first instruction required the jury to find every essential fact necessary to constitute the offense with which accused was charged, it was not error to omit any further definition of the offense.

Mo.—State v. Keyes, 93 S.W. 801, 196 Mo. 136, 6 L.R.A., N.S., 369.

Instructions held sufficient or not erroneous

(1) In general.
Ark.—Norris v. State, 280 S.W. 398, 170 Ark. 484.

Cal.—People v. Routh, 189 P. 436, 182 C. 561.

Ga.—Brent v. State, 163 S.E. 319, 44 Ga.App. 777.

Idaho.—State v. Davis, 336 P.2d 692—State v. McCallum, 295 P.2d 259, 77 Idaho 489.

Ky.—Lee v. Commonwealth, 242 S.W. 2d 984.

Mo.—State v. Montgomery, 116 S.W. 2d 72.

N.J.—State v. Kaufman, 112 A.2d 721, 18 N.J. 75.

N.C.—State v. Roberts, 126 S.E. 161, 189 N.C. 93.

Okl.—Bennett v. State, 204 P. 462, 21 Okl.Cr. 27.

Pa.—Commonwealth v. Neuman, 30 A.2d 698, 151 Pa.Super. 642—Commonwealth v. Conroy, 167 A. 407, 109 Pa.Super. 274.

Tex.—Walker v. State, 271 S.W.2d 286, 160 Tex.Cr. 383.

25 C.J. p 654 note 84.

(2) As to representation on which conviction might be based.

Tex.—Brown v. State, Cr., 43 S.W. 986.

(3) As to necessity for existence of intention of prosecuting witness to part with title and ownership of promissory notes.

Iowa.—State v. Reysa, 199 N.W. 1000, 198 Iowa 496.

(4) As to sufficient statement that conspiracy to defraud must be conspiracy to defraud prosecuting witness.

Ark.—Wilkerson v. State, 21 S.W.2d 183, 180 Ark. 280.

(5) Charge as to representation, which followed the language used by accused in making the alleged false representations.

Mo.—State v. Foley, 153 S.W. 1010, 247 Mo. 607.

(6) In prosecution for statutory larceny by obtaining check by misrepresentation, in which instructions as a whole were sufficient.

Wash.—State v. Adams, 258 P. 23, 144 Wash. 363, opinion adhered to 263 P. 746, 146 Wash. 696.

(7) In prosecution for statutory theft in obtaining money by false pretenses, in which an instruction as to conspiracy was included.

Cal.—People v. Ellison, 79 P.2d 732, 26 C.A.2d 496.

(8) In prosecution for attempt to commit statutory larceny by false pretenses.

Minn.—State v. Smith, 255 N.W. 826, 192 Minn. 237, followed in State v. Ginsberg, 255 N.W. 828, 192 Minn. 241.

Instruction held erroneous

Mo.—State v. Griggs, 236 S.W.2d 588, 361 Mo. 758.

Failure to charge certain matters not error

Cal.—People v. Broes, 292 P.2d 556, 138 C.A.2d 843—People v. Wilder, 287 P.2d 854, 135 C.A.2d 742.

Mo.—State v. Hartman, 273 S.W.2d 198, 364 Mo. 1109.

Pa.—Commonwealth v. Dempsey, 22 A.2d 76, 146 Pa.Super. 124.

84. Cal.—People v. Frey, 131 P. 127, 165 C. 140.

People v. Harrman, 104 P.2d 1063, 40 C.A.2d 487.

Ill.—People v. Perlmutter, 138 N.E. 152, 306 Ill. 495.

and should not disregard the evidence;⁸⁵ nor should instructions which are not warranted by the evidence be given.⁸⁶

Instructions should be given as to the necessity for intent,⁸⁷ and instructions should also be given

Kan.—State v. Nash, 204 P. 736, 110 Kan. 550.

Mo.—State v. Zingher, 259 S.W. 451, 302 Mo. 650.

N.J.—State v. Cohen, 131 A. 675, 4 N.J. Misc. 59, affirmed 134 A. 919, 103 N.J. Law 205.

N.C.—State v. McFarland, 105 S.E. 179, 180 N.C. 726.

Pa.—Commonwealth v. Johnson, Quar.Sess., 21 Lehigh L.J. 369.

S.D.—State v. Pickus, 257 N.W. 284, 63 S.D. 209.

Tex.—Overall v. State, 128 S.W.2d 1194, 137 Tex. Cr. 303—Nash v. State, 29 S.W.2d 359, 115 Tex. Cr. 324.

Wash.—State v. Price, 21 P.2d 1038, 173 Wash. 108.

25 C.J. p 654 note 84.

Instructions held erroneous or properly refused

(1) In general.

Ark.—Schultz v. State, 242 S.W.2d 131, 219 Ark. 217.

Cal.—People v. Waxman, 250 P.2d 339, 114 C.A.2d 399.

La.—State v. Dabbs, 84 So.2d 601, 228 La. 960.

Mo.—State v. Weber, 298 S.W.2d 403.

N.C.—State v. Ivey, 103 S.E.2d 398, 248 N.C. 316—State v. Jackson, 90 S.E.2d 507, 248 N.C. 216.

Wyo.—State v. Posey, 314 P.2d 833, 77 Wyo. 258.

(2) As to what constitutes false pretense.

Mo.—State v. Hollbrook, 289 S.W. 560.

Pa.—Commonwealth v. Mauk, 79 Pa. Super. 153.

S.D.—State v. Alick, 252 N.W. 644, 62 S.D. 220.

(3) As to conviction on proof of any one of several pretenses alleged in information where one was an expression of opinion.

Cal.—People v. Walker, 244 P. 94, 76 C.A. 192.

(4) As to precautions exercised by prosecuting witness with respect to representations.

Kan.—State v. Nash, 204 P. 736, 110 Kan. 550.

(5) As to nature of intent to defraud.

Cal.—People v. Simms, 300 P.2d 898, 144 C.A.2d 189.

N.J.—State v. Cohen, 131 A. 675, 4 N.J. Misc. 59, affirmed 134 A. 919, 103 N.J. Law 205.

(6) In prosecution for issuing check without sufficient funds in bank, instruction to effect that jury may regard refusal of payment by drawee as sufficient to establish beyond reasonable doubt intention to

defraud and knowledge of insufficient funds or credit.

Ohio.—Koenig v. State, 167 N.E. 385, 121 Ohio St. 147.

(7) As to statutory provisions concerning preparation and filing of claim, in prosecution for filing fraudulent claim against township.

Ind.—Nordyke v. State, 11 N.E.2d 165, 213 Ind. 243.

Instruction held sufficient or not erroneous

(1) In general.

Cal.—People v. Robertson, App., 334 P.2d 938—People v. Schmitt, 317 P.2d 673, 155 C.A.2d 87—People v.

Brown, 296 P.2d 560, 141 C.A.2d 299—People v. Davis, 246 P.2d 160, 112 C.A.2d 286—People v. Chesley, 236 P.2d 22, 106 C.A.2d 748—People v.

Gordon, 163 P.2d 110, 71 C.A.2d 606.

Ga.—Cox v. State, 21 S.E.2d 283, 67 Ga. App. 618.

Tex.—Redding v. State, 265 S.W.2d 811, 159 Tex. Cr. 335, certiorari denied Redding v. State of Texas, 75 S.Ct. 38, 348 U.S. 838, 99 L.Ed. 661.

Utah.—State v. Scott, 175 P.2d 1016, 111 Utah 9.

Wash.—State v. Peterson, 70 P.2d 306, 190 Wash. 668.

(2) As to what would constitute a false representation.

Ala.—Donegan v. State, 95 So. 826, 19 Ala. App. 171.

La.—State v. Gaspard, 62 So.2d 281, 222 La. 222.

(3) As to pretenses which would be sufficient to support a conviction.

Mo.—State v. Craft, 126 S.W.2d 177, 344 Mo. 269.

(4) As to extent to which misrepresentation must be inducing cause or must be relied on.

Idaho.—State v. Stratford, 37 P.2d 681, 55 Idaho 65.

N.C.—State v. Howley, 16 S.E.2d 705, 220 N.C. 113.

(5) As to reliance on some of several representations made by accused.

Kan.—State v. Mathes, 196 P. 607, 108 Kan. 488.

(6) As to reliance on representations and independent investigation.

Kan.—State v. Stanley, 227 P. 263, 116 Kan. 449.

(7) As to right of prosecuting witness to rely on representations without investigation.

Kan.—State v. Nash, 204 P. 736, 110 Kan. 550.

(8) As to sufficiency of proof of intent to defraud.

La.—State v. Wilson, 125 So. 854, 169 La. 684.

(9) As to conviction on proof of any one of several pretenses or representations alleged in the indictment.

Cal.—People v. Griesheimer, 167 P. 521, 176 C. 44.

People v. Smith, 84 P. 449, 3 C.A. 62.

(10) As to person swindled and ownership of property.

Tex.—Noblitt v. State, 281 S.W. 849, 103 Tex. Cr. 550.

(11) As to finding accused guilty of confidence game.

Colo.—Clark v. People, 97 P.2d 440, 105 Colo. 335.

(12) In prosecution under Remington Rev. St. § 2601 (2), an instruction, using the word "trick," substantially the same as the statute.

Wash.—State v. Peterson, 70 P.2d 306, 190 Wash. 668.

Requested instruction held improperly refused

N.Y.—People v. Will, 46 N.E.2d 498, 289 N.Y. 413.

85. Kan.—State v. Mathes, 196 P. 607, 108 Kan. 488.

86. N.Y.—People v. De Goode, 196 N.Y.S. 418, 203 App. Div. 35, 40 N.Y. Cr. 145, affirmed 142 N.E. 305, 236 N.Y. 613.

25 C.J. p 655 note 90 [a].

Requested instructions properly refused

Cal.—People v. Andary, 261 P.2d 791, 120 C.A.2d 675—People v. Roland, 26 P.2d 517, 134 C.A. 675.

La.—State v. Courreges, 9 So.2d 453, 201 La. 62.

87. Ariz.—Tate v. State, 106 P.2d 487, 56 Ariz. 194.

Cal.—People v. Ashley, 267 P.2d 271, 42 C.2d 246.

Colo.—Bomareto v. People, 137 P.2d 402, 111 Colo. 99.

Mo.—State v. Zingher, 259 S.W. 451, 302 Mo. 650.

N.H.—State v. Skaff, 54 A.2d 155, 94 N.H. 402.

N.J.—Sharp v. State, 21 A. 1026, 53 N.J. Law 511.

W. Va.—State v. Cobb, 7 S.E.2d 443, 122 W. Va. 97—State v. Laskey, 7 S.E.2d 439, 122 W. Va. 93—State v. Smith, 125 S.E. 90, 97 W. Va. 313.

25 C.J. p 655 note 2.

Modification of instruction

In prosecution for passing check without sufficient funds in bank, court properly modified request advising jury that defendant's intent was "the all-important element" to read it was "an" important element.

Cal.—People v. Freeman, 156 P. 994, 29 C.A. 543.

as to the necessity for the falsity of the pretense,⁸⁸ for accused's knowledge of the falsity of the pretense,⁸⁹ for the reliance by the owner on the pretense,⁹⁰ and for injury to the prosecutor;⁹¹ and instructions which permit the jury to render a verdict of guilty notwithstanding the nonexistence of an essential element of the offense are erroneous.⁹²

Instructions should be given as to the materiality of the pretenses where more than one was used,⁹³ and an instruction which authorizes conviction on proof of a misrepresentation as to an immaterial matter is erroneous.⁹⁴ Under some circumstances it is necessary and proper for the court to segregate false statements by accused as to existing facts from his statements amounting merely to future promises, in order that the jury may understand clearly what facts, if proved, would permit a con-

viction.⁹⁵

Instructions should be given as to a defense which negatives the existence of an essential element, where such defense is supported by evidence,⁹⁶ and, where such defense is supported by evidence, an instruction or charge is erroneous if it ignores such defense⁹⁷ or if it is so limited in scope as not to give accused the full benefit of his defense and of the supporting evidence.⁹⁸

No greater definiteness is necessary in an instruction as to an element of the offense than is required with respect to an allegation of an indictment in that regard.⁹⁹

An instruction failing to inform the jury what representations accused was charged with making,

Instructions held sufficient

Cal.—People v. Schmitt, 317 P.2d 673, 155 C.A.2d 87—People v. Montgomery, 287 P.2d 520, 135 C.A.2d 507.

88. Cal.—People v. Bowman, 142 P. 495, 24 C.A. 781.
Ky.—Smith v. Commonwealth, 133 S. W. 228, 141 Ky. 534.

Instruction held sufficient

Mo.—State v. Montgomery, 116 S.W. 2d 72.

89. N.J.—Sharp v. State, 21 A. 1026, 53 N.J.Law 511.
S.D.—State v. Pickus, 257 N.W. 284, 63 S.D. 209.
25 C.J. p 655 note 4.

90. Ala.—Meek v. State, 23 So. 155, 117 Ala. 116.
25 C.J. p 655 note 5.

Instruction held sufficient

Instruction to convict if victim, "relying upon" accused's false representations, gave him money, was not defective on the theory that it failed to require that such representations constituted inducement.
Ind.—Greening v. State, 153 N.E. 412, 198 Ind. 706.

91. Ga.—Berry v. State, 23 S.E. 833, 97 Ga. 202.
25 C.J. p 655 note 6.

92. Ill.—People v. Perlmutter, 138 N.E. 152, 306 Ill. 495.
Mo.—State v. Zingher, 258 S.W. 451, 302 Mo. 650.
N.J.—Sharp v. State, 21 A. 1026, 53 N.J.Law 511.
W.Va.—State v. Cobb, 7 S.E.2d 443, 122 W.Va. 97—State v. Laskey, 7 S.E.2d 439, 122 W.Va. 93—State v. Smith, 125 S.E. 90, 97 W.Va. 313.
25 C.J. p 655 notes 2-6.

93. Neb.—West v. State, 88 N.W. 503, 63 Neb. 257.
25 C.J. p 656 note 7.

35 C.J.S.—59

94. Ariz.—Willis v. State, 271 P. 725, 34 Ariz. 363.
25 C.J. p 656 note 7.

95. Kan.—State v. Mathes, 196 P. 607, 108 Kan. 438.

Undue emphasis on isolated matter not shown

An instruction in accordance with the rule stated in the text was not subject to the criticism that it gave undue prominence to a single isolated matter.

Kan.—State v. Mathes, supra.

96. Ky.—Tartar v. Commonwealth, 102 S.W.2d 971, 267 Ky. 502—Hatcher v. Commonwealth, 5 S.W. 2d 882, 224 Ky. 131.

Mo.—State v. Norman, 232 S.W. 452.
Okl.—Kilgore v. State, 219 P. 160, 25 Okl.Cr. 69.

Instruction held sufficient

(1) Prosecution for swindling.
Tex.—Parten v. State, 160 S.W.2d 935, 144 Tex.Cr. 12—Rumfield v. State, 141 S.W.2d 630, 139 Tex.Cr. 599.

(2) Prosecution under Remington Comp.St. § 2601-2, in which there was an issue as to whether check was post-dated.

Wash.—State v. Carr, 294 P. 1016, 160 Wash. 83.

(3) In prosecution for issuing a check without sufficient funds with intent to defraud, an instruction charging that it was no defense to prosecution for making and uttering a fictitious check that after check was passed accused attempted to make restitution, was not error.

Cal.—People v. Porter, 222 P.2d 151, 99 C.A.2d 506.

(4) In prosecution for making and drawing a check without sufficient funds with intent to defraud, charge in terms of statute and that main issue was whether payee parted with anything of value in exchange for

check and that if check was given purely in payment of existing debt, accused was not guilty, fully and fairly submitted defense, as presented by the evidence, that giving of check was merely an extension of credit.

Ga.—Gibson v. State, 48 S.E.2d 483, 77 Ga.App. 270.

Necessity of supporting evidence

(1) In a prosecution for swindling, it was held that there was nothing in the evidence which required the giving of an instruction that accused should not be convicted if other influences, outside representations mentioned in indictment, actuated injured persons in parting with property.

Tex.—Raymond v. State, 33 S.W.2d 192, 116 Tex.Cr. 595.

(2) In prosecution for statutory larceny by obtaining money by false representations, it was proper for the court to omit from its instructions that part of Remington Code § 2602, providing that it shall not be larceny for a bailee, etc., to retain his reasonable collection fee or charges, in view of the admitted and undisputed facts.

Wash.—State v. Cook, 194 P. 401, 115 Wash. 391.

Instruction properly refused

Requested instruction constituting incorrect statement of law, in prosecution for swindling.

Tex.—Overall v. State, 128 S.W.2d 1194, 137 Tex.Cr. 303—Nash v. State, 29 S.W.2d 359, 115 Tex.Cr. 324.

97. Ark.—Utley v. State, 238 S.W. 607, 152 Ark. 407.

98. Ariz.—State v. Ellis, 189 P.2d 717, 67 Ariz. 7.

Okl.—Kilgore v. State, 219 P. 160, 25 Okl.Cr. 69.

99. Ind.—Greening v. State, 153 N. E. 412, 198 Ind. 706.

but referring them to the information therefor, is erroneous.¹

Instructions based on a statute other than that on which the indictment is based and under which it may be upheld are erroneous.²

§ 55. Verdict

The general rules as to verdicts in criminal cases apply in prosecutions for obtaining property by false pretenses and in like prosecutions.

Rules as to verdicts in criminal cases generally, considered in Criminal Law §§ 1388-1416, apply in prosecutions for obtaining property by false pretenses and the like.³ The verdict must respond to the issues submitted to the jury,⁴ and should be consistent with the indictment or information⁵ and with the evidence.⁶

The verdict must contain, either in itself or by reference to the indictment, all the elements of the crime.⁷ A verdict of "guilty of drawing on insufficient account" is a general verdict, and is not defective for failure to state affirmatively the degree of the crime.^{7.5} A verdict which finds accused guilty of but one of several elements of an offense is insufficient.⁸

Mere irregularity or surplusage in a verdict of

conviction is immaterial, if intent to convict of the crime charged is unmistakably expressed.⁹

A special verdict must embrace all the facts material to the determination of issues of fact raised by the pleadings; otherwise it is imperfect and void.¹⁰

Value of property obtained. In view of a statute making the extent of the punishment depend on the value of the property obtained, considered generally infra § 56, a statutory provision that the jury shall ascertain and declare in their verdict the value of the property obtained has been regarded as mandatory so that a verdict which does not declare the value of the property is not effective.¹¹ A verdict finding accused guilty as charged in the indictment and assessing the punishment has been regarded as sufficient, however, notwithstanding it contains no statement as to value, where the value of the property is stated in the indictment.¹²

§ 56. Sentence and Punishment

The sentence and punishment imposed must be in accord with the controlling statutes.

The punishment for obtaining property by false pretenses and the like is regulated by statutes which vary in their provisions.¹³ Under some statutes the

1. Mo.—State v. Marion, 138 S.W. 491, 235 Mo. 359.

2. Ga.—Sims v. State, 131 S.E. 101, 34 Ga.App. 683.

3. Ariz.—Kimball v. Territory, 115 P. 70, 13 Ariz. 310.

S.D.—State v. Pickus, 257 N.W. 284, 63 S.D. 209.

25 C.J. p 656 notes 9-14.

4. Ariz.—Kimball v. Territory, 115 P. 70, 13 Ariz. 310.

Cal.—People v. Cummings, 49 P. 576, 117 C. 497.

People v. Small, 82 P. 87, 1 C.A. 320.

Pa.—Commonwealth v. Johnson, Quar.Sess., 21 Lehl.J. 369.

5. **Degree of offense**

Where information charged, and proof disclosed, that defendant obtained only twelve dollars and fifty cents by false pretenses, conviction for felony was not authorized.

Mo.—State v. Hollbrook, 289 S.W. 560.

Verdict held responsive to charge

A jury's verdict, finding accused guilty of obtaining property by means of check drawn with intent to cheat and defraud on bank in which he knew he had no funds, as charged in information, and fixing his punishment at five years in state penitentiary was sufficient.

Mo.—State v. Abbott, 236 S.W.2d 592.

6. **Discrepancy between verdict and evidence not shown**

Colo.—Shemwell v. People, 161 P. 157, 62 Colo. 146.

25 C.J. p 656 note 10 [a].

7. S.D.—State v. Pickus, 257 N.W. 284, 63 S.D. 209.

25 C.J. p 656 note 11.

Verdict held sufficient

A verdict finding accused guilty of obtaining money by means and by use of the confidence game, "in the manner and form as charged in the indictment" contained all the substantive elements of the crime, and, hence, it was proper to refer to charging part of the indictment instead of alleging that accused "unlawfully, willfully, and feloniously" had obtained money by a confidence game.

Ill.—People v. Krazik, 73 N.E.2d 297, 397 Ill. 202.

Insufficient verdict as acquittal

Jury's verdict, finding defendant "guilty of obtaining money recklessly without information to justify truthfully, did obtain by means of false pretenses as charged in count two of the information," did not amount to verdict of acquittal, although insufficient to support judgment of conviction.

S.D.—State v. Pickus, 257 N.W. 284, 63 S.D. 209.

7.5 Ariz.—State v. Lubetkin, 276 P. 2d 520, 78 Ariz. 91.

8. Ariz.—Kimball v. Territory, 115 P. 70, 13 Ariz. 310.

9. Ariz.—Kimball v. Territory, supra.

Mo.—State v. Hartman, 273 S.W.2d 198, 364 Mo. 1109.

25 C.J. p 656 note 13.

10. Cal.—People v. Bowman, 142 P. 495, 24 C.A. 781.

N.C.—State v. Oakley, 9 S.E. 575, 103 N.C. 408.

25 C.J. p 656 note 14.

11. Neb.—Fowler v. State, 191 N.W. 702, 109 Neb. 400—Hennig v. State, 166 N.W. 617, 102 Neb. 271.

25 C.J. p 656 note 11 [b] (5).

12. Colo.—Montez v. People, 132 P. 2d 970, 110 Colo. 208.

Mo.—State v. Kleine, 263 S.W. 114—State v. Rosenheim, 261 S.W. 95, 303 Mo. 553—State v. Bohle, 81 S.W. 179, 182 Mo. 58.

25 C.J. p 656 notes 11 [b] (4), (6), 13 [b].

13. Mo.—State v. Krouse, 156 S.W. 727, 171 Mo.App. 424.

25 C.J. p 656 notes 15-17.

Concurrent sentences for single crime

Where accused seller falsely represented to buyer of automobile that title was in certain condition and seller accepted purchase price and

punishment is the same as for larceny,¹⁴ but where false pretenses it applies, and not the punishment specific punishment is prescribed by statute as to for ordinary larceny.¹⁵

another automobile in trade-in, and finance company later repossessed automobile from buyer, although accused was guilty of either larceny by trick or device or of obtaining property by false pretenses, depending on whether he intended possession or title to pass at time of transaction, there was only one theft and imposing of two sentences to run concurrently was error.

Cal.—People v. Nor Woods, 233 P.2d 897, 37 C.2d 584.

Determination of degree of offense as affecting punishment

Indictment charging misdemeanor cannot be aided by inference from extraneous circumstances to justify sentence for higher offense.

Iowa.—Woods v. Hollowell, 214 N.W. 675, 204 Iowa 186.

"Simple imprisonment"

Where the statute provides for "simple imprisonment" for obtaining money by false pretenses, it means imprisonment in the county jail; therefore, a sentence to imprisonment at hard labor in the penitentiary is improper.

Pa.—Commonwealth ex rel. Bishop v. Smith, 186 A. 763, 123 Pa.Super. 79.

25 C.J. p 656 note 15 [a].

Particular provision applicable

Where statute, under which accused was convicted of obtaining buyer's money under false pretenses by selling property on which accused had previously given lien without informing buyer of lien, stated that punishment was same as for obtaining goods under false pretenses, and the false pretenses statute which dealt with conduct more nearly similar was statute relating to obtaining money or property by false pretenses, accused would be sentenced under latter statute prescribing three years' imprisonment as maximum term.

Miss.—Jones v. State, 84 So.2d 799, 226 Miss. 535.

Giving check

(1) Sentences held proper under statute or not excessive.

Neb.—Taylor v. State, 66 N.W.2d 514, 159 Neb. 210.

N.D.—State v. Ziesemer, 93 N.W.2d 803.

Okl.—Moore v. State, 250 P.2d 46, 96 Okl.Cr. 118.

(2) Under indictment for obtaining money under false pretenses and conviction of violation of so-called "cold check" statute, penalty must conform to that imposed by such statute.

Ky.—Tartar v. Commonwealth, 102 S.W.2d 971, 267 Ky. 502.

(3) Imposition of penitentiary sentence instead of punishment for a misdemeanor on conviction for giving check with fraudulent intent in violation of L.1932 c 299 was error. Miss.—Russell v. State, 169 So. 654, 176 Miss. 853.

(4) Penitentiary sentence of one year on conviction under law relating to making and uttering "no fund" check was not excessive under the circumstances.

Neb.—Lahners v. State, 223 N.W. 951, 118 Neb. 184.

(5) A sentence of seven years imposed on one who pleaded guilty to crime of passing a false and worthless check, and who had previously served six years in prison, was within limitation fixed by law and was within limits of discretion given district court.

Mont.—State v. Zumwalt, 291 P.2d 257, 129 Mont. 529.

(6) Under some statutes, unlike the offenses of theft and swindling, in the prosecution for issuance of a check without sufficient funds, the amount of check and not the value of the property acquired determines the punishment applicable to the offense. Tex.—Donahoo v. State, 285 S.W.2d 952, 162 Tex.Cr. 388.

(7) Accused was improperly sentenced to hard labor because of his failure to pay fine assessed for issuing a worthless check in view of Code 1923 §§ 4158, 4159, as amended by Gen.Acts 1931 p 643 §§ 1, 2. Ala.—Chambers v. State, 153 So. 665, 26 Ala.App. 89.

Punishment or penalty held excessive

(1) Generally.

Iowa.—State v. Cooper, 151 N.W. 835, 169 Iowa 571.

Okl.—Rollins v. State, 54 P.2d 224, 58 Okl.Cr. 400.

(2) In prosecution under Pub. Welfare L. § 148 for fraud or false representation in connection with application for relief.

N.Y.—People v. La Face, 266 N.Y.S. 458, 148 Misc. 238.

Punishment not excessive

(1) Sentence of five years in the penitentiary was not excessive where accused pleaded guilty to indictment which charged offenses of assuming and pretending to be an officer or employee acting under authority of United States and taking it upon one's self to act as such, and of demanding and obtaining money while pretending to be an officer or employee of the United States. U.S.—Elliott v. Hudspeth, C.C.A. Kan., 110 F.2d 389.

(2) Sentence for attempt to obtain

money by false pretenses equivalent to maximum statutory penalty for the substantive offense was not illegal.

Md.—Cooper v. Warden of Md. House of Correction, 136 A.2d 367, 214 Md. 629.

(3) Sentence of seven years imprisonment imposed on one convicted of obtaining money by means of a bogus check was not so severe as to indicate passion and prejudice against him.

Mo.—State v. Polakoff, 237 S.W.2d 173, 361 Mo. 929.

(4) Sentence of four years in state penitentiary for obtaining money by false pretenses was not excessive, where evidence disclosed a deliberate purpose conceived and pursued over a long period of time to beguile, entrap, deceive and defraud a trusting and gullible person which was successful in the amount of approximately six thousand seven hundred dollars which represented a permanent loss to the one defrauded.

Neb.—Hameyer v. State, 29 N.W.2d 458, 148 Neb. 798.

14. Mo.—State v. McBrien, 178 S.W. 489, 265 Mo. 594.

25 C.J. p 656 note 16.

Sentence held proper

Convictions under either false pretense or larceny count would support ten-year sentence.

Md.—Cook v. Warden of Md. Penitentiary, 137 A.2d 649, 215 Md. 628, certiorari denied 78 S.Ct. 920, 356 U.S. 953, 2 L.Ed.2d 846.

Degrees of larceny considered

Obtaining property by false pretenses being punishable as for larceny, statute fixing penalty for larceny in its two degrees was applicable.

Cal.—People v. Rabe, 261 P. 303, 202 C. 409.

Punishment measured by convertible money value of real property obtained

Under a statute providing that the offense is punishable in the same manner and to the same extent as for larceny of the money or property obtained, the view was expressed that, where real property was acquired by accused, punishment was to be measured by its convertible money value.

Cal.—People v. Rabe, supra.

15. W.Va.—State v. Martin, 137 S.E. 385, 103 W.Va. 446.

25 C.J. p 656 note 16 [a].

Punishment as for forgery

Where, after accused's uninsured tenant house burned to the ground, accused applied to insurer's agent for fire policy on the then destroyed tenant house and subsequently re-

The punishment sometimes depends on the value of the property obtained.¹⁶ Under some statutes, where the punishment is dependent on the value of the property obtained, the court looks to the verdict for the value of the property for the purpose of determining the sentence to be imposed,¹⁷ and, where the jury fail to declare in their verdict the value of the property obtained, when so required by statute, the court is without jurisdiction to pronounce sentence, and a judgment based thereon is erroneous.¹⁸

Besides providing for punishment of the offense by fine or imprisonment, under certain statutes defendant may be sentenced also to restore the property so fraudulently obtained if it can be done;¹⁹ and under other statutes, where the value of the property obtained is less than a specified amount, accused in addition to being liable to fine and imprisonment is liable to the person injured in the amount of damage sustained.²⁰

Restitution or an agreement to reimburse may be ground for mitigation of punishment in the discretion of the court.²¹

FALSI CRIMEN or CRIMEN FALSI. See Criminal Law § 2.

FALSIFICACIÓN. In Spanish law, falsification; the act of counterfeiting, forging, adulterating, or corrupting something, such as a document, money, or medicine;¹ the act of adulteration or the chang-

ing of anything, like a writing.^{1,5}

FALSIFICATION. In general, the act of falsifying or making false, or of deceptively altering, adulterating, counterfeiting, or misrepresenting; also false representation;² and, more specifically, the showing, in an action of account, that entries made in the account rendered are wrong.³

ported the fire loss orally, stating that loss happened after effective date of policy, accused's punishment should have been as for third-degree forgery, following his conviction of false pretense.

Ala.—*Earnest v. State*, App., 113 So. 2d 517.

Sentence as for grand larceny improper

Wash.—*Mooney v. Cranor*, 233 P.2d 850, 38 Wash.2d 881—*Campbell v. Cranor*, 212 P.2d 1019, 35 Wash.2d 938—*Lutes v. Cranor*, 211 P.2d 1005, 35 Wash.2d 937—*Jeane v. Smith*, 210 P.2d 127, 34 Wash.2d 826—*Sorenson v. Smith*, 209 P.2d 479, 34 Wash.2d 659.

16. Ky.—*Tartar v. Commonwealth*, 102 S.W.2d 971, 267 Ky. 502.

Mo.—*State v. Hollbrook*, 289 S.W. 560.

25 C.J. p 656 note 17.

As to determination of degree of offense by value of property obtained see *supra* § 35.

Imprisonment or fine

Under statute making crime of obtaining property under false pretenses punishable by imprisonment for not exceeding three years or fine of not exceeding three times the value of property obtained, or both, judgment imposing term of three years imprisonment and fine of one thousand two hundred fifty dollars was not excessive on conviction of obtaining automobile valued at one thousand five hundred dollars by false pretense.

Okl.—*Ex parte Harman*, 247 P.2d 302, 95 Okl.Cr. 411.

Fine

Where the statute authorizes, in addition to imprisonment, the imposition of a fine not to exceed three times the value of the money obtained, it is improper to impose a fine in excess of the amount so authorized.

S.D.—*State v. Bundrock*, 207 N.W. 484, 49 S.D. 483.

17. Neb.—*Fowler v. State*, 191 N.W. 702, 109 Neb. 400—*Hennig v. State*, 166 N.W. 617, 102 Neb. 271.

18. Neb.—*Fowler v. State*, 191 N.W. 702, 109 Neb. 400—*Hennig v. State*, 166 N.W. 617, 102 Neb. 271.

19. Wyo.—*Martins v. State*, 98 P. 709, 17 Wyo. 319, 22 L.R.A., N.S., 645.

20. Neb.—*Mason v. State*, 155 N.W. 895, 99 Neb. 221.

21. Cal.—*People v. Miles*, 99 P.2d 551, 37 C.A.2d 373.

Restitution and payment of court costs

In petty larceny prosecution, under Pen.L. § 1292-a, for issuing check without funds, three months' jail sentence was reduced to fifteen days, accused having paid costs and made restitution.

N.Y.—*People v. Foote*, 258 N.Y.S. 210, 144 Misc. 134.

1. *Escriche Diccionario*.

More specifically

(1) "The counterfeiting or feigning of a signature, writing, or rubric, only when an attempt is made to imitate the signature, writing, or rubric of a person in order to induce another to accept the document as written, signed, or rubricated by the

former. . . . Where the imitation is such that anyone would mistake it for the signature, writing, or rubric that was imitated, the crime of falsification is committed."

Philippine.—U. S. v. *Austero*, 14 Philippine 377, 380.

(2) It has been said that the fact that consent to a contract may be obtained by mistake, violence, intimidation, or fraud does not make the contract a false contract, and therefore a person who has obtained such contract by those means is not guilty of the crime of falsification either of a public or of a private document.

Philippine.—U. S. v. *Milla*, 4 Philippine 391.

It is described as a species of, but narrower than, "falsedad," for it does not include acts of omission.

Escriche Diccionario.

1.5 Puerto Rico.—In re *Martorel*, 12 Puerto Rico Fed. 50, 60.

2. Century D.

Falsification of a telegram, as a crime, committed by a telegraph operator and public official who, with intent to gain, reduces the number of words written in a telegram received by him for dispatch, by making alterations in its wording, when unauthorized to do so by the sender, and who transmits the message by wire in the form as amended by him after suppressing several of the words therein contained.

Philippine.—U. S. v. *Romero*, 17 Philippine 76, 78.

3. N.Y.—*Philips v. Belden*, 2 Edw. 1, 23.

See also *Account Stated* § 57.

Falsification of evidence or influencing testimony as an element of the offenses of obstructing justice and perjury see Obstructing Justice § 9, and Perjury § 1.

FALSIFIER. One who falsifies or deceives, or gives to anything a deceptive appearance; a liar.⁴

FALSIFY. The word "falsify" is described as a word of double import in that it may be used to convey two distinct meanings; either that of being intentionally or knowingly untrue, made with intent to defraud, or the meaning of mistakenly and accidentally untrue.^{4,5} The word may be used with a third meaning, that is, not an accidental but an intentional untruth, without, however, an intent to defraud.^{4,10}

Primarily "falsify" means to counterfeit or forge; to give a false appearance to anything; to make something false;⁵ to make false by mutilation or addition; to tamper with, as to falsify a record or document.⁶

More specifically, in a different sense, to disprove, to prove to be false or erroneous;⁷ to prove a thing to be false,⁸ as an item in an account see Account Stated § 57; and also to avoid or defeat, spoken of verdicts, appeals, etc.;⁹ to reverse or avoid, as a verdict or judgment.¹⁰

For other references to specific uses of the term see 25 C.J. p 662 note 8.

Scope

The term applies to items in the account which are supposed to be wholly false or in part erroneous. S.C.—Kennedy v. Adickes, 15 S.E. 922, 923, 37 S.C. 174.

4. Minn.—Tawney v. Simonson, Whitcomb & Hurley Co., 124 N.W. 229, 232, 109 Minn. 341, 27 L.R.A., N.S., 1035.

4.5 Cal.—Washer v. Bank of America Nat. Trust & Savings Ass'n, 136 P.2d 297, 301, 21 C.2d 822, 155 A.L.R. 1338.

4.10 Cal.—Washer v. Bank of America Nat. Trust & Savings Bank, supra.

5. Black L.D.

6. Fla.—Pou v. Ellis, 63 So. 721, 723, 66 Fla. 358.

"Falsifying a record"

A high offense against public justice, punishable by statute in England and in the United States. Black L.D.

"Falsifying evidence" see Obstructing Justice § 9, and Perjury § 1.

7. Black L.D.

8. Bouvier L.D.

"Falsifying account"

Pa.—Rehill v. McTague, 7 A. 224, 114 Pa. 82, 95, 60 Am.R. 341.

S.C.—Kennedy v. Adickes, 15 S.E. 922, 37 S.C. 174, 177.

"Surcharge" and "falsify"

N.Y.—Philips v. Belden, 2 Edw. 1, 23.

25 C.J. p 662 note 12 [b].

9. Black L.D.

10. Burrill L.D., citing 4 Blackstone Comm. p 390.

"Falsifying a judgment"

A term sometimes used for reversing a judgment. Black L.D.

11. Black L.D.

"Falsing of dooms"

The proving of the injustice, falsity, or error of the doom or sentence of a court; the reversal of a sentence or judgment; an action to set aside a decree; protesting against a sentence and taking an appeal to a higher tribunal. Black L.D.

FALSING. In Scotch law, false making, forgery; also making or proving false.¹¹

FALSITY. In general, the character of being false; contrariety or nonconformity to truth or fidelity; falseness.¹²

In law the term has been said to imply more than erroneous or untrue, indicating or presupposing knowledge of the untruth.¹³

FALSONARIUS. A forger, a counterfeiter.¹⁴

FALSO RETORNO BREVIVUM. In old English law, a writ which formerly lay against the sheriff who had execution of process for false returning of writs.¹⁵

FALSO TESTIMONIO. In Spanish law, the crime of testifying falsely in court,¹⁶ in this respect being somewhat narrower than the Anglo-American crime of perjury.¹⁷

FALSUM. Latin, in the civil law, a false or forged thing, a fraudulent simulation, a fraudulent counterfeit or imitation, such as a forged signature or instrument; also, falsification, which may be either by falsehood, concealment of the truth, or fraudulent alteration, as by cutting out or erasing part of a writing.¹⁸

FALSUS. Erroneous, or mistaken; also, deceitful, false, or fraudulent.¹⁹

FALSUS IN UNO, FALSUS IN OMNIBUS.²⁰

12. Century D.

13. Ga.—Abercrombie v. Hair, 196 S.E. 447, 451, 185 Ga. 728.

14. Black L.D.

15. Black L.D.

16. Escribano Diccionario.

17. Philippine.—U. S. v. Temora, 8 Philippine 19, 20.

18. Black L.D.

19. Black L.D.

As applied to persons and things

In the sense of "deceiving" or "fraudulent," it is applied to persons in respect to their acts and conduct, as well as to things; and in the sense of "erroneous," it is applied to persons on the question of personal identity. Black L.D.

20. A maxim meaning "False in one thing, false in everything."

Black L.D.

Applied or explained in:

U.S.—The Santissima Trinidad, Va., 7 Wheat. 283, 339, 5 L.Ed. 454.

Ala.—Corpus Juris cited in Fidelity-Phoenix Fire Ins. Co. of New York

FALTA. In Spanish literally "fault" or "lack;" hence in law, a misdemeanor, a petty crime.²¹

FAMA. Latin, generally, fame, character, or reputation; hence report of common opinion.²²

In the civil and Spanish law, reputation.²³

FAMACIDE. A killer of reputation, hence a slanderer.²⁴

FAMA EST CONSTANS VIRORUM BONORUM DE RE ALIQUA OPINIO.²⁵

FAMA, FIDES, ET OCULUS NON PATIUNTUR LUDUM.²⁶

FAMA QUÆ SUSPICIONEM INDUCIT, ORIRI DEBET APUD BONOS ET GRAVES, NON QUIDEM MALEVOLOS ET MALEDICOS, SED PROVIDAS ET FIDE DIGNAS PERSONAS, NON SEMEL SED SÆPIUS, QUIA CLAMOR MINUIT ET DEFAMATIO MANIFESTAT.²⁷

FAME. Report or opinion widely diffused; renowned; notoriety; celebrity, favorable or unfavorable, but especially the former; reputation.²⁸

"Fame" has been held to be synonymous with "reputation."^{28.5}

v. Murphy, 166 So. 604, 608, 231 Ala. 680.

Ariz.—Whitman v. Moore, 125 P.2d 445, 455, 59 Ariz. 211.

D.C.—**Corpus Juris Secundum** cited in Heindrich v. Dimas-Aruti, Mun. App., 42 A.2d 138, 140.

Ill.—Godair v. Ham Nat. Bank, 80 N.E. 407, 408, 225 Ill. 572, 116 Am.S.R. 172, 8 Ann.Cas. 447.

Ind.—Inland Steel Co. v. Barcena, 39 N.E.2d 800, 801, 110 Ind.App. 551.

Ky.—**Corpus Juris** cited in Halcomb v. Creech, 73 S.W.2d 21, 22, 255 Ky. 262.

Mo.—Clemens v. Clemens, App., 238 S.W.2d 47, 50.

Neb.—Knihal v. State, 36 N.W.2d 109, 113, 150 Neb. 771, 9 A.L.R.2d 891.

Okl.—State ex rel. Burford v. Sullivan, 193 P.2d 594, 606, 86 Okl.Cr. 364.

25 C.J. p 662 note 18 [b].

Characterizations or descriptions of maxim

(1) "An ancient maxim of the law of evidence."

Ohio.—Stoffer v. State, 15 Ohio St. 47, 54, 55, 86 Am.D. 470.

(2) The ancient and established maxim of the law of evidence.

Ala.—**Corpus Juris** cited in Fidelity-Phenix Fire Ins. Co. of New York v. Murphy, 166 So. 604, 608, 231 Ala. 680.

(3) The harsh "falsus in uno falsus in omnibus" rule which means no more at the present time than that jury may disbelieve a witness if the jury thinks that the witness is lying has little or no place in modern jurisprudence.

U.S.—Virginian Ry. Co. v. Armentrout, C.C.A.W.Va., 166 F.2d 400, 405, 4 A.L.R.2d 1064.

(4) Other similar statements see 25 C.J. p 662 note 18 [a].

Scope and effect of the maxim

(1) The maxim is a mere rule of evidence affirming a rebuttable presumption of fact, under which the jury considers all the evidence of the witness, other than that which is

found to be false, and gives effect to so much of it, if any, as is relieved from the presumption against it and found to be true.

W.Va.—Levine Bros. v. Mantell, 111 S.E. 501, 504, 90 W.Va. 166.

(2) It deals only with the weight of evidence, and is not a positive rule of law.

Miss.—Metropolitan Life Ins. Co. v. Wright, 199 So. 289, 290, 190 Miss. 53.

N.J.—State v. Sturchio, 22 A.2d 235, 236, 127 N.J.Law 366—Hargrave v. Stockloss, 21 A.2d 820, 823, 127 N.J. Law 262.

R.I.—Dawson v. Bertolini, 38 A.2d 765, 768, 70 R.I. 325.

(3) The principle of the maxim is not an inflexible rule of evidence.

U.S.—Norfolk & W. Ry. Co. v. McKenzie, C.C.A.Ky., 116 F.2d 632, 635.

(4) It does not require rejection of testimony which is corroborated by that of another and credible witness.

D.C.—Lee Won Sing v. Cottone, 123 F.2d 169, 173, 74 App.D.C. 374.

(5) Rule held to be merely permissive, and not mandatory.

U.S.—Norfolk & W. Ry. Co. v. McKenzie, supra.

Ga.—Bankers' Health & Life Ins. Co. v. Nichols, 162 S.E. 161, 44 Ga.App. 536.

N.J.—State v. Sturchio, 22 A.2d 235, 237, 127 N.J.Law 366—Hargrave v. Stockloss, 21 A.2d 820, 823, 127 N.J.Law 262.

(6) It is not of universal application.

N.Y.—Seymour v. Fellows, 44 N.Y. Super. 124, 130.

(7) False statement, if the maxim is to be applied, must be made with respect to a material fact.

N.J.—State v. Sturchio, supra.

(8) The maxim, "falsus in uno, falsus in omnibus," does not incorporate a mandatory or compulsory principle.

N.J.—State v. Wesler, 59 A.2d 834, 837, 137 N.J.Law 311.

(9) The maxim applies, but with less force, to statements which are in fact untrue though not intentionally false, especially when they involve judgment and skill.

N.Y.—People v. Caccamise, 65 N.Y.S. 2d 744, 747, 271 App.Div. 362.

21. Escriche Diccionario.

22. Black L.D.

23. Escriche Diccionario.

24. Black L.D.

25. A maxim meaning "Fame is the constant opinion of good men concerning a thing."

Morgan Leg.Max.

26. A maxim meaning "Fame, faith, and eyesight do not suffer a cheat."

Black L.D.

Similarly rendered

"Fame, plighted faith, and eyesight do not endure deceit."

Bouvier L.D.

27. A maxim meaning "Report, which induces suspicion, ought to arise from good and grave men, not indeed from malevolent and malicious men, but from cautious and credible persons, not only once, but frequently; for clamor diminishes, and defamation manifests."

Black L.D.

28. Century D.

See also the C.J.S. definition Character, and, as to admissibility of evidence of reputation see Evidence §§ 430-432.

"It has a reference to the thing which gives birth to it, it goes about of itself without any apparent instrumentality. . . . Hearsay refers to the receiver of that which is said, it is limited therefore to a small number of speakers or reporters. The fame serves to form or establish a character either of a person or a thing; it will be good or bad according to circumstances."

Pa.—Commonwealth v. Murr, 42 Wkly.N.C. 263, quoting Crabb Synonyms.

28.5 Mo.—Harrison v. Lakenan, 88 S.W.2d 53, 58, 189 Mo. 581.

FAMILIA. Latin and Spanish; in Roman, in old English, and in Spanish law, a family or household,²⁹ although it has been said that in the civil law this term has a wider significance than the English word "family."³⁰

Familia emptor. In Roman law, an intermediate person who purchased the aggregate inheritance, when sold "per æs et libram," in the process of making a will under the Twelve Tables. He was merely a man of straw, transmitting the inheritance to the "hæres" proper.³¹

Familia erciscundæ. In Roman law, an action for the partition of the aggregate succession of a familia, where that devolved upon cohæredes; also applicable to enforce a contribution toward the necessary expenses incurred on the familia.³² The imprescriptibility of the action to demand the division of a succession is known in Roman law as "familia erciscundæ."³³

FAMILIAR. When applied to a knowledge of things, either mental or physical, the word means having an intimate knowledge, thoroughly versed, well-known, well knowing, or well understood,³⁴ and as employed in the phrase "familiar with," has been held equivalent to "know."³⁵

Used with reference to persons, it means closely acquainted with or intimate, well acquainted, or well-known.³⁶

FAMILIARES REGIS. Literally "Familiars of the king." Persons of the king's household, the ancient title of the "six clerks" of chancery in England.³⁷

FAMILIARITY. The state of being familiar, in any sense of that word; intimate knowledge, close or habitual acquaintance, free or unrestrained intercourse.³⁸ It is said to arise from long habit or daily intercourse, as distinguished from occasional intercourse, which gives rises to acquaintance, and unreserved intercourse which breeds intimacy.³⁹

It has been compared with, or distinguished from, "acquaintance" see the C.J.S. definition of that term, and "intimacy."⁴⁰

FAMILUS. A slave.⁴¹

FAMILY.

In General

It is said that the word "family" is derived from the Latin term "familia,"⁴² and also that it is derived from the Oscan word "famul" which signifies a slave,^{42.5} and it is generally recognized that the

29. Black L.D.

30. Scope and development of the term

(1) Among the Romans it included not only all descendants of the same paterfamilias but all others of the household and subject to his power, such as clientes [dependents] and slaves. The same concept was carried into the early Spanish law and the head of the household was there called "paterfamilias" [padre de familias] although he had no children. Escribano Diccionario.

(2) "Familia" anciently signified the servants belonging to one master. Afterward, together with them, the wife and children, or what we from this word call a "family," of which the master was called "pater familias," the mistress "mater familias." S.C.—Pringle v. McPherson, 2 S.C.Eq. 524, 543.

(3) "The 'familia,' amongst the Romans was the body of household servants. They were called 'familiares,' and 'famuli' or 'famulæ,' men or maid servants [distinguishing them from] the 'servi,' who were by far the most considerable and were employed in husbandry and manufactures." Pa.—Ex parte Meason, 5 Binn. 167, 180.

(4) It included the whole of the slaves in a household.

Ill.—Race v. Oldridge, 90 Ill. 250, 252, 32 Am.R. 27.

(5) Also in Roman law it was the family right, the right or status of being the head of a family, or of exercising the "patria potestas" over others, which could belong only to a Roman citizen. Black L.D.

(6) In old English law, besides meaning a household, or the body of household servants, it also designated a quantity of land, otherwise called "mansa," sufficient to maintain one family. Black L.D.

(7) In Spanish law, a family, which might consist of domestics or servants; and it seems that even an unmarried man, owning negroes, might be the "head of a family," within the colonization laws of Coahuila and Texas. Black L.D., citing State v. Sullivan, 9 Tex. 156, 159.

31. Black L.D.

32. Black L.D.

Scope of action limited

"Where actions of communi dividundo and familia erciscundæ are prosecuted, nothing can be considered except division of the thing or the common inheritance."

Puerto Rico.—Rios v. Rios, 7 Puerto Rico 584, 589.

33. Philippine.—De Castro v. Echarri, 20 Philippine 23, 29.

34. Iowa.—Turner v. Loomis, 125 N.W. 662, 664, 146 Iowa 655.

35. Ill.—Smiley v. Lenane, 1 N.E.2d 213, 216, 363 Ill. 66.

36. Iowa.—Turner v. Loomis, 125 N.W. 662, 664, 146 Iowa 655.

37. Black L.D.

38. Century D.

39. Cal.—Atkins Corporation v. Tourny, 57 P.2d 480, 483, 6 C.2d 206.

40. Cal.—Atkins Corporation v. Tourny, supra—Carpenter v. Bailey, 29 P. 1101, 1103, 94 C. 406.

41. Ill.—Race v. Oldridge, 90 Ill. 250, 252, 32 Am.R. 27.

42. Ill.—Race v. Oldridge, 90 Ill. 250, 252, 32 Am.R. 27. N.Y.—Stafford v. Incorporated Village of Sands Point, 102 N.Y.S.2d 910, 913, 200 Misc. 57. People v. Whitted, 124 N.Y.S.2d 189, 191.

Wis.—Missionaries of Our Lady of La Salette v. Village of Whitefish Bay, 66 N.W.2d 627, 631, 267 Wis. 609. 25 C.J. p 664 note 38.

42.5 Kan.—Cross v. Benson, 75 P. 558, 560, 68 Kan. 495, 64 L.R.A. 560.

original meaning of the term was a servant or slave.^{42.10}

While the word "family" may be said to have a well defined,⁴³ broad, and comprehensive meaning in general,⁴⁴ it is one of great flexibility and is capable of many different meanings according to the connection in which it is used,⁴⁵ its meaning not being sufficiently certain or defined to permit its use as descriptive of particular persons for some purposes,⁴⁶ although for other purposes the term is not considered to be so indefinite.^{46.5}

It may be considered as referring to a man's household at a particular period, or to his race or generation;⁴⁷ and so it may be of narrow or broad meaning as the intention of the parties using the word, or as the intention of the law using it, may be made to appear;⁴⁸ but unless the context manifests a different intention it is usually construed in its primary sense.⁴⁹

The history of the development of the family and the family relations and the duties and obligations

42.10 N.Y.—Stafford v. Incorporated Village of Sands Point, 102 N.Y.S. 2d 910, 913, 200 Misc. 57.
Wis.—Missionaries of Our Lady of La Salette v. Village of Whitefish Bay, 66 N.W.2d 627, 630, 631, 267 Wis. 609.

43. Iowa.—Menefee v. Chesley, 66 N. W. 1038, 1040, 98 Iowa 55.
Mo.—Wentz v. Chicago, B. & Q. R. Co., 168 S.W. 1166, 1172, 259 Mo. 450, Ann.Cas.1916B 317.

44. Ill.—Liberty Nat. Bank of Chicago v. Zimmerman, 77 N.E.2d 49, 52, 333 Ill.App. 94—Village of Riverside v. Reagan, 270 Ill.App. 355, 365.

25 C.J. p 664 note 40.

45. U.S.—Johnson v. State Farm Mut. Auto Ins. Co., C.A.Mo., 252 F.2d 158, 161.

Ala.—Gamble v. Leva, 102 So. 120, 121, 212 Ala. 155.

Conn.—Farnam v. Farnam, 77 A. 70, 72, 83 Conn. 369.

Md.—Krug v. Mills, 152 A. 493, 495, 159 Md. 670.

Mich.—In re Buckley's Estate, 47 N. W.2d 33, 41, 330 Mich. 102—Boston Edison Protective Ass'n v. Paulist Fathers, 10 N.W.2d 847, 849, 306 Mich. 253, 148 A.L.R. 364.

Minn.—Corpus Juris Secundum quoted in Tomlyanovich v. Tomlyanovich, Minn., 58 N.W.2d 855, 864, 239 Minn. 250, 50 A.L.R.2d 108.

Mo.—Corpus Juris Secundum quoted in Brown v. Shield Fire Ins. Co., App., 260 S.W.2d 337, 338—Corpus Juris cited in State ex rel. Kemp v. Arnold, 113 S.W.2d 143, 145, 234 Mo.App. 154.

Nev.—In re Foster's Estate, 220 P. 734, 736, 47 Nev. 297.

N.Y.—Klee v. Klee, 93 N.Y.S.2d 588, 590, 47 Misc. 101.

In re Keegan's Estate, 37 N.Y.S. 2d 368, 370.

S.C.—Lemmon v. McElroy, 101 S.E. 852, 853, 113 S.C. 532.

Wis.—Missionaries of Our Lady of La Salette v. Village of Whitefish Bay, 66 N.W.2d 627, 631, 267 Wis. 609.

25 C.J. p 664 note 41.

Similarly expressed

(1) "An elastic expression, and

must necessarily vary with given facts and circumstances."

N.J.—Fratellanza Italiana v. Nugnes, 168 A. 589, 590, 114 N.J.Eq. 185.

N.C.—McGee v. Crawford, 171 S.E. 326, 327, 205 N.C. 318.

(2) The word is not one of inflexible meaning and its significance to a large extent depends upon the context and the purpose for which it is employed.

Mass.—Magill v. Magill, 56 N.E.2d 892, 894, 896, 317 Mass. 89, 154 A.L. R. 1406.

(3) The meaning of the term depends on the circumstances in which it is used as well as on the nature of the matter in which interpretation is required.

Conn.—Rathbun v. Aetna Cas. & Sur. Co., 128 A.2d 327, 329, 144 Conn. 165.

"Corpus Juris, and other works contain citation to many cases wherein the word 'family' is defined, but no two of them are alike. While the word is one of great flexibility, we think it may be said that the underlying principle running through the mass of authorities, is that there must be a head to a family, upon whom the other members are wholly or partially dependent."

Nev.—Jones v. Golick, 206 P. 679, 683, 46 Nev. 10.

"It is used to indicate, first, the whole body of persons who form one household, thus including also servants; second, the parents, with their children, whether they dwell together or not; and, third, the whole group of persons closely related by blood. It may mean a man's household, consisting of himself, his wife, children, and servants; it may mean his wife and his children, or his children, excluding his wife; or, in the absence of wife and children, it may mean his brothers and sisters, or next of kin; or it may mean the genealogical stock, from which he may have sprung."

Ill.—Norwegian Old People's Home Society v. Wilson, 52 N.E. 41, 43, 176 Ill. 94, 99.

First Catholic Slovak Ladies' Union of United States of America v. Florek, 210 Ill.App. 469, 472.
S.C.—Lemmon v. McElroy, 101 S.E. 852, 853, 113 S.C. 532.

Variety of tests

"In some of its uses the test for determining membership is found in the collective quality of the residence of the persons concerned and the unity of their domestic government and control. In those uses it is said to mean and embrace all the members of a collective body of persons living in one household and under one head and domestic government, and including servants and others as well as parents, children, and kin. . . . In other instances regard is had for relationship by blood or otherwise between the different members of the group, as well as to the unity of residence and domestic control. . . . In still other cases the factors of collectivity of residence and unity of headship are ignored, and that of relationship made to furnish the test of membership. . . . Again it is held that the term may be employed to designate individuals whom it is the right of its head to control and his . . . duty to support."

Conn.—Piccinini v. Connecticut Light & Power Co., 106 A. 330, 331, 93 Conn. 423.

46. R.I.—Davis v. Smith, 58 A. 630, 632, 26 R.I. 129, 106 Am.S.R. 691, 66 L.R.A. 478, 3 Ann.Cas. 832.

Tex.—Goode v. State, 16 Tex.App. 411, 414.

46.5 N.Y.—In re Keegan's Estate, 37 N.Y.S.2d 368, 370.

As not so indefinite in will as to render devise invalid see Wills § 644.

47. Pa.—McCullough v. Gilmore, 11 Pa. 370, 373.

48. S.C.—Lemmon v. McElroy, 101 S.E. 852, 853, 113 S.C. 532.

25 C.J. p 664 note 42.

49. N.J.—Fratellanza Italiana v. Nugnes, 168 A. 589, 590, 114 N.J. Eq. 185.

S.C.—Barkley v. International Mut. Ins. Co., 86 S.E.2d 602, 604, 227 S. C. 38.

25 C.J. p 664 note 43.

of the members of the family has been the subject of judicial discussion.^{49.5}

As used in exemption and homestead statutes see Exemptions § 16, and Homesteads § 23. For other references to specific titles see 25 C.J. p 664 note 37.

Primary Signification

—In General. In its ordinary and primary sense the word "family" signifies, embraces, or denotes a group of persons related to each other by marriage or blood, and living together under a single roof,

and comprising a household whose head is usually the father or husband;^{49.10} a collection of persons as a single group, with one head, living together, a unit of permanent and domestic character, under one roof.⁵⁰

Thus, the term "family" is frequently defined as meaning, substantially, a collection, or the collective body, of persons living in one house, or under one head or manager,⁵¹ although this definition has been criticized,⁵² and it has been said that the term cannot be so limited and strait-jacketed as always to

49.5 U.S.—Daily v. Parker, C.C.A. Ill., 152 F.2d 174, 175, 162 A.L.R. 819.

49.10 Mass.—Magill v. Magill, 56 N. E.2d 892, 894, 317 Mass. 89, 154 A. L.R. 1406.

50. U.S.—Lumbermens Mut. Casualty Co. v. Pulsifer, D.C.Me., 41 F. Supp. 249, 251.

Minn.—Corpus Juris Secundum quoted in Tomlyanovich v. Tomlyanovich, 58 N.W.2d 855, 863, 864, 239 Minn. 250, 50 A.L.R.2d 108.

"Used in its generic sense, [the term embraces] a household, composed of parents and children, or other relatives, or domestics and servants."

Tex.—Laning v. Langford Inv. Co., Civ.App., 36 S.W.2d 1079, 1081.

51. U.S.—Neidhoefer v. Automobile Ins. Co. of Hartford, Conn., C.A. Ill., 182 F.2d 269, 272—In re McFarland, D.C.Wash., 49 F.2d 342, 343.

Lumbermens Mut. Casualty Co. v. Pulsifer, D.C.Me., 41 F.Supp. 249, 251—Cleaves v. Funk, D.C.Okla., 3 F. Supp. 804, 805.

Zuckerman v. McCulley, D.C.Mo., 7 F.R.D. 739, 742.

Ill.—Corpus Juris Secundum cited in Liberty Nat. Bank of Chicago v. Zimmerman, 77 N.E.2d 49, 52, 333 Ill.App. 94—Village of Riverside v. Reagan, 270 Ill.App. 355, 365—Policemen's Benev. Assn. of Chicago v. Hill, 257 Ill.App. 138, 140.

Iowa.—In re Klepper's Estate, 57 N. W.2d 565, 567, 244 Iowa 521—Umbarger v. State Farm Mut. Automobile Ins. Co., 254 N.W. 87, 89, 218 Iowa 203—Solnar v. Solnar, 216 N. W. 288, 290, 205 Iowa 701—Wilson v. Else, 216 N.W. 33, 37, 204 Iowa 857.

Kan.—In re Dittmore's Estate, 106 P.2d 1056, 1059, 152 Kan. 574—Vaughn v. American Alliance Ins. Co. of New York, 27 P.2d 212, 213, 138 Kan. 731.

Md.—Krug v. Mills, 152 A. 493, 495, 159 Md. 670.

Mass.—Roney's Case, 56 N.E.2d 859, 864, 866, 316 Mass. 732.

Minn.—Corpus Juris Secundum quoted in Tomlyanovich v. Tomlyanovich, 58 N.W.2d 855, 863, 864, 239 Minn. 250, 50 A.L.R.2d 108.

vich, 58 N.W.2d 855, 863, 864, 239 Minn. 250, 50 A.L.R.2d 108—In re Tilghman's Estate, 61 N.W.2d 743, 746, 240 Minn. 494.

Miss.—Holsomback v. Slaughter, 171 So. 542, 543, 177 Miss. 553.

Mo.—Roller v. Montgomery's Estate, 45 S.W.2d 945, 947.

Cieslinski v. Clark, App., 223 S. W.2d 139, 143—Manning v. Driscoll's Estate, App., 174 S.W.2d 921, 923—Logan v. St. Louis Police Relief Ass'n, App., 133 S.W.2d 1048, 1050—Corpus Juris cited in State v. Arnold, App., 113 S.W.2d 143, 145—Colter v. Luke, 108 S.W. 608, 609, 129 Mo.App. 702—L. J. Mueller Furnace Co. v. Dreibelbis, App., 229 S.W. 240, 241.

Neb.—Hollibaugh v. School Dist. No. 89, 269 N.W. 819, 820, 131 Neb. 727. N.J.—Fratellanza Italiana v. Nugnes, 168 A. 589, 590, 114 N.J.Eq. 185.

Corpus Juris quoted in Sullivan v. Walburn, 154 A. 617, 619, 9 N.J. Misc. 280.

N.Y.—In re Schmidt's Estate, 289 N. Y.S. 247, 250, 159 Misc. 373—In re Barnes' Estate, 267 N.Y.S. 634, 638, 149 Misc. 149.

Okl.—Indemnity Ins. Co. of North America v. Sanders, 36 P.2d 271, 273, 169 Okl. 378—Mayhue v. Clapp, 261 P. 144, 146, 128 Okl. 1. Or.—Allen v. Multnomah County, 173 P.2d 475, 477, 179 Or. 548.

Utah.—Utah Fuel Co. v. Industrial Commission of Utah, 64 P.2d 1287, 1289, 91 Utah 491.

Wash.—Collins v. Northwest Casualty Co., 39 P.2d 986, 989, 180 Wash. 347, 97 A.L.R. 1235.

25 C.J. p 664 note 45.

Similarly expressed

(1) "The collective group of persons who form an existing household under one head."

Ill.—Liberty Nat. Bank of Chicago v. Zimmerman, 77 N.E.2d 49, 52, 53, 333 Ill.App. 94.

Mass.—Gardiner v. Everett, 134 N.E. 372, 374, 240 Mass. 536.

(2) "A collective body of persons living together in one house or within the curtilage."

N.J.—Corpus Juris quoted in Sullivan v. Walburn, 154 A. 617, 619, 9 N.J.Misc. 280.

Tex.—Goode v. State, 16 Tex.App. 411, 414.

(3) "A collective body, consisting of two or more persons who live together, and between whom there are family relations of a domestic character."

Ill.—Liberty Nat. Bank of Chicago v. Zimmerman, 77 N.E.2d 49, 52, 333 Ill.App. 94—Policemen's Benev. Ass'n of Chicago v. Hill, 257 Ill. App. 138, 140—Women's Catholic Order of Foresters v. Heffernan, 206 Ill.App. 70, 75.

(4) "A self-governing entity, under the discipline and the direction of the father as its head."

R.I.—Matarese v. Matarese, 181 A. 198, 199, 47 R.I. 131, 42 A.L.R. 1360.

(5) "A company of people living together and constituting one household."

Ill.—Women's Catholic Order of Foresters v. Heffernan, supra.

(6) "All members of the household living under the authority of the head thereof."

Mo.—Wentz v. Chicago, B. & Q. R. Co., 168 S.W. 1166, 1172, 259 Mo. 450, Ann.Cas.1916B 317.

N.J.—Corpus Juris quoted in Sullivan v. Walburn, 154 A. 617, 619, 9 N.J.Misc. 280.

25 C.J. p 665 note 50.

(7) "All individuals who live under the authority of another."

Ill.—Village of Riverside v. Reagan, 270 Ill.App. 355, 365.

(8) "A collective body of persons who live in one house under one head or management."

Conn.—Kiska v. Skrensky, 138 A.2d 523, 526, 145 Conn. 28.

52. Definition criticized

(1) "But this is not accurate, for strangers might thus band themselves together and live under the direction of a leader."

Iowa.—Umbarger v. State Farm Mut. Automobile Ins. Co., 254 N.W. 87, 89, 218 Iowa 203.

(2) "The word 'family' suggests primarily a husband and wife and children. . . . While the term has often been defined broadly as 'a collective body of persons forming

mean, regardless of facts and circumstances, a collective body of persons who live in one house under one common head or manager.^{52.5}

The word "family" is further defined to mean a collective body of persons, consisting of parents or children, or other relatives, domestics, or servants, residing together in one house or upon the same premises;⁵³ a collective body of persons, who form

one household, under one head and one domestic government, and who have reciprocal natural or moral duties to support and care for each other;⁵⁴ such persons as habitually reside under one roof and form one domestic circle,^{54.5} or such as are dependent on each other for support, or among whom there is a legal or equitable obligation to furnish support;^{54.10} those, who live under the same roof with the pater familias, who form his fireside;⁵⁵ an entire house-

one household under one head or manager'. . . the courts of this state . . . have expressly declined to approve that definition." Tex.—Howard v. Marshall, 48 Tex. 471, 479.

Franklin Fire Ins. Co. v. Shadid, Com.App., 68 S.W.2d 1030, 1032.

52.5 U.S.—Johnson v. State Farm Mut. Auto. Ins. Co., C.A.Mo., 252 F.2d 158, 161.

53. Ariz.—Lobban v. Vander Vries Realty & Mortgage Co., 60 P.2d 933, 935, 48 Ariz. 180.

Minn.—*Corpus Juris Secundum* quoted in Tomlyanovich v. Tomlyanovich, 58 N.W.2d 855, 863, 864, 239 Minn. 250, 50 A.L.R.2d 108.

N.J.—*Corpus Juris* quoted in Sullivan v. Walburn, 154 A. 617, 619, 9 N.J.Misc. 280.

Okl.—Union Trust Co. v. Cox, 155 P. 206, 209, 55 Okl. 68, L.R.A.1917C 356.

Similarly defined

(1) "A household composed of parents or children, or other relatives, or domestics and servants."

N.J.—*Corpus Juris* quoted in Sullivan v. Walburn, 154 A. 617, 619, 9 N.J.Misc. 280.

Tex.—Goode v. State, 16 Tex.App. 411, 414.

(2) The body of persons who live in one house, and under one head or manager.

Minn.—Tomlyanovich v. Tomlyanovich, 58 N.W.2d 855, 862, 864, 239 Minn. 250, 50 A.L.R.2d 102.

N.J.—Cicchino v. Biarsky, 61 A.2d 163, 164, 26 N.J.Misc. 300.

Utah.—Bryant v. Deseret News Pub. Co., 233 P.2d 355, 356, 120 Utah 241.

(3) A collection of persons living under a common roof, or constituting a domestic circle, children, husband or wife and children, or relatives by blood.

N.Y.—In re Keegan's Estate, 27 N.Y. S.2d 368, 370.

(4) A group composing immediate kindred, especially, the group formed of parents and children, constituting the fundamental social unit in civilized societies.

N.J.—Cicchino v. Biarsky, 61 A.2d 163, 164, 26 N.J.Misc. 300.

54. Idaho.—Shurrum v. Watts, 324

P.2d 380, 384—Hartley v. Bohrer, 11 P.2d 616, 618, 52 Idaho 72.

Md.—Jones v. Jones, 125 A. 722, 724, 146 Md. 19, 36 A.L.R. 672.

Minn.—*Corpus Juris Secundum* quoted in Tomlyanovich v. Tomlyanovich, 58 N.W.2d 855, 863, 864, 239 Minn. 250, 50 A.L.R.2d 108.

Mo.—Offord v. Jenner's Estate, App., 189 S.W.2d 173, 176.

Okl.—In re Smith's Estate, 213 P.2d 284, 287, 202 Okl. 302.

Or.—Ibach v. Hoffman, 198 P.2d 266, 270, 184 Or. 296.

Wyo.—*Corpus Juris Secundum* cited in Castor v. Rice, 254 P.2d 189, 191, 71 Wyo. 99.

Similarly expressed

(1) "A collective body of persons who form one household under one head and one domestic government." U.S.—Cleaves v. Funk, D.C.Okl., 3 F. Supp. 804, 805.

Idaho.—Wasson v. Wasson, 253 P.2d 236, 239, 73 Idaho 359.

Ill.—Liberty Nat. Bank of Chicago v. Zimmerman, 77 N.E.2d 49, 54, 333 Ill.App. 94—Village of Riverside v. Reagan, 270 Ill.App. 355, 365.

N.J.—*Corpus Juris* quoted in Sullivan v. Walburn, 154 A. 617, 619, 9 N.J.Misc. 280.

25 C.J. p 665 note 48.

(2) "A collective body of persons living together within one curtilage, subsisting in common and directing their attention to a common object, the promotion of their mutual interests and social happiness."

U.S.—Lumbermens Mutual Casualty Company v. Pulsifer, D.C.Me., 41 F.Supp. 249, 251.

Tex.—Laning v. Langford Inv. Co., Civ.App., 36 S.W.2d 1079, 1081.

(3) "A collection of persons living together under one head, under such circumstances or conditions that the head is under a legal or moral obligation to support the other members, and the other members are dependent upon him for support."

Utah.—Utah Fuel Co. v. Industrial Commission of Utah, 64 P.2d 1287, 1289, 91 Utah 491.

(4) A collective body of persons living together in one house, under the same management and head subsisting in common, and directing their attention to a common object,

the promotion of their mutual interests and social happiness.

N.Y.—Stafford v. Incorporated Village of Sands Point, 102 N.Y.S.2d 910, 913, 200 Misc. 57.

People v. Whitted, 124 N.Y.S.2d 180, 191.

Wis.—Missionaries of Our Lady of La Salette v. Village of Whitefish Bay, 66 N.W.2d 627, 631, 267 Wis. 609.

(5) The collective body of persons living in one house, or under one head or manager, or one domestic government, the relations between such persons necessarily being of a permanent or domestic character, not that of persons abiding temporarily together as strangers.

S.C.—Barkley v. International Mut. Ins. Co., 86 S.E.2d 602, 604, 227 S.C. 38.

54.5 U.S.—Johnson v. State Farm Mut. Auto. Ins. Co., C.A.Mo., 252 F.2d 158, 161.

54.10 Mo.—Logan v. St. Louis Police Relief Ass'n, App., 133 S.W.2d 1048, 1050.

55. Md.—Krug v. Mills, 152 A. 493, 495, 159 Md. 670.

N.J.—Fratellanza Italiana v. Nugnes, 168 A. 589, 590, 114 N.J.Eq. 185.

Corpus Juris quoted in Sullivan v. Walburn, 154 A. 617, 619, 9 N.J. Misc. 280.

Or.—Allen v. Multnomah County, 173 P.2d 475, 477, 179 Or. 548.

Pa.—In re Way's Estate, 109 A.2d 164, 172, 379 Pa. 421.

S.C.—Barkley v. International Mut. Ins. Co., 86 S.E.2d 602, 604, 227 S.C. 38.

Va.—Carroll v. Arlington County, 44 S.E.2d 6, 7, 186 Va. 575, 172 A.L.R. 1169.

25 C.J. p 665 note 49.

Similarly defined

"Those who live with the pater familias."

U.S.—Neidhoefer v. Automobile Ins. Co. of Hartford, Conn., C.A.Ill., 182 F.2d 269, 272.

Kan.—Vaughn v. American Alliance Ins. Co. of New York, 27 P.2d 212, 213, 138 Kan. 731.

Okl.—Indemnity Ins. Co. of North America v. Sanders, 36 P.2d 271, 273, 169 Okl. 378.

hold;⁵⁶ a household;⁵⁷ members of the domestic circle;⁵⁸ any group of persons constituting a distinct domestic or social body;⁵⁹ a household including parents, children, and servants, and, as the case may be, lodgers or boarders;⁶⁰ all persons who dwell together under a common head as a household;⁶¹ the personnel of the home.⁶²

Also, specifically applied, all the persons of the same blood living together in the household.⁶³

—**Particular Elements Considered.** In applying, construing, or discussing the foregoing definitions of the word "family" in its primary sense, it has been held that to constitute a "family" there must be

(1) a social status, (2) there must be a head who has a right, at least in a limited way, to direct and control those gathered into the household, and (3) this head must be obligated either legally or morally to support the other members, and (4) there must be a corresponding state of at least partial dependence of the other members for this support.^{63.5} The courts have considered these various elements.

Relation. "Family" conveys the notion of some relationship, by blood or otherwise;⁶⁴ and such relation must be of a permanent and domestic character,⁶⁵ rather than that of persons abiding temporarily together as strangers.⁶⁶

56. N.J.—*Corpus Juris* quoted in *Sullivan v. Walburn*, 154 A. 617, 619, 9 N.J.Misc. 280.
Va.—*Brett v. Donaghe*, 45 S.E. 324, 325, 101 Va. 786.

57. Del.—*Hogg v. Lobb*, 32 A. 631, 632, 12 Del. 399, 401.
Ill.—*Village of Riverside v. Reagan*, 270 Ill.App. 355, 365.

N.J.—*Corpus Juris* quoted in *Sullivan v. Walburn*, 154 A. 617, 619, 9 N.J.Misc. 280.

S.C.—*Barkley v. International Mut. Ins. Co.*, 86 S.E.2d 602, 604, 227 S. C. 38.

25 C.J. p 665 note 53.

Similarly expressed

(1) All those persons who constitute the members of the same household.

N.Y.—*Stafford v. Incorporated Village of Sands Point*, 102 N.Y.S.2d 910, 913, 200 Misc. 57.

(2) A household, including parents, children, and servants.

Minn.—*Tomlyanovich v. Tomlyanovich*, 58 N.W.2d 855, 863, 864, 239 Minn. 250, 50 A.L.R.2d 108.

Utah.—*Bryant v. Deseret News Pub. Co.*, 233 P.2d 355, 356, 120 Utah 241.

(3) All who live in one house under one head.

Pa.—*In re Way's Estate*, 109 A.2d 164, 172, 379 Pa. 421.

58. Cal.—*In re Jessup*, 21 P. 976, 81 C. 408, 424, 22 P. 742, 1028, 6 L. R.A. 594.

N.J.—*Corpus Juris* quoted in *Sullivan v. Walburn*, 154 A. 617, 619, 9 N.J.Misc. 280.

Pa.—*In re Way's Estate*, 109 A.2d 164, 172, 379 Pa. 421.

25 C.J. p 665 note 54.

Similarly defined

"The collection of persons forming a domestic household."

Tenn.—*Whitfield v. People's Union Bank & Trust Co.*, 73 S.W.2d 690, 691, 168 Tenn. 24.

59. Mich.—*Boston-Edison Protective Ass'n v. Paulist Fathers*, 10 N.W. 2d 847, 849, 306 Mich. 253, 148 A.L. R. 364—*Carmichael v. Northwest-*

ern Mut. Ben. Assoc., 16 N.W. 871, 872, 51 Mich. 494.

Minn.—*State v. Hays*, 117 N.W. 615, 616, 105 Minn. 399.

N.J.—*Corpus Juris* quoted in *Sullivan v. Walburn*, 154 A. 617, 619, 9 N.J.Misc. 280.

N.Y.—*Klee v. Klee*, 93 N.Y.S.2d 588, 590, 47 Misc. 101.

Pa.—*In re Way's Estate*, 109 A.2d 164, 172, 379 Pa. 421.

Wis.—*Missionaries of Our Lady of La Salette v. Village of Whitefish Bay*, 66 N.W.2d 627, 631, 267 Wis. 609.

60. U.S.—*Lumbermens Mut. Casualty Co. v. Pulsifer*, D.C.Me., 41 F. Supp. 249, 251—*Cleaves v. Funk*, D.C.Okl., 3 F.Supp. 804, 805.

Zuckerman v. McCulley, D.C.Mo., 7 F.R.D. 739, 742.

Ill.—*Liberty Nat. Bank of Chicago v. Zimmerman*, 77 N.E.2d 49, 54, 333 Ill.App. 94.

Mo.—*Colter v. Luke*, 108 S.W.2d 608, 609, 129 Mo.App. 702—*L. J. Mueller Furnace Co. v. Dreibelbis*, App., 229 S.W. 240, 241.

N.J.—*Cicchino v. Biarsky*, 61 A.2d 163, 164, 26 N.J.Misc. 300.

N.Y.—*In re Schmidt's Estate*, 289 N.Y.S. 247, 250, 159 Misc. 373.

Okl.—*Gathings' Estate*, *In re*, 187 P. 2d 981, 984, 199 Okl. 460—*Mayhue v. Clapp*, 261 P. 144, 146, 128 Okl. 1.

61. Pa.—*Kransky v. Glen Alden Coal Co.*, 45 A.2d 384, 385, 158 Pa.Super. 544—*Hoff v. Hoff*, 1 A.2d 506, 508, 132 Pa.Super. 431.

62. Mo.—*January v. Marler*, 203 S. W. 817, 818, 274 Mo. 543.

N.J.—*Corpus Juris* quoted in *Sullivan v. Walburn*, 154 A. 617, 619, 9 N.J.Misc. 280.

63. Pa.—*Beilstein v. Beilstein*, 45 A. 73, 74, 194 Pa. 152, 75 Am.S.R. 692.

25 C.J. p 665 note 57.

63.5 Ariz.—*Phlegar v. Elmer*, 325 P. 2d 881, 882, 84 Ariz. 204—*Lobban v. Vander Vries Realty & Mort-*

gage Co., 60 P.2d 933, 935, 48 Ariz. 180.

25 C.J. p 665 note 64 [a].

Similarly expressed

"We deduce from the authorities the following general rules to determine when the relation of a family, as contemplated by law, exists: 1. It is one of social status, not of mere contract. 2. Legal or moral obligation on the head to support the other members. 3. Corresponding state of dependence on the part of the other members for this support."

Iowa.—*Sheehy v. Scott*, 104 N.W. 1139, 128 Iowa 551, 4 L.R.A., N.S., 365.

Okl.—*Union Trust Co. v. Cox*, 155 P. 206, 209, 55 Okl. 68, L.R.A.1917C 356.

Tex.—*Stout v. Anthony*, Civ.App., 254 S.W.2d 879, 880.

64. As an expression for "relations"

(1) "It [relations] . . . is expressed also by the word 'family,' in its largest sense."

R.I.—*Huling v. Fenner*, 9 R.I. 410, 412.

(2) In its most common use, the term means father, mother, and children, immediate blood relatives, but it is also used to designate many other and extended relationships.

Wash.—*Collins v. Northwest Casualty Co.*, 39 P.2d 986, 989, 180 Wash. 347, 97 A.L.R. 1235.

65. Mo.—*L. J. Mueller Furnace Co. v. Dreibelbis*, App., 229 S.W. 240, 241.

Okl.—*Rolator v. King*, 73 P. 291, 292, 13 Okl. 37.

S.C.—*Barkley v. International Mut. Ins. Co.*, 86 S.E.2d 602, 604, 227 S. C. 38.

To be affected only by the loss of any member by death, or severance by other means of these relations.

Ill.—*Cole v. Bentley*, 26 Ill.App. 260, 262.

66. Mo.—*Wentz v. Chicago, B. & Q. R. Co.*, 168 S.W. 1166, 1172, 259 Mo. 450, Ann.Cas.1916B 317.

25 C.J. p 665 note 62.

In legal contemplation, whomsoever it is the natural or moral duty of one to support or is dependent on him for support may be considered and treated as a member of his family,⁶⁷ if the other facts essential to the existence of the family relationship appear.⁶⁸ The term implies a relationship entered into in good faith,⁶⁹ a social status as distinguished from a contract relationship,⁷⁰ and mutual gratuitous services,⁷¹ but does not always imply the existence within the group of children⁷² or dependents;⁷³ and it has been said that a family, in its collective or aggregate capacity, can have no heirs.⁷⁴

Dependency. It has been said that the central thought underlying the family relation is that of dependency, and hence any number of persons more than one living together under the same roof, with some one of their number as head who controls the affairs of the household and upon whom the others or

some of them are, by reason of some legal or moral obligation, dependent, may be said to be a family, and the person in control the head of that family.^{74.5} Thus, a family is not alone a collection of persons living together, but there must exist an obligation, either legal or moral, upon some one who thus occupies the position of head of the house to support the others or some of them, and on the part of such others a corresponding state of dependence.^{74.10}

Number. No definite number of persons is necessary to constitute a family when the term is used in its primary sense,⁷⁵ although generally a family does not consist of only one person,^{75.5} and usually there must be at least two persons.⁷⁶ Under particular circumstances, however, a single member may constitute a family,⁷⁷ as in the case of an only and surviving child⁷⁸ or of a surviving spouse.⁷⁹

Residing together. The proper elements neces-

67. Iowa.—Umbarger v. State Farm Mut. Automobile Ins. Co., 254 N. W. 87, 89, 218 Iowa 203.
Mich.—In re Buckley's Estate, 47 N. W.2d 33, 41, 330 Mich. 102.
Mo.—Corpus Juris cited in State v. Arnold, App., 113 S.W.2d 143, 145.
N.C.—McGee v. Crawford, 171 S.E. 326, 327, 205 N.C. 313.
25 C.J. p 665 note 64.

68. Mo.—Corpus Juris cited in State v. Arnold, App., 113 S.W.2d 143, 145.

69. Ariz.—Lobban v. Vander Vries Realty & Mortgage Co., 60 P.2d 933, 935, 48 Ariz. 180.
Okl.—Union Trust Co. v. Cox, 155 P. 206, 209, 55 Okl. 68, L.R.A.1917C 356.

70. Okl.—Rolator v. King, 73 P. 291, 292, 13 Okl. 37.
25 C.J. p 665 note 64 [a].

Ultimate foundation of the state
"The family is the origin of all society and of all government. The happy family, well organized, and successfully discharging its functions, by strengthening the parents for the proper discharge of life's duties, while it fits the children to succeed to those duties, is the highest type of human goodness, and the surest source of human happiness. The whole frame of government and laws has been said to exist only to protect and support the family, so that it may develop and perfect the character of its members."
N.Y.—People v. Olmstead, 27 Barb. 9, 33.
In re Forte's Will, 267 N.Y.S. 603, 606, 149 Misc. 327.

71. N.C.—McGee v. Crawford, 171 S.E. 326, 327, 205 N.C. 313.

72. Ill.—Berry v. Hanks, 28 Ill.App. 51, 56.
N.Y.—Valentine v. Lloyd, 4 Abb.Pr. N.S. 371, 373.
Wash.—In re De Nisson's Guardianship, 84 P.2d 1024, 1027, 197 Wash. 265.

73. Wash.—In re De Nisson's Guardianship, supra.

74. Pa.—McCullough v. Gilmore, 11 Pa. 370, 373.

74.5 Mo.—Brown v. Shield Fire Ins. Co., App., 260 S.W.2d 337, 338—Elliott v. Thomas, 143 S.W. 563, 564, 161 Mo.App. 441.

Va.—Carroll v. Arlington County, 44 S.E.2d 6, 7, 8, 186 Va. 575, 172 A. L.R. 1169.

74.10 Ill.—Logue v. Von Almen, 40 N.E.2d 73, 80, 379 Ill. 208, 140 A. L.R. 251—Rock Island Bank & Trust Co. v. Lamont, 198 N.E. 430, 431, 361 Ill. 432.

75. Ill.—Corpus Juris Secundum cited in Liberty Nat. Bank of Chicago v. Zimmerman, 77 N.E.2d 49, 52, 333 Ill.App. 94—Policemen's Benev. Ass'n of Chicago v. Hill, 257 Ill.App. 138, 140.

Mo.—Wentz v. Chicago, B. & Q. R. Co., 168 S.W. 1166, 1172, 259 Mo. 450, Ann.Cas.1916B 317.
25 C.J. p 666 note 65.

75.5 Va.—Carroll v. Arlington County, 44 S.E.2d 6, 7, 186 Va. 575, 172 A.L.R. 1169.

76. Ariz.—Lobban v. Vander Vries Realty & Mortgage Co., 60 P.2d 933, 935, 48 Ariz. 180.

Ill.—Corpus Juris Secundum cited in Liberty Nat. Bank of Chicago v. Zimmerman, 77 N.E.2d 49, 52, 333 Ill.App. 94—Policemen's Benevolent Ass'n of Chicago v. Hill, 257 Ill.App. 138, 140.

Iowa.—Umbarger v. State Farm Mut. Automobile Ins. Co., 254 N.W. 87, 89, 218 Iowa 203.
Utah.—Zuniga v. Evans, 48 P.2d 513, 524, 87 Utah 198, 101 A.L.R. 532.
25 C.J. p 666 note 66.

77. Iowa.—Coleman v. Bosworth, 164 N.W. 238, 240, 180 Iowa 975.
25 C.J. p 666 note 67.

Where used with that intention

One person may be deemed a family where the statute or other instrument in which the word is employed intends this to be the meaning of the word.

Iowa.—Coleman v. Bosworth, supra.
N.Y.—Brooklyn Masonic Relief Assoc. v. Hanson, 6 N.Y.S. 161, 162, 53 Hun 149.
25 C.J. p 666 note 68.

Federal decennial census

The Century dictionary devotes a column to defining families, and nowhere is it said that a family can consist of one person. That is also the definition in Webster's New International Dictionary, subject to one exception there stated as an exception: The Federal Government in its decennial census treats as a home and family one or more persons living there.

Va.—Carroll v. Arlington County, 44 S.E.2d 6, 7, 186 Va. 575, 172 A.L.R. 1169.

78. Ill.—Norwegian Old People's Home Soc. v. Wilson, 52 N.E. 41, 43, 176 Ill. 94, 97.

79. Miss.—Miers v. Miers, 133 So. 133, 134, 160 Miss. 746.

N.Y.—Brooklyn Masonic Relief Association v. Hanson, 6 N.Y.S. 161, 162, 53 Hun 149.

Wash.—In re De Nisson's Guardianship, 84 P.2d 1024, 1027, 197 Wash. 265.

sary to constitute a family being present, under certain circumstances it is not essential that the persons actually reside together in one house or place,⁸⁰ except where this may be required by statute⁸¹ or by the intent or circumstances in connection with which the term is employed,⁸² and even where a living together is required the term does not negative the possibility that the head of the family may be called away at times and for temporary periods.⁸³

Restricted Sense

In a more restricted sense, the term has been defined as a group of persons consisting of father, mother, and children;⁸⁴ a collection of persons having association by reason of marriage,⁸⁵ including only parents and their children,⁸⁶ whether living together or not;⁸⁷ and the word "family" has been construed to include those who have left the father's home and have married and established their own homes.^{87.5}

In its most usual signification the word "family" denotes the group comprising the husband and wife

and their dependent children,⁸⁸ constituting a fundamental unity in the organization of society;⁸⁹ but the term, as commonly understood, is not so limited,⁹⁰ and unless the context in which it is used manifests a different intention it is usually to be construed in its primary sense.⁹¹

Enlarged Sense

The word is frequently used in common speech without reference to any established household, but merely for the purpose of indicating the individuals related, as husband and wife or parents and children,⁹² and may be used to denote one's wife or husband together with lineal descendants.^{92.5}

In another sense the word "family" includes such persons as are descendants of a common ancestor,⁹³ all descended from a common stock,⁹⁴ those who have the blood of the ancestor;^{94.5} only the descendants of such ancestor, those who have his blood running in their veins,⁹⁵ it being said that its strict meaning, as thus used in this connection, is "children,"⁹⁶ and that this is the meaning that should

80. U.S.—In re McFarland, D.C. Wash., 49 F.2d 342, 343.

Conn.—Rathbun v. Aetna Cas. & Sur. Co., 128 A.2d 327, 329, 144 Conn. 165.

Ill.—*Corpus Juris Secundum* cited in Liberty Nat. Bank of Chicago v. Zimmerman, 77 N.E.2d 49, 52, 333 Ill.App. 94—Policemen's Benevolent Ass'n of Chicago v. Hill, 257 Ill.App. 138, 140.

N.Y.—In re Gluer's Will, 278 N.Y.S. 994, 997, 155 Misc. 41—In re Brown's Will, 274 N.Y.S. 924, 933, 153 Misc. 282.

Wash.—In re De Nisson's Guardianship, 84 P.2d 1024, 1027, 197 Wash. 265.

25 C.J. p 666 note 72.

81. Conn.—Knights of Columbus v. Rowe, 40 A. 451, 452, 70 Conn. 545. 25 C.J. p 666 note 73.

In defining "domicile"

The word "family," as used in the section of the code defining "domicile," conveys the idea of the unity of the household in which are gathered the members of the family as one collective body under the management of the head thereof, or to which the head of the family, although called away by the demands of business at times, constantly returns or expects to return.

Ga.—Forlaw v. Augusta Naval Stores Co., 52 S.E. 898, 901, 124 Ga. 261.

82. N.J.—*Corpus Juris* quoted in Sullivan v. Walburn, 154 A. 617, 619, 9 N.J.Misc. 280.

N.C.—McGee v. Crawford, 171 S.E. 326, 327, 205 N.C. 318. 25 C.J. p 666 note 74.

83. Ga.—Forlaw v. Augusta Naval Stores Co., 52 S.E. 898, 901, 124 Ga. 261.

84. U.S.—Daily v. Parker, C.C.A.Ill., 152 F.2d 174, 175, 162 A.L.R. 819. Tenn.—Whitfield v. People's Union Bank & Trust Co., 73 S.W.2d 690, 691, 168 Tenn. 24.

Group of persons consisting of parents and their children

N.Y.—G. M. G. Realty Co. v. Spring, 77 N.Y.S.2d 732, 734, 191 Misc. 334.

85. Tex.—Hill v. Moore, 19 S.W. 162, 164, 85 Tex. 335.

86. Md.—Krug v. Mills, 152 A. 493, 494, 159 Md. 670.

Mich.—In re Buckley's Estate, 47 N.W.2d 33, 41, 330 Mich. 102.

Mo.—*Corpus Juris* cited in State v. Arnold, App., 113 S.W.2d 143, 145. 25 C.J. p 666 note 76.

In ordinary conversation among laymen, this term is used more often than otherwise as descriptive of husband, wife, and children, and as exclusive of next of kin.

N.H.—Adams v. Carrie F. Wright Hospital, 132 A. 525, 526, 82 N.H. 260.

87. Ill.—*Corpus Juris Secundum* cited in Craig v. Hegeler Local Union No. 209, Mine Mill and Smelter Workers, 80 N.E.2d 377, 380, 335 Ill.App. 28.

Md.—Higgins v. Baltimore Safe Deposit & Trust Co., 96 A. 322, 323, 127 Md. 171.

N.Y.—In re Schmidt's Estate, 289 N.Y.S. 247, 250, 159 Misc. 373.

87.5 Mass.—Magill v. Magill, 56 N.E.2d 892, 894, 317 Mass. 89, 154 A.L.R. 1406.

88. Iowa.—Floyd County v. Wolfe, 117 N.W. 32, 33, 138 Iowa 749.

89. Ky.—Finn v. Eminent Household of Columbia Woodmen, 173 S.W. 349, 350, 163 Ky. 187.

90. Mich.—In re Buckley's Estate, 47 N.W.2d 33, 41, 330 Mich. 102.

Mo.—Wentz v. Chicago, B. & Q. R. Co., 168 S.W. 1166, 1172, 259 Mo. 450, Ann.Cas.1916B 317.

Corpus Juris cited in State v. Arnold, App., 113 S.W.2d 143, 145.

Pa.—Bair v. Robinson, 108 Pa. 247, 249, 56 Am.R. 198.

91. Mo.—*Corpus Juris* cited in State v. Arnold, App., 113 S.W.2d 143, 145.

92. Ill.—Norwegian Old People's Home Soc. v. Wilson, 52 N.E. 41, 43, 176 Ill. 94. 25 C.J. p 666 note 79.

92.5 Mass.—Magill v. Magill, 56 N.E.2d 892, 894, 317 Mass. 89, 154 A.L.R. 1406.

93. Mass.—Dodge v. Boston & P. R. Corp., 28 N.E. 243, 244, 154 Mass. 259, 13 L.R.A. 318. 25 C.J. p 666 note 80.

94. Va.—Brett v. Donaghe, 45 S.E. 324, 325, 101 Va. 786.

94.5 N.Y.—Stafford v. Incorporated Village of Sands Point, 102 N.Y.S. 2d 910, 913, 200 Misc. 57.

95. N.J.—Ryder v. Myers, 167 A. 22, 24, 113 N.J.Eq. 360.

96. Mo.—Wentz v. Chicago, B. & Q. R. Co., 168 S.W. 1166, 1172, 259 Mo. 450, Ann.Cas.1916B 317.

25 C.J. p 667 note 82.

be given it unless the context shows the term to have been used in a different sense.⁹⁷

Nevertheless the term has been extended to include the issue of the ancestor's children,⁹⁸ all his descendants;⁹⁹ the whole group of persons thus related by blood,¹ sometimes in the broad sense of "relatives," including relatives by affinity as well as by blood.² In this sense, the word "family" is defined as meaning those who descend or are descended from one common progenitor;^{2,5} descendants of a common progenitor, as where we speak of one's family tree;³ the genealogical stock from which a man and those related to him by blood have sprung.⁴ Thus the term may mean tribe, race, or clan;^{4,5} persons of the same lineage.^{4,10}

It has been said that the word "family" does not

always, or necessarily, imply a relationship by blood⁵ or marriage;⁶ and so the term may be used to signify a collection of persons living together in a home, though none of them be married;^{6,5} a master and slave, or two single men living together.^{6,10}

The word "family" may be used to denote a small select corps attached to an army chief, and has even been extended to whole sects, as in case of the Shakers.⁷

Particular Persons Included

In conformity with, but subject to, the definitions above given, and depending on the connection in which the word "family" is used, as indicated in the accompanying notes, particular persons, or classes, have been held included,⁸ and particular persons,

97. Va.—Phillips v. Ferguson, 8 S. E. 241, 243, 85 Va. 509, 17 Am.S.R. 78, 1 L.R.A. 837.
25 C.J. p 667 note 83.
98. Mo.—Wentz v. Chicago, B. & Q. R. Co., 168 S.W. 1166, 1172, 259 Mo. 450, Ann.Cas.1916B 317.
99. Mass.—Marsh v. Supreme Council A. L. H., 21 N.E. 1070, 1072, 149 Mass. 512, 4 L.R.A. 382.
25 C.J. p 667 note 85.
1. Ill.—Norwegian Old People's Home Soc. v. Wilson, 52 N.E. 41, 43, 176 Ill. 94.
Mich.—Boston-Edison Protective Ass'n v. Paulist Fathers, 10 N.W.2d 847, 849, 306 Mich. 253, 148 A.L.R. 364.
25 C.J. p 667 note 86.
2. Mo.—Wentz v. Chicago, B. & Q. R. Co., 168 S.W. 1166, 1172, 259 Mo. 450, Ann.Cas.1916B 317.
25 C.J. p 667 note 87.
- 2.5 Conn.—Kiska v. Skrensky, 138 A.2d 523, 526, 145 Conn. 28.
- III.—Women's Catholic Order of Foresters v. Heffernan, 206 Ill.App. 70, 75.
N.J.—Fratellanza Italiana v. Nugnes, 168 A. 589, 590, 114 N.J.Eq. 185.
Ohio.—Albright v. Albright, 157 N.E. 760, 764, 116 Ohio St. 668.
Utah.—Bryant v. Deseret News Pub. Co., 233 P.2d 355, 356, 120 Utah 241.
- Similarly expressed**
- (1) "All lineal descendants of a common ancestor."
Mass.—Gardiner v. Everett, 134 N.E. 372, 374, 240 Mass. 536.
- (2) All who are descended from a not-too-distant common progenitor.
Cal.—In re Lund's Estate, 159 P.2d 643, 655, 26 C.2d 472, 162 A.L.R. 606.
3. Mo.—Logan v. St. Louis Police Relief Ass'n, App., 133 S.W.2d 1048, 1049.
4. Ohio.—Albright v. Albright, 157 N.E. 760, 764, 116 Ohio St. 668.
- 4.5 Utah.—Bryant v. Deseret News Pub. Co., Utah, 233 P.2d 355, 356, 120 Utah 241.
- 4.10 Conn.—Kiska v. Skrensky, 138 A.2d 523, 526, 145 Conn. 28.
- N.J.—Fratellanza Italiana v. Nugnes, 168 A. 589, 590, 114 N.J.Eq. 185.
5. Wash.—Hart v. Hogan, 24 P.2d 99, 102, 173 Wash. 598.
6. **As including two single persons**
The word "family" has been given a construction liberal enough to apply to two single persons.
Tex.—Hardiman v. Herbert, 11 Tex. 656, 659.
- 6.5 Ky.—Robertson v. Western Baptist Hospital, 267 S.W.2d 395, 397.
- 6.10 Tex.—McBride v. Gulf Oil Corp., Civ.App., 292 S.W.2d 151, 155.
7. Mich.—Boston-Edison Protective Ass'n v. Paulist Fathers, 10 N.W.2d 847, 849, 306 Mich. 253, 148 A.L.R. 364—Carmichael v. Northwestern Mut. Ben. Assoc., 16 N.W. 871, 872, 51 Mich. 494.
Wis.—Missionaries of Our Lady of La Salette v. Village of Whitefish Bay, 66 N.W.2d 627, 631, 267 Wis. 609.
8. **Blood relatives**
N.Y.—In re Tefft's Will, 130 N.Y.S.2d 192, 194.
- Brothers or sisters**
- Ill.—Anchor Finance Corp. v. Miller, 132 N.E.2d 81, 82, 8 Ill.App.2d 326.
Mich.—Hosmer v. Welch, 67 N.W. 504, 107 Mich. 470, 475.
Okl.—Union Trust Co. v. Cox, 155 P. 206, 209, 55 Okl. 68, L.R.A.1917C 356.
25 C.J. p 668 note 4 [a].
- Children**
- (1) In general.
Mass.—Magill v. Magill, 56 N.E.2d 892, 894, 317 Mass. 89, 154 A.L.R. 1406.
- Mich.—Boston - Edison Protective Ass'n v. Paulist Fathers, 10 N.W.2d 847, 849, 306 Mich. 253, 148 A.L.R. 364.
- N.Y.—In re Dooling's Will, 285 N.Y.S. 603, 609, 158 Misc. 333.
Cerasuolo v. Zumbrum, 81 N.Y.S. 2d 232, 235—In re Tefft's Will, 130 N.Y.S.2d 192, 194.
- Tenn.—Baskin & Cole v. Whitson, 8 Tenn.App. 578, 590.
25 C.J. p 667 note 94 [a].
- (2) Adopted children.
Minn.—Anderson v. Royal League, 153 N.W. 853, 855, 130 Minn. 416.
Okl.—Union Trust Co. v. Cox, 155 P. 206, 209, 55 Okl. 68, L.R.A.1917C 356.
- (3) Adult children.
Tex.—Reconstruction Finance Corporation v. Burgess, Civ.App., 155 S.W.2d 977, 980.
- W.Va.—Watson v. Burley, 143 S.E. 95, 96, 105 W.Va. 416, 64 A.L.R. 839.
- (4) Children living with widowed parent.
N.Y.—In re Keegan's Estate, 37 N.Y.S.2d 368, 370, 371.
Okl.—Union Trust Co. v. Cox, 155 P. 206, 209, 55 Okl. 68, L.R.A.1917C 356.
- (5) Children surviving the wife.
Cal.—People v. Feilen, 58 C. 218, 225, 41 Am.R. 258.
- (6) A daughter after divorce of parents.
Nev.—In re Foster's Estate, 220 P. 734, 736, 47 Nev. 297.
- (7) Illegitimate children.
Conn.—Paccinim v. Connecticut Light & Power Co., 106 A. 330, 332, 93 Conn. 423.
25 C.J. p 668 note 98 [a].
- (8) A son or daughter.
Mich.—Carmichael v. Northwestern

or classes of persons have been held not included,⁹ by the term "family".

Mut. Ben. Assoc., 16 N.W. 871, 872, 51 Mich. 494.

Grandchildren

N.C.—McGee v. Crawford, 171 S.E. 326, 327, 205 N.C. 318.
25 C.J. p 668 note 1 [a].

Grandparents

Okl.—Union Trust Co. v. Cox, 155 P. 206, 209, 55 Okl. 68, L.R.A.1917C 356.

Lodgers and boarders

Ill.—Corpus Juris Secundum cited in Liberty Nat. Bank of Chicago v. Zimmerman, 77 N.E.2d 49, 52, 333 Ill.App. 94.

N.Y.—May v. Dermont, 186 N.Y.S. 113, 116, 114 Misc. 106.
25 C.J. p 668 note 14 [a].

Members of domestic circle

N.Y.—In re Tefft's Will, 130 N.Y.S.2d 192, 194.

Parents

(1) In general.

Okl.—Union Trust Co. v. Cox, 155 P. 206, 209, 55 Okl. 68, L.R.A.1917C 356.
25 C.J. p 667 note 92 [a].

(2) A divorced parent living with an unmarried child.

Okl.—Union Trust Co. v. Cox, supra.

(3) A father and child.

Tenn.—Hinds v. Buck, 150 S.W.2d 1071, 1072, 177 Tenn. 444.

(4) Father, mother, and all children, wherever they may reside.

Tex.—Barrett v. Commercial Standard Ins. Co., Civ.App., 145 S.W.2d 315, 318.

(5) A father or mother.

Mich.—Carmichael v. Northwestern Mut. Ben. Assoc., 16 N.W. 171, 172, 51 Mich. 494, 496.

(6) An unmarried woman and her adopted child.

Okl.—Union Trust Co. v. Cox, 155 P. 206, 209, 55 Okl. 68, L.R.A.1917C 356.

(7) A widow and her daughter.

Ark.—Yadon v. Yadon, 151 S.W.2d 969, 970, 202 Ark. 634.

(8) A widowed mother.

Tex.—Barry v. Hale, 21 S.W. 783, 784, 2 Tex.Civ.App. 668.

(9) A mother and children.

Tex.—Garrard v. Henderson, Civ. App., 209 S.W.2d 225, 229.

Parents, children, and domestic servants

Tex.—Rudy v. Southampton Civic Club, Civ.App., 271 S.W.2d 431, 435.

Relatives-in-law

(1) A husband or wife of a blood relative.

Mo.—Wentz v. Chicago, B. & Q. R. Co., 168 S.W. 1166, 1172, 259 Mo. 450, Ann.Cas.1916B 317.

(2) A parent-in-law.

Okl.—Union Trust Co. v. Cox, 155 P.

206, 209, 55 Okl. 68, L.R.A.1917C 356.

(3) A son-in-law or daughter-in-law.

Mo.—Wentz v. Chicago, B. & Q. R. Co., supra.

Neb.—Hollibaugh v. School Dist. No. 89, 269 N.W. 819, 820, 131 Neb. 727.
25 C.J. p 668 note 10 [a].

Servants or domestics

Ill.—Corpus Juris Secundum cited in Liberty Nat. Bank of Chicago v. Zimmerman, 77 N.E.2d 49, 52, 333 App.App. 94.

N.J.—Sullivan v. Walburn, 154 A. 617, 619, 9 N.J.Misc. 280.

Pa.—Yerkes v. Stetson, 61 A. 113, 114, 211 Pa. 556.

25 C.J. p 668 note 13 [a].

Spouses

(1) A deserted wife without children.

Ill.—Berry v. Hanks, 28 Ill.App. 51, 56.

(2) A husband and children deserted by the wife and mother.

Okl.—Union Trust Co. v. Cox, 155 P. 206, 209, 55 Okl. 68, L.R.A.1917C 356.

(3) A husband and wife.

Fla.—Bigelow v. Dunphe, 198 So. 13, 144 Fla. 330.

Tenn.—Hinds v. Buck, 150 S.W.2d 1071, 1072, 177 Tenn. 444.

25 C.J. p 668 note 6 [a].

(4) A husband and wife without children or servants.

Conn.—Hoadly v. Wood, 42 A. 263, 264, 71 Conn. 452.

Mich.—Boston - Edison Protective Ass'n v. Paulist Fathers, 10 N.W.2d 847, 849, 306 Mich. 253, 148 A.L.R. 364.

25 C.J. p 668 note 7.

(5) A husband deserted by his wife and living in improper relations with another woman.

Mo.—Whitehead v. Tapp, 69 Mo. 415.

(6) A surviving wife.

N.Y.—Brooklyn Masonic Relief Assoc. v. Hanson, 6 N.Y.S. 161, 162, 53 Hun 149.

In re Skewrys' Will, 33 N.Y.S.2d 610, 612.

(7) A surviving wife from whom the husband had not been judicially separated.

N.Y.—In re Zalewski's Estate, 30 N.Y.S.2d 658, 664, 177 Misc. 384.

(8) A widower and his adopted child.

Okl.—Union Trust Co. v. Cox, 155 P. 206, 209, 55 Okl. 68, L.R.A.1917C 356.

(9) A wife and children.

Conn.—Baledes v. Greenbaum, 151 A. 333, 334, 112 Conn. 64—Paquin, Limited, v. Westervelt, 106 A. 766, 767, 93 Conn. 513.

Mich.—Boston - Edison Protective

Ass'n v. Paulist Fathers, 10 N.W. 2d 847, 849, 306 Mich. 253, 148 A.L.R. 364.

N.Y.—In re Tefft's Will, 130 N.Y.S.2d 192, 194.

25 C.J. p 668 note 3 [a].

(10) A man's wife is a member of his family.

La.—Vidrine v. Evangeline Gravel Co., 4 La.App. 687.

Strangers and visitors

(1) A guest.

Mo.—City of Mexico v. Gray, 219 S.W. 707, 709, 203 Mo.App. 547.

(2) A stranger or visitor.

Mass.—Oystead v. Shed, 13 Mass. 520, 523, 7 Am.D. 172.

(3) Persons not related by blood.

Ill.—Foresters v. Heffernan, 206 Ill. App. 70, 75.

9. Children

(1) Adopted children.

Mich.—Carmichael v. Northwestern Mut. Ben. Assoc., 16 N.W. 871, 872, 51 Mich. 494.

25 C.J. p 667 note 95 [d].

(2) Adult children.

Conn.—Dalton v. Knights of Columbus, 67 A. 510, 511, 80 Conn. 212, 125 Am.S.R. 116, 11 Ann.Cas. 568.
25 C.J. p 667 note 96 [a].

(3) Children by a former marriage.

N.H.—Smith v. Greeley, 30 A. 413, 414, 67 N.H. 377.

Wis.—Hutson v. Jensen, 85 N.W. 689, 693, 110 Wis. 26.

(4) Children of deceased servants.

La.—Galligar v. Payne, 34 La. Ann. 1057, 1058.

(5) Married children.

Conn.—Wood v. Wood, 28 A. 520, 521, 63 Conn. 324.

25 C.J. p 668 note 99 [a].

(6) Stepchildren.

N.J.—Tepper v. Supreme Council R. A., 47 A. 460, 461, 61 N.J.Eq. 638, 88 Am.S.R. 449.

25 C.J. p 668 note 11.

Grandchildren

Va.—Brett v. Donaghe, 45 S.E. 324, 325, 101 Va. 786.

Lodgers and boarders

Va.—Fowler v. Mosher, 7 S.E. 542, 543, 85 Va. 421.

25 C.J. p 668 note 14 [b].

Next of kin

N.H.—Adams v. Carrie F. Wright Hospital, 132 A. 525, 526, 82 N.H. 260.

Parents

(1) A mother not living with her son.

Cal.—Lawson v. Lawson, 111 P. 354, 355, 158 C. 446.

(2) A stepmother.

Vt.—Barnet v. Norton, 99 A. 238, 239, 90 Vt. 544.

Persons unlawfully married

Okl.—Union Trust Co. v. Cox, 155 P.

Other Terms Compared

In one or another of the senses above discussed "family" has been held equivalent to, or interchangeable or synonymous with, "heirs"¹⁰ "kindred,"^{10,5} and "household,"¹¹ nearly, if not quite, of the same import as the word "issue;"¹² and has been com-

pared with, or distinguished from, "household."¹³

In Phrases

In the accompanying footnotes phrases are listed in which the word is used as a noun¹⁴ and as an adjective.¹⁵ Other phrases as to which more recent

206, 209, 55 Okl. 68, L.R.A.1917C 356.

Relatives-in-law

(1) A daughter-in-law.

Idaho.—Hartley v. Bohrer, 11 P.2d 616, 618, 52 Idaho 721.

(2) A son-in-law, or the daughter after she becomes the son-in-law's wife.

Ga.—Bryant v. Keen, 158 S.E. 445, 446, 43 Ga.App. 251.

Servants

(1) A domestic or servant.

Tex.—Whitehead v. Nickelson, 48 Tex. 517, 528.

(2) A negro servant having his own family and household as a domestic unit separate from that of his employer.

Okl.—**Corpus Juris** cited in Moore v. Kasishke, 117 P.2d 113, 115, 189 Okl. 336, 136 A.L.R. 1502.

(3) A nursemaid employed regularly about twice a week, but who did not reside with employer.

N.J.—Sullivan v. Walburn, 154 A. 617, 619, 9 N.J.Misc. 280.

Spouses

Widow, separated from her decedent husband many years before his death, held not to constitute a "family" within the statutory sense, and hence not entitled to statutory allowance for the benefit of a decedent's family.

N.Y.—In re Feciuch's Estate, 26 N.Y. S.2d 390, 391.

Sisters of a religious order who were employed in hospital and lived together in a community.

Colo.—Goss v. Klipfel, 146 P.2d 217, 218, 112 Colo. 87.

10. Cal.—In re McCrum's Estate, 275 P. 971, 972, 97 C.A. 576.

10.5 Me.—Jacobs v. Prescott, 65 A. 761, 762, 102 Me. 63.

11. U.S.—Lumbermens Mutual Casualty Company v. Pulsifer, D.C. Mo., 41 F.Supp. 249, 251.

Ill.—People v. Tait, 103 N.E. 750, 753, 261 Ill. 197.

Iowa.—Umbarger v. State Farm Mut. Automobile Ins. Co., 254 N.W. 87, 88, 218 Iowa 203.

Kan.—Vaughn v. American Alliance Ins. Co. of New York, 27 P.2d 212, 213, 138 Kan. 731.

La.—Letteff v. Maryland Cas. Co., App., 91 So.2d 123, 144.

Md.—Krug v. Mills, 152 A. 493, 495, 159 Md. 670.

N.Y.—Lafrenz v. Whitney, 134 N.E. 852, 854, 233 N.Y. 107.

Okl.—Indemnity Ins. Co. of North America v. Sanders, 36 P.2d 271, 273, 169 Okl. 378.

Or.—Allen v. Multnomah County, 173 P.2d 475, 477, 179 Or. 548.

Pa.—Kransky v. Glen Alden Coal Co., 45 A.2d 384, 385, 158 Pa.Super. 544

—Brovdy v. Jones & Laughlin Steel Corporation, 21 A.2d 437, 438, 145 Pa.Super. 602—Hoff v. Hoff, 1 A.2d 506, 507, 132 Pa.Super. 431.

Wash.—Collins v. Northwest Casualty Co., 39 P.2d 986, 989, 180 Wash. 347, 97 A.L.R. 1235.

30 C.J. p 474 note 20 [a].

12. N.J.—Ryder v. Myers, 167 A. 22, 24, 113 N.J.Eq. 360.

13. Pa.—Brovdy v. Jones & Laughlin Steel Corporation, 21 A.2d 437, 438, 145 Pa.Super. 602—Hoff v. Hoff, 1 A.2d 506, 507, 132 Pa.Super. 431.

Wash.—Collins v. Northwest Casualty Co., 39 P.2d 986, 989, 180 Wash. 347, 97 A.L.R. 1235.

14. Immediate family

(1) The term "immediate family" denotes members of one household gathered around one head.

Conn.—Dalton v. Knights of Columbus, 67 A. 510, 511, 512, 80 Conn. 212, 125 Am.S.R. 116, 11 Ann.Cas. 568.

31 C.J. p 246 note 37.

(2) The "immediate family" are those members of the same household who are bound together by ties of relationship.

Ky.—Cincinnati, N. & C. Ry. Co. v. Peluso, 293 S.W.2d 556, 558.

(3) It has been held to include only a son, daughter, father, mother, father-in-law, and mother-in-law.

N.Y.—Grant-Morris Management Corp. v. Weaver, 166 N.Y.S.2d 610, 611, 612, 7 Misc.2d 449.

Other phrases

(1) "Families, if then living, or represented."

Mass.—Gardiner v. Everett, 134 N.E. 372, 373, 240 Mass. 536.

(2) "Family dependent on him for support."

U.S.—In re McFarland, D.C.Wash., 49 F.2d 342, 343.

(3) "Having a family."

Mass.—Woodworth v. Comstock, 10 Allen 425.

N.Y.—In re Brown's Will, 274 N.Y.S. 924, 934, 153 Misc. 282—In re Barnes' Estate, 267 N.Y.S. 634, 639, 149 Misc. 149.

(4) "Head of a family."

Kan.—In re Dittmore's Estate, 106 P.2d 1056, 1058, 152 Kan. 574.

25 C.J. p 669 note 51.

See specifically Exemptions § 17, and Homesteads § 24.

(5) "Houses, apartments, families, or firms."

Ala.—City of Montgomery v. Smith, 88 So. 671, 675, 205 Ala. 557.

(6) "Immediate members of the family," as not including a boarder or roomer.

Iowa.—Umbarger v. State Farm Mut. Automobile Ins. Co., 254 N.W. 87, 89, 218 Iowa 203.

(7) "Legal representatives of . . . [named] family."

Ohio.—Albright v. Albright, 157 N.E. 760, 764, 116 Ohio St. 668.

(8) "Member of his family."

Okl.—**Corpus Juris** cited in Moore v. Kasishke, 117 P.2d 113, 114, 189 Okl. 336.

See particularly Process § 48, and Workmen's Compensation § 139.

(9) "Of a single family only."

Ill.—Village of Riverside v. Reagan, 270 Ill.App. 355, 365.

(10) "The Adams family," an ambiguous term having reference to the immediate domestic circle of a particular person by that name, or to all persons "of the blood of the second President."

Wash.—Collins v. Northwest Casualty Co., 39 P.2d 986, 989, 180 Wash. 347, 97 A.L.R. 1235.

15. Phrases

(1) "Family allowance" see Executors and Administrators § 336.

(2) "Family Bible," as the ordinary register of a family, and usually accessible to all its members.

Md.—Weaver v. Leiman, 52 Md. 709, 719.

(3) "Family car," "family group," and "family purpose doctrine" see Motor Vehicles § 433.

(4) "Family connections" distinguished from "family relationship." S.C.—State v. Logue, 28 S.E.2d 788, 790, 204 S.C. 171.

(5) "Family corporation," as close corporation see the C.J.S. definition Close.

(6) "Family domicile."

Kan.—In re Dittmore's Estate, 106 P.2d 1056, 1058, 152 Kan. 574.

(7) "Family expense" see the C.J.S. definition Expense or Expenses.

adjudications have not been found see 25 C.J. p 668 note 17—p 669 note 61.

FAMOSUS. In the civil and old English law, defined as relating to or affecting injuriously the character or reputation; hence defamatory, scandalous, or slanderous.¹⁶

FAMOUS. Celebrated in fame or public report; renowned; distinguished in story or common talk;¹⁷ and held synonymous with "notorious" in the innocent or laudatory sense of that term.¹⁸

FANAL. In French maritime law, a large lantern, fixed upon the highest part of a vessel's stern.¹⁹

FANATIC. A bigot, a person entertaining wild and extravagant notions, or affected by zeal or enthusiasm, especially upon religious subjects, hence a religious enthusiast; also a person pretending to be inspired. The term was formerly applied to

Quakers, Anabaptists, and all other sectaries, and factious dissenters from the Church of England.²⁰

FANATICA MANIA. As a form of insanity characterized by a morbid state of religious feeling see *Insane Persons* § 2 c.

FANCIFUL. Applied to trade-marks or trade-names see *Trade-Marks, Trade-Names, and Unfair Competition* § 35.

FANCY.

As a Verb

To believe with little or no reason, to imagine, presume, or suppose,²¹

"Fancied" has been said to be opposed to "real."²²

As an Adjective

Adapted to please the fancy or taste, hence ornamental;²³ having some special quality, virtue, or

(8) "Family history" see *Evidence* §§ 168-172, as to relevancy and materiality of family facts; and § 232, as to declarations regarding pedigree.

(9) "Family hotel," as designed primarily for the accommodation of permanent guests and only incidentally for the accommodation of transients, and so distinguished from ordinary "public hotel."

N.Y.—*Kew Gardens Corporation v. Ciro's Plaza*, 23 N.Y.S.2d 957, 959, 175 Misc. 475.

(10) "Family house," as distinguished from "boarding house."

N.Y.—*Baddour v. City of Long Beach*, 18 N.E.2d 18, 22, 279 N.Y. 167.

(11) "Family library," as composed of such books as family or head of family chooses to select.

Kan.—*Lupton v. Merchants' Nat. Bank of Topeka*, 38 P.2d 125, 127, 140 Kan. 615.

(12) "Family name" see *Names* § 2.

(13) "Family necessities."

Tex.—*Graves v. Parker*, Civ.App., 22 S.W.2d 747, 748.
25 C.J. p 669 note 34.

(14) "Family occupancies," as capable of being joined or "tacked," see *Adverse Possession* § 130 e.

(15) "Family physician."

Mo.—*Cromeens v. Sovereign Camp*, W. O. W., App., 247 S.W. 1033, 1034.

(16) "Family pool" is a species of contract that must have something to stand on besides wishful thinking, and the parties to it must be conscious that they are in it and contributing to it to be bound by it.

Fla.—*Sherman v. Florida Tar & Creosote Corp.*, 36 So.2d 267, 269, 160 Fla. 696.

(17) "Family portraits and their necessary frames."

Idaho.—*McMillan v. U. S. Fire Ins. Co.*, 280 P. 220, 222, 48 Idaho 163.

(18) "Family relation" and "family relationship."

Fla.—*Cumberland & Liberty Mills v. Keggins*, 190 So. 492, 493, 139 Fla. 133.

Iowa.—*In re Larsen's Estate*, 15 N. W.2d 919, 921, 235 Iowa 57.

Mo.—*Brunnert v. Boeckmann's Estate*, App., 258 S.W. 768, 770—*Nelson v. Poorman's Estate*, App., 215 S.W. 753, 754.

Pa.—*Gaydos v. Domabyl*, 152 A. 549, 551, 301 Pa. 523.

Hartman v. Moloney, 194 A. 234, 236, 128 Pa.Super. 302.

S.C.—*State v. Logue*, 28 S.E.2d 788, 790, 204 S.C. 171.

Tex.—*Garrard v. Henderson*, Civ. App., 209 S.W.2d 225, 229—*Standard Paving Co. v. Tolson*, Civ.App., 86 S.W.2d 789, 791—*Central Life Assur. Soc. (Mutual) v. Gray*, Civ. App., 32 S.W.2d 259, 260.

Wash.—*Yates v. Dohring*, 168 P.2d 404, 406, 24 Wash.2d 877.
25 C.J. p 669 note 36.

(19) "Family residence."

N.Y.—*Williams v. Pioneer Co-op. Fire Ins. Co.*, 171 N.Y.S. 353, 354, 183 App.Div. 826.

25 C.J. p 669 note 38.

(20) "Family settlement" see *Compromise and Settlement* § 3 b, *Descent and Distribution* § 73 b (3), and *Wills* §§ 325, 1110.

(21) "Family support" see *Husband and Wife* §§ 14-16, as to duties;

and *Vagrancy* § 2, as to criminal liability for neglect or refusal.

(22) "Family ticket" as restricted to particular persons see *Carriers* § 607 b notes 99, 1.

(23) "Family uses," defined as such as are appropriate to the individual needs of the members of a household, and to the needs of the household in its collective capacity.

Cal.—*Spring Valley Water Works v. San Francisco*, 52 C. 111, 120.

(24) "Single-family detached dwelling."

N.H.—*Sullivan v. Anglo-American Inv. Trust Co.*, 193 A. 225, 227, 89 N.H. 112.

16. Black L.D.

Famosus libellus

A libelous writing, a term of the civil law denoting that species of injuria which corresponds nearly to libel or slander.

Black L.D.

17. Century D.

18. Tex.—*Knapp v. Campbell*, 36 S. W. 765, 769, 14 Tex.Civ.App. 199.

19. Black L.D.

20. Black L.D.

21. Century D.

22. Pa.—*Commonwealth v. Pinkenson*, 11 A.2d 176, 183, 138 Pa.Super. 485.

Phrase construed

"Fancied or conjured up."

Pa.—*Commonwealth v. Drum*, 58 Pa. 9, 22.

Commonwealth v. Pinkenson, 11 A.2d 176, 183, 138 Pa.Super. 485.

23. Webster Int.D.

value not found in the article commonly used and not required by the use to which the ordinary article is commonly put.²⁴

In common speech the term is applied to an article which is out of the ordinary or it may be something which pleases not so much because of the qualities which make it useful as because of characteristics which appeal to the taste and to the fancy, and implies a value or characteristics not found in articles of simpler type.²⁵

It has been said to be the antonym of "common," "ordinary," "plain," and "staple."²⁶

Phrases employing the word are set out in the note.²⁷ Other phrases as to which more recent adjudications have not been found see 25 C.J. p 670 notes 67-76.

FANEGA. A Spanish dry measure of capacity equivalent to a little more than a bushel and a half.²⁸

As a land measure, "fanega" has been defined to mean as much ground as a fanega (measure) of wheat will serve to sow; it is generally considered equal to four hundred "estadales" (or spaces eleven Spanish feet) square.²⁹ It is also called a "fanegada" and has been said to equal five thousand five hundred square yards, or about an acre and a third.³⁰

FANTAIL. A term which designates a particular method of operating "pull-boats," used to drag timber from the point where it has been felled to the

water upon which it is to be floated to the mill.³¹

FAQUEER. See Faker or Fakir ante.

FARAD. As the unit of electrical capacity see Electricity § 1 b note 48.

FARANDMAN. In Scotch law, a traveler or merchant stranger.³²

FARCE. A short dramatic entertainment, in which ludicrous qualities are greatly exaggerated for the purpose of exciting laughter; a short play of low comic character.³³ It need not necessarily be written, but may be impromptu.³⁴

FARCY. A disease of horses in the nature of scabies (itch) or mangy eruptions of the skin, and, unlike influenza, a contagious disease.³⁵

FARDA. In old Spanish law, a species of tax paid by foreigners, originally a branch of the revenues of Granada.³⁶

FARDELLA. In old English law, a bundle or pack, a fardel.³⁷

FARDEL OF LAND. In old English law, the fourth part of a yard-land.³⁸

FARDING-DEAL. The fourth part of an acre of land.³⁹

FARE. A rate of charge for the carriage of passengers.⁴⁰ The word originally meant "journey,"

24. U.S.—United Cigar Stores Co. v. U. S., 4 Ct.Cust.App. 66, 69.

25. U.S.—United Cigar Stores Co. v. U. S., supra.

26. U.S.—United Cigar Stores Co. v. U. S., supra.

27. Phrases

(1) "Fancy bread," as sometimes applied to bread containing milk, butter, and sugar.

Mass.—Commonwealth v. McArthur, 25 N.E. 836, 152 Mass. 522.

(2) "Fancy grasses," defined as grass which has been dyed and then "stemmed" or "branched up" on wire, with the aid of silk, paper, or cotton, so as to resemble feathers, used in trimming women's hats.

U.S.—Levy Co. v. U. S., 12 Ct.Cust.App. 550.

See also Customs Duties § 45 b.

(3) "Fancy stationery," as including a miscellaneous assembly of leather and other goods, such as pocketbooks, bags, card cases, and many kindred articles, which cannot be classified.

Ala.—Crook v. Calhoun County Com-

missioners Court, 39 So. 383, 144 Ala. 505.

Okl.—Oklahoma County v. Blakeney, 48 P. 101, 103, 5 Okl. 70.

28. U.S.—Strother v. Lucas, Mo., 12 Pet. 410, 442-444 note, 9 L.Ed. 1137.

29. U.S.—Strother v. Lucas, supra, citing Dictionary of the Spanish Academy.

30. U.S.—Strother v. Lucas, supra, citing Kelly, Cambist.

31. La.—Des Allemands Lumber Co. v. Morgan City Timber Co., 41 So. 332, 342, 117 La. 1.

Differs from the ordinary process in that instead of pulling at right angles with the canal, by means of numerous small pockets at short intervals along the canal in such way that the territory covered from each pocket has the shape of a parallelogram, the pull boat operates at varying angles from one large pocket, and the territory covered has the shape of an open fan.

La.—Des Allemands Lumber Co. v. Morgan City Timber Co., supra.

32. Black L.D.

33. N.Y.—Juvenile Delinquents Reformation Soc. v. Diers, 60 Barb. 152, 156, 10 Abb.Pr., N.S., 216.

34. N.Y.—Juvenile Delinquents Reformation Soc. v. Diers, supra.

35. Wis.—Wirth v. State, 22 N.W. 860, 862, 63 Wis. 51.

36. Escriche Diccionario.

37. Black L.D.

38. Black L.D.

Contrary view

"Noy says an eighth only, because, according to him, two fardels make a nook, and four nooks a yard-land." Black L.D.

39. Black L.D.

40. Neb.—Krause v. Pacific Mut. Life Ins. Co. of California, 5 N.W. 2d 229, 232, 141 Neb. 844.

N.C.—McNeal Pipe & Foundry Co. v. Howland, 16 S.E. 857, 860, 111 N.C. 615, 20 L.R.A. 743. 25 C.J. p 670 note 82.

Phrases

(1) "Fare paying passenger." U.S.—Metropolitan Life Ins. Co. v.

and such is still its connotation.⁴¹

It is embraced in the word "compensation,"⁴² although a cash fare is not necessarily implied by the use of that term, see the C.J.S. definition Compensation. It has been compared with, or distinguished from, "rental charge,"⁴³ "toll," and "water rate."⁴⁴

As related to transportation by public carriers see Carriers § 578, and Shipping § 182.

FARINA. A term applied to the food preparation made from that portion of the wheat kernel which contains the largest percentage of gluten, as distinguished from "potato starch."⁴⁵ It is a highly refined wheat product resembling flour but with larger particles.^{45.5} Farina is obtained by grinding wheat and separating the bran coat and germ of the grain from the endosperm,^{45.10} that is, by removal of all glutinous matter from farinaceous grains or roots.^{45.15}

FARINAGIUM. A mill; also a toll of meal or flour.⁴⁶

FARLEU or FARLEY. Money paid by tenants in lieu of a heriot. It was often applied to the best

chattel, as distinguished from heriot, the best beast.⁴⁷

FARLINGARII. Whoremongers; adulterers.⁴⁸

FARM.

As a Noun

The word is derived from "feorme," an old Saxon word signifying "provisions,"⁴⁹ or "farme" or "ferme," called in Latin "firma."⁵⁰ Although the word, in its context, may have a very wide meaning,⁵¹ indefinite and ambiguous as to extent,⁵² yet it is said to have a well-defined meaning.⁵³

Some centuries ago the word "farm" had a meaning very different from the meaning it has today,^{53.5} and primitively it was used to signify that which was held by a tenant;⁵⁴ and at still earlier times the word was used as the equivalent of "rent," which meaning was naturally derived from the original meaning of the old Saxon word "feorme," namely, provisions, because the rent was paid in provisions produced on the land; and from the meaning "rent" it was a natural transition to have the word signify the very estate or lands rented;⁵⁵ and so it came to

Halcomb, C.C.A.Cal., 79 F.2d 788, 789.

Ala.—Continental Life Ins. Co. v. Newman, 123 So. 93, 219 Ala. 311.
Neb.—Krause v. Pacific Mut. Life Ins. Co. of California, 5 N.W.2d 229, 232, 141 Neb. 844.

(2) "Ring up fares," a term said to mean pulling a rope at the side of a car upon receipt of each fare to move the index one point on the circular scale of the regulator, the registry of the fare being announced by the stroke of a bell.

Pa.—Pittsburgh, A. & M. Pass. Ry. Co. v. McCurdy, 8 A. 230, 232, 114 Pa. 554, 60 Am.R. 363.

41. N.J.—Shelton v. Erie R. Co., 66 A. 403, 407, 73 N.J.Law 558, 118 Am.S.R. 704, 9 L.R.A., N.S., 727, 9 Ann.Cas. 883.

42. N.Y.—De Grauw v. Long Island Electric R. Co., 60 N.Y.S. 163, 167, 43 App.Div. 502.

43. Wis.—Nekoosa-Edwards Paper Co. v. Public Service Commission, 246 N.W. 428, 430, 210 Wis. 644.

44. N.C.—McNeal Pipe & Foundry Co. v. Howland, 16 S.E. 857, 860, 111 N.C. 615, 20 L.R.A. 743.

45. U.S.—Union Nat. Bank v. Seeberger, C.C.Ill., 30 F. 429, 430.

45.5 U.S.—Federal Security Adm'r v. Quaker Oats Co., 63 S.Ct. 589, 593, 318 U.S. 218, 87 L.Ed. 724, 158 A.L.R. 832.

More specifically

It consists essentially of endosperm in particles larger than permissible in flour, the size of the particles being the principal characteristic distinguishing the product from flour. It is used as a breakfast food, as an ingredient of macaroni products and extensively as a cereal food for children.

U.S.—Quaker Oats Co. v. Federal Security Administrator, C.C.A., 129 F.2d 76, 79.

45.10 U.S.—Quaker Oats Co. v. Federal Security Administrator, supra.

45.15 U.S.—Quaker Oats Co. v. Federal Security Administrator, supra.

46. Black L.D.

47. Black L.D.

48. Black L.D.

49. N.Y.—Kendall v. Miller, 47 How. Pr. 446, 448.

50. Ohio.—Black v. Hill, 32 Ohio St. 313, 318.

51. N.H.—Riddle v. Littlefield, 53 N. H. 503, 508, 16 Am.R. 388.

52. Conn.—Doolittle v. Blakesley, 4 Day 265, 271, 4 Am.D. 218.

53. Mass.—Winship v. Inspector of Buildings of Town of Wakefield, 174 N.E. 476, 477, 274 Mass. 380.

Okl.—Mattison v. Dunlap, 127 P.2d 140, 141, 191 Okl. 168.

53.5 Or.—State Industrial Accident Commission v. Eggiman, 139 P.2d 565, 567, 172 Or. 19.

54. N.H.—Bell v. Woodward, 46 N. H. 315, 333.

In England

(1) A primitive meaning of the term was agricultural land let to a tenant.

Pa.—Respublica v. Carmalt, 4 Yeates 416, 417.

25 C.J. p 671 note 93.

(2) Land not held by the owner, but granted out and occupied by another person.

Eng.—Holmes v. Milward, 47 L.J.Ch. 522.

(3) A term in lands, a lease of lands, or a leasehold interest in lands.

Eng.—Wrotesley v. Adams, Plowd. 187, 195, 75 Reprint 287—Lane v. Stanhope, 6 T.R. 345, 101 Reprint 587.

(4) Land taken on lease under a reht, generally annual, payable by the tenant.

Eng.—Wrotesley v. Adams, supra.

55. N.Y.—Kendall v. Miller, 47 How. Pr. 446, 448.

In old English law, a lease of other things than land, as of imposts. There were several of these, such as "the sugar farm," "the silk farm," and farms of wines and currants, called "petty farms."

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mean originally a lease or letting or farming out of land for a specified term and a fixed amount for these purposes; hence a large tract or portion of land taken by a lease under a yearly rent payable by the tenant, or a piece of land held under lease for the purpose of cultivation.⁵⁶

In more modern times the word has received a more extended signification, and now denotes, in this country, both in a popular and legal sense, a considerable tract of land, devoted, in part at least, to cultivation, with suitable buildings, and under the supervision of a single occupant, regardless of the nature or extent of his tenure,⁵⁷ and in the present day, both in England and the United States, a farm in its ordinary acceptation means any considerable tract of land, or a number of small tracts, devoted wholly or partially to agricultural purposes or

pasturage of cattle.^{57.5}

The word "farm" is defined as meaning a body of land, usually under one ownership, devoted to agriculture, either to the raising of crops, or pasture, or both;⁵⁸ a considerable tract of land, cultivated or used in some one of the usually recognized ways of farming;⁵⁹ an indefinite quantity of land, some of which is cultivated,⁶⁰ whether it is large or small, isolated, or made up of many parcels,⁶¹ for a farm may be of any size, of any shape, of any boundaries, and may include less than one lot, or comprise several lots or parts of lots.⁶²

The term is further defined to mean a tract of land devoted to agricultural purposes,^{62.5} generally under the management of a tenant or owner;^{62.10} a tract of land devoted to agriculture, stock raising, or some allied industry;^{62.15} a parcel or tract of land

56. Tex.—Gordon v. Buster, 257 S. W. 220, 221, 113 Tex. 382.

57. N.Y.—Kendall v. Miller, 47 How. Pr. 446, 448.

Similarly expressed

"Any tract of land (whether consisting of one or more parcels) devoted to agricultural purposes, including the production of crops and generally of animals, under the management of the tenant or owner." Tex.—Gordon v. Buster, 257 S.W. 220, 221, 222, 113 Tex. 382.

57.5 Md.—Jones v. Holloway, 36 A. 2d 551, 554, 183 Md. 40, 152 A.L.R. 933.

Described in detail

The popular connotation of a "farm" is a place of several acres where the owner or tenant resides, a substantial portion of which is devoted to the raising of crops, such as wheat, oats, hay, etc., and some vegetables, such as corn and beans, and generally accompanied by the breeding of certain animals such as pigs, cows, chickens, etc., the principal use of the produce being to maintain the farmer and his family, and only the excess being sold.

Pa.—Township of Marple v. Lynam, 30 A.2d 208, 210, 151 Pa.Super. 288.

58. Okl.—Mattison v. Dunlap, 127 P.2d 140, 141, 191 Okl. 168.

Tex.—Gordon v. Buster, 257 S.W. 220, 221, 113 Tex. 382.

Wash.—State v. Superior Court for Walla Walla County, 10 P.2d 986, 987, 168 Wash. 142.

25 C.J. p 672 note 13.

Corpus Juris Secundum quoted in part

In defining the word "farm" as used in the phrase "located on a farm," the court stated, quoting from Corpus Juris Secundum, that the word means land used for "the raising of crops, or pasture, or both."

Cal.—Fraenkel v. Trescony, 309 P.2d 819, 822, 48 C.2d 378.

59. Ohio.—Corpus Juris Secundum quoted in In re Clark's Estate, Prob., 141 N.E.2d 259, 262.

Wis.—O'Neil v. Pleasant Prairie Mut. F. Ins. Co., 38 N.W. 345, 346, 71 Wis. 621.

60. Cal.—Corpus Juris Secundum quoted in Hagenburger v. City of Los Angeles, 124 P.2d 345, 348, 51 C.A.2d 161.

Ohio.—Corpus Juris Secundum quoted in In re Clark's Estate, Prob., 141 N.E.2d 259, 262.

Pa.—Commonwealth v. Carmalt, 2 Binn. 235, 238.

Wash.—Porter v. Yakima County, 137 P. 466, 467, 77 Wash. 299.

Similarly expressed

"A tract of land chiefly under cultivation."

Tex.—Gordon v. Buster, 257 S.W. 220, 222, 113 Tex. 382.

61. U.S.—In re Drake, D.C.S.C., 114 F. 229, 231.

Cal.—Corpus Juris Secundum quoted in Hagenburger v. City of Los Angeles, 124 P.2d 345, 348, 51 C.A.2d 161.

Ohio.—Corpus Juris Secundum quoted in In re Clark's Estate, Prob., 141 N.E.2d 259, 262.

Pa.—Supervisors of Manheim Tp., Lancaster County, v. Workman, 35 A.2d 747, 749, 154 Pa.Super. 146—Township of Marple v. Lynam, 30 A.2d 208, 210, 151 Pa.Super. 288.

Detached parcels

N.H.—Gafney v. Kenison, 10 A. 706, 707, 64 N.H. 354.

25 C.J. p 672 note 15 [a].

Disconnected and separated by lands of adjoining owners

N.Y.—Kendall v. Miller, 47 How.Pr. 446, 448.

Location immaterial

It may lie in one township or in more than one.

Mass.—Winship v. Inspector of Buildings of Town of Wakefield, 174 N.E. 476, 477, 274 Mass. 380.

62. Cal.—Corpus Juris Secundum quoted in Hagenburger v. City of Los Angeles, 124 P.2d 345, 348, 51 C.A.2d 161.

Ohio.—Corpus Juris Secundum quoted in In re Clark's Estate, Prob., 141 N.E.2d 259, 262.

Wis.—Pepper v. O'Dowd, '39 Wis. 538, 547.

62.5 Cal.—Hagenburger v. City of Los Angeles, 124 P.2d 345, 347, 51 C.A.2d 161.

62.10 Pa.—Commonwealth v. Przychodski, 110 A.2d 737, 738, 177 Pa. Super. 203—Supervisors of Manheim Tp., Lancaster County, v. Workman, 35 A.2d 747, 750, 154 Pa.Super. 146—Township of Marple v. Lynam, 30 A.2d 208, 210, 151 Pa. Super. 288.

62.15 Cal.—Fraenkel v. Trescony, 309 P.2d 819, 822, 48 C.2d 378.

Corpus Juris Secundum cited in Board of Sup'rs of Merced County v. Cothran, 191 P.2d 506, 508, 84 C.A.2d 679.

Mass.—Town of Lincoln v. Murphy, 49 N.E.2d 453, 455, 314 Mass. 16, 146 A.L.R. 1196—Winship v. Inspector of Buildings of Town of Wakefield, 174 N.E. 476, 477, 274 Mass. 380.

Similarly defined

(1) "A large tract used for cultivation or other purposes, as raising stock, whether hired or owned by the occupant, including a message with outbuildings, gardens, orchard, yard, etc."

Tex.—Gordon v. Buster, 257 S.W. 220, 221, 222, 113 Tex. 382.

(2) A tract of land devoted to general or special cultivation under a single control, whether that of its owner or of a tenant: as, a small

consisting usually of grassland, meadow, pasture, tillage, and woodland, cultivated by one man, and usually owned by him in fee;⁶³ any parcel or group of parcels of land cultivated as a unit;^{63.5} one or more tracts of land devoted to agricultural purposes including the production of crops and the raising of domestic and other animals;⁶⁴ a tract of land used for raising crops or rearing animals;^{64.5} a tract devoted to cultivation under a single control, whether it be large or small, isolated or made up of many parcels;^{64.10} a tract of land under one control or forming a single property devoted to agriculture, stock raising, dairy produce, or some allied industry;^{64.15} a tract of ground cultivated or designed for cultivation by a farmer.⁶⁵

In a somewhat restrictive sense, the term is defined to mean a plot or tract of land devoted to the raising of domestic or other animals,⁶⁶ as a chicken farm⁶⁷ or a fox farm;^{67.5} a tract of land devoted to the breeding, grazing, shearing, and lambing of

sheep.⁶⁸

The term is and has been a collective one, comprehending divers things collected together, whereof one is a message, and the others are the lands, meadows, pastures, woods, commons, and other things lying on or appertaining thereto.⁶⁹ Generally the word "farm" includes all the land which forms part of the tract,⁷⁰ and is not confined to inclosures.⁷¹

The word "farm" implies some tillage of the soil under natural conditions,^{71.5} and also implies cultivation of land for the purpose of production, or use in aid thereof.⁷²

It has been said that what constitutes a farm must differ under the particular statute considered, or the circumstances in the particular case.^{72.5} The word has a suggestive significance apart from any explicit or restrictive meaning, and even in a popular sense is applied to land used for any one of a variety of purposes,^{72.10} and it is generally recognized that

farm; a wheat-, fruit-, dairy-, or market-farm.

Pa.—Commonwealth v. Przychodski, 110 A.2d 737, 738, 177 Pa.Super. 203—Supervisors of Manheim Tp., Lancaster County, v. Workman, 35 A.2d 747, 750, 154 Pa.Super. 146—Township of Marple v. Lynam, 30 A.2d 208, 210, 151 Pa.Super. 288.

(3) "A piece of ground devoted by its owner to agriculture."

Ill.—Williams v. Chicago & N. W. R. Co., 81 N.E. 1133, 1135, 228 Ill. 593. Okl.—Mattison v. Dunlap, 127 P.2d 140, 141, 191 Okl. 168.

Pa.—Supervisors of Manheim Tp., Lancaster County, v. Workman, supra.

(4) A tract of land used wholly or principally for agricultural purposes and under one control.

S.D.—Corpus Juris Secundum cited in Connolly v. Standard Casualty Company, 73 N.W.2d 119, 121, 76 S.D. 95.

(5) A piece of land used wholly or principally for agricultural purposes. Or.—State Industrial Accident Commission v. Eggiman, 139 P.2d 565, 567, 172 Or. 19.

(6) A piece of land held under lease for cultivation.

Pa.—Commonwealth v. Przychodski, 110 A.2d 737, 738, 177 Pa.Super. 203—Supervisors of Manheim Tp., Lancaster County, v. Workman, 35 A.2d 747, 750, 154 Pa.Super. 146—Township of Marple v. Lynam, 30 A.2d 208, 210, 151 Pa.Super. 288.

63. Minn.—Worley v. Naylor, 6 Minn. 192, 202.

63.5 Pa.—Commonwealth v. Przychodski, 110 A.2d 737, 738, 177 Pa.Super. 203—Supervisors of Man-

heim Tp., Lancaster County, v. Workman, 35 A.2d 747, 750, 154 Pa.Super. 146—Township of Marple v. Lynam, 30 A.2d 208, 210, 151 Pa.Super. 288.

64. Mass.—Town of Lincoln v. Murphy, 49 N.E.2d 453, 455, 314 Mass. 16, 146 A.L.R. 1196—Winship v. Inspector of Buildings of Town of Wakefield, 174 N.E. 476, 477, 274 Mass. 380.

64.5 Cal.—Fraenkel v. Trescony, 309 P.2d 819, 822, 48 C.2d 378.

Corpus Juris Secundum cited in Board of Sup'rs of Merced County v. Cothran, 191 P.2d 506, 508, 84 C. A.2d 679.

Ohio.—In re Clark's Estate, Prob., 141 N.E.2d 259, 262.

Tex.—Gordon v. Buster, 257 S.W.2d 220, 221, 222, 113 Tex. 382.

64.10 Ohio.—In re Clark's Estate, Prob., 141 N.E.2d 259, 262.

64.15 Ill.—Williams v. Chicago & N. W. R. Co., 81 N.E. 1133, 1135, 228 Ill. 593.

Okl.—Mattison v. Dunlap, 127 P.2d 140, 141, 191 Okl. 168.

65. Ill.—Williams v. Chicago & N. W. R. Co., 81 N.E. 1133, 1135, 228 Ill. 593.

Okl.—Mattison v. Dunlap, 127 P.2d 140, 141, 191 Okl. 168.

Pa.—Township of Marple v. Lynam, 30 A.2d 208, 210, 151 Pa.Super. 288.

66. Cal.—Hagenburger v. City of Los Angeles, 124 P.2d 345, 347, 51 C.A.2d 161.

Wash.—State v. Superior Court for Walla Walla County, 10 P.2d 986, 987, 168 Wash. 142—Porter v. Yakima County, 137 P. 466, 467, 77 Wash. 299.

67. Cal.—Hagenburger v. City of Los Angeles, 124 P.2d 345, 347, 51 C.A.2d 161.

Mass.—Winship v. Inspector of Buildings of Town of Wakefield, 174 N.E. 476, 477, 274 Mass. 380.

Wash.—State v. Superior Court for Walla Walla County, 10 P.2d 986, 987, 168 Wash. 142—Porter v. Yakima County, 137 P. 466, 467, 77 Wash. 299.

67.5 Cal.—Hagenburger v. City of Los Angeles, 124 P.2d 345, 347, 51 C.A.2d 161.

Wash.—State v. Superior Court for Walla Walla County, 10 P.2d 986, 987, 168 Wash. 142—Porter v. Yakima County, 137 P. 466, 467, 77 Wash. 299.

68. Wash.—State v. Superior Court for Walla Walla County, 10 P.2d 986, 987, 168 Wash. 142—Porter v. Yakima County, 137 P. 466, 467, 77 Wash. 299.

69. Ohio.—Black v. Hill, 32 Ohio St. 313, 318.

25 C.J. p 672 note 18.

70. La.—Succession of Williams, 61 So. 852, 854, 132 La. 865.

25 C.J. p 672 note 19.

71. Mo.—Finley v. Langston, 12 Mo. 120, 124.

71.5 Mich.—Hammons v. Franzblau, 50 N.W.2d 161, 162, 331 Mich. 572.

72. N.C.—State v. Patterson, 4 S.E. 47, 48, 98 N.C. 657.

72.5 Okl.—Mattison v. Dunlap, 127 P.2d 140, 141, 191 Okl. 168.

72.10 Pa.—Commonwealth v. Przychodski, 110 A.2d 737, 738, 177 Pa.Super. 203—Supervisors of Manheim Tp., Lancaster County, v. Workman, 35 A.2d 747, 750, 154

the term includes land and buildings, the real estate devoted to agricultural purposes, raising of cattle, dairying, and the like,^{72.15} and may and often does include not only cultivated land and pasture land, but also woodland.^{72.20}

In the accompanying footnote examples are given of what, in particular connections, the term has been held to include and not to include.⁷³

What passes under a devise of a "farm" is treated in Wills § 761.

Depending on the use of the term in the particular case, it has been held equivalent to, or synonymous with, "lot"⁷⁴ and "ranch,"⁷⁵ and nearly synonymous with "plantation."^{75.5}

"Farm" has been compared with, and distinguished from, "ranch."⁷⁶

Phrases employing the noun are set out in the note.⁷⁷ Other phrases in which the noun occurs and as to which more recent adjudications have not been found see 25 C.J. p 672 notes 22, 30, 35 and p 673 notes 36-39.

As a Verb

—**Present Tense.** The verb "to farm" includes and means the act of devoting land to the processes of agriculture,⁷⁸ and it also is defined as meaning to produce crops or animals on a farm.⁷⁹ It is further defined as meaning to lease or let; to demise or grant for a limited term and at a stated rental.^{79.5}

As used in a lease of mineral lands see Mines and Minerals § 3 h.

Phrases employing the verb "farm" are set out in the note.⁸⁰

Other phrases

(1) "Connected with a farm."

Wash.—State v. Superior Court for Walla Walla County, 10 P.2d 986, 987, 168 Wash. 142.

(2) "Farms which I now occupy." N.Y.—Jackson v. Sill, 11 Johns. 201, 215, 6 Am.D. 363.

(3) "Fee farm" and "fee farm rent" see Ground Rents § 1.

(4) "Home farm" connotes both a place to live and a place to work. Ohio.—In re Clark's Estate, Prob., 141 N.E.2d 259, 263.

(5) "Homestead farm" see Homesteads § 1.

(6) "Muskrat farm," as a place for raising and breeding muskrats. Ohio.—State v. Evans, 152 N.E. 776, 777, 21 Ohio App. 168.

(7) "Products of his own farm." N.C.—State v. Patterson, 4 S.E. 47, 48, 98 N.C. 657, 659.

(8) "Sent to the poor farm" is generally understood to mean impoverishment.

Mont.—Walsh v. Kennedy, 147 P.2d 425, 430, 115 Mont. 551.

78. N.Y.—DeWeaver v. Jackson & Perkins Co., 63 N.Y.S.2d 593, 596, 271 App.Div. 119.

79. Cal.—Hagenburger v. City of Los Angeles, 124 P.2d 345, 347, 51 C.A.2d 161.

Tex.—Gordon v. Buster, 257 S.W. 220, 221, 113 Tex. 382.

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80. Phrases construed

(1) "Farm let."

Ala.—Magee v. Fisher, 8 Ala. 320, 322.

Pa.—Steel v. Frick, 56 Pa. 172, 174.

(2) "Farm out."

N.C.—State v. Richmond & D. R. Co., 72 N.C. 634, 637.

Pa.Super. 146—Township of Marple v. Lynam, 30 A.2d 208, 210, 151 Pa.Super. 288.

72.15 N.Y.—In re Wesche's Will, 169 N.Y.S.2d 612, 613, 4 A.D.2d 997.

72.20 Md.—Jones v. Holloway, 36 A.2d 551, 554, 183 Md. 40, 152 A.L.R. 933.

73. Held to include

(1) Grazing land, and cultivated land and the improvements thereon. Wash.—State v. Superior Court for Walla Walla County, 10 P.2d 986, 987, 168 Wash. 142.

(2) Land held for cultivation and cultivated in whole or in part. Wis.—Pepper v. O'Dowd, 39 Wis. 538, 547.

(3) Stock, dairy, poultry, fruit, and truck farms, plantations, ranches, ranges, and orchards. U.S.—Jones v. Gaylord Guernsey Farms, C.C.A.Okl., 128 F.2d 1008, 1011.

(4) Nursery where ornamental and other trees and shrubs were grown. Pa.—Township of Marple v. Lynam, 30 A.2d 208, 210, 151 Pa.Super. 288.

Held not to include

(1) A tract of land, partly plowed, partly pasture, with no house or barn on it. Wis.—Lentz v. Dostal, 249 N.W. 174, 176, 212 Wis. 81.

(2) Greenhouses and retail flower stores. Colo.—Park Floral Co. v. Industrial Commission, 91 P.2d 492, 495, 104 Colo. 350.

(3) Stock and tools. Mass.—Hallett v. Taylor, 58 N.E. 154, 177 Mass. 6. N.Y.—In re Wesche's Will, 169 N.Y.S.2d 612, 613, 4 A.D.2d 997.

(4) A lawyer's suburban home, consisting of several acres of rough

unplanted land where the livestock was limited to some saddle horses.

Okl.—Mattison v. Dunlap, 127 P.2d 140, 141, 191 Okl. 168.

(5) Premises devoted entirely to raising hogs, for which no food was produced thereon, and not equipped with farming implements or buildings for housing of livestock. Mass.—Town of Lincoln v. Murphy, 49 N.E.2d 453, 455, 314 Mass. 16, 146 A.L.R. 1196.

74. N.Y.—People v. Wilson, 98 N.Y.S. 1080, 1081, 113 App.Div. 1. Saunders v. Springsteen, 4 Wend. 429, 431.

75. Tex.—Gordon v. Buster, 257 S.W. 220, 221, 113 Tex. 382.

Wash.—State v. Superior Court for Walla Walla County, 10 P.2d 986, 987, 168 Wash. 142—Porter v. Yakima County, 137 P. 466, 467, 77 Wash. 299.

75.5 Cal.—Attorney General v. State Bd. of Judges, 38 C. 291, 296.

Pa.—In re Lower Towamensing Tp. Private Road, 10 Pa.Dist. 581, 25 Pa.Co. 305, 8 North.Co. 84.

76. Utah.—Davis v. State Industrial Commission, 206 P. 267, 269, 59 Utah 607.

77. Supervision of a farm

(1) It means any work, manual or otherwise, that may be required for keeping it in order.

Ill.—Borovicka v. Bankers Indemnity Ins. Co., 6 N.E.2d 531, 533, 289 Ill.App. 51.

(2) It includes as part of the care and oversight the doing of such incidental things as may be required for keeping the farm in order, and it does not mean absolute idleness as far as physical labor is concerned.

Ill.—National Accident Society of the City of New York v. Taylor, 42 Ill. App. 97, 102.

—**Farming.** In cases decided early in the century it has been stated that the use of the word "farming" in its purely agricultural sense is comparatively modern,⁸¹ and it also has been said that most of the judicial definitions have been evolved by the federal courts in construing the exemption, under the bankruptcy acts, from adjudication as an involuntary bankrupt,⁸² or by courts generally in applying workmen's compensation acts, and other statutes, from the operation of which farming and farm labor are exempted.⁸³

The dominant and distinguishing characteristic of this occupation, in both the popular and the legal senses of the term, is the cultivation of the soil for the production of crops therefrom,⁸⁴ implying the dealing with natural products of the soil in a natural manner rather than the artificial care of commodities under artificial conditions,⁸⁵ and that, as far as the character of the work is concerned, the activity connected therewith may be physical or mental or financial, including more than manual farm labor.⁸⁶

"Farming" is defined as the act or business of cultivating the land, the business of tilling the soil;⁸⁷ the business of cultivating land, or employing it for the purposes of husbandry;⁸⁸ the act of devoting land to the processes of agriculture;^{88.5} the cultivation and fertilization of the soil, as well as caring for and harvesting the crops;⁸⁹ the cultivation of land for the production of agricultural crops with incidental enterprises;⁹⁰ the act or business of cultivating and using the land and the soil thereof for production of crops for the use of man and animals and incidental purposes;^{90.5} the commercial production of any plant, even horticultural, or annual which has economic value;^{90.10} the operation of a farm.⁹¹

In a restricted sense, the word has been used as applying to the cultivation of large tracts of lands, but this is not always or necessarily so.⁹²

In the accompanying note examples are given of what, in particular connections, the term has been held to include and not to include.⁹³

81. U.S.—In re Johnson, D.C.N.Y., 149 F. 864, 868—In re Drake, D.C. S.C., 114 F. 229, 231.

82. Conn.—Chudnov v. Board of Appeals of Town of Bloomfield, 154 A. 161, 162, 113 Conn. 49.
See also Bankruptcy § 95.

83. Cal.—Hagenburger v. City of Los Angeles, 124 P.2d 345, 347, 51 C.A.2d 161.

See also Workmen's Compensation § 33.

84. Cal.—Corpus Juris Secundum cited in Board of Sup'rs of Merced County v. Cothran, 191 P.2d 506, 508, 84 C.A.2d 679.

Conn.—Corpus Juris cited in Chudnov v. Board of Appeals of Town of Bloomfield, 154 A. 161, 162, 113 Conn. 49.

85. Tenn.—Dye v. McIntyre Floral Co., 144 S.W.2d 752, 753, 176 Tenn. 527.

86. U.S.—Florida Nat. Bank v. Evans, D.C.Ga., 28 F.2d 67, 72.

87. Cal.—Hagenburger v. City of Los Angeles, 124 P.2d 345, 347, 51 C.A.2d 161.

Pa.—Sohner v. Mason, 288 P.2d 616, 617, 136 C.A.2d 449—Corpus Juris Secundum cited in Board of Sup'rs of Merced County v. Cothran, 191 P.2d 506, 508, 84 C.A.2d 679.

88. U.S.—Corpus Juris quoted in Kaslovitz v. Reid, C.C.A.Utah, 128 F.2d 1017, 1018.

Cal.—Corpus Juris quoted in Hagenburger v. City of Los Angeles, 124 P.2d 345, 348, 51 C.A.2d 161.

Conn.—Corpus Juris quoted in Chudnov v. Board of Appeals of Town

of Bloomfield, 154 A. 161, 162, 113 Conn. 49.

25 C.J. p 674 note 81.

88.5 N.Y.—DeWeaver v. Jackson & Perkins Co., 63 N.Y.S.2d 593, 596, 271 App.Div. 119.

89. U.S.—Corpus Juris quoted in Kaslovitz v. Reid, C.C.A.Utah, 128 F.2d 1017, 1018.

Cal.—Miller v. Stults, 300 P.2d 312, 320, 143 C.A.2d 592—Corey v. Struve, 116 P. 975, 978, 16 C.A. 310.

Conn.—Corpus Juris quoted in Chudnov v. Board of Appeals of Town of Bloomfield, 154 A. 161, 162, 113 Conn. 49.

90. Ga.—Collins v. Mills, 30 S.E.2d 866, 870, 198 Ga. 18.

Utica Mut. Ins. Co. v. Winters, 48 S.E.2d 918, 921, 77 Ga.App. 550—Pridgen v. Murphy, 160 S.E. 701, 44 Ga.App. 147.

90.5 N.Y.—Town of Mount Pleasant v. Van Tassel, 166 N.Y.S.2d 458, 460, 7 Misc.2d 643.

Incidental purposes may include animal husbandry, stock-raising, or dairying.

N.Y.—Town of Mount Pleasant v. Van Tassel, supra.

90.10 Pa.—Commonwealth v. Przychodski, 110 A.2d 737, 739, 177 Pa. Super. 203—Supervisors of Manheim Tp., Lancaster County, v. Workman, 35 A.2d 747, 749, 154 Pa. Super. 146—Township of Marple v. Lynam, 30 A.2d 208, 210, 151 Pa. Super. 288.

91. U.S.—Florida Nat. Bank v. Evans, D.C.Ga., 28 F.2d 67, 72.

In re McMurray, D.C.Iowa, 8 F. Supp. 449, 454.

Or.—State Industrial Accident Commission v. Eggiman, 139 P.2d 565, 567, 172 Or. 19.

92. Cal.—Hagenburger v. City of Los Angeles, 124 P.2d 345, 348, 51 C.A.2d 161.

93. **Held to constitute "farming"**
(1) Gardening, horticulture and raising trees, shrubs and plants in a nursery.

Cal.—Hagenburger v. City of Los Angeles, supra.

(2) Stock raising, dairying, and kindred activities, when carried on in connection with, and incidental and subordinate to, tillage of the soil.

U.S.—In re Brown, D.C.Wash., 251 F. 365, 370.

Conn.—Chudnov v. Board of Appeals of Town of Bloomfield, 154 A. 161, 163, 113 Conn. 49.

Or.—State Industrial Accident Commission v. Eggiman, 139 P.2d 565, 567, 172 Or. 19.

(3) The use of most of the acreage of a farm in general farming operations although small portions thereof were devoted to raising of foxes and ginseng, as separate businesses.

Wis.—Eberlein v. Industrial Commission, 297 N.W. 429, 430, 237 Wis. 555.

(4) The raising of horses.
N.J.—Stout v. Mitschele, 52 A.2d 422, 424, 135 N.J.Law 406.

Held not to constitute "farming"

(1) Chicken raising.
Conn.—Chudnov v. Board of Appeals

"Farming" has been held synonymous with "agriculture" see Agriculture § 1 note 12, and "tillage of the soil" see Bankruptcy § 95 note 9; and has been compared with, and distinguished from, "agriculture,"⁹⁴ "tillage of the soil" see Bankruptcy § 95 note 15, "trade,"⁹⁵ and "wheat threshing."⁹⁶ For references to some specific uses of the term see 25 C.J. p 674 note 80.

Farming tools and utensils. A term which has no well-defined legal signification, but is susceptible to divers meanings, applicable to the various im-

plements used in different branches of farming,⁹⁷ and dependent on circumstances.⁹⁸ It has been defined as such utensils or implements as are needed or used by the farmer in conducting his own farming operations.⁹⁹ Articles held included and not included are set out in the footnote.¹

In French jurisprudence the word "utensils" is used as synonymous with "agricultural instruments," whatever may be their nature.²

Other phrases are listed in the note.³ Additional

of Town of Bloomfield, 154 A. 161, 162, 113 Conn. 49.

(2) Conducting a riding stable and academy.

N.J.—Berry v. Recorder's Court of Town of West Orange, 11 A.2d 743, 745, 124 N.J.Law 385.

(3) Ginseng raising, when separately pursued.

Wis.—Eberlein v. Industrial Commission, 297 N.W. 429, 430, 237 Wis. 555.

(4) Operation of a commercial greenhouse and nursery.

Tenn.—Dye v. McIntyre Floral Co., 144 S.W.2d 752, 753, 176 Tenn. 527.

(5) Operation of a small sawmill by a farmer cutting lumber for the purpose of constructing a dwelling house.

Or.—Farrin v. State Industrial Acc. Commission, 205 P. 984, 989, 104 Or. 452.

(6) Operation of a turpentine business.

Ga.—Pridgen v. Murphy, 160 S.E. 701, 44 Ga.App. 147.

(7) Raising of foxes, when separately pursued.

Wis.—Eberlein v. Industrial Commission, supra.

(8) "Well boring."

Cal.—Robinson v. Eberhart, 83 P. 452, 454, 148 C. 495.

(9) Forestry and lumbering.

U.S.—Jones v. Gaylord Guernsey Farms, C.C.A.Okla., 128 F.2d 1008, 1011.

(10) Planting and cultivating vegetables in a backyard "victory garden."

U.S.—Kaslovitz v. Reid, C.C.A.Utah, 128 F.2d 1017, 1018.

(11) Maintaining piggery.

Mass.—Town of Lincoln v. Murphy, 49 N.E.2d 453, 455, 314 Mass. 16, 146 A.L.R. 1196.

N.Y.—Town of Mount Pleasant v. Van Tassell, 166 N.Y.S.2d 458, 460, 7 Misc.2d 643.

94. Fla.—Florida Industrial Commission v. Growers Equipment Co., 12 So.2d 889, 894, 152 Fla. 595.

Neb.—In re Rodgers, 279 N.W. 800, 803, 134 Neb. 832.

95. Me.—Leeds v. Freeport, 10 Me. 356, 359.

63 C.J. p 234 note 70 [b] (2).

96. U.S.—North Whittier Heights Citrus Ass'n v. National Labor Relations Board, C.C.A., 109 F.2d 76, 81.

97. La.—Lahn v. Carr, 45 So. 707, 709, 120 La. 797.

25 C.J. p 674 note 90.

98. Vt.—Rugg v. Hale, 40 Vt. 138, 144.

99. Cal.—In re Baldwin, 12 P. 44, 45, 71 C. 74.

1. Held included

(1) A McCormick advance reaper and mower.

Kan.—Voorhees v. Patterson, 20 Kan. 555, 556.

(2) A mower.

Wis.—Humphrey v. Taylor, 45 Wis. 251, 253, 30 Am.R. 738.

(3) A steam engine used in connection with a pump for irrigation, with a thresher, and with machinery for cultivating a crop of rice, and not shown to have been used for any other purpose than the cultivation and harvesting of such crop.

La.—Lahn v. Carr, 45 So. 707, 709, 120 La. 797.

(4) A steam thresher for harvesting a rice crop.

La.—Laporte v. Libby, 38 So. 457, 458, 114 La. 570.

(5) A threshing machine, clover huller, and wagon which is used for the purpose of carrying the machines from place to place.

Ohio.—Muse v. Darrah, 2 Ohio Dec. Reprint, 604, 606, 4 West.L.Month. 149.

(6) A wagon.

N.C.—Elliott v. Posten, 57 N.C. 433, 435.

(7) Blacksmith's tools used in operating the farm.

Tenn.—Royston v. McCulley, Ch., 59 S.W. 725, 730, 52 L.R.A. 899.

Held not included

(1) A horse lawn mower.

Mass.—Sullivan v. Ashfield, 116 N.E. 565, 566, 227 Mass. 24.

(2) An automobile truck used in operating farm and transporting farm products to market for sale.

Iowa.—Farmers' Elevator & Live Stock Co. v. Satre, 195 N.W. 1011, 1012, 196 Iowa 1076.

Mass.—Trull v. City of Lowell, 139 N.E. 434, 435, 245 Mass. 45.

(3) A threshing machine with which the owner threshes his own grain, but which he employed during the larger portion of the threshing season in threshing for others for hire.

Cal.—In re Baldwin, 12 P. 44, 45, 71 C. 74.

2. La.—Laporte v. Libby, 38 So. 457, 458, 114 La. 570.

3. Phrases

(1) "Farming business," contrasted with "manufacturing business."

La.—Hayes v. Barras, App., 6 So.2d 66, 68.

(2) "Farming corporation."

U.S.—McLaughlin Land & Livestock Co. v. Bank of America, Nat. Trust & Savings Ass'n, C.C.A.Cal., 94 F. 2d 491, 493.

(3) "Farming industry," construed as including rice growers' association with warehouse.

Cal.—California Employment Commission v. Butte County Rice Growers Ass'n, App., 138 P.2d 347, 349.

(4) "Farming operations."

U.S.—In re Weis, D.C.Iowa, 10 F. Supp. 227, 229—In re Knight, D. C.Conn., 9 F.Supp. 502.

Conn.—American Sumatra Tobacco Corporation v. Tone, 15 A.2d 80, 82, 127 Conn. 132.

Minn.—Stahl v. Patrick, 288 N.W. 854, 855, 206 Minn. 413.

Miss.—Clement v. Stone, 15 So.2d 517, 522, 195 Miss. 774, 152 A.L.R. 742.

(5) "Farming or agriculture," as including pasturing sheep.

Or.—Weddle v. Parrish, 295 P. 454, 455, 135 Or. 345.

(6) "Farming or tillage of the soil."

U.S.—Chandler v. Metomkin Bank & Trust Co., C.C.A.Va., 86 F.2d 370, 371.

phrases as to which more recent adjudications have not been found see 25 C.J. p 674 notes 84-89.

As an Adjective

Farm labor. In its generally accepted meaning, the term is defined as labor engaged in the production of hay, grain, vegetables, and the like by the tillage of the soil,⁴ and ordinarily it connotes the tilling of the soil, its products, and the raising and caring for such domestic animals as usually are found in those surroundings.^{4.5}

The term has been restricted in its application to work performed on a farm and connected with farm activities, the word "farm" being used in its ordinarily accepted sense.^{4.10} Work connected with a substantial commercial enterprise, separate and distinct from farming activity, is not "farm labor" even though it is performed on a farm.^{4.15}

By statute the term "farm labor" has been extended to include all service performed on a farm in connection with the raising, shearing, feeding, car-

ing for, training, and management of live stock, bees, poultry, and fur-bearing animals and wild life.⁵

In the accompanying note examples are given of what, in particular connections, the term has been held to include and not to include.⁶

As used in workmen's compensation acts see Workmen's Compensation § 33.

Farm laborer. Defined generally as a man hired to work on a farm;⁷ a laborer employed in or about the business of farming;⁸ any man employed to work on a farm and to perform the work ordinarily done there;⁹ one who devotes his time to ordinary farm labor as a gainful occupation with some reasonable degree of regularity and continuity.¹⁰

While the work of a "farm laborer" consists of plowing, planting, harvesting, keeping machinery in its place and in repair, and a variety of other duties that are not performed by an industrial laborer,^{10.5} a "farm laborer's" duties are not confined to plow-

(7) "Farming purposes," as including raising of live stock, as well as production of farm crops directly from soil.

Wash.—State v. Superior Court for Walla Walla County, 10 P.2d 986, 987, 168 Wash. 142.

(8) "Farming season" as "season of farming."

N.D.—Funston v. Little, 25 N.W.2d 92, 98, 75 N.D. 60.

4. Cal.—Krobitch v. Industrial Accident Commission of California, 185 P. 396, 398, 181 C. 541.

4.5 Minn.—Tucker v. Newman, 14 N.W.2d 767, 771, 772, 217 Minn. 473.

4.10 Minn.—Cristgau v. Woodlawn Cemetery Ass'n, 293 N.W. 619, 627, 208 Minn. 263.

Wis.—Cedarburg Fox Farms, Inc., v. Industrial Commission, 6 N.W.2d 687, 690, 241 Wis. 604, 610.

4.15 Minn.—Tucker v. Newman, 14 N.W.2d 767, 771, 217 Minn. 473.

5. N.Y.—In re Bridges, 28 N.Y.S.2d 312, 314, 262 App.Div. 19.

6. Held to include

(1) Assisting a neighbor in filling silo pursuant to agreement of community of farmers for an exchange of work.

Wis.—Schuster v. Bridgeman, 275 N.W. 440, 442, 225 Wis. 547.

(2) Getting out logs on a farm in the winter time.

N.Y.—Brockett v. Mietz, 171 N.Y.S. 412, 184 App.Div. 342.

(3) Labor on a farm devoted to the raising of fur-bearing animals.

N.Y.—In re Bridges, 28 N.Y.S.2d 312, 314, 262 App.Div. 19.

(4) Sawing wood on a neighboring farm belonging to a lumber company pursuant to an agreement for baling hay in exchange therefor.

Wis.—Powell v. Industrial Commission of Wisconsin, 213 N.W. 651, 652, 193 Wis. 38.

(5) Growing of hybrid seed corn and preparing it for market without changing its form or its nature.

Wis.—Vandre v. Trachte, 12 N.W.2d 48, 244 Wis. 233.

Held not to include

(1) Blasting, removing, and loading, under employment by a farmer, of surface coal from an outcrop on his farm for sale to third persons.

Ind.—Hanna v. Warren, 133 N.E. 9, 10, 77 Ind.App. 1.

(2) Propagation of trout for domestic purposes.

Cal.—Krobitch v. Industrial Accident Commission of California, 185 P. 396, 398, 181 C. 541.

(3) Repairing of buildings on farms to make them salable and rentable for insurance revenue in the usual course of an insurance business.

Neb.—Hiestand v. Ristau, 284 N.W. 756, 760, 135 Neb. 881.

(4) The cleaning of beans by an elevator.

Mich.—Minor Walton Bean Co. v. Michigan Unemployment Compensation Commission, 14 N.W.2d 524, 526, 308 Mich. 636.

(5) Raising foxes, mink, worms, rattlesnakes, crocodiles, or oysters.

Minn.—Tucker v. Newman, 14 N.W.2d 767, 771, 772, 217 Minn. 473.

7. Minn.—Klein v. McCleary, 192 N.W. 106, 107, 154 Minn. 498.

8. Ga.—Pridgen v. Murphy, 160 S.E. 701, 44 Ga.App. 147.

9. Mich.—Shafer v. Parke, Davis & Co., 159 N.W. 304, 305, 192 Mich. 577.

Similarly defined

(1) A "farm laborer" as ordinarily understood is one who labors upon a farm in raising crops or in doing general farm work.

U.S.—Jones v. Gaylord Guernsey Farms, C.C.A.Okl., 128 F.2d 1008, 1011.

Ariz.—Wayland v. Kleck, 112 P.2d 207, 208, 57 Ariz. 135.

Conn.—H. Duys & Co., Inc. v. Tone, 5 A.2d 23, 28, 125 Conn. 300.

(2) Term "farm laborers" means any employees who are engaged in rendering any agricultural service, including threshing or harvesting, or who are engaged in service incidental to and in connection with agricultural pursuits or developments whether employer be farmer or person contracting with farmer to perform any agricultural service, pursuit, or development.

Mo.—McCaleb v. Greer, 267 S.W.2d 54, 60, 241 Mo.App. 736.

10. Ind.—Makeever v. Marlin, 174 N.E. 517, 518, 92 Ind.App. 158.

N.Y.—Adams v. Ross, 243 N.Y.S. 464, 466, 230 App.Div. 216.

10.5 Tex.—Texas Emp. Ins. Ass'n v. Brown, Civ.App., 226 S.W.2d 233, 238.

ing, planting, and harvesting, but are extended to the great variety of routine work on the farm.¹¹

The term "farm laborer" has been held to include a horticultural or nursery laborer,^{11.5} an employee of a florist,^{11.10} a laborer in fruit growing,^{11.15} and an employee devoting his time exclusively to general farm work on an employer's dairy farm, notwithstanding the employer's major business is that of operating a milk pasteurizing and bottling plant.¹²

The term has been held not to include an employee of a florist who buys and sells nursery stock, none of which was raised or grown by him,^{12.5} and not to include a clerical worker at a milk distributing plant, a separate establishment from the farm operated by the employer.¹³

"Farm laborer" has been held equivalent to, or synonymous with, "hired man"¹⁴ and "ranch laborer."¹⁵

It has been compared with, or distinguished from, "agricultural laborer"¹⁶ and "ranch laborer."¹⁷

As construed in workmen's compensation acts see Workmen's Compensation § 33.

Farm product. A term applicable to an article which is produced by the soil, either under cultivation or by nature, by labor or otherwise, and of spontaneous growth.¹⁸ While it has been said that the term applies only to such products of the land as are subject to the process of becoming ripe and of being cut, gathered, made, and laid up when ripe,¹⁹ the term is more broadly defined to mean any food-crop, cattle, hogs, poultry, dairy products, and other agricultural products designed to be used for food purposes.^{19.5} Under this definition the test is whether or not a particular item is a product of a farm, and whether or not it is designed for human consumption.^{19.10} Thus the term may embrace live stock^{19.15} or animals²⁰ such as cattle,^{20.5} horses, swine, sheep,^{20.10} and may also include poultry.^{20.15}

11. N.Y.—Coleman v. Bartholomew, 161 N.Y.S. 560, 561, 175 App.Div. 122.

11.5 Cal.—Hagenburger v. City of Los Angeles, 124 P.2d 345, 347, 51 C.A.2d 161.

Tex.—Hill v. Georgia Casualty Co., Com.App., 45 S.W.2d 566, 567.

11.10 Florist growing plants and flowers for sale

Tex.—Guerrero v. U. S. Fidelity & Guaranty Co., 98 S.W.2d 796, 798, 128 Tex. 407.

11.15 Pa.—Bucher v. American Fruit Growers' Co., 163 A. 33, 35, 107 Pa.Super. 399.

12. N.Y.—Davis v. Ryan, 30 N.Y.S. 2d 17, 262 App.Div. 982.

12.5 Tex.—Guerrero v. U. S. Fidelity & Guaranty Co., 98 S.W.2d 796, 798, 138 Tex. 407.

13. N.Y.—In re Claim of Thompson, 27 N.Y.S.2d 514, 515, 262 App.Div. 792.

14. N.D.—Lowe v. North Dakota Workmen's Compensation Bureau, 264 N.W. 837, 839, 66 N.D. 246, 107 A.L.R. 973.

15. Ariz.—Hight v. Industrial Commission, 34 P.2d 404, 407, 44 Ariz. 129.

Tex.—Gordon v. Buster, 257 S.W. 220, 222, 113 Tex. 382.

16. Minn.—Tucker v. Newman, 14 N.W.2d 767, 771, 772, 217 Minn. 473.

Utah.—Davis v. State Industrial Commission, 206 P. 267, 269, 59 Utah 607.

17. Tex.—Holmes v. Travelers Ins. Co., Civ.App., 148 S.W.2d 270, 271

—Slaughter Cattle Co. v. Pastrana, Civ.App., 217 S.W. 749, 752.

18. N.C.—State v. Patterson, 4 S.E. 47, 48, 98 N.C. 657, 659.

25 C.J. p 673 notes 41, 42.

Articles produced on the farm

"The common parlance of the country, and the common practice of the country, have been to consider all those things as farming products or agricultural products which had the situs of their production upon the farm, and which were brought into condition for the uses of society by the labor of those engaged in agricultural pursuits, as contradistinguished from manufacturing or other industrial pursuits. The product of the dairy or the product of the poultry yard, while it does not come directly out of the soil, is necessarily connected with the soil and with those who are engaged in the culture of the soil."

D.C.—District of Columbia v. Oyster, 15 D.C. 285, 286, 54 Am.R. 275.

Neb.—In re Rodgers, 279 N.W. 800, 802, 134 Neb. 832.

19. Eng.—Clark v. Gaskarth, 8 Taunt. 431, 433, 4 E.C.L. 216, 129 Reprint 450.

Held to include

(1) Grain.

Mo.—Arnold v. Hanna, 290 S.W. 416, 418, 315 Mo. 823.

(2) Hay and straw.

Md.—Keeney v. Beasman, 182 A. 566, 569, 169 Md. 582, 103 A.L.R. 1515.

Mo.—Arnold v. Hanna, supra.

(3) Indian corn, rye, barley, cotton, fruits, vegetables, and the like.

Md.—Keeney v. Beasman, supra.

N.C.—State v. Patterson, 4 S.E. 47, 48, 98 N.C. 657.

(4) Pineapple plants.

Fla.—Long v. State, 28 So. 775, 777, 42 Fla. 509.

(5) Standing crops of corn.

Eng.—West v. Moore, 8 East 339, 343, 103 Reprint 372.

(6) Wheat.

U.S.—Union Nat. Bank v. German Ins. Co., Wis., 71 F. 473, 475, 18 C.C.A. 203.

N.C.—State v. Patterson, supra.

Held not to include

Growing pineapple plant as distinguished from the unsevered fruit.

Fla.—Long v. State, 28 So. 775, 777, 42 Fla. 509.

19.5 N.J.—State v. Ward, 117 A.2d 49, 50, 37 N.J.Super. 95.

19.10 N.J.—State v. Ward, supra.

19.15 Mo.—Arnold v. Hanna, 290 S.W. 416, 418, 315 Mo. 823.

N.C.—State v. Spauld, 40 S.E. 60, 61, 129 N.C. 564.

20. N.C.—State v. Patterson, 4 S.E. 47, 48, 98 N.C. 657.

Pa.—Philadelphia v. Davis, 6 Watts & S. 269, 279.

20.5 N.C.—State v. Patterson, 4 S.E. 47, 48, 98 N.C. 657.

Neat cattle

Md.—Keeney v. Beasman, 182 A. 566, 569, 169 Md. 582, 103 A.L.R. 1515.

Pa.—Philadelphia v. Davis, 6 Watts & S. 269, 279.

20.10 Md.—Keeney v. Beasman, 182 A. 566, 569, 169 Md. 582, 103 A.L.R. 1515.

25 C.J. p 673 note 50.

20.15 D.C.—District of Columbia v. Oyster, 15 D.C. 285, 286, 54 Am. R. 275.

The term may include certain processed articles or farming by-products;²¹ but it has been held inapplicable to a cotton gin, a cotton mill, grist mill, blacksmith shop, or other structure or machinery erected on the farm for the purposes of manufacture.²²

Other phrases are listed in the note.²³ Additional phrases employing "farm" as an adjective see 25 C.J. p 672 notes 23-28, and 32-34.

FARMACÉUTICO. See Druggists § 1 b note 19.

21. Held to include

(1) Butter, eggs, and milk.
Md.—Keeney v. Beasman, 182 A. 566, 569, 169 Md. 582, 103 A.L.R. 1515.

(2) Dairy products.
D.C.—District of Columbia v. Oyster, 15 D.C. 285, 286, 54 Am.R. 275.

(3) Lard.
Md.—Keeney v. Beasman, supra.

(4) Manure and cordwood.
Md.—Keeney v. Beasman, supra.
Pa.—Philadelphia v. Davis, 6 Watts & S. 269, 279.

(5) Meat.
Idaho.—In re Snyder, 79 P. 819, 822, 10 Idaho 682, 68 L.R.A. 708.
N.C.—State v. Spough, 40 S.E. 60, 61, 129 N.C. 564, 568.

Held not to include

(1) Dairy products.
Ky.—Pure Milk Producers & Distributors Ass'ns v. Morton, 125 S.W.2d 216, 218, 276 Ky. 736.

(2) Lumber.
Ga.—Collins v. Mills, 30 S.E.2d 866, 870, 198 Ga. 18.

(3) Meat.
Pa.—Philadelphia v. Davis, 6 Watts & S. 269, 279.

(4) Mineral water, drawn and bottled from a well on a farm.
Ga.—Pratt v. City of Macon, 134 S.E. 191, 35 Ga.App. 583.

22. N.C.—State v. Patterson, 4 S.E. 47, 48, 98 N.C. 657.

23. Phrases

(1) "Any farm products or edibles."
Wash.—Hastings v. City of Bremerton, 294 P. 551, 553, 159 Wash. 621.

(2) "Farm buildings and improvements."
Okl.—Ganzer v. Chapman & Barnard, 11 P.2d 115, 116, 157 Okl. 99.

(3) "Farm crossing" see Railroads § 169.

(4) "Farm debtor" see Bankruptcy § 95.

(5) "Farm employee" see the C.J.S. definition Employee.

(6) "Farm hand."
Tex.—Beakley v. Lind, Civ.App., 32 S.W.2d 671, 672.

(7) "Farm land," as not necessarily meaning merely land which has been plowed, but as covering all the land contained in the farm.

Or.—De Woffe v. Kupers, 211 P. 927, 930, 106 Or. 176.

(8) "Farm lots," as distinguished from "town or city lot or lots."
Tex.—Connelly v. Johnson, Civ.App., 259 S.W. 634, 636.

(9) "Farm machinery."
Wis.—Lewis v. Insurance Co. of North America of Philadelphia, Pa., 234 N.W. 499, 500, 203 Wis. 324.

(10) "Farm premises" is not an apt expression to include an area devoted principally to the operation of a railroad and from which without lease or similar right hay is cut and removed. The term denotes a tract of land used wholly or principally for agricultural purposes, and under one control.

S.D.—Connolly v. Standard Casualty Company, 73 N.W.2d 119, 121, 76 S.D. 95.

(11) "Farm products grown in this state."
Miss.—Clay County v. Hogan, 111 So. 373, 375, 145 Miss. 857.

(12) "Farm purposes."
Kan.—Winchel v. National Fire Ins. Co., 282 P. 571, 573, 129 Kan. 225.
Mass.—Berube v. New York, N. H. & H. R. Co., 125 N.E. 629, 630, 234 Mass. 415.

(13) "Farm-to-market roads," as meaning county public highways leading directly to, or intersecting, state highways leading to markets.
Ark.—Hastings v. Pfeiffer, 43 S.W.2d 1073, 1074, 184 Ark. 952.

(14) "Farm tractor" is a machine designed and intended to be used for an agricultural implement and is not intended or ordinarily used as a means of transportation on the highways although on occasion it may be temporarily operated thereon.
Ky.—Washington Nat. Ins. Co. v. Burke, 258 S.W.2d 709, 711, 38 A.L.R.2d 861.

(15) "Farm wagon."
Colo.—People v. Corder, 15 P.2d 621,

622, 91 Colo. 383—People v. Corder, 259 P. 613, 82 Colo. 318.

(16) "Farm work."
U.S.—Ellis v. Continental Casualty Co., C.C.A.Tex., 115 F.2d 1006, 1007.
Ill.—Novorio v. Industrial Commission, 180 N.E. 861, 862, 348 Ill. 137.

(17) "Fee farm rent" see the C.J.S. title Ground Rents § 1, also 25 C.J. p 1009 note 8.

(18) "Improved farm property."
Wis.—Lentz v. Dostal, 249 N.W. 174, 176, 212 Wis. 81.

24. U.S.—Corpus Juris quoted in Kaslovitz v. Reid, C.C.A.Utah, 128 F.2d 1017, 1018.

In re Johnson, D.C.N.Y., 149 F. 864, 868.
25 C.J. p 673 note 61.

25. U.S.—Corpus Juris quoted in Kaslovitz v. Reid, C.C.A.Utah, 128 F.2d 1017, 1018.

Wis.—O'Neil v. Pleasant Prairie Mut. F. Ins. Co., 38 N.W. 345, 346, 71 Wis. 621.

26. U.S.—Corpus Juris quoted in Kaslovitz v. Reid, C.C.A.Utah, 128 F.2d 1017, 1018.

Wulbern v. Drake, S.C., 120 F. 493, 495, 56 C.C.A. 643.
Cal.—In re Slade, 55 P. 158, 159, 122 C. 434.

26.5 U.S.—Corpus Juris quoted in Kaslovitz v. Reid, C.C.A.Utah, 128 F.2d 1017, 1018.

In re Johnson, D.C.N.Y., 149 F. 864, 868.

Cal.—In re Slade's Estate, 55 P. 158, 159, 122 C. 434.

Sohner v. Mason, 288 P.2d 616, 617, 136 C.A.2d 449.

26.10 Cal.—Sohner v. Mason, supra.

26.15 U.S.—Corpus Juris quoted in Kaslovitz v. Reid, C.C.A.Utah, 128 F.2d 1017, 1018.

25 C.J. p 674 note 65.

27. U.S.—Corpus Juris quoted in Kaslovitz v. Reid, C.C.A.Utah, 128 F.2d 1017, 1018.

In re Johnson, D.C.N.Y., 149 F. 864, 868.

Or.—State v. Hines, 186 P. 420, 422, 94 Or. 607.

farm and works at farm labor;^{27.5} one who directs for himself the management of a farm or farms owned or rented by him and works thereon at farm labor;²⁸ one who cultivates a farm either as owner or lessee; an agriculturist; a cultivator;²⁹ a husbandman;³⁰ one who owns and resides on a farm;^{30.5} the lessee of a farm.³¹

While there are many kinds of farmers and a particular definition may not fit every case,³² the term does imply that farming is the chief, even though not necessarily the only, occupation of the person.³³

Ordinarily a man is not considered to be a farmer unless he has a considerable tract of land and cultivates it or uses it in some one of the usually recognized ways of farming,^{33.5} and for a person to be a farmer more is required than the production of a few vegetables on a backyard lot.^{33.10} The mere fact that a person owns or resides on a farm does not, ipso facto, make him a farmer.^{33.15}

To be a farmer it is not necessary that one be

actually engaged in farming activities at the moment, provided there is a present intention to resume such occupation after the temporary suspension.³⁴ Furthermore, if an owner has acquired the status of a farmer through long years of personal participation in farming operations, he does not lose that status though his personal activities in connection with the farm have been reduced to a minimum through the infirmities of old age or illness.^{34.5}

A person may be a farmer even though his personal participation in the farming operations are remote, as where he exercises general supervision and control through an agent or overseer who is in immediate charge of the hired hands.^{34.10} It is not conclusive against the status of a person as a farmer that he no longer lives on the farm on which the operations are being conducted.^{34.15}

Persons held to be or not to be farmers, under particular circumstances, are listed in the footnote.³⁵

27.5 U.S.—*Corpus Juris* quoted in *Kaslovitz v. Reid*, C.C.A.Utah, 128 F.2d 1017, 1018.

Mo.—*Foglesong v. Modern Brotherhood of America*, 97 S.W. 240, 241, 121 Mo.App. 548.

28. Mo.—*Stoner v. New York Life Ins. Co.*, 114 S.W.2d 167, 172, 232 Mo.App. 1048—*Stoner v. New York Life Ins. Co.*, App., 90 S.W.2d 784, 795.

29. U.S.—*Corpus Juris* quoted in *Kaslovitz v. Reid*, C.C.A.Utah, 128 F.2d 1017, 1018.

In re *Johnson*, D.C.N.Y., 149 F. 864, 867.

25 C.J. p 674 note 71.

Employee in agriculture not necessarily farmer

However, it has been said that one may be employed in agriculture and yet not be a "farmer" in the ordinary sense of the term.

N.D.—*Lowe v. North Dakota Workmen's Compensation Bureau*, 264 N.W. 837, 838, 66 N.D. 246, 107 A.L.R. 973.

30. U.S.—*Corpus Juris* quoted in *Kaslovitz v. Reid*, C.C.A.Utah, 128 F.2d 1017, 1018.

In re *Johnson*, D.C.N.Y., 149 F. 864, 867.

Cal.—In re *Slade*, 55 P. 158, 159, 122 C. 434.

30.5 U.S.—*Corpus Juris* quoted in *Kaslovitz v. Reid*, C.C.A.Utah, 128 F.2d 1017, 1018.

Pa.—*Miller v. Jackson*, 34 Pa.Super. 31, 39.

31. Black L.D.

Applied to lessee of small house and land

"It is said that every lessee for

life or years, although it be but of a small house and land, is called 'farmer.' This word implies no mystery, except it be that of husbandman."

Black L.D.

32. Mo.—*Stoner v. New York Life Ins. Co.*, 114 S.W.2d 167, 172, 232 Mo.App. 1048.

Not confined to tilling the soil

"Farmer" is defined in the *Frazier-Lemke Act*, 11 U.S.C.A. § 203 sub r, as "not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or live stock, or the production of poultry products or livestock products in their unmanufactured state."

U.S.—*Hamburg Bank v. Kitchens*, C. C.A.Ark., 116 F.2d 377, 378—*Leonard v. Bennett*, C.C.A.Or., 116 F.2d 128, 131.

33. U.S.—*Benitez v. Bank of Nova Scotia*, C.C.A.Puerto Rico, 125 F.2d 523, 528—*Hamburg Bank v. Kitchens*, C.C.A.Ark., 116 F.2d 377, 378.

Cal.—*McCue v. Tunstead*, 4 P. 510, 65 C. 506.

25 C.J. p 673 note 61 [a].

33.5 Okl.—*Mattison v. Dunlap*, 127 P.2d 140, 141, 191 Okl. 168.

33.10 U.S.—*Kaslovitz v. Reid*, C.C.A.Utah, 128 F.2d 1017, 1018.

33.15 Colo.—*Dellacroce v. Industrial Commission*, 138 P.2d 280, 283, 111 Colo. 129, 146 A.L.R. 745.

34. Iowa.—*Hickman v. Cruise*, 34 N. W. 316, 317, 72 Iowa 528, 2 Am.S. R. 256.

Wash.—*State v. McNeill*, 107 P. 1028, 1029, 58 Wash. 47, 137 Am.S.R. 1038.

34.5 U.S.—*Benitez v. Bank of Nova Scotia*, C.C.A.Puerto Rico, 125 F. 2d 523, 528.

34.10 U.S.—*Benitez v. Bank of Nova Scotia*, supra.

34.15 U.S.—*Benitez v. Bank of Nova Scotia*, supra.

35. Held to include

(1) One who cuts valuable timber off land incidental to his occupation of agriculture.

Tenn.—*Robinson v. Stockley*, 61 S. W.2d 677, 678, 166 Tenn. 380.

(2) The owner of a plantation on which cotton is raised.

La.—*Louisiana Farm Bureau Cotton Growers' Co-op. Ass'n v. Clark*, 107 So. 115, 121, 160 La. 294.

Held not to include

(1) A truckman who raises small fruits, vegetables, and the like for barter with the villagers.

Pa.—In re *Tullytown Borough*, 11 Pa. Co. 97, 103.

(2) A turpentine operator.

Ga.—*Meadows v. Dixon*, 7 S.E.2d 329, 330, 61 Ga.App. 697.

(3) One who raises foxes as a separate pursuit.

Wis.—*Eberlein v. Industrial Commission*, 297 N.W. 429, 430, 237 Wis. 555.

(4) Co-operative peach growers' association and its employees.

U.S.—*Walling v. McCracken County Peach Growers Ass'n*, D.C.Ky., 50 F.Supp. 900, 904.

The term "farmer" has been held equivalent to, or synonymous with, "agriculturist," "cultivator," "husbandman,"³⁶ "planter,"³⁷ and "tiller of the soil."³⁸

"Farmer" has been distinguished from "dealer" see the C.J.S. definition of that term, "herder,"³⁹ "laborer,"⁴⁰ "tiller of the soil,"⁴¹ and "tradesman."⁴²

As construed in the Bankruptcy Acts see Bankruptcy § 95, as to exemption from involuntary proceedings, and § 746, as to who entitled to offer an agricultural composition and extension.

In an entirely different sense, the term has been defined as one who assumes the collection of the public revenues, taxes, excise, etc., for a certain commission or percentage, as a farmer of the revenues; also, a farmer of other personal property as well as of revenue and lands.⁴³

Phrases employing the word are set out in the note.⁴⁴

FARMERESS. A woman who farms; also a farmer's wife.⁴⁵

FARMERLIKE MANNER. A workmanlike manner; as good farmers usually do.⁴⁶

FARMERS' ASSOCIATION. As an agricultural society see Agriculture § 11. See also Industrial Co-operative Societies § 1.

FARMING. See Farm ante.

FARO. See Gaming § 1 b (3).

FARO BANK or FARO LAYOUT. See Gaming § 1 g.

FARRAGO LIBELLI. Latin, an ill-composed book containing a collection of miscellaneous subjects not properly associated or scientifically arranged.⁴⁷

FARRIER. One who takes upon himself the public employment of shoeing horses.⁴⁸

FARTHER. In addition to.⁴⁹

FARTHING. The fourth part of an English penny.⁵⁰

FARVAND. In maritime language, a term meaning to travel by water.⁵¹

36. U.S.—In re Johnson, D.C.N.Y., 149 F. 864, 867.

37. Historically considered

"There was a well-marked distinction in South Carolina anterior to the war between the states between a planter and a farmer, but the distinction has disappeared with the social and economic conditions which produced it, and for the purposes of this case it would be as idle to discuss it as the social conditions in Judea described by St. Matthew when those bidden to the marriage of the king's son 'made light of it, and went their ways; one to his farm, another to his merchandise.'" U.S.—In re Drake, D.C.S.C., 114 F. 229, 231.

38. U.S.—In re Johnson, D.C.N.Y., 149 F. 864, 867.

39. Wash.—Hooker v. McAllister, 40 P. 617, 618, 12 Wash. 46, 49.

40. Eng.—Regina v. Cleworth, 4 B. & S. 927, 933, 116 E.C.L. 927, 122 Reprint 707.

41. U.S.—Dearborn Bank v. Matney, D.C.Mo., 132 F. 75, 76.

42. U.S.—In re U. S. Hotel Co., Ohio, 134 F. 225, 227, 67 C.C.A. 153, 68 L.R.A. 588.

63 C.J. p 606-650 note 71 [a].

43. Black L.D.

Historical

Among the Romans the collection of revenue was farmed out, and the

same system existed in France before the revolution of 1789; in England the excise taxes were farmed out, and thereby their evils were greatly aggravated. The farming of the excise was abolished in Scotland by the union, having been abandoned in England before that time. In all these cases the custom gave rise to great abuse and oppression of the people, and in France most of the farmers-general, as they were called, perished on the scaffold. Black L.D.

44. Phrases

(1) "Farmers' cooperatives."

U.S.—Midland Co-op. Wholesale v. Ickes, C.C.A., 125 F.2d 618, 626.

(2) "Farmers Dairy," as a legend painted on a truck, held not to create presumption that truck belonged to a particular "Farmers Dairy Association," for the phrase is a generic term designating a type of establishment rather than name of a particular concern.

Pa.—Midora v. Alfieri, 17 A.2d 873, 875, 341 Pa. 11.

(3) "Farmers' market" is commonly understood to mean not a place operated by one or two individuals for sale of stores in their business which they have purchased from distant places to supply general public which may include farmers as well, but rather a place where farmers come to bring their products to sell to the general public.

N.Y.—People v. Shifrin, 101 N.Y.S. 2d 613, 616, 198 Misc. 348.

(4) "Farmers . . . who slaughter their own animals." Or.—State v. Hines, 186 P. 420, 422, 94 Or. 607.

(5) "Supervising farmer," as implying active duties in care and oversight, and defined as meaning a person who employs farm laborers and does but little work himself. Ill.—National Acc. Soc. v. Taylor, 42 Ill.App. 97, 102.

45. U.S.—In re Johnson, D.C.N.Y., 149 F. 864, 867.

46. Pa.—Aughinbaugh v. Coppenheffer, 55 Pa. 347, 349.

47. Black L.D.

48. Black L.D.

49. Eng.—Hopwood v. Hopwood, 7 H.L.Cas. 728, 749, 11 Reprint 290.

50. Black L.D.

"Farthing of gold"

"An ancient English coin, containing in value the fourth part of a noble." Black L.D.

"Farthing of land"

"A great quantity of land, differing much from farding-deal." Black L.D.

51. Derivation

It is said to be compounded of "fare," a verb signifying "to travel," and "vand," meaning "by water."

FARVANDA. "Navigation" or "sea," "passage by sea."⁵²

FARYNDON INN. The ancient designation of Serjeants' Inn, Chancery Lane, London.⁵³

FAS. Latin, right, justice, or the divine law.⁵⁴

F. A. S. See Abbreviations 1 C.J.S.; and Sales § 143 d, and Shipping § 109.

FASCIST. As a noun, a member of the Fascisti. As an adjective, of, pertaining to, sponsored by, or embodying the principles of the Fascisti. A political term which applied to one who believed in the ideology or philosophy of government known as fascism.^{54,50}

Fascism. A patriotic and anti-communistic movement which started in Italy during World War I and culminated in the virtual dictatorship of Signor Mussolini. The term is also applied to similar movements in other countries. Prior to the entry of the United States into World War II fascism was regarded as an ideology or philosophy of government, but the word has since acquired a sinister meaning and has come to be regarded as symbolic of race hatred in a most terrible form, concentration camps, oppression, barbarism, and cruelty.^{54,55}

FASIUS. In old English law, a faggot of wood.⁵⁵

FAST. When the word "fast" is employed as a noun it means abstinence from food, omission to take nourishment, a state of fasting.⁵⁶

When the word "fast" is used as an adjective or adverb it is descriptive of motion, and the meaning usually given to it is moving rapidly, quick in motion, rapid, or rapidly, swift, or swiftly;⁵⁷ but in this application it is a word of uncertain use in the absence of reference to some established rate of speed or some other criterion as to what is considered fast.⁵⁸

In a different sense, it means fixed in such a way as to prevent detachment, separation, removal, or escape; tight, secure, close, not loose or easily detachable;⁵⁹ and in this sense the word is said to be a relative term and is contrasted with "loose."⁶⁰

Phrases employing the word are set out in the note.⁶¹ Other phrases for which more recent adjudications have not been found see 25 C.J. p 675 notes 7-14.

FASTEN. To make fast; to attach or unite firmly;⁶² to secure in place by any physical means.^{62,5}

FASTERMANS, FASTERMANNES, or FASTING-MEN. Men in repute and substance; pledges, sureties, or bondsmen, who, according to the Sax-

Eng.—Gether v. Capper, 18 C.B. 866, 870, 880, 86 E.C.L. 866, 139 Reprint 1613.

52. Eng.—Gether v. Capper, supra.

53. Black L.D.

54. Black L.D.

"In primitive times it was the will of the gods, embodied in rules regulating not only ceremonials but the conduct of all men."

54.50 N.Y.—Luotto v. Field, 49 N.Y. S.2d 785, 788.

54.55 N.Y.—Luotto v. Field, supra.

55. Black L.D.

56. Century D.

57. Ky.—South Covington & C. St. R. Co. v. Beatty, 50 S.W. 239, 20 Ky.L. 1845.

58. U.S.—Missouri Pac. R. Co. v. Baldwin, C.C.A. Ark., 117 F.2d 510, 513.

59. Century D.

60. U.S.—Saltex Looms v. Collins & Aikman Corporation, D.C.N.Y., 43 F.Supp. 914, 916.
Sandwich Enterprise Co. v. Joliet Mfg. Co., Ill., 91 F. 254, 255, 33 C.C.A. 491.

61. Phrases construed

(1) "Coming very fast," "drives fast," "drives too fast," going pretty fast," "lightning fast," as relative expressions depending on the unknown factor of the witness' personal views regarding standards of speed.

Cal.—McKinley v. Dalton, 17 P.2d 160, 162, 128 C.A. 298.

(2) "Fast bill of exceptions" see Appeal and Error § 103.

(3) "Fast-day," defined as a day of fasting and penitence, or of mortification by religious abstinence. Black L.D.

(4) "Fast estate" see the C.J.S. definition Estate.

(5) "Fast pile" contrasted with "loose pile" as applied to woven fabrics.

U.S.—Saltex Looms v. Collins & Aikman Corporation, D.C.N.Y., 43 F. Supp. 914, 916.

(6) "Fast writ of error" see Appeal and Error § 16.

(7) "Mighty fast."

Tex.—Moore v. Northern Texas Traction Co., 95 S.W. 652, 653, 41 Tex.Civ.App. 583.

40 C.J. p 657 note 29 [a].

(8) "Pretty fast," a relative term conveying no definite idea when not stated in comparison with ordinary rate of speed or some definite standard.

Ill.—National Builders Bank of Chicago v. Cummings, 42 N.E.2d 883, 315 Ill.App. 212.

(9) "Quite fast" is an antonym of "slowly."

N.H.—Labreque v. Childs, 55 A.2d 473, 475, 94 N.H. 451.

(10) "Running fast."

Ky.—South Covington & C. St. R. Co. v. Beatty, 50 S.W. 239, 20 Ky.L. 1845.

(11) "Very fast."

Cal.—McKinley v. Dalton, 17 P.2d 160, 162, 128 C.A. 298.

Ill.—Indianapolis & St. L. R. Co. v. Peyton, 76 Ill. 340, 341.

Tex.—Moore v. Northern Texas Traction Co., supra.

62. Webster New Int.D.

62.5 Tex.—Davis Transport, Inc. v. Bolstad, Civ.App., 295 S.W.2d 941, 953.

Phrase

"Fasten and secure."

Mo.—Jones v. Kansas City, Ft. S. & M. R. Co., 77 S.W. 890, 897, 178 Mo. 528, 101 Am.S.R. 434.

on polity, were fast bound to answer for each other's peaceable behavior.⁶³

FASTI. In Roman law, lawful.⁶⁴

FAT. As a noun, a white or yellowish oily solid substance forming the chief part of the adipose tissue of animals, and also found in plants.⁶⁵

As an adjective, containing the substance called fat; containing or consisting of fat, oil, or grease; oily; greasy.⁶⁶

Phrases employing the word are set out in the note.⁶⁷

FATAL. Causing death; deadly or mortal;⁶⁸ also destructive; disastrous; ruinous.⁶⁹

Phrases employing the word are set out in the note.⁷⁰

FATETUR FACINUS QUI JUDICIUM FUGIT.⁷¹

FATHER. The term employed to designate a male parent;⁷² a male who has begotten a child.⁷³

In particular connections, it has been construed as referring to a natural father or procreator of a child;⁷⁴ one's own natural father, as distinguished from stepfather;⁷⁵ a natural, rather than an adoptive, father;⁷⁶ although it may refer also to an adoptive father⁷⁷ and sometimes to a male ancestor more remote than a parent.⁷⁸

The term usually implies a relationship by consanguinity within a certain degree,⁷⁹ and parenthood within the rules of legitimacy.⁸⁰

Various relationships held included or not included within the term are set out in the accompanying note.⁸¹

The word has been used as a signature, substituting it for a proper name.⁸²

In a different sense, the word is also used as an

63. Black L.D.

64. Black L.D.

"Dies fasti" see the C.J.S. definition Dies.

65. Century D.

66. Century D.

67. Phrases construed

(1) "Fat boiling establishment" as a nuisance see Nuisances § 62.

(2) "Fat or oil," as not including egg yolk, even though it may contain some fat.

U.S.—Mahoney v. Carolene Products Co., C.C.A.Mass., 2 F.2d 366.

(3) "Fat spot," as referring to the surface of a tarred road, and described as a spot where there is an excessive amount of bituminous material on the surface of the pavement, which is very smooth and becomes very slippery when wet.

N.Y.—Karl v. State, 18 N.E.2d 852, 853, 279 N.Y. 555.

68. Neb.—Boyer v. State, 121 N.W. 445, 446, 84 Neb. 407.

69. Century D.

70. Phrases

(1) "Fatal blow," as referring to the consequences of the blow as well as the blow itself.

Neb.—Boyer v. State, 121 N.W. 445, 446, 84 Neb. 407.

(2) "Fatal consequences."

Ind.—Guion v. Terre Haute, Indianapolis & Eastern Traction Co., 143 N.E. 20, 21, 82 Ind.App. 458.

(3) "Fatal defect," as a "defect of substance" and not mere "defect of form."

U.S.—Sweeney v. Greenwood Index-Journal Co., D.C.S.C., 37 F.Supp. 484, 485.

(4) "Fatal errors," such only as

may reasonably be held to have worked injury to complaining party. Ind.—Willard v. Stauffer, 170 N.E. 332, 334, 91 Ind.App. 119.

(5) "Fatal injury," as embracing injuries resulting in death.

Tex.—Provident Life & Accident Ins. Co. v. Johnson, Civ.App., 235 S.W. 650, 653.

"Disability" distinguished see the C. J.S. definition Disability.

(6) "Fatal variance" see Indictments and Informations § 254, and Pleading §§ 531-535.

71. A maxim meaning "He who flees judgment confesses his guilt." Black L.D.

Applied in Foster's Case, 11 Coke 56a, 60b, 77 Reprint 1222—Foxley's Case, 5 Coke 109a, 109b, 77 Reprint 224.

72. Iowa.—In re Clark's Estate, 290 N.W. 13, 32, 228 Iowa 75.

Miss.—Boroughs v. Oliver, 64 So.2d 338, 341, 217 Miss. 280.

Neb.—Lind v. Burke, 77 N.W. 444, 445, 56 Neb. 785.

73. Miss.—Boroughs v. Oliver, 64 So.2d 338, 341, 217 Miss. 280.

Neb.—Lind v. Burke, 77 N.W. 444, 445, 56 Neb. 785.

74. Wis.—In re Dexheimer's Estate, 221 N.W. 737, 739, 197 Wis. 145.

75. Ind.—Thornburg v. American Strawboard Co., 40 N.E. 1062, 1063, 141 Ind. 443, 50 Am.S.R. 334.

Citizens' St. R. Co. v. Cooper, 53 N.E. 1092, 1094, 22 Ind.App. 459, 72 Am.S.R. 319.

76. Ky.—Jackson's Adm'x v. Alexiou, 3 S.W.2d 177, 179, 223 Ky. 95, 56 A.L.R. 1345.

Tex.—McKinney v. Minkler, Civ. App., 102 S.W.2d 273, 279.

77. Mo.—Fienup v. Stamer, App., 28 S.W.2d 437, 439.

Neb.—Lind v. Burke, 77 N.W. 444, 445, 56 Neb. 785.

78. Neb.—Lind v. Burke, supra. 25 C.J. p 676 note 25.

79. Fla.—Capps v. State, 100 So. 172, 173, 87 Fla. 388.

80. U.S.—Howard v. U. S., D.C.Ky., 2 F.2d 170, 173.

Ala.—Crook v. Webb, 28 So. 384, 386, 125 Ala. 457.

Iowa.—In re Clark's Estate, 290 N.W. 13, 32, 228 Iowa 75.

N.Y.—People v. Wolf, 215 N.Y.S. 95, 96, 216 App.Div. 771.

81. Held included

(1) An adoptive father.

N.Y.—In re Butler's Estate, 222 N.Y.S. 265, 266, 129 Misc. 396.

(2) A mother.

N.J.—Walker v. Hyland, 56 A. 268, 271, 70 N.J.Law 69.

Tex.—Parker v. Swain, Civ.App., 223 S.W. 231.

(3) Heirs of father.

N.M.—State v. Chavez, 82 P.2d 900, 906, 42 N.M. 569.

Held not included

(1) A mother.

Ga.—Holton v. Mercer, 15 S.E.2d 253, 257, 65 Ga.App. 53.

N.Y.—Cotheal v. Cotheal, 40 N.Y. 405, 410.

(2) A natural father.

N.Y.—Betz v. Horr, 11 N.E.2d 548, 550, 276 N.Y. 83, 114 A.L.R. 491.

(3) A stepfather.

Ind.—Thornburg v. American Strawboard Co., 40 N.E. 1062, 1063, 141 Ind. 443, 445, 50 Am.S.R. 334.

N.C.—Owens v. Munden, 84 S.E. 257, 258, 168 N.C. 266, Ann.Cas.1917B 1117.

82. Pa.—In re Kimmel's Estate, 123

appellation indicating that the person to whom it is applied is a priest of the Roman Catholic Church.⁸³

Depending on the circumstances, "father" has been held equivalent to "parent,"⁸⁴ and has been distinguished from "parent"⁸⁵ and "stepfather."⁸⁶

For some references to particular uses of the word see 25 C.J. p 675 note 21.

Phrases employing the word are set out in the note.⁸⁷

FATHOM. See *Weights and Measures* § 1b.

FATIGUE BREAK. In metal airplane construction, a crack caused by repeated stresses, any single one of which might have been successfully resisted by the metal.⁸⁸

FATTY OILS. The non-volatile oils of plants and animals consisting of mixtures of fatty acids and their esters, usually triglycerides. They are subdivided into three groups: solid (mainly stearin), semi-solid (mainly palmitin), and liquid (mainly olein).^{88.50}

FATUITAS. In old English law, fatuity; idiocy.⁸⁹

FATUM. Latin, fate, a superhuman power; hence an event or cause of loss, beyond human foresight or means of prevention.⁹⁰

FATUOUS PERSON. In Scotch law, one entirely destitute of reason; an idiot; one who is incapable

of managing his affairs by reason of a total defect of reason.⁹¹

FATUUS, APUD JURISCONSULTOS NOSTROS, ACCIPITUR PRO NON COMPOS MENTIS; ET FATUUS DICITUR, QUI OMNINO DESIPIT.⁹²

FATUUS, FATUA, or FATUUM. A Latin adjective⁹³ meaning foolish, silly, absurd, indiscreet, or ill considered.⁹⁴ The masculine singular, "fatuus," used as a noun, has been defined as meaning a fool, an idiot.⁹⁵

FATUUS PRÆSUMITUR QUI IN PROPRIO NOMINE ERRAT.⁹⁶

FAUBOURG. In French law, and in Louisiana, a district or part of a town adjoining the principal city, hence a suburb.⁹⁷

FAUCES TERRÆ. Literally "Jaws of the land." Narrow headlands or promontories inclosing a portion or arm of the sea within them.⁹⁸

FAULT. It has been said that, whether its lexical or legal meaning be consulted, the word "fault" always connotes an act to which blame, censure, impropriety, shortcoming, or culpability attaches.^{98.5}

The primary lexical meaning of the word is defect

A. 405, 406, 278 Pa. 435, 31 A.L.R. 678.

83. Tenn.—Sweeney v. Newspaper Printing Corporation, 147 S.W.2d 406, 407, 177 Tenn. 196.

84. Del.—In re Frist's Estate, 161 A. 918, 920, 18 Del.Ch. 409.

85. Tex.—Lantzner v. State, 19 Tex.App. 320, 321.

86. N.C.—Owens v. Munden, 84 S.E. 257, 258, 168 N.C. 266, Ann.Cas. 1917B 1117.

87. *Phrases*

(1) "Father-in-law," defined as the father of one's wife or husband. Black L.D.

(2) "Father or mother," as including stepfather or stepmother. Minn.—McGaughey v. Grand Lodge, A. O. U. W. of State of Minnesota, 180 N.W. 1001, 1002, 148 Minn. 136.

(3) "Putative father" see *Bastards* § 17 c.

88. *Cause explained*

"Metal objects stand strains of certain force indefinitely without discoverable effects. Greater forces produce results only after repeated applications. This is called fatigue.

It takes the form of a crack in the object, which may be in the interior and not visible on the surface. This crack grows, very slowly at first but with increasing speed, and the final stage of growth, which ends in a separation of the metal object into two broken parts, is very rapid indeed."

N.Y.—American Airways v. Ford Motor Co., 10 N.Y.S.2d 816, 818, 170 Misc. 721.

88.50 U.S.—In re Johnston, 132 F.2d 136, 139, 30 C.C.P.A. (Patents) 757.

89. Black L.D.

90. Black L.D.

91. Black L.D.

Described as one having uniform stupidity and inattention of manner and childishness of speech. Black L.D.

92. A maxim meaning "Fatuus, among our juriconsults, is understood for a man not of right mind; and he is called 'fatuus' who is altogether foolish." Black L.D.

93. Andrews Latin-English Lex.

94. Black L.D.

Fatua mulier

A whore.

Black L.D.

Fatumum iudicium

A foolish judgment or verdict; and applied to the latter it is one false rather by reason of folly than criminally so, or as amounting to perjury.

Black L.D.

95. Black L.D.

96. A maxim meaning "A man is presumed to be simple who makes a mistake in his own name."

Black L.D.

Applied in

N.Y.—Van Alst v. Hunter, 5 Johns. Ch. 148, 161.

97. Black L.D.

98. Black L.D.

"Where a man may reasonably discern between shore and shore." U.S.—The Harriet, C.C.Me., 11 F.Cas. No.6,099, 1 Story 250.

98.5 Pa.—Department of Labor & Industry v. Unemployment Compensation Bd. of Review, 65 A.2d 436, 439, 164 Pa.Super. 421.

or failing,⁹⁹ and, hence, in the language of the law and in the interpretation of statutes, it is held to signify a failure of duty;¹ and, in its various applications, it is said to have the meanings of bad faith or mismanagement.²

The word "fault" is variously defined as meaning a failure to do what is right;^{2.5} a defect, or blemish, or impairment of excellence;³ blame; censure;^{3.5} any deviation from prudence, rectitude, or duty;⁴ an error or defect of judgment or conduct;⁵ wrongdoing of a venial nature;^{5.5} error or mistake;⁶ a misdemeanor;^{6.5} failure of duty or misconduct;⁷ a moral transgression, a sin;^{7.5} any legal default, and not merely mismanagement;⁸ responsibility for wrongdoing or failure;^{8.5} neglect of duty;⁹ culpable cause;^{9.5} any shortcoming or neglect of care or performance resulting from inattention, incapacity, or perversity; a wrong tendency, course, or

act;¹⁰ in the wrong; worthy of blame;¹¹ a moral failing less serious than a vice;^{11.5} wrongful act or default.¹²

The word "fault" may be used in the sense of failure or volition,^{12.5} and not as meaning something worthy of censure,^{12.10} or something blameworthy, culpable, or wrongful.^{12.15}

The term has been held to include a refusal to make payment when due,¹³ but not to include delay in delivery not involving a breach of contract,¹⁴ or a refusal to return to one's employment under conditions believed by him to endanger his safety.¹⁵

In the civil law "fault" means negligence, or want of care; an improper act or omission, injurious to another, and transpiring through negligence, rashness, or ignorance.¹⁶

99. Me.—Milliken v. Fenderson, 86 A. 174, 175, 110 Me. 306.

Similarly defined

A failing; a defect in quality or constitution; as an imperfection in character or disposition.

Pa.—**Corpus Juris Secundum** cited in Department of Labor & Industry v. Unemployment Compensation Bd. of Review, 65 A.2d 436, 439, 164 Pa.Super. 421.

1. Me.—Milliken v. Fenderson, 86 A. 174, 175, 110 Me. 306.

2. Md.—**Corpus Juris** cited in Continental Oil Co. v. Horsey, 3 A.2d 476, 478, 175 Md. 609—State v. Brown, 21 A. 374, 376, 73 Md. 484.

2.5 Pa.—**Corpus Juris Secundum** cited in Department of Labor & Industry v. Unemployment Compensation Bd. of Review, 65 A.2d 436, 439, 164 Pa.Super. 421.

3. Ky.—Mutter v. Mutter, 97 S.W. 393, 394, 123 Ky. 754, 124 Am.S.R. 381.

3.5 Ohio.—In re Masters, 137 N.E. 2d 752, 755, 165 Ohio St. 503.

4. Ind.—Louisville, E. & St. L. C. R. Co. v. Berry, 28 N.E. 714, 716, 2 Ind.App. 427.

Md.—**Corpus Juris** cited in Continental Oil Co. v. Horsey, 3 A.2d 476, 478, 175 Md. 609.

5. Ind.—Louisville, E. & St. L. C. R. Co. v. Berry, 28 N.E. 714, 716, 2 Ind.App. 427.

5.5 Pa.—**Corpus Juris Secundum** cited in Department of Labor & Industry v. Unemployment Compensation Bd. of Review, 65 A.2d 436, 439, 164 Pa.Super. 421.

6. U.S.—Malone v. U. S., 5 Ct.Cl. 486, 489.

Pa.—**Corpus Juris Secundum** cited in Department of Labor & Industry v. Unemployment Compensation Bd.

of Review, 65 A.2d 436, 439, 164 Pa.Super. 421.

6.5 Pa.—**Corpus Juris Secundum** cited in Department of Labor & Industry v. Unemployment Compensation Bd. of Review, 65 A.2d 436, 439, 164 Pa.Super. 421.

7. Ill.—Amberson v. Amberson, 181 N.E. 825, 826, 349 Ill. 214.

7.5 Pa.—**Corpus Juris Secundum** cited in Department of Labor & Industry v. Unemployment Compensation Bd. of Review, 65 A.2d 436, 439, 164 Pa.Super. 421.

8. Md.—State v. Brown, 21 A. 374, 376, 73 Md. 484.

8.5 Cal.—Lashley v. Koerber, 156 P. 2d 441, 445, 26 C.2d 83.

Pa.—**Corpus Juris Secundum** cited in Department of Labor & Industry v. Unemployment Compensation Bd. of Review, 65 A.2d 436, 439, 164 Pa.Super. 421.

9. Md.—**Corpus Juris** cited in Continental Oil Co. v. Horsey, 3 A.2d 476, 478, 175 Md. 609.

9.5 Cal.—Lashley v. Koerber, 156 P.2d 441, 445, 26 C.2d 83.

Pa.—**Corpus Juris Secundum** cited in Department of Labor & Industry v. Unemployment Compensation Bd. of Review, 65 A.2d 436, 439, 164 Pa.Super. 421.

10. Ind.—Louisville, E. & St. L. C. R. Co. v. Berry, 28 N.E. 714, 716, 2 Ind.App. 427.

11. Ill.—Augenstein v. Augenstein, 275 Ill.App. 18, 20.

11.5 Ohio.—In re Masters, 137 N.E. 2d 752, 755, 165 Ohio St. 503.

Similarly defined

A blameworthy moral weakness less serious than a vice.

Pa.—**Corpus Juris Secundum** cited in Department of Labor & Industry v. Unemployment Compensation Bd.

of Review, 65 A.2d 436, 439, 164 Pa. Super. 421.

12. Mass.—Cochrane v. Forbes, 153 N.E. 566, 570, 257 Mass. 135.

12.5 Ind.—Walter Bledsoe Coal Co. v. Review Board of Employment Sec. Division, 46 N.E.2d 477, 479, 221 Ind. 16.

Iowa.—Wolf's v. Iowa Employment Sec. Commission, 59 N.W.2d 216, 220, 244 Iowa 999—Moulton v. Iowa Employment Sec. Commission, 34 N.W.2d 211, 217, 239 Iowa 1161.

12.10 Ind.—Walter Bledsoe Coal Co. v. Review Board of Employment Sec. Division, 46 N.E.2d 477, 479, 221 Ind. 16.

Iowa.—Wolf's v. Iowa Employment Sec. Commission, 59 N.W.2d 216, 220, 244 Iowa 999.

12.15 Iowa.—Moulton v. Iowa Employment Sec. Commission, 34 N.W.2d 211, 217, 239 Iowa 1161.

13. Cal.—United Canneries Co. of California v. Seelye, 192 P. 341, 342, 48 C.A. 747.

14. Mass.—Cochrane v. Forbes, 153 N.E. 566, 570, 257 Mass. 135.

15. N.Y.—Sabl v. Laenderbank Wien Aktiengesellschaft, 30 N.Y.S.2d 608, 619.

16. Black L.D.

Degrees

There are in law three degrees of faults, the gross, the slight, and the very slight fault. The gross fault is that which proceeds from inexcusable negligence or ignorance; it is considered as nearly equal to fraud. The slight fault is that want of care which a prudent man usually takes of his business. The very slight fault is that which is excusable, and for which no responsibility is incurred.

Black L.D.

In English auction law, the word occurring in the conditions of sale may refer to the quantity as well as to the quality of the article purchased.¹⁷

"Fault" has been held equivalent to, or synonymous with, "negligence" see Negligence § 1 a (7) (a), and "want of ordinary care;"¹⁸ and has been compared with, or distinguished from, "default" see the C.J.S. definition Default, and "error" see the C.J.S. definition "Error."

As determining the right to permanent alimony in divorce proceedings see Divorce § 229 (1) b, and as affecting the wife's right to dower see Dower §§ 52, 53. As a mining term see Mines and Minerals § 3 h. As used in the Harter Act see Shipping § 128 c.

Phrases employing the word are set out in the note.¹⁹

FAUTOR. In Spanish law, an abettor; one who aids another, especially in committing a crime, such as accomplices and accessories.²⁰

In old English law, a favorer or supporter of others; an abettor; a partisan; one who encouraged resistance to the execution of process.²¹

FAUX. In old English law, false, or counterfeit.²²

In French law, a falsification or fraudulent alteration or suppression of a thing by words, by writings, or by acts without either.²³

In the civil law, the fraudulent alteration of the truth; the same as the Latin falsum or crimen falsi.²⁴

FAVOR.

In General

The word "favor" is the Anglicized form of an old French or Latin term "faveur" or "favere," having the meaning of "favorable."^{24.5}

As a Noun

In one sense, bias, lenity, partiality, or prejudice;²⁵ in another sense, affection;²⁶ hence a disposition to aid;²⁷ an act of kindness or generosity as distinguished from one that is inspired by a regard for justice, duty, or right;²⁸ the state of favoring or of being favored, friendly consideration bestowed or received; objective regard, aid, support, or behoof, frequently with "in," as to be or act in favor of a person or thing.²⁹

The noun has been contrasted with "right."³⁰

As a Verb

To aid or to have the disposition to aid, to regard

17. Eng.—Pettitt v. Mitchell, 4 M. & G. 819, 838, 43 E.C.L. 423, 134 Reprint 337.

18. Wis.—Sorensen v. J. I. Case Threshing Mach. Co., 109 N.W. 84, 86, 129 Wis. 366.

19. Phrases

(1) "Fault or error in navigation or management of vessel" see Shipping § 128 c.

(2) "Fault or misconduct," as including wife's desertion of her husband.

Ill.—Endicott v. Rudolph, 169 N.E. 478, 338 Ill. 307.

See also Divorce § 34 and Dower § 53.

(3) "Fault or privy."

U.S.—Continental Ins. Co. v. Sabine Towing Co., C.C.A.Tex., 117 F.2d 694, 696.

(4) "Inexcusable fault" see the C. J.S. definition Inexcusable.

(5) "Without fault," as equivalent or synonym of "free from negligence."

Cal.—Marston v. Pickwick Stages, 248 P. 930, 933, 78 C.A. 526.
Ind.—Bain v. Mattmiller, 13 N.E.2d 712, 714, 213 Ind. 549.

(6) "Without fault of the company."

Md.—State v. Brown, 21 A. 374, 376, 73 Md. 484.

(7) "Without fault on part of licensee."

Mass.—Clifford Shoe Co. v. United Shoe Machinery Corporation, 8 N. E.2d 161, 166, 297 Mass. 94.

(8) "Without the fault of the party of the second part," as equivalent to "over which the second party has no control."

W.Va.—Robinson v. Kistler, 59 S. E. 505, 508, 62 W.Va. 489.

(9) "Without their fault."
Ill.—Amberson v. Amberson, 181 N. E. 825, 826, 349 Ill. 214.

Augenstein v. Augenstein, 275 Ill.App. 18, 20.

20. Escriche Diccionario.

21. Black L.D.

22. Black L.D.

Phrases

(1) "Faux action"—a false action. Black L.D.

(2) "Faux money"—counterfeit money. Black L.D.

(3) "Faux peys"—false weights. Black L.D.

(4) "Faux serement"—a false oath. Black L.D.

23. Black L.D.

Three meanings

"Faux may be understood in three ways. In its most extended sense it

is the alteration of truth, with or without intention; it is nearly synonymous with 'lying.' In a less extended sense, it is the alteration of truth, accompanied with fraud, mutatio veritatis cum dolo facta. And lastly, in a narrow, or rather the legal, sense of the word, when it is a question to know if the faux be a crime, it is the fraudulent alteration of the truth in those cases ascertained and punished by the law." Black L.D.

24. Black L.D.

24.5 U.S.—Continental Coffee Co. v. Continental Foods, 202 F.2d 759, 761, 40 C.C.P.A., Patents, 865.

25. Black L.D.

26. Burrill L.D.

27. U.S.—U. S. v. Schulze, D.C.Cal., 253 F. 377, 379.

28. N.Y.—Ross v. Davis, 248 N.Y.S. 441, 443, 138 Misc. 863.

"Favor legislation," as distinguished from "debt legislation" see Debt. 26 C.J.S. p 14 note 35.

29. Century D.

"In favor of," as distinguished from "to the order of."

Puerto Rico.—Exposito v. Robert, 11 Puerto Rico 14, 21.

30. U.S.—In re Schwarz, D.C.Cal., 34 F.Supp. 937, 939.

with favor, to show partiality or unfair bias toward;³¹ to give support to or to sustain.^{31.5}

The term implies an attitude of mind, imports willfulness and intent,³² requires action and purpose,³³ and has been held practically synonymous with "support."³⁴

Phrases employing the verb are set out in the note.³⁵

FAVORABILIA IN LEGE SUNT FISCUS, DOS, VITA, LIBERTAS.³⁶

FAVORABILIORES REI POTIUS QUAM ACTORES HABENTUR.³⁷

FAVORABILIORES SUNT EXECUTIONES ALII PROCESSIBUS QUIBUSCUNQUE.³⁸

FAVORABILIORES TAM AUCTORES REI POTIUS AUCTORES QUAM INTERVENIORES HABENTUR.³⁹

FAVORABLE. Favoring, manifesting partiality.⁴⁰

31. U.S.—U. S. v. Schulze, D.C.Cal., 253 F. 377, 379.

31.5 Vt.—Proulx v. Parrow, 56 A.2d 623, 626, 115 Vt. 232.

32. U.S.—Schulze v. U. S., C.C.A.Cal., 259 F. 189, 190—U. S. v. Schulze, D.C.Cal., 253 F. 377, 379.

33. U.S.—U. S. v. Schulze, D.C.Cal., 253 F. 377, 379.

34. U.S.—U. S. v. Schulze, supra.

35. Phrases construed

(1) "Favored beneficiary," as meaning one who in the circumstances of the particular case has been favored over others having equal claim to testator's bounty, by an unnatural discrimination which leads to a natural inference that advantage has been taken by one in position to do so.

Ala.—Mindler v. Crocker, 18 So.2d 278, 281, 245 Ala. 578—Cook v. Morton, 1 So.2d 890, 892, 214 Ala. 188.

(2) "Favored direction" see Motor Vehicles § 363.

(3) "Favored highway." Tenn.—Maxwell v. Kirkpatrick, 116 S.W.2d 340, 343, 344, 22 Tenn.App. 21.

See also Motor Vehicles § 362.

(4) "Favored retailer," as distinguished from "selling agent." N.J.—Harry Pinsky & Son Co. v. Gorman, 120 A. 732, 98 N.J.Law 887.

(5) "Support or favor the cause of any country."

U.S.—Schulze v. U. S., C.C.A.Cal., 259 F. 189, 190—U. S. v. Schulze, D.C. Cal., 253 F. 377, 379.

(6) "The party you desire to fa-

vor," as equivalent to "the party with whom you find the merits."

Ind.—Pittsburgh, C. C. & St. L. R. Co. v. Burton, 37 N.E. 150, 154, 38 N.E. 594, 139 Ind. 357.

36. A maxim meaning "Things favorably considered in law are the treasury, dower, life, liberty." Black L.D.

37. A maxim meaning "Defenders are held to be in a more favourable position than pursuers." Trayner Leg.Max.

Characterized as "A maxim of the civil law; 'Potior est conditio defendentis,' is the familiar language of our own."

U.S.—Hunt v. Rousmanier, R.I., 8 Wheat. 174, 195, 5 L.Ed. 589.

Similarly rendered

(1) "Accused persons are held more favorably than accusers." Morgan Leg.Max.

(2) "The condition of the defendant must be favored, rather than that of the plaintiff." In other words, 'melior est conditio defendentis.' Black L.D.

38. A maxim meaning "Executions are preferred to all other processes whatever." Black L.D.

39. A maxim meaning "Accusers are held more favorably than intervenors." Morgan Leg.Max.

40. Webster New Int.D.

Phrases

(1) "Favorable termination of [criminal] proceeding" as affecting

FAVORABLY. Advantageously, with friendly disposition or indulgence.⁴¹

FAVOREM VITÆ. A rule of criminal law meaning "Favor of life."⁴²

FAVORES AMPLIANDI SUNT: ODIA RESTRINGENDA.⁴³

FAVUS. The medical term for head scalds. It is a disease resulting from external causes, being parasitic or fungoid in character.^{43.50}

FAZAÑA. In old Spanish law, judgment, especially one which followed or was based upon another. This early form of stare decisis was not favored and fazañas were even declared void.⁴⁴

F. C. L. See the word Abbreviations in 1 C.J.S. and consult Pocket Parts.

FÉ. In Spanish law, faith, the lack of which was formerly the subject of cognizance on the part of the Inquisition.⁴⁵ In its common legal application

the bringing of an action for malicious prosecution see Malicious Prosecution §§ 54-60.

(2) "Rates as favorable as," construed to mean prices as low, irrespective of any circumstances or conditions.

Ill.—Decatur Gas-Light Co. v. Decatur, 11 N.E. 406, 408, 120 Ill. 67, 69.

41. Century D.

"To 'favourably consider' means, having regard to the surrounding facts, to grant an application."

Eng.—Montreal Gas Co. v. Vasey, 1900, A.C. 595, 596, 599.

42. Idaho.—State v. Schieler, 37 P. 272, 274, 4 Idaho 120.

Mo.—State v. Eaton, 89 S.W. 949, 951, 191 Mo. 151.

43. A maxim meaning "Favors are to be enlarged; things hateful restrained." Black L.D.

Similarly rendered

"Favorable inclinations are to be enlarged; animosities restrained." Bouvier L.D.

43.50 U.S.—Belmont Laboratories v. Federal Trade Commission, C.C.A., 103 F.2d 538, 540.

44. Escriche Diccionario, citing Partidas III tit XXII ley XIV.

45. Escriche Diccionario.

This tribunal was abolished by royal decree in 1820 and jurisdiction of such causes restored to the diocesan prelates.

Escriche Diccionario.

it is used much as the English "faith."⁴⁶

FEAL. Faithful, truthful, or true.⁴⁷

FEALTY. In feudal law, the obligation of fidelity which the tenant owed to his lord.⁴⁸

The term has been compared with, or distinguished from, "escheat" see Escheat § 1 b note 20(3), and "homage."⁴⁹

FEAR. As a noun, apprehension of harm, apprehension of harm or punishment, as exhibited by outward and visible marks of emotion, consciousness of approaching danger, dread; an evidence of guilt in certain cases.⁵⁰

It has been said that the word "fear" may include fear of economic loss,^{50.5} and that fear may be rational and not reasonable.^{50.10}

As a verb, to feel a painful apprehension of, as some impending evil, to be afraid of, or to consider or expect with emotions of alarm or solicitude.⁵¹ While to "fear" is given as one of the meanings of

"apprehend," sometimes it is not synonymous with that word see the C.J.S. definition Apprehend.

FEASANCE. A doing, the doing of an act, a performing or performance; also, a making, the making of an indenture, release, or obligation, the making of a statute.⁵²

FEASANT. Doing, or making, as in the term "damage feasant," doing damage or injury, spoken of cattle straying upon another's land.⁵³

FEASIBLE. Capable of being done, executed, or effected;⁵⁴ capable of being managed, utilized, or dealt with successfully;^{54.5} practically possible;⁵⁵ capable of being successfully done or accomplished;⁵⁶ suitable; likely; probable; reasonable.^{56.5}

In deciding whether or not a project is feasible, its cost is a potent and determining factor to be considered.⁵⁷

The word has been held equivalent to "practicable."⁵⁸

46. Phrases

(1) "Buena fé"—good faith.

Escriche Diccionario.

(2) "Mala fé"—bad faith.

Escriche Diccionario.

(3) "Dar fé"—to give faith—is to certify, as when an official makes a certificate of some transaction before him; and "hacer fé"—to make faith—is to meet the requirements of proof.

Escriche Diccionario.

47. Black L.D.

"Feal and divot"

A right in Scotland, similar to the right of turbary in England, for fuel, etc.

Black L.D.

Feal and leal

"Tenants by knight service swore to their lords to be 'feal and leal,' i. e., faithful and loyal."

Black L.D.

"Feal homager"

Faithful subject.

Black L.D.

48. N.Y.—De Peyster v. Michael, 6 N.Y. 467, 499, 57 Am.D. 470.

More fully discussed

The word is defined as fidelity, allegiance to the feudal lord of the manor, the feudal obligation resting on the tenant or vassal by which he was bound to be faithful and true to his lord, and render him obedience and service. This fealty was of two sorts: The one general, which was due from every subject to his prince; the other special, and required only of those who, in respect of their fee, were tied by this oath to their landlords.

Black L.D., citing 1 Blackstone Comm. p 367.

Condition of tenure

"Tenants by knights' service and also tenants in socage were required to take an oath of fealty to the king or others, their immediate lords; and fealty was one of the conditions of their tenure, the breach of which operated a forfeiture of their estates." Black L.D.

49. Black L.D.

50. Black L.D.

Phrases construed

(1) "Fears or hopes," as merely an amplification of the word "motives." Cal.—People v. Glass, 112 P. 281, 292, 158 C. 650.

(2) "Putting in fear" in connection with various crimes see the references collected in 25 C.J. p 677 note 58.

(3) "Reasonable fear."

Ga.—Paramore v. State, 129 S.E. 772, 773, 161 Ga. 166.

52 C.J. p 1186 note 96.

50.5 U.S.—Bianchi v. U. S., C.A.Mo., 219 F.2d 182, 189.

50.10 Tex.—Christian v. State, 79 S. W. 562, 563, 46 Tex.Cr. 47.

51. Century D.

52. Black L.D.

53. Black L.D.

See also Animals §§ 188-190.

54. Ala.—Smith v. Chickamauga Cedar Co., 82 So.2d 200, 202, 263 Ala. 245.

Neb.—Lowe v. Chicago Lumber Co. of Omaha, 283 N.W. 841, 844, 135 Neb. 735.

54.5 Ala.—Smith v. Chickamauga Cedar Co., 82 So.2d 200, 202, 263 Ala. 245.

Wyo.—In re Washakie Needles Irr. Dist., 76 P.2d 617, 621, 52 Wyo. 518.

Similarly defined

(1) "Feasible" refers to that which may be used or dealt with successfully, as land feasible for cultivation.

Ill.—People ex rel. Adamowski v. Chicago Land Clearance Commission, 150 N.E.2d 792, 796, 14 Ill.2d 74.

(2) Fit to be dealt with successfully.

Tenn.—Hinchman v. City Water Co., 167 S.W.2d 986, 990, 179 Tenn. 545.

55. Wyo.—In re Washakie Needles Irr. Dist., 76 P.2d 617, 621, 52 Wyo. 518.

Similarly defined

Possible of realization; as, your plan seems feasible; hence, successful in operation.

Ala.—Smith v. Chickamauga Cedar Co., 82 So.2d 200, 202, 263 Ala. 245.

56. Conn.—Mastorgi v. Valley View Farms, 83 A.2d 919, 921, 138 Conn. 313—Gilmartin v. D. & N. Transp. Co., 193 A. 726, 729, 123 Conn. 127, 113 A.L.R. 1322.

56.5 Ala.—Smith v. Chickamauga Cedar Co., 82 So.2d 200, 202, 263 Ala. 245.

57. Wyo.—In re Washakie Needles Irr. Dist., 76 P.2d 617, 621, 52 Wyo. 518.

58. Conn.—Gilmartin v. D. & N. Transp. Co., 193 A. 726, 728, 123 Conn. 127, 113 A.L.R. 1322.

As applied to plans for reorganization of bankrupt corporations see Bankruptcy § 836 c.

Phrases employing the term are set out in the note.⁵⁹

FEASOR. Doer, or maker; as "Feasors del estatute,"—makers of the statute.⁶⁰ Also used in the compound term, "tort-feasor," one who commits or is guilty of a tort.^{60.5}

FEASTS. Certain established festivals or holidays in the ecclesiastical calendar.⁶¹

FEATHER. Primarily, one of the epidermal appendages which together constitute the plumage, the peculiar covering of birds; also, collectively, the plumage.⁶²

Derivatively, a technical term applied to a protrusion from the inside of the shell of the cylinder on cloth-printing machines which fits a groove in the mandrel and keeps it from slipping as the mandrel revolves.⁶³

Phrases employing the word are set out in the note.⁶⁴

FEATHERBONE. The term has become the name of the article produced from the quills of feathers and used as a substitute for whalebone.⁶⁵

FEATHERWEIGHT. A common English word defined as meaning a very light weight.⁶⁶

Used with relation to sports, such as horse-racing,

boxing, and wrestling, the word implies the lightest class of jockeys, boxers, or wrestlers.⁶⁷

FEATURE. As used in the motion picture industry see Theaters and Shows § 1 f.

FECHA. In Spanish law, date, an essential feature of all public documents.⁶⁸

FECIALES. Among the ancient Romans, that order of priests who discharged the duties of ambassadors. Subsequently their duties appear to have related more particularly to the declaration of war and peace.⁶⁹

FECIAL LAW. The nearest approach to a system of international law known to the ancient world. It was a branch of Roman jurisprudence, concerned with embassies, declarations of war, and treaties of peace. It received this name from the feciales, who were charged with its administration.⁷⁰

FED. As the preterit or past participle of "feed," see Feed.

FEDERAL. In American law, belonging to the general government or union of the states, founded on or organized under the constitution or laws of the United States.⁷¹

In a broader sense, it is commonly used with reference to a league or compact between two or more states to become united under one central government, and may be applicable to the Dominion of Canada as well as to the United States.⁷²

59. Phrases construed

(1) "Application . . . would not be feasible."

U.S.—Harris v. Biskowicz, C.C.A. Mo., 100 F.2d 854, 856.

(2) "As near as feasible." Neb.—Lowe v. Chicago Lumber Co. of Omaha, 283 N.W. 841, 844, 135 Neb. 735.

(3) "Fair, equitable and feasible." U.S.—Provident Mut. Life Ins. Co. of Philadelphia v. University Evangelical Lutheran Church of Seattle, C.C.A.Wash., 90 F.2d 992, 994.

In re Wilton Realty Corporation, D.C.Mich., 30 F.Supp. 486, 488. See also Bankruptcy § 914.

(4) "Feasible method of liquidation."

U.S.—Heldstab v. Equitable Life Assur. Soc. of U. S., C.C.A.Kan., 91 F.2d 655, 659.

(5) "Feasible or practicable plan." U.S.—In re Sterba, C.C.A.Ill., 74 F.2d 413, 417.

(6) "Feasible route," as not necessarily the best route.

N.H.—Spaulding v. Groton, 44 A. 88, 89, 68 N.H. 77, 79.

60. Black L.D.

60.5 Black L.D.

Tort-feasors and joint tort-feasors

A person who commits a tort is a tort-feasor, and persons who contribute to the commission of a tort are joint tort-feasors.

Me.—Gordon v. Lee, 178 A. 353, 355, 133 Me. 361.

61. Black L.D.

As official dates

These days were anciently used as the dates of legal instruments, and in England the quarter-days, for paying rent, are four feast-days. The terms of the English courts before 1875 were fixed to begin on certain days determined with reference to the occurrence of four of the chief feasts.

Black L.D.

62. Century D.

63. N.J.—Griggs v. Stone, 18 A. 1094, 51 N.J.Law 549, 550, 7 L.R.A. 43.

64. Phrases construed

(1) "Feather bed," described in domestic use, as a single article composed of a quantity of feathers enclosed in a bedtick.

Vt.—State v. Parker, 47 Vt. 19.

(2) "Feather manufactures" see Custom Duties § 45 g note 96.

(3) "Feather rails" see Railroads § 1 r.

65. U.S.—Warren Featherbone Co. v. American Featherbone Co., Wis., 141 F. 513, 516, 72 C.C.A. 571.

66. U.S.—In re Federal Cement Tile Co., Cust. & Pat.App., 58 F.2d 457.

67. U.S.—In re Federal Cement Tile Co., supra.

68. Escriche Diccionario.

69. Black L.D.

70. Black L.D.

71. Black L.D.

72. Mont.—Montana Auto Finance Corporation v. British & Federal Underwriters of Norwich Union Fire Ins. Soc., 232 P. 193, 199, 72 Mont. 69, 36 A.L.R. 1495.

"In a particular connection it has been said that "federal" is not synonymous with "fidelity," nor may the two words be taken for each other.⁷³

The word occurs in the discussion of various legal principles which form the subject matter of such

C.J.S. titles as Constitutional Law, Customs Duties, Federal Courts, Internal Revenue, Intoxicating Liquors, Patents, Public Lands, and United States.

Phrases employing the word are set out in the note.⁷⁴

73. Not "idem sonans"

Although both "fidelity" and "federal" are words in common use, they are not synonymous, nor are they included within rule of idem sonans, nor do they so closely resemble each other in orthography or visual appearance that use of one suggests the other.

Cal.—Fidelity Appraisal Co. v. Federal Appraisal Co., 18 P.2d 950, 954, 217 C. 307.

74. Federal common law

A body of decisional law developed by the federal courts untrammelled by state court decisions.

U.S.—Lyons v. Howard, C.A.Mass., 250 F.2d 912, 915.

Federal enclaves or federal islands

Areas in which a state has ceded jurisdiction to the United States are known as "federal enclaves," or "federal islands" within the state.

Ill.—Thiele v. City of Chicago, 145 N.E.2d 637, 638, 12 Ill.2d 218.

Federal officers

(1) A term not applicable to presidential electors.

U.S.—Little v. U. S., C.C.A.Mo., 93 F.2d 401, 402—Walker v. U. S., C. C.A.Mo., 93 F.2d 383, 388.

(2) Held not to include receiver of a national bank so as to exempt him from liability under state compensation act for injuries to his employee. Ill.—Sneeden v. Industrial Commission, 10 N.E.2d 327, 330, 366 Ill. 552, 113 A.L.R. 1447.

Federal question

(1) Jurisdiction of federal court as dependent on existence of see Federal Courts §§ 27–43.

(2) Right to remove cause based on see the Removal of Causes §§ 47–51.

Federal servant or employee

(1) Applicable to employees of National Park Service. N.Y.—In re Geis, 293 N.Y.S. 577, 578, 162 Misc. 398.

(2) Held to include railway corporation receiving compensation from federal government for transporting the United States mails. Ala.—Western Ry. of Alabama v. State, 3 So.2d 9, 12, 241 Ala. 440.

(3) Does not include one who had been employed in trust department of national bank and who, after conservator for bank was appointed, continued to perform same services as employee of conservator and not of bank.

Pa.—Giffen v. First Nat. Bank & Trust Co. of Greensburg, 187 A. 283, 287, 123 Pa.Super. 476.

(4) Not applicable to relief worker on a W.P.A. project.

N.Y.—In re Matruski, 8 N.Y.S.2d 471, 481, 169 Misc. 316.

Other phrases construed

(1) "Exempted by federal law," as meaning exempted by federal statutes or by the decisions of federal courts.

Or.—Meredith v. State Tax Commission, 96 P.2d 1082, 1084, 163 Or. 305, 125 A.L.R. 1417.

(2) "Federal agencies and instrumentalities" see Courts § 525 notes 70–72, and Federal Courts §§ 40–43, as subject to jurisdiction of state or federal courts; Taxation §§ 207–212, as subject to state taxes.

(3) "Federal census" see Census § 2 note 6, § 3 note 15, § 4 notes 18, 19, § 6 notes 31, 32, 36, 42, § 7 notes 43, 45.

(4) "Federal district," as not including an army post or military reservation.

U.S.—Bailey v. Smith, D.C.Iowa, 40 F.2d 958, 960.

(5) "Federal estate tax" see Internal Revenue §§ 477–503.

(6) "Federal function," as including government's selling of electricity created at dams erected within the federal power.

U.S.—Tennessee Electric Power Co.

v. Tennessee Valley Authority, D. C.Tenn., 21 F.Supp. 947, 961.

(7) "Federal legislation affecting monopolies" see Monopolies §§ 17–26.

(8) "Federal money," defined as lawful money of the United States. U.S.—Cocke v. Kendall, Super.Ark., 5 F.Cas.No.2,929b, Hempst. 236.

(9) "Federal prisoner," as not including inmate of state prison produced by state for trial in federal court.

U.S.—U. S. ex rel. Stewl v. Warden of Clinton Prison at Dannemora, D.C.N.Y., 21 F.Supp. 502, 504.

(10) "Federal prohibition agents." U.S.—U. S. v. Syrek, D.C.Mass., 290 F. 820, 822.

(11) "Federal prohibition officer." U.S.—De Marco v. U. S., C.C.A.Va., 296 F. 667, 668.

(12) "Federal purposes," as distinguished from "county purposes." Wash.—State v. King County, 88 P. 935, 937, 45 Wash. 519.

(13) "Federal territory," as not including the portion of the premises of a packing company reserved for the use of federal inspectors to examine the meat as to its fitness for human consumption.

Mo.—Brody v. Cudahy Packing Co., 127 S.W.2d 7, 16, 233 Mo.App. 973.

(14) "Federal 'title, right, privilege, or immunity.'"

U.S.—Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey, v. Colburn, N.J., 60 S.Ct. 1039, 1041, 310 U.S. 419, 84 L.Ed. 1287.

(15) "Federal Trade Commission Act" see Trade-Marks, Trade-Names and Unfair Competition §§ 225–234.

(16) "Municipal, federal or state authorities."

Mont.—Montana Auto Finance Corporation v. British & Federal Underwriters of Norwich Union Fire Ins. Soc., 232 P. 198, 199, 72 Mont. 69, 36 A.L.R. 1495.

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Del.—*Bowers v. Cooper's Home Furnishings Co.*, 255 A.2d 884.

Fla.—*Graham v. Azar*, 204 So.2d 193.

In re Livingston's Estate, App., 161 So.2d 723.

Iowa—*Westinghouse Credit Corp. v. Crotts*, 98 N.W.2d 843, 250 Iowa 1273.—*Frudden Lumber Co. v. Clifton*, 183 N.W.2d 201.

Kan.—*Miller v. Keeling*, 347 P.2d 424, 185 Kan. 623. *Coward v. Smith*, 636 P.2d 793, 6 Kan.App.2d 863.

Mich.—*Sears, Roebuck & Co. v. A.T. & G. Co., Inc.*, 239 N.W.2d 614, 66 Mich.App. 359.

Miss.—*Newton County Bank, Louin Branch Office v. Jones*, 299 So.2d 215.

Mont.—*Anaconda Federal Credit Union*, No. 4401 v. West, 483 P.2d 909, 157 Mont. 175.

Neb.—*In re Grassman's Estate*, 158 N.W.2d 673, 183 Neb. 147.

N.J.—*General Motors Acceptance Corp. v. Falcone*, 327 A.2d 699, 130 N.J.Super. 517.

N.M.—*Laughlin v. Lumbert*, 362 P.2d 507, 68 N.M. 351.—*Advance Loan Co. v. Kovach*, 445 P.2d 389, 79 N.M. 509.

Wash.—*Cody v. Herberger*, 371 P.2d 626, 60 Wash.2d 48.

W.Va.—C.J.S. cited in *ACF Industries v. Creditthrift of America*, 312 S.E.2d 746, 749.

Wis.—*Eloff v. Riesch*, 111 N.W.2d 578, 14 Wis.2d 519.

In Louisiana

(1) La.—C.J.S. cited in *Laurencie v. Jones*, App., 180 So.2d 803, 805.

In New York

(1) N.Y.—*Scheer v. City of Syracuse*, 277 N.Y.S.2d 866, 53 Misc.2d 80.

In Pennsylvania

(1) U.S.—*Consumers Time Credit, Inc. v. Remark Corp.*, D.C.Pa., 248 F.Supp. 158.

§ 4 EXEMPTIONS

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70. Kan.—Nohinek v. Logsdon, 628 P.2d 257, 6 Kan. App.2d 342.
Miss.—Bonds v. Bonds, 409 So.2d 704.
Wis.—Schwanz v. Teper, 223 N.W.2d 896, 66 Wis.2d 157.

§ 5. — Retroactive Operation Generally

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79. U.S.—In re Littell, Bkrcty.Or., 6 B.R. 85.
Ga.—Cale v. Eastern Air Lines, Inc., 284 S.E.2d 647, 159 Ga.App. 630.
La.—C.J.S. quoted at length in American Finance Corp. of Coushatta v. Small, App., 250 So.2d 768, 772.
82. U.S.—In re Skipwith, Bkrcty.Cal., 9 B.R. 730.
84. U.S.—In re Brownrigg, Bkrcty.Ala., 13 B.R. 6.
N.Y.—Manufacturers Trust Co. v. Koch, 216 N.Y.S.2d 514, 29 Misc.2d 557.
85. U.S.—Marine Midland Bank v. Surfbelt, Inc., D.C.Pa., 532 F.Supp. 728.

§ 6. — Effect of Change or Repeal of Exemption and Change of Form, Merger or Renewal of Debt

91. La.—American Finance Corp. of Natchitoches v. Allen, App., 250 So.2d 775—C.J.S. quoted at length in American Finance Corp. of Coushatta v. Small, App., 250 So.2d 768, 772—Excel Baronne Discount, Inc. v. Montana, App., 279 So.2d 229.

Statute held retroactive

- La.—Natchitoches Collections, Inc. v. Gorum, App., 274 So.2d 449.

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99. Exemption not repealed
Ind.—Mims v. Commercial Credit Corp., 307 N.E.2d 867, 261 Ind. 591.
4. Ind.—Mims v. Commercial Credit Corp., 307 N.E.2d 867, 261 Ind. 591.

§ 7. Exemptions in Lieu of Homestead

Library References Exemptions ⇐12.

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18. U.S.—In re Perry, D.C.Ohio, 225 F.Supp. 481.

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- 39.5. Ohio—Niehaus v. Faul, 1 N.E. 87, 43 Ohio St. 63.

§ 10. Particular Powers

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- 75.50. U.S.—In re Leonardo, Bkrcty.N.Y., 11 B.R. 453.
76. Pa.—In re McGreevy's Estate, 286 A.2d 355, 445 Pa. 318.

Social security benefits

- Mich.—Matter of Vary's Estate, 258 N.W.2d 11, 401 Mich. 340, cert. den. 98 S.Ct. 1283, 434 U.S. 1087, 55 L.Ed.2d 793.

§ 11. In General

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79. Corporations

- Kan.—Southwest State Bank v. Quinn, 424 P.2d 620, 198 Kan. 359.

§ 12. Residence and Citizenship

81. Mo.—Beneficial Finance Co. of Houston, Tex. v. Yellow Transit Freight Lines, Inc., App., 450 S.W.2d 222.

In Louisiana

- (1) La.—Laurencic v. Jones, App., 180 So.2d 803.

§ 13. — Change of Residence and Absence from State

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15. Iowa—Frudden Lumber Co. v. Clifton, 183 N.W.2d 201.

§ 14. Particular Classes of Persons

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36. Pa.—In re Gana's Estate, 32 D. & C.2d 657, 14 Fiduciary 1.

§ 15. — "Debtor," "Defendant," and "Tenant"

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37. U.S.—In re Ferguson, Bkrcty.Colo., 15 B.R. 439.

§ 16. — "Family"

Library References

Exemptions ⇐15.

47. Broader exemption than that of other persons
U.S.—Phillips v. C. Palomo & Sons, C.A.Tex., 270 F.2d 791.

49. Living together or separate

- N.Y.—Dallesandro v. Dallesandro, 442 N.Y.S.2d 400, 110 Misc.2d 342.

§ 17. — "Head of a Family"

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60. U.S.—In re Hellman, D.C.Colo., 474 F.Supp. 348.

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65. Ill.—First Nat. Bank & Trust Co. of Rockford v. Sandifer, 258 N.E.2d 35, 121 Ill.App.2d 479.
76. U.S.—In re Konkin, D.C.Mo., 334 F.Supp. 203, aff'd., C.A., 468 F.2d 752. Cert. den. 93 S.Ct. 3018, 412 U.S. 951, 37 L.Ed.2d 1004.

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82. Former wife

- Fla.—Killian v. Lawson, 387 So.2d 960.
83. U.S.—In re Bennett, Bkrcty.Fla., 15 B.R. 136.
84. U.S.—Matter of Murrell, C.A.Mo., 588 F.2d 1207, cert. den. 99 S.Ct. 2177, 441 U.S. 950, 60 L.Ed.2d 1055.

87. La.—Laurencic v. Jones, App., 180 So.2d 803.
90. U.S.—In re Schachne, Bkrcty.Fla., 6 B.R. 236.
92. U.S.—In re Barncastle, Bkrcty.Fla., 8 B.R. 464.

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95. Fla.—Killian v. Lawson, 387 So.2d 960.
3. U.S.—Matter of Hersch, Bkrcty.Fla., 23 B.R. 42.

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14. Fla.—Azar v. Graham, App., 194 So.2d 684, cert. discharged, Sup., 204 So.2d 193.
16. Widow disqualified as "head of family" on remarriage
U.S.—John Hancock Mut. Life Ins. Co. v. Frost Nat. Bank of San Antonio, D.C.Tenn., 393 F.Supp. 204, aff'd., C.A., 516 F.2d 901, two cases.

§ 18. — "Householders" and "Housekeepers"

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35. U.S.—In re Williams, Bkrcty.Va., 3 B.R. 244.
52. N.Y.—Tuckman v. Hayward, 204 N.Y.S.2d 655, 26 Misc.2d 45.

§ 19. — Married Women

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53. U.S.—In re Ferguson, Bkrcty.Colo., 15 B.R. 439.
59. U.S.—In re Thompson, D.C.Va., 4 B.R. 823.
60. U.S.—In re Hellman, D.C.Colo., 474 F.Supp. 348.
65. U.S.—In re Schachne, Bkrcty.Fla., 6 B.R. 236.

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§ 20. — Unmarried Persons

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97. U.S.—C.J.S. cited in Rietz v. Butler, D.C.Ga., 322 F.Supp. 1029, 1032.

Non-dependent resident relatives

- U.S.—Rietz v. Butler, D.C.Ga., 322 F.Supp. 1029, 1032.
98. U.S.—Matter of Shapiro, Bkrcty.Fla., 2 B.R. 28.

Two individuals are not required to share a common exemption simply because they were once married, where the parties are divorced, each has a separate residence, and each meets the statutory use requirements for an exemption.^{1,5}

15 Divorced at time of filing petition in bankruptcy

- U.S.—In re Hendrick, Bkrcty.La., 45 B.R. 965.

§ 23. — Surviving Husband, Wife, Children, and Next of Kin

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24. Pa.—In re Spossey's Estate, 14 Fiduciary 209, 14 Wash.Co. 107.
26. Tex.—Ward v. Braun, Civ.App., 417 S.W.2d 888.
31. No title in fee simple
Tex.—Kelley v. Shields, Civ.App., 448 S.W.2d 135, err. ref. no rev. err.

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39. Medical care

- Cal.—J. J. Macintyre Co. v. Duren, 173 Cal.Rptr. 715, 118 C.A.3d Supp. 16.
49. Pa.—In re Gana's Estate, 32 D. & C.2d 657, 14 Fiduciary 1—In re Hunter's Estate, 56 Berks 143.
50. Pa.—In re Gana's Estate, 32 D. & C.2d 657, 14 Fiduciary 1—In re Zappardino's Estate, 33 D. & C.2d 117, 14 Fiduciary 212—In re Hunter's Estate, 56 Berks 143.

§ 24. — Persons Engaged in Particular Occupation

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49. Professional corporations not entitled to exemption

- Cal.—Canal-Randolph Anaheim, Inc. v. Wilkoski, 163 Cal.Rptr. 30, 103 C.A.3d 282.

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80. Statute applicable to Jones Act seamen as well as to traditional seamen

- La.—X-L Finance Co. v. Bonvillion, 244 So.2d 826, 257 La. 899.
82. La.—X-L Finance Co. v. Bonvillion, 244 So.2d 826, 257 La. 899.

§ 26. General Statement

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4. U.S.—Danielson v. U.S., C.A.Cal., 416 F.2d 408. In re Canutt, D.C.Or., 264 F.Supp. 919. In re Marklin, Bkrcty.Ky., 16 B.R. 729—Matter of Ziegler, Bkrcty.Ohio, 20 B.R. 449.
- Alaska—Guterman v. First Nat. Bank of Anchorage, 597 P.2d 969.
- Ga.—Juggilal Kamlapat v. Purvis-Wade Carpet Mills, 146 S.E.2d 138, 112 Ga.App. 781.
- N.Y.—Prior v. Cunningham, 306 N.Y.S.2d 22, 33 A.D.2d 853, affd. 260 N.E.2d 871, 27 N.Y.2d 502, 312 N.Y.S.2d 677.
- Wis.—Grant County Service Bureau, Inc. v. Treweek, 120 N.W.2d 634, 19 Wis.2d 548.

Artistic or recreational items not exempt
U.S.—In re Hendrick, Bkrcty.La., 45 B.R. 965.

Liquor license

- Alaska—C.Y., Inc. v. Brown, 574 P.2d 1274.
5. U.S.—In re St. Laurent, Bkrcty.Me., 17 B.R. 768.

§ 27. "Personal Property" or "Property" under General Clauses

10. Ala.—Holley v. Crow, Civ., 355 So.2d 1123.

§ 28. — Choses in Action

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13. U.S.—In re Musgrove, Bkrcty.Va., 7 B.R. 892.
- Kan.—Southwest State Bank v. Quinn, 424 P.2d 620, 198 Kan. 359.

§ 29. — Money

Checking account

- Alaska—Miller v. Monrean, 507 P.2d 771.

§ 30. — Real Property

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38. **Church property**
N.C.—Floyd S. Pike Elec. Contractor, Inc. v. Goodwill Missionary Baptist Church, 214 S.E.2d 276, 25 N.C.App. 563.

§ 31. In General

Library References

Exemptions ⇨ 37.

39. **Veteran's benefits**

- U.S.—American Training Services, Inc. v. Veterans Administration, D.C.N.J., 434 F.Supp. 988.
- Ga.—U.S. v. Murray, 282 S.E.2d 372, 158 Ga.App. 781.
- Pa.—In re Pierce's Estate, 421 A.2d 1065, 492 Pa. 10.

40. **Punitive damages awarded not exempt**

- U.S.—In re Keyworth, D.C.Colo., 47 B.R. 966.

Insurance proceeds exempted by statute are liberally construed to afford exemption whenever possible.^{40.5}

40.5. **Health insurance policy exempted apart from any life policy**

- Del.—Wilmington Trust Co. v. Barry, Super., 338 A.2d 575, affd. Sup., 359 A.2d 664.

Insurance payments

- La.—McInnis-Peterson Chevrolet, Inc. v. Plain, App., 391 So.2d 1251, writ ref., Sup., 396 So.2d 933.

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Mobile home is exempt under some statutes.^{48.16}

48.16. **Houseboat as "mobile home"**

- U.S.—In re Bell, D.C.Or., 181 F.Supp. 387.

Particular amount of equity in home

- Colo.—Centennial Sav. & Loan Ass'n v. Schmuhi, App., 690 P.2d 882.

48.20. **Held share account**

- Cal.—Contract Liquidator Corp. v. Blunt, 12 Cal.Rptr. 254, 190 C.A.2d Supp. 875.

48.25. **Not exempt**

- N.Y.—Helmsley-Spear, Inc. v. Winter, 420 N.Y.S.2d 599, 101 Misc.2d 17.

Social security payments are exempt,^{48.30} and the exemption continues although payment is deposited in a bank.^{48.35}

- 48.30. Mich.—Matter of Vary's Estate, 258 N.W.2d 11, 401 Mich. 340, cert. den. 98 S.Ct. 1283, 434 U.S. 1087, 55 L.Ed.2d 793.

- N.J.—Potter v. Potter, 404 A.2d 352, 169 N.J.Super. 140.

- N.Y.—Household Finance Corp. v. Chase Manhattan Bank, N.A., 397 N.Y.S.2d 564, 91 Misc.2d 141.

- Pa.—Good v. Wohlgenuth, 327 A.2d 397, 15 Pa. Cmwlth. 524.

Purpose of statute

- Mich.—Matter of Vary's Estate, 237 N.W.2d 498, 65 Mich.App. 447, affd. 258 N.W.2d 11, 401 Mich. 340, cert. den. 98 S.Ct. 1283, 434 U.S. 1087, 55 L.Ed.2d 793.

- N.Y.—Consumer Credit Corp. v. Lewis, 313 N.Y.S.2d 879, 63 Misc.2d 928.

Funds in hands of recipient or welfare agency

- Mo.—Owens v. Owens, App., 591 S.W.2d 57.

- N.Y.—Dist.Ct.—Consumer Credit Corp. v. Lewis, 313 N.Y.S.2d 879, 63 Misc.2d 928—Russo v. New York State Social Services Dept., 329 N.Y.S.2d 13, 68 Misc.2d 1094.

Not exempt

- U.S.—Department of Health and Rehabilitative Services, State of Fla. v. Davis, C.A.Ala., 616 F.2d 828.

- 48.35. N.Y.—Consumer Credit Corp. v. Lewis, 313 N.Y.S.2d 879, 63 Misc.2d 928.

Aid to dependent children

- Mass.—MacQuarrie v. Balch, 285 N.E.2d 103, 362 Mass. 151.

- N.J.—Guardian Loan Co. of Plainfield v. Baylis, 270 A.2d 304, 112 N.J.Super. 44—Dover Oil Co. v. Sedor, 427 A.2d 1135, 178 N.J.Super. 46.

- Ohio—Goodyear Service Store v. Speck, 355 N.E.2d 886, 48 Ohio App.2d 115, 2 O.O.3d 82.

Money derived from Railroad Retirement Act pension

- N.J.—Freedom Finance Co. v. Fleckenstein, 282 A.2d 458, 116 N.J.Super. 428.

Joint account

- Ga.—Anderson v. First Nat. Bank of Atlanta, 260 S.E.2d 501, 151 Ga.App. 573.

However, statutory exemption of social security disability payments does not apply to a claim for alimony.^{48.35a}

- 48.35a. Okl.—Meadows v. Meadows, 619 P.2d 598.

Poor relief funds are exempt from attachment and garnishment when so provided by statute.^{48.40}

48.40. **Exemption not lost because deposited in checking account**

- Ohio—First Nat. Master Charge v. Gilardi, App., 324 N.E.2d 576.

"Public aid funds"

- Conn.—Branford Manor Associates v. Hargey, Com.Pl., 362 A.2d 1390, 33 Conn.Sup. 85.

Wages of public aid recipient not exempt

- Ill.—Credit Thrift of America v. Kittrell, 354 N.E.2d 59, 41 Ill.App.3d 361.

A non-income producing spouse has no property interest in her

spouse's income tax refund and is not entitled to claim an exemption in refunds even though a joint return was filed.^{48.45}

- 48.45. U.S.—In re Colbert, Bkrcty.Ohio, 5 B.R. 646.

§ 33. **Burial Lots; Property of Cemetery**

55. N.J.—Woliner v. Woliner, 372 A.2d 1170, 148 N.J.Super. 510.

57. **Cemetery lots, tombstones, monuments, coffins, and other articles of burial**

- Wis.—Grant County Service Bureau, Inc. v. Treweek, 120 N.W.2d 634, 19 Wis.2d 548.

Provision without value limit held not invalid
Md.—Diffendall v. Diffendall, 209 A.2d 914, 239 Md. 32.

59. N.J.—Abra-May Cemetery Sales Co. v. Degel Yehudo Cemetery Corp. of N.J., 223 A.2d 507, 92 N.J.Super. 365.

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§ 36. — Food Animals

However, debtors cannot avoid a creditor's security interest in animals held primarily as part of the debtor's capital business venture and not primarily for personal, family, or household use.^{5.5}

- 5.5 U.S.—Matter of Thompson, Bkrcty.Iowa, 46 B.R. 1, affd. 750 F.2d 628.

§ 37. **Household Goods and Furniture**

17. U.S.—In re Cummings, C.A.Colo., 413 F.2d 281, cert. den. 90 S.Ct. 918, 397 U.S. 915, 25 L.Ed.2d 95.

- In re Fisher, Bkrcty.Okl., 11 B.R. 666.

- Tex.—Causey v. Catlett, Civ.App., 605 S.W.2d 719.

No limitations

- U.S.—In re Noland, Bkrcty.Kan., 13 B.R. 766.

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- 17.5. Cal.—C.J.S. cited in Independence Bank v. Heller, 79 Cal.Rptr. 868, 871, 275 C.A.2d 84.

18. U.S.—C.J.S. quoted in Matter of Beard, Bkrcty. Iowa, 5 B.R. 429, 430.

20. N.Y.—In re Livingston's Estate, 211 N.Y.S.2d 897, 30 Misc.2d 71, affd. 220 N.Y.S.2d 434, 14 A.D.2d 264.

Stereo

- Cal.—In re Marriage of Sanabia, 157 Cal.Rptr. 56, 95 C.A.3d 483.

22. Kan.—Nohinek v. Logsdon, 628 P.2d 257, 6 Kan. App.2d 342.

"Necessary" does not mean "indispensable"

- Cal.—Independence Bank v. Heller, 79 Cal.Rptr. 868, 275 C.A.2d 84.

24. Cal.—Independence Bank v. Heller, 79 Cal.Rptr. 868, 275 C.A.2d 84.

25. **Similar tests**

- Cal.—Newport Nat. Bank v. Adair, 83 Cal.Rptr. 1, 2 C.A.3d 1043, 41 A.L.R.3d 603.

30. **Paintings used as security for loans**

- U.S.—In re Reid, C.A.10, 757 F.2d 230.

§ 38. **Library or Instruments of Professional Men****Library References**

Exemptions ⇨ 47.

68. Wis.—Opitz v. Brawley, 102 N.W.2d 117, 10 Wis.2d 93.

81. Under general exemption of "library"

- Wis.—Opitz v. Brawley, 102 N.W.2d 117, 10 Wis.2d 93.

86. Wis.—Opitz v. Brawley, 102 N.W.2d 117, 10 Wis.2d 93.

§ 39. Life Insurance

Library References

Exemptions ⇨50.

99. U.S.—In re Privett, C.A.Okla., 435 F.2d 261.

Klebanoff v. Mutual Life Ins. Co. of New York, D.C.Conn., 246 F.Supp. 935, remd., C.A., 362 F.2d 975.

Fla.—Thomas v. Nuckols, App., 157 So.2d 712.

Tenn.—Overman v. Overman, 570 S.W.2d 857.

- 99.5. N.Y.—Kaufman v. New York Life Ins. Co., 299 N.Y.S.2d 269, 32 A.D.2d 79, affd. 258 N.E.2d 213, 26 N.Y.2d 878, 309 N.Y.S.2d 929.

- 4.5. U.S.—Milwaukee Const. Co. v. Glens Falls Ins. Co., C.A.Or., 389 F.2d 364.

Words "proceeds" and "avails" synonymous

La.—Succession of Videau, App., 197 So.2d 655, writ ref. 199 So.2d 922, 250 La. 920.

5. Pa.—Resolute Ins. Co. v. Pennington, 224 A.2d 757, 423 Pa. 472.

7. N.Y.—In re Plotkin's Estate, 290 N.Y.S.2d 46, 56 Misc.2d 754, motion den. 248 N.E.2d 925, 24 N.Y.2d 870, 301 N.Y.S.2d 99.

- 26.10. Cal.—Schrtr v. Sehrtr, 3 Cal.Rptr. 555, 179 C.A.2d 167.

34. Proceeds of national service life insurance under automatic coverage

- Ark.—Cruce v. Arkansas State Hospital, 409 S.W.2d 342, 241 Ark. 680.

40. N.J.—O'Neill v. Little, 258 A.2d 731, 107 N.J.Super. 426.

- Pa.—Resolute Ins. Co. v. Pennington, 224 A.2d 757, 433 Pa. 472.

45. U.S.—In re White, D.C.W.Va., 185 F.Supp. 609.

51. Sequestration for payment of alimony

- N.J.—Hirko v. Hirko, 398 A.2d 1353, 166 N.J.Super. 111.

Owner of policy also beneficiary

- U.S.—In re Bess, D.C.Ohio, 47 B.R. 414.

52. Ark.—Cruce v. Arkansas State Hospital, 409 S.W.2d 342, 241 Ark. 680.

Purpose of statute

- (2) Other statements of purpose.

- U.S.—Pearl v. Goldberg, C.A.Conn., 300 F.2d 610.

Persons other than widow or children

- Cal.—Jackson v. Fisher, 14 Cal.Rptr. 439, 363 P.2d 479, 56 C.2d 196.

67. Conditions for exemption

- Fla.—Thomas v. Nuckols, App., 157 So.2d 712.

71. In New York

- (1) N.Y.—Kaufman v. New York Life Ins. Co., 299 N.Y.S.2d 269, 32 A.D.2d 79. Affd. 258 N.E.2d 213, 26 N.Y.2d 878, 309 N.Y.S.2d 929.

- 73.50. N.J.—Heritage Bank North v. Ashley Development Corp., 477 A.2d 410, 194 N.J.Super. 523.

76. Ark.—Cluck v. Mack, 489 S.W.2d 8, 253 Ark. 769.

79. U.S.—Milwaukee Const. Co. v. Glens Falls Ins. Co., C.A.Or., 389 F.2d 364.

- Tex.—Klein v. Klein, Civ.App., 370 S.W.2d 769.

§ 40. — Amount Exempted

87. Aggregate exemption apportioned among beneficiaries

- Cal.—Jackson v. Fisher, 14 Cal.Rptr. 439, 363 P.2d 479, 56 C.2d 196.

99. U.S.—Brown v. Posin, C.A.Md., 284 F.2d 300. In re White, D.C.W.Va., 185 F.Supp. 609.

§ 42. — Debts Affected

17. Cal.—Danielson v. Stokes, 29 Cal.Rptr. 489, 214 C.A.2d 234.

18. U.S.—Klebanoff v. Mutual Life Ins. Co. of New York, D.C.Conn., 246 F.Supp. 935, remd., C.A., 362 F.2d 975.

19. Utah—Oliver v. Mitchell, 376 P.2d 390, 14 Utah2d 9.

24. What constitutes existing claim

- (3) Other matters.

- U.S.—In re Lieblich, C.A.Ill., 269 F.2d 94.

25. U.S.—Consumers Time Credit, Inc. v. Remark Corp., D.C.Pa., 248 F.Supp. 158.

32. Evidence held insufficient to show agreement

- Pa.—Resolute Ins. Co. v. Pennington, 224 A.2d 757, 423 Pa. 472.

§ 43. Pensions and Bounties

Library References

Exemptions ⇨49.

40. U.S.—Commercial Mortg. Ins. Inc. v. Citizens Nat. Bank of Dallas, D.C.Tex., 526 F.Supp. 510—Marine Midland Bank v. Surfbelt, Inc., D.C.Pa., 532 F.Supp. 728.

- Cal.—Roosevelt v. Roosevelt, 172 Cal.Rptr. 641, 117 C.A.3d 397.

- Ill.—Commonwealth Loan Co. v. Baker, 214 N.E.2d 904, 67 Ill.App.2d 359, app. after remand 230 N.E.2d 507, 87 Ill.App.2d 81, affd. 240 N.E.2d 682, 40 Ill.App.2d 506—Shrader v. Maulitz, 374 N.E.2d 819, 16 Ill.Dec. 44, 58 Ill.App.3d 484.

- N.J.—Ward v. Ward, 396 A.2d 365, 164 N.J.Super. 354.

- N.Y.—National Bank of North America v. International Broth. of Elect. Workers Local No. 3, 400 N.Y.S.2d 482, 93 Misc.2d 590, affd. 419 N.Y.S.2d 127, 69 A.D.2d 679, 397 N.E.2d 1333, 48 N.Y.2d 752, 422 N.Y.S.2d 666—Pepitone v. Pepitone, 436 N.Y.S.2d 966, 108 Misc.2d 12.

- Pa.—Com. v. Thompson, 57 Lanc.Rev. 167.

- Tex.—U.S. v. Miranda, Civ.App., 581 S.W.2d 711.

- Wash.—Baker v. Teachers Ins. & Annuities Ass'n College Retirement Equity Funds (TIAA-CREF), 588 P.2d 1164, 91 Wash.2d 482.

Against whom available

- (4) Other statements.

- Tex.—Gaudion v. Gaudion, Civ.App., 601 S.W.2d 805.

41. U.S.—Williams, 370 A.2d 1134, 279 Md. 673.

48. U.S.—McCarty v. McCarty, Cal., 101 S.Ct. 2728, 453 U.S. 210, 69 L.Ed.2d 589.

- Ga.—Davis v. Davis, 288 S.E.2d 748, 161 Ga.App. 722.

- Ill.—Christ Hospital v. Greenwald, 403 N.E.2d 700, 38 Ill.Dec. 469, 82 Ill.App.3d 1024.

- Minn.—Knapp v. Johnson, 301 N.W.2d 548.

Subject to wage deduction order

- N.Y.—Villano v. Villano, 414 N.Y.S.2d 625, 98 Misc.2d 774.

Purpose

- U.S.—American Tel. and Tel. Co. v. Merry, C.A.Conn., 592 F.2d 118.

54. Military retirement benefits

- U.S.—Matter of Harter, Bkrtcy.Ind., 10 B.R. 272.

56. Pa.—Com. v. Thompson, 22 D. & C.2d 236, 57 Lanc.Rev. 167.

On the other hand, it has also been held that the Act does not preclude a creditor from garnishing funds held by a vacation trust fund on behalf of an employer notwithstanding that the fund is an employee welfare benefit plan.^{59,10}

- 59.10. U.S.—Local Union 212, Intern. Broth. of Elec. Workers Vacation Trust Fund v. Local 212 Intern. Broth. of Elec. Workers Credit Union, C.A.Ohio, 735 F.2d 1010, disagreeing with Franchise Tax Board v. Construction Laborers, et al., 679 F.2d 1307.

60. N.Y.—Lowery v. Spector, 430 N.Y.S.2d 767, 77 A.D.2d 813.

65. Cal.—Ogle v. Heim, 69 Cal.Rptr. 579, 442 P.2d 659, 69 C.2d 7, app. dism. 89 S.Ct. 477, 393 U.S. 265, 21 L.Ed.2d 426.

- Fla.—Buzzard v. Buzzard, App., 2 Dist., 412 So.2d 388—McClung v. McClung, App. 2 Dist., 465 So.2d 637.

- Or.—Bresnan v. Bresnan, 601 P.2d 851, 42 Or.App. 739.

Pension funds exempt

- Ga.—Cooper v. City of Atlanta Policemen's Pension Fund, 249 S.E.2d 684, 147 Ga.App. 633.

Keogh plan assets not exempt

- U.S.—In re Clark, Bkrtcy.Tenn., 18 B.R. 824—Matter of Baviello, Bkrtcy.N.Y., 12 B.R. 412.

- N.Y.—Plymouth Rock Fuel Corp. v. Bank of New York, 425 N.Y.S.2d 908, 102 Misc.2d 235.

Individual retirement account not exempt

- U.S.—In re Talbert, Bkrtcy.La., 15 B.R. 536—In re Gefen, Bkrtcy.Fla., 35 B.R. 368.

66. Cal.—In re Marriage of DeLotel, 140 Cal.Rptr. 553, 73 C.A.3d 21, 100 A.L.R.3d 1231.

- N.Y.—Dumpson v. Ward, 262 N.Y.S.2d 159, 24 A.D.2d 570.

- First & Merchants Nat. Bank of Richmond v. Wade, 232 N.Y.S.2d 636, 35 Misc.2d 398.

Statute inapplicable

- U.S.—Ball v. Revised Retirement Plan for Salaried Emp. of Johns-Manville Corp. and Subsidiaries, D.C.Colo., 522 F.Supp. 718.

Tort settlement not within statute

- U.S.—Gray v. U.S., D.C.Cal., 226 F.Supp. 479.

67. U.S.—In re Everhart, Bkrtcy., Ohio, 11 B.R. 770.

- Fla.—City of Miami v. Spurrier, App., 320 So.2d 397.

- Ga.—Goddard v. Boozert, 287 S.E.2d 308, 160 Ga.App. 303.

- La.—Kennedy v. Kennedy, App., 391 So.2d 1193, writ ref., Sup., 396 So.2d 883.

- Mass.—Uitley v. Uitley, 245 N.E.2d 435, 355 Mass. 469.

- Pa.—Lowe v. Jones, 200 A.2d 880, 414 Pa. 466.

- Lowe v. Jones, 111 P.L.J. 511, affd. 200 A.2d 880, 414 Pa. 466.

- Tenn.—Coke v. Coke, App., 560 S.W.2d 631.

Tex.—Prewitt v. Smith, Civ.App., 528 S.W.2d 893.

Teacher's pension

(3) Other statements.

U.S.—In re Roper, Bkrtcy.Tex., 49 B.R. 4.

Mich.—Marion v. Vaughn, 163 N.W.2d 239, 12 Mich. App. 543—Michigan Public School Emp. Retirement Bd. v. Peterson, 197 N.W.2d 854, 39 Mich. App. 568.

N.Y.—Aurora G. v. Harold Aaron G., 414 N.Y.S.2d 632, 98 Misc.2d 695.

Severance pay

U.S.—In re Phillips, Bkrtcy.Ohio, 45 B.R. 529.

Former employee's right to refund

Colo.—Pueblo Regional Planning Commission v. Spytek, 542 P.2d 88, 36 Colo.App. 406.

R.I.—Warwick Municipal Emp. Credit Union v. Berard, 157 A.2d 818, 90 R.I. 317.

68. U.S.—Samples v. Samples, D.C.Okl., 414 F.Supp. 773.

69. N.Y.—Board of Ed. of City of New York v. Treyball, 446 N.Y.S.2d 417, 86 A.D.2d 639, app. diss. 436 N.E.2d 1333, 56 N.Y.2d 683, 451 N.Y.S.2d 731, app. diss. 439 N.E.2d 885, 57 N.Y.2d 670, 454 N.Y.S.2d 76.

Recognized benefits

Wis.—Ponath on Behalf of Outagamie Co. Dept. of Public Welfare v. Hedrick, 126 N.W.2d 28, 22 Wis.2d 382.

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70. N.Y.—Lade v. Parker, 317 N.Y.S.2d 871, 65 Misc.2d 369.

Ohio—Shaw Jewelers v. Watkins, 164 N.E.2d 200.

73. N.H.—Fowler v. Fowler, 362 A.2d 204, 116 N.H. 446, 93 A.L.R.3d 705.

However, in particular cases, it has also been held that retirement benefits are not exempt from garnishment.^{77.5}

77.5 Tex.—Perkins v. Perkins, App. 8 Dist., 690 S.W.2d 706, err. ref. n.r.e.

U.S. v. Fleming, Civ.App., 565 S.W.2d 87.

In addition, it has been held that a portion of former husband's retirement pension attributable to husband's employment during the existence of the community was community property; and, as such, could be distributed to the wife even though they were specifically exempted by statute.^{77.10}

77.10 La.—Thrash v. Thrash, App., 387 So.2d 21, writ ref. 393 So.2d 745—Lewis v. Lewis, App. 3 Cir., 467 So.2d 179.

78. Alimony arrears

Conn.—Sienkiewicz v. Sienkiewicz, 425 A.2d 116, 178 Conn. 675.

N.J.—Biles v. Biles, 394 A.2d 153, 163 N.J.Super. 49. N.Y.—Gramet v. New York State Teachers' Retirement System, 424 N.Y.S.2d 598, 102 Misc.2d 731.

Pensions not exempt

Minn.—Faus v. Faus, 319 N.W.2d 408.

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99.10. Statute provides for wage deduction

N.Y.—Michel v. Michel, 384 N.Y.S.2d 381, 86 Misc.2d 774.

1. Ala.—Allen v. Glover, 304 So.2d 172, 293 Ala. 377. Md.—Smolin v. First Fidelity Sav. and Loan Ass'n, 209 A.2d 546, 238 Md. 386.

Pa.—In re Ace's Estate, 24 D. & C.2d 534, 11 Fiduciary 53, 62 Lack.Jur. 117.

Tex.—Wagar v. U.S., Civ.App., 582 S.W.2d 896.

2. Purpose

(1) N.Y.—In re Guardianship of Dugan, 222 N.Y. S.2d 831, 29 Misc.2d 980.

Okl.—State ex rel. Eastern State Hospital v. Beard, 600 P.2d 324.

(4) Other statements.

U.S.—Porter v. Aetna Cas. & Sur. Co., App.D.C., 82 S.Ct. 1231, 370 U.S. 159, 8 L.Ed.2d 407.

N.J.—State v. Monaco, 195 A.2d 910, 81 N.J.Super. 448.

2.5. N.J.—State v. Monaco, 195 A.2d 910, 81 N.J.Super. 448.

It has been determined that federal benefits, including veteran's benefits drawn on account of a beneficiary's father, conserved by the state during the period the beneficiary was in foster care in a trust fund in the beneficiary's name can not, under federal law, be used by the state to reimburse itself for cost of past foster care.²¹⁰

2.10. Md.—Conaway v. Social Services Admin., 471 A.2d 1058, 298 Md. 639.

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8. U.S.—Porter v. Aetna Cas. & Sur. Co., App.D.C., 82 S.Ct. 1231, 370 U.S. 159, 8 L.Ed.2d 407. Nev.—Security Nat. Bank of Reno v. McColl, 385 P.2d 825, 79 Nev. 423.

N.Y.—Colton v. Martell, 359 N.Y.S.2d 632, 79 Misc.2d 190.

9. D.C.—Aetna Cas. & Sur. Co. v. Porter, C.A., 296 F.2d 399, 111 U.S.App.D.C. 267, revd. 82 S.Ct. 1231, 370 U.S. 159, 8 L.Ed.2d 407.

Mass.—Hale v. Gravalles, 162 N.E.2d 817, 340 Mass. 96.

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32. Tex.—Ex parte Johnson, Civ.App., 583 S.W.2d 660.

Intent of statute

Ga.—U.S. v. Murray, 282 S.E.2d 372, 158 Ga.App. 781.

Exception where Army pension waived

Ga.—Warren v. Warren, 283 S.E.2d 669, 159 Ga.App. 440.

37. Mass.—Hale v. Gravalles, 166 N.E.2d 557, 340 Mass. 722.

38.5. Mass.—Hale v. Gravalles, 166 N.E.2d 557, 340 Mass. 722.

§ 46. Tools, Implements, Instruments, Etc.

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68.50. U.S.—In re Lind, Bkrtcy.S.D., 10 B.R. 611.

"Business" includes "profession"

Wis.—Opitz v. Brawley, 102 N.W.2d 117, 10 Wis.2d 93.

Mechanic

U.S.—In re Lind, Bkrtcy.S.D., 10 B.R. 611.

72. La.—Pope v. Spiers, App., 347 So.2d 1191.

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75. "Common tools of trade", etc.

U.S.—Rietz v. Butler, D.C.Ga., 322 F.Supp. 1029.

81. N.Y.—Thorpe Elec. Supply, Inc. v. Deitz, 429 N.Y.S.2d 386, 104 Misc.2d 994.

Particular items held not within exemption

(6) Tex.—Davis v. Schultz, Civ.App., 474 S.W.2d 804.

(9) Other items.

U.S.—In re Dummitt, Bkrtcy.Va., 2 B.R. 136—In re Breaux, Bkrtcy.Me., 17 B.R. 697.

La.—Pickett v. Miller, App., 329 So.2d 816.

Tex.—Kelley v. Shields, Civ.App., 448 S.W.2d 135, err. ref. no rev. err.

Retired workers tools

La.—Bank of Louisiana v. Nash, App., 360 So.2d 259.

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81.5. U.S.—In re Frierson, Bkrtcy.Kan., 15 B.R. 157. Cal.—Lopp v. Lopp, 18 Cal.Rptr. 388, 198 C.A.2d 474.

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14. U.S.—In re Seacord, Bkrtcy.Mo., 7 B.R. 121. Cal.—Lopp v. Lopp, 18 Cal.Rptr. 388, 198 C.A.2d 474.

Tex.—Kelley v. Shields, Civ.App., 448 S.W.2d 135, err. ref. no rev. err.

15. U.S.—In re Andreotti, Bkrtcy.Cal., 16 B.R. 28.

16. Meaning of "necessary"

La.—Finley v. Graves, App., 393 So.2d 345.

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44. La.—Cox v. Smith, App., 275 So.2d 459.

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72.5. La.—Oubre v. Hinchman, App., 365 So.2d 17, writ den., Sup., 365 So.2d 1375.

78. U.S.—Matter of Hanks, D.C.La., 11 B.R. 706.

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93. Person qualified as "farmer"

U.S.—Matter of Hahn, Bkrtcy.Iowa, 5 B.R. 242.

94. U.S.—Matter of Hahn, Bkrtcy.Iowa, 5 B.R. 242.

A debtor engaged in the business of agriculture is not entitled to an exemption as a mechanic, miner, or other person within statute exempting tools and instruments of such persons.^{97.5}

97.5. Neb.—Miller v. Dixon, 127 N.W.2d 203, 176 Neb. 659.

98. "Tool"

U.S.—Matter of Hahn, Bkrtcy.Iowa, 5 B.R. 242.

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8.5. U.S.—Cantrell v. Molz-Frick Implement Co. of Wichita, Kan., C.A.Kan., 278 F.2d 546.

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31. Neb.—Miller v. Dixon, 127 N.W.2d 203, 176 Neb. 659.

§ 47. Wages, Salary, and Earnings

32. U.S.—Giurdanella v. Giurdanella, C.A.Virgin Islands, 358 F.2d 321.

Paid vacation considered additional earnings

Mo.—Electrical Workers, Local No. 1 Credit Union v. IBEW-NECA Holiday Trust Fund, 583 S.W.2d 154.

33. Ala.—Holley v. Crow, Civ., 355 So.2d 1123.

Fla.—France v. Hart, App., 170 So.2d 52.

N.Y.—Bush v. Domestic Finance Corp., 308 N.Y.S.2d 79, 62 Misc.2d 291.

Tenn.—Rhea v. Park, 366 S.W.2d 765, 211 Tenn. 589.

Tex.—U.S. v. Fleming, Civ.App., 565 S.W.2d 87.

Voluntary assignment not garnishment exempting remaining wages

U.S.—Bache Halsey Stuart Shields Inc. v. Killop, D.C. Mich., 589 F.Supp. 390 (declining to follow Sears Roebuck v. A.T. & G. Co., 66 Mich.App. 359, 239 N.W.2d 614).

Consumer Credit Protection Act

U.S.—Hodgson v. Hamilton Municipal Court, D.C. Ohio, 349 F.Supp. 1125—Dunlop v. First Nat. Bank of Arizona, D.C.Ariz., 399 F.Supp. 855.

Mich.—Sears, Roebuck & Co. v. A.T. & G. Co., Inc., 239 N.W.2d 614, 66 Mich.App. 359.

Mo.—Dyche v. Dyche, 570 S.W.2d 293.

Public assistance

Ill.—Coehennour v. Lofton, 379 N.E.2d 922, 20 Ill.Dec. 89, 62 Ill.App.3d 955.

N.J.—Avco Financial Services v. Kaminsky, 400 A.2d 581, 167 N.J.Super. 195.

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N.Y.—Bond Stores, Inc. v. Sanford, 334 N.Y.S.2d 938, 70 Misc.2d 697.

Intent of statute

U.S.—In re Kokoszka, C.A.Conn., 479 F.2d 990, affd. 94 S.Ct. 2431, reh. den. 95 S.Ct. 160.

Earned income only

U.S.—John Hancock Mut. Life Ins. Co. v. Frost Nat. Bank of San Antonio, D.C.Tenn., 393 F.Supp. 204, affd., C.A., 516 F.2d 901, two cases.

Child support payment subtracted from "disposable earnings"

La.—Theriot v. Melancon, App., 311 So.2d 578.
Or.—State ex rel. Roth v. Bookhart, 586 P.2d 382, 37 Or.App. 173.

Child support and counsel fees

Mo.—Dyche v. Dyche, 570 S.W.2d 293.

Unemployment insurance benefits not exempt from support order

Md.—Pope v. Pope, 390 A.2d 1128, 283 Md. 531.

34. Fla.—Elvine v. Public Finance Co., App., 196 So.2d 25.

Ill.—Englewood Hospital Ass'n v. Knox, 364 N.E.2d 528, 7 Ill.Dec. 367, 49 Ill.App.3d 515.

N.C.—Elmwood v. Elmwood, 244 S.E.2d 668, 295 N.C. 168.

Consumer Credit Protection Act construed

U.S.—Kokoszka v. Belford, Conn., 94 S.Ct. 2431, 417 U.S. 642, 41 L.Ed.2d 374, reh. den. 95 S.Ct. 160, 419 U.S. 886, 42 L.Ed.2d 131.

Gehrig v. Shreves, C.A.Neb., 491 F.2d 668.
Hodgson v. Hamilton Municipal Court, D.C. Ohio, 349 F.Supp. 1125—First Nat. Bank v. Hasty, D.C.Mich., 415 F.Supp. 170, affd., C.A., 573 F.2d 1310, two cases.

Mo.—Gerry Elson Agency, Inc. v. Muck, App., 509 S.W.2d 750.

37. N.M.—Advance Loan Co. v. Kovach, 445 P.2d 386, 79 N.M. 509.

38. Ala.—Walker v. Williams & Boulter Const. Co., Civ., 241 So.2d 896, 46 Ala.App. 337.

43. U.S.—Crane v. Crane, D.C.Okl., 417 F.Supp. 38.

Exemption applicable only to ordinary debts
Ga.—Pollock Paper Corp. v. Klebold, 122 S.E.2d 459, 104 Ga.App. 653.

44. Ohio—State Nat. Bank v. Fryman, 272 N.E.2d 217, 27 Ohio Misc. 12.

45.5. Wages not exempt

La.—Williams v. Williams, App., 371 So.2d 297, writ den., Sup., 373 So.2d 526.

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46. U.S.—U.S. v. Dumont, D.C.Mont., 416 F.Supp. 632.

Mont.—Anaconda Federal Credit Union, No. 4401 v. West, 483 P.2d 909, 157 Mont. 175.

58. Pilot

(1) Ark.—Carter v. Melena Marine Service, Inc., 475 S.W.2d 528, 251 Ark. 876.

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61. Readjustment pay not wages

U.S.—In re Howe, D.C.Fla., 381 F.Supp. 1025.

63. "Wages" and "salary" held not synonymous

Del.—Norman v. Goldman, Super., 173 A.2d 607, 4 Storey 45.

64. Persons not entitled, etc.

(2) U.S.—In re Malloy, Bkrtcy.Fla., 2 B.R. 674.
Del.—Norman v. Goldman, Super., 173 A.2d 607, 4 Storey 45.

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73. Tex.—U.S. v. Wakefield, Civ.App., 572 S.W.2d 569, err. dismissed.

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84. Deposit in bank

(2) Other statements.

U.S.—Dunlop v. First Nat. Bank of Arizona, D.C.Ariz., 399 F.Supp. 855.

Conn.—Michael's Jewelers v. Handy, Cir.A.D., 266 A.2d 904, 6 Conn.Cir. 103.

Fla.—Holmes v. Blazer Financial Services, Inc., App., 369 So.2d 987.

Mich.—Pease v. North American Finance Corp., 244 N.W.2d 400, 69 Mich.App. 165.

Wis.—John O. Melby & Co. Bank v. Anderson, 276 N.W.2d 274, 88 Wis.2d 252.

Funds in IRA accounts

U.S.—Matter of Szuets, Bkrtcy.Fla., 22 B.R. 805.

87. Pa.—Right Lumber Co. v. Kretchmar, 189 A.2d 302, 200 Pa.Super. 335.

88. Tex.—King v. Floyd, Civ.App., 538 S.W.2d 166, err. ref. no rev. err.

91. Tex.—Pitts v. Dallas Nurseries Garden Center, Inc., Civ.App., 545 S.W.2d 34.

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98. Pa.—Right Lumber Co. v. Kretchmar, 189 A.2d 302, 200 Pa.Super. 335.

13. U.S.—Pasos v. Ferber, D.C.Pa., 263 F.Supp. 877, affd., C.A., 386 F.2d 452.

Pa.—Kolber v. "The Cyrcle", 249 A.2d 555, 433 Pa. 247.

Eastern Lithographing Corp. v. Neville, 198 A.2d 391, 203 Pa.Super. 21.

17.5. Miss.—Leach v. Frazier, 215 So.2d 253.

Tex.—King v. Floyd, Civ.App., 538 S.W.2d 166, err. ref. no rev. err.

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21. U.S.—Dunn v. Printing Corp. of America, D.C. Pa., 245 F.Supp. 875—Pasos v. Ferber, D.C.Pa., 263 F.Supp. 877, affd., C.A., 386 F.2d 452.

Royalties

Pa.—Sheryl Records, Inc. v. Pickens, 245 A.2d 454, 431 Pa. 299.

29.50. Phrase "disposable earnings payable from garnishee" construed

U.S.—Hodgson v. Cleveland Municipal Court, D.C. Ohio, 326 F.Supp. 419.

Income tax refund is not "earnings"

U.S.—In re Kokoszka, C.A.Conn., 479 F.2d 990, affd. 94 S.Ct. 2431, reh. den. 95 S.Ct. 160.

In re Verill, Bkrtcy.Md., 17 B.R. 652.

Other definitions

U.S.—In re Kokoszka, C.A.Conn. 479 F.2d 990, affd. 94 S.Ct. 2431, reh. den. 95 S.Ct. 160.

Benefits and pension not earnings

Cal.—Phillips v. Bartolome, 121 Cal.Rptr. 56, 46 C.A.3d 346.

La.—Legier v. Legier, App., 357 So.2d 1203.

Termination payments

U.S.—In re Marshburn, Bkrtcy.Colo., 5 B.R. 711.

Vacation pay constitutes "earnings"

Ohio—Riley v. Kessler, 441 N.E.2d 638, 2 Ohio Misc.2d 4, 2 O.B.R. 351.

30. Separation allowance

Ill.—Arrow S Credit Union v. Harrell, 248 N.E.2d 312, 109 Ill.App.2d 59.

Ohio—Employees Credit Union, Inc. v. Glanton, 176 N.E.2d 926.

32. Retirement pay

U.S.—Evans v. Evans, D.C.Okl., 429 F.Supp. 580, N.C.—Elmwood v. Elmwood, 244 S.E.2d 668, 295 N.C. 168.

Tex.—U.S. v. Fleming, Civ.App., 565 S.W.2d 87.

39. Kan.—Coward v. Smith, 636 P.2d 793, 6 Kan. App.2d 863.

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49. When life insurance proceeds not "income"

U.S.—John Hancock Mut. Life Ins. Co. v. Frost Nat. Bank of San Antonio, D.C.Tenn., 393 F.Supp. 204, affd., C.A., 516 F.2d 901, two cases.

53. Termination of employment immaterial

La.—Laurencic v. Jones, App., 180 So.2d 803.

54. Alaska—Miller v. Monrean, 507 P.2d 771.

Pa.—Friendly Consumer Discount Co. v. Dillman, 41 D. & C.2d 397.

56. "In the hands of the employer"

(1) Pa.—Eastern Lithographing Corp. v. Neville, 198 A.2d 391, 203 Pa.Super. 21.

(2) Other matters.

N.Y.—Erenerol v. McCarthy, 248 N.Y.S.2d 464, 20 A.D.2d 798.

Pa.—Kolber v. "The Cyrcle", 249 A.2d 555, 433 Pa. 247.

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58. Fla.—Hertz v. Fisher, App., 339 So.2d 1148.

§ 48. — Amount of Wages and Time within Which Earned

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96. Colo.—First Nat. Bank of Denver v. Columbia Credit Corp., 499 P.2d 1163, 179 Colo. 242.

97. Colo.—First Nat. Bank of Denver v. Columbia Credit Corp., 499 P.2d 1163, 179 Colo. 242.

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4. U.S.—Samples v. Samples, D.C.Okl., 414 F.Supp. 773.

La.—Laurencic v. Jones, App., 180 So.2d 803.

Mo.—Brown v. Brewington, App., 513 S.W.2d 768.

N.J.—Household Finance Corp. v. Clevenger, 357 A.2d 279, 141 N.J.Super. 53.

N.Y.—City & Suburban Homes Co. v. John J. Reynolds, Inc., 240 N.Y.S.2d 628, 39 Misc.2d 299.

Ohio—Sterling Finance Co. v. Thornhill, 272 N.E.2d 650.

Sterling Finance Co. v. Thornhill, 263 N.E.2d 925, 25 Ohio Misc. 213.

Statute not intended as limitation of child support order

La.—Davis v. Contornio, App., 234 So.2d 470.

§ 49. — Future Wages or Earnings

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14. Ala.—Walker v. Williams & Boulter Const. Co., Civ., 241 So.2d 896, 46 Ala.App. 337.

18. N.Y.—In re Jones' Claim, 242 N.Y.S.2d 1004, 19 A.D.2d 330, affd. 248 N.Y.S.2d 652, 14 N.Y.2d 558, 198 N.E.2d 40.

§ 51. Workmen's Compensation

24. U.S.—McDougald v. Norton, D.C.Conn., 361 F.Supp. 1325.

Ill.—East Moline Works Credit Union v. Linn, 200 N.E.2d 910, 51 Ill.App.2d 97.

Iowa—C.J.S. cited in State v. Coburn, 294 N.W.2d 57, 59.

N.Y.—Scheer v. City of Syracuse, 277 N.Y.S.2d 866, 53 Misc.2d 80.

Pa.—Rhodes v. Automotive Ignition Co., 275 A.2d 846, 218 Pa.Super. 281.

Blake v. Com., Dept. of Public Welfare, 439 A.2d 1262, 63 Pa.Cmwlth. 491.

Compensation held not attachable

Mich.—Petrie v. Petrie, 199 N.W.2d 673, 41 Mich.App. 80.

Mo.—Patton v. Patton, App., 573 S.W.2d 71.

Medical benefits included

Tex.—Lively v. Blue Cross Hospital Service, Inc., Civ. App., 488 S.W.2d 474, err. rev. no rev. err.

Award for wife's nursing services not exempt
Cal.—Spire v. Malito, 160 Cal.Rptr. 698, 99 C.A.3d 16.

Exemption of workmen's compensation payments or benefits due is applicable only to civil debts due, and not to any alimony or support payments due under a divorce decree.^{24.5}

24.5. Ga.—American Mut. Liability Ins. Co. v. Hicks, 283 S.E.2d 18, 159 Ga.App. 214—Travelers Ins. Co. v. Moxley, 287 S.E.2d 340, 160 Ga.App. 391. Mich.—Petrie v. Petrie, 199 N.W.2d 673, 41 Mich.App. 80.

N.Y.—Dallesandro v. Dallesandro, 442 N.Y.S.2d 400, 110 Misc.2d 342.

Okl.—Meadows v. Meadows, 619 P.2d 598.

25. Ill.—East Moline Works Credit Union v. Linn, 200 N.E.2d 910, 51 Ill.App.2d 97.

In lieu of compensation

Cal.—Knopfer v. Flournoy, 109 Cal.Rptr. 892, 34 C.A.3d 318.

26. Ill.—East Moline Works Credit Union v. Linn, 200 N.E.2d 910, 51 Ill.App.2d 97.

N.J.—General Motors Acceptance Corp. v. Falcone, 327 A.2d 699, 130 N.J.Super. 517.

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28. Tex.—Anthony v. Anthony, App., 624 S.W.2d 388, err. dism.

Public assistance payments

U.S.—McDougald v. Norton, D.C.Conn., 361 F.Supp. 1325.

32. N.Y.—Scheer v. City of Syracuse, 277 N.Y.S.2d 866, 53 Misc.2d 80.

§ 52. Wearing Apparel, Yarn, and Cloth

39. U.S.—In re Perry, Bkrcty.Va., 6 B.R. 263.

§ 53. — Ornaments and Jewelry**page 106**

64. U.S.—In re Westhem, C.A.Cal., 642 F.2d 1139. Iowa—C.J.S. cited in Forsyth v. Forsyth, 210 N.W.2d 430, 431.

Investment of value

U.S.—In re Mims, Bkrcty.N.C., 49 B.R. 283.

§ 54. Work Animals, Vehicles, and Harness**page 108****98. Other definitions**

U.S.—"Vehicle" for purposes of Iowa's exemption statute, which allows a farmer to exempt a team and wagon or other vehicle that farmer uses to habitually earn his living, is that in or on which a person or thing is carried, or may be carried, and is a means of conveyance; a wheelbarrow, a covered wagon, a rolls-royce, a patient mule, a man-of-war, and possibly a pullman car or ocean liner is a "vehicle." Matter of Hahn, Bkrcty.Iowa, 5 B.R. 242.

7. U.S.—In re McCoy, C.A.Okl., 643 F.2d 684.

8. U.S.—In re Sisemore, C.A.Tex., 602 F.2d 742. In re Setley, Bkrcty.Minn., 11 B.R. 106.

La.—Grayson v. Gray, App., 207 So.2d 916.

Exemptions may not be stacked in one vehicle
U.S.—In re Pastorek, Bkrcty.Ill., 33 B.R. 406—In re Terry, Bkrcty.Ill., 41 B.R. 508 (disagreeing with In re Pastorek, Jr., 33 B.R. 406).

One vehicle only exempt

U.S.—Matter of Hahn, Bkrcty.Iowa, 5 B.R. 242.

Tex.—Coghlan v. Sullivan, Civ.App., 480 S.W.2d 229.

page 109**16.5. Partners each entitled**

U.S.—Phillips v. C. Palomo & Sons, C.A.Tex., 270 F.2d 791.

20. Me.—Perkins v. McGonagle, 342 A.2d 287.

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21. Cal.—Lopp v. Lopp, 18 Cal.Rptr. 338, 198 C.A.2d 474.

22. La.—Terplan, Inc. v. Tucker, App., 215 So.2d 385.

§ 55. — Use and Necessity**page 112****32.5. Transportation**

Iowa—Frudden Lumber Co. v. Clifton, 183 N.W.2d 201.

§ 57. Property Necessary to Enjoyment of Exempt Property**page 114****61. House trailer**

La.—Oubre v. Hinchman, App., 365 So.2d 17, writ den., Sup., 365 So.2d 1375.

§ 58. Proceeds

70.5. Disability insurance or unemployment compensation

Cal.—Kruger v. Wells Fargo Bank, 113 Cal.Rptr. 449, 521 P.2d 441, 11 C.3d 352, 65 A.L.R.3d 1266.

§ 59. — Sale or Exchange

71. U.S.—Oklahoma Gas & Elec. Co. v. U.S., C.A. Okl., 609 F.2d 1365.

page 115**72. Portion of property held not exempt**

D.C.—District of Columbia v. Phillips, C.A., 347 F.2d 795, 121 U.S.App.D.C. 11.

76. Kan.—C.J.S. cited in International Harvester Credit Corp. v. Ross, 538 P.2d 655, 658, 217 Kan. 683.

§ 63. In General**page 118**

11. U.S.—In re Ferguson, Bkrcty.Colo., 15 B.R. 439. Pa.—In re McGreevy's Estate, 286 A.2d 355, 445 Pa. 318.

Tex.—Baucum v. Texam Oil Corp., Civ.App., 423 S.W.2d 434, err. ref. no rev. err.

17. U.S.—Matter of Ziegler, Bkrcty.Ohio, 20 B.R. 449.

§ 64. Joint Ownership**page 119****31. Joint tenants**

U.S.—In re Lausch, D.C.Fla., 16 B.R. 162.

§ 65. Partnership Property

33. U.S.—Phillips v. C. Palomo & Sons, C.A.Tex., 270 F.2d 791.

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66. U.S.—In re Browning, Bkrcty.Ala., 13 B.R. 6.

Uniform Partnership Act

Tex.—Kelley v. Shields, Civ.App., 448 S.W.2d 135, err. ref. no rev. err.

§ 66. In General**page 122**

76. U.S.—In re Bradley, Bkrcty.Ala., 19 B.R. 265. Ark.—Duraclean Co. v. Foltz, 397 S.W.2d 804, 240 Ark. 38.

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Fla.—In re Livingston's Estate, App., 161 So.2d 723. N.Y.—Tuckman v. Hayward, 204 N.Y.S.2d 655, 26 Misc.2d 45—Abraham & Straus, Division of Federated Dept. Stores, Inc. v. Feynman, 337 N.Y.S.2d 654, 71 Misc.2d 928.

Statutes construed

(2) Other statutes.

U.S.—In re Harrison, Bkrcty.Ga., 13 B.R. 293.

Cal.—Independence Bank v. Heller, 79 Cal.Rptr. 868, 275 C.A.2d 84.

76.5. N.Y.—Sailers' Snug Harbor in City of New York v. Tax Commission of City of New York, 259 N.E.2d 910, 26 N.Y.2d 444, 311 N.Y.S.2d 481.

Tuckman v. Hayward, 204 N.Y.S.2d 655, 26 Misc.2d 45.

Accumulated funds. Funds accumulated from a series of payments to the debtor may be reached by a judgment creditor to the extent that the total amount on hand exceeds the authorized exemption even though each of the payments was less than the exemption and by itself could have been claimed as within the exemption at the time it was received.^{80.5}

80.5. U.S.—New Amsterdam Cas. Co. v. Waller, D.C.N.C., 196 F.Supp. 780, revd. on oth. grds., C.A., 301 F.2d 839.

§ 68. Double Exemptions**page 124**

20. U.S.—In re Margolis, C.A.Cal., 456 F.2d 213.

§ 69. Successive Claims**page 125**

26. U.S.—C.J.S. cited in New Amsterdam Cas. Co. v. Waller, D.C.N.C., 196 F.Supp. 780, 785, revd. on oth. grds., C.A., 301 F.2d 839.

27. U.S.—C.J.S. cited in New Amsterdam Cas. Co. v. Waller, D.C.N.C., 196 F.Supp. 780, 785, revd. on oth. grds., C.A., 301 F.2d 839.

§ 70. In General

34. Cal.—In re Marriage of Sanabia, 157 Cal.Rptr. 56, 95 C.A.3d 483.

La.—Tri-State Finance Corp. v. Surry, App., 139 So.2d 100.

Judgment lien

U.S.—In re Flege, Bkrcty.Ohio, 17 B.R. 690.

Unsecured creditors

Tex.—Klein v. Klein, Civ.App., 370 S.W.2d 769.

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35. Md.—U.S. v. Williams, 370 A.2d 1134, 279 Md. 673.

Tex.—Baucum v. Texam Oil Corp., Civ.App., 423 S.W.2d 434, err. ref. no rev. err.

Receiver of savings and loan association not creditor of depositor

Md.—Smolin v. First Fidelity Sav. and Loan Ass'n, 209 A.2d 546, 238 Md. 386.

36. Fla.—Miami Herald Pub. Co. v. Payne, App., 345 So.2d 730, quashed Sup., 358 So.2d 541, adopted App., 360 So.2d 122.

Expenses of last illness, funeral, and administration

(3) Other statements.

Fla.—In re Livingston's Estate, App., 161 So.2d 723.

Property encumbered for more than value

U.S.—In re Evans, Bkrcty.Tex., 25 B.R. 105.

37. Fla.—Sweeten v. Anderson, App. 4 Dist. 414 So.2d 258.

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§ 71. Constitutionality, Construction, and Operation of Exemptions

40. Pension funds

N.Y.—Villano v. Villano, 414 N.Y.S.2d 625, 98 Misc.2d 774.

Attaching annuity payments

N.Y.—Aurora G. v. Harold Aaron G., 414 N.Y.S.2d 632, 98 Misc.2d 695.

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48. Cal.—Greene v. Franchise Tax Bd., 103 Cal.Rptr. 483, 27 C.A.3d 38.

51. Terms of statute itself

N.Y.—Helmley-Spear, Inc. v. Winter, 426 N.Y.S.2d 778, 74 A.2d 195, aff'd. 419 N.E.2d 1078, 52 N.Y.2d 984, 438 N.Y.S.2d 79.

§ 72. Character Based on Contract or Tort

54. U.S.—Satterfield v. Clark, D.C.Ala., 514 F.Supp. 1323, aff'd., C.A., 685 F.2d 1387.

§ 81. Costs and Fees in Civil Actions

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§ 83. Alimony or Maintenance

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12. Cal.—Thomas v. Thomas, 13 Cal.Rptr. 872, 192 C.A.2d 771.

Fla.—Azar v. Graham, App., 194 So.2d 684, cert. discharged, Sup., 204 So.2d 193.

Pension

U.S.—American Tel. and Tel. Co. v. Merry, C.A.Conn., 592 F.2d 118.

Ball v. Revised Retirement Plan for Salaried Emp. of Johns-Manville Corp. and Subsidiaries, D.C.Colo., 522 F.Supp. 718.

Cal.—Ogle v. Heim, 69 Cal.Rptr. 579, 442 P.2d 659, 69 C.2d 7, app. dismissed. 89 S.Ct. 477, 393 U.S. 265, 21 L.Ed.2d 426—Miller v. Superior Court of Los Angeles County, 69 Cal.Rptr. 583, 442 P.2d 663, 69 C.2d 14.

Conaway v. Conaway, 32 Cal.Rptr. 890, 218 C.A.2d 427—In re Marriage of McGhee, 182 Cal.Rptr. 456, 131 C.A.3d 408.

Tex.—U.S. v. Wakefield, Civ.App., 572 S.W.2d 569, err. dismissed.

Contributions to pension fund

Wash.—Boronat v. Boronat, 537 P.2d 1050, 13 Wash. App. 671.

Workmen's compensation benefits

Or.—Satterfield v. Satterfield, 643 P.2d 336, 292 Or. 780—disapproving Calvin v. Calvin, 6 Or.App. 572, 487 P.2d 1164, 489 P.2d 403.

13.5. U.S.—Cody v. Riecker, D.C.N.Y., 454 F.Supp. 22, aff'd., C.A., 594 F.2d 314.

N.Y.—M. H. v. J. H., 403 N.Y.S.2d 411, 93 Misc.2d 1016.

14. U.S.—Operating Engineers Local No. 428 Pension Trust Fund v. Zamborsky, C.A.Ariz. 650 F.2d 196.

In re Willert, D.C.Cal., 265 F.Supp. 999.

Ala.—Kendrick v. Kendrick, 124 So.2d 78, 271 Ala. 372.

Ariz.—Bickel v. Bickel, 495 P.2d 154, 17 Ariz.App. 29.

Cal.—McIntosh v. McIntosh, 26 Cal.Rptr. 28, 209 C.A.2d 374.

Fla.—City of Miami v. Spurrier, App., 320 So.2d 397.

Ga.—C.F.S. cited in Pollock Paper Corp. v. Klebold, 123 S.E.2d 459, 461, 104 Ga.App. 653—Southern

Motors of Savannah, Inc. v. Cleary, 213 S.E.2d 920, 134 Ga.App. 278.

Minn.—Knapp v. Johnson, 301 N.W.2d 548.

N.J.—Steller v. Steller, 235 A.2d 476, 97 N.J.Super. 493, 31 A.L.R.3d 526.

N.Y.—Albert v. Albert, 199 N.Y.S.2d 766—King v. King, 255 N.Y.S.2d 938, 45 Misc.2d 149.

Pa.—Com. ex rel. Magrini v. Magrini, 398 A.2d 179, 263 Pa.Super. 366.

Wash.—Boronat v. Boronat, 537 P.2d 1050, 13 Wash. App. 671.

Protection of family

N.Y.—Dallandro v. Dallandro, 442 N.Y.S.2d 400, 110 Misc.2d 342.

(2) Other matters.

U.S.—Senco of Florida, Inc. v. Clark, D.C.Fla., 473 F.Supp. 902.

N.J.—Thiel v. Thiel, 197 A.2d 354, 41 N.J. 446.

N.D.—Albrecht v. Albrecht, 99 N.W.2d 229.

Wages

(3) Other matters.

Cal.—Henry v. Henry, 6 Cal.Rptr. 418, 182 C.A.2d 707—Rasmussen v. Rasmussen, 79 Cal.Rptr. 842, 275 C.A.2d 443.

Ga.—Moore-McCormack Lines, Inc. v. Hill, 147 S.E.2d 55, 113 Ga.App. 12.

N.J.—Burstein v. Burstein, 442 A.2d 1056, 182 N.J.Super. 586.

Pension, disability, retirement, or annuity funds

(1) Kan.—Mahone v. Mahone, 517 P.2d 131, 213 Kan. 346.

Minn.—Faus v. Faus, 319 N.W.2d 408.

N.Y.—Fordyce v. Fordyce, 365 N.Y.S.2d 323, 80 Misc.2d 909.

Pa.—Young v. Young, 488 A.2d 264, 507 Pa. 40, disapproving Commonwealth ex rel. Cerminara v. Cerminara, 239 Pa.Super. 111, 362 A.2d 1011; Commonwealth v. Mooney, 172 Pa.Super. 30, 92 A.2d 258.

(3) Vt.—LaFarr v. LaFarr, 315 A.2d 235, 132 Vt. 191.

(5) Other matters.

U.S.—Cody v. Riecker, C.A.N.Y., 594 F.2d 314.

N.J.—Thiel v. Thiel, 197 A.2d 354, 41 N.J. 446.

N.Y.—Wanamaker v. Wanamaker, 401 N.Y.S.2d 702, 93 Misc.2d 784.

Tex.—Perkins v. Perkins, App., 690 S.W.2d 706, err. ref. n.r.e.

Exemption allowed

Fla.—Graham v. Azar, 204 So.2d 193—Healey v. Toolan, App., 227 So.2d 55.

Mo.—Davis v. Thompson, App., 619 S.W.2d 754.

Social Security Act disability payments not exempt

Okl.—Huskey v. Batts, App., 530 P.2d 1375.

Claim held to lose status by assignment

Mo.—Brown v. Brewington, App., 513 S.W.2d 768.

Workmen's Compensation benefits

Ga.—American Mut. Liability Ins. Co. v. Hicks, 283 S.E.2d 18, 159 Ga.App. 214.

Mo.—Patton v. Patton, App., 573 S.W.2d 71.

N.Y.—Dallandro v. Dallandro, 442 N.Y.S.2d 400, 110 Misc.2d 342.

Servicemen Group Life Insurance Act provisions not exempt

U.S.—Ridgway v. Ridgway, Me., 102 S.Ct. 49, 454 U.S. 46, 70 L.Ed.2d 39.

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15. Ohio—Brown v. Brown, 288 N.E.2d 852, 32 Ohio App.2d 139.

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17. N.Y.—M. H. v. J. H., 403 N.Y.S.2d 411, 93 Misc.2d 1016.

18.10. Colo.—Packard v. Packard, 519 P.2d 1221, 33 Colo.App. 308.

Fla.—Costa v. Costa, App., 285 So.2d 665.

Wages

(2) Other matters.

Ohio—Door County Memorial Hospital v. Cole, App., 171 N.E.2d 184, cert. den. 81 S.Ct. 165, 366 U.S. 930, 6 L.Ed.2d 389.

Pa.—Birl v. Birl, 24 D. & C.2d 421, 48 Del.Co. 387.

19.5. Tex.—Dillard v. Dillard, Civ.App., 341 S.W.2d 668, err. ref. no rev. err.

20. Exemption not allowed

Cal.—Henry v. Henry, 6 Cal.Rptr. 418, 182 C.A.2d 707.

§ 85. Debts Due Government

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23. Cal.—McDaniel v. City and County of San Francisco, 66 Cal.Rptr. 384, 259 C.A.2d 356.

Conn.—State v. Reed, 241 A.2d 875, 5 Conn.Cir. 69.

Pa.—Com. v. Shafer, 37 D. & C.2d 45.

26. Pa.—Com. v. Garlick, 26 D. & C.2d 389—Petition of Klaric, 27 D. & C.2d 93.

Unpaid taxes

Cal.—Greene v. Franchise Tax Bd., 103 Cal.Rptr. 483, 27 C.A.3d 38.

27. Mont.—State ex rel. Harry v. District Court of Ninth Judicial Dist. of State of Mont., Glacier County, 628 P.2d 657.

Veteran's benefits; support and maintenance

(2) Pa.—In re Rothenberger's Estate, 17 D. & C.2d 383, 51 Berks 35.

(3) D.C.—Savoy v. District of Columbia, C.A., 288 F.2d 851, 110 U.S.App.D.C. 39.

Ill.—Department of Public Welfare v. Sevcik, 164 N.E.2d 10, 18 Ill.2d 449.

Me.—State v. Bean, 195 A.2d 68, 159 Me. 455.

Okl.—State ex rel. Eastern State Hospital v. Beard, 600 P.2d 324.

(7) Other statements.

Ark.—Cruce v. Arkansas State Hospital, 409 S.W.2d 342, 241 Ark. 680.

N.Y.—In re Guardianship of Dugan, 222 N.Y.S.2d 831, 29 Misc.2d 980.

The Social Security Act bars a state from recovering federal disability insurance benefits retroactively paid to a beneficiary.^{27.5}

27.5. U.S.—Philpott v. Essex County Welfare Bd., U.S.N.J., 93 S.Ct. 590, 409 U.S. 413, 34 L.Ed.2d 608.

Survivor's benefits

N.Y.—Colton v. Martell, 359 N.Y.S.2d 632, 79 Misc.2d 190.

§ 86. Purchase Money

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32. Statute as giving lien

U.S.—In re Rade, D.C.Colo., 205 F.Supp. 336.

38. La.—W. T. Grant Co. v. Mitchell, 269 So.2d 186, 263 La. 627, cert. gr. 93 S.Ct. 2276, 411 U.S. 981, 36 L.Ed.2d 957.

§ 88. Necessaries in General

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97. Cal.—In re Marriage of Pallesi, 140 Cal.Rptr. 842, 73 C.A.3d 424.

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1.5. Del.—Bowers v. Cooper's Home Furnishings Co., 255 A.2d 884.

1.10. Cal.—Ratzlaff v. Portillo, 92 Cal.Rptr. 722, 14 C.A.3d 1013.

Del.—Bowers v. Cooper's Home Furnishings Co., 255 A.2d 884.

6. Ohio—Door County Memorial Hospital v. Cole, App., 171 N.E.2d 184, cert. den. 81 S.Ct. 165, 366 U.S. 930, 6 L.Ed.2d 389.

Other items have been held not necessities within the rule.^{9,15}

9.15. Automobile

Cal.—Ratzlaff v. Portillo, 92 Cal.Rptr. 722, 14 C.A.3d 1013.

15. Cal.—Carpenter v. Trujillo, 79 Cal.Rptr. 725, 275 C.A.2d Supp. 1021.

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19. House trailer

Del.—G. A. C. Finance Corp. v. Shaver, Super., 271 A.2d 43.

§ 90. Wages

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35. Fla.—Busot v. Busot, App., 354 So.2d 1255.

§ 91. Other Exceptions

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A statute permitting the state to recover legal defense costs from indigents has been held to deny equal protection.^{54,10}

54.10. U.S.—James v. Strange, Kan., 92 S.Ct. 2027, 407 U.S. 128, 32 L.Ed.2d 600.

§ 92. Enforcement of Claims under Exceptions

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72.5. Cal.—Carpenter v. Trujillo, 79 Cal.Rptr. 725, 275 C.A.2d Supp. 1021.

72.10. Cal.—Carpenter v. Trujillo, Super., 79 Cal.Rptr. 725, 275 C.A.2d Supp. 1021.

The wife may enjoin the use of exempt property pending determination of alimony decree.^{77,5}

77.5. Ohio—Brown v. Brown, 288 N.E.2d 852, 32 Ohio App.2d 139.

§ 93. Right to Transfer in General

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78. N.Y.—Carole K. v. Arnold K., 380 N.Y.S.2d 593, 85 Misc.2d 643, reh. 385 N.Y.S.2d 740, 87 Misc.2d 547.

82. Mo.—Hopkins v. Hopkins, App., 626 S.W.2d 389.

§ 96. — Mortgage, Pledge, or Other Liens

89. U.S.—C.J.S. cited in In re Rade, D.C.Colo., 205 F.Supp. 336, 339.

N.Y.—State v. Avco Financial Service of New York, Inc., 406 N.E.2d 1075, 50 N.Y.2d 383, 429 N.Y.S.2d 181.

§ 97. — Sale or Exchange

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93. N.Y.—State v. Avco Financial Service of New York Inc., 406 N.E.2d 1075, 50 N.Y.2d 383, 429 N.Y.S.2d 181.

§ 98. Consent of Wife or Husband

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7. Wis.—Opitz v. Brawley, 102 N.W.2d 117, 10 Wis.2d 93.

15. Wis.—Opitz v. Brawley, 102 N.W.2d 117, 10 Wis.2d 93.

§ 101. Power to Waive

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45.50. Pa.—Resolute Ins. Co. v. Pennington, 224 A.2d 757, 433 Pa. 472.

Voluntarily relinquish a right he knew he had Pa.—Transnational Consumer Discount Co. v. Kefauver, 307 A.2d 303, 224 Pa.Super. 475.

45.55. Pa.—Mayhugh v. Coon, 331 A.2d 452, 460 Pa. 128.

46. U.S.—In re Caldwell, Bkrcty.Ga., 15 B.R. 811. Cal.—In re Marriage of Thompson, 158 Cal.Rptr. 160, 96 C.A.3d 621.

Kan.—State v. Goering, 392 P.2d 930, 193 Kan. 307.

Waiver not void but voidable

U.S.—In re Caldwell, Bkrcty.Ga., 15 B.R. 811.

§ 102. — Constitutional and Statutory Provisions

A legislature can, by statute, permit the waiver of personal exemptions it has created.^{55,5}

55.5. Kan.—Iowa Mut. Ins. Co. v. Parr, 370 P.2d 400, 189 Kan. 475, 94 A.L.R.2d 960.

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The validity of other statutes considered in relation to waiver of wage exemptions has been determined.^{68,5}

68.5. Statute held valid

Tex.—Moseley v. Texas & N.O.R. Co., Civ.App., 346 S.W.2d 636, err. ref. no rev. err.

§ 103. — By Executory Contract

72. Kan.—C.J.S. cited in Celco, Inc. of America v. Davis Van Lines, Inc., 598 P.2d 188, 191, 226 Kan. 366.

Mont.—C.J.S. cited in Anaconda Federal Credit Union, No. 4401 v. West, 483 P.2d 909, 912, 157 Mont. 175.

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78. Mont.—C.J.S. cited in Anaconda Federal Credit Union, No. 4401 v. West, 483 P.2d 909, 912, 157 Mont. 175.

§ 104. Persons Who May Waive

82. Waiver by attorney of beneficiary

Utah—Oliver v. Mitchell, 376 P.2d 390, 14 Utah2d 9.

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90. Ga.—Cale v. Eastern Air Lines, Inc., 284 S.E.2d 647, 159 Ga.App. 630.

§ 105. Waiver by Contract

Additional agreement

Ala.—Broadway v. Household Finance Corp. of Huntsville, 351 So.2d 1373, cert. den. 351 So.2d 1378.

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6. Judgment note

Pa.—Transnational Consumer Discount Co. v. Kefauver, 307 A.2d 303, 224 Pa.Super. 475.

9. Ala.—Broadway v. Household Finance Corp. of Huntsville, Civ., 351 So.2d 1373, cert. den. 351 So.2d 1378.

§ 106. — Mortgage and Other Liens

15. U.S.—C.J.S. cited in In re Rade, D.C.Colo., 205 F.Supp. 336, 339.

La.—Aetna Finance Co. v. Antoine, App., 343 So.2d 1195.

§ 108. Waiver by Conduct

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55. Utah—Oliver v. Mitchell, 376 P.2d 390, 14 Utah2d 9.

§ 110. — Failure to Assert Claim

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77. Nev.—Nationwide Finance Corp. v. Wolford, 396 P.2d 398, 80 Nev. 502.

Tex.—Coghlan v. Sullivan, Civ.App., 480 S.W.2d 229.

Wis.—Home Bank v. Becker, 179 N.W.2d 855, 48 Wis.2d 1.

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93. Nev.—Nationwide Finance Corp. v. Wolford, 396 P.2d 398, 80 Nev. 502.

94. Nev.—Nationwide Finance Corp. v. Wolford, 396 P.2d 398, 80 Nev. 502.

Wis.—Opitz v. Brawley, 102 N.W.2d 117, 10 Wis.2d 93.

§ 111. Operation and Effect of Waiver

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5. U.S.—Elzea v. National Bank of Georgia, C.A.Ga., 570 F.2d 1248.

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23. Ala.—C.J.S. cited in Underwood v. First Ala. Bank of Huntsville, 453 So.2d 742, 744.

§ 116. Forfeiture

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7. N.C.—Elmwood v. Elmwood, 241 S.E.2d 693, 34 N.C.App. 652, mod. and remanded 244 S.E.2d 668, 295 N.C. 168.

§ 119. In General

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55. N.Y.—Dumpson v. Ward, 262 N.Y.S.2d 159, 24 A.D.2d 570.

59. Cal.—Phillips v. Bartolomei, 121 Cal.Rptr. 56, 46 C.A.3d 346.

S.D.—Layton v. Chase, 144 N.W.2d 561, 82 S.D. 270.

61. N.Y.—Izzo v. Kirby, 287 N.Y.S.2d 994, 56 Misc.2d 131.

§ 120. Persons Who May Assert Claim

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64. Mich.—Matter of Vary's Estate, 237 N.W.2d 498, 65 Mich.App. 447, affd. 258 N.W.2d 11, 401 Mich. 340, cert. den. 98 S.Ct. 1283, 434 U.S. 1087, 55 L.Ed.2d 793.

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65. Del.—Wilmington Trust Co. v. Barry, Super., 338 A.2d 575, affd. Sup., 359 A.2d 664.

Personal claim not required

R.I.—Warwick Municipal Emp. Credit Union v. Berard, 157 A.2d 818, 90 R.I. 317.

§ 121. Powers and Duties of Levying Officers

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73. Fee received from creditor

Cal.—Lampley v. Alvares, 123 Cal.Rptr. 181, 50 C.A.3d 124.

82. Mo.—Dancer v. Chenault, App., 527 S.W.2d 714.

Not applicable to debt due government

Cal.—McDaniel v. City and County of San Francisco, 66 Cal.Rptr. 384, 259 C.A.2d 356.

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§ 122. Process and Proceedings against Which Exemption May Be Claimed

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5. N.C.—Montford v. Grohman, 245 S.E.2d 219, 36 N.C.App. 733, app. dismissed. 248 S.E.2d 727, 295 N.C. 551.

§ 123. — Attachment and Garnishment

Library References

Evidence ⇐109, 110.

7. Tex.—In Interest of Solomon, Civ.App., 546 S.W.2d 129, err. ref. no rev. err.
Vt.—Milne v. Shell Oil Co., 278 A.2d 741, 129 Vt. 375.

Statute construed

- N.J.—Biles v. Biles, 394 A.2d 153, 163 N.J.Super. 49.
N.C.—First Nat. Bank of Shelby v. Dixon, 248 S.E.2d 416, 38 N.C.App. 430.

8. U.S.—Permian Corp. v. Armco Steel Corp., C.A. Wyo., 508 F.2d 68.

9. Colo.—State v. Butler's Estate, 491 P.2d 102, 30 Colo.App. 246.

12. U.S.—Marshall v. District Court for Forty-First-b Judicial Dist. of Michigan, Mount Clemens Division, D.C.Mich., 444 F.Supp. 1110—Commercial Mortg. Ins. Inc. v. Citizens Nat. Bank of Dallas, D.C.Tex., 526 F.Supp. 510.

- Cal.—Los Angeles County Emp. Union, Local 434 v. Los Angeles County, Bd. of Sup'rs, 109 Cal.Rptr. 46, 33 C.A.3d 269—Raigoza v. Sperl, 110 Cal.Rptr. 296, 34 C.A.3d 560.

- Fla.—Noland Co. v. Linning, App., 132 So.2d 802.
Ga.—Roquemore v. Goldstein, 112 S.E.2d 24, 100 Ga. App. 591.

- Ill.—Libby Furniture & Appliance Co. v. Nabors, 230 N.E.2d 28, 86 Ill.App.2d 381—Kaufman v. Hicks, 307 N.E.2d 615, 17 Ill.App.3d 274.

- N.J.—Biles v. Biles, 394 A.2d 153, 163 N.J.Super. 49.
N.M.—Laughlin v. Lumbert, 362 P.2d 507, 68 N.M. 351.

"Garnishment" construed

- N.Y.—General Motors Acceptance Corp. v. Metropolitan Opera Ass'n, Inc., 413 N.Y.S.2d 818, 98 Misc.2d 307.

Statute inapplicable to checking accounts

- Ill.—Deschauer v. Hilt, 434 N.E.2d 552, 61 Ill.Dec. 399, 105 Ill.App.3d 657.

13. Duty not imposed on bank

- U.S.—Usery v. First Nat. Bank of Arizona, C.A.Ariz., 586 F.2d 107.

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16. Ga.—W. T. Grant Co. v. General Finance Corp., 186 S.E.2d 324, 124 Ga.App. 742.

18. U.S.—Marshall v. District Court for Forty-First-b Judicial Dist. of Michigan, Mount Clemens Division, D.C.Mich., 444 F.Supp. 1110.

In re Kahn, Bkrtcy.Ala., 16 B.R. 15.

Statute inapplicable

- Okl.—Freeling v. State ex rel. Sebring, 452 P.2d 789.

§ 125. — Execution

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28. Del.—Household Finance Corp. v. Johnson, Super., 346 A.2d 177.

- N.Y.—Erenrol v. McCarthy, 248 N.Y.S.2d 464, 20 A.D.2d 798.

Necessity for levy

- U.S.—New Amsterdam Cas. Co. v. Waller, C.A.N.C., 301 F.2d 839.

- N.Y.—Wyoming County Bank & Trust Co. v. Kiley, 199 N.Y.S.2d 277.

§ 127. — Set-Off and Counter-claim

page 176

43. Colo.—Finance Acceptance Co. v. Breaux, 419 P.2d 955, 160 Colo. 510.

47. N.Y.—Soto v. Catherwood, 317 N.Y.S.2d 70, 35 A.D.2d 395.

§ 128. — Miscellaneous Proceedings

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In other instances a claim of exemption has been held unavailable.^{61.1}

61.1. Restitution of premises to landlord

- Cal.—Gray v. Whitmore, 94 Cal.Rptr. 904, 17 C.A.3d 1.

Reimbursement of landlord for storage charges after eviction

- Cal.—Gray v. Whitmore, 94 Cal.Rptr. 904, 17 C.A.3d 1.

Restitution for unlawful detainer

- Minn.—McPherson v. University Motors, Inc., 193 N.W.2d 616, 292 Minn. 147.

Divorce proceedings

- Mich.—Michigan Public School Emp. Retirement Bd. v. Peterson, 197 N.W.2d 854, 39 Mich.App. 568.

§ 130. — Necessity

In a proceeding to declare a constructive trust with respect to gifts received from a debtor, the donee has been held not entitled to claim the personal property exemption of the debtor.^{61.5}

- 61.5. U.S.—New Amsterdam Cas. Co. v. Waller, C.A.N.C., 323 F.2d 20, cert. den. 84 S.Ct. 1124, 376 U.S. 963, 11 L.Ed.2d 981.

62. Ind.—Mims v. Commercial Credit Corp., 307 N.E.2d 867, 261 Ind. 591.

- S.D.—Layton v. Chase, 144 N.W.2d 561, 82 S.D. 270.

Statutory requirement reasonable

- Cal.—Phillips v. Bartolome, 121 Cal.Rptr. 56, 46 C.A.3d 346.

63. Cal.—Smith v. Rhea, 140 Cal.Rptr. 116, 72 C.A.3d 361.

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76. N.Y.—In re Livingston's Estate, 211 N.Y.S.2d 897, 30 Misc.2d 71, affd. 220 N.Y.S.2d 434, 14 A.D.2d 264.

§ 131. — Time

81. Ala.—Russell v. Waller, 217 So.2d 534, 283 Ala. 385.

89.5. Motion not untimely

- Del.—Wilmington Trust Co. v. Barry, Super., 338 A.2d 575, affd. Sup., 359 A.2d 664.

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- 13.10. Fla.—Maryl v. Hernandez, App., 254 So.2d 47.

§ 132. — Form and Sufficiency

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42. Ala.—Sterling v. Colvard, 225 So.2d 790, 284 Ala. 730.

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60. N.C.—Sturgill v. Sturgill, 272 S.E.2d 423, 49 N.C. Ann. 578.

§ 133. — Presentation and Filing

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83. Payment of filing fee not prerequisite

- Cal.—Lampley v. Alvares, 123 Cal.Rptr. 181, 50 C.A.3d 124.

89. Ark.—Winkle v. Grand Nat. Bank, 590 S.W.2d 852, 267 Ark. 101.

Under a statute so providing a claim for exemption is properly filed only in the county in which the claimant resides.^{89.5}

- 89.5. U.S.—In re Smith, Bkrtcy.Va., 22 B.R. 866.

§ 136. Schedule or Inventory

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48. Ind.—Schuler v. Langdon, App., 433 N.E.2d 841.

§ 139. Allotment and Setting Apart

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97. Jurisdiction

- (2) Magistrate court without jurisdiction.

- Mo.—Dancer v. Chenault, Civ.App., 527 S.W.2d 714.

§ 140. Contest and Hearing

Library References

Evidence ⇐127.

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8. Ind.—Mims v. Commercial Credit Corp., 307 N.E.2d 867, 261 Ind. 591.

- Mass.—Hale v. Gravalles, 162 N.E.2d 817, 340 Mass. 96.

Reduction of previously ordered wage assignment

- Or.—State ex rel. Roth v. Bookhart, 586 P.2d 382, 37 Or.App. 173.

10. Ala.—Holley v. Crow, Civ., 355 So.2d 1123.

- Cal.—Westervelt v. Robertson, 176 Cal.Rptr. 94, 122 C.A.3d Supp. 1.

- Fla.—Miami Herald Pub. Co. v. Payne, 358 So.2d 541, adopted App., 360 So.2d 122.

14. Wash.—Costanzo v. Harris, 427 P.2d 963, 71 Wash.2d 254.

Affidavit sufficient

- Ga.—Southern Motors of Savannah, Inc. v. Cleary, 213 S.E.2d 920, 134 Ga.App. 50.

15. Ala.—Holley v. Crow, Civ., 355 So.2d 1123.

15.5. Burden not sustained

- Ala.—Walker v. Williams & Boulter Const. Co., Civ., 241 So.2d 896, 46 Ala.App. 337.

§ 142. Successive Exemptions

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29. U.S.—New Amsterdam Cas. Co. v. Waller, D.C. N.C., 196 F.Supp. 780, rev'd. on oth. grds., C.A., 301 F.2d 839.

- N.C.—Commissioner of Banks v. Yelverton, 168 S.E. 305, 204 N.C. 441.

§ 145. Motions and Summary Proceedings

33. N.Y.—Power v. Loonam, 266 N.Y.S.2d 865, 49 Misc.2d 127.

37. Cal.—Burke v. Superior Court of Sacramento County, 78 Cal.Rptr. 481, 455 P.2d 409, 71 C.2d 276.

Necessity of affidavits

- Mont.—Kidder v. Varner, 347 P.2d 721, 136 Mont. 328.

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46. N.Y.—Bond Stores, Inc. v. Sanford, 334 N.Y.S.2d 938, 70 Misc.2d 697.
47. La.—Grayson v. Gray, App., 207 So.2d 916.
55. Mich.—Pease v. North American Finance Corp., 244 N.W.2d 400, 69 Mich.App. 165.
- N.Y.—King v. King, 255 N.Y.S.2d 938, 45 Misc.2d 149.

§ 148. — Right of Action in General

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85. S.D.—Layton v. Chase, 144 N.W.2d 561, 82 S.D. 270.

§ 153. — Injunction Generally

page 203

18. Injunction void where no bond required
Tex.—Evans Division-Royal Industries v. Jeffries, Civ. App., 511 S.W.2d 71, revd. on oth. grds. 510 S.W.2d 579, mand. conf. to 516 S.W.2d 214.
- (1) Other matters.

§ 154. — Injunction against Proceedings in Another State

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20. Iowa—C.J.S. cited in State v. Coburn, 294 N.W.2d 57, 60.

§ 155. Defenses

§ 156. — Set-off of Debt or Judgment of Creditor

page 205

31. Cal.—Kruger v. Wells Fargo Bank, 113 Cal.Rptr. 449, 521 P.2d 441, 11 C.3d 352, 65 A.L.R.3d 1266.
- Del.—Household Finance Corp. v. Johnson, Super., 346 A.2d 177.

§ 159. Pleading

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62. Demurrer held sufficient to raise law issues

- Or.—Calvin v. Calvin, App., 487 P.2d 1164, mand. mod. on oth. grds. and reh. den. 489 P.2d 403.
71. La.—Rousseau v. Atlas Finance Co., App., 167 So.2d 495, application den. 168 So.2d 824, 246 La. 917.

§ 160. Presumptions and Burden of Proof

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88. Ala.—Walker v. Williams & Boulter Const. Co., Civ., 241 So.2d 896, 46 Ala.App. 337.
93. Ark.—Carter v. Helena Marine Service, Inc., 475 S.W.2d 528, 251 Ark. 876.
- N.Y.—Dickens v. Director of Finance of City of New York, 258 N.Y.S.2d 211, 45 Misc.2d 882.
94. Ala.—Walker v. Williams & Boulter Const. Co., Civ., 241 So.2d 896, 46 Ala.App. 337.
- N.Y.—Dickens v. Director of Finance of City of New York, 258 N.Y.S.2d 211, 45 Misc.2d 882.

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10. N.Y.—Tuckman v. Hayward, 204 N.Y.S.2d 655, 26 Misc.2d 45.

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41. Other presumptions

- Cal.—Independence Bank v. Heller, 79 Cal.Rptr. 868, 275 C.A.2d 84.

§ 162. Weight and Sufficiency of Evidence

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27. Evidence held to establish exemption

- La.—Terplan, Inc. v. Tucker, App., 215 So.2d 385.

Evidence held sufficient to establish other facts

- N.Y.—Power v. Loonam, 266 N.Y.S.2d 865, 49 Misc.2d 127.

Evidence held insufficient to establish other facts

- U.S.—Gray v. U.S., D.C.Cal., 226 F.Supp. 479.
- La.—Laurencic v. Jones, App., 180 So.2d 803.

§ 163. Trial and Hearing

page 213

60. Purpose of statute as to garnishment of wages

- La.—American Universal Ins. Co. v. Coleman, App., 121 So.2d 265.

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73. Pa.—Houston-Starr Co. v. Davenport, 324 A.2d 495, 227 Pa.Super. 186.

§ 165. Damages

page 217

27. La.—Cox v. Smith, App., 275 So.2d 459.
- 34.5. La.—Cox v. Smith, App., 275 So.2d 459.

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EXERTION. The term "exertion" is not confined in its use to muscular efforts, but means the act of putting some power or faculty into vigorous action; a strong effort, either of the body or the mind.^{13.50}

- 13.50. Okl.—Bill Gover Ford Co. v. Roniger, 426 P.2d 701, 704.

EXHAUST.

19. U.S.—Darby v. Daniel, D.C.Miss., 168 F.Supp. 170, 192.

Similarly defined

- (1) "Exhaust" means to expend completely.—Darby v. Daniel, D.C.Miss., 168 F.Supp. 170, 192.

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EXHIBIT.

As a Verb

— Present Tense.

34. Cal.—People v. Campise, 51 Cal.Rptr. 815, 820, 242 C.A.2d Supp. 905.

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35. Cal.—People v. Campise, 51 Cal.Rptr. 815, 820, 242 C.A.2d Supp. 905.

38. Similarly defined

- (1) To offer or present for inspection.—People v. Campise, 51 Cal.Rptr. 815, 820, 242 C.A.2d Supp. 905.
- (2) To display or to show by any method.—Bartsch v. Metro-Goldwyn-Mayer, Inc., C.A.N.Y., 391 F.2d 150, 154.

EXHIBITION.

49. Similarly defined

- (2) "Exhibition" is an act or instance of exhibiting for inspection, or of holding forth to view, and its manifestation or display.—In re Harvill, 335 P.2d 1016, 1018, 168 C.A.2d 490.

- (3) "Exhibition" means, among other things, the act or fact of showing publicly, a public show or display, as

of athletic feats.—Cuna v. Board of Fire Com'rs, Avenel, 182 A.2d 397, 399, 75 N.J.Super. 152.

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50. Similarly expressed

- (1) "Exhibition" is any public show, display as of feats of skill.—Inter-Continental Promotions, Inc. v. MacDonald, C.A.Fla., 367 F.2d 293, 296.

EXIGENCY.

59.5. Similarly defined

- (1) The quality or state of being exigent.
- Ohio—Biery v. City of Lima, 255 N.E.2d 855, 857, 21 Ohio App.2d 154.

60. Similarly defined

- Ohio—Biery v. City of Lima, 255 N.E.2d 855, 857, 21 Ohio App.2d 154.

61. Ohio—Biery v. City of Lima, 255 N.E.2d 855, 857, 21 Ohio App.2d 154.

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62. Ohio—Biery v. City of Lima, 255 N.E.2d 855, 857, 21 Ohio App. 154.

EXIGENT.

65. Similarly defined

- (1) A time of crisis or need; exacting or requiring immediate aid or action; pressing, critical.
- Ohio—Biery v. City of Lima, 255 N.E.2d 855, 857, 21 Ohio App. 154.

EXONERATION.

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7. U.S.—C.J.S. cited in Uptagraff v. U.S., C.A.Va., 315 F.2d 200, 203.

- Belcher v. Birmingham Trust Nat. Bank, D.C. Ala., 348 F.Supp. 61, stay den., C.A., 395 F.2d 685.

Similarly defined

- (1) "Exoneration" means the right to be reimbursed by reason of having paid that which another should be compelled to pay.—American Tobacco Co. v. Transport Corp., D.C.Va., 277 F.Supp. 457, 461—Mahone v. McGraw-Edison Co., D.C.Va., 281 F.Supp. 582, 585.

EXOTHERMIC.

- 16.50. "Exothermic reaction" is a reaction in which heat is given off from reacting mixture, resulting in sudden glow as components interact and raise their internal temperatures.—Monolith Portland Midwest Co. v. Kaiser Aluminum & Chemical Corp., D.C.Cal., 267 F.Supp. 726, 737, mod. on oth. grds., C.A., 407 F.2d 288.

EXOTIC. Term means species which are not natural to the locality, being imported from other areas.^{16.55}

- 16.55. U.S.—Minnesota Public Research Group v. Butz, D.C.Minn., 358 F.Supp. 584, 613.

EXPECT.

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27. More than mere waiting

- U.S.—Aetna Cas. & Sur. Co. v. Martin Bros. Container & Timber Products Corp., D.C.Or., 256 F.Supp. 145, 150.

"Expect" often carries connotation of more than merely waiting for and implies some ground or reason in the mind for considering the event as likely to happen.—Orr v. State, 111 So.2d 627, 635, 40 Ala.App. 45.

More than hope or anticipation

Word "expect" is frequently used to mean more than "hope" or "anticipation", and may be to "consider (a person) obligated or in duty bound" or "to count upon as right and due; rely upon; or require"—Western Natural Gas Co. v. Cities Service Gas Co., 223 A.2d 379, 383, cert. den. 87 S.Ct. 1030, 386 U.S. 964, 18 L.Ed.2d 112, reh. den. 87 S.Ct. 1372, 386 U.S. 1028, 18 L.Ed.2d 473.

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EX PACTO ILLICITO NON ORITUR ACTIO.

17. Ohio—Martineau v. Gresser, 182 N.E.2d 48, 57.

EXPECTATION

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The word "expectation" has been distinguished from "objective."^{50.50}

50.50. U.S.—U. S. v. Sheriff of Lancaster County, D.C.Va., 561 F.Supp. 1005, 1010.

EXPENDITURE.

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4. Spending or using of money

N.J.—Slurzburg v. City of Bayonne, 148 A.2d 171, 175, 29 N.J. 106.

EXPENSE or EXPENSES.

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19. Similarly expressed

(1) The word "expense" may include, in addition to payment, the employment and consumption of time and labor or the expenditure of other resources.

Minn.—Local 1140, Intern. Union of Elec., Radio and Mach. Workers, AFL—CIO v. Massachusetts Mut. Life Ins. Co., 165 N.W.2d 234, 236, 282 Minn. 455.

21.5. Similarly defined

(1) In its strict sense, "expense" is that which is expended or laid out.—Protective Indus. Ins. Co. of Ala. v. Gray, 118 So.2d 289, 290, 40 Ala.App. 578.

22. Similarly defined

(1) Charge incurred in performing services.

Wis.—Geyso v. City of Cudahy, 149 N.W.2d 611, 614, 34 Wis.2d 476.

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Other phrases.

41. Traveling expenses

(3) Ordinary meaning of words "traveling expenses" is an actual outlay or expenditure of funds for purpose of travel.—Knockaert v. Studebaker Corp., 228 N.E.2d 101, 84 Ill.App.2d 16.

General overhead expenses

The continuous expenses of a business irrespective of the outlay on particular job.—Corbello v. Jefferson Davis Parish Police Jury, La.App., 262 So.2d 151, 153.

16.55. U.S.—Minnesota Public Research Group v. Butz, D.C.Minn., 358 F.Supp. 584, 613.

EXPERT.

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60. Ga.—Brown v. State, Ga., 230 S.E.2d 128, 131, 140 Ga.App. 160, cert. den. 98 S.Ct. 58, 434 U.S. 819, 54 L.Ed.2d 75.

Similarly defined

(1) An "expert" is one who has acquired certain habits of judgment based on experience or special observation.—State by and through State Highway Commission v. Arnold, 341 P.2d 1089, 1099, 218 Or. 43, mod. on oth. grds. and reh. den. 343 P.2d 1113, 218 Or. 43.

(2) "Expert" is someone with knowledge which trial judge deems superior to that of average man.—Douglas v. State, 163 So.2d 477, 491, 42 Ala.App. 314.

(3) "Expert" is one qualified by study, training, or experience in particular subject or field of endeavor which gives him special knowledge and permits him to form definite opinion of his own on matters persons lacking such knowledge or training cannot correctly decide.

Ga.—Midtown Properties, Inc. v. George F. Richardson, Inc., 228 S.E.2d 303, 307, 139 Ga.App. 182.

Iowa.—Dougherty v. Boyken, 155 N.W.2d 488, 490.

(4) "Expert" is generally defined as someone possessing certain skill or knowledge which is beyond compe-

tence of average layman or juror.—Bean v. Diamond Alkali Co., Idaho, 454 P.2d 69, 71, 93 Idaho 32.

(5) "Expert" has been defined as person who is qualified, either by actual experience or by careful study, and may be competent to testify as expert in proper circumstances although his knowledge was acquired through practical experience rather than scientific study training and research.—People v. Oberlander, 248 N.E.2d 805, 807, 109 Ill.App.2d 469.

(6) "Expert" is person who is very skilled or highly trained and informed in some special field. Perk v. Board of Revision Cuyahoga County, 272 N.E.2d 188, 200, 29 Ohio Misc. 1, affd. in part, revd. in part on oth. grds., 275 N.E.2d 642, 28 Ohio App.2d 182.

(7) "Expert" is a person who can express an opinion based on skill, experience or knowledge in a particular field.

Ariz.—State v. Jessen, 633 P.2d 410, 416, 130 Ariz. 1, app. after remand 657 P.2d 871, 134 Ariz. 458.

EXPIRATION.

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74. As denoting insurance records

The term "expirations" connotes not only physical records of insurance agency relative to various policyholders but exclusive right to use those records to solicit renewals.—Calley v. U.S., D.C.W.Va., 220 F.Supp. 111, 114.

76. Similarly defined

(1) "Expiration" means cessation, close, end, conclusion, or termination of a contract or agreement.—Southern Bell Tel. & Tel. Co. v. Department of Indus. Relations, 165 So.2d 128, 132, 42 Ala.App. 351.

(2) Word "expiration" means fact of coming to an end, termination close, extinction.—Perruccio v. Allen, 240 A.2d 912, 156 Conn. 282.

(3) Cessation; termination from mere lapse of time; as the expiration of a lease, statute, and the like. Conn.—Perruccio v. Allen, 240 A.2d 912, 156 Conn. 282.

EXPLICIT.

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88.5. Similarly defined

(1) Term "explicit" means that which is so clearly stated or distinctively set forth that there is no doubt as to its meaning.—Harney v. Spellman, 251 N.E.2d 265, 266, 113 Ill.App.2d 463.

EXPLOSION.

99. Iowa—Pastour v. Kolb Hardware, Inc., Iowa, 173 N.W.2d 116, 124.

Tex.—C.J.S. cited in Ormsby v. Travelers Indem. Co. of Rhode Island, 573 S.W.2d 281, 285.

Insusceptible of fixed definition

U.S.—American Cas. Co. of Reading, Pa. v. Myrick, C.A.Tex., 304 F.2d 179, 183, 96 A.L.R.2d 1352.

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3.10. Essential element

N.C.—Peterson v. Royal Ins. Co., 110 S.E.2d 441, 443, 251 N.C. 61.

4. Iowa—Pastour v. Kolb Hardware, Inc., Iowa, 173 N.W.2d 116, 124.

6. Iowa—Pastour v. Kolb Hardware, Inc., 173 N.W.2d 116, 124.

6.5. U.S.—Pre-Cast Concrete Products, Inc. v. Home Ins. Co., C.A.Ill., 417 F.2d 1323, 1326.

Wis.—Aetna Cas. & Sur. Co. v. Osborne McMillan Elevator Co., 132 N.W.2d 510, 513, 26 Wis.2d 292, app. after remand 151 N.W.2d 113, 35 Wis.2d 517, cert. den. 88 S.Ct. 786, 389 U.S. 1043, 19 L.Ed.2d 834.

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6.10. U.S.—Pre-Cast Concrete Products, Inc. v. Home Ins. Co., C.A.Ill., 417 F.2d 1323, 1326.

6.15. Similarly defined

(1) N.C.—Peterson v. Royal Ins. Co., 110 S.E.2d 441, 251 N.C. 61.

7. U.S.—American Cas. Co. of Reading, Pa. v. Myrick, C.A.Tex., 304 F.2d 179, 183, 96 A.L.R.2d 1352.

12. La.—Levert-St. John, Inc. v. Birmingham Fire & Cas. Co., App., 137 So.2d 494, 496.

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14. Not synonymous

Iowa—Pastour v. Kolb Hardware, Inc., Iowa, 173 N.W.2d 116, 124.

EXPLOSIVES

§ 1. Definition

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1. Held "explosive"

(1) Colo.—C.J.S. cited in People v. Lovato, Colo., 630 P.2d 597, 599.

(7) U.S.—U.S. v. Hepp, D.C.Iowa, 497 F.Supp. 348, affd., C.A., 656 F.2d 350.

Utah—State v. Vickers, 549 P.2d 449.

§ 2. Power to Regulate

Library References

Explosives ⇐1.

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9. Cal.—People v. Westoby, 134 Cal.Rptr. 97, 63 C.A.3d 790.

Gunpowder

Kan.—Arredondo v. Duckwall Stores, Inc., 610 P.2d 1107, 227 Kan. 842.

Organized Crime Control Act of 1970

U.S.—U.S. v. Womack, C.A.Ala., 654 F.2d 1034, cert. den. 102 S.Ct. 1029, 454 U.S. 1156, 71 L.Ed.2d 314.

10. Mass.—Com. v. Krasner, 223 N.E.2d 508, 351 Mass. 648.

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13.5. Regulations held not unreasonable

(2) Other regulations.

Wyo.—Brinegar v. Clark, 371 P.2d 62.

Arbitrary determination not permitted

Ala.—Davis v. City of Birmingham, 178 So.2d 547, 278 Ala. 391.

14. U.S.—Cohen v. Bredehoeft, D.C.Tex., 290 F.Supp. 1001, affd. 402 F.2d 61, cert. den. 89 S.Ct. 873, 393 U.S. 1086, 21 L.Ed.2d 779.

Del.—C.J.S. cited in Catholic Welfare Guild, Inc. v. Brodney Corp., Super., 208 A.2d 301, 302, 8 Storey 246.

Ill.—Bulk Petroleum Corp. v. City of Chicago, 164 N.E.2d 42, 18 Ill.2d 383.

Tex.—Alpha Enterprises, Inc. v. City of Houston, Civ. App., 411 S.W.2d 417, err. ref. no rev. err. cert. den. 88 S.Ct. 565, 389 U.S. 1005, 19 L.Ed.2d 601, reh. den. 88 S.Ct. 914, 390 U.S. 913, 19 L.Ed.2d 887.

Outside corporate limits

Wyo.—Haddenham v. City of Laramie, 648 P.2d 551.

16.5. Purpose

Mont.—State ex rel. Pat Griffin Co. v. City of Butte, 445 P.2d 739, 151 Mont. 546.

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28. Tex.—Alpha Enterprises, Inc. v. City of Houston, Civ.App., 411 S.W.2d 417, err. ref. no rev. err. cert. den. 88 S.Ct. 565, 389 U.S. 1005, 19 L.Ed.2d 601, reh. den. 88 S.Ct. 914, 390 U.S. 913, 19 L.Ed.2d 887.

29.10. Ala.—Davis v. City of Birmingham, 178 So.2d 547, 278 Ala. 391.

§ 3. Statutory and Municipal Regulation

30. U.S.—U.S. v. Bubar, C.A.Conn., 567 F.2d 192, cert. den. 98 S.Ct. 217, 434 U.S. 872, 54 L.Ed.2d 151.
- Ala.—State v. Nelson Bros., Inc., Civ.App., 406 So.2d 425.
- D.C.—Burch v. Amsterdam Corp., App., 366 A.2d 1079.
- Mont.—State v. McBenige, 574 P.2d 260, 175 Mont. 362.
- "Hazardous substances" within federal labeling act**
- U.S.—Toy Mfrs. of America, Inc. v. Consumer Product Safety Commission, C.A., 630 F.2d 70.
- U.S. v. 7 Cases, Cracker Balls, D.C.Tex., 253 F.Supp. 771.

Statute held valid

- U.S.—U.S. v. Featherston, C.A.Fla., 461 F.2d 1119, cert. den. 93 S.Ct. 339, 409 U.S. 991, 34 L.Ed.2d 258—U.S. v. Womack, C.A.Ala., 654 F.2d 1034, cert. den. 102 S.Ct. 1029, 454 U.S. 1156, 71 L.Ed.2d 314.
- Johnson v. Lee, D.C.Conn., 281 F.Supp. 650.
- Fla.—Junior Food Stores of West Florida, Inc. v. Division of Alcoholic Beverages and Tobacco, App., 390 So.2d 1244.
- Mass.—Com. v. Bruneau, 386 N.E.2d 29, 7 Mass.App. 858.
- N.M.—State v. Williams, 377 P.2d 513, 71 N.M. 210.
- Tex.—McClane v. State, 343 S.W.2d 447, 170 Tex.Cr.R. 603, cert. den. 81 S.Ct. 698, 365 U.S. 816, 5 L.Ed.2d 695—Harrison v. State, Cr., 477 S.W.2d 583.

Other purposes

- U.S.—Snap-N-Pops, Inc. v. Browning, D.C.Va., 432 F.Supp. 360.
- Fla.—State v. Babun, App., 233 So.2d 171.
- N.Y.—People v. Sullivan, 331 N.Y.S.2d 298, 39 A.D.2d 631.

Fireworks within Federal Hazardous Substances Act

- U.S.—U.S. v. Chalaire, D.C.La., 316 F.Supp. 543.
31. U.S.—U.S. v. Gere, C.A.Cal., 662 F.2d 1291.
- Fla.—Courtney v. American Oil Co., App., 220 So.2d 675.
- Kan.—Arredondo v. Duckwall Stores, Inc., 610 P.2d 1107, 227 Kan. 842.

Retail export statute construed

- Ohio—Van Camp v. Riley, 476 N.E.2d 1078, 16 Ohio App.3d 457, 16 O.B.R. 539.

Protection of minors from fireworks injuries

- Iowa—Rosenau v. City of Estherville, 199 N.W.2d 125.
- Wis.—Fleury v. Wentorf, 262 N.W.2d 68, 82 Wis.2d 105.

31.5. Constitutional

- U.S.—U.S. v. Poulos, C.A.Kan., 667 F.2d 939.

33. Ordinances held void

- (3) Other ordinances.
- Ark.—Hackler v. City of Fort Smith, 377 S.W.2d 875, 238 Ark. 29.

Ordinances held not invalid

- (5) Ill.—Bulk Petroleum Corp. v. City of Chicago, 164 N.E.2d 42, 18 Ill.2d 383—Chicago Title & Trust Co. v. Village of Lombard, 166 N.E.2d 41, 19 Ill.2d 98.
- Tex.—City of Houston v. Johnny Frank's Auto Parts Co., Civ.App., 480 S.W.2d 774, err. ref. no rev. err.
- Wyo.—Haddenham v. City of Laramie, 648 P.2d 551.

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- 33.5. Ala.—Davis v. City of Birmingham, 178 So.2d 547, 278 Ala. 391.
- Conn.—Toffolon v. Zoning Bd. of Appeals of Town of Plainville, 236 A.2d 96, 155 Conn. 558.
- 33.10. Ill.—Bulk Petroleum Corp. v. City of Chicago, 164 N.E.2d 42, 18 Ill.2d 383.

- Mass.—Sherman v. Board of Selectmen of Orleans, 243 N.E.2d 816, 355 Mass. 786.

34. U.S.—U.S. v. Mennuti, C.A.N.Y., 639 F.2d 107.
- Snap-N-Pops, Inc. v. Browning, D.C.Va., 432 F.Supp. 360.

- Ariz.—State v. White, 425 P.2d 424, 102 Ariz. 97.
- Cal.—People v. Heideman, 130 Cal.Rptr. 349, 58 C.A.3d 321.

- Ill.—People v. New Melrose Fireworks Display Co., 299 N.E.2d 321, 12 Ill.App.3d 1095.

- Mass.—Com. v. Krasner, 223 N.E.2d 508, 351 Mass. 648.

- N.Y.—People v. Sullivan, 331 N.Y.S.2d 298, 39 A.D.2d 631.

Intent and knowledge necessary

- U.S.—U.S. v. Featherston, C.A.Fla., 461 F.2d 1119, cert. den. 93 S.Ct. 339, 409 U.S. 991, 34 L.Ed.2d 258.

35. Mass.—Com. v. Bushway, 389 N.E.2d 1034, 7 Mass.App. 715.

"Possess"

- Ind.—Satterfield v. State, App. 1 Dist., 468 N.E.2d 571.

"Sell at retail"

- Ohio—State v. DeWees, 208 N.E.2d 558, 2 Ohio App.2d 343, revd. on oth. grds. 216 N.E.2d 624, 6 Ohio St.2d 153.

"Sale, possession, or use"

- Colo.—Calkins v. Albi, 431 P.2d 17, 163 Colo. 370.

"Malicious"

- N.C.—State v. Conrad, 168 S.E.2d 39, 275 N.C. 342.

"Wholesale" transactions

- U.S.—U.S. v. Spiezio, D.C.Pa., 523 F.Supp. 264.

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40. Repeal of earlier statute

- Wyo.—Haddenham v. City of Laramie, 648 P.2d 551.

43. U.S.—U.S. v. Scharstein, D.C.Ky., 531 F.Supp. 460.

- Del.—C.J.S. cited in Catholic Welfare Guild, Inc. v. Brodney Corp., Super., 208 A.2d 301, 302, 8 Storey 246.

- Md.—Schuman v. State, 311 A.2d 460, 19 Md.App. 400.

- Mass.—Frontier Research Inc. v. Commissioner of Public Safety, 222 N.E.2d 854, 351 Mass. 616.

- E. A. D. Realty Corp. v. Board of Selectmen of Shrewsbury, App., 371 N.E.2d 446, 6 Mass.App. 826.

Who may apply

- (2) Some right, title, or interest in land used for storage was necessary.

- R.I.—Ecro Corp. v. Sanford, 244 A.2d 265, 104 R.I. 337.

Failure to obtain no bar to recovery on contract

- Mass.—Buccella Schuster, 164 N.E.2d 141, 340 Mass. 323.

Requirement of liability bond

- N.Y.—Rill v. Chiarella, 269 N.Y.S.2d 736, 50 Misc.2d 105, mod. on oth. grds. 293 N.Y.S.2d 1, 30 A.D.2d 852. Motion den. 252 N.E.2d 628, 25 N.Y.2d 929, 305 N.Y.S.2d 147, affd. 255 N.E.2d 183, 25 N.Y.2d 702, 306 N.Y.S.2d 955.

License improper

- Mass.—Chase v. Board of Selectmen of Littleton, 310 N.E.2d 144, 2 Mass.App. 159.

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- 43.5. Wash.—Red Devil Fireworks Co. v. Siddle, 648 P.2d 468, 32 Wash.App. 521.

- 43.15. Mass.—Chase v. Board of Selectmen of Littleton, 310 N.E.2d 144, 2 Mass.App. 159.

Exercise of official duty

- N.Y.—Rill v. Chiarella, 269 N.Y.S.2d 736, 50 Misc.2d 105, mod. on oth. grds. 293 N.Y.S.2d 1, 30 A.D.2d 852. Motion den. 252 N.E.2d 628, 25 N.Y.2d 929, 305 N.Y.S.2d 147, affd. 255 N.E.2d 183, 25 N.Y.2d 702, 306 N.Y.S.2d 955.

Geographical jurisdiction

- N.Y.—Rill v. Chiarella, 269 N.Y.S.2d 736, 50 Misc.2d 105, mod. on oth. grds. 293 N.Y.S.2d 1, 30 A.D.2d 852. Motion den. 252 N.E.2d 628, 25 N.Y.2d 929, 305 N.Y.S.2d 147, affd. 255 N.E.2d 183, 25 N.Y.2d 702, 306 N.Y.S.2d 955.

44. Appeals

- (12) Other matters.

- R.I.—Ecro Corp. v. Sanford, 244 A.2d 265, 104 R.I. 337.

§ 4. Civil Liability for Injuries

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55. U.S.—U.S. v. Hepp, D.C.Iowa, 497 F.Supp. 348, affd., C.A., 656 F.2d 350.

- La.—Moak v. Link-Belt Co., App., 229 So.2d 395, app. dism. in part, revd. in part on oth. grds. 242 So.2d 515, 257 La. 281.

- Mo.—Stevens v. Missouri Pac. R. Co., 355 S.W.2d 122.

- Wis.—Fleury v. Wentorf, 262 N.W.2d 68, 82 Wis.2d 105.

Person servicing offshore oil well platform

- U.S.—Armstrong v. Chambers and Kennedy, D.C.Tex., 340 F.Supp. 1220. Affd. in part, revd. in part on oth. grds., C.A., 499 F.2d 263, reh. den. 512 F.2d 1061, cert. dism. 96 S.Ct. 163, 423 U.S. 886, 46 L.Ed.2d 118.

Accrual of duty

- Tex.—Harding v. Sinclair Pipeline Co., Civ.App., 480 S.W.2d 786, err. ref. no rev. err.

56. Ala.—Consolidated Pipe and Supply Co., Inc. v. Stockham Valves and Fittings, Inc., 365 So.2d 968.
- Cal.—Hall v. Macco Corp., 18 Cal.Rptr. 273, 198 C.A.2d 415.

- D.C.—McGettigan v. National Bank of Washington, D.C., 199 F.Supp. 133. Revd. on oth. grds., C.A., 320 F.2d 703, 115 U.S.App.D.C. 384, cert. den. 84 S.Ct. 348, 375 U.S. 943, 11 L.Ed.2d 273.

- Ga.—Young v. Towles, 148 S.E.2d 455, 113 Ga.App. 471.

- Ky.—Totten v. Parker, 428 S.W.2d 231.

- Tex.—Allan Const. Co. v. Soliz, Civ.App., 421 S.W.2d 423, err. dism.

Negligence

- (4) Other matters.

- U.S.—Martie v. Cogan, C.A.Va., 428 F.2d 446.

- Home Ins. Co. v. Hamilton, D.C.Ky., 253 F.Supp. 752.

- Ga.—Bolden v. Barnes, 162 S.E.2d 307, 117 Ga.App. 862.

- Ohio—Bennison v. Stillpass Transit Co., 214 N.E.2d 213, 5 Ohio St.2d 122.

- Tex.—Harding v. Sinclair Pipeline Co. Civ.App., 480 S.W.2d 786, err. ref. no rev. err.

What law governs

- U.S.—Cross v. M. C. Carlisle & Co., C.A.Mass., 368 F.2d 947.

Contractor-seller-installer of water heater held liable for explosion from defect

- Miss.—State Stove Mfg. Co. v. Hodges, 189 So.2d 113, cert. den. 87 S.Ct. 860, 386 U.S. 912, 17 L.Ed.2d 784.

Willful and malicious

- N.C.—State v. Sanders, 218 S.E.2d 352, 288 N.C. 285, cert. den. 96 S.Ct. 886, 423 U.S. 1091, 47 L.Ed.2d 102.

- 56.5. U.S.—Cross v. M. C. Carlisle & Co., C.A.Mass., 368 F.2d 947.

- Croteau v. Borden Co., D.C.Pa., 277 F.Supp. 945, affd., C.A., 395 F.2d 771.

- Miss.—State Stove Mfg. Co. v. Hodges, 189 So.2d 113, cert. den. 87 S.Ct. 860, 386 U.S. 912, 17 L.Ed.2d 784.

57. U.S.—C.J.S. quoted in Hernandez v. U.S., D.C. Tex., 313 F.Supp. 349, 358.

- Fla.—Barfield v. Atlantic Coast Line R. Co., App., 197 So.2d 545.

- Ky.—Texaco, inc. v. Debusk, 444 S.W.2d 261.

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La.—Waters v. Southern Farm Bureau Cas. Ins. Co., App., 212 So.2d 487, writ ref. 214 So.2d 720, 252 La. 900.

Tex.—Mobil Pipe Line Co. v. Goodwin, Civ.App., 492 S.W.2d 608, err. ref. no rev. err.

Absolute liability

N.C.—Trull v. Carolina Virginia Well Co., 142 S.E.2d 622, 264 N.C. 687.

Ordinary care

Fla.—Hix v. Billen, 284 So.2d 209.

57.5. U.S.—C.J.S. quoted in Hernandez v. U.S., D.C. Tex., 313 F.Supp. 349, 359.

Mo.—Paisley v. Liebowitz, 347 S.W.2d 178.

Standard of conduct

Or.—Kor v. Sugg, 443 P.2d 641, 250 Or. 543.

57.10. Mo.—Stevens v. Missouri Pac. R. Co., 355 S.W.2d 122.

58. Tex.—Acme Products Co. v. Wenzel, Civ.App., 448 S.W.2d 139.

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58.5. Installer of furnace held to have no duty to warn of danger of particular mode of operation absent knowledge thereof.

Ga.—Floyd v. Morgan, 127 S.E.2d 31, 106 Ga.App. 332.

60. U.S.—U.S. v. Guess, C.A.Cal., 629 F.2d 573. Home Ins. Co. v. Hamilton, D.C.Ky., 253 F.Supp. 752.

Wis.—Johnson v. Chemical Supply Co., 156 N.W.2d 455, 38 Wis.2d 194.

61. Regulations not violated

Ky.—McKinley v. Danville Motors, Inc., 374 S.W.2d 366.

§ 5. — Manufacture, Storage, or Keeping

Library References

Explosives ⇄8.

65. U.S.—Littlehale v. E. I. du Pont de Nemours & Co., D.C.N.Y., 268 F.Supp. 791, affd., C.A., 380 F.2d 274.

The law relating to products liability, and the doctrine of strict liability, is discussed generally in 72 Supplement Products Liability.

67. La.—McMorris v. Insurance Co. of North America, App., 289 So.2d 208.

No absolute duty as to average dynamite on dealer's shelf

U.S.—Doss v. Apache Powder Co., C.A.Tex., 430 F.2d 1317.

69. U.S.—Hall v. E. I. Du Pont de Nemours & Co., Inc., D.C.N.Y., 345 F.Supp. 353.

N.Y.—Bernstein v. Remington Arms Co., 227 N.Y.S.2d 802, 16 A.D.2d 694, on remand 231 N.Y.S.2d 787, 35 Misc.2d 884, affd., 238 N.Y.S.2d 78, 18 A.D.2d 910.

High degree of care

(1) U.S.—Smith v. Pennsylvania-Reading Seashore Lines, D.C.Pa., 355 F.Supp. 1176, affd., C.A., 487 F.2d 1394, and 487 F.2d 1395.

Warning of danger

(4) Other matters.

S.—Huffstutler v. Hercules Powder Co., C.A.Ala., 305 F.2d 292—Doss v. Apache Powder Co., C.A. Tex., 430 F.2d 1317.

Littlehale v. E. I. du Pont de Nemours & Co., D.C.N.Y., 268 F.Supp. 791, affd., C.A., 380 F.2d 274.

al.—Canifax v. Hercules Powder Co., 46 Cal.Rptr. 552, 237 C.A.2d 44.

ex.—Technical Chemical Co. v. Jacobs, 480 S.W.2d 602.

Lerosene

N.C.—Stegall v. Catawba Oil Co. of N.C., 133 S.E.2d 138, 260 N.C. 459.

Manufacturer of water heater not liable where not intended to reach consumer without changes

Miss.—State Stove Mfg. Co. v. Hodges, 189 So.2d 113, cert. den. 87 S.Ct. 860, 386 U.S. 912, 17 L.Ed.2d 784.

Not absolutely liable as insurer

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Cal.—Walker v. Stauffer Chemical Corp., 96 Cal.Rptr. 803, 19 C.A.3d 669.

Gasoline

Ill.—Davis v. Marathon Oil Co., 330 N.E.2d 312, 28 Ill.App.3d 526, revd. on oth. grds. 1 Ill.Dec. 93, 356 N.E.2d 93, 64 Ill.2d 380.

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Products liability

S.D.—Shaffer v. Honeywell, Inc., 249 N.W.2d 251.

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70.5. Tenn.—Trimble v. Irwin, 441 S.W.2d 818, 59 Tenn.App. 465.

73. U.S.—Tug Raven v. Trexler, C.A.Va., 419 F.2d 536, cert. den. 90 S.Ct. 1843, 398 U.S. 938, 26 L.Ed.2d 271.

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74. N.Y.—Tucci v. Bossert, 385 N.Y.S.2d 328, 53 A.D.2d 291, 85 A.L.R.3d 721.

Warning of danger

U.S.—Armstrong v. Chambers and Kennedy, D.C.Tex., 340 F.Supp. 1220. Affd. in part, revd. in part on oth. grds., C.A., 499 F.2d 263, reh. den. 512 F.2d 1061, cert. dism. 96 S.Ct. 163, 423 U.S. 886, 46 L.Ed.2d 118.

Fla.—Marks v. Delcastillo, App., 386 So.2d 1259.

The absolute liability arising out of the dangerous activity of storing explosives is not suspended by virtue of the fact that the detonation of the explosives is an intentional act by third parties.^{77.5}

77.5. Thieves attempting to prevent discovery Alaska—Yukon Equipment, Inc. v. Fireman's Fund Ins. Co., Alaska, 585 P.2d 1206.

78. U.S.—Medlin v. U.S., D.C.S.C., 244 F.Supp. 403. Colo.—Liber v. Flor, 415 P.2d 332, 160 Colo. 7, 35 A.L.R.3d 1165.

Ky.—C.J.S. cited in Vandiver v. Wilson, 446 S.W.2d 650, 651.

Explosion held not fortuitous

U.S.—De Legrand v. U.S., D.C.Puerto Rico, 182 F.Supp. 184.

Degree of care depends on circumstances

Colo.—Liber v. Flor, 415 P.2d 332, 160 Colo. 7, 35 A.L.R.3d 1165.

79. U.S.—National Auto. & Cas. Ins. Co. v. Mt. Pitt Co., D.C.Or., 234 F.Supp. 477.

Or.—Howard v. Sloan, 504 P.2d 735, 264 Or. 247.

83. Alaska—Yukon Equipment, Inc. v. Fireman's Fund Ins. Co., 585 P.2d 1206.

Wis.—Johnson v. Chemical Supply Co., 156 N.W.2d 455, 38 Wis.2d 194.

84. La.—Briggs v. Iowa Mut. Ins. Co., App., 150 So.2d 905, writ ref. 152 So.2d 563, 244 La. 470. Mo.—Pecan Shoppe of Springfield, Missouri, Inc. v. Tri-State Motor Transit Co., App., 573 S.W.2d 431.

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85. U.S.—Dickerson v. Continental Oil Co., C.A.La., 449 F.2d 1209, cert. den. 92 S.Ct. 942, 405 U.S. 934, 30 L.Ed. 809, app. after remd. 476 F.2d 635.

Conn.—Angier v. Barton, 276 A.2d 782, 160 Conn. 204.

94. Cal.—Vedder v. Imperial County, 111 Cal.Rptr. 728, 36 C.A.3d 654.

N.Y.—Halloran v. Virginia Chemicals Inc., 361 N.E.2d 991, 41 N.Y.2d 386, 393 N.Y.S.2d 341.

Effect of contributory negligence

La.—Leake v. Prudhomme Truck Tank Service, Inc., 258 So.2d 358, 260 La. 1071.

96. Wash.—Callahan v. Keystone Fireworks Mfg. Co., 435 P.2d 626, 72 Wash.2d 823.

Liability of employer to employee

Ky.—Texas v. Standard, 536 S.W.2d 136.

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97. Ky.—Smith v. Hensley, 354 S.W.2d 744, 99 A.L.R.2d 340.

N.C.—Moore v. Beard-Laney, Inc., 139 S.E.2d 879, 263 N.C. 601.

Duty to invitee

(5) Other matters.

Mont.—Vogel v. Fetter Livestock Co., 394 P.2d 766, 144 Mont. 127.

Tenn.—Trimble v. Irwin, 441 S.W.2d 818, 59 Tenn.App. 465.

Duty to licensee

(5) Other matters.

U.S.—Emerson v. Holloway Concrete Products Co., C.A.Fla., 282 F.2d 271, cert. den. 81 S.Ct. 459, 364 U.S. 941, 5 L.Ed.2d 372.

Fla.—Marks v. Delcastillo, App., 386 So.2d 1259.

Mo.—Stevens v. Missouri Pac. R. Co., 355 S.W.2d 122.

City fireman

(3) Other matters.

Cal.—Scott v. E. L. Yeager Const. Co., 91 Cal.Rptr. 232, 12 C.A.3d 1190.

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Held negligence

(4) Other matters.

N.C.—Tayloe v. Southern Bell Tel. & Tel. Co., 129 S.E.2d 512, 258 N.C. 766.

Held not negligence

(5) Other matters.

U.S.—De Legrand v. U.S., D.C.Puerto Rico, 182 F.Supp. 184.

N.C.—Hoggard v. Umphlett, 268 S.E.2d 882, 48 N.C.App. 397.

Tex.—Pembroke v. Phillips Petroleum Co., Civ.App., 463 S.W.2d 236, err. ref. no rev. err.

Willful or wanton negligence

(2) Other matters.

Wash.—Hanson v. Freigang, 345 P.2d 1109, 55 Wash.2d 70.

98. U.S.—Koster & Wythe v. Massey, C.A.Guam, 293 F.2d 922, cert. den. 82 S.Ct. 362, 368 U.S. 927, 7 L.Ed.2d 191.

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Mo.—Stevens v. Missouri Pac. R. Co., 355 S.W.2d 122.

N.Y.—Pond v. Regis, 270 N.Y.S.2d 121, 25 A.D.2d 917.

N.C.—Moore v. Beard-Laney, Inc., 139 S.E.2d 879, 263 N.C. 601.

Storage of explosives held "ultra hazardous activity"

U.S.—National Auto. & Cas. Ins. Co. v. Mt. Pitt Co., D.C.Or., 234 F.Supp. 477.

99. Colo.—Liber v. Flor, 415 P.2d 332, 160 Colo. 7, 35 A.L.R.3d 1165.

Kan.—Wroth v. McKinney, 373 P.2d 216, 190 Kan. 127.

La.—Cambridge Mut. Fire Ins. Co. v. State Farm Fire & Cas. Co., App., 405 So.2d 587.

Mich.—Gilbert v. Sabin, 256 N.W.2d 54, 76 Mich.App. 137.

N.C.—Tayloe v. Southern Bell Tel. & Tel. Co., 129 S.E.2d 512, 258 N.C. 766.

Okl.—WeGo Perforators v. Hilligoss, 397 P.2d 113.

1. N.Y.—Pond v. Regis, 270 N.Y.S.2d 121, 25 A.D.2d 917.

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4. U.S.—M. C. Carlisle & Co. v. Cross, C.A.Mass., 386 F.2d 672.

Fla.—Marks v. Delcastillo, App., 386 So.2d 1259.

Pa.—Johnston v. Dick, 165 A.2d 634, 401 Pa. 637.

Responsibility of county commissioners for injuries from dynamite stored by road supervisor near highway

Colo.—Liber v. Flor, 415 P.2d 332, 160 Colo. 7, 35 A.L.R.3d 1165.

8. U.S.—Dickerson v. Continental Oil Co., C.A.La., 449 F.2d 1209, cert. den., 92 S.Ct. 942, 405 U.S. 934, 30 L.Ed.2d 809, app. after remd. 476 F.2d 635.

Fla.—General Tel. Co. of Fla. v. Mahr, App., 153 So.2d 13, cert. dism., Sup., 153 So.2d 285.

Held not proximate cause

(2) Ark.—Allen v. Lake Catherine Footwear Corp., 437 S.W.2d 803, 246 Ark. 237.

Cal.—Gonzalez v. Derrington, 14 Cal.Rptr. 1, 363 P.2d 1, 56 C.2d 130.

9. **Held not independent intervening proximate cause**

(4) Other matters.

U.S.—Troepe v. Shell Oil Co., C.A.N.Y., 307 F.2d 757—Dickerson v. Continental Oil Co., C.A.La., 449 F.2d 1209, cert. den., 92 S.Ct. 942, 405 U.S. 934, 30 L.Ed.2d 809, app. after remd. 476 F.2d 635.

N.D.—Chicago, M., St. P. & P.R. Co. v. Johnston's Fuel Liners, Inc., 122 N.W.2d 140, app. after remand 130 N.W.2d 154.

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9.5. Ga.—Cobb Heating & Air Conditioning Co., Inc. v. Hertron Chemical Co., 229 S.E.2d 681, 139 Ga.App. 803.

9.10. **Dynamite as dangerous instrumentality**

Utah—Robison v. Robison, 394 P.2d 876, 16 Utah 2d 2.

10.50. Tenn.—Berry v. Whitworth, App., 576 S.W.2d 351.

11. U.S.—Duvall v. U.S., D.C.N.C., 312 F.Supp. 625.

Mo.—Paisley v. Liebowits, 347 S.W.2d 178—Stevens v. Missouri Pac. R. Co., 355 S.W.2d 122.

N.Y.—Patterson v. Proctor Paint & Varnish Co., 288 N.Y.S.2d 622, 21 N.Y.2d 447, 235 N.E.2d 765.

Particular explosives

(3) U.S.—Parrott v. U.S., D.C.Cal., 181 F.Supp. 425.

Fla.—Peterson v. Concrete Const., Inc., of Lake Worth, App., 202 So.2d 191.

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11.5. Ark.—Hartssock v. Forsgren, Inc., 365 S.W.2d 117, 236 Ark. 167.

Tex.—Dezendorf Marble Co. v. Gartman, 343 S.W.2d 441, 161 Tex. 535.

Duty to anticipate injury

(3) Other matters.

Or.—Kor v. Sugg, 443 P.2d 641, 250 Or. 543.

13. N.Y.—Carradine v. City of New York, 229 N.Y.S.2d 328, 16 A.D.2d 928, revd. on oth. grds. 196 N.E.2d 259, 13 N.Y.2d 291, 246 N.Y.S.2d 620.

13.5. Ky.—M & T Chemicals, Inc. v. Westrick, 525 S.W.2d 740.

N.Y.—Rafos v. Rolnick, 222 N.Y.S.2d 394, 15 A.D.2d 505.

Accompanying parents not absolute defense

Tex.—Dezendorf Marble Co. v. Gartman, Civ.App., 333 S.W.2d 404, affd., Sup., 343 S.W.2d 441, 161 Tex. 535.

14. Or.—Kor v. Sugg, 443 P.2d 641, 250 Or. 543.

15. Or.—Kor v. Sugg, 443 P.2d 641, 250 Or. 543.

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19. Vt.—Winter v. Unaitis, 204 A.2d 115, 124 Vt. 249.

22. Ga.—Shockley v. Henslee, 176 S.E.2d 470, 122 Ga.App. 163.

Held proximate cause

(3) Other instances.

U.S.—Medlin v. U.S., D.C.S.C., 244 F.Supp. 403.

22.5. Ill.—Ortiz v. City of Chicago, 398 N.E.2d 1007, 35 Ill.Dec. 57, 79 Ill.App.3d 902.

22.10. Ark.—Hartssock v. Forsgren, Inc., 365 S.W.2d 117, 236 Ark. 167.

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23. Fla.—Concrete Const., Inc., of Lake Worth v. Peterson, 216 So.2d 221.

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30. U.S.—Bryant v. Hercules, Inc., D.C.Ky., 325 F.Supp. 241.

Ky.—Hercules Powder Co. v. Hicks, 453 S.W.2d 583.

N.Y.—Brownstone v. Times Square Stage Lighting Co., 333 N.Y.S.2d 781, 39 A.D.2d 892.

35. Persons protected by rule

U.S.—Patch v. Stanley Works (Stanley Chemical Co. Division), C.A.Conn., 448 F.2d 483.

36. U.S.—Franks v. National Dairy Products Corp., D.C.Tex., 282 F.Supp. 528, affd., C.A., 414 F.2d 682.

Miss.—Pridgett v. Jackson Iron & Metal Co., 253 So.2d 837, 53 A.L.R.3d 327.

Gasoline

La.—Jones v. Robbins, App., 275 So.2d 812, revd. on oth. grds. 289 So.2d 104, on remand 296 So.2d 361.

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42. U.S.—Glens Falls Ins. Co. v. Danville Motors, Inc., C.A.Ky., 333 F.2d 187.

Ill.—Cohn v. Petroleum Heat & Power Co., 194 N.E.2d 29, 44 Ill.App.2d 23.

N.C.—Stegall v. Catawba Oil Co. of N.C., 133 S.E.2d 138, 260 N.C. 459.

43. **Seller liable for violation of implied promise of safe delivery where delivery by independent contractor.**

Wis.—Peterson v. Sinclair Refining Co. 123 N.W.2d 479, 20 Wis.2d 576.

Use of similar method by others immaterial

U.S.—Glens Falls Ins. Co. v. Danville Motors, Inc., C.A.Ky., 333 F.2d 187.

44. Colo.—Albo v. Shamrock Oil & Gas Corp., 415 P.2d 536.

46. Ga.—Young v. Blalock Hauling Co., 127 S.E.2d 689, 106 Ga.App. 590.

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48. Iowa—Cooley v. Quick Supply Co., 221 N.W.2d 763.

Adequate warning held given

U.S.—Bryant v. Hercules Inc., D.C.Ky., 325 F.Supp. 241.

Tenn.—Trimble v. Irwin, 441 S.W.2d 818, 59 Tenn. App. 465.

Duty to warn

U.S.—Higginbotham v. United Iron and Metal Co., D.C.Mo., 228 F.Supp. 513.

No duty to warn

Ky.—Hercules Powder Co. v. Hicks, 453 S.W.2d 583.

N.Y.—Brownstone v. Times Square Stage Lighting Co., 333 N.Y.S.2d 781, 39 A.D.2d 892.

However, the adequacy of a label is of no value if it is not read and considered.^{48.1}

48.1. Mo.—Bean v. Ross Mfg. Co., 344 S.W.2d 18.

Rule inapplicable where injured child presumed unable to read.

Fla.—Blue v. Drackett Products Co., App., 143 So.2d 897, decision quashed, Sup., 152 So.2d 463, conf. to 153 So.2d 346.

48.5. U.S.—Boone Val. Co-op. Processing Ass'n, Eagle Grove, Iowa v. French Oil Mill Machinery Co., D.C.Iowa, 383 F.Supp. 606.

51. Knowledge of danger

(2) Other matters.

U.S.—Borowicz v. Chicago Mastic Co., C.A.Ill., 367 F.2d 751.

Vendor's negligence held not proximate cause of death

U.S.—Bryant v. Hercules, Inc., D.C.Ky., 325 F.Supp. 241.

53. N.C.—Stegall v. Catawba Oil Co. of N.C., 133 S.E.2d 138, 260 N.C. 459.

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56. Extraterritorial effect

U.S.—Doss v. Apache Powder Co., C.A.Tex., 430 F.2d 1317.

"Selling" within Federal Hazardous Substances Act

U.S.—U.S. v. Chalaire, D.C.La., 316 F.Supp. 543.

Automotive flares exempted

Wash.—Lake Washington School Dist. No. 414 v. Schuck's Auto Supply, Inc., 613 P.2d 561, 26 Wash.App. 618.

58.5. **Connection need not constitute proximate cause**

N.Y.—Daggett v. Keshner, 199 N.Y.S.2d 411, 7 N.Y.2d 981, 166 N.E.2d 324.

62. Compliance does not preclude liability

D.C.—Burch v. Amsterdam Corp., App., 366 A.2d 1079.

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68. **Not proximate cause as a matter of law**

Fla.—Courtney v. American Oil Co., App., 220 So.2d 675.

69. Tex.—Shamrock Fuel & Oil Sales Co. v. Tunks, Civ.App., 406 S.W.2d 483.

72. No liability in absence of negligence

N.C.—Stegall v. Catawba Oil Co. of N.C., 133 S.E.2d 138, 260 N.C. 459—Stegall v. Catawba Oil Co. of N.C., 133 S.E.2d 145, 260 N.C. 468—Stegall v. Catawba Oil Co. of N.C., 133 S.E.2d 146, 260 N.C. 469.

75. Cal.—McGinnis v. Fidelity & Cas. Co. of New York, 80 Cal.Rptr. 482, 276 C.A.2d 15.

Ill.—Van Skike v. Zussman, 318 N.E.2d 244, 22 Ill. App.3d 1039.

La.—Jones v. Robbins, 289 So.2d 104, on remand 296 So.2d 361.

C.J.S. cited in Schmit v. Guidry, App., 204 So.2d 646, 648.

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77. Fla.—Langevin v. Gray Drug Stores, Inc., Miami, App., 216 So.2d 70—Courtney v. American Oil Co., App., 220 So.2d 675.

79. **Manner of exploding not intervening cause**

Ga.—Allen v. Gornto, 112 S.E.2d 368, 100 Ga.App. 744.

Under Federal Hazardous Substances Act

U.S.—U.S. v. Chalaire, D.C.La., 316 F.Supp. 543.

80. Wash.—Lake Washington School Dist. No. 414 v. Schuck's Auto Supply, Inc., 613 P.2d 561, 26 Wash.App. 618.

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85. U.S.—Suchomajcz v. Hummel Chemical Co., New Jersey, C.A.Pa., 524 F.2d 19.

§ 7. — Use in General

86. U.S.—Ward v. H. B. Zachry Const. Co., C.A. Okl., 570 F.2d 892.
National Auto. & Cas. Ins. Co. v. Mt. Pitt Co., D.C.Or., 234 F.Supp. 477.
Alaska—Yukon Equipment, Inc. v. Fireman's Fund Ins. Co., 585 P.2d 1206.
Ariz.—Correa v. Curbey, App., 605 P.2d 458, 124 Ariz. 480.
Ga.—Hitchcock Corp. v. Stoner, 116 S.E.2d 631, 102 Ga.App. 450.
Ill.—Peet v. Doles & Shepard Co., 190 N.E.2d 613, 41 Ill.App.2d 358.
Ind.—Galbreath v. Engineering Const. Corp., 273 N.E.2d 121, 149 Ind.App. 347, 56 A.L.R.3d 1002.
Or.—Mathison v. Massart Co., 638 P.2d 484, 55 Or. App. 435.
Vt.—Malloy v. Lane Const. Corp., 194 A.2d 398, 123 Vt. 500.

Use in vicinity of residential area

- Cal.—Balding v. D. B. Stutsman, Inc., 54 Cal.Rptr. 717, 246 C.A.2d 559.

87. Trespasser or licensee, etc.

- Mo.—Stevens v. Missouri Pac. R. Co., 355 S.W.2d 122.

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88. U.S.—Armstrong v. Chambers and Kennedy, D.C.Tex., 340 F.Supp. 1220. Affd. in part, revd. in part on oth. grds., C.A., 499 F.2d 263, reh. den. 512 F.2d 1061, cert. diss. 96 S.Ct. 163, 423 U.S. 886, 46 L.Ed.2d 118.
Ill.—Campbell v. Northern Signal Co., 430 N.E.2d 670, 58 Ill.Dec. 638, 103 Ill.App.3d 154.
La.—Maggio v. A. J. Toups Co., App., 153 So.2d 437.
Nev.—Richfield Oil Corp. v. Harbor Ins. Co., 452 P.2d 462, 85 Nev. 185.
Tex.—Stafford v. Thornton, Civ.App., 420 S.W.2d 153, err. ref. no rev. err.

No liability in absence of negligence

- U.S.—Forbes v. State Farm Fire & Cas. Co., D.C.Tex., 323 F.Supp. 227.
Mont.—Elkins v. Husky Oil Co., 455 P.2d 329, 153 Mont. 159.

Negligence of independent contractor

- (3) Did not adequately blind all sources of pressure and failed to supervise its welders and test for the presence of fumes.

- U.S.—Herman v. Hess Oil Virgin Islands Corp., D.C. Virgin Islands, 379 F.Supp. 1268, affd., C.A., 524 F.2d 767.

90. N.J.—C.J.S. cited in State v. Farmland-Fair Lawn Dairies, Inc., 174 A.2d 598, 601, 70 N.J.Super. 19.

91. U.S.—Cross v. M. C. Carlisle & Co., C.A.Mass., 368 F.2d 947.

- Tex.—Farmers Butane Gas Co., Inc. v. Walker, Civ. App., 489 S.W.2d 949.

- 91.5. La.—Waters v. Southern Farm Bureau Cas. Ins. Co., App., 212 So.2d 487, writ ref. 214 So.2d 720, 252 La. 900—Royal Ins. Co. v. Fidelity & Cas. Co. of New York, App., 256 So.2d 352—Mobley v. Rego Co., App. 2 Cir., 412 So.2d 1143, writ den. Sup., 414 So.2d 774, 1251.

- 91.10. Cal.—Borenkraut v. Whitten, 15 Cal.Rptr. 653, 364 P.2d 467, 56 C.2d 538.

Federal government

- U.S.—Parrott v. U.S., D.C.Cal., 181 F.Supp. 425.

92. Mo.—Natoli v. Johnson, App., 490 S.W.2d 275.

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94. N.Y.—Hoffman v. Raconello, 192 N.Y.S.2d 463, 9 A.D.2d 766, affd. 203 N.Y.S.2d 924, 8 N.Y.2d 883, 168 N.E.2d 722.

95. Tex.—Streety v. Chambers, Civ.App., 368 S.W.2d 148.

96. Mo.—Paisley v. Liebowitz, 347 S.W.2d 178.

98. Cal.—Whited v. Seaside Oil Co., 26 Cal.Rptr. 894, 210 C.A.2d 848.

- La.—Leake v. Prudhomme Truck Tank Service, Inc., 258 So.2d 358, 260 La. 1071.

- Mont.—Consolidated Freightways Corp. v. Continental Oil Co., 488 P.2d 1138.

- N.D.—Chicago, M., St. P. & P.R. Co. v. Johnston's Fuel Liners, Inc., 122 N.W.2d 140, app. after remand 130 N.W.2d 154.

- Pa.—Lizza v. Hale, 63 Lack.Jur. 93.

Reasonable care

- Fla.—Billen v. Hix, App., 260 So.2d 284. Cert. den., Sup., 284 So.2d 209.

Recovery not precluded because defendant could not have foreseen extent of harm

- N.Y.—Citowitz v. City of New York, 430 N.Y.S.2d 135, 77 A.D.2d 642.

- Or.—Smith v. J. C. Penney Co., Inc., 525 P.2d 1299, 269 Or. 643.

Safe place to work

- U.S.—Walters v. Inexco Oil Co., D.C.Miss., 511 F.Supp. 21.

99. Last clear chance doctrine inapplicable

- La.—Romero v. Trahan, App., 246 So.2d 268.

Exploding a flashcube is not a dangerous instrumentality for which a seller is absolutely liable.¹⁵

- 1.5. N.C.—Maybank v. S.S. Kresge Co., 266 S.E.2d 409, 46 N.C.App. 687, mod. on oth. grds. and affd. 273 S.E.2d 681, 302 N.C. 129.

2. U.S.—Smith v. U.S., C.A.Fla., 497 F.2d 500.

- Ala.—Harper v. Regency Development Co., Inc., 399 So.2d 248.

Negligence held proximate cause of injury

- U.S.—Glens Falls Ins. Co. v. Danville Motors, Inc., D.C.Ky., 215 F.Supp. 296, affd., C.A., 333 F.2d 187—Armstrong v. Chambers and Kennedy, D.C. Tex., 340 F.Supp. 1220, affd. in part, revd. in part on oth. grds., C.A., 499 F.2d 263, reh. den. 512 F.2d 1061, cert. diss. 96 S.Ct. 163, 423 U.S. 886, 46 L.Ed.2d 118.

- N.Y.—Citowitz v. City of New York, 430 N.Y.S.2d 135, 77 A.D.2d 642.

Negligence not proximate cause of injury

- Pa.—Green v. Independent Oil Co., 201 A.2d 207, 414 Pa. 477.

§ 8. — Blasting

Library References

Summers, The Law of Oil and Gas § 661.

- Fla.—C.J.S. black letter summary quoted in Price v. Florida Power and Light Co., 159 So.2d 654, 660.

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- 4.50. Ind.—C.J.S. black letter summary quoted in Enos Coal Min. Co. v. Schuchart, 188 N.E.2d 406, 410, 243 Ind. 692.

- Iowa—Davis v. L & W Const. Co., 176 N.W.2d 223.

- N.C.—C.J.S. quoted at length in Guilford Realty & Ins. Co. v. Blythe Bros. Co., 131 S.E.2d 900, 904, 260 N.C. 69—C.J.S. quoted at length in Trull v. Carolina-Virginia Well Company, 142 S.E.2d 622, 624, 264 N.C. 687.

- W.Va.—C.J.S. black letter summary quoted in Whitney v. Ralph Myers Contracting Corp., 118 S.E.2d 622, 629, 146 W.Va. 130.

Blasting not necessarily inherently dangerous

- N.Y.—Annuto v. Town of Herkimer, 288 N.Y.S.2d 79, 56 Misc.2d 186, affd. in part, revd. in part on oth. grds. 297 N.Y.S.2d 295, 31 A.D. 733, app. diss. 248 N.E.2d 449, 24 N.Y.2d 820, 300 N.Y.S.2d 596.

- 4.55. U.S.—McSparran v. Hanigan, D.C.Pa., 225 F.Supp. 628, affd., C.A., 356 F.2d 983—Good Fund, Ltd.—1972 v. Church, D.C.Colo., 540 F.Supp. 519, revd. on oth. grds., C.A., 703 F.2d 464.

5. Tex.—Stephens Trucking Co. v. Kemp, Civ.App., 560 S.W.2d 523.

Insufficient to rebut prima facie case

- La.—Roshong v. Travelers Ins. Co., App., 281 So.2d 785.

6. Ala.—Lehigh Portland Cement Co. v. Dobbins, 213 So.2d 246, 282 Ala. 513.

- Mo.—Donnell v. Vigus Quarries, Inc., App., 526 S.W.2d 314.

8. Mo.—Smith v. Aldridge, App., 356 S.W.2d 532.

- 10.5. W.Va.—C.J.S. quoted in Moore, Kelly & Reddish, Inc. v. Shannondale, Inc., 165 S.E.2d 113, 117, 152 W.Va. 549.

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11. U.S.—State Motor Parts Co. v. Christopher Const. Co., D.C.W.Va., 212 F.Supp. 467—Brewer v. Sheco Corp., Super., 208 A.2d 301, 303, 8 Storey 246.

- Del.—C.J.S. quoted at length in Catholic Welfare Guild, Inc. v. Brodney Corp., Super., 208 A.2d 301, 303, 8 Storey 246.

- Ga.—Berger v. Plantation Pipeline Co., 173 S.E.2d 741, 121 Ga.App. 362.

- Ind.—Galbreath v. Engineering Const. Corp., 273 N.E.2d 121, 149 Ind.App. 347, 56 A.L.R.3d 1002.

- Iowa—Monroe v. Razor Const. Co., 110 N.W.2d 250, 252 Iowa 1249—Davis v. L & W Const. Co., 176 N.W.2d 223.

- Ky.—Caney Creek Coal Co. v. Ellis, 437 S.W.2d 745—Wolf Creek Collieries Co. v. Davis, 441 S.W.2d 401.

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- N.Y.—Annuto v. Town of Herkimer, 288 N.Y.S.2d 79, 56 Misc.2d 186, affd. in part and revd. in part on oth. grds. 297 N.Y.S.2d 295, 31 A.D.2d 733, app. diss. 248 N.E.2d 449, 24 N.Y.2d 820, 300 N.Y. S.2d 596.

- Pa.—Lobozzo v. Adam Eidemiller, Inc., 263 A.2d 432, 437 Pa. 360.

- Armed v. Harris Walsh, Inc., 62 Lack.Jur. 197.

- S.C.—C.J.S. quoted at length in Wallace v. A. H. Guion & Co., 117 S.E.2d 359, 361, 237 S.C. 349.

- Va.—C.J.S. cited in M. W. Worley Const. Co., Inc. v. Hungerford, Inc., 210 S.E.2d 161, 164, 215 Va. 377.

- Wash.—Erickson Paving Co. v. Yardley Drilling Co., 502 P.2d 334, 7 Wash.App. 681.

- W.Va.—Konchesky v. S. J. Groves & Sons Co., 135 S.E.2d 299, 148 W.Va. 411—C.J.S. cited in *Perdue v. S. J. Groves and Sons Co.*, 161 S.E.2d 250, 255, 152 W.Va. 222—C.J.S. quoted in Moore, Kelly & Reddish, Inc. v. Shannondale, Inc., 165 S.E.2d 113, 117, 152 W.Va. 549.

- Wis.—Ziegler v. Wonn, 118 N.W.2d 706, 18 Wis.2d 382.

- The law relating to products liability, and the doctrine of strict liability, is discussed generally in 72 C.J.S. Supplement Products Liability.

- La.—Gullatt v. Ashland Oil & Refining Co., App., 243 So.2d 820.

12. La.—Greene v. Wright, App., 365 So.2d 551.

- Okl.—Cartwright v. Atlas Chemical Industries, Inc., App., 593 P.2d 104, 18 A.L.R.4th 180.

13. U.S.—Ward v. H. B. Zachry Const. Co., C.A. Okl., 570 F.2d 892.

- Ind.—Enos Coal Min. Co. v. Schuchart, 188 N.E.2d 406, 243 Ind. 692, overruling Boonville Collieries v. Reynolds, 163 N.E.2d 627, 130 Ind.App. 331.

- Iowa—Davis v. L & W Const. Co., 176 N.W.2d 223.

- Ky.—Clement Bros. Co. v. Everett, 414 S.W.2d 576.

- Miss.—Teledyne Exploration Co. v. Dickerson, 253 So.2d 817.

- Mo.—Smith v. Aldridge, App., 356 S.W.2d 532—Richards v. C.B. Contracting Co., App., 395 S.W.2d 737.

- N.Y.—Spano v. Perini Corp., 250 N.E.2d 31, 25 N.Y.2d 11, 302 N.Y.S.2d 527, on remand 304 N.Y.S.2d 15,

33 A.D.2d 516 overruling Booth v. Rome, 140 N.Y. 267, 35 N.E. 592.

Heimer v. Johnson, Drake and Piper, 274 N.Y. S.2d 520, 51 Misc.2d 958.

N.C.—C.J.S. cited in Guilford Realty & Ins. Co. v. Blythe Bros. Co., 131 S.E.2d 900, 905, 260 N.C. 69. Ohio—Walczesky v. Horvitz Co., 269 N.E.2d 844, 26 Ohio St.2d 146.

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W.Va.—C.J.S. cited in Whitney v. Ralph Myers Contracting Corp., 118 S.E.2d 622, 627, 146 W.Va. 130—Perdue v. S. J. Groves and Sons Co., 161 S.E.2d 250, 152 W.Va. 222—Ellison v. Wood & Bush Co., 170 S.E.2d 321, 153 W.Va. 506.

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16.5. U.S.—Brannon v. U.S., D.C.Fla., 287 F.Supp. 813.

Okla.—Falletti v. Brown, 481 P.2d 744.

Or.—Gronn v. Rogers Const., Inc., 350 P.2d 1086, 221 Or. 226.

16.10. U.S.—Ward v. H. B. Zachry Const. Co., C.A. Okl., 570 F.2d 892.

Tenn.—Poe v. Atlas Powder Co., 444 S.W.2d 170, 60 Tenn.App. 69.

17. Ala.—Vulcan Materials Co. v. Grace, 151 So.2d 229, 274 Ala. 653—Milford v. Tidwell, 159 So.2d 621, 276 Ala. 110—Coalite, Inc. v. Aldridge, 229 So.2d 539, 285 Ala. 137, on remand 229 So.2d 541, 45 Ala.App. 721.

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Ohio—Held v. Red Malcuit, Inc., 231 N.E.2d 356, 12 Ohio Misc. 158.

Rule no longer followed in New York

N.Y.—Spano v. Perini Corp., 250 N.E.2d 31, 25 N.Y.2d 11, 302 N.Y.S.2d 527, on remand 304 N.Y.S.2d 15, 33 A.D.2d 516, overruling Booth v. Rome, 35 N.E. 592, 140 N.Y. 267.

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28. Iowa—C.J.S. quoted at length in Hobbs v. Martin Marietta Co., 131 N.W.2d 772, 778, 257 Iowa 124.

30. Ark.—C.J.S. quoted in Carroll-Boone Water Dist. v. M. & P. Equipment Co., 661 S.W.2d 345, 351, 280 Ark. 560.

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32.5. However, a third party beneficiary may recover where he invokes a provision of the bond which is within the requirement of an ordinance.

N.Y.—Piscionere v. Bellino Bros. Const. Co., 195 N.Y. S.2d 767, 10 A.D.2d 580.

36. Ga.—Barrow v. Georgia Lightweight Aggregate Co., 120 S.E.2d 636, 103 Ga.App. 704.

40. Pleading

N.Y.—Iannone v. Cayuga Const. Corp., 411 N.Y.S.2d 599, 66 A.D.2d 745.

40.5. N.Y.—Shemin v. City of New York, 180 N.Y. S.2d 360, 6 A.D.2d 668, app. den. 182 N.Y.S.2d 330, 7 A.D.2d 846, motion den. 188 N.Y.S.2d 203, 6 N.Y.S.2d 814, 159 N.E.2d 690, app. diss. 198 N.Y.S.2d 627, 7 N.Y.2d 971, 166 N.E.2d 201.

44. N.Y.—Heimer v. Johnson, Drake and Piper, 274 N.Y.S.2d 520, 51 Misc.2d 958—Annutto v. Town of Herkimer, 288 N.Y.S.2d 79, 56 Misc.2d 186. Affd. in part and revd. in part on oth. grds. 297

N.Y.S.2d 295, 31 A.D.2d 733, app. diss. 248 N.E.2d 449, 24 N.Y.2d 820, 300 N.Y.S.2d 596.

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45. Ala.—Coalite, Inc. v. Weeks, 224 So.2d 251, 284 Ala. 219.

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49.5. Tex.—Stafford v. Thornton, Civ.App., 420 S.W.2d 153, err. ref. nq rev. err.

49.10. N.Y.—Schlansky v. Augustus V. Riegel, Inc., 215 N.Y.S.2d 52, 9 N.Y.2d 493, 174 N.E.2d 730.

50. Recovery denied

Cal.—Barrett v. Atlas Powder Co., 150 Cal.Rptr. 339, 86 C.A.3d 560.

Warning on flashcube

N.C.—Maybank v. U.S. Kresge Co., 266 S.E.2d 409, 46 N.C.App. 687, mod. on oth. grds. and affd. 273 S.E.2d 681, 302 N.C. 129.

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60. Performance of government duty

(3) Other statements.

Iowa—Monroe v. Razor Const. Co., 110 N.W.2d 250, 252 Iowa 1249.

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62. U.S.—Hagberg v. City of Sioux Falls, D.C.S.D., 281 F.Supp. 460.

Ga.—Dalon Contracting Co. v. Artman, 115 S.E.2d 377, 101 Ga.App. 828.

N.C.—C.J.S. cited in Guilford Realty & Ins. Co. v. Blythe Bros. Co., 131 S.E.2d 900, 906, 260 N.C. 69.

In New York

(1) N.Y.—3 E. 52nd St. Corp. v. Uris Fifth Ave. Corp., 329 N.Y.S.2d 943, 38 A.D.2d 917.

(2) N.Y.—Korycka v. S. A. Healy Co., 195 N.Y.S.2d 539, 9 A.D.2d 938, amendment den. 199 N.Y.S.2d 404, 10 A.D.2d 642, affd. 204 N.Y.S.2d 347, 8 N.Y.2d 968, 169 N.E.2d 9.

(3) Other matters.

N.Y.—Annutto v. Town of Herkimer, 288 N.Y.S.2d 79, 56 Misc.2d 186, affd. in part, revd. in part on oth. grds. 297 N.Y.S.2d 295, 31 A.D.2d 733, app. diss. 248 N.E.2d 449, 24 N.Y.2d 820, 300 N.Y.S.2d 596.

General contractor liable for acts of subcontractor

N.Y.—Carmel Associates Inc. v. Turner Const. Co., 314 N.Y.S.2d 941, 35 A.D.2d 157.

§ 9. — Transportation

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70. Mo.—C.J.S. cited in Pecan Shoppe of Springfield, Missouri, Inc. v. Tri-State Motor Transit, 573 S.W.2d 431, 435.

Carrier neither insurer nor absolutely liable

Conn.—Christ Church Parish v. Cadet Chemical Corp., 199 A.2d 707, 25 Conn.Sup. 191.

Strict liability imposed as to transporting gasoline

Wash.—Sieglar v. Kuhlman, 502 P.2d 1181, 81 Wash.2d 448, cert. den. 93 S.Ct. 2275, 411 U.S. 983, 36 L.Ed.2d 959.

71. U.S.—Continental Cas. Co. v. Fireman's Fund Ins. Co., C.A.Colo., 403 F.2d 291.

La.—Leake v. Prudhomme Truck Tank Service, Inc., 258 So.2d 358, 260 La. 1071.

73. Ohio—Bennison v. Stillpass Transit Co., 214 N.E.2d 213, 5 Ohio St.2d 122.

74. Conn.—Christ Church Parish v. Cadet Chemical Corp., 199 A.2d 707, 25 Conn.Sup. 191.

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82.5. No duty to warn of fire danger from crude oil well known throughout petroleum barge line industry

U.S.—Hobart v. Sohio Petroleum Co., D.C.Miss., 255 F.Supp. 972, affd., C.A., 376 F.2d 1011.

§ 10. — Discharge of Fireworks

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91. U.S.—Suchomajcz v. Hummel Chemical Co., New Jersey, C.A.Pa., 524 F.2d 19.

Pa.—Haddon v. Litito, 161 A.2d 160, 399 Pa. 521, 81 A.L.R.2d 1199.

93. Active negligence

Tex.—Martinez v. Martinez, Civ.App., 553 S.W.2d 211.

96. N.Y.—Rill v. Chiarella, 269 N.Y.S.2d 736, 50 Misc.2d 105, mod. on oth. grds. 293 N.Y.S.2d 1, 30 A.D.2d 852. Motion den. 252 N.E.2d 628, 25 N.Y.2d 929, 305 N.Y.S.2d 147, affd. 255 N.E.2d 183, 25 N.Y.2d 702, 306 N.Y.S.2d 955.

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2. N.Y.—Rill v. Chiarella, 269 N.Y.S.2d 736, 50 Misc.2d 105, mod. on oth. grds. 293 N.Y.S.2d 1, 30 A.D.2d 852. Motion den. 252 N.E.2d 628, 25 N.Y.2d 929, 305 N.Y.S.2d 147, affd. 255 N.E.2d 183, 25 N.Y.2d 702, 306 N.Y.S.2d 955.

3. Pa.—C.J.S. cited in Haddon v. Lotito, 161 A.2d 160, 163, 399 Pa. 521, 81 A.L.R.2d 1199.

5. U.S.—Suchomajcz v. Hummel Chemical Co., New Jersey, C.A.Pa., 524 P.2d 19.

La.—Robinson v. Muller, App., 242 So.2d 86.

Pa.—Haddon v. Lotito, 161 A.2d 160, 399 Pa. 521, 81 A.L.R.2d 1199.

Tex.—Martinez v. Martinez, Civ.App., 553 S.W.2d 211.

Liability for negligent entrustment

U.S.—Collins v. Arkansas Cement Co., C.A.Ark., 453 F.2d 512.

6. Charge of admission price not material to liability

N.Y.—Rill v. Chiarella, 269 N.Y.S.2d 736, 50 Misc.2d 105, mod. on oth. grds. 293 N.Y.S.2d 1, 30 A.D.2d 852. Motion den. 252 N.E.2d 628, 25 N.Y.2d 929, 305 N.Y.S.2d 147, affd. 255 N.E.2d 183, 25 N.Y.2d 702, 306 N.Y.S.2d 955.

7. Purpose of requirement of bond

N.Y.—Rill v. Chiarella, 269 N.Y.S.2d 736, 50 Misc.2d 105, mod. on oth. grds. 293 N.Y.S.2d 1, 30 A.D.2d 852, motion den. 252 N.E.2d 628, 25 N.Y.2d 929, 305 N.Y.S.2d 147, affd. 255 N.E.2d 183, 25 N.Y.2d 702, 306 N.Y.S.2d 955.

8. La.—Royal Ins. Co. v. Fidelity & Cas. Co. of New York, App., 256 So.2d 352.

11. Parent held not liable

Ga.—Wittke v. Horne's Enterprises, Inc., 162 S.E.2d 898, 118 Ga.App. 211.

However, a promoter's duty of care may not be delegated to an independent contractor.^{11.5}

11.5. Duty to select skilled contractor

N.Y.—Rill v. Chiarella, 269 N.Y.S.2d 736, 50 Misc.2d 105, mod. on oth. grds. 293 N.Y.S.2d 1, 30 A.D.2d 852, motion den. 252 N.E.2d 628, 25 N.Y.2d 929, 305 N.Y.S.2d 147, affd. 255 N.E.2d 183, 25 N.Y.2d 702, 306 N.Y.S.2d 955.

12. La.—Briggs v. Iowa Mut. Ins. Co., App., 150 So.2d 905, writ ref. 152 So.2d 563, 244 La. 470.

§ 11(1). — Actions

Library References

Explosives ¶7-12.

13. Wash.—Lake Washington School Dist. No. 414 v. Schuck's Auto Supply, Inc., 613 P.2d 561, 26 Wash.App. 618.

Trespass form of action not required

Vt.—Malloy v. Lane Const. Corp., 194 A.2d 398, 123 Vt. 500.

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15.5. Ala.—Vulcan Materials Co. v. Grace, 151 So.2d 229, 274 Ala. 653.

§ 11(1) EXPLOSIVES

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- 15.15. Ga.—Ledbetter Bros., Inc. v. Jenkins, 190 S.E.2d 797, 126 Ga.App. 413.

Some jurisdictions have adopted the theory of strict liability.^{16,5}

- 16.5. U.S.—Howard v. Sears, Roebuck & Co., D.C. Miss., 437 F.Supp. 883, affd. 584 F.2d 388.

Not applied retroactively

- Okl.—Northrip v. Montgomery Ward & Co., 529 P.2d 489.

§ 11(2). — — — Defenses

17. Ohio—Bennison v. Stillpass Transit Co., 214 N.E.2d 213, 5 Ohio St.2d 122.
Or.—Kor v. Sugg, 443 P.2d 641, 250 Or. 543.
17.10. U.S.—Gaskins v. Tarpley, C.A.Pa., 456 F.2d 1149.

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19.15. Warning properly given

- Tex.—Delhi-Taylor Oil Corp. v. Henry, 416 S.W.2d 390, cert. den. 88 S.Ct. 592, 389 U.S. 1021, 19 L.Ed.2d 667, reh. den. 88 S.Ct. 1023, 390 U.S. 975, 19 L.Ed.2d 1192.

20. Blasting in customary manner

- Ky.—Juett v. Calhoun, 405 S.W.2d 946,

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30. U.S.—Craig v. Olin Mathieson Chemical Corp., C.A.Ill., 427 F.2d 962, cert. den. 91 S.Ct. 365, 400 U.S. 964, 27 L.Ed.2d 383—Dickerson v. Continental Oil Co., C.A.La., 449 F.2d 1209, cert. den., 92 S.Ct. 942, 405 U.S. 934, 30 L.Ed.2d 809, app. after remd. 476 F.2d 635.

- Ga.—Seagraves v. ABCO Mfg. Co., 173 S.E.2d 416, 121 Ga.App. 224.

- La.—Pinner v. Clark, App., 371 So.2d 1306, writ den., Sup., 373 So.2d 547.

- Tenn.—Wilburn v. Vernon, 447 S.W.2d 382, 60 Tenn. App. 436.

- Utah—Southwick v. S.S. Mullen, Inc., 432 P.2d 56, 19 Utah 2d 430.

31. U.S.—De Legrand v. U.S., D.C.Puerto Rico, 182 F.Supp. 184—Tropae v. Shell Oil Co., C.A.N.Y., 307 F.2d 757.

33. Del.—O'Hara v. Petrillo Bros., Inc., 216 A.2d 672, 9 Storey 202.

Fireworks

- Ky.—Shelanie v. National Fireworks Ass'n, 487 S.W.2d 921.

- Ohio—Self v. American Legion Post No. 389, 279 N.E.2d 889, 29 Ohio App.2d 189.

34. Wash.—Bringle v. Lloyd, 537 P.2d 1060, 13 Wash.App. 844.

35. U.S.—Duvall v. U.S., D.C.N.C., 312 F.Supp. 625.

- Wis.—Christians v. Homestake Enterprises, Ltd., 303 N.W.2d 608, 101 Wis.2d 25.

36. Ga.—Allen v. Gornito, 112 S.E.2d 368, 100 Ga. App. 744.

37. Tex.—Dezendorf Marble Co. v. Gartman, Civ. App., 333 S.W.2d 404, affd., Sup., 343 S.W.2d 441, 161 Tex. 535—Shamrock Fuel & Oil Sales Co. v. Tunks Civ.App., 406 S.W.2d 483.

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39. La.—Romero v. Trahan, App., 246 So.2d 268.

42. N.C.—Moore v. Beard-Laney, Inc., 139 S.E.2d 879, 263 N.C. 601.

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63. Mo.—Dalby v. Hercules, Inc., 458 S.W.2d 274.

64. Or.—Gronn v. Rogers Const., Inc., 350 P.2d 1086, 221 Or. 226.

§ 11(3). — — — Jurisdiction and Venue

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66. U.S.—Suchomajec v. Hummel Chemical Co., Newark, New Jersey, C.A.Pa., 524 F.2d 19.

67. Strict liability rule of forum properly applied

- U.S.—Foster v. Day & Zimmermann, Inc., C.A.Iowa, 502 F.2d 867.

§ 11(5). — — — Pleading

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82. Ill.—Bauch v. Bee Line Service, Inc., 167 N.E.2d 568, 26 Ill.App.2d 254.

- 82.5. N.C.—Paris v. Carolina Portable Aggregates, Inc., 157 S.E.2d 131, 271 N.C. 471.

84. U.S.—Duckett v. Clement Bros. Co., C.A.Ky., 375 F.2d 963.

- Ky.—Valley Stone Co. v. Binion, 422 S.W.2d 889.

85. Wis.—Szafranski v. Radetzky, 141 N.W.2d 902, 31 Wis.2d 119, 23 A.L.R.3d 1071.

86. Or.—Spencer v. B. P. John Furniture Corp., 467 P.2d 429, 255 Or. 359.

- Pa.—Messner v. H. B. McClure Co., 76 Dauph. 174.

Allegations held sufficient

- Ga.—Allen v. Gornito, 112 S.E.2d 368, 100 Ga.App. 744—Hitchcock Corp. v. Stoner, 116 S.E.2d 631, 102 Ga.App. 450.

- Barrow v. Georgia Lightweight Aggregate Co., 120 S.E.2d 636, 103 Ga.App. 704—Floyd v. Morgan, 127 S.E.2d 31, 106 Ga.App. 332.

- Iowa—Tice v. Wilmington Chemical Corp., 141 N.W.2d 616, op. supp. 143 N.W.2d 86, 259 Iowa 27.

- Okl.—Commercial Union Fire Ins. Co. v. Kelly, 389 P.2d 641.

- Tex.—Pelphrey v. Diver, Civ.App., 348 S.W.2d 453, err. ref. no rev. err.

- Vt.—Malloy v. Lane Const. Corp., 194 A.2d 398, 123 Vt. 500.

Allegations held insufficient

- Ala.—Vulcan Materials Co. v. Grace, 151 So.2d 229, 274 Ala. 653—Ramsey v. Sentell Oil Co., 195 So.2d 527, 280 Ala. 475—Sammons v. Garner, 222 So.2d 717, 284 Ala. 131.

- Fla.—Langevin v. Gray Drug Stores, Inc., of Miami, App., 216 So.2d 70.

- Ind.—Pier v. Schultz, 182 N.E.2d 255, 243 Ind. 200.

- Boonville Collieries Corp. v. Reynolds, 163 N.E.2d 627, 130 Ind.App. 331.

- N.C.—Stegall v. Catawba Oil Co. of N.C., 133 S.E.2d 138, 260 N.C. 459—Stegall v. Catawba Oil Co. of N.C., 133 S.E.2d 145, 260 N.C. 468—Stegall v. Catawba Oil Co. of N.C., 133 S.E.2d 146, 260 N.C. 469.

- Wis.—Szafranski v. Radetzky, 141 N.W.2d 902, 31 Wis.2d 119, 23 A.L.R.3d 1071.

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- 86.5. Ga.—Barrow v. Georgia Lightweight Aggregate Co., 120 S.E.2d 636, 103 Ga.App. 704.

87. Pleading held sufficient

- Ala.—Marigold Coal, Inc. v. Thames, 149 So.2d 276, 274 Ala. 421.

- N.Y.—Spano v. Perini Corp., 250 N.E.2d 31, 25 N.Y.2d 11, 302 N.Y.S.2d 527, on remand 304 N.Y.S.2d 15, 33 A.D.2d 516.

Pleading held insufficient

- Ga.—Henderson v. Baird, 112 S.E.2d 221, 100 Ga.App. 627.

- 88.5. Kan.—Lackey v. Price, 378 P.2d 19, 190 Kan. 648.

General and specific allegations

(2) Pleading both held permissible.

- Del.—Wattilana v. George & Lynch, Inc., Super., 154 A.2d 565, 2 Storey 168.

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- 88.10. Wis.—Szafranski v. Radetzky, 141 N.W.2d 902, 31 Wis.2d 119, 23 A.L.R.3d 1071.

89. Allegations held sufficient

- Ala.—Milford v. Tidwell, 159 So.2d 621, 276 Ala. 110.

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91. Pa.—Messner v. H. B. McClure Co., 76 Dauph. 174.

- 91.5. W.Va.—Perdue v. S. J. Groves and Sons Co., 161 S.E.2d 250, 152 W.Va. 222.

Complaint advancing theory of strict liability held sufficient

- Cal.—Canifax v. Hercules Powder Co., 46 Cal.Rptr. 552, 237 C.A.2d 44.

- Del.—Catholic Welfare Guild, Inc. v. Brodney Corp., Super., 208 A.2d 301, 8 Storey 246.

95. U.S.—Cataldo v. Brunswick Corp., D.C.N.Y., 68 F.R.D. 600.

- N.Y.—Tucci v. Bossert, 385 N.Y.S.2d 328, 53 A.D.2d 291, 85 A.L.R.3d 721.

96. Ga.—Floyd v. Morgan, 127 S.E.2d 31, 106 Ga. App. 332.

2. Petition held insufficient

- Ga.—Shockley v. Henslee, 150 S.E.2d 689, 114 Ga.App. 227.

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7. Ala.—Marigold Coal, Inc. v. Thames, 149 So.2d 276, 274 Ala. 421.

Pleading held sufficient to state cause of action for punitive damages

- Kan.—McMillan v. Jayhawk Const. Co., 360 P.2d 1082, 188 Kan. 113.

17. Iowa—Hobbs v. Martin Marietta Co., 131 N.W.2d 772, 257 Iowa 124.

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- 21.5. Ala.—Milford v. Tidwell, 159 So.2d 621, 276 Ala. 110.

Evidence of fire safety ordinance held admissible under general allegation of negligence in allowing escape of gasoline.

- U.S.—Burriss v. Texaco, Inc., C.A.S.C., 361 F.2d 169.

§ 11(6). — — — Presumptions and Burden of Proof

23. Cal.—Hartsook v. Owl Drug Co., 5 Cal.Rptr. 835, 182 C.A.2d 150, 78 A.L.R.2d 733.

- 23.5. Mass.—Haley v. Allied Chemical Corp., 231 N.E.2d 549, 353 Mass. 325.

- N.C.—Hubbard v. Quality Oil Co. of Statesville, Inc., 151 S.E.2d 71, 268 N.C. 489.

- Tex.—Delhi-Taylor Oil Corp. v. Henry, 416 S.W.2d 390, cert. den. 88 S.Ct. 592, 389 U.S. 1021, 19 L.Ed.2d 667, reh. den. 88 S.Ct. 1023, 390 U.S. 975, 19 L.Ed.2d 1192.

- 23.10. Minn.—Teslow v. Minneapolis-Honeywell Regulator Co., 141 N.W.2d 507, 273 Minn. 309.

24. U.S.—Borowicz v. Chicago Mastic Co., C.A.Ill., 367 F.2d 751.

However, the doctrine of alternative liability, which shifts the burden of proof of proximate cause to the defendant, is applicable where a plaintiff has been injured in an explosion by the tortious conduct of one of two defendants but it is uncertain as to which defendant is responsible.^{24,5}

- 24.5. Ohio—Minnich v. Ashland Oil Co., Inc., 473 N.E.2d 1199, 15 Ohio St.3d 396, 15 O.B.R. 511.

26. U.S.—De Legrand v. U.S., D.C.Puerto Rico, 182 F.Supp. 184.

- Va.—Wells v. Whitaker, 151 S.E.2d 422, 207 Va. 616.

26.5. No duty to present expert testimony
U.S.—Tropes v. Shell Oil Co., C.A.N.Y., 307 F.2d 757.

No absolute liability

Ind.—Smith v. Kauffman, 366 N.E.2d 1195, 174 Ind. App. 222.

26.15. Colo.—Kaesik v. John E. Mitchell Co., 492 P.2d 871, 30 Colo.App. 227. Affd. 506 P.2d 362, 181 Colo. 19.

N.M.—Lovato v. Plateau, Inc., App., 444 P.2d 623, 79 N.M. 428.

Pa.—Haddon v. Lotito, 161 A.2d 160, 399 Pa. 521, 81 A.L.R.2d 1199—Shirley v. Clark, 271 A.2d 868, 441 Pa. 508.

26.20. Mo.—Copher v. Barbee, App., 361 S.W.2d 137.

27. U.S.—Franks v. National Dairy Products Corp., C.A.Tex., 414 F.2d 682.

Del.—Vattilana v. George & Lynch, Inc., Super., 154 A.2d 565, 2 Storey 168.

Ill.—Moore v. Jewel Tea Co., 253 N.E.2d 636, 116 Ill.App.2d 109, affd., 263 N.E.2d 103, 46 Ill.2d 288.

La.—Tassin v. Louisiana Power & Light Co., 201 So.2d 275, 250 La. 1016.

Text rule held applicable, etc.

(8) Other explosions.

U.S.—Smith v. Pennsylvania-Reading Seashore Lines, D.C.Pa., 355 F.Supp. 1176, affd., C.A., 487 F.2d 1394, and 487 F.2d 1395.

La.—Waters v. Southern Farm Bureau Cas. Ins. Co., App., 212 So.2d 487, writ ref. 214 So.2d 720, 252 La. 900.

Mo.—Crystal Tire Co. v. Home Service Oil Co., 465 S.W.2d 531, 46 A.L.R.3d 794, app. after remand 507 S.W.2d 383, app. after remand 525 S.W.2d 317.

Application of doctrine to parties jointly liable

La.—Moak v. Link-Belt Co., App., 229 So.2d 395, app. dism. in part, revd. in part, 242 So.2d 515, 257 La. 281.

28. Cal.—Walker v. Stauffer Chemical Corp., 96 Cal. Rptr. 803, 19 C.A.3d 669.

La.—Moak v. Link-Belt Co., 242 So.2d 515, 257 La. 281.

N.C.—O'Quinn v. Southard, 152 S.E.2d 538, 269 N.C. 385.

R.I.—Lopes v. Narragansett Elec. Co., 229 A.2d 55, 102 R.I. 128.

Rule of res ipsa loquitur held inapplicable

U.S.—Dickerson v. Continental Oil Co., C.A.La., 449 F.2d 1209, cert. den., 92 S.Ct. 942, 405 U.S. 934, 30 L.Ed.2d 809, app. after remand. 476 F.2d 635.

Forbes v. State Farm Fire & Cas. Co., D.C.Tex., 323 F.Supp. 227.

Ark.—Delta Oxygen Co. v. Scott, 383 S.W.2d 885, 238 Ark. 534.

29. La.—Moak v. Link-Belt Co., App., 229 So.2d 395, app. dism. in part, revd. in part on oth. grds. 242 So.2d 515, 257 La. 281—American Emp. Ins. Co. v. Fagot, App., 250 So.2d 842.

N.C.—Hubbard v. Quality Oil Co. of Statesville, Inc., 151 S.E.2d 71, 268 N.C. 489.

Vt.—C.J.S. cited in McDonnell v. Montgomery Ward & Co., 154 A.2d 469, 474, 121 Vt. 221, 80 A.L.R.2d 590.

29.10. N.C.—O'Quinn v. Southard, 152 S.E.2d 538, 269 N.C. 385.

Pa.—Haddon v. Lotito, 161 A.2d 160, 399 Pa. 521, 81 A.L.R.2d 1199.

Vt.—McDonnell v. Montgomery Ward & Co., 154 A.2d 469, 121 Vt. 221, 80 A.L.R.2d 590.

29.15. N.C.—O'Quinn v. Southard, 152 S.E.2d 538, 269 N.C. 385.

29.20. U.S.—Hall v. E. I. Du Pont De Nemours & Co., Inc., D.C.N.Y., 345 F.Supp. 353.

29.25. La.—Tassin v. Louisiana Power & Light Co., App., 191 So.2d 338, affd. 201 So.2d 275, 250 La. 1016.

32. U.S.—De Legrand v. U.S. D.C.Puerto Rico, 182 F.Supp. 184.

33. U.S.—Cauley v. U.S. D.C.N.C., 242 F.Supp. 866. Ala.—Mitchell v. Richardson, 173 So.2d 814, 277 Ala. 651.

Va.—B. G. Young & Sons, Inc. v. Kirk, 116 S.E.2d 38, 202 Va. 176—V. N. Green & Co. v. Thomas, 140 S.E.2d 635, 205 Va. 903, 9 A.L.R.3d 376.

33.5. N.Y.—Annutto v. Town of Herkimer, 288 N.Y. S.2d 79, 56 Misc.2d 786, affd. in part and revd. in part on oth. grds. 297 N.Y.S.2d 295, 31 A.D.2d 733, app. dism. 248 N.E.2d 449, 24 N.Y.2d 820, 300 N.Y.S.2d 596.

Tenn.—Silcox v. Smith County, App., 487 S.W.2d 652. W.Va.—Whitney v. Ralph Myers Contracting Corp., 118 S.E.2d 622, 146 W.Va. 130.

Consequential damage from vibrations

(2) Other instances.

Ala.—Vulcan Materials Co. v. Grace, 151 So.2d 229, 274 Ala. 653.

Lack of causation need not be established by defendant.

Pa.—Enoch v. New Enterprise Stone & Lime Co., 184 A.2d 407, 199 Pa.Super. 220.

33.15. Ill.—Peet v. Dolese & Shepard Co., 190 N.E.2d 613, 41 Ill.App.2d 358.

Strict liability imposed for trespass, but negligence must be proved where damage from concession is sought.—Thomas v. Hendrickson Bros., Inc., 291 N.Y. S.2d 57, 30 A.D.2d 730.

Proof of causation still necessary

N.Y.—Baron v. Acme Excavating Corp., 337 N.Y.S.2d 667, 71 Misc.2d 919.

34. U.S.—Cauley v. U.S. D.C.N.C., 242 F.Supp. 866. Ala.—Coalite, Inc. v. Aldridge, 229 So.2d 539, 285 Ala. 137, on remand 229 So.2d 541, 45 Ala.App. 721.

Va.—B. G. Young & Sons, Inc. v. Kirk, 116 S.E.2d 38, 202 Va. 176—V. N. Green & Co. v. Thomas, 140 S.E.2d 635, 205 Va. 903, 9 A.L.R.3d 376.

35. Fla.—Morse v. Hendry Corp., App., 200 So.2d 816.

Tex.—Hood v. Laning, Civ.App., 415 S.W.2d 953.

36. N.Y.—Schlansky v. Augustus V. Riegel, Inc., 215 N.Y.S.2d 52, 9 N.Y.2d 493, 174 N.E.2d 730.

37. Tex.—Hood v. Laning, Civ.App., 415 S.W.2d 953.

38. N.Y.—Heimer v. Johnson, Drake and Piper, 274 N.Y.S.2d 520, 51 Misc.2d 958.

Blasting licensee is presumed as matter of law to be competent.^{39.5}

39.5. U.S.—Watsontown Brick Co. v. Hercules Powder Co., D.C.Pa., 265 F.Supp. 268, affd., C.A., 387 F.2d 99.

38. Ky.—Terry & Wright of Ky. v. Crick, 418 S.W.2d 217.

41. Tex.—Hood v. Laning, Civ.App., 415 S.W.2d 953.

46. Minn.—Skaggs v. Zinken, 136 N.W.2d 290, 292 Minn. 392.

54.5. U.S.—Huffstutler v. Hercules Powder Co., C.A. Ala., 305 F.2d 292.

Croteau v. Borden Co., D.C.Pa., 277 F.Supp. 945, affd., C.A., 395 F.2d 771.

Minn.—Teslow v. Minneapolis-Honeywell Regulator Co., 141 N.W.2d 507, 273 Minn. 309.

W.Va.—Walton v. Given, 215 S.E.2d 647, 158 W.Va. 897.

64.5. N.Y.—Daggett v. Keshner, 179 N.Y.S.2d 428, 6 A.D.2d 503, am. on oth. grds. 185 N.Y.S.2d 555, 5 N.Y.2d 1039, 158 N.E.2d 254, affd. 199 N.Y.S.2d 41, 7 N.Y.2d 981, 166 N.E.2d 324.

66. Or.—Howard v. Sloan, 504 P.2d 735, 264 Or. 247.

67. Static spark

(2) Other matters.

Okl.—Jack Cooper Transport Co. v. Griffin, 356 P.2d 748.

Stationary or mobile storage of dynamite

Ky.—Vandiver v. Wilson, 446 S.W.2d 650.

68. Ky.—Vandiver v. Wilson, 446 S.W.2d 650.

71. La.—Rancatore v. Evans, App., 182 So.2d 102.

Plaintiff need not show who stored explosive nor freedom from contributory negligence

U.S.—Carey v. U.S., D.C.N.C., 183 F.Supp. 727.

§ 11(7). — Admissibility of Evidence

85.5. Fla.—Billen v. Hix, App., 260 So.2d 284, cert. den., Sup., 284 So.2d 209.

Ga.—Seagraves v. ABCO Mfg. Co., 173 S.E.2d 416, 121 Ga.App. 224.

La.—American Ins. Co. v. Stansbury, App., 197 So.2d 337.

Pa.—O'Malley v. Peerless Petroleum, Inc., 423 A.2d 1251, 283 Pa.Super. 272.

Discretion not abused

Ariz.—Shell Oil Co. v. Gutierrez, App., 581 P.2d 271, 119 Ariz. 426.

88.50. Ohio—Benyo v. Kaiser-Nelson Corp., 210 N.E.2d 740, 3 Ohio App.2d 405.

88.55. Iowa—C.J.S. cited in Davis v. L & W Construction Co., 176 N.W.2d 223, 227.

89. U.S.—State Motor Parts Co. v. Christopher Const. Co., D.C.W.Va., 212 F.Supp. 467—Hall v. E. I. Du Pont De Nemours & Co., Inc., D.C.N.Y., 345 F.Supp. 353.

Ala.—Marigold Coal, Inc. v. Thames, 149 So.2d 276, 274 Ala. 421.

Ill.—Arras v. Columbia Quarry Co., 367 N.E.2d 580, 10 Ill.Dec. 192, 52 Ill.App.3d 560.

Ind.—Enos Coal Min. Co. v. Schuchart, 188 N.E.2d 406, 243 Ind. 692.

Ky.—Valley Stone Co. v. Binion, 422 S.W.2d 889.

N.M.—Jaramillo v. Anaconda Co., 376 P.2d 954, 71 N.M. 161.

N.C.—McLamb v. Brown Const. Co., 179 S.E.2d 895, 10 N.C.App. 688.

Ohio—Benyo v. Kaiser-Nelson Corp., 210 N.E.2d 740, 3 Ohio App.2d 405.

Other blasts

(6) Damage to other structures similarly situated. Mo.—Donnell v. Vigus Quarries, Inc., App., 526 S.W.2d 314.

90. Ala.—Marigold Coal, Inc. v. Thames, 149 So.2d 276, 274 Ala. 421.

90.5. Mo.—Poston v. Clarkson Const. Co., App., 401 S.W.2d 522.

Evidence held admissible

(3) Other evidence.

Ohio—Benyo v. Kaiser-Nelson Corp., 210 N.E.2d 740, 3 Ohio App.2d 405.

90.10. Evidence improperly excluded

Ohio—Benyo v. Kaiser-Nelson Corp., 210 N.E.2d 740, 3 Ohio App.2d 405.

93. Colo.—Kaesik v. John E. Mitchell Co., 492 P.2d 871, 39 Colo.App. 227. Affd. 506 P.2d 362, 181 Colo. 19.

Ill.—Moore v. Jewel Tea Co., 253 N.E.2d 636, 116 Ill.App.2d 109, affd., 263 N.E.2d 103, 46 Ill.2d 288.

Tex.—Howesley & Jacobs v. Kendall, Civ.App., 364 S.W.2d 836, err. gr.

94. U.S.—Borowicz v. Chicago Mastio Co., C.A.Ill., 367 F.2d 751.

95. Fla.—Marks v. Delcastillo, App., 386 So.2d 1259.
Mont.—Keck v. Bairs Inc., 437 P.2d 380, 150 Mont. 562, 32 A.L.R.3d 1158.

Opinion

- (3) Proper handling of gelled rocket propellant.
U.S.—Gaskins v. Tarpley, C.A.Pa., 456 F.2d 1149.

Previous or subsequent conduct or situation

- (5) Reports and memorandum to actual control by defendants.
U.S.—Gaskins v. Tarpley, C.A.Pa., 456 F.2d 1149.

96. Mo.—Crystal Tire Co. v. Home Service Oil Co., 525 S.W.2d 317.

Remoteness

- Cal.—Hoover v. City of Fresno, 77 Cal.Rptr. 146, 272 C.A.2d 7.

- 96.5. Okl.—Jack Cooper Transport Co. v. Griffin, 356 P.2d 748.

§ 11(8). — Weight and Sufficiency

97. U.S.—Hall v. E. I. Du Pont De Nemours & Co., Inc., D.C.N.Y., 345 F.Supp. 353.
Utah—Law v. Uinta Oil Refining Co., 364 P.2d 1024, 12 Utah 2d 229.

98. U.S.—Forbes v. State Farm Fire & Cas. Co., D.C.Tex., 323 F.Supp. 227.

1. Cal.—Smith v. Lockheed Propulsion Co., 56 Cal. Rptr. 128, 247 C.A.2d 774, 29 A.L.R.3d 538.
Mo.—Donnell v. Vigus Quarries, Inc., App., 526 S.W.2d 314.

Res ipsa loquitur applied

- U.S.—Foster v. Day & Zimmermann, Inc., C.A.Iowa, 502 F.2d 867.

- La.—Moak v. Link-Belt Co., App., 229 So.2d 395, app. diss. in part, rev'd. in part 242 So.2d 515, 257 La. 281.

- Mont.—Keck v. Bairs Inc., 437 P.2d 380, 150 Mont. 562, 32 A.L.R.3d 1158.

i. Evidence held sufficient

- (1) U.S.—Gaskins v. Tarpley, C.A.Pa., 456 F.2d 1149.

- Gregg v. U.S., D.C.S.C., 186 F.Supp. 44—Richardson v. U.S., D.C.Tenn., 251 F.Supp. 107—Croteau v. Borden Co., D.C.Pa., 277 F.Supp. 945, aff'd., C.A., 395 F.2d 771—Franks v. National Dairy Products Corp., D.C.Tex., 282 F.Supp. 528, aff'd., C.A., 414 F.2d 682.

- Cal.—Hartsook v. Owl Drug Co., 5 Cal.Rptr. 835, 182 C.A.2d 150, 78 A.L.R.2d 733.

- Ind.—Baugh v. Branum, 231 N.E.2d 281, 141 Ind.App. 679.

- Mass.—Haley v. Allied Chemical Corp., 231 N.E.2d 549, 353 Mass. 325—Fiorentino v. A. E. Staley Mfg. Co., 416 N.E.2d 998, 11 Mass.App. 428.

- Mich.—Parsonson v. Construction Equipment Co., 170 N.W.2d 479, 18 Mich.App. 87, aff'd. 191 N.W.2d 465, 386 Mich. 61.

- Okl.—McDaniel v. C & G Well Servicing Co., 535 P.2d 686.

- Pa.—De Marco v. Frommyer Brick Co., 201 A.2d 234, 203 Pa.Super. 486.

- Wash.—Callahan v. Keystone Fireworks Mfg. Co., 435 P.2d 626, 72 Wash.2d 823.

- (2) U.S.—M. C. Carlisle & Co. v. Cross, C.A.Mass., 386 F.2d 672.

- N.Y.—Jackson v. Ludlow Marine Corp., 365 N.Y.S.2d 216, 47 A.D.2d 737.

- Okl.—Champlin Oil & Refining Co. v. Roever, 477 P.2d 662.

- Pa.—O'Malley v. Peerless Petroleum, Inc., 423 A.2d 1251, 283 Pa.Super. 272.

- Tex.—Southwestern Hydrocarbon Co. v. Thompson, Civ.App., 355 S.W.2d 823, err. ref. no rev. err.—Missouri Pac.R. Co. v. Covarrubias, Civ.App., 400 S.W.2d 599, err. ref. no rev. err.

- (5) N.Y.—Daggett v. Keshner, 179 N.Y.S.2d 428, 6 A.D.2d 503, am. on oth. grds. 185 N.Y.S.2d 555, 5 N.Y.2d 1039, 158 N.E.2d 254, aff'd. 199 N.Y.S.2d 41, 7 N.Y.2d 981, 166 N.E.2d 324.

(7) Other matters

- U.S.—Cross v. M. C. Carlisle & Co., C.A.Mass., 368 F.2d 947—M. C. Carlisle & Co. v. Cross, C.A. Mass., 386 F.2d 672.

- De Legrand v. U.S., D.C.Puerto Rico, 182 F.Supp. 184.

Evidence held insufficient

- (1) U.S.—Hennigan v. Atlantic Refining Co., D.C. Pa., 282 F.Supp. 667, aff'd., C.A., 400 F.2d 857, cert. den. 89 S.Ct. 1739, 395 U.S. 904, 23 L.Ed.2d 216—Rowe v. John C. Motter Printing Press Co., D.C.R.I., 305 F.Supp. 1001.

- Ky.—Texas v. Standard, 536 S.W.2d 136.

- Mich.—Parsonson v. Construction Equipment Co., 191 N.W.2d 465, 386 Mich. 61.

- Mont.—Knowlton v. Sandaker, 436 P.2d 98, 150 Mont. 438.

- (2) U.S.—Hennigan v. Atlantic Refining Co., D.C. Pa., 282 F.Supp. 667, aff'd., C.A., 400 F.2d 857, cert. den. 89 S.Ct. 1739, 395 U.S. 904, 23 L.Ed.2d 216.

- 5.5. U.S.—Herman v. Hess Oil Virgin Islands Corp., C.A.Virgin Islands, 524 F.2d 767.

- La.—American Ins. Co. v. Stansbury, App., 197 So.2d 337.

- Mich.—Schedbauer v. Chris-Craft Corp., 160 N.W.2d 889, 381 Mich. 217.

- Pa.—Lizza v. Hale, 63 Lack.Jur. 93.

- Tex.—Brown & Root, Inc. v. Gragg, Civ.App., 444 S.W.2d 656, err. ref. no rev. err.

- 5.10. U.S.—Sun Oil Co. v. Fisher, C.A.Mich., 285 F.2d 5—Tropea v. Shell Oil Co., C.A.N.Y., 307 F.2d 757—Martie v. Cogan, C.A.Va., 428 F.2d 446.

- Atlantic Mut. Ins. Co. v. Clearview Club, Inc., D.C.N.Y., 264 F.Supp. 608—Duvall v. U.S., D.C. N.C., 312 F.Supp. 625.

- Ariz.—Shell Oil Co. v. Gutierrez, App., 581 P.2d 271, 119 Ariz. 426.

- Ky.—Texaco, Inc. v. Debusk, 444 S.W.2d 261.

- Tex.—Air Control Engineering, Inc. v. Hogan, Civ. App., 477 S.W.2d 941.

- Wash.—Callahan v. Keystone Fireworks Mfg. Co., 435 P.2d 626, 72 Wash.2d 823.

- Wyo.—Davison v. American Emp. Ins. Co., 420 P.2d 441.

- 5.15. U.S.—Rowe v. John C. Motter Printing Press Co., D.C.R.I., 305 F.Supp. 1001—Young v. Clear Lake Yacht Basin, Inc., D.C.Tex., 337 F.Supp. 1305, aff'd., C.A., 473 F.2d 1389, cert. den. 94 S.Ct. 158, 414 U.S. 856, 38 L.Ed.2d 106.

- Tex.—Thomas v. Magnolia Chemical Co. of Tex., Civ. App., 394 S.W.2d 50, err. ref. no rev. err.

- 5.20. U.S.—Elkins v. U.S., C.A.Va., 429 F.2d 297.

- 5.25. U.S.—Franks v. National Dairy Products Corp., C.A.Tex., 414 F.2d 682.

- N.M.—Maryland Cas. Co. v. Jolly, 352 P.2d 1013, 67 N.M. 101.

- 5.30. U.S.—Herman v. Hess Oil Virgin Islands Corp., C.A.Virgin Islands, 524 F.2d 767.

- Miss.—Reaves v. Wiggs, 192 So.2d 401.

- Or.—Spencer v. B. P. John Furniture Corp., 467 P.2d 429, 255 Or. 359.

- 5.35. U.S.—Richardson v. U.S., D.C.Tenn., 251 F.Supp. 107—Rowe v. John C. Motter Printing Press Co., D.C.R.I., 305 F.Supp. 1001.

- Ga.—Tidwell v. Tidwell, 268 S.E.2d 689, 154 Ga.App. 449.

- La.—Haymark & Sons, Inc. v. Prendergast, App., 268 So.2d 110.

- N.C.—Stafford v. Griffin, 132 S.E.2d 319, 260 N.C. 218—Hubbard v. Quality Oil Co. of Statesville, Inc., 151 S.E.2d 71, 268 N.C. 489.

- R.I.—Russo v. G. C. W. Gooden, Inc., 275 A.2d 266, 108 R.I. 356.

- 5.40. U.S.—Tropea v. Shell Oil Co., C.A.N.Y., 307 F.2d 757.

- Hernandez v. U.S., D.C.Tex., 313 F.Supp. 349.

- Ariz.—Shell Oil Co. v. Gutierrez, App., 581 P.2d 271, 119 Ariz. 426.

- Iowa—Fram Service Co. v. Tobin, 121 N.W.2d 128, 254 Iowa 1328.

- Pa.—Lizza v. Hale, 63 Lack.Jur. 93.

- “Insulating negligence”
U.S.—Duvall v. U.S., D.C.N.C., 312 F.Supp. 625.

6. Evidence held sufficient

- (1) U.S.—Codell-Oman Const. Co. v. Sorensen, C.A. Ala., 273 F.2d 703—Duckett v. Clement Bros. Co., C.A.Ky., 375 F.2d 963—Watsontown Brick Cos. v. Hercules Powder Co., C.A.La., 387 F.2d 99—Smith v. U.S., C.A.Fla., 497 F.2d 500.

- D.C.—Washington Air Compressor Rental Co. v. National Union Ins. Co., Mun.App., 165 A.2d 482.

- Ga.—Beck v. Flint Const. Co., 268 S.E.2d 739, 154 Ga.App. 490.

- Ky.—Security Fire & Indem. Co. v. Hughes, 383 S.W.2d 113.

- Mo.—Misch v. C. B. Contracting Co., App., 394 S.W.2d 98.

- N.C.—Guilford Realty & Ins. Co. v. Blythe Bros. Co., 145 S.E.2d 838, 266 N.C. 229.

- Pa.—Arnese v. Harris Walsh, Inc., 62 Lack.Jur. 197.

- W.Va.—Moore, Kelly & Reddish, Inc. v. Shannondale, Inc., 165 S.E.2d 113, 152 W.Va. 549.

- (2) Iowa—Monroe v. Razor Const. Co., 110 N.W.2d 250, 252 Iowa 1249.

- La.—C. A. Collins and Son v. Pope Bros. Steam Cleaning Co., App., 174 So.2d 199, writ ref. 176 So.2d 143, 247 La. 1083.

- N.Y.—Bucci v. S. J. Groves & Sons, Inc., 233 N.Y.S.2d 7, 17 A.D.2d 906.

- (3) U.S.—State Motor Parts Co. v. Christopher Const. Co., D.C.W.Va., 212 F.Supp. 467.

- Ala.—Marigold Coal, Inc. v. Thames, 149 So.2d 276, 274 Ala. 421.

- Ky.—Clement Bros. Co. v. Everett, 414 S.W.2d 576.

- La.—Gullatt v. Ashland Oil & Refining Co., App., 243 So.2d 820.

- N.Y.—Spano v. Perini Corp., 250 N.E.2d 31, 25 N.Y.2d 11, 302 N.Y.S.2d 527, on remand 304 N.Y.S.2d 15, 33 A.D.2d 516.

- Spano v. Perini Corp., 304 N.Y.S.2d 15, 33 A.D.2d 516.

- Pa.—Mazza v. Berlanti Const. Co., 214 A.2d 257, 206 Pa.Super. 505.

- Wis.—Ziegler v. Wonn, 118 N.W.2d 706, 18 Wis.2d 382—Piorkowski v. Liberty Mut. Ins. Co., 228 N.W.2d 695, 68 Wis.2d 455.

- (4) Ala.—Lehigh Portland Cement Co. v. Dobbins, 213 So.2d 246, 282 Ala. 513.

- D.C.—Washington Air Compressor Rental Co. v. National Union Ins. Co., Mun.App., 165 A.2d 482.

- La.—Wright v. Superior Oil Co., App., 138 So.2d 688.

- Tex.—Pelphrey v. Diver, Civ.App., 348 S.W.2d 453, err. ref. no rev. err.

Evidence held insufficient

- (1) U.S.—Smith v. U.S., C.A.Fla., 497 F.2d 500.

- Lake Lorraine, Inc. v. American Tel. and Tel., D.C.Mo., 378 F.Supp. 13.

- Ala.—McDowell & McDowell, Inc. v. Barnett, 169 So.2d 324, 277 Ala. 302—Coalite, Inc. v. Weeks, 224 So.2d 251, 248 Ala. 219.

- N.H.—Bergeron v. W. W. Wyman, Inc., 248 A.2d 90, 109 N.H. 219.

- N.Y.—Goedkoop v. Ward Pavement Corp., 399 N.Y. S.2d 257, 59 A.D.2d 923.

- Va.—B. G. Young & Sons, Inc. v. Kirk, 116 S.E.2d 38, 202 Va. 176.

- Wis.—Piorkowski v. Liberty Mut. Ins. Co., 228 N.W.2d 695, 68 Wis.2d 455.
- (2) U.S.—Ashland Oil & Refining Co. v. Kenny Const. Co., C.A.Ky., 395 F.2d 683.
- Conn.—Remaniello v. Dyna Distributors, Inc., 227 A.2d 430, 154 Conn. 605.
- Ind.—Bridges v. Kentucky Stone Co., Inc., 425 N.E.2d 125.

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- 6.5. Ark.—Miller v. Garner, 409 S.W.2d 336, 241 Ark. 715.
- Cal.—Wilson v. Rancho Sespe, 24 Cal.Rptr. 296, 207 C.A.2d 10.
- Fla.—Maule Industries, Inc. v. Watson, App., 201 So.2d 631.
- Ga.—Dalon Contracting Co. v. Artman, 115 S.E.2d 377, 101 Ga.App. 828.
- Okl.—States Exploration Co. v. Reynolds, 344 P.2d 275.
- W.Va.—Whitney v. Ralph Myers Contracting Corp., 118 S.E.2d 622, 146 W.Va. 130.
- 6.10. N.J.—Yuhav v. Mudge, 322 A.2d 824, 129 N.J. Super. 207.
- 6.15. U.S.—Watsontown Brick Co. v. Hercules Powder Co., D.C.Pa., 265 F.Supp. 268, affd., C.A., 387 F.2d 99.
- D.C.—Washington Air Compressor Rental Co. v. National Union Ins. Co., Mun.App., 165 A.2d 482.
- Miss.—Bridges v. Texaco, Inc., 136 So.2d 595, 242 Miss. 705—Shell Oil Co. v. Cavanaugh, 295 So.2d 1.
- N.Y.—Bucci v. S. J. Groves & Sons, Inc., 233 N.Y.S.2d 7, 17 A.D.2d 906.
- Tex.—Stafford v. Thornton, Civ.App., 420 S.W.2d 153, err. ref. no rev. err.
- 6.20. Ala.—Mitchell v. Richardson, 173 So.2d 814, 277 Ala. 651.
- N.Y.—Shemin v. City of New York, 180 N.Y.S.2d 360, 6 A.D.2d 668, app. den. 182 N.Y.S.2d 330, 7 A.D.2d 846, motion den. 188 N.Y.S.2d 203, 6 N.Y.2d 814, 159 N.E.2d 690, app. diss. 198 N.Y. S.2d 627, 7 N.Y.2d 971, 166 N.E.2d 201.
- Va.—V. N. Green & Co. v. Thomas, 140 S.E.2d 635, 205 Va. 903, 9 A.L.R.3d 376.
- 6.30. Pa.—Mazza v. Berlanti Const. Co., 214 A.2d 257, 206 Pa.Super. 505.
- 6.35. La.—Burgess v. Travelers Ins. Co., App., 254 So.2d 163.
- Pa.—Mazza v. Berlanti Const. Co., 214 A.2d 257, 206 Pa.Super. 505.
- Tex.—C.J.S. cited in Cage Brothers v. McCormick, 344 S.W.2d 203, 206, err. ref. no rev. err.
7. Evidence held sufficient
- (1) Colo.—Calkins v. Albi, 431 P.2d 17, 163 Colo. 370.
- Minn.—Olson v. Village of Babbitt, 189 N.W.2d 701, 291 Minn. 105.
- Tex.—Martinez v. Martinez, Civ.App., 553 S.W.2d 211.
- (4) Absence of proximate cause.
- Iowa.—Rosenau v. City of Estherville, 199 N.W.2d 125.
- (5) To sustain finding of "assumption of risk."
- La.—Lefebvre v. Fireman's Fund Am. Ins. Companies, App., 304 So.2d 69, writ den., Sup., 307 So.2d 631.
- Evidence held insufficient
- (2) La.—Robinson v. Muller, App., 242 So.2d 86.

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8. Evidence held sufficient

- (2) U.S.—Foster v. Day & Zimmermann, Inc., C.A. Iowa, 502 F.2d 867.
- (6) U.S.—Clay v. Ensign-Bickford Co., D.C.Colo., 307 F.Supp. 288.
- (8) Other evidence.
- U.S.—Clay v. Ensign-Bickford Co., D.C.Colo., 307 F.Supp. 288.
- Ill.—Moore v. Jewel Tea Co., 253 N.E.2d 636, 116 Ill.App.2d 109, affd., 263 N.E.2d 103, 46 Ill.2d 288.
- N.Y.—Prata v. National R.R. Passenger Corp., 420 N.Y.S.2d 276, 70 A.D.2d 114.

Evidence held insufficient

- (2) U.S.—Borowicz v. Chicago Mastic Co., C.A.Ill., 367 F.2d 751.
- Hicks v. E. I. DuPont de Nemours & Co., D.C.Okl., 246 F.Supp. 589.
- Ill.—Olin Mathieson Chemical Corp. v. Moushon, 235 N.E.2d 263, 93 Ill.App.2d 280.
9. Evidence held sufficient
- (1) U.S.—Glens Falls Ins. Co. v. Danville Motors, Inc., C.A.Ky., 333 F.2d 187.
- Ill.—Baylie v. Swift & Co., 327 N.E.2d 438, 27 Ill. App.3d 1031.
- Mo.—Bean v. Ross Mfg. Co., 344 S.W.2d 18.

Evidence held insufficient

- (1) U.S.—Toppi v. U.S., D.C.Pa., 332 F.Supp. 513.

10. Evidence held sufficient

- (1) Okl.—Jack Cooper Transport Co. v. Griffin, 356 P.2d 748.
- Utah—Law v. Uinta Oil Refining Co., 364 P.2d 1024, 12 Utah 2d 229.

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- 10.5. Ga.—Ward v. Nance, 115 S.E.2d 781, 102 Ga. App. 201.
- 10.15. Cal.—McGinnis v. Fidelity & Cas. Co. of New York, 80 Cal.Rptr. 482, 276 C.A.2d 15.
- La.—McDonald v. Wheeling Pipeline, Inc., App., 162 So.2d 408, writ ref. 164 So.2d 356, 246 La. 363.
- 10.20. U.S.—Moschkau v. Sears, Roebuck & Co., C.A.Wis., 282 F.2d 878.
- Mass.—LaClair v. Silberline Mfg. Co., Inc., 393 N.E.2d 867, 379 Mass. 21.
- Pa.—Johnston v. Dick, 165 A.2d 634, 401 Pa. 637.

11. Evidence held sufficient

- (1) Fla.—Marks v. Delcastillo, App., 386 So.2d 1259.
- La.—Williams v. American Mut. Liability Ins. Co., App., 121 So.2d 545—Trahav v. Liberty Muts. Inc. Co., App., 348 So.2d 205, writ den. Sup., 351 So.2d 163.
- (2) Tex.—Dezendorf Marble Co. v. Gartman, 343 S.W.2d 441.
- Wis.—Johnson v. Chemical Supply Co., 156 N.W.2d 455, 38 Wis.2d 194.
- (3) Ky.—Vandiver v. Wilson, 446 S.W.2d 650.
- (6) Wis.—Johnson v. Chemical Supply Co., 156 N.W.2d 455, 38 Wis.2d 194.
- Evidence held insufficient
- (1) La.—Williams v. American Mut. Liability Ins. Co., App., 121 So.2d 545.
- Va.—Wells v. Whitaker, 151 S.E.2d 422, 207 Va. 616.

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- 11.10. U.S.—Hernandez v. U.S., D.C.Tex., 313 F.Supp. 349.
- Fla.—Marks v. Delcastillo, App., 386 So.2d 1259.
- 11.15. Wis.—Johnson v. Chemical Supply Co., 156 N.W.2d 455, 38 Wis.2d 194.
- 11.20. Okl.—Vaughn v. Texaco, Inc., App., 631 P.2d 1334.
12. Evidence held sufficient
- (3) U.S.—Medlin v. U.S., D.C.S.C., 244 F.Supp. 403.
- Tex.—Dezendorf Marble Co. v. Gartman, Civ.App., 333 S.W.2d 404, affd., 343 S.W.2d 441, 161 Tex. 535.
- (4) Mont.—Knowlton v. Sandaker, 436 P.2d 98, 150 Mont. 438.
- Tex.—Thomas v. Magnolia Chemical Co. of Tex., Civ. App., 394 S.W.2d 50, err. ref. no rev. err.
- (7) To show defendant's negligence.
- U.S.—Parrott v. U.S., D.C.Cal., 181 F.Supp. 425.
- (8) To show other matters.
- Tex.—Dezendorf Marble Co. v. Gartman, Civ.App., 333 S.W.2d 404, affd., 343 S.W.2d 441, 161 Tex. 535.
13. Kan.—Casement v. Gearhart, 370 P.2d 95, 189 Kan. 442.
- Tank truck
- (3) Other matters.

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- La.—Leake v. Prudhomme Truck Tank Service, Inc., App., 238 So.2d 4, affd., amended and revd. 258 So.2d 358, 260 La. 1071.

Evidence held insufficient to show negligence

- La.—Leake v. Prudhomme Truck Tank Service, Inc., App., 238 So.2d 4, affd., amended and revd. 258 So.2d 358, 260 La. 1071.
- Ohio—Bennison v. Stilpass Transit Co., 214 N.E.2d 213, 5 Ohio St.2d 122.

§ 11(9). — Questions of Law and Fact

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14. U.S.—Bailey v. Atlas Powder Co., C.A.Pa., 602 F.2d 585.
- 15.5. U.S.—Borowicz v. Chicago Mastic Co., C.A.Ill., 367 F.2d 751.
- 15.10. N.C.—Taylor v. Southern Bell Tel. & Tel. Co., 129 S.E.2d 512, 258 N.C. 766.
- 15.15. Ala.—Vulcan Materials Co. v. Grace, 151 So.2d 229, 274 Ala. 653.
- 15.30. Mo.—Bean v. Ross Mfg. Co., 344 S.W.2d 18.
- N.Y.—Burdeau v. Burdeau, 275 N.Y.S.2d 988, 27 A.D.2d 632, affd., 234 N.E.2d 452, 21 N.Y.2d 677, 287 N.Y.S.2d 413.
- Affirmative instruction not proper
- Ala.—Milford v. Tidwell, 159 So.2d 621, 276 Ala. 110.
- Fla.—Petterson v. Concrete Const., Inc., of Lake Worth, App., 202 So.2d 191.
- Mo.—Smith v. Aldridge, App., 356 S.W.2d 532.
- N.M.—Jaramillo v. Anaconda, Co., 376 P.2d 954, 71 N.M. 161.
- Tex.—Thomas v. Magnolia Chemical Co. of Tex., Civ. App., 394 S.W.2d 50, err. ref. no rev. err.
16. Iowa—Cooley v. Quick Supply Co., 221 N.W.2d 763.
- Okl.—Cartwright v. Atlas Chemical Industries, Inc., App., 593 P.2d 104, 18 A.L.R.4th 180.

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17. La.—Dupree v. Pechinay Saint Gobain Co., App., 369 So.2d 1075, writ den., Sup., 371 So.2d 1341.
- Expert testimony
- (3) Expert testimony held unnecessary.
- U.S.—Smith v. Pennsylvania-Reading Seashore Lines, D.C.Pa., 355 F.Supp. 1176, affd., C.A., 487 F.2d 1394 and 487 F.2d 1395.
- Tex.—Missouri Pac. R. Co. v. Covarrubias, Civ.App., 400 S.W.2d 599, err. ref. no rev. err.
- (4) Other matters.
- U.S.—Southern Cement Co., Division of Martin-Marietta Corp. v. Sproul, C.A.Ala., 378 F.2d 48.
- 18.5. U.S.—Dement v. Olin-Mathieson Chemical Corp., C.A.Tex., 282 F.2d 76.
- Kan.—Lackey v. Price, 378 P.2d 19, 190 Kan. 648.
- Ky.—Wolf Creek Collieries Co. v. Davis, 441 S.W.2d 401—Texaco, Inc. v. Debusk, 444 S.W.2d 261.
- N.D.—Chicago, M., St. P. & P.R. Co. v. Johnston's Fuel Liners, Inc., 122 N.W.2d 140, app. after remand 130 N.W.2d 154.
- Particular questions or issues
- (1) U.S.—Cross v. M. C. Carlisle & Co., C.A.Mass., 368 F.2d 947.
- Fla.—Napolitano v. Unger, App., 237 So.2d 234.
- N.M.—Jaramillo v. Anaconda Co., 376 P.2d 954, 71 N.M. 161.
- N.Y.—Lomoriello v. Tibbetts Contracting Corp., 238 N.Y.S.2d 188, 18 A.D.2d 911, affd., 191 N.E.2d 916, 13 N.Y.2d 736, 241 N.Y.S.2d 864.
- Tenn.—Trimble v. Irwin, 441 S.W.2d 818, 59 Tenn. App. 465.
- Tex.—Thomas v. Magnolia Chemical Co. of Tex., Civ. App., 394 S.W.2d 50, err. ref. no rev. err.
- (3) Cal.—Crane v. Sears Roebuck & Co., 32 Cal. Rptr. 754, 218 C.A.2d 855.
- (4) Colo.—Liber v. Flor, 415 P.2d 332, 160 Colo. 7, 35 A.L.R.3d 1165.
- (7) Res ipsa loquitur theory.

Cal.—Homer v. Barber, 40 Cal.Rptr. 570, 229 C.A.2d 829, 8 A.L.R.3d 966.

(8) Other questions or issues.

Ill.—Moore v. Jewel Tea Co., 253 N.E.2d 636, 116 Ill.App.2d 109, aff'd., 263 N.E.2d 103, 46 Ill.2d 288.

Mass.—Fiorentino v. A. E. Staley Mfg. Co., 416 N.E.2d 998, 11 Mass.App. 428.

Okla.—WeGo Perforators v. Hilligoss, 397 P.2d 113.

Wash.—Callahan v. Keystone Fireworks Mfg. Co., 435 P.2d 626, 72 Wash.2d 823.

18.10. U.S.—Butler v. L. Sonneborn Sons, Inc., C.A. N.Y., 296 F.2d 623—Collins v. Clayton & Lambert Mfg. Co., C.A.Ky., 299 F.2d 362—Cross v. M. C. Carlisle & Co., C.A.Mass., 368 F.2d 947.

Cal.—Crane v. Sears Roebuck & Co., 32 Cal.Rptr. 754, 218 C.A.2d 815.

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Mass.—Stewart v. Roy Bros. Inc., 265 N.E.2d 357, 358 Mass. 446—Zezuski v. Jenny Mfg. Co., 293 N.E.2d 875, 363 Mass. 324.

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18.15. U.S.—Commercial Ins. Co. of Newark, N.J. v. Ferguson, C.A.La., 285 F.2d 527—Butler v. L. Sonneborn Sons, Inc., C.A.N.Y., 296 F.2d 623.

Cal.—Richardson v. Oliveri, 53 Cal.Rptr. 59, 244 C.A.2d 369.

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N.M.—Stephens v. Dulaney, 428 P.2d 27, 78 N.M. 53. Finding that negligence of plaintiff in misinforming tank truck operator as to available capacity of storage tank was proximate cause of overflow and explosion held not precluded as matter of law.

Or.—Babler Bros. Inc. v. Pacific Intermountain Exp. Co., 415 P.2d 735, 244 Or. 459, overruling Oregon Mut. Fire Ins. Co. v. Mayer, 316 P.2d 805, 211 Or. 556.

Tenn.—Southeastern Steel & Tank Maintenance Co. v. Luttrell, 348 S.W.2d 905, 48 Tenn.App. 522.

18.20. Fla.—Schnabel v. Mormann, App., 324 So.2d 197.

Particular questions or issues

(1) N.Y.—Carradine v. City of New York, 209 N.Y. 52d 143.

(3) U.S.—Huffstutler v. Hercules Powder Co., C.A. Ala., 305 F.2d 292.

(7) U.S.—Huffstutler v. Hercules Powder Co., C.A. Ala., 305 F.2d 292.

(10) U.S.—Dement v. Olin-Mathieson Chemical Corp., C.A.Tex., 282 F.2d 76.

(11) Other matters.

N.M.—Stephens v. Dulaney, 413 P.2d 217, 76 N.M. 181.

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18.25. Pa.—Haddon v. Lotito, 161 A.2d 160, 399 Pa. 521, 81 A.L.R.2d 1199.

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20. Blasting

Ala.—Marigold Coal, Inc. v. Thames, 149 So.2d 276, 274 Ala. 421.

21. U.S.—Tropea v. Shell Oil Co., C.A.N.Y., 307 F.2d 757—Doss v. Apache Powder Co., C.A.Tex., 430 F.2d 1317.

Ill.—Davis v. Marathon Oil Co., 356 N.E.2d 93, 1 Ill.Dec. 93, 64 Ill.2d 380.

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Mo.—Bean v. Ross Mfg. Co., 344 S.W.2d 18.

N.C.—Moore v. Beard-Laney, Inc., 139 S.E.2d 879, 263 N.C. 601.

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R.I.—Notarantonio v. Damiano Bros. Welding Co., 221 A.2d 473, 101 R.I. 173.

Tex.—Penguin Industries, Inc. v. Junge, Civ.App., 589 S.W.2d 842, err. ref. no rev. err.

Utah—White v. Newman, 348 P.2d 343, 10 Utah 2d 62.

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Ky.—Wolf Creek Collieries Co. v. Davis, 441 S.W.2d 401.

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Miss.—Capital Transport Co. v. Segrest, 181 So.2d 111, 254 Miss. 168.

21.5. Tenn.—Williams v. Williams, 470 S.W.2d 368, 63 Tenn.App. 252.

22. U.S.—Superior Combustion Industries, Inc. v. Schollman Bros. Co. C.A.Neb., 271 F.2d 357—Tropea v. Shell Oil Co., C.A.N.Y., 307 F.2d 757—Pinkowski v. Sherman Hotel, C.A.Ill., 313 F.2d 190.

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Cal.—Whited v. Seaside Oil Co., 26 Cal.Rptr. 894, 210 C.A.2d 848.

Ky.—Smith v. Hensley, 354 S.W.2d 744, 98 A.L.R.2d 340.

N.Y.—Lomoriello v. Tibbetts Contracting Corp., 238 N.Y.S.2d 188, 18 A.D.2d 911, aff'd., 191 N.E.2d 916, 13 N.Y.2d 736, 241 N.Y.S.2d 864.

Ohio—Murray v. Consolidation Coal Co., App., 195 N.E.2d 826.

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22.5. U.S.—Duckett v. Clement Bros. Co., C.A.Ky., 375 F.2d 963—Watsonville Brick Co. v. Hercules Powder Co., C.A.La., 387 F.2d 99.

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Ill.—Peet v. Dolese & Shepard Co., 190 N.E.2d 613, 41 Ill.App.2d 358.

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Iowa—Cooley v. Quick Supply Co., 221 N.W.2d 763.

22.10. U.S.—Cherensky v. George Washington-East Motor Lodge, D.C.Pa., 317 F.Supp. 1401.

22.15. N.Y.—Carradine v. City of New York, 246 N.Y.S.2d 620, 13 N.Y.2d 291, 196 N.E.2d 259.

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22.20. Neb.—Landmesser v. Ahlberg, 166 N.W.2d 124, 184 Neb. 182.

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22.25. U.S.—Smith v. Pennsylvania-Reading Seashore Lines, D.C.Pa., 355 F.Supp. 1176, aff'd., C.A., 487 F.2d 1394, and 487 F.2d 1395.

22.30. Ill.—Cohn v. Petroleum Heat & Power Co., 194 N.E.2d 29, 44 Ill.App.2d 23.

Wash.—Jackson v. Standard Oil Co. of California, 505 P.2d 139, 8 Wash.App. 83.

23. U.S.—Tropea v. Shell Oil Co., C.A.N.Y., 307 F.2d 757—Pinowski v. Sherman Hotel, C.A.Ill., 313 F.2d 190.

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Ill.—Davis v. Marathon Oil Co., 356 N.E.2d 93, 1 Ill.Dec. 93, 64 Ill.2d 380.

Ky.—Smith v. Hensley, 354 S.W.2d 744, 98 A.L.R.2d 340.

N.Y.—Lomoriello v. Tibbetts Contracting Corp., 238 N.Y.S.2d 188, 18 A.D.2d 911, aff'd., 191 N.E.2d 916, 13 N.Y.2d 736, 241 N.Y.S.2d 864.

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Okla.—WeGo Perforators v. Hilligoss, 397 P.2d 113.

S.C.—Carroll v. Wilson, 180 S.E.2d 198, 255 S.C. 536.

Tex.—Southeastern Hydrocarbon Co. v. Thompson, Civ.App., 355 S.W.2d 823, err. ref. no rev. err.

Utah—Robison v. Robison, 394 P.2d 876, 16 Utah 2d 2.

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Neb.—Landmesser v. Ahlberg, 166 N.W.2d 124, 184 Neb. 182.

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(1) Ill.—Cohn v. Petroleum Heat & Power Co., 194 N.E.2d 29, 44 Ill.App.2d 23.

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24. Md.—Evans v. Johns Hopkins University, 167 A.2d 591, 224 Md. 234.

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Mo.—Fletcher v. Kemp, 327 S.W.2d 178.

Tenn.—Southeastern Steel & Tank Maintenance Co. v. Luttrell, 348 S.W.2d 905, 48 Tenn.App. 522.

Utah—Robison v. Robison, 394 P.2d 876, 16 Utah 2d 2.

25. S.C.—Carroll v. Wilson, 180 S.E.2d 198, 255 S.C. 536.

30. Tex.—Eddleman v. Scalco, Civ.App., 484 S.W.2d 122, err. ref. no rev. err.

32. Colo.—Liber v. Flor, 415 P.2d 332, 160 Colo. 7, 35 A.L.R.3d 1165.

Ga.—Seagraves v. ABCO Mfg. Co., 164 S.E.2d 242, 118 Ga.App. 414, app. after remand 173 S.E.2d 416, 121 Ga.App. 224.

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37. Ala.—Marigold Coal, Inc. v. Thames, 149 So.2d 276, 274 Ala. 421.

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38.15. Cal.—Borenkraut v. Whitten, 15 Cal.Rptr. 635, 364 P.2d 467, 56 C.2d 538.

§ 11(10). — — — Instructions

39. Mo.—Bean v. Ross Mfg. Co., 344 S.W.2d 18.

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(2) Neb.—Landmesser v. Ahlberg, 166 N.W.2d 124, 184 Neb. 182.

(3) Cal.—Menchaca v. Helms Bakeries, Inc., 67 Cal. Rptr. 775, 439 P.2d 903, 68 C.2d 535.

(4) Okl.—WeGo Perforators v. Hilligoss, 397 P.2d 113.

(5) Fla.—Vitale Fireworks Mfg. Co., Inc. v. Marini, App., 314 So.2d 176.

(6) Or.—Studer v. Brown, 415 P.2d 509, 244 Or. 24.

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(7) U.S.—Southern Cement Co., Division of Martin-Marietta Corp. v. Sproul, C.A.Ala., 378 F.2d 48.

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Ill.—Davis v. Marathon Oil Co., 356 N.E.2d 93, 1 Ill.Dec. 93, 64 Ill.2d 380.

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(2) U.S.—Dement v. Olin—Mathieson Chemical Corp., C.A.Tex., 282 F.2d 76.

(6) U.S.—Leposki v. Railway Exp. Agency, Inc., C.A.Pa., 297 F.2d 849.

Cal.—Borenkraut v. Whitten, 15 Cal.Rptr. 635, 364 P.2d 467, 56 C.2d 538.

Ga.—Seagraves v. ABCO Mfg. Co., 173 S.E.2d 416, 121 Ga.App. 224.

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Mo.—Fletcher v. Kemp, 327 S.W.2d 178.

N.M.—Stephens v. Dulaney, 428 P.2d 27, 78 N.M. 53.

Or.—Smith v. J. C. Penney Co., Inc., 525 P.2d 1299, 269 Or. 643.

40. Ky.—Cox v. Stafford, 460 S.W.2d 818.

(41) Instructions held warranted by evidence

(3) U.S.—Dement v. Olin—Mathieson Chemical Corp., C.A.Tex., 282 F.2d 76.

Cal.—Mahoney v. Hercules Powder Co., 34 Cal.Rptr. 468, 221 C.A.2d 353.

(5) U.S.—Whitehurst v. Revlon, Inc., D.C.Va., 307 F.Supp. 918.

Mo.—Fletcher v. Kemp, 327 S.W.2d 178.

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Ariz.—Shell Oil Co. v. Gutierrez, App., 581 P.2d 271, 119 Ariz. 426.

43. Refusal of instruction, etc.

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44. Instructions held misleading or confusing

U.S.—Leposki v. Railway Exp. Agency, Inc., C.A.Pa., 297 F.2d 849.

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Cal.—Richardson v. Oliveri, 53 Cal.Rptr. 59, 244 C.A.2d 369.

Mo.—Bean v. Ross Mfg. Co., 344 S.W.2d 18.

44.5. Refusal held prejudicial

Ill.—Davis v. Marathon Oil Co., 356 N.E.2d 93, 1 Ill.Dec. 93, 64 Ill.2d 380.

45. Insurer

(3) Other instructions.

N.Y.—Bernstein v. Remington Arms Co., 227 N.Y.S.2d 802, 16 A.D.2d 694, on remand 231 N.Y.S.2d 787, 35 Misc.2d 884, affd. 238 N.Y.S.2d 78, 18 A.D.2d 910.

52. Cal.—Balding v. D. B. Stutsman, Inc., 54 Cal. Rptr. 717, 246 C.A.2d 559.

Ga.—Ledbetter Bros., Inc. v. Jenkins, 190 S.E.2d 797, 126 Ga.App. 413.

Okl.—States Exploration Co. v. Reynolds, 344 P.2d 275.

55. Okla.—States Exploration Co. v. Reynolds, 344 P.2d 275.

Pa.—Mazza v. Berlanti Const. Co., 214 A.2d 257, 206 Pa.Super. 505.

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64. Cal.—Wilson v. Rancho Sespe, 24 Cal.Rptr. 296, 207 C.A.2d 10.

Ga.—Berger v. Plantation Pipeline Co., 173 S.E.2d 741, 121 Ga.App. 362.

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74. Colo.—Calkins v. Albi, 431 P.2d 17, 163 Colo. 370.

75. Instructions held proper or not erroneous

Utah—Law v. Uinta Oil Refining Co., 364 P.2d 1024, 12 Utah 2d 229.

76. Instructions held proper or not erroneous

(4) Colo.—Calkins v. Albi, 431 P.2d 17, 163 Colo. 370.

Instruction held objectionable

(2) Other instructions.

Colo.—Calkins v. Albi, 431 P.2d 17, 163 Colo. 370.

§ 11(11). — — — Verdict, Findings, Judgment, and Review

77. N.Y.—Novo Corp. v. Consolidated Edison Co. of New York, 385 N.Y.S.2d 44, 53 A.D.2d 570.

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Ark.—South Arkansas Oil Co. v. Livingston, 465 S.W.2d 119, 250 Ark. 374.

N.M.—Mabrey v. Mobil Oil Corp., App., 505 P.2d 865, 84 N.M. 524, cert. den. 505 P.2d 855, 84 N.M. 512.

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U.S.—Hogue v. Permanent Mold Die Co., D.C.Mich., 177 F.Supp. 229.

Fla.—Vitale Fireworks Mfg. Co., Inc. v. Marini, App., 314 So.2d 176.

78.10. U.S.—Hall v. E. I. Du Pont De Nemours & Co., Inc., D.C.N.Y., 345 F.Supp. 353.

Mich.—Simonetti v. Rinshed-Mason Co., App., 200 N.W.2d 354, 41 Mich.App. 446.

79. Judgment held proper

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79.5. Failure to instruct on res ipsa loquitur held error

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81. U.S.—State Motor Parts Co. v. Christopher Const. Co., D.C.W.Va., 212 F.Supp. 467.

Ga.—Barrow v. Georgia Lightweight Aggregate Co., 120 S.E.2d 636, 103 Ga.App. 704.

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81.5. Consequential damages

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82. Tension and anxiety

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85. Injuries to livestock resulting from fright

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87. N.Y.—Halpert v. Ingram & Greene, Inc., 333 N.Y.S.2d 913, 70 Misc.2d 872.

88. Ga.—Ledbetter Bros., Inc. v. Jenkins, 190 S.E.2d 797, 126 Ga.App. 413.

92. Tenn.—Silcox v. Smith County, App., 487 S.W.2d 652.

93. U.S.—State Motor Parts Co. v. Christopher Const. Co., D.C.W.Va., 212 F.Supp. 467.

Mo.—Kirst v. Clarkson Const. Co., App., 395 S.W.2d 487—Decker v. J. E. Sieben Const. Co., App., 492 S.W.2d 155.

Tex.—Crain v. West Tex. Utilities Co., 218 S.W.2d 512. Err. ref. no rev. err.

94. Ill.—Peet v. Dolese & Shepard Co., 190 N.E.2d 613, 41 Ill.App.2d 358.

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95. Mass.—Dalton v. Demos Bros. General Contractors, Inc., 135 N.E.2d 646, 334 Mass. 377.

Mo.—Kirst v. Clarkson Const. Co., 395 S.W.2d 487.

96. Ala.—Milford v. Tidwell, 159 So.2d 621, 276 Ala. 110.

Ga.—Barrow v. Georgia Lightweight Aggregate Co., 120 S.E.2d 636, 103 Ga.App. 704—Ledbetter Bros., Inc. v. Jenkins, 190 S.E.2d 797, 126 Ga.App. 413.

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97. U.S.—U.S. v. Hepp, C.A.Iowa, 656 F.2d 350.

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98. Former statute unconstitutional

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2. Fla.—Victor v. State, 174 So.2d 544.

2.5. Ill.—People v. Ross, 402 N.E.2d 399, 37 Ill.Dec. 509, 82 Ill.App.3d 158.

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N.Y.—People v. Bochter, 311 N.Y.S.2d 186, 63 Misc.2d 249.

3. U.S.—U.S. v. Agrillo—Ladlad, C.A.Ill., 675 P.2d 905, cert. den. 103 S.Ct. 66, 459 U.S. 829, 74 L.Ed.2d 67.

Colo.—People v. Lovato, 630 P.2d 597.

Mich.—People v. Dorris, 291 N.W.2d 196, 95 Mich. App. 760.

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(7) Destructive device.

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(8) Explosive substance.

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(2) Other statements.

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4. N.J.—State v. Seng, 213 A.2d 515, 89 N.J.Super. 58, revd. on oth. grds. 219 A.2d 185, 91 N.J.Super. 50.

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6. Del.—Saunders v. State, 275 A.2d 564.

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11.5. Ariz.—State v. White, 425 P.2d 424, 102 Ariz. 97.

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11.10. Neb.—State v. Casados, 225 N.W.2d 267, 193 Neb. 28.

Knowledge and willfulness not elements within Federal Hazardous Substances Act

U.S.—U.S. v. Chalaire, D.C.La., 316 F.Supp. 543.

Innocent possession not punishable

Cal.—People v. Yoshimura, 133 Cal.Rptr. 228, 62 C.A.3d 410.

An unlawful intent is to be presumed from defendant's possession of incendiary devices.^{11.15}

11.15. Mich.—People v. Dorris, 291 N.W.2d 196, 95 Mich.App. 760.

The malicious use proscription of the statute, 18 U.S.C.A. § 844(i, j), does not apply to uncontained air-fuel mixtures, such as gasoline spread on a premises and ignited,^{11.25} there is, however, authority to the contrary.^{11.30}

11.25. U.S.—U. S. v. Cutler, C.A.Cal., 676 F.2d 1245 —U. S. v. DeLuca, C.A.Cal., 692 F.2d 1277, app. after remand 739 F.2d 488, app. after remand 763 F.2d 1115—U. S. v. Gelb, C.A.N.Y., 700 F.2d 875, cert. den. 104 S.Ct. 167, 464 U.S. 853, 78 L.Ed.2d 152—U. S. v. Katsougrakis, C.A.N.Y., 715 F.2d 769, cert. den. 104 S.Ct. 704, 464 U.S. 1040, 79 L.Ed.2d 169—U. S. v. Reed, C.A.Cal., 726 F.2d 570, cert. den. 105 S.Ct. 221, 83 L.Ed.2d 151.

Photocopier fluid

U.S.—U. S. v. Gere, C.A.Cal., 662 F.2d 1291.

11.30. U.S.—U.S. v. Beldin, C.A.Tex., 737 F.2d 450, cert. den. 105 S.Ct. 572, 83 L.Ed.2d 512, disagreeing with United States v. Gere, 662 F.2d 1291; United States v. Cutler, 676 F.2d 1245; United States v. DeLuca, 692 F.2d 1277; United States v. Gelb, 700 F.2d 875; United States v. Reed, 726 F.2d 570; and United States v. Katsougrakis, 715 F.2d 769.

12. Me.—State v. Wilcox, 387 A.2d 1124.

Sentence

Mich.—People v. Rodgers, 170 N.W.2d 493, 18 Mich. App. 37.

Gasoline not within term "explosive"

Mich.—People v. Robinson, 194 N.W.2d 436, 37 Mich. App. 15, remd. 195 N.W.2d 278, 387 Mich. 758.

14.5. Tex.—Hunt v. State, Cr., 492 S.W.2d 540.

Bomb defined

(3) Other definitions.

Md.—Chambers v. State, 251 A.2d 30, 6 Md.App. 339, 42 A.L.R.3d 1225.

Miss.—Tarrants v. State, 236 So.2d 360, cert. den. 91 S.Ct. 907, 401 U.S. 920, 27 L.Ed.2d 823.

14.10. Placing of bomb

Miss.—Tarrants v. State, 236 So.2d 360, cert. den. 91 S.Ct. 907, 401 U.S. 920, 27 L.Ed.2d 823.

Federal statute 18 U.S.C.A. § 844(f) makes it an offense to use explosives against organizations receiving federal financial assistance.^{14.20}

14.20. U.S.—U.S. v. Apodaca, C.A.Wyo., 522 F.2d 568.

Broad power upheld as granted under "necessary and proper" clause

U.S.—U.S. v. Brown, D.C.Mich., 384 F.Supp. 1151, revd. on oth. grds., C.A., 557 F.2d 541.

Any institution receiving federal assistance whatever capacity, purpose or amount covered

U.S.—U.S. v. Brown, D.C.Mich., 384 F.Supp. 1151, revd. on oth. grds., C.A., 557 F.2d 541.

Statute covers both real and personal property bombing

U.S.—U.S. v. Brown, D.C.Mich., 384 F.Supp. 1151, revd. on oth. grds., C.A., 557 F.2d 541.

Planned parenthood clinic as within protection

U.S.—U.S. v. Brown, D.C.Mich., 384 F.Supp. 1151, revd. on oth. grds., C.A., 557 F.2d 541.

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19. U.S.—U.S. v. Thordarson, C.A.Cal., 646 F.2d 1323, cert. den. 102 S.Ct. 601, 454 U.S. 1055, 70 L.Ed.2d 591, app. after remand 758 F.2d 656.

Statute construed

U.S.—U.S. v. Illingworth, C.A.Colo., 489 F.2d 264.

Elements

U.S.—U.S. v. Carlson, C.A.Me., 561 F.2d 105, cert. den. 98 S.Ct. 529, 434 U.S. 973, 54 L.Ed.2d 464.

20. Evidence sufficient to show boat used in interstate commerce

U.S.—U.S. v. Keen, C.A.Wash., 508 F.2d 986, cert. den. 95 S.Ct. 1655, 421 U.S. 929, 44 L.Ed.2d 86.

Carrying explosive during commission of felony

U.S.—U.S. v. Tiche, D.C.Pa., 424 F.Supp. 996, affd., C.A., 564 F.2d 90, two cases.

21. U.S.—U.S. v. Franks, C.A.Tenn., 511 F.2d 25, cert. den. 95 S.Ct. 2654, 2656, 422 U.S. 1042, 45 L.Ed.2d 693, 95 S.Ct. 2667, 422 U.S. 1048, 45 L.Ed.2d 701.

Statute construed

U.S.—U.S. v. Hootor, C.A.Wash., 487 F.2d 270.

Holding for sale after shipment in interstate commerce may constitute an offense.^{21.5}

21.5. "Interstate shipment" within Federal Hazardous Substances Act

U.S.—U.S. v. Chalaire, D.C.La., 316 F.Supp. 543.

The act of transporting cannot be construed to include successive trips by different defendants carrying different loads of explosives.^{21.10}

21.10. U.S.—U.S. v. Tanner, C.A.Ill., 471 F.2d 128, cert. den. 93 S.Ct. 269, 409 U.S. 449, 34 L.Ed.2d 220.

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Other matters have been held not to be defenses.^{26.5}

26.5. Detonation in self-defense

Mass.—Com. v. Krasner, 223 N.E.2d 508, 351 Mass. 648.

Other matters have been held to be defenses.^{26.10}

26.10. No causal link

Wash.—Peterick v. State, 589 P.2d 250, 22 Wash.App. 163.

27. U.S.—U.S. v. Carlson, C.A.Me., 561 F.2d 105, cert. den. 98 S.Ct. 529, 434 U.S. 973, 54 L.Ed.2d 464—U.S. v. Womack, C.A.Ala., 654 F.2d 1034, cert. den. 102 S.Ct. 1029, 454 U.S. 1156, 71 L.Ed.2d 314.

N.C.—State v. Conrad, 168 S.E.2d 39, 275 N.C. 342.

Must be indicated for felony

Or.—State v. McDonald, 361 P.2d 1001, 231 Or. 24, cert. den. 82 S.Ct. 1247, 370 U.S. 903, 8 L.Ed.2d 399.

Substitution of certain words not in statute as not invalidating indictment

Tex.—McClane v. State, 343 S.W.2d 447, 170 Tex.Cr.R. 603, cert. den. 81 S.Ct. 698, 365 U.S. 816, 5 L.Ed.2d 695.

Felony

Or.—State v. McDonald, 361 P.2d 1001, 231 Or. 24, cert. den. 82 S.Ct. 1247, 370 U.S. 903, 8 L.Ed.2d 399.

Indictment held sufficient

Fla.—Victor v. State, 174 So.2d 544.

Following statutory language

Mo.—State v. Meller, 387 S.W.2d 515.

33. N.Y.—People v. Lay, 334 N.Y.S.2d 398, 39 A.D.2d 904.

35.5. Tex.—Christa v. State, 351 S.W.2d 221, 171 Tex.Cr.R. 464.

Statutory exceptions not made a part of the offense need not be negated.^{35.10}

35.10. Tex.—*McClane v. State*, Cr., 343 S.W.2d 447, cert. den. 81 S.Ct. 698, 365 U.S. 816, 5 L.Ed.2d 695.

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37. U.S.—*U.S. v. Morningstar*, C.A.W.Va., 456 F.2d 278, cert. den. 93 S.Ct. 135, 409 U.S. 896, 34 L.Ed.2d 153.

Not necessary to prove device was capable of detonation

Ariz.—*State v. Van Arsdale*, 511 P.2d 697, 20 Ariz. App. 253.

38. Statutory presuming of illegal purpose from violation of regulations construed

Tenn.—*Sanders v. State*, 404 S.W.2d 506, 218 Tenn. 527.

Circumstantial evidence

La.—*State v. de la Beckwith*, 344 So.2d 360.

Intent

Mich.—*People v. Eichenberg*, 310 N.W.2d 800, 108 Mich.App. 578.

39. Tenn.—*Willerson v. State*, Cr., 478 S.W.2d 907.

42. Evidence held admissible

(3) U.S.—*U.S. v. Frederick*, C.A.Ky., 583 F.2d 273, cert. den. 100 S.Ct. 124, 444 U.S. 860, 62 L.Ed.2d 80.

(4) Other evidence.

U.S.—*U.S. v. Moore*, C.A.Okl., 556 F.2d 479.

43. U.S.—*U.S. v. Nashawaty*, C.A.Mass., 571 F.2d 71.

Ala.—*White v. State*, 119 So.2d 344, 40 Ala.App. 613.

Colo.—*People v. Brown*, 574 P.2d 92, 194 Colo. 553.

Fla.—*Llano v. State*, App., 356 So.2d 1260.

Ind.—*Zwick v. State*, 236 N.E.2d 26, 250 Ind. 302.

Evidence held sufficient

(1) U.S.—*U.S. v. Crumpler*, C.A.Tex., 536 F.2d 1063, cert. den. 97 S.Ct. 736, 429 U.S. 1039, 50 L.Ed.2d 750.

Ala.—*Wilcutt v. State*, 123 So.2d 193, 41 Ala.App. 25, cert. den. 123 So.2d 203, 271 Ala. 315.

Ariz.—*State v. Van Arsdale*, 511 P.2d 697, 20 Ariz. App. 253.

Ark.—*Monts v. State*, 349 S.W.2d 350, 233 Ark. 816.

Cal.—*People v. Yoshimura*, 154 Cal.Rptr. 314, 91 C.A.3d 609.

Ga.—*Harrold v. State*, 126 S.E.2d 278, 105 Ga.App. 853.

Ill.—*People v. Green*, 304 N.E.2d 32, 14 Ill.App.3d 972, cert. den. 94 S.Ct. 3179, 417 U.S. 972, 41 L.Ed.2d 1143—*People v. Johnson*, 321 N.E.2d 38, 23 Ill. App.3d 886.

Mass.—*Com. v. Smith*, 172 N.E.2d 597, 342 Mass. 180.

Mich.—*People v. Rodgers*, 170 N.W.2d 493, 18 Mich. App. 37.

Minn.—*State v. Rieck*, 286 N.W.2d 724.

Mo.—*State v. Meller*, 387 S.W.2d 515.

Neb.—*State v. Goodwin*, 169 N.W.2d 270, 184 Neb. 537, cert. den. 90 S.Ct. 1374, 397 U.S. 1046, 25 L.Ed.2d 658.

Pa.—*Com. v. Joyner*, 380 A.2d 754, 475 Pa. 345.

S.D.—*State v. Powless*, 245 N.W.2d 143.

Tenn.—*Lackey v. State*, Cr.App., 578 S.W.2d 101.

Tex.—*McClane v. State*, 343 S.W.2d 447, 170 Tex.Cr.R. 603, cert. den. 81 S.Ct. 698, 365 U.S. 816, 5 L.Ed.2d 695.

(2) U.S.—*U.S. v. Tweed*, C.A.Ill., 503 F.2d 1127.

Cal.—*People v. Westoby*, 134 Cal.Rptr. 97, 63 C.A.3d 790.

Ga.—*Haas v. State*, 247 S.E.2d 507, 146 Ga.App. 729, cert. den. 99 S.Ct. 1249, 440 U.S. 922, 59 L.Ed.2d 475.

N.Y.—*People v. Cruz*, 314 N.E.2d 39, 34 N.Y.2d 362, 357 N.Y.S.2d 709.

(3) Cal.—*People v. Darnold*, 33 Cal.Rptr. 369, 219 C.A.2d 561, cert. den. 84 S.Ct. 694, 376 U.S. 927, 11 L.Ed.2d 623.

(7) U.S.—*U.S. v. Haynes*, C.A.Ga., 466 F.2d 1260—*U.S. Dawson*, C.A.Mo., 467 F.2d 668, cert. den. 93 S.Ct. 1427, 410 U.S. 956, 35 L.Ed.2d 689—*U.S. v.*

Bridges, C.A.Ill., 499 F.2d 179, cert. den. 95 S.Ct. 333, 419 U.S. 1010, 42 L.Ed.2d 284.

Ariz.—*State v. Van Arsdale*, 511 P.2d 697, 20 Ariz. App. 253.

Cal.—*People v. Petersen*, 100 Cal.Rptr. 590, 23 C.A.3d 883.

Ill.—*People v. Thomas*, 279 N.E.2d 784, 3 Ill.App.3d 1079—*People v. Ross*, 402 N.E.2d 399, 37 Ill.Dec. 509, 82 Ill.App.3d 158.

La.—*Benefield v. Milchem, Inc.*, App., 281 So.2d 771, writ den., sup., 282 So.2d 146.

Md.—*Chambers v. State*, 251 A.2d 30, 6 Md.App. 339, 42 A.L.R.3d 1225.

Miss.—*Tarrants v. State*, 236 So.2d 360. Cert. den. 91 S.Ct. 907, 401 U.S. 920, 27 L.Ed.2d 823.

Ohio—*State v. Abrams*, 322 N.E.2d 339.

Evidence held insufficient, etc.

U.S.—*U.S. v. Monholland*, C.A.Okl., 607 F.2d 1311.

Ariz.—*State v. White*, 425 P.2d 424, 102 Ariz. 97.

Ga.—*Brown v. State*, 165 S.E.2d 183, 118 Ga.App. 617.

Mo.—*State v. Thoe*, App., 565 S.W.2d 818.

Va.—*Burnett v. Com.*, 125 S.E.2d 171, 203 Va. 455.

(2) To overcome inference of possession of explosives for illegal purpose.

Tenn.—*Willerson v. State*, Cr., 478 S.W.2d 907.

Circumstantial evidence

Fla.—*Adams v. State*, App., 367 So.2d 635.

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44. Cal.—*People v. Scheib*, 159 Cal.Rptr. 665, 98 C.A.3d 820.

Colo.—*Miller v. District Court In and For Nineteenth Judicial Dist.*, 566 P.2d 1063, 193 Colo. 404.

Mass.—*Com. v. Bushway*, 389 N.E.2d 1034, 7 Mass. App. 715.

N.C.—*State v. Conrad*, 165 S.E.2d 771, 4 N.C.App. 50, affd. in part, revd. in part on oth. grds. 168 S.E.2d 39, 275 N.C. 342.

Tex.—*Hunt v. State*, Cr., 492 S.W.2d 540.

Evidence held sufficient to warrant submission to jury

Ala.—*Wilcutt v. State*, 123 So.2d 193, 41 Ala.App. 25, cert. den. 123 So.2d 203, 271 Ala. 315.

N.C.—*State v. Grier*, 227 S.E.2d 126, 30 N.C.App. 281, cert. den. 229 S.E.2d 691, 291 N.C. 177.

Direction of verdict for defendant held properly refused

Fla.—*Victer v. State*, App., 160 So.2d 727. Affd., Sup., 174 So.2d 544.

44. Question for court

U.S.—*U.S. v. Barton*, C.A.N.Y., 647 F.2d 224, cert. den. 102 S.Ct. 307, 454 U.S. 857, 70 L.Ed.2d 152.

45. U.S.—*U.S. v. James*, C.A.Cal., 576 F.2d 223.

Cal.—*People v. Poulin*, 103 Cal.Rptr. 623, 27 C.A.3d 54.

N.C.—*State v. Conrad*, 168 S.E.2d 39, 275 N.C. 342.

Instruction held proper

(2) Other instructions.

U.S.—*U.S. v. Sweet*, C.A.Ill., 548 F.2d 198, cert. den. 97 S.Ct. 1653, 430 U.S. 969, 52 L.Ed.2d 361.

Ala.—*Wilcutt v. State*, 123 So.2d 193, 41 Ala.App. 25, cert. den. 123 So.2d 203, 271 Ala. 315.

Cal.—*People v. Darnold*, 33 Cal.Rptr. 369, 219 C.A.2d 561, cert. den. 84 S.Ct. 694, 376 U.S. 927, 11 L.Ed.2d 623—*People v. Poulin*, 103 Cal.Rptr. 623, 27 C.A.3d 54.

Ill.—*People v. Thomas*, 279 N.E.2d 784, 3 Ill.App.3d 1079.

Mass.—*Com. v. Kennedy*, 277 N.E.2d 305, 360 Mass. 859.

N.C.—*State v. Little*, 209 S.E.2d 749, 286 N.C. 185.

Tenn.—*Sanders v. State*, 404 S.W.2d 506, 218 Tenn. 527.

Instruction held erroneous or properly refused

(3) Other instruction.

Fla.—*Henry v. State*, App., 344 So.2d 1311.

Instructions held erroneously refused

Del.—*Saunders v. State*, 275 A.2d 564.

Failure to inform jury about intent as material element

Neb.—*State v. Casados*, 225 N.W.2d 267, 193 Neb. 28.

46. Cal.—*People v. Heideman*, 130 Cal.Rptr. 349, 58 C.A.3d 321.

Surplusage

N.C.—*State v. Conrad*, 168 S.E.2d 39, 275 N.C. 342.

Sentence. Matters relating to sentence have been adjudicated.^{46.5}

46.5. U.S.—*U.S. v. Akers*, D.C.Or., 499 F.Supp. 46.

Cal.—*People v. Barnum*, 169 Cal.Rptr. 840, 113 C.A.3d 340.

Ill.—*City of Springfield v. Ushman*, 388 N.E.2d 1357, 27 Ill.Dec. 308, 71 Ill.App.3d 112.

Held not excessive

Ill.—*People v. Hayes*, 264 N.E.2d 23, 133 Ill.App.2d 114—*People v. Olinger*, 305 N.E.2d 730, 16 Ill. App.3d 170—*People v. Koba*, 374 N.E.2d 713, 15 Ill.Dec. 930, 58 Ill.App.3d 713.

§ 13. Forfeitures and Penalties

47. Sentence

Ohio—*State v. Weed*, 169 N.E.2d 39, 110 Ohio App. 186.

Other matters relating to the punishment in prosecutions involving explosives have been adjudicated.^{47.10}

47.10. Discretion of court

Wis.—*Cheney v. State*, 171 N.W.2d 339, 44 Wis.2d 454, reh. den. 174 N.W.2d 1, 44 Wis.2d 454.

Less severe punishment where not intent to injure

Cal.—*People v. Heideman*, 130 Cal.Rptr. 349, 58 C.A.3d 321.

EXPRESS.

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As a Verb

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Expressed.

37. N.Y.—*Persico Oil Co. v. Levy*, 316 N.Y.S.2d 924, 925, 64 Misc.2d 1091.

38. N.Y.—*Persico Oil Co. v. Levy*, 316 N.Y.S.2d 924, 925, 64 Misc.2d 1091.

As an Adjective

42. Similarly defined

(1) "Express" means clear, definite, and explicit; manifested by direct and appropriate language, as distinguished from that which is inferred from conduct; it is usually contrasted with "implied"—*Baxter v. Baxter*, Ind.App., 195 N.E.2d 877, 882, 138 Ind.App. 24.

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46. Idaho—*Messmer v. Ker*, 524 P.2d 536, 541, 96 Idaho 75.

Phrases.

Additional phrases are set out in the note.^{52.1}

52.1. Phrases

(1) "Express knowledge" refers to direct information.—*Black v. Public Service Elec. & Gas Co.*, 237 A.2d 495, 499, 98 N.J.Super. 366.

(2) "Express fraudate" is one in which principal specifies nature of act or acts to be accomplished by mandatory.—*Resweber v. Daspit*, La.App., 240 So.2d 376, 379.

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57. Cal.—Long v. City of Fresno, App., 36 Cal.Rptr. 886, 889, 225 C.A.2d 59.
 Nev.—Galloway v. Truesdell, 422 P.2d 237, 246, 83 Nev. 13.
 Ohio—Green, Inc., v. Smith, 317 N.E.2d 227, 229, 40 Ohio App.2d 30.
 Okl.—In re Arbuckle Master Conservancy Dist., Dist. Court, Murray County, No. 9660, Okl., 474 P.2d 385, 391.
 S.D.—Kramer v. Bon Homme County, S.D., 155 N.W.2d 777, 779, 83 S.D. 112.
 Tex.—Carp v. Texas State Bd. of Examiners in Optometry, Tex.Civ.App., 401 S.W.2d 639, 642.
 Utah—Orderville Irr. Co. v. Glendale Irr.Co., 409 P.2d 616, 619, 17 Utah 2d 282.

Application discussed

- (3) Mich.—Chesapeake & Ohio Ry. Co. v. Michigan Public Service Commission, 228 N.W.2d 843, 850, 59 Mich.App. 88.
 (4) D.C.—Maitico v. U.S., C.A., 302 F.2d 880, 886, 112 U.S.App.D.C. 295.

Applied or explained in

- Fla.—Biddle v. State Beverage Dept., App., 187 So.2d 65, 66, 67.

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64. Cal.—R. J. Cardinal Co. v. Ritchie, 32 Cal.Rptr. 545, 552, 218 C.A.2d 124.
 Ind.—Baxter v. Baxter, 195 N.E.2d 877, 882, 138 Ind. App. 24.
 65. Cal.—R. J. Cardinal Co. v. Ritchie, 32 Cal.Rptr. 545, 552, 218 C.A.2d 124.
 66. Cal.—R. J. Cardinal Co. v. Ritchie, 32 Cal.Rptr. 545, 552, 218 C.A.2d 124.
 68. N.J.—Application of Lamb, 169 A.2d 822, 826, 67 N.J.Super. 39, affd. 170 A.2d 34, 34 N.J. 448.

In distinct terms

"Expressly" means in an express manner, in distinct terms, with distinct purpose.—Baxter v. Baxter, 195 N.E.2d 877, 882, 138 Ind.App. 24.

73. Ind.—Baxter v. Baxter, 195 N.E.2d 877, 882, 138 Ind.App. 24.

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85. N.Y.—C.J.S. quoted in K. v. K., 483 N.Y.S.2d 602, 604, 126 Misc.2d 624.
 85.5. U.S.—C.J.S. quoted in Dubnov v. Goldstein, C.A.N.Y., 385 F.2d 717, 724.
 N.Y.—C.J.S. quoted in K. v. K., 483 N.Y.S.2d 602, 604, 126 Misc.2d 624.

Similarly defined

Word "expunge" properly describes a physical act, not a legal one. State v. Chambers, Utah, 533 P.2d 876, 878.

86.10. Similarly defined

- (1) Expunge means to blot out, efface designedly; to strike out wholly.—Thornbrough v. Barnhart, 340 S.W.2d 569, 571, 232 Ark. 862.
 Mo.—Bergel v. Kassebaum, App., 577 S.W.2d 863, 871.

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EXTEND.

94. U.S.—C.J.S. quoted at length in St. Paul Fire & Marine Inc. v. Medical Protective, D.C.Kan., 504 F.Supp. 877, Affd., C.A., 691 F.2d 468.

Present Tense

4. Ariz.—Sloatman v. Gibbons, 448 P.2d 124, 127, 8 Ariz.App. 554.

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12. Ariz.—Sloatman v. Gibbons, 448 P.2d 124, 127, 8 Ariz.App. 554.
 14. La.—Louisiana Power & Light Co. v. Lasseigne, 232 So.2d 278, 281, 255 La. 579.
 16. La.—Louisiana Power & Light Co. v. Lasseigne, 232 So.2d 278, 281, 255 La. 579.
 23. Similarly expressed
 (3) To enlarge.
 Ariz.—Sloatman v. Gibbons, 448 P.2d 124, 127, 8 Ariz. App. 554.
 (4) To increase the duration of.
 La.—Louisiana Power & Light Co. v. Lasseigne, 232 So.2d 278, 281, 255 La. 579.

EXTENT.

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82. Similarly defined

- (1) "Extent" means space or amount to which a thing is extended.—Application of Slayter, 276 F.2d 408, 410, 47 CCPA 849.

EXTERIOR.

95. D.C.—Abrams v. National Fire Ins. Co. of Hartford, Conn., D.C.Mun.App., 186 A.2d 232, 233, 2 A.L.R.3d 804.

EXTERNAL.

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3. In medical terminology

As applied in medical terms, word "external" is defined as relating to surface of body.—McCallum v. Mutual Life Ins. Co. of N.Y., D.C.Va., 175 F.Supp. 3, 6.

EXTINGUISH.

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21. Abrupt complete elimination not required

Verb "extinguish" does not necessarily mean an abrupt complete elimination of rights or claims and may also mean a gradual or limited result.—Mong v. Hershberger, 186 A.2d 427, 429, 200 Pa.Super. 68.

EXTORTION

§ 1. Definitions and Nature of Offense in General

Library References

Extortion and Threats ¶1, 2.

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1. Other definitions

- U.S.—U.S. v. Adcock, C.A.Iowa, 558 F.2d 397, cert. den. 98 S.Ct. 395, 434 U.S. 921, 54 L.Ed.2d 277.
 U.S. v. Salvitti, D.C.Pa., 464 F.Supp. 611.

- 1.5. Pa.—Com. v. Neff, 171 A.2d 561, 195 Pa.Super. 420, revd. on oth. grds., 179 A.2d 630, 407 Pa. 1.

2. U.S.—U.S. v. Kabot, C.A.N.Y., 295 F.2d 848, cert. den. 82 S.Ct. 641, 369 U.S. 803, 7 L.Ed.2d 550.

- Mass.—C.J.S. cited in Com. v. Matchett, 436 N.E.2d 400, 408, 386 Mass. 492.

- Mich.—People v. Krist, 296 N.W.2d 139, 97 Mich.App. 669.

- Nev.—Adler v. Sheriff, Clark County, 556 P.2d 549, 92 Nev. 641.

Other statements

- (4) Additional statements.

- U.S.—U.S. v. Miller, C.A.Md., 340 F.2d 421.

- U.S. v. Kubacki, D.C.Pa., 237 F.Supp. 638.

- N.J.—State v. Begyn, 167 A.2d 161, 34 N.J. 35.

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3. U.S.—C.J.S. quoted in United States v. Harding, C.A.Tenn., 563 F.2d 299, 304, cert. den. 98 S.Ct. 1235, 434 U.S. 1062, 55 L.Ed.2d 762.

4. Okl.—Yoder v. State, Cr., 493 P.2d 1141.

Construction of statute

- U.S.—U.S. v. Huber, C.A.N.Y., 603 F.2d 387, cert. den. 100 S.Ct. 1312, 445 U.S. 927, 63 L.Ed.2d 759—
 U.S. v. Gan, C.A.N.Y., 636 F.2d 28, cert. den. 101 S.Ct. 3011, two cases, 451 U.S. 1020, 69 L.Ed.2d 392.

- Ark.—Richards v. State, App., 585 S.W.2d 375, 266 Ark. 733.

- Cal.—People v. Baker, 151 Cal.Rptr. 362, 88 C.A.3d 115.

- Fla.—Carricarte v. State, 384 So.2d 1261, cert. den. 101 S.Ct. 215, 449 U.S. 874, 66 L.Ed.2d 95.

- N.J.—State v. Savoie, 341 A.2d 598, 67 N.J. 439.

5. U.S.—U.S. v. Brooklier, D.C.Cal., 459 F.Supp. 476.
 Cal.—Kehoe v. City of Berkeley, 135 Cal.Rptr. 700, 67 C.A.3d 666.

- Mich.—People v. Ritholz, 103 N.W.2d 481, 359 Mich. 539, cert. den. 81 S.Ct. 275, 364 U.S. 912, 5 L.Ed.2d 226.

- N.Y.—People v. Squillante, 185 N.Y.S.2d 357, 18 Misc.2d 561.

- Wash.—Stage v. Garvin, 621 P.2d 215, 28 Wash.App. 82.

- Statute valid

- U.S.—U.S. v. Dozier, C.A.La., 672 F.2d 531, reh. den. 677 F.2d 113, cert. den. 103 S.Ct. 256, 459 U.S. 943, 74 L.Ed.2d 200.

- La.—State v. Cannon, 383 So.2d 389, cert. den. 102 S.Ct. 596, 454 U.S. 1052, 70 L.Ed.2d 587.

- Purpose of Hobbs Act

- U.S.—U.S. v. Blakey, C.A.Ill., 607 F.2d 779.

"Benefit"

- Fla.—Shields v. Smith, App., 404 So.2d 1106.

6. Unconstitutionally vague

- Fla.—State v. Rou, 366 So.2d 385.

Public salary extortion

- La.—State v. Cannon, 383 So.2d 389, cert. den. 102 S.Ct. 576, 454 U.S. 1052, 70 L.Ed.2d 587.

- 9.5. U.S.—U.S. v. Calder, C.A.N.Y., 641 F.2d 76, cert. den. 101 S.Ct. 1984, two cases, 451 U.S. 92, 68 L.Ed.2d 302 and 102 S.Ct. 156, 454 U.S. 843, 70 L.Ed.2d 128, and 102 S.Ct. 156.

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14. Mo.—Motley v. Dugan, App., 191 S.W.2d 979.
 N.Y.—Hornstein v. Paramount Pictures, 55 N.E.2d 740, 292 N.Y. 468.

- 26.5. Pa.—Com. v. Guenger, 389 A.2d 133, 255 Pa. Super. 587.

29.5. Reward

- N.J.—State v. Begyn, 167 A.2d 161, 34 N.J. 35.

§ 2. Elements of Offense

Library References

Extortion and Threats ¶3, 4.

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29. U.S.—U.S. v. Trotta, C.A.N.Y., 525 F.2d 1096, cert. den. 96 S.Ct. 2167, 425 U.S. 971, 48 L.Ed.2d 794—U.S. v. French, C.A.Mo., 628 F.2d 1069, cert. den. 101 S.Ct. 364, 449 U.S. 956, 66 L.Ed.2d 221.

- N.J.—State v. Savoie, 341 A.2d 598, 67 N.J. 439.

- N.M.—State v. Barber, App., 606 P.2d 192, 93 N.M. 782.

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44. Under Hobbs Act

- U.S.—U.S. v. Jannotti, C.A.Pa., 673 F.2d 578, cert. den. 102 S.Ct. 2906, 457 U.S. 1106, 73 L.Ed.2d 1315, app. after remand C.A., 729 F.2d 213, cert. den. 105 S.Ct. 243, 244, 83 L.Ed.2d 182.

- § 3. — Intent

Library References

Extortion and Threats ¶5.

45. U.S.—U.S. v. Price, C.A.Ill., 617 F.2d 455—U.S. v. Smith, C.A.Mo., 631 F.2d 103.

Colo.—People v. Sandoval, 596 P.2d 1225, 42 Colo. App. 503.

Ill.—People v. Ambrose, 179 N.E.2d 460, 33 Ill.App.2d 399.

Mich.—People v. Krist, 296 N.W.2d 139, 97 Mich.App. 669.

Pa.—Com. v. Bollinger, 179 A.2d 253, 197 Pa.Super. 492.

48. U.S.—U.S. v. Enmons, La., 93 S.Ct. 1007, 410 U.S. 396, 35 L.Ed.2d 379.

U.S. v. Dozier, C.A.La., 672 F.2d 531, reh. den. 677 F.2d 113, cert. den. 103 S.Ct. 256, 459 U.S. 943, 74 L.Ed.2d 200.

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55. U.S.—U.S. v. Furey, D.C.Pa., 491 F.Supp. 1048, affd., C.A., 636 F.2d 1211, cert. den. 101 S.Ct. 1987, 451 U.S. 913, 68 L.Ed.2d 304.

§ 4. — Duress or Exaction

Library References

Extortion and Threats ⇐7.

61. U.S.—U.S. v. Hathaway, C.A.Mass., 534 F.2d 386, cert. den. 97 S.Ct. 64, two cases, 429 U.S. 819, 50 L.Ed.2d 79—U.S. v. Hedman, C.A.Ill., 630 F.2d 1184, cert. den. 101 S.Ct. 1481, 450 U.S. 965, 67 L.Ed.2d 614.

Pa.—Com. v. Lynch, 411 A.2d 1224, 290 Pa.Super. 554, affd. in part revd. in part on oth. grds., 466 A.2d 991, 502 Pa. 359.

Under Hobbs Act

U.S.—U.S. v. Gates, C.A.Nev., 616 F.2d 1103—U.S. v. Agnes, C.A.Pa., 753 F.2d 293.

U.S. v. Salvitti, D.C.Pa., 464 F.Supp. 611.

N.J.—State v. Savoie, 341 A.2d 598, 67 N.J. 439.

Pa.—Com. v. Burns, 178 A.2d 619, 197 Pa.Super. 282.

62. N.J.—State v. Savoie, 320 A.2d 164, 128 N.J.Super. 329, revd. on oth. grds. 341 A.2d 598, 67 N.J. 439.

§ 5. — Color of Office or Right

Library References

Extortion and Threats ⇐6.

62.50. Under Hobbs Act

(1) In general

U.S.—U.S. v. Phillips, C.A.Cal., 577 F.2d 495, cert. den. 99 S.Ct. 107, 439 U.S. 831, 58 L.Ed.2d 125—U.S. v. Dozier, C.A.La., 672 F.2d 531, reh. den. 677 F.2d 113, cert. den. 103 S.Ct. 256, 459 U.S. 943, 74 L.Ed.2d 200—U.S. v. Murphy, C.A.7 (Ill.), 768 F.2d 1518.

Fla.—Shields v. Smith, App., 404 So.2d 1106.

(2) Force; violence or fear not elements in Hobbs Act case.

U.S.—U.S. v. Hathaway, C.A.Mass., 534 F.2d 386, cert. den. 97 S.Ct. 64, two cases 249 U.S. 819, 50 L.Ed.2d 79.

(3) Hobbs Act prosecution may lie where extorted payments are transferred to third parties, including political allies and political parties, rather than to public official who has acted under color of official right. U.S.—U.S. v. Margiotta, C.A.N.Y., 688 F.2d 108, cert. den. 103 S.Ct. 1891, 461 U.S. 913, 77 L.Ed.2d 282.

(4) Mere acceptance of benefits by public official is not "extortion under color of official right," even if official knew that his office was the motivation behind the giving of the benefits.

U.S.—U.S. v. O'Grady, C.A.N.Y., 742 F.2d 682.

(5) While Government is not required to prove that public official demanded or directly solicited benefits received, or that he offered a specific quid pro quo in exchange for benefits, Government must show that power of public office was misused in such a way as to induce the giving of benefits.

U.S.—U.S. v. O'Grady, C.A.N.Y., 742 F.2d 682.

63. U.S.—U.S. v. Adcock, C.A.Iowa, 558 F.2d 397, cert. den. 98 S.Ct. 395, 434 U.S. 921, 54 L.Ed.2d 277.

64. U.S.—U.S. v. Price, C.A.S.C., 507 F.2d 1349. Pa.—Com. v. Froelich, 326 A.2d 364, 458 Pa. 104, 70 A.L.R.3d 1146.

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64.5. N.J.—State v. Savoie, 341 A.2d 598, 67 N.J. 439.

65. Nev.—Adler v. Sheriff, Clark County, 556 P.2d 549, 92 Nev. 641.

66. Pa.—Com. v. Francis, 191 A.2d 884, 201 Pa.Super. 313, cert. den. 84 S.Ct. 517, 375 U.S. 985, 11 L.Ed.2d 472.

67. U.S.—U.S. v. Trotta, D.C.N.Y., 396 F.Supp. 755, revd. on oth. grds. 525 F.2d 1096, cert. den. 96 S.Ct. 2167, 425 U.S. 971, 48 L.Ed.2d 794.

N.M.—State v. Wheeler, App., 622 P.2d 283, 95 N.M. 378.

Pa.—Com. v. Maxwell, 49 Del.Co. 153.

68. Pa.—Com. v. Francis, 191 A.2d 884, 201 Pa.Super. 313, cert. den. 84 S.Ct. 517, 375 U.S. 985, 11 L.Ed.2d 472.

69. Pa.—Com. v. Burns, 178 A.2d 619, 197 Pa.Super. 282.

Violation of Hobbs Act

U.S.—U.S. v. Crowley, C.A.Ill., 504 F.2d 992.

§ 6. — Money or Thing of Value Extorted

Library References

Extortion and Threats ⇐8.

74. U.S.—U.S. v. Baudin, D.C.N.Y., 486 F.Supp. 403. La.—State v. Cannon, 383 So.2d 389, cert. den. 102 S.Ct. 596, 454 U.S. 1052, 70 L.Ed.2d 587.

Rule applied under statute

U.S.—U.S. v. Cerilli, C.A.Pa., 603 F.2d 415, cert. den. 100 S.Ct. 728, 444 U.S. 1043, 62 L.Ed.2d 728.

U.S. v. Provinzano, D.C.Wis., 50 F.R.D. 361.

Fla.—Shields v. Smith, App., 404 So.2d 1106.

Wash.—State v. Taylor, 632 P.2d 892, 30 Wash.App. 89.

Amount of no importance

U.S.—U.S. v. Irall, C.A.Ill., 503 F.2d 1295, cert. den. 95 S.Ct. 1424, 420 U.S. 990, 43 L.Ed.2d 670.

78. The gravamen of the offense, etc.

(2) Other matters.

U.S.—U.S. v. Provenzano, C.A.N.J., 334 F.2d 678, cert. den. 85 S.Ct. 440, 379 U.S. 947, 13 L.Ed.2d 544.

Under a statute relating to any obtaining of property from another through a wrongful use of force and fear, "property from another" implies a giving by the victim and receipt by the wrongdoer.^{78.5}

78.5. N.Y.—People v. Squillante, 185 N.Y.S.2d 357, 18 Misc.2d 561.

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80. U.S.—U.S. v. French, C.A.Mo., 628 F.2d 1069, cert. den. 101 S.Ct. 364, 449 U.S. 956, 66 L.Ed.2d 221.

N.J.—State v. Seaman, 274 A.2d 810, 114 N.J.Super. 19, cert. den. 92 S.Ct. 674, 404 U.S. 1015, 30 L.Ed.2d 662.

Wash.—State v. Taylor, 632 P.2d 892, 30 Wash.App. 89.

§ 7. Attempts

81. U.S.—U.S. v. Rosa, D.C.Pa., 404 F.Supp. 602, affd. 535 F.2d 1247 and 535 F.2d 1248, cert. den. 97 S.Ct. 71, two cases, 429 U.S. 822, 50 L.Ed.2d 83, affd., C.A., 560 F.2d 149, cert. den. 98 S.Ct. 191, 434 U.S. 862, 54 L.Ed.2d 135—U.S. v. Salvitti, D.C.Pa., 451 F.Supp. 195, affd., C.A., 588 F.2d 822, 829.

Crime of attempted extortion does not exist
Fla.—Achin v. State, App., 387 So.2d 375, approved in part, disapproved in part, Sup., 436 So.2d 30—Spohnheim v. State, App. 2 Dist., 416 So.2d 54.

81.5. U.S.—U.S. v. Rindone, C.A.Ill., 631 F.2d 491. N.J.—State v. Begyn, 167 A.2d 161, 34 N.J. 35.

81.10. Attempt defined

N.Y.—People v. Siocum, 412 N.Y.S.2d 321, 97 Misc.2d 728.

§ 8. Defenses

Other matters relating to defenses have been adjudicated.^{89.5}

89.5. U.S.—U.S. v. Zappola, D.C.N.Y., 523 F.Supp. 362, affd., C.A., 677 F.2d 264, cert. den. 103 S.Ct. 145, 459 U.S. 866, 74 L.Ed.2d 122.

Ark.—Richards v. State, App., 585 S.W.2d 375, 266 Ark. 733.

§ 9. Persons Liable

Library References

Extortion and Threats ⇐10.

90. U.S.—U.S. v. Nelson, D.C.Mich., 486 F.Supp. 464.

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91. Pa.—Com. v. Neff, 179 A.2d 630, 407 Pa. 1.

Particular persons held officers

(4) Other persons.

Pa.—Com. v. Neff, 171 A.2d 561, 195 Pa.Super. 420, revd. on oth. grds. 179 A.2d 630, 407 Pa. 1.

95. Payor of money

U.S.—U.S. v. Nelson, D.C.Mich., 486 F.Supp. 464.

2. Nev.—Adler v. Sheriff, Clark County, 556 P.2d 549, 92 Nev. 641.

6. U.S.—U.S. v. Lena, D.C.Pa., 497 F.Supp. 1352, affd., C.A., 649 F.2d 861.

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7. Mich.—People v. Wirth, 273 N.W.2d 104, 87 Mich. App. 41.

§ 10. Indictment or Information

Library References

Extortion and Threats ⇐12, 13.

8. Indictments or informations held sufficient

(1) U.S.—U.S. v. Nardello, Pa., 89 S.Ct. 534, 393 U.S. 286, 21 L.Ed.2d 487.

Cal.—People v. Winning, 12 Cal.Rptr. 885, 191 C.A.2d 763.

10. U.S.—U.S. v. Trotta, C.A.N.Y., 525 F.2d 1096, cert. den. 96 S.Ct. 2167, 425 U.S. 971, 48 L.Ed.2d 794.

12. N.Y.—People v. Wisch, 296 N.Y.S.2d 882, 58 Misc.2d 766.

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37. U.S.—U.S. v. Provinzano, D.C.Wis., 50 F.R.D. 361.

38. Allegation held insufficient

Okl.—Yoder v. State, Cr., 493 P.2d 1141.

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42. Indictment held sufficient

Fla.—Horner v. State, App., 149 So.2d 863.

44. Ill.—People v. Ambrose, 179 N.E.2d 460, 33 Ill. App.2d 399.

§ 11. — Issues, Proof, and Variance

Library References

Extortion and Threats ⇐14.

§ 11 EXTORTION

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49. Issue to be determined

U.S.—U.S. v. Emalfarb, C.A.Ill., 484 F.2d 787, cert. den. 94 S.Ct. 571, 414 U.S. 1064, 38 L.Ed.2d 469.

Under Hobbs Act

U.S.—U.S. v. Schmidt, C.A.7 (Ill.), 760 F.2d 828, cert. den. 106 S.Ct. 86, 88 L.Ed.2d 71.

§ 12. Evidence

Library References

Extortion and Threats ⇨15.

Extradition and Detainers ⇨50-60.

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68. N.J.—State v. Milano, 400 A.2d 854, 167 N.J.Super. 318, affd. 412 A.2d 129, 172 N.J.Super. 361.

75. N.J.—State v. Begyn, 167 A.2d 161, 34 N.J. 35.

Exclusion held error

(2) Other evidence.

Pa.—Com. v. Bollinger, 179 A.2d 253, 197 Pa.Super. 492.

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80. U.S.—U.S. v. DiGregorio, C.A.Mass., 605 F.2d 1184, cert. den. 100 S.Ct. 287, 444 U.S. 937, 62 L.Ed.2d 197, and 100 S.Ct. 302, 444 U.S. 944, 62 L.Ed.2d 312, and 100 S.Ct. 489, 444 U.S. 983, 62 L.Ed.2d 411.

Evidence held sufficient

U.S.—Byrnes v. U.S., C.A.Cal., 327 F.2d 825, cert. den. 84 S.Ct. 1652, 377 U.S. 970, 12 L.Ed.2d 739—Lefler v. U.S., C.A.Mo., 409 F.2d 44—U.S. v. Crowley, C.A.Ill., 504 F.2d 992—U.S. v. Price, C.A.S.C., 507 F.2d 1349—U.S. v. Smith, C.A.Mo., 631 F.2d 103.

Ark.—Richards v. State, App., 585 S.W.2d 375, 266 Ark. 733.

Cal.—People v. Baker, 151 Cal.Rptr. 362, 88 C.A.3d 115.

Fla.—Ford v. State, App., 251 So.2d 562.

Mich.—People v. Dempsey, 199 N.W.2d 231, 40 Mich. App. 400.

N.J.—State v. Schneider, 165 A.2d 299, 33 N.J. 451, cert. den. 81 S.Ct. 824, 365 U.S. 859, 5 L.Ed.2d 822.

Pa.—Com. v. Burns, 178 A.2d 619, 197 Pa.Super. 282—Com. v. Bruno, 201 A.2d 434, 203 Pa.Super. 541, cert. den. 85 S.Ct. 656, 379 U.S. 965, 13 L.Ed.2d 558—Com. v. Froelich, 326 A.2d 364, 458 Pa. 104, 70 A.L.R.3d 1146.

Evidence held insufficient

U.S.—U.S. v. Staszczuk, C.A.Ill., 502 F.2d 875, reh. 517 F.2d 53, cert. den. 96 S.Ct. 65, 423 U.S. 837, 46 L.Ed.2d 56.

N.Y.—People v. Bonsignore, 250 N.Y.S.2d 345, 21 A.D.2d 309.

§ 13. Trial and Review

Library References

Extortion and Threats ⇨16.

81. N.Y.—People v. Rothschild, 320 N.E.2d 639, 35 N.Y.2d 355, 361 N.Y.S.2d 901.

Evidence held sufficient to take case to jury, etc.

Colo.—People v. Noga, 586 P.2d 1002, 196 Colo. 478.

Mich.—People v. Brant, 146 N.W.2d 710, 5 Mich. App. 315.

N.C.—State v. Zigler, 256 S.E.2d 479, 42 N.C.App. 148.

82. U.S.—Lefler v. U.S., C.A.Mo., 409 F.2d 44.

Test

In economic duress cases, causation issue is reduced to question of whether victim would have acquiesced in absence of wrongful threat; thus, factual finding that wrongful threat was communicated and understood is prerequisite for finding that threat was reason for victim's acquiescence.

Wis.—Wurtz v. Fleischman, App., 278 N.W.2d 266, 89 Wis.2d 291, revd. on oth. grds. 293 N.W.2d 155, 97 Wis.2d 100, 12 A.L.R.4th 1254.

85. Instructions held proper

(4) U.S.—U.S. v. Iraili, C.A.Ill., 503 F.2d 1295, cert. den. 95 S.Ct. 1424, 420 U.S. 990, 43 L.Ed.2d 670—U.S. v. Price, C.A.S.C., 507 F.2d 1349—U.S. v. Huber, C.A.N.Y., 603 F.2d 387, cert. den. 100 S.Ct. 1312, 445 U.S. 927, 63 L.Ed.2d 759.

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95. U.S.—U.S. v. Ochs, C.A.N.Y., 595 F.2d 1247, cert. den. 100 S.Ct. 435, 444 U.S. 955, 62 L.Ed.2d 328, reh. den. 100 S.Ct. 695, 444 U.S. 1027, 62 L.Ed.2d 663.

N.J.—State v. Milano, 400 A.2d 854, 167 N.J.Super. 318, affd. 412 A.2d 129, 172 N.J.Super. 361.

§ 15. Penalties and Actions Therefor

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78. U.S.—U.S. v. Summers, C.A.Ala., 598 F.2d 450.

EXTRA (Latin).

Phrases:

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4. Additional phrases

(1) "Extra-curricular" means of or pertaining to activities as debating, dramatics, and athletics which form part of life of students, but are not part of regular course of study, and term is all inclusive, and whether or not, in specific instance, an activity is "extra-curricular" is question of fact that may depend upon policy of each individual school.—Eckard v. World Ins. Co., Omaha, Neb., 96 N.W.2d 454, 456, 250 Iowa 782.

EXTRADITION

§ 1. Definition and Distinctions

Library References

Modern Legal Forms Ch. 31, Extradition.

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1. U.S.—Stevenson v. U.S., C.A.Ariz., 381 F.2d 142—Tavarez v. U.S. Atty.Gen., C.A.Tex., 668 F.2d 805.

Conn.—Narel v. Liburdi, 441 A.2d 177, 185 Conn. 562, cert. den. 102 S.Ct. 1974, 456 U.S. 928, 72 L.Ed.2d 443.

Nev.—Sheriff, Washoe County v. Povey, 491 P.2d 54, 87 Nev. 603.

Pa.—Com. ex rel. Marshall v. Gedney, 386 A.2d 942, 478 Pa. 299, 90 A.L.R.3d 1074.

Interstate arrest

Colo.—Wynsma v. Leach, 536 P.2d 817, 189 Colo. 59.

"Detainer"

Mich.—People v. Browning, 310 N.W.2d 365, 108 Mich.App. 281.

1.5. Kan.—King v. Hawes, 580 P.2d 1318, 224 Kan. 335.

Interstate rendition or extradition is the right of one state to demand from the asylum state the surrender of a fugitive from justice from the demanding state when the fugitive is found in the asylum state.^{1,10}

1.10. Ariz.—Application of Dugger, 497 P.2d 413, 17 Ariz.App. 297.

3.10. U.S.—Smith v. State of Idaho, C.A.Idaho, 373 F.2d 149, cert. den. 87 S.Ct. 2139, 388 U.S. 919, 18 L.Ed.2d 1364.

§ 2. Foundation and Nature of Right

Library References

Modern Legal Forms Ch. 31, Extradition.

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4. U.S.—DeGenna v. Grasso, D.C.Conn., 413 F.Supp. 427, affd. 96 S.Ct. 2617, 426 U.S. 913, 49 L.Ed.2d 368.

Ala.—C.J.S. black letter summary quoted in Krenwinkel v. State, Cr., 232 So.2d 346, 348, 45 Ala.App. 474.

Ariz.—C.J.S. cited in State ex rel. Babbitt v. Kinman, 550 P.2d 1108, 1109, 27 Ariz.App. 66.

Ark.—Cadle v. Cauthron, 584 S.W.2d 6, 266 Ark. 419.

Cal.—In re Albright, 181 Cal.Rptr. 84, 129 C.A.3d 504.

Colo.—Simmons v. Leach, 626 P.2d 164.

Ill.—People ex rel. Hackler v. Lohman, 160 N.E.2d 792, 17 Ill.2d 78, cert. den. 80 S.Ct. 591, 361 U.S. 963, 4 L.Ed.2d 544.

Mich.—Eroh v. Manistee County Sheriff, 272 N.W.2d 720, 86 Mich.App. 545.

Neb.—Prettyman v. Karnopp, 222 N.W.2d 362, 192 Neb. 451.

N.J.—State v. Phillips, 162 A.2d 113, 62 N.J.Super. 70, affd. 167 A.2d 175, 34 N.J. 63—Application of Dunster, 328 A.2d 238, 131 N.J.Super. 22.

N.D.—C.J.S. cited in Bebeau v. Granrud, 184 N.W.2d 577, 580.

Ohio—In re Rowe, 423 N.E.2d 167, 67 Ohio St.2d 115, 21 O.O.3d 73.

Pa.—Com. ex rel. Marshall v. Gedney, 386 A.2d 942, 478 Pa. 299, 90 A.L.R.3d 1074.

Wash.—Application of Jeffries, 548 P.2d 594, 15 Wash. App. 302.

Wis.—State ex rel. O'Connor v. Williams, App., 290 N.W.2d 533, 95 Wis.2d 378—State ex rel. Graves v. Williams, App., 298 N.W.2d 392, 99 Wis.2d 65, cert. den. 101 S.Ct. 1389, 450 U.S. 930, 67 L.Ed. 362.

Intent of provision

U.S.—Michigan v. Doran, Mich., 99 S.Ct. 530, 439 U.S. 282, 58 L.Ed.2d 521.

Hines v. Guthrey, D.C.Va., 342 F.Supp. 594.

Colo.—Lovato v. Johnson, 617 P.2d 1203.

Md.—Utt v. State, 443 A.2d 582, 293 Md. 271.

Wash.—State ex rel. Boutwell v. Coughlin, 586 P.2d 1145, 90 Wash.2d 835.

Rights of accused must be protected

Alaska—Warmbo v. State, 578 P.2d 582.

Colo.—Pippin v. Leach, 534 P.2d 1193, 188 Colo. 385.

Idaho—Walton v. State, 566 P.2d 765, 98 Idaho 442.

5. U.S.—Wellington v. State of S.D., D.C.S.D., 413 F.Supp. 151.

Fla.—Hill v. Roberts, App., 359 So.2d 911.

Idaho—Smith v. State, 403 P.2d 221, 89 Idaho 70, cert. den. 86 S.Ct. 906, 383 U.S. 916, 15 L.Ed.2d 669.

Ill.—People ex rel. Hackler v. Lohman, 160 N.E.2d 792, 17 Ill.2d 78, cert. den. 80 S.Ct. 591, 361 U.S. 963, 4 L.Ed.2d 544.

N.D.—C.J.S. cited in Bebeau v. Granrud, 184 N.W.2d 577, 580.

S.D.—Wellington v. State, 238 N.W.2d 499, 90 S.D. 133.

Wis.—State v. Hughes, 229 N.W.2d 655, 68 Wis.2d 662.

5.5. U.S.—U.S. ex rel. McInery v. Shelley, D.C.Ill., 524 F.Supp. 499.

Cal.—In re Fabricant, 173 Cal.Rptr. 245, 118 C.A.3d 115.

N.Y.—People ex rel. Shults v. Lombard, 398 N.Y.S.2d 932, 91 Misc.2d 881.

Grounds for extradition

Pa.—Com. ex rel. McGowan v. Aytch, 334 A.2d 750, 233 Pa.Super. 66.

Wis.—State ex rel. Reddin v. Meekma, 298 N.W.2d 192, 99 Wis.2d 56, affd., 306 N.W.2d 664, 102 Wis.2d

358, cert. den. 102 S.Ct. 407, 454 U.S. 902, 70 L.Ed.2d 220.

6. Cal.—In re Golden, 135 Cal.Rptr. 512, 65 C.A.3d 789, cert. den. 98 S.Ct. 35, 434 U.S. 805, 54 L.Ed.2d 63.

Constitutional comity

(2) Other matters.

- U.S.—Turner v. Boles, D.C.W.Va., 272 F.Supp. 60. Colo.—Bryan v. Conn, 530 P.2d 1274, 187 Colo. 275. Conn.—Hill v. Blake, 441 A.2d 841, 186 Conn. 404. Or.—Ault v. Purcell, 519 P.2d 1285, 16 Or.App. 664, cert. den. 95 S.Ct. 106, 419 U.S. 858, 42 L.Ed.2d 92.

Granting protection

- U.S.—Pierson v. Grant, D.C.Iowa, 357 F.Supp. 397.

8. Compact between states

(3) Other instances.

- Mich.—People v. McEmore, 311 N.W.2d 720, 411 Mich. 691. Okl.—Pfothhauer v. Hunter, 536 P.2d 923. 9. Ariz.—State v. Bost, 409 P.2d 590, 2 Ariz.App. 431.

Not criminal prosecution

- U.S.—U.S. v. Galanis, D.C.Conn., 429 F.Supp. 1215. 10. Neb.—Wise v. State, 251 N.W.2d 373, 197 Neb. 831.

- N.J.—State v. Sinacore, 376 A.2d 580, 151 N.J.Super. 106.

- N.C.—State v. Carter, 256 S.E.2d 535, 42 N.C.App. 325, cert. den. 259 S.E.2d 302, 298 N.C. 301.

- S.D.—Wellington v. State, 238 N.W.2d 499, 90 S.D. 153.

- Tenn.—C.J.S. cited in State ex rel. Wiley v. Waggoner, 508 S.W.2d 535, 539.

- 10.5. U.S.—Michigan v. Doran, Mich., 99 S.Ct. 530, 439 U.S. 282, 58 L.Ed.2d 521.

- Colo.—C.J.S. cited in Luker v. Koch, 489 P.2d 191, 193, 176 Colo. 75.

- Iowa—State v. Martin, 252 N.W.2d 438.

- La.—State v. Tyler, 398 So.2d 1108, op. dissented 435 So.2d 422.

- Mass.—In re Maldonado, 304 N.E.2d 419, 364 Mass. 359.

- N.Y.—People ex rel. Drake v. Oslwyn, 380 N.Y.S.2d 666, 51 A.D.2d 240.

- Pa.—Com. ex rel. Colcough v. Aytech, 323 A.2d 359, 227 Pa.Super. 527.

Summary executive proceeding

- U.S.—Garrison v. Smith, D.C.Miss., 413 F.Supp. 747.

Waiver

- U.S.—McBride v. Soos, D.C.Ind., 512 F.Supp. 1207, affd. 679 F.2d 1223, applying Missouri law.

- Colo.—Schoengarth v. Bray, 615 P.2d 655, 200 Colo. 288.

- D.C.—Hagans v. U.S., App., 408 A.2d 965.

- Tex.—Ex parte Medeiros, Cr., 552 S.W.2d 156.

- Ex parte Johnson, Cr.App., 610 S.W.2d 757.

- Vt.—In re Roessel, 388 A.2d 835, 136 Vt. 324.

Technical or formal objections

- Ohio—Carpenter v. Jamerson, 432 N.E.2d 177, 69 Ohio St.2d 308, 23 O.O.3d 290.

- Pa.—Com. ex rel. Myers v. Case, 378 A.2d 917, 250 Pa.Super. 242.

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- 10.10. U.S.—Campbell v. Smith, D.C.Ga., 308 F.Supp. 796.

- Ill.—People ex rel. Banks v. Farnar, 233 N.E.2d 360, 39 Ill.2d 176.

- Ind.—Holland v. Hargar, 409 N.E.2d 604, 274 Ind. 156.

- Iowa—State v. Zylstra, 263 N.W.2d 529.

- La.—State v. Tyler, 398 So.2d 1108, op. dissented 435 So.2d 422.

- Mich.—People v. Berryman, 204 N.W.2d 238, 43 Mich. App. 366.

- N.Y.—People ex rel. Cook v. Gavel, 377 N.Y.S.2d 839, 51 A.D.2d 641.

- Wash.—Vetsch v. Sheriff of Spokane County, 546 P.2d 927, 14 Wash.App. 971.

- Wis.—State ex rel. Reddin v. Meekma, 306 N.W.2d 664, 102 Wis.2d 358, cert. den. 102 S.Ct. 407, 454 U.S. 902, 70 L.Ed.2d 220.

10.15. Grounds for challenging extradition

- Ga.—Aikens v. Turner, 245 S.E.2d 660, 241 Ga. 401.

- Idaho—Jacobsen v. State, 577 P.2d 24, 99 Idaho 45.

- Kan.—State v. McCowan, 602 P.2d 1363, 226 Kan. 752, cert. den. 101 S.Ct. 127, 449 U.S. 844, 66 L.Ed.2d 53.

- Minn.—State ex rel. DeGiglio v. Talbot, 250 N.W.2d 169, 311 Minn. 426—State v. Drager, 264 N.W.2d 820.

- Tex.—Ex parte Ellis, Cr.App., 589 S.W.2d 128.

11. U.S.—Smith v. State of Idaho, C.A.Idaho, 373 F.2d 149, cert. den. 87 S.Ct. 2139, 388 U.S. 919, 18 L.Ed.2d 1364.

- Colo.—Blackburn v. Johnson, 647 P.2d 238.

12. Colo.—Gottfried v. Cronin, 555 P.2d 969, 192 Colo. 25.

- Ill.—People v. Cheek, 420 N.E.2d 238, 50 Ill.Dec. 921, 95 Ill.App.3d 392, affd. 442 N.E.2d 877, 66 Ill.Dec. 316, 93 Ill.2d 82.

- Md.—Clark v. State, 396 A.2d 243, 284 Md. 260, cert. den. 100 S.Ct. 119, 444 U.S. 858, 62 L.Ed.2d 77.

- Miss.—Phillips v. State, 185 So.2d 157.

- N.H.—Gullick v. Sampson, 395 A.2d 187, 118 N.H. 826.

- N.Y.—People v. Faustino, 432 N.Y.S.2d 782, 105 Misc.2d 641.

- People ex rel. McGill v. Wright, 307 N.Y.S.2d 964, 62 Misc.2d 154, affd. 314 N.Y.S.2d 128, 34 A.D.2d 1106.

- Okl.—Ray v. Raines, Cr., 347 P.2d 659.

- Pa.—Com. v. Heath, Super., 431 A.2d 317, 288 Pa.Super. 119.

- Wis.—State ex rel. Niederer v. Cady, 240 N.W.2d 626, 72 Wis.2d 311.

Waiver not coercive

- U.S.—Forester v. California Adult Authority, C.A.N.D., 510 F.2d 58.

- Neb.—State v. Lingle, 308 N.W.2d 531, 209 Neb. 492.

14. Ala.—Chatham v. State, Cr., 248 So.2d 768, 46 Ala.App. 729.

Extradition not barred

- Ala.—Warner v. State, Cr., 292 So.2d 48, 52 Ala.App. 361.

- 14.15. U.S.—U.S. ex rel. Vitiello v. Flood, C.A.N.Y., 374 F.2d 554.

- Ala.—Gage v. State, Cr.App., 397 So.2d 265, writ den., Sup., 397 So.2d 270.

- Conn.—Mandarano v. Tierney, 195 A.2d 48, 151 Conn. 155—Negron v. Warden, Hartford Community Correctional Center, 429 A.2d 841, 180 Conn. 153—C.J.S. cited in Johnson v. Manson, 493 A.2d 846, 854, 196 Conn. 309, cert. den. 106 S.Ct. 813.

- Ill.—People ex rel. Kubala v. Woods, 284 N.E.2d 286, 52 Ill.2d 48.

- Nev.—Sheriff, Clark County v. Randono, 515 P.2d 1267, 89 Nev. 521, cert. den. 94 S.Ct. 1970, 416 U.S. 956, 40 L.Ed.2d 307—Martinez v. Sheriff of Clark County, 527 P.2d 1200, 90 Nev. 37.

- R.I.—Salvail v. Sharkey, 271 A.2d 814, 108 R.I. 63.

15. N.M.—State v. Quiroz, App., 612 P.2d 1328, 94 N.M. 517.

- Or.—Fisco v. Clark, 414 P.2d 331, 243 Or. 466.

- 15.5. Ill.—People ex rel. Hackler v. Lohman, 160 N.E.2d 792, 17 Ill.2d 78, cert. den. 80 S.Ct. 591, 361 U.S. 963, 4 L.Ed.2d 544.

- La.—State v. Tyler, 398 So.2d 1108, op. dissented 435 So.2d 422.

- Me.—Olson v. Thurston, 393 A.2d 1320.

- N.H.—Debski v. State, 348 A.2d 343, 115 N.H. 673.

- N.Y.—People ex rel. Little v. Cuiros, 377 N.E.2d 980, 44 N.Y.2d 825, 406 N.Y.S.2d 449.

- Wis.—State ex rel. Reddin v. Meekma, 306 N.W.2d 664, 102 Wis.2d 358, cert. den. 102 S.Ct. 407, 454 U.S. 902, 70 L.Ed.2d 220.

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16. U.S.—C.J.S. cited in Thomas v. Levi, D.C.Pa., 422 F.Supp. 1027, 1032.

- Ala.—McCallum v. State, Cr.App., 407 So.2d 865.

- Ariz.—State v. O'Neill, App., 570 P.2d 811, 117 Ariz. 40.

§ 3. Constitutional and Statutory Provisions

17. U.S.—Smith v. State of Idaho, C.A.Idaho, 373 F.2d 149, cert. den. 87 S.Ct. 2139, 388 U.S. 919, 18 L.Ed.2d 1364—Derengowski v. U.S., C.A. Minn., 404 F.2d 778, cert. den. 89 S.Ct. 1640, 394 U.S. 1024, 23 L.Ed.2d 49—U.S. v. Guy, C.A.Mo., 456 F.2d 1157, cert. den. 93 S.Ct. 136, 409 U.S. 896, 34 L.Ed.2d 153, reh. den. 93 S.Ct. 327, 409 U.S. 1002, 34 L.Ed.2d 263, cert. den. 93 S.Ct. 344, 409 U.S. 1001, 34 L.Ed.2d 263—Sanders v. Co-nine, C.A.Wyo., 506 F.2d 530.

- Lupino v. U.S., D.C.Minn., 185 F.Supp. 363.

- D.C.—Kirkland v. Preston, C.A., 385 F.2d 670, 128 U.S.App.D.C. 148.

- Hawaii—Murray v. Burns, 405 P.2d 309, 48 Haw. 508.

- Minn.—State v. Finkelstein, 262 N.W.2d 159.

- R.I.—Brown v. Sharkey, 263 A.2d 104, 106 R.I. 714.

- Federal Fugitive Act

- (2) Other matters.

- Nev.—Sheriff, Clark County v. Thompson, 452 P.2d 911, 85 Nev. 211.

- No invasion of fugitive's rights

- (2) Other matters.

- Ky.—Com. v. Monroe, App., 580 S.W.2d 722.

- Provisions construed together

- Del.—Grano v. State, Super., 257 A.2d 768.

- Proper forum

- Minn.—State v. Bailey, 262 N.W.2d 406.

- Uniform Act for Out-of-State Parolee Supervision

- Wis.—State ex rel. Reddin v. Meekma, App., 298 N.W.2d 192, 99 Wis.2d 56, affd., 306 N.W.2d 664, 102 Wis.2d 358, cert. den. 102 S.Ct. 407, 454 U.S. 902, 70 L.Ed.2d 220.

18. U.S.—Smith v. State of Idaho, C.A.Idaho, 373 F.2d 149, cert. den. 87 S.Ct. 2139, 388 U.S. 919, 18 L.Ed.2d 1364—Bush v. Muncey, C.A.Md., 659 F.2d 402, cert. den. 102 S.Ct. 1259, 455 U.S. 910, 71 L.Ed.2d 449.

- U.S. ex rel. Grano v. Anderson, D.C.Del., 318 F.Supp. 263, affd., C.A., 446 F.2d 272.

- Ala.—Hendrix v. State, Cr.App., 405 So.2d 53.

- Fla.—State v. Cox, App., 306 So.2d 156.

- N.J.—State v. Sinacore, 376 A.2d 580, 151 N.J.Super. 106.

- R.I.—Bailey v. Laurie, 373 A.2d 482, 118 R.I. 184.

- Wash.—State ex rel. Boutwell v. Coughlin, 586 P.2d 1145, 90 Wash.2d 835.

19. U.S.—Smith v. State of Idaho, C.A.Idaho, 373 F.2d 149, cert. den. 87 S.Ct. 2139, 388 U.S. 919, 18 L.Ed.2d 1364—Chunn v. Clark, C.A.Ga., 451 F.2d 1005.

- In re Hunt, D.C.Mich., 276 F.Supp. 112.

- Ariz.—State v. Hooker, App., 626 P.2d 1111, 128 Ariz. 479.

- Idaho—Richardson v. State, 414 P.2d 871, 90 Idaho 566—Fenton v. State, 417 P.2d 415, 91 Idaho 149—Norton v. State, 470 P.2d 413, 93 Idaho 648, cert. den. 91 S.Ct. 918, 401 U.S. 936, 28 L.Ed.2d 215.

- Iowa—Hill v. Houck, 195 N.W.2d 692.

- Pa.—Com. ex rel. Banks v. Hendrick, 243 A.2d 438, 430 Pa. 575.

- R.I.—Bailey v. Laurie, 373 A.2d 482, 118 R.I. 184.

20. Cal.—Application of Morgan, 53 Cal.Rptr. 642, 244 C.A.2d 903.

- Ill.—People ex rel. Hackler v. Lohman, 160 N.E.2d 792, 17 Ill.2d 78, cert. den. 80 S.Ct. 591, 361 U.S. 963, 4 L.Ed.2d 544.

- Mass.—In re Moore, 313 N.E.2d 893, 2 Mass.App. 399.

- R.I.—In re Robert, 406 A.2d 266, 121 R.I. 356.

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Wis.—State ex rel. Sieloff v. Golz, 258 N.W.2d 700, 80 Wis.2d 225.

Equal protection clause not violated

Fla.—In Interest of C.J.W., 377 So.2d 22.

Wash.—Hystad v. Rhay, 533 P.2d 409, 12 Wash.App. 872.

21. U.S.—Farrant v. Bennett, C.A.Iowa, 347 F.2d 390, cert. den. 86 S.Ct. 143, 382 U.S. 868, 15 L.Ed.2d 107—Salazar v. Eads, C.A.Ind., 466 F.2d 765.

Walden v. Mosley, D.C.Miss., 312 F.Supp. 855—Huddleston v. Costa, D.C.Pa., 314 F.Supp. 278.

Ariz.—State v. O'Neill, App., 570 P.2d 811, 117 Ariz. 40.

Cal.—State of S.D. v. Brown, 144 Cal.Rptr. 758, 576 P.2d 473, 20 C.3d 765.

Fla.—State v. Cox, App., 306 So.2d 156.

Ga.—Johnstone v. Deyton, 210 S.E.2d 692, 233 Ga. 146.

Ill.—People ex rel. Brenner v. Sain, 193 N.E.2d 767, 29 Ill.2d 239.

Iowa—C.J.S. cited in Clayton v. Michael, 141 N.W.2d 538, 541, 258 Iowa 1037—Evans v. Rosenberger, 181 N.W.2d 152.

Mich.—Eroh v. Manistee County Sheriff, 272 N.W.2d 720, 86 Mich.App. 545.

Neb.—C.J.S. cited in In re Austin, 186 N.W.2d 723, 726, 186 Neb. 815.

Nev.—Sheriff, Clark County v. Thompson, 452 P.2d 911, 85 Nev. 211.

N.Y.—Dudley v. Corbett, 259 N.Y.S.2d 572, 46 Misc.2d 205.

Tenn.—State ex rel. Wiley v. Waggoner, 508 S.W.2d 535.

Wis.—State v. Hughes, 229 N.W.2d 655, 68 Wis.2d 662.

Federal procedure not exclusive

Alaska—Moser v. Zaborac, 514 P.2d 12.

Cal.—Ex parte Cooper, 3 Cal.Rptr. 140, 349 P.2d 956, 53 C.2d 772, app. dism. and cert. den. 81 S.Ct. 104, 364 U.S. 294, 5 L.Ed.2d 83—In re Patterson, 49 Cal.Rptr. 801, 411 P.2d 897, 64 C.2d 357.

Less exacting terms

Ark.—Glover v. State, 515 S.W.2d 641, 257 Ark. 241.

Cal.—Application of Morgan, 53 Cal.Rptr. 642, 244 C.A.2d 903.

Neb.—In re Austin, 186 N.W.2d 723, 186 Neb. 815.

N.Y.—Dudley v. Corbett, 259 N.Y.S.2d 572, 46 Misc.2d 205.

Right to impose conditions precedent to exercise of power.

Cal.—Hart v. People, 40 Cal.Rptr. 420, 229 C.A.2d 455.

Where procedure governed by state law

U.S.—Sanders v. Conine, C.A.Wyo., 506 F.2d 530.

Or.—Application of Carden, 635 P.2d 341, 291 Or. 515, cert. den. 102 S.Ct. 1278, 455 U.S. 921, 71 L.Ed.2d 462.

Uniform Reciprocal Enforcement of Support Act

Me.—Gallant v. State, 356 A.2d 734.

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22. W.Va.—Locke v. Burns, 238 S.E.2d 536, 160 W.Va. 753.

22.5. U.S.—Johnson v. Buie, D.C.Mo., 312 F.Supp. 1349.

Cal.—People v. Superior Court of Los Angeles County, 182 Cal.Rptr. 132, 130 C.A.3d 776.

N.Y.—People ex rel. Linaris v. Weizenecker, 392 N.Y. S.2d 813, 89 Misc.2d 814.

However, requirement that person arrested as fugitive be advised of right to counsel and be taken before court patently benefits prisoner, not the state.^{22.10}

22.10. U.S.—Sanders v. Conine, C.A.Wyo., 506 F.2d 530.

24. Conn.—Hill v. Blake, 441 A.2d 841, 186 Conn. 404.

N.J.—Application of Mahler, 426 A.2d 1021, 177 N.J. Super. 337.

Tex.—Ex parte Mendoza, Cr., 408 S.W.2d 926.

Discretion

(2) Other matters.

Alaska—Moser v. Zaborac, 514 P.2d 12.

Colo.—Conrad v. McClearn, 445 P.2d 222, 166 Colo. 568.

Uniform Criminal Extradition Act, etc.

(1) Cal.—In re Patterson, 49 Cal.Rptr. 801, 411 P.2d 897, 64 C.2d 357.

(2) Provision held valid.

Cal.—Ex parte Cooper, 3 Cal.Rptr. 140, 349 P.2d 956, 53 C.2d 772, app. dism. and cert. den. 81 S.Ct. 104, 364 U.S. 294, 5 L.Ed.2d 83.

Ga.—Fain v. Thurman, 277 S.E.2d 503, 247 Ga. 569.

Ind.—Andrews v. State, 169 N.E.2d 193, 241 Ind. 180, cert. den. 81 S.Ct. 829, 365 U.S. 861, 5 L.Ed.2d 824.

Iowa—Clayton v. Michael, 141 N.W.2d 538, 258 Iowa 1037.

Nev.—Sheriff, Clark County v. Thompson, 452 P.2d 911, 85 Nev. 211.

(3) Purpose.

Colo.—Pippin v. Leach, 534 P.2d 1193, 188 Colo. 385—Moen v. Wilson, 536 P.2d 1129, 189 Colo. 85.

Conn.—Bloom v. Lundburg, 175 A.2d 568, 149 Conn. 67, cert. den. 82 S.Ct. 831, 369 U.S. 819, 7 L.Ed.2d 785.

Ind.—Martin v. State, 376 N.E.2d 498, 176 Ind.App. 503.

Pa.—Com. ex rel. Phillips v. Myers, 77 York 149.

R.I.—Brown v. Sharkey, 263 A.2d 104, 106 R.I. 714.

(4) Other cases.

U.S.—Pierson v. Grant, C.A.Iowa, 527 F.2d 161.

Ark.—Glover v. State, 515 S.W.2d 641, 257 Ark. 241.

Colo.—Schoengarth v. Bray, 615 P.2d 655, 200 Colo. 288.

Fla.—Grimes v. State, 244 So.2d 130.

Md.—White v. Hall, 291 A.2d 694, 15 Md.App. 446.

Minn.—State v. Bailey, 262 N.W.2d 406.

Nev.—Sheriff, Clark County v. Thompson, 452 P.2d 911, 85 Nev. 211.

Okl.—In re Chenowith, Cr., 432 P.2d 132.

Pa.—Com. ex rel. Thomas v. Maroney, 22 D. & C.2d 595, affd. 166 A.2d 673, 194 Pa.Super. 19—Com. ex rel. Horn v. Sostar, 34 D. & C.2d 713, 15 Cumb. 42.

R.I.—Bailey v. Laurie, 373 A.2d 482, 118 R.I. 184.

Tenn.—State ex rel. Wiley v. Waggoner, 508 S.W.2d 535.

Tex.—Ex parte Hagar, Cr., 434 S.W.2d 675—Ex Parte Bennett, Cr.App., 442 S.W.2d 373.

Wis.—State v. Hughes, 229 N.W.2d 655, 68 Wis.2d 662.

Uniform Support of Dependents Act

(6) Colo.—Conrad v. McClearn, 445 P.2d 222, 166 Colo. 568.

Iowa—Welch v. Strout, 186 N.W.2d 895.

(7) Necessity of charge of crime.

Ohio—In re Harris, 163 N.E.2d 762, 170 Ohio St. 151.

(8) Other matters.

U.S.—Miller v. Decker, C.A.Tex., 411 F.2d 302.

Tex.—Ex parte Brito, 358 S.W.2d 122, 172 Tex.Cr.R. 409.

Uniform Reciprocal Enforcement of Support Act

Ga.—In re Pace, 297 S.E.2d 255, 250 Ga. 276.

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25. U.S.—Cohen v. Warden, Montgomery County Detention Center, Rockville, Md., D.C.Md., 252 F.Supp. 666—U.S. ex rel. Grano v. Anderson, D.C.Del., 318 F.Supp. 263, affd., C.A., 446 F.2d 272.

Ark.—Glover v. State, 515 S.W.2d 641, 257 Ark. 241.

Cal.—In re Schoengarth, 57 Cal.Rptr. 600, 425 P.2d 200, 66 C.2d 295.

Colo.—Glenn v. Baker, 519 P.2d 349, 184 Colo. 211.

Ill.—People ex rel. Banks v. Farner, 233 N.E.2d 360, 39 Ill.2d 176—People ex rel. Jolley v. Koepfel, 245 N.E.2d 247, 42 Ill.2d 257.

Iowa—Hughes v. Waters, 204 N.W.2d 599.

Mich.—Williams v. Wayne County Sheriff, 235 N.W.2d 552, 395 Mich. 204.

Miss.—Taylor v. Garrison, 329 So.2d 506.

N.J.—State v. West, 191 A.2d 758, 79 N.J.Super. 379—State v. Mason, 218 A.2d 158, 90 N.J.Super. 464.

N.Y.—People ex rel. Eiseman v. Sheriff of Oneida County, 285 N.Y.S.2d 950, 55 Misc.2d 685, affd. 291 N.Y.S.2d 780, 30 A.D.2d 644.

Wash.—Vetsch v. Sheriff of Spokane County, 546 P.2d 927, 14 Wash.App. 971.

Interstate Agreement on Detainers see infra § 11.

State law must be considered, etc.

Ill.—People ex rel. Hackler v. Lohman, 160 N.E.2d 792, 17 Ill.2d 78, cert. den. 80 S.Ct. 591, 361 U.S. 963, 4 L.Ed.2d 544.

26. U.S.—Wellington v. State of S.D., D.C.S.D., 413 F.Supp. 151.

27. Alaska—Wortham v. State, 519 P.2d 797.

Cal.—In re Schoengarth, 57 Cal.Rptr. 600, 425 P.2d 200, 66 C.2d 295.

N.J.—State v. Lippolis, 244 A.2d 531, 101 N.J.Super. 435, affd. 257 A.2d 705, 107 N.J.Super. 137, revd. on oth. grds. 262 A.2d 203, 55 N.J. 354.

N.Y.—People ex rel. Wheeler v. Murphy, 236 N.Y.S.2d 262, 38 Misc.2d 154.

Or.—State v. Arwood, 612 P.2d 763, 46 Or.App. 653.

Pa.—Com. ex rel. Smalley v. Aytch, Super., 371 A.2d 1018, 247 Pa.Super. 23—Com. ex rel. Simpson v. Aytch, 372 A.2d 861, 247 Pa.Super. 348.

Strict construction as in derogation of common law

Colo.—Davis v. People, 474 P.2d 206, 172 Colo. 486.

Delay not violation of due process

Minn.—State ex rel. DeGidio v. Talbot, 250 N.W.2d 169, 311 Minn. 426.

Uniformity of construction

Mo.—McQueen v. Wyrick, 543 S.W.2d 778.

Compliance with procedural requirements on state

Del.—State v. Cunningham, Super., 405 A.2d 706.

28. Ala.—Beecher v. State, 256 So.2d 154, 288 Ala. 749, striking petition 255 So.2d 55, 47 Ala.App. 386.

Cal.—State of S.D. v. Brown, 144 Cal.Rptr. 758, 576 P.2d 473, 20 C.3d 765.

No shield for malefactors

Kan.—State v. Eaton, 433 P.2d 347, 199 Kan. 610.

N.Y.—Dudley v. Corbett, 259 N.Y.S.2d 572, 46 Misc.2d 205.

Rights under federal provisions granted to states rather than fugitives

U.S.—Johnson v. Buie, D.C.Mo., 312 F.Supp. 1349.

§ 4. Authority of Duty to Demand or Deliver Persons Accused

Library References

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29. Cal.—People v. Travaglini, 178 Cal.Rptr. 751, 126 C.A.3d 382—In re Albright, 181 Cal.Rptr. 84, 129 C.A.3d 504.

Colo.—Watson v. Enslow, 517 P.2d 1346, cert. den. 95 S.Ct. 145, 419 U.S. 880, 42 L.Ed.2d 120.

Ill.—People v. Davis, 416 N.E.2d 85, 48 Ill.Dec. 190, 92 Ill.App.3d 869.

La.—State v. Dupree, 235 So.2d 408, 256 La. 146.

Minn.—State ex rel. DeGidio v. Talbot, 250 N.W.2d 169, 311 Minn. 426.

Miss.—Phillips v. State, 185 So.2d 157.

Nev.—Director, Nevada Dept. of Prisons v. Blum, 639 P.2d 559, 98 Nev. 40.

Wash.—Vetsch v. Sheriff of Spokane County, 546 P.2d 927, 14 Wash.App. 971.

A private person, etc.

Miss.—Phillips v. State, 185 So.2d 157.

Courts should not interfere

Idaho—Walton v. State, 566 P.2d 765, 98 Idaho 442.

Delegation of authority

Colo.—Steinman v. Caldwell, 628 P.2d 110—Macurdy v. Leach, 662 P.2d 166.

30. U.S.—U.S. v. Bryant, C.A.N.C., 612 F.2d 806, cert. den. 100 S.Ct. 1855, 446 U.S. 920, 64 L.Ed.2d 274.

Cal.—In re Russell, 115 Cal.Rptr. 511, 524 P.2d 1295, 12 C.3d 229.

Application of Morgan, 53 Cal.Rptr. 642, 244 C.A.2d 903.

Del.—Grano v. State, Super., 257 A.2d 768.

Ill.—People v. Siler, 406 N.E.2d 891, 40 Ill.Dec. 688, 85 Ill.App.3d 304.

Nev.—Sheriff, Clark County v. Thompson, 452 P.2d 911, 85 Nev. 211.

Comity between states

(2) U.S.—Curran v. U.S., D.C.Del., 332 F.Supp. 259.

(3) Constitutionality of statutes of sister state determinable in that state.

Colo.—Denton v. Cronin, 529 P.2d 644, 187 Colo. 247.

31. Ind.—Smeltzer v. State, 258 N.E.2d 647, 254 Ind. 165.

32. U.S.—Michigan v. Doran, Mich., 99 S.Ct. 530, 439 U.S. 282, 58 L.Ed.2d 521.

Cal.—Hart v. People, 40 Cal.Rptr. 420, 229 C.A.2d 455.

Mo.—State v. Kelsey, App., 592 S.W.2d 509.

33. Cal.—State of S.D. v. Brown, 144 Cal.Rptr. 758, 576 P.2d 473, 20 C.3d 765.

Conn.—Dutil v. Rice, Super., 376 A.2d 1119, 34 Conn. Sup. 78.

N.J.—Application of DeGina, 228 A.2d 74, 94 N.J. Super. 267—State v. Parsells, 305 A.2d 88, 124 N.J. Super. 144.

N.Y.—Dudley v. Corbett, 259 N.Y.S.2d 572, 46 Misc.2d 205.

Ohio—In re Harris, 163 N.E.2d 762, 170 Ohio St. 151.

Pa.—Cooper v. McDermott, 159 A.2d 486, 399 Pa. 160.

R.I.—Brown v. Sharkey, 263 A.2d 104, 106 R.I. 714.

Tenn.—State ex rel. Duvall v. Frazier, 423 S.W.2d 487, 220 Tenn. 696.

Fugitive not entitled to asylum in international sense
Wis.—State ex rel. Foster v. Uttech, 143 N.W.2d 500, 31 Wis.2d 664, cert. den. 87 S.Ct. 392, 385 U.S. 956, 17 L.Ed.2d 303.

Cannot refuse issuance

N.J.—Matter of Lucas, 343 A.2d 84, 136 N.J. Super. 24, affd. 346 A.2d 624, 136 N.J. Super. 460.

The duty of state prosecuting officials to extradite an accused is not obviated by the failure of the accused to waive extradition.^{34.5}

34.5. Okl.—Thompson v. State, Cr., 482 P.2d 627.

Vacatur of the detainer warrant does not preclude the prosecuting state from seeking extradition for the underlying criminal act.^{34.10}

34.10. N.Y.—Baker v. Schublin, 339 N.Y.S.2d 360, 72 Misc.2d 413.

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35. Ariz.—State v. Hooker, App., 626 P.2d 1111, 128 Ariz. 479.

36. N.J.—State v. Sinacore, 376 A.2d 580, 151 N.J. Super. 106.

Surrender of nonfugitive within Governor's discretion

N.J.—Application of Mahler, 426 A.2d 1021, 177 N.J. Super. 337.

37. U.S.—Campbell v. Smith, D.C.Ga., 308 F.Supp. 796.

Iowa—C.J.S. cited in Hill v. Houck, 195 N.W.2d 692, 695.

R.I.—Baker v. Laurie, 375 A.2d 405, 118 R.I. 539.

38. U.S.—Forester v. California Adult Authority, C.A.N.D., 510 F.2d 58.

Cal.—State of S.D. v. Brown, 144 Cal.Rptr. 758, 576 P.2d 473, 20 C.3d 765.

D.C.—U.S. v. Merritt, D.C., 478 F.Supp. 804.

Determination of loss of jurisdiction of demanding state

Cal.—People v. Superior Court of Los Angeles County, 182 Cal.Rptr. 132, 130 C.A.3d 776.

Tex.—Ex parte Escarrega, Cr., 388 S.W.2d 192.

42. Wash.—State ex rel. Boutwell v. Coughlin, 586 P.2d 1145, 90 Wash.2d 835.

42.5. Cal.—People v. Superior Court of Los Angeles County, 182 Cal.Rptr. 132, 130 C.A.3d 776.

Me.—Walker v. State, 315 A.2d 855.

N.Y.—Baker v. Schublin, 339 N.Y.S.2d 360, 72 Misc.2d 413.

Okl.—Fernaugh v. Hurt, Cr., 354 P.2d 787; cert. den. 81 S.Ct. 117, 364 U.S. 873, 5 L.Ed.2d 95.

Pa.—Com. ex rel. Banks v. Hendrick, 243 A.2d 438, 430 Pa. 575.

Right to enforce extradition held forfeited under totality of circumstances

Ill.—People ex rel. Bowman v. Woods, 264 N.E.2d 151, 46 Ill.2d 572.

§ 5. — To or from Territories

43. Federated States of Micronesia

Hawaii—Wolfe v. Au, 686 P.2d 16.

§ 7. Extraditable Offenses

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Mo.—C.J.S. black letter summary quoted in State ex rel. Danforth v. Bondurant, 566 S.W.2d 478, 482.

49. Fla.—Salazar v. Sandstrom, App., 355 So.2d 145.

N.Y.—People ex rel. Mallin v. Kuh, 375 N.Y.S.2d 871, 50 A.D.2d 191, app. diss. 348 N.E.2d 616, 38 N.Y.2d 982, 384 N.Y.S.2d 159.

Tex.—Ex parte Chapman, Cr.,⁴³ 435 S.W.2d 529.

Parole violation

(1) U.S.—Forester v. California Adult Authority, C.A.N.D., 510 F.2d 58.

Ala.—Boothe v. State, 180 So.2d 450, 43 Ala.App. 119.

Particular offenses held extraditable

Ill.—People ex rel. Tennenbaum v. Woods, 253 N.E.2d 423, 43 Ill.2d 322.

50. U.S.—U.S. ex rel. Proctor v. States of N.Y. and Ala., D.C.N.Y., 229 F.Supp. 696.

Ark.—Glover v. State, 515 S.W.2d 641, 257 Ark. 241, stating Texas law.

Ga.—Graham v. State, 204 S.E.2d 630, 231 Ga. 820.

Okl.—C.J.S. cited in Starks v. Turner, Cr., 365 P.2d 564, 566.

Tex.—Ex parte Leach, Cr.App., 478 S.W.2d 471.

Desertion and non-support

Fla.—State v. Darnell, 230 So.2d 151, conf. to 231 So.2d 870.

(2) Other matters.

Tex.—Ex parte Miller, Cr., 382 S.W.2d 937—Ex parte Roberts, Cr., 479 S.W.2d 293.

Uniform Criminal Extradition Act

Conn.—Painter v. Slavin, 199 A.2d 341, 25 Conn. Sup. 179.

Tex.—Ex parte Harris, Cr., 375 S.W.2d 453—Ex parte Mendoza, Cr., 408 S.W.2d 926.

51. Neb.—State of Kan. v. Holeb, 196 N.W.2d 287, 188 Neb. 319.

Offense extraditable

N.J.—Application of Mahler, 426 A.2d 1021, 177 N.J. Super. 337.

54. Offense of which accused cannot be charged or tried

Tex.—Ex parte Dodson, Cr., 387 S.W.2d 406.

55. N.Y.—People v. Smith, 440 N.Y.S.2d 837, 109 Misc.2d 705.

Ohio—In re Harris, 163 N.E.2d 762, 170 Ohio St. 151.

Tex.—Ex parte Burns, Cr., 507 S.W.2d 777.

Parking violation not extraditable offense

U.S.—Bricker v. Craven, D.C.Mass., 391 F.Supp. 601.

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56. N.Y.—People ex rel. Wheeler v. Murphy, 236 N.Y.S.2d 262, 38 Misc.2d 154.

Tex.—Ex parte Lippincott, Cr., 487 S.W.2d 333.

§ 8. Persons Who May Be Extradited

59. U.S.—Morgan v. McNair, D.C.S.C., 301 F.Supp. 870.

D.C.—Bean v. U.S., App., 409 A.2d 1064.

Ill.—People v. Lingle, 257 N.E.2d 243, 122 Ill.App.2d 87.

N.M.—State v. Nicolini, 576 P.2d 290, 91 N.M. 484.

Pa.—Com. ex rel. Pizzo v. Aytch, 416 A.2d 1086, 273 Pa. Super. 55.

Tex.—Ex parte Smith, Cr., 391 S.W.2d 433.

Wash.—Vetsch v. Sheriff of Spokane County, 546 P.2d 927, 14 Wash.App. 971.

Domicile or residence within demanding state not required

Pa.—Com. ex rel. Crist v. Price, 175 A.2d 852, 405 Pa. 384.

Minors

N.Y.—Matter of Brenda Lee G., 388 N.Y.S.2d 229, 88 Misc.2d 899.

Tex.—Ex parte Jetter, Cr., 495 S.W.2d 925.

60. Colo.—Gottfried v. Cronin, 555 P.2d 969, 192 Colo. 25.

Ill.—Newman v. Elrod, 391 N.E.2d 37, 28 Ill.Dec. 838, 72 Ill.App.3d 616, cert. den. 100 S.Ct. 1338, 445 U.S. 942, 63 L.Ed.2d 776.

N.Y.—People ex rel. Hall v. Cassicles, 378 N.Y.S.2d 813, 51 A.D.2d 623, app. diss. 348 N.E.2d 918, 38 N.Y.2d 1006, 384 N.Y.S.2d 442.

Pa.—Com. ex rel. Edgar v. Davis, 228 A.2d 742, 425 Pa. 133—In re Ripepi, 235 A.2d 141, 427 Pa. 507.

Com. v. Inadi, 449 A.2d 753, 303 Pa. Super. 409.

61. Colo.—Eathorne v. Nelson, 505 P.2d 1, 180 Colo. 288.

Fla.—Audsley v. Stack, 289 So.2d 714.

Minn.—State ex rel. Miletich v. Tahash, 148 N.W.2d 134, 275 Minn. 505.

§ 9. — Charge of Crime

64. Colo.—Gottfried v. Cronin, 555 P.2d 969, 192 Colo. 25.

D.C.—Moncrief v. Anderson, C.A., 342 F.2d 902, 119 U.S.App.D.C. 323.

Ga.—Fain v. Thurman, 277 S.E.2d 503, 247 Ga. 569.

Idaho—Balla v. State, 563 P.2d 402, 98 Idaho 344.

Iowa—Hughes v. Waters, 204 N.W.2d 599.

Minn.—State ex rel. Brown v. Telander, 163 N.W.2d 858, 282 Minn. 209.

Miss.—Taylor v. Garrison, 329 So.2d 506.

N.Y.—People ex rel. Mallin v. Kuh, 375 N.Y.S.2d 871, 50 A.D.2d 191, app. diss. 348 N.E.2d 616, 38 N.Y.2d 982, 384 N.Y.S.2d 159.

Okl.—Ex parte Crawford, Cr., 342 P.2d 580—Anderson v. State, Cr., 386 P.2d 320.

Pa.—Com. ex rel. Raucci v. Price, 185 A.2d 523, 409 Pa. 90—Com. ex rel. Coades v. Gable, 264 A.2d 716, 437 Pa. 553.

W.Va.—C.J.S. cited in State ex rel. Sublett v. Adams, 115 S.E.2d 158, 163, 145 W.Va. 354, reh. den. 81 S.Ct. 1652, 366 U.S. 933, 6 L.Ed.2d 392.

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Extradition justified

Tex.—Ex parte Rosenthal, Cr., 515 S.W.2d 114.

Not "substantially charged"

U.S.—Ewing v. Waldrop, D.C.N.C., 397 F.Supp. 509.

66. Fla.—Clarke v. Blackburn, App., 151 So.2d 325—Cox v. State, App., 180 So.2d 467.

Mich.—Deur v. Sheriff of Newaygo County, 362 N.W.2d 698, 420 Mich. 440, cert. den. 105 S.Ct. 2676, 86 L.Ed.2d 694.

Minn.—State ex rel. Clark v. Pierce, 317 N.W.2d 709.

N.Y.—People ex rel. Cosel v. McMahon, 357 N.Y.S.2d 30, 45 A.D.2d 769.

Okl.—Ralph v. Turner, Cr., 366 P.2d 777.

Misdemeanor as crime

R.I.—Brown v. Sharkey, 263 A.2d 104, 106 R.I. 714.

Presence in demanding state not essential

Ala.—Tolbert v. State, Cr., 308 So.2d 740, 54 Ala.App. 381.

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67.5. N.Y.—People ex rel. Weiss v. Menna, 269 N.Y. S.2d 904, 25 A.D.2d 399, affd. 238 N.E.2d 924, 22 N.Y.2d 709, 291 N.Y.S.2d 817.

People ex rel. Wheeler v. Murphy, 236 N.Y.S.2d 262, 38 Misc.2d 154—In re Taylor, 323 N.Y.S.2d 128, 66 Misc.2d 1006.

68. U.S.—Ierardi v. Gunter, C.A.Mass., 528 F.2d 929. Tex.—Burnett v. State, Cr., 514 S.W.2d 939.

Person held charged with crime

N.Y.—Morton v. Fischer, 300 N.Y.S.2d 227, 59 Misc.2d 649—State ex rel. Mallin v. Wilson, 360 N.Y.S.2d 579, 79 Misc.2d 575.

Tex.—Ex parte Miller, Cr., 382 S.W.2d 937—Ex parte Ham, Cr., 423 S.W.2d 598.

Ex Parte Williams, App., 622 S.W.2d 482, review ref.

The Fifth Amendment does not require an indictment of the fugitive by a grand jury in the demanding state before he can be extradited.^{68.5}

68.5. Idaho—Application of Hanson, App., 651 P.2d 543, 103 Idaho 609.

70. Colo.—Watson v. Enslow, 517 P.2d 1346, 183 Colo. 435, cert. den. 95 S.Ct. 145, 419 U.S. 880, 42 L.Ed.2d 120.

Ill.—People ex rel. Jolley v. Koepfel, 246 N.E.2d 247, 42 Ill.2d 257—People ex rel. Brown v. Jackson, 274 N.E.2d 17, 49 Ill.2d 209.

Kan.—Sloss v. Sheriff of Leavenworth County, 648 P.2d 255, 7 Kan.App.2d 702.

Mo.—C.J.S. quoted in State ex rel. Danforth v. Bondurant, 566 S.W.2d 478, 482.

W.Va.—C.J.S. cited in State ex rel. Mitchell v. Allen, 185 S.E.2d 355, 358, 155 W.Va. 530, cert. den. 92 S.Ct. 2048, 406 U.S. 946, 32 L.Ed.2d 333.

A person paroled or placed on probation, etc. Ga.—Frazier v. Grimes, 145 S.E.2d 39, 221 Ga. 375.

Or.—Hidalgo v. Purocell, 488 P.2d 858, 6 Or.App. 513, cert. den. 92 S.Ct. 1188, 405 U.S. 957, 31 L.Ed.2d 235.

71. Mo.—C.J.S. quoted in State ex rel. Danforth v. Bondurant, 566 S.W.2d 478, 482.

Under the Uniform Criminal Extradition Act a person "charged with a crime" does not include one already convicted.^{71.5}

71.5. N.Y.—People ex rel. Cavers v. Grasheim, 214 N.Y.S.2d 936, 28 Misc.2d 102, affd. 217 N.Y.S.2d 588, 13 A.D.2d 999.

§ 10. — Status as Fugitive from Justice

72. U.S.—People of State of Ill., ex rel. Smith v. Elrod, D.C.Ill., 511 F.Supp. 559.

Conn.—Ross v. Hegstrom, 254 A.2d 556, 157 Conn. 403—Glavin v. Warden, State Prison, 311 A.2d 86, 163 Conn. 394.

D.C.—Moncrief v. Anderson, C.A., 342 F.2d 902, 119 U.S.App.D.C. 323.

Conn.—Bursgue v. Moore, 227 A.2d 255, 26 Conn.Supp. 469.

Idaho—Walton v. State, 566 P.2d 765, 98 Idaho 442.

Iowa—Hughes v. Waters, 204 N.W.2d 599.

Kan.—Longoria v. Sheriff of Leavenworth County, 589 P.2d 607, 225 Kan. 248.

Miss.—Taylor v. Garrison, 329 So.2d 506.

N.J.—State v. Phillips, 162 A.2d 113, 62 N.J.Super. 70, affd. 167 A.2d 175, 34 N.J. 63.

N.Y.—Jones v. People, 404 N.Y.S.2d 525, 94 Misc.2d 304.

Okl.—Ex parte Crawford, Cr., 342 P.2d 580—Ralph v. Turner, Cr., 366 P.2d 777—Anderson v. State, Cr., 386 P.2d 320.

Pa.—Com. ex rel. DeVault v. Kovach, 264 A.2d 589, 439 Pa. 96.

Com. ex rel. Reis v. Aytch, 310 A.2d 681, 225 Pa.Super. 315.

S.C.—C.J.S. quoted in King v. Noe, 137 S.E.2d 102, 103, 244 S.C. 344.

Absence of status valid defense

Idaho—Kerr v. Watson, App., 649 P.2d 1234, 103 Idaho 478.

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73. U.S.—Wirth v. Surles, C.A.S.C., 562 F.2d 319, 45 A.L.R. Fed. 864, cert. den. 98 S.Ct. 1509, 435 U.S. 933, 55 L.Ed.2d 531.

Colo.—Allen v. Leach, 626 P.2d 1141.

Nev.—Sheriff, Clark County v. Thompson, 452 P.2d 911, 85 Nev. 211.

N.Y.—People ex rel. Davis v. Quinlan, 330 N.Y.S.2d 544, 69 Misc.2d 708.

S.C.—C.J.S. quoted in King v. Noe, 137 S.E.2d 102, 103, 244 S.C. 344.

Under Uniform Criminal Extradition Act the governor may surrender a person charged with committing in the asylum state or a third state an act intentionally resulting in a crime in the demanding state even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom.^{73.5}

73.5. Cal.—Ex parte Cooper, 3 Cal.Rptr. 140, 349 P.2d 956, 53 C.2d 772, app. dism. and cert. den. 81 S.Ct. 104, 364 U.S. 294, 5 L.Ed.2d 83.

Ga.—Johnstone v. Deyton, 210 S.E.2d 692, 233 Ga. 146.

Kan.—McCullough v. Darr, 548 P.2d 1245, 219 Kan. 477.

La.—State v. Ross, 404 So.2d 440.

Neb.—State of Kan. v. Holeb, 196 N.W.2d 387, 188 Neb. 319.

Nev.—Sheriff, Clark County v. Thompson, 452 P.2d 911, 85 Nev. 211.

Tex.—Ex parte Malone, Cr., 378 S.W.2d 330—Ex parte Richeson, Cr.App., 443 S.W.2d 265.

Discretion as to non-fugitive

Conn.—Dutil v. Rice, Super., 376 A.2d 1119, 34 Conn. Sup. 78.

Pa.—Cooper v. McDermott, 159 A.2d 486, 399 Pa. 160.

Necessity of charge of commission of crime
(1) Even in absence of adjudication of paternity, father of illegitimate child in demanding state, who while in asylum state failed to support child committed act resulting in crime.

Ohio—In re Harris, 163 N.E.2d 762, 170 Ohio St. 151.

(2) The act charged must have resulted in a crime in the demanding state.

Ohio—In re Harris, 163 N.E.2d 762, 170 Ohio St. 151.

Circumstances held within provision

Tex.—Foskett v. State, Cr., 390 S.W.2d 273.

Held inapplicable to person charged with nonsupport of dependent in demanding state without committing act in asylum state.

Cal.—Application of Morgan, 53 Cal.Rptr. 642, 244 C.A.2d 903.

Waiver

N.J.—State v. Maglio, 459 A.2d 1209, 189 N.J.Super. 257.

74. Cal.—In re Albright, 181 Cal.Rptr. 84, 129 C.A.3d 504.

Okl.—Wright v. Page, Cr., 414 P.2d 570.

Agreement not to resist extradition

(3) Waiver not revoked by application for habeas corpus by another person.

Ind.—Notter v. Beasley, 166 N.E.2d 643, 240 Ind. 631, 93 A.L.R.2d 905.

(4) Other matters.

U.S.—Woods v. Steiner, D.C.Md., 207 F.Supp. 945.

Kan.—Hunt v. Hand, 352 P.2d 1, 186 Kan. 670.

Minn.—State ex rel. Morris v. Tahash, 115 N.W.2d 676, 262 Minn. 562.

Tex.—Ex parte Williams, Cr., 472 S.W.2d 779.

75. Alaska—C.J.S. quoted in Brown v. State, 518 P.2d 770, 773.

Ariz.—Applications of Oppenheimer, 389 P.2d 696, 95 Ariz. 292, cert. den. 84 S.Ct. 1359, 377 U.S. 948, 12 L.Ed.2d 311.

Cal.—In re Watson, 139 Cal.Rptr. 609, 566 P.2d 243, 19 C.3d 646.

People v. Superior Court of Los Angeles County, 182 Cal.Rptr. 132, 130 C.A.3d 776.

Colo.—Fox v. People, 420 P.2d 412, 161 Colo. 163—C.J.S. cited in Gottfried v. Cronin, 555 P.2d 969, 972, 192 Colo. 25.

D.C.—Moncrief v. Anderson, C.A., 342 F.2d 902, 119 U.S.App.D.C. 323.

Ga.—Anderson v. Roth, 202 S.E.2d 91, 231 Ga. 369.

Idaho—Kerr v. Watson, App., 649 P.2d 1234, 103 Idaho 478.

Iowa—Clayton v. Michael, 141 N.W.2d 538, 258 Iowa 1037.

Ky.—C.J.S. black letter summary quoted in Jones v. Rayborn, 346 S.W.2d 743, 748.

Me.—State v. Hale, 172 A.2d 631, 157 Me. 361.

Nev.—Sheriff, Clark County v. Thompson, 452 P.2d 911.

N.J.—State v. Phillips, 162 A.2d 113, 62 N.J.Super. 70, affd. 116 A.2d 175, 34 N.J. 63.

Okl.—In re Tucker, Cr., 384 P.2d 413.

Pa.—Com. ex rel. Horn v. Sostar, 34 D. & C.2d 713, 15 Cumb. 42.

S.C.—C.J.S. quoted at length in King v. Noe, 137 S.E.2d 102, 103, 244 S.C. 344.

S.D.—State ex rel. Martin v. Boos, 186 N.W.2d 130, 85 S.D. 484—State ex rel. Hall v. Hawkey, 263 N.W.2d 141.

W.Va.—State ex rel. Sublett v. Adams, 115 S.E.2d 158, 145 W.Va. 354, reh. den. 81 S.Ct. 1652, 366 U.S. 933, 6 L.Ed.2d 392.

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76. Cal.—Application of Morgan, 53 Cal.Rptr. 642, 244 C.A.2d 903.

Fla.—State v. Cox, App., 306 So.2d 156.

Ga.—Watson v. Grimes, 129 S.E.2d 795, 218 Ga. 631.

Ill.—People v. Swisher, 376 N.E.2d 797, 17 Ill.Dec. 651, 60 Ill.App.3d 452.

Iowa—Hill v. Houck, 195 N.W.2d 692.

Mich.—In re Simmons, 220 N.W.2d 311, 54 Mich.App. 112.

Minn.—State v. Limberg, 142 N.W.2d 563, 274 Minn. 31—State ex rel. Wagner v. Hedman, 195 N.W.2d 420, 292 Minn. 358.

Miss.—Taylor v. Garrison, 329 So.2d 506.

Nev.—Sheriff, Clark County v. Thompson, 452 P.2d 911, 85 Nev. 211.

N.J.—State v. Phillips, 162 A.2d 113, 62 N.J.Super. 70, affd. 167 A.2d 175, 34 N.J. 63—Matter of Lucas 343 A.2d 845, 136 N.J.Super. 245, affd. 346 A.2d 624, 136 N.J.Super. 460.

N.Y.—People ex rel. Arnold v. Hoy, 223 N.Y.S.2d 759, 32 Misc.2d 824.

Pa.—Com. v. Inadi, 449 A.2d 753, 303 Pa.Super. 409.

Test

N.Y.—Morton v. Fischer, 300 N.Y.S.2d 227, 59 Misc.2d 649.

W.Va.—Lott v. Bechtold, 289 S.E.2d 210.

Forfeiture of bond

Colo.—Davis v. People, 474 P.2d 206, 172 Colo. 486.

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78. Ohio—In re Rowe, 423 N.E.2d 167, 67 Ohio St.2d 115, 21 O.O.3d 73.

S.C.—C.J.S. quoted in King v. Noe, 137 S.E.2d 102, 103, 244 S.C. 344.

Desertion and nonsupport

(1) Cal.—Application of Morgan, 53 Cal.Rptr. 642, 244 C.A.2d 903.

Colo.—Layher v. Van Cleave, 468 P.2d 32, 171 Colo. 465.

Fla.—Cox v. State, App., 180 So.2d 467.

Idaho—Derr v. Wilcox, 487 P.2d 684, 94 Idaho 321.

(3) Ky.—Squadroni v. Smith, 349 S.W.2d 700.

(5) Other matters.

Iowa—Smith v. Sheriff of Woodbury County, 141 N.W.2d 529, 258 Iowa 1110—Clayton v. Michael, 141 N.W.2d 538, 258 Iowa 1037—Welch v. Strout, 186 N.W.2d 895.

Tex.—Ex parte Hagar, Cr., 434 S.W.2d 675.

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80. R.I.—Brown v. Sharkey, 263 A.2d 104, 106 R.I. 714.

81. Conn.—Ross v. Hegstrom, 254 A.2d 556, 157 Conn. 403.

Nev.—Sheriff, Clark County v. Thompson, 452 P.2d 91, 85 Nev. 211.

82. N.J.—State v. Phillips, 162 A.2d 113, 62 N.J. Super. 70, affd. 167 A.2d 175, 34 N.J. 63.

83. Me.—Burke v. State, 265 A.2d 489.

Necessity of overt act; continuing crime

(3) Other statements.

Nev.—Sheriff, Clark County v. Thompson, 452 P.2d 91, 85 Nev. 211.

85. U.S.—U.S. v. Steinberg, D.C.Ill., 478 F.Supp. 29.

Colo.—Fox v. People, 420 P.2d 412, 161 Colo. 163.

Ill.—People ex rel. Pollock v. Campbell, 285 N.E.2d 585, 6 Ill.App.3d 483.

Kan.—Woody v. State, 524 P.2d 1150, 215 Kan. 353, cert. den. 95 S.Ct. 322, 419 U.S. 1003, 42 L.Ed.2d 278.

N.J.—State v. West, 191 A.2d 758, 79 N.J. Super. 379.

N.Y.—People v. Hinton, 353 N.E.2d 617, 40 N.Y.2d 345, 386 N.Y.S.2d 703.

Pa.—Com. ex rel. Horn v. Sostar, 34 D. & Co.2d 713, 15 Cumb. 42—Com. ex rel. Horn v. Sostar, 34 D. & C.2d 713, 15 Cumb. 42.

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86. Neb.—Kujala v. Headley, 225 N.W.2d 25, 193 Neb. 1.

Okl.—McKee v. Page, Cr., 438 P.2d 649.

Conscious flight from justice not prerequisite to fugitivity

Me.—Burke v. State, 265 A.2d 489.

87. U.S.—U.S. v. Schreiber, D.C.N.Y., 535 F.Supp. 1359.

82. Del.—Golla v. State, 159 A.2d 585, 2 Storey 433, cert. den. 81 S.Ct. 78, 364 U.S. 841, 5 L.Ed.2d 64.

Ja.—Anderson v. Roth, 202 S.E.2d 91, 231 Ga. 369.

Can.—Woody v. State, 524 P.2d 1150, 215 Kan. 353, cert. den. 95 S.Ct. 322, 419 U.S. 1003, 42 L.Ed.2d 278.

Okl.—Application of Butler, Cr., 346 P.2d 348, cert. den. 80 S.Ct. 1620, 363 U.S. 846, 4 L.Ed.2d 1729.

Wis.—State ex rel. Jackson v. Froelich, 253 N.W.2d 69, 77 Wis.2d 299.

93. Ga.—Parson v. Grimes, 138 S.E.2d 306, 220 Ga. 231—Anderson v. Roth, 202 S.E.2d 91, 231 Ga. 369.

Okl.—Application of Butler, Cr., 346 P.2d 348, cert. den. 80 S.Ct. 1620, 363 U.S. 846, 4 L.Ed.2d 1729.

Tex.—Ex parte Manzella, Cr., 452 S.W.2d 913—Ex parte Christmas, Cr., 453 S.W.2d 146.

Wis.—State ex rel. Jackson v. Froelich, 253 N.W.2d 69, 77 Wis.2d 299.

Prisoner removed by federal authorities, etc.

Kan.—Hedge v. Campbell, 389 P.2d 834, 192 Kan. 623.

Pa.—Com. ex rel. Bonomo v. Haas, 236 A.2d 810, 428 Pa. 167.

94. Okl.—Anderson v. State, Cr., 386 P.2d 320.

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95. U.S.—U.S. ex rel. Tyler v. Henderson, C.A.La., 453 F.2d 790—Chamberlain v. Celeste, C.A.Ohio, 729 F.2d 1071.

Colo.—Espinoza v. Tinsley, 409 P.2d 835, 159 Colo. 62.

Mich.—C.J.S. quoted at length in In re Simmons, 220 N.W.2d 311, 313, 54 Mich.App. 112.

W.Va.—State ex rel. Sublett v. Adams, 115 S.E.2d 158, 145 W.Va. 354, reh. den. 81 S.Ct. 1652, 366 U.S. 933, 6 L.Ed.2d 392.

98. Ill.—People ex rel. Taylor v. Johnson, 264 N.E.2d 198, 47 Ill.2d 103, cert. den. 91 S.Ct. 1243, 401 U.S. 995, 28 L.Ed.2d 534, cert. dism. 91 S.Ct. 250, 400 U.S. 932, 27 L.Ed.2d 262.

Release on bail

Me.—Poulin v. Bonenfant, 251 A.2d 436.

(2) Other statements.

N.Y.—People ex rel. McGill v. Wright, 307 N.Y.S.2d 964, 62 Misc.2d 154, affd. 314 N.Y.S.2d 128, 34 A.D.2d 1106.

99. U.S.—Walden v. Mosley, D.C.Miss., 312 F.Supp. 855.

Ala.—Johnson v. State, 222 So.2d 370, 45 Ala.App. 40.

Colo.—C.J.S. cited in Wynsma v. Leach, 536 P.2d 817, 189 Colo. 59.

Conn.—Pointer v. Slavin, 199 A.2d 341, 25 Conn. Sup. 179.

Fla.—Brown v. Purdy, App., 222 So.2d 239.

Okl.—Application of Butler, Cr., 346 P.2d 348, cert. den. 80 S.Ct. 1620, 363 U.S. 846, 4 L.Ed.2d 1729—Ralph v. Turner, Cr., 366 P.2d 777.

Pa.—Com. ex rel. Lloyd v. Jones, 26 Beaver 114.

S.D.—State ex rel. Hall v. Hawkey, 263 N.W.2d 141.

1. Cal.—People v. Superior Court of Los Angeles County, 182 Cal.Rptr. 132, 130 C.A.3d 776.

Fla.—Pecnik v. Blackburn, App., 132 So.2d 604.

Ill.—People ex rel. Lick v. Fields, 302 N.E.2d 389, 14 Ill.App.3d 305.

Mich.—In re Simmons, 220 N.W.2d 311, 54 Mich.App. 112.

N.D.—Wilkins v. Granrud, 178 N.W.2d 644.

Ohio—Carpenter v. Jamerson, 432 N.E.2d 177, 69 Ohio St.2d 308, 23 O.O.3d 290.

Wis.—State ex rel. Westlund v. Nehls, 168 N.W.2d 866, 43 Wis.2d 379.

State ex rel. Reddin v. Meekma, App., 298 N.W.2d 192, 99 Wis.2d 56, Affd., 306 N.W.2d 664, 102 Wis.2d 358, cert. den. 102 S.Ct. 407, 454 U.S. 902, 70 L.Ed.2d 220.

Statute held inapplicable to parolees

Ky.—Shull v. Wingo, 446 S.W.2d 545.

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2. Ga.—Soviero v. State, 137 S.E.2d 471, 220 Ga. 119.

Ill.—People ex rel. Hackler v. Lohman, 160 N.E.2d 792, 17 Ill.2d 78, cert. den. 80 S.Ct. 591, 361 U.S. 963, 4 L.Ed.2d 544.

People v. Maryan, 316 N.E.2d 647, 22 Ill.App.3d 60.

Iowa—C.J.S. cited in Gardels v. Brewer, 190 N.W.2d 803, 806.

Okl.—McKee v. Page, Cr., 438 P.2d 649.

Pa.—Com. ex rel. Banks v. Hendrick, 243 A.2d 438, 430 Pa. 575.

Com. ex rel. Lloyd v. Jones, 26 Beaver 114.

Tex.—Ex parte Pfouts, Cr., 383 S.W.2d 598—Ex parte Kovacs, Cr., 416 S.W.2d 420.

Irrespective of validity of revocation of probation

Ariz.—Application of Kirk, 431 P.2d 678, 6 Ariz.App. 238.

Ga.—Jeffers v. State, 124 S.E.2d 753, 217 Ga. 740.

Extradition basis for uncompleted sentence place of parole violation immaterial

Colo.—Wynsma v. Leach, 536 P.2d 817, 189 Colo. 59.

3. Ala.—Morris v. State, 199 So.2d 675, 43 Ala.App. 660, cert. den. 199 So.2d 677, 281 Ala. 723.

Del.—Golla v. State, 159 A.2d 585, 2 Storey 433, cert. den. 81 S.Ct. 78, 364 U.S. 841, 5 L.Ed.2d 64.

Okl.—Application of Brown, Cr., 432 P.2d 358.

4. Colo.—Mote v. Koch, 476 P.2d 255, 173 Colo. 82.

Del.—Golla v. State, 159 A.2d 585, 2 Storey 433, cert. den. 81 S.Ct. 78, 364 U.S. 841, 5 L.Ed.2d 64.

Ga.—Frazier v. Grimes, 145 S.E.2d 39, 221 Ga. 375.

Tenn.—Burnette v. State, Cr., 536 S.W.2d 353, cert. den. 97 S.Ct. 157, 429 U.S. 858, 50 L.Ed.2d 135.

Wis.—State ex rel. O'Connor v. Williams, App., 290 N.W.2d 533, 95 Wis.2d 378.

§ 11. — Persons in Custody in Asylum State

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5. U.S.—Bullis v. Hocker, C.A.Nev., 409 F.2d 1380.

Ariz.—State v. Barlean, App., 590 P.2d 463, 121 Ariz. 347.

Pa.—Interest of Kallinger, 392 A.2d 309, 481 Pa. 185.

Tenn.—Burton v. State, 377 S.W.2d 900, 214 Tenn. 9.

Detention under Uniform Criminal Extradition Act

Ind.—Pallett v. State, 381 N.E.2d 452, 269 Ind. 396.

5.5. Fla.—Abbott v. Genung, App., 238 So.2d 135.

Okl.—Application of Caudill, Cr., 352 P.2d 926.

Pa.—Com. v. Godfrey, 9 Chest. 149.

5.10. D.C.—C.J.S. cited in Matter of G. C. S., App., 360 A.2d 498, 501.

A sister state may file a valid hold order with warden of state penitentiary concerning an inmate therein at any time.^{5.15}

5.15. Okl.—Skinner v. Raines, Cr., 370 P.2d 40.

Detainer defined

Mich.—People v. Browning, 306 N.W.2d 326, 104 Mich.App. 741, on reh., 310 N.W.2d 365, 108 Mich.App. 281.

Federal detainer

U.S.—U.S. v. Carmen, D.C.Tenn., 479 F.Supp. 1, affd., C.A., 601 F.2d 587.

Interstate Compact on Detainers Act see *infra* this section.

7. Colo.—Espinoza v. Tinsley, 409 P.2d 835, 159 Colo. 62—Capra v. Miller, 422 P.2d 636, 161 Colo. 448.

Ill.—People ex rel. Johnson v. Elrod, 297 N.E.2d 182, 11 Ill.App.3d 649.

Nev.—Sheriff, Washoe County v. Povey, 491 P.2d 54, 87 Nev. 603.

Okl.—C.J.S. quoted in Application of Caudill, Cr., 352 P.2d 926, 929.

Tex.—Ex parte Smith, Cr., 410 S.W.2d 638.

Wash.—Johnson v. Peterson, 466 P.2d 183, 1 Wash. App. 856.

Wis.—State ex rel. Westlund v. Nehls, 168 N.W.2d 866, 43 Wis.2d 379.

Executive agreements

(3) Other matters.

U.S.—Bullis v. Hocker, C.A.Nev., 409 F.2d 1380.

Fla.—Abbott v. Genung, App., 238 So.2d 135.

N.Y.—People v. Singleton, 263 N.Y.S.2d 203, 47 Misc.2d 810.

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Ohio.—In re Severino, 204 N.E.2d 542, 1 Ohio App.2d 325, cert. den. 86 S.Ct. 1463, 384 U.S. 942, 16 L.Ed.2d 540.

Conviction in federal court

(3) Other matters.

Pa.—Com. ex rel. Gurnus v. Haas, 266 A.2d 94, 439 Pa. 39.

Waiver not reviewable by courts

N.J.—State v. West, 191 A.2d 758, 79 N.J.Super. 379.
Tenn.—State ex rel. Woods v. Bomar, 366 S.W.2d 750, 211 Tenn. 552.

Statute held not mandatory

U.S.—Thompson v. Bannan, C.A.Mich., 298 F.2d 611, cert. 82 S.Ct. 1610, 370 U.S. 957, 8 L.Ed.2d 823.

Statute given liberal and practical construction

Ky.—Davis v. Harris, 355 S.W.2d 147.

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10. Iowa.—Evans v. Rosenberger, 181 N.W.2d 152.

11. Del.—Hall v. State, 410 A.2d 154.

Okla.—Application of Caudill, Cr., 352 P.2d 926, 929.

Tex.—Ex parte Castor, Cr., 481 S.W.2d 830.

Uniform Extradition Act

Pa.—Com. ex rel. Crist v. Price, 175 A.2d 852, 405 Pa. 384.

Executive agreement between governors of states

Ark.—Hinkle v. Rockefeller, 458 S.W.2d 371, 249 Ark. 110.

Under the Interstate Compact on Detainers Act and similar statutes variously entitled Uniform Agreement on Detainers Interstate Agreement and Detainers, etc., whenever a person has entered upon a term of imprisonment of a party state, and there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within the time stated in the Act after he causes to be delivered to the prosecuting officer and the appropriate court written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint.^{14.5}

14.5. U.S.—United States v. Mauro, 98 S.Ct. 1834, 436 U.S. 340, 56 L.Ed.2d 329.

U.S. v. Cappucci, D.C.Pa., 342 F.Supp. 790—Johnson v. Cuyler, D.C.Pa., 535 F.Supp. 466, affd. C.A., 714 F.2d 123, affd. C.A., 714 F.2d 123.

Ala.—Parnley v. State, Cr.App., 397 So.2d 183, writ den., Sup., 397 So.2d 184.

Cal.—In re Blake, 160 Cal.Rptr. 781, 99 C.A.3d 1004.

Colo.—People v. Bielecki, 588 P.2d 377, 41 Colo.App. 256.

Conn.—Thomlinson v. Liburdi, 380 A.2d 105, 34 Conn. Sup. 128.

Del.—Pittman v. State, 301 A.2d 509.

Fla.—Shewan v. State, App., 396 So.2d 1133—State v. Ivey, App. 2 Dist., 410 So.2d 636.

Hawaii.—State v. Russell, 617 P.2d 84, 62 Haw. 474.

Ky.—Shanks v. Com., App., 574 S.W.2d 688.

Md.—Hoss v. State, 292 A.2d 48, 266 Md. 136.

Mich.—People v. Browning, 306 N.W.2d 326, 104 Mich.App. 741, on reh., 310 N.W.2d 365, 108 Mich.App. 281—People v. Paulus, 320 N.W.2d 337, 115 Mich.App. 183.

Minn.—Wertheimer v. State, 201 N.W.2d 383, 294 Minn. 293.

N.J.—State v. Lippolis, 244 A.2d 531, 101 N.J.Super. 435, affd. 257 A.2d 705, 107 N.J.Super. 137, revd. on oth. grds. 262 A.2d 203, 55 N.J. 354.

N.Y.—Baker v. Schublin, 339 N.Y.S.2d 360, 72 Misc.2d 413.

N.C.—State v. Ferdinando, 260 S.E.2d 423, 298 N.C. 737.

Or.—State v. Stewart, 487 P.2d 899, 6 Or.App. 264—State v. Coffman, 650 P.2d 144, 59 Or.App. 18.

S.D.—Robison v. State, 278 N.W.2d 463.

Tenn.—State v. Grizzell, Cr.App., 584 S.W.2d 678—State v. Black, Cr.App., 594 S.W.2d 738.

Wis.—State ex rel. Garner v. Gray, 201 N.W.2d 163, 55 Wis.2d 574.

Necessity for governor's warrant expressly exempted see infra § 16.

Waiver of exclusive priority and lending offender to another court or sovereignty: Generally see C.J.S. Criminal Law § 111b; As between federal and state courts see C.J.S. Criminal Law § 145.

Failure of state to comply with act as not cognizable in federal habeas corpus proceeding see C.J.S. Habeas Corpus § 49.

Act not applicable to parole violations

U.S.—U.S. v. Reed, C.A.Or., 620 F.2d 709, cert. den. 101 S.Ct. 229, 449 U.S. 880, 66 L.Ed.2d 104.

U.S. v. Price, D.C.Tenn., 535 F.Supp. 7.

D.C.—Hill v. U.S., App., 434 A.2d 422, cert. den. 102 S.Ct. 1020, 454 U.S. 1151, 71 L.Ed.2d 307.

Fla.—Maggard v. Wainwright, App., 1 Dist., 411 So.2d 200, cert. den. 103 S.Ct. 309, 459 U.S. 974, 74 L.Ed.2d 289.

S.D.—Bush v. Canary, 286 N.W.2d 536.

As applicable to federal government

U.S.—U.S. v. Umbower, C.A.Fla., 602 F.2d 754, cert. den. 100 S.Ct. 678, 444 U.S. 1021, 62 L.Ed.2d 652.

Mich.—People v. Browning, 306 N.W.2d 326, 104 Mich.App. 741, on reh., 310 N.W.2d 365, 108 Mich.App. 281.

Hearing mandatory if demanded

Mich.—People v. Browning, 310 N.W.2d 365, 108 Mich.App. 281.

Wis.—State v. Sykes, App., 283 N.W.2d 446, 91 Wis.2d 436.

No hearing before extradition

Md.—Wilson v. State, 408 A.2d 1058, 44 Md.App. 318.

Violation not shown

U.S.—Fasano v. Hall, D.C.Mass., 476 F.Supp. 291, affd. C.A., 615 F.2d 555, cert. den. 101 S.Ct. 201, 449 U.S. 867, 66 L.Ed.2d 86—U.S. v. Boyce, D.C. Va., 518 F.Supp. 862, affd. C.A., 681 F.2d 817.

Ill.—People v. Mitchell, 420 N.E.2d 415, 51 Ill.Dec. 1, 95 Ill.App.3d 779, cert. den. 102 S.Ct. 1441, 455 U.S. 944, 71 L.Ed.2d 656.

Mass.—Com. v. Bell, 420 N.E.2d 360, 11 Mass.App. 1035.

Mich.—People v. Estelle, 287 N.W.2d 262, 93 Mich. App. 449—People v. Barnes, 287 N.W.2d 282, 93 Mich.App. 509.

N.Y.—People ex rel. Harrist v. Dalsheim, 442 N.Y.S.2d 906, 110 Misc.2d 734.

Or.—State v. Miebach, 629 P.2d 1312, 52 Or.App. 709, review den. 642 P.2d 308, 291 Or. 771.

S.C.—State v. Knowles, 270 S.E.2d 133, 275 S.C. 312.

Utah.—Hearn v. State, 642 P.2d 757.

Wash.—State v. Carpenter, 599 P.2d 1, 24 Wash.App. 41.

Waiver

U.S.—U.S. v. Boggs, C.A.Ga., 612 F.2d 991, cert. den., 101 S.Ct. 156, 449 U.S. 857, 66 L.Ed.2d 72—U.S. v. Odom, C.A.Md., 674 F.2d 228, cert. den. 102 S.Ct. 2946, 457 U.S. 1125, 73 L.Ed.2d 1341—U.S. v. Lawson, 736 F.2d 835.

Perry v. Carter, D.C.Okla., 514 F.Supp. 19.

Colo.—Schoengarth v. Bray, 615 P.2d 655, 200 Colo. 288.

Fla.—State v. Grizzell, App., 399 So.2d 1091—Dillman v. State, App. 3 Dist., 411 So.2d 964.

Ind.—Pethel v. State, App., 427 N.E.2d 891.

Mich.—People v. Browning, 306 N.W.2d 326, 104 Mich.App. 741, on reh. 310 N.W.2d 365, 108 Mich.App. 281—People v. Wimbley, 310 N.W.2d 449, 108 Mich.App. 527.

N.M.—State v. Shaw, App., 651 P.2d 115, 98 N.M. 580.

When provisions activated or triggered

U.S.—U.S. v. Milhollan, C.A.Pa., 599 F.2d 518, cert. den. 100 S.Ct. 221, 444 U.S. 909, 62 L.Ed.2d 144—U.S. v. Woods, C.A.Ky., 621 F.2d 844, cert. den. 101 S.Ct. 222, 449 U.S. 877, 66 L.Ed.2d 99—U.S. v. Hill, C.A.Ga., 622 F.2d 900.

Bowman v. Wilson, D.C.Pa., 514 F.Supp. 403, revd. in part, vac. in part on oth. grds. 672 F.2d 1145.

Colo.—Romans v. District Court in and for Eighth Judicial Dist., 633 P.2d 477—People v. Gonzales, 679 P.2d 1085.

People v. Lincoln, 601 P.2d 641, 42 Colo.App. 512.

Md.—Clipper v. State, 455 A.2d 973, 295 Md. 303.

Mich.—People v. Wimbley, 310 N.W.2d 449, 108 Mich. App. 527.

Mo.—State ex rel. Kemp v. Hodge, 629 S.W.2d 353.

State v. Choate, App., 600 S.W.2d 37—State v. Soloway, App., 603 S.W.2d 688.

N.M.—State v. Quiroz, App., 612 P.2d 1328, 94 N.M. 517.

Writ of habeas corpus ad prosequendum not encompassed

U.S.—Greathouse v. U.S., C.A.Kan., 655 F.2d 1032, cert. den. 102 S.Ct. 1289, 455 U.S. 926, 71 L.Ed.2d 469—U.S. v. Bammam, C.A.Va., 737 F.2d 413, cert. den. 105 S.Ct. 789, 83 L.Ed.2d 783.

Detainers to obtain custody for serving sentence not encompassed

U.S.—Johnson v. Williams, D.C.N.J., 508 F.Supp. 52, affd. 666 F.2d 842.

Act inapplicable to probation violation

U.S.—Carchman v. Nash, N.J., 105 S.Ct. 3401, 87 L.Ed.2d 516.

U.S. v. Roach, C.A.Cal., 745 F.2d 1252, cert. den. 106 S.Ct. 107, 88 L.Ed.2d 87.

Colo.—People v. Jackson, App., 626 P.2d 723.

Md.—Edge v. State, 493 A.2d 437, 63 Md.App. 676.

N.Y.—People ex rel. Capalongo v. Howard, 453 N.Y. S.2d 45, 87 A.D.2d 242.

Not applicable to prisoner already convicted

Ohio.—State v. Barnes, 471 N.E.2d 514, 14 Ohio App.3d 351, 14 O.B.R. 418.

Speedy trial inapplicable to escape

U.S.—U.S. v. Bottoms, C.A.9 (Cal.), 755 F.2d 1349.

Administrative error

D.C.—Malone v. U.S., App., 482 A.2d 868.

Letter not detainer

Mich.—People v. Browning, 306 N.W.2d 326, 104 Mich.App. 741, on reh., 310 N.W.2d 365, 108 Mich.App. 281.

"I A D forms"

Mich.—People v. Browning, 306 N.W.2d 326, 104 Mich.App. 741, on reh. 310 N.W.2d 365, 108 Mich.App. 281.

Violation shown

Mich.—People v. Browning, 306 N.W.2d 326, 104 Mich.App. 741, on reh., 310 N.W.2d 365, 108 Mich.App. 281.

Violation held not to divest court of jurisdiction

Mich.—People v. Browning, 306 N.W.2d 326, 104 Mich.App. 741, on reh. 310 N.W.2d 365, 108 Mich.App. 281.

Purpose of transfer

Mich.—People v. Browning, 306 N.W.2d 326, 104 Mich.App. 741, on reh. 310 N.W.2d 365, 108 Mich.App. 281.

Right to trial before return mandatory

Mich.—People v. Browning, 306 N.W.2d 326, 104 Mich.App. 741, on reh., 310 N.W.2d 365, 108 Mich.App. 281.

Speedy trial

U.S.—U.S. v. Odom, C.A.Md., 674 F.2d 228, cert. den. 102 S.Ct. 2946, 457 U.S. 1125, 73 L.Ed.2d 1341.

Colo.—People v. Anderson, App., 649 P.2d 720.

Fla.—Irby v. State of Missouri, App. 2 Dist., 427 So.2d 367.

Ind.—Ward v. State, App., 435 N.E.2d 578.

Iowa—State v. Bass, 320 N.W.2d 824.

Mich.—People v. Browning, 306 N.W.2d 326, 104 Mich.App. 741, on reh. 310 N.W.2d 365, 108 Mich.App. 281—People v. Paulus, 320 N.W.2d 337, 115 Mich.App. 183.

N.Y.—People v. Chan, 439 N.Y.S.2d 112, 81 A.D.2d 765.

N.C.—State v. Dunlap, 290 S.E.2d 744, 57 N.C.App. 175, review den. 294 S.E.2d 213, 306 N.C. 388.

S.C.—State v. Johnson, 301 S.E.2d 138, 278 S.C. 668.

Tenn.—State v. Tyson, Cr.App., 603 S.W.2d 748.

Failure to object

Mich.—People v. Browning, 306 N.W.2d 326, 104 Mich.App. 741, on reh., 310 N.W.2d 365, 108 Mich.App. 281.

Physical custody

Mich.—People v. Browning, 306 N.W.2d 326, 104 Mich.App. 741, on reh., 310 N.W.2d 365, 108 Mich.App. 281.

Protection afforded

Mich.—People v. Browning, 306 N.W.2d 326, 104 Mich.App. 741, on reh., 310 N.W.2d 365, 108 Mich.App. 281.

Violation shown

Mich.—People v. Browning, 310 N.W.2d 365, 108 Mich.App. 281.

Jurisdiction

Mich.—People v. Browning, 310 N.W.2d 365, 108 Mich.App. 281.

Showing of prejudice not necessary

Mich.—People v. Meyers, 311 N.W.2d 454, 109 Mich. App. 719.

As applicable to federal prisoners

Mich.—People v. Browning, 310 N.W.2d 365, 108 Mich.App. 281.

Detainer need not be formal document

Mich.—People v. Paulus, 320 N.W.2d 337, 115 Mich. App. 183.

Hearing

U.S.—Sorenson v. U.S., D.C.N.Y., 539 F.Supp. 865.

Utah—Gibson v. Morris, 646 P.2d 733.

Judicial review

Colo.—Abad v. Ricketts, 645 P.2d 848—Moore v. Wilson, 662 P.2d 160.

"Untried" charges

Ark.—Padilla v. State, 648 S.W.2d 797, 279 Ark. 100.

Okl.—Engs v. District Court of Tulsa County, Cr., 645 P.2d 1035.

Writ of habeas corpus

(1) Writ of habeas corpus ad prosequendum not encompassed.

U.S.—Kleinbart v. U.S., App., 426 A.2d 343.

Tenn.—Metheny v. State, Cr.App., 589 S.W.2d 943, cert. den. 100 S.Ct. 1658, 445 U.S. 967, 64 L.Ed.2d 243.

(2) Writ of habeas corpus ad prosequendum treated as detainer where previous detainer filed.

N.Y.—People v. Sorenson, 436 N.Y.S.2d 745, 80 A.D.2d 878.

(3) Writ of habeas corpus to bring defendant to trial operated as written request for temporary custody of prisoner, and thus, was detainer within meaning of interstate agreement on detainers.

Mich.—People v. Paulus, 320 N.W.2d 337, 115 Mich. App. 183.

(4) Writ of habeas corpus issued to bring defendant to court for arraignment purposes was not detainer for purposes of speedy trial provisions of interstate agreement on detainers.

Mich.—People v. Paulus, 320 N.W.2d 337, 115 Mich. App. 183.

"Open court" requirement for continuances

U.S.—U.S. v. Odom, C.A.Md., 674 F.2d 228, cert. den. 102 S.Ct. 2946.

Statutes strictly construed

Colo.—People v. Anderson, App., 649 P.2d 720.

Compliance not shown

Mo.—State v. Buckles, 636 S.W.2d 914.

Act not operative

Or.—State v. Coffman, 650 P.2d 144, 59 Or.App. 18.

Sufficient compliance by defendant

N.J.—State v. Wells, 453 A.2d 236, 186 N.J.Super. 497.

Commencement of period

N.M.—State v. Shaw, App., 651 P.2d 115, 98 N.M. 580.

N.Y.—People v. Jellicks, 455 N.Y.S.2d 327, 116 Misc.2d 328.

Continuous custody requirements

U.S.—U.S. v. Persinger, D.C.Pa., 562 F.Supp. 557.

Confinement as both state and federal prisoner

U.S.—Shigemura v. U.S., C.A.Mo., 726 F.2d 380.

Failure to notify prisoner as to detainer

Fla.—Shumate v. State, App. 3 Dist., 449 So.2d 387.

Notice of untried charges

Ind.—Dotson v. State, 463 N.E.2d 266.

Letter and warrant constituted detainer

Mich.—People v. Office, 337 N.W.2d 592, 126 Mich. App. 597.

The remedial nature of the Act requires that it be construed liberally in favor of those it was intended to benefit,^{14.10} however, the burden is on an inmate, acting pro se, to demonstrate strict compliance with the notification and certificate requirements thereof.^{14.15}

14.10. N.M.—State v. Quiroz, App., 612 P.2d 1328, 94 N.M. 517.

Tenn.—State v. Grizzell, Cr.App., 584 S.W.2d 678.

Meaning of "approved"

Ill.—People ex rel. Vogel v. Fairman, 445 N.E.2d 860, 68 Ill.Dec. 216, 112 Ill.App.3d 477.

14.15. Ga.—Reed v. Styncombe, 290 S.E.2d 469, 249 Ga. 344.

Registered or certified mail

Tenn.—State v. Grizzell, Cr.App., 584 S.W.2d 678.

Insufficient request for final disposition

Fla.—Coit v. State, App., 440 So.2d 409.

The purpose of the Act is to encourage expeditious and orderly disposition of outstanding charges and determination of proper status of any and all detainees based on untried indictments, informations, or complaints.^{14.20}

14.20. U.S.—Johnson v. Cuyler, D.C.Pa., 535 F.Supp. 466, affd. C.A., 714 F.2d 123.

Cal.—People v. Reyes, 159 Cal.Rptr. 572, 98 C.A.3d 524.

Colo.—People v. Jackson, App., 626 P.2d 723.

Del.—Saunders v. State, 397 A.2d 548.

Mo.—State ex rel. Saxton v. Moore, App., 598 S.W.2d 586.

S.C.—State v. Patterson, 256 S.E.2d 417, 273 S.C. 361.

Utah—Sampley v. Morris, 632 P.2d 837.

Wis.—State v. Sykes, App., 283 N.W.2d 446, 91 Wis.2d 436.

Other purpose

U.S.—Adams v. Cuyler, C.A.Pa., 592 F.2d 720, affd. 101 S.Ct. 703, 449 U.S. 433, 66 L.Ed.2d 641—U.S. v. Bryant, C.A.N.C., 612 F.2d 806, cert. den. 100 S.Ct. 1855, 446 U.S. 920, 64 L.Ed.2d 274—U.S. v. Reed, C.A.Or., 620 F.2d 709, cert. den. 101 S.Ct. 229, 449 U.S. 880, 66 L.Ed.2d 104—U.S. v. Graham, C.A.Pa., 622 F.2d 57, cert. den. 101 S.Ct. 278, 449 U.S. 904, 66 L.Ed.2d 135.

Cal.—People v. Posten, 166 Cal.Rptr. 661, 108 C.A.3d 633.

Colo.—People v. Lewis, 680 P.2d 226.

Conn.—Bursque v. Moore, 227 A.2d 255, 26 Conn.Supp. 469.

D.C.—Vance v. U.S., App., 399 A.2d 52, Kleinbart v. U.S., App., 426 A.2d 343.

Md.—Parks v. State, 397 A.2d 212, 41 Md.App. 381, affd. 410 A.2d 597, 287 Md. 11—Boyd v. State, 441 A.2d 1133, 51 Md.App. 197, affd. 447 A.2d 871, 294 Md. 103.

Mich.—People v. Browning, 306 N.W.2d 326, 104 Mich.App. 741, on reh., 310 N.W.2d 365, 108 Mich.App. 281—People v. Browning, 310 N.W.2d 365, 108 Mich.App. 281.

N.Y.—People ex rel. Capalonga v. Howard, 453 N.Y. S.2d 45, 87 A.D.2d 242.

S.C.—State v. Finley, 290 S.E.2d 808, 277 S.C. 548.

The time limit for bringing the accused to trial may be extended for good cause.^{14.21}

14.21. Good caused shown

Colo.—People v. Anderson, App., 649 P.2d 720.

Good cause not shown

Tex.—Hollomon v. State, App. 2 Dist., 675 S.W.2d 351.

Delay provision under speedy trial act distinguished

Colo.—People v. Anderson, App., 649 P.2d 720.

Personal approval of continuance by accused unnecessary

Colo.—People v. Anderson, App., 649 P.2d 720.

Where the failure to bring a defendant to trial within the statutory time is attributable to the state and there is no legal ground to excuse its failure to act, the defendant is entitled to a dismissal of the charges with prejudice^{14.25} however, a dismissal is not warranted, where the delay is caused by the acts of the defendant.^{14.30}

14.25. U.S.—Johnson v. Cuyler, D.C.Pa., 535 F.Supp. 466, affd. C.A., 714 F.2d 123.

Colo.—Romans v. District Court in and for Eighth Judicial Dist., 633 P.2d 477—People v. Bean, 650 P.2d 565.

Ky.—Lovitt v. Com., 592 S.W.2d 133.

Md.—Boyd v. State, 441 A.2d 1133, 51 Md.App. 197, affd. 447 A.2d 871, 294 Md. 103.

Mich.—People v. Browning, 306 N.W.2d 326, 104 Mich.App. 741, on reh., 310 N.W.2d 365, 108 Mich.App. 281.

Mo.—State ex rel. Kemp v. Hodge, 629 S.W.2d 353.

S.C.—State v. Holbrook, 260 S.E.2d 181, 274 S.C. 4.

Exceptional circumstances or miscarriage of justice necessary

U.S.—U.S. v. Boyce, D.C.Va., 518 F.Supp. 862, affd., C.A., 681 F.2d 817.

Continuance for good cause allowed

Md.—Latimer v. State, 433 A.2d 1234, 49 Md.App. 586.

Time limit not applicable

N.C.—State v. Rose, 281 S.E.2d 404, 53 N.C.App. 608.

"Good cause" shown

Mass.—Com. v. Dickson, 434 N.E.2d 1284, 386 Mass. 230.

Prisoner remedy for improper delay

Or.—State v. Coffman, 650 P.2d 144, 59 Or.App. 18.

No discharge because of oversight of asylum state

Fla.—Williams v. State, App. 1 Dist., 426 So.2d 1121, review den. 437 So.2d 677.

14.30. Ark.—Derring v. State, 619 S.W.2d 644, 273 Ark. 347.

Mich.—People v. Browning, 310 N.W.2d 365, 108 Mich.App. 281.

§ 11 EXTRADITION

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N.Y.—People v. Chiofalo, 423 N.Y.S.2d 210, 73 A.D.2d 673.

Wash.—State v. Carpenter, 599 P.2d 1, 24 Wash.App. 41.

Wis.—State v. Sykes, App., 283 N.W.2d 446, 91 Wis.2d 436.

Time limit tolled

U.S.—Bush v. Muncy, C.A.Md., 659 F.2d 402, cert. den. 102 S.Ct. 1259, 455 U.S. 910, 71 L.Ed.2d 449.

Del.—Naughton v. State, 453 A.2d 796.

Fla.—State v. Minnick, App. 2 Dist., 413 So.2d 168.

Ga.—Cobb v. State, 260 S.E.2d 60, 244 Ga. 344.

Mich.—People v. Meyers, 335 N.W.2d 189, 124 Mich. App. 148.

S.C.—State v. Finley, 290 S.E.2d 808, 277 S.C. 548.

Time limit not tolled

Mich.—People v. Meyers, 311 N.W.2d 454, 109 Mich. App. 719.

N.Y.—People v. Torres, 456 N.E.2d 497, 60 N.Y.2d 119, 468 N.Y.S.2d 606, on remand 473 N.Y.S.2d 554, 100 A.D.2d 602, app. decided 489 N.Y.S.2d 115, 111 A.D.2d 281.

When a jurisdiction assumes temporary custody for purposes of disposing of a pending action upon which a detainer was filed, that jurisdiction must resolve all matters pertaining to that action while the prisoner is in the receiving state's custody.^{14,35}

14.35. U.S.—U.S. v. Boyce, D.C.Va., 518 F.Supp. 862, aff'd., C.A., 681 F.2d 817.

Cal.—People v. Reyes, 159 Cal.Rptr. 572, 98 C.A.3d 524.

Md.—Boyd v. State, 441 A.2d 1133, 51 Md.App. 197, aff'd. 447 A.2d 871, 294 Md. 103.

Mich.—People v. Browning, 310 N.W.2d 365, 108 Mich.App. 281.

Dismissal not warranted

U.S.—Sassoon v. Stynchcombe, C.A.Ga., 654 F.2d 371.

Mistrial does not bar further prosecution

N.Y.—People v. Sorenson, 436 N.Y.S.2d 745, 80 A.D.2d 878.

A prisoner incarcerated in a jurisdiction that has adopted the Uniform Criminal Extradition Act is entitled to the procedural protections of that Act, before being transferred to another jurisdiction pursuant to the article of the Interstate Agreement of Detainers providing the procedure by which the prosecutor of a receiving state may initiate a transfer.^{14,40}

14.40. Pretransfer hearing

U.S.—Cuyler v. Adams, 101 S.Ct. 703, 449 U.S. 433, 66 L.Ed.2d 641.

Parole violation detainers within Act

Pa.—Com. ex rel. Jacobs v. Digiacinto, 468 A.2d 1118, 321 Pa.Super. 536.

A prisoner must be informed by a state of his right under the Interstate Agreement on Detainers to petition the governor when a detainer is lodged against him.^{14,45}

14.45. Ill.—People v. Koren, 449 N.E.2d 191, 70 Ill.Dec. 317, 114 Ill.App.3d 421.

§ 12. Preliminary Detention

14.55. U.S.—U.S. v. Dixon, C.A.Mich., 592 F.2d 329, cert. den. 99 S.Ct. 2179, 441 U.S. 951, 60 L.Ed.2d 1056.

Colo.—Whittington v. Bray, 612 P.2d 72, 200 Colo. 17.

Conn.—Narel v. Liburdi, 441 A.2d 177, 185 Conn. 562, cert. den. 102 S.Ct. 1974, 456 U.S. 928, 72 L.Ed.2d 443.

Mo.—State ex rel. Saxton v. Moore, App., 598 S.W.2d 586.

Pa.—Com. ex rel. Colbert v. Aytch, 386 A.2d 950, 478 Pa. 314.

Com. ex rel. Blecher v. Rundle, 217 A.2d 772, 207 Pa.Super. 443.

Criminal arrest

D.C.—Kirkland v. Preston, C.A., 385 F.2d 670, 128 U.S.App.D.C. 148.

Lesser standard as to probable cause not permitted

Colo.—Pippin v. Leach, 534 P.2d 1193, 188 Colo. 385.

Mass.—In re Consalvi, 382 N.E.2d 734, 376 Mass. 699.

Proper documentation

U.S.—Atkinson v. Hanberry, C.A.Ga., 589 F.2d 917.

Right to contest dismissal of detainer

Pa.—Com. v. Hude, 397 A.2d 772, 483 Pa. 489.

Custody

U.S.—Saulsbury v. U.S., C.A.Tex., 591 F.2d 1028, cert. den. 100 S.Ct. 118, 444 U.S. 857, 62 L.Ed.2d 77.

Colo.—Hughes v. District Court In and For City and County of Denver, 593 P.2d 702, 197 Colo. 396.

Hawaii—State v. Russell, 617 P.2d 84, 62 Haw. 474.

Mich.—People v. Browning, 310 N.W.2d 365, 108 Mich.App. 281.

N.Y.—People v. Hayden, 414 N.Y.S.2d 473, 98 Misc.2d 574.

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15. Pa.—Com. ex rel. Colbert v. Aytch, Super., 369 A.2d 1321, 246 Pa.Super. 278, aff'd. 386 A.2d 950, 478 Pa. 314.

Validity of detention shown

Ga.—Cota v. Benson, 238 S.E.2d 332, 239 Ga. 695.

16. U.S.—Rinaldi v. U.S., D.C.N.Y., 484 F.Supp. 916.

17. U.S.—U.S. v. Milhollan, C.A.Pa., 599 F.2d 518, cert. den. 100 S.Ct. 221, 444 U.S. 909, 62 L.Ed.2d 144.

Ala.—McCallum v. State, Cr.App., 407 So.2d 865.

Cal.—In re Albright, 181 Cal.Rptr. 84, 129 C.A.3d 504.

Conn.—Narel v. Liburdi, 441 A.2d 177, 185 Conn. 562, cert. den. 102 S.Ct. 1974, 456 U.S. 928, 72 L.Ed.2d 443.

Idaho—Struve v. Wilcox, 579 P.2d 1188, 99 Idaho 205, cert. den. 99 S.Ct. 1037, 439 U.S. 1123, 59 L.Ed.2d 84.

Ill.—People v. Merryfield, 404 N.E.2d 907, 39 Ill.Dec. 316, 83 Ill.App.3d 1017.

Ind.—Webb v. State, 437 N.E.2d 1330.

Kan.—Application of Simpson, 586 P.2d 1389, 2 Kan. App.2d 713.

N.J.—State v. Coppolla, 440 A.2d 465, 182 N.J.Super. 230.

N.C.—State v. Vaughn, 250 S.E.2d 210, 296 N.C. 167, cert. den. 99 S.Ct. 2060, 441 U.S. 935, 60 L.Ed.2d 665.

Pa.—Com. v. Frison, 448 A.2d 18, 301 Pa.Super. 498.

W.Va.—Moore v. Whyte, 266 S.E.2d 137, 164 W.Va. 718.

Interstate parole compact

Ind.—Passwater v. Winn, 229 N.E.2d 622, 248 Ind. 404.

Informal process

U.S.—U.S. v. Dixon, C.A.Mich., 592 F.2d 329, cert. den. 99 S.Ct. 2179, 441 U.S. 951, 60 L.Ed.2d 1056.

Notice to accused

Pa.—Com. ex rel. Coleman v. Cuyler, 396 A.2d 394, 261 Pa.Super. 274.

18. Colo.—People v. Jacobs, 596 P.2d 1187, 198 Colo. 75.

Ill.—People v. Merryfield, 404 N.E.2d 907, 39 Ill.Dec. 316, 83 Ill.App.3d 1017.

Mo.—State v. Lee, 626 S.W.2d 252.

State ex rel. Saxton v. Moore, App., 598 S.W.2d 586.

Communication held without legal effect

Mich.—People v. Browning, 310 N.W.2d 365, 108 Mich.App. 281.

Ohio—State v. Doyle, 228 N.E.2d 863, 11 Ohio App.2d 97.

Detainer held ineffective after release of prisoner by court

Ind.—Passwater v. Winn, 229 N.E.2d 622, 248 Ind. 404.

Provisions inapplicable upon issuance of warrant

Minn.—State ex rel. Brown v. Hedman, 157 N.W.2d 756, 280 Minn. 69.

Mandatory

Colo.—Hughes v. District Court In and For City and County of Denver, 593 P.2d 702, 197 Colo. 396.

Time limitations

U.S.—U.S. v. Sanders, C.A.Cal., 669 F.2d 609, cert. den. 102 S.Ct. 2044, 456 U.S. 964, 72 L.Ed.2d 489.

Foran v. Metz, D.C.N.Y., 463 F.Supp. 1088, aff'd. C.A., 603 F.2d 212, cert. den. 100 S.Ct. 58, 444 U.S. 830, 62 L.Ed.2d 38.

Conn.—Narel v. Liburdi, 441 A.2d 177, 185 Conn. 562, cert. den. 102 S.Ct. 1974, 456 U.S. 928, 72 L.Ed.2d 443.

Iowa—State v. Thomas, 275 N.W.2d 211.

Mass.—Com. v. Giordano, 402 N.E.2d 1076, 9 Mass. App. 888.

Mich.—People v. Cook, 291 N.W.2d 152, 95 Mich.App. 645.

Mo.—State ex rel. Hammett v. McKenzie, App., 396 S.W.2d 53.

18.5. Colo.—People v. Jacobs, 596 P.2d 1187, 198 Colo. 75.

Mass.—Com. v. Florence, 387 N.E.2d 152, 7 Mass.App. 126.

N.Y.—People v. Hayden, 414 N.Y.S.2d 473, 98 Misc.2d 574.

W.Va.—Moore v. Whyte, 266 S.E.2d 137, 164 W.Va. 718.

19. Ark.—Bell v. State, 422 S.W.2d 668, 243 Ark. 839.

Informing detainee of right to speedy trial

U.S.—U.S. v. Maldonado, D.C.W.Va., 601 F.Supp. 502.

Probable cause

U.S.—Zambito v. Blair, C.A.W.Va., 610 F.2d 1192, cert. den. 100 S.Ct. 1316, 445 U.S. 928, 63 L.Ed.2d 761.

S.D.—State ex rel. Hall v. Hawkey, 263 N.W.2d 141.

Question of federal law

N.Y.—People v. Hayden, 414 N.Y.S.2d 473, 98 Misc.2d 574.

19.5. Wis.—State v. Klein, 130 N.W.2d 816, 25 Wis.2d 394, cert. den. 85 S.Ct. 1083, 380 U.S. 951, 13 L.Ed.2d 969.

Applies if demanding state is a party

Pa.—Com. ex rel. Coleman v. Cuyler, 396 A.2d 394, 261 Pa.Super. 274.

Dismissal of detainer

Pa.—Com. v. Hude, 397 A.2d 772, 483 Pa. 489.

Under the Federal Fugitive Felon Act written approval by the attorney general is not required prior to issuance of warrant of arrest,^{19,10} or prior to arrest without one.^{19,15}

19.10. U.S.—U.S. v. McCarthy, D.C.N.Y., 249 F.Supp. 199.

19.15. U.S.—U.S. v. McCarthy, D.C.N.Y., 249 F.Supp. 199.

20. D.C.—Vance v. U.S., App., 399 A.2d 52.

Mont.—C.J.S. quoted at length in State v. Coleman, 579 P.2d 732, 744, 177 Mont. 1, app. after remand 605 P.2d 1000, cert. den. 100 S.Ct. 2952, 446 U.S. 970, 64 L.Ed.2d 831, reh. den. 101 S.Ct. 34, 448 U.S. 914, 65 L.Ed.2d 1177.

W.Va.—Lott v. Bechtold, 289 S.E.2d 210.

Violator not "incarcerated"

N.Y.—People v. Williams, 391 N.Y.S.2d 518, 89 Misc.2d 269.

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21. U.S.—Clemas v. U.S., C.A.S.D., 382 F.2d 403, cert. den. 88 S.Ct. 1064, 390 U.S. 962, 19 L.Ed.2d 1160—Barnett v. U.S., C.A.Miss., 384 F.2d 848, reh. den. 391 F.2d 931.

Legg v. Hayter Oil Co., D.C.Tenn., 298 F.Supp. 604.

Ga.—Bearden v. State, 155 S.E.2d 5, 223 Ga. 381. Tex.—Morales v. State, Cr., 513 S.W.2d 869.

Wis.—State v. Klein, 130 N.W.2d 816, 25 Wis.2d 394, cert. den. 85 S.Ct. 1083, 380 U.S. 951, 13 L.Ed.2d 969.

Prerequisite arrest as warrantless detention

Wis.—State v. Hughes, 229 N.W.2d 655, 68 Wis.2d 662.

21.5. Tex.—Ex parte Bucaro, App. 2 Dist., 656 S.W.2d 217.

22.5. Extension of time

Colo.—Norrod v. Bower, 532 P.2d 330, 187 Colo. 421.

22.10. U.S.—Barnett v. U.S., C.A.Miss., 384 F.2d 848, reh. den. 391 F.2d 931.

Ark.—Cadle v. Cauthron, 584 S.W.2d 6, 266 Ark. 419. N.J.—Application of Dunster, 328 A.2d 238, 131 N.J. Super. 22.

Question of compliance dependent on circumstances

Okl.—Application of Caudill, Cr., 352 P.2d 926.

Defects must be raised prior to trial

Wis.—Desjarlais v. State, 243 N.W.2d 453, 73 Wis.2d 480.

25. Colo.—People v. Swazo, 610 P.2d 1072, 199 Colo. 486.

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26. Miss.—Taylor v. Garrison, 329 So.2d 506.

Neb.—Bell v. Janing, 199 N.W.2d 24, 188 Neb. 690. N.Y.—People ex rel. Spence v. Sheriff of Rensselaer County, 355 N.Y.S.2d 494, 44 A.D.2d 867—People ex rel. Moree v. Waldron, 383 N.Y.S.2d 430, 52 A.D.2d 1007.

Pa.—Com. ex rel. Berry v. Aytch, 385 A.2d 354, 253 Pa.Super. 312.

Wash.—Vetsch v. Sheriff of Spokane County, 546 P.2d 927, 14 Wash.App. 971.

Wash.—Vetsch v. Sheriff of Spokane County, 546 P.2d 927, 14 Wash.App. 971.

Miranda decision inapplicable

Mass.—Com. v. Glavin, 235 N.E.2d 547, 354 Mass. 69.

Arrest not invalid

N.J.—Application of Dunster, 328 A.2d 238, 131 N.J. Super. 22.

Irregularities in prior arrest

Mass.—In re Brown, 346 N.E.2d 830, 370 Mass. 267.

27. U.S.—U.S. ex rel. Mayberry v. Yeager, D.C.N.J., 321 F.Supp. 199.

Colo.—Whittington v. Bray, 612 P.2d 72, 200 Colo. 17. N.Y.—People v. Vidal, 445 N.Y.S.2d 479, 85 A.D.2d 701.

Vt.—In re Saunders, 415 A.2d 199, 138 Vt. 259.

Wis.—C.J.S. quoted in State v. Capelle, 115 N.W.2d 487, 489, 17 Wis.2d 116—State ex rel. Holmes v. Spice, 229 N.W.2d 97, 68 Wis.2d 263.

Wis.—C.J.S. quoted in State v. Capelle, 115 N.W.2d 487, 489, 17 Wis.2d 116—State ex rel. Holmes v. Spice, 229 N.W.2d 97, 68 Wis.2d 263.

Colo.—Velasquez v. People, 389 P.2d 849, 154 Colo. 284—White v. Leach, 532 P.2d 740, 188 Colo. 62—Norrod v. Bower, 532 P.2d 330, 187 Colo. 421—Gerard v. Ossola, 649 P.2d 1110.

27.50. Colo.—People v. Swazo, 610 P.2d 1072, 199 Colo. 486.

Minn.—State ex rel. Brown v. Hedman, 157 N.W.2d 756, 280 Minn. 69.

Mo.—State ex rel. Saxton v. Moore, App., 598 S.W.2d 586.

Mont.—State v. Seadin, 593 P.2d 451, 181 Mont. 294.

Mont.—State v. Seadin, 593 P.2d 451, 181 Mont. 294.

U.S.—Mathes v. Pierpont, C.A.Mo., 725 F.2d 77.

28. Delay held not unreasonable

U.S.—Lott v. Heyd, C.A.La., 315 F.2d 350.

Pa.—Com. ex rel. Heaton v. Harvey, 164 A.2d 123, 193 Pa.Super. 315.

29. U.S.—U.S. v. Bryant, C.A.N.C., 612 F.2d 799. Speaks v. Pittsylvania County, Virginia Sheriff Taylor E. McGregor, D.C.Va., 355 F.Supp. 1129.

Conn.—Bursque v. Moore, 227 A.2d 255, 26 Conn.Supp. 469.

Pa.—Com. ex rel. Quackenbush v. Fairchild, 435 A.2d 1266, 291 Pa.Super. 358.

Tenn.—Burns v. State, Cr.App., 578 S.W.2d 650.

Tex.—Ex parte Worden, Cr., 502 S.W.2d 803.

Delay due to prisoner

(2) Other instances.

Mo.—State ex rel. Saxton v. Moore, App., 598 S.W.2d 586.

Mo.—State ex rel. Saxton v. Moore, App., 598 S.W.2d 586.

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Mo.—State ex rel. Saxton v. Moore, App., 598 S.W.2d 586.

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Mo.—State ex rel. Saxton v. Moore, App., 598 S.W.2d 586.

Waiver of demand

Colo.—Smith v. Miller, 571 P.2d 1084, 194 Colo. 218.

Okl.—Ray v. Raines, Cr., 347 P.2d 659.

29.65. Accused must be party names in requisition

N.J.—State v. Phillips, 162 A.2d 113, 62 N.J. Super. 70, affd. 167 A.2d 175, 34 N.J. Super. 63.

43. U.S.—DeGenna v. Grasso, D.C.Conn., 413 F.Supp. 427, affd. 96 S.Ct. 2617, 426 U.S. 913, 49 L.Ed.2d 368.

page 404**30.15. Procedures available**

(2) Other matters.

Fla.—Clarke v. Blackburn, App., 151 So.2d 325.

Ohio—In re Harris, 163 N.E.2d 762, 170 Ohio St. 151.

30.20. N.Y.—People ex rel. Brunner v. Dominy, 191 N.Y.S.2d 46, 22 Misc.2d 863.

Recital held not fatal

Cal.—Application of Morgan, 53 Cal.Rptr. 642, 244 C.A.2d 903.

30.30. Fla.—Clarke v. Blackburn, App., 151 So.2d 325.

31. Ala.—State v. West, 178 So.2d 182, 42 Ala.App. 678.

Alaska—Kostic v. Smedley, 522 P.2d 535.

Demand under Reciprocal Enforcement of Support Act

Cal.—Application of Morgan, 53 Cal.Rptr. 642, 244 C.A.2d 903.

page 405**33. Original detainer insufficient**

Ky.—Com. v. Monroe, App., 580 S.W.2d 722.

35. Discretion

Ky.—Burd v. Com., 335 S.W.2d 945.

Ohio—State ex rel. Corbett v. Common Pleas Court of Stark County, 155 N.E.2d 923, 168 Ohio St. 468, cert. den. 79 S.Ct. 1286, 360 U.S. 907, 3 L.Ed.2d 1258, reh. den. 80 S.Ct. 47, 361 U.S. 856, 4 L.Ed.2d 98.

Wash.—State ex rel. Boutwell v. Coughlin, 586 P.2d 1145, 90 Wash.2d 835.

37. Tex.—Ex parte McNeely, Cr., 363 S.W.2d 943.

43. Signing not required

Fla.—Hudson v. State, App., 388 So.2d 577.

page 406**44.5. Under Uniform Reciprocal Enforcement of Support Act**

Me.—Gallant v. State, 356 A.2d 734.

44.15. Fla.—State ex rel. Burnstine v. Purdy, App., 219 So.2d 95.

Colo.—Anderson v. Cronin, 596 P.2d 760, 198 Colo. 103.

Me.—Bouchard v. Richardson, 427 A.2d 490.

Pa.—Com. ex rel. Edgar v. Davis, 228 A.2d 742, 425 Pa. 133—Com. ex rel. Coades v. Gable, 264 A.2d 716, 437 Pa. 553.

Com. v. Inadi, 449 A.2d 753, 303 Pa.Super. 409.

Signature of governor

Ala.—Baugh v. State, 154 So.2d 674, revd. on oth. grds. 154 So.2d 674, 275 Ala. 319.

McGahagin v. State, 131 So.2d 425, 41 Ala.App. 236, cert. den. 131 So.2d 426, 272 Ala. 706.

Fla.—Hudson v. State, App., 388 So.2d 577.

Ill.—People ex rel. Jolley v. Koepfel, 246 N.E.2d 247, 42 Ill.2d 257.

Delegation by governor to review and sign proper

Colo.—Tackett v. Leach, 661 P.2d 1160.

44.20. Colo.—Clark v. Leach, 612 P.2d 1130, 200 Colo. 151.

Minn.—State v. Limberg, 142 N.W.2d 563, 274 Minn. 31.

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N.Y.—People ex rel. Harris v. Warden, New York City Adult Remand Center, 345 N.Y.S.2d 29, 42 A.D.2d 549.

People ex rel. Eisman v. Sheriff of Oneida County, 285 N.Y.S.2d 950, 55 Misc.2d 685, affd. 291 N.Y.S.2d 780, 30 A.D.2d 644.

Tex.—Ex parte Robbins, Cr.App., 575 S.W.2d 27.

Clerical error will not invalidate requisition

Colo.—Wilson v. Johnson, 645 P.2d 21.

Ind.—Andrews v. State, 169 N.E.2d 193, 241 Ind. 180, cert. den. 81 S.Ct. 829, 365 U.S. 861, 5 L.Ed.2d 824.

Ohio—Carpenter v. Jamerson, 432 N.E.2d 177, 69 Ohio St.2d 308, 23 O.O.3d 290.

Minor discrepancies do not invalidate requisition

Colo.—Martello v. Baker, 539 P.2d 1280, 189 Colo. 195.

Conn.—Hill v. Blake, 441 A.2d 841, 186 Conn. 404.

45. Ala.—Martin v. State, Cr., 276 So.2d 149, 50 Ala.App. 1.

Del.—C.J.S. cited in *In re Dean*, 254 A.2d 242, 243.

Idaho—Norton v. State, 470 P.2d 413, 93 Idaho 648, cert. den. 91 S.Ct. 918, 401 U.S. 936, 28 L.Ed.2d 215.

Pa.—Com. ex rel. Berry v. Aytch, 385 A.2d 354, 253 Pa.Super. 312.

Tex.—Ex parte Bresco, Cr., 573 S.W.2d 240.

Requisition held sufficient

(1) Ala.—Holcomb v. State, 207 So.2d 119, 44 Ala. App. 259, cert. den. 207 So.2d 122, 281 Ala. 721.

Ariz.—Application of Dugger, 497 P.2d 413, 17 Ariz. App. 297.

Colo.—Woolsey v. Nelson, 496 P.2d 306, 178 Colo. 144.

Buffalo v. Tanksley, 536 P.2d 827, 189 Colo. 45.

Johnson v. Kiefer, 624 P.2d 894.

Ga.—Frazier v. Grimes, 145 S.E.2d 39, 221 Ga. 375.

Wollweber v. Martin, 172 S.E.2d 605, 226 Ga. 20.

Pahno v. Mathews, 173 S.E.2d 704, 226 Ga. 216.

Kan.—Gladney v. Sheriff of Leavenworth County, 598 P.2d 559, 3 Kan.App.2d 568.

Neb.—Wise v. State, 251 N.W.2d 373, 197 Neb. 831.

N.H.—Smith v. Helgemoe, 369 A.2d 218, 117 N.H. 91.

Or.—State ex rel. Juvenile Dept. of Multnomah County v. Edwards, 516 P.2d 1303, 15 Or.App. 677.

Pa.—Com. ex rel. Edgar v. Davis, 228 A.2d 742, 425 Pa. 133.

Tex.—Ex parte Kovacs, Cr., 416 S.W.2d 420—Ex parte Venable, Cr., 456 S.W.2d 86—Ex parte Ward, Cr., 470 S.W.2d 684—Ex parte Fontes, App., 475 S.W.2d 781—Ex parte Connelly, Cr., 479 S.W.2d 943.

W.Va.—Lott v. Bechtold, 289 S.E.2d 210.

Wis.—State ex rel. Holmes v. Spice, 229 N.W.2d 97, 68 Wis.2d 263.

46. Ala.—Morris v. State, 199 So.2d 675, 43 Ala.App. 660, cert. den. 199 So.2d 677, 281 Ala. 723—Aldio v. State, 208 So.2d 212, 44 Ala.App. 303, cert. den. 208 So.2d 215, 282 Ala. 723.

Peacock v. State, Cr., 265 So.2d 175, 48 Ala. App. 391, certiorari denied 265 So.2d 180, 288 Ala. 748, cert. den. 93 S.Ct. 967, 410 U.S. 910, 35 L.Ed.2d 272.

Ga.—Wollweber v. Martin, 172 S.E.2d 605, 226 Ga. 20.

Requisition or demand and accompanying papers held sufficient

U.S.—U.S. ex rel. Robinson v. Koson, D.C.N.Y., 315 F.Supp. 1.

Ala.—Johnson v. State, 222 So.2d 370, 45 Ala.App. 40.

Martin v. State, Cr., 276 So.2d 149, 50 Ala.App. 1.

Colo.—Eathorne v. Nelson, 505 P.2d 1, 180 Colo. 288.

Fla.—Pecnik v. Blackburn, App., 132 So.2d 604.

Ga.—Clonts v. Stynchcombe, 194 S.E.2d 94, 229 Ga. 672—Wheeler v. Stynchcombe, 215 S.E.2d 244, 234 Ga. 240.

Ill.—People ex rel. Banks v. Farner, 233 N.E.2d 360, 39 Ill.2d 176.

N.Y.—People ex rel. Scarlett v. Taylor, 245 N.Y.S.2d 498, 20 A.D.2d 152.

Tex.—Ex parte Higgins, 338 S.W.2d 717, 170 Tex.Cr.R. 21—Ex parte Renfro, 350 S.W.2d 655, 171 Tex. Cr.R. 454.

Utah—Birmingham v. Larson, 490 P.2d 893, 26 Utah2d 414.

Wis.—State v. Hughes, 229 N.W.2d 655, 68 Wis.2d 662.

Interstate juvenile compact

(1) In general.

D.C.—Matter of G. C. S., App., 360 A.2d 498.

Tenn.—State ex rel. Needham v. Ford, 376 S.W.2d 486, 213 Tenn. 582.

(2) Requisition held invalid.

Tenn.—State ex rel. Needham v. Ford, 376 S.W.2d 486, 213 Tenn. 582.

The Uniform Criminal Extradition Law does not require that the demand be accompanied by all documents referred to, since the various requirements are alternatives and not cumulative.^{46.5}

46.5. Fla.—Pecnik v. Blackburn, App., 132 So.2d 604.

47. Fla.—Pecnik v. Blackburn, App., 132 So.2d 604.

Idaho—Jacobsen v. State, 577 P.2d 24, 99 Idaho 45.

Minn.—State v. Limber, 142 N.W.2d 563, 274 Minn. 31—State ex rel. Keller v. LeVander, 168 N.W.2d 491, 283 Minn. 461.

Or.—State ex rel. Eggleston v. Hatrak, 636 P.2d 1017, 54 Or.App. 974.

Pa.—Com. ex rel. Raucei v. Price, 185 A.2d 523, 409 Pa. 90—Com. ex rel. Edgar v. Davis, 228 A.2d 742, 425 Pa. 133.

Com. ex rel. Hatcher v. Reeder, 46 Erie 92.

Demand and accompanying papers held sufficient

(1) Cal.—In re Russell, 115 Cal.Rptr. 511, 524 P.2d 1295, 12 C.3d 229.

Ga.—McCullough v. Stynchcombe, 252 S.E.2d 453, 243 Ga. 24.

Or.—Grant v. Shobe, 524 P.2d 550, 18 Or.App. 188.

Tex.—Ex parte Trisler, Cr.App., 605 S.W.2d 619.

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47.10. U.S.—U.S. ex rel. Vitiello v. Flood, C.A.N.Y., 374 F.2d 554.

N.J.—Application of DeGina, 228 A.2d 74, 94 N.J.Super. 267.

N.Y.—People ex rel. McGill v. Wright, 307 N.Y.S.2d 964, 62 Misc.2d 154, affd. 314 N.Y.S.2d 128, 34 A.D.2d 1108.

47.15. Fla.—Blackburn v. Munson, App., 155 So.2d 730.

Pa.—Com. ex rel. Hatcher v. Reeder, 46 Erie 92.

47.20. Colo.—Wynsma v. Leach, 536 P.2d 817, 189 Colo. 59.

Ga.—Willard v. Hutson, 276 S.E.2d 611, 247 Ga. 430.

Tex.—Ex parte McComb, 332 S.W.2d 575, 169 Tex. Cr.R. 8.

Affidavit of district attorney held to be sufficient

Ill.—People ex rel. Lacanski v. Backes, 169 N.E.2d 80, 19 Ill.2d 541.

47.25. Ill.—Newman v. Elrod, 391 N.E.2d 37, 28 Ill.2d 838, 72 Ill.App.3d 616, cert. den. 100 S.Ct. 1338, 445 U.S. 942, 63 L.Ed.2d 776.

Me.—Olson v. Thurston, 393 A.2d 1320.

Mich.—People v. Rayborn, 171 N.W.2d 460, 18 Mich. App. 468.

Minn.—State ex rel. Brown v. Telandier, 163 N.W.2d 858, 282 Minn. 209.

R.I.—Salvail v. Sharkey, 271 A.2d 814, 108 R.I. 63.

Requisition held sufficient to charge crime

Ala.—Johnson v. State, 222 So.2d 370, 45 Ala.App. 40.

Colo.—Bartz v. Capra, 423 P.2d 25, 161 Colo. 503—McCoy v. Cronin, 531 P.2d 379, 187 Colo. 364.

N.Y.—People ex rel. Miller v. Hoy, 232 N.Y.S.2d 134.

People ex rel. O'Dell v. Quinlan, 366 N.Y.S.2d 531, 81 Misc.2d 271.

Requisition held insufficient

Ala.—Battles v. State, Cr.App., 389 So.2d 957, writ den., Sup., 389 So.2d 960, cert. den. 101 S.Ct. 3059, 452 U.S. 920, 69 L.Ed.2d 426.

Mich.—Campbell v. Bell, 166 N.W.2d 267, 15 Mich. App. 210.

Tex.—Ex parte Juarez, Cr., 412 S.W.2d 444.

Wash.—State v. Hershey, 641 P.2d 1201, 31 Wash.App. 366.

Requisition not inconsistent with accompanying papers

Ill.—People ex rel. Jolley v. Koepfel, 246 N.E.2d 247, 42 Ill.2d 257.

Hearing establishing probable cause equivalent to indictment

Colo.—Pippin v. Leach, 534 P.2d 1193, 188 Colo. 385.

48.5. Neb.—Singleton v. Adams, 298 N.W.2d 369, 207 Neb. 293.

48.10. Colo.—Morgan v. Miller, 593 P.2d 357, 197 Colo. 341.

Fla.—Pecnik v. Blackburn, App., 132 So.2d 604.

Kan.—Ellis v. Darr, 640 P.2d 361, 7 Kan.App.2d 285.

Statement held sufficient

Colo.—Wynsma v. Leach, 536 P.2d 817, 189 Colo. 59—Protz v. Watson, 571 P.2d 719, 194 Colo. 223.

Ill.—In re Leonard, 327 N.E.2d 480, 27 Ill.App.3d 870.

Mich.—In re Simmans, 220 N.W.2d 311, 54 Mich.App. 112.

N.H.—Martel v. Knight, 400 A.2d 478, 119 N.H. 190.

Wis.—State ex rel. Clayton v. Wolke, 230 N.W.2d 869, 69 Wis.2d 363.

Statement held insufficient

Fla.—Blasi v. State, App., 192 So.2d 307.

Alternate statutory grounds sufficient

Colo.—Norrod v. Bower, 532 P.2d 330, 187 Colo. 421.

49. Colo.—Wynsma v. Leach, 536 P.2d 817, 189 Colo. 59.

50. Kan.—Longoria v. Sheriff of Leavenworth County, 589 P.2d 607, 225 Kan. 248.

Different documents are necessary to support extradition of one charged with a crime as contrasted with one who is claimed to have escaped from confinement or broken terms of parole, bail, or probation.

50.5. Minn.—State v. Limberg, 142 N.W.2d 563, 274 Minn. 31—State ex rel. Keller v. LeVander, 168 N.W.2d 491, 283 Minn. 461.

Tenn.—Ratliff v. Thomas, Cr.App., 652 S.W.2d 919.

page 408**50.15. Clerical error insufficient to invalidate requisition**

Alaska—Smedley v. Holt, 541 P.2d 17.

51. U.S.—Zambito v. Blair, C.A.W.Va., 610 F.2d 1192, cert. den. 100 S.Ct. 1316, 445 U.S. 928, 63 L.Ed.2d 761.

N.H.—Smith v. Helgemoe, 369 A.2d 218, 117 N.H. 91.

52. Additional time not allowed

Colo.—Moog v. Williams, 577 P.2d 6, 195 Colo. 237.

52.10. Minn.—Gayles v. Hedman, 244 N.W.2d 154, 309 Minn. 289.

52.15. Me.—Poulin v. Bonenfant, 251 A.2d 436.

N.H.—Reeves v. Cox, 385 A.2d 847, 118 N.H. 271.

Extradition papers sufficient to identify prisoner

Colo.—Cates v. Cronin, 570 P.2d 524, 194 Colo. 89.

N.H.—Smith v. Helgemoe, 369 A.2d 218, 117 N.H. 91.

Pa.—Com. ex rel. Pizzo v. Aytch, 416 A.2d 1086, 373 Pa.Super. 55.

Name different

Colo.—Ramos v. Bower, 602 P.2d 4, 198 Colo. 473.

52.20. Presumption of identity

Ill.—Newman v. Elrod, 391 N.E.2d 37, 28 Ill.Dec. 838, 72 Ill.App.3d 616, cert. den. 100 S.Ct. 1338, 445 U.S. 942, 63 L.Ed.2d 776.

54. Fla.—Moore v. State, App. 3 Dist., 407 So.2d 991. Minn.—State ex rel. Doherty v. Duggan, 218 N.W.2d 759, 300 Minn. 528.

Pa.—Com. ex rel. McCaine v. Gedney, 352 A.2d 72, 237 Pa.Super. 499.

§ 14(1). — Accompanying Indicator Affidavit

55.50. Colo.—Burnette v. McClearn, 427 P.2d 331, 162 Colo. 503—White v. Leach, 532 P.2d 740, 188 Colo. 62.

Fla.—Salazar v. Sandstrom, App., 355 So.2d 145.

Ga.—DeWitt v. O'Neal, 171 S.E.2d 144, 225 Ga. 645.

Idaho.—Jacobsen v. State, 577 P.2d 24, 99 Idaho 45.

Minn.—State v. Limberg, 142 N.W.2d 563, 274 Minn. 31.

N.Y.—People ex rel. Butler v. Flood, 287 N.Y.S.2d 150, 29 A.D.2d 692—People ex rel. Cosel v. McMahon, 357 N.Y.S.2d 30, 45 A.D.2d 769.

People ex rel. Eiseman v. Sheriff of Oneida County, 285 N.Y.S.2d 950, 55 Misc.2d 685, affd. 291 N.Y.S.2d 780, 30 A.D.2d 644.

Vt.—Deyo v. Snelling, 428 A.2d 1117, 139 Vt. 341.

Tex.—Ex parte Sanchez, Cr., 605 S.W.2d 289.

Supporting documents accompanying requisition held sufficient

(1) U.S.—Smith v. State of Idaho, C.A.Idaho, 373 F.2d 149, cert. den. 87 S.Ct. 2139, 388 U.S. 919, 18 L.Ed.2d 1364.

Ala.—Morris v. State, 199 So.2d 675, 43 Ala.App. 660, cert. den. 199 So.2d 677, 281 Ala. 723.

Ariz.—Application of Kirk, 431 P.2d 678, 6 Ariz.App. 238.

Colo.—Threadgill v. Capra, 423 P.2d 318, 161 Colo. 453—Davis v. People, 474 P.2d 206, 172 Colo. 486—People v. Jackson, 502 P.2d 1106.

Conn.—Bloom v. Lundburg, 175 A.2d 568, 149 Conn. 67, cert. den. 82 S.Ct. 831, 369 U.S. 819, 7 L.Ed.2d 785.

Idaho—Kerr v. Watson, App., 649 P.2d 1234, 103 Idaho 478.

Ill.—People ex rel. Banks v. Farnier, 233 N.E.2d 360, 39 Ill.2d 176—People ex rel. Jolley v. Koepfel, 246 N.E.2d 247, 42 Ill.2d 257.

People ex rel. Abeles v. Elrod, 326 N.E.2d 443, 27 Ill.App.2d 155, cert. den. 96 S.Ct. 1113, 424 U.S. 914, 47 L.Ed.2d 318.

Nev.—Martinez v. Sheriff of Clark County, 527 P.2d 1200, 90 Nev. 371.

N.Y.—People ex rel. Perry v. Flynn, 397 N.Y.S.2d 245, 59 A.D.2d 591.

N.D.—Wilkins v. Granrud, 178 N.W.2d 644.

Okla.—In re Chenoweth, Cr., 432 P.2d 132.

Pa.—Com. ex rel. Ebbole v. Robinson, 299 A.2d 47, 223 Pa.Super. 119—Com. v. Inadi, 449 A.2d 753, 303 Pa.Super. 409.

Tex.—Ex parte Peterson, Cr., 409 S.W.2d 851—Ex parte DeFoy, Cr., 417 S.W.2d 168—Ex parte Sutton, Cr., 455 S.W.2d 274—Ex parte Drennan, Cr., 461 S.W.2d 420—Ex parte Rhodes, Cr., 467 S.W.2d 425—Ex parte Beckham, Cr., 468 S.W.2d 446—Ex parte Case, Cr., 485 S.W.2d 561.

Ex parte McDonald, App. 2 Dist., 631 S.W.2d 222, review ref., cert. den. 103 S.Ct. 1193, 459 U.S. 1205, 75 L.Ed.2d 438.

Wis.—State ex rel. Sieloff v. Golz, 258 N.W.2d 700, 80 Wis.2d 225.

(4) Other matters.

Ala.—Tyner v. State, Cr., 346 So.2d 493, cert. den. Ex parte Tyner, 346 So.2d 496.

Ga.—Mitchell v. Dodd, 235 S.E.2d 15, 238 Ga. 638.

La.—In re Chelette, 116 So.2d 293, 238 La. 683.

Tex.—Ex parte Flores, Cr., 548 S.W.2d 31.

Under Reciprocal Enforcement of Support Act
Cal.—Application of Morgan, 53 Cal.Rptr. 642, 244 C.A.2d 903.**Statute construed**

Mass.—In re Moore, 313 N.E.2d 893, 2 Mass.App. 399.

Under Uniform Criminal Extradition Act

Kan.—McCullough v. Darr, 548 P.2d 1245, 219 Kan. 477.

Supporting documents held insufficient

Colo.—Moog v. Williams, 577 P.2d 6, 195 Colo. 237.

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56. U.S.—Smith v. State of Idaho, C.A.Idaho, 373 F.2d 149, cert. den. 87 S.Ct. 2139, 388 U.S. 919, 18 L.Ed.2d 1364.

Horne v. Wilson, D.C.Tenn., 316 F.Supp. 247.

Ala.—State v. West, 178 So.2d 182, 42 Ala.App. 678.

Colo.—People v. Jackson, 502 P.2d 1106.

Ga.—Batton v. Griffin, 241 S.E.2d 201, 240 Ga. 450.

Ill.—People v. DeSpain, 433 N.E.2d 748, 62 Ill.Dec. 722, 106 Ill.App.3d 934.

Ind.—Sumner v. Lovellette, 256 N.E.2d 681, 253 Ind. 675.

Kan.—Greenbaum v. Darr, 552 P.2d 993, 220 Kan. 525.

Me.—Sawyer v. State, 382 A.2d 1039.

Mich.—People v. Rayborn, 171 N.W.2d 460, 18 Mich. App. 468.

Minn.—State ex rel. Brown v. Telander, 163 N.W.2d 858, 282 Minn. 209.

N.Y.—People ex rel. Cook v. Gavel, 377 N.Y.S.2d 839, 51 A.D.2d 641.

N.C.—Dodd v. State, 287 S.E.2d 435, 56 N.C.App. 214.

Or.—Fisco v. Clark, 414 P.2d 331, 243 Or. 466.

Pa.—Com. ex rel. Wilson v. Ague, 39 D. & C.2d 316.

Tenn.—State ex rel. Jones v. Gann, Cr.App., 584 S.W.2d 235.

Tex.—Ex parte Ivy, Cr., 419 S.W.2d 862—Ex parte Preston, Cr., 434 S.W.2d 136—Ex parte Clubb, Cr., 447 S.W.2d 185—Ex parte Case, Cr., 485 S.W.2d 561—Ex parte Hernandez, Cr., 486 S.W.2d 299.

Utah—Ludahl v. Larson, 586 P.2d 439.

W.Va.—Locke v. Burns, 238 S.E.2d 536, 160 W.Va. 753.

Wis.—State ex rel. Sieloff v. Golz, 258 N.W.2d 700, 80 Wis.2d 225.

Purpose of requirement, etc.

(2) To establish probable cause that crime committed in demanding state.

Nev.—Martinez v. Sheriff of Clark County, 527 P.2d 1200, 90 Nev. 371.

(3) To show that charge was regularly made.

Tex.—Ex parte Rosenthal, Cr., 515 S.W.2d 114.

Indictment controlling

Colo.—Fox v. People, 420 P.2d 412, 161 Colo. 163.

Probable cause not required

Colo.—Eathorne v. Nelson, 505 P.2d 1, 180 Colo. 288.

Colo.—White v. Leach, 532 P.2d 740, 188 Colo. 62.

Conn.—Hill v. Blake, 441 A.2d 841, 186 Conn. 404.

Accused substantially charged

Colo.—White v. Leach, 532 P.2d 740, 188 Colo. 62.

Conn.—Hill v. Blake, 441 A.2d 841, 186 Conn. 404.

Accompanying document cured deficiencies in demand

Ill.—In re Leonard, 327 N.E.2d 480, 27 Ill.App.3d 870.

Indictment not required

Kan.—McCullough v. Darr, 548 P.2d 1245, 219 Kan. 477.

Conclusory affidavit insufficient

Wis.—State ex rel. Sieloff v. Golz, 258 N.W.2d 700, 80 Wis.2d 225.

56.5 Conn.—Crew v. State, 486 A.2d 664, 40 Conn. Sup. 179.

N.Y.—People ex rel. Eiseman v. Sheriff of Oneida County, 285 N.Y.S.2d 950, 55 Misc.2d 685, affd. 291 N.Y.S.2d 780, 30 A.D.2d 644.

56.10. U.S.—Smith v. State of Idaho, C.A.Idaho, 373 F.2d 149, cert. den. 87 S.Ct. 2139, 388 U.S. 919, 18 L.Ed.2d 1364.

Colo.—People v. Jackson, 502 P.2d 1106—McCoy v. Cronin, 531 P.2d 379, 187 Colo. 364.

Minn.—State ex rel. Brown v. Telander, 163 N.W.2d 858, 282 Minn. 209.

Absence of indictment, etc.

U.S.—U.S. ex rel. Vitiello v. Flood, C.A.N.Y., 374 F.2d 554.

Cal.—In re Russell, 115 Cal.Rptr. 511, 524 P.2d 1295, 12 C.3d 229.

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56.15. Kan.—Greenbaum v. Darr, 552 P.2d 993, 220 Kan. 525.

N.Y.—People ex rel. Coryell v. Flood, 322 N.Y.S.2d 162, 36 A.D.2d 977.

In re Taylor, 323 N.Y.S.2d 428, 66 Misc.2d 1006.

56.25. To establish probable cause

Colo.—Anderson v. Cronin, 596 P.2d 760, 198 Colo. 103.

57. N.Y.—People ex rel. Grice v. Wright, 301 N.Y. S.2d 706, 60 Misc.2d 488.

59.5. Tex.—Ex parte Green, Cr., 437 S.W.2d 859.

59.10. Tex.—Ex parte Felker, 336 S.W.2d 161, 169 Tex.Cr.R. 607—Ex parte Slavlin, Cr., 461 S.W.2d 421.

Failure to furnish copies not error in absence of request therefor

Tex.—Ex parte Dodson, Cr., 387 S.W.2d 406—Ex parte Grant, Cr., 480 S.W.2d 639.

Substantial compliance shown

Tex.—Ex parte Dodson, Cr., 387 S.W.2d 406.

59.15. Tex.—Ex parte Thompson, 351 S.W.2d 890, 171 Tex.Cr.R. 509—Ex parte Kronhaus, Cr., 410 S.W.2d 442—Ex parte Rochester, Cr., 417 S.W.2d 291.

59.20. Cal.—Application of Morgan, 53 Cal.Rptr. 642, 244 C.A.2d 903.

Idaho—Fenton v. State, 417 P.2d 415, 91 Idaho 149.

Tex.—Ex parte Evans, Cr., 411 S.W.2d 367—Ex parte Baker, Cr., 465 S.W.2d 379.

§ 14(2). — Other Instruments Charging Crime

59.50. Colo.—Simmons v. Leach, 626 P.2d 164.

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59.55. Ark.—Carrico v. Pearson, 555 S.W.2d 951, 262 Ark. 278.

59.60. Tex.—Ex parte Gideon, Cr., 493 S.W.2d 156.

59.65. N.Y.—People ex rel. Fuller v. Chaufy, 213 N.Y.S.2d 841, 27 Misc.2d 1047—People ex rel. Leo v. Hoy, 225 N.Y.S.2d 412.

Tex.—Ex parte Blazier, Cr., 435 S.W.2d 506.

Probable cause shown

N.H.—Smith v. Helgemoe, 369 A.2d 218, 117 N.H. 91.

59.70. Colo.—Allen v. Leach, 626 P.2d 1141.

59.75. Mo.—State ex rel. Danforth v. Bondurant, 566 S.W.2d 478.

59.80. Tex.—Ex parte Baker, Cr., 465 S.W.2d 379.

Judgment, sentence and statement of Governor satisfied requirements

Ill.—People ex rel. Agee v. Elrod, 418 N.E.2d 145, 49 Ill.Dec. 501, 93 Ill.App.3d 1038.

60. Conn.—Crew v. State, 486 A.2d 664, 40 Conn. Sup. 179.

Kan.—Greenbaum v. Darr, 552 P.2d 993, 220 Kan. 525.

Minn.—State ex rel. Brown v. Telander, 163 N.W.2d 858, 282 Minn. 209.

Miss.—Corkern v. State, 269 So.2d 630.

In New York

(5) Other statements.

N.Y.—People ex rel. Eiseman v. Sheriff of Oneida County, 285 N.Y.S.2d 950, 55 Misc.2d 685, affd. 291 N.Y.S.2d 780, 30 A.D.2d 644—People ex rel. Gondolfo v. Lindemann, 313 N.Y.S.2d 786, 63 Misc.2d 773, affd. 314 N.Y.S.2d 702, 34 A.D.2d 1105.

In Texas

(2) Tex.—Ex parte Posey, Cr., 453 S.W.2d 833—Ex parte Bowman, Cr., 480 S.W.2d 675.

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(6) Showing that felony may be prosecuted on information in demanding state not required.

Tex.—Ex parte Connelly, Cr., 479 S.W.2d 943—Ex parte Wammack, Cr., 482 S.W.2d 859.

(7) Other matters.

Tex.—Ex parte Fisher, 327 S.W.2d 579, 168 Tex. Cr. 336—Ex parte Fant, Cr., 400 S.W.2d 332.

List of witnesses not essential

Ga.—Baker v. Smith, 212 S.E.2d 819, 233 Ga. 644.

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61.5. U.S.—Ierardi v. Gunter, C.A.Mass., 528 F.2d 929.

62.10. Del.—Grano v. State, Super., 257 A.2d 768.

62.20. Charge on information and affidavit insufficient

Ala.—Tolbert v. State, Cr., 308 So.2d 740, 54 Ala.App. 381.

62.30. Del.—C.J.S. cited in Grano v. State, Super., 257 A.2d 768, 773.

Tex.—Ex parte Fant, Cr., 400 S.W.2d 332.

62.35. Del.—C.J.S. cited in Grano v. State, Super., 257 A.2d 768, 773.

Tex.—Ex parte Fuller, Cr., 432 S.W.2d 537—Ex parte Drennan, Cr., 461 S.W.2d 420.

62.40. Del.—C.J.S. cited in Grano v. State, Super., 257 A.2d 768, 773.

Tex.—Ex parte Drennan, Cr., 461 S.W.2d 420.

Purpose of affidavits, etc.

N.Y.—People ex rel. Panitz v. Ruthazer, 224 N.Y.S.2d 737, 15 A.2d 800.

N.Y.—People ex rel. Leo v. Hoy, 225 N.Y.S.2d 412.

62.45. Colo.—Fox v. People, 420 P.2d 412, 161 Colo. 163.

Mass.—In re Consalvi, 370 N.E.2d 707, 5 Mass.App. 729, rev'd on oth. grds., 382 N.E.2d 734, 376 Mass. 699.

N.H.—Smith v. Helgemoe, 369 A.2d 218, 117 N.H. 91.

N.Y.—People ex rel. Eiseiman v. Sheriff of Oneida County, 285 N.Y.S.2d 950, 55 Misc.2d 685, aff'd, 291 N.Y.S.2d 780, 30 A.D.2d 644.

S.D.—State ex rel. Hall v. Hawkey, 263 N.W.2d 141.

Tex.—Ex parte Clubb, Cr., 447 S.W.2d 185.

Ex parte McDonald, App. 2 Dist., 631 S.W.2d 222, review ref., cert. den. 103 S.Ct. 1193, 459 U.S. 1205, 75 L.Ed.2d 438.

Wash.—Vetsch v. Sheriff of Spokane County, 546 P.2d 927, 14 Wash.App. 971.

Not applicable when surrender voluntary

Pa.—Com. v. Fennell, 252 A.2d 678, 434 Pa. 232.

Ala.—Rayburn v. State, Cr.App., 366 So.2d 698, aff'd, Sup., 366 So.2d 708.

Ariz.—Powell v. State, 507 P.2d 989, 19 Ariz.App. 377.

Colo.—Norrod v. Bower, 532 P.2d 330, 187 Colo. 421.

Ind.—Dawson v. Beasley, 180 N.E.2d 367, 242 Ind. 536.

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64. N.Y.—People ex rel. Eiseiman v. Sheriff of Oneida County, 285 N.Y.S.2d 950, 55 Misc.2d 685, aff'd, 291 N.Y.S.2d 780, 30 A.D.2d 644.

64.25. Minn.—State v. Limberg, 142 N.W.2d 563, 274 Minn. 31.

66. Ala.—Gage v. State, Cr.App., 397 So.2d 265, writ den., Sup., 397 So.2d 270.

Colo.—Burnette v. McClearn, 427 P.2d 331, 162 Colo. 503—Holmes v. People, 456 P.2d 731, 169 Colo. 371—Blackburn v. Johnson, 647 P.2d 238.

Md.—White v. Hall, 291 A.2d 694, 15 Md.App. 446.

Or.—State ex rel. Yarbrough v. Snider, App., 465 P.2d 739, 2 Or.App. 97.

Tex.—Ex parte Gray, Cr., 426 S.W.2d 241.

67. Colo.—Wynsma v. Leach, 536 P.2d 817, 189 Colo. 59.

68. Ark.—Wilkins v. State, 528 S.W.2d 382, 258 Ark. 578.

Ky.—Com. v. Monroe, App., 580 S.W.2d 722.

Warrant issued without sufficient evidence

Wis.—State v. Towne, 174 N.W.2d 251, 46 Wis.2d 169.

68.5. U.S.—Carrison v. Smith, D.C.Miss., 413 F.Supp. 747.

Colo.—Moore v. Miller, 596 P.2d 64, 198 Colo. 24.

Tex.—Ex parte Mungia, Cr., 478 S.W.2d 440.

Ex parte McDonald, App. 2 Dist., 631 S.W.2d 222, review ref., cert. den. 103 S.Ct. 1193, 459 U.S. 1205, 75 L.Ed.2d 438.

Wis.—State v. Hughes, 229 N.W.2d 655, 68 Wis.2d 662.

Probable cause

Colo.—Thomeczek v. Bray, 600 P.2d 66, 198 Colo. 341.

68.10. Tex.—Ex parte Green, Cr., 437 S.W.2d 859.

Warrant must be issued by magistrate before whom affidavit made

Wis.—State ex rel. Foster v. Uttech, 143 N.W.2d 500, 31 Wis.2d 664, cert. den. 87 S.Ct. 392, 385 U.S. 956, 17 L.Ed.2d 303.

68.15. Tex.—Ex parte Manzella, Cr., 452 S.W.2d 913.

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68.20. N.Y.—People ex rel. Leo v. Hoy, 225 N.Y.S.2d 412.

Wash.—In re Hystad, 660 P.2d 1145, 34 Wash.App. 342.

69. Second information not res judicata

Kan.—McCullough v. Darr, 548 P.2d 1245, 219 Kan. 477.

§ 14(3). — Subsequent Filing of Indictment or Other Pleading

70.10. Alaska—Brown v. State, 518 P.2d 770.

Cal.—Ex parte Cooper, 3 Cal.Rptr. 140, 349 P.2d 956, 53 C.2d 772, app. dism. and cert. den. 81 S.Ct. 104, 364 U.S. 294, 5 L.Ed.2d 83.

Idaho—C.J.S. cited in Fenton v. State, 417 P.2d 415, 417, 91 Idaho 149.

Tex.—Ex parte Edwards, Cr., 502 S.W.2d 148.

§ 14(4). — Affidavit Taken before Magistrate

71. Alaska—Montague v. Smedley, 557 P.2d 774.

Ill.—People ex rel. Gilarmini v. Elrod, 376 N.E.2d 53, 17 Ill.Dec. 160, 59 Ill.App.3d 258.

Pa.—Com. ex rel. Wilson v. Ague, 39 D. & C.2d 316.

Tex.—Ex parte Goodwin, Cr., 384 S.W.2d 874.

However, it has been held that an affidavit does not have to be made before a magistrate.^{72,73}

72.5. Ill.—People ex rel. Agee v. Elrod, 418 N.E.2d 145, 49 Ill.Dec. 501, 93 Ill.App.3d 1038.

Tex.—Ex parte Dumas, Cr., 487 S.W.2d 753.

Before Notary Public

Tex.—Ex parte Wammack, Cr., 482 S.W.2d 859.

74. Ill.—People ex rel. Coats v. Sain, 181 N.E.2d 179, 24 Ill.2d 248.

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74.5. Officials held to be magistrates

(4) Tex.—Ex parte Harry, Cr., 482 S.W.2d 197.

(6) Ill.—People ex rel. Coats v. Sain, 181 N.E.2d 179, 24 Ill.2d 248.

(10) Ky.—Ex parte Noel, 338 S.W.2d 903.

Officials held not to be magistrates

(1) Ala.—Boothe v. State, 180 So.2d 450, 43 Ala. App. 119.

Ill.—People ex rel. Kubala v. Woods, 284 N.E.2d 286, 52 Ill.2d 48.

Tex.—Ex parte Goodwin, Cr., 384 S.W.2d 874.

(6) Ala.—Beasley v. State, 187 So.2d 806, 43 Ala. App. 247.

75. Ga.—Bryant v. Griffin, 137 S.E.2d 640, 220 Ga. 154.

78.10. Idaho—In re Martz, 357 P.2d 940, 83 Idaho 72.

Md.—C.J.S. cited in Campbell v. State, 271 A.2d 190, 194, 10 Md.App. 406.

Tex.—Ex parte McDonald, App. 2 Dist., 631 S.W.2d 222, review ref., cert. den. 103 S.Ct. 1193, 459 U.S. 1205, 75 L.Ed.2d 438.

78.15. Ala.—Dinkelman v. State, 184 So.2d 845, 43 Ala.App. 177.

§ 14(5). — Authentication

78.50. Ala.—Rayburn v. State, Cr.App., 366 So.2d 698, aff'd, Sup., 366 So.2d 708.

Alaska—Montague v. Smedley, 557 P.2d 774.

Colo.—Keefer v. Leach, 597 P.2d 203, 198 Colo. 101.

Or.—State ex rel. Yarbrough v. Snider, 448 P.2d 379, 252 Or. 35.

Pa.—Com. ex rel. Girus v. Haas, 266 A.2d 94, 439 Pa. 39.

Authentication held sufficient

(1) U.S.—Price v. Pitchess, C.A.Cal., 556 F.2d 926, cert. den. 98 S.Ct. 504, 434 U.S. 965, 54 L.Ed.2d 451, reh. den. 98 S.Ct. 783, 434 U.S. 1041, 54 L.Ed.2d 791.

Ala.—Smith v. State, Cr., 231 So.2d 345, 45 Ala.App. 423—Martin v. State, Cr., 276 So.2d 149, 50 Ala. App. 1.

Griffin v. State, App., 187 So.2d 293, 43 Ala. 237.

Colo.—Hall v. Cronin, 585 P.2d 286, 196 Colo. 333.

Ga.—Wollweber v. Martin, 172 S.E.2d 605, 226 Ga. 20.

Miss.—McEwen v. State, 224 So.2d 206.

Neb.—In re Austin, 186 N.W.2d 723, 186 Neb. 815.

N.H.—Loulakis v. Walker, 176 A.2d 314, 103 N.H. 526.

N.Y.—People ex rel. Arnold v. Hoy, 223 N.Y.S.2d 759, 32 Misc.2d 824.

Or.—Mays v. Shields, 444 P.2d 949, 251 Or. 168.

Pa.—Com. ex rel. Meshel v. Gedney, 384 A.2d 1340, 253 Pa.Super. 274.

Tex.—Ex parte Stanley, Cr., 377 S.W.2d 660, 170 Tex. Cr.R. 445—Ex parte Knoll, 339 S.W.2d 678, 170 Tex. Cr.R. 174—Ex parte Posey, Cr., 453 S.W.2d 833—Ex parte Bradley, Cr., 456 S.W.2d 370—Ex parte Young, Cr., 455 S.W.2d 287.

Utah—Birmingham v. Larson, 490 P.2d 893, 26 Utah2d 414.

Authentication insufficient

Ala.—State v. West, 178 So.2d 182, 42 Ala.App. 678.

Ill.—People v. Evans, 467 N.E.2d 631, 81 Ill.Dec. 760, 126 Ill.App.3d 812.

Authentication by governor only required on "charging" document

Colo.—People v. Lent, 529 P.2d 1317, 187 Colo. 248.

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79. Colo.—Byers v. Leach, 530 P.2d 1276, 187 Colo. 312—Rush v. Baker, 533 P.2d 36, 188 Colo. 136.

Fla.—State ex rel. Gandert v. Roberts, App., 381 So.2d 1191.

Ill.—People ex rel. Dimas v. Shimp, 403 N.E.2d 750, 38 Ill.Dec. 519, 83 Ill.App.3d 150.

Md.—Utt v. Warden, Baltimore City, Jail, 427 A.2d 1092, 48 Md.App. 486, aff'd, 443 A.2d 582, 293 Md. 271.

Mass.—In re Ierardi, 321 N.E.2d 921, 366 Mass. 640.

Mo.—Seger v. Camp, 576 S.W.2d 722.

Or.—State ex rel. Groves v. Mason, 575 P.2d 679, 33 Or.App. 63.

Certification by court

(2) Other instances.

N.Y.—People ex rel. O'Dell v. Quinlan, 366 N.Y.S.2d 531, 81 Misc.2d 271.

Authentication held sufficient

Ala.—Aldio v. State, 208 So.2d 212, 44 Ala.App. 303, cert. den. 208 So.2d 215, 282 Ala. 723.

Ga.—Clonts v. Stynchcombe, 194 S.E.2d 94, 229 Ga. 672.

Photocopy insufficient

Fla.—Palmer v. State, App., 312 So.2d 476.

Authentication insufficient

Fla.—Wheaton v. State, App. 3 Dist., 420 So.2d 604, review den. 426 So.2d 28.

80. Tex.—Ex parte Sawyers, Cr., 409 S.W.2d 424.

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83. Ala.—Griffin v. State, App., 187 So.2d 293, 43 Ala.App. 237.

85. Colo.—Burnette v. McLearn, 427 P.2d 331, 162 Colo. 503.

Wis.—C.J.S. cited in State ex rel. Clayton v. Wolke, 230 N.W.2d 869, 872, 69 Wis.2d 363.

State seal

Ga.—Baker v. Smith, 212 S.E.2d 819, 233 Ga. 644. Tex.—Ex parte Renfro, 350 S.W.2d 655, 171 Tex.Cr.R. 454.

86. Fla.—Pecnik v. Blackburn, App., 132 So.2d 604. Mich.—Williams v. Wayne County Sheriff, 235 N.W.2d 552, 395 Mich. 204.

86.10. Colo.—Griffith v. Nelson, 647 P.2d 228.

§ 14(6). — Sufficiency of Accompanying Papers Charging Crime

87.50. Del.—C.J.S. cited in Grano v. State, Super., 257 A.2d 768, 774.

Ga.—Watson v. Stynchcombe, 240 S.E.2d 56, 24 Ga. 169.

Ill.—People ex rel. Lance v. Elrod, 315 N.E.2d 602, 21 Ill.App.3d 786.

S.D.—State ex rel. Hall v. Hawkey, 263 N.W.2d 141. Tex.—Ex parte McMillan, Cr., 482 S.W.2d 640.

Variance not fatal

Tex.—Ex parte Brito, 358 S.W.2d 122, 172 Tex.Cr.R. 409.

Variance as to date of offense

Tex.—Ex parte Bowman, Cr., 480 S.W.2d 675.

Indictment sufficient

Colo.—Samples v. Cronin, 536 P.2d 306, 189 Colo. 40.

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88. U.S.—Horne v. Wilson, D.C.Tenn., 316 F.Supp. 247.

Ala.—Monroe v. State, Cr.App., 400 So.2d 753, writ den. 400 So.2d 757, cert. den. 102 S.Ct. 482, 454 U.S. 943, 70 L.Ed.2d 252.

Ark.—Glover v. State, 515 S.W.2d 641, 257 Ark. 241. Colo.—Nevard v. Conn, 529 P.2d 305, 187 Colo. 168.

Ind.—Masden v. State, 355 N.E.2d 398, 265 Ind. 428. Mich.—Williams v. Wayne County Sheriff, 235 N.W.2d 552, 395 Mich. 204.

Minn.—State ex rel. Brown v. Telander, 163 N.W.2d 858, 282 Minn. 209.

Miss.—Taylor v. Garrison, 329 So.2d 506.

N.Y.—People ex rel. Grant v. Doherty, 247 N.Y.S.2d 759, 42 Misc.2d 239, revd. on oth. grds. 251 N.Y. S.2d 596, 21 A.D.2d 829.

Okl.—Starks v. Turner, Cr., 365 P.2d 564.

Pa.—Com. ex rel. Marshall v. Gedney, 352 A.2d 528, 237 Pa.Super. 372, affd. 386 A.2d 942, 478 Pa. 299, 90 A.L.R.3d 1074.

Tex.—Ex parte Terranova, 341 S.W.2d 650.

Ex parte Preston, Cr., 434 S.W.2d 136—Ex parte Wiggins, Cr., 435 S.W.2d 517—Ex parte Chapman, Cr., 435 S.W.2d 529.

Tex.—Ex parte Williams, App., 622 S.W.2d 482, review ref.

Underlying facts and circumstances to be set forth

Colo.—Hithe v. Nelson, 471 P.2d 596, 172 Colo. 179.

89. Alaska.—Brown v. State, 518 P.2d 770.

Cal.—In re Golden, 135 Cal.Rptr. 512, 65 C.A.3d 789, cert. den. 98 S.Ct. 35, 434 U.S. 805, 54 L.Ed.2d 63.

Colo.—Dressel v. Blanco, 452 P.2d 756, 168 Colo. 517—Hithe v. Nelson, 471 P.2d 596, 172 Colo. 179—Patrick v. Watson, 576 P.2d 1014, 195 Colo. 156.

Del.—Grano v. State, Super., 257 A.2d 768.

Fla.—State ex rel. Dyer v. Wilson, App., 260 So.2d 241. Ill.—People ex rel. Ritholz v. Sain, 180 N.E.2d 464, 24 Ill.2d 168.

Ky.—Squadroni v. Smith, 349 S.W.2d 700.

Me.—Olson v. Thurston, 393 A.2d 1320.

Nev.—Sheriff, Clark County v. Thompson, 452 P.2d 911, 85 Nev. 211.

N.Y.—People ex rel. Gondolfo v. Lindemann, 313 N.Y. S.2d 786, 63 Misc.2d 773, affd. 314 N.Y.S.2d 702, 34 A.D.2d 1105.

Or.—Fisco v. Clark, 414 P.2d 331, 243 Or. 466.

Pa.—Com. ex rel. Crist v. Price, 175 A.2d 852, 405 Pa. 384.

S.D.—Wellington v. State, 238 N.W.2d 499, 90 S.D. 153.

Tenn.—State ex rel. Ezell v. Evatt, Cr., 512 S.W.2d 673.

Tex.—Ex parte Harrison, Cr., 469 S.W.2d 571—Ex parte Ward, Cr., 470 S.W.2d 684—Ex parte Brice, Cr., 472 S.W.2d 163.

Ex parte Smith, App., 624 S.W.2d 671.

Utah.—Birmingham v. Larson, 490 P.2d 893, 26 Utah2d 414.

Charge held sufficient

(1) U.S.—U.S. ex rel. Robinson v. Koson, D.C.N.Y., 315 F.Supp. 1.

Ark.—Glover v. State, 515 S.W.2d 641, 257 Ark. 241. Cal.—Application of Morgan, 53 Cal.Rptr. 642, 244 C.A.2d 903.

Colo.—Bellias v. Phillips, 460 P.2d 233, 170 Colo. 212—Graham v. Vanderhoof, 524 P.2d 611, 185 Colo. 334.

Fla.—Buchanan v. State ex rel. Sowerwine, App., 171 So.2d 564.

Ga.—Adams v. Griffin, 169 S.E.2d 325, 225 Ga. 445—Wollweber v. Martin, 172 S.E.2d 605, 226 Ga. 20.

Idaho—Cope v. State, 402 P.2d 970, 89 Idaho 64—Smith v. State, 403 P.2d 221, 89 Idaho 70, cert. den. 86 S.Ct. 906, 383 U.S. 916, 15 L.Ed.2d 669—Richardson v. State, 414 P.2d 871, 90 Idaho 566—Fenton v. State, 417 P.2d 415, 91 Idaho 149.

Ill.—People ex rel. Halley v. Willis, 262 N.E.2d 480, 46 Ill.2d 29—People ex rel. Kubala v. Woods, 284 N.E.2d 286, 52 Ill.2d 48.

Ind.—Bailey v. Cox, 296 N.E.2d 422, 260 Ind. 448. Me.—Poulin v. Bonenfant, 251 A.2d 436.

Md.—Haynes v. Sheriff of Washington County, 252 A.2d 807, 253 Md. 278.

N.J.—In re Colasanti, 249 A.2d 1, 104 N.J.Super. 122. N.Y.—People ex rel. Davis v. Skinner, 327 N.Y.S.2d 124, 38 A.D.2d 673, affd., 281 N.E.2d 561, 30 N.Y.2d 564, 330 N.Y.S.2d 620.

People ex rel. Leo v. Hoy, 225 N.Y.S.2d 412.

Pa.—Com. ex rel. Ebbale v. Robinson, 299 A.2d 47, 223 Pa.Super. 119.

R.I.—Salvail v. Sharkey, 271 A.2d 814, 108 R.I. 63. Tex.—Ex parte Carroll, 351 S.W.2d 228, 171 Tex.Cr.R. 462—Ex parte Drake, Cr., 363 S.W.2d 781—Ex parte Browder, Cr., 373 S.W.2d 751—Ex parte Malone, Cr., 378 S.W.2d 330—Ex parte Powers, Cr., 391 S.W.2d 413—Ex parte Blazier, Cr., 435 S.W.2d 506—Ex parte Green, Cr., 437 S.W.2d 859—Ex parte Corley, Cr., 439 S.W.2d 668—Ex parte Weiner, Cr., 472 S.W.2d 773—Ex parte Fontes, Cr., 472 S.W.2d 781—Ex parte Harry, Cr., 482 S.W.2d 197.

Ex parte Williams, App., 622 S.W.2d 482, review ref.

(2) Iowa.—Evans v. Rosenberger, 181 N.W.2d 152.

Charge held insufficient

Ala.—Smith v. State, 226 So.2d 668, 45 Ala.App. 125, app. after remand 231 So.2d 345, 45 Ala.App. 423.

Colo.—Buhler v. People, 377 P.2d 748, 151 Colo. 345.

Ill.—People ex rel. Ritholz v. Sain, 180 N.E.2d 464, 24 Ill.2d 168.

Minn.—State ex rel. Keller v. LeVander, 168 N.W.2d 491, 283 Minn. 461.

N.Y.—People ex rel. Hodges v. Silberglitt, 201 N.Y.S.2d 991, 11 A.D.2d 681—People ex rel. Leo v. Hoy, 225 N.Y.S.2d 412.

Pa.—Com. ex rel. Casterline v. Mock, 55 Luz.L.Reg. 259.

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Reading affidavit with information

N.Y.—People ex rel. Leo v. Hoy, 225 N.Y.S.2d 412.

Ex parte affidavit

U.S.—Walden v. Mosley, D.C.Miss., 312 F.Supp. 855.

Duty of demanding state

Colo.—Pickinpaugh v. Lamm, 538 P.2d 113, 189 Colo. 143.

Allegations in supporting rather than charging documents

Fla.—State v. Soto, 423 So.2d 362.

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89.5. Colo.—Patrick v. Watson, 576 P.2d 1014, 195 Colo. 156.

N.Y.—State ex rel. Mallin v. Wilson, 360 N.Y.S.2d 579, 79 Misc.2d 575.

Pa.—Com. ex rel. Hulse v. Gedney, 402 A.2d 551, 265 Pa.Super. 505.

89.15. Pa.—Com. ex rel. Edgar v. Davis, 228 A.2d 742, 425 Pa. 133.

91. U.S.—Horne v. Wilson, D.C.Tenn., 316 F.Supp. 247.

91.5. Kan.—McCullough v. Darr, 548 P.2d 1245, 219 Kan. 477.

Mich.—Williams v. Wayne County Sheriff, 235 N.W.2d 552, 395 Mich. 204.

Validity not affected

Colo.—Pickinpaugh v. Lamm, 538 P.2d 113, 189 Colo. 143.

92. Act not crime in asylum state of at common law

Tex.—Ex parte Brice, Cr., 472 S.W.2d 163.

94. U.S.—Garrison v. Smith, D.C.Miss., 413 F.Supp. 747.

Ga.—Collins v. Stynchcombe, 177 S.E.2d 682, 226 Ga. 776.

Tex.—Ex parte Rosenthal, Cr., 515 S.W.2d 114.

95. Md.—Miller v. Warden, Baltimore City Jail, 287 A.2d 57, 14 Md.App. 377.

Or.—Ault v. Purcell, 519 P.2d 1285, 16 Or.App. 664, cert. den. 95 S.Ct. 106, 419 U.S. 858, 42 L.Ed.2d 92.

Tenn.—McLaughlin v. State, Cr., 512 S.W.2d 657.

Tex.—Ex parte Green, Cr., 437 S.W.2d 859.

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96. U.S.—Zambito v. Blair, C.A.W.Va., 610 F.2d 1192, cert. den. 100 S.Ct. 1316, 445 U.S. 928, 63 L.Ed.2d 761.

Ariz.—Rogers v. Boies, 478 P.2d 92, 106 Ariz. 468. Colo.—Gerard v. Ossola, 649 P.2d 1110.

Md.—C.J.S. cited in Koprivich v. Warden of Baltimore City Jail, 200 A.2d 49, 51, 234 Md. 465—Haynes v. Sheriff of Washington County, 252 A.2d 807, 253 Md. 278.

Campbell v. State, 271 A.2d 190, 10 Md.App. 406.

Pa.—Com. ex rel. Hulse v. Gedney, 402 A.2d 551, 265 Pa.Super. 505.

Tex.—Ex parte Corley, Cr., 439 S.W.2d 668—Ex parte Baker, Cr., 465 S.W.2d 379—Ex parte Collins, Cr., 468 S.W.2d 409—Ex parte Weiner, Cr., 472 S.W.2d 773—Ex parte Bowman, Cr., 480 S.W.2d 675—Ex parte Harry, Cr., 482 S.W.2d 197—Ex parte Dumas, Cr., 487 S.W.2d 753—C.J.S. cited in Contreras v. State, Cr.App., 587 S.W.2d 723, 724.

Legality of revocation, etc.

(2) Other matters.

Ala.—Moody v. State, App., 201 So.2d 650, 44 Ala. App. 26, cert. den. 201 So.2d 654, 281 Ala. 723.

97. U.S.—U.S. ex rel. Davis v. Behagen, C.A.N.Y., 436 F.2d 596.

Davis v. Behagen, D.C.N.Y., 321 F.Supp. 1216, affd., C.A., 436 F.2d 596.

Ariz.—Application of Dugger, 497 P.2d 413, 17 Ariz. App. 297.

Colo.—Samples v. Cronin, 536 P.2d 306, 189 Colo. 40.

Conn.—Glavin v. Warden, State Prison, 311 A.2d 86, 163 Conn. 394.

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- Minn.—State v. Drager, 264 N.W.2d 820.
 N.J.—State v. Phillips, 162 A.2d 113, 62 N.J.Super. 70, affd. 167 A.2d 175, 34 N.J. 63.
 N.Y.—People ex rel. McGill v. Wright, 307 N.Y.S.2d 964, 62 Misc.2d 154, affd. 314 N.Y.S.2d 128, 34 A.D.2d 1106.
 Tex.—Ex parte Bowman, Cr., 480 S.W.2d 675.
97.5. Ill.—Newman v. Elrod, 391 N.E.2d 37, 28 Ill. Dec. 838, 72 Ill.App.3d 616. Cert. den. 100 S.Ct. 1338, 445 U.S. 942, 63 L.Ed.2d 776.
 Neb.—State of Kan. v. Holeb, 196 N.W.2d 387, 188 Neb. 319.
97.10. Nev.—Sheriff, Clark County v. Thompson, 452 P.2d 911, 85 Nev. 211—Marshall v. Sheriff, Clark County, 488 P.2d 1157, 87 Nev. 455.
 Or.—Fisco v. Clark, 414 P.2d 331, 243 Or. 466.
 Tex.—Ex parte Weiner, Cr., 472 S.W.2d 773.
97.15. U.S.—Zambito v. Blair, C.A.W.Va., 610 F.2d 1192, cert. den. 100 S.Ct. 1361, 445 U.S. 928, 63 L.Ed.2d 761.
 Colo.—Dressel v. Bianco, 452 P.2d 756, 168 Colo. 517—Gerard v. Ossola, 649 P.2d 1110.
 N.Y.—People ex rel. Lewis v. Commissioner of Correction of City of New York, 417 N.Y.S.2d 377, 100 Misc.2d 48.
 Pa.—Com. ex rel. Raucci v. Price, 185 A.2d 523, 409 Pa. 90.
Forms of pleading in demanding state, etc.
 N.Y.—People ex rel. Fuller v. Chaufy, 213 N.Y.S.2d 841, 27 Misc.2d 1047.
Incorporation by reference
 Colo.—Coca v. Sheriff of City and County of Denver, 517 P.2d 843, 184 Colo. 11.

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- 98.** N.Y.—People ex rel. Leo v. Hoy, 225 N.Y.S.2d 412.
99. U.S.—Smith v. State of Idaho, C.A.Idaho, 373 F.2d 149, cert. den. 87 S.Ct. 2139, 388 U.S. 919, 18 L.Ed.2d 1364.

§ 14(7). — Indictment and Affidavit Contrasted

- 1.** N.Y.—People ex rel. Hodges v. Silberglitt, 201 N.Y.S.2d 991, 11 A.D.2d 681—People ex rel. Nettles v. Police Commissioner of City of New York, 206 N.Y.S.2d 362, 11 A.D.2d 1068.
 People ex rel. Fuller v. Chaufy, 213 N.Y.S.2d 841, 27 Misc.2d 1047—People ex rel. Blecher v. Silberglitt, 223 N.Y.S.2d 160, 33 Misc.2d 236.
2. D.C.—Kirkland v. Preston, C.A., 385 F.2d 670, 128 U.S.App.D.C. 148.
2.5. N.Y.—People ex rel. Nettles v. Police Commissioner of City of New York, 206 N.Y.S.2d 362, 11 A.D.2d 1068.

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3.5. Affidavits held sufficient

- (1) Fla.—State ex rel. Meyers v. Miller, App., 388 So.2d 1358.
4. U.S.—U.S. ex rel. Grano v. Anderson, C.A.Del., 446 F.2d 272.
 Ala.—C.J.S. quoted in Rayburn v. State, Cr.App., 366 So.2d 698, 705, affd., Sup., 366 So.2d 708.
 Alaska—Brown v. State, 518 P.2d 770.
 Colo.—Hithe v. Nelson, 471 P.2d 596, 172 Colo. 179.
 D.C.—Kirkland v. Preston, C.A., 385 F.2d 670, 128 U.S.App.D.C. 148.
 Ill.—People ex rel. Kubala v. Woods, 284 N.E.2d 286, 52 Ill.2d 48.
 Kan.—Wilbanks v. State, 579 P.2d 132, 224 Kan. 66.
 Me.—C.J.S. cited in Poulin v. Bonenfant, 251 A.2d 436, 439.
 Mass.—In re Ierardi, 321 N.E.2d 921, 366 Mass. 640.
 Mo.—C.J.S. quoted in Application of Evans, App., 512 S.W.2d 238, 242.
 Nev.—Sheriff, Clark County v. Thompson, 452 P.2d 911, 85 Nev. 211—Marshall v. Sheriff, Clark County, 488 P.2d 1157, 87 Nev. 455.
 N.H.—Clement v. Cox, 385 A.2d 841, 118 N.H. 246.

- N.Y.—People v. Artis, 300 N.Y.S.2d 208, 32 A.D.2d 554—People ex rel. Porzio v. Wright, 301 N.Y.S.2d 668, 59 Misc.2d 1056.
 Wis.—State ex rel. Foster v. Uttech, 143 N.W.2d 500, 31 Wis.2d 664, cert. den. 87 S.Ct. 392, 385 U.S. 956, 17 L.Ed.2d 303.

Affidavits held sufficient

- (1) U.S.—U.S. ex rel. Vitiello v. Flood, C.A.N.Y., 374 F.2d 554.

- U.S. ex rel. Grano v. Anderson, D.C.Del., 318 F.Supp. 263, affd., C.A., 446 F.2d 272—Wellington v. State of S.D., 413 F.Supp. 151.

- Colo.—Weathers v. Sullivan, 518 P.2d 842, 184 Colo. 39.

- Fla.—Miles v. State, App., 339 So.2d 246.

- Ky.—Ex parte Noel, 338 S.W.2d 903.

- Me.—Poulin v. Bonenfant, 251 A.2d 436.

- Tex.—Ex parte Scott, Cr., 446 S.W.2d 307.

Affidavit held insufficient

- (1) Ala.—Rayburn v. State, Cr.App., 366 So.2d 698, affd., Sup., 366 So.2d 708.

- Colo.—People v. McFall, 486 P.2d 6, 175 Colo. 151.
 Del.—Grano v. State, Super., 257 A.2d 768.

- Fla.—Stack v. State ex rel. Ebbola, App., 284 So.2d 472.
 N.Y.—People ex rel. Nettles v. Police Commissioner of City of New York, 206 N.Y.S.2d 362, 11 A.D.2d 1068—People ex rel. Miller v. Krueger, 316 N.Y. S.2d 246, 35 A.D.2d 743.

- People ex rel. Blecher v. Silberglitt, 223 N.Y. S.2d 160, 33 Misc.2d 236—In re Kjeldsen, 240 N.Y.S.2d 71, 39 Misc.2d 128.

Extradition documents must establish probable cause to justify extradition

- Colo.—Pippin v. Leach, 534 P.2d 1193, 188 Colo. 385.
 Conn.—Brode v. Power, 332 A.2d 376, 31 Conn.Sup. 412.

- 6.** Alaska—Montague v. Smedley, 557 P.2d 774.

- Colo.—Raynor v. Cronin, 557 P.2d 398, 192 Colo. 239.
 Del.—Grano v. State, Super., 257 A.2d 768.

- Fla.—Miles v. State, App., 339 So.2d 246.

- 7.** Alaska—Montague v. Smedley, 557 P.2d 774.

- Tex.—Ex parte Elliott, Cr., 542 S.W.2d 863.

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- 11.** Tex.—Ex parte Gray, Cr., 426 S.W.2d 241.

§ 14(8). — Pleadings on Information and Belief

- 12.** U.S.—Smith v. State of Idaho, C.A.Idaho, 373 F.2d 149, cert. den. 87 S.Ct. 2139, 388 U.S. 919, 18 L.Ed.2d 1364.

- Mo.—C.J.S. cited in Application of Evans, App., 512 S.W.2d 238, 242.

Affidavit by eyewitness unnecessary

- N.Y.—People v. Silberglitt, 223 N.Y.S.2d 160, 33 Misc.2d 236.

- 12.5.** Ark.—Hammond v. State ex rel. Davis, 424 S.W.2d 861, 244 Ark. 186, cert. den. 89 S.Ct. 116, 393 U.S. 839, 21 L.Ed.2d 109.

- Tex.—Ex parte Foss, Cr., 492 S.W.2d 552.

Affidavit based on hearsay

- Colo.—Goeschel v. Cronin, 586 P.2d 664, 196 Colo. 435.

- Fla.—Cossette v. State, App., 221 So.2d 427.

- 12.10.** N.Y.—People ex rel. Fuller v. Chaufy, 213 N.Y.S.2d 841, 27 Misc.2d 1047—People ex rel. Porzio v. Wright, 301 N.Y.S.2d 668, 59 Misc.2d 1056.

- 13.** Ala.—Rayburn v. State, Cr.App., 366 So.2d 698, affd., Sup., 366 So.2d 708.

- Pa.—Com. ex rel. Wilson v. Ague, 39 D. & C.2d 316.
 Tex.—Ex parte Parker, Cr., 390 S.W.2d 774.

- 14.** N.Y.—People v. Artis, 300 N.Y.S.2d 208, 32 A.D.2d 554.

- People ex rel. Gondolfo v. Lindemann, 313 N.Y. S.2d 786, 63 Misc.2d 773, affd. 314 N.Y.S.2d 702, 34 A.D.2d 1105.

- 14.8.** Minn.—State v. Limberg, 142 N.W.2d 563, 274 Minn. 31.

- 15.** Ala.—C.J.S. quoted in Grubbs v. State, Cr.App., 363 So.2d 121, 124.

- Del.—Grano v. State, Super., 257 A.2d 768.

- Ill.—People ex rel. Lacanski v. Backes, 169 N.E.2d 80, 19 Ill.2d 541.

- N.Y.—People v. Miller, 342 N.Y.S.2d 288, 74 Misc.2d 806.

- 15.5.** Tex.—Ex parte Terranova, 341 S.W.2d 660, 170 Tex.Cr.R. 445.

- 16.** Tex.—Ex parte Green, Cr., 437 S.W.2d 859.

§ 14(9). — Time and Place of Crime; Identity of Criminal

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- 17.5.** Kan.—C.J.S. cited in McCullough v. Darr, 548 P.2d 1245, 1249, 219 Kan. 477.

- Pa.—Com. ex rel. Crist v. Price, 175 A.2d 852, 405 Pa. 384.

- Tenn.—State ex rel. Duval v. Frazier, 423 S.W.2d 487, 220 Tenn. 696.

- 18.** Miss.—Corkern v. State, 269 So.2d 630.

- Tex.—Foskett v. State, Cr., 390 S.W.2d 273.

Year of crime

- (4) Other instances.

- Fla.—Miles v. State, App., 339 So.2d 246.

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- 20.** Md.—Haynes v. Sheriff of Washington County, 252 A.2d 807, 253 Md. 278.

- N.Y.—People ex rel. Grant v. Doherty, 247 N.Y.S.2d 759, 42 Misc.2d 239, revd. on oth. grds. 251 N.Y. S.2d 596, 21 A.D.2d 829.

- 21.5.** Tex.—Ex parte Foss, Cr., 492 S.W.2d 552.

- 21.10.** N.Y.—State ex rel. Friedman v. Commissioner, New York City Dept. of Correction, 414 N.Y. S.2d 557, 68 A.D.2d 855.

- 22.** Ariz.—Applications of Oppenheimer, 389 P.2d 696, 95 Ariz. 292, cert. den. 84 S.Ct. 1359, 377 U.S. 948, 12 L.Ed.2d 311.

- Colo.—Thomeczek v. Bray, 600 P.2d 66, 198 Colo. 341—Light v. Cronin, 621 P.2d 309—Beverly v. Davis, 648 P.2d 621.

- Kan.—King v. Hawes, 580 P.2d 1318, 224 Kan. 335.

- Minn.—State v. Limberg, 142 N.W.2d 563, 274 Minn. 31.

- Utah—Santina v. Larson, 593 P.2d 137.

23. Shifts burden of proof

- Tex.—Ex parte Meador, Cr.App., 597 S.W.2d 372.

§ 15. Determination as to Rendition

- 25.** Cal.—Application of Morgan, 53 Cal.Rptr. 642, 244 C.A.2d 903.

- Del.—Grano v. State, Super., 257 A.2d 768.

- Mich.—People v. Sterbins, 189 N.W.2d 154, 32 Mich. App. 508.

- S.C.—Scott v. MacDougall, 143 S.E.2d 457, 246 S.C. 252, cert. den. 86 S.Ct. 299, 382 U.S. 920, 15 L.Ed.2d 235.

- Wis.—State ex rel. Niederer v. Cady, 240 N.W.2d 626, 72 Wis.2d 311.

Discretion

- (2) Other matters.

- Cal.—Hart v. People, 40 Cal.Rptr. 420, 229 C.A.2d 455.
 Colo.—Allen v. Leach, 626 P.2d 1141.

- N.J.—Matter of Lucas, 343 A.2d 845, 136 N.J.Super. 24, affd. 346 A.2d 624, 136 N.J.Super. 460.

Temporary custody

- N.J.—State v. Masselli, 202 A.2d 415, 43 N.J. 1.

Legality of extradition

- Pa.—Com. v. Carlos, 341 A.2d 71, 462 Pa. 262.

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26.5. Ga.—C.J.S. quoted in *Lively v. Fulcher*, 262 S.E.2d 93, 94, 244 Ga. 771.

26.5. U.S.—*DeGenna v. Grasso*, D.C.Conn., 413 F.Supp. 427, affd. 96 S.Ct. 2617, 426 U.S. 913, 49 L.Ed.2d 368.

Cal.—Application of *Morgan*, 53 Cal.Rptr. 642, 244 C.A.2d 903.

Nev.—*Housewright v. Lefrak*, 669 P.2d 711, 99 Nev. 684.

Pa.—Com. ex rel. *Douglass v. Aytch*, 310 A.2d 313, 225 Pa.Super. 195.

Prima facie case

(2) Pa.—Com. v. *Murphy*, 344 A.2d 662, 236 Pa.Super. 37.

Proper basis for extradition held shown

(1) Ala.—*Boothe v. State*, 180 So.2d 450, 43 Ala. App. 119.

Colo.—*Protz v. Watson*, 571 P.2d 719, 194 Colo. 223.

Ill.—*People ex rel. Hackler v. Lohman*, 160 N.E.2d 792, 17 Ill.2d 78, cert. den. 80 S.Ct. 591, 361 U.S. 963, 4 L.Ed.2d 544.

Kan.—*Dean v. Sheriff of Leavenworth County*, 538 P.2d 725, 217 Kan. 669.

N.Y.—*People ex rel. Ingram v. Bound*, 397 N.Y.S.2d 189, 58 A.D.2d 961.

Tex.—Ex parte *Thomas*, Cr., 393 S.W.2d 908—Ex parte *Thomas*, Cr., 393 S.W.2d 909—Ex parte *Goins*, Cr., 515 S.W.2d 918.

26.15. D.C.—*Kirkland v. Preston*, C.A.D.C., 385 F.2d 670, 128 U.S.App.D.C. 148.

N.Y.—*People ex rel. Stracci v. Warden, New York City House of Detention for Men*, 424 N.Y.S.2d 704, 72 A.D.2d 393.

26.20. Delegation of duty

Ark.—*Hammond v. State ex rel. Davis*, 424 S.W.2d 861, 244 Ark. 186, cert. den. 89 S.Ct. 116, 393 U.S. 839, 21 L.Ed.2d 109.

Held invalid

Ala.—*Crowell v. State*, Cr., 315 So.2d 607, 55 Ala.App. 371.

26.25. Conn.—*Reynolds v. Conway*, 288 A.2d 77, 161 Conn. 329.

N.H.—*Reeves v. Cox*, 385 A.2d 847, 118 N.H. 271.

Okl.—*McKee v. Page*, Cr., 438 P.2d 649.

Tex.—Ex parte *Schmidt*, Cr., 500 S.W.2d 144.

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27. U.S.—*Watson v. Montgomery*, C.A.Tex., 431 F.2d 1083.

Ala.—*Aldio v. State*, 177 So.2d 107, 42 Ala.App. 653, app. after remand 208 So.2d 212, 44 Ala.App. 303, cert. den. 208 So.2d 215, 282 Ala. 723.

Ariz.—*State v. Flowers*, 453 P.2d 536, 9 Ariz.App. 440.

Conn.—*Bursque v. Moore*, 227 A.2d 255, 26 Conn.Super. 469.

Pa.—Com. ex rel. *Flood v. Pizzo*, 252 A.2d 656, 434 Pa. 208.

R.I.—*Salvail v. Sharkey*, 271 A.2d 814, 108 R.I. 63.

28. U.S.—U.S. ex rel. *Vitiello v. Flood*, C.A.N.Y., 374 F.2d 554.

D.C.—*Moncrief v. Anderson*, C.A., 342 F.2d 902, 119 U.S.App.D.C. 323.

Iowa—*Hill v. Houck*, 195 N.W.2d 692.

28.5. U.S.—*Moncrief v. Anderson*, C.A., 342 F.2d 902, 119 U.S.App.D.C. 323.

Or.—*Fisco v. Clark*, 414 P.2d 331, 243 Or. 466.

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29. Colo.—*Harding v. People*, 423 P.2d 847, 161 Colo. 571.

Conn.—*Reynolds v. Conway*, 288 A.2d 77, 161 Conn. 329.

Del.—*Golla v. State*, 159 A.2d 585, 2 Storey 433, cert. den. 81 S.Ct. 78, 364 U.S. 841, 5 L.Ed.2d 64.

D.C.—*Moncrief v. Anderson*, C.A., 342 F.2d 902, 119 U.S.App.D.C. 323.

Iowa—*Hill v. Houck*, 195 N.W.2d 692.

Mc.—*Burke v. State*, 265 A.2d 489.

29.15. N.Y.—In re *Taylor*, 323 N.Y.S.2d 128, 66 Misc.2d 1006.

The status of a prisoner as a juvenile in the asylum state is irrelevant to his status in the demanding state, and his extradition does not unconstitutionally deprive him of his standing as a juvenile under the laws of the asylum state.^{29.30}

29.30. Extradition waived without benefit of counsel

Ill.—*Peoplé v. Pardo*, 265 N.E.2d 656, 47 Ill.2d 420, app. dism. 91 S.Ct. 2179, 402 U.S. 992, 29 L.Ed.2d 158, reh. den. 91 S.Ct. 2260, 403 U.S. 941, 29 L.Ed.2d 721.

30. Conn.—*Thomlinson v. Liburdi*, Super., 380 A.2d 105, 34 Conn.Super. 128.

Tex.—Ex parte *Parker*, Cr., 390 S.W.2d 774.

Proof held sufficient

(1) N.Y.—*People ex rel. Spence v. Sheriff of Rensselaer County*, 355 N.Y.S.2d 494, 44 A.D.2d 867.

Tex.—Ex parte *Jackson*, Cr., 470 S.W.2d 679.

(3) Ind.—*Meek v. State*, 321 N.E.2d 205, 262 Ind. 618.

30.5. U.S.—U.S. ex rel. *Vitiello v. Flood*, C.A.N.Y., 374 F.2d 554.

U.S. ex rel. *Eatessami v. Marasco*, D.C.N.Y., 275 F.Supp. 492.

Proof held sufficient

(2) Iowa—*Evans v. Rosenberger*, 181 N.W.2d 152.

Md.—*Koprivich v. Warden of Baltimore City Jail*, 200 A.2d 49, 234 Md. 465.

Tex.—Ex parte *Rigsby*, Cr., 453 S.W.2d 169.

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30.10. U.S.—U.S. ex rel. *Vitiello v. Flood*, C.A.N.Y., 374 F.2d 554.

Conn.—*Reynolds v. Conway*, 288 A.2d 77, 161 Conn. 329.

Md.—*Johnson v. Warden, Montgomery County Detention Center*, 223 A.2d 584, 244 Md. 384.

N.Y.—*People v. Miller*, 342 N.Y.S.2d 288, 74 Misc.2d 806.

Hearsay evidence

U.S.—U.S. ex rel. *Eatessami v. Marasco*, D.C.N.Y., 275 F.Supp. 492.

Ill.—*People ex rel. Emerson v. Pratt*, 319 N.E.2d 108, 23 Ill.App.3d 340.

Pa.—Com. v. *Kulp*, 310 A.2d 399, 225 Pa.Super. 345.

32. U.S.—*Carino v. Grasso*, D.C.Conn., 413 F.Supp. 75.

Ariz.—*State v. Flowers*, 453 P.2d 536, 9 Ariz.App. 440.

Tex.—Ex parte *Young*, Cr., 397 S.W.2d 74.

32.5. U.S.—*DeGenna v. Grasso*, D.C.Conn., 413 F.Supp. 427, affd. 96 S.Ct. 2617, 426 U.S. 913, 49 L.Ed.2d 368.

Iowa—*Hughes v. Waters*, 204 N.W.2d 599.

Md.—*Haynes v. Sheriff of Washington County*, 252 A.2d 807, 253 Md. 278.

Pa.—Com. ex rel. *Raucci v. Price*, 185 A.2d 523, 409 Pa. 90.

Tenn.—*State ex rel. Lingerfelt v. Gardner*, Cr.App., 591 S.W.2d 777.

Tex.—Ex parte *Harrison*, Cr., 469 S.W.2d 571—Ex parte *Larson*, Cr., 494 S.W.2d 179.

33. Pa.—Com. v. *Kulp*, 310 A.2d 399, 225 Pa.Super. 345.

Deficient showing of substantial charge in papers of demanding state can be supplemented by testimony of person possessing necessary information in order to make sufficient showing.^{33.1}

33.1. D.C.—*Tucker v. Com. of Va.*, App., 308 A.2d 783.

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33.5. Investigation by officer of demanding state held not sufficient

Cal.—*Hart v. People*, 40 Cal.Rptr. 420, 229 C.A.2d 455.

Mere examination of papers held not a sufficient investigation

Cal.—*Hart v. People*, 40 Cal.Rptr. 420, 229 C.A.2d 455.

Purpose of statute

Cal.—*Hart v. People*, 40 Cal.Rptr. 420, 229 C.A.2d 455.

34. Cal.—C.J.S. cited in Application of *Morgan*, 53 Cal.Rptr. 642, 649, 244 C.A.2d 903.

34.5. Ariz.—*State ex rel. Babbitt v. Kinman*, 550 P.2d 1108, 27 Ariz.App. 66.

Tenn.—*State ex rel. Lingerfelt v. Gardner*, Cr.App., 591 S.W.2d 777.

However, it has been held that a statutory requirement that a demand for extradition be investigated is mandatory,^{34.15} and that a warrant issued without an investigation is void.^{34.20}

34.15. Cal.—*Hart v. People*, 40 Cal.Rptr. 420, 229 C.A.2d 455.

34.20. Cal.—*Hart v. People*, 40 Cal.Rptr. 420, 229 C.A.2d 455.

36. Tex.—Ex parte *Fontes*, Cr., 475 S.W.2d 781.

37. Cal.—Application of *Morgan*, 53 Cal.Rptr. 642, 244 C.A.2d 903.

38.5. Fla.—*Cossette v. State*, App., 221 So.2d 427.

Iowa—*Hughes v. Waters*, 204 N.W.2d 599.

38.15. Colo.—*Dilworth v. Leach*, 515 P.2d 1130, 183 Colo. 206.

Md.—*Roscoe v. Warden, Baltimore City Jail*, 328 A.2d 64, 23 Md.App. 516.

Evidence held insufficient

Conn.—*Reynolds v. Conway*, 288 A.2d 77, 161 Conn. 329.

39. Ariz.—Applications of *Oppenheimer*, 389 P.2d 696, 95 Ariz. 292, cert. den. 84 S.Ct. 1359, 377 U.S. 948, 12 L.Ed.2d 311.

State v. *Flowers*, 453 P.2d 536, 9 Ariz.App. 440.

Pa.—Com. v. *Murphy*, 344 A.2d 662, 236 Pa.Super. 37.

40.5. Ariz.—*State v. Flowers*, 453 P.2d 536, 9 Ariz.App. 440.

45.5. Ariz.—*Powell v. State*, 507 P.2d 989, 19 Ariz.App. 377.

Pa.—Com. ex rel. *Flood v. Pizzo*, 252 A.2d 656, 434 Pa. 208.

Uncontradicted evidence conclusive

D.C.—*Brown v. Ward*, C.A., 275 F.2d 884, 107 U.S.App.D.C. 220.

Burden of proof

Minn.—*State ex rel. Rhodes v. Omodt*, 218 N.W.2d 461, 300 Minn. 129.

Accused must show non-presence

N.Y.—*People ex rel. Pata v. Lindemann*, 427 N.Y.S.2d 445, 75 A.D.2d 654.

Pa.—Com. v. *Murphy*, 344 A.2d 662, 236 Pa.Super. 37.

Not cognizable

Ga.—*Smith v. Hart*, 252 S.E.2d 470, 243 Ga. 59.

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45.10. U.S.—*People of State of Ill.*, ex rel. *Smith v. Elrod*, D.C.Ill., 511 F.Supp. 559.

Crimes of continuing nature

N.Y.—*People ex rel. Pata v. Lindemann*, 427 N.Y.S.2d 445, 75 A.D.2d 654.

45.20. Tex.—Ex parte *Harvey*, Cr., 459 S.W.2d 853.

46.10. Tex.—Ex parte *Posey*, Cr., 453 S.W.2d 833—Ex parte *Schmidt*, Cr., 500 S.W.2d 144.

Burden on state

Ill.—*People v. Cheek*, 420 N.E.2d 238, 50 Ill.Dec. 921, 95 Ill.App.3d 392, affd. 442 N.E.2d 877, 66 Ill.Dec. 316, 93 Ill.2d 82.

Mass.—In re *Moore*, 313 N.E.2d 893, 2 Mass.App. 399.

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Tex.—Ex parte Parker, Cr., 515 S.W.2d 926.

Burden on defendant to rebut prima facie case

N.Y.—People ex rel. Degina v. Delaney, 385 N.Y.S.2d 332, 53 A.D.2d 880, app. after remand 391 N.Y.S.2d 640, 56 A.D.2d 614.

Tex.—Ex parte Smith, Cr., 515 S.W.2d 925.

46.50. Quasi-judicial capacity

Me.—Poulin v. Bonenfant, 251 A.2d 436.

46.55. U.S.—Zambito v. Blair, C.A.W.Va., 610 F.2d 1192, cert. den. 100 S.Ct. 1361, 445 U.S. 928, 63 L.Ed.2d 761.

D.C.—Martin v. State of Md., App., 287 A.2d 823.

Ga.—Graham v. State, 204 S.E.2d 630, 231 Ga. 820.

Idaho—Norton v. State, 470 P.2d 413, 93 Idaho 648, cert. den. 91 S.Ct. 918, 401 U.S. 936, 28 L.Ed.2d 215.

Iowa—Thurman v. State, 223 N.W.2d 248.

Tex.—Ex parte Beckham, Cr., 468 S.W.2d 446.

Wis.—Desjarlais v. State, 243 N.W.2d 453, 73 Wis.2d 480.

47. U.S.—Holloway v. Carey, D.C.N.Y., 482 F.Supp. 551.

Ariz.—State ex rel. Babbitt v. Kinman, 550 P.2d 1108, 27 Ariz.App. 66.

D.C.—Martin v. State of Md., App., 287 A.2d 823.

48. Ga.—Stynchcombe v. Smith, 261 S.E.2d 342, 244 Ga. 548.

49. U.S.—Smith v. Ellington, C.A.Tenn., 348 F.2d 1021, cert. den. 86 S.Ct. 589, 382 U.S. 998, 15 L.Ed.2d 486, reh. den. 86 S.Ct. 1207, 383 U.S. 954, 16 L.Ed.2d 216.

Garrison v. Smith, D.C.Miss., 413 F.Supp. 747.

Ala.—Holcomb v. State, 207 So.2d 119, 44 Ala.App. 259, cert. den. 207 So.2d 122, 281 Ala. 721.

Colo.—Jordan v. Cronin, 554 P.2d 1099, 191 Colo. 550.

Fla.—State v. Cox, App., 306 So.2d 156.

Ga.—Waterman v. Deyton, 210 S.E.2d 765, 233 Ga. 243.

Minn.—State v. Limberg, 142 N.W.2d 563, 274 Minn. 31.

N.Y.—People v. Hinton, 353 N.E.2d 617, 40 N.Y.2d 345, 386 N.Y.S.2d 703.

Tex.—Ex parte Renfro, 350 S.W.2d 655, 171 Tex.Cr.R. 454—Ex parte Thomas, Cr., 393 S.W.2d 909—Ex parte Sutton, Cr., 455 S.W.2d 274—Ex parte Bacquet, Cr., 469 S.W.2d 578.

Wis.—State ex rel. Foster v. Uttech, 143 N.W.2d 500, 31 Wis.2d 664, cert. den. 87 S.Ct. 392, 385 U.S. 956, 17 L.Ed.2d 303.

Purpose of restriction

Pa.—Com. ex rel. Raucci v. Price, 185 A.2d 523, 409 Pa. 90.

Wis.—State v. Ritter, 246 N.W.2d 552, 74 Wis.2d 227.

Immateral attack

(3) Other matters.

Or.—Fisco v. Clark, 414 P.2d 331, 243 Or. 466.

Insanity

Alaska—Kostic v. Smedley, 522 P.2d 535.

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49.5. Fla.—Bonazzo v. Michell, App., 221 So.2d 186.

Wis.—State ex rel. Foster v. Uttech, Wis., 143 N.W.2d 500, 31 Wis.2d 664, cert. den. 87 S.Ct. 392, 385 U.S. 956, 17 L.Ed.2d 303.

While in some jurisdictions under statute compliance with a court order for support is a defense to extradition,^{49.20} in other jurisdictions such statutory exemption is not made.^{49.25}

49.20. Tex.—Ex parte Smith, Cr., 391 S.W.2d 433.

49.25. Tex.—Ex parte Smith, Cr., 391 S.W.2d 433, stating California law.

50. Colo.—Howe v. Cronin, 589 P.2d 930, 197 Colo. 17.

D.C.—Martin v. State of Md., App., 287 A.2d 823.

Mich.—Rutledge v. Preadmore, 176 N.W.2d 417, 21 Mich.App. 726, cert. den. 91 S.Ct. 891, 401 U.S. 915, 27 L.Ed.2d 814.

Minn.—State v. Limberg, 142 N.W.2d 563, 274 Minn. 31.

Neb.—West v. Janing, 274 N.W.2d 161, 202 Neb. 141, cert. den. 100 S.Ct. 72, 444 U.S. 837, 62 L.Ed.2d 47.

Nev.—Martinez v. Sheriff of Clark County, 527 P.2d 1200, 90 Nev. 37.

R.I.—Brown v. Sharkey, 263 A.2d 104, 106 R.I. 714.

Tex.—Ex parte Grooms, Cr., 468 S.W.2d 817.

Alibi

Conn.—Reynolds v. Conway, 288 A.2d 77, 161 Conn. 329.

Plea of former jeopardy, etc.

(2) Question must be resolved in demanding state.

U.S.—Garrison v. Smith, D.C.Miss., 413 F.Supp. 747.

Md.—Roscoe v. Warden, Baltimore City Jail, 328 A.2d 64, 23 Md.App. 516.

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51. Tex.—Ex parte Ward, Cr., 470 S.W.2d 684—Ex parte Schmidt, Cr., 500 S.W.2d 144.

52. Typographical error in date

Tex.—Ex parte Bradley, Cr., 456 S.W.2d 370.

53.5. Neb.—Kujala v. Headley, 225 N.W.2d 25, 193 Neb. 1.

Extradition cannot be resisted on the ground that widespread publicity would prevent accused from receiving a fair trial.^{53.20}

53.20. Tex.—Ex parte Watson, Cr., 455 S.W.2d 300.

56. Ga.—Smith v. Stynchcombe, 232 S.E.2d 546, 238 Ga. 263.

57. Pa.—Com. ex rel. Laitmore v. Gedney, 363 A.2d 786, 240 Pa.Super. 226.

Photograph

Colo.—Raynor v. Cronin, 557 P.2d 398, 192 Colo. 239.

58. U.S.—U.S. ex rel. Vitiello v. Flood, C.A.N.Y., 374 F.2d 554.

Pa.—Com. v. Roe, 398 A.2d 1060, 264 Pa.Super. 67.

R.I.—Salvail v. Sharkey, 271 A.2d 814, 108 R.I. 63.

Time for hearing

Pa.—Com. ex rel. Heaton v. Harvey, 21 D. & C.2d 763, affd. 164 A.2d 123, 193 Pa.Super. 315.

Civil in nature

D.C.—Martin v. State of Md., App., 287 A.2d 823.

Time for hearing

U.S.—McDonald v. Burrows, C.A.Tex., 731 F.2d 294, cert. den. 105 S.Ct. 173, 83 L.Ed.2d 108.

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58.5. U.S.—U.S. ex rel. Vitiello v. Flood, C.A.N.Y., 374 F.2d 554.

Ill.—People ex rel. Douglas v. Woods, 235 N.E.2d 601, 39 Ill.2d 381.

Ky.—Squadroni v. Smith, 349 S.W.2d 700.

Md.—Shields v. State, 263 A.2d 565, 257 Md. 384.

Mass.—Com. v. Glavin, 235 N.E.2d 547, 354 Mass. 69.

Pa.—Com. ex rel. Coleman v. Cuyler, 396 A.2d 394, 261 Pa.Super. 274.

Informalities in hearing

Ariz.—Applications of Oppenheimer, 389 P.2d 696, 95 Ariz. 292, cert. den. 84 S.Ct. 1359, 377 U.S. 948, 12 L.Ed.2d 311.

60. U.S.—Felke v. Governor, State of N.J., D.C.Pa., 414 F.Supp. 10.

Mont.—C.J.S. cited in Petition of Blackburn, 701 P.2d 715, 719.

Notice required

Minn.—Wertheimer v. State, 201 N.W.2d 383, 294 Minn. 293.

Notice better practice

N.D.—Alkerton v. Wingenbach, 217 N.W.2d 787.

60.5. Tex.—Ex parte Naggles, Cr., 482 S.W.2d 878.

Statutory right not denied

Tex.—Ex parte Naggles, Cr., 482 S.W.2d 878.

61. Ariz.—Application of Dugger, 497 P.2d 413, 17 Ariz.App. 297.

Ark.—Cadle v. Cauthron, 584 S.W.2d 6, 266 Ark. 419.

Md.—Haynes v. Sheriff of Washington County, 252 A.2d 807, 253 Md. 278.

Estep v. State, 286 A.2d 187, 14 Md.App. 53.

N.J.—State In Interest of D. N. H., 370 A.2d 506, 147 N.J.Super. 1.

Tex.—Ex parte Wammack, Cr., 482 S.W.2d 859.

62. Ark.—Cadle v. Cauthron, 584 S.W.2d 6, 266 Ark. 419.

Right of prisoner to offer evidence

Colo.—Krutka v. Bryer, 372 P.2d 83, 150 Colo. 293.

62.5. Tex.—Ex parte McCarthy, Cr., 472 S.W.2d 759.

No right to counsel

Ariz.—Rugg v. Burr, 402 P.2d 28, 1 Ariz.App. 280—Powell v. State, 507 P.2d 989, 19 Ariz.App. 377.

Md.—Bartholomey v. State, 273 A.2d 164, 260 Md. 504, vac. in part on oth. grds. 92 S.Ct. 2870, 408 U.S. 938, 33 L.Ed.2d 759, reh. den. 93 S.Ct. 180, 409 U.S. 901, 34 L.Ed.2d 162, on remand 297 A.2d 696, 267 Md. 175.

Mich.—Rutledge v. Preadmore, 176 N.W.2d 417, 21 Mich.App. 726, cert. den. 91 S.Ct. 891, 401 U.S. 915, 27 L.Ed.2d 814.

Minn.—Wertheimer v. State, 201 N.W.2d 383, 294 Minn. 293.

62.10. Ga.—Lively v. Fulcher, 262 S.E.2d 93, 244 Ga. 771.

§ 16. Warrant

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63.50. U.S.—Thomas v. Levi, D.C.Pa., 422 F.Supp. 1027.

Colo.—Capra v. Miller, 422 P.2d 636, 161 Colo. 448.

Fla.—State ex rel. Owens v. Boyer, App., 207 So.2d 29.

N.Y.—Matter of Brenda Lee G., 388 N.Y.S.2d 229, 88 Misc.2d 899.

Tex.—Ex parte Eubanks, Cr., 392 S.W.2d 700—Ex parte Clubb, Cr., 447 S.W.2d 185.

Provision as to bail not intended to prescribe time within which warrant must issue

Ill.—People ex rel. Gummow v. Larson, 220 N.E.2d 165, 35 Ill.2d 280.

Distinction between fugitive warrant and warrant for extradition

Minn.—State ex rel. Wagner v. Hedman, 195 N.W.2d 420, 292 Minn. 358.

Okl.—In re Chenoweth, Cr., 432 P.2d 132.

Rendition warrant valid although issued after fugitive warrant nolle prossed

Md.—Shields v. State, 263 A.2d 565, 257 Md. 384.

64. U.S.—Zambito v. Blair, C.A.W.Va., 610 F.2d 1192, cert. den. 100 S.Ct. 1361, 445 U.S. 928, 63 L.Ed.2d 761.

Discretion to postpone extradition

Colo.—Buffalo v. Tanksley, 536 P.2d 827, 189 Colo. 45.

N.Y.—People ex rel. Linaris v. Weizenecker, 392 N.Y.S.2d 813, 89 Misc.2d 814.

Magistrate must sign

Tex.—Ex parte Quinn, Cr., 549 S.W.2d 198.

Governor need not be neutral

Wis.—State ex rel. Sieloff v. Golz, 258 N.W.2d 700, 80 Wis.2d 225.

68. D.C.—Martin v. State of Md., App., 287 A.2d 823.

Tex.—Ex parte Scarbrough, Cr., 604 S.W.2d 170.

69. Ala.—Potts v. State, Cr.App., 378 So.2d 264, writ den., Sup., 378 So.2d 267.

Fla.—Hudson v. State, App., 388 So.2d 577.
Ohio—In re Hollander, 441 N.E.2d 824, 2 Ohio App.3d 282, 2 O.B.R. 312.

Tex.—Ex parte Britton, Cr., 382 S.W.2d 264.

69.5. Alaska—Marrone v. State, 458 P.2d 736, cert. den. 90 S.Ct. 1005, 397 U.S. 967, 25 L.Ed.2d 260.

Life of warrant

Ala.—State v. Sparks, App., 215 So.2d 469.

Ga.—Stynchcombe v. Whiley, 242 S.E.2d 720, 240 Ga. 776.

N.Y.—People ex rel. Brandolino v. Hastings, 421 N.Y. S.2d 893, 72 A.D.2d 821.

69.10. Subject to Fourth Amendment strictures

Wis.—State ex rel. Sietloff v. Golz, 258 N.W.2d 700, 80 Wis.2d 225.

69.15. Tex.—Ex parte Wilson, Cr., 437 S.W.2d 569.

Warrant properly issued

Ala.—Tyner v. State, Cr., 346 So.2d 493, cert. den. Ex parte Tyner, 346 So.2d 496.

Conn.—Hill v. Blake, 441 A.2d 841, 186 Conn. 404.

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69.20. Ala.—Johnson v. State, 222 So.2d 370, 45 Ala.App. 40.

Ill.—People ex rel. Brenner v. Sain, 193 N.E.2d 767, 29 Ill.2d 239.

Iowa—C.J.S. cited in Evans v. Rosenberger, 181 N.W.2d 152, 157.

Tex.—Ex parte Ward, Cr., 470 S.W.2d 684.

Warrant need not be based on magistrate's affidavit

Wis.—State ex rel. Holmes v. Spice, 229 N.W.2d 97, 68 Wis.2d 263.

70. Or.—Ault v. Purcell, 519 P.2d 1285, 16 Or.App. 664, cert. den. 95 S.Ct. 106, 419 U.S. 858, 42 L.Ed.2d 92.

Quasi-judicial capacity

R.I.—Brown v. Sharkey, 263 A.2d 104, 106 R.I. 714.

72. U.S.—State ex rel. Bailey v. Shepard, C.A.Minn., 584 F.2d 858, cert. den. 99 S.Ct. 1259, 440 U.S. 926, 59 L.Ed.2d 481.

Ga.—Ward v. Jarvis, 242 S.E.2d 134, 240 Ga. 668.

Idaho—In re Martz, 357 P.2d 940, 83 Idaho 72.

Ill.—People ex rel. Lacanski v. Backes, 169 N.E.2d 80, 19 Ill.2d 541.

Tex.—Ex parte Cain, Cr.App., 592 S.W.2d 359.

Subordinate officer must comply

Okla.—Application of Caudill, Cr., 352 P.2d 926.

73. Conn.—Bursque v. Moore, 227 A.2d 255, 26 Conn.Supp. 469.

Ga.—Ward v. Jarvis, 242 S.E.2d 134, 240 Ga. 668.

Rearrest not required

Colo.—McClarn v. Jones, 426 P.2d 192, 162 Colo. 354.

Interstate Agreement on Detainers.

The necessity for a governor's warrant is expressly exempted as a procedural right in proceedings under the Interstate Agreement on Detainers.^{74.5}

74.5. U.S.—Application of Morris, D.C.N.C., 563 F.Supp. 1289.

Interstate Agreement on Detainers generally see supra § 11.

Accordingly, the lack of a governor's warrant will not create material deficiencies in extradition documents.^{74.10}

74.10. U.S.—Application of Morris, D.C.N.C., 563 F.Supp. 1289.

75. Fla.—Carter v. Coleman, App. 2 Dist., 443 So.2d 491.

Minn.—State ex rel. Brown v. Hedman, 157 N.W.2d 756, 280 Minn. 69.

Tex.—Ex parte Williams, Cr., 472 S.W.2d 779.

76. Conn.—Cain v. Moore, 438 A.2d 723, 182 Conn. 470, cert. den. 102 S.Ct. 157, 454 U.S. 844, 70 L.Ed.2d 129.

Service. Under some statutes service of a governor's warrant authorizing extradition on a defendant seeking to defeat extradition is not required where he has made no request or demand therefor.^{76.20}

76.20. Tex.—Ex parte Posey, Cr., 453 S.W.2d 833.

Information, not service, required

Ala.—Hester v. State, Cr.App., 444 So.2d 1.

77. Ala.—Shirley v. State, 363 So.2d 104, on remand, Cr.App., 363 So.2d 107.

Fla.—State ex rel. Owens v. Boyer, App., 207 So.2d 29.

N.Y.—People ex rel. Cooper v. Lombard, 357 N.Y.S.2d 323, 45 A.D.2d 928.

People ex rel. Brunner v. Dominy, 191 N.Y.S.2d 46, 22 Misc.2d 863.

Or.—State ex rel. Eggleston v. Hatrak, 636 P.2d 1017, 54 Or.App. 974.

Tex.—Ex parte Medina, Cr., 417 S.W.2d 409.

Warrant held valid on its face

Ala.—Sullivan v. State, 181 So.2d 518, 43 Ala.App. 133.

Alaska—Griggs v. State, 481 P.2d 388, cert. den. 92 S.Ct. 302, 404 U.S. 946, 30 L.Ed.2d 263.

N.D.—Bebeau v. Granrud, 184 N.W.2d 577.

Tex.—Ex parte Brito, 358 S.W.2d 122, 172 Tex.Cr.R. 409—Ex parte Green, Cr., 415 S.W.2d 424—Ex parte DeFoy, Cr., 417 S.W.2d 168—Ex parte Rochester, Cr., 417 S.W.2d 291—Ex parte York, Cr., 417 S.W.2d 411—Ex parte Myers, Cr., 465 S.W.2d 767.

Vt.—In re Bryant, 276 A.2d 628, 129 Vt. 302.

Statutes relating to fugitive warrant and rendition warrant not in irreconcilable conflict

Ky.—Ex parte Noel, 338 S.W.2d 903.

Out of state arrest warrant

Pa.—Com. ex rel. McGowan v. Aytch, 334 A.2d 750, 233 Pa.Super. 66.

Required time period to serve warrant

N.Y.—People v. Williams, 391 N.Y.S.2d 518, 89 Misc.2d 269.

Warrant invalid

N.Y.—Matter of Brenda Lee G., 388 N.Y.S.2d 229, 88 Misc.2d 899.

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78. Ala.—McGahagin v. State, 131 So.2d 425, 41 Ala.App. 236, cert. den. 131 So.2d 426, 272 Ala. 706.

Colo.—Hill v. Miller, 578 P.2d 655, 195 Colo. 370.

Idaho—In re Martz, 357 P.2d 940, 83 Idaho 72.

Ill.—People ex rel. Lacanski v. Backes, 169 N.E.2d 80, 19 Ill.2d 541.

Ky.—Squadroni v. Smith, 349 S.W.2d 700.

N.J.—State v. Phillips, 162 A.2d 113, 62 N.J.Super. 70, affd. 167 A.2d 175, 34 N.J. 63.

N.C.—State v. Owen, 280 S.E.2d 44, 53 N.C.App. 121, review den., Sup., 285 S.E.2d 107.

Pa.—Com. ex rel. Marshall v. Gedney, 352 A.2d 528, 237 Pa.Super. 372, affd. 386 A.2d 942, 478 Pa. 299, 90 A.L.R.3d 1074.

Warrants held sufficient

U.S.—Whittington v. Bray, C.A.Colo., 623 F.2d 681.

Alaska—Wortham v. State, 519 P.2d 797.

Ariz.—Applications of Oppenheimer, 389 P.2d 696, 95 Ariz. 292, cert. den. 84 S.Ct. 1359, 377 U.S. 948, 12 L.Ed.2d 311.

Colo.—Whittington v. Bray, 613 P.2d 633, 200 Colo. 92.

D.C.—Lathan v. Reid, C.A., 280 F.2d 66, 108 U.S.App. D.C. 58, cert. den. 81 S.Ct. 107, 364 U.S. 865, 5 L.Ed.2d 86.

Ga.—Nevill v. Tyson, 197 S.E.2d 340, 230 Ga. 438.

Ill.—People ex rel. Kubala v. Woods, 284 N.E.2d 286, 52 Ill.2d 48.

Kan.—Gladney v. Sheriff of Leavenworth County, 598 P.2d 559, 3 Kan.App.2d 568.

La.—State v. Ross, 404 So.2d 440.

Me.—Burke v. State, 265 A.2d 489.

N.Y.—People ex rel. Arnold v. Allen, 220 N.Y.S.2d 71, 30 Misc.2d 1031.

Tex.—Ex parte Gasper, 343 S.W.2d 712, 170 Tex.Cr.R. 628—Ex parte Cates, Cr., 399 S.W.2d 543—Ex parte Reese, Cr., 442 S.W.2d 397—Ex parte Ransom, Cr., 470 S.W.2d 692—Ex parte Grant, Cr., 480 S.W.2d 639—Ex parte Case, Cr., 485 S.W.2d 561—Ex parte Goodman, Cr., 485 S.W.2d 785.

Warrants held insufficient

(1) Ala.—Lofton v. State, 239 So.2d 901, 46 Ala.App. 229.

(4) Other warrants.

Ala.—Baugh v. State, 154 So.2d 674, revd. on oth. grds. 154 So.2d 674, 275 Ala. 319.

Johnson v. State, Cr.App., 425 So.2d 515, cert. den. 103 S.Ct. 2108, 461 U.S. 937, 77 L.Ed.2d 313.

State v. West, 178 So.2d 182, 42 Ala.App. 678—Beasley v. State, 187 So.2d 806, 43 Ala.App. 247—Crowell v. State, Cr., 315 So.2d 607, 55 Ala.App. 371.

Fla.—Kelly v. State ex rel. Rosenthal, App., 149 So.2d 85.

Ill.—People ex rel. Rukavina v. Sain, 177 N.E.2d 110, 22 Ill.2d 546—People ex rel. Coats v. Sain, 181 N.E.2d 179, 24 Ill.2d 248—People ex rel. Frye v. Woods, 280 N.E.2d 701, 51 Ill.2d 91.

Pa.—Com. ex rel. Aronson v. Price, 194 A.2d 881, 412 Pa. 493.

Tex.—Ex parte Brunner, Cr., 396 S.W.2d 125.

Under Uniform Criminal Extradition Act

(1) No substantial change in requirement as to showing of jurisdictional facts.

Ill.—People ex rel. Hackler v. Lohman, 160 N.E.2d 792, 17 Ill.2d 78, cert. den. 80 S.Ct. 591, 361 U.S. 963, 4 L.Ed.2d 544.

(2) Compliance with one of three alternative documentary requirements should be recited.

Ill.—People ex rel. Hackler v. Lohman, 160 N.E.2d 792, 17 Ill.2d 78, cert. den. 80 S.Ct. 591, 361 U.S. 963, 4 L.Ed.2d 544.

(3) Other statements.

Ga.—Wollweber v. Martin, 172 S.E.2d 605, 226 Ga. 20.

Pa.—Com. ex rel. Myers v. Case, 378 A.2d 917, 250 Pa.Super. 242.

Sufficiency determined as of time of arrest

Fla.—State ex rel. Owens v. Boyer, App., 207 So.2d 29.

78.5. Or.—State ex rel. Hood v. Purcell, App., 494 P.2d 461, 8 Or.App. 532, cert. den. 93 S.Ct. 564, 409 U.S. 1061, 34 L.Ed.2d 514.

79. Ala.—Rayburn v. State, Cr.App., 366 So.2d 698, affd., Sup., 366 So.2d 708.

Conn.—Cain v. Moore, 438 A.2d 723, 182 Conn. 470, cert. den. 102 S.Ct. 157, 454 U.S. 844, 70 L.Ed.2d 129.

Fla.—Wilson v. State ex rel. Tarter, App., 325 So.2d 51.

Ind.—Sumner v. Lovellette, 256 N.E.2d 681, 253 Ind. 675.

Particular warrants construed

(4) Other warrants.

Tex.—Ex parte Fant, Cr., 400 S.W.2d 332.

80. Colo.—Harding v. People, 423 P.2d 847, 161 Colo. 571—Morris v. Nelson, 659 P.2d 1386.

Ill.—People ex rel. Lance v. Elrod, 315 N.E.2d 602, 21 Ill.App.3d 786.

Iowa—C.J.S. cited in Evans v. Rosenberger, 181 N.W.2d 152, 157.

Nev.—Marshall v. Sheriff, Clark County, 488 P.2d 1157, 87 Nev. 455.

Tenn.—State ex rel. Jones v. Gann, Cr.App., 584 S.W.2d 235.

Tex.—Ex parte Thomas, Cr., 393 S.W.2d 909.

Surplusage

Alaska—Moser v. Zaborac, 514 P.2d 12.

Iowa—Clayton v. Michael, 141 N.W.2d 538, 258 Iowa 1037.

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Particular defects

(2) Minn.—State ex rel. Doherty v. Duggan, 218 N.W.2d 759, 300 Minn. 528.

(3) Other defects.

Colo.—Dilworth v. Leach, 515 P.2d 1130, 183 Colo. 206.

Del.—In re Dean, 254 A.2d 242.

Ga.—Clonts v. Stynchcombe, 194 S.E.2d 94, 229 Ga. 672.

Pa.—Com. v. Brown, 421 A.2d 1131, 281 Pa.Super. 31.

Tex.—Ex parte Mackerman, Cr., 376 S.W.2d 350—Ex parte Lee, Cr., 432 S.W.2d 103.

82. Me.—C.J.S. cited in Poulin v. Bonenfant, 251 A.2d 436, 440.

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85. Pa.—Com. ex rel. Edgar v. Davis, 228 A.2d 742, 425 Pa. 133—Com. ex rel. Coades v. Gable, 264 A.2d 716, 437 Pa. 553.

The sufficiency of a rendition warrant is to be tested by the law of the demanding state.^{85.5}

85.5. Colo.—Gerard v. Ossola, 649 P.2d 1110.

Ga.—Smith v. Stynchcombe, 218 S.E.2d 63, 234 Ga. 780, cert. den. 96 S.Ct. 882, 423 U.S. 1089, 47 L.Ed.2d 99, reh. den. 96 S.Ct. 1437, 424 U.S. 959, 47 L.Ed.2d 365.

Me.—Burke v. State, 265 A.2d 489.

86. Ind.—Sumner v. Lovellette, 256 N.E.2d 681, 253 Ind. 675.

Warrant held not void

Ill.—In re Leonard, 327 N.E.2d 480, 27 Ill.App.3d 870.

Statement that acts charged punishable by laws of asylum state required

N.Y.—In re Taylor, 323 N.Y.S.2d 128, 66 Misc.2d 1006.

87. Ill.—People ex rel. Douglas v. Woods, 235 N.E.2d 601, 39 Ill.2d 381.

N.Y.—People ex rel. Friedman v. Commissioner, New York City Dept. of Correction, 411 N.Y.S.2d 267, 66 A.D.2d 689.

Tex.—Ex parte Medina, Cr., 417 S.W.2d 409.

Probable cause

Colo.—Parker v. Glazner, 645 P.2d 1319.

Conn.—Crew v. State, 486 A.2d 664, 40 Conn.Super. 179.

Fla.—Chesser v. Dougherty, App. 1 Dist., 417 So.2d 1164.

N.Y.—People v. Miller, 342 N.Y.S.2d 288, 74 Misc.2d 806.

Or.—Ault v. Purcell, 519 P.2d 1285, 16 Or.App. 664, cert. den. 95 S.Ct. 106, 419 U.S. 858, 42 L.Ed.2d 92.

Pa.—Com. ex rel. Simpson v. Aytch, 372 A.2d 861, 247 Pa.Super. 348.

Warrant defective

N.Y.—State ex rel. Mallin v. Wilson, 360 N.Y.S.2d 579, 79 Misc.2d 575.

89. Tex.—Ex parte Fontes, Cr., 475 S.W.2d 781.

Warrants held sufficient

Ariz.—State v. Truman In and For Pima County, App., 564 P.2d 96, 115 Ariz. 145.

Ill.—People ex rel. Halley v. Willis, 262 N.E.2d 480, 46 Ill.2d 29.

Ind.—Holland v. Hargar, 409 N.E.2d 604, 274 Ind. 156.

Ky.—Squadroni v. Smith, 349 S.W.2d 700.

Minn.—State v. Coddington, 145 S.W.2d 866, 275 Minn. 237.

N.Y.—People ex rel. Bleacher v. Silbergliitt, 223 N.Y.S.2d 160, 33 Misc.2d 236.

Tenn.—State ex rel. Nunn v. Bradshaw, 340 S.W.2d 884, 207 Tenn. 384.

Tex.—Ex parte Harris, Cr., 375 S.W.2d 453—Ex parte Medina, Cr., 439 S.W.2d 344—Ex parte Carroll, Cr., 474 S.W.2d 923.

Wis.—State ex rel. Keehn v. Capelle, 115 N.W.2d 487, 17 Wis.2d 116.

Validity of warrant

Wis.—State v. Ritter, 246 N.W.2d 552, 74 Wis.2d 227.

90. Ga.—Wollweber v. Martin, 172 S.E.2d 605, 226 Ga. 20.

Probable cause need not be shown

N.J.—Application of Mahler, 426 A.2d 1021, 177 N.J. Super. 337.

92. Tex.—Benton v. State, 344 S.W.2d 877, 171 Tex. Cr.R. 47.

Wis.—State ex rel. Jackson v. Froelich, 253 N.W.2d 69, 77 Wis.2d 299.

Recital of former presence

Colo.—Harding v. People, 423 P.2d 847, 161 Colo. 571.

Neb.—State of Kan. v. Holeb, 196 N.W.2d 387, 188 Neb. 319.

Tex.—Ex parte Lowe, Cr., 435 S.W.2d 516.

Warrant focuses on fugitive status and not substantive crime

Wis.—State v. Hughes, 229 N.W.2d 655, 68 Wis.2d 662.

92.5. Fla.—Bonazzo v. Michell, App., 221 So.2d 186.

Ga.—Harmon v. State, 152 S.E.2d 861, 222 Ga. 845.

Ill.—People ex rel. Douglas v. Woods, 235 N.E.2d 601, 39 Ill.2d 381.

Md.—Campbell v. State, 271 A.2d 190, 10 Md.App. 406—Roscoe v. Warden, Baltimore City Jail, 328 A.2d 64, 23 Md.App. 516.

Neb.—Kujala v. Headley, 225 N.W.2d 25, 193 Neb. 1.

93. Ariz.—State v. Flowers, 453 P.2d 536, 9 Ariz. App. 440.

N.M.—Bazaldua v. Hanrahan, 592 P.2d 512, 92 N.M. 596.

N.Y.—People ex rel. Friedman v. Commissioner, New York City Dept. of Correction, 411 N.Y.S.2d 267, 66 A.D.2d 689.

Wis.—State ex rel. Keehn v. Capelle, 115 N.W.2d 487, 17 Wis.2d 116.

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94. Ala.—Aldio v. State, 177 So.2d 107, 42 Ala.App. 653, app. after remand 208 So.2d 212, 44 Ala.App. 303, cert. den. 208 So.2d 215, 282 Ala. 723.

Warrants held sufficient

(1) Tex.—Ex parte Butler, Cr., 416 S.W.2d 411.

95. Ala.—Rayburn v. State, Cr.App., 366 So.2d 698, affd., Sup., 366 So.2d 708.

97. Ark.—Carrico v. Pearson, 555 S.W.2d 951, 262 Ark. 278.

Tex.—Ex parte Fontes, Cr., 475 S.W.2d 781.

2. Charge of "complaint" sufficient

Idaho—In re Martz, 357 P.2d 940, 83 Idaho 72.

5. Ill.—People v. Williams, 386 N.E.2d 145, 24 Ill. Dec. 941, 68 Ill.App.3d 351.

Ind.—Dawson v. Beasley, 180 N.E.2d 367, 242 Ind. 536.

Consideration of allied documents

Ala.—Lofton v. State, 239 So.2d 901, 46 Ala.App. 229.

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7. Failure to timely execute

Pa.—Com. ex rel. Myers v. Case, 378 A.2d 917, 250 Pa.Super. 242.

9. Tex.—Ex parte Lee, Cr., 432 S.W.2d 103.

Designation of named sheriff includes duly commissioned deputy

Ala.—Poucher v. State, 240 So.2d 694, 46 Ala.App. 272, cert. den. 240 So.2d 695, 286 Ala. 736.

11. N.Y.—People ex rel. Houllahan v. Lombard, 374 N.Y.S.2d 508, 49 A.D.2d 1036.

12. Delegation to agent improper

Ala.—Poucher v. State, 240 So.2d 694, 46 Ala.App. 272, cert. den. 240 So.2d 695, 286 Ala. 736.

14. Conn.—Ross v. Hegstrom, 254 A.2d 556, 157 Conn. 403.

Ill.—People ex rel. Goodman v. Elrod, 336 N.E.2d 535, 32 Ill.App.3d 362.

Iowa—C.J.S. cited in Smith v. Sheriff of Woodbury County, 141 N.W.2d 529, 530, 258 Iowa 1110.

Kan.—Woody v. State, 524 P.2d 1150, 215 Kan. 353, cert. den. 95 S.Ct. 322, 419 U.S. 1003, 42 L.Ed.2d 278.

Miss.—Keller v. State, 150 So.2d 426, 246 Miss. 436.

Nev.—Jernigan v. Sheriff, Clark County, 469 P.2d 64, 86 Nev. 387.

S.D.—State ex rel. Hall v. Hawkey, 263 N.W.2d 141.

Tex.—Ex parte Grooms, Cr., 468 S.W.2d 817.

Vt.—In re Saunders, 415 A.2d 199, 138 Vt. 259.

16. U.S.—Michigan v. Doran, 99 S.Ct. 530, 439 U.S. 282, 58 L.Ed.2d 521.

U.S.—Garrison v. Smith, D.C.Miss., 413 F.Supp. 747.

Ala.—Aldio v. State, 177 So.2d 107, 42 Ala.App. 653, app. after remand 208 So.2d 212, 44 Ala.App. 303, cert. den. 208 So.2d 215, 282 Ala. 723—Holcomb v. State, 207 So.2d 119, 44 Ala.App. 259, cert. den. 207 So.2d 122, 281 Ala. 721.

Alaska—Brown v. State, 518 P.2d 770.

Ark.—Carrico v. Pearson, 555 S.W.2d 951, 262 Ark. 278.

Colo.—Fox v. People, 420 P.2d 412, 161 Colo. 163—Capra v. Miller, 422 P.2d 636, 161 Colo. 448—Harding v. People, 423 P.2d 847, 161 Colo. 571—Dilworth v. Leach, 515 P.2d 1130, 183 Colo. 206.

Conn.—C.J.S. cited in Reynolds v. Conway, 288 A.2d 77, 79, 161 Conn. 329.

Del.—Dickerson v. State, 267 A.2d 881.

Fla.—Trice v. Blackburn, App., 153 So.2d 32—State ex rel. Sklaroff v. Purdy, App., 219 So.2d 723—Cossette v. State, App., 221 So.2d 427—Palmer v. State, App., 312 So.2d 476.

Ga.—Sellers v. Griffin, 176 S.E.2d 75, 226 Ga. 565.

Idaho—Jacobsen v. State, 577 P.2d 24, 99 Idaho 45.

Ill.—People ex rel. Rietholz v. Sain, 180 N.E.2d 464, 24 Ill.2d 168—People ex rel. Hernandez v. Elrod, 427 N.E.2d 1209, 56 Ill.Dec. 663, 86 Ill.2d 453.

People v. DeSpain, 436 N.E.2d 748, 62 Ill.Dec. 722, 106 Ill.App.3d 934.

Ind.—Wade v. Lovellette, 239 N.E.2d 585, 251 Ind. 97.

Kan.—Dean v. Sheriff of Leavenworth County, 538 P.2d 725, 217 Kan. 669.

La.—State v. Tyler, 398 So.2d 1108, op. dissented 435 So.2d 422.

Me.—Poulin v. Bonenfant, 251 A.2d 436.

Md.—Johnson v. Warden, Montgomery County Detention Center, 223 A.2d 584, 244 Md. 384—Solomon v. Warden, Baltimore City Jail, 260 A.2d 68, 256 Md. 297.

Minn.—State v. Limberg, 142 N.W.2d 563, 274 Minn. 31.

Miss.—Taylor v. Garrison, 329 So.2d 506.

N.Y.—People ex rel. Coster v. Andrews, 428 N.Y.S.2d 594, 104 Misc.2d 506.

Or.—State ex rel. Hood v. Purcell, 494 P.2d 461, 8 Or.App. 532, cert. den. 93 S.Ct. 564, 409 U.S. 1061, 34 L.Ed.2d 514.

Pa.—Com. ex rel. Raucci v. Price, 185 A.2d 523, 409 Pa. 90.

Com. ex rel. Lloyd v. Jones, 26 Beaver 114.

R.I.—Brown v. Sharkey, 263 A.2d 104, 106 R.I. 714—Salvail v. Sharkey, 271 A.2d 814, 108 R.I. 63.

Tenn.—State ex rel. Wiley v. Waggoner, 508 S.W.2d 535.

State ex rel. Ezell v. Evatt, Cr., 512 S.W.2d 673.

Tex.—Ex parte Lancaster, Cr., 501 S.W.2d 904—Ex parte Haggard, Cr., 501 S.W.2d 908—Ex parte Bunch, Cr., 519 S.W.2d 653—Ex parte Viduair, Cr., 525 S.W.2d 163.

Utah—Scott v. Beckstead, 375 P.2d 767, 13 Utah2d 428.

W.Va.—State ex rel. Gonzales v. Wilt, 256 S.E.2d 15, 163 W.Va. 270.

Wis.—State ex rel. Foster v. Uttech, 143 N.W.2d 500, 31 Wis.2d 664, cert. den. 87 S.Ct. 392, 385 U.S. 956, 17 L.Ed.2d 303—State ex rel. Holmes v. Spice, 229 N.W.2d 97, 68 Wis.2d 263.

Identity

(3) Other statements.

Colo.—Deas v. Cronin, 544 P.2d 991, 190 Colo. 177.

Fla.—State ex rel. Sklaroff v. Purdy, App., 219 So.2d 723.

Me.—Poulin v. Bonenfant, 251 A.2d 436.
Pa.—Com. ex rel. Coades v. Gable, 264 A.2d 716, 437 Pa. 553.

Tex.—Ex parte Wheeler, Cr., 528 S.W.2d 229.

Former presence in demanding state

(1) Me.—Burke v. State, 265 A.2d 489.
N.J.—State v. Phillips, 162 A.2d 113, 62 N.J.Super. 70, affd. 167 A.2d 175, 34 N.J. 63.

(4) Other instances.

Fla.—Bonazzo v. Michell, App., 221 So.2d 186.

Tex.—Ex parte Thomas, Cr., 393 S.W.2d 908.

Fugitive from justice

Colo.—Krutka v. Bryer, 372 P.2d 83, 150 Colo. 293—Mote v. Koch, 476 P.2d 255, 173 Colo. 82.

Idaho—Smith v. State, 403 P.2d 221, 89 Idaho 70, cert. den. 86 S.Ct. 906, 383 U.S. 916, 15 L.Ed.2d 669.

Ill.—People ex rel. O'Mara v. Ogilvie, 220 N.E.2d 172, 35 Ill.2d 287.

Minn.—State ex rel. Wagner v. Hedman, 195 N.W.2d 420, 292 Minn. 358.

N.J.—State v. West, 191 A.2d 758, 79 N.J.Super. 379.
Tex.—Ex parte Drake, Cr., 363 S.W.2d 781.

Prima facie validity overcome

(3) Other instances.

Ala.—Baugh v. State, 154 So.2d 674, revd. on oth. grds. 154 So.2d 674, 275 Ala. 319.

State v. West, 178 So.2d 182, 42 Ala.App. 678.

Prima facie validity not overcome

Fla.—State ex rel. Meyers v. Miller, App., 388 So.2d 1358.

(1) Ala.—Chavers v. State, 143 So.2d 187, 41 Ala. App. 585, cert. den. 143 So.2d 190, 273 Ala. 705.

Ga.—Young v. Martin, 167 S.E.2d 139, 225 Ga. 173.

Ill.—People v. Williams, 201 N.E.2d 117, 31 Ill.2d 160—People ex rel. Tennenbaum v. Woods, 253 N.E.2d 423, 43 Ill.2d 322—People ex rel. Kubala v. Woods, 284 N.E.2d 286, 52 Ill.2d 48.

Iowa—Evans v. Rosenberg, 181 N.W.2d 152.

N.Y.—People ex rel. McGill v. Wright, 307 N.Y.S.2d 964, 62 Misc.2d 154, affd. 314 N.Y.S.2d 128, 34 A.D.2d 1106.

Tex.—Ex parte Manzella, Cr., 452 S.W.2d 913—Ex parte Bradley, Cr., 456 S.W.2d 370.

(4) Tex.—Ex parte Overaker, Cr., 404 S.W.2d 595—Ex parte Harvey, Cr., 459 S.W.2d 853—Ex parte Binette, Cr., 465 S.W.2d 373—Ex parte Buel, Cr., 468 S.W.2d 385.

Degree of proof necessary to overcome prima facie case

Ariz.—Applications of Oppenheimer, 389 P.2d 696, 95 Ariz. 292, cert. den. 84 S.Ct. 1359, 377 U.S. 948, 12 L.Ed.2d 311.

Where regular on its face

Ill.—People ex rel. Agee v. Elrod, 418 N.E.2d 145, 49 Ill.Dec. 501, 93 Ill.App.3d 1038.

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17. Ala.—Waldrop v. State, 170 So.2d 286, 42 Ala. App. 517.

Fla.—Cox v. State, App., 180 So.2d 467.

Idaho—In re Martz, 357 P.2d 940, 83 Idaho 72.

Ill.—People ex rel. Brown v. Jackson, 274 N.E.2d 17, 49 Ill.2d 209—People ex rel. Kubala v. Woods, 284 N.E.2d 286, 52 Ill.2d 48.

People v. Smith, 297 N.E.2d 29, 12 Ill.App.3d 9—People v. Maryan, 316 N.E.2d 647, 22 Ill. App.3d 60.

Mo.—Application of Evans, App., 512 S.W.2d 238.

Pa.—Com. v. Inadi, 449 A.2d 753, 303 Pa.Super. 409.

Tex.—Ex parte Leach, Cr., 478 S.W.2d 471.

18. Ala.—McCahagin v. State, 131 So.2d 425, 41 Ala.App. 236, cert. den. 131 So.2d 426, 272 Ala. 706.

State v. Freeman, 160 So.2d 12, 42 Ala.App. 240—Aldio v. State, 177 So.2d 107, 42 Ala.App. 653, app. after remand 208 So.2d 212, 44 Ala.App. 303, cert. den. 208 So.2d 215, 282 Ala. 723.

Idaho—Walton v. State, 566 P.2d 765, 98 Idaho 442.

35 C.J.S. 1986 P.P.—2

Ill.—People ex rel. Ritholz v. Sain, 180 N.E.2d 464, 24 Ill.2d 168.

Mass.—In re Consalvi, 382 N.E.2d 734, 376 Mass. 699.

R.I.—Baker v. Laurie, 375 A.2d 405, 118 R.I. 539.

18.5. U.S.—Garrison v. Smith, D.C.Miss., 413 F.Supp. 747.

Ala.—Potts v. State, Cr.App., 378 So.2d 264, writ den., Sup., 378 So.2d 267.

Colo.—Krutka v. Bryer, 372 P.2d 83, 150 Colo. 293—Mote v. Koch, 476 P.2d 255, 173 Colo. 82—Luker v. Koch, 489 P.2d 191, 176 Colo. 75—McCoy v. Cronin, 531 P.2d 379, 187 Colo. 364.

Conn.—Reynolds v. Conway, 288 A.2d 77, 161 Conn. 329.

Fla.—Bonazzo v. Michell, App., 221 So.2d 186—State ex rel. Cocchiaro v. Purdy, App., 260 So.2d 556—Kohler v. Sandstrom, App., 305 So.2d 76, cert. den. 96 S.Ct. 289, 423 U.S. 934, 46 L.Ed.2d 264.

Ga.—Waterman v. Deyton, 210 S.E.2d 765, 233 Ga. 243.

Idaho—Smith v. State, 403 P.2d 221, 89 Idaho 70, cert. den. 86 S.Ct. 906, 383 U.S. 916, 15 L.Ed.2d 669.

Ill.—People ex rel. Lacanski v. Backes, 169 N.E.2d 80, 19 Ill.2d 541—People ex rel. O'Mara v. Ogilvie, 220 N.E.2d 172, 35 Ill.2d 287.

Kan.—Woody v. State, 524 P.2d 1150, 215 Kan. 353, cert. den. 95 S.Ct. 322, 419 U.S. 1003, 42 L.Ed.2d 278.

Me.—Burke v. State, 265 A.2d 489.

Md.—Haynes v. Sheriff of Washington County, 252 A.2d 807, 253 Md. 278.

Ray v. Warden, Baltimore City Jail, 281 A.2d 125, 13 Md.App. 61.

N.J.—State v. Phillips, 162 A.2d 113, 62 N.J.Super. 70, affd. 167 A.2d 175, 34 N.J. 63.

N.Y.—People ex rel. Harris v. Warden, New York City Adult Remand Center, 345 N.Y.S.2d 29, 42 A.D.2d 549.

Pa.—Extradition of David, 107 P.L.J. 249.

Tenn.—McLaughlin v. State, Cr., 512 S.W.2d 657.

Tex.—Ex parte Hobbs, Cr., 410 S.W.2d 787—Ex parte Brown, Cr., 450 S.W.2d 647—Ex parte Jackson, Cr., 470 S.W.2d 679—Ex parte Stehling, Cr., 481 S.W.2d 431—Ex parte Bunch, Cr., 519 S.W.2d 653.

Authority of lieutenant governor

(2) Other statements.

R.I.—Brown v. Sharkey, 263 A.2d 104, 106 R.I. 714.

Tex.—Ex parte Schmidt, Cr., 500 S.W.2d 144.

Identity

Ala.—Smith v. State, Cr., 231 So.2d 345, 45 Ala.App. 423.

Tex.—Ex parte Clubb, Cr., 447 S.W.2d 185—Ex parte Harvey, Cr., 459 S.W.2d 853—Ex parte Connelly, Cr., 479 S.W.2d 943.

Utah—Mora v. Larson, 540 P.2d 520.

Wis.—State ex rel. Clayton v. Wolke, 230 N.W.2d 869, 69 Wis.2d 363.

18.10. U.S.—Smith v. State of Idaho, C.A.Idaho, 373 F.2d 149, cert. den. 87 S.Ct. 2139, 388 U.S. 919, 18 L.Ed.2d 1364.

Md.—Shoemaker v. Sheriff of Carroll County, 265 A.2d 260, 258 Md. 129.

N.J.—Application of DeGina, 228 A.2d 74, 94 N.J.Super. 267—In re Colasanti, 249 A.2d 1, 104 N.J.Super. 122.

Tenn.—State ex rel. Lingerfelt v. Gardner, Cr.App., 591 S.W.2d 777.

Tex.—Ex parte Mach, Cr., 448 S.W.2d 126.

Prima facie case may be defeated by supporting papers

Tex.—Ex parte Brown, Cr., 450 S.W.2d 647.

Ex parte Cain, Cr.App., 592 S.W.2d 359.

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20. Colo.—Massey v. Wilson, 605 P.2d 469, 199 Colo. 121.

Wis.—State ex rel. Holmes v. Spice, 229 N.W.2d 97, 68 Wis.2d 263.

25. Colo.—Massey v. Wilson, 605 P.2d 469, 199 Colo. 121.

§ 17. Examination and Review of Proceedings by Courts

26. U.S.—Horne v. Wilson, D.C.Tenn., 316 F.Supp. 247—U.S. ex rel. Fort v. Meisner, D.C.Ill., 319 F.Supp. 693.

Alaska—Brown v. State, 518 P.2d 770.

Ariz.—State v. Bost, 409 P.2d 590, 2 Ariz.App. 431.

Ark.—Smith v. Cauthron, 631 S.W.2d 10, 275 Ark. 435.

Cal.—In re Golden, 135 Cal.Rptr. 512, 65 C.A.3d 789, cert. den. 98 S.Ct. 35, 434 U.S. 805, 54 L.Ed.2d 63.

Ind.—Wade v. Lovellette, 239 N.E.2d 585, 251 Ind. 97.

Kan.—Sloss v. Sheriff of Leavenworth County, 648 P.2d 255, 7 Kan.App.2d 702.

N.H.—State v. Breest, 367 A.2d 1320, 116 N.H. 734.

N.Y.—In re Kjeldsen, 240 N.Y.S.2d 71, 39 Misc.2d 128.

Okl.—Ralph v. Turner, Cr., 366 P.2d 777.

Tenn.—State v. Lann, Cr., 567 S.W.2d 772.

Tex.—Ex parte Spencer, Cr., 567 S.W.2d 520.

Absence of requisition from record

Kan.—Sloss v. Sheriff of Leavenworth County, 648 P.2d 255, 7 Kan.App.2d 702.

Presumption that fugitives rights will be protected by demanding state

U.S.—Brown v. Fogel, C.A.Va., 387 F.2d 692, cert. den. 88 S.Ct. 1647, 390 U.S. 1045, 20 L.Ed.2d 307.

Surrender of nonfugitive does not require hearing

N.J.—Application of Mahler, 426 A.2d 1021, 177 N.J. Super. 337.

Appellate jurisdiction of extradition proceedings may be exercised only to the extent it is conferred on a court by constitution or statute of a particular state.^{26.5}

26.5. Pa.—Com. ex rel. Reyes v. Aytch, Super., 369 A.2d 1325, 246 Pa.Super. 287.

Jurisdiction not given to supreme court

(1) Duty to take notice of lack of jurisdiction on own motion.

La.—Extradition Proceedings v. Palmer, 125 So.2d 164, 240 La. 784.

(2) Accused's remedy, if any, is invocation of court's supervisory jurisdiction.

La.—Extradition Proceedings v. Palmer, 125 So.2d 164, 240 La. 784.

Extradition statute liberally construed

Fla.—Brunelle v. Norvell, App., 433 So.2d 19.

Plenary review in the asylum state of issues that can be fully litigated in the charging state violates the constitution.^{26.10}

26.10. Defeats plain purposes of summary and mandatory procedures authorized

U.S.—Michigan v. Doran, 99 S.Ct. 530, 439 U.S. 282, 58 L.Ed.2d 521.

The courts of an asylum state are bound to accept the demanding state's judicial determination since the proceedings of the demanding state are clothed with the traditional presumption of regularity.^{26.15}

26.15. U.S.—Michigan v. Doran, 99 S.Ct. 530, 439 U.S. 282, 58 L.Ed.2d 521.

Pa.—Com. v. Inadi, 449 A.2d 753, 303 Pa.Super. 409.

In other words, once the governor of the asylum state has acted on a requisition for extradition based on the demanding state's judicial determination that probable cause existed, no further

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judicial inquiry may be had on that issue in the asylum state.^{26,20}

U.S.—Michigan v. Doran, 99 S.Ct. 530, 439 U.S. 282, 58 L.Ed.2d 521.

Colo.—Moore v. Miller, 596 P.2d 64, 198 Colo. 24—Allen v. Leach, 626 P.2d 1141—Gerard v. Ossola, 649 P.2d 1110.

27. U.S.—Morgan v. McNair, D.C.S.C., 301 F.Supp. 870.

Colo.—Krutka v. Bryer, 372 P.2d 83, 150 Colo. 293—Capra v. Miller, 422 P.2d 636, 161 Colo. 448—Osborne v. Van Cleave, 443 P.2d 988, 166 Colo. 398—Michaels v. Caldwell, 646 P.2d 899.

Neb.—State ex rel. Brito v. Warrick, 125 N.W.2d 545, 176 Neb. 211—Dovel v. Adams, 301 N.W.2d 102, 207 Neb. 766.

No inquiry into validity of extradition by courts of asylum state

Tex.—Myer v. State, App. 4 Dist., 686 S.W.2d 735, review ref.

Right to appellate review

U.S.—Horne v. Wilson, D.C.Tenn., 316 F.Supp. 247.

Technical pleading not considered

Colo.—Eathorne v. Nelson, 505 P.2d 1, 180 Colo. 288.

Res judicata not applicable

Colo.—Boyd v. Van Cleave, 505 P.2d 1305, 180 Colo. 403.

Identity not established

Ga.—Treadaway v. Baker, 243 S.E.2d 41, 241 Ga. 95.

27.5. U.S.—Woods v. Cronvich, C.A.La., 396 F.2d 142.

Ala.—Potts v. State, Cr.App., 378 So.2d 264, writ den., Sup., 378 So.2d 267—Owens v. State, Cr.App., 410 So.2d 479.

Alaska—Wortham v. State, 519 P.2d 797.

Ariz.—State v. Jacobson, 526 P.2d 784, 22 Ariz.App. 260.

Ill.—People ex rel. Ritholz v. Sain, 180 N.E.2d 464, 24 Ill.2d 168.

Kan.—State v. Mick, 621 P.2d 1006, 229 Kan. 157.

Me.—Burke v. State, 265 A.2d 489.

Miss.—Terry v. State, 384 So.2d 76.

Mo.—Seger v. Camp, 576 S.W.2d 722.

N.Y.—In re Kjeldsen, 240 N.Y.S.2d 71, 39 Misc.2d 128.

Pa.—Com. ex rel. Banks v. Hendrick, 243 A.2d 438, 430 Pa. 575.

Com. ex rel. Colbert v. Aytch, Super., 369 A.2d 1321, 246 Pa.Super. 278, aff'd. 386 A.2d 950, 478 Pa. 314.

Com. ex rel. Watson v. Gable, 51 Del.Co. 486.

Tex.—Ex parte Spencer, Cr., 567 S.W.2d 520.

Fugitive entitled to lawful arrest

Wis.—State ex rel. Foster v. Uttech, 143 N.W.2d 500, 31 Wis.2d 664, cert. den. 87 S.Ct. 392, 385 U.S. 956, 17 L.Ed.2d 303—State ex rel. Lutchin v. County Court of Outagamie County, 165 N.W.2d 593, 42 Wis.2d 78, cert. den. 90 S.Ct. 121, 396 U.S. 856, 24 L.Ed.2d 106.

Essentials of crime sufficiently stated

Fla.—Cossette v. State, App., 221 So.2d 427.

N.Y.—People ex rel. Gondolfo v. Lindemann, 313 N.Y. S.2d 786, 63 Misc.2d 773, aff'd. 314 N.Y.S.2d 702, 34 A.D.2d 1105.

Presumptions

N.Y.—People ex rel. Gondolfo v. Lindemann, 313 N.Y. S.2d 786, 63 Misc.2d 773, aff'd. 314 N.Y.S.2d 702, 34 A.D.2d 1105.

Pa.—Com. ex rel. Pizzo v. Aytch, 416 A.2d 1086, 273 Pa.Super. 55.

Vt.—In re Roessel, 388 A.2d 835, 136 Vt. 324.

Court need not determine whether defendant committed particular offense

Colo.—White v. Leach, 532 P.2d 740, 188 Colo. 62.

Substantially charged

Conn.—Brode v. Power, 332 A.2d 376, 31 Conn.Sup. 412.

Idaho—Jacobsen v. State, 577 P.2d 24, 99 Idaho 45.

Assistance of counsel

N.H.—Smith v. Helgemoe, 369 A.2d 218, 117 N.H. 91.

27.10. U.S.—Smith v. State of Idaho, C.A.Idaho, 373 F.2d 149, cert. den. 87 S.Ct. 2139, 388 U.S. 919, 18 L.Ed.2d 1364—Woods v. Cronvich, C.A.La., 396 F.2d 142.

Ala.—Williams v. State, App., 130 So.2d 351, cert. den. 130 So.2d 354, 272 Ala. 713.

Alaska—Wortham v. State, 519 P.2d 797.

Ariz.—Application of Kirk, 431 P.2d 678, 6 Ariz.App. 238—Application of Dugger, 497 P.2d 413, 17 Ariz.App. 297.

Ark.—Smith v. Cauthron, 631 S.W.2d 10, 275 Ark. 435.

Colo.—Fox v. People, 420 P.2d 412, 161 Colo. 163—Osborne v. Van Cleave, 475 P.2d 625, 173 Colo. 26—Breault v. Wilson, 645 P.2d 276.

Fla.—Bonazzo v. Michell, App., 221 So.2d 186.

Ga.—Adams v. Griffin, 169 S.E.2d 325, 225 Ga. 445—DeBusschere v. Rutledge, 189 S.E.2d 397, 229 Ga. 128.

Idaho—C.J.S. cited in Richardson v. State, 414 P.2d 871, 873, 90 Idaho 566.

Kerr v. Watson, App., 649 P.2d 1234, 103 Idaho 478.

Ill.—People v. Partelow, 188 N.E.2d 25, 26 Ill.2d 606.

Ind.—Bailey v. Cox, 296 N.E.2d 422, 260 Ind. 448.

Idaho—Snyder v. State, 516 P.2d 700, 95 Idaho 643, 73 A.L.R.3d 695.

Kan.—McCullough v. Darr, 548 P.2d 1245, 219 Kan. 477.

Mich.—People v. Rayborn, 171 N.W.2d 460, 18 Mich. App. 468.

Neb.—Singleton v. Adams, 298 N.W.2d 369, 207 Neb. 293.

Nev.—Sheriff, Clark County v. Randono, 515 P.2d 1267, 89 Nev. 521, cert. den. 94 S.Ct. 1970, 416 U.S. 956, 40 L.Ed.2d 307.

N.M.—State v. Sandoval, 620 P.2d 1279, 95 N.M. 254.

N.Y.—In re Holloway, 260 N.Y.S.2d 980, 46 Misc.2d 773.

Ohio—In re Rowe, 423 N.E.2d 167, 67 Ohio St.2d 115, 21 O.O.3d 73.

Pa.—Com. ex rel. Pacewicz v. Turley, 160 A.2d 685, 399 Pa. 458—In re Ripepi, 235 A.2d 141, 427 Pa. 507—Com. ex rel. Banks v. Hendrick, 243 A.2d 438, 430 Pa. 575—Com. ex rel. Kelly v. Santo, 259 A.2d 456, 436 Pa. 204.

Com. ex rel. Reis v. Aytch, 310 A.2d 681, 225 Pa.Super. 315.

Com. ex rel. Watson v. Gable, 51 Del.Co. 486.

R.I.—In re Robert, 406 A.2d 266, 122 R.I. 356.

Tex.—Ex parte Overaker, Cr., 404 S.W.2d 595—Ex parte Frega-Buendia, Cr., 433 S.W.2d 695—Ex parte Clubb, Cr., 447 S.W.2d 185—Ex parte Posey, Cr., 453 S.W.2d 833—Ex parte Weiner, Cr., 472 S.W.2d 773.

Vt.—In re Iverson, 376 A.2d 23, 135 Vt. 255.

W.Va.—State ex rel. Sublett v. Adams, 115 S.E.2d 158, 145 W.Va. 354, reh. den. 81 S.Ct. 1652, 366 U.S. 933, 6 L.Ed.2d 392.

Wis.—State ex rel. Foster v. Uttech, 143 N.W.2d 500, 31 Wis.2d 664, cert. den. 87 S.Ct. 392, 385 U.S. 956, 17 L.Ed.2d 303.

Right to change of venue

Ga.—Hill v. Griffin, 162 S.E.2d 397, 224 Ga. 378.

No constitutional right to hearing before governor

U.S.—Horne v. Wilson, D.C.Tenn., 316 F.Supp. 247.

Md.—Utt v. State, 443 A.2d 582, 293 Md. 271.

Utt v. Warden, Baltimore City Jail, 427 A.2d 1092, 48 Md.App. 486, aff'd. 442 A.2d 582, 293 Md. 271.

Tex.—Ex parte Roberts, Cr., 479 S.W.2d 293.

Discretion of judge

Tex.—Ex parte Sutton, Cr., 455 S.W.2d 274.

Credit for time served

Tex.—Ex parte Reynolds, Cr., 479 S.W.2d 684.

Denial of speedy trial not appropriate question

Ga.—Gilstrap v. Wilder, 213 S.E.2d 895, 233 Ga. 968.

Mental competency not relevant

Ky.—Kellems v. Buchignani, 518 S.W.2d 788.

Identity established

Pa.—Com. ex rel. McGowan v. Aytch, 334 A.2d 750, 233 Pa.Super. 66.

Wis.—State ex rel. Clayton v. Wolke, 230 N.W.2d 869, 69 Wis.2d 363.

Identification sufficient

Pa.—Com. ex rel. Meshel v. Gedney, 384 A.2d 1340, 253 Pa.Super. 274.

Discretion not abused

Wash.—In re Schy, 580 P.2d 1114, 20 Wash.App. 498.

Prison conditions of demanding state

U.S.—Pacileo v. Walker, Cal., 101 S.Ct. 308, 449 U.S. 86, 66 L.Ed.2d 304, reh. den. 101 S.Ct. 1421, 450 U.S. 960, 67 L.Ed.2d 385.

Hearing on identity not prejudicial

Kan.—State v. Smith, 652 P.2d 703, 232 Kan. 128.

Once the governor of an asylum state acts on a requisition for extradition based on the demanding state's judicial determination that probable cause exists, no further judicial inquiry may be had on that issue in the asylum state.^{27,11}

27.11. U.S.—Michigan v. Doran, 99 S.Ct. 530, 439 U.S. 282, 58 L.Ed.2d 521.

Fla.—State ex rel. Meyers v. Miller, App. 5 Dist., 388 So.2d 1358.

Tex.—Ex parte Cain, Cr.App., 592 S.W.2d 359.

Ex Parte Williams, App. 9 Dist., 622 S.W.2d 482, review ref.

In other words, an asylum state may not, in an extradition proceeding, conduct its own investigation into the sufficiency of the facts supporting a finding of probable cause,^{27,12} but, rather, it must accept the demanding state's conclusion if the documents reveal that a probable cause determination was made.^{27,13}

27.12. Kan.—Application of O'Riordan, 643 P.2d 1147, 7 Kan.App.2d 460.

No power to review determination

U.S.—Michigan v. Doran, 99 S.Ct. 530, 439 U.S. 282, 58 L.Ed.2d 521.

Colo.—Wynsma v. Leach, 536 P.2d 817, 189 Colo. 59.

27.13. U.S.—Jerardi v. Gunter, C.A.Mass., 528 F.2d 929.

Ind.—Bailey v. Cox, 296 N.E.2d 422, 260 Ind. 448.

Kan.—Application of O'Riordan, 643 P.2d 1147, 7 Kan.App.2d 460.

Pa.—Com. ex rel. Marshall v. Gedney, 386 A.2d 942, 478 Pa. 299, 90 A.L.R.3d 1074. (Per Roberts, J., with three Justices concurring and one Justice concurring in the result.)

Sufficient probable cause not proper subject in asylum state

Pa.—Com. v. Heilman, 433 A.2d 83, 289 Pa.Super. 314.

On the other hand, the accused is entitled to his discharge where the demanding state fails to make a showing of probable cause.^{27,14}

27.14. Kan.—Wilbanks v. State, 579 P.2d 132, 224 Kan. 66.

Fugitive complaint inadequate to show probable cause

Idaho—Struve v. Wilcox, 579 P.2d 1188, 99 Idaho 205, cert. den. 99 S.Ct. 1037, 439 U.S. 1123, 59 L.Ed.2d 84.

However, where a judicial determination that probable cause exists has never been made, either in the demanding state or the asylum state, and such issue is timely and properly raised by the accused the courts of the asylum state are empowered to make the determination.^{27.15}

27.15. Colo.—Wynsma v. Leach, 536 P.2d 817, 189 Colo. 59—Patrick v. Watson, 576 P.2d 1014, 195 Colo. 156.

Ill.—People ex rel. Abeles v. Elrod, 326 N.E.2d 443, 27 Ill.App.3d 155, cert. den. 96 S.Ct. 1113, 424 U.S. 914, 47 L.Ed.2d 318.

Pa.—Com. ex rel. Colcough v. Aytech, 323 A.2d 359, 227 Pa.Super. 527.

Tex.—Ex parte Sanchez, Cr.App., 642 S.W.2d 809.

Whether the demanding state has made a judicial determination of probable cause may be determined from all the relevant sources.^{27.16}

27.16. Sources considered

Mass.—In re Whitehouse, 467 N.E.2d 228, 18 Mass. App. 455, review den. 469 N.E.2d 830, 393 Mass. 1102.

The responsibility for a full and fair trial rests on the demanding state and not on the asylum state.^{27.20}

27.20. Colo.—Eathorne v. Nelson, 505 P.2d 1, 180 Colo. 288.

28. U.S.—McBride v. Soos, C.A.Ind., 679 F.2d 1223. D.C.—Hoffman v. U.S., C.A., 403 F.2d 927, 131 U.S. App.D.C. 201.

Idaho—Struve v. Wilcox, 579 P.2d 1188, 99 Idaho 205, cert. den. 99 S.Ct. 1037, 439 U.S. 1123, 59 L.Ed.2d 84.

Reasonable delays to be anticipated

Wis.—State v. Hughes, 229 N.W.2d 655, 68 Wis.2d 662.

Jurisdiction

(2) Other statements.

Ga.—Batton v. Griffin, 246 S.E.2d 667, 241 Ga. 548.

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29. U.S.—Horne v. Wilson, D.C.Tenn., 306 F.Supp. 753—U.S. ex rel. Fort v. Meisner, D.C.Ill., 319 F.Supp. 693—U.S. ex rel. McNery v. Shelley, D.C.Ill., 524 F.Supp. 499.

Ariz.—State v. Flowers, 453 P.2d 536, 9 Ariz.App. 440. Cal.—In re Watson, 139 Cal.Rptr. 609, 566 P.2d 243, 19 C.3d 646.

Colo.—Massey v. Cronin, 570 P.2d 523, 194 Colo. 91. D.C.—Martin v. State of Md., App., 287 A.2d 823.

Ill.—People ex rel. Jolley v. Koepfel, 246 N.E.2d 247, 42 Ill.2d 257.

La.—State v. Ross, 404 So.2d 440.

Pa.—Com. ex rel. Aronson v. Price, 191 A.2d 881, 412 Pa. 493.

Com. v. Bell, 293 A.2d 74, 222 Pa.Super. 190. Tenn.—State ex rel. Jones v. Gann, Cr.App., 584 S.W.2d 235.

Tex.—Ex parte Hobbs, Cr., 410 S.W.2d 787.

Wash.—Hystad v. Rhay, 533 P.2d 409, 12 Wash.App. 872.

Nature and scope of proceedings

(2) Other matters.

U.S.—Boag v. Boies, C.A.Ariz., 455 F.2d 467, cert. den. 92 S.Ct. 2509, 408 U.S. 926, 33 L.Ed.2d 338. Ala.—Rayburn v. State, Cr.App., 366 So.2d 698, affd., Sup., 366 So.2d 708.

Ariz.—Application of Dugger, 497 P.2d 413, 17 Ariz. App. 297.

Colo.—Conrad v. McClearn, 145 P.2d 222, 166 Colo. 568—Osborne v. Van Cleave, 475 P.2d 625, 173 Colo. 26.

Conn.—Ross v. Hegstrom, 254 A.2d 556, 157 Conn. 403—Narel v. Liburdi, 441 A.2d 177, 185 Conn. 562, cert. den. 102 S.Ct. 1974, 456 U.S. 928, 72 L.Ed.2d 443.

Del.—State v. Cunningham, Super., 405 A.2d 706.

Ga.—DeBusschere v. Rutledge, 189 S.E.2d 397, 229 Ga. 128.

Ill.—People ex rel. Johnson v. Elrod, 297 N.E.2d 182, 11 Ill.App.3d 649.

Ind.—Holland v. Hargar, 109 N.E.2d 604, 274 Ind. 156.

Kan.—Odum v. State, 524 P.2d 217, 215 Kan. 456.

Md.—Utt v. State, 143 A.2d 582, 293 Md. 271.

N.J.—State v. Dieffenbach, 349 A.2d 581, 137 N.J.Super. 531.

N.Y.—In re Holloway, 260 N.Y.S.2d 980, 46 Misc.2d 773.

N.C.—Dodd v. State, 287 S.E.2d 435, 56 N.C.App. 214.

Or.—State ex rel. Juvenile Dept. of Multnomah County v. Edwards, 516 P.2d 1303, 15 Or.App. 677.

Pa.—In re Ripepi, 235 A.2d 141, 427 Pa. 507—Com. ex rel. Kelly v. Santo, 259 A.2d 456, 436 Pa. 204—Com. ex rel. Marshall v. Gedney, 321 A.2d 641, 456 Pa. 570, transf. to 352 A.2d 528, 237 Pa.Super. 372, affd. 386 A.2d 942, 478 Pa. 299, 90 A.L.R.3d 1074.

Com. ex rel. Heaton v. Harvey, 164 A.2d 123, 193 Pa.Super. 315—Com. ex rel. Bleacher v. Rundle, 217 A.2d 772, 207 Pa.Super. 443—Com. ex rel. Johnson v. Johnson, 292 A.2d 456, 221 Pa.Super. 304—Com. v. Heilman, 433 A.2d 83, 289 Pa.Super. 314.

Tex.—Ex parte Fuller, Cr., 432 S.W.2d 537—Ex parte Jennings, Cr., 434 S.W.2d 673—Ex parte Upton, Cr., 455 S.W.2d 245—Ex parte Venable, Cr., 456 S.W.2d 86—Ex parte Baker, Cr., 465 S.W.2d 379—Ex parte Harry, Cr., 482 S.W.2d 197.

Wash.—In re Wiles' Welfare, 547 P.2d 302, 15 Wash. App. 61.

W.Va.—Wooten v. Hatfield, 287 S.E.2d 516.

Burden of proof

(2) Other matters.

Colo.—Allen v. Cronin, 543 P.2d 707, 189 Colo. 540. Ga.—Stynchcombe v. Rhodes, 231 S.E.2d 63, 238 Ga. 74.

Idaho—Walton v. State, 566 P.2d 765, 98 Idaho 442.

Ill.—In re Leonard, 327 N.E.2d 480, 27 Ill.App.3d 870.

Ind.—Holland v. Hargar, 409 N.E.2d 604, 274 Ind. 156.

Miss.—Taylor v. Garrison, 329 So.2d 506.

N.Y.—People ex rel. Hall v. Casscles, 378 N.Y.S.2d 813, 51 A.D.2d 623, app. diss. 348 N.E.2d 918, 38 N.Y.2d 1006, 384 N.Y.S.2d 442.

Pa.—Com. ex rel. Colcough v. Aytech, 323 A.2d 359, 227 Pa.Super. 527—Com. v. Murphy, 344 A.2d 662, 236 Pa.Super. 37.

Tex.—Ex parte Martinez, Cr., 530 S.W.2d 578.

Ex Parte Williams, App., 622 S.W.2d 482, review ref.

Sufficiency of evidence

N.J.—In re Colasanti, 249 A.2d 1, 104 N.J.Super. 122. Pa.—Com. ex rel. Kelly v. Santo, 259 A.2d 456, 436 Pa. 204.

Com. v. Quackenbush, 435 A.2d 872, 291 Pa.Super. 209.

Tex.—Ex parte Wiggins, Cr., 435 S.W.2d 517—Ex parte Ovalle, Cr., 434 S.W.2d 854—Ex parte Stehling, Cr., 481 S.W.2d 431.

(2) Other matters.

Colo.—Capra v. Miller, 422 P.2d 636, 161 Colo. 448. D.C.—Lathan v. Reid, C.A., 280 F.2d 66, 108 U.S.App. D.C. 58, cert. den. 81 S.Ct. 107, 364 U.S. 865, 5 L.Ed.2d 86.

Idaho—Walton v. State, 566 P.2d 765, 98 Idaho 442.

Ill.—People ex rel. Martin v. Elrod, 344 N.E.2d 714, 36 Ill.App.3d 952, cert. den. 97 S.Ct. 1599, 430 U.S. 955, 51 L.Ed.2d 804.

Md.—Johnson v. Warden, Montgomery County Detention Center, 223 A.2d 584, 244 Md. 384.

Miss.—Johnson v. Ledbetter, 348 So.2d 1007.

N.Y.—People ex rel. O'Dell v. Quinlan, 366 N.Y.S.2d 531, 81 Misc.2d 271.

Pa.—Com. ex rel. Kelly v. Aytech, 385 A.2d 508, 254 Pa.Super. 28—Com. v. Inadi, 449 A.2d 753, 303 Pa.Super. 409.

Tenn.—State ex rel. Ezell v. Evatt, Cr., 512 S.W.2d 673. Tex.—Ex parte Fuller, Cr., 432 S.W.2d 537—Ex parte Sutton, Cr., 455 S.W.2d 274—Ex parte Bradley, Cr., 456 S.W.2d 370—Ex parte Binette, Cr., 465 S.W.2d 373—Ex parte Martino, Cr., 474 S.W.2d 691—Ex parte Bowman, Cr., 480 S.W.2d 675.

W.Va.—Lott v. Bechtold, 289 S.E.2d 210.

Presumptions

Colo.—Conrad v. McClearn, 145 P.2d 222, 166 Colo. 568—Graham v. Vanderhoof, 524 P.2d 611, 185 Colo. 334.

Idaho—Jacobsen v. State, 577 P.2d 24, 99 Idaho 45. La.—State v. Lee, 275 So.2d 757.

N.Y.—People ex rel. Drake v. Oslwyn, 380 N.Y.S.2d 66, 51 A.D.2d 240.

Pa.—In re Ripepi, 235 A.2d 141, 427 Pa. 507.

Tex.—Ex parte Goodwin, Cr., 384 S.W.2d 874—Ex parte Fraga-Buendia, Cr., 433 S.W.2d 695—Ex parte Weiner, Cr., 472 S.W.2d 773.

Wis.—State ex rel. Reddin v. Meekma, App., 298 N.W.2d 192, 99 Wis.2d 56, affd., 36 N.W.2d 664, 102 Wis.2d 358, cert. den. 102 S.Ct. 407, 454 U.S. 902, 70 L.Ed.2d 220.

Record

Mass.—Com. v. Lamoureux, 204 N.E.2d 115, 348 Mass. 390.

Pa.—Com. v. Quackenbush, 435 A.2d 872, 291 Pa.Super. 209.

Tex.—Ex parte Pfouts, Cr., 383 S.W.2d 598.

Ex parte Trisler, Cr.App., 605 S.W.2d 619.

Admissibility of evidence

U.S.—U.S. ex rel. Vitiello v. Flood, C.A.N.Y., 374 F.2d 554.

Colo.—Conrad v. McClearn, 145 P.2d 222, 166 Colo. 568.

Idaho—Smith v. State, 403 P.2d 221, 89 Idaho 70, cert. den. 86 S.Ct. 906, 383 U.S. 916, 15 L.Ed.2d 669.

Ill.—People ex rel. Molock v. Elrod, 368 N.E.2d 487, 10 Ill.Dec. 892, 53 Ill.App.3d 14.

Ind.—Bailey v. Cox, 296 N.E.2d 422, 260 Ind. 448. Neb.—Application of Mahan, 319 N.W.2d 760, 211 Neb. 671.

Pa.—Com. v. Murphy, 344 A.2d 662, 236 Pa.Super. 37—Com. v. Inadi, 449 A.2d 753, 303 Pa.Super. 409.

Tex.—Ex parte Kronhaus, Cr., 410 S.W.2d 442—Ex parte Stehling, Cr., 481 S.W.2d 431—Ex parte Dumas, Cr., 487 S.W.2d 753.

Right to counsel

Fla.—Payne v. Askew, App., 350 So.2d 831.

Idaho—Struve v. Wilcox, 579 P.2d 1188, 99 Idaho 205, cert. den. 99 S.Ct. 1037, 439 U.S. 1123, 59 L.Ed.2d 84.

Ill.—People ex rel. Harris v. Ogilvie, 221 N.E.2d 265, 35 Ill.2d 512.

Kan.—State v. Andrews, 614 P.2d 447, 228 Kan. 368.

Md.—Utt v. State, 443 A.2d 582, 293 Md. 271.

Mich.—People v. Braziel, 169 N.W.2d 513, 17 Mich. App. 411—Rutledge v. Preadmore, 176 N.W.2d 417, 21 Mich.App. 726, cert. den. 91 S.Ct. 891, 401 U.S. 915, 27 L.Ed.2d 814.

Nev.—Roberts v. Hocker, 456 P.2d 425, 85 Nev. 390.

Tex.—Ex parte Turner, Cr., 410 S.W.2d 639.

Delivery of extradition paper to accused

Tex.—Ex parte Strunk, Cr., 444 S.W.2d 940.

Extension of time for extradition proceedings

N.D.—Wilkins v. Granrud, 178 N.W.2d 644.

Pa.—Com. v. Quackenbush, 435 A.2d 872, 291 Pa.Super. 209.

Showing of probable cause

U.S.—Ierardi v. Gunter, C.A.Mass., 528 F.2d 929.

Colo.—Wynsma v. Leach, 536 P.2d 817, 189 Colo. 59—Lucero v. Martin, 660 P.2d 902—People v. Schneekloth, 660 P.2d 1293.

Fla.—State ex rel. Meyers v. Miller, App., 388 So.2d 1358.

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Idaho—Struve v. Wilcox, 579 P.2d 1188, 99 Idaho 205, cert. den. 99 S.Ct. 1037, 439 U.S. 1123, 59 L.Ed.2d 84.

Ind.—Bailey v. Cox, 296 N.E.2d 422, 260 Ind. 448.

Kan.—Wilbanks v. State, 579 P.2d 132, 224 Kan. 66. Application of O'Riordan, 643 P.2d 1147, 7 Kan. App.2d 460.

N.D.—Wilkins v. Granrud, 178 N.W.2d 644.

Pa.—Com. ex rel. Marshall v. Gedney, 386 A.2d 942, 478 Pa. 299, 90 A.L.R.3d 1074.

Com. v. Heilman, 433 A.2d 83, 289 Pa.Super. 314.

Tex.—Ex parte Sanchez, Cr.App., 642 S.W.2d 809. Ex Parte Williams, App., 622 S.W.2d 482, review ref.

Review

U.S.—Michigan v. Doran, Mich., 99 S.Ct. 530, 439 U.S. 282, 58 L.Ed.2d 521.

Colo.—Lovato v. Johnson, 617 P.2d 1203.

Iowa—Evans v. Rosenberger, 181 N.W.2d 152.

Tex.—Ex parte Starks, Cr., 464 S.W.2d 837.

Wash.—Veisch v. Sheriff of Spokane County, 546 P.2d 927, 14 Wash.App. 971.

Notification of accused of crimes charged

Kan.—Application of O'Riordan, 643 P.2d 1147, 7 Kan.App.2d 460.

Nev.—Marshall v. Sheriff, Clark County, 488 P.2d 1157, 87 Nev. 455.

Remand for extradition

Tex.—Ex parte Goodman, Cr., 485 S.W.2d 785.

Prosecutor's promise accorded no weight

U.S.—Forester v. California Adult Authority, D.C. N.D., 510 F.2d 58.

Continuance not prejudicial

Pa.—Com. ex rel. Stille v. State of Fla., 340 A.2d 534, 235 Pa.Super. 10.

Applicability of rules of evidence

Neb.—Application of Mahan, 319 N.W.2d 760, 211 Neb. 671.

Witnesses

Neb.—Application of Mahan, 319 N.W.2d 760, 211 Neb. 671.

Grant of continuance sua sponte not error

Tex.—Ex parte Shoels, App. 4 Dist., 643 S.W.2d 761.

29.5. N.Y.—People ex rel. Grice v. Wright, 301 N.Y. S.2d 706, 60 Misc.2d 488.

Provision held applicable to person already in custody in asylum state

Ill.—People ex rel. Lehman v. Frye, 220 N.E.2d 235, 35 Ill.2d 343, cert. den. 87 S.Ct. 732, 385 U.S. 1015, 17 L.Ed.2d 552.

Rendition without hearing as not converting warrant into executive pardon with respect to offenses in asylum state.

Ill.—People ex rel. Lehman v. Frye, 220 N.E.2d 235, 35 Ill.2d 343, cert. den. 87 S.Ct. 732, 385 U.S. 1015, 17 L.Ed.2d 552.

Procedure under Uniform Interstate Extradition Law

Fla.—Grimes v. State, 244 So.2d 130.

Pa.—Com. v. Bell, 293 A.2d 74, 222 Pa.Super. 190.

Custody by sister state required

Colo.—Eathorne v. Nelson, 505 P.2d 1, 180 Colo. 288.

Uniform Criminal Extradition Act

U.S.—Cuyler v. Adams, Pa., 101 S.Ct. 703, 449 U.S. 433, 66 L.Ed.2d 641.

Ill.—Papas v. Brown, 410 N.E.2d 568, 43 Ill.Dec. 568, 88 Ill.App.3d 471.

N.Y.—People v. Faustino, 432 N.Y.S.2d 782, 105 Misc.2d 641.

Or.—Application of Carden, 635 P.2d 341, 291 Or. 515, cert. den. 102 S.Ct. 1278, 455 U.S. 921, 71 L.Ed.2d 462.

Pa.—Com. ex rel. Simpson v. Aytey, 372 A.2d 861, 247 Pa.Super. 348.

29.10. Rights held not violated

(2) Uniform Criminal Extradition Act.

Ind.—Andrews v. State, 169 N.E.2d 193, 241 Ind. 180, cert. den. 81 S.Ct. 829, 365 U.S. 861, 5 L.Ed.2d 824.

Lodging detainer warrant as arrest requiring taking before judicial authority

Pa.—Com. ex rel. Knowles v. Lester, 321 A.2d 637, 456 Pa. 423, disapproving Com. ex rel. Johnson v. Johnson, 292 A.2d 456, 291 Pa.Super. 304, to extent inconsistent.

29.15. Ariz.—Watson v. Dupuik, App., 626 P.2d 622, 128 Ariz. 458.

Colo.—Conrad v. McClearn, 445 P.2d 222, 166 Colo. 568.

Neb.—Application of Mahan, 319 N.W.2d 760, 211 Neb. 671.

N.J.—Matter of Lucas, 343 A.2d 845, 136 N.J.Super. 24, affd. 316 A.2d 624, 136 N.J.Super. 460.

Motion for rehearing

Tex.—Ex parte Connelly, Cr., 479 S.W.2d 943.

New hearing

N.Y.—People ex rel. Harris v. Warden, New York City Adult Remand Center, 345 N.Y.S.2d 29, 42 A.D.2d 549.

Questions moot

Colo.—Reese v. Warden and Keeper of County Jail, Jefferson County, 561 P.2d 339, 193 Colo. 7.

Pa.—Com. ex rel. Berry v. Aytey, 385 A.2d 354, 253 Pa.Super. 312.

29.20. Ala.—Shirley v. State, 363 So.2d 104, on remand, Cr.App., 363 So.2d 107.

Fla.—Cossette v. State, App., 221 So.2d 427.

N.J.—State v. Sinacore, 376 A.2d 580, 151 N.J.Super. 106.

N.Y.—People ex rel. Grice v. Wright, 301 N.Y.S.2d 706, 60 Misc.2d 488.

Pa.—Com. ex rel. Girmus v. Haas, 266 A.2d 94, 439 Pa. 39.

Tex.—Ex parte Goodwin, Cr., 384 S.W.2d 874.

"Hold order"

Okl.—Skinner v. Raines, Cr., 370 P.2d 40.

Burden of proof

S.D.—State ex rel. Hall v. Hawkey, 263 N.W.2d 141.

When insufficiency of requisition is challenged by accused whose extradition is sought, the court must find, as jurisdictional facts, that the complaint issued out of the demanding state was made on an affidavit, that it substantially charged on offense, and that accused was made to appear to be a fugitive from justice.^{29.25}

29.25. U.S.—U.S. ex rel. Vitiello v. Flood, C.A.N.Y., 374 F.2d 554.

Ariz.—Applications of Oppenheimer, 389 P.2d 696, 95 Ariz. 292, cert. den. 84 S.Ct. 1359, 377 U.S. 948, 12 L.Ed.2d 311.

Tex.—Ex parte Spencer, Cr., 567 S.W.2d 520.

Marginal cases resolved by preference accorded warrant

Fla.—Cossette v. State, App., 221 So.2d 427.

Under the Interstate Compact on Juveniles the state court requested to return a runaway child should have a hearing and then decide whether it is in the child's best interests to be returned.^{29.30}

29.30. W.Va.—In re M.D., 298 S.E.2d 243.

30. Tenn.—State ex rel. Ezell v. Ewart, Cr., 512 S.W.2d 673.

Grant of continuances not prejudicial

Pa.—Com. ex rel. Colcough v. Aytey, 323 A.2d 359, 227 Pa.Super. 527.

§ 18. Discharge and Rearrest

36.5. Ariz.—State v. Hooker, App., 626 P.2d 1111, 128 Ariz. 479.

Conn.—Bursque v. Moore, 227 A.2d 255, 26 Conn.Super. 469.

Fla.—Treadway v. Heidtman, App., 284 So.2d 473—Hill v. Roberts, App., 359 So.2d 911.

Ga.—Horning v. Hutson, 253 S.E.2d 167, 243 Ga. 217.

N.J.—In re Colasanti, 249 A.2d 1, 104 N.J.Super. 122.

Pa.—Com. v. Murphy, 344 A.2d 662, 236 Pa.Super. 37—Com. v. Quackenbush, 435 A.2d 872, 291 Pa.Super. 209.

Discharge not mandatory

Cal.—People v. Superior Court of Los Angeles County, 182 Cal.Rptr. 132, 130 C.A.3d 776.

Miss.—McEwen v. State, 224 So.2d 206.

Neb.—Prettyman v. Karnopp, 222 N.W.2d 362, 192 Neb. 451.

N.J.—Application of Dunster, 328 A.2d 238, 131 N.J. Super. 22.

Properly rearrested

W.Va.—Brightman v. Withrow, 304 S.E.2d 688.

36.10. U.S.—Smith v. State of Idaho, C.A.Idaho, 373 F.2d 149, cert. den. 87 S.Ct. 2139, 388 U.S. 919, 18 L.Ed.2d 1364.

Cal.—People v. Superior Court of Los Angeles County, 182 Cal.Rptr. 132, 130 C.A.3d 776.

36.15. Neb.—C.J.S. quoted at length in Prettyman v. Karnopp, 222 N.W.2d 362, 366, 192 Neb. 451.

N.J.—Application of Dunster, 328 A.2d 238, 131 N.J. Super. 22.

36.20. N.Y.—People ex rel. Green v. Nenna, 279 N.Y.S.2d 324, 53 Misc.2d 525, affd. 264 N.Y.S.2d 211, 24 A.D.2d 936, affd. 218 N.E.2d 311, 17 N.Y.2d 815, 271 N.Y.S.2d 267.

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36.30. Colo.—Massey v. Wilson, 605 P.2d 469, 199 Colo. 121.

Conn.—Glavin v. Warden, State Prison, 311 A.2d 86, 163 Conn. 394.

Ill.—People ex rel. Vasquez v. Pratt, 322 N.E.2d 74, 24 Ill.App.3d 927.

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36.35. Ga.—Barton v. Griffin, 241 S.E.2d 201, 240 Ga. 450.

Ill.—May v. Sexton, 221 N.E.2d 283, 35 Ill.2d 585.

Or.—King v. Mitchell, 513 P.2d 519, 14 Or.App. 382.

Pa.—Com. ex rel. Berry v. Aytey, 385 A.2d 354, 253 Pa.Super. 312.

§ 19. Bail

36.50. Neb.—C.J.S. cited in State ex rel. Partin v. Jensen, 279 N.W.2d 120, 123, 203 Neb. 441.

37. U.S.—Meechaicum v. Fountain, C.A.Kan., 696 F.2d 790.

Ala.—State v. Sparks, App., 215 So.2d 469.

Conn.—Carino v. Watson, 370 A.2d 950, 171 Conn. 366.

Ind.—Holland v. Hargar, 409 N.E.2d 604, 274 Ind. 156.

Tex.—Ex parte Quinn, Cr., 549 S.W.2d 198.

Purpose of provision for further bail if governor's warrant not issued within specified period

Colo.—Dressel v. Bianco, 452 P.2d 756, 168 Colo. 517.

Ill.—People ex rel. Gummow v. Larson, 220 N.E.2d 165, 35 Ill.2d 280.

Bond construed as continuing bond

Ariz.—State v. Hervey, 456 P.2d 953, 10 Ariz.App. 107.

Okl.—James v. State, 584 P.2d 213.

37.5. Ala.—State v. Sparks, App., 215 So.2d 469.

37.10. N.J.—Matter of Lucas, 343 A.2d 845, 136 N.J.Super. 24, affd. 346 A.2d 624, 136 N.J.Super. 460.

38. U.S.—U.S. ex rel. Little v. Ciuross, D.C.N.Y., 452 F.Supp. 388.

39. U.S.—Walden v. Mosley, D.C.Miss., 312 F.Supp. 855.

Ala.—C.J.S. cited in *Balasco v. State*, Cr., 289 So.2d 666, 670, 52 Ala.App. 99.

Ariz.—C.J.S. cited in *State v. Jacobson*, 526 P.2d 784, 788, 22 Ariz.App. 260.

Fla.—*Tomarchin v. Kelly*, App., 118 So.2d 788.

Iowa—*State v. Martin*, 252 N.W.2d 438.

Nev.—*State v. Second Judicial Dist. Court*, Washoe County, 471 P.2d 224, 86 Nev. 531, cert. den. 91 S.Ct. 871, 401 U.S. 910, 27 L.Ed.2d 809, reh. den. 91 S.Ct. 1365, 402 U.S. 925, 28 L.Ed.2d 664.

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N.Y.—*People ex rel. McGill v. Wright*, 307 N.Y.S.2d 964, 62 Misc.2d 154, affd. 314 N.Y.S.2d 128, 34 A.D.2d 1106.

39.5. Vt.—In re *Iverson*, 376 A.2d 23, 135 Vt. 255.

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44. Ariz.—*State v. Hervey*, 456 P.2d 953, 10 Ariz. App. 107.

Remittance of bail bond taken without authority
N.C.—*State v. Cronauer*, 310 S.E.2d 78, 65 N.C.App. 449.

44.5. Status of agent

R.I.—*Bailey v. Laurie*, 373 A.2d 482, 118 R.I. 184.

§ 20. Authority and Liability of Agent to Receive Fugitive

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46. Utah—*Nix v. Smith*, 540 P.2d 516.

§ 21. Proceedings after Return

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55. U.S.—C.J.S. quoted in *Collins v. State of Fla.*, C.A.Fla., 432 F.2d 60, 62—*Siegel v. Edwards*, C.A.La., 366 F.2d 958.

Ark.—*Bell v. State*, 422 S.W.2d 668, 243 Ark. 839.

Colo.—*Habbord v. People*, 488 P.2d 554, 175 Colo. 417.

Fla.—*Jones v. State*, App., 386 So.2d 804.

Mich.—*People v. Berryman*, 204 N.W.2d 238, 43 Mich. App. 366.

Neb.—*State v. Dodd*, 122 N.W.2d 518, 175 Neb. 533.

Okla.—*McKee v. Page*, Cr., 438 P.2d 649.

Tenn.—*State ex rel. Jones v. Gann*, Cr.App., 584 S.W.2d 235.

Violation of parole

(2) Other matters.

Ariz.—*State v. Canady*, 606 P.2d 815, 124 Ariz. 599.

Fla.—*Fowler v. State of N.J. State Parole Bd.*, App., 239 So.2d 831.

Right to speedy trial

Cal.—*Selfa v. Superior Court In and For Santa Clara County*, 167 Cal.Rptr. 153, 109 C.A.3d 182.

59.5. U.S.—*U.S. v. Eaddy*, C.A.Mich., 595 F.2d 341.

Effectiveness of proposed waiver of extradition
Cal.—In re *Satterfield*, 50 Cal.Rptr. 284, 412 P.2d 540, 64 C.2d 419.

Notice of charges prior to waiver

U.S.—*Fugate v. Gaffney*, D.C.Neb., 313 F.Supp. 128, affd., C.A., 453 F.2d 362, cert. den. 93 S.Ct. 142, 409 U.S. 888, 34 L.Ed.2d 145.

59.15. Ariz.—*State v. Peel*, 407 P.2d 756, 99 Ariz. 174.

A person who has been extradited may thereafter be returned to the state from which he was taken without the initiation of new proceedings.^{61.5}

61.5. Agreement by governors

U.S.—*Boag v. Boies*, C.A.Ariz., 455 F.2d 467, cert. den. 92 S.Ct. 2509, 408 U.S. 926, 33 L.Ed.2d 338.

Ariz.—*Walsh v. State ex rel. Eyman*, 450 P.2d 392, 104 Ariz. 202.

Voluntary return

Ariz.—*State v. Knapp*, App., 599 P.2d 855, 123 Ariz. 402.

Conviction of accused in the demanding state after defective extradition proceedings may cure defects in such proceedings.^{61.10}

61.10. Alaska—*Warmbo v. State*, 578 P.2d 582.

Conviction as determination of guilt and showing of probable cause for extradition

U.S.—*Campbell v. Smith*, D.C.Ga., 308 F.Supp. 796.

62. Restitution

Statement in extradition petition that requisition not sought for collection of debt or enforcing civil remedy does not preclude trying defendant on issue of restitution.

Tenn.—*Burton v. State*, 377 S.W.2d 900, 214 Tenn. 9.

Purpose

N.J.—*Santos v. Figueroa*, 208 A.2d 810, 87 N.J.Super. 227.

Noncompliance makes service voidable, not void

N.J.—*Santos v. Figueroa*, 208 A.2d 810, 87 N.J.Super. 227.

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63. **Petition not immune from service of writ ne exeat**

Fla.—*Pifer v. Pifer*, App., 349 So.2d 778.

69. U.S.—*Shields v. Beto*, C.A.Tex., 370 F.2d 1003.

Ill.—*People ex rel. O'Connor v. Bensinger*, 270 N.E.2d 1, 48 Ill.2d 440.

Kan.—*State v. Mick*, 621 P.2d 1006, 229 Kan. 157.

Ky.—*Shull v. Wingo*, 446 S.W.2d 645.

Okla.—*Anderson v. State*, Cr., 386 P.2d 320—*Knott v. State*, Cr., 387 P.2d 142.

Permanent waiver

U.S.—*Shields v. Beto*, C.A.Tex., 370 F.2d 1003.

Fugitive not entitled to object

Iowa—*Gardels v. Brewer*, 190 N.W.2d 803.

Only governor may waive

Okla.—*Application of Butler*, Cr., 346 P.2d 348, cert. den. 80 S.Ct. 1620, 363 U.S. 846, 4 L.Ed.2d 1729.

70. Ky.—C.J.S. cited in *Craday v. Cranfill*, 371 S.W.2d 640, 643.

Okla.—*Anderson v. State*, Cr., 386 P.2d 320—*Knott v. State*, Cr., 387 P.2d 142—*Application of Brown*, Cr., 432 P.2d 358.

Since the publication of *Corpus Juris Secundum* language in the case of *In re Whittington*, 167 P. 404, 34 C.A. 344, to the effect that jurisdiction is automatically waived when a prisoner is transferred to another state has been disapproved.

Cal.—In re *Patterson*, 49 Cal.Rptr. 801, 411 P.2d 897, 64 C.2d 357.

Since the publication of *Corpus Juris Secundum* the holding in the case of *In re Whittington*, cited to the

text in the bound volume, has been expressly disapproved.

Cal.—In re *Patterson*, 49 Cal.Rptr. 801, 411 P.2d 897, 64 C.2d 357.

No waiver where jurisdiction reacquired

Okla.—*Peoples v. State*, Cr., 523 P.2d 1123.

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70.10. Ariz.—*Walsh v. State ex rel. Eyman*, 450 P.2d 392, 104 Ariz. 202.

State v. White, App., 639 P.2d 1053, 131 Ariz. 228.

Cal.—In re *Patterson*, 49 Cal.Rptr. 801, 411 P.2d 897, 64 C.2d 357—In re *Patterson*, 49 Cal.Rptr. 801, 411 P.2d 897, 64 C.2d 357—In re *Satterfield*, 50 Cal.Rptr. 284, 412 P.2d 540, 64 C.2d 419.

People v. Albin, 88 Cal.Rptr. 422, 9 C.A.3d 31.

Conn.—*Amato v. Robinson*, 325 A.2d 810, 31 Conn. Sup. 170.

Ky.—*Shull v. Wingo*, 446 S.W.2d 645.

N.M.—*State v. Blankenship*, 441 P.2d 218, 79 N.M. 178.

N.Y.—*People ex rel. Millan v. Kennedy*, 304 N.Y.S.2d 490, 61 Misc.2d 97.

Or.—*State ex rel. Hood v. Purcell*, 494 P.2d 461, 8 Or.App. 532, cert. den. 93 S.Ct. 564, 409 U.S. 1061, 34 L.Ed.2d 514.

Tenn.—*Dodson v. State*, Cr., 497 S.W.2d 767.

Elements of waiver

Okla.—*Application of Butler*, Cr., 346 P.2d 348, cert. den. 80 S.Ct. 1620, 363 U.S. 846, 4 L.Ed.2d 1729—*Fernbaugh v. Hurt*, Cr., 354 P.2d 787, cert. den. 81 S.Ct. 117, 364 U.S. 873, 5 L.Ed.2d 95.

Question of state policy, not constitutional right

Ky.—*Craday v. Cranfill*, 371 S.W.2d 640.

Voluntary return

R.I.—*Grieco v. Langlois*, 181 A.2d 230, 94 R.I. 415, motion den. 182 A.2d 434, 94 R.I. 415, cert. den. 83 S.Ct. 75, 371 U.S. 843, 9 L.Ed.2d 79, and 83 S.Ct. 1101, 372 U.S. 962, 10 L.Ed.2d 135.

Effect of statutory provision for surrender by governor not retroactive

Ky.—*Chick v. Com.*, 405 S.W.2d 14, cert. den. 87 S.Ct. 518, 385 U.S. 977, 17 L.Ed.2d 439.

Matters held not to constitute waiver under statute providing for surrender by governor

Ky.—*Chick v. Com.*, 405 S.W.2d 14, cert. den. 87 S.Ct. 518, 385 U.S. 977, 17 L.Ed.2d 439.

70.15. Minn.—*State ex rel. Morris v. Tahash*, 115 N.W.2d 676, 262 Minn. 562—*State ex rel. Chamberlain v. Martinco*, 179 N.W.2d 286, 288 Minn. 231.

N.J.—*State v. Masselli*, 202 A.2d 415, 43 N.J. 1.

No waiver

Colo.—*Gottfried v. Cronin*, 555 P.2d 969, 192 Colo. 25.

70.20. Cal.—*People v. Fritz*, 80 Cal.Rptr. 506, 275 C.A.2d 866—*People v. Albin*, 88 Cal.Rptr. 422, 9 C.A.3d 31.

Ky.—*Simpson v. Black*, 471 S.W.2d 739.

Md.—*Ray v. Warden*, Baltimore City Jail, 281 A.2d 125, 13 Md.App. 61.

Minn.—*Cleaver v. State*, 187 N.W.2d 700, 290 Minn. 336.

Ohio—*Murphy v. Maxwell*, 199 N.E.2d 597, 176 Ohio St. 297.

Or.—*Bishop v. Cupp*, 490 P.2d 524, 7 Or.App. 349.

Waiver of jurisdiction as to unserved portion of sentence held shown

U.S.—*Shields v. Beto*, C.A.Tex., 370 F.2d 1003.

72.5. Okla.—*Knott v. State*, Cr., 387 P.2d 142.

73. U.S.—*Himes v. Ohio Adult Parole Authority*, C.A. Ohio, 448 F.2d 410.

Ky.—*Zitt v. Wingo*, 467 S.W.2d 370.

Ohio—*Huesdash v. Haskins*, 247 N.E.2d 754, 18 Ohio St.2d 108, cert. den. 90 S.Ct. 399, 396 U.S. 115, 24 L.Ed.2d 310.

Pa.—*Com. ex rel. Heiser v. Myers*, 79 York 75.

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Surrender to federal authorities

Ga.—Hanford v. Grimes, 132 S.E.2d 75, 219 Ga. 136.
Ill.—People ex rel. Davis v. Farmer, 246 N.E.2d 249, 42 Ill.2d 261.

76.5. Ariz.—Watson v. Dupnik, App., 626 P.2d 622, 128 Ariz. 458.

§ 22. — Effect of Illegal Rendition

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77. U.S.—McCowan v. Nelson, C.A.Cal., 436 F.2d 758—Boag v. Boies, C.A.Ariz., 455 F.2d 467, cert. den. 92 S.Ct. 2509, 408 U.S. 926, 33 L.Ed.2d 388.
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Ariz.—C.J.S. cited in Watson v. Dupnik, App., 626 P.2d 622, 624, 128 Ariz. 458.

Boag v. State, 520 P.2d 317, 21 Ariz.App. 404.
Cal.—People v. Sergeant, 6 Cal.Rptr. 576, 183 C.A.2d 342.

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Iowa—C.J.S. cited in Gardels v. Brewer, 190 N.W.2d 803, 806.

Md.—Miller v. Warden, Baltimore City Jail, 287 A.2d 57, 14 Md.App. 377.

N.Y.—Dudley v. Corbett, 259 N.Y.S.2d 572, 46 Misc.2d 205.

N.C.—State v. Teal, 177 S.E.2d 283, 277 N.C. 349, cert. den. 91 S.Ct. 1395, 402 U.S. 913, 28 L.Ed.2d 655.

Okl.—Davis v. Page, Cr., 405 P.2d 710.
Tex.—Gaither v. State, Cr., 479 S.W.2d 50.

Not a defense

U.S.—In re David, D.C.Ill., 395 F.Supp. 803.

78. U.S.—Johnson v. Buie, D.C.Mo., 312 F.Supp. 1349.

Ill.—People v. Cartee, 408 N.E.2d 396, 42 Ill.Dec. 18, 86 Ill.App.3d 895.

Absence of counsel

(2) Other statements.

Cal.—People v. Willingham, 76 Cal.Rptr. 760, 271 C.A.2d 562, cert. den. 90 S.Ct. 1129, 397 U.S. 993, 25 L.Ed.2d 401.

Right to challenge validity of arrest

Wis.—State ex rel. Lutchin v. County Court of Outagamie County, 165 N.W.2d 593, 42 Wis.2d 78, cert. den. 90 S.Ct. 121, 396 U.S. 856, 24 L.Ed.2d 106.

82.5. Defective extradition as basis for action against asylum state officers

U.S.—Johnson v. Buie, D.C.Mo., 312 F.Supp. 1349.

§ 23. Costs and Expenses

83. U.S.—Monroe County v. State of Fla., C.A.N.Y., 678 F.2d 1124, cert. den. 103 S.Ct. 726, 459 U.S. 1104, 74 L.Ed.2d 951.

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85. Pa.—Com. v. Davy, 317 A.2d 48, 456 Pa. 88.

§ 24. Nature of Right

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94. U.S.—Gallina v. Fraser, C.A.Conn., 278 F.2d 77, cert. den. 81 S.Ct. 97, 364 U.S. 851, 5 L.Ed.2d 74, reh. den. 81 S.Ct. 238, 364 U.S. 906, 5 L.Ed.2d 199.

C.J.S. cited in Ramos v. Diaz, D.C.Fla., 179 F.Supp. 459, 460.

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Return without extradition proceedings

U.S.—Tavarez v. U.S. Atty. Gen., C.A.Tex., 668 F.2d 805.

95. Denied on humanitarian grounds

U.S.—Sindona v. Grant, C.A.N.Y., 619 F.2d 167.

No inherent requirement

U.S.—McElvy v. Civiletti, D.C.Fla., 523 F.Supp. 42.

96. U.S.—Fioconci v. Attorney General of U.S., C.A.N.Y., 462 F.2d 475, cert. den. 93 S.Ct. 552, 409 U.S. 1059, 34 L.Ed.2d 511.

97. U.S.—Peroff v. Hylton, C.A.Va., 563 F.2d 1099.

98. U.S.—Gallina v. Fraser, D.C.Conn., 177 F.Supp. 856, affd., C.A., 278 F.2d 77, cert. den. 81 S.Ct. 97, 364 U.S. 851, 5 L.Ed.2d 74, reh. den. 81 S.Ct. 238, 364 U.S. 906, 5 L.Ed.2d 199. McElvy v. Civiletti, D.C.Fla., 523 F.Supp. 42.

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U.S.—Williams v. Rogers, C.A.N.D., 449 F.2d 513, cert. den. 92 S.Ct. 976, 405 U.S. 926, 30 L.Ed.2d 799.

Ryan v. U.S., D.C.N.Y., 360 F.Supp. 264, affd. 478 F.2d 1397.

3. Limitation period

U.S.—Barrett v. U.S., C.A.Mich., 590 F.2d 624—Matter of Assarsson, C.A.Ill., 670 F.2d 722.

The surrender of an American citizen required by treaty for foreign criminal prosecution is unimpaired by the absence of American Constitutional Safeguards in such country.⁴⁵

4.5. D.C.—Holmes v. Laird, C.A., 459 F.2d 1211, 148 U.S.App.D.C. 187, cert. den. 93 S.Ct. 197, 409 U.S. 869, 34 L.Ed.2d 120.

§ 25. Treaty and Statutory Provisions

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6. U.S.—Sayne v. Shipley, C.A.Can. Zone, 418 F.2d 679, cert. den. 90 S.Ct. 1688, 398 U.S. 903, 26 L.Ed.2d 61—Waitis v. McGowan, C.A.N.J., 516 F.2d 203—Magisano v. Locke, C.A.Wash., 545 F.2d 1228.

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Treaties with Germany

(2) U.S.—Plaster v. U.S., C.A.Va., 720 F.2d 340, on remand 605 F.Supp. 1532.

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Treaties with Great Britain

(3) Other matters.

U.S.—Jhirad v. Ferrandina, D.C.N.Y., 355 F.Supp. 1155, revd. on oth. grds. 486 F.2d 442, on remand 377 F.Supp. 34, on remand 401 F.Supp. 1215, affd. 536 F.2d 478, cert. den. 97 S.Ct. 97, 429 U.S. 833, 50 L.Ed.2d 98, reh. den. 97 S.Ct. 511, 429 U.S. 988, 50 L.Ed.2d 600—Jhirad v. Ferrandina, D.C.N.Y., 362 F.Supp. 1057, revd. on oth. grds., C.A., 486 F.2d 442, on remand 377 F.Supp. 34, on remand 401 F.Supp. 1215, affd. 536 F.2d 478, cert. den. 97 S.Ct. 97, 429 U.S. 833, 50 L.Ed.2d 98, reh. den. 97 S.Ct. 511, 429 U.S. 988, 50 L.Ed.2d 600.

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7. Protection against double jeopardy

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8.5. Treaty with Italy

(2) Notification entitled to great weight.

U.S.—In re Extradition of D'Amico, D.C.N.Y., 177 F.Supp. 648.

Extradition after revival for offense during suspension

U.S.—In re Extradition of D'Amico, D.C.N.Y., 177 F.Supp. 648—Gallina v. Fraser, D.C.Conn., 177 F.Supp. 856, affd., C.A., 278 F.2d 77, cert. den. 81 S.Ct. 97, 364 U.S. 851, 5 L.Ed.2d 74, reh. den. 81 S.Ct. 238, 364 U.S. 906, 5 L.Ed.2d 199.

Time of demand was determinative

U.S.—In re Ryan, D.C.N.Y., 360 F.Supp. 270, affd. 478 F.2d 1397.

9. U.S.—Fioconci v. Attorney General of U.S., C.A.N.Y., 462 F.2d 475, cert. den. 93 S.Ct. 552, 409 U.S. 1059, 34 L.Ed.2d 511.

Matter of Assarsson, D.C.Minn., 538 F.Supp. 1055, affd., C.A., 697 F.2d 1157.

10. U.S.—U.S. ex rel. Sakaguchi v. Kaulukukui, C.A.Hawaii, 520 F.2d 726—Vardy v. U.S., C.A.Fla., 529 F.2d 404, reh. den. 533 F.2d 310, cert. den. 97 S.Ct. 489, 429 U.S. 978, 50 L.Ed.2d 587—Caltagione v. Grant, C.A.N.Y., 629 F.2d 739.

McElvy v. Civiletti, D.C.Fla., 523 F.Supp. 42.

What law governs

U.S.—Shapiro v. Ferrandina, C.A.N.Y., 478 F.2d 894, cert. dism. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

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11. U.S.—In re Chan Kam-shu, C.A.Fla., 477 F.2d 333, cert. den. 94 S.Ct. 112, 414 U.S. 847, 38 L.Ed.2d 94.

In re Edmondson, D.C.Minn., 352 F.Supp. 22.

16. Pending charges

U.S.—Stowe v. Devoy, C.A.N.Y., 588 F.2d 336, cert. den. 99 S.Ct. 2862, 442 U.S. 931, 61 L.Ed.2d 299.

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24.5. Military Bases Agreement pursuant to joint resolution of Congress

U.S.—Williams v. Rogers, C.A.N.D., 449 F.2d 513, cert. den. 92 S.Ct. 976, 405 U.S. 926, 30 L.Ed.2d 799.

§ 26. Extraditable Offenses

28. U.S.—Shapiro v. Ferrandina, C.A.N.Y., 478 F.2d 894, cert. dism. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

In re Edmondson, D.C.Minn., 352 F.Supp. 22—Matter of Assarsson, D.C.Minn., 538 F.Supp. 1055, affd., C.A., 687 F.2d 1157.

What law governs

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Amendment to treaty

U.S.—Markham v. Pitchess, C.A.Cal., 605 F.2d 436, cert. den. 100 S.Ct. 2985, 447 U.S. 904, 64 L.Ed.2d 853.

30. U.S.—U.S. v. Neustice, C.A.Cal., 452 F.2d 123.

31. U.S.—In re Shapiro, D.C.N.Y., 352 F.Supp. 641—Shapiro v. Ferrandina, D.C.N.Y., 355 F.Supp. 563, mod. on oth. grds., C.A., 478 F.2d 894, cert. den. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

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35. U.S.—McGann v. U.S. Bd. of Parole, C.A.Pa., 488 F.2d 39, cert. den. 94 S.Ct. 1974, 416 U.S. 958, 40 L.Ed.2d 309, reh. den. 94 S.Ct. 2635, 417 U.S. 927, 41 L.Ed.2d 230—Shapiro v. Ferrandina, C.A.N.Y., 478 F.2d 894, cert. dism. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

Wacker v. Beeson, D.C.La., 256 F.Supp. 542, affd., C.A., 370 F.2d 552, cert. den. 87 S.Ct. 2063, 387 U.S. 936, 18 L.Ed.2d 999—U.S. ex rel. Eatessami v. Marasco, D.C.N.Y., 275 F.Supp. 492—Jhirad v. Ferrandina, D.C.N.Y., 362 F.Supp. 1057, revd. on oth. grds., C.A., 486 F.2d 442, on remand 377 F.Supp. 34, on remand 401 F.Supp. 1215, affd. 536 F.2d 478. Cert. den. 97 S.Ct. 97, 429 U.S. 833, 50 L.Ed.2d 98, reh. den. 97 S.Ct. 511, 429 U.S. 988, 50 L.Ed.2d 600—Abu Eain v. Adams, D.C.Ill., 529 F.Supp. 685.

Embezzlement of public funds

(2) U.S.—Jimenez v. Aristeguieta, C.A.Fla., 311 F.2d 547, motion den. 314 F.2d 649, cert. den. 83 S.Ct. 1302.

373 U.S. 914, 10 L.Ed.2d 415, reh. den. 83 S.Ct. 1867, 374 U.S. 858, 10 L.Ed.2d 1083.

Fraudulent conversion, etc.

U.S.—U.S. ex rel. Rauch v. Stockinger, C.A.N.Y., 269 F.2d 681, cert. den. 80 S.Ct. 257, 361 U.S. 913, 4 L.Ed.2d 183, reh. den. 80 S.Ct. 584, 361 U.S. 973, 4 L.Ed.2d 553.

Aggravated robbery

U.S.—Gallina v. Fraser, D.C.Conn., 177 F.Supp. 856, affd., C.A., 278 F.2d 77, cert. den. 81 S.Ct. 97, 364 U.S. 851, 5 L.Ed.2d 74, reh. den. 81 S.Ct. 238, 364 U.S. 906, 5 L.Ed.2d 199.

Unlawful importation of marijuana

U.S.—In re Edmondson, D.C.Minn., 352 F.Supp. 22.

Possession of marijuana

U.S.—McElvy v. Civiletti, D.C.Fla., 523 F.Supp. 42.

Kidnapping

(5) Extradition of professional bail bondsman to foreign country on kidnapping charges based on bondsman's apprehension of bail jumper in such country and returning him for trial was proper.

U.S.—Kear v. Hilton, C.A.Va., 699 F.2d 181.

36. U.S.—Matter of Assarsson, D.C.Minn., 538 F.Supp. 1055, affd., C.A., 687 F.2d 1157.

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37. U.S.—Freedman v. U.S., D.C.Ga., 437 F.Supp. 1252.

Cal.—People v. Posten, 166 Cal.Rptr. 661, 108 C.A.3d 633.

Federal law applied

U.S.—Jhirad v. Ferrandina, D.C.N.Y., 355 F.Supp. 1155, revd. on oth. grds. 486 F.2d 442, on remand 377 F.Supp. 34, on remand 401 F.Supp. 1215, affd., 536 F.2d 478, cert. den. 97 S.Ct. 97, 429 U.S. 833, 50 L.Ed.2d 98, reh. den. 97 S.Ct. 511, 429 U.S. 988, 50 L.Ed.2d 600—Matter of Assarsson, D.C.Minn., 538 F.Supp. 1055, affd., C.A., 687 F.2d 1157.

38. U.S.—Merino v. U.S. Marshal, C.A.Cal., 326 F.2d 5, cert. den. 84 S.Ct. 1922, 377 U.S. 997, 12 L.Ed.2d 1046, reh. den. 85 S.Ct. 20, 379 U.S. 872, 13 L.Ed.2d 79.

Federal limitation statute applied

U.S.—Freedman v. U.S., D.C.Ga., 437 F.Supp. 1252.

Extradition has been denied under a treaty provision that a fugitive shall not be surrendered when from lapse of time or other lawful cause, according to the laws of either nation, the criminal is exempt from prosecution.^{38.5}

38.5. U.S.—Caplan v. Vokes, C.A.Cal., 649 F.2d 1336.

In re Mylonas, D.C.Ala., 187 F.Supp. 716.

39. U.S.—Shapiro v. Ferrandina, C.A.N.Y., 478 F.2d 894, cert. diss. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

40. U.S.—U.S. ex rel. Rauch v. Stockinger, C.A.N.Y., 269 F.2d 681, cert. den. 80 S.Ct. 257, 361 U.S. 913, 4 L.Ed.2d 183, reh. den. 80 S.Ct. 584, 361 U.S. 973, 4 L.Ed.2d 553—Shapiro v. Ferrandina, C.A.N.Y., 478 F.2d 894, cert. diss. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

In re Edmondson, D.C.Minn., 352 F.Supp. 22.

41. U.S.—In re Extradition of Gonzalez, D.C.N.Y., 217 F.Supp. 717.

43. U.S.—Gallina v. Fraser, C.A.Conn., 278 F.2d 77, cert. den. 81 S.Ct. 97, 364 U.S. 851, 5 L.Ed.2d 74, reh. den. 81 S.Ct. 238, 364 U.S. 906, 5 L.Ed.2d 199.

44. U.S.—Brauch v. Raiche, C.A.N.H., 618 F.2d 843.

45. U.S.—Brauch v. Raiche, C.A.N.H., 618 F.2d 843.

48. U.S.—Matter of Locatelli, D.C.N.Y., 468 F.Supp. 568.

Treaty exemption applies to charge or conviction

U.S.—Ramos v. Diaz, D.C.Fla., 179 F.Supp. 459.

Reason for treaty exception

U.S.—In re Extradition of Gonzalez, D.C.N.Y., 217 F.Supp. 717.

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49. U.S.—Matter of Doherty by Government of United Kingdom of Great Britain and Northern Ireland, D.C.N.Y., 599 F.Supp. 270.

50. U.S.—Matter of Sindona, D.C.N.Y., 450 F.Supp. 672.

Effect of particular matters

U.S.—Ramos v. Diaz, D.C.Fla., 179 F.Supp. 459—In re Extradition of Gonzalez, D.C.N.Y., 217 F.Supp. 717.

Offense held political

U.S.—Ramos v. Diaz, D.C.Fla., 179 F.Supp. 459—In re Mylonas, D.C.Ala., 187 F.Supp. 716—Matter of Doherty by Government of United Kingdom of Great Britain and Northern Ireland, D.C.N.Y., 599 F.Supp. 270.

Offense held not political

U.S.—Garcia-Guillern v. U.S., C.A.Fla., 450 F.2d 1189, cert. den. 92 S.Ct. 1251, 405 U.S. 989, 31 L.Ed.2d 455.

Factors

U.S.—Eain v. Wilkes, C.A.Ill., 641 F.2d 504, cert. den. 102 S.Ct. 390, 454 U.S. 894, 70 L.Ed.2d 208.

51. U.S.—Jimenez v. Aristeguieta, C.A.Fla., 311 F.2d 547, motion den. 314 F.2d 649, cert. den. 83 S.Ct. 1302, 373 U.S. 914, 10 L.Ed.2d 145, reh. den. 83 S.Ct. 1867, 374 U.S. 858, 10 L.Ed.2d 1083.

Abu Eain v. Adams, D.C.Ill., 529 F.Supp. 685.

Political uprising

(2) Other matters.

U.S.—Garcia-Guillern v. U.S., C.A.Fla., 450 F.2d 1189, cert. den. 92 S.Ct. 1251, 405 U.S. 989, 31 L.Ed.2d 455—Eain v. Wilkes, C.A.Ill., 641 F.2d 504, cert. den. 102 S.Ct. 390, 454 U.S. 894, 70 L.Ed.2d 208.

In re Extradition of Gonzalez, D.C.N.Y., 217 F.Supp. 717.

§ 28. Persons Who May Be Extradited

54. Alien

U.S.—Vardy v. U.S., C.A.Fla., 529 F.2d 404, reh. den. 533 F.2d 310, cert. den. 97 S.Ct. 489, 429 U.S. 978, 50 L.Ed.2d 587.

56. U.S.—Sindona v. Grant, C.A.N.Y., 619 F.2d 167.

58. U.S.—In re Chan Kam-shu, C.A.Fla., 477 F.2d 333, cert. den. 94 S.Ct. 112, 414 U.S. 847, 38 L.Ed.2d 94.

U.S. ex rel. Eatessami v. Marasco, D.C.N.Y., 275 F.Supp. 492—U.S. v. Schreiber, D.C.N.Y., 535 F.Supp. 1359.

Former chief executive of foreign country

U.S.—Jimenez v. Aristeguieta, C.A.Fla., 311 F.2d 547, motion den. 314 F.2d 649, cert. den. 83 S.Ct. 1302, 373 U.S. 914, 10 L.Ed.2d 415, reh. den. 83 S.Ct. 1867, 374 U.S. 858, 10 L.Ed.2d 1083.

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58.5. U.S.—In re Chan Kam-shu, C.A.Fla., 477 F.2d 333, cert. den. 94 S.Ct. 112, 414 U.S. 847, 38 L.Ed.2d 94—Waits v. McGowan, C.A.N.J., 516 F.2d 203.

In re Ryan, D.C.N.Y., 360 F.Supp. 270, affd. 478 F.2d 1397.

Person convicted in absentia extraditable

U.S.—U.S. ex rel. Bloomfield v. Gengler, C.A.N.Y., 507 F.2d 925.

Gallina v. Fraser, D.C.Conn., 177 F.Supp. 856, affd., C.A., 278 F.2d 77, cert. den. 81 S.Ct. 97, 364 U.S. 851, 5 L.Ed.2d 74, reh. den. 81 S.Ct. 238, 364 U.S. 906, 5 L.Ed.2d 199—In re Mylonas, D.C.Ala., 187 F.Supp. 716.

A treaty providing that a fugitive shall not be surrendered if according to the laws of either nation he is ex-

empt from prosecution for lawful cause has been enforced.^{58.10}

58.10. U.S.—In re Mylonas, D.C.Ala., 187 F.Supp. 716.

Persons who have been convicted and sentenced may be extradited.^{58.15}

58.15. U.S.—In re Edmondson, D.C.Minn., 352 F.Supp. 22.

§ 29. "Jurisdiction" and "Territory"

59. Under treaty with Germany

U.S.—In re Ryan, D.C.N.Y., 360 F.Supp. 270, affd. 478 F.2d 1397.

64. U.S.—Gallina v. Fraser, D.C.Conn., 177 F.Supp. 856, affd., C.A., 278 F.2d 77, cert. den. 81 S.Ct. 97, 364 U.S. 851, 5 L.Ed.2d 74, reh. den. 81 S.Ct. 238, 364 U.S. 906, 5 L.Ed.2d 199.

§ 31. Authority to Entertain, Institute, or Conduct Proceedings

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70. Criminal safeguards not same as in United States immaterial

U.S.—Freedman v. U.S., D.C.Ga., 437 F.Supp. 1252.

§ 32. Indictment or Warrant of Arrest in Foreign Country

72. False pretenses

U.S.—U.S. ex rel. Rauch v. Stockinger, D.C.N.Y., 170 F.Supp. 506, affd., C.A., 269 F.2d 681, cert. den. 80 S.Ct. 257, 361 U.S. 913, 4 L.Ed.2d 183, reh. den. 80 S.Ct. 584, 361 U.S. 973, 4 L.Ed.2d 553.

Larceny

(1) U.S.—U.S. ex rel. Rauch v. Stockinger, D.C.N.Y., 170 F.Supp. 506, affd., C.A., 269 F.2d 681, cert. den. 80 S.Ct. 257, 361 U.S. 913, 4 L.Ed.2d 183, reh. den. 80 S.Ct. 584, 361 U.S. 973, 4 L.Ed.2d 553.

(2) U.S.—U.S. ex rel. Rauch v. Stockinger, D.C.N.Y., 170 F.Supp. 506, affd., C.A., 269 F.2d 681, cert. den. 80 S.Ct. 257, 361 U.S. 913, 4 L.Ed.2d 183, reh. den. 80 S.Ct. 584, 361 U.S. 973, 4 L.Ed.2d 553.

§ 33. Requisition

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78. Proper request demonstrated

U.S.—In re David, D.C.Ill., 395 F.Supp. 803.

80. U.S.—Shapiro v. Ferrandina, D.C.N.Y., 355 F.Supp. 563, mod. on oth. grds., C.A., 478 F.2d 894, cert. den. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

National standard of sufficiency applied

U.S.—U.S. ex rel. Sakaguchi v. Kaulukui, C.A.Hawaii, 520 F.2d 726.

§ 34. Proceedings before Committing or Examining Magistrate

84. U.S.—Jimenez v. Aristeguieta, C.A.Fla., 311 F.2d 547, motion den. 314 F.2d 649, cert. den. 83 S.Ct. 1302, 373 U.S. 914, 10 L.Ed.2d 415, reh. den. 83 S.Ct. 1867, 374 U.S. 858, 10 L.Ed.2d 1083.

Matter of Demjanjuk, D.C.Ohio, 603 F.Supp. 1468, app. diss. 762 F.2d 1012.

87. U.S.—Sabatier v. Dambrowski, D.C.R.I., 453 F.Supp. 1250, affd. C.A., 586 F.2d 866.

91. U.S.—Shapiro v. Ferrandina, D.C.N.Y., 355 F.Supp. 563, mod. on oth. grds., C.A., 478 F.2d 894, cert. den. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

Jurisdiction of federal court not deprived

U.S.—David v. Attorney General of U.S., C.A.Ill., 699 F.2d 411, cert. den. 104 S.Ct. 113, 464 U.S. 832, 78 L.Ed.2d 114.

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In re David, D.C.Ill., 390 F.Supp. 521.

§ 37. — Complaint

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9. U.S.—Stevenson v. U.S., C.A.Ariz., 381 F.2d 142. U.S. ex rel. Petrushansky v. Marasco, D.C.N.Y., 215 F.Supp. 953. Affd., C.A., 325 F.2d 562, cert. den. 84 S.Ct. 969, 376 U.S. 952, 11 L.Ed.2d 971, reh. den. 84 S.Ct. 1178, 377 U.S. 920, 12 L.Ed.2d 188—Schonbrun v. Dreiband, D.C.N.Y., 268 F.Supp. 332.
16. U.S.—Shapiro v. Ferrandina, C.A.N.Y., 478 F.2d 894, cert. dism. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.
- 16.5. U.S.—Caplan v. Vokes, C.A.Cal., 649 F.2d 1336.
21. U.S.—U.S. ex rel. Petrushansky v. Marasco, D.C.N.Y., 215 F.Supp. 953. Affd., C.A., 325 F.2d 562, cert. den. 84 S.Ct. 969, 376 U.S. 952, 11 L.Ed.2d 971, reh. den. 84 S.Ct. 1178, 377 U.S. 920, 12 L.Ed.2d 188.

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32. Complaint held sufficient

- U.S.—Merino v. U.S. Marshal, C.A.Cal., 326 F.2d 5, cert. den. 84 S.Ct. 1922, 377 U.S. 997, 12 L.Ed.2d 1046, reh. den. 85 S.Ct. 20, 379 U.S. 872, 13 L.Ed.2d 79.

Minor variances not fatal

- U.S.—In re Edmondson, D.C.Minn., 352 F.Supp. 22.
34. U.S.—U.S. ex rel. Petrushansky v. Marasco, C.A.N.Y., 325 F.2d 562, cert. den. 84 S.Ct. 969, 376 U.S. 952, 11 L.Ed.2d 971, reh. den. 84 S.Ct. 1178, 377 U.S. 920, 12 L.Ed.2d 188.
 36. U.S.—U.S. ex rel. Rauch v. Stockinger, C.A.N.Y., 269 F.2d 681, cert. den. 80 S.Ct. 257, 361 U.S. 913, 4 L.Ed.2d 183, reh. den. 80 S.Ct. 584, 361 U.S. 973, 4 L.Ed.2d 553.
 37. U.S.—Shapiro v. Ferrandina, D.C.N.Y., 355 F.Supp. 563, mod. on oth. grds., C.A., 478 F.2d 894, cert. den. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

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51. U.S.—U.S. ex rel. Petrushansky v. Marasco, D.C.N.Y., 215 F.Supp. 953. Affd., C.A., 325 F.2d 562, cert. den. 84 S.Ct. 969, 376 U.S. 952, 11 L.Ed.2d 971, reh. den. 84 S.Ct. 1178, 377 U.S. 920, 12 L.Ed.2d 188.

§ 38. — Provisional Arrest and Detention; Warrant

52. U.S.—U.S. ex rel. Petrushansky v. Marasco, C.A.N.Y., 325 F.2d 562, cert. den. 84 S.Ct. 969, 376 U.S. 952, 11 L.Ed.2d 971, reh. den. 84 S.Ct. 1178, 377 U.S. 920, 12 L.Ed.2d 188.

Abu Eain v. Adams, D.C.Ill., 529 F.Supp. 685.

Requirements for jurisdictional purposes satisfied

- U.S.—Jimenez v. Aristeguieta, C.A.Fla., 311 F.2d 547, motion den. 314 F.2d 649, cert. den. 83 S.Ct. 1302, 373 U.S. 914, 10 L.Ed.2d 415, reh. den. 83 S.Ct. 1867, 374 U.S. 858, 10 L.Ed.2d 1083.

Return before issuing magistrate not required

- U.S.—Jimenez v. Aristeguieta, C.A.Fla., 311 F.2d 547, motion den. 314 F.2d 649, cert. den. 83 S.Ct. 1302, 373 U.S. 914, 10 L.Ed.2d 415, reh. den. 83 S.Ct. 1867, 374 U.S. 858, 10 L.Ed.2d 1083.

57. Warrant of arrest valid

- U.S.—Shapiro v. Ferrandina, C.A.N.Y., 478 F.2d 894, cert. dism. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

Warrant need not contain all charges

- U.S.—Hill v. U.S., C.A.Fla., 737 F.2d 950.

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60. N.Y.—Beebe v. State, 237 N.Y.S.2d 579, 38 Misc.2d 485.

Extradition treaty not violated

- U.S.—U.S. v. Marzano, D.C.Ill., 388 F.Supp. 906, affd., C.A., 537 F.2d 257, cert. den. 97 S.Ct. 734, 429 U.S. 1038, 50 L.Ed.2d 749.

62. Other period of detention in treaty considered

- U.S.—Jimenez v. Aristeguieta, C.A.Fla., 311 F.2d 547, motion den. 314 F.2d 649, cert. den. 83 S.Ct. 1302, 373 U.S. 914, 10 L.Ed.2d 415, reh. den. 83 S.Ct. 1867, 374 U.S. 858, 10 L.Ed.2d 1083.

§ 39. — Hearing and Evidence

63. Due process requirements

- U.S.—Sayne v. Shipley, C.A.Can. Zone, 418 F.2d 679, cert. den. 90 S.Ct. 1688, 398 U.S. 903, 26 L.Ed.2d 61.

65. U.S.—Taylor v. Jackson, D.C.N.Y., 470 F.Supp. 1290.

67. U.S.—U.S. ex rel. Rauch v. Stockinger, C.A.N.Y., 269 F.2d 681, cert. den. 80 S.Ct. 257, 361 U.S. 913, 4 L.Ed.2d 183, reh. den. 80 S.Ct. 584, 361 U.S. 973, 4 L.Ed.2d 553.

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74. U.S.—Jimenez v. Aristeguieta, C.A.Fla., 311 F.2d 547, motion den. 314 F.2d 649, cert. den. 83 S.Ct. 1302, 373 U.S. 914, 10 L.Ed.2d 415, reh. den. 83 S.Ct. 1867, 374 U.S. 858, 10 L.Ed.2d 1083—Sayne v. Shipley, C.A.Can. Zone, 418 F.2d 679, cert. den. 90 S.Ct. 1688, 398 U.S. 903, 26 L.Ed.2d 61.

Extraditable from nonextraditable offenses

- U.S.—Shapiro v. Ferrandina, C.A.N.Y., 478 F.2d 894, cert. dism. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

75. U.S.—Schonbrun v. Dreiband, D.C.N.Y., 268 F.Supp. 332.

76. U.S.—Shapiro v. Ferrandina, C.A.N.Y., 478 F.2d 894, cert. dism. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

- In re Mylonas, D.C.Ala., 187 F.Supp. 716—Schonbrun v. Dreiband, D.C.N.Y., 268 F.Supp. 332.

77. U.S.—Sayne v. Shipley, C.A.Can. Zone, 418 F.2d 679, cert. den. 90 S.Ct. 1688, 398 U.S. 903, 26 L.Ed.2d 61—Garcia-Guillern v. U.S., C.A.Fla., 450 F.2d 1189, cert. den. 92 S.Ct. 1251, 405 U.S. 989, 31 L.Ed.2d 455—Shapiro v. Ferrandina, C.A.N.Y., 478 F.2d 894, cert. dism. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

- In re Ryan, D.C.N.Y., 360 F.Supp. 270, affd. 478 F.2d 1397.

Specific finding required

- U.S.—Application of D'Amico, D.C.N.Y., 185 F.Supp. 925, app. dism., C.A., 286 F.2d 320, cert. den. 81 S.Ct. 1924, 366 U.S. 963, 6 L.Ed.2d 1254.

78. U.S.—U.S. ex rel. Petrushansky v. Marasco, D.C.N.Y., 215 F.Supp. 953. Affd., C.A., 325 F.2d 562, cert. den. 84 S.Ct. 969, 376 U.S. 952, 11 L.Ed.2d 971, reh. den. 84 S.Ct. 1178, 377 U.S. 920, 12 L.Ed.2d 188—In re Extradition of Gonzalez, D.C.N.Y., 217 F.Supp. 717—In re Ryan, D.C.N.Y., 360 F.Supp. 270, affd. 478 F.2d 1397.

Statute of limitations

- U.S.—Merino v. U.S. Marshal, C.A.Cal., 326 F.2d 5, cert. den. 84 S.Ct. 1922, 377 U.S. 997, 12 L.Ed.2d 1046, reh. den. 85 S.Ct. 20, 379 U.S. 872, 13 L.Ed.2d 79—Garcia-Guillern v. U.S., C.A.Fla., 450 F.2d 1189, cert. den. 92 S.Ct. 1251, 405 U.S. 989, 31 L.Ed.2d 455.

81. U.S.—In re Ryan, D.C.N.Y., 360 F.Supp. 270, affd. 478 F.2d 1397.

82. U.S.—Shapiro v. Ferrandina, D.C.N.Y., 355 F.Supp. 563, mod. on oth. grds. C.A., 478 F.2d 894, cert. den. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

83. U.S.—Shapiro v. Ferrandina, D.C.N.Y., 355 F.Supp. 563, mod. on oth. grds. C.A., 478 F.2d 894, cert. den. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

87. Prior judicial determination

- U.S.—Shapiro v. Ferrandina, C.A.N.Y., 478 F.2d 894, cert. dism. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

Nonjudicial branches of government

- U.S.—In re Ryan, D.C.N.Y., 360 F.Supp. 270, affd. 478 F.2d 1397.

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Burden of proof. Questions of burden of proof have been considered.^{89.10}

- 89.10. Iowa—Smith v. Sheriff of Woodbury County, 141 N.W.2d 529, 258 Iowa 1110.

- Tenn.—State v. Grizzell, Cr.App., 584 S.W.2d 678.

Demanding government must prove:

- (1) Not only that crime charged is one enumerated in treaty but that it is extraditable.

- U.S.—Ramos v. Diaz, D.C.Fla., 179 F.Supp. 459.

- (2) That offense is not of a political character when evidence tends to show political character.

- U.S.—Ramos v. Diaz, D.C.Fla., 179 F.Supp. 459.

- (3) Other matters.

- U.S.—In re Extradition of Gonzalez, D.C.N.Y., 217 F.Supp. 717.

90. U.S.—U.S. ex rel. Argento v. Jacobs, D.C.Ohio, 176 F.Supp. 877.

Evidence obtained by search incident to arrest with warrant held admissible

- U.S.—In re Extradition of D'Amico, D.C.N.Y., 177 F.Supp. 648.

Evidence held admissible

- U.S.—Application of D'Amico, D.C.N.Y., 185 F.Supp. 925, app. dism., C.A., 286 F.2d 320, cert. den. 81 S.Ct. 1924, 366 U.S. 963, 6 L.Ed.2d 1254.

94. U.S.—Sayne v. Shipley, C.A.Can. Zone, 418 F.2d 679, cert. den. 90 S.Ct. 1688, 398 U.S. 903, 26 L.Ed.2d 61—Shapiro v. Ferrandina, C.A.N.Y., 478 F.2d 894, cert. dism. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

- U.S. ex rel. Eatessami v. Marasco, D.C.N.Y., 275 F.Supp. 492.

99. Statements of witness conclusively certified

- U.S.—Galanis v. Pallanck, C.A.Conn., 568 F.2d 234.

1. U.S.—Shapiro v. Ferrandina, C.A.N.Y., 478 F.2d 897, cert. dism. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

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2. Federal statutes

- (3) Purpose.

- U.S.—Merino v. U.S. Marshal, C.A.Cal., 326 F.2d 5, cert. den. 84 S.Ct. 1922, 377 U.S. 997, 12 L.Ed.2d 1046, reh. den. 85 S.Ct. 20, 379 U.S. 872, 13 L.Ed.2d 79.

3. U.S.—U.S. ex rel. Petrushansky v. Marasco, C.A.N.Y., 325 F.2d 562, cert. den. 84 S.Ct. 969, 376 U.S. 952, 11 L.Ed.2d 971, reh. den. 84 S.Ct. 1178, 377 U.S. 920, 12 L.Ed.2d 188—Shapiro v. Ferrandina, C.A.N.Y., 478 F.2d 894, cert. dism. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

4. U.S.—U.S. ex rel. Petrushansky v. Marasco, C.A.N.Y., 325 F.2d 562, cert. den. 84 S.Ct. 969, 376 U.S. 952, 11 L.Ed.2d 971, reh. den. 84 S.Ct. 1178, 377 U.S. 920, 12 L.Ed.2d 188—Shapiro v. Ferrandina, C.A.N.Y., 478 F.2d 894, cert. dism. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

5. U.S.—Sayne v. Shipley, C.A.Can. Zone, 418 F.2d 679, cert. den. 90 S.Ct. 1688, 398 U.S. 903, 26 L.Ed.2d 61.

- U.S. ex rel. Petrushansky v. Marasco, D.C.N.Y., 215 F.Supp. 953. Affd., C.A., 325 F.2d 562, cert. den. 84 S.Ct. 969, 376 U.S. 952, 11 L.Ed.2d 971, reh. den. 84 S.Ct. 1178, 377 U.S. 920, 12 L.Ed.2d 188.

8. U.S.—Jimenez v. Aristeguieta, C.A.Fla., 311 F.2d 547, motion den. 314 F.2d 649, cert. den. 83 S.Ct. 1302, 373 U.S. 914, 10 L.Ed.2d 415, reh. den. 83 S.Ct. 1867, 374 U.S. 858, 10 L.Ed.2d 1083—Wacker v. Bisson, C.A.La., 370 F.2d 552, cert. den. 87 S.Ct. 2063, U.S. 914, 10

L.Ed.2d 415, reh. den. 83 S.Ct. 1867, 374 U.S. 858, 10 L.Ed. 387 U.S. 936, 18 L.Ed.2d 999. Application of D'Amico, D.C.N.Y., 185 F.Supp. 925, app. diss., C.A., 286 F.2d 320, cert. den. 81 S.Ct. 1924, 366 U.S. 963, 6 L.Ed.2d 1254.

9. U.S.—Shapiro v. Ferrandina, D.C.N.Y., 355 F.Supp. 563, mod. on oth. grds., C.A., 478 F.2d 894, cert. den. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

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10. Hearsay

(2) Other instances.

U.S.—O'Brien v. Rozman, C.A.Mich., 554 F.2d 780.

12. U.S.—O'Brien v. Rozman, C.A.Mich., 554 F.2d 780.

19. U.S.—Shapiro v. Ferrandina, C.A.N.Y., 478 F.2d 894, cert. diss. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

20. U.S.—Shapiro v. Ferrandina, D.C.N.Y., 355 F.Supp. 563, mod. on oth. grds., C.A., 478 F.2d 894, cert. den. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

Sufficiency of certificate

(2) U.S.—In re Extradition of D'Amico, D.C.N.Y., 177 F.Supp. 648.

23. U.S.—Shapiro v. Ferrandina, D.C.N.Y., 355 F.Supp. 563, mod. on oth. grds. C.A., 478 F.2d 894, cert. den. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

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31. U.S.—C.J.S. cited in U.S. ex rel. Argento v. Jacobs, D.C.Ohio, 176 F.Supp. 877, 881.

33. Test of sufficiency

U.S.—Application of D'Amico, D.C.N.Y., 185 F.Supp. 925, app. diss., C.A., 286 F.2d 320, cert. den. 81 S.Ct. 1924, 366 U.S. 963, 6 L.Ed.2d 1254.

34. U.S.—Shapiro v. Ferrandina, C.A.N.Y., 478 F.2d 894, cert. diss. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133.

U.S. ex rel. Petrushansky v. Marasco, D.C.N.Y., 215 F.Supp. 953. Aff'd., C.A., 325 F.2d 562, cert. den. 84 S.Ct. 969, 376 U.S. 952, 11 L.Ed.2d 971, reh. den. 84 S.Ct. 1178, 377 U.S. 920, 12 L.Ed.2d 188.

Evidence held to support charge

U.S.—U.S. ex rel. Rauch v. Stockinger, C.A.N.Y., 269 F.2d 681, cert. den. 80 S.Ct. 257, 361 U.S. 913, 4 L.Ed.2d 183, reh. den. 80 S.Ct. 584, 361 U.S. 973, 4 L.Ed.2d 553—Jimenez v. Aristeguieta, C.A.Fla., 311 F.2d 547, motion den. 314 F.2d 619, cert. den. 83 S.Ct. 1302, 373 U.S. 914, 10 L.Ed.2d 415, reh. den. 83 S.Ct. 1867, 374 U.S. 858, 10 L.Ed.2d 1083—Garcia-Guillern v. U.S., C.A.Fla., 450 F.2d 1189, cert. den. 92 S.Ct. 1251, 405 U.S. 989, 31 L.Ed.2d 455.

Evidence held sufficient as to jurisdiction

U.S.—Gallina v. Fraser, D.C.Conn., 177 F.Supp. 856, aff'd., C.A., 278 F.2d 77, cert. den. 81 S.Ct. 97, 364 U.S. 851, 5 L.Ed.2d 74, reh. den. 81 S.Ct. 238, 364 U.S. 906, 5 L.Ed.2d 199.

Evidence held to establish a political offense

U.S.—In re Mylonas, D.C.Ala., 187 F.Supp. 716.

Evidence held to show offense not a political offense

U.S.—In re Extradition of Gonzalez, D.C.N.Y., 217 F.Supp. 717.

35. Evidence held to support charge

U.S.—U.S. ex rel. Petrushansky v. Marasco, C.A.N.Y., 325 F.2d 562, cert. den. 84 S.Ct. 969, 376 U.S. 952, 11 L.Ed.2d 971, reh. den. 84 S.Ct. 1178, 377 U.S. 920, 12 L.Ed.2d 188.

Commitment for trial

U.S.—In re Extradition of Gonzalez, D.C.N.Y., 217 F.Supp. 717.

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38. U.S.—In re Shapiro, D.C.N.Y., 352 F.Supp. 641.

40. U.S.—Jimenez v. Aristeguieta, C.A.Fla., 311 F.2d 547, motion den. 314 F.2d 649, cert. den. 83 S.Ct. 1302, 373 U.S. 914, 10 L.Ed.2d 415, reh. den. 83 S.Ct. 1867, 374 U.S. 858, 10 L.Ed.2d 1083—U.S. ex rel. Petrushansky v. Marasco, C.A.N.Y., 325 F.2d 562, cert. den. 84 S.Ct. 969, 376 U.S. 952, 11 L.Ed.2d 971, reh. den. 84 S.Ct. 1178, 377 U.S. 920, 12 L.Ed.2d 188—Merino v. U.S. Marshal, C.A.Cal., 326 F.2d 5, cert. den. 84 S.Ct. 1922, 377 U.S. 997, 12 L.Ed.2d 1046, reh. den. 85 S.Ct. 20, 379 U.S. 872, 13 L.Ed.2d 79.

C.J.S. cited in U.S. ex rel. Argento v. Jacobs, D.C.Ohio, 176 F.Supp. 877, 881—In re Ryan, D.C.N.Y., 360 F.Supp. 270, aff'd. 478 F.2d 1397.

Evidence held insufficient

Iowa—Smith v. Sheriff of Woodbury County, 141 N.W.2d 529, 258 Iowa 1110.

Evidence held sufficient

U.S.—Nicosia v. Wall, C.A.Canal Zone, 442 F.2d 1005—Zanazanian v. U.S., C.A.Cal., 729 F.2d 624. In re Extradition of Kawalek, D.C.N.J., 187 F.Supp. 861—In re Extradition of Gonzalez, D.C.N.Y., 217 F.Supp. 717.

Fla.—Buchanan v. State ex rel. Bartling, App., 185 So.2d 509.

42. U.S.—U.S. ex rel. Argento v. Jacobs, D.C.Ohio, 176 F.Supp. 877.

46. U.S.—C.J.S. cited in U.S. ex rel. Argento v. Jacobs, D.C.Ohio, 176 F.Supp. 877, 879—In re Extradition of D'Amico, D.C.N.Y., 177 F.Supp. 648.

55. Magistrate's duty to certify record

U.S.—In re U.S., C.A.Tex., 713 F.2d 105.

§ 41. — Rearrest

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58. U.S.—In re Mylonas, D.C.Ala., 187 F.Supp. 716.

Prior denial not binding in renewed proceedings

U.S.—In re Extradition of Gonzalez, D.C.N.Y., 217 F.Supp. 717.

§ 42. — Bail

69. U.S.—Beaulieu v. Hartigan, C.A.Mass., 554 F.2d 1.

73. U.S.—U.S. v. Williams, C.A.Mass., 611 F.2d 914.

§ 43. — Review

75. U.S.—Jimenez v. Aristeguieta, C.A.Fla., 290 F.2d 106—Merino v. U.S. Marshal, C.A.Cal., 326 F.2d 5, cert. den. 84 S.Ct. 1922, 377 U.S. 997, 12 L.Ed.2d 1046, reh. den. 85 S.Ct. 20, 379 U.S. 872, 13 L.Ed.2d 79—Wacker v. Bisson, C.A.La., 348 F.2d 602—Sayne v. Shipley, C.A.Canal Zone, 418 F.2d 679, cert. den. 90 S.Ct. 1688, 398 U.S. 903, 26 L.Ed.2d 61—Shapiro v. Ferrandina, C.A.N.Y., 478 F.2d 894, cert. diss. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133—Greci v. Birknes, C.A.Mass., 527 F.2d 956.

Extradition within exclusive purview of executive

D.C.—Shapiro v. Secretary of State, C.A., 499 F.2d 527, 162 U.S.App.D.C. 391, aff'd. 96 S.Ct. 1062, 424 U.S. 614, 47 L.Ed.2d 278.

§ 44. Surrender to Demanding Country

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77. U.S.—Peroff v. Hylton, C.A.Va., 542 F.2d 1247, cert. den. 97 S.Ct. 787, 429 U.S. 1062, 50 L.Ed.2d 778, reh. den. 97 S.Ct. 1163, 429 U.S. 1124, 51 L.Ed.2d 575.

79. U.S.—Peroff v. Hylton, C.A.Va., 542 F.2d 1247, cert. den. 97 S.Ct. 787, 429 U.S. 1062, 50 L.Ed.2d 778, reh. den. 97 S.Ct. 1163, 429 U.S. 1124, 51 L.Ed.2d 575.

83. U.S.—Escobedo v. U.S., C.A.Fla., 623 F.2d 1098, cert. den. 101 S.Ct. 612, 449 U.S. 1036, 66 L.Ed.2d 497, and 101 S.Ct. 1371, 450 U.S. 922, 67 L.Ed.2d

350, reh. den. 101 S.Ct. 2012, 451 U.S. 934, 68 L.Ed.2d 321.

84. U.S.—Jimenez v. U.S. Dist. Court for Southern Dist. of Fla., Fla., Miami Division, 84 S.Ct. 14, 11 L.Ed.2d 30.

"Date of commitment" construed

U.S.—In re Chan Kam-shu, C.A.Fla., 477 F.2d 333, cert. den. 94 S.Ct. 112, 414 U.S. 847, 38 L.Ed.2d 94.

85. Determination by federal, rather than state, judge held not prejudicial

U.S.—Jimenez v. U.S. Dist. Court for Southern Dist. of Fla., Miami Division, Fla., 84 S.Ct. 14, 11 L.Ed.2d 30.

Period running from time of adjudication of claims

U.S.—Jimenez v. U.S. Dist. Court for Southern Dist. of Fla., Fla., Miami Division, 84 S.Ct. 14, 11 L.Ed.2d 30.

McElvy v. Civiletti, D.C.Fla., 523 F.Supp. 42.

87. Sufficient cause shown

U.S.—Jimenez v. U.S. Dist. Court for Southern Dist. of Fla., Miami Division, Fla., 84 S.Ct. 14, 11 L.Ed.2d 30.

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A party who is successful in obtaining an order quashing a subpoena duces tecum in international extradition proceeding is not entitled to allowance for counsel fees.^{98.5}

98.5. U.S.—Aristeguieta v. Jimenez, D.C.N.Y., 34 F.R.D. 218.

§ 46. Rights and Liabilities of Accused after Surrender

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1. U.S.—Shapiro v. Ferrandina, C.A.N.Y., 478 F.2d 894, cert. diss. 94 S.Ct. 204, 414 U.S. 884, 38 L.Ed.2d 133—U.S. v. Rossi, C.A.N.Y., 545 F.2d 814, cert. den. 97 S.Ct. 1178, 430 U.S. 907, 51 L.Ed.2d 584 Melia v. U.S., C.A.Conn., 667 F.2d 300.

Gallina v. Fraser, D.C.Conn., 177 F.Supp. 856, aff'd., C.A., 278 F.2d 77, cert. den. 81 S.Ct. 97, 364 U.S. 851, 5 L.Ed.2d 74, reh. den. 81 S.Ct. 238, 364 U.S. 906, 5 L.Ed.2d 199.

Charge included in extradition proceedings

U.S.—U.S. v. Jetter, C.A.Iowa, 722 F.2d 371.

2.5. U.S.—U.S. v. Deaton, D.C.Ohio, 448 F.Supp. 532.

Rule designed to protect against abuse of act of extradition

U.S.—U.S. v. Paroutian, C.A.N.Y., 299 F.2d 486.

Treaty not violated

U.S.—McGann v. U.S. Bd. of Parole, C.A.Pa., 488 F.2d 39, cert. den. 94 S.Ct. 1974, 416 U.S. 958, 40 L.Ed.2d 309, reh. den. 94 S.Ct. 2635, 417 U.S. 927, 41 L.Ed.2d 230.

9. U.S.—U.S. v. Paroutian, C.A.N.Y., 299 F.2d 486.

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15. U.S.—Fiocconi v. Attorney General of U.S., D.C.N.Y., 339 F.Supp. 1242, aff'd., C.A., 462 F.2d 475, cert. den. 93 S.Ct. 552, 409 U.S. 1059, 34 L.Ed.2d 511.

§ 47. — Effect of Illegal Extradition

27. Cal.—C.J.S. cited in People v. Garner, 18 Cal. Rptr. 40, 43, 367 P.2d 680, 57 C.2d 135, cert. den. 82 S.Ct. 1571, 370 U.S. 929, 8 L.Ed.2d 508. N.Y.—People ex rel. Hein v. Ramsden, 232 N.Y.S.2d 633, 36 Misc.2d 345.

§ 47 EXTRADITION

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28. U.S.—C.J.S. cited in *Goodspeed v. Beto*, C.A. Tex., 341 F.2d 908, 909, cert. den. 87 S.Ct. 867, 386 U.S. 926, 17 L.Ed.2d 798, reh. den. 87 S.Ct. 1032, 386 U.S. 969, 18 L.Ed.2d 126.

Abduction

- U.S.—U.S. ex rel. *Lujan v. Gengler*, C.A.N.Y., 510 F.2d 62, cert. den. 95 S.Ct. 2400, 421 U.S. 1001, 44 L.Ed.2d 668.

Di Lorenzo v. U.S., D.C.N.Y., 496 F.Supp. 79.

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29. U.S.—U.S. v. *Reed*, C.A.N.Y., 639 F.2d 896.
30. Cal.—C.J.S. cited in *People v. Garner*, 18 Cal. Rptr. 40, 43, 367 P.2d 680, 57 C.2d 135, cert. den. 82 S.Ct. 1571, 370 U.S. 929, 8 L.Ed.2d 508.

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EXTRAORDINARY.

As an Adjective

15. U.S.—*Atlanta & St. A.B. Ry. Co. v. Chilean Nitrate Sales Corp.*, D.C.Fla., 277 F.Supp. 242, 246.

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EXTREME.

7. Similarly defined

At the end or outer most point; farthest away; most remote; utmost.—*State v. Akridge*, 543 P.2d 1073, 1075, 23 Or.App. 633.

EXTRUSION.

19.50. Similarly defined

To shape (as metal, plastic, rubber) by forcing through specially designed openings often after a previous heating of the material or of the opening or both. Pa.—*Eastern Diversified Metals Corp. v. Com.*, 297 A.2d 167, 169, 6 Pa.Cmwlth. 605, aff'd., Sup., 306 A.2d 300.

EX TURPI CAUSE NON ORITUR ACTIO.

20. Ohio—*Martineau v. Gresser*, 182 N.E.2d 48, 57.

Similarly rendered

(3) "From a base cause, no action arises."

- Cal.—*Moriarty v. Carison*, 7 Cal.Rptr. 282, 284, 184 C.A.2d 51.

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EYE.

25. Organ of sight

- Idaho—*Gentry v. Bano, Inc.*, 430 P.2d 681, 683, 91 Idaho 790.

EYELET.

30. U.S.—*Metal Coating Corp. v. Baker Mfg. Co.*, D.C.Wis., 227 F.Supp. 529, 530.

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FABRICATE.

- 53.5. N.Y.—C.J.S. cited in *Airlift Intern., Inc., v. State Tax Commission*, 382 N.Y.S.2d 572, 574, 52 A.D.2d 688.

FACE.

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As applied to a house, the "face" is the portion which contains the main entrance and which is the most attractive aesthetically.^{69.50}

- 69.50. Cal.—*Howard Homes, Inc. v. Guttman*, 12 Cal.Rptr. 244, 247, 190 C.A.2d 526.

FACIAL.

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87. Phrases

- (1) La.—*Ousley v. Employers Mut. Liability Ins. Co. of Wis., App.*, 121 So.2d 378, 379.

FACILITATE.

91. U.S.—*Cellino v. U.S.*, C.A.Cal., 276 F.2d 941, 943—U.S. v. *Judkins*, C.A.Tenn., 428 F.2d 333, 335.

U.S. v. *Barrow*, D.C.Pa., 212 F.Supp. 837, 840.

- Cal.—*People v. One 1952 Mercury 2-Door Sedan*, 1 Cal.Rptr. 245, 247, 249, 176 C.A.2d 220.

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- 91.5. U.S.—*Cellino v. U.S.*, C.A.Cal., 276 F.2d 941, 943.

Cal.—*People v. One 1952 Mercury 2-Door Sedan*, 1 Cal.Rptr. 245, 247, 249, 176 C.A.2d 220.

Ga.—*Raynor v. American Heritage Life Ins. Co.*, 180 S.E.2d 248, 250, 123 Ga.App. 247.

- 91.10. U.S.—*Cellino v. U.S.*, C.A.Cal., 276 F.2d 941, 943.

Cal.—*People v. One 1952 Mercury 2-Door Sedan*, 1 Cal.Rptr. 245, 247, 249, 176 C.A.2d 220.

Ga.—*Raynor v. American Heritage Life Ins. Co.*, 180 S.E.2d 248, 250, 123 Ga.App. 247.

- 91.25. Cal.—*People v. One 1952 Mercury 2-Door Sedan*, 1 Cal.Rptr. 245, 247, 249, 176 C.A.2d 220.

91.30. Similarly defined

(1) To make easy.

N.J.—*Cirasella v. Village of South Orange*, 155 A.2d 134, 139, 57 N.J.Super. 522.

91.35. To assist or aid

Cal.—*People v. One 1952 Mercury 2-Door Sedan*, 1 Cal.Rptr. 245, 247, 249, 176 C.A.2d 220.

N.J.—*Cirasella v. Village of South Orange*, 155 A.2d 134, 139, 57 N.J.Super. 522.

FACILITY.

93. Includes telephone

U.S.—U.S. v. *Smith*, D.C.Ill., 209 F.Supp. 907, 918.

Similarly expressed

It can be animate beings such as persons, people and groups thereof.

Ark.—*Cheney v. Tolliver*, 356 S.W.2d 636, 638, 234 Ark. 973.

94. Similarly defined

(1) The word "facility" is defined as something by which anything is made easy or less difficult; an aid, advantage, or convenience, usually in the plural, as facilities for travel.

U.S.—*Knoll Golf Club v. U.S.*, D.C.N.J., 179 F.Supp. 377, 379, 380.

- 94.5. Ark.—C.J.S. cited in *Cheney v. Tolliver*, 356 S.W.2d 636, 639, 234 Ark. 973—*Cheney v. Tolliver*, 356 S.W.2d 636, 638, 234 Ark. 973.

- 94.10. Ark.—C.J.S. cited in *Cheney v. Tolliver*, 356 S.W.2d 636, 639, 234 Ark. 973—*Cheney v. Tolliver*, 356 S.W.2d 636, 638, 234 Ark. 973.

The word "facility" means something that is built or installed to perform some particular function.^{97.1}

- 97.1. "Facility" means something that is built or installed to perform some particular function, but it also means something that promotes the ease of any action or course of conduct.—*Raynor v. American Heritage Life Ins. Co.*, 180 S.E.2d 248, 250, 123 Ga.App. 247.

Facilities.

- 98.5. Mo.—C.J.S. cited in *Mashak v. Poelker*, 367 S.W.2d 625, 630.

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1. Ark.—C.J.S. cited in *Cheney v. Tolliver*, 356 S.W.2d 636, 639, 234 Ark. 973.

Kan.—C.J.S. cited in *Extencicare, Inc. v. State Court. Coun. for Health Pl.*, Kan., 532 P.2d 1119, 1122, 216 Kan. 527.

FACT.

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14. Ohio—*City of South Euclid v. Clapacs*, 213 N.E.2d 828, 832, 6 Ohio Misc. 101.

19. Actual occurrence

Ohio—*City of South Euclid v. Clapacs*, 213 N.E.2d 828, 832, 6 Ohio Misc. 101.

Event or circumstances

Ohio—*City of South Euclid v. Clapacs*, 213 N.E.2d 828, 832, 6 Ohio Misc. 101.

22. Ohio—*City of South Euclid v. Clapacs*, 213 N.E.2d 828, 832, 6 Ohio Misc. 101.

24. Similarly expressed

(1) Suspicion, mistrust, uncertainty, doubt, innuendo and skepticism, even though engendered by the best of motives, are not facts.—In re September 1968 Monroe County Supreme Court Grand Jury, 301 N.Y.S.2d 380, 382, 32 A.D.2d 221.

25. Similarly defined

(1) That which has taken place.—*City of South Euclid v. Clapacs*, 213 N.E.2d 828, 832, 6 Ohio Misc. 101.

(2) "Fact" means reality of events or things the actual occurrence or existence of which is to be determined by evidence.—*Peoples v. Peoples*, 179 S.E.2d 138, 141, 10 N.C.App. 402.

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Other phrases:

37. Trier of fact

- (1) U.S.—*Olson Rug Co. v. N.L.R.B., C.A.*, 291 F.2d 655, 661.

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- 44.50. Ark.—C.J.S. quoted in *Manhattan Factoring Corp. v. Orsburn*, 385 S.W.2d 785, 790, 238 Ark. 947.

FACTORS

§ 1. Definitions, Nature, and Distinctions

Library References

Factors §=1, 29.

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2. U.S.—C.J.S. cited in *In re Summit Hardware, Inc.*, C.A. Ohio, 302 F.2d 397, 400, 96 A.L.R.2d 717, cert. den. 83 S.Ct. 154, 371 U.S. 882, 9 L.Ed.2d 118.

Colo.—*Ranchers & Farmers Livestock Auction Co. v. Honey*, 552 P.2d 313, 38 Colo.App. 69, petition stricken, 553 P.2d 799, 191 Colo. 503.

Ga.—C.J.S. cited in *Cobb Exchange Bank v. Byrd*, 134 S.E.2d 871, 872, 108 Ga.App. 825.

Other definitions

(6) U.S.—*Davenport v. Ralph N. Peters & Co., C.A.* N.C., 386 F.2d 199.

Statutory definition

(2) U.S.—*In re Freeman*, C.A.N.J., 294 F.2d 126.

(4) Particular persons held not factors within statutory definition.

U.S.—*In re Freemant*, C.A.N.J., 294 F.2d 126.

Facts held to constitute one a factor for the sale of

(5) Mo.—*Nagels v. Christy*, 330 S.W.2d 754.

Tex.—*Dalton S.S. Corp. v. W. R. Zanes & Co., Civ. App.*, 354 S.W.2d 621.

Facts held not to constitute one a factor

(3) Other facts.

U.S.—In re Freeman, C.A.N.J., 294 F.2d 126.

"Dealer"

U.S.—Arnold Livestock Sales Co., Inc. v. Pearson, D.C. Neb., 383 F.Supp. 1319.

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16. Iowa—C.J.S. cited in Mayrath Company v. Helgeson, 139 N.W.2d 303, 311, 258 Iowa 543.

17. U.S.—Gold Circle Stores, a Div. of Federated Dept. Stores, Inc. v. Riviera Finance-East Bay, Inc., D.C.Cal., 540 F.Supp. 15.

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A factor is also distinguished from purchaser.^{28.10}

28.10. Wash.—Cox v. Funk, 368 P.2d 694, 59 Wash.2d 489.

36. Pa.—C.J.S. quoted at length in Tax Review Bd. of City of Philadelphia v. Elster & Prager, 178 A.2d 611, 612, 406 Pa. 543.

Utah—Manger v. Davis, 619 P.2d 687.

38. U.S.—General Ins. Co. of America v. Schnell Livestock Market, Inc., C.A.S.D., 353 F.2d 67, reh. den. 354 F.2d 649.

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41. Cal.—Northern Counties Bank v. Earl Himovitz & Sons Livestock Co., 31 Cal.Rptr. 551, 216 C.A.2d 849.

47. Ga.—Parks v. Atlanta News Agency, Inc., 156 S.E.2d 137, 115 Ga.App. 842.

48. Mo.—C.J.S. cited in Nagels v. Christy, 330 S.W.2d 754, 757.

49. Mass.—Clauson's of Wellesley, Inc., v. Coombs & McBeath, Inc., 173 N.E.2d 81, 342 Mass. 298.

53. U.S.—Wood v. Western Beef Factory, Inc., C.A. Wyo., 378 F.2d 96.

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54. U.S.—Wood v. Western Beef Factory, Inc., C.A. Wyo., 378 F.2d 96.

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73. Iowa—C.J.S. cited in Mayrath Company v. Helgeson, 139 N.W.2d 303, 311, 258 Iowa 543.

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75. U.S.—Simpson v. Union Oil Co. of Cal., Cal., 84 S.Ct. 1051, 377 U.S. 13, 12 L.Ed.2d 98, reh. den. 84 S.Ct. 1349, 377 U.S. 949, 12 L.Ed.2d 313. On remand, D.C., 270 F.Supp. 754. Aff'd. 411 F.2d 897, rev'd. on oth. grds. 90 S.Ct. 30, 396 U.S. 13, 24 L.Ed.2d 13.

Md.—Dixon v. Process Corp., 382 A.2d 893, 38 Md. App. 644.

§ 3. — Licenses and Bonds

79. Cal.—Southfield v. Barrett, 91 Cal.Rptr. 514, 13 C.A.3d 290.

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U.S.—U.S. v. Bournon, C.A.Tex., 574 F.2d 202.

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81. U.S.—Birkenfield v. U.S., C.A.Pa., 369 F.2d 491 —Zwick v. Freeman, C.A.N.Y., 373 F.2d 110, cert. den. 88 S.Ct. 43.

82. U.S.—Birkenfield v. U.S., C.A.Pa., 369 F.2d 491 —Zwick v. Freeman, C.A.N.Y., 373 F.2d 110, cert. den. 88 S.Ct. 43.

Tex.—Globe Indem. Co. v. White, Civ.App., 332 S.W.2d 454, err. ref. no rev. err.

83. U.S.—Zwick v. Freeman, C.A.N.Y., 373 F.2d 110, cert. den. 88 S.Ct. 43.

Statute construed

Va.—Com. ex rel. Morrisett v. Manzer, 154 S.E.2d 185, 207 Va. 996.

87. Wash.—Kilthau v. Covelli, 563 P.2d 1305, 17 Wash.App. 460.

Suspension or revocation of licenses has been considered.^{90.5}

90.5. Grounds

U.S.—Eastern Produce Co. v. Benson, C.A., 278 F.2d 606.

Fla.—Osceola Fruit Distributors v. Mayo, App., 115 So.2d 760.

Defenses

Cal.—Post v. Jacobsen, 4 Cal.Rptr. 817, 180 C.A.2d 297.

Issues

Cal.—Post v. Jacobsen, 4 Cal.Rptr. 817, 180 C.A.2d 297.

Evidence

U.S.—Mandell, Spector, Rudolph Co. v. U.S., C.A.Pa., 364 F.2d 889, cert. den. 87 S.Ct. 715, 385 U.S. 1008, 17 L.Ed.2d 546—Miller v. Butz, C.A.La., 498 F.2d 1088.

Cal.—Post v. Jacobsen, 4 Cal.Rptr. 817, 180 C.A.2d 297.

D.C.—Harrisburg Daily Market, Inc. v. Freeman, C.A., 309 F.2d 646, 114 U.S.App.D.C. 26, cert. den. 83 S.Ct. 1108, 372 U.S. 976, 10 L.Ed.2d 141.

Fla.—Osceola Fruit Distributors v. Mayo, App., 115 So.2d 760.

N.Y.—Maine Sugar of Montezuma, Inc. v. Wickham, 325 N.Y.S.2d 858, 37 A.D.2d 381.

Review

U.S.—Eastern Produce Co. v. Benson, C.A., 278 F.2d 606—Mustain v. U.S., C.A.Colo., 314 F.2d 113.

Findings

U.S.—Mitchell v. Freeman, C.A., 308 F.2d 855, cert. den. 83 S.Ct. 882, 372 U.S. 935, 9 L.Ed.2d 766.

Failure to file complaint before investigation held waived

U.S.—Mandell, Spector, Rudolph Co. v. U.S., C.A.Pa., 364 F.2d 889, cert. den. 87 S.Ct. 715, 385 U.S. 1008, 17 L.Ed.2d 546.

Requirement of formal complaint held satisfied

U.S.—Mandell, Spector, Rudolph Co. v. U.S., C.A.Pa., 364 F.2d 889, cert. den. 87 S.Ct. 715, 385 U.S. 1008, 17 L.Ed.2d 546.

60 day suspension warranted

U.S.—Maine Potato Growers, Inc. v. Butz, C.A., 540 F.2d 518.

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91. U.S.—Arnold Livestock Sales Co., Inc. v. Pearson, D.C.Neb., 383 F.Supp. 1319.

Statutory penalty of fine held to preclude judicial imposition of other sanctions for failure

Tex.—Sutton v. Reagan & Gee, Civ.App., 405 S.W.2d 828, err. ref. no rev. err.

92. U.S.—Chidsey v. Geurin, D.C.Mich., 314 F.Supp. 480, aff'd., C.A., 443 F.2d 584.

93. No bond required

U.S.—Travelers Indem. Co. v. Manley Cattle Co., C.A. Tex., 553 F.2d 943.

94. Purpose

U.S.—Travelers Indem. Co. v. Manley Cattle Co., C.A. Tex., 553 F.2d 943.

97. Mo.—Francis v. New Amsterdam Cas. Co., App., 407 S.W.2d 631.

Rules governing insurance policies applicable

Vt.—Insurance Co. of North America v. Tucker, 262 A.2d 489, 128 Vt. 340.

99. Mo.—Francis v. New Amsterdam Cas. Co., App., 407 S.W.2d 631.

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(2) Under other statutes only producers are protected.

Ill.—Hicks v. Williams, 432 N.E.2d 1278, 60 Ill.Dec. 379, 104 Ill.App.3d 172.

Nev.—Midwest Livestock Commission Co. v. Griswold, 372 P.2d 689, 78 Nev. 358.

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Nev.—Midwest Livestock Commission Co. v. Griswold, 372 P.2d 689, 78 Nev. 358.

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8. Ariz.—Badley v. Towle, 451 P.2d 899, 9 Ariz.App. 321.

Transactions held within protection of bond

(3) Mo.—Francis v. New Amsterdam Cas. Co., App., 407 S.W.2d 631.

Transaction held not within protection of bond

(2) Other matters.

U.S.—General Ins. Co. of America v. Schnell Livestock Market, Inc., C.A.S.D., 354 F.2d 649.

Tex.—Globe Indem. Co. v. White, Civ.App., 332 S.W.2d 454, err. ref. no rev. err.

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30. Evidence held sufficient

(1) U.S.—General Ins. Co. of America v. Schnell Livestock Market, Inc., C.A.S.D., 354 F.2d 649.

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44. Review

U.S.—Butz v. Glover Livestock Commission Co., Inc., 93 S.Ct. 1455, 411 U.S. 182, 36 L.Ed.2d 142, reh. den. 93 S.Ct. 2746, 412 U.S. 933, 37 L.Ed.2d 162.

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46. U.S.—U.S. v. William B. Mandell Co., D.C.Pa., 242 F.Supp. 873.

54. U.S.—American Fruit Purveyors, Inc. v. U.S., C.A., 630 F.2d 370, cert. den. 101 S.Ct. 1701, 450 U.S. 997, 68 L.Ed.2d 197.

55. Review

U.S.—Fairbank v. Hardin, C.A.Cal., 429 F.2d 264, cert. den. 91 S.Ct. 244, 400 U.S. 943, 27 L.Ed.2d 247.

56. U.S.—Fairbank v. Hardin, C.A.Cal., 429 F.2d 264, cert. den. 91 S.Ct. 244, 400 U.S. 943, 27 L.Ed.2d 247.

§ 5. Creation and Termination of Relation

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58. What law governs

Mass.—Nissenberg v. Felleman, 162 N.E.2d 304, 339 Mass. 717.

60. Iowa—Mayrath Co. v. Helgeson, 139 N.W.2d 303, 258 Iowa 543.

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U.S.—Stahlman v. National Lead Co., C.A.Miss., 318 F.2d 388.

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61. Mo.—Henderson v. Yust, App., 560 S.W.2d 269.

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64. Mich.—Frost-Pack Distributing Co., v. City of Grand Rapids, 252 N.W.2d 747, 399 Mich. 664.

Utah—Manger v. Davis, 619 P.2d 687.

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§ 7. — Duration and Termination

67. N.Y.—Matter of Rothko's Estate, 372 N.E.2d 291, 43 N.Y.2d 305, 401 N.Y.S.2d 449, on remand, 407 N.Y.S.2d 954, 95 Misc.2d 492.

68. Ga.—Parks v. Atlanta News Agency, Inc., 156 S.E.2d 137, 115 Ga.App. 842.

69.5. U.S.—Standard Oil Co. of Cal. v. Perkins, C.A. Or., 347 F.2d 379.

71. Waiver of right to terminate

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83. N.Y.—Estate of Wilhelmina Friedman, 397 N.Y. S.2d 561, 91 Misc.2d 201.

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89. Ill.—Nassar v. Smith, 315 N.E.2d 692, 21 Ill. App.3d 462.

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33. U.S.—American Fruit Purveyors, Inc. v. U.S., C.A., 630 F.2d 370, cert. den. 101 S.Ct. 1701, 450 U.S. 997, 68 L.Ed.2d 197.

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6. U.S.—Amoco Oil Co. v. Cardinal Oil Co., Inc., D.C.Wis., 535 F.Supp. 661.

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20. Fiduciary obligations not created

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75. N.Y.—Matter of Friedman, 407 N.Y.S.2d 999, 64 A.D.2d 70.

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22. N.Y.—Duobond Corp. v. Congress Factors Corp., 373 N.Y.S.2d 828, 49 A.D.2d 919, app. diss. 345 N.E.2d 586, 38 N.Y.2d 821, 382 N.Y.S.2d 43. App. after remand 359 N.E.2d 984, 41 N.Y.2d 177, 391 N.Y.S.2d 394.

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32. Wis.—Arrowhead Growers Sales Co. v. Central Sands Produce, Inc., 180 N.W.2d 48, Wis.2d 383.

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45. N.Y.—La Mar Hosiery Mills, Inc. v. Credit & Commodity Corp., 216 N.Y.S.2d 186, 28 Misc.2d 764.

46. Iowa—C.J.S. cited in Mayrath Company v. Helgeson, 139 N.W.2d 303, 311, 258 Iowa 543.

47. Iowa—C.J.S. cited in Mayrath Company v. Helgeson, 139 N.W.2d 303, 311, 258 Iowa 543.

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62. U.S.—Armour & Co. v. Celic, C.A.N.Y., 294 F.2d 432.

72. U.S.—Metalexport Co. v. Gen-O-Ral Processing Corp., C.A.Ill., 365 F.2d 178.

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81. Mo.—C.J.S. cited in Nagels v. Christy, 330 S.W.2d 754, 757.

82. U.S.—Knuth v. Erie-Crawford Dairy Co-op. Ass'n. C.A.Pa., 463 F.2d 470, cert. den. 93 S.Ct. 966, 410 U.S. 913, 35 L.Ed.2d 278, on remand, D.C., 58 F.R.D. 646, affd. 487 F.2d 1394.

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N.Y.—In re Mincow Bag Co., 279 N.Y.S.2d 306, 53 Misc.2d 599, affd. 288 N.Y.S.2d 364, 29 A.D.2d 400, affd. 300 N.Y.S.2d 115, 24 N.Y.2d 776, 248 N.E.2d 26.

84. U.S.—Parks v. Baldwin Piano & Organ Co., D.C. Conn., 262 F.Supp. 515, affd., C.A., 386 F.2d 828.

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89. U.S.—U.S. v. Menier Hardware No. 1, Inc., D.C. Tex., 219 F.Supp. 448.

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90. Mont.—C.J.S. cited in Donich v. U.S. Fidelity & Guaranty Co., 223 P.2d 298, 300, 149 Mont. 79.

§ 41. Compensation of Factor

3. Provision for charging back commissions on repossessed merchandise held part of contract.

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28. U.S.—In re M & B Printing Equipment Corp., Bkrtcy.Fla., 18 B.R. 411.

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16. U.S.—In re Freeman, C.A.N.J., 294 F.2d 126.

17. Legal, not equitable, lien
U.S.—In re Summit Hardware, Inc., C.A.Ohio, 302 F.2d 397, 96 A.L.R.2d 717, cert. den. 83 S.Ct. 154, 371 U.S. 882, 9 L.Ed.2d 118.

19. Construction of statute

(3) Liberal construction.
U.S.—In re Summit Hardware, Inc., D.C.Ohio, 192 F.Supp. 489, revd. on oth. grds. C.A., 302 F.2d 397, 96 A.L.R.2d 717, cert. den. 83 S.Ct. 154, 371 U.S. 882, 9 L.Ed.2d 118.

(4) Other statements.

U.S.—Solomon v. Northwestern State Bank, C.A.Minn., 327 F.2d 720.

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U.S.—In re Summit Hardware, Inc., C.A.Ohio, 302 F.2d 397, cert. den. 83 S.Ct. 154, 371 U.S. 882, 9 L.Ed.2d 118.

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27. Construction of agreement

U.S.—In re Summit Hardware, Inc., C.A.Ohio, 302 F.2d 397, 96 A.L.R.2d 717, cert. den. 83 S.Ct. 154, 371 U.S. 882, 9 L.Ed.2d 118.

35. Cal.—Gerber v. Spector, 344 P.2d 890, 174 C.A.2d 489.

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45. U.S.—*In re Freeman, C.A.N.J.*, 294 F.2d 126. N.Y.—*Sidney Janis Limited v. deKooning*, 304 N.Y.S.2d 826, 33 A.D.2d 555, affd. 258 N.E.2d 396, 26 N.Y.2d 910, 310 N.Y.S.2d 97.

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60. Tex.—*Dalton S.S. Corp. v. W. R. Zanes & Co.*, Civ.App., 354 S.W.2d 621.

62. U.S.—*National Acceptance Co. of America v. Southwest Automotive Warehouse, Inc.*, C.A.Tex., 410 F.2d 1139.

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(5) Verification of notice.
U.S.—*In re Ben Weiss Co.*, C.A.Ill., 271 F.2d 234.

(6) Other statements.
U.S.—*Solomon v. Northwestern State Bank*, C.A.Minn., 327 F.2d 720.

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9. U.S.—*Pasadena Inv. Co. v. Pasadena Air Products, Inc.*, D.C.Cal., 234 F.Supp. 128.

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N.Y.—*James Talcott, Inc. v. Stagg Warehousing & Distributing Co.*, 252 N.Y.S.2d 628, 43 Misc.2d 864.

26. U.S.—*In re Summit Hardware*, C.A.Ohio, 302 F.2d 397, 96 A.L.R.2d 717, cert. den. 83 S.Ct. 154, 371 U.S. 882, 9 L.Ed.2d 118.

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32.5. Sale of all capital stock

Or.—*McGregor Co. v. Heritage*, 620 P.2d 488, 49 Or.App. 489, mod. on oth. grds. 631 P.2d 1355, 291 Or. 420.

48. Or.—*McGregor Co. v. Heritage*, 631 P.2d 1355, 291 Or. 420.

§ 48. — Enforcement and Preservation

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57. Identification of property

U.S.—*Matthews v. James Talcott, Inc.*, C.A.Ind., 345 F.2d 374, cert. den. 86 S.Ct. 84, 382 U.S. 837, 15 L.Ed.2d 79.

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74. N.Y.—*Duobond Corp. v. Congress Factors Corp.*, 373 N.Y.S.2d 828, 49 A.D.2d 919, app. diss. 345 N.E.2d 586, 38 N.Y.2d 821, 382 N.Y.S.2d 43, app. after remand 359 N.E.2d 984, 41 N.Y.2d 177, 391 N.Y.S.2d 394.

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84. N.Y.—*Estate of Rothko*, 379 N.Y.S.2d 923, 84 Misc.2d 830, mod. on oth. grds. 392 N.Y.S.2d 870, 56 A.D.2d 499. Affd. 372 N.E.2d 291, 43 N.Y.2d 305, 401 N.Y.S.2d 449, on remand, 407 N.Y.S.2d 924, 95 Misc.2d 492.

Reimbursement of the principal by insurance is no defense where the insurance company is subrogated to the rights of the principal.^{88.5}

88.5. Cal.—*Meyer Koulish Co. v. Cannon*, 28 Cal.Rptr. 757, 213 C.A.2d 419.

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10. Action under Perishable Agricultural Commodities Act

(3) Other matters.
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35. U.S.—*Consolidated Citrus Co. v. Goldstein*, D.C.Pa., 214 F.Supp. 823.

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71.15. U.S.—*Pure Oil Co. v. Superior Oil & Tire Co.*, C.A.Ky., 317 F.2d 330—*Metalexport Co. v. Gen-O-Ral Processing Corp.*, C.A.Ill., 365 F.2d 178. Cal.—*Duze v. Ace Tractor & Equipment Co.*, 343 P.2d 315, 173 C.A.2d 300—*Pico Citizens Bank v. Tafco Inc.*, 19 Cal.Rptr. 905, 201 C.A.2d 131.

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U.S.—*John J. Trombetta Co. v. Goldstein and Procacci*, D.C.Pa., 198 F.Supp. 288—*Jackson v. Harrisburg Daily Market, Inc.*, D.C.Pa., 198 F.Supp. 490—*Consolidated Citrus Co. v. Goldstein*, D.C.Pa., 214 F.Supp. 823—*Flood v. M. P. Clark, Inc.*, D.C.Pa., 319 F.Supp. 1043, motion den. 335 F.Supp. 970.

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82.15. U.S.—*Four Star Comics Corp. v. Kable News Co.*, C.A.N.Y., 327 F.2d 287. *Condakes v. Wolf*, D.C.Mass., 211 F.Supp. 746.

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1. U.S.—*C. F. Smith, Inc. v. Bushala*, D.C.Cal., 232 F.Supp. 178.

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2.5. U.S.—*Flood v. M. P. Clark, Inc.*, D.C.Pa., 319 F.Supp. 1043, motion den. 335 F.Supp. 970.

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U.S.—*Jackson v. Harrisburg Daily Market, Inc.*, D.C.Pa., 198 F.Supp. 490.

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U.S.—*John J. Trombetta Co. v. Goldstein and Procacci*, D.C.Pa., 198 F.Supp. 288—*Flood v. M. P. Clark, Inc.*, D.C.Pa., 42 F.R.D. 602.

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U.S.—*John J. Trombetta Co. v. Goldstein and Procacci*, D.C.Pa., 198 F.Supp. 288.

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U.S.—*Rankin Sales Co. v. Morrie H. Morgan Co.*, C.A.Cal., 296 F.2d 113.

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U.S.—*Consolidated Citrus Co. v. Goldstein*, D.C.Pa., 214 F.Supp. 823.

Service of notice of appeal

U.S.—*Flood v. M. P. Clark, Inc.*, D.C.Pa., 42 F.R.D. 602.

§ 51. Actions by Factor against Principal

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U.S.—*Standard Oil Co. of Cal. v. Perkins*, C.A.Or., 347 F.2d 379.

48. Negligent delay

Wyo.—*Wyoming Wool Marketing Ass'n v. Woodruff*, 372 P.2d 174, 3 A.L.R.3d 802.

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Wyo.—*Wyoming Wool Marketing Ass'n v. Woodruff*, 372 P.2d 174, 3 A.L.R.3d 802.

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57. Ga.—*Revlon, Inc. v. Hagood Pharmacy, Inc.*, 168 S.E.2d 649, 119 Ga.App. 747.

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66. Authorization of deductions by contract

Wyo.—*Cooksley, Lloyd and Chubb v. Wyoming Wool Marketing Ass'n*, 374 P.2d 766.

67. Wyo.—*Wyoming Wool Marketing Ass'n v. Woodruff*, 372 P.2d 174, 3 A.L.R.3d 802.

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78. Wyo.—*Wyoming Wool Marketing Ass'n v. Woodruff*, 372 P.2d 174, 3 A.L.R.3d 802.

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(1) U.S.—*Standard Oil Co. of Cal. v. Perkins*, C.A.Or., 347 F.2d 379.

79. U.S.—*Standard Oil Co. of Cal. v. Perkins*, C.A.Or., 347 F.2d 379.

81. Wyo.—*Wyoming Wool Marketing Ass'n v. Woodruff*, 372 P.2d 174, 3 A.L.R.3d 802.

§ 52. Rights of Factor against Third Persons

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Tex.—*Dalton S.S. Corp. v. W. R. Zanes & Co.*, Civ.App., 354 S.W.2d 621.

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Tex.—*Gulf Coast Factors, Inc. v. Hamilton Supply Corp.*, Civ.App., 389 S.W.2d 341.

§ 53. — On Contracts Relating to Goods

90. Colo.—*Ranchers & Farmers Livestock Auction Co. v. Honey*, 552 P.2d 313, 38 Colo.App. 69, petition stricken, 553 P.2d 799, 191 Colo. 503.

93. U.S.—*Knuth v. Erie-Crawford Dairy Co-op. Ass'n*, C.A.Pa., 463 F.2d 470, cert. den. 93 S.Ct. 966, 410 U.S. 913, 35 L.Ed.2d 278, on remand, D.C., 58 F.R.D. 646, affd. 487 F.2d 1394.

§ 54. — For Torts Relating to Goods

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5. Iowa—*C.J.S. cited in Ontario Livestock Commission Co. v. Flynn*, 126 N.W.2d 362, 367, 256 Iowa 116.

§ 56. Liability of Factor to Third Person

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21. Duty to discover principal does not rest on buyer

Iowa—*Barrett v. Rumelotte*, 126 N.W.2d 322, 256 Iowa 1.

24. Buyer chargeable with knowledge of factor's announcement of relationship

Iowa—*Barrett v. Rumelotte*, 126 N.W.2d 322, 256 Iowa 1.

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Obligation to prove buyer's knowledge a heavy one

Iowa—Barrett v. Rumeliote, 126 N.W.2d 322, 256 Iowa 1.

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29. Iowa—C.J.S. cited in Barrett v. Rumeliote, 126 N.W.2d 322, 256 Iowa 1.

N.Y.—McGraw-Edison Co. v. Standard Financial Corp., 246 N.Y.S.2d 823, 20 A.D.2d 282, affd. 209 N.E.2d 732, 16 N.Y.2d 749, 262 N.Y.S.2d 118. Tex.—C.J.S. quoted at length in Hagen v. Brzozowski, Civ.App., 336 S.W.2d 213, 215.

30. U.S.—In re Bildisco, D.C.N.J., 11 B.R. 1019, affd., C.A., 681 F.2d 804.

N.Y.—Kenmore Builders, Inc. v. James Talcott, Inc., 231 N.Y.S.2d 939.

31. Iowa—C.J.S. cited in Barrett v. Rumeliote, 126 N.W.2d 322, 256 Iowa 1.

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53. Colo.—Winter Livestock Commission Co. v. Noll, 489 P.2d 1067, 30 Colo.App. 141.

§ 57. — For Torts

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63. Okl.—C.J.S. cited in Howard v. Jessup, 519 P.2d 913, 914, 90 A.L.R.3d 1163.

64. U.S.—Adams v. Greeson, C.A.Okl., 300 F.2d 555, stating Arkansas law.

Kan.—C.J.S. cited in DeVore v. McClure Livestock Commission Co., 485 P.2d 1013, 1017, 207 Kan. 499.

Mo.—Interstate Finance Co. of Kan. v. Kansas City Auto. Auction Co., App., 446 S.W.2d 462.

67. U.S.—U.S. v. LaGrange Stockyard, Inc., D.C.Ga., 270 F.Supp. 492.

Kan.—C.J.S. cited in DeVore v. McClure Livestock Commission Co., 485 P.2d 1013, 1017, 207 Kan. 499.

C.J.S. cited in First Nat. Bank v. Atchison County Auction Co., 699 P.2d 1032, 1038, 10 Kan.App. 382.

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69. Iowa—C.J.S. cited in Ontario Livestock Commission Co. v. Flynn, 126 N.W.2d 362, 365, 256 Iowa 116.

71. U.S.—Adams v. Greeson, C.A.Okl., 300 F.2d 555.

72. Iowa—C.J.S. quoted in Ontario Livestock Commission Co. v. Flynn, 126 N.W.2d 362, 365, 256 Iowa 116.

Kan.—C.J.S. cited in DeVore v. McClure Livestock Commission Co., 485 P.2d 1013, 1017, 207 Kan. 499.

74. Iowa—C.J.S. quoted in Ontario Livestock Commission Co. v. Flynn, 126 N.W.2d 362, 365, 256 Iowa 116.

74.5. Since the publication of Corpus Juris Secundum the case of Blackwell v. Laird, cited to the text in the bound volume has been expressly overruled. Mo.—Farmers State Bank v. Stewart, 454 S.W.2d 908.

74.10. Mont.—O'Connell Ranch Co. v. Great Falls Livestock Commission Co., 343 P.2d 703, 136 Mont. 23.

Liability for sale of mortgaged cattle

Mo.—Farmers State Bank v. Stewart, 454 S.W.2d 908.

74.15. Mo.—Farmers State Bank v. Stewart, 454 S.W.2d 908, overruling Blackwell v. Laird, 236 Mo.App. 1217, 163 S.W.2d 91.

What law governs

U.S.—Adams v. Greeson, C.A.Okl., 300 F.2d 555.

§ 58. Rights of Principal against Third Persons

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81. Ga.—Cobb Exchange Bank v. Byrd, 134 S.E.2d 871, 108 Ga.App. 825.

Utah—Manger v. Davis, 619 P.2d 687.

89. Ga.—C.J.S. cited in Cobb Exchange Bank v. Byrd, 134 S.E.2d 871, 872, 108 Ga.App. 825.

Uniform Commercial Code

(1) Statute construed.

U.S.—Toyomenka, Inc. v. Mount Hope Finishing Co., C.A.N.C., 432 F.2d 722.

(2) Elements stated.

U.S.—Toyomenka, Inc. v. Mount Hope Finishing Co., C.A.N.C., 432 F.2d 722.

(3) Where not applicable, precode law applies.

U.S.—Toyomenka, Inc. v. Mount Hope Finishing Co., C.A.N.C., 432 F.2d 722.

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94. Ga.—C.J.S. cited in Cobb Exchange Bank v. Byrd, 134 S.E.2d 871, 873, 108 Ga.App. 825.

§ 60. — Right to Follow Property and Proceeds in General

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32. La.—Diesel Equipment Corp. v. Epstein, App., 159 So.2d 1, affd. 169 So.2d 61, 246 La. 953.

34. Ga.—Peoples Loan & Finance Corp. v. Bell, 115 S.E.2d 218, 101 Ga.App. 593.

35. Creditor as bona fide purchaser

La.—Diesel Equipment Corp. v. Epstein, App., 159 So.2d 1, affd. 169 So.2d 61, 246 La. 953.

§ 61. — Insolvency of Death of Factor

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41. U.S.—In re D.I.A. Sales Corp., C.A.Mich., 339 F.2d 175.

§ 63. Liability of Principal to Third Person

Library References

Factors ⇐48 et seq.

53. Mo.—C.J.S. cited in Nagels v. Christy, 330 S.W.2d 754, 757.

Misrepresentation

Mo.—Nagels v. Christy, 330 S.W.2d 754.

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60. N.Y.—Buy Fabrics, Inc. v. ADA Co., Inc., 351 N.Y.S.2d 522, 76 Misc.2d 607.

61. Uniform Commercial Code

(1) Statute construed.

Colo.—American Nat. Bank of Denver v. First Nat. Bank of Glenwood Springs, 476 P.2d 304, 28 Colo. App. 486.

Mass.—General Elec. Co. v. Pettingell Supply Co., 199 N.E.2d 326, 347 Mass. 631.

(2) Subject to claims of factor's creditors.

Mass.—General Elec. Co. v. Pettingell Supply Co., 199 N.E.2d 326, 347 Mass. 631.

(3) Purpose of provisions.

Colo.—American Nat. Bank of Denver v. First Nat. Bank of Glenwood Springs, 476 P.2d 304, 28 Colo. App. 486—American Nat. Bank v. Quad Const., Inc., 504 P.2d 1113, 31 Colo.App. 373.

(4) Other instances.

U.S.—Newhall v. Haines, D.C.Mont., 10 B.R. 1019.

§ 64. Protection of Third Persons under Factors' Acts

65. Statute as to filing of consignment agreement construed

Wis.—In re Adams Machinery, Inc., 123 N.W.2d 558, 20 Wis.2d 607.

Statute not applicable

U.S.—Newhall v. Haines, D.C.Mont., 10 B.R. 1019.

§ 67. — Persons Protected by Statutes

page 589

15. Contract not bona fide one within factor's statute

R.I.—O. M. Scott Credit Corp. v. Apex Inc., 198 A.2d 673, 97 R.I. 442.

Tenn.—Couch v. Cockroft, App., 490 S.W.2d 713.

Held not "merchant"

U.S.—Gallagher v. Unenrolled Motor Vessel River Queen (Hull No. A-681 84), C.A.Tex., 475 F.2d 117.

Persons not protected by Packers and Stockyard Act

U.S.—U.S. v. Squires, D.C.Iowa, 378 F.Supp. 798.

24. La.—Diesel Equipment Corp. v. Epstein, 169 So.2d 61, 246 La. 953, 11 A.L.R.3d 1022.

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29. Ill.—Coffman Truck Sales v. Sackley Cartage Co., Inc., 373 N.E.2d 1026, 15 Ill.Dec. 554, 58 Ill. App.3d 68.

§ 68. Actions by or against Principals or Factors

33. Noncompliance with Uniform Commercial Code provisions

Colo.—American Nat. Bank of Denver v. First Nat. Bank of Glenwood Springs, 476 P.2d 304, 28 Colo. App. 486.

Under statutory provisions a third person may have an action against the principal.^{38.5}

38.5. Replevin

Miss.—Litchfield v. Dueitt, 245 So.2d 190.

39. Petition held insufficient

Ga.—Peoples Loan & Finance Corp. v. Bell, 115 S.E.2d 218, 101 Ga.App. 593.

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41. Iowa—Barrett v. Rumeliote, 126 N.W.2d 322, 256 Iowa 1.

44. Evidence held sufficient to establish

(5) Other matters.

U.S.—In re Summit Hardware, Inc., C.A.Ohio, 302 F.2d 397, 96 A.L.R.2d 717, cert. den. 83 S.Ct. 154, 371 U.S. 882, 9 L.Ed.2d 118.

45. Mont.—O'Connell Ranch Co. v. Great Falls Livestock Commission Co., 343 P.2d 703, 136 Mont. 23.

46. Mont.—O'Connell Ranch Co. v. Great Falls Livestock Commission Co., 343 P.2d 703, 136 Mont. 23.

47. Iowa—Barrett v. Rumeliote, 126 N.W.2d 322, 256 Iowa 1.

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FAILURE.

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Phrases.

75. Phrase construed

(17a) "Willful failure" imports a conscious, knowing, voluntary, intentional failure, a purpose of willingness to make the omission, rather than a mere inadvertent, accidental, involuntary, inattentive, inert, or passive omission.—McGruder v. Georgia Power Co., 191 S.E.2d 305, 307, 126 Ga.App. 562.

FAIR.

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As a Noun

80. Similarly expressed

(1) "Fairs" are events where people congregate to present and observe exhibitions that disclose how other people work, live and play; for purpose of buying and selling livestock and commodities; for holding and participating in contests; and for pleasure and enjoyment.—Maryland State Fair & Agr. Soc. Inc. v. Supervisor of Assessments of Baltimore County, 171 A.2d 132, 134, 225 Md. 574, 89 A.L.R.2d 1095.

As a Verb

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For ship building purposes, the word "fair" means to make smooth and regular.^{81.5}

81.5. U.S.—Application of Hume, 346 F.2d 594, 598, 52 CCPA 1436.

As an Adjective

87. Mo.—Reighley v. Fabricius' Estate, App., 332 S.W.2d 76, 90.

88. Mo.—Reighley v. Fabricius' Estate, App., 332 S.W.2d 76, 90.

95. Mo.—C.J.S. quoted in Jones v. State Dept. of Public Health and Welfare, 354 S.W.2d 37, 39.

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Fair market value.

9.5. Meaning in tax case

There is no distinction, for most purposes, in meaning of "fair market value" as used in an estate tax case and one involving income tax.—U.S. v. Parker, C.A.La., 376 F.2d 402, 408.

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11.5. U.S.—Albrecht v. Herald Co., C.A.Mo., 452 F.2d 124, 131.

Similarly defined

(3) Value arrived at between willing buyer and willing seller, neither of whom is under any compulsion to buy or sell.—Fletcher v. Smith, La.App., 216 So.2d 663, 667, application den. 219 So.2d 173, 253 La. 633. N.Y.—Leider v. State, 332 N.Y.S.2d 45, 50, 69 Misc.2d 998.

Classic formula

Fla.—Powell v. Kelly, Fla.App., 214 So.2d 347, 349. Traditional test of "fair market value" is the amount that a purchaser, willing but not obligated to buy the property, would pay to an owner, willing but not obligated to sell.—U.S. v. Branch Coal Corp., D.C.Pa., 285 F.Supp. 514, 518.

13.5. U.S.—Willow Terrace Development Co. v. C. I. R., C.A.Tex., 345 F.2d 933, 936—South Carolina Nat. Bank v. McLeod, D.C.S.C., 256 F.Supp. 913, 915.

Flanders v. U.S., D.C.Cal., 347 F.Supp. 95, 97.

Similarly defined

(11) "Fair market value" is the price at which property would change hands in a transaction between a willing buyer and a willing seller, neither under compulsion to buy nor to sell and both being informed.—Hamm v. C. I. R., C.A.Minn., 325 F.2d 934, 937. Diefenthal v. U.S., D.C.La., 343 F.Supp. 1208, 1210.

(12) Other similar statements.

U.S.—Dempsey v. Stauffer, C.A.Pa., 312 F.2d 360, 365. Jack Daniel Distillery v. U.S., 379 F.2d 569, 574, 180 Ct.Cl. 308.

Clayton v. James B. Clow & Sons, D.C.Ill., 212 F.Supp. 482, 560—Obermer v. U.S., D.C.Hawaii, 238 F.Supp. 29, 34—Howell v. U.S., D.C.Ind., 290 F.Supp. 690, 692.

Colo.—City of Thornton v. Public Utilities Commission, 402 P.2d 194, 198, 157 Colo. 188.

Conn.—Del Vecchio v. New Haven Redevelopment Agency, 161 A.2d 190, 192, 147 Conn. 362.

Del.—Poole v. N. V. Deli Maatschappij, Del., 243 A.2d 67, 70.

Fla.—Peters v. Hansen, App., 157 So.2d 103, 105—Walter v. Schuler, 176 So.2d 81, 85.

Southern Realty & Utilities Corp. v. Gettleman, App., 197 So.2d 30, 31.

Ind.—Sikora v. Barney, 207 N.E.2d 846, 849, 138 Ind. App. 686.

Mo.—Carter v. Matthey Laundry & Dry Cleaning Co., Mo., 350 S.W.2d 786, 794.

N.J.—City of East Orange v. Crawford, 188 A.2d 219, 221, 78 N.J.Super. 239.

Vt.—Petition of Mallary, 250 A.2d 837, 841, 127 Vt. 412.

Wash.—State v. Rowley, 444 P.2d 695, 698, 74 Wash.2d 328.

State v. Wilson, 493 P.2d 1252, 1255, 6 Wash. App. 443.

Wis.—Schwalbach v. Antigo Elec. & Gas, Inc., 135 N.W.2d 263, 268, 27 Wis.2d 651.

13.10. U.S.—Cornish v. U.S., D.C.Or., 221 F.Supp. 658, 663.

N.Y.—Kestor v. State, 244 N.E.2d 248, 249, 23 N.Y.2d 337, 296 N.Y.S.2d 767.

13.20. U.S.—Davis v. U.S., 287 F.2d 168, 173, 152 Ct.Cl. 805.

14. U.S.—Sierra Club v. Hardin, D.C.Alaska, 325 F.Supp. 99, 121.

Ark.—Arkansas State Highway Commission v. DeLaughter, Ark., 468 S.W.2d 242, 247, 250 Ark. 990.

Mo.—Union Elec. Co. v. Saale, 377 S.W.2d 427, 429.

Va.—American Viscose Corp. v. City of Roanoke, 135 S.E.2d 795, 797, 205 Va. 192.

Similarly expressed

(3) U.S.—Goldstin v. C. I. R., C.A., 298 F.2d 562, 567.

U.S. v. 34.09 Acres of Land, More or Less, in City of Norfolk, State of Va., D.C.Va., 290 F.Supp. 551, 555.

Alaska—State v. 7.026 acres, Alaska, 466 P.2d 364, 365.

Del.—Fitzsimmons v. McCorkle, 214 A.2d 334, 338, 9 Storey 94.

Ky.—Com. Dept. of Highways v. Darch, 374 S.W.2d 490, 491.

Mo.—City of St. Louis v. Union Quarry & Const. Co., 394 S.W.2d 300, 305.

Wis.—P.C. Monday Tea Co. v. Milwaukee County Expressway Commission, 128 N.W.2d 631, 634, 24 Wis.2d 107.

Other similar definitions

U.S.—Onego Corp. v. U.S., C.A.Okla., 295 F.2d 461, 463.

Cal.—Buena Park School Dist. of Orange County v. Metrim Corp., 1 Cal.Rptr. 250, 252, 176 C.A.2d 255—Covina Union High School Dist. of Los Angeles County v. Jobe, 345 P.2d 78, 86, 174 C.A.2d 340.

Ind.—Southern Ind. Gas & Elec. Co. v. Gerhardt, 172 N.E.2d 204, 205, 241 Ind. 389.

Mont.—State Highway Commission v. Metcalf, 500 P.2d 951, 955, 160 Mont. 164.

Wash.—Dillon v. O'Connor, Wash., 412 P.2d 126, 128, 68 Wash.2d 184.

Fair value.

36. Cal.—C.J.S. cited in Forde v. Vernbro Corp., 32 Cal.Rptr. 577, 579, 218 C.A.2d 405.

FAITH.

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Good faith.

69. Mo.—C.J.S. cited in Stix Friedman & Co. v. Fidelity & Deposit Co., Mo., 563 S.W.2d 517, 522.

71. Cal.—People v. Bowman, 320 P.2d 70, 96, 77, 151 C.A.2d 784—Efron v. Kalmanovitz, 57 Cal.Rptr. 248, 251, 249 C.A.2d 187.

72. Cal.—People v. Bowman, 320 P.2d 70, 76, 77, 151 C.A.2d 784—A. I. Gage Plumbing Supply Co. v. Local 300 of Intern. Hod Carriers, Bldg. and Common Laborers Union of America, 20 Cal. Rptr. 860, 866, 202 C.A.2d 197, 92 A.L.R.2d 1223—Efron v. Kalmanovitz, 57 Cal.Rptr. 248, 251, 249 C.A.2d 187.

Similarly defined

(1) State of mind motivated by proper motive.

U.S.—Polotti v. Flemming, C.A.N.Y., 277 F.2d 864, 868.

73. Cal.—People v. Bowman, 320 P.2d 70, 76, 77, 151 C.A.2d 784—A. I. Gage Plumbing Supply Co. v. Local 300 of Intern. Hod Carriers, Bldg. and Common Laborers Union of America, 20 Cal.Rptr. 860, 866, 202 C.A.2d 197, 92 A.L.R.2d 1223—Efron v. Kalmanovitz, 57 Cal.Rptr. 248, 251, 249 C.A.2d 187.

Faithful to duty or obligation that is owed

Ill.—Chernocky v. Indemnity Insurance Co. of No. Amer., 216 N.E.2d 198, 203, 69 Ill.App.2d 196.

Md.—State Farm Mut. Auto. Ins. Co. v. White, 236 A.2d 269, 273, 248 Md. 324.

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79. La.—Succession of Hopkins, App., 114 So.2d 742, 745.

82. Similarly expressed

(1) It means with good intentions and an abiding and honest belief that the facts advanced are true, and that the legal position taken is sound in law.—Long Beach Federal Sav. and Loan Ass'n v. Federal Home Loan Bank Bd., D.C.Cal., 189 F.Supp. 589, 611, 612.

(2) "Good faith" ordinarily imports honesty of purpose and integrity of conduct with respect to a given subject.—Smith v. Whitman, 189 A.2d 15, 19, 39 N.J. 397.

(3) "Good faith" means honestly and without any culpable motive or intent.—In re Pine Grove Canning Co., D.C.La., 226 F.Supp. 872, 877.

82.5. Cal.—A. I. Gage Plumbing Supply Co. v. Local 300 of Intern. Hod Carriers, Bldg. and Common Laborers Union of America, 20 Cal.Rptr. 860, 866, 202 C.A.2d 197, 92 A.L.R.2d 1223.

Implies honesty, fair dealing, and full revelation.

Cal.—Davy v. Public Nat. Ins. Co., 5 Cal.Rptr. 488, 492, 181 C.A.2d 387.

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93.5. Possibility of more prudent course

The fact that a person could have adopted a more prudent course than the course taken does not prevent him from establishing that course taken was one taken in good faith.

U.S.—Polotti v. Flemming, C.A.N.Y., 277 F.2d 864, 868.

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Other phrases:

8. Additional phrases

(1) "Faith and trust" as name applied to confidence game.—Few v. U.S., D.C.App., 248 A.2d 125.

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FAITHFUL.

Phrases.

13. Phrases

(5a) "Faithful performance" goes further than honesty and implies that a person may be held responsible even though he has been entirely honest in his conduct.—Concord v. Peerless Ins. Co., N.H., 272 A.2d 588, 590, 110 N.H. 497.

FAKE.

The word has been held to be synonymous with "sham."^{22.50}

FAKE

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22.50. N.Y.—Aacon Contracting Co. v. Herrmann, 208 N.Y.S.2d 659, 667, 27 Misc.2d 197.

FALL.

As a Noun

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39. N.Y.—C.J.S. quoted in Pohl v. Commercial Ins. Co. of Newark, N.J., 232 N.Y.S.2d 92, 95, 36 Misc.2d 173.

39.5. N.Y.—C.J.S. quoted in Pohl v. Commercial Ins. Co. of Newark, N.J., 232 N.Y.S.2d 92, 95, 36 Misc.2d 173.

41. Similarly expressed

(1) "Fall" has been held under a variety of circumstances to be a reference to three-month period of the year which commences on the first day of September and ends on the last day of November.—Solove v. Solove, 469 P.2d 95, 97, 12 Ariz.App. 203.

As a Verb

46. N.Y.—C.J.S. quoted in Pohl v. Commercial Ins. Co. of Newark, N.J., 232 N.Y.S.2d 92, 95, 36 Misc.2d 173.

46.10. N.Y.—C.J.S. quoted in Pohl v. Commercial Ins. Co. of Newark, N.J., 232 N.Y.S.2d 92, 95, 36 Misc.2d 173.

46.15. N.Y.—C.J.S. quoted in Pohl v. Commercial Ins. Co. of Newark, N.J., 232 N.Y.S.2d 92, 95, 36 Misc.2d 173.

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Falling

53.5. N.Y.—C.J.S. quoted in Pohl v. Commercial Ins. Co. of Newark, N.J., 232 N.Y.S.2d 92, 95, 36 Misc.2d 173.

FALSA DEMONSTRATIO NON-NOCET, etc.

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62. Ohio—C.J.S. cited in Mastics v. Kiraly, 196 N.E.2d 172, 175.

Applied or explained in

Ala.—C.J.S. cited in Withers v. Burton, 106 So.2d 876, 879, 268 Ala. 365.

FALSE.

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Involving evil intent or turpitude.

72. Colo.—C.J.S. cited in Industrial Commission v. Emerson Western Co., 369 P.2d 791, 795, 149 Colo. 529.

Mass.—Com. v. Kraatz, Mass., 310 N.E.2d 368, 376, 2 Mass.App. 196.

75. U.S.—C.J.S. quoted at length in U.S. v. Snider, C.A.N.C., 502 F.2d 645, 652.

Similarly expressed

(3) Alaska—Lanier v. State, Alaska, 448 P.2d 587, 592.

(4) Word "false" means more than merely erroneous or untrue.—In re Hippler, D.C.La., 278 F.Supp. 753, 755.

78. U.S.—In re Hippler, D.C.La., 278 F.Supp. 753, 755.

Conn.—C.J.S. cited in State v. Tedesco, 397 A.2d 1352, 1358, 175 Conn. 279.

79. Alaska—Lanier v. State, 448 P.2d 587, 592.

88. Mass.—Com. v. Kraatz, Mass., 310 N.E.2d 368, 376, 2 Mass.App. 196.

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Not involving evil intent or turpitude.

N.M.—C.J.S. cited in Gaston v. Hartzell, 549 P.2d 632, 634.

Wis.—State v. Woodington, 142 N.W.2d 810, 823, 31 Wis.2d 151.

99. N.M.—C.J.S. cited in Gaston v. Hartzell, 549 P.2d 632, 634.

Wis.—State v. Woodington, 142 N.W.2d 810, 823, 31 Wis.2d 151.

2. Wis.—State v. Woodington, 142 N.W.2d 810, 823, 31 Wis.2d 151.

4. N.M.—C.J.S. cited in Gaston v. Hartzell, 549 P.2d 632, 634.

Other terms compared.

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It has also been held to be synonymous with "unlawful." 15.1

15.1. Me.—Jedziewski v. Jordan, 172 A.2d 636, 637, 157 Me. 352.

FALSE IMPRISONMENT

§ 1. Definition

Library References

False Imprisonment ⇨2.

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Mich.—C.J.S. black letter summary quoted in Stowers v. Wolodsko, 191 N.W.2d 355, 363, 386 Mich. 119.

1. U.S.—C.J.S. cited in Luker v. Nelson, D.C.Ill., 341 F.Supp. 111, 120.

Ariz.—State v. Caudillo, 604 P.2d 1121, 124 Ariz. 410.

Ill.—James v. Bank of Highland Park, 226 N.E.2d 404, 82 Ill.App.2d 118—C.J.S. cited in Campbell v. Kaczmarek, 350 N.E.2d 97, 101, 39 Ill.App.3d 465—Robinson v. Wieboldt Stores, Inc., 433 N.E.2d 1005, 60 Ill.Dec. 767, 104 Ill.App.3d 1021.

Ind.—Grooms v. Fervida, 396 N.E.2d 405, 182 Ind. App. 664.

Ky.—Callihan v. Kirk, 419 S.W.2d 539.

Me.—Nadeau v. State, 395 A.2d 107.

Mich.—Tumbarella v. Kroger Co., 271 N.W.2d 284, 85 Mich.App. 482.

Minn.—Lundeen v. Renteria, 224 N.W.2d 132, 302 Minn. 142.

Neb.—Herbrick v. Samardick & Co., 101 N.W.2d 488, 169 Neb. 833—Schmidt v. Richman Gorman, Inc., 215 N.W.2d 105, 191 Neb. 345—Cimino v. Rosen, 225 N.W.2d 567, 193 Neb. 162.

N.H.—C.J.S. cited in Hickox v. J. B. Morin Agency, Inc., 272 A.2d 321, 323, 10 N.H. 438.

N.D.—Lang v. Basin Elec. Power Co-op., 274 N.W.2d 253.

Tex.—Kroger Co. v. Warren, Civ.App., 420 S.W.2d 218.

Other definitions

(1) Mo.—Parrott v. Reis, App., 441 S.W.2d 390.

(5) Ill.—McKendree v. Christy, 172 N.E.2d 380, 29 Ill.App.2d 195.

(8) Conn.—Green v. Donroe, 440 A.2d 973, 186 Conn. 265.

Wis.—Lane v. Collins, 138 N.W.2d 264, 29 Wis.2d 66—Laska v. Steinpreis, 231 N.W.2d 196, 69 Wis.2d 307.

(9) U.S.—Great Atlantic & Pacific Tea Co. v. Lethcoe, C.A.W.Va., 279 F.2d 948—Blitz v. Boog, C.A.N.Y., 328 F.2d 596, cert. den. 85 S.Ct. 106, two cases, 379 U.S. 855, 13 L.Ed.2d 58—Reichender v. Skaggs Drug Center, C.A.Tex., 421 F.2d 307—Armstead v. Escobedo, C.A.Tex., 488 F.2d 509—Weisman v. LeLanda, C.A.N.Y., 532 F.2d 308.

Roberts v. Hecht Co., D.C.Md., 280 F.Supp. 639—Gretencord v. Ford Motor Co., D.C.Kan., 538 F.Supp. 331.

Ariz.—Slade v. City of Phoenix, 541 P.2d 550, 112 Ariz. 298.

Cal.—Gorlack v. Ferrari, 7 Cal.Rptr. 699, 184 C.A.2d 702—Floro v. Lawton, 10 Cal.Rptr. 98, 187 C.A.2d 657—City of Newport Beach v. Sasse, 88 Cal.Rptr.

476, 9 C.A.3d 803—Gomez v. Garcia, 169 Cal. Rptr. 350, 112 C.A.3d 392—Novoa v. Ventura County, 183 Cal.Rptr. 736, 133 C.A.3d 137.

D.C.—Tocker v. Great Atlantic & Pacific Tea Co., App., 190 A.2d 822.

Fla.—Kanner v. First Nat. Bank of South Miami, App., 287 So.2d 715.

Ill.—Morse v. Nelson, 363 N.E.2d 167, 6 Ill.Dec. 638, 48 Ill.App.3d 895.

Ind.—Coleman v. Mitnick, 202 N.E.2d 577, 137 Ind. App. 125, 16 A.L.R.3d 527, reh. den. 203 N.E.2d 834, 137 Ind.App. 125—Brickman v. Robertson Bros. Dept. Store, 202 N.E.2d 583, 136 Ind.App. 467.

Ky.—Grayson Variety Store, Inc. v. Shaffer, 402 S.W.2d 424.

Neb.—Dangberg v. Sears, Roebuck & Co., 152 N.W.2d 168, 198 Neb. 234.

Nev.—Lerner Shops of Nev., Inc. v. Marin, 423 P.2d 398, 83 Nev. 75—Jensen v. Sheriff, White Pine County, 508 P.2d 4, 89 Nev. 123.

N.Y.—Pearson v. Pearson, 212 N.Y.S.2d 281, 29 Misc.2d 677.

N.C.—Hales v. McCrory-McLellan Corp., 133 S.E.2d 225, 260 N.C. 568.

Ohio—Feliciano v. Kreiger, 362 N.E.2d 646, 50 Ohio. St.2d 69, 4 O.O.3d 158.

Or.—Lukas v. J. C. Penney Co., 378 P.2d 717, 233 Or. 345.

R.I.—Cioci v. Santos, 207 A.2d 300, 99 R.I. 308.

Tex.—Browning v. Pay-Less Self Service Shoes, Inc., Civ.App., 373 S.W.2d 71—Skillern & Sons, Inc. v. Stewart, Civ.App., 379 S.W.2d 687, err. ref. no rev. err.—Big Town Nursing Home, Inc. v. Newman, Civ.App., 461 S.W.2d 195—J. C. Penney Co. v. Duran, Civ.App., 479 S.W.2d 374, err. ref. no rev. err.—Black v. Kroger Co., Civ.App., 527 S.W.2d 794.

Utah—C.J.S. cited in Mildon v. Bybee, 375 P.2d 458, 459, 13 Utah2d 400.

Va.—Zayre of Va., Inc. v. Gowdy, 147 S.E.2d 710, 207 Va. 47.

Wash.—Tufte v. City of Tacoma, 431 P.2d 183, 71 Wash.2d 866.

Wis.—Strong v. City of Milwaukee, 157 N.W.2d 619, 38 Wis.2d 564.

Wis.—Strong v. City of Milwaukee, 157 N.W.2d 619, 38 Wis.2d 564.

Essence of false imprisonment

(1) Mich.—Hess v. Village of Wolverine Lake, 189 N.W.2d 42, 32 Mich.App. 601.

(2) Ariz.—Boies v. Raynor, 361 P.2d 1, 89 Ariz. 257.

(4) Ohio—Mullins v. Rinks, Inc., 272 N.E.2d 152, 27 Ohio App.2d 45.

(5) Similar statements.

D.C.—Faniel v. Chesapeake and Potomac Tel. Co. of Maryland, App., 404 A.2d 147.

N.H.—Welch v. Bergeron, 337 A.2d 341, 115 N.H. 175.

S.C.—Thomas v. Colonial Stores, Inc., 113 S.E.2d 337, 236 S.C. 95.

Injury suffered

Cal.—Sullivan v. Los Angeles County, 117 Cal.Rptr. 241, 527 P.2d 865, 12 C.3d 710.

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1.5. U.S.—Kajtazi v. Kajtazi, D.C.N.Y., 488 F.Supp. 15.

D.C.—S. Freedman & Sons, Inc. v. Hartford Fire Ins. Co., App., 396 A.2d 195.

Ill.—Johnson v. Jackson, 193 N.E.2d 485, 43 Ill.App.2d 251.

Ky.—Columbia Sussex Corp., Inc. v. Hay, App., 62 S.W.2d 270.

Me.—Nadeau v. State, 395 A.2d 107.

N.Y.—Blanchfield v. State, 427 N.Y.S.2d 682, 10 Misc.2d 21.

Unlawful arrest

Wash.—Kilcup v. McManus, 394 P.2d 375, 64 Wash.2d 771.

2. N.Y.—Boose v. City of Rochester, 421 N.Y.S.2d 740, 71 A.D.2d 59.

Statutory definitions

(2) Cal.—Muller v. Reagh, 30 Cal.Rptr. 633, 215 C.A.2d 831.

Applicability of statute

U.S.—Raffone v. Sullivan, D.C.Conn., 436 F.Supp. 939, remd., C.A., 595 F.2d 1209.

Ga.—S.S. Kresge Co. v. Carty, 169 S.E.2d 735, 120 Ga.App. 170.

Applicability in civil and criminal actions

Cal.—City of Newport Beach v. Sasse, 88 Cal.Rptr. 476, 9 C.A.3d 803.

3. Ariz.—Slade v. City of Phoenix, 541 P.2d 550, 112 Ariz. 298.

D.C.—Clarke v. District of Columbia, App., 311 A.2d 508.

Ind.—Dubreuil v. Pinnick, 383 N.E.2d 420, 178 Ind. App. 526.

Kan.—Glassey v. Ramada Inn, 612 P.2d 1261, 5 Kan. App.2d 121.

Mich.—Moore v. Federal Dept. Stores, Inc., 190 N.W.2d 262, 33 Mich.App. 556, 46 A.L.R.3d 1275.

Mo.—Gerald v. Caterers, Inc., App., 382 S.W.2d 740.

N.J.—Cooke v. J. J. Newberry & Co., 232 A.2d 425, 96 N.J.Super. 9.

N.Y.—Guzy v. Guzy, 184 N.Y.S.2d 161, 16 Misc.2d 905, affd. 206 N.Y.S.2d 355, 11 A.D.2d 1047.

Kraft v. State, 275 N.Y.S.2d 109, 52 Misc.2d 35.

N.C.—Dellinger v. Belk, 238 S.E.2d 788, 34 N.C.App. 488, cert. den. 241 S.E.2d 517, 294 N.C. 182.

R.I.—Mailey v. De Pasquale's Estate, 177 A.2d 376, 94 R.I. 31.

Similar expressions

N.Y.—Goldstein v. Siegel, 244 N.Y.S.2d 378, 19 A.D.2d 489.

Lack of criminal charge immaterial

Utah—Tolman v. K-Mart Enterprises of Utah, Inc., 560 P.2d 1127.

3.5. U.S.—Testa v. Winquist, D.C.R.I., 451 F.Supp. 388.

Ark.—Faulkinbury v. U.S., Fire Ins. Co., 444 S.W.2d 254, 247 Ark. 70.

D.C.—Clarke v. District of Columbia, App., 311 A.2d 508.

Kan.—Thurman v. Cundiff, 580 P.2d 893, 2 Kan. App.2d 406.

Mo.—Gerald v. Caterers, Inc., App., 382 S.W.2d 740.

N.Y.—Fields v. Victory Chain Store, Inc., 300 N.Y.S.2d 688, 59 Misc.2d 814.

It has been held that there is no such tort as "negligent false imprisonment".^{3.10}

3.10 Ga.—Stewart v. Williams, 255 S.E.2d 699, 243 Ga. 580, on remand 258 S.E.2d 251, 150 Ga.App. 539.

Baggett v. National Bank & Trust Co., 330 S.E.2d 108, 174 Ga.App. 346.

§ 2. Distinguished from Other Torts**page 624**

4. U.S.—Hoffman v. Wair, D.C.Or., 193 F.Supp. 727.

Mo.—Brown v. Jones Store, App., 493 S.W.2d 39.

Intentional tort

U.S.—Johnson v. U.S., C.A., 547 F.2d 688, 178 U.S. App.D.C. 391.

5. U.S.—Whirl v. Kern, C.A.Tex., 407 F.2d 781, cert. den. 90 S.Ct. 210, 396 U.S. 901, 24 L.Ed.2d 177.

Ala.—Prince v. Bryant, 145 So.2d 837, 274 Ala. 134.

Fla.—Weissman v. K-Mart Corp., App., 396 So.2d 1164.

Ky.—Lexington-Fayette Urban County Government v. Middleton, App., 555 S.W.2d 613.

Me.—Jedzierski v. Jordan, 172 A.2d 636, 157 Me. 352.

N.Y.—Jackson v. Police Dept. of City of New York, 447 N.Y.S.2d 320, 86 A.D.2d 860.

Baisch v. State, 351 N.Y.S.2d 617, 76 Misc.2d 1006.

Okl.—Allen v. State, Cr., 400 P.2d 463.

Synonymous

(2) Other statements.

Kan.—Holland v. Lutz, 401 P.2d 1015, 194 Kan. 712.

N.J.—Price v. Phillips, 218 A.2d 167, 90 N.J.Super. 480.

Difference only in terminology

Md.—Great Atlantic & Pac. Tea Co. v. Paul, 261 A.2d 731, 256 Md. 643.

Not separate torts

Alaska—City of Nome v. Ailak, 570 P.2d 162.

Cal.—Collins v. City and County of San Francisco, 123 Cal.Rptr. 525, 50 C.A.3d 671.

Generic term

Conn.—State v. Cutler, Com.Pl., 366 A.2d 805, 33 Conn.Sup. 158.

6. U.S.—Martell v. Chisholm, D.C.Pa., 384 F.Supp. 1224, affd., C.A., 517 F.2d 1398.

Kan.—Sweeney v. United Loan & Finance Co., 468 P.2d 124, 205 Kan. 66.

7. Colo.—Enright v. Groves, 560 P.2d 851, 39 Colo. App. 39.

9. N.M.—State v. Clark, 455 P.2d 844, 80 N.M. 340.

10. Wis.—C.J.S. cited in Strong v. City of Milwaukee, 157 N.W.2d 619, 38 Wis.2d 564.

§ 3. — Abuse of process**12. Criminal or civil process**

Ga.—Hatcher v. Moree, 209 S.E.2d 708, 133 Ga.App. 14.

§ 4. — Malicious Prosecution**page 625**

18. N.H.—Hickox v. J. B. Morin Agency, Inc., 272 A.2d 321, 10 N.H. 438.

22. U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420—Molvel v. Russell, D.C.Md., 264 F.Supp. 22.

Ariz.—Sarwark Motor Sales, Inc. v. Woolridge, 354 P.2d 34, 88 Ariz. 173.

Ga.—Smith v. Embry, 119 S.E.2d 45, 103 Ga.App. 375—Courtenay v. Randolph 188 S.E.2d 396, 125 Ga.App. 581.

Ky.—Super X Drugs of Kentucky, Inc. v. Rice, App., 554 S.W.2d 903.

Mo.—C.J.S. cited in Pride v. Lamberg, 366 S.W.2d 441, 442.

N.Y.—Smith v. Livingston County, 416 N.Y.S.2d 130, 69 A.D.2d 993.

N.Y.—Smith v. Livingston County, 416 N.Y.S.2d 130, 69 A.D.2d 993.

Similar statements

Cal.—Bulkley v. Klein, 23 Cal.Rptr. 855, 206 C.A.2d 742.

La.—Tillman v. Holsum Bakeries, Inc., App., 244 So.2d 681, application den. 246 So.2d 199, 258 La. 352.

Record of prior acquittal required for malicious prosecution

Ind.—Mitchell v. Drake, 360 N.E.2d 195, 172 Ind.App. 376.

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23. U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420.

Fla.—Toomey v. Tolin, App., 311 So.2d 678.

Ga.—Hatcher v. Moree, 209 S.E.2d 708, 133 Ga.App. 14.

Okl.—James v. Southwestern Ins. Co., 354 P.2d 408.

26. U.S.—Hayes v. Irwin, D.C.Ga., 541 F.Supp. 397, affd., C.A., 729 F.2d 1466, two cases, reh. den. 733 F.2d 908, two cases, cert. den. 105 S.Ct. 185, 83 L.Ed.2d 119, two cases.

Cal.—Collins v. Los Angeles County, 50 Cal.Rptr. 586, 241 C.A.2d 451.

Ga.—Smith v. Embry, 119 S.E.2d 45, 103 Ga.App. 375.

27. Pa.—Lokoy v. Kinney, 57 Lanc.Rev. 491.

Where an arrest results from a wrongful prosecution instituted maliciously

(5) Other matters.

Ga.—Smith v. Embry, 119 S.E.2d 45, 103 Ga.App. 375.

Ky.—Freeman v. Logan, 475 S.W.2d 636.

N.J.—Genito v. Rabinowitz, 225 A.2d 590, 93 N.J.Super. 225—Di Giovanni v. Pessel, 250 A.2d 756, 104 N.J.Super. 550, affd. in part, revd. in part on oth. grds. 260 A.2d 510, 55 N.J. 188.

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28. N.Y.—Williams v. City of Buffalo, A.D., 422 N.Y.S.2d 241, 72 A.D.2d 952, app. diss. 403 N.E.2d 458, 49 N.Y.2d 799, 426 N.Y.S.2d 735.

Arrest on warrant wrongfully obtained

Fla.—Wilson v. O'Neal, App., 118 So.2d 101.

31. Ga.—Godfrey v. Home Stores, Inc., 114 S.E.2d 202, 101 Ga.App. 269.

§ 5. Nature in General

32. U.S.—Whirl v. Kern, C.A.Tex., 407 F.2d 781, cert. den. 90 S.Ct. 210, 396 U.S. 901, 24 L.Ed.2d 177.

Johnson v. Buie, D.C.Mo., 312 F.Supp. 1349.

Md.—Goad v. State, 211 A.2d 337, 239 Md. 345.

Wis.—Herbst v. Wuennenberg, 266 N.W.2d 391, 83 Wis.2d 768.

33. U.S.—City of Peoria v. Underwriter's at Lloyd's London, Uninc., D.C.Ill., 290 F.Supp. 890.

34. U.S.—Pierson v. Ray, C.A.Miss., 352 F.2d 213, affd. in part, revd. in part on oth. grds. 87 S.Ct. 1213, 386 U.S. 547, 18 L.Ed.2d 288.

37. Cal.—People v. Curtis, 74 Cal.Rptr. 713, 450 P.2d 33, 70 C.2d 347.

Ill.—Morris v. Faulkner, 361 N.E.2d 112, 5 Ill.Dec. 112, 46 Ill.App.3d 625.

Minn.—Blaz v. Molin Concrete Products Co., 244 N.W.2d 277, 309 Minn. 382.

N.M.—Perea v. Stout, App., 613 P.2d 1034, 94 N.M. 595, cert. den. 101 S.Ct. 610, 449 U.S. 1035, 66 L.Ed.2d 496.

N.Y.—Snyder v. State, 236 N.Y.S.2d 355, 38 Misc.2d 488, mod. on oth. grds. 247 N.Y.S.2d 757, 20 A.D.2d 827.

Prior felony conviction immaterial

Wyo.—Waters v. Brand, 497 P.2d 875.

Most cherished liberty

D.C.—Apton v. Wilson, C.A., 506 F.2d 83, 165 U.S. App.D.C. 22.

Libable for interference

N.Y.—Broughton v. State, 335 N.E.2d 310, 37 N.Y.2d 451, 373 N.Y.S.2d 87, cert. den. 96 S.Ct. 277, 423 U.S. 929, 46 L.Ed.2d 257.

38. N.Y.—Staebler v. Supermarkets General Corp., 432 N.Y.S.2d 828, 105 Misc.2d 677.

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40. U.S.—Geddes v. Daughters of Charity of St. Vincent De Paul, Inc., C.A.La., 348 F.2d 144—Rawis v. Daughters of Charity of St. Vincent De Paul, Inc., C.A.La., 491 F.2d 141, reh. den. 494 F.2d 1296, cert. den. 95 S.Ct. 513, 419 U.S. 1032, 42 L.Ed.2d 307.

Clark v. Heard, D.C.Tex., 538 F.Supp. 800.

Cal.—City of Newport Beach v. Sasse, 88 Cal.Rptr. 476, 9 C.A.3d 803.

D.C.—Shaw v. May Dept. Stores Co., App., 268 A.2d 607.

Ga.—Seligman & Latz of Atlanta, Inc. v. Grant, 158 S.E.2d 483, 116 Ga.App. 539.

La.—Wells v. Gaspard, App., 129 So.2d 245—Tillman v. Holsum Bakeries, Inc., App., 244 So.2d 681, application den. 246 So.2d 199, 258 La. 352.

Md.—Great Atlantic & Pac. Tea Co. v. Paul, 261 A.2d 731, 256 Md. 643.

Minn.—Blaz v. Molin Concrete Products Co., 244 N.W.2d 277, 309 Minn. 382.

Miss.—C.J.S. cited in State for Use of Powell v. Moore, 174 So.2d 352, 354, 252 Miss. 471.

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- Mo.—Warren v. Parrish, 436 S.W.2d 670.
 Patrick v. Menorah Medical Center, App., 636 S.W.2d 134.
 N.Y.—Fields v. Victory Chain Store, Inc., 300 N.Y.S.2d 688, 59 Misc.2d 814—Karen v. State, 444 N.Y.S.2d 381, 111 Misc.2d 396.
 Ohio—Baillie v. Miami Valley Hospital, 221 N.E.2d 217, 8 Ohio Misc. 193.
 Pa.—Lokey v. Kinney, 57 Lanc.Rev. 491.
 R.I.—Mailey v. De Pasquale's Estate, 177 A.2d 376, 94 R.I. 31—Cioci v. Santos, 207 A.2d 300, 99 R.I. 308—Webbier v. Thoroughbred Racing Protective Bureau, Inc., 254 A.2d 285, 105 R.I. 605.
 S.D.—Catenkamp v. Albright, 251 N.W.2d 190.
 Tex.—American Ins. Ass'n v. Smith, Civ.App., 439 S.W.2d 418—J. C. Penney Co. v. Duran, Civ.App., 479 S.W.2d 374, err. ref. no rev. err.—Lilley v. Minute Market, Inc., Civ.App., 501 S.W.2d 688, err. ref. no rev. err.—Cronen v. Nix, Civ.App., 611 S.W.2d 651, cert. den. 102 S.Ct. 132, 454 U.S. 833, 70 L.Ed.2d 112, reh. den. 102 S.Ct. 667, 454 U.S. 1095, 70 L.Ed.2d 636.

Slander and assault and battery are not necessary elements of false imprisonment.^{42,5}

- 42.5. S.C.—Gathers v. Harris Teeter Supermarket, Inc., 317 S.E.2d 748, 282 S.C. 220.
 44. N.Y.—Budgar v. State, 414 N.Y.S.2d 463, 98 Misc.2d 588.

Date of knowledge immaterial

- N.Y.—Emanuele v. State, 250 N.Y.S.2d 361, 43 Misc.2d 135.

§ 6. Intent

45. U.S.—Bryan v. Jones, C.A.Tex., 530 F.2d 1210, cert. den. 97 S.Ct. 174, 429 U.S. 865, 50 L.Ed.2d 145.
 Conn.—Green v. Donroe, 440 A.2d 973, 186 Conn. 265.
 D.C.—Marshall v. District of Columbia, App., 391 A.2d 1374.
 Idaho—Lively v. City of Blackfoot, 416 P.2d 27, 91 Idaho 80.
 Minn.—State v. Dokken, 312 N.W.2d 106.
 Miss.—State for Use of Powell v. Moore, 174 So.2d 352, 252 Miss. 471.
 Nev.—Lerner Shops of Nev., Inc. v. Marin, 423 P.2d 398, 83 Nev. 75—Hernandez v. City of Reno, 634 P.2d 668, 97 Nev. 429.
 N.Y.—Broughton v. State, 335 N.E.2d 310, 37 N.Y.2d 451, 373 N.Y.S.2d 87, cert. den. 96 S.Ct. 277, 423 U.S. 929, 46 L.Ed.2d 257.
 Sindle v. New York City Transit Authority, 316 N.Y.S.2d 657, 64 Misc.2d 993, 995, affd. 331 N.Y.S.2d 343, 38 A.D.2d 892, revd. on oth. grds. 307 N.E.2d 245, 33 N.Y.2d 293, 352 N.Y.S.2d 183—Mubarez v. State, 453 N.Y.S.2d 549, 115 Misc.2d 57.
 Ohio—C.J.S. quoted at length in Garland v. Dustman, 251 N.E.2d 153, 157, 19 Ohio App.2d 292.
 Or.—Napier v. Sheridan, 547 P.2d 1399, 24 Or.App. 761.
 Wash.—Tufte v. City of Tacoma, 431 P.2d 183, 71 Wash.2d 866.
 Wilson v. City of Walla Walla, 528 P.2d 1006, 12 Wash.App. 152.
 Wis.—Strong v. City of Milwaukee, 157 N.W.2d 619, 38 Wis.2d 564—Laska v. Steinpreis, 231 N.W.2d 196, 69 Wis.2d 307.

False imprisonment resulting from negligent conduct

- Cal.—Shakespeare v. City of Pasadena, 40 Cal.Rptr. 863, 230 C.A.2d 375.

Importance of determination of intent

- Miss.—State for Use of Powell v. Moore, 174 So.2d 352, 252 Miss. 471.
 46. U.S.—Whirl v. Kern, C.A.Tex., 407 F.2d 781, cert. den. 90 S.Ct. 210, 396 U.S. 901, 24 L.Ed.2d 177.

47. Wis.—Strong v. City of Milwaukee, 157 N.W.2d 619, 38 Wis.2d 564.

§ 7. Motive or Malice

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50. U.S.—Majors v. U.S. Air, Inc., D.C.Md., 525 F.Supp. 853.
 Ga.—Greenbaum v. Brooks, 139 S.E.2d 432, 110 Ga. App. 661—Lowe v. Turner, 154 S.E.2d 792, 115 Ga.App. 503.
 Kan.—Thompson v. General Finance Co., 468 P.2d 269, 205 Kan. 76.
 Md.—Shipp v. Autoville Ltd., 328 A.2d 349, 23 Md. App. 555.
 W.Va.—City of McMechen ex rel. Willey v. Fidelity & Cas. Co. of N.Y., 116 S.E.2d 388, 145 W.Va. 660.
 Wis.—Strong v. City of Milwaukee, 157 N.W.2d 619, 38 Wis.2d 564.
 General damages
 Hawaii—Lopez v. Wigwam Dept. Stores No. 10, Inc., 421 P.2d 289.

51. U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 589, 375 U.S. 975, 11 L.Ed.2d 420.

Johnson v. City of New York, D.C.N.Y., 401 F.Supp. 50.

- Ind.—Dubreuil v. Pinnick, 383 N.E.2d 420, 178 Ind. App. 526.
 Kan.—C.J.S. cited in Holland v. Lutz, 401 P.2d 1015, 1019, 194 Kan. 712.
 La.—Fontenot v. Lavergne, App., 365 So.2d 1168.
 N.Y.—Broughton v. State, 335 N.E.2d 310, 37 N.Y.2d 451, 373 N.Y.S.2d 87, cert. den. 96 S.Ct. 277, 423 U.S. 929, 46 L.Ed.2d 257.
 Or.—McNeff v. Heider, 337 P.2d 819, 216 Or. 583, reh. den. 340 P.2d 180, 216 Or. 583.
 54. Ga.—U.S. Shoe Corp. v. Jones, 255 S.E.2d 73, 149 Ga.App. 595.
 Kan.—Holland v. Lutz, 401 P.2d 1015, 194 Kan. 712.
 56. U.S.—Bryan v. Jones, C.A.Tex., 530 F.2d 1210, cert. den. 97 S.Ct. 174, 429 U.S. 865, 50 L.Ed.2d 145.
 Ariz.—C.J.S. cited in Tate v. Connel, 416 P.2d 213, 216, 3 Ariz.App. 534.
 N.Y.—Broughton v. State, 335 N.E.2d 310, 37 N.Y.2d 451, 373 N.Y.S.2d 87, cert. den. 96 S.Ct. 277, 423 U.S. 929, 46 L.Ed.2d 257.
 Zimmerman v. City of New York, 242 N.Y.S.2d 791, 40 Misc.2d 179.

Neither ill will nor the slightest wrongful intention, etc.

- Va.—Zayre of Va., Inc. v. Gowdy, 147 S.E.2d 710, 207 Va. 47.

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59. U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420—Dowsey v. Wilkins, C.A.Ala., 467 F.2d 1022.
 La.—Wells v. Gaspard, App., 129 So.2d 245.
 N.Y.—Pawloski v. State, 258 N.Y.S.2d 258, 45 Misc.2d 933.
 Va.—Zayre of Va., Inc. v. Gowdy, 147 S.E.2d 710, 207 Va. 47.
 W.Va.—State ex rel. Sovine v. Stone, 140 S.E.2d 801, 149 W.Va. 310.

Only unjustifiable mistake is "fault"

- La.—Jones v. Simonson, App., 292 So.2d 251.
 60. Ill.—C.J.S. cited in Campbell v. Kaczmarek, 350 N.E.2d 97, 101, 39 Ill.App.3d 465.
 62. Ariz.—C.J.S. cited in Tate v. Connel, 416 P.2d 213, 216, 3 Ariz.App. 534.
 Cal.—Capachi v. Glens Falls Ins. Co., 30 Cal.Rptr. 323, 215 C.A.2d Supp. 843.
 Kan.—Holland v. Lutz, 401 P.2d 1015, 194 Kan. 712.
 63. Ind.—Dubreuil v. Pinnick, 383 N.E.2d 420, 178 Ind.App. 526.
 Tenn.—McLaughlin v. Smith, App., 412 S.W.2d 21, 56 Tenn.App. 715.

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66. U.S.—Dellums v. Powell, C.A., 566 F.2d 167, 184 U.S.App.D.C. 275, cert. den. 98 S.Ct. 3146, 438 U.S. 916, 57 L.Ed.2d 1161, reh. den. 99 S.Ct. 234, 439 U.S. 886, 58 L.Ed.2d 201, on remand, D.C., 490 F.Supp. 70, affd. in part, revd. in part on oth. grds., C.A., 660 F.2d 802, 212 U.S.App.D.C. 403.
 Fla.—Herbeck v. Holdeman, App., 163 So.2d 766.
 69. U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420.
 Ga.—Greenbaum v. Brooks, 139 S.E.2d 432, 110 Ga. App. 661.
 Md.—Clark's Brooklyn Park, Inc. v. Hranicka, 227 A.2d 726, 246 Md. 178.
 Or.—McNeff v. Heider, 337 P.2d 819, 216 Or. 583, reh. den. 340 P.2d 180, 216 Or. 583.
 Va.—Yeatts v. Minton, 177 S.E.2d 646, 211 Va. 402.

Since the publication of *Corpus Juris Secundum* the case of *Collins v. Jones*, 22 P.2d 39, 131 Cal.App. 747 has been overruled, the court holding that lack of probable cause is a necessary element of the action.
 Cal.—Whaley v. Kirby, 25 Cal.Rptr. 50, 208 C.A.2d 232.

70. Md.—Arrington v. Moore, 358 A.2d 909, 31 Md. App. 448.

§ 8. Necessity

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72. U.S.—Armstead v. Escobedo, C.A.Tex., 488 F.2d 509.
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- La.—Clark v. I. H. Rubenstein, Inc., 326 So.2d 497, on remand 335 So.2d 545.
- Or.—Roberts v. Coleman, 365 P.2d 79, 228 Or. 286—Lukas v. J. C. Penney Co., 378 P.2d 717, 233 Or. 345 Gaffney v. Payless Drug Stores, 492 P.2d 474, 261 Or. 148.
- Wash.—Kilcup v. McManus, 394 P.2d 375, 64 Wash.2d 771.
- Moore v. Pay'N Save Corp., 581 P.2d 159, 20 Wash.App. 482.
82. Ga.—Lowe v. Turner, 154 S.E.2d 792, 115 Ga. App. 503.
- Ill.—Karow v. Student Inns, Inc., 357 N.E.2d 682, 2 Ill.Dec. 515, 43 Ill.App.3d 878, 98 A.L.R.3d 531.
- Minn.—Blaz v. Molin Concrete Products Co., 244 N.W.2d 277, 309 Minn. 382.
- Neb.—Herbrick v. Samardick & Co., 101 N.W.2d 488, 169 Neb. 833—Schmidt v. Richman Gordan, Inc., 215 N.W.2d 105, 191 Neb. 345.
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85. Va.—Zayre of Va., Inc. v. Gowdy, 147 S.E.2d 710, 207 Va. 47.
86. N.M.—Diaz v. Lockheed Electronics, App., 618 P.2d 372, 95 N.M. 28.
- Wash.—Kilcup v. McManus, 394 P.2d 375, 64 Wash.2d 771.
90. Miss.—State for Use of Powell v. Moore, 174 So.2d 352, 252 Miss. 471.
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- Wis.—Herbst v. Wuennenberg, 266 N.W.2d 391, 83 Wis.2d 768.

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95. Hawaii.—Noguchi v. Nakamura, 638 P.2d 1383, 2 Haw.App. 655.

§ 10. — Actual Physical Force

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- Ark.—Childs v. Berry, App., 597 S.W.2d 134, 268 Ark. 970.
- N.C.—Hales v. McCrory-McLellan Corp., 133 S.E.2d 225, 260 N.C. 568.
- Wash.—Moore v. Pay'N Save Corp., 581 P.2d 159, 20 Wash.App. 482.
99. U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420.
- Ill.—Marcus v. Liebman, 375 N.E.2d 486, 16 Ill.Dec. 613, 59 Ill.App.3d 337.
- W.Va.—State ex rel. Sovine v. Stone, 140 S.E.2d 801, 149 W.Va. 310.
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2. N.C.—Hales v. McCrory-McLellan Corp., 133 S.E.2d 225, 260 N.C. 568.
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4. Kan.—C.J.S. cited in Sweaney v. United Loan & Finance Co., 468 P.2d 124, 129, 205 Kan. 66—Thompson v. General Finance Co., 468 P.2d 269, 205 Kan. 76.
- N.C.—Black v. Clark's Greensboro, Inc., 139 S.E.2d 199, 263 N.C. 226.
5. Assault and battery
- Kan.—Perry v. S. H. Kress & Co., 358 P.2d 665, 187 Kan. 537.

§ 11. — Apprehension of Force; Threats

6. Ga.—Greenbaum v. Brooks, 139 S.E.2d 432, 110 Ga.App. 661.
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- Ky.—Ford Motor Credit Co. v. Gibson, App., 566 S.W.2d 154.
- N.M.—Martinez v. Sears, Roebuck & Co., App., 467 P.2d 37, 81 N.M. 371.
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- Tex.—Kroger Co. v. Warren, Civ.App., 420 S.W.2d 218.
- Va.—Zayre of Va., Inc. v. Gowdy, 147 S.E.2d 710, 207 Va. 47.
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- Miss.—Martin v. Santora, 199 So.2d 63.

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- Ala.—Daniel v. Hodges, 125 So.2d 726, 41 Ala.App. 119, cert. den. 125 So.2d 729, 271 Ala. 698.

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- Or.—Roberts v. Coleman, 365 P.2d 79, 228 Or. 286.

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8. Ga.—Greenbaum v. Brooks, 139 S.E.2d 432, 110 Ga.App. 661—Seligman & Latz of Atlanta, Inc. v. Grant, 158 S.E.2d 483, 116 Ga.App. 539.
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- (2) Other statements.

- D.C.—Marshall v. District of Columbia, App., 391 A.2d 1374.

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- Nev.—Moen v. Las Vegas Intern. Hotel, Inc., 521 P.2d 370, 90 Nev. 176.

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17. Tex.—Safeway Stores, Inc. v. Amburn, Civ.App., 388 S.W.2d 443.

18. Miss.—Martin v. Santora, 199 So.2d 63.

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19. Tex.—C.J.S. cited in Safeway Stores, Inc. v. Amburn, Civ.App., 388 S.W.2d 443, 447.

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20. Wash.—Kilcup v. McManus, 394 P.2d 375, 64 Wash.2d 771.

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21. N.Y.—Maracle v. State, 270 N.Y.S.2d 439, 50 Misc.2d 348.
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23. D.C.—Bass v. Dunbar House, Inc., Mun.App., 161 A.2d 50.
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§ 13. — Time and Place

27. U.S.—Mendoza v. K-Mart, Inc., C.A.N.M., 587 F.2d 1052.
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Or.—Lukas v. J. C. Penney Co., 378 P.2d-717, 233 Or. 345.
32. N.M.—Martinez v. Sears, Roebuck & Co., App., 467 P.2d 37, 81 N.M. 371.
33. La.—Thompson v. LeBlanc, App., 336 So.2d 344, application not considered, Sup., 339 So.2d 26.
34. U.S.—Mendoza v. K-Mart, Inc., C.A.N.M., 587 F.2d 1052.
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47. U.S.—Anderson v. Nossner, C.A.Miss., 456 F.2d 835, cert. den. 93 S.Ct. 53.
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49. **Public and private institution distinguished**
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51. U.S.—McWilliams v. Interstate Bakeries, Inc., C.A.Ga., 439 F.2d 16—Gaines v. McGraw, C.A. Ala., 445 F.2d 393.
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- Wash.—Ottenbacher v. City of Hoquiam, 537 P.2d 862, 13 Wash.App. 752.

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- Ind.—State v. Whitney, 377 N.E.2d 652, 176 Ind.App. 615.

(2) Other matters.

- Fla.—Harris v. Solvonic, App., 386 So.2d 19.

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- Utah—Haas v. Emmett, 459 P.2d 432, 23 Utah2d 138.

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- Mich.—Haisenleder v. Reeder, 318 N.W.2d 634, 114 Mich.App. 258.

52. U.S.—McIver v. Russell, D.C.Md., 264 F.Supp. 22.

- Cal.—Leggett v. DiGiorgio Corp., 80 Cal.Rptr. 697, 276 C.A.2d 306—Novoa v. Ventura County, 183 Cal. Rptr. 736, 133 C.A.3d 137.

- Ga.—Lowe v. Turner, 154 S.E.2d 792, 115 Ga.App. 503.

- La.—Hughes v. Standidge, App., 219 So.2d 6, writ den. 222 So.2d 63, 254 La. 4, writ ref. 222 So.2d 64, 254 La. 6. Cert. den. 90 S.Ct. 177, 396 U.S. 887, 24 L.Ed.2d 162.

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- S.C.—Huggins v. Winn-Dixie Greenville, Inc., 153 S.E.2d 693, 249 S.C. 206, 27 A.L.R.3d 1195, app. after remand 166 S.E.2d 297, 252 S.C. 353.

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- Wis.—Maniaci v. Marquette University, 184 N.W.2d 168, 50 Wis.2d 287.

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- Ariz.—Cullison v. City of Peoria, 584 P.2d 1156, 120 Ariz. 165.

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- S.D.—Catencamp v. Albright, 251 N.W.2d 190.

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(5) Other instances.

- Tex.—Rains v. Crow, App., 601 S.W.2d 774, err. ref. no rev. err.

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(2) Entrapment.

- Cal.—Beauregard v. Wingard, 47 Cal.Rptr. 279, 237 C.A.2d 760, 15 A.L.R.3d 955.

(3) Holding person incommunicado.

- Mich.—Stowers v. Wolodzko, 191 N.W.2d 355, 386 Mich. 119.

(4) Other instances.

- Wash.—Clipse v. Gillis, 582 P.2d 555, 20 Wash.App. 691.

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- U.S.—Morales v. Hamilton, D.C.Ariz., 391 F.Supp. 85.

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- Ill.—Dutton v. Roo-Mac, Inc., 426 N.E.2d 604, 55 Ill.Dec. 458, 100 Ill.App.3d 116.

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- (3) U.S.—Seaman v. City of Reno, D.C.Nev., 559 F.Supp. 683.

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53. U.S.—Curtis v. Peerless Ins. Co., D.C.Minn., 299 F.Supp. 429.

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- Neb.—Wilson v. Gutschenritter, 175 N.W.2d 282, 185 Neb. 311.

- N.J.—Di Giovanni v. Pessel, 250 A.2d 756, 104 N.J.Super. 550, affd. in part, revd. in part on oth. grds., 260 A.2d 510, 55 N.J. 188.

- N.M.—Perea v. Stout, App., 613 P.2d 1034, 94 N.W. 595, cert. den. 101 S.Ct. 610, 449 U.S. 1035, 66 L.Ed.2d 496.

- N.Y.—Hicks v. State, 253 N.Y.S.2d 814, 22 A.D.2d 837.

- N.C.—Koury v. John Meyer of Norwich, 261 S.E.2d 217, 44 N.C.App. 392, petition den. 267 S.E.2d 662, 299 N.C. 736.

- R.I.—Mailey v. De Pasquale's Estate, 177 A.2d 376, 94 R.I. 31.

- S.C.—Prosser v. Parsons, 141 S.E.2d 342, 245 S.C. 493.

- Tex.—Rains v. Corrigan Properties, Inc., Civ.App., 600 S.W.2d 895, err. ref. no rev. err.

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- U.S.—Wood v. Worachek, C.A.Wis., 618 F.2d 1225.

54. Ind.—Fields v. State, 382 N.E.2d 972, 178 Ind. App. 350.

56. U.S.—Wright v. Kroeger Corp., C.A.Tex., 422 F.2d 176.

- Kan.—Codner v. Toone, 581 P.2d 387, 224 Kan. 531.

- Ky.—C.J.S. cited in Allen v. Vogue Amusement Co., 377 S.W.2d 805, 806.

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- R.I.—Tucker v. Mammoth Mart Inc., 446 A.2d 760.

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- Wis.—Drabek v. Sabley, 142 N.W.2d 798, 31 Wis.2d 184, 20 A.L.R.3d 1435.

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- Ky.—SuperX Drugs of Kentucky, Inc. v. Rice, App., 554 S.W.2d 903.

- N.Y.—Best v. Genung's Inc., 363 N.Y.S.2d 669, 46 A.D.2d 550.

58. U.S.—Robinson v. Goff, D.C.Va., 517 F.Supp. 350.

- Fla.—Boca Raton v. Coughlin, App., 299 So.2d 105.

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- Mich.—Hess v. Village of Wolverine Lake, 189 N.W.2d 42, 32 Mich.App. 601.

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- Colo.—Enright v. Groves, 560 P.2d 851, 39 Colo.App. 39.

59. N.Y.—Saunsen v. State, 440 N.Y.S.2d 281, 81 A.D.2d 252.

- Mubarez v. State, 453 N.Y.S.2d 549, 115 Misc.2d 57.

61. U.S.—O'Neal v. Morgan, C.A.N.Y., 637 F.2d 846, cert. den. 101 S.Ct. 2050, 451 U.S. 972, 68 L.Ed.2d 351.

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68. Effect of subsequent proceedings

Cal.—Whaley v. Kirby, 25 Cal.Rptr. 50, 208 C.A.2d 232.

Statutory reasonable cause held to exist

Cal.—Whaley v. Kirby, 25 Cal.Rptr. 50, 208 C.A.2d 232.

73. False certificate

La.—Delatte v. Genovese, App., 228 So.2d 252.

74. Burden of proving a return of sanity

N.Y.—Vitello v. State, 369 N.Y.S.2d 229, 48 A.D.2d 956, affd. 351 N.E.2d 747, 39 N.Y.2d 847, 386 N.Y.S.2d 99, app. diss. and cert. den. 97 S.Ct. 779, 429 U.S. 1056, 50 L.Ed.2d 773.

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76. N.Y.—Siegel v. City of New York, 351 N.Y.S.2d 394, 43 A.D.2d 271.

77. State held not liable for physician's error of judgment

N.Y.—Rosario v. State, 305 N.Y.S.2d 574, 33 A.D.2d 122, affd. 334 N.E.2d 596, 36 N.Y.2d 901, 372 N.Y.S.2d 647—Young v. State, 336 N.Y.S.2d 470, 40 A.D.2d 730.

82. U.S.—Campbell v. Glenwood Hills Hospital, Inc., D.C.Minn., 224 F.Supp. 27.

N.Y.—Montanaro v. State, 253 N.Y.S.2d 833, 44 Misc.2d 533, affd. 290 N.Y.S.2d 189, 29 A.D.2d 916.

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N.C.—Fowle v. Fowle, 140 S.E.2d 398, 263 N.C. 724. Samons v. Meymandi, 177 S.E.2d 209, 9 N.C. App. 490, cert. den. 178 S.E.2d 225, 277 N.C. 458.

Wis.—Maniaci v. Marquette University, 184 N.W.2d 168, 50 Wis.2d 287.

Rule pertaining to order valid on face held not applicable

N.Y.—Wood v. State, 280 N.Y.S.2d 609, 28 A.D.2d 643.

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Ga.—Carter v. Landy, 295 S.E.2d 177, 163 Ga.App. 509.

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84. Physicians

(4) Other matters.

Me.—Hurley v. Towne, 156 A.2d 377, 155 Me. 433. Mo.—Patrich v. Menorah Medical Center, App., 636 S.W.2d 134.

Hospital

Mo.—Patrich v. Menorah Medical Center, App., 636 S.W.2d 134.

86. Mass.—Beaumont v. Segal, 283 N.E.2d 858, 362 Mass. 30.

90. Physicians

(3) Other matters.

Mich.—Stowers v. Ardmore Acres Hospital, 172 N.W.2d 497, 19 Mich.App. 115 affd. 191 N.W.2d 355, 386 Mich. 119.

§ 17. Delinquent Children

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96. Ky.—C.J.S. cited in Whitt v. Com., 479 S.W.2d 646, 648.

§ 18. Prevention of Bodily Harm Justifying Restraint**97. Persons deprived of reason by drunkenness**

N.Y.—Parvi v. City of Kingston, 362 N.E.2d 960, 41 N.Y.2d 533, 394 N.Y.S.2d 161.

Privilege of self defense or defense of another not shown

Wis.—Drabek v. Sabley, 142 N.W.2d 798, 31 Wis.2d 184, 20 A.L.R.3d 1435.

Temporary detention of child in absence of mother

Ohio—Garland v. Dustman, App., 251 N.E.2d 153, 19 Ohio App.2d 292.

Determination of alcoholism

N.Y.—Lynch v. St. Lawrence Nat. Bank, 404 N.Y.S.2d 484, 62 A.D.2d 1140.

§ 19. Authority Arising from Relationship of Parties

1. D.C.—Faniel v. Chesapeake and Potomac Tel. Co. of Maryland, App., 404 A.2d 147.

III.—Kay v. Boehm, 336 N.E.2d 781, 32 Ill.App.3d 853. N.Y.—Gottlieb v. Sullivan County Harness Racing Ass'n, 269 N.Y.S.2d 314, 25 A.D.2d 798.

Ohio—Baillie v. Miami Valley Hospital, 221 N.E.2d 217, 8 Ohio Misc. 193.

3. Detention pursuant to order of juvenile authorities

Ohio—Garland v. Dustman, App., 251 N.E.2d 153, 19 Ohio App.2d 292.

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When parents, or their agents, acting under the conviction that the judgmental capacity of their adult child is impaired, seek to extricate that child from what they reasonably believe to be a religious or pseudo-religious cult, and the child at some juncture assents to the actions in question, limitations upon the child's mobility do not constitute liberty-deprivations of personal liberty sufficient to support a judgment for false imprisonment.^{5,10}

5.10. Minn.—Peterson v. Sorlien, 299 N.W.2d 123, 11 A.L.R.4th 208, cert. den. 101 S.Ct. 1742, 450 U.S. 1031, 68 L.Ed.2d 227.

6. President and dean of college

U.S.—Dennis v. College of Virgin Islands, D.C.Virgin Islands, 398 F.Supp. 1317.

8. Ga.—C.J.S. cited in Greenbaum v. Brooks, 139 S.E.2d 432, 435, 110 Ga.App. 661.

9. Detention held reasonable

Mass.—Proulx v. Pinkerton's Nat. Detective Agency, Inc., 178 N.E.2d 575, 343 Mass. 390.

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37. Cal.—Culbertson v. Santa Clara County, 67 Cal. Rptr. 752, 261 C.A.2d 274.

Ind.—Stine v. Shuttle, 186 N.E.2d 168, 134 Ind.App. 67.

La.—Singleton v. Townsend, App., 339 So.2d 543.

N.Y.—Rosenthal v. State, 259 N.Y.S.2d 913, 23 A.D.2d 946.

Pawloski v. State, 258 N.Y.S.2d 258, 45 Misc.2d 933.

Tex.—Cronen v. Nix, Civ.App. 611 S.W.2d 651, cert. den. 102 S.Ct. 132, 454 U.S. 833, 70 L.Ed.2d 112, reh. den. 102 S.Ct. 667, 454 U.S. 1095, 70 L.Ed.2d 636.

Qualified immunity defense under civil rights statutes

U.S.—Dellums v. Powell, C.A., 566 F.2d 167, 184 U.S.App.D.C. 275, cert. den. 98 S.Ct. 3146, 138 U.S. 916, 37 L.Ed.2d 1161, reh. den. 99 S.Ct. 234,

439 U.S. 886, 58 L.Ed.2d 201, on remand, D.C., 490 F.Supp. 70, affd. in part, revd. in part on oth. grds., C.A., 660 F.2d 802, 212 U.S.App.D.C. 403.

38. U.S.—Hunter v. Clardy, C.A.Ga., 558 F.2d 290. Cal.—Scruggs v. Haynes, 60 Cal.Rptr. 355, 252 C.A.2d 256.

Detention by detective agency

Mass.—Proulx v. Pinkerton's Nat. Detective Agency, Inc., 178 N.E.2d 575, 343 Mass. 390.

39. U.S.—Czap v. Marshall, C.A.Wis., 315 F.2d 766, cert. den. 84 S.Ct. 348, 375 U.S. 942, 11 L.Ed.2d 273.

40. U.S.—Hartnett v. Schmit, D.C.Ill., 501 F.Supp. 1024.

Ohio—McFarland v. Shirkey, 151 N.E.2d 797, 106 Ohio App. 517, app. diss. 154 N.E.2d 83, 168 Ohio St. 288, reh. den. 155 N.E.2d 468, 106 Ohio App. 517, motion over. 155 N.E.2d 925, 106 Ohio App. 517.

Wash.—Planchich v. Williamson, 357 P.2d 693, 57 Wash.2d 367, 92 A.L.R.2d 559.

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(2) Other statements.

U.S.—Whirl v. Kern, C.A.Tex., 407 F.2d 781, cert. den. 90 S.Ct. 210, 396 U.S. 901, 17 L.Ed.2d 177.

Cal.—Allison v. Ventura County, 134 Cal.Rptr. 542, 68 C.A.3d 689.

41. U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420.

N.Y.—Snyder v. State, 236 N.Y.S.2d 355, 38 Misc.2d 488, mod. on oth. grds. 247 N.Y.S.2d 757, 20 A.D.2d 827.

43. N.Y.—Ross v. Village of Wappingers Falls, 406 N.Y.S.2d 506, 62 A.D.2d 892.

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44. Conn.—C.J.S. cited in Zanks v. Flückiger, 171 A.2d 86, 88, 22 Conn.Sup. 311.

Probable cause

(1) N.Y.—Krafft v. State, 275 N.Y.S.2d 109, 52 Misc.2d 35.

Arrest held proper

N.H.—Welch v. Bergeron, 337 A.2d 341, 115 N.H. 179.

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U.S.—Arnsberg v. U.S., D.C.Or., 549 F.Supp. 55, affd. in part, revd. in part, C.A., 759 F.2d 971.

47. Probable cause

(3) Other statements.

S.C.—Faulkenberry v. Springs Mills, Inc., 247 S.E.2d 445, 271 S.C. 377.

48. N.Y.—Millea v. City of New York, 204 N.Y.S.2d 260, 25 Misc.2d 369.

Or.—Napier v. Sheridan, App., 547 P.2d 1399, 24 Or. App. 761.

49. U.S.—Adcox v. Safeway Stores, Inc., D.C.Tex., 512 F.Supp. 452.

Fla.—City of Miami v. Albro, App., 120 So.2d 23.

La.—Keys v. Sambo's Restaurant, Inc., 398 So.2d 1083.

50. Cal.—King v. Andersen, 51 Cal.Rptr. 561, 242 C.A.2d 606.

N.Y.—Halberstadt v. Nelson, 226 N.Y.S.2d 100, 34 Misc.2d 472.

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(1) La.—Eason v. J. Weingarten, Inc., App., 219 So.2d 516.

N.J.—Cooke v. J. J. Newberry & Co., 232 A.2d 425, 96 N.J.Super. 9.

(4) Civil action against merchant for unreasonably causing arrest.

La.—State ex rel. Bailey v. City of West Monroe, 418 So.2d 570.

(5) Other matters.

U.S.—Meadows v. F. W. Woolworth Co., D.C.Fla., 254 F.Supp. 907.

Colo.—J. S. Dillon & Sons Stores Co. v. Carrington, 455 P.2d 201, 169 Colo. 242.

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- Gonzales v. Harris, 528 P.2d 259, 34 Colo.App. 282, revd. on oth. grds., Sup., 542 P.2d 842.
- D.C.—Prieto v. May Dept. Stores Co., App., 216 A.2d 577.
- Ga.—Dixon v. S.S. Kresge, Inc., 169 S.E.2d 189, 119 Ga.App. 776.
- Ky.—Consolidated Sales Co. v. Malone, 530 S.W.2d 680.
- La.—Simmons v. J. C. Penney Co., App., 186 So.2d 358—Williams v. F. W. Woolworth Co., App., 242 So.2d 16—Townsend v. Sears, Roebuck & Co., App. 5 Cir., 466 So.2d 675.
- Md.—Kimbrough v. Giant Food Inc., 339 A.2d 688, 26 Md.App. 640.
- Mo.—Peak v. W. T. Grant Co., App., 386 S.W.2d 685.
- N.J.—Cooke v. J. J. Newberry & Co., 232 A.2d 425, 96 N.J.Super. 9—Henry v. Shopper's World, 490 A.2d 320, 200 N.J.Super. 14.
- N.Y.—Jacques v. Sears, Roebuck & Co., Inc., 285 N.E.2d 871, 30 N.Y.2d 466, 334 N.Y.S.2d 632.
- Wolin v. Abraham and Straus, 316 N.Y.S.2d 377, 64 Misc.2d 982.
- Va.—F. B. C. Stores, Inc. v. Duncan, 198 S.E.2d 595, 214 Va. 246.

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- R.I.—Webbier v. Thoroughbred Racing Protective Bureau, Inc., 254 A.2d 285, 105 R.I. 605.

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52. U.S.—Nesmith v. Alford, C.A. Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420—Pierson v. Ray, C.A. Miss., 352 F.2d 213, affd. in part, revd. in part, on oth. grds. 87 S.Ct. 1213, 386 U.S. 547, 18 L.Ed.2d 288—Perry v. Jones, C.A. Tex., 506 F.2d 778.
- Wright v. Patterson, D.C. Ala., 298 F.Supp. 906.
- Ariz.—Cullison v. City of Peoria, 584 P.2d 1156, 120 Ariz. 165.
- Cal.—Collins v. Los Angeles County, 50 Cal.Rptr. 586, 241 C.A.2d 451.
- Conn.—Zanks v. Fluckiger, 171 A.2d 86, 22 Conn.App. 311.
- D.C.—Gueory v. District of Columbia, App., 408 A.2d 967.
- Ga.—Lowe v. Turner, 154 S.E.2d 792, 115 Ga.App. 503.
- Ill.—Alverio v. Dowery, 243 N.E.2d 858, 104 Ill.App.2d 125.
- Ind.—Dubreuil v. Pinnick, 383 N.E.2d 420, 178 Ind. App. 526.
- Iowa—Johannsen v. Stuart, 152 N.W.2d 202, 260 Iowa 1140.
- La.—Hughes v. Standidge, App., 219 So.2d 6, writ den. 222 So.2d 63, 254 La. 4, writ ref. 222 So.2d 64, 254 La. 6. Cert. den. 90 S.Ct. 177, 396 U.S. 887, 24 L.Ed.2d 162.
- Mich.—Blackman v. Cooper, 280 N.W.2d 620, 89 Mich. App. 639.
- Mo.—C.J.S. quoted in Sturgeon v. Holtan, 486 S.W.2d 209, 211.
- Nelson v. R. H. Macy & Co., App., 434 S.W.2d 767.
- Mont.—Strung v. Anderson, 529 P.2d 1380.
- N.Y.—Baish v. State, 351 N.Y.S.2d 617, 76 Misc.2d 1006.
- R.I.—Tessier v. LaNois, 198 A.2d 142, 97 R.I. 414, cause shown pursuant to 201 A.2d 927, 98 R.I. 333.
- Wash.—Planchich v. Williamson, 357 P.2d 693, 14 A.D.2d 774, 92 A.L.R.2d 559—Kilcup v. McManus, 394 P.2d 375, 64 Wash.2d 771.

Matters of defense

(2) Other matters.

- U.S.—Whirl v. Kern, C.A. Tex., 407 F.2d 781, cert. den. 90 S.Ct. 210, 396 U.S. 901, 24 L.Ed.2d 177—Jones v. Perrigan, C.A. Tenn., 459 F.2d 81—Greer v. Turner, C.A. Ala., 639 F.2d 229.
- Lathon v. Jefferson Parish, D.C. La., 358 F.Supp. 558.
- Cal.—McKay v. San Diego County, 168 Cal.Rptr. 442, 111 C.A.3d 252.

- D.C.—Wade v. District of Columbia, App., 310 A.2d 857.
- La.—Roberts v. American Emp. Ins. Co., Boston, Mass., App., 221 So.2d 550.
- Nev.—Jacobson v. State, 510 P.2d 856, 89 Nev. 197.
- S.C.—Faulkenberry v. Springs Mills, Inc., 247 S.E.2d 445, 271 S.C. 377.

Unconstitutional, invalid, or inapplicable ordinances

(3) Other ordinances.

- Fla.—Boca Raton v. Coughlin, App., 299 So.2d 105.
- Ky.—McCray v. City of Lake Louisville, 332 S.W.2d 837.

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- U.S.—Pierson v. Ray, Miss., 87 S.Ct. 1213, 386 U.S. 547, 18 L.Ed.2d 288.
- Anderson v. Reynolds, D.C. Utah, 342 F.Supp. 101, affd., C.A., 476 F.2d 665.
- Ind.—Mitchell v. Drake, 360 N.E.2d 195, 172 Ind.App. 376.

- R.I.—Yekhtikian v. Blessing, 157 A.2d 669, 90 R.I. 287.
- Statutory duty of police officers to accept custody of persons lawfully subjected to citizen's arrest

- Cal.—Shakespeare v. City of Pasadena, 40 Cal.Rptr. 863, 230 C.A.2d 375.

Standard of good faith

- Ohio—Bertram v. Richards, 358 N.E.2d 1372, 49 Ohio App.2d 3, 3 O.O.3d 89.

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- N.C.—Robinson v. City of Winston-Salem, 238 S.E.2d 628, 34 N.C.App. 401.

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- N.C.—Robinson v. City of Winston-Salem, 238 S.E.2d 628, 34 N.C.App. 401.

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53. Officer from another municipality

- R.I.—Cioci v. Santose, 207 A.2d 300, 99 R.I. 308.
54. U.S.—Henry v. U.S., Ill., 80 S.Ct. 168, 361 U.S. 98, 4 L.Ed.2d 134.

- Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, C.A.N.Y., 456 F.2d 1339—Hill v. Rowland, C.A.N.C., 474 F.2d 1374.

- Hebert v. Morley, D.C. Cal., 273 F.Supp. 800.
- Cal.—Cole v. Johnson, 17 Cal.Rptr. 664, 197 C.A.2d 788.

- La.—Roche v. Aetna Cas. & Sur. Co., App., 303 So.2d 888, writ ref. Sup., 307 So.2d 372.

- Mich.—C.J.S. cited in Blackman v. Cooper, 280 N.W.2d 620, 89 Mich.App. 639.

- Mo.—C.J.S. cited in Bergel v. Kassebaum, App., 577 S.W.2d 863, 868.

- Or.—C.J.S. quoted in Kraft v. Montgomery Ward & Co., 348 P.2d 239, 243, 244, 220 Or. 230, 92 A.L.R.2d 1.

- Tex.—Bell v. Spraggins, Civ.App., 372 S.W.2d 740, err. ref. no rev. err.

- W.Va.—C.J.S. cited in City of McMechen v. Fidelity and Cas. Co. of N.Y., 116 S.E.2d 388, 392, 145 W.Va. 660.

56. U.S.—Beard v. Stephens, C.A. Ala., 372 F.2d 685.

57. U.S.—Tritsis v. Backer, D.C. Ill., 355 F.Supp. 225, affd., C.A., 501 F.2d 1021.

61. In New York

- (2) N.Y.—Barnes v. Bollhorst, 215 N.Y.S.2d 348, 28 Misc.2d 866, affd. 219 N.Y.S.2d 916, 14 A.D.2d 774.

(3) No reasonable grounds.

- N.Y.—Smith v. Nassau County, 311 N.E.2d 489, 34 N.Y.2d 18, 355 N.Y.S.2d 349.

64. Fla.—Toomey v. Tolin, App., 311 So.2d 678.
- R.I.—Descoteaux v. Bonaventura, 350 A.2d 396, 115 R.I. 555.

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65. La.—Stevens v. Mumphy, App., 218 So.2d 642.

- N.Y.—Williams v. State, 194 N.Y.S.2d 421, 9 A.D.2d 415, affd. 203 N.Y.S.2d 925, 8 N.Y.2d 886, 168 N.E.2d 723.

- R.I.—Gantz v. Hames, 337 A.2d 234, 114 R.I. 586.
- Wash.—Neff v. United Pac. Ins. Co., 364 P.2d 515, 58 Wash.2d 618.

No misdemeanor committed

- U.S.—Thamel v. Town of East Hartford, D.C. Conn., 373 F.Supp. 455.

72. Cal.—Farnsworth v. Cote, 19 Cal.Rptr. 45, 199 C.A.2d 762.

- Mich.—Bloss v. Williams, 166 N.W.2d 520, 15 Mich. App. 228.

- N.Y.—Blake v. State, 219 N.Y.S.2d 754, 28 Misc.2d 1095.

73. Nev.—Bearden v. City of Boulder City, 507 P.2d 1034, 89 Nev. 106.

74. U.S.—Cambist Films, Inc. v. Duggan, C.A. Pa., 475 F.2d 887.

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81. D.C.—Shaw v. May Dept. Stores Co., App., 268 A.2d 607.

- La.—Wells v. Gaspard, App., 129 So.2d 245—Meyers v. Edwards, App., 256 So.2d 337.

82. Subsequent release does not render arrest unlawful

- R.I.—Barth v. Flad, 208 A.2d 533, 99 R.I. 446.

84. Ill.—McKendree v. Christy, 172 N.E.2d 380, 29 Ill.App.2d 195.

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One falsely arrested by a citizen has a remedy against the offending citizen.^{90.5}

- 90.5. Cal.—Kinney v. Contra Costa County, 87 Cal. Rptr. 638, 8 C.A.3d 761.

91. U.S.—Moolenaar v. Atlas Motor Inns, Inc., C.A. Virgin Islands, 616 F.2d 87.

93. Conn.—LaFontaine v. Family Drug Stores, Inc., Com.Pl., 360 A.2d 899, 33 Conn.Supp. 66.

94. U.S.—McWilliams v. Interstate Bakeries, Inc., C.A. Ga., 439 F.2d 16.
- Burnaman v. J. C. Penney Co. D.C. Tex., 181 F.Supp. 633.

- Ill.—Karow v. Student Inns, Inc., 357 N.E.2d 682, 2 Ill.Dec. 515, 43 Ill.App.3d 878, 98 A.L.R.3d 531.

- Kan.—Sweeney v. United Loan & Finance Co., 468 P.2d 124, 205 Kan. 66.

- N.Y.—Chenkin v. Times Square Stores Corp., 415 N.Y. S.2d 468, 69 A.D.2d 849.

95. La.—Sapp v. J. A. West Co., App., 352 So.2d 268, writ den., Sup., 353 So.2d 1337.

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2. U.S.—Roberts v. Hecht Co., D.C. Md., 280 F.Supp. 639—Scanlon v. Flynn, D.C.N.Y., 465 F.Supp. 32.
- Ky.—SuperX Drugs of Kentucky, Inc. v. Rice, App., 554 S.W.2d 903.

- Md.—Great Atlantic & Pac. Tea Co. v. Paul, 261 A.2d 731, 256 Md. 643.

8. Ind.—Crase v. Highland Village Value Plus Pharmacy, 374 N.E.2d 58, 176 Ind.App. 47.

9. Shoplifting

(2) Other instances.

- Fla.—Washington County Kennel Club, Inc. v. Edge, App., 216 So.2d 512.

- Md.—General Motors Corp. v. Piskor, 340 A.2d 767, 27 Md.App. 95, affd. in part on oth. grds., revd. in part 352 A.2d 810, 277 Md. 165, app. after remand 381 A.2d 16, 281 Md. 627, 93 A.L.R.3d 1097.

Statute not applicable

- Md.—General Motors Corp. v. Piskor, App., 340 A.2d 767, 27 Md.App. 95, affd. in part, revd. in part on oth. grds. 352 A.2d 810, 277 Md. 165, app. after

remand 381 A.2d 16, 281 Md. 627, 93 A.L.R.3d 1097.

§ 24. — Individual Directing Arrest or Giving Information

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20. U.S.—Reicheneder v. Skaggs Drug Center, C.A. Tex., 421 F.2d 307.
D.C.—Safeway Trails, Inc. v. Schmidt, App., 225 A.2d 317, applying Maryland law.
Kan.—Thompson v. General Finance Co., 468 P.2d 269, 205 Kan. 76.
N.C.—Hales v. McCrory-McLellan Corp., 133 S.E.2d 225, 260 N.C. 568.
21. U.S.—Reicheneder v. Skaggs Drug Center, C.A. Tex., 421 F.2d 307.
Conn.—LaFontaine v. Family Drug Stores, Inc., Com. Pl., 360 A.2d 899, 33 Conn.Sup. 66.
22. Ala.—Blake v. Barton Williams, Inc., Civ.App., 361 So.2d 376.
24. N.Y.—Ambrosina v. Cohen, 393 N.Y.S.2d 818, 57 A.D.2d 680.
Or.—C.J.S. quoted in Kraft v. Montgomery Ward & Co., 348 P.2d 239, 244, 220 Or. 230, 92 A.L.R.2d 1.

Right to assume proper arrest will be made
Ga.—Massey Stores, Inc. v. Reeves, 141 S.E.2d 227, 111 Ga.App. 227.

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26. A.D.—Catencamp v. Albright, 251 N.W.2d 190.
27. **Inference not warranted**
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28. Ill.—Karow v. Student Inns, Inc., 357 N.E.2d 682, 2 Ill.Dec. 515, 43 Ill.App.3d 878, 98 A.L.R.3d 531.
30. Ill.—Dutton v. Roo-Mac, Inc., 426 N.E.2d 604, 55 Ill.Dec. 458, 100 Ill.App.3d 116.
32. Neb.—Jensen v. Barnett, 134 N.W.2d 53, 178 Neb. 429.
Or.—Delp v. Zapp's Drug and Variety Stores, 395 P.2d 137, 238 Or. 538.
32.5. Wis.—Harris v. Kelly, 218 N.W.2d 360, 63 Wis.2d 664.
33. Cal.—Muller v. Reagh, 30 Cal.Rptr. 633, 215 C.A.2d 831.

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34. U.S.—Armstead v. Escobedo, C.A.Tex., 488 F.2d 509.
Ariz.—Sarwark Motor Sales, Inc. v. Woolridge, 354 P.2d 34, 88 Ariz. 173.
Cal.—Gorlack v. Ferrari, 7 Cal.Rptr. 699, 184 C.A.2d 702—Farnsworth v. Cote, 19 Cal.Rptr. 45, 199 C.A.2d 762—Vivell v. City of Belmont, 78 Cal.Rptr. 841, 274 C.A.2d 38.
D.C.—Alvey v. United Air Lines, Inc., C.A., 494 F.2d 1031, 161 U.S.App.D.C. 112.
Bass v. Dunbar House, Inc., Mun.App., 161 A.2d 50.
Ill.—Narrow v. Student Inns, Inc., 357 N.E.2d 682, 2 Ill.Dec. 515, 43 Ill.App.3d 878, 98 A.L.R.3d 531.
Minn.—Rosvall v. Provost, 155 N.W.2d 900, 279 Minn. 119.
N.Y.—Stearns v. New York City Transit Authority, 200 N.Y.S.2d 272, 24 Misc.2d 216, affd. 209 N.Y.S.2d 264, 12 A.D.2d 451.
McGough v. State, 244 N.Y.S.2d 1007, 41 Misc.2d 78.
Tex.—Morris v. University of Tex., Civ.App., 348 S.W.2d 644, revd. on oth. grds. 352 S.W.2d 947, 163 Tex. 130, cert. den. 83 S.Ct. 511, 371 U.S. 953, 9 L.Ed.2d 503.
Utah—Haas v. Emmett, 459 P.2d 432, 23 Utah2d 138.
Identification
(4) Other statements.
Cal.—Cole v. Johnson, 17 Cal.Rptr. 664, 197 C.A.2d 788.

N.Y.—Vennard v. Sunnyside Sav. and Loan Ass'n, 354 N.Y.S.2d 446, 44 A.D.2d 727.

Even mistaken information causing imprisonment

Md.—Newton v. Spence, 316 A.2d 837, 20 Md.App. 126.

An individual who knowingly gives to a peace officer false information which is a determining factor in the officer's decision to make an arrest may be held liable.^{35.5}

35.5. Md.—Newton v. Spence, 316 A.2d 837, 20 Md.App. 126—Fletcher v. High's Dairy Products Division of Capital Milk Producers Co-Operative, Inc., 321 A.2d 821, 22 Md.App. 71.

Neb.—Jensen v. Barnett, 134 N.W.2d 53, 178 Neb. 429.

False statement not shown

U.S.—Lieberman v. Gulf Oil Corp., C.A.N.Y., 331 F.2d 160.

§ 25. — Reasonable Grounds of Suspicion

37. U.S.—Banish v. Locks, C.A.Ind., 414 F.2d 638—Odorizzi v. A. O. Smith Corp., C.A.Ill., 452 F.2d 229—Galella v. Onassis, C.A.N.Y., 487 F.2d 986—Tritsis v. Backer, C.A.Ill., 501 F.2d 1021—Greer v. Turner, C.A.Ala., 639 F.2d 229.
Burnaman v. J. C. Penney Co., D.C.Tex., 181 F.Supp. 633—Roberts v. Hecht Co., D.C.Md., 280 F.Supp. 639.

Alaska—City of Nome v. Ailak, 570 P.2d 162.

Ariz.—Kon v. Skaggs Drug Center, Inc., App., 563 P.2d 920, 115 Ariz. 121.

Cal.—White v. Martin, 30 Cal.Rptr. 367, 215 C.A.2d 641.

Colo.—Austin v. Rivera, App., 472 P.2d 747—Beyer v. Young, 513 P.2d 1086, 32 Colo.App. 273—White v. Pierson, App., 533 P.2d 514.

D.C.—Shaw v. May Dept. Stores Co., App., 268 A.2d 607.

Fla.—Herbeck v. Holdeman, App., 163 So.2d 766.

Ga.—Stewart v. Williams, 255 S.E.2d 699, 243 Ga. 580, on remand 258 S.E.2d 251, 150 Ga.App. 539.

Ill.—Gaszak v. Zayre of Illinois, Inc., 305 N.E.2d 704, 16 Ill.App.3d 50—Dutton v. Roo-Mac, Inc., 426 N.E.2d 604, 55 Ill.Dec. 458, 100 Ill.App.3d 116.

Ind.—Saloom v. Holder, 304 N.E.2d 217, 158 Ind.App. 177, cert. den. 307 N.E.2d 890, 158 Ind.App. 177—Crane v. Highland Village Value Plus Pharmacy, 374 N.E.2d 58, 176 Ind.App. 47.

Ky.—Lexington-Fayette Urban County Government v. Middleton, App., 555 S.W.2d 613.

La.—Guidry v. IGF, Inc., App., 332 So.2d 515—Duhe v. Schwegmann Bros. Giant Super Markets, App., 384 So.2d 1019—Nigreville v. State, Dept. of Public Safety, App., 3 Cir., 415 So.2d 600, writ den. Sup., 420 So.2d 444.

Mass.—Coblyn v. Kennedy's, Inc., 268 N.E.2d 860, 359 Mass. 319, 47 A.L.R.3d 991.

Miss.—J. C. Penney Co. v. Cox, 148 So.2d 679, 246 Miss. 1.

Neb.—Bishop v. Bockoven, Inc., 260 N.W.2d 488, 199 Neb. 613.

Nev.—Jacobson v. State, 510 P.2d 856, 89 Nev. 197—Grover v. County of Clark, 625 P.2d 85, 97 Nev. 104.

N.Y.—Cimmino v. State, 285 N.Y.S.2d 656, 29 A.D.2d 587.

Barness v. Bolhorst, 225 N.Y.S.2d 286—Rutuelo v. State, 449 N.Y.S.2d 419, 113 Misc.2d 467.

Ohio—Bertram v. Richards, 358 N.E.2d 1372, 49 Ohio App.2d 3, 3 O.O.3d 89.

Or.—Gigler v. City of Klamath Falls, 537 P.2d 121, 21 Or.App. 753.

Va.—Yeatts v. Minton, 177 S.E.2d 646, 211 Va. 402.

Reasonable cause is pivotal question

N.M.—Stienbaugh v. Payless Drug Store, Inc., 401 P.2d 104, 75 N.M. 118.

Equivalent to probable cause in malicious prosecution action

D.C.—Prieto v. May Dept. Stores Co., App., 216 A.2d 577.

Probable cause as affirmative defense

U.S.—Traver v. Meshriy, C.A.Cal., 627 F.2d 934.

Lucas v. U.S., D.C., 443 F.Supp. 539, affd. 590 F.2d 356, 191 U.S.App.D.C. 225.

Hawaii—Lopez v. Wigwam Dept. Stores No. 10, Inc., 421 P.2d 289—House v. Ane, 538 P.2d 320, 56 Haw. 383.

La.—Keys v. Sambo's Restaurant, Inc., App., 389 So.2d 1360, affd. 398 So.2d 1083.

Probable cause in criminal proceedings different

Fla.—Gatto v. Publix Supermarket, Inc., App., 387 So.2d 377.

Ind.—Mitchell v. Drake, 360 N.E.2d 195, 172 Ind.App. 376.

Reasonable cause only threshold requirement

Ariz.—Gortarez By and Through Gortarez v. Smitty's Super Value, Inc., 680 P.2d 807, 140 Ariz. 97.

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38. Ky.—McCray v. City of Lake Louis villa, 332 S.W.2d 837.

Mich.—Tumbarella v. Kroger Co., 271 N.W.2d 284, 85 Mich.App. 482.

Mo.—Wehrman v. Liberty Petroleum Co., App., 382 S.W.2d 56.

39. Mere assertion not sufficient

U.S.—Butler v. Goldblatt Bros., Inc., D.C.Ill., 432 F.Supp. 1122.

40. Miss.—J. C. Penney Co. v. Cox, 148 So.2d 679, 246 Miss. 1.

41. Colo.—Beyer v. Young, 513 P.2d 1086, 32 Colo. App. 273.

D.C.—Dellums v. Powell, C.A., 566 F.2d 167, 184 U.S.App.D.C. 275, cert. den. 98 S.Ct. 3146, 438 U.S. 916, 57 L.Ed.2d 1161, reh. den. 99 S.Ct. 234, 439 U.S. 886, 58 L.Ed.2d 201, on remand, D.C., 490 F.Supp. 70, affd. in part, revd. in part on oth. grds., C.A., 660 F.2d 802, 212 U.S.App.D.C. 403.

Okl.—Roberts v. City of Stillwater, Okl., App., 646 P.2d 6.

42. U.S.—Anderson v. Reynolds, C.A.Utah, 476 F.2d 665.

Fla.—Boca Raton v. Coughlin, App., 299 So.2d 105.

La.—Brown v. Hartford Ins. Co., App., 370 So.2d 179.

44. La.—Thompson v. LeBlanc, App., 336 So.2d 344, application not considered, Sup., 339 So.2d 26.

Duty of pharmacists

U.S.—Hemmerle v. K-Mart Discount Stores, D.C.S.C., 383 F.Supp. 303.

47. U.S.—Draeger v. Grand Central, Inc., C.A.Utah, 504 F.2d 142—Brubaker v. King, C.A.Ind., 505 F.2d 534.

D.C.—Dellums v. Powell, C.A., 566 F.2d 167, 184 U.S.App.D.C. 275, cert. den. 98 S.Ct. 3146, 438 U.S. 916, 57 L.Ed.2d 1161, reh. den. 99 S.Ct. 234, 439 U.S. 886, 58 L.Ed.2d 201, on remand, D.C., 490 F.Supp. 70, affd. in part, revd. on part on oth. grds., C.A., 660 F.2d 802, 212 U.S.App.D.C. 403.

Ill.—Alvarez v. Reynolds, 181 N.E.2d 616, 35 Ill. App.2d 54.

Utah—Terry v. Zions Co-op. Mercantile Institution, 605 P.2d 314, on reh. 617 P.2d 700.

Wis.—Stelloh v. Liban, 124 N.W.2d 101, 21 Wis.2d 119.

Failure of person to identify himself, etc.

Mo.—Parrott v. Reis, App., 441 S.W.2d 390.

Immaterial matters, etc.

Alaska—City of Nome v. Ailak, 570 P.2d 162.

D.C.—Prieto v. May Dept. Stores Co., App., 216 A.2d 577.

Reasonable grounds held to exist

(1) U.S.—Burnaman v. J. C. Penney Co., D.C.Tex., 181 F.Supp. 633—Hampton v. Gilmore, D.C.Mo., 60 F.R.D. 71, affd., C.A., 486 F.2d 1407.

Ariz.—Kon v. Skaggs Drug Center, Inc., App., 563 P.2d 920, 115 Ariz. 121.

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Cal.—White v. Martin, 30 Cal.Rptr. 367, 215 C.A.2d 641—Mercurius v. Rolon, 41 Cal.Rptr. 789, 231 C.A.2d 359—King v. Anderson, 51 Cal.Rptr. 561, 242 C.A.2d 606—Wilson v. Los Angeles County, 98 Cal.Rptr. 525, 21 C.A.3d 308.

Colo.—Land v. Hill, App., 644 P.2d 43.

D.C.—Shaw v. May Dept. Stores Co., App., 268 A.2d 607—Safeway Stores, Inc. v. Kelly, App., 448 A.2d 856.

Fla.—Rothstein v. Jackson's of Coral Gables, Inc., App., 133 So.2d 331.

La.—Eason v. J. Weingarten, Inc., App., 219 So.2d 516—Meyers v. Edwards, App., 256 So.2d 337—Firstley v. Bill Watson Ford, Inc., App., 268 So.2d 314, 99 A.L.R.3d 1106.

Nev.—Hernandez v. City of Reno, 634 P.2d 668, 97 Nev. 429.

N.Y.—Langley v. City of New York, 337 N.Y.S.2d 460, 40 A.D.2d 844, affd. 316 N.E.2d 716, 34 N.Y.2d 885, 359 N.Y.S.2d 281.

Mubarez v. State, 453 N.Y.S.2d 549, 115 Misc.2d 57.

Or.—Delp v. Zapp's Drug and Variety Stores, 395 P.2d 137, 238 Or. 538.

Reasonable grounds held not to exist

U.S.—Butler v. Goldblatt Bros., Inc., D.C.Ill., 432 F.Supp. 1122.

D.C.—Woodward v. District of Columbia, App., 387 A.2d 726.

La.—Abraham v. Boat Center, Inc., App., 146 So.2d 23—Wilde v. Schwegmann Bros. Giant Supermarkets, Inc., App., 160 So.2d 839—Stewart v. J. C. Penney Co., App., 267 So.2d 925.

Mo.—Quinn v. Rosenberg, App., 399 S.W.2d 433.

Miss.—J. C. Penney Co. v. Cox, 148 So.2d 679, 246 Miss. 1.

N.M.—Ulibarri v. Maestas, 395 P.2d 238, 74 N.M. 516. N.Y.—Blanchfield v. State, 427 N.Y.S.2d 682, 104 Misc.2d 21.

R.I.—Berberian v. Smith, 206 A.2d 531, 99 R.I. 198.

Existence of probable cause

Colo.—Enright v. Groves, 560 P.2d 851, 39 Colo.App. 39.

Fla.—Weissman v. K-Mart Corp., App., 396 So.2d 1164.

Minn.—Lundeen v. Renteria, 224 N.W.2d 132, 302 Minn. 142.

Wis.—Johnson v. K-Mart Enterprises, Inc., App., 297 N.W.2d 74, 98 Wis.2d 533.

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48. U.S.—Schulz v. Lamb, C.A.Nev., 504 F.2d 1009, on remand, D.C., 416 F.Supp. 723, app. after remand C.A., 591 F.2d 1268.

D.C.—Prieto v. May Dept. Stores Co., App., 216 A.2d 577—Shaw v. May Dept. Stores Co., App., 268 A.2d 607.

Fla.—City of Jacksonville v. Walton, App., 318 So.2d 546.

Ga.—Dixon v. S.S. Kresge, Inc., 169 S.E.2d 189, 119 Ga.App. 776—S.S. Kresge Co. v. Carty, 169 S.E.2d 735, 120 Ga.App. 170.

La.—Roche v. Aetna Cas. & Sur. Co., App., 303 So.2d 888, writ ref., Sup., 307 So.2d 372.

Va.—F.B.C. Stores, Inc. v. Duncan, 198 S.E.2d 595, 214 Va. 246.

Wyo.—Rodarte v. City of Riverton, 552 P.2d 1245.

49. Ariz.—Patterson v. City of Phoenix, 436 P.2d 613, 103 Ariz. 64.

Reasonable belief

U.S.—Brubaker v. King, C.A.Ind., 505 F.2d 534.

Dependent on fact of crime

U.S.—Thompson v. Anderson, D.C.Md., 447 F.Supp. 584.

50. U.S.—Banish v. Locks, C.A.Ind., 414 F.2d 638. La.—Thompson v. LeBlanc, App., 336 So.2d 344, application not considered, Sup., 339 So.2d 26.

51. N.Y.—DeBonis v. State, 325 N.Y.S.2d 215, 37 A.D.2d 878.

53. U.S.—U.S. ex rel. Jones v. Rundle, D.C.Pa., 358 F.Supp. 939.

D.C.—Dellums v. Powell, C.A., 566 F.2d 167, 184 U.S.App.D.C. 275, cert. den. 98 S.Ct. 3146, 438 U.S. 916, 57 L.Ed.2d 1161, reh. den. 99 S.Ct. 234, 439 U.S. 886, 58 L.Ed.2d 201, on remand, D.C., 490 F.Supp. 70, affd. in part, revd. in part on oth. grds., C.A., 660 F.2d 802, 212 U.S.App.D.C. 403.

Mich.—Tumbarella v. Kroger Co., 271 N.W.2d 284, 85 Mich.App. 482.

Wyo.—Rodarte v. City of Riverton, 552 P.2d 1245.

56. Md.—Great Atlantic & Pac. Tea Co. v. Paul, 261 A.2d 731, 256 Md. 643.

W.Va.—City of McMechen ex rel. Wiley v. Fidelity & Cas. Co. of N.Y., 116 S.E.2d 388, 145 W.Va. 660.

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57. La.—Brasher v. Gibson's Products Co., Inc., App., 306 So.2d 842.

Mo.—C.J.S. cited in Parrott v. Reis, App., 441 S.W.2d 390, 392.

64. Cal.—Whaley v. Kirby, 25 Cal.Rptr. 50, 208 C.A.2d 232.

Mich.—Arnold v. Jarvis, 116 N.W.2d 38, 367 Mich. 59.

N.Y.—Pawloski v. State, 258 N.Y.S.2d 258, 45 Misc.2d 933.

W.Va.—City of McMechen ex rel. Willey v. Fidelity & Cas. Co. of N.Y., 116 S.E.2d 388, 145 W.Va. 660.

Ultimate innocence not determinative

Md.—Brewer v. Mele, 298 A.2d 156, 267 Md. 437.

67. U.S.—Palma v. Powers, D.C.Ill., 295 F.Supp. 924. Ariz.—Hansen v. Stoll, App., 636 P.2d 1236, 130 Ariz. 454.

§ 27. — Valid Process

72. U.S.—Motley v. Virginia Hardware & Mfg. Co., D.C.Va., 287 F.Supp. 790—Link v. Greyhound Corp., D.C.Mich., 288 F.Supp. 898 Clark Heard, D.C.Tex., 538 F.Supp. 800.

Ala.—O'Barr v. Feist, 296 So.2d 152, 292 Ala. 440. Ariz.—Slade v. City of Phoenix, 541 P.2d 550, 112 Ariz. 298.

Cal.—Lacy v. Lauretinde Finance Corp., 104 Cal.Rptr. 547, 28 C.A.3d 251—Robinson v. City and County of San Francisco, 116 Cal.Rptr. 125, 41 C.A.3d 334.

Colo.—Lofton v. Cochran, App., 499 P.2d 629—Enright v. Groves, 560 P.2d 851, 39 Colo.App. 39.

Ga.—Mathews v. Murray, 113 S.E.2d 232, 101 Ga.App. 216—Stephens v. Big Apple Supermarkets of Rome, Inc., 204 S.E.2d 805, 130 Ga.App. 841.

Ill.—Jacobson v. Rolley, 330 N.E.2d 256, 29 Ill.App.3d 265.

Ky.—Duncan v. Brothers, 344 S.W.2d 398.

Me.—Nadeau v. State, 395 A.2d 107.

Md.—Brewer v. Mele, 298 A.2d 156, 267 Md. 437.

Mich.—Bridgman v. Bunker, 162 N.W.2d 310, 12 Mich. App. 44.

Minn.—Rosvall v. Provost, 155 N.W.2d 900, 279 Minn. 119—Morgan v. McLaughlin, 188 N.W.2d 829, 290 Minn. 389.

Nev.—Catrone v. 105 Casino Corp., 414 P.2d 106, 82 Nev. 166.

N.J.—Gierman v. Toman, 185 A.2d 241, 77 N.J.Super. 18—Di Giovanni v. Pessel, 250 A.2d 756, 104 N.J.Super. 550, affd. in part, revd. in part on oth. grds. 260 A.2d 510, 55 N.J. 188.

N.Y.—Golstein v. Siegel, 244 N.Y.S.2d 378, 19 A.D.2d 489—Harty v. State, 287 N.Y.S.2d 306, 29 A.D.2d 243, affd. 262 N.E.2d 220, 27 N.Y.2d 698, 314 N.Y.S.2d 14.

Montanaro v. State, 253 N.Y.S. 833, 44 Misc.2d 533, affd. 290 N.Y.S.2d 189, 29 A.D.2d 916—C.J.S. cited in Caminito v. City of New York, 256 N.Y.S.2d 670, 679, 45 Misc.2d 241.

Guzy v. Guzy, 184 N.Y.S.2d 161, 16 Misc.2d 905, affd. 206 N.Y.S.2d 355, 11 A.D.2d 1047—Awad v. Universal Coconut Corp., 234 N.Y.S.2d 652, 37 Misc.2d 208, 211—Whitree v. State, 265 N.Y.S.2d 709, 48 Misc.2d 673, affd. 271 N.Y.S.2d 319, 26 A.D.2d 720.

Ohio—Tymcio v. State, 369 N.E.2d 1063, 52 Ohio App.2d 298, 6 O.O.3d 310.

Okla.—James v. Southwestern Ins. Co., 354 P.2d 408. S.C.—Thomas v. Colonial Stores, Inc., 113 S.E.2d 337, 236 S.C. 95.

Tex.—C.J.S. quoted in Tandy Corp. v. McGregor, Civ. App., 527 S.W.2d 246, 248, err. ref. no rev. err.—C.J.S. cited in Sanchez v. Garza, Civ.App., 581 S.W.2d 258, 259.

Court order

(4) Other matters.

Ill.—Executive Commercial Services, Ltd. v. Daskalakis, 393 N.E.2d 1365, 31 Ill.Dec. 58, 74 Ill.App.3d 760, cert. den. 100 S.Ct. 2945.

Neb.—Cimino v. Rosen, 225 N.W.2d 567, 193 Neb. 162.

N.Y.—Ferrucci v. State, 348 N.Y.S.2d 236, 42 A.D.2d 359, affd. 316 N.E.2d 359, 34 N.Y.2d 881, 359 N.Y.S.2d 279.

Gomillion v. State, 274 N.Y.S.2d 381, 51 Misc.2d 952—Jordan v. State, 290 N.Y.S.2d 621, 56 Misc.2d 1032.

Duty to cause revocation

La.—Jones v. Simonson, App., 292 So.2d 251.

Subsequent invalidity immaterial

U.S.—Fleming v. McEnany, C.A.Vt., 491 F.2d 1353.

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73. *U.S.—Smith v. Ellington, C.A.Tenn., 348 F.2d 1021, cert. den. 86 S.Ct. 589, 382 U.S. 998, 15 L.Ed.2d 486, reh. den. 86 S.Ct. 1207, 383 U.S. 954, 16 L.Ed.2d 216.

Mich.—Bridgman v. Bunker, 162 N.W.2d 310, 12 Mich. App. 44.

N.Y.—Jordan v. State, 290 N.Y.S.2d 621, 56 Misc.2d 1032.

Okla.—James v. Southwestern Ins. Co., 354 P.2d 408. Wash.—Kellogg v. State, 621 P.2d 133, 94 Wash.2d 851.

75. Tex.—Lilley v. Minute Market, Inc., Civ.App., 501 S.W.2d 688, err. ref. no rev. err.

75.5. N.Y.—Glynn v. State, 263 N.Y.S.2d 902, 47 Misc.2d 1016.

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81. Malicious prosecution

(2) Other instances.

N.Y.—Lincoln First Bank of Rochester v. Siegel, 400 N.Y.S.2d 627, 60 A.D.2d 270.

86. N.Y.—Jordan v. State, 290 N.Y.S.2d 621, 56 Misc.2d 1032.

87. N.Y.—Harty v. State, 287 N.Y.S.2d 306, 29 A.D.2d 243, affd. 262 N.E.2d 220, 27 N.Y.2d 698, 314 N.Y.S.2d 14.

88. N.H.—Hickox v. J. B. Morin Agency, Inc., 272 A.2d 321, 10 N.H. 438.

N.Y.—Awad v. Universal Coconut Corp., 234 N.Y.S.2d 652, 37 Misc.2d 208, 211—Montanaro v. State, 253 N.Y.S.2d 833, 44 Misc.2d 533, affd. 290 N.Y.S.2d 189, 29 A.D.2d 916.

Tex.—Reid v. Nortex Const. Co., Civ.App., 366 S.W.2d 870, err. ref. no rev. err.

Affidavit

(2) Other matters.

Ga.—Courtenay v. Randolph, 188 S.E.2d 396, 125 Ga. App. 581.

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95. Wis.—Strong v. City of Milwaukee, 157 N.W.2d 619, 38 Wis.2d 564.

96. W.Va.—Winters v. Campbell, 137 S.E.2d 188, 148 W.Va. 710.

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16. U.S.—Zuranski v. Anderson, D.C.Ind., 582 F.Supp. 101.

Fla.—O'Brien v. Food Fair Stores, North Dade, Inc., App., 155 So.2d 836.

Mich.—Tomita v. Tucker, 171 N.W.2d 564, 18 Mich. App. 559—Belt v. Ritter, 171 N.W.2d 581, 18

- Mich.App. 495, affd. 189 N.W.2d 221, 385 Mich. 402.
- Minn.—Rosvall v. Provost, 155 N.W.2d 900, 279 Minn. 119.
- N.Y.—Ford v. State, 250 N.Y.S.2d 857, 21 A.D.2d 437—Bellows v. State, 294 N.Y.S.2d 282, 30 A.D.2d 1019.
- N.C.—State v. Sparrow, 171 S.E.2d 321, 7 N.C.App. 107, affd. in part, revd. in part on oth. grds. 173 S.E.2d 897, 276 N.C. 499.

18. Warden

- U.S.—Zuranski v. Anderson, D.C.Ind., 582 F.Supp. 101.

§ 28. — Void, Erroneous, or Irregular Process**page 665**

28. Ind.—C.J.S. quoted at length in Stine v. Shuttle, 186 N.E.2d 168, 171, 172, 134 Ind.App. 67.
- N.Y.—C.J.S. cited in Ford v. State, 250 N.Y.S.2d 857, 860, 21 A.D.2d 437.
29. N.Y.—Harty v. State, 287 N.Y.S.2d 306, 29 A.D.2d 243, affd. 262 N.E.2d 220, 27 N.Y.2d 698, 314 N.Y.S.2d 14—Nuernberger v. State, 337 N.Y.S.2d 704, 40 A.D.2d 939.
- Montanaro v. State, 249 N.Y.S.2d 365, 42 Misc.2d 851—Maracle v. State, 270 N.Y.S.2d 439, 50 Misc.2d 348.
32. U.S.—Mundt v. U.S., C.A.Ariz., 611 F.2d 1257.
- N.Y.—Davis v. State, 271 N.Y.S.2d 381, 50 Misc.2d 740—Bozeman v. City of Buffalo, 310 N.Y.S.2d 814, 62 Misc.2d 967, affd. 313 N.Y.S.2d 361, 34 A.D.2d 892—Dennis v. State, 449 N.Y.S.2d 602, 113 Misc.2d 540, affd. 467 N.Y.S.2d 737, 96 A.D.2d 1143.
- N.C.—Koury v. John Meyer of Norwich, 261 S.E.2d 217, 44 N.C.App. 392; petition den. 267 S.E.2d 662, 299 N.C. 736.
33. N.Y.—Montanaro v. State, 249 N.Y.S.2d 365, 42 Misc.2d 851.

Confinement pursuant to unconstitutional process does not in itself constitute false imprisonment.^{40.5}

- 40.5. U.S.—Fleming v. McEnany, C.A.Vt., 491 F.2d 1353.
41. S.D.—Catencamp v. Albright, 251 N.W.2d 190.
- Tex.—J. C. Penney Co. v. Reynolds, Civ.App., 329 S.W.2d 104, cert. ref. no rev. err.—Sparkman v. Peoples Nat. Bank of Tyler, Civ.App., 501 S.W.2d 739, err. ref. no rev. err.

Giving wrong information

- Cal.—McKay v. San Diego County, 168 Cal.Rptr. 442, 111 C.A.3d 252.

- Mo.—Davis v. Weil Clothing Co., App., 367 S.W.2d 19.

Signer of complaint acting with malice

- Kan.—Holland v. Lutz, 401 P.2d 1015, 194 Kan. 712.

Determination of malice

- Cal.—McKay v. San Diego County, 168 Cal.Rptr. 442, 111 C.A.3d 252.

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43. Mo.—Davis v. Weil Clothing Co., App., 367 S.W.2d 19.
44. Tex.—C.J.S. cited in J. C. Penney Co. v. Reynolds, Civ.App., 329 S.W.2d 104, 107, err. ref. no rev. err.
45. Tex.—C.J.S. cited in J. C. Penney Co. v. Reynolds, Civ.App., 329 S.W.2d 104, 107, err. ref. no rev. err.
46. Ind.—Coleman v. Mitnick, 202 N.E.2d 577, 137 Ind.App. 125, 16 A.L.R.3d 527, reh. den. 203 N.E.2d 834, 137 Ind.App. 125.
- W.Va.—Winters v. Campbell, 137 S.E.2d 188, 148 W.Va. 710.
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- Jailer, etc.
- (2) Other matters.
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- Process regular on face**
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§ 31. — Delay and Prolonged Detention

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16. Officer not participating not liable

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State not liable for municipal officer's delay

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23. Cal.—*Gorlack v. Ferrari*, 7 Cal.Rptr. 699, 184 C.A.2d 702.

24. Unreasonable periods

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§ 32. — Unnecessary Force, Hardship, Cruelty, or Indignity

36. La.—*Norrell v. City of Monroe*, App., 375 So.2d 159.

37. Fla.—*City of Hollywood v. Coley*, App., 258 So.2d 828.

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- Violation of physical integrity not permitted
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§ 34. — Detention after Acquittal or Expiration of Term

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59. Chargeable with constructive notice of termination of proceedings

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§ 35. Arrest on One Ground, Justification on Another

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Jailer's liability

(3) Other matters.

U.S.—Reeves v. City of Jackson, Miss., C.A.Miss., 608 F.2d 644.

Cal.—Kinney v. Contra Costa County, 87 Cal.Rptr. 638, 8 C.A.3d 761.

88. Rule inapplicable in circumstances

Tex.—J. C. Penney Co. v. Reynolds, Civ.App., 329 S.W.2d 104, err. ref. no rev. err.

90.10. Ind.—C.J.S. cited in Brickman v. Robertson Bros. Dept. Store, 202 N.E.2d 583, 587, 136 Ind. App. 467.

91. Ill.—Alverio v. Dowery, 243 N.E.2d 858, 104 Ill.App.2d 125.

§ 38. — Instigating and Directing Others

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96. La.—Stevens v. Humphrey, App., 218 So.2d 642.

97. U.S.—Palmentere v. Campbell, C.A.Mo., 344 F.2d 234—Rodriguez v. Ritchey, C.A.Fla., 539 F.2d 394, reh. 556 F.2d 1185, cert. den. 98 S.Ct. 894, 434 U.S. 1047, 54 L.Ed.2d 799.

Luker v. Nelson, D.C.Ill., 341 F.Supp. 111.

D.C.—Smith v. District of Columbia, App., 399 A.2d 213.

Ill.—Karow v. Student Inns, Inc., 357 N.E.2d 682, 2 Ill.Dec. 515, 43 Ill.App.3d 878, 98 A.L.R.3d 531.

Mo.—Wehrman v. Liberty Petroleum Co., App., 382 S.W.2d 56—Gerald v. Caterers, Inc., App., 382 S.W.2d 740.

Neb.—Johnson v. First Nat. Bank & Trust Co. of Lincoln, 300 N.W.2d 10, 207 Neb. 521.

N.Y.—Dunn v. City of Syracuse, 443 N.Y.S.2d 463, 83 A.D.2d 783.

N.C.—Blackwood v. Cates, 254 S.E.2d 7, 297 N.C. 163.

Or.—Pearson v. Galvin, 454 P.2d 638, 253 Or. 331.

Tex.—Cronen v. Nix, Civ.App., 611 S.W.2d 651, cert. den. 102 S.Ct. 132, 454 U.S. 833, 70 L.Ed.2d 112, reh. den. 102 S.Ct. 667, 454 U.S. 1095, 70 L.Ed.2d 636.

Utah—Haas v. Emmett, 459 P.2d 432, 23 Utah2d 138.

Wash.—McCord v. Tielsch, 544 P.2d 56, 14 Wash.App. 564.

98. Ill.—Karow v. Student Inns, Inc., 357 N.E.2d 682, 2 Ill.Dec. 515, 43 Ill.App.3d 878, 99 A.L.R.3d 531.

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1.5. U.S.—Testa v. Winquist, D.C.R.I., 451 F.Supp. 388.

Mo.—Conley v. Commerce Bank of St. Charles, App., 599 S.W.2d 48.

Tex.—Harrison v. Southland Corp., Civ.App., 544 S.W.2d 692.

Utah—Greenwell v. Canyon Lincoln Mercury, Inc., 575 P.2d 688.

But it has been held that where a private citizen merely summons the police for assistance because of a disturbance and does not specifically request an arrest, the police officer's independent determination to make an arrest will not render the complaining citizen liable for false arrest.^{1.6}

1.6 Ohio—White v. Standard Oil Co., 474 N.E.2d 366, 16 Ohio App.3d 21, 16 O.B.R. 22.

1.10. U.S.—Butler v. Goldblatt Bros., Inc., D.C.Ill., 432 F.Supp. 1122.

Ga.—Ginn v. Citizens and Southern Nat. Bank, 243 S.E.2d 528, 145 Ga.App. 175.

Kan.—Thurman v. Cundiff, 580 P.2d 893, 2 Kan. App.2d 406.

Mo.—C.J.S. cited in Knupp v. Esslinger, App., 363 S.W.2d 210, 213.

N.M.—Barnett v. Cal M. Inc., 445 P.2d 974, 79 N.M. 553.

Ohio—Smith v. Bodle, App., 257 N.E.2d 417, 220 Ohio App.2d 44.

Knowingly giving false information

R.I.—Powers v. Carvalho, 368 A.2d 1242, 117 R.I. 519.

§ 39. — Ratification

2. U.S.—C.J.S. cited in Palmentere v. Campbell, C.A. Mo., 344 F.2d 234, 238.

§ 40(1). Liability of Principal for Acts of Agent

5. D.C.—Daughtry v. Arlington County, Va., D.C., 490 F.Supp. 307.

Action not precluded by statute providing for indemnification of officer

Ill.—Andrews v. Porter, 217 N.E.2d 305, 70 Ill.App.2d 202, affd., Sup., 226 N.E.2d 597, 37 Ill.2d 309.

6. Cal.—Fish v. Regents of University of Cal., 54 Cal.Rptr. 656, 246 C.A.2d 327.

Ga.—J. C. Penney Co. v. Green, 132 S.E.2d 83, 108 Ga.App. 155—Brown v. Triton, Inc., 156 S.E.2d 200, 115 Ga.App. 785.

Md.—Leach v. Penn-Mar Merchants Ass'n, Inc., 308 A.2d 446, 18 Md.App. 603.

Mo.—Manson v. Wabash R. Co., 338 S.W.2d 54.

C.J.S. cited in Peak v. W. T. Grant Co., App., 386 S.W.2d 685.

Tex.—Dupree v. Piggly Wiggly Shop Rite Foods, Inc., Civ.App., 542 S.W.2d 882. Err. ref. no rev. err.

Not liable for usurpation of authority

Fla.—Mendez v. Blackburn, App., 205 So.2d 697, quashed, Sup., 226 So.2d 340.

6.5. Tex.—C.J.S. cited in Dupree v. Piggly Wiggly Shop Rite Foods, Inc., 542 S.W.2d 882, 887, err. ref. no rev. err.

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7. U.S.—Draeger v. Grand Central, Inc., C.A.Utah, 504 F.2d 142.

Skelton v. W. T. Grant Co., D.C.Ga., 229 F.Supp. 430, revd. 331 F.2d 593, cert. den. 85 S.Ct. 61, 379 U.S. 830, 13 L.Ed.2d 39—Clark v. Heard, D.C.Tex., 538 F.Supp. 800.

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- Ark.—Dillard Dept. Stores, Inc. v. Stuckey, 511 S.W.2d 154, 256 Ark. 88.
- Cal.—Ramsden v. Western Union, 138 Cal.Rptr. 426, 71 C.A.3d 873.
- Miss.—Allen v. Ritter, 235 So.2d 253.
- N.Y.—Sindle v. New York City Transit Authority, 316 N.Y.S.2d 657, 64 Misc.2d 993, 995, affd. 331 N.Y. S.2d 343, 38 A.D.2d 892, revd. on oth. grds. 307 N.E.2d 245, 33 N.Y.2d 293, 352 N.Y.S.2d 183.
- N.C.—Black v. Clark's Greensboro, Inc., 139 S.E.2d 199, 263 N.C. 226.
- Tex.—American Ins. Ass'n v. Smith, Civ.App., 439 S.W.2d 418.
8. Tex.—Dupree v. Piggly Wiggly Shop Rite Foods, Inc., Civ.App., 542 S.W.2d 882, err. ref. no rev. err.
10. Me.—Nadeau v. State, 395 A.2d 107.

Arrest by police officer

- (5) Other statements.
- Ga.—Colonial Stores, Inc. v. Holt, 166 S.E.2d 30, 118 Ga.App. 826.
- Ill.—Green v. No. 35 Check Exchange, Inc., 222 N.E.2d 133, 77 Ill.App.2d 25.
- Ind.—Conn v. Paul Harris Stores, Inc., App., 439 N.E.2d 195.
- Ky.—Lexington-Fayette Urban County Government v. Middleton, App., 555 S.W.2d 613.
11. U.S.—Williams v. City of Chicago, D.C.Ill., 525 F.Supp. 85.
- Mo.—Peak v. W. T. Grant Co., App., 386 S.W.2d 685.

The United States may be held liable for false imprisonment where its law enforcement officials fail to take a person arrested before a magistrate within a reasonable time after arrest.^{11.5}

- 11.5. U.S.—Van Schaick v. U.S., D.C.S.C., 586 F.Supp. 1023.

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13. Ga.—J. C. Penney Co. v. Green, 132 S.E.2d 83, 108 Ga.App. 155.
16. La.—Firstley v. Bill Watson Ford, Inc., App., 268 So.2d 314, 99 A.L.R.3d 1106.
- Or.—Kraft v. Montgomery Ward & Co., 348 P.2d 239, 220 Or. 230, 92 A.L.R.2d 1.
18. Or.—Kraft v. Montgomery Ward & Co., 348 P.2d 239, 220 Or. 230, 92 A.L.R.2d 1.

§ 40(3). — Effect of Breach of Instructions, Negligence, Malice, etc., of Employee

24. Mo.—Peak v. W. T. Grant Co., App., 386 S.W.2d 685.
29. Mo.—C.J.S. cited in Peak v. W. T. Grant Co., App., 386 S.W.2d 685, 690.
30. Mo.—C.J.S. cited in Peak v. W. T. Grant Co., App., 386 S.W.2d 685, 690.

§ 40(5). — Detectives

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51. R.I.—Webbier v. Thoroughbred Racing Protective Bureau, Inc., 254 A.2d 285, 105 R.I. 605.

§ 40(7). — Regular Policemen

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78. Mo.—Nelson v. R. H. Macy & Co., App., 434 S.W.2d 767.
80. Ga.—Colonial Stores, Inc. v. Holt, 166 S.E.2d 30, 118 Ga.App. 826.

§ 40(9). — Carriers and Their Employees

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90. Md.—D. C. Transit System, Inc. v. Brooks, 287 A.2d 251, 264 Md. 578.

§ 41. Liability of Agent

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39. Notice
- Cal.—Maben v. Rankin, 10 Cal.Rptr. 353, 358 P.2d 681, 55 C.2d 139.
40. Ill.—Karow v. Student Inns, Inc., 357, N.E.2d 682, 2 Ill.Dec. 515, 43 Ill.App.3d 878, 98 A.L.R.3d 531.
- Mo.—Stafford v. Muster, 582 S.W.2d 670.

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43. U.S.—Fleming v. McEnany, C.A.Vt., 491 F.2d 1353.
44. Ill.—Karow v. Student Inns, Inc., 357 N.E.2d 682, 2 Ill.Dec. 515, 43 Ill.App.3d 878, 98 A.L.R.3d 531.

§ 42. Superior Executive Officer and His Inferior or Deputy

- 50.50. La.—Granier v. Odom, App., 167 So.2d 531, writ ref. 168 So.2d 268, 246 La. 884.

No vicarious liability

- U.S.—Schulz v. Lamb, C.A.Nev., 504 F.2d 1009, on remand, D.C., 416 F.Supp. 723, app. after remand C.A., 591 F.2d 1268.

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53. U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420—C.J.S. cited in Anderson v. Nossner, C.A.Miss., 438 F.2d 183, 200, mod. on oth. grds. on reh. 456 F.2d 835, cert. den. 93 S.Ct. 53, 409 U.S. 848, 34 L.Ed.2d 89.
56. Cal.—McKay v. San Diego County, 168 Cal.Rptr. 442, 111 C.A.3d 252.
62. U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420—C.J.S. cited in Anderson v. Nossner, C.A.Miss., 438 F.2d 183, 198, mod. on oth. grds. on reh. 456 F.2d 835, cert. den. 93 S.Ct. 53, 409 U.S. 848, 34 L.Ed.2d 89.
63. U.S.—C.J.S. cited in Anderson v. Nossner, C.A.Miss., 438 F.2d 183, 198. Mod. on oth. grds. on reh. 456 F.2d 835, cert. den. 93 S.Ct. 53, 409 U.S. 848, 34 L.Ed.2d 89.

§ 43. Private Persons Assisting Officer

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67. County attorney carrying concealed weapon
- Kan.—Mendoza v. Reno County, 681 P.2d 676, 235 Kan. 692.
71. N.Y.—Tunia v. State, 434 N.Y.S.2d 846, 106 Misc.2d 601.

§ 44. Judicial Officers

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82. Kan.—C.J.S. cited in Holland v. Lutz, 401 P.2d 1015, 1019, 194 Kan. 712.
- Wash.—C.J.S. cited in Burgess v. Towne, 538 P.2d 559, 562, 13 Wash.App. 954.
83. Iowa—Huendling v. Jensen, 168 N.W.2d 745.
- Kan.—Holland v. Lutz, 401 P.2d 1015, 194 Kan. 712.
- N.J.—Di Giovanni v. Pessel, 250 A.2d 756, 104 N.J.Super. 550, affd. in part, revd. in part on oth. grds. 260 A.2d 510, 55 N.J. 188.
- Ohio—Garland v. Dustman, App., 251 N.E.2d 153, 19 Ohio App.2d 292.

- Tex.—Tedford v. McWhorter, Civ.App., 373 S.W.2d 832, err. ref. no rev. err.

85. Collection of forfeited recognizance bond by criminal process

- Kan.—Holland v. Lutz, 401 P.2d 1015, 194 Kan. 712.

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91. Ky.—McCray v. City of Lake Louisville, 332 S.W.2d 837.
93. Tex.—C.J.S. quoted at length in Tedford v. McWhorter, Civ.App., 373 S.W.2d 832, 833, err. ref. no rev. err.
95. S.C.—Foust v. Hughes, 204 S.E.2d 230, 21 N.C. App. 268, cert. den. 205 S.E.2d 722, 285 N.C. 589.
1. Tex.—Tedford v. McWhorter, Civ.App., 373 S.W.2d 832, err. ref. no rev. err.

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9. N.Y.—Casler v. State, 307 N.Y.S.2d 695, 33 A.D.2d 305.
10. U.S.—C.J.S. cited in Pierson v. Ray, C.A.Miss., 352 F.2d 213, 217, affd. in part and revd. in part on oth. grds. 87 S.Ct. 1213, 386 U.S. 547, 18 L.Ed.2d 288.
22. U.S.—C.J.S. cited in Pierson v. Ray, C.A.Miss., 352 F.2d 213, 217, affd. in part and revd. in part on oth. grds. 87 S.Ct. 1213, 386 U.S. 547, 18 L.Ed.2d 288.
23. Kan.—C.J.S. cited in Holland v. Lutz, 401 P.2d 1015, 1020, 194 Kan. 712.

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25. Fla.—Waters v. Ray, App., 167 So.2d 326.

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33. Rule held inapplicable

- Ky.—McCray v. City of Lake Louisville, 332 S.W.2d 837.
41. Ind.—C.J.S. cited in Stine v. Shuttle, 186 N.E.2d 168, 173, 134 Ind.App. 67.
42. Ind.—Stine v. Shuttle, 186 N.E.2d 168, 134 Ind. App. 67.
48. Ky.—McCray v. City of Lake Louisville, 332 S.W.2d 837.

§ 45. In General

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68. N.Y.—Driskell v. Alfano, 220 N.Y.S.2d 513, 14 A.D.2d 791.

Volenti non fit injuria

(2) Held applicable in other instances.

- U.S.—Pierson v. Ray, C.A.Miss., 352 F.2d 213, affd. in part and revd. in part on oth. grds. 87 S.Ct. 1213, 386 U.S. 547, 18 L.Ed.2d 288.

Abandonment held not shown

- Ariz.—Fridena v. Maricopa County, 504 P.2d 58, 18 Ariz.App. 527.

§ 46. Particular Matters

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79. Plea plus service of sentence

- U.S.—Edwards v. People of State of N.Y., D.C.N.Y., 314 F.Supp. 469.

80. U.S.—C.J.S. cited in Pierson v. Ray, C.A.Miss., 352 F.2d 213, 230, affd. in part and revd. in part on oth. grds. 87 S.Ct. 1213, 386 U.S. 547, 18 L.Ed.2d 288—Clark v. Bird, C.A.R.I., 354 F.2d 977, cert. den. 86 S.Ct. 1341, 384 U.S. 906, 16 L.Ed.2d 359.

- N.Y.—Halberstadt v. Nelson, 226 N.Y.S.2d 100, 34 Misc.2d 472.

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90. Iowa—Johannsen v. Stewart, 152 N.W.2d 202, 260 Iowa 1140.

§ 47. Nature and Form

96. U.S.—Still v. Nichols, C.A.Me., 412 F.2d 778. Garland v. True Temper Corp., D.C.W.Va., 354 F.Supp. 328.
- Mass.—Baldassari v. Public Finance Trust, 337 N.E.2d 701, 369 Mass. 33.
- N.Y.—Boose v. City of Rochester, 421 N.Y.S.2d 740, 71 A.D.2d 59.

Cause of action not shown

- N.Y.—Turbin v. Metropolitan Transp. Authority, 439 N.Y.S.2d 578, 109 Misc.2d 149.

4. Ga.—Stewart v. Williams, 255 S.E.2d 699, 243 Ga. 580, on remand 258 S.E.2d 251, 150 Ga.App. 539.

Where a cause of action exists having all the elements of false imprisonment and other torts, the prosecution may be for the whole cause of action in one proceeding.^{4,5}

- 4.5. Kan.—Thompson v. General Finance Co., 468 P.2d 269, 205 Kan. 76.

§ 48. Jurisdiction and Venue

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8. Law of place where tort committed governs
- N.Y.—Heaney v. Purdy, 272 N.E.2d 550, 29 N.Y.2d 157, 324 N.Y.S.2d 47.

9. Ga.—Bush v. State, App., 180 S.E.2d 917, 123 Ga.App. 584, cert. den. 92 S.Ct. 747, 404 U.S. 1061, 30 L.Ed.2d 749.

§ 49. Time to Sue and Limitations

13. Cal.—C.J.S. cited in Milliken v. City of South Pasadena, 15 Cal.Rptr. 409, 412, 96 C.A.3d 834.
- Me.—C.J.S. cited in Jedzierski v. Jordan, 172 A.2d 636, 637, 157 Me. 352.

- Mich.—Kersheske v. Thomas Tp., 138 N.W.2d 509, 2 Mich.App. 1.

- N.Y.—Huff v. State, 263 N.Y.S.2d 897, 47 Misc.2d 1053, mod. on oth. grds. 278 N.Y.S.2d 12, 27 A.D.2d 892—Todzia v. State, 278 N.Y.S.2d 291, 53 Misc.2d 200.

16. U.S.—Dorak v. Nassau County of State of N.Y., D.C.N.Y., 329 F.Supp. 497, C.A., affd. 445 F.2d 1023.

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23. U.S.—Crawford v. Zeitler, C.A.Ohio, 326 F.2d 119—Kleve v. Negangard, C.A.Ohio, 330 F.2d 74—Henig v. Odoriso, C.A.Pa., 385 F.2d 491, cert. den. 88 S.Ct. 1269, 390 U.S. 1016, 20 L.Ed.2d 166, reh. den. 88 S.Ct. 1814, 391 U.S. 929, 20 L.Ed.2d 671—Mulligan v. Schlachter, C.A.Mich., 389 F.2d 231—Hileman v. Knable, C.A.Pa., 391 F.2d 596—Ammlung v. City of Chester, C.A.Pa., 494 F.2d 811.

- Gilpin v. Tack, D.C.Ark., 256 F.Supp. 562.

- Fla.—Gordon v. City of Belle Glade, App., 132 So.2d 449.

- Wis.—Oosterwyk v. Corrigan, 120 N.W.2d 620, 19 Wis.2d 464, cert. den. 84 S.Ct. 168, 375 U.S. 892, 11 L.Ed.2d 119.

Confinement in mental institution

- U.S.—Dorak v. Nassau County of State of N.Y., D.C.N.Y., 329 F.Supp. 497, C.A., affd. 445 F.2d 1023.

- 24.5. U.S.—Kleve v. Negangard, C.A.Ohio, 330 F.2d 74.

Action held timely

- U.S.—Klein v. Springborn, D.C.Ill., 327 F.Supp. 1289.

26. Pa.—Gaiardi v. Lynn, 285 A.2d 109, 446 Pa. 144.

False imprisonment, etc.

- U.S.—Funk v. Cable, D.C.Pa., 251 F.Supp. 598.

- 26.5. U.S.—Quigley v. Hawthorne Lumber Co., D.C.N.Y., 264 F.Supp. 214—Hileman v. Knable, D.C.Pa., 266 F.Supp. 317.

Action brought pursuant to Federal Civil Rights Act

- U.S.—Funk v. Cable, D.C.Pa., 251 F.Supp. 598.

When one-year statute controls

- U.S.—Hooper v. Guthrie, D.C.Pa., 390 F.Supp. 1327.

When two-year statute controls

- U.S.—Smith v. Wendell, D.C.Pa., 390 F.Supp. 260.

28. Imprisonment or subsequent imprisonment does not toll statute

- Conn.—Kirwan v. State, 320 A.2d 837, 31 Conn.Sup. 46, affd. 363 A.2d 56, 168 Conn. 498.

Not at conclusion of proceedings from which imprisonment arose

- Conn.—Kirwan v. State, 320 A.2d 837, 31 Conn.Sup. 46, affd. 363 A.2d 56, 168 Conn. 498.

§ 50. Parties

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32. Cal.—Northrup v. Baker, 20 Cal.Rptr. 797, 202 C.A.2d 347.

§ 51. Declaration, Complaint, or Petition

Library References

False Imprisonment ⇐20.

38. N.Y.—Guzy v. Guzy, 184 N.Y.S.2d 161, 16 Misc.2d 905, affd. 206 N.Y.S.2d 355, 11 A.D.2d 1047.

Allegations held sufficient

- (1) U.S.—Jones v. Perrigan, C.A.Tenn., 459 F.2d 81. Elsberry v. Haynes, D.C.Okl., 256 F.Supp. 736.
- Cal.—Smith v. Madruga, 14 Cal.Rptr. 389, 193 C.A.2d 543.

- Colo.—McDonald v. Lakewood Country Club, 461 P.2d 437, 170 Colo. 355.

- Ky.—Duncan v. Brothers, 344 S.W.2d 398.

- Fla.—Waters v. Ray, App., 167 So.2d 326.

- Iowa—Strong v. Town of Lansing, 179 N.W.2d 365.

- Ky.—Crouch v. Cameron, 114 S.W.2d 408, 30 A.L.R.3d 520.

- Mo.—Sturgeon v. Holtan, 486 S.W.2d 209.

- N.Y.—Gianaca v. R K O Theatres, Inc., 205 N.Y.S.2d 420, 24 Misc.2d 719.

- (5) Fla.—Mendez v. Blackburn, App., 205 So.2d 697, quashed, Sup., 226 So.2d 340.

Allegations held insufficient

- (1) U.S.—Kamsler v. H. A. Seinsheimer Co. of Cincinnati, Ohio, C.A.Ill., 347 F.2d 740, cert. den. 86 S.Ct. 84, 382 U.S. 837, 15 L.Ed.2d 79.

- Bujaki v. Egan, D.C.Alaska, 237 F.Supp. 822.

- Fla.—Waters v. Ray, App., 167 So.2d 326.

- Ga.—F. W. Woolworth Co. v. Loggins, 155 S.E.2d 462, 115 Ga.App. 557—Hatcher v. Moree, 209 S.E.2d 708, 133 Ga.App. 14.

- Ill.—Dear v. Locke, 262 N.E.2d 127, 128 Ill.App.2d 356.

- Miss.—Mangum v. Jones, 236 So.2d 741.

- Mo.—Warren v. Parrish, 436 S.W.2d 670.

- Mont.—Wheeler v. Moe, 515 P.2d 679, 163 Mont. 154.

- N.Y.—Guzy v. Guzy, 206 N.Y.S.2d 355, 11 A.D.2d 1047—DeMarco v. Nassau County, 238 N.Y.S.2d 537, 18 A.D.2d 999.

- Gomillion v. State, 274 N.Y.S.2d 381, 51 Misc.2d 952.

- N.C.—Gillisple v. Goodyear Service Stores, 128 S.E.2d 762, 258 N.C. 487.

- Or.—Aiken v. Shell Oil Co., 348 P.2d 51, 219 Or. 523.

- R.I.—Clarke v. Sullivan, 205 A.2d 828, 99 R.I. 96, app. after remand, 235 A.2d 668, 103 R.I. 177.

- Tex.—Morris v. University of Tex., Civ.App., 348 S.W.2d 644, revd. on oth. grds., 352 S.W.2d 947, 163 Tex. 130, cert. den. 83 S.Ct. 511, 371 U.S. 953, 9 L.Ed.2d 503.

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39. Conclusions

- (4) Cal.—Muller v. Reagh, 30 Cal.Rptr. 633, 215 C.A.2d 831.

43. Ky.—Callihan v. Kirk, 419 S.W.2d 539.

44.5. Only affecting recovery

- (3) Other matters.

- Fla.—City of Miami v. Albro, App., 120 So.2d 23.

- 44.20. Ga.—J. C. Penney Co. v. Green, 132 S.E.2d 83, 108 Ga.App. 155.

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51. Ga.—Brown v. Colonial Stores, Inc. 138 S.E.2d 62, 110 Ga.App. 154.

52. Mo.—Trotter v. Sirinek, App., 515 S.W.2d 67.

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54. Ala.—Prince v. Bryant, 145 So.2d 837, 274 Ala. 134.

57. Ga.—Smith v. Embry, 119 S.E.2d 45, 103 Ga. App. 375.

60. R.I.—Clarke v. Sullivan, 205 A.2d 828, 99 R.I. 96, app. after remand 235 A.2d 668, 103 R.I. 177.

In California

- (1) Cal.—Muller v. Reagh, 30 Cal.Rptr. 633, 215 C.A.2d 831.

Pleading held insufficient

- Ga.—Mathews v. Murray, 113 S.E.2d 232, 101 Ga.App. 216.

Statement of damage by wrongful or unlawful detention held sufficient

- Ky.—Callihan v. Kirk, 419 S.W.2d 539.

61. Cal.—Whaley v. Jansen, 25 Cal.Rptr. 184, 208 C.A.2d 222.

- Pa.—Lokey v. Kinney, 57 Lanc.Rev. 491.

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- 62.10. Cal.—Muller v. Reagh, 30 Cal.Rptr. 633, 215 C.A.2d 831.

Decision no longer controlling

Because of changes in criminal procedure rules in Kentucky the case of Rosenberg v. Bax, 258 S.W.2d 458, cited to the text in the bound volume, is no longer controlling, and it is only necessary that plaintiff aver in concise and direct language that he was damaged by the wrongful or unlawful detention or imprisonment by defendant.

- Ky.—Callihan v. Kirk, 419 S.W.2d 539.

62.20. Decision no longer controlling

Because of changes in criminal procedure rules in Kentucky the case of Rosenberg v. Bax, 258 S.W.2d 458, cited to the text in the bound volume, is no longer controlling, and it is only necessary that plaintiff aver in concise and direct language that he was damaged by the wrongful or unlawful detention or imprisonment by defendant.

- Ky.—Callihan v. Kirk, 419 S.W.2d 539.

62.35. Decision no longer controlling

Because of changes in criminal procedure rules in Kentucky the case of Rosenberg v. Bax, 258 S.W.2d 458, cited in the bound volume, is no longer controlling, and it is only necessary that plaintiff aver in concise and direct language that he was damaged by the wrongful detention or imprisonment by defendant.

- Ky.—Callihan v. Kirk, 419 S.W.2d 539.

63. Cal.—Culbertson v. Santa Clara County, 67 Cal. Rptr. 752, 261 C.A.2d 274.

67. Iowa—Johannsen v. Stuart, 152 N.W.2d 202, 260 Iowa 1140.

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69. Complaints held insufficient

- (3) Other complaints.

- Cal.—Muller v. Reagh, 30 Cal.Rptr. 633, 215 C.A.2d 831.

- 69.5. U.S.—Motley v. Virginia Hardware & Mfg. Co., D.C.Va., 287 F.Supp. 790.

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70. Cal.—Herndon v. Marin County, 102 Cal.Rptr. 221, 25 C.A.3d 933.
 N.Y.—Ford v. State, 241 N.Y.S.2d 736, 19 A.D.2d 677.
 72.5. Cal.—Muller v. Reagh, 30 Cal.Rptr. 633, 215 C.A.2d 831.

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80. U.S.—Palmentere v. Campbell, C.A.Mo., 344 F.2d 234.

Confinement in insane asylum

- (3) Other instances.
 U.S.—Hellebrand v. Hoctor, D.C.Mo., 222 F.Supp. 81, aff'd., C.A., 331 F.2d 453.
 La.—Burns v. Genovese, 223 So.2d 160, 254 La. 237.

Allegations held sufficient

- (1) N.M.—Balizer v. Shaver, App., 481 P.2d 709, 82 N.M. 347.
 (4) Other allegations.
 N.Y.—Pearson v. Pearson, 212 N.Y.S.2d 281, 29 Misc.2d 677.

Allegations held insufficient

- (4) Other allegations.
 Cal.—Whaley v. Jansen, 25 Cal.Rptr. 184, 208 C.A.2d 222—Vivell v. City of Belmont, 78 Cal.Rptr. 841, 274 C.A.2d 38.
 Ill.—Dear v. Locke, 262 N.E.2d 127, 218 Ill.App.2d 356.

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83. Allegations held insufficient

- N.M.—Balizer v. Shaver, App., 481 P.2d 709, 82 N.M. 347.

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90. D.C.—Clarke v. District of Columbia, App., 311 A.2d 508.
 N.Y.—Guzy v. Guzy, 184 N.Y.S.2d 161, 16 Misc.2d 905, aff'd. 206 N.Y.S.2d 355, 11 A.D.2d 1047.
 91. Necessity of allegation of extrinsic fraud to avoid effect of conviction.
 Mich.—Arnold v. Jarvis, 116 N.W.2d 38, 367 Mich. 59.

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4. N.Y.—Tranberg v. Nassau County, 209 N.Y.S.2d 995.
 5. N.Y.—Tranberg v. Nassau County, 209 N.Y.S.2d 995.
 7. N.Y.—Tranberg v. Nassau County, 209 N.Y.S.2d 995.

§ 52. Plea or Answer

16. R.I.—Clarke v. Sullivan, 194 A.2d 831, 96 R.I. 511.

Justification may be raised in answer

- Ky.—Callihan v. Kirk, 419 S.W.2d 539.

A defense based on a statute enacted after the false arrest occurred is properly stricken as the statute is inapplicable thereto.^{19.5}

- 19.5. N.Y.—Bandel v. R. H. Macy's & Co., 222 N.Y.S.2d 37.

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22. Ill.—Campbell v. Kaczmarek, 350 N.E.2d 97, 39 Ill.App.3d 465.
 Mo.—Vanneman v. W. T. Grant Co., 351 S.W.2d 729.
 Nev.—Marshall v. City of Carson, 464 P.2d 494, 86 Nev. 107.

Plea or answer held sufficient

- (3) Other pleas or answers.
 Mo.—Bond v. Wabash R. Co., 363 S.W.2d 1.

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33. Mo.—Wehrman v. Liberty Petroleum Co., App., 382 S.W.2d 56.
 35. Mo.—Nelson v. R. H. Macy & Co., App., 434 S.W.2d 767.

Pleading held sufficient

- S.C.—Thomas v. Colonial Stores, Inc., 113 S.E.2d 337, 236 S.C. 95.
 36. R.I.—Ahern v. Lynch, 207 A.2d 296, 99 R.I. 316.
 36.5. N.Y.—Versosa v. City of New York, 194 N.Y.S.2d 5, 22 Misc.2d 597.
 39. N.Y.—Millea v. City of New York, 204 N.Y.S.2d 260, 25 Misc.2d 369.

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48. N.Y.—Versosa v. City of New York, 194 N.Y.S.2d 5, 22 Misc.2d 597.

§ 54. Issues, Proof, and Variance

55. Mo.—Bond v. Wabash R. Co., 363 S.W.2d 1.
 R.I.—Cioci v. Santos, 207 A.2d 300, 99 R.I. 308.
 57. Mo.—Nelson v. R. H. Macy & Co., App., 434 S.W.2d 767.
 Nev.—Marshall v. City of Carson, 464 P.2d 494, 86 Nev. 107.
 N.Y.—Broughton v. State, 335 N.E.2d 310, 37 N.Y.2d 451, 373 N.Y.S.2d 87, cert. den. 96 S.Ct. 277, 423 U.S. 929, 46 L.Ed.2d 257.

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58. Or.—Kraft v. Montgomery Ward & Co., 348 P.2d 239, 220 Or. 230, 92 A.L.R.2d 1.
 59. Right to arrest immaterial in absence of arrest
 Miss.—State for Use of Powell v. Moore, 174 So.2d 352, 252 Miss. 471.
 60. Kan.—Thompson v. General Finance Co., 468 P.2d 269, 205 Kan. 76.
 61. Ky.—Consolidated Sales Co. v. Malone, 530 S.W.2d 680.
 61.10. Ind.—Coleman v. Mitnick, 202 N.E.2d 577, 137 Ind.App. 125, 16 A.L.R.3d 527, reh. den. 203 N.E.2d 834, 137 Ind.App. 125.
 63. D.C.—Clarke v. District of Columbia, App., 311 A.2d 508.
 66. U.S.—Skelton v. W. T. Grant Co., D.C.Ga., 229 F.Supp. 430, rev'd. 331 F.2d 593, cert. den. 85 S.Ct. 61, 379 U.S. 830, 13 L.Ed.2d 39.
 N.Y.—Woodson v. New York City Housing Authority, 217 N.Y.S.2d 31, 10 N.Y.2d 30, 176 N.E.2d 57.

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67. R.I.—Barth v. Flad, 208 A.2d 533, 99 R.I. 446.

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84. Ark.—Wells v. Adams, 340 S.W.2d 572, 232 Ark. 873.
 88. Md.—Benjamin v. State, 264 A.2d 490, 9 Md. App. 373.

§ 55. Presumptions and Burden of Proof

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97. Ohio—Garland v. Dustman, App., 251 N.E.2d 153, 19 Ohio App.2d 292.
 97.5. Cal.—Maben v. Rankin, 10 Cal.Rptr. 353, 358 P.2d 681, 55 C.2d 139.
 Prima facie case
 Vt.—Thurston v. Leno, 204 A.2d 106, 124 Vt. 298.
 99. Fla.—City of Hollywood v. Coley, App., 258 So.2d 828.
 Miss.—State for Use of Powell v. Moore, 174 So.2d 352, 252 Miss. 471.
 N.J.—Cooke v. J. J. Newberry & Co., 232 A.2d 425, 96 N.J.Super. 9.

99.5. Delay in taking before magistrate

- Mont.—Rounds v. Bucher, 349 P.2d 1026, 137 Mont. 39, 98 A.L.R.2d 962.

1. U.S.—Palmentere v. Campbell, C.A.Mo., 344 F.2d 234.
 Mo.—Davis v. Weil Clothing Co., App., 367 S.W.2d 19.

Causing arrest

(2) Other matters.

- U.S.—Lieberman v. Gulf Oil Corp., C.A.N.Y., 331 F.2d 160.

Proof that defendant ordered or directed arrest not required

- Mo.—Wehrman v. Liberty Petroleum Co., App., 382 S.W.2d 56.

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- 3.10. Mich.—Bridgman v. Bunker, 162 N.W.2d 310, 12 Mich.App. 44.

Presumption as to probable cause

- N.Y.—Broughton v. State, 335 N.E.2d 310, 37 N.Y.2d 451, 373 N.Y.S.2d 87, cert. den. 96 S.Ct. 277, 423 U.S. 929, 46 L.Ed.2d 257.

- 3.15. Cal.—Bulkeley v. Klein, 23 Cal.Rptr. 855, 206 C.A.2d 742.

- 3.20. U.S.—Taylor v. McDonald, D.C.Tex., 346 F.Supp. 390.

- 3.25. Mo.—Wehrman v. Liberty Petroleum Co., App., 382 S.W.2d 56.

- N.Y.—Baisch v. State, 351 N.Y.S.2d 617, 76 Misc.2d 1006.

- 3.30. Nev.—Marshall v. City of Carson, 464 P.2d 494, 86 Nev. 107.

- Ohio—Isaiah v. Great Atlantic & Pacific Tea Co., 174 N.E.2d 128, 111 Ohio App. 537, 86 A.L.R.2d 430.

4. N.Y.—Woodson v. New York City Housing Authority, 217 N.Y.S.2d 31, 10 N.Y.2d 30, 176 N.E.2d 57.

- Ohio—Isaiah v. Great Atlantic & Pacific Tea Co., 174 N.E.2d 128, 111 Ohio App. 537, 86 A.L.R.2d 430.

- 4.15. D.C.—C.J.S. cited in Dellums v. Powell, C.A., 566 F.2d 167, 176, 184 U.S.App.D.C. 275, cert. den. 98 S.Ct. 3146, 438 U.S. 916, 57 L.Ed.2d 1161, reh. den. 99 S.Ct. 234, 439 U.S. 886, 58 L.Ed.2d 201, on remand, D.C., 490 F.Supp. 70, aff'd. in part, rev'd. in part on oth. grds., C.A., 660 F.2d 802, 212 U.S.App.D.C. 403.
 Clarke v. District of Columbia, App., 311 A.2d 508.

- N.Y.—Smith v. Nassau County, 311 N.E.2d 489, 34 N.Y.2d 18, 355 N.Y.S.2d 349—Broughton v. State, 335 N.E.2d 310, 37 N.Y.2d 451, 373 N.Y.S.2d 87, cert. den. 96 S.Ct. 277, 423 U.S. 929, 46 L.Ed.2d 257.

5. U.S.—Pritchard v. Perry, C.A.S.C., 508 F.2d 423.
 Ark.—Pettijohn v. Smith, 502 S.W.2d 618, 255 Ark. 780.

- Cal.—Cervantez v. J. C. Penney Co., Inc., 156 Cal.Rptr. 198, 595 P.2d 975, 24 C.3d 579, disapproving Whaley v. Kirby, 25 Cal.Rptr. 50, and Wilson v. County of Los Angeles, 98 Cal.Rptr. 525, to the extent they are inconsistent.

- Ky.—Consolidated Sales Co. v. Malone, 530 S.W.2d 680.

- Mass.—Beaumont v. Segal, 283 N.E.2d 858, 362 Mass. 30.

- Miss.—J. C. Penney Co. v. Cox, 148 So.2d 679, 246 Miss. 1.

- Mo.—Parrott v. Reis, App., 441 S.W.2d 390.

- N.Y.—Woodson v. New York City Housing Authority, 217 N.Y.S.2d 31, 10 N.Y.2d 30, 176 N.E.2d 57—Broughton v. State, 335 N.E.2d 310, 37 N.Y.2d 451, 373 N.Y.S.2d 87, cert. den. 96 S.Ct. 277, 423 U.S. 929, 46 L.Ed.2d 257.

- DeBonis v. State, 325 N.Y.S.2d 215, 37 A.D.2d 878.

- Tranberg v. Nassau County, 209 N.Y.S.2d 995, 28 Misc.2d 275—Caminito v. City of New York, 256 N.Y.S.2d 670, 45 Misc.2d 241—Pawloski v. State, 258 N.Y.S.2d 258, 45 Misc.2d 933—Tota v. Alexander's, 314 N.Y.S.2d 93, 63 Misc.2d 908.

- Ohio—Isaiah v. Great Atlantic & Pacific Tea Co., 174 N.E.2d 128, 111 Ohio App. 537, 86 A.L.R.2d 430.

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- 5.5. Mo.—Wehrman v. Liberty Petroleum Co., App., 382 S.W.2d 56.

5.10. U.S.—C.J.S. cited in *Martin v. Duffie*, 463 F.2d 464, 468.

D.C.—Clarke v. District of Columbia, App., 311 A.2d 508.

N.Y.—Awad v. Universal Coconut Corp., 234 N.Y.S.2d 652, 27 Misc.2d 208, 211—Baisch v. State, 351 N.Y.S.2d 617, 76 Misc.2d 1006.

Ohio—Isaiah v. Great Atlantic & Pacific Tea Co., 174 N.E.2d 128, 111 Ohio App. 537, 86 A.L.R.2d 430.

Or.—Pearson v. Galvin, 454 P.2d 638, 253 Or. 331.

5.15. Mo.—Parrott v. Reis, App., 441 S.W.2d 390. N.Y.—Pawloski v. State, 258 N.Y.S.2d 258, 45 Misc.2d 933.

5.20. Ill.—McKendree v. Christy, 172 N.E.2d 380, 29 Ill.App.2d 195.

N.Y.—Pawloski v. State, 258 N.Y.S.2d 258, 45 Misc.2d 933.

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7. W.Va.—City of McMechen ex rel. Willey v. Fidelity & Cas. Co. of N.Y., 116 S.E.2d 388, 145 W.Va. 660.

8. Mich.—Stowers v. Ardmore Acres Hospital, 172 N.W.2d 497, 19 Mich.App. 115, affd. 191 N.W.2d 355, 386 Mich. 119.

N.Y.—Barnes v. Bollhorst, 215 N.Y.S.2d 348, 28 Misc.2d 866, affd. 219 N.Y.S.2d 916, 14 A.D.2d 774.

10. Tex.—C.J.S. cited in *Tandy Corp. v. McGregor*, Civ.App., 527 S.W.2d 246, 248, err. ref. no rev. err.

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13.10. Kan.—Thompson v. General Finance Co., 468 P.2d 269, 205 Kan. 76.

Necessity where imprisonment incident to malicious prosecution

Ill.—Vasquez v. Jacobs, 163 N.E.2d 730, 23 Ill.App.2d 457.

14. Ky.—Consolidated Sales Co. v. Malone, 530 S.W.2d 680.

§ 56. Admissibility of Evidence

15. Or.—Vandermeer v. Pacific Northwest Development Corp., 545 P.2d 868, 274 Or. 221.

Evidence held irrelevant

(10) Other evidence.

U.S.—Pierson v. Ray, C.A.Miss., 352 F.2d 213, affd. in part, revd. in part on oth. grds. 87 S.Ct. 1213, 386 U.S. 547, 18 L.Ed.2d 288.

Alaska—Hash v. Hogan, 453 P.2d 468.

Or.—Pearson v. Galvin, 454 P.2d 638, 253 Or. 331.

Publicity given to charge against plaintiff

(1) Newspaper picture and article held admissible. Ind.—Coleman v. Mitnick, 202 N.E.2d 577, 137 Ind. App. 125, 16 A.L.R.3d 527, reh. den. 203 N.E.2d 834, 137 Ind.App. 125.

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20. Cal.—Beauregard v. Wingard, 47 Cal.Rptr. 279, 237 C.A.2d 760, 15 A.L.R.3d 955.

21. Evidence held inadmissible

U.S.—Pierson v. Ray, 352 F.2d 213, affd. in part, revd. in part on oth. grds. 87 S.Ct. 1213, 386 U.S. 547, 18 L.Ed.2d 288.

22. Mo.—Vanneman v. W. T. Grant Co., 351 S.W.2d 729.

Wis.—Carson v. Pape, 112 N.W.2d 693, 15 Wis.2d 300.

23. N.Y.—Siegel v. City of New York, 351 N.Y.S.2d 394, 43 A.D.2d 271.

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25. Held admissible

(5) Other evidence.

Mo.—Manson v. Wabash R. Co., 338 S.W.2d 54.

28. Idaho—Sima v. Skaggs Payless Drug Center, Inc., 353 P.2d 1085, 82 Idaho 387.

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32. Capias for arrest of another person held inadmissible

Miss.—State for Use of Powell v. Moore, 174 So.2d 352, 252 Miss. 471.

43. Tex.—State v. Vargas, 424 S.W.2d 416.

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45. N.J.—C.J.S. cited in *Price v. Phillips*, 218 A.2d 167, 170, 90 N.J.Super. 480.

48. Ga.—Ross v. Rich's, Inc., 201 S.E.2d 159, 129 Ga.App. 716.

52. N.J.—C.J.S. cited in *Price v. Phillips*, 218 A.2d 167, 170, 90 N.J.Super. 480.

N.Y.—Krafft v. State, 275 N.Y.S.2d 109, 52 Misc.2d 35.

53. Okl.—Doyle v. Douglas, 390 P.2d 871.

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54. Evidence of bad reputation

(2) Other matters.

N.J.—Price v. Phillips, 218 A.2d 167, 90 N.J.Super. 480.

54.5. N.J.—C.J.S. cited in *Price v. Phillips*, 218 A.2d 167, 170, 90 N.J.Super. 480.

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57. Evidence held admissible

(3) Other evidence.

Wis.—Lane v. Collins, 138 N.W.2d 264, 29 Wis.2d 66.

59. Wis.—Meke v. Nicol, 203 N.W.2d 129, 56 Wis.2d 654.

60. U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420.

Or.—Vandermeer v. Pacific Northwest Development Corp., 545 P.2d 868, 274 Or. 221.

Wis.—Lane v. Collins, 138 N.W.2d 264, 29 Wis.2d 66—Strong v. City of Milwaukee, 157 N.W.2d 619, 38 Wis.2d 564.

61. U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420.

N.J.—C.J.S. cited in *Price v. Phillips*, 218 A.2d 167, 170, 90 N.J.Super. 480.

Or.—McNeff v. Heider, 337 P.2d 819, 216 Or. 583, reh. den. 340 P.2d 180, 216 Or. 583.

Basis for arrest

(2) Other matters.

Ark.—Wells v. Adams, 340 S.W.2d 572, 232 Ark. 873.

61.10. U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420.

65. Or.—Vandermeer v. Pacific Northwest Development Corp., 545 P.2d 868, 274 Or. 221.

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66. U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420.

70.10. Va.—Zayre v. Va., Inc. v. Gowdy, 147 S.E.2d 710, 207 Va. 47.

71. Mo.—Bond v. Wabash R. Co., 363 S.W.2d 1. N.Y.—Siegel v. City of New York, 351 N.Y.S.2d 394, 43 A.D.2d 271.

Okl.—Doyle v. Douglas, 390 P.2d 871.

R.I.—Barth v. Flad, 208 A.2d 533, 99 R.I. 446.

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77. W.Va.—Winters v. Campbell, 137 S.E.2d 188, 148 W.Va. 710.

Evidence held admissible

(7) Other evidence.

Or.—Krafft v. Montgomery Ward & Co., 348 P.2d 239, 220 Or. 230, 92 A.L.R.2d 1—Utley v. City of Independence, 402 P.2d 91, 240 Or. 384.

Mental and physical suffering

(1) Ala.—Super X Drugs of Alabama, Inc. v. Martz, Civ., 286 So.2d 47, 51 Ala.App. 370.

N.Y.—Chirieleison v. City of New York, 373 N.Y.S.2d 361, 49 A.D.2d 873.

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77.10. Or.—McNeff v. Heider, 337 P.2d 819, 216 Or. 583, reh. den. 340 P.2d 180, 216 Or. 583.

77.15. U.S.—National Food Stores, Inc. v. Utley, C.A.Ark., 303 F.2d 284.

Or.—Dabbling v. Beck, 474 P.2d 322, 256 Or. 355.

Evidence held inadmissible

Wis.—Meke v. Nicol, 203 N.W.2d 129, 56 Wis.2d 654.

78. U.S.—McWilliams v. Interstate Bakeries, Inc., C.A.Ga., 439 F.2d 16.

Md.—Great Atlantic & Pac. Tea Co. v. Paul, 261 A.2d 731, 256 Md. 643.

Evidence held admissible

(3) Other evidence.

N.J.—Price v. Phillips, 218 A.2d 167, 90 N.J.Super. 480.

78.5. Ky.—Allen v. Vogue Amusement Co., 377 S.W.2d 805.

§ 57. Weight and Sufficiency of Evidence

80. Md.—Fine v. Kolodny, 284 A.2d 409, 263 Md. 647, cert. den. 92 S.Ct. 1803, 406 U.S. 928, 32 L.Ed.2d 129.

81.5. N.Y.—Dixon v. State, 290 N.Y.S.2d 682, 30 A.D.2d 626.

81.10. Mo.—Knapp v. Esslinger, App., 363 S.W.2d 210.

Neb.—Jensen v. Barnett, 134 N.W.2d 53, 178 Neb. 429.

Evidence insufficient

Fla.—Toomey v. Tolin, App., 311 So.2d 678.

81.15. Mo.—Wehrman v. Liberty Petroleum Co., App., 382 S.W.2d 56.

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82. Tenn.—McInturf v. White, 565 S.W.2d 478. Tex.—State v. Vargas, Civ.App., 419 S.W.2d 426, err. ref. no rev. err. 424 S.W.2d 416.

Evidence held sufficient

(1) U.S.—Whitree v. State, 290 N.Y.S.2d 486, 56 Misc.2d 693.

Rue v. Snyder, D.C.Tenn., 249 F.Supp. 740.

Fla.—City of Miami Beach v. Bretagna, App., 190 So.2d 364, 21 A.L.R.3d 1064—Washington County Kennel Club, Inc. v. Edge, App., 216 So.2d 512—Hill v. Hill, App., 388 So.2d 625, approved, Sup., 415 So.2d 20.

Ga.—Lowe v. Turner, 154 S.E.2d 792, 115 Ga.App. 503.

Md.—D.C. Transit System, Inc. v. Brooks, 287 A.2d 251, 264 Md. 578.

Tex.—Skillern & Sons, Inc. v. Stewart, Civ.App., 379 S.W.2d 687, err. ref. no rev. err.—Lubbock Bail Bond v. Joshua, Civ.App., 416 S.W.2d 523—Big Town Nursing Home, Inc. v. Newman, Civ.App., 461 S.W.2d 195—Levine v. Enlow, Civ.App., 462 S.W.2d 50.

Wash.—Neff v. United Pac. Ins. Co., 364 P.2d 515, 58 Wash.2d 618—Tuft v. City of Tacoma, 431 P.2d 183, 71 Wash.2d 866.

(2) Ga.—Greenbaum v. Brooks, 139 S.E.2d 432, 110 Ga.App. 661.

Evidence held insufficient

(1) U.S.—Meeker v. Rizley, C.A.Okl., 346 F.2d 521. Iowa—Johannsen v. Steuart, 152 N.W.2d 202, 260 Iowa 1140.

Pa.—Painter v. Baronner, 47 West. 111.

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83. Evidence held sufficient

U.S.—Marx v. Hartford Acc. & Indem. Co., C.A.La., 321 F.2d 70.

Cal.—Jaques v. Firestone Tire & Rubber Co., 6 Cal. Rptr. 878, 183 C.A.2d 632.

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Nev.—Lerner Shops of Nev., Inc. v. Marin, 423 P.2d 398, 83 Nev. 75.

84. Evidence held sufficient

Nev.—Marshall v. City of Carson, 464 P.2d 494, 86 Nev. 107.

84.5. Evidence held sufficient

U.S.—Rue v. Snyder, D.C.Tenn., 249 F.Supp. 740.
Ga.—Greenbaum v. Brooks, 139 S.E.2d 432, 110 Ga. App. 661.

Mich.—Dixon v. Shiner, 163 N.W.2d 481, 12 Mich. App. 573.

Tex.—J. C. Penney Co. v. Doran, Civ.App., 479 S.W.2d 374, err. ref. no rev. err.

Utah—State v. Pass, 515 P.2d 612, 30 Utah2d 197.

Evidence held insufficient

U.S.—Czap v. Marshall, C.A.Wis., 315 F.2d 766, cert. den. 84 S.Ct. 348, 375 U.S. 942, 11 L.Ed.2d 273.

N.Y.—Schildhaus v. City of New York, 261 N.Y.S.2d 909, 23 A.D.2d 409, affd. 218 N.E.2d 325, 17 N.Y.2d 853, 271 N.Y.S.2d 286, cert. den. 87 S.Ct. 222, 385 U.S. 906, 17 L.Ed.2d 137.

N.C.—Black v. Clark's Greensboro, Inc., 139 S.E.2d 199, 263 N.C. 226.

Tex.—J. C. Penney Co. v. Romero, Civ.App., 318 S.W.2d 129, err. ref. no rev. err.

85. Evidence held sufficient

(1) N.Y.—Montanaro v. State, 253 N.Y.S.2d 833, 44 Misc.2d 533, affd. 290 N.Y.S.2d 189, 29 A.D.2d 916—Tota v. Alexander's, 314 N.Y.S.2d 93, 63 Misc.2d 908.

(4) Nev.—Marshall v. City of Carson, 464 P.2d 494, 86 Nev. 107.

(5) Ariz.—Boies v. Raynor, 361 P.2d 1 89 Ariz. 257.

Evidence held insufficient

Mich.—Dixon v. Shiner, 163 N.W.2d 481, 12 Mich. App. 573.

Miss.—Fuller v. Sloan, 230 So.2d 574.

N.Y.—Young v. State, 336 N.Y.S.2d 470, 40 A.D.2d 730.

Pawloski v. State, 258 N.Y.S.2d 258, 45 Misc.2d 933.

N.C.—Black v. Clark's Greensboro, Inc., 139 S.E.2d 199, 263 N.C. 226.

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85.10. Evidence held sufficient

W.Va.—City of McMechen ex rel. Wiley v. Fidelity & Cas. Co. of N.Y., 116 S.E.2d 388, 145 W.Va. 660.

Lack of care in arresting person not named in warrant

Tenn.—State ex rel. Anderson v. Evatt, 471 S.W.2d 949, 63 Tenn.App. 322.

85.15. Evidence held sufficient

Tex.—Bell v. Spraggins, Civ.App., 372 S.W.2d 740, err. ref. no rev. err.

86. Evidence held sufficient

(1) Ariz.—Boies v. Raynor, 361 P.2d 1, 89 Ariz. 257.
Ga.—Greenbaum v. Brooks, 139 S.E.2d 432, 110 Ga. App. 661.

Kan.—Thompson v. General Finance Co., 468 P.2d 269, 205 Kan. 76.

Mo.—Knapp v. Esslinger, App., 363 S.W.2d 210.

Neb.—Jensen v. Barnett, 134 N.W.2d 53, 178 Neb. 429.

Or.—McNeff v. Heider, 337 P.2d 819, 216 Or. 583, reh. den. 340 P.2d 180, 216 Or. 583.

(3) To show defendant not responsible for arrest.
U.S.—Palmentere v. Campbell, C.A.Mo., 344 F.2d 234.

Evidence held insufficient

(1) Tex.—J. C. Penney Co. v. Reynolds, Civ.App., 329 S.W.2d 104, err. ref. no rev. err.—S.S. Kresge Co. v. Prescott, Civ.App., 435 S.W.2d 203, err. ref. no rev. err.

87. Evidence held sufficient

Ind.—Brickman v. Robertson Bros. Dept. Store, 202 N.E.2d 583, 136 Ind.App. 467.

N.C.—Black v. Clark's Greensboro, Inc., 139 S.E.2d 199, 263 N.C. 226.

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87.5. Evidence held sufficient

(1) Ill.—Alvarez v. Reynolds, 181 N.E.2d 616, 35 Ill.App.2d 54.

87.10. Evidence held sufficient

(1) U.S.—Great Atlantic & Pacific Tea Co. v. Lethcoe, C.A.W.Va., 279 F.2d 948.

N.Y.—Snyder v. State, 247 N.Y.S.2d 757, 20 A.D.2d 827.

Evidence held insufficient

Fla.—City of Miami v. Crouch, App., 249 So.2d 739.

N.Y.—Schildhaus v. City of New York, 195 N.Y.S.2d 402, 10 A.D.2d 566, affd. 209 N.Y.S.2d 787, 8 N.Y.2d 1108, 171 N.E.2d 874—Snyder v. State, 247 N.Y.S.2d 757, 20 A.D.2d 827—Dennison v. State, 280 N.Y.S.2d 31, 28 A.D.2d 608, affd. 246 N.E.2d 760, 23 N.Y.2d 996, 298 N.Y.S.2d 1002, am. on oth. grds. 252 N.E.2d 130, 25 N.Y.2d 904, 304 N.Y.S.2d 596, cert. den. 90 S.Ct. 922, 397 U.S. 923, 25 L.Ed.2d 103.

(2) Other evidence.

Wis.—Dupler v. Seubert, 230 N.W.2d 626, 69 Wis.2d 373.

87.15. Evidence held sufficient

U.S.—Jeffcoat v. K-Mart Discount Stores, C.A.S.C., 439 F.2d 713.

D.C.—Safeway Trails, Inc. v. Schmidt, App., 225 A.2d 317.

Wyo.—Waters v. Brand, 497 P.2d 875.

Evidence held insufficient

Fla.—Grand Union Super Markets, Inc. v. De Aquinos, App., 135 So.2d 754.

N.Y.—Murray v. Long Island R. Co., 313 N.Y.S.2d 610, 35 A.D.2d 579, affd. 271 N.E.2d 227, 28 N.Y.2d 849, 322 N.Y.S.2d 248.

Tex.—S.S. Kresge Co. v. Prescott, Civ.App., 435 S.W.2d 203, err. ref. no rev. err.

88. Evidence held sufficient

(1) U.S.—Pierson v. Ray, C.A.Miss., 352 F.2d 213, affd. in part, revd. in part on oth. grds. 87 S.Ct. 1213, 386 U.S. 547, 18 L.Ed.2d 288.

Ariz.—Boies v. Raynor, 361 P.2d 1, 89 Ariz. 257.

Cal.—Gorlack v. Ferrari, 7 Cal.Rptr. 699, 184 C.A.2d 702.

Miss.—State for Use of Powell v. Moore, 174 So.2d 352, 252 Miss. 471.

N.Y.—Montanaro v. State, 253 N.Y.S.2d 833, 44 Misc.2d 533, affd. 290 N.Y.S.2d 189, 29 A.D.2d 916—Broughton v. City of New York, 398 N.Y.S.2d 397, 91 Misc.2d 543, app. dism. 408 N.Y.S.2d 186, 95 Misc.2d 807.

Or.—Lukas v. J. C. Penney Co., 378 P.2d 717, 233 Or. 345.

Tex.—Reid v. Nortex Const. Co., Civ.App., 366 S.W.2d 870, err. ref. no rev. err.—State v. Vargas, Civ. App., 419 S.W.2d 926, err. ref. no rev. err. 424 S.W.2d 416—Castaneda v. J. C. Penney, Inc., Civ. App., 438 S.W.2d 938, err. ref. no rev. err.

Vt.—Thurston v. Leno, 204 A.2d 106, 124 Vt. 298.

(5) Cal.—Gorlack v. Ferrari, 7 Cal.Rptr. 699, 184 C.A.2d 702.

Evidence held insufficient

(1) Conn.—Zanks v. Fluckiger, 171 A.2d 86, 22 Conn.Supp. 311.

Fla.—City of Hollywood v. Coley, App., 258 So.2d 828.

Mo.—Quinn v. Rosenberg, App., 399 S.W.2d 433.

N.Y.—Lesser v. State, 275 N.Y.S.2d 685, 27 A.D.2d 642.

Halberstadt v. Nelson, 226 N.Y.S.2d 100, 34 Misc.2d 472.

Or.—Roberts v. Coleman, 365 P.2d 79, 228 Or. 286.

Medical testimony required to show aggravation of mental disability

Ohio—Culp v. Federated Dept. Stores, Inc., 229 N.E.2d 100, 11 Ohio App.2d 165.

Abuse and excessive force

Colo.—Austin v. Rivera, App., 472 P.2d 747.

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89. Innocence not established by dismissal at close of prosecution's evidence.

N.Y.—Barnes v. Bollhorst, 215 N.Y.S.2d 348, 28 Misc.2d 866, affd. 219 N.Y.S.2d 916, 14 A.D.2d 774.

93. Conviction after admissions in court

U.S.—Hampton v. De Blaay, C.A.Mich., 258 F.2d 790, cert. den. 79 S.Ct. 76, 358 U.S. 850, 3 L.Ed.2d 83, reh. den. 79 S.Ct. 591, 359 U.S. 922, 3 L.Ed.2d 584.

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95. N.Y.—Langley v. City of New York, 337 N.Y.S.2d 460, 40 A.D.2d 844, affd. 316 N.E.2d 716, 34 N.Y.2d 885, 359 N.Y.S.2d 281—Vennard v. Sunnyside Sav. and Loan Ass'n 354 N.Y.S.2d 446, 44 A.D.2d 727.

Barnes v. Bollhorst, 215 N.Y.S.2d 348, 28 Misc.2d 866, affd. 219 N.Y.S.2d 916, 14 A.D.2d 774.

96. N.Y.—Langley v. City of New York, 337 N.Y.S.2d 460, 40 A.D.2d 844, affd. 316 N.E.2d 716, 34 N.Y.2d 885, 359 N.Y.S.2d 281.

3. Tenn.—McLaughlin v. Smith, App., 412 S.W.2d 21, 56 Tenn.App. 715.

Legal and actual malice

Va.—F.B.C. Stores, Inc. v. Duncan, 198 S.E.2d 595, 214 Va. 246.

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6. Evidence held sufficient

(1) Minn.—Olson v. Rogers, 210 N.W.2d 232, 297 Minn. 506.

Tenn.—McLaughlin v. Smith, App., 412 S.W.2d 21, 56 Tenn.App. 715.

Tex.—Skillern & Sons, Inc. v. Stewart, Civ.App., 379 S.W.2d 687, err. ref. no rev. err.

Evidence held insufficient

N.Y.—Krafft v. State, 275 N.Y.S.2d 109, 52 Misc.2d 35.

7. Cal.—Shakespeare v. Zervos, App., 68 Cal.Rptr. 481, 262 C.A.2d 171, cert. den. 89 S.Ct. 1186, 394 U.S. 319, 22 L.Ed.2d 306.

Evidence held sufficient

(1) Cal.—Gorlack v. Ferrari, 7 Cal.Rptr. 699, 184 C.A.2d 702.

La.—Wells v. Gaspard, App., 129 So.2d 245.

Okla.—James v. Southwestern Ins. Co., 354 P.2d 408—Doyle v. Douglas, 390 P.2d 871.

Wash.—Tufte v. City of Tacoma, 431 P.2d 183, 71 Wash.2d 866.

(4) To show no reasonable cause.

N.M.—Stienbaugh v. Payless Drug Store, Inc., 401 P.2d 101, 75 N.M. 118.

Quantum of proof required

U.S.—Pritchard v. Downie, C.A.Ark., 326 F.2d 323.

8. Pa.—Mercurio v. Seven-Eleven Food Stores, 16 Bucks 169.

Evidence held sufficient

(1) Ill.—Vasquez v. Jacobs, 163 N.E.2d 230, 23 Ill. App.2d 157.

Mass.—Coblyn v. Kennedy's, Inc., 268 N.E.2d 860, 359 Mass. 319, 47 A.L.R.3d 991.

N.Y.—Barnes v. Bollhorst, 225 N.Y.S.2d 286.

Tenn.—McLaughlin v. Smith, App., 412 S.W.2d 21, 56 Tenn.App. 715.

Evidence held insufficient

N.Y.—Stearns v. New York City Transit Authority, 200 N.Y.S.2d 272, 24 Misc.2d 216, affd. 209 N.Y.S.2d 264, 12 A.D.2d 451.

§ 58. Trial

9.50. Argument of counsel held not improper
Mo.—Wisner v. S.S. Kresge Co., App., 465 S.W.2d 666.

§ 59. — Questions of Law and Fact

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13. Fla.—Joseph v. Jefferson Stores, App., 228 So.2d 103.
Ga.—Seligman & Latz of Atlanta, Inc. v. Grant, 158 S.E.2d 483, 116 Ga.App. 539.
N.Y.—Dunn v. City of New York, 257 N.Y.S.2d 29, 23 A.D.2d 660.
Or.—Dabbling v. Beck, 474 P.2d 322, 256 Or. 355.

Particular questions held for jury

(13) Other questions.

- U.S.—Aley v. Great Atlantic & Pacific Tea Co., D.C. Mo., 211 F.Supp. 500.
Ala.—Daniel v. Hodges, 125 So.2d 726, 41 Ala.App. 119, cert. den. 125 So.2d 729, 271 Ala. 698.
Cal.—Beauregard v. Wingard, 47 Cal.Rptr. 279, 237 C.A.2d 760, 15 A.L.R.3d 955.
Colo.—Gilmer v. Playboy Club of Denver, Inc., App., 513 P.2d 1065.
Fla.—City Stores Co. v. Mazzaferro, App., 342 So.2d 827.
Ind.—Coleman v. Mitnick, 202 N.E.2d 577, 137 Ind. App. 125, 16 A.L.R.3d 527, reh. den. 203 N.E.2d 834, 137 Ind.App. 125.
Mich.—Nash v. Sears, Roebuck & Co., 174 N.W.2d 818, 383 Mich. 136.
Tenn.—Travelers Indem. Co. v. Hoard, 340 S.W.2d 260, 47 Tenn.App. 565.
Wis.—Lane v. Collins, 138 N.W.2d 264, 29 Wis.2d 66.

Evidence held to require submission to jury

- Md.—Montgomery Ward & Co., Inc. v. Cliser, 298 A.2d 16, 267 Md. 406.
W.Va.—State for Use and Benefit of Morris v. Mills, 203 S.E.2d 362, 157 W.Va. 674.
Newton v. Spence, 316 A.2d 837, 20 Md.App. 126.

Miss.—Allen v. Ritter, 235 So.2d 253.

Mo.—Librach v. Litzinger, 401 S.W.2d 433.

Gerald v. Caterers, Inc., App., 382 S.W.2d 740.
Neb.—Herbrick v. Samardick & Co., 101 N.W.2d 488, 169 Neb. 833.

Ohio—Smith v. Bodle, App., 257 N.E.2d 417, 22 Ohio App.2d 44.

Okla.—Stiles v. Albee, 377 P.2d 590.

Utah—Mildon v. Bybee, 375 P.2d 458, 13 Utah2d 400.

Vt.—Thurston v. Leno, 204 A.2d 106, 124 Vt. 298.

Evidence held insufficient to go to jury

(1) Ky.—Grayson Variety Store, Inc. v. Shaffer, 402 S.W.2d 424.

Mich.—Bonkowski v. Arian's Dept. Store, 174 N.W.2d 765, 383 Mich. 90.

Okla.—Thompson v. Pollock, 350 P.2d 274.

W.Va.—State ex rel. Sovine v. Stone, 140 S.E.2d 801, 149 W.Va. 310.

Question considered one of fact

Ark.—Dillard Dept. Stores, Inc. v. Stuckey, 511 S.W.2d 154, 256 Ark. 881.

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14. Existence of false imprisonment as mixed question of law and fact

Ohio—Bronaugh v. Harding Hospital, Inc., 231 N.E.2d 487, 12 Ohio App.2d 110.

15. Ind.—C.J.S. cited in Crase v. Highland Village Value Plus Pharmacy, 374 N.E.2d 58, 61, 176 Ind.App. 47.

Evidence held for jury

(1) U.S.—Geddes v. Daughters of Charity of St. Vincent De Paul, Inc., C.A.La., 348 F.2d 144.

Kan.—Munsell v. Ideal Food Stores, 494 P.2d 1063, 208 Kan. 909, 60 A.L.R.3d 1059.

Ky.—Allen v. Vogue Amusement Co., 377 S.W.2d 805.

Mass.—Coblyn v. Kennedy's, Inc., 268 N.E.2d 860, 359 Mass. 319, 47 A.L.R.3d 991.

Vt.—Covell v. McCarthy, 194 A.2d 394, 123 Vt. 472.

35 C.J.S. 1986 P.P.—3

Va.—Zayer of Va., Inc. v. Gowdy, 147 S.E.2d 710, 207 Va. 47.

Evidence held not to make case for jury

(1) D.C.—Tocker v. Great Atlantic & Pacific Tea Co., App., 190 A.2d 822.

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15.5. Mass.—Cabral v. Heller, 199 N.E.2d 537, 347 Mass. 778.

Mich.—Dixon v. Shiner, 163 N.W.2d 481, 12 Mich. App. 573.

16. Fla.—City of Miami v. Albrow, App., 120 So.2d 23.

Evidence held for jury on question of:

(2) Wis.—Carson v. Pape, 112 N.W.2d 693, 15 Wis.2d 300.

(5) Other evidence.

Mass.—Cabral v. Heller, 199 N.E.2d 537, 347 Mass. 778.

17.5. Ill.—Alverio v. Dowery, 243 N.E.2d 858, 104 Ill.App.2d 125.

N.C.—Hales v. McCrory-McLellan Corp., 133 S.E.2d 225, 260 N.C. 568.

Or.—Kraft v. Montgomery Ward & Co., 348 P.2d 239, 220 Or. 230, 92 A.L.R.2d 1—Pearson v. Galvin, 454 P.2d 638, 253 Or. 331.

Evidence held insufficient

(2) Other evidence.

Pa.—Painter v. Baronner, 47 West. 111.

Tex.—J. C. Penney Co. v. Reynolds, Civ.App., 329 S.W.2d 104, err. ref. no rev. err.

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18. Mo.—Bond v. Wabash R. Co., 363 S.W.2d 1.
Peak v. W. T. Grant Co., App., 386 S.W.2d 685.

Evidence held for jury on question of

(1) Mo.—Wehrman v. Liberty Petroleum Co., App., 382 S.W.2d 56.

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19. Fla.—Spicy v. City of Miami, App., 280 So.2d 419, mand. conf. to, App., 284 So.2d 699, cert. den. 94 S.Ct. 869, 414 U.S. 1131, 38 L.Ed.2d 755, reh. den. 94 S.Ct. 1457, 415 U.S. 939, 39 L.Ed.2d 497.

20. Questions held for jury

(1) Ariz.—Sarwark Motor Sales, Inc. v. Woolridge, 354 P.2d 34, 88 Ariz. 173.

Ill.—Alverio v. Dowery, 243 N.E.2d 858, 104 Ill.App.2d 125.

Mo.—Nelson v. R. H. Macy & Co., App., 434 S.W.2d 767.

21. Ill.—Wright v. Young, 262 N.E.2d 769, 128 Ill. App.2d 100.

Neb.—Herbrick v. Samardick & Co., 101 N.W.2d 488, 169 Neb. 833.

22. Neb.—Herbrick v. Samardick & Co., 101 N.W.2d 488, 169 Neb. 833.

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24. Cal.—White v. Martin, 30 Cal.Rptr. 367, 215 C.A.2d 641.

D.C.—Prieto v. May Dept. Stores Co., App., 216 A.2d 577.

Kan.—Silva v. Lewis, 502 P.2d 831, 210 Kan. 348.

R.I.—Ahern v. Lynch, 283 A.2d 263, 109 R.I. 218.

Direction of verdict for defendant, or dismissal, held proper

Ill.—Kaye v. Kremer, 163 N.E.2d 561, 23 Ill.App.2d 506, app. diss. 169 N.E.2d 357, 20 Ill.2d 148.

N.J.—Di Giovanni v. Pessel, 250 A.2d 756, 104 N.J. Super. 550, affd. in part, revd. in part on oth. grds. 260 A.2d 510, 55 N.J. 188.

N.Y.—Brown v. Sibley, Lindsay & Curr Co., 200 N.Y. S.2d 289, 11 A.D.2d 622.

25. Ill.—Gaszak v. Zayre of Illinois, Inc., 305 N.E.2d 704, 16 Ill.App.3d 50.

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26. Ark.—Pettijohn v. Smith, 502 S.W.2d 618, 255 Ark. 780.

Ill.—Johnson v. Jackson, 193 N.E.2d 485, 43 Ill.App.2d 251.

27. Fla.—Jefferson Stores, Inc. v. Caudell, App., 228 So.2d 99.

Neb.—Wilson v. Gutschenritter, 175 N.W.2d 282, 185 Neb. 311.

Or.—C.J.S. cited in Delp v. Zapp's Drug and Variety Stores, 395 P.2d 137, 140, 238 Or. 538.

Conduct of defendant held unreasonable as matter of law

Wis.—Drabek v. Sabley, 142 N.W.2d 798, 31 Wis.2d 184, 20 A.L.R.3d 1435.

28. Ohio—Mullins v. Rinks, Inc., 272 N.E.2d 152, 27 Ohio App.2d 45.

Particular questions held for jury as to reasonableness of detention

(5) Other questions.

Ga.—Dixon v. S.S. Kresge, Inc., 169 S.E.2d 189, 119 Ga.App. 776.

Mo.—Schwane v. Kroger Co., App., 480 S.W.2d 113.

N.Y.—Best v. Genung's Inc., 363 N.Y.S.2d 669, 46 A.D.2d 550.

Or.—Lukas v. J. C. Penney Co., 378 P.2d 717, 233 Or. 345.

28.5. Nev.—Lerner Shops of Nev., Inc. v. Marin, 423 P.2d 398, 83 Nev. 75.

28.10. Wis.—Drabek v. Sabley, 142 N.W.2d 798, 31 Wis.2d 184, 20 A.L.R.3d 1435.

28.15. Cal.—Goriack v. Ferrari, 7 Cal.Rptr. 699, 184 C.A.2d 702.

Mo.—Librach v. Litzinger, 401 S.W.2d 433.

Evidence held insufficient for jury, etc.
Mont.—Rounds v. Bucher, 349 P.2d 1026, 137 Mont. 39, 98 A.L.R.2d 962.

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29. U.S.—Banish v. Locks, C.A.Ind., 414 F.2d 638.
Aley v. Great Atlantic & Pacific Tea Co., D.C. Mo., 211 F.Supp. 500.

Cal.—Cole v. Johnson, 17 Cal.Rptr. 654, 197 C.A.2d 788—Whaley v. Jansen, 25 Cal.Rptr. 181, 208 C.A.2d 222—White v. Martin, 30 Cal.Rptr. 367, 215 C.A.2d 641—Mercurius v. Rolon, 41 Cal.Rptr. 789, 231 C.A.2d 359—King v. Andersen, 51 Cal. Rptr. 561, 242 C.A.2d 606.

Colo.—J. S. Dillon & Sons Stores Co. v. Carrington, 455 P.2d 201, 169 Colo. 242.

Iowa—Children v. Burton, 331 N.W.2d 673, cert. den. 104 S.Ct. 155, 464 U.S. 848, 78 L.Ed.2d 143.

Md.—Great Atlantic & Pac. Tea Co. v. Paul, 261 A.2d 731, 256 Md. 643.

Kimbrough v. Giant Food Inc., 339 A.2d 688, 26 Md.App. 640.

Miss.—C.J.S. cited in Southwest Drug Stores of Miss., Inc. v. Garner, 195 So.2d 837, 841, 29 A.L.R.3d 953—Butler v. W. E. Walker Stores, Inc., 222 So.2d 128.

Neb.—Wilson v. Gutschenritter, 175 N.W.2d 282, 185 Neb. 311.

N.M.—Stienbaugh v. Payless Drug Store, Inc., 401 P.2d 104, 75 N.M. 118.

N.Y.—Caminito v. City of New York, 256 N.Y.S.2d 670, 45 Misc.2d 241.

Or.—C.J.S. quoted at length in Lukas v. J. C. Penney Co., 378 P.2d 717, 724, 233 Or. 345—Delp v. Zapp's Drug and Variety Stores, 395 P.2d 137, 238 Or. 538—Fleet v. May Dept. Stores, Inc., 500 P.2d 1054, 262 Or. 592.

30. D.C.—May Dept. Stores Co., Inc. v. Devercelli, App., 311 A.2d 767.

N.M.—Stienbaugh v. Payless Drug Store, Inc., 401 P.2d 104, 75 N.M. 118.

31. U.S.—Draeger v. Grand Central, Inc., C.A.Utah, 504 F.2d 142.

Cal.—Whaley v. Johnson, 25 Cal.Rptr. 184, 208 C.A.2d 222—Robinson v. City and County of San Francisco 116 Cal.Rptr. 125, 41 C.A.3d 334.

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Colo.—Gonzales v. Harris, 542 P.2d 842, 189 Colo. 518.
D.C.—Nichols v. Woodward & Lothrop, Inc., App., 322 A.2d 283, cert. den. 95 S.Ct. 780, 419 U.S. 1108, 42 L.Ed.2d 804.
Fla.—City of Hollywood v. Coley, App., 258 So.2d 828.
Md.—Montgomery Ward & Co., Inc. v. Cliser, 298 A.2d 16, 267 Md. 406.
Miss.—Butler v. W. E. Walker Stores, Inc., 222 So.2d 128.
Mo.—Vanneman v. W. T. Grant Co., 351 S.W.2d 729.
Parrott v. Reis, App., 441 S.W.2d 390.
Pa.—Nicodem v. Conlin, 65 Lack.Jur. 173.
R.I.—Mailey v. De Pasquale's Estate, 177 A.2d 376, 94 R.I. 31.

Evidence held for jury

(1) U.S.—Rothschild v. Drake Hotel, Inc., C.A.III., 397 F.2d 419.
Colo.—White v. Pierson, App., 533 P.2d 514.
Ill.—Alvarez v. Reynolds, 181 N.E.2d 616, 35 Ill. App.2d 54—Felton v. Coyle, 238 N.E.2d 191, 95 Ill.App.2d 202.
Ky.—Consolidated Sales Co. v. Malone, 530 S.W.2d 680.
Miss.—Southwest Drug Stores of Miss., Inc. v. Garner, 195 So.2d 837, 29 A.L.R.3d 953.
Mo.—Quinn v. Rosenberg, App., 399 S.W.2d 433—Wissner v. S.S. Kresge Co., App., 465 S.W.2d 666.
N.Y.—Craner v. Corbett, 279 N.Y.S.2d 135, 27 A.D.2d 796.

Evidence held insufficient for jury

Mich.—Arnold v. Jarvis, 116 N.W.2d 38, 367 Mich. 59.

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32. Md.—Montgomery Ward & Co., Inc. v. Keulemans, 326 A.2d 45, 23 Md.App. 81, affd. in part, mod. in part on oth. grds., remd. 340 A.2d 705, 275 Md. 441.

Pa.—Nicodem v. Conlin, 65 Lack.Jur. 173.

Jury to be instructed

Cal.—Whaley v. Johnson, 25 Cal.Rptr. 184, 208 C.A.2d 222.

32.5. N.Y.—Roker v. Gertz Long Island, 310 N.Y.S.2d 536, 34 A.D.2d 680.

32.10. R.I.—Kavanagh v. Stenhouse, 174 A.2d 560, 93 R.I. 252, app. diss. 82 S.Ct. 529, 368 U.S. 516, 7 L.Ed.2d 521.

33. Ill.—Johnson v. Jackson, 193 N.E.2d 485, 43 Ill. App.2d 251.

N.Y.—Roker v. Gertz Long Island, 310 N.Y.S.2d 536, 34 A.D.2d 680.

Arrest without warrant

Ill.—McKendree v. Christy, 172 N.E.2d 380, 29 Ill. App.2d 195.

Or.—Kraft v. Montgomery Ward & Co., 348 P.2d 239, 220 Or. 230, 92 A.L.R.2d 1.

Pa.—Nicodem v. Conlin, 65 Lack.Jur. 173.

34. D.C.—Neisner Bros., Inc. v. Ramos, App., 326 A.2d 239.

34.5. Or.—McNeff v. Heider, 337 P.2d 819, 216 Or. 583, reh. den. 340 P.2d 180, 216 Or. 583.

35. Md.—Montgomery Ward & Co., Inc. v. Cliser, 298 A.2d 16, 267 Md. 406.

N.Y.—Hinton v. City of New York, 212 N.Y.S.2d 97, 13 A.D.2d 475.

Evidence held for jury

Fla.—City of Hollywood v. Coley, App., 258 So.2d 828.

Mo.—Garvis v. K Mart Discount Store, App., 461 S.W.2d 317.

36. Mo.—Wehrman v. Liberty Petroleum Co., App., 382 S.W.2d 56.

37. Fla.—Boca Raton v. Coughlin, App., 299 So.2d 105.

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38. U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420.

Fla.—Blair v. Chrysler Credit Corp., App., 260 So.2d 236.

Mo.—Nelson v. R. H. Macy & Co., App., 434 S.W.2d 767.

Tex.—S.S. Kresge Co. v. Prescott, Civ.App., 435 S.W.2d 203, err. ref. no rev. err.

Wash.—Neff v. United Pac. Ins. Co., 364 P.2d 515, 58 Wash.2d 618.

42. N.J.—Parentini v. S. Klein Dept. Stores, Inc., 228 A.2d 725, 94 N.J.Super. 452.

43. U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420.

Fla.—Joseph v. Jefferson Stores, App., 228 So.2d 103.
Md.—Great Atlantic & Pac. Tea Co. v. Paul, 261 A.2d 731, 256 Md. 643—Montgomery Ward & Co., Inc. v. Cliser, 298 A.2d 16, 267 Md. 406.

Mo.—Peak v. W. T. Grant Co., 409 S.W.2d 58, 31 A.L.R.3d 697.

Okl.—Doyle v. Douglas, 390 P.2d 871.

Or.—Lukas v. J. C. Penney Co., 378 P.2d 717, 233 Or. 345.

Evidence held sufficient

Mo.—Wehrman v. Liberty Petroleum Co., App., 382 S.W.2d 56—Peak v. W. T. Grant Co., App., 386 S.W.2d 685.

N.J.—Price v. Phillips, 218 A.2d 167, 90 N.J.Super. 480.

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45. Fla.—City of Miami v. Albino, App., 120 So.2d 23—Boca Raton v. Coughlin, App., 299 So.2d 105.

Instructions held proper or erroneously refused, etc.

(3) Kan.—Sweeney v. United Loan & Finance Co., 468 P.2d 124, 205 Kan. 66.

Mich.—Bonkowski v. Arlan's Dept. Store, 162 N.W.2d 347, 12 Mich.App. 88. Revd. on oth. grds. 174 N.W.2d 765, 383 Mich. 90.

Miss.—J. C. Penney Co. v. Cox, 148 So.2d 679, 246 Miss. 1.

Mo.—Peak v. W. T. Grant Co., App., 386 S.W.2d 685—Nelson v. R. H. Macy & Co., App., 434 S.W.2d 767.

Or.—Vandermeer v. Pacific Northwest Development Corp., 545 P.2d 868, 274 Or. 221.

Wis.—Carson v. Pape, 112 N.W.2d 693, 15 Wis.2d 300.

Instructions held erroneous or properly refused, etc.

(4) U.S.—Jeffcoat v. K-Mart Discount Stores, C.A.S.C., 439 F.2d 713.

Fla.—Washington County Kennel Club, Inc. v. Edge, App., 216 So.2d 512.

Ind.—Hancock v. York, 227 N.E.2d 187, 141 Ind.App. 212.

Vt.—Covell v. McCarthy, 194 A.2d 394, 123 Vt. 472.

45.5. **Instructions held erroneous or properly refused**

Mo.—Wehrman v. Liberty Petroleum Co., App., 382 S.W.2d 56.

N.Y.—Farina v. Saratoga Harness Racing Ass'n, 246 N.Y.S.2d 960, 20 A.D.2d 750.

45.10. Colo.—J. S. Dillon & Sons Stores Co. v. Carrington, 455 P.2d 201, 169 Colo. 242.

Mo.—Wehrman v. Liberty Petroleum Co., App., 382 S.W.2d 56.

Power to make arrest

(5) Other instructions upheld.

Wis.—Carson v. Pape, 112 N.W.2d 693, 15 Wis.2d 300.

Instructions held proper or erroneously refused

Mich.—Hess v. Village of Wolverine Lake, 189 N.W.2d 42, 32 Mich.App. 601.

Wis.—Lane v. Collins, 138 N.W.2d 264, 29 Wis. 66.

Instructions held erroneous or properly refused

(1) Ill.—Felton v. Coyle, App., 238 N.E.2d 191.
Ky.—Finch v. Com., 419 S.W.2d 146.
W.Va.—State for Use and Benefit of Morris v. Mills, 203 S.E.2d 362, 157 W.Va. 674.

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45.15. U.S.—Aley v. Great Atlantic & Pacific Tea Co., D.C.Mo., 211 F.Supp. 500.

Instructions held proper or erroneously refused

U.S.—Pierson v. Ray, C.A.Miss., 352 F.2d 213, affd. in part, revd. in part on oth. grds. 87 S.Ct. 1213, 386 U.S. 547, 18 L.Ed.2d 288.

Alaska—Malvo v. J. C. Penney Co., Inc., 512 P.2d 575, 63 A.L.R.3d 1034.

Ga.—S.S. Kresge Co. v. Carty, 169 S.E.2d 735, 120 Ga.App. 170.

Idaho—Sima v. Skaggs Payless Drug Center, Inc., 353 P.2d 1085, 82 Idaho 387.

Nev.—Lerner Shops of Nev., Inc. v. Marin, 423 P.2d 398, 83 Nev. 75.

Instructions held erroneous or properly refused

(1) Mass.—Coblyn v. Kennedy's, Inc., 268 N.E.2d 860, 359 Mass. 319, 47 A.L.R.3d 991.

Miss.—Butler v. W. E. Walker Stores, Inc., 222 So.2d 128.

Va.—Zayre of Va., Inc. v. Gowdy, 147 S.E.2d 710, 207 Va. 17.

Wash.—Tufte v. City of Tacoma, 431 P.2d 183, 71 Wash.2d 866.

45.20. **Instructions held proper or erroneously refused**

Ky.—Wilson v. Hellard, 333 S.W.2d 777.

Instructions held erroneous or properly refused

Ky.—Wilson v. Hellard, 333 S.W.2d 777.

(1) Mo.—Librach v. Litzinger, 401 S.W.2d 433.

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45.25. **Instructions held proper or erroneously refused**

Mo.—Peak v. W. T. Grant Co. App., 386 S.W.2d 685.

Instructions held erroneous or properly refused

Me.—Bale v. Ryder, 290 A.2d 359.

Mo.—Peak v. W. T. Grant Co., 409 S.W.2d 58, 32 A.L.R.3d 697.

46. Ark.—Wells v. Adams, 340 S.W.2d 572, 232 Ark. 873.

Instructions held proper

(1) Miss.—State for Use of Powell v. Moore, 174 So.2d 352, 252 Miss. 474.

47. **Instructions held misleading**

Mo.—Helming v. Adams, App., 509 S.W.2d 159.

48. **Evidence held to warrant instructions**

(1) Mo.—Bond v. Wabash R. Co., 363 S.W.2d 1.

(3) Mo.—Bond v. Wabash R. Co., 363 S.W.2d 1.

Evidence held not to support instructions

(5) Mo.—Helming v. Adams, App., 509 S.W.2d 159.

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49. Mo.—Wehrman v. Liberty Petroleum Co., App., 382 S.W.2d 56.

51.5. Or.—McNeff v. Heider, 337 P.2d 819, 216 Or. 583, reh. den. 340 P.2d 180, 216 Or. 583.

"Moneylender" when referring to "mortgagee"

Or.—McNeff v. Heider, 337 P.2d 819, 216 Or. 583, reh. den. 340 P.2d 180, 216 Or. 583.

52. Miss.—Butler v. W. E. Walker Stores, Inc., 222 So.2d 128.

55. Or.—Fleet v. May Dept. Stores, Inc., 500 P.2d 1054, 262 Or. 592.

56. **Instructions held proper**

(1) Wash.—Neff v. United Pac. Ins. Co., 364 P.2d 515, 58 Wash.2d 618—Tufte v. City of Tacoma, 431 P.2d 183, 71 Wash.2d 866.

Instructions held erroneous or properly refused

U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420—Whirl v. Kern, C.A.Tex., 407 F.2d 781, cert. den. 90 S.Ct. 210, 396 U.S. 901, 24 L.Ed.2d 177.

Mo.—Helming v. Adams, App., 509 S.W.2d 159.

N.C.—Kuykendall v. Clark's Discount Dept. Store, 167 S.E.2d 833, 5 N.C.App. 200.

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58. Instructions held not warranted by evidence

(4) other instructions.

Ill.—Alvarez v. Reynolds, 181 N.E.2d 616, 35 Ill. App.2d 54.

(5) Other instructions.

Nev.—Lerner Shops of Nev., Inc. v. Marin, 423 P.2d 398, 83 Nev. 75.

67. Instructions held warranted by evidence

(1) Fla.—Webb's City, Inc. v. Hancur, App. 144 So.2d 319.

Mo.—Helming v. Adams, App., 509 S.W.2d 159.

Instructions held not warranted or supported by evidence

Ky.—Consolidated Sales Co. v. Malone, 530 S.W.2d 680.

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68. Instructions held proper

Alaska—Hash v. Hogan, 453 P.2d 468.

Fla.—Webb's City, Inc. v. Hancur, App., 144 So.2d 319.

Mo.—Wehrman v. Liberty Petroleum Co., App., 382 S.W.2d 56.

Instruction held erroneous or properly refused

Alaska—Hash v. Hogan, 453 P.2d 468.

70. Md.—Clark's Brooklyn Park, Inc. v. Hranicka, 227 A.2d 726, 246 Md. 178.

71. Ga.—S.S. Kresge Co. v. Carty, 169 S.E.2d 735, 120 Ga.App. 170.

§ 61. — Verdict and Findings

74. U.S.—Anderson v. Reynolds, C.A.Utah, 476 F.2d 665.

Finding construed

(2) Other findings.

Wash.—Planchich v. Williamson, 357 P.2d 693, 57 Wash.2d 367, 92 A.L.R.2d 559.

Wis.—Drabek v. Sabley, 142 N.W.2d 798, 31 Wis.2d 184, 20 A.L.R.3d 1435.

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Ohio—Darden v. Louisville & N.R. Co., 167 N.E.2d 765, 171 Ohio St. 63.

Finding of trial court held to constitute finding of fact

Tex.—Kroger Co. v. Warren, Civ.App., 420 S.W.2d 218.

77.5. Cal.—Gorlack v. Ferrari, 7 Cal.Rptr. 699, 184 C.A.2d 702.

Tex.—Bell v. Spraggins, Civ.App., 372 S.W.2d 740, err. ref. no rev. err.

Verdicts held not inconsistent

Colo.—Gilmer v. Playboy Club of Denver, Inc., App., 513 P.2d 1065.

N.Y.—Dunn v. City of New York, 257 N.Y.S.2d 29, 23 A.D.2d 660.

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§ 62. Judgment and Review

79. Reversible error

W.Va.—Winters v. Campbell, 137 S.E.2d 188, 148 W.Va. 710.

§ 63. Nominal Damages

80. U.S.—Ford v. Wells, D.C.Tenn., 347 F.Supp. 1026.

R.I.—Tessier v. LaNois, 201 A.2d 927, 98 R.I. 333—Abern v. Lynch, 283 A.2d 263, 109 R.I. 218—Gingras v. Richmond, 329 A.2d 189, 114 R.I. 115.

W.Va.—C.J.S. quoted in City of McMechen v. Fidelity and Cas. Co. of N.Y., 116 S.E.2d 388, 392, 145 W.Va. 660.

81. W.Va.—C.J.S. quoted in City of McMechen v. Fidelity and Cas. Co. of N.Y., 116 S.E.2d 388, 392, 145 W.Va. 660.

83. Mo.—Nelson v. R. H. Macy & Co., App., 434 S.W.2d 767.

§ 64. Compensatory Damages

84. N.Y.—Schanbarger v. Kellogg, 352 N.Y.S.2d 50, 43 A.D.2d 362, affd. 335 N.E.2d 310, 37 N.Y.2d 451, 373 N.Y.S.2d 87, cert. den. 96 S.Ct. 277, 423 U.S. 929, 46 L.Ed.2d 257.

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85. Mo.—Peak v. W. T. Grant Co., App., 386 S.W.2d 685.

Award not excessive

Hawaii—Orso v. City and County of Honolulu, 534 P.2d 489, 56 Haw. 241.

86. U.S.—Johnson v. Greer, C.A.Tex., 477 F.2d 101. Nev.—Lerner Shops of Nev., Inc. v. Marin, 423 P.2d 398, 83 Nev. 75.

87. U.S.—Whirl v. Kern, C.A.Tex., 407 F.2d 781, cert. den. 90 S.Ct. 210 396 U.S. 901, 24 L.Ed.2d 177.

Failure to distinguish damages from valid and invalid arrests precludes recovery

N.Y.—Burden v. City of Niagara Falls, 354 N.Y.S.2d 42, 44 A.D.2d 754.

90. U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420.

N.Y.—Martin v. City of Albany, 377 N.Y.S.2d 774, 51 A.D.2d 596, revd. on oth. grds. 364 N.E.2d 1304, 42 N.Y.2d 13, 396 N.Y.S.2d 612.

92. U.S.—Whirl v. Kern, C.A.Tex., 407 F.2d 781, cert. den. 91 S.Ct. 210, 396 U.S. 901, 24 L.Ed.2d 177.

N.Y.—Broughton v. State, 335 N.E.2d 310, 37 N.Y.2d 451, 373 N.Y.S.2d 87, cert. den. 96 S.Ct. 277, 423 U.S. 929, 46 L.Ed.2d 257.

§ 65. — Measure and Elements

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95. D.C.—Safeway Trails, Inc. v. Schmidt, App., 225 A.2d 317.

Md.—Great Atlantic & Pac. Tea Co. v. Paul, 261 A.2d 731, 256 Md. 643.

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Tenn.—McLaughlin v. Smith, App., 412 S.W.2d 21, 56 Tenn.App. 715.

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N.Y.—Powell v. State, 191 N.Y.S.2d 846, 19 Misc.2d 9.

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U.S.—Anderson v. Robinson, C.A.Miss., 497 F.2d 120.

96. N.Y.—Sindle v. New York City Transit Authority, 316 N.Y.S.2d 657, 64 Misc.2d 993, 995, affd. 331 N.Y.S.2d 343, 38 A.D.2d 892, revd. on oth. grds. 307 N.E.2d 245, 33 N.Y.2d 293, 352 N.Y.S.2d 183.

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La.—Abraham v. Boat Center, Inc., App., 146 So.2d 23.

99. Mo.—Quinn v. Rosenberg, App., 399 S.W.2d 433.

1. Mo.—Quinn v. Rosenberg, App., 399 S.W.2d 433.

2. N.Y.—Emanuele v. State, 250 N.Y.S.2d 361, 43 Misc.2d 135—Maracle v. State, 270 N.Y.S.2d 439, 50 Misc.2d 348.

3. Effect of subsequent valid detention

N.Y.—Carpenter v. City of Rochester, 324 N.Y.S.2d 591, 67 Misc.2d 832, affd. 335 N.Y.S.2d 255, 39 A.D.2d 1015.

5. Ariz.—C.J.S. cited in Dogarin v. Connor, 433 P.2d 653, 658, 6 Ariz.App. 473.

Cal.—Gill v. Epstein, 44 Cal.Rptr. 45, 401 P.2d 397, 62 C.2d 611.

Nev.—Lerner Shops of Nev., Inc. v. Marin, 423 P.2d 398, 83 Nev. 75.

N.Y.—Sindle v. New York City Transit Authority, 307 N.E.2d 245, 33 N.Y.2d 293, 352 N.Y.S.2d 183. Powell v. State, 191 N.Y.S.2d 846, 19 Misc.2d 9—Sindle v. New York City Transit Authority, 316 N.Y.S.2d 657, 64 Misc.2d 993, 995, affd. 331 N.Y.S.2d 343, 38 A.D.2d 892, revd. on oth. grds. 307 N.E.2d 245, 33 N.Y.2d 293, 352 N.Y.S.2d 183.

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7. Nev.—Lerner Shops of Nev., Inc. v. Marin, 423 P.2d 398, 83 Nev. 75.

8. U.S.—Whirl v. Kern, C.A.Tex., 407 F.2d 781, cert. den. 90 S.Ct. 210, 396 U.S. 901, 24 L.Ed.2d 177.

13. U.S.—Whirl v. Kern, C.A.Tex., 407 F.2d 781, cert. den. 90 S.Ct. 210, 396 U.S. 901, 24 L.Ed.2d 177.

Ariz.—Boies v. Raynor, 361 P.2d 1, 89 Ariz. 257.

Cal.—Gill v. Epstein, 44 Cal.Rptr. 45, 401 P.2d 397, 62 C.2d 611.

D.C.—Neisner Bros., Inc. v. Ramos, App., 326 A.2d 239.

Mo.—Quinn v. Rosenberg, App., 399 S.W.2d 433—Garvis v. K Mart Discount Store, App., 461 S.W.2d 317.

N.Y.—Maracle v. State, Ct.Cl., 270 N.Y.S.2d 439, 50 Misc.2d 348—Fields v. Victory Chain Store, Inc., 300 N.Y.S.2d 688, 59 Misc.2d 814—Sindle v. New York City Transit Authority, 316 N.Y.S.2d 657, 64 Misc.2d 993, 995, affd. 331 N.Y.S.2d 343, 38 A.D.2d 892, revd. on oth. grds. 307 N.E.2d 245, 33 N.Y.2d 293, 352 N.Y.S.2d 183.

Tex.—J. C. Penney Co. v. Duran, Civ.App., 479 S.W.2d 374, err. ref. no rev. err.

Wis.—Lanc v. Collins, 138 N.W.2d 264, 29 Wis.2d 66.

14. Ariz.—Boies v. Raynor, 361 P.2d 1, 89 Ariz. 257. Ga.—Gibson's Products Co. of Albany, Inc. v. Mansfield, 196 S.E.2d 353, 128 Ga.App. 186.

La.—Abraham v. Boat Center, Inc., App., 146 So.2d 23—Hughes v. Standidge, App., 219 So.2d 6, writ den. 222 So.2d 63, 254 La. 4, writ ref. 222 So.2d 64, 254 La. 6, cert. den. 90 S.Ct. 177, 396 U.S. 887, 24 L.Ed.2d 162.

Mo.—Quinn v. Rosenberg, App., 399 S.W.2d 433—Nelson v. R. H. Macy & Co., App., 434 S.W.2d 767.

Nev.—Lerner Shops of Nev., Inc. v. Marin, 423 P.2d 398, 83 Nev. 75.

N.Y.—Emanuele v. State, 250 N.Y.S.2d 361, 43 Misc.2d 135.

Ohio—Baillie v. Miami Valley Hospital, 221 N.E.2d 217, 8 Ohio Misc. 193.

Wyo.—Waters v. Brand, 497 P.2d 875.

No humiliation under circumstances

La.—Simmons v. J. C. Penney Co., App., 186 So.2d 358.

15. Ariz.—Boies v. Raynor, 361 P.2d 1, 89 Ariz. 257.

15.5. Ariz.—Boies v. Raynor, 361 P.2d 1, 89 Ariz. 257.

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19. U.S.—Reicheneder v. Skaggs Drug Center, C.A. Tex., 421 F.2d 307.

22. U.S.—Reicheneder v. Skaggs Drug Center, C.A. Tex., 421 F.2d 307.

Ohio—Baillie v. Miami Valley Hospital, Com.Pl., 221 N.E.2d 217, 8 Ohio Misc. 193.

23. D.C.—Tatum v. Morton, D.C., 386 F.Supp. 1308.

La.—Abraham v. Boat Center, Inc., App., 146 So.2d 23.

N.Y.—Emanuele v. State, 250 N.Y.S.2d 361, 43 Misc.2d 135.

24. Loss not recoverable

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26. N.Y.—Gorman v. Kings Mercantile Co., 231 N.Y.S.2d 642, 36 Misc.2d 38.

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26.5. Attorney fees

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Rosario v. State, Ct.Cl., 274 N.Y.S.2d 81, 51 Misc.2d 790, revd. on oth. grds. 305 N.Y.S.2d 574, 33 A.D.2d 122, affd. 334 N.E.2d 596, 36 N.Y.2d 901, 372 N.Y.S.2d 647.

31. Fla.—Glusman v. Lieberman, App., 285 So.2d 29. N.Y.—Casler v. State, 307 N.Y.S.2d 695, 33 A.D.2d 305.

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R.I.—Berberian v. Mitchell, 341 A.2d 56, 115 R.I. 149. Wis.—Lane v. Collins, 138 N.W.2d 264, 29 Wis.2d 66.

32. Fla.—City of Miami Beach v. Bretagna, App., 190 So.2d 364, 21 A.L.R.3d 1064.

N.Y.—Broughton v. State, 335 N.E.2d 310, 37 N.Y.2d 451, 373 N.Y.S.2d 87, cert. den. 96 S.Ct. 277, 423 U.S. 929, 46 L.Ed.2d 257.

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42. Humiliation damages

U.S.—Ochino v. U.S., C.A.Minn., 686 F.2d 1302.

44. U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420.

Mo.—C.J.S. cited in Vanneman v. W. T. Grant Co., 351 S.W.2d 729, 730.

45. Wis.—C.J.S. cited in Strong v. City of Milwaukee, 157 N.W.2d 619, 38 Wis.2d 564.

45.5. Md.—Clark's Brooklyn Park, Inc. v. Hranicka, 227 A.2d 726, 246 Md. 178.

48. N.Y.—Broughton v. State, 335 N.E.2d 310, 37 N.Y.2d 451, 373 N.Y.S.2d 87, cert. den. 96 S.Ct. 277, 423 U.S. 929, 46 L.Ed.2d 257.

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55. U.S.—Whirl v. Kern, C.A.Tex., 407 F.2d 781, cert. den. 90 S.Ct. 210, 396 U.S. 901, 24 L.Ed.2d 177.

57. Intensity of distress

Wyo.—Waters v. Brand, 497 P.2d 875.

58. U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420.

61. W.Va.—Sutherland v. Kroger Co., 110 S.E.2d 716, 144 W.Va. 673.

§ 67. Exemplary or Punitive Damages

Library References

False Imprisonment ⇨ 35.

68. U.S.—Clark v. Kroger Co., C.A.Ind., 382 F.2d 562.

Kan.—Sweeney v. United Loan & Finance Co., 468 P.2d 124, 205 Kan. 66.

Md.—Great Atlantic & Pac. Tea Co. v. Paul, 261 A.2d 731, 256 Md. 643.

Mo.—Peak v. W. T. Grant Co., App., 386 S.W.2d 685.

Or.—Kraft v. Montgomery Ward & Co., 348 P.2d 239, 220 Or. 230, 92 A.L.R.2d 1.

Tex.—Big Town Nursing Home, Inc. v. Newman, Civ. App., 461 S.W.2d 195.

Wyo.—C.J.S. cited in Town of Jackson v. Shaw, 569 P.2d 1246, 1252.

Exemplary damages held not recoverable under
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U.S.—Ford v. Wells, D.C.Tenn., 347 F.Supp. 1026. Fla.—City Stores Co. v. Mazzaferro, App., 342 So.2d 827.

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69. D.C.—Safeway Trails, Inc. v. Schmidt, App., 225 A.2d 317.

Fla.—Grand Union Super Markets, Inc. v. De Aquinos, App., 135 So.2d 754.

Ohio—Baillie v. Miami Valley Hospital, 221 N.E.2d 217, 8 Ohio Misc. 193.

R.I.—Sherman v. McDermott, 329 A.2d 195, 114 R.I. 107.

70. Md.—Montgomery Ward & Co., Inc. v. Keulemans, 340 A.2d 705, 275 Md. 441.

Tex.—Skillern & Sons, Inc. v. Stewart, Civ.App., 379 S.W.2d 687, err. ref. no rev. err.

73. Tex.—Skillern & Sons, Inc. v. Stewart, Civ.App., 379 S.W.2d 687, err. ref. no rev. err.

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88. Ky.—Consolidated Sales Co. v. Malone, 530 S.W.2d 680.

91. Ark.—Wells v. Adams, 340 S.W.2d 572, 232 Ark. 873.

Colo.—Gilmer v. Playboy Club of Denver, Inc., App., 513 P.2d 1065.

Exemplary damages held not recoverable under
circumstances

U.S.—Curtis v. Peerless Ins. Co., D.C.Minn., 299 F.Supp. 429.

N.Y.—Maracle v. State, 270 N.Y.S.2d 439, 50 Misc.2d 348.

92. U.S.—Bujaki v. Egan, D.C.Alaska, 237 F.Supp. 822.

Ark.—Wells v. Adams, 340 S.W.2d 572, 232 Ark. 873.

D.C.—Tatum v. Morton, D.C., 386 F.Supp. 1308.

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Va.—F.B.C. Stores, Inc. v. Duncan, 198 S.E.2d 595, 214 Va. 246.

Malice in fact required

Utah—McFarland v. Skaggs Companies, Inc., 678 P.2d 298 (overruling Terry v. Zions Co-op. Mercantile Institution, 605 P.2d 314).

92.5. Ark.—Wells v. Adams, 340 S.W.2d 572, 232 Ark. 873.

N.Y.—Chirieleison v. City of New York, 373 N.Y.S.2d 361, 49 A.D.2d 873.

Exemplary damages held not recoverable under
circumstances

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7. U.S.—Duncan v. Edwards, C.A.La., 600 F.2d 1069.

8. D.C.—Dart Drug, Inc. v. Linthicum, App., 300 A.2d 442, 93 A.L.R.3d 821.

12. Tenn.—McLaughlin v. Smith, App., 412 S.W.2d 21, 56 Tenn.App. 715.

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14. Joint judgment allowed although evidence
of only one defendant's wealth introduced

Tenn.—Odum v. Gray, 508 S.W.2d 526.

16. Cal.—Leggett v. DiGiorgio Corp., 80 Cal.Rptr. 697, 276 C.A.2d 306.

17. U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420.

§ 68. Excessive and Inadequate
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24. Neb.—Herbrick v. Samardick & Co., 101 N.W.2d 488, 169 Neb. 833—Jensen v. Barnett, 134 N.W.2d 53, 178 Neb. 429.

25. U.S.—Reicheneder v. Skaggs Drug Center, C.A. Tex., 421 F.2d 307.

26. Double recovery not allowed

Ill.—Koris v. Norfolk & W. Ry. Co., 333 N.E.2d 217, 30 Ill.App.3d 1055.

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27. Amounts held adequate

(4) La.—Cannon v. Goudchoux's, Inc., App., 255 So.2d 243.

(6) La.—Stewart v. J. C. Penney Co., App., 267 So.2d 925.

N.M.—Ulbarri v. Maestas, 395 P.2d 238, 74 N.M. 516. N.Y.—Sindle v. New York City Transit Authority, 316 N.Y.S.2d 657, 64 Misc.2d 993, 995, affd. 331 N.Y. S.2d 343, 38 A.D.2d 892, revd. on oth. grds. 307 N.E.2d 245, 33 N.Y.2d 293, 352 N.Y.S.2d 183.

(7) N.Y.—Rosenthal v. State, 259 N.Y.S.2d 913, 23 A.D.2d 946.

(8) La.—Hughes v. Standidge, App., 219 So.2d 6, writ den. 222 So.2d 63, 254 La. 4, writ ref. 222 So.2d 64, 254 La. 6. Cert. den. 90 S.Ct. 177, 396 U.S. 887, 24 L.Ed.2d 162.

(11) La.—Keating v. Keller, App., 242 So.2d 892.

(13) Hawaii—Lopez v. Wigwam Dept. Stores, No. 10, Inc., 421 P.2d 289, 49 Haw. 416.

N.Y.—Emanuele v. State, 250 N.Y.S.2d 361, 43 Misc.2d 135—Todzia v. State, 278 N.Y.S.2d 291, 53 Misc.2d 200.

Tex.—Levine v. Enlow, Civ.App., 462 S.W.2d 50.

29. Tex.—Lubbock Bail Bond v. Joshua, Civ.App., 416 S.W.2d 523.

Wyo.—C.J.S. cited in Town of Jackson, v. Shaw, 569 P.2d 1246, 1251.

Amounts held excessive

(7) W.Va.—Winters v. Campbell, 137 S.E.2d 188, 148 W.Va. 710.

(8) La.—Wilde v. Schwegmann Bros. Giant Supermarkets, Inc., App., 160 So.2d 839.

N.Y.—Holtz v. State, 235 N.Y.S.2d 458, 37 Misc.2d 595.

(13) Hawaii—Lopez v. Wigwam Dept. Stores No. 10, Inc., 421 P.2d 289.

(19) N.J.—Price v. Phillips, 218 A.2d 167, 90 N.J. Super. 480.

N.Y.—Crispin v. City of Rochester, 319 N.Y.S.2d 478, 36 A.D.2d 684.

(22) Tex.—Big Town Nursing Home, Inc. v. Newman, Civ.App., 461 S.W.2d 195.

Fla.—Washington County Kennel Club, Inc. v. Edge, App., 216 So.2d 512.

Neb.—Herbrick v. Samardick & Co., 101 N.W.2d 488, 169 Neb. 833.

N.Y.—Dunn v. City of New York, 257 N.Y.S.2d 29, 23 A.D.2d 660—Reiback v. Malibu Shore Club, Inc., 259 N.Y.S.2d 261, 23 A.D.2d 829—Graham v. City of New York, 284 N.Y.S.2d 518, 28 A.D.2d 245.

Tex.—S.S. Kresge Co. v. Prescott, Civ.App., 435 S.W.2d 203, err. ref. no rev. err.

Tex.—K-Mart No. 4195 v. Judge, Civ.App., 515 S.W.2d 148, err. dismiss.

Amounts held not excessive

(10) U.S.—Roberts v. Hecht Co., D.C.Md., 280 F.Supp. 639.

Conn.—Zanks v. Fluckiger, 171 A.2d 86, 22 Conn.Supp. 311.

(14) La.—Stevens v. Mumphy, App., 218 So.2d 642.

N.Y.—Williams v. State, 194 N.Y.S.2d 421, 9 A.D.2d 415, affd. 203 N.Y.S.2d 925, 8 N.Y.2d 886, 168 N.E.2d 723.

Wash.—Neff v. United Pac. Ins. Co., 364 P.2d 515, 58 Wash.2d 618.

(17) U.S.—Great Atlantic & Pacific Tea Co. v. Lethcoe, C.A.W.Va., 279 F.2d 948.

Ariz.—Boies v. Raynor, 361 P.2d 1, 89 Ariz. 257.
N.Y.—Pawloski v. State, 258 N.Y.S.2d 258, 45 Misc.2d 933.

(20) Wash.—Neff v. United Pac. Ins. Co., 364 P.2d 515, 58 Wash.2d 618.

(21) Miss.—J. C. Penney Co. v. Cox, 148 So.2d 679, 246 Miss. 1.

N.Y.—Montanaro v. State, 249 N.Y.S.2d 365, 42 Misc.2d 851.

(23) Mo.—Peak v. W. T. Grant Co., App., 386 S.W.2d 685—Nelson v. R. H. Macy & Co., App., 434 S.W.2d 767.

Neb.—Jensen v. Barnett, 134 N.W.2d 53, 178 Neb. 429.
N.Y.—Martin v. City of Albany, 377 N.Y.S.2d 774, 51 A.D.2d 596, revd. on oth. grds. 364 N.E.2d 1304, 42 N.Y.2d 13, 396 N.Y.S.2d 612.

N.Y.—Selden v. City of Albany, 376 N.Y.S.2d 46, 50 A.D.2d 975.

(27) Tex.—J. C. Penney Co. v. Duran, Civ.App., 479 S.W.2d 374, err. ref. no rev. err.

(31) Mo.—Peak v. W. T. Grant Co., App., 386 S.W.2d 685.

(33) D.C.—City Stores Co. v. Gibson, App., 263 A.2d 252.

Mo.—Wisner v. S.S. Kresge Co., App., 465 S.W.2d 666.
N.Y.—DeBonis v. State, 325 N.Y.S.2d 215, 37 A.D.2d 878.

Okla.—Montgomery Ward & Co. v. Oldham, 391 P.2d 283.

(37) Mo.—Wisner v. S.S. Kresge Co., App., 465 S.W.2d 666.

(38) U.S.—National Food Stores, Inc. v. Utley, C.A. Ark., 303 F.2d 284—Reicheneder v. Skaggs Drug Center, C.A.Tex., 421 F.2d 307.

Mo.—Quinn v. Rosenberg, App., 399 S.W.2d 433.

Tex.—Skillern & Sons, Inc. v. Stewart, Civ.App., 379 S.W.2d 687, err. ref. no rev. err.

(41) N.Y.—Brizer v. City of New York, 380 N.Y.S.2d 60, 51 A.D.2d 791.

(44) Fla.—Silvia v. Zayre Corp., App., 233 So.2d 856—Joseph v. Jefferson Stores, App., 228 So.2d 103.
Ind.—City of Evansville v. Cook, 319 N.E.2d 874, 162 Ind.App. 465.

Kan.—Sweeney v. United Loan & Finance Co., 468 P.2d 124, 205 Kan. 66.

Mich.—Stowers v. Wolodzko, 191 N.W.2d 355, 386 Mich. 119.

Stowers v. Ardmore Acres Hospital, 172 N.W.2d 497, 19 Mich.App. 115, affd. 191 N.W.2d 355, 386 Mich. 119.

Mo.—Wehrman v. Liberty Petroleum Co., App., 382 S.W.2d 56—Garvis v. K Mart Discount Store, App., 461 S.W.2d 317—Helming v. Adams, App., 509 S.W.2d 159.

N.Y.—Snyder v. State, 236 N.Y.S.2d 355, 38 Misc.2d 488, mod. on oth. grds. 247 N.Y.S.2d 757, 20 A.D.2d 827—Pawlodki v. State, 258 N.Y.S.2d 258, 45 Misc.2d 933—Sindle v. New York City Transit Authority, 316 N.Y.S.2d 657, 64 Misc.2d 993, 995, affd. 331 N.Y.S.2d 343, 38 A.D.2d 892. Revd. on oth. grds. 307 N.E.2d 245, 33 N.Y.2d 293, 352 N.Y.S.2d 183.

Wis.—Lane v. Collins, 138 N.W.2d 264, 29 Wis.2d 66.

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31. Fla.—Washington County Kennel Club, Inc. v. Edge, App., 216 So.2d 512.

Verdicts held not result of passion or prejudice

Ind.—City of New Albany v. Schmidt, 250 N.E.2d 609, 145 Ind.App. 296.

Miss.—Southwest Drug Stores of Miss., Inc. v. Garner, 195 So.2d 837, 29 A.L.R.3d 953.

Wash.—Wilson v. City of Walla Walla, 528 P.2d 1006, 12 Wash.App. 152.

34. Amount inadequate

La.—Jones v. Simonson, App., 292 So.2d 251.

§ 71. Offenses and Responsibility Therefor

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44. N.C.—C.J.S. quoted in State v. Ingham, 178 S.E.2d 577, 582, 278 N.C. 42.

45. Minn.—Wild v. Rarig, 234 N.W.2d 775, 302 Minn. 419, app. dism., cert. den. 96 S.Ct. 1093, 424 U.S. 902, 47 L.Ed.2d 307, reh. den. 96 S.Ct. 1689, 425 U.S. 945, 48 L.Ed.2d 190.

N.C.—C.J.S. cited in State v. Ingham, 178 S.E.2d 577, 582, 278 N.C. 42.

State v. Fulcher, 237 S.E.2d 909, 34 N.C.App. 233, app. decided no error, 243 S.E.2d 338, 294 N.C. 503.

"Carrying away" as element of kidnapping but not false imprisonment

Md.—Hunt v. State, 278 A.2d 637, 12 Md.App. 286.

46. Fla.—Jane v. State, App., 362 So.2d 1005.

Tex.—Phillips v. State, Cr.App., 597 S.W.2d 929.

Statutory definitions

(1) Cal.—Muller v. Reagh, 30 Cal.Rptr. 633, 215 C.A.2d 831—People v. Gibbs, 90 Cal.Rptr. 866, 12 C.A.3d 526.

Statute construed

Cal.—People v. Arvanites, 95 Cal.Rptr. 493, 17 C.A.3d 1052.

Ill.—People v. Jones, 417 N.E.2d 647, 48 Ill.Dec. 915, 93 Ill.App.3d 475.

Ky.—Timmons v. Com., 555 S.W.2d 234—Smith v. Com., 610 S.W.2d 602.

Acts in eviction fell within statutory provisions

N.Y.—People v. Cook, 365 N.Y.S.2d 611, 81 Misc.2d 235.

Statute valid

Wash.—State v. Parker, 649 P.2d 637, 97 Wash.2d 737.

47. Cal.—People v. Gibbs, 90 Cal.Rptr. 866, 12 C.A.3d 526.

Fla.—Hearns v. State, App., 378 So.2d 70.

Ind.—C.J.S. cited in Inman v. State, 393 N.E.2d 767, 770, 271 Ind. 491.

Md.—Hawkins v. State, 366 A.2d 421, 34 Md.App. 82.

N.H.—State v. Fecteau, 437 A.2d 294, 121 N.H. 1003.
Utah—C.J.S. cited in State v. Pass, 515 P.2d 612, 613, 30 Utah2d 197.

Continuous offense

Wis.—Baldwin v. State, 215 N.W.2d 541, 62 Wis.2d 521.

Time completed

Wis.—Kwosek v. State, 208 N.W.2d 308, 60 Wis.2d 276.

Attempt to prevent suicide not crime

Minn.—State v. Hembd, 232 N.W.2d 872, 305 Minn. 120.

Lessor offense

Wash.—State v. Robinson, 582 P.2d 580, 20 Wash.App. 882, affd. 597 P.2d 892, 92 Wash.2d 357.

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47.5. Cal.—People v. Brock, 34 Cal.Rptr. 113, 220 C.A.2d 605.

Ill.—People v. Jones, 417 N.E.2d 647, 48 Ill.Dec. 915, 93 Ill.App.3d 475.

Nev.—Lerner Shops of Nev., Inc. v. Marin, 423 P.2d 398, 83 Nev. 75.

48. Pa.—Com. v. Schilling, 431 A.2d 1088, 288 Pa.Super. 359.

Tex.—C.J.S. cited in Safeway Stores, Inc. v. Amburn, Civ.App., 388 S.W.2d 443, 447.

49. Ill.—People v. Warner, 424 N.E.2d 747, 53 Ill. Dec. 956, 98 Ill.App.3d 133.

Md.—Watkins v. State, 478 A.2d 326, 59 Md.App. 705.

50. Cal.—People v. Sipult, 44 Cal.Rptr. 846, 234 C.A.2d 862, cert. den. 86 S.Ct. 1951, 384 U.S. 1015, 16 L.Ed.2d 1036.

Ill.—C.J.S. quoted in People v. Satterthwaite, 391 N.E.2d 162, 164, 29 Ill.Dec. 3, 72 Ill.App.3d 483.

Ky.—Whitt v. Com., 479 S.W.2d 646.

Minn.—State v. McCormick, 273 N.W.2d 624.

Tex.—Ex parte Gutierrez, Cr.App., 600 S.W.2d 933.

Forcing accompaniment of minor child without mother's consent

N.Y.—People v. Amazon, 383 N.Y.S.2d 686, 52 A.D.2d 1012.

Confinement only incidental to other crime

Fla.—Hrindich v. State, App. 5 Dist., 427 So.2d 212, review den. 431 So.2d 989.

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61. N.H.—State v. Fecteau, 437 A.2d 294, 121 N.H. 1003.

62.5. Consent obtained through coercion or deception no defense

N.Y.—People v. D'Arcy, 359 N.Y.S.2d 453, 79 Misc.2d 113.

Consent construed

U.S.—Rosario v. Amalgamated Ladies Garment Cutters' Union, Local 10, I.L.G.W.U., C.A.N.Y., 605 F.2d 1228, cert. den. 100 S.Ct. 1853, 446 U.S. 919, 64 L.Ed.2d 273, app. after remand 749 F.2d 1000.

70. Necessity defense not available

Cal.—People v. Patrick, 179 Cal.Rptr. 276, 126 C.A.3d 952.

74. N.Y.—People v. Muka, 421 N.Y.S.2d 438, 72 A.D.2d 649.

Person guilty of kidnapping

Cal.—People v. Morrison, 39 Cal.Rptr. 874, 228 C.A.2d 707.

75. Ky.—Crain v. Com., 484 S.W.2d 839.

Transpiration

(2) Other matters.

Wash.—Davis v. Rhay, 413 P.2d 654, 68 Wash.2d 496.

§ 72. Prosecution and Punishment

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Generally, allegations following statutory language in charging the offense of false imprisonment are sufficient.^{93.5}

93.5. N.Y.—People v. D'Arcy, 359 N.Y.S.2d 453, 79 Misc.2d 113.

Tex.—Mobley v. State, Cr., 365 S.W.2d 173, reh. den. 366 S.W.2d 558.

Indictment held sufficient

Ky.—Finch v. Com., 419 S.W.2d 146.

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12. Evidence held sufficient

(1) Ill.—People v. Scott, 314 N.E.2d 671, 20 Ill. App.3d 880.

Tex.—Washington v. State, Cr., 509 S.W.2d 638.

(5) Other evidence.

Wis.—State v. McClanahan, 196 N.W.2d 700, 54 Wis.2d 751.

Evidence held insufficient

(1) Fla.—In Interest of T. L. T., App., 32*So.2d 200.
N.Y.—People v. Reale, 368 N.Y.S.2d 59, 48 A.D.2d 707.

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14. Instruction proper

Ky.—Crain v. Com., 484 S.W.2d 839.

20.10. N.Y.—People v. Ennis, 322 N.Y.S.2d 341, 37 A.D.2d 573, affd. 281 N.E.2d 180, 30 N.Y.S.2d 535, 330 N.Y.S.2d 384.

Discretion not abused

Wis.—Byrd v. State, 222 N.W.2d 696, 65 Wis.2d 415, 77 A.L.R.3d 168.

FALSE PERSONATION

§ 1. Definition

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1. "Impersonate" and "personate" have same meaning

Cal.—People v. Vaughn, 16 Cal.Rptr. 711, 196 C.A.2d 622.

Other definitions

N.J.—State v. Thyfault, 297 A.2d 873, 121 N.J.Super. 487, affd. 315 A.2d 424, 126 N.J.Super. 459.

§ 2. As Common-Law and Statutory Offense

4. Ala.—C.J.S. cited in Smith v. State, Cr., 239 So.2d 230, 231, 46 Ala.App. 157.

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6. Colo.—People v. Lambert, 572 P.2d 839, 194 Colo. 421.

N.Y.—People v. Diamond, 353 N.Y.S.2d 688, 77 Misc.2d 412.

R.I.—State v. Dussault, 403 A.2d 244, 121 R.I. 751.

United States statute

(1) U.S.—U.S. v. Milton, C.A.Okl., 421 F.2d 586. U.S. v. Carr, D.C.Cal., 194 F.Supp. 144.

(2) U.S.—Honea v. U.S., C.A.Tex., 344 F.2d 798.

(7) Pretense of being member of armed forces reserve not excluded by statute as to status of reserves.

U.S.—U.S. v. Harris, D.C.Md., 220 F.Supp. 289.

(8) Other matters.

U.S.—Honea v. U.S., C.A.Tex., 344 F.2d 798.

Constable included

N.J.—State v. Thyfault, 297 A.2d 873, 121 N.J.Super. 487, affd. 315 A.2d 424, 126 N.J.Super. 459.

Statute not invalid

Tex.—Harrison v. State, App. 14 Dist., 633 S.W.2d 337.

10. N.J.—State v. Thyfault, 297 A.2d 873, 121 N.J.Super. 487, affd. 315 A.2d 424, 126 N.J.Super. 459.

S.C.—State v. Fischer, 242 S.E.2d 437, 270 S.C. 402.

Need not be pecuniary

N.Y.—People v. Diamond, 353 N.Y.S.2d 688, 77 Misc.2d 412.

Statute not overbroad

Colo.—People v. Gonzales, 534 P.2d 626, 188 Colo. 272.

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20.5. Kan.—State v. Turner, 328 P.2d 733, 183 Kan. 496, app. dism. 79 S.Ct. 739, 359 U.S. 206, 3 L.Ed.2d 759.

21. "Benefits" accruing "to any other person" Cal.—People v. Vaughn, 16 Cal.Rptr. 711, 196 C.A.2d 622.

Statutes construed

N.Y.—People v. Simmons, 357 N.Y.S.2d 362, 79 Misc.2d 249.

§ 3. Elements of Offense and Persons Liable

Library References

False Personation ⇨2.

22. N.Y.—People v. Gaissert, 348 N.Y.S.2d 82, 75 Misc.2d 478.

Okl.—Stokes v. State, Cr., 366 P.2d 425.

R.I.—State v. Dussault, 403 A.2d 244, 121 R.I. 751.

Essence of the offense

(4) Other statements.

N.Y.—People v. Danisi, 449 N.Y.S.2d 874, 113 Misc.2d 753.

Submission to pretended official authority

N.Y.—People v. Jackson, 339 N.Y.S.2d 429, 72 Misc.2d 297.

No false personation

N.Y.—People v. Karp, 365 N.Y.S.2d 414, 80 Misc.2d 965—People v. Danisi, 449 N.Y.S.2d 874, 113 Misc.2d 753.

23. Crime not committed

N.Y.—People v. Powell, 399 N.Y.S.2d 477, 59 A.D.2d 950.

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27. Alaska—Lanier v. State, 448 P.2d 587.

28. Elements of impersonation of public servant

Or.—In re Conduct of Steffen, 567 P.2d 544, 279 Or. 313.

30. N.Y.—People v. Jones, 376 N.Y.S.2d 885, 84 Misc.2d 737.

32. U.S.—Caruso v. U.S., 414 F.2d 225.

36.5 U.S.—U.S. v. Bushrod, C.A.9 (Cal.), 763 F.2d 1051.

37. N.J.—State v. Thyfault, 297 A.2d 873, 121 N.J.Super. 487, affd. 315 A.2d 424, 126 N.J.Super. 459.

38. N.J.—State v. Thyfault, 297 A.2d 873, 121 N.J.Super. 487, affd. 315 A.2d 424, 126 N.J.Super. 459.

Tex.—Harrison v. State, App. 14 Dist., 633 S.W.2d 337.

39. N.J.—State v. Thyfault, 297 A.2d 873, 121 N.J.Super. 487, affd. 315 A.2d 424, 126 N.J.Super. 459.

40. Pa.—Com. v. Lorey, 25 Beaver 5.

United States statute

(1) U.S.—U.S. v. Guthrie, C.A.N.C., 387 F.2d 569, app. after remand 391 F.2d 930, cert. den. 88 S.Ct. 2284, 392 U.S. 927, 20 L.Ed.2d 1386—U.S. v. Mitman, C.A.Cal., 459 F.2d 451, cert. den. 93 S.Ct. 154, 409 U.S. 863, 34 L.Ed.2d 111—U.S. v. Robbins, C.A.Ark., 613 F.2d 688.

U.S. v. Harth, D.C.Okl., 280 F.Supp. 425.

(2) U.S.—Honea v. U.S., C.A.Tex., 344 F.2d 798.

(4) Intent to defraud held essential element of false impersonation of federal officer and demanding money.

U.S.—Honea v. U.S., C.A.Tex., 344 F.2d 798—U.S. v. Randolph, C.A.Fla., 460 F.2d 367—U.S. v. Pollard, C.A.Ala., 491 F.2d 1387, cert. den. 95 S.Ct. 92, 419 U.S. 851, 42 L.Ed.2d 82.

(5) D.C.—U.S. v. Rosser, C.A., 528 F.2d 652, 174 U.S.App.D.C. 79.

41. U.S.—U.S. v. Southerland, C.A.Md., 565 F.2d 1281.

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43. U.S.—U.S. v. Harmon, C.A.N.Y., 496 F.2d 20.

Wearing firearms in impersonating officer

U.S.—U.S. v. Hamilton, C.A.Ind., 276 F.2d 96.

Boarding aircraft with forged military passports

U.S.—U.S. v. Birch, C.A.Md., 470 F.2d 808, cert. den. 93 S.Ct. 1897, 411 U.S. 931, 36 L.Ed.2d 390.

44. U.S.—U.S. v. Harth, D.C.Okl., 280 F.Supp. 425.

47. Tex.—Boyle v. State, Cr., 368 S.W.2d 769.

§ 5. — Indictment or Information

Library References

Barron and Holtzoff, Federal Practice and Procedure §§ 4530, 4538.

50. U.S.—U.S. v. Harth, D.C.Okl., 280 F.Supp. 425.

Indictment held sufficient

(5) Other indictments.

U.S.—U.S. v. Leggett, C.A.N.C., 312 F.2d 566.

U.S. v. Harth, D.C.Okl., 280 F.Supp. 425.

Ill.—People v. Vyshter, 199 N.E.2d 668, 49 Ill.App.2d 223.

Approved form

U.S.—Honea v. U.S., C.A.Tex., 344 F.2d 798.

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51. U.S.—Honea v. U.S., C.A.Tex., 344 F.2d 798.

54. U.S.—Honea v. U.S., C.A.Tex., 344 F.2d 798.

58. U.S.—U.S. v. Harth, D.C.Okl., 280 F.Supp. 425.

Indictment or information held insufficient

U.S.—U.S. v. Pollard, C.A.Ala., 486 F.2d 190—U.S. v. Harmon, C.A.N.Y., 496 F.2d 20.

U.S. v. Carr, D.C.Cal., 194 F.Supp. 144.

Language of statute

(1) U.S.—Haddad v. U.S., C.A.Cal., 349 F.2d 511, cert. den. 86 S.Ct. 193, 382 U.S. 896, 15 L.Ed.2d 153.

Indictment sufficient

U.S.—U.S. v. Pollard, C.A.Ala., 491 F.2d 1387, cert. den. 95 S.Ct. 92, 419 U.S. 851, 42 L.Ed.2d 82.

60. Intent to defraud

U.S.—U.S. v. Guthrie, C.A.N.C., 387 F.2d 569, app. after remand 391 F.2d 930, cert. den. 88 S.Ct. 2284, 392 U.S. 927, 20 L.Ed.2d 1386.

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70. Falseness of claimed character

(3) Other matters.

Tex.—Boyle v. State, Cr., 368 S.W.2d 769.

§ 6. — Evidence

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73. Evidence held sufficient

(1) Conn.—State v. Davis, Cir.A.D., 197 A.2d 668, 2 Conn.Cir. 257.

(3) D.C.—Parker v. U.S., C.A., 391 F.2d 457, 129 U.S.App.D.C. 104.

Tex.—Boyle v. State, Cr., 368 S.W.2d 769.

(4) U.S.—U.S. v. Harth, D.C.Okl., 280 F.Supp. 425.

(5) U.S.—Whaley v. U.S., C.A.Cal., 324 F.2d 356, cert. den. 84 S.Ct. 665, 376 U.S. 911, 11 L.Ed.2d 609, reh. den. 84 S.Ct. 1122, 376 U.S. 966, 11 L.Ed.2d 984—U.S. v. Hessbrook, C.A.Tex., 504 F.2d 1375, cert. den. 95 S.Ct. 1450, 420 U.S. 1006, 43 L.Ed.2d 764.

(10) Cal.—People v. Vaughn, 16 Cal.Rptr. 711, 196 C.A.2d 622.

(11) Other cases.

U.S.—U.S. v. Johnson, C.A.Fla., 483 F.2d 444.

Ga.—Mitchell v. State, 222 S.E.2d 160, 136 Ga.App. 658.

Evidence held insufficient

(4) N.Y.—People v. Toro, 355 N.Y.S.2d 634, 44 A.D.2d 848.

(5) U.S.—Honea v. U.S., C.A.Tex., 344 F.2d 798. Ill.—People v. Rinehart, 225 N.E.2d 486, 81 Ill.App.2d 125.

§ 7. — Trial and Review

74. D.C.—U.S. v. Rosser, C.A., 528 F.2d 652, 174 U.S.App.D.C. 79.

Instructions held properly refused

Cal.—People v. Vaughn, 16 Cal.Rptr. 711, 196 C.A.2d 622.

Proffered instruction properly refused

U.S.—U.S. v. Hessbrook, C.A.Tex., 504 F.2d 1375, cert. den. 95 S.Ct. 1450, 420 U.S. 1006, 43 L.Ed.2d 764.

Sentence held excessive

N.Y.—People v. Bentley, 359 N.Y.S.2d 391, 78 Misc.2d 578.

75. Submission to jury held proper

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20. U.S.—United Pac. Ins. Co. v. Idaho First Nat. Bank, C.A.Idaho, 378 F.2d 62.

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(5) Other statements.

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(3) Other statements.

- Cal.—People v. Aiken, 34 Cal.Rptr. 828, 222 C.A.2d 45.

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- N.Y.—Giannetto v. General Exchange Ins. Corp., 200 N.Y.S.2d 238, 10 A.D.2d 442.

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33. Whether accused could confer good title on another

- Or.—State v. Thompson, 402 P.2d 243, 240 Or. 468.

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36. Md.—Smith v. State, 207 A.2d 493, 237 Md. 573.

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75. U.S.—Smith v. Warden, Md. House of Correction, D.C.Md., 280 F.Supp. 827.

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- (1) Okla.—Dunaway v. State, Cr., 561 P.2d 103.

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- Cal.—People v. Perry, 40 Cal.Rptr. 829, 230 C.A.2d 258.

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- Tex.—Nolan v. State, Cr.App., 629 S.W.2d 940.

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- Colo.—People v. Abbott, 638 P.2d 781.
- Kan.—State v. Haremsa, 515 P.2d 1217, 213 Kan. 201.
- Ky.—Patterson v. Com., App., 556 S.W.2d 909, cert. den. 98 S.Ct. 1609, 435 U.S. 970, 56 L.Ed.2d 61.
- Minn.—State v. Harris, 152 N.W.2d 728, 277 Minn. 351.
- Tenn.—Smithson v. State, 438 S.W.2d 61, 222 Tenn. 499.
77. Ky.—Patterson v. Com., App., 556 S.W.2d 909, cert. den. 98 S.Ct. 1609, 435 U.S. 970, 56 L.Ed.2d 61.
78. U.S.—Mathis v. State of N.C., D.C.N.C., 266 F.Supp. 841—Lundgren v. Turner, D.C.Utah, 305 F.Supp. 996.
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- N.M.—State v. Sweat, App., 504 P.2d 24, 84 N.M. 416.
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83. Colo.—People v. Vinnola, 494 P.2d 826, 177 Colo. 405.

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- Okl.—Dunaway v. State, Cr., 561 P.2d 103.

85. Invalid as device to force payment of debt

- Colo.—People v. Vinnola, 494 P.2d 826, 177 Colo. 405.

86.5. Invalid as collection device

- Colo.—People v. Vinnola, 494 P.2d 826, 177 Colo. 405.

87. Iowa—State v. Robinson, 183 N.W.2d 190.

- Okl.—Shriver v. Graham, Cr., 366 P.2d 774.

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- Cal.—People v. Dixon, 120 Cal.Rptr. 163, 46 C.A.3d 431.

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- N.J.—State v. Donohue, 201 A.2d 413, 84 N.J.Super. 226.

- Tex.—Bearden v. State, Cr., 487 S.W.2d 739.

89. Common-law offense included

- Minn.—State v. Mathiasen, 141 N.W.2d 805, 273 Minn. 372.

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- U.S.—U.S. v. Feroni, C.A.Mich., 655 F.2d 707.

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- Mo.—State v. Newhart, App., 503 S.W.2d 62, app. after remand 539 S.W.2d 486.

90. U.S.—U.S. v. Benson, C.A.N.Y., 548 F.2d 42, cert. den. 97 S.Ct. 1185, 430 U.S. 910, 51 L.Ed.2d 588, and 97 S.Ct. 2652, 431 U.S. 939, 53 L.Ed.2d 257.

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- 90.5. Fla.—Crowell v. State, App., 153 So.2d 849.

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- Cal.—People v. Enriquez, 56 Cal.Rptr. 334, 423 P.2d 262, 65 C.2d 746.

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§ 6. Elements of Offenses in General

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- N.C.—State v. Houston, 166 S.E.2d 881, 4 N.C.App. 484—State v. Banks, 211 S.E.2d 860, 24 N.C.App. 604—State v. Wallace, 213 S.E.2d 420, 25 N.C. App. 360, cert. den. 215 S.E.2d 628, 287 N.C.

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 Tex.—Ratcliff v. State, Cr., 504 S.W.2d 883, cert. den. 96 S.Ct. 227, 423 U.S. 910, 46 L.Ed.2d 147.
 Utah—State v. Vatsis, 351 P.2d 96, 10 Utah2d 244.
 Va.—Bourgeois v. Com., 227 S.E.2d 714, 217 Va. 268—Sult v. Com., 275 S.E.2d 608, 221 Va. 915.

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(1) Cal.—People v. Causey, 34 Cal.Rptr. 43, 220 C.A.2d 641, cert. den. 84 S.Ct. 981, 376 U.S. 959, 11 L.Ed.2d 976—People v. Taylor, 106 Cal.Rptr. 216, 30 C.A.3d 117.

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(2) Other matters.

Ga.—Allen v. State, 138 S.E.2d 431, 110 Ga.App. 294.

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N.J.—State v. Moore, 385 A.2d 867, 158 N.J.Super. 68.
 Tex.—Ex parte Mangrum, Cr., 564 S.W.2d 751.

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N.C.—State v. Hines, 243 S.E.2d 782, 36 N.C.App. 33, app. dism., review den. Sup., 245 S.E.2d 779.

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6. Ala.—Griffin v. State, Cr., 352 So.2d 843, affd. 352 So.2d 847.
 Cal.—People v. Allen, 25 Cal.Rptr. 351, 208 C.A.2d 537—People v. Gibson, 79 Cal.Rptr. 693, 275 C.A.2d 198.
 D.C.—Fowler v. U.S., App., 374 A.2d 856.
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 Kan.—State v. Hamilton, 631 P.2d 1255, 6 Kan.App.2d 646.
 La.—State v. Heymann, 235 So.2d 78, 256 La. 18.
 Md.—State v. Sinclair, 337 A.2d 703, 274 Md. 646.
 N.C.—State v. Cronin, 262 S.E.2d 277, 299 N.C. 229.
 Pa.—Com. v. Silia, 166 A.2d 73, 194 Pa.Super. 291, cert. den. 82 S.Ct. 443, 368 U.S. 969, 7 L.Ed.2d 397—Com. v. Petrosky, 166 A.2d 682, 194 Pa.Super. 94—Com. v. Matthews, 173 A.2d 772, 196 Pa.Super. 60—Com. v. Buzak, 179 A.2d 248, 197 Pa.Super. 514—Com. v. Bomersbach, 302 A.2d 472, 224 Pa.Super. 40.
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Theft by deception

Colo.—People v. Attebury, 587 P.2d 281, 196 Colo. 509.
 Ga.—Harris v. State, 233 S.E.2d 21, 141 Ga.App. 213—Hancock v. State, 282 S.E.2d 401, 158 Ga.App. 829.
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 Pa.—Com. v. Patterson, 390 A.2d 784, 257 Pa.Super. 206.
 6.5. Ariz.—State v. Mills, 396 P.2d 5, 96 Ariz. 377.

Ky.—Palmer v. Com., 479 S.W.2d 613.
 Va.—Quidley v. Com., 275 S.E.2d 622, 221 Va. 963.
 6.10. Cal.—People v. Lorenzo, 135 Cal.Rptr. 337, 64 C.A.3d Supp. 43.
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 Neb.—Harger v. State, 106 N.W.2d 176, 171 Neb. 342—State v. Bohannon, 193 N.W.2d 153, 187 Neb. 594.
 Pa.—Com. v. Hoffman, 28 Leh.L.J. 471.

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6.20. Pa.—Com. v. Evans, 154 A.2d 57, 190 Pa.Super. 179, affd. 160 A.2d 407, 399 Pa. 387, cert. den. 81 S.Ct. 233, 364 U.S. 899, 5 L.Ed.2d 194, reh. den. 81 S.Ct. 377, 364 U.S. 939, 5 L.Ed.2d 371.
 Com. v. Rosciolo, 57 Lanc.Rev. 567—Com. v. Adams, 35 North. 393.
 6.25. Theft by fraud
 U.S.—Hawkins v. Mathews, D.C.Wis., 495 F.Supp. 323.
 7. Conn.—State v. Anonymous, 347 A.2d 648, 32 Conn.Super. 591, 32 Conn.Super. 591.
 Neb.—State v. Swanson, 140 N.W.2d 618, 179 Neb. 693.
 8.5. Mo.—State v. Watson, App., 562 S.W.2d 721.
 8.10. Md.—Sine v. State, 394 A.2d 1206, 40 Md.App. 628.
 Pa.—Com. v. Gallo, 373 A.2d 1109, 473 Pa. 186.

Motive is not an essential element of the offense.^{8.15}

8.15. Ohio—State v. Cickelli, 193 N.E.2d 409, 118 Ohio App. 87, app. dism. 191 N.E.2d 806, 175 Ohio St. 146, app. dism. 84 S.Ct. 1178, 377 U.S. 128, 12 L.Ed.2d 184.

In accordance with specific statutory provisions, the use of a credit card with intent to defraud is a criminal offense.^{8.20}

8.20. Ga.—Rowland v. State, 184 S.E.2d 495, 124 Ga.App. 495.

Nature and elements of offense

Cal.—People v. Churchill, 63 Cal.Rptr. 312, 255 C.A.2d 448.
 N.M.—State v. Lopez, App., 516 P.2d 1125, 85 N.M. 742.

Nature and elements of offense

Tex.—Ex parte Mathis, Cr.App., 571 S.W.2d 186.

Credit card offense distinguished from burglary

Cal.—People v. Churchill, 63 Cal.Rptr. 312, 255 C.A.2d 448.

Violation of credit card act

N.J.—State v. Dehchill, 342 A.2d 161, 67 N.J. 565.

§ 7. Intent

9. U.S.—Norton v. C. I. R., C.A.Cal., 333 F.2d 1005.
 U.S. v. Brunet, D.C.Wis., 227 F.Supp. 766—Rummel v. Estelle, D.C.Tex., 498 F.Supp. 793.
 Ala.—Tolbert v. State, 321 So.2d 227, 294 Ala. 738, on remand 321 So.2d 234, 56 Ala.App. 730.
 Ariz.—State v. Burton, 444 P.2d 743, 8 Ariz.App. 186.
 Cal.—People v. Hewitt, 18 Cal.Rptr. 5, 198 C.A.2d 247—People v. Hambleton, 32 Cal.Rptr. 471, 218 C.A.2d 479—Otash v. Bureau of Private Investigators and Adjusters, 41 Cal.Rptr. 263, 230 C.A.2d 568—People v. Curtis, 43 Cal.Rptr. 286, 232 C.A.2d 859—People v. Lynam, 68 Cal.Rptr. 202, 261 C.A.2d 490—People v. Brady, 80 Cal.Rptr. 418, 275 C.A.2d 984—People v. Faubus, 121 Cal. Rptr. 167, 48 C.A.3d 1.
 Colo.—People v. Kanan, 526 P.2d 1339, 186 Colo. 255.
 Conn.—State v. Winters, Cir.A.D., 202 A.2d 908, 2 Conn.Cir. 508, certification den. 199 A.2d 705, 151 Conn. 738.
 Fla.—Younger v. State, App., 215 So.2d 318—Wright v. State, App., 226 So.2d 442.

Idaho—State v. Urie, 437 P.2d 24, 92 Idaho 71.
 Ill.—People v. Billingsley, 213 N.E.2d 765, 67 Ill. App.2d 292—People v. Greene, 235 N.E.2d 295, 92 Ill.App.2d 201—People v. Johnson, 233 N.E.2d 574, 91 Ill.App.2d 378—People v. Cundiff, 305 N.E.2d 735, 16 Ill.App.3d 267—People v. Curtis, 316 N.E.2d 557, 22 Ill.App.3d 4.
 Ind.—Lemert Engineering Co., Inc. v. Monroe Auto Equipment Co., Inc., App., 444 N.E.2d 859.
 Kan.—State v. Haremza, 515 P.2d 1217, 213 Kan. 201.
 La.—State v. Smith, 262 So.2d 362, 262 La. 39.
 Md.—League v. State, 232 A.2d 828, 1 Md.App. 681—Andresen v. State, 331 A.2d 78, 24 Md.App. 128, affd. 96 S.Ct. 2737, 427 U.S. 463, 49 L.Ed.2d 627.
 Mass.—Com. v. Abbott Engineering, Inc., 222 N.E.2d 862, 351 Mass. 568—Com. v. Leonard, 227 N.E.2d 721, 352 Mass. 636.
 Mich.—People v. Creger, 167 N.W.2d 490, 16 Mich. App. 59.
 Mo.—State v. Inscore, 592 S.W.2d 809.
 Neb.—Harger v. State, 106 N.W.2d 176, 171 Neb. 342.
 Nev.—State v. Jarman, 438 P.2d 250, 84 Nev. 187—Watkins v. Sheriff of Clark County, 453 P.2d 611, 85 Nev. 246.
 N.J.—State v. Graves, 291 A.2d 2, 60 N.J. 441—State v. Blasi, 312 A.2d 135, 64 N.J. 51.
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 N.Y.—People v. Powell, 256 N.Y.S.2d 117, 22 A.D.2d 959.
 N.C.—State v. Cronin, 262 S.E.2d 277, 299 N.C. 229.
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 Ohio—State v. Creachbaum, 263 N.E.2d 675, 24 Ohio App.2d 31, affd. 276 N.E.2d 28, 28 Ohio St.2d 116.
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 Pa.—Com. v. Bollinger, 179 A.2d 253, 197 Pa.Super. 492.
 S.D.—State v. West, 260 N.W.2d 215.
 Tenn.—Stines v. State, Cr., 556 S.W.2d 234.
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 Va.—Huntt v. Com., 187 S.E.2d 183, 212 Va. 737.
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 Ky.—Talbert v. Com., 486 S.W.2d 702.
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 Cal.—People v. Churchill, 63 Cal.Rptr. 312, 255 C.A.2d 448.
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 9.5. Cal.—People v. Lynam, 68 Cal.Rptr. 202, 261 C.A.2d 490.
 Mass.—Com. v. Louis Const. Co., 180 N.E.2d 83, 343 Mass. 600.
 Ohio—State v. Creachbaum, 276 N.E.2d 240, 28 Ohio St.2d 116.
 10. N.D.—State v. McDowell, 312 N.W.2d 301, cert. den. 103 S.Ct. 318, 459 U.S. 981, 74 L.Ed.2d 294.
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§ 7 FALSE PRETENSES

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11. Ariz.—State v. Ebner, 616 P.2d 30, 126 Ariz. 355.
12. Fla.—Valassakis v. State, App., 187 So.2d 74.
16. Cal.—People v. Lorenzo, 135 Cal.Rptr. 337, 64 C.A.3d Supp. 43.
17. Ill.—People v. Mitchell, 365 N.E.2d 185, 7 Ill. Dec. 900, 50 Ill.App.3d 12.
- Ky.—Rice v. Com., 621 S.W.2d 911.
- Mich.—People v. Beaudoin, App., 151 N.W.2d 868, 7 Mich.App. 461.
- Or.—State v. Clermont, 495 P.2d 305, 9 Or.App. 141.
- Va.—Riegert v. Com., 237 S.E.2d 803, 218 Va. 511.

Nonperformance of promise

- Cal.—People v. Gibson, 79 Cal.Rptr. 693, 275 C.A.2d 198.

Intent to countermand check must exist at time of issuance

- Md.—Sinclair v. State, 319 A.2d 549, 21 Md.App. 477, affd. 337 A.2d 703, 274 Md. 646.

Intent must be accompanied by false representation

- Iowa—State v. Evely, 228 N.W.2d 196.

Check tendered in payment of preexisting debt

- Md.—State v. Sinclair, 337 A.2d 703, 274 Md. 646.
21. Mich.—People v. Sharpe, 178 N.W.2d 90, 22 Mich.App. 454.

§ 8. Nature of Pretense or Fact Represented

- Miss.—C.J.S. black letter summary quoted in Presley v. American Guarantee & Liability Ins. Co., 116 So.2d 410, 414, 237 Miss. 807.

- 21.50. N.Y.—People v. Churchill, 390 N.E.2d 1146, 47 N.Y.2d 151, 417 N.Y.S.2d 221.

- R.I.—State v. Aurgemma, 358 A.2d 46, 116 R.I. 425.

22. U.S.—Indemnity Ins. Co. of North America v. Pioneer Val. Sav. Bank, C.A.Iowa, 343 F.2d 634—U.S. v. Fulcher, C.A., 626 F.2d 985, 200 U.S.App. D.C. 121, cert. den. 101 S.Ct. 116, 449 U.S. 839, 66 L.Ed.2d 46.

- Pioneer Val. Sav. Bank v. Indemnity Ins. Co. of North America, D.C.Iowa, 225 F.Supp. 404, affd., C.A., 343 F.2d 634.

- Ariz.—State v. Ebner, 616 P.2d 30, 126 Ariz. 355.
- Ark.—Kerby v. State, 342 S.W.2d 412, 233 Ark. 8—Davis v. State, 411 S.W.2d 531, 241 Ark. 646, 242 Ark. 43.

- Cal.—People v. Wallace, 6 Cal.Rptr. 309, 182 C.A.2d 624—People v. Koch, 84 Cal.Rptr. 629, 4 C.A.3d 270.

- Colo.—Rogers v. People, 422 P.2d 377, 161 Colo. 317.
- Conn.—State v. Semrau, Cir.A.D., 199 A.2d 580, 2 Conn.Cir. 392.

- Fla.—Youngker v. State, App., 215 So.2d 318.

- Ga.—Lindsey v. State, 129 S.E.2d 395, 107 Ga.App. 112—Croy v. State, 211 S.E.2d 183, 133 Ga.App. 244.

- Ill.—People v. Jedlicka, 405 N.E.2d 844, 39 Ill.Dec. 865, 84 Ill.App.3d 483.

- Iowa—State v. Hatridge, 109 N.W.2d 705, 252 Iowa 1116.

- Me.—C.J.S. cited in State v. Austin, 188 A.2d 275, 276, 159 Me. 71—C.J.S. cited in State v. Deschambault, 191 A.2d 114, 117, 159 Me. 223—State v. Chick, 263 A.2d 71.

- Md.—Nicholas v. State, 212 A.2d 291, 239 Md. 569.
- Mich.—People v. Cook, 279 N.W.2d 579, 89 Mich.App. 72.

- Mont.—State v. Love, 440 P.2d 275, 151 Mont. 190.
- N.Y.—Giannetto v. General Exchange Ins. Corp., 200 N.Y.S.2d 238, 10 A.D.2d 442—People v. Benevento, 239 N.Y.S.2d 761, 19 A.D.2d 561.

- Va.—Riegert v. Com., 237 S.E.2d 803, 218 Va. 511.
- Wash.—State v. Bryant, 437 P.2d 398, 73 Wash.2d 168. State v. Walters, 508 P.2d 1390, 8 Wash.App. 706.

No misrepresentation of existing fact

- Ga.—Harris v. State, 233 S.E.2d 21, 141 Ga.App. 213.

- Md.—Burroughs v. State, 320 A.2d 587, 21 Md.App. 648.

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- N.J.—State v. Thyfault, 297 A.2d 873, 121 N.J.Super. 487, affd. 315 A.2d 424, 126 N.J.Super. 459.

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23. U.S.—Pioneer Val. Sav. Bank v. Indemnity Ins. Co. of North America, D.C.Iowa, 225 F.Supp. 404, affd., C.A., 343 F.2d 634.

- Ill.—People v. Kamsler, 223 N.E.2d 237, 78 Ill.App.2d 349.

- La.—State v. Hardy, 376 So.2d 131.

- Pa.—Com. v. Sharkey, 22 Law.L.J. 140.

- Tex.—Hilliard v. State, Cr., 401 S.W.2d 814, cert. den. 87 S.Ct. 310, 385 U.S. 941, 17 L.Ed.2d 220, reh. den. 87 S.Ct. 726, 385 U.S. 1021, 17 L.Ed.2d 561.

24. Ga.—Cross v. State, 190 S.E.2d 561, 126 Ga.App. 346.

25. Fla.—C.J.S. cited in Lash v. State, App., 399 So.2d 534, 535.

- Pa.—Com. v. Rosicci, 186 A.2d 648, 199 Pa.Super. 609.
- Wash.—State v. Walters, 508 P.2d 1390, 8 Wash.App. 706.

- 25.5. Cal.—People v. Kassab, 33 Cal.Rptr. 494, 219 C.A.2d 687.

- Ga.—Cohen v. State, 112 S.E.2d 672, 101 Ga.App. 23.

26. N.C.—State v. Tesenair, 241 S.E.2d 877, 35 N.C. App. 531.

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- D.C.—Frazier v. Silver, D.C., 185 F.Supp. 625.
27. N.C.—State v. Page, 232 S.E.2d 460, 32 N.C.App. 478, cert. den. 235 S.E.2d 64, 292 N.C. 643.

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- Cal.—People v. Sanchez, 109 Cal.Rptr. 56, 33 C.A.3d 413.

30. Fla.—Valassakis v. State, App., 187 So.2d 74.

- Ga.—Gill v. State, 234 S.E.2d 665, 141 Ga.App. 823.
- Vt.—State v. Benoit, 313 A.2d 387, 131 Vt. 631.

35. Ariz.—State v. Mills, 396 P.2d 5, 96 Ariz. 377.

- Ga.—McElroy v. Williams Bros. Motors, Inc., 121 S.E.2d 917, 104 Ga.App. 435.

- Md.—Bosley v. State, 286 A.2d 203, 14 Md.App. 83.

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- Pa.—Com. v. Koritan, 163 A.2d 915, 193 Pa.Super. 212.

Credit card offenses

- U.S.—U.S. v. Helgesen, D.C.N.Y., 513 F.Supp. 209, affd. and remanded 669 F.2d 69, cert. den. 102 S.Ct. 1978, 456 U.S. 929, 72 L.Ed.2d 445.

- Ariz.—State v. Ulmer, 519 P.2d 867, 21 Ariz.App. 378.
- Va.—Cheatham v. Com., 208 S.E.2d 760, 215 Va. 286.

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36. Colo.—Woodman v. People, 450 P.2d 330, 168 Colo. 80.

- N.C.—State v. Banks, 211 S.E.2d 860, 24 N.C.App. 604.
- Pa.—Com. v. Price, 10 Cumb. 18.

False representations as to security for loan

- N.C.—State v. Cronin, 262 S.E.2d 277, 299 N.C. 229.

40. U.S.—U.S. v. Jenkins, C.A.Mich., 554 F.2d 783.

41.5. Member of charitable or beneficial organization

- Alaska—Lanier v. State, 448 P.2d 587.

44. Md.—Berman v. State, 370 A.2d 580, 35 Md.App. 193.

- 46.5. Me.—State v. Hardin, App., 627 S.W.2d 908.
- N.Y.—People v. Churchill, 390 N.E.2d 1146, 47 N.Y.2d 151, 417 N.Y.S.2d 221.

47. Statements held not “puffing”

- Pa.—Com. v. Nappi, 431 A.2d 1027, 288 Pa.Super. 240.

47.5. Gross overcharge as not fraudulent misrepresentation

- Mich.—People v. Marks, 163 N.W.2d 506, 12 Mich. App. 690.

§ 9. — Simple Promise or Promise Combined with Representation of Fact

48. U.S.—Indemnity Ins. Co. of North America v. Pioneer Val. Sav. Bank, C.A.Iowa, 343 F.2d 634.

- Ark.—Ross v. State, 424 S.W.2d 168, 244 Ark. 103—Dean v. State, 522 S.W.2d 421, 258 Ark. 32.

- Conn.—State v. Spitko, Cir.A.D., 195 A.2d 577, 2 Conn.Cir. 99.

- Fla.—Youngker v. State, App., 215 So.2d 318—Waterman v. State, App., 317 So.2d 469.

- Kan.—State v. Hamilton, 631 P.2d 1255, 6 Kan.App.2d 646.

- Ky.—C.J.S. cited in Rowland v. Com., 487 S.W.2d 682, 683.

- Me.—State v. Austin, 188 A.2d 275, 159 Me. 71—State v. Deschambault, 191 A.2d 114, 159 Me. 223.

- Md.—Berman v. State, 370 A.2d 580, 35 Md.App. 193.
- Mich.—People v. Cage, 301 N.W.2d 819, 410 Mich. 401.

- Mo.—State v. Saveraid, App., 583 S.W.2d 238.

- N.Y.—People v. Catruna, 400 N.Y.S.2d 385, 60 A.D.2d 694.

- N.C.—State v. Hargett, 130 S.E.2d 865, 259 N.C. 496—State v. Agnew, 241 S.E.2d 684, 294 N.C. 382, cert. den. 99 S.Ct. 107, 439 U.S. 830, 58 L.Ed.2d 124.

- State v. Simpson, 212 S.E.2d 566, 25 N.C.App. 176, cert. den. 214 S.E.2d 436, 287 N.C. 263.

- Or.—Gumm v. Heider, 348 P.2d 455, 220 Or. 5.

- Pa.—Com. v. Kelinson, 184 A.2d 374, 199 Pa.Super. 135—C.J.S. cited in Com. v. Bomersbach, 302 A.2d 472, 473, 224 Pa.Super. 40.

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49. Ark.—Bakri v. State, 551 S.W.2d 215, 261 Ark. 765.

- N.C.—State v. Banks, 211 S.E.2d 860, 24 N.C.App. 604.

51. Ga.—Cross v. State, 190 S.E.2d 561, 126 Ga.App. 346.

- Ill.—People v. Kamsler, 214 N.E.2d 562, 67 Ill.App.2d 33.

- Iowa—State v. West, 252 N.W.2d 457, cert. den. 98 S.Ct. 177, 434 U.S. 856, 54 L.Ed.2d 128.

- Me.—State v. Austin, 188 A.2d 275, 159 Me. 71.

- N.C.—State v. Agnew, 241 S.E.2d 684, 294 N.C. 382, cert. den. 99 S.Ct. 107, 439 U.S. 830, 58 L.Ed.2d 124.

- Okla.—Lamascus v. State, Cr., 516 P.2d 279.

- Tex.—Kinder v. State, Cr., 477 S.W.2d 584—Fisher v. State, Cr., 487 S.W.2d 335.

- Wash.—State v. Mercy, 348 P.2d 978, 55 Wash.2d 530.

- Wis.—Lambert v. State, 243 N.W.2d 524, 73 Wis.2d 590.

In California and New Jersey

- (1) Cal.—People v. Wallace, 6 Cal.Rptr. 309, 182 C.A.2d 624—People v. Samuel, 53 Cal.Rptr. 887, 245 C.A.2d 210—People v. Hedrick, 71 Cal.Rptr. 352, 265 C.A.2d 392—People v. Gibson, 79 Cal.Rptr. 693, 275 C.A.2d 198—People v. Randonio, 108 Cal.Rptr. 326, 32 C.A.3d 164—People v. Fujita, 117 Cal.Rptr. 757, 43 C.A.3d 454, cert. den. 95 S.Ct. 1952, 421 U.S. 964, 44 L.Ed.2d 451.

(5) Other matters.

- Cal.—People v. Kiperman, 138 Cal.Rptr. 271, 69 C.A.3d Supp. 25.

Theft by deception

- Ga.—Harris v. State, 233 S.E.2d 21, 141 Ga.App. 213—Mathis v. State, 288 S.E.2d 317, 161 Ga.App. 251.

- 51.5. Md.—Berman v. State, 370 A.2d 580, 35 Md. App. 193.

- Nev.—Balsamo v. Sheriff, Clark County, 565 P.2d 650, 93 Nev. 315.

- S.C.—State v. Love, 271 S.E.2d 110, 275 S.C. 55, cert. den. 101 S.Ct. 272, 449 U.S. 901, 66 L.Ed.2d 131.

- W.Va.—State v. Moore, 273 S.E.2d 821, 19 A.L.R. 4th 945.

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52. N.C.—C.J.S. cited in State v. Rogers, 226 S.E.2d 829, 833, 30 N.C.App. 298, cert. den., 229 S.E.2d 35, 290 N.C. 781.

53. Cal.—People v. Carlin, 3 Cal.Rptr. 301, 178 C.A.2d 705.

Ga.—Cross v. State, 190 S.E.2d 561, 126 Ga.App. 346.

55. Ga.—Harris v. State, 233 S.E.2d 21, 141 Ga.App. 213.

§ 10. — Statement of Intention, Expectation, or Desire

57. U.S.—First Nat. Bank of Webster v. Aetna Cas. & Sur. Co., D.C.Mass., 256 F.Supp. 266, affd., C.A., 370 F.2d 276.

N.C.—C.J.S. quoted in State v. Hargett, 130 S.E.2d 865, 867, 259 N.C. 496.

W.Va.—State v. Moore, 273 S.E.2d 821, 19 A.L.R. 4th 945.

In California

(1) Cal.—People v. De Casaus, 15 Cal.Rptr. 521, 194 C.A.2d 666.

58. Ark.—Ross v. State, 424 S.W.2d 168, 244 Ark. 103.

Kan.—State v. Hamilton, 631 P.2d 1255, 6 Kan.App.2d 646.

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58.5. U.S.—U.S. v. O'Boyle, C.A.Mich., 680 F.2d 34.

62. Tenn.—State v. Smith, Cr.App., 612 S.W.2d 493.

§ 11. — Statement of Opinion

63. Me.—State v. Chick, 263 A.2d 71.

Mich.—People v. Wilde, 202 N.W.2d 542, 42 Mich. App. 514.

Statements held expressions of opinion

(4) Colo.—Rogers v. People, 422 P.2d 377, 161 Colo. 317.

Me.—State v. Deschambault, 191 A.2d 119, 159 Me. 216.

64. Ill.—People v. Warren, 276 N.E.2d 92, 2 Ill. App.3d 983.

65. Mich.—People v. Wilde, 202 N.W.2d 542, 42 Mich.App. 514.

67. Me.—C.J.S. quoted in Herrick v. State, 196 A.2d 101, 105, 159 Me. 499, 99 A.L.R.2d 918.

§ 12. — Statement as to Authority or Power

68. Me.—C.J.S. cited in State v. Deschambault, 191 A.2d 114, 118, 159 Me. 223.

S.C.—C.J.S. cited in State v. Love, 271 S.E.2d 110, 113, 275 S.C. 55, cert. den. 101 S.Ct. 272, 449 U.S. 901, 66 L.Ed.2d 131.

Constitutes representation of fact

Me.—State v. Deschambault, 191 A.2d 114, 159 Me. 223, overruling State v. Vatee, 12 A.2d 421, 136 Me. 432.

§ 13. — Statement as to Financial Ability or Condition

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72. N.Y.—People v. Benevento, 239 N.Y.S.2d 761, 19 A.D.2d 561.

Misrepresentations of security

Ariz.—State v. Brown, 400 P.2d 111, 97 Ariz. 310.

Statute held not applicable

Wyo.—Hildebrand v. State, 491 P.2d 741.

Public assistance fraud

Mich.—People v. Akerley, 251 N.W.2d 309, 73 Mich. App. 321.

Mont.—State v. Moore, 570 P.2d 580, 174 Mont. 292.

N.Y.—People v. Hunter, 315 N.E.2d 436, 34 N.Y.2d 432, 358 N.Y.S.2d 360.

Misrepresentation of collateral

Or.—State v. Wiemals, 660 P.2d 702, 62 Or.App. 266.

73. Okl.—Carroll v. State, Cr., 347 P.2d 812.

Pa.—Com. v. Rosicci, 186 A.2d 648, 199 Pa.Super. 609.

75. Cal.—People v. Dixon, 120 Cal.Rptr. 163, 46 C.A.3d 431.

Pa.—Com. v. Feldman, 365 A.2d 1289, 243 Pa.Super. 408.

76. Statement as to genuineness of collateral
Mass.—Com. v. Greenberg, 160 N.E.2d 181, 339 Mass. 557.

Hotel registration cards

Md.—Tillman v. State, 284 A.2d 259, 13 Md.App. 570, app. dism., cert. den. 93 S.Ct. 144, 409 U.S. 812, 34 L.Ed.2d 67.

Goal of statute

Iowa.—State v. Schoelerman, 315 N.W.2d 67.

79. Credit card

Md.—Tillman v. State, 284 A.2d 259, 13 Md.App. 570, app. dism., cert. den. 93 S.Ct. 144, 409 U.S. 812, 34 L.Ed.2d 67.

§ 14. — Statement as to Value, Quality, Quantity, Nature, or Condition

81. Pecuniary significance necessary

Pa.—Com. v. Posavek, 420 A.2d 532, 278 Pa.Super. 265.

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82. Cal.—C.J.S. cited in People v. Kassab, 33 Cal. Rptr. 494, 496, 219 C.A.2d 687.

93. Fla.—Adjmi v. State, 154 So.2d 812 conf. to 154 So.2d 820.

Mich.—People v. Wilde, 202 N.W.2d 542, 42 Mich. App. 514.

94. Me.—C.J.S. cited in Herrick v. State, 196 A.2d 101, 105, 159 Me. 499, 99 A.L.R.2d 918.

N.C.—State v. Hines, 243 S.E.2d 782, 36 N.C.App. 33, app. dism., review den., Sup., 245 S.E.2d 779.

95. Me.—C.J.S. cited in Herrick v. State, 196 A.2d 101, 105, 159 Me. 499, 99 A.L.R.2d 918.

§ 15. — Tendency to Deceive

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97. Mont.—State v. Duncan, 593 P.2d 1026, 181 Mont. 382.

99. Ind.—Snelling v. State, 337 N.E.2d 829, 167 Ind. App. 70.

2. Cal.—People v. Phillips, 8 Cal.Rptr. 830, 186 C.A.2d 231.

4. Conn.—State v. Winters, Cir.A.D., 202 A.2d 908, 2 Conn.Cir. 508, certification den. 199 A.2d 705, 151 Conn. 738.

Ill.—People v. Wurster, 403 N.E.2d 1306, 38 Ill.Dec. 702, 83 Ill.App.3d 399.

Undercover police officer not deceived

Wash.—State v. Wellington, 663 P.2d 496, 34 Wash. App. 607.

6. N.J.—State v. Donohue, 201 A.2d 413 84 N.J.Super. 226.

§ 16. Falsity of Pretense

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16. U.S.—Norton v. C. I. R., C.A.Cal. 333 F.2d 1005.

Neb.—Harger v. State, 106 N.W.2d 176, 171 Neb. 342.

N.M.—State v. Jones, 389 P.2d 398, 73 N.M. 459.

False as meaning more than untrue

Alaska—Lanier v. State, 448 P.2d 587.

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18. Cal.—People v. Sobick, 106 Cal.Rptr. 519, 30 C.A.3d 458, cert. den. 93 S.Ct. 155, 414 U.S. 855, 38 L.Ed.2d 104.

§ 17. Form of Pretense

21.50. U.S.—First Nat. Bank of Webster v. Aetna Cas. & Sur. Co., D.C.Mass., 256 F.Supp. 266, affd., C.A., 370 F.2d 276.

Necessity of communication

Okl.—Carroll v. State, Cr., 347 P.2d 812.

Oath not required

Colo.—Woodman v. People, 450 P.2d 330, 168 Colo. 80.

Credit cards

Kan.—State v. Howard, 557 P.2d 1280, 221 Kan. 21.

Filing false claim in judicial proceeding

Nev.—Adler v. State, 594 P.2d 725, 95 Nev. 339.

22. U.S.—Selvidge v. U.S., C.A.Okl., 290 F.2d 894.

Ala.—Tate v. State, Cr., 335 So.2d 212, cert. den. 335 So.2d 216.

Ariz.—State v. Smith, App., 588 P.2d 848, 121 Ariz. 106.

Cal.—People v. Rondono, 108 Cal.Rptr. 326, 32 C.A.3d 164.

D.C.—Skantze v. U.S., C.A., 288 F.2d 416, 110 U.S. App.D.C. 14, cert. den. 81 S.Ct. 1938, 366 U.S. 972, 6 L.Ed.2d 1261, cert. den. 83 S.Ct. 72, 371 U.S. 843, 9 L.Ed.2d 78.

Miss.—Necce v. State, 210 So.2d 657.

Mo.—C.J.S. quoted in State v. Hamm, App., 569 S.W.2d 289, 291.

24. Cal.—People v. Brady, 80 Cal.Rptr. 418, 275 C.A.2d 984.

Conn.—C.J.S. cited in State v. Farrah, 282 A.2d 879, 882, 161 Conn. 43.

Mass.—Com. v. Louis Const. Co., 180 N.E.2d 83, 343 Mass. 600.

Nev.—Adler v. Sheriff, Clark County, 552 P.2d 334, 92 Nev. 436.

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25. Colo.—Woodman v. People, 450 P.2d 330, 168 Colo. 80.

27. Cal.—People v. Parker, 44 Cal.Rptr. 900, 235 C.A.2d 86.

28. Silence

Cal.—People v. Rondono, 108 Cal.Rptr. 326, 32 C.A.3d 164.

§ 18. — Acts or Conduct

31. Ala.—Tate v. State, Cr., 335 So.2d 212, cert. den. 335 So.2d 216.

Cal.—People v. Brady, 80 Cal.Rptr. 418, 275 C.A.2d 984—People v. Britz, 95 Cal.Rptr. 303, 17 C.A.3d 743—People v. Rondono, 108 Cal.Rptr. 326, 32 C.A.3d 164.

Conn.—C.J.S. cited in State v. Winters, Cir.A.D., 202 A.2d 908, 912, 2 Conn.Cir. 508, certification den. 199 A.2d 705, 151 Conn. 738.

Ind.—Beech v. State, 319 N.E.2d 678, 162 Ind.App. 287.

Mich.—People v. Vida, 140 N.W.2d 559, 2 Mich.App. 409, affd. 166 N.W.2d 465, 381 Mich. 595.

Miss.—C.J.S. cited in Lee v. State, 146 So.2d 736, 738, 244 Miss. 813.

Nev.—Bright v. Sheriff, Washoe County, 521 P.2d 371, 90 Nev. 168.

N.Y.—People v. Hochberg, 386 N.Y.S.2d 740, 87 Misc.2d 1024.

N.C.—State v. Banks, 211 S.E.2d 860, 24 N.C.App. 604.

N.D.—In re Lyons, 193 N.W.2d 462.

Tex.—Hogan v. State, Cr., 393 S.W.2d 898.

Va.—Warren v. Com., 247 S.E.2d 692, 219 Va. 416.

Words or acts or both

Iowa—State v. West, 252 N.W.2d 457. Cert. den. 98 S.Ct. 177, 434 U.S. 856, 54 L.Ed.2d 128.

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§ 19. — Nondisclosure of Truth

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34. Cal.—People v. Martin, 47 Cal.Rptr. 337, 237 C.A.2d 770.

Mich.—People v. Vida, 140 N.W.2d 559, 2 Mich.App. 409, aff'd. 166 N.W.2d 465, 381 Mich. 595.

Failure to disclose financial condition

Colo.—Rogers v. People, 422 P.2d 377, 161 Colo. 317.

36. U.S.—U.S. v. O'Boyle, C.A.Mich., 680 F.2d 34. Iowa—C.J.S. cited in State v. Robinson, 183 N.W.2d 190, 192.

Nev.—Bright v. Sheriff, Washoe County, 521 P.2d 371, 90 Nev. 168.

Utah—State v. Walton, 646 P.2d 689.

Wash.—State v. Walters, 508 P.2d 1390, 8 Wash.App. 706.

§ 20. False Token or Writing in General

38. Md.—Harris v. State, 342 A.2d 305, 27 Md.App. 547.

39. U.S.—Matter of Harper, Bkrtcy.Fla., 19 B.R. 207. Ariz.—State v. Mixer, 546 P.2d 39, 26 Ariz.App. 62. Ky.—Taylor v. Com., 384 S.W.2d 333.

Or.—State v. Ewers, 458 P.2d 708, 1 Or.App. 47—State v. Clermont, 495 P.2d 305, 9 Or.App. 141.

S.D.—State v. Ryan, 203 N.W.2d 177, 87 S.D. 102.

Written escrow instructions

Cal.—People v. Causey, 34 Cal.Rptr. 43, 220 C.A.2d 641, cert. den. 84 S.Ct. 981, 376 U.S. 969, 11 L.Ed.2d 976.

Offense of use of Stolen Credit-Card as not dependent on who stole card or where it was stolen.

Cal.—People v. Perry, 40 Cal.Rptr. 829, 230 C.A.2d 258.

(2) Other matters.

Mo.—State v. Wright, App., 409 S.W.2d 797.

Unauthorized use of credit card as violation of false pretense statute

D.C.—Hynes v. U.S., App., 260 A.2d 679.

Use of another's credit card

N.J.—Zuppa v. Hertz Corp., 268 A.2d 364, 111 N.J.Super. 419.

Credit card statute construed

N.M.—State v. Sweat, 504 P.2d 24, 84 N.M. 416.

Held "false token"

S.D.—State v. Johnston, 200 N.W.2d 238, 86 S.D. 628.

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40.5. Ariz.—State v. Carroll, 515 P.2d 1197, 21 Ariz. App. 99.

§ 21. — Worthless Checks, Orders, Bank Bills, Etc.

41. N.H.—State v. Partlow, 369 A.2d 221, 117 N.H. 78.

42. Payee improperly designated

Okla.—Coots v. State, Cr., 560 P.2d 592.

45. N.M.—State v. Cowley, App., 439 P.2d 567, 79 N.M. 49.

46. Cal.—People v. Silver, 121 Cal.Rptr. 153, 47 C.A.3d 837.

Md.—Waye v. State, 191 A.2d 428, 231 Md. 510. Baskerville v. State, 327 A.2d 918, 23 Md.App. 439.

Mo.—State v. Klosterman, 471 S.W.2d 175.

N.J.—State v. Covington, 273 A.2d 402, 113 N.J.Super. 229, aff'd. 284 A.2d 532, 59 N.J. 536.

N.C.—Nunn v. Smith, 154 S.E.2d 497, 270 N.C. 374.

Or.—State v. MacMullen, 482 P.2d 544, 5 Or.App. 38. S.D.—State v. Christian, 177 N.W.2d 271, 85 S.D. 92.

47. Md.—C.J.S. cited in Waye v. State, 191 A.2d 428, 430, 231 Md. 510.

Minn.—State ex rel. Hastings v. Bailey, 116 N.W.2d 548, 263 Minn. 261.

Mo.—State v. DeClue, 400 S.W.2d 50.

Or.—State v. Wilson, 369 P.2d 739, 230 Or. 251.

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48. Ariz.—State v. Daymus, 367 P.2d 647, 90 Ariz. 294.

D.C.—Clemmons v. U.S., App., 400 A.2d 1048.

49.5. S.D.—State v. Christian, 177 N.W.2d 271, 85 S.D. 92.

50. N.C.—State v. Cruse, 117 S.E.2d 49, 253 N.C. 456.

54. Ala.—Harris v. State, Cr.App., 378 So.2d 257, writ den., Sup., 378 So.2d 263.

Ariz.—State v. Zent, 376 P.2d 861, 92 Ariz. 334—State v. DeVinney, 403 P.2d 921, 98 Ariz. 273.

Cal.—People v. Jordan, 18 Cal.Rptr. 587, 199 C.A.2d 271—People v. Silver, 121 Cal.Rptr. 153, 47 C.A.3d 837—People v. North, 182 Cal.Rptr. 126, 131 C.A.3d 112.

Colo.—People v. Attebury, 587 P.2d 281, 196 Colo. 509.

Ga.—McDuffie v. State, 218 S.E.2d 320, 135 Ga.App. 616—Pittman v. State, 269 S.E.2d 522, 154 Ga. App. 691.

Idaho—State v. Campbell, 543 P.2d 1171, 97 Idaho 331.

Iowa—State v. Johnson, 196 N.W.2d 563.

Ky.—Owsley v. Com., 621 S.W.2d 21.

Md.—Wesbecker v. State, 212 A.2d 737, 240 Md. 41.

Mich.—People v. Finley, 220 N.W.2d 741, 54 Mich. App. 259.

Mo.—Hulett v. State, 468 S.W.2d 636.

Nev.—Winston v. Warden, Nev. State Prison, 464 P.2d 30, 86 Nev. 33.

N.J.—State v. Wright, 381 A.2d 58, 154 N.J.Super. 174.

N.Y.—People v. Miller, 286 N.Y.S.2d 448.

N.D.—State v. Thiel, 303 N.W.2d 96.

Okla.—Whitten v. State, Cr., 543 P.2d 758.

Pa.—Com. v. Ali, 265 A.2d 796, 438 Pa. 463.

Com. v. Burns, 22 Monroe L.R. 33, 35 North 318.

Wash.—State v. Dennis, 561 P.2d 219, 16 Wash.App. 939.

Wyo.—Bailey v. State, 408 P.2d 244.

Purpose of statute

(3) Md.—Riggs v. State, 367 A.2d 22, 34 Md.App. 324.

(4) Kan.—Foor v. State, 413 P.2d 719, 196 Kan. 618.

(6) Other statements.

Ala.—Tolbert v. State, 321 So.2d 227, 294 Ala. 738, on remand 321 So.2d 234, 56 Ala.App. 730.

Conn.—State v. Spitko, Cir.A.D., 195 A.2d 577, 2 Conn.Cir. 99.

Pa.—Com. v. Bonetti, 235 A.2d 447, 211 Pa.Super. 161.

S.D.—State v. Christian, 177 N.W.2d 271, 85 S.D. 92.

Tenn.—Smithson v. State, 438 S.W.2d 61, 222 Tenn. 499.

Gravamen of offense, etc.

Colo.—Beasley v. People, 450 P.2d 658, 168 Colo. 286.

Ga.—Russell v. State, 271 S.E.2d 689, 155 Ga.App. 555.

Wyo.—Barker v. State, 599 P.2d 1349.

Meaning of "utter"

(3) Other meanings.

Ariz.—State v. Weis, 375 P.2d 735, 92 Ariz. 254, cert. den. 88 S.Ct. 226, 389 U.S. 899, 19 L.Ed.2d 221—State v. Culver, 446 P.2d 234, 103 Ariz. 505.

Va.—Warren v. Com., 247 S.E.2d 692, 219 Va. 416.

Instruments included

(4) Other matters.

Cal.—People v. Eisenberg, 28 Cal.Rptr. 583, 213 C.A.2d 121.

Md.—Bafford v. State, 200 A.2d 142, 235 Md. 41.

Tex.—Burlison v. State, Cr., 449 S.W.2d 252.

Sulacia v. State, App., 8 Dist., 631 S.W.2d 569.

Va.—Payne v. Com., 281 S.E.2d 873, 222 Va. 485.

Wash.—State v. Haynes, 426 P.2d 851, 71 Wash.2d 136.

Check drawn by another

(5) Other statements.

Ariz.—State v. Culver, 446 P.2d 234, 103 Ariz. 505.

Nonexistence of funds or credit, etc.

(2) Absence of account.

Minn.—State v. Cunningham, 99 N.W.2d 908, 257 Minn. 31.

Presentation to non-drawee bank not included

Iowa—State v. Cameron, 117 N.W.2d 816, 254 Iowa 505.

Distinct from drawing check on no account

Ariz.—State v. Claytor, 413 P.2d 285, 3 Ariz.App. 226.

Offense as involving moral turpitude

Ala.—Irvin v. State, 203 So.2d 283, 44 Ala.App. 101.

Presentment and dishonor not essential elements

Ala.—Tate v. State, Cr., 335 So.2d 212, cert. den. 335 So.2d 216.

Cal.—People v. Superior Court for Los Angeles County, 127 Cal.Rptr. 672, 55 C.A.3d 759.

Kan.—State v. Powell, 551 P.2d 902, 220 Kan. 168.

Tex.—Chapa v. State, Cr., 420 S.W.2d 943.

"Issuing" and "delivering" defined

Neb.—State of Kan. v. Holey, 196 N.W.2d 387, 188 Neb. 319 stating Kansas law.

Elements to be proved

Ga.—State v. Brannon, 267 S.E.2d 888, 154 Ga.App. 285.

Pa.—Com. v. Conti, 345 A.2d 238, 236 Pa.Super. 488.

Meaning of "or"

Va.—Patterson v. Com., 218 S.E.2d 435, 216 Va. 306.

Statute valid

N.M.—State v. Libero, App., 581 P.2d 873, 91 N.M. 780, cert. den. 585 P.2d 324, 92 N.M. 180, cert. quashed 585 P.2d 324, 92 N.M. 180.

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55. Ill.—People v. Kollmann, 342 N.E.2d 240, 33 Ill.App.3d 629.

Iowa—Hoskins v. State, 246 N.W.2d 266.

Expectation of meeting check

(4) Other statements.

Cal.—People v. Rubin, 36 Cal.Rptr. 167, 223 C.A.2d 825, 9 A.L.R.3d 707.

Mo.—State v. Warren, App., 628 S.W.2d 410.

Utah—State v. Coleman, 406 P.2d 308, 17 Utah2d 166.

Actual deposit of sufficient funds, etc.

(2) Held not to exonerate defendant.

Ariz.—State v. Stout, 448 P.2d 115, 8 Ariz.App. 545.

55.5. Ala.—Claunch v. State, Cr.App., 406 So.2d 1003, decision after remand, reh. den. 406 So.2d 1008, writ den. Sup., 406 So.2d 1008.

55.10. N.C.—State v. Cruse, 117 S.E.2d 49, 253 N.C. 456.

Statutory misdemeanor not separate offense

Cal.—People v. Kennedy, 26 Cal.Rptr. 696, 210 C.A.2d 599, cert. den. 84 S.Ct. 126, 375 U.S. 861, 11 L.Ed.2d 87.

55.15. Utah—State v. Donaldson, 385 P.2d 151, 14 Utah2d 401.

55.20. Md.—Quinn v. State, 230 A.2d 368, 1 Md. App. 373.

55.25. Kan.—State v. Walden, 490 P.2d 370, 208 Kan. 163.

Fraudulent issuance of checks within certain period as single statutory offense

Minn.—State v. Harris, 152 N.W.2d 728, 277 Minn. 351.

56. Tex.—Christiansen v. State, Cr.App., 575 S.W.2d 42.

Gravamen or gist of offense

(3) Okla.—Grice v. State, Cr., 530 P.2d 565.

(4) Other statements.

Or.—Gumm v. Heider, 348 P.2d 455, 220 Or. 5.

Offenses distinguished

(4) Other offenses.

Minn.—State v. Cunningham, 99 N.W.2d 908, 257 Minn. 31.

Mo.—State v. Euge, 400 S.W.2d 119.

N.J.—State v. Morse, 262 A.2d 715, 109 N.J.Super. 160.

Instruments included

(3) Other instruments.

Alaska—Faulkner v. State, 445 P.2d 815.

Cal.—People v. McNear, 12 Cal.Rptr. 124, 190 C.A.2d 541.

Statute held not violated

Mo.—State v. Kleen, 491 S.W.2d 244.

Where service already performed prosecution should be under provision as to obtaining postponement of payment.

Okl.—Moore v. State, Cr., 374 P.2d 630.

Check for payment for labor performed

Utah—State v. Pfannenstiel, 448 P.2d 346, 22 Utah2d 31.

Common scheme or plan

Wash.—State v. Meyer, 613 P.2d 132, 26 Wash.App. 119.

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56.10. Check drawn without funds

Ariz.—State v. Culver, 446 P.2d 234, 103 Ariz. 505.

Corporate check signed by unauthorized persons

Mo.—State v. Fraley, 369 S.W.2d 195.

56.15. Mo.—State v. Grothe, App., 540 S.W.2d 221.

56.20. Ind.—Ferrell v. State, 219 N.E.2d 804, 247 Ind. 535.

Bad check offense not shown

Ga.—Harrington v. State, 244 S.E.2d 130, 145 Ga.App. 609.

57. Mont.—State v. Johnston, 367 P.2d 891, 140 Mont. 111.

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58. Conn.—State v. Spitko, Cir.A.D., 195 A.D.2d 577, 2 Conn.Cir. 99.

Md.—Levy v. State, 170 A.2d 216, 225 Md. 201, cert. den. 82 S.Ct. 113, 368 U.S. 865, 7 L.Ed.2d 62.

Offenses mutually exclusive

Or.—Broome v. Gladden, 373 P.2d 611, 231 Or. 502.

59. U.S.—C.J.S. cited in U.S. for Use of First Continental Nat. Bank & Trust Co., Lincoln, Neb. v. Western Contracting Corp., C.A.Neb., 341 F.2d 383, 389.

Conn.—C.J.S. cited in State v. Sillis, Cir.A.D., 199 A.2d 186, 187, 2 Conn.Cir. 349.

S.D.—State v. Mauck, 270 N.W.2d 56.

Bogus-check statute

(3) Other matters.

Tenn.—Clardy v. State, 332 S.W.2d 178, 206 Tenn. 100.

60. D.C.—Ciullo v. U.S., C.A., 325 F.2d 227, 117 U.S.App.D.C. 31.

Pa.—Com. v. Malinowski, 31 Northumb.L.J. 29.

Elements stated

Ala.—Ex parte Allred, 393 So.2d 1030, on remand 393 So.2d 1034.

Cal.—People v. Swanson, 176 Cal.Rptr. 915, 123 C.A.3d 1024.

Ga.—Hardeman v. State, 268 S.E.2d 415, 154 Ga.App. 364.

Nev.—Garnick v. First Judicial Dist. Court In and For Churchill County, 407 P.2d 163, 81 Nev. 531.

Technical imperfections

U.S.—U.S. v. Freeman, C.A.Kan., 514 F.2d 1184.

61. U.S.—U.S. v. Frazier, C.A.Fla., 444 F.2d 235.

Ala.—Harris v. State, Cr.App., 378 So.2d 257, writ den., Sup., 378 So.2d 263.

Ariz.—State v. Weis, 375 P.2d 735, 92 Ariz. 254, cert. den. 88 S.Ct. 226, 389 U.S. 899, 19 L.Ed.2d 221.

Cal.—People v. Haines, 1 Cal.Rptr. 41, 176 C.A.2d 41—People v. Davis, 1 Cal.Rptr. 103, 176 C.A.2d 80—People v. Greenwood, 24 Cal.Rptr. 337, 207 C.A.2d 300—People v. Rubin, 36 Cal.Rptr. 167, 223 C.A.2d 825, 9 A.L.R.3d 707.

Colo.—Woodard v. People, 389 P.2d 411, 154 Colo. 162.

Conn.—C.J.S. cited in State v. Callahan, Cir.A.D., 183 A.2d 861, 863, 23 Conn.Sup. 374, 1 Conn.Cir. 247.

Ill.—People v. Samples, 224 N.E.2d 284, 80 Ill.App.2d 182—People v. Baylor, 324 N.E.2d 255, 25 Ill. App.3d 1070.

Ind.—Hanrahan v. State, 241 N.E.2d 143, 251 Ind. 325.

Iowa—State v. Kimball, 176 N.W.2d 864—State v. Mullin, 225 N.W.2d 305, 75 A.L.R.3d 1072.

La.—Davis-Delcambre Motors, Inc. v. Simon, 163 So.2d 553, 246 La. 105.

Md.—Marr v. State, 177 A.2d 862, 227 Md. 510.

Mich.—People v. Chappelle, 319 N.W.2d 584, 114 Mich.App. 364.

Minn.—State ex rel. Hasting v. Bailey, 116 N.W.2d 548, 263 Minn. 261—State v. Everson, 175 N.W.2d 503, 286 Minn. 246.

Mo.—State v. Brookshire, App., 329 S.W.2d 252.

Neb.—State v. Martin, 128 N.W.2d 583, 177 Neb. 209.

N.J.—State v. Covington, 284 A.2d 532, 59 N.J. 536.

Okl.—Dunaway v. State, Cr., 561 P.2d 103.

Or.—State v. Scott, 390 P.2d 328, 237 Or. 390.

Pa.—Com. v. Bonetti, 235 A.2d 447, 211 Pa.Super. 161. Com. v. Burns, 22 Monroe L.R. 33, 35 North 318.

S.D.—State v. Yarber, 285 N.W.2d 592.

Tex.—Burleson v. State, Cr., 403 S.W.2d 143.

Gravamen of crime

Ga.—Tapley v. State, 126 S.E.2d 715, 106 Ga.App. 215.

Kan.—State v. Powell, 551 P.2d 902, 220 Kan. 168.

Va.—Warren v. Com., 247 S.E.2d 692, 219 Va. 416.

Time of intent

Iowa—State v. Kulow, 123 N.W.2d 872, 255 Iowa 789, 16 A.L.R.3d 1085.

(2) Other statements.

Mo.—State v. DeClue, 400 S.W.2d 50.

Intent implicit in endorsing and cashing bogus check

Mo.—State v. Fraley, 369 S.W.2d 195.

Immaterial whether defendant wrote check

Cal.—People v. Sanderson, 6 Cal.Rptr. 330, 183 C.A.2d 544.

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62. Ariz.—State v. Zent, 376 P.2d 861, 92 Ariz. 334.

Cal.—People v. Pitts, 16 Cal.Rptr. 879, 196 C.A.2d 841—People v. Greenwood, 24 Cal.Rptr. 337, 207 C.A.2d 300.

Colo.—People v. Kanan, 526 P.2d 1339, 186 Colo. 255.

Conn.—C.J.S. cited in State v. Callahan, Cir.A.D., 183 A.2d 861, 863, 23 Conn.Sup. 374, 1 Conn.Cir. 247.

Mo.—State v. Forsythe, 406 S.W.2d 633.

Neb.—State v. Martin, 128 N.W.2d 583, 177 Neb. 209.

N.Y.—People v. Parker, 274 N.Y.S.2d 38, 51 Misc.2d 843.

N.C.—State v. Cruse, 117 S.E.2d 49, 253 N.C. 456.

Pa.—Com. v. Kelson, 184 A.2d 374, 199 Pa.Super. 135.

Com. v. Corcoran, 16 Bucks 253.

Tex.—Brown v. Parrata Sales, Inc., Civ.App., 521 S.W.2d 359.

Wash.—State v. Evans, 356 P.2d 589, 57 Wash.2d 288.

It is incumbent on accused to know condition of his account.

Ariz.—State v. Daymus, 367 P.2d 647, 90 Ariz. 294.

Okl.—Moore v. State, 250 P.2d 46, 96 Okl.Cr. 118.

62.10. Fla.—George v. State, App., 203 So.2d 173.

Ga.—Hamilton v. State, 165 S.E.2d 884, 118 Ga.App. 842.

Ky.—Stiles v. Com., 348 S.W.2d 843.

Miss.—Kitchens v. Barlow, 164 So.2d 745, 250 Miss. 121—Jackson v. State, 170 So.2d 438, 251 Miss. 529.

Pa.—Com. v. Corcoran, 16 Bucks 253.

Cheating and defrauding of payee essential wrong

Utah—State v. Saxton, 519 P.2d 1340, 30 Utah2d 456.

Check kiting

U.S.—U.S. v. Foshee, C.A.Ala., 578 F.2d 629.

North Carolina Nat. Bank v. South Carolina Nat. Bank, D.C.S.C., 449 F.Supp. 616, 617, affd., C.A., 573 F.2d 1305, cert. den. 99 S.Ct. 577, 439 U.S. 985, 58 L.Ed.2d 657.

Neb.—D & J Hatchery, Inc. v. Feeders Elevator, Inc., 274 N.W.2d 138, 202 Neb. 69.

Tex.—First State Bank & Trust Co. of Edinburg v. George, Civ.App., 519 S.W.2d 198, err. ref. no rev. err.

63. Ariz.—State v. Zent, 376 P.2d 861, 92 Ariz. 334.

Cal.—People v. Poyet, 99 Cal.Rptr. 758, 492 P.2d 1150, 6 C.3d 530.

Fla.—Rigaud v. State, App., 404 So.2d 791.

Ill.—C.J.S. cited in People v. Cundiff, 305 N.E.2d 735, 738, 16 Ill.App.3d 267.

Iowa—State v. James, 310 N.W.2d 197.

La.—State v. Jones, 400 So.2d 658.

Miss.—Kitchens v. Barlow, 164 So.2d 745, 250 Miss. 121.

Ohio—State v. Crechbaum, 263 N.E.2d 675, 24 Ohio App.2d 31, affd. 276 N.E.2d 240, 28 Ohio St.2d 116.

Tex.—Deitle v. State, Cr., 363 S.W.2d 939.

Wyo.—O'Neal v. State, 498 P.2d 1232.

Request or agreement to defer presentment

(1) Mo.—State v. Phillips, App., 430 S.W.2d 635.

(2) Wash.—State v. Etheridge, 443 P.2d 536, 74 Wash.2d 102.

Statute specifically prohibiting prosecution

Kan.—State v. Beard, 416 P.2d 783, 197 Kan. 275.

Check given as evidence of indebtedness and to protect seller against charge of unlawful sale of liquor on credit

S.C.—State v. Brazzell, 149 S.E.2d 339, 248 S.C. 118.

"Payee"

Fla.—George v. State, App., 203 So.2d 173.

Payee who is also maker not within exception

Fla.—George v. State, App., 203 So.2d 173.

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63.5. Ariz.—State v. Zent, 376 P.2d 861, 92 Ariz. 334.

Ohio—State v. Crechbaum, 263 N.E.2d 675, 24 Ohio App.2d 31, affd. 276 N.E.2d 240, 28 Ohio St.2d 116.

64. Iowa—C.J.S. cited in State v. Coburn, 244 N.W.2d 560, 562.

65. Fla.—State v. Berry, 358 So.2d 545.

Kan.—State v. Morris, 372 P.2d 282, 190 Kan. 93.

Pa.—Com. v. Mutnik, 406 A.2d 516, 486 Pa. 428.

It has also been held to be immaterial whether or not the person writing the check had an erroneous, innocent impression that there were sufficient funds on deposit.^{66.5}

66.5 Strict liability offense

N.D.—State v. Mathisen, 356 N.W.2d 129.

67. N.D.—State v. Thiel, 303 N.W.2d 96.

68. Md.—Riggs v. State, 367 A.2d 22, 34 Md.App. 324.

Miss.—C.J.S. cited in Edwards v. State, 217 So.2d 14, 16.

N.D.—State v. Thiel, 303 N.W.2d 96.

69. Md.—Riggs v. State, 367 A.2d 22, 34 Md.App. 324.

S.C.—State v. McCord, 187 S.E.2d 654, 258 S.C. 163.

70. Ill.—C.J.S. cited in People v. Cundiff, 305 N.E.2d 735, 739, 16 Ill.App.3d 267.

Pa.—Com. v. Tattersall, 49 Luz.L.Reg. 67.

70.5. U.S.—U.S. v. Gilliam, D.C.Cal., 273 F.Supp. 507.

Ariz.—State v. Daymus, 367 P.2d 647, 90 Ariz. 294. State v. Stout, 448 P.2d 115, 8 Ariz.App. 545.

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Mo.—State v. DeClue, 400 S.W.2d 50.

Arrangement for immediate credit for checks deposited not sufficient

Cal.—People v. Martin, 25 Cal.Rptr. 610, 208 C.A.2d 867.

71. Ala.—Harris v. State, Cr.App., 378 So.2d 257, writ den., Sup., 378 So.2d 263.

72. Idaho—State v. Roderick, 375 P.2d 1005, 85 Idaho 80—State v. Cochran, 539 P.2d 999, 97 Idaho 71.

Kan.—State v. Shannon, 398 P.2d 344, 194 Kan. 258, cert. den. 86 S.Ct. 172, 382 U.S. 881, 15 L.Ed.2d 122, reh. den. 86 S.Ct. 298, 382 U.S. 922, 15 L.Ed.2d 238—Foor v. State, 413 P.2d 719, 196 Kan. 618—State v. Haremsa, 515 P.2d 1217, 213 Kan. 201—C.J.S. cited in State v. Powell, 551 P.2d 902, 907, 220 Kan. 168.

Mich.—People v. Henson, 171 N.W.2d 26, 18 Mich. App. 259.

Mo.—State v. DeClue, 400 S.W.2d 50.

Neb.—State v. Eggers, 120 N.W.2d 541, 175 Neb. 79—State v. Martin, 128 N.W.2d 583, 177 Neb. 209—State v. Koester, 209 N.W.2d 172, 190 Neb. 485. N.M.—State v. Libero, App., 581 P.2d 873, 91 N.M. 780, cert. den. 585 P.2d 324, 92 N.M. 180, cert. quashed 585 P.2d 324, 92 N.M. 180.

Pa.—Com. v. Tattersall, 49 Luz.L.Reg. 67—Com. v. Burns, 22 Monroe L.R. 33, 35 North. 318—Com. v. Bricker, 58 Lanc.Rev. 381.

Presentation to bank unnecessary

Cal.—People v. Rubin, 36 Cal.Rptr. 167, 223 C.A.2d 825, 9 A.L.R.3d 707.

"Delivery"

N.Y.—People v. Parker, 274 N.Y.S.2d 38, 51 Misc.2d 843.

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73. Ala.—Tolbert v. State, Cr., 321 So.2d 224, 56 Ala.App. 269, revd. on oth. grds. 321 So.2d 227, 294 Ala. 738, on remand 321 So.2d 234, 56 Ala. App. 730.

Cal.—People v. Privitier, 19 Cal.Rptr. 640, 200 C.A.2d 725.

D.C.—Gilmore v. U.S., C.A., 273 F.2d 79, 106 U.S. App.D.C. 344.

Ill.—C.J.S. cited in People v. Cundiff, 305 N.E.2d 735, 739, 16 Ill.App.3d 267.

Iowa—State v. Kulow, 123 N.W.2d 872, 255 Iowa 789, 16 A.L.R.3d 1085.

Mont.—State v. Johnston, 367 P.2d 891, 140 Mont. 111.

Mo.—State v. Euge, App., 349 S.W.2d 502.

N.Y.—People v. Goldstein, 361 N.Y.S.2d 994, 79 Misc.2d 996.

Not a defense

Iowa—State v. Swallow, 244 N.W.2d 321.

74. Purpose and intent

(3) Other statements.

Kan.—State v. Morris, 372 P.2d 282, 190 Kan. 93.

What constitutes payment

(4) Since the publication of Corpus Juris Secundum Ex parte Myers, 237 P. 1026, 119 Kan. 270 has been overruled, the court holding that offender's discharge in bankruptcy not pleadable as payment in proceeding for abatement of prosecution.

Kan.—State v. Breitenbach, 373 P.2d 601, 190 Kan. 189—State v. Bontz, 386 P.2d 201, 192 Kan. 158, app. dism. 84 S.Ct. 1186, 377 U.S. 162, 12 L.Ed.2d 213—State v. Bontz, 386 P.2d 205, 192 Kan. 163, foll'g 386 P.2d 201, 192 Kan. 158, app. dism. 84 S.Ct. 1186, 377 U.S. 162, 12 L.Ed.2d 213.

Proceedings for abatement of prosecution

(2) Evidence.

Kan.—State v. Morris, 372 P.2d 282, 190 Kan. 93.

(3) Matters which must be shown.

Kan.—State v. Breitenbach, 373 P.2d 601, 190 Kan. 189.

Intent to defraud

Kan.—State v. Morris, 372 P.2d 282, 190 Kan. 93.

Statute permissive

Kan.—State v. Bontz, 386 P.2d 201, 192 Kan. 158, app. dism. 84 S.Ct. 1186, 377 U.S. 162, 12 L.Ed.2d 213.

Circumstances held not to require notice

Tenn.—Kirby v. State, 379 S.W.2d 780, 214 Tenn. 296.

Notice to drawer with account

Tenn.—Meadows v. State, 421 S.W.2d 639, 220 Tenn. 615.

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76. Conn.—C.J.S. cited in State v. Callahan, Cir. A.D., 183 A.2d 861, 863, 23 Conn.Sup. 374, 1 Conn.Cir. 247.

77. Fla.—Harris v. State, 123 So.2d 752, quashed in part, Sup., 136 So.2d 633, 91 A.L.R.2d 1088, conf. to 137 So.2d 243.

Ga.—Bowers v. State, 285 S.E.2d 702, 248 Ga. 714, on remand 290 S.E.2d 362, 161 Ga.App. 239—Griffith v. State, 287 S.E.2d 187, 249 Ga. 19, on remand 290 S.E.2d 559, 162 Ga.App. 187.

Miss.—C.J.S. cited in Jackson v. State, 170 So.2d 438, 439, 251 Miss. 529.

Nev.—Hoyt v. Hoffman, 416 P.2d 232, 82 Nev. 270—State v. Jarman, 438 P.2d 250, 84 Nev. 187.

N.J.—State v. Blasi, 312 A.2d 166, 125 N.J.Super. 543, affd. 312 A.2d 135, 64 N.J. 51.

S.D.—C.J.S. cited in State v. Mauck, 270 N.W.2d 56, 58.

Where goods are delivered prior to issuance of check, etc.

Ga.—Brooks v. State, 247 S.E.2d 209, 146 Ga.App. 626.

78. Ill.—C.J.S. cited in People v. Cundiff, 305 N.E.2d 735, 738, 16 Ill.App.3d 267.

Tex.—Norman v. State, 338 S.W.2d 714, 170 Tex.Cr.R. 25.

78.5. La.—Blue Bonnet Creamery, Inc. v. Gulf Milk Ass'n, App., 172 So.2d 133.

Nev.—State v. Jarman, 438 P.2d 250, 84 Nev. 187.

Pa.—Com. v. Malinowski, 31 Northumb L.J. 29.

Future delivery of property held sufficient consideration

Neb.—State v. Edmonds, 153 N.W.2d 364, 182 Neb. 140.

78.10. N.J.—State v. Turetsky, 188 A.2d 198, 78 N.J.Super. 203.

78.15. One of typical instances, etc.

N.J.—State v. Turetsky, 188 A.2d 198, 78 N.J.Super. 203.

79. D.C.—Clarke v. U.S., Mun.App., 140 A.2d 181, affd. 263 F.2d 269, 105 U.S.App.D.C. 19.

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80. Conn.—State v. Spitko, Cir.A.D., 195 A.2d 577, 2 Conn.Cir. 99.

Fla.—Banderas v. State, App., 372 So.2d 489.

Idaho—State v. Ramsbottom, 402 P.2d 384, 89 Idaho 1.

Or.—Gumm v. Heider, 348 P.2d 455, 220 Or. 5.

Tex.—Martini v. State, Cr., 371 S.W.2d 387.

Intent as to postdated check

Mo.—State v. Brookshire, App., 329 S.W.2d 252.

82. Cal.—Wilson v. Lewis, 165 Cal.Rptr. 396, 106 C.A.3d 802, app. after remand 198 Cal.Rptr. 494, 151 C.A.3d 232.

Colo.—People v. Meller, 524 P.2d 1366, 185 Colo. 389.

Instruments not postdated

Pa.—Com. v. Schwartz, 378 A.2d 1237, 250 Pa.Super. 455.

82.5. Ky.—Owsley v. Com., 621 S.W.2d 21.

Check no more than note

(3) Other matters.

Ky.—Mercer v. Com., 332 S.W.2d 655.

83. Mich.—People v. Vida, 140 N.W.2d 559, 2 Mich. App. 409, affd. 166 N.W.2d 465, 381 Mich. 595.

N.J.—State v. Turetsky, 188 A.2d 198, 78 N.J.Super. 203.

N.Y.—People v. Kubitz, 235 N.Y.S.2d 971, 37 Misc.2d 453.

Effect of postdating

Mo.—State v. Brookshire, App., 329 S.W.2d 252.

Pa.—Com. v. Kelinson, 184 A.2d 374, 199 Pa.Super. 135.

(2) Other statements.

Ariz.—State v. Stout, 448 P.2d 115, 8 Ariz.App. 545.

Statute specifically prohibiting prosecution construed

Kan.—State v. Beard, 416 P.2d 783, 197 Kan. 275.

84. Colo.—People v. Abbott, 638 P.2d 781.

Mich.—People v. Vida, 140 N.W.2d 559, 2 Mich.App. 409, affd. 166 N.W.2d 465, 381 Mich. 595—People v. Niver, 152 N.W.2d 714, 7 Mich.App. 652.

Or.—C.J.S. cited in Gumm v. Heider, 348 P.2d 455, 467, 220 Or. 5.

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84.5. N.M.—State v. Downing, App., 488 P.2d 112, 83 N.M. 62, 52 A.L.R.3d 461.

84.10. Pa.—Com. v. Martin, 13 D. & C.2d 612, 7 Montg. 156.

85. D.C.—Clemons v. U.S., App., 400 A.2d 1048.

86. Ill.—Pratt v. Kilborn Motors, Inc., 363 N.E.2d 452, 6 Ill.Dec. 770, 48 Ill.App.3d 932.

§ 22. Effectiveness of Pretense; Reliance Thereon

89.50. Me.—State v. Binette, 190 A.2d 744, 159 Me. 231.

90. Ala.—Ex parte Thaggard, 159 So.2d 820, 276 Ala. 117.

Whipple v. State, Cr., 286 So.2d 52, 51 Ala.App. 377, cert. den. 286 So.2d 57, 291 Ala. 802, cert. den. 94 S.Ct. 1564, 415 U.S. 977, 39 L.Ed.2d 873—Smith v. State, Cr.App., 409 So.2d 927, writ den. Sup., 409 So.2d 930.

Ariz.—State v. Carroll, 515 P.2d 1197, 21 Ariz.App. 99.

Cal.—People v. Phillips, 51 Cal.Rptr. 225, 414 P.2d 353, 64 C.2d 574.

People v. Causey, 34 Cal.Rptr. 43, 220 C.A.2d 641, cert. den. 84 S.Ct. 981, 376 U.S. 959, 11 L.Ed.2d 976—People v. Brady, 80 Cal.Rptr. 418, 275 C.A.2d 984.

Colo.—People v. Terranova, 563 P.2d 363, 38 Colo. App. 476.

D.C.—Ciullo v. U.S., C.A., 325 F.2d 227, 117 U.S.App. D.C. 31—Frazier v. Silver, D.C., 185 F.Supp. 625.

Kan.—State v. Finch, 573 P.2d 1048, 223 Kan. 398.

Me.—Ellis v. State, 276 A.2d 438.

Md.—Levy v. State, 170 A.2d 216, 225 Md. 201, cert. den. 82 S.Ct. 113, 368 U.S. 865, 7 L.Ed.2d 62—Immel v. State, 180 A.2d 703, 228 Md. 566—Davis v. State, 182 A.2d 49, 229 Md. 139, cert. den. 83 S.Ct. 200, 371 U.S. 898, 9 L.Ed.2d 130—Smith v. State, 207 A.2d 493, 237 Md. 573—State v. Sinclair, 337 A.2d 703, 274 Md. 646.

Dolan v. State, 229 A.2d 443, 1 Md.App. 292—League v. State, 232 A.2d 828, 1 Md.App. 681—Tumminello v. State, 272 A.2d 77, 10 Md.App. 612, cert. den. 92 S.Ct. 276, 404 U.S. 948, 30 L.Ed.2d 264.

Mass.—Com. v. Edgerly, 375 N.E.2d 1, 6 Mass.App. 241.

Mich.—People v. Wilde, 202 N.W.2d 542, 42 Mich. App. 514—People v. Schieda, 297 N.W.2d 688, 99 Mich.App. 420—People v. Chappelle, 319 N.W.2d 584, 114 Mich.App. 364.

Mo.—State v. St. John, 544 S.W.2d 5.

State v. Young, App., 672 S.W.2d 366.

Neb.—State v. Bohannon, 193 N.W.2d 153, 187 Neb. 594—State v. Hauck, 209 N.W.2d 580, 190 Neb. 534, 60 A.L.R.3d 1286.

N.H.—State v. Langlais, 276 A.2d 487, 111 N.H. 83.

N.J.—State v. Zwillman, 270 A.2d 284, 112 N.J.Super. 6—State v. Thyfault, 297 A.2d 873, 121 N.J.Super. 487, affd. 315 A.2d 424, 126 N.J.Super. 459.

N.M.—State v. Jones, 389 P.2d 398, 73 N.M. 459.

N.Y.—People v. Mancuso, 273 N.Y.S.2d 940, 26 A.D.2d 292, rearg. den. 275 N.Y.S.2d 503, 27 A.D.2d 643, mod. on oth. grds. 238 N.E.2d 757, 22

N.Y.2d 679, 291 N.Y.S.2d 370, cert. den. 89 S.Ct. 320, 393 U.S. 946, 21 L.Ed.2d 284—People v. Trotta, 291 N.Y.S.2d 185, 30 A.D.2d 562.
People v. Levitas, 243 N.Y.S.2d 234, 40 Misc.2d 331.

Okl.—Kellogg v. State, Cr., 551 P.2d 301.
Pa.—Com. v. Rosciolo, 57 Lanc.Rev. 567.
Tex.—Thornton v. State, 352 S.W.2d 742, 171 Tex. Cr.R. 565—Womack v. State, Cr., 408 S.W.2d 119—Cleveland v. State, Cr., 438 S.W.2d 807—Kinder v. State, Cr., 477 S.W.2d 584—Atkinson v. State, Cr., 523 S.W.2d 708.
Wash.—State v. Zorich, 431 P.2d 584, 72 Wash.2d 31.
State v. Eppens, 633 P.2d 92, 30 Wash.App. 119.

Under worthless check act

(1) Iowa—State v. Mullin, 225 N.W.2d 305, 75 A.L.R.3d 1072.

False pretense must be communicated

Okl.—State v. Layman, Cr., 357 P.2d 1022.

Reliance by agent of corporation

Ala.—Lambert v. State, Cr., 314 So.2d 318, 55 Ala.App. 242, cert. den. 314 So.2d 322, 294 Ala. 763.

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90.5. Neb.—State v. Swanson, 140 N.W.2d 618, 179 Neb. 693.
N.C.—State v. Cronin, 262 S.E.2d 277, 299 N.C. 229.
91. Ala.—Beaty v. State, Cr., 267 So.2d 490, 48 Ala. App. 699.
Cal.—People v. Lorenzo, 135 Cal.Rptr. 337, 64 C.A.3d Supp. 43.
Ind.—Harwei, Inc. v. State, App., 459 N.E.2d 52.
Md.—Dolan v. State, 229 A.2d 443, 1 Md.App. 292.
Mo.—State v. Young, App., 672 S.W.2d 366.
Neb.—State v. Bohannon, 193 N.W.2d 153, 187 Neb. 594—State v. Hauck, 209 N.W.2d 580, 190 Neb. 534, 60 A.L.R.3d 1286.
Tenn.—Mullican v. State, 360 S.W.2d 35, 210 Tenn. 505.

Victim collaborating with police

N.J.—State v. Greenberg, 382 A.2d 58, 154 N.J. Super. 564.

91.5. Mich.—People v. Wilde, 202 N.W.2d 542, 42 Mich.App. 514.

N.J.—State v. Thyfault, 297 A.2d 873, 121 N.J. Super. 487, affd. 315 A.2d 424, 126 N.J. Super. 459.

92. Ala.—Ex parte Thaggard, 159 So.2d 820, 276 Ala. 117.

N.Y.—People v. Levitas, 243 N.Y.S.2d 234, 40 Misc.2d 331.

Tenn.—Mullican v. State, 360 S.W.2d 35, 210 Tenn. 505.

Tex.—Ashford v. State, Cr., 410 S.W.2d 433—Bearden v. State, Cr., 487 S.W.2d 739.

93. Ala.—Ex parte Thaggard, 159 So.2d 813, 42 Ala. App. 229, cert. den. 159 So.2d 820, 276 Ala. 117.

Pa.—Com. v. Joy, 384 A.2d 1288, 253 Pa. Super. 177.

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94. Cal.—C.J.S. cited in People v. Phillips, 8 Cal. Rptr. 830, 835, 186 C.A.2d 231.

Conn.—State v. Winters, Cir.A.D., 202 A.2d 908, 2 Conn.Cir. 508, certification den. 199 A.2d 705, 151 Conn. 738.

Under statute so providing, proof of reliance by, or successful misleading of, victim is not required.^{94.5}

94.5. Neb.—State v. Koester, 209 N.W.2d 172, 190 Neb. 485.

Nev.—Chedester v. State, 535 P.2d 794, 91 Nev. 316.

N.C.—State v. Wilburn, 290 S.E.2d 782, 57 N.C.App. 40.

Va.—Warren v. Com., 247 S.E.2d 692, 219 Va. 416.

Deceptive practices statute

Ind.—Streeval v. State, 241 N.E.2d 255, 251 Ind. 349, reh. den. 244 N.E.2d 126, 251 Ind. 349.

Capacity to influence

U.S.—U.S. v. Scott, C.A. Ala., 701 F.2d 1340, reh. den. 707 F.2d 523, cert. den. 104 S.Ct. 175, 464 U.S. 856, 78 L.Ed.2d 158.

Legal impossibility not defense to attempt

N.Y.—People v. Pisciotta, 3 Dept., 470 N.Y.S.2d 928, 98 A.D.2d 926.

96. Cal.—People v. Parker, 44 Cal.Rptr. 900, 235 C.A.2d 86.

98. Miss.—Hindman v. State, 378 So.2d 663.

Tex.—Cortez v. State, Cr.App., 582 S.W.2d 119.

Bad check

Md.—Sinclair v. State, 319 A.2d 549, 21 Md.App. 477, affd. 337 A.2d 703, 274 Md. 646.

99. U.S.—Pioneer Val. Sav. Bank v. Indemnity Ins. Co. of North America, D.C.Iowa, 225 F.Supp. 404, affd., C.A., 343 F.2d 634.

Ala.—Franklin v. State, 214 So.2d 924, 44 Ala.App. 521.

Ariz.—State v. Brown, 400 P.2d 111, 97 Ariz. 310.

Cal.—Perry v. Superior Court of Los Angeles County, 19 Cal.Rptr. 1, 368 P.2d 529, 57 C.2d 276.

People v. Phillips, 8 Cal.Rptr. 830, 186 C.A.2d 231—People v. Hambleton, 32 Cal.Rptr. 471, 218 C.A.2d 479—People v. Kassab, 33 Cal.Rptr. 494, 219 C.A.2d 687—Buck v. Superior Court, 42 Cal. Rptr. 527, 232 C.A.2d 153, 11 A.L.R.3d 1064, cert. den. 86 S.Ct. 77, 382 U.S. 834, 15 L.Ed.2d 77—People v. Lynam, 68 Cal.Rptr. 202, 261 C.A.2d 490—People v. Taylor, 106 Cal.Rptr. 216, 30 C.A.3d 117—People v. Keefer, 110 Cal.Rptr. 597, 35 C.A.3d 156.

Pa.—Com. v. Seidman, 4 Adams L.J. 199.

S.D.—State v. Johnston, 200 N.W.2d 238, 86 S.D. 628.

Wash.—State v. Cooke, 371 P.2d 39, 59 Wash.2d 804, 94 A.L.R.2d 564—State v. Bryant, 437 P.2d 398, 72 Wash.2d 168.

Worthless check

D.C.—Gilmore v. U.S., C.A., 273 F.2d 79, 106 U.S. App.D.C. 344.

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5. Ala.—C.J.S. cited in Griffin v. State, 352 So.2d 847, 850.

§ 23. Knowledge of Accused of Falsity of Pretense and of Reliance Thereon

6. Cal.—People v. Lynam, 6 Cal.Rptr. 202, 261 C.A.2d 490.

D.C.—U.S. v. Avant, C.A., 275 F.2d 650, 107 U.S.App. D.C. 192.

Kan.—State v. Paxton, 440 P.2d 650, 201 Kan. 353, 607, cert. den. 89 S.Ct. 137, 393 U.S. 849, 21 L.Ed.2d 120.

Pa.—Com. v. Gold, 286 A.2d 676, 220 Pa. Super. 181.

Wash.—State v. Kaliman, 516 P.2d 1096, 10 Wash.App. 41.

7. Cal.—People v. Marsh, 26 Cal.Rptr. 300, 376 P.2d 300, 58 C.2d 732.

People v. Conlon, 24 Cal.Rptr. 219, 207 C.A.2d 86.

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11. Tex.—Gibson v. State, Cr.App., 623 S.W.2d 324.

§ 24. Obtaining of Property

12. Cal.—People v. Phillips, 51 Cal.Rptr. 225, 414 P.2d 353, 64 C.2d 574.

Idaho—State v. Urie, 437 P.2d 24, 92 Idaho 71.

Mo.—State v. Basham, 568 S.W.2d 518.

N.J.—State v. Covington, 284 A.2d 532, 59 N.J. 536.

N.C.—State v. Davis, 269 S.E.2d 291, 48 N.C.App. 526, review den. 283 S.E.2d 134, 301 N.C. 237.

Pa.—Commonwealth v. Stone, 71 Dauph.Co. 213, mod. on oth. grds. 144 A.2d 610, 187 Pa. Super. 236, affd. 150 A.2d 870, 395 Pa. 583.

Com. v. Festa, 62 Lack.Jur. 25.

Tex.—Smith v. State, Cr., 502 S.W.2d 133.

13. U.S.—Cameron v. Hauck, C.A.Tex., 383 F.2d 966, cert. den. 88 S.Ct. 777, 389 U.S. 1039, 19 L.Ed.2d 828.

Ala.—Clonts v. State, 161 So.2d 155, 42 Ala.App. 287—Teal v. State, 196 So.2d 729, 43 Ala.App. 584.

Cal.—People v. Aiken, 34 Cal.Rptr. 828, 222 C.A.2d 45.

Conn.—State v. Spittke, Cir.A.D., 195 A.2d 577, 2 Conn.Cir. 99.

Fla.—Gill v. State, App., 235 So.2d 751.

Ga.—Clontz v. State, 231 S.E.2d 454, 140 Ga.App. 440.

Ill.—People v. Fowler, 390 N.E.2d 1377, 28 Ill.Dec. 787, 72 Ill.App.3d 491.

Md.—Shope v. State, 307 A.2d 730, 18 Md.App. 472.

Mass.—Com. v. Greenberg, 160 N.E.2d 181, 339 Mass. 557—Com. v. Crocker, 424 N.E.2d 524, 384 Mass. 353.

Mich.—People v. Pickett, 166 N.W.2d 24, 15 Mich. App. 1.

Miss.—Pollard v. State, 244 So.2d 729.

Mo.—State v. McWilliams, 331 S.W.2d 610.

Or.—State v. Alden, 495 P.2d 302, 8 Or.App. 519.

Pa.—Com. v. Evans, 154 A.2d 57, 190 Pa. Super. 179, affd. 160 A.2d 407, 399 Pa. 387, cert. den. 81 S.Ct. 233, 364 U.S. 899, 5 L.Ed.2d 194, reh. den. 81 S.Ct. 377, 364 U.S. 939, 5 L.Ed.2d 371.

Tex.—White v. State, App. 5 Dist., 632 S.W.2d 752.

Va.—Bateman v. Com., 139 S.E.2d 102, 205 Va. 595.

Intent to appropriate does not suffice

Tex.—Finley v. State, Cr., 440 S.W.2d 849.

Held per se illegal objective

Md.—Pearlman v. State, 192 A.2d 767, 232 Md. 251, cert. den. 84 S.Ct. 797, 376 U.S. 943, 11 L.Ed.2d 767.

Retention of property immaterial

Kan.—Foor v. State, 413 P.2d 719, 196 Kan. 618.

14. Miss.—Miller v. State, 413 So.2d 1041.

Mont.—State v. Love, 440 P.2d 275, 151 Mont. 190.

15. Cal.—People v. Layman, 66 Cal.Rptr. 267, 259 C.A.2d 404.

Iowa—State v. Sabins, 127 N.W.2d 107, 256 Iowa 295.

Md.—C.J.S. cited in Immel v. State, 180 A.2d 703, 704, 228 Md. 566.

Carey v. State, 313 A.2d 696, 19 Md.App. 695.

“Obtain” defined

(2) Pa.—Commonwealth v. Stone, 144 A.2d 610, 187 Pa. Super. 236, affd. 150 A.2d 870, 395 Pa. 583.

Com. v. Matthews, 21 D. & C.2d 555, 32 Northumb.L.J. 50, affd. 173 A.2d 772, 196 Pa. Super. 60—Com. v. Conners, 4 Adams L.J. 187, affd. 193 A.2d 682, 201 Pa. Super. 500—Com. v. Seidman, 4 Adams L.J. 199.

(3) Other matters.

Pa.—Com. v. Posavek, 420 A.2d 532, 278 Pa. Super. 265.

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16. Cal.—People v. Ali, 57 Cal.Rptr. 348, 424 P.2d 932, 66 C.2d 277.

19. Miss.—Russell v. State, 391 So.2d 987.

Or.—Lilly v. Gladden, 348 P.2d 1, 220 Or. 84.

Va.—Cunningham v. Com., 247 S.E.2d 683, 219 Va. 399.

Test

Iowa—State v. Sabins, 127 N.W.2d 107, 256 Iowa 295.

N.C.—State v. Davis, 269 S.E.2d 291, 48 N.C.App. 526, review den. 283 S.E.2d 134, 301 N.C. 237.

19.5. Cal.—Buck v. Superior Court, 42 Cal.Rptr. 527, 232 C.A.2d 153, 11 A.L.R.3d 1064, cert. den. 86 S.Ct. 77, 382 U.S. 834, 15 L.Ed.2d 77.

Iowa—State v. Sabins, 127 N.W.2d 107, 256 Iowa 295.

La.—State v. Williams, 389 So.2d 384.

Pa.—Com. v. Patterson, 390 A.2d 784, 257 Pa. Super. 206.

20. Pa.—Com. v. Wetmore, 447 A.2d 1012, 301 Pa. Super. 370.

20.5. D.C.—Levin v. U.S., C.A., 338 F.2d 265, 119 U.S.App.D.C. 156, cert. den. 85 S.Ct. 719, 379 U.S. 999, 13 L.Ed.2d 701.

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Pa.—Com. v. Festa, 62 Lack.Jur. 25.

21. Not required under prior code

Mont.—State v. Cline, 555 P.2d 724, 170 Mont. 520.

22. Md.—Levy v. State, 170 A.2d 216, 225 Md. 201, cert. den. 82 S.Ct. 113, 368 U.S. 865, 7 L.Ed.2d 62.

§ 25. — By and for Whom Obtained

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25. Me.—C.J.S. cited in State v. Deschambault, 191 A.2d 114, 118, 159 Me. 223.

Tex.—Brown v. State, Cr., 392 S.W.2d 126.

26. Me.—C.J.S. cited in State v. Deschambault, 191 A.2d 114, 118, 159 Me. 223.

Md.—C.J.S. cited in Polisher v. State, 276 A.2d 102, 114, 11 Md. 555.

N.H.—C.J.S. cited in State v. Langlais, 276 A.2d 487, 489, 111 N.H. 83.

27. Cal.—Buck v. Superior Court, 42 Cal.Rptr. 527, 232 C.A.2d 153, 11 A.L.R.3d 1064, cert. den. 86 S.Ct. 77, 382 U.S. 834, 15 L.Ed.2d 77.

Ky.—C.J.S. quoted in Jones v. Com., 463 S.W.2d 936, 938.

Md.—C.J.S. quoted in Polisher v. State, 276 A.2d 102, 114, 11 Md.App. 555.

Mont.—C.J.S. quoted in State v. Lagerquist, 445 P.2d 910, 916, 152 Mont. 21.

§ 26. — Property Obtained in General

32. Cal.—People v. Darling, 41 Cal.Rptr. 219, 230 C.A.2d 615.

N.Y.—People v. Seymour, 389 N.Y.S.2d 467, 55 A.D.2d 737.

N.C.—State v. Wilson, 238 S.E.2d 632, 34 N.C.App. 474, cert. allowed 241 S.E.2d 72, 294 N.C. 188.

“Present value of any kind”

Neb.—State v. Spaulding, 319 N.W.2d 449, 211 Neb. 575.

34. Md.—Andresen v. State, 331 A.2d 78, 24 Md. App. 128, affd. 96 S.Ct. 2737, 427 U.S. 463, 49 L.Ed.2d 627.

Miss.—Miller v. State, 413 So.2d 1041.

Mo.—State v. Beemer, App., 538 S.W.2d 768.

Pa.—Com. v. Evans, 154 A.2d 57, 190 Pa.Super. 179, affd. 160 A.2d 407, 399 Pa. 387, cert. den. 81 S.Ct. 233, 364 U.S. 899, 5 L.Ed.2d 194, reh. den. 81 S.Ct. 377, 364 U.S. 939, 5 L.Ed.2d 371.

Va.—Warren v. Com., 247 S.E.2d 692, 219 Va. 416.

Wash.—State v. Dennis, 561 P.2d 219, 16 Wash.App. 939.

35. Release of lien

Md.—Brooks v. State, 372 A.2d 1055, 280 Md. 242.

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36. Labor or services

Pa.—Com. v. McCray, 242 A.2d 229, 430 Pa. 130.

Va.—Lund v. Com., 232 S.E.2d 745, 217 Va. 688.

The loaning of a student ID card to a non-student is not an offense against the state.^{36.5}

36.5. La.—State v. McIntyre, 269 So.2d 448, 263 La. 803.

37. Ala.—Franklin v. State, 214 So.2d 924, 44 Ala. App. 521.

Ky.—Palmer v. Com., 479 S.W.2d 613.

37.5. Cal.—Buck v. Superior Court, 42 Cal.Rptr. 527, 232 C.A.2d 153, 11 A.L.R.3d 1064, cert. den. 86 S.Ct. 77, 382 U.S. 834, 15 L.Ed.2d 77.

N.Y.—Giannetto v. General Exchange Ins. Corp., 200 N.Y.S.2d 238, 10 A.D.2d 442.

Or.—Lilly v. Gladden, 348 P.2d 1, 220 Or. 84.

39. Fla.—Sherman v. State, 255 So.2d 263.

Pa.—Com. v. Rosicci, 186 A.2d 648, 199 Pa.Super. 609.

Tex.—Sigers v. State, Cr., 479 S.W.2d 665.

Postdated check

Tex.—Barefield v. State, 331 S.W.2d 754, 169 Tex.Cr.R. 76.

43. Contractual obligation to pay money

Cal.—People v. Parker, 63 Cal.Rptr. 413, 255 C.A.2d 664.

49. Va.—Lund v. Com., 232 S.E.2d 745, 217 Va. 688.

A motor vehicle operator's license is not property.^{49.10}

49.10. N.Y.—People v. Sansanese, 270 N.Y.S.2d 607, 17 N.Y.2d 302, 217 N.E.2d 660.

51. Ala.—Latham v. State, Cr., 320 So.2d 747, 56 Ala.App. 234, affd. 320 So.2d 760, 294 Ala. 685.

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65. Md.—C.J.S. cited in State v. Sinclair, 337 A.2d 703, 711, 274 Md. 646.

70. Mo.—State v. Beemer, App., 538 S.W.2d 768.

80.5. Telephone service held “valuable thing”

Okl.—Stokes v. States, Cr., 366 P.2d 425.

Dishonored check held “thing of value”

Fla.—McCormick v. State, App., 161 So.2d 696.

Waiver of lien held “thing of value”

Colo.—Beasley v. People, 450 P.2d 658, 168 Colo. 286.

80.10. Pa.—Commonwealth v. Stone, 144 A.2d 610, 187 Pa.Super. 236, affd. 150 A.2d 870, 395 Pa. 583.

80.15. Railroad ticket

Tex.—Turner v. State, Cr., 372 S.W.2d 346.

84. Ohio—State v. Yurek, App., 198 N.E.2d 773.

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85. In California

(3) Cal.—Callan v. Superior Court In and For San Mateo County, 22 Cal.Rptr. 508, 204 C.A.2d 652.

Under some statutes, the obtaining of services by false pretenses is an offense.^{91.5}

91.5. Failure to pay prevailing wage

Cal.—People v. Miles & Sons Trucking Service, Inc., 65 Cal.Rptr. 465, 257 C.A.2d 697.

92. Or.—Lilly v. Gladden, 348 P.2d 1, 220 Or. 84.

93. Forgery

(1) Iowa—State v. Hatridge, 109 N.W.2d 705, 252 Iowa 1116.

§ 27. — Written Instruments and Signatures Thereto

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94. Ind.—Griffin v. State, 357 N.E.2d 917, 171 Ind. App. 543.

96. Cal.—People v. Layman, 66 Cal.Rptr. 267, 259 C.A.2d 404.

Blank check

Ind.—Griffin v. State, 357 N.E.2d 917, 171 Ind.App. 543.

§ 28. Loss to Prosecutor

2.50. Miss.—C.J.S. quoted at length in Carter v. State, 386 So.2d 1102, 1105.

3. Colo.—Zarate v. People, 429 P.2d 309, 163 Colo. 205.

Nev.—Watkins v. Sheriff of Clark County, 453 P.2d 611, 85 Nev. 246.

Utah—State v. Nuttall, 397 P.2d 797, 16 Utah2d 171.

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4. Ind.—Streeval v. State, 241 N.E.2d 255, 251 Ind. 349, reh. den. 244 N.E.2d 126, 251 Ind. 349.

Iowa—State v. Armstrong, 183 N.W.2d 205, app. after remand 203 N.W.2d 269, cert. den. 94 S.Ct. 163, 414 U.S. 857, 38 L.Ed.2d 108.

N.J.—State v. Greenberg, 382 A.2d 58, 154 N.J.Super. 564.

Va.—Mosteller v. Com., 279 S.E.2d 380, 222 Va. 143.

5. Ga.—Powell v. Cohen, 156 S.E.2d 495, 116 Ga. App. 48.

Nev.—Watkins v. Sheriff of Clark County, 453 P.2d 611, 85 Nev. 246.

Pa.—Com. v. Gallo, 573 A.2d 1109, 473 Pa. 186.

7. U.S.—U.S. v. Sparks, C.A.Va., 560 F.2d 1173.

Ariz.—State v. Mills, 396 P.2d 5, 96 Ariz. 377.

Ark.—Stewart v. State, 509 S.W.2d 298, 256 Ark. 619.

Cal.—People v. Ali, 57 Cal.Rptr. 348, 424 P.2d 932, 66 C.2d 277.

People v. Maggart, 14 Cal.Rptr. 745, 194 C.A.2d 84—People v. Conlon, 24 Cal.Rptr. 219, 207 C.A.2d 86—Buck v. Superior Court, 42 Cal.Rptr. 527, 232 C.A.2d 153, 11 A.L.R.3d 1064, cert. den. 86 S.Ct. 77, 382 U.S. 834, 15 L.Ed.2d 77—People v. Brady, 80 Cal.Rptr. 418, 275 C.A.2d 984—People v. Lockett, 102 Cal.Rptr. 41, 25 C.A.3d 433.

D.C.—Clemmons v. U.S., App., 400 A.2d 1048.

Fla.—Rosengarten v. State, App., 171 So.2d 591.

Neb.—State v. Martin, 128 N.W.2d 583, 177 Neb. 209—State v. Swanson, 140 N.W.2d 618, 179 Neb. 693.

N.C.—State v. Hines, 243 S.E.2d 782, 36 N.C.App. 33, app. dism., review den. Sup., 245 S.E.2d 779.

Va.—Quidley v. Com., 275 S.E.2d 622, 221 Va. 963.

Wis.—State v. Kennedy, App., 314 N.W.2d 884, 105 Wis.2d 625.

9. Ariz.—State v. Mills, 396 P.2d 5, 96 Ariz. 377.

10. Cal.—People v. Ross, 100 Cal.Rptr. 703, 25 C.A.3d 190.

12.5. Fla.—Rosengarten v. State, App., 171 So.2d 591.

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15. N.J.—State v. Professional Credit Corp., 271 A.2d 7, 112 N.J.Super. 286.

Or.—Gumm v. Heider, 348 P.2d 455, 220 Or. 5.

Wis.—C.J.S. quoted at length in State v. Kennedy, 314 N.W.2d 884, 890, 105 Wis.2d 625.

17. N.Y.—People v. Lofton, 340 N.Y.S.2d 984, 73 Misc.2d 285, op. supp. 356 N.Y.S.2d 791, 78 Misc.2d 202.

§ 29. To Whom Pretense Made

24. Tenn.—State v. McDonald, 534 S.W.2d 650, cert. den. 96 S.Ct. 1733, 425 U.S. 955, 48 L.Ed.2d 200, reh. den. 96 S.Ct. 2219, 425 U.S. 1000, 48 L.Ed.2d 826.

26. Cal.—C.J.S. cited in Callan v. Superior Court In and For County of San Mateo, 22 Cal.Rptr. 508, 519, 204 C.A.2d 652.

27. D.C.—Bolet v. U.S., App., 417 A.2d 386.

N.Y.—People v. Gould, 246 N.Y.S.2d 758, 41 Misc.2d 875.

29. Mich.—People v. Wilde, 202 N.W.2d 542, 42 Mich.App. 514.

33. Filing false claim in judicial proceeding

Nev.—Adler v. Sheriff, Clark County, 552 P.2d 334, 92 Nev. 436.

§ 30. Particular Acts, Transactions, or Subject Matters

Library References

False Pretenses §15 et seq.

34. Cal.—People v. Felsman, 64 Cal.Rptr. 870, 257 C.A.2d 437.

Minn.—State v. Ruffin, 158 N.W.2d 202, 280 Minn. 126.

Neb.—State v. Hauck, 209 N.W.2d 580, 190 Neb. 534, 60 A.L.R.3d 1286.

N.J.—State v. Zwillman, 270 A.2d 284, 112 N.J.Super. 6.

Pa.—Com. v. Duzak, 179 A.2d 248, 197 Pa.Super. 514.

Obtaining money on promise to marry

Wis.—Lambert v. State, 243 N.W.2d 524, 73 Wis.2d 590.

35. Minn.—State v. Oklon, 299 N.W.2d 89, cert. den. 101 S.Ct. 954, 449 U.S. 1132, 67 L.Ed.2d 119.

Passing bad check and other circumstances

Minn.—State v. Cunningham, 99 N.W.2d 908, 257 Minn. 31—State v. Hodge, 123 N.W.2d 323, 266 Minn. 193.

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41. Fla.—Pauk v. State, App., 344 So.2d 304.

50. Unemployment compensation

Cal.—People v. Lustman, 91 Cal.Rptr. 548, 13 C.A.3d 278, cert. den. 92 S.Ct. 989, 405 U.S. 932, 30 L.Ed.2d 807.

page 853**58. Elements of offense**

U.S.—U.S. v. Marchisio, C.A.N.Y., 344 F.2d 653.

Materiality as essential element of proof

U.S.—U.S. v. Marchisio, C.A.N.Y., 344 F.2d 653.

61. Statute held valid

U.S.—Syversen v. U.S., C.A.Iowa, 342 F.2d 780, cert. den. 86 S.Ct. 443, 382 U.S. 961, 15 L.Ed.2d 364, reh. den. 86 S.Ct. 623, 382 U.S. 1021, 15 L.Ed.2d 537.

62. Cal.—People v. Gilbert, 82 Cal.Rptr. 724, 462 P.2d 580, 1 C.3d 475.

People v. Ford, 46 Cal.Rptr. 144, 236 C.A.2d 438, app. diss. 86 S.Ct. 1365, 384 U.S. 100, 16 L.Ed.2d 396.

Ky.—Com. v. McKinney, App., 594 S.W.2d 884.

Md.—Gentry v. State, 276 A.2d 673, 12 Md.App. 44.

N.J.—State v. Graves, 291 A.2d 2, 60 N.J. 441.

§ 31. — Cheating or Fraudulent Practices in Sports or Games**page 854**

Mo.—C.J.S. black letter summary quoted in State v. Fields, 366 S.W.2d 462, 467.

64. Nev.—D'Anna v. Sheriff, Clark County, 476 P.2d 472, 86 Nev. 756.

Three card monte

(2) Scheme or artifice to defraud.

U.S.—U.S. v. Edwards, D.C.Mo., 394 F.Supp. 1288, aff'd. 516 F.2d 913.

§ 32. — Confidence Game

65. Mo.—State v. Inscore, 592 S.W.2d 809.

S.D.—C.J.S. cited in State v. Cole, 168 N.W.2d 507, 84 S.D. 111.

The statutes were intended, etc.

Ill.—People v. Lewis, 161 N.E.2d 821, 17 Ill.2d 403.

(2) Cheats and swindlers of all kinds and descriptions.

Minn.—State v. Wells, 121 N.W.2d 68, 265 Minn. 212.

65.5. Ariz.—State v. Govorko, 533 P.2d 688, 23 Ariz. App. 380.

Minn.—State v. Ruffin, 158 N.W.2d 202, 280 Minn. 126.

66. Ill.—People v. Lewis, 161 N.E.2d 821, 17 Ill.2d 403.

Mo.—C.J.S. quoted at length in State v. Fields, 366 S.W.2d 462, 467.

66.5. Ejusdem generis

D.C.—U.S. v. Brown, App., 309 A.2d 256.

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67. Ariz.—State v. Carr, 543 P.2d 441, 112 Wash. 453.

Ill.—People v. Caruth, 192 N.E.2d 911, 28 Ill.2d 514. People v. Wilson, 202 N.E.2d 103, 52 Ill.App.2d 304.

Minn.—State v. Wells, 121 N.W.2d 68, 265 Minn. 212.

Fraudulent accosting

N.Y.—People v. Brown, 365 N.Y.S.2d 115, 81 Misc.2d 149.

68. Fla.—Pauk v. State, App., 344 So.2d 304.

Ill.—People v. Lewis, 161 N.E.2d 821, 17 Ill.2d 403. Mo.—State v. Fields, 366 S.W.2d 462.

Gist of offense

Ariz.—State v. McGhee, 551 P.2d 568, 27 Ariz.App. 119.

Ill.—People v. Gipson, 194 N.E.2d 318, 29 Ill.2d 336.

Some measure of confidence, however limited or qualified, is all that is necessary.

Colo.—Marshall v. People, 417 P.2d 491, 160 Colo. 323.

Duration immaterial

S.D.—State v. Keeling, 233 N.W.2d 586, 89 S.D. 436.

Confidence need not be absolute

S.D.—State v. Keeling, 233 N.W.2d 586, 89 S.D. 436.

69. Ill.—People v. Walker, 208 N.E.2d 840, 60 Ill. App.2d 178.

Mo.—State v. Fields, 366 S.W.2d 462.

Elements

D.C.—U.S. v. Brown, App., 309 A.2d 256.

70. Ariz.—State v. Jackson, 485 P.2d 580, 14 Ariz. App. 591.

Del.—Crawley v. State, 229 A.2d 839.

Ill.—People v. Walker, 208 N.E.2d 840, 60 Ill.App.2d 178.

Intent, etc.

Mo.—State v. Basham, App., 571 S.W.2d 130.

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72. Ariz.—State v. Loudon, App., 619 P.2d 758, 127 Ariz. 249.

Mo.—State v. Cunningham, 380 S.W.2d 401.

Confidence in innocent third person

(2) Other matters.

Ill.—People v. Caruth, 192 N.E.2d 911, 28 Ill.2d 514.

73. Ill.—People v. Lewis, 161 N.E.2d 821, 17 Ill.2d 403—People v. Caruth, 192 N.E.2d 911, 28 Ill.2d 514.

76.5. Ill.—People v. Lewis, 161 N.E.2d 821, 17 Ill.2d 403—People v. Gipson, 194 N.E.2d 318, 29 Ill.2d 336.

77. Minn.—State v. Wells, 121 N.W.2d 68, 265 Minn. 212.

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80. S.D.—State v. Cole, 168 N.W.2d 507, 84 S.D. 111.

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82.25. Ill.—People v. Walker, 192 N.E.2d 833, 28 Ill.2d 393.

82.35. Ill.—People v. Epping, 162 N.E.2d 366, 17 Ill.2d 557.

People v. Walker, 208 N.E.2d 840, 60 Ill.App.2d 178.

"Jamaica switch" is a confidence game.^{85.5}

85.5. Cal.—People v. Rideaux, 39 Cal.Rptr. 391, 393 P.2d 703, 61 C.2d 537.

§ 33. — False Personation of Officer or Another Person

86. U.S.—Williams v. U.S., C.A.Fla., 402 F.2d 258, cert. den. 90 S.Ct. 582, 396 U.S. 1017, 24 L.Ed.2d 509—U.S. v. McMillian, C.A.Va., 438 F.2d 980.

Ala.—Snipes v. State, Cr., 277 So.2d 413, 50 Ala.App. 139.

Colo.—People v. Brown, 562 P.2d 754, 193 Colo. 120.

Elements

Iowa—State v. Smith, 223 N.W.2d 223.

87. U.S.—U.S. v. Milton, C.A.Okla., 421 F.2d 586—U.S. v. Randolph, C.A.Fla., 460 F.2d 367—U.S. v. Etheridge, C.A.N.Y., 512 F.2d 1249, cert. den. 96 S.Ct. 77, 423 U.S. 843, 46 L.Ed.2d 63.

U.S. v. Carr, D.C.Cal., 194 F.Supp. 144.

87.5. Alaska—Lanier v. State, 448 P.2d 587.

§ 34. — Fraudulent Presentation of Claims to Public Officers**page 859**

89. U.S.—State v. Sierra, App., 568 P.2d 206, 90 N.M. 680, cert. den. 569 P.2d 414, 91 N.M. 4.

90. Ariz.—State v. Holden, 352 P.2d 705, 88 Ariz. 43.

§ 35. Degrees of Offenses**Library References****False Pretenses ⇐20½.**

95.50. N.Y.—Industrial Bank of Commerce v. Packard Yonkers Corp., 101 N.Y.S.2d 189, aff'd. 108 N.Y.S.2d 249, 279 App.Div. 125, rearg. and app. den. 109 N.Y.S.2d 925, 279 App.Div. 792, aff'd. 107 N.E.2d 96, 304 N.Y. 622.

Wash.—Jeane v. Smith, 210 P.2d 127, 34 Wash.2d 826.

96. Fla.—State ex rel. Shargaa v. Culver, 113 So.2d 383—Greer v. Culver, 113 So.2d 386.

Heims v. State, App., 128 So.2d 756.

97. U.S.—Burr v. Immigration and Naturalization Service, C.A.Cal., 350 F.2d 87, cert. den. 86 S.Ct. 905, 383 U.S. 915, 15 L.Ed.2d 669.

Cal.—People v. Boyce, 221 P.2d 1011, 99 Cal.App.2d 439—People v. Natividad, 35 Cal.Rptr. 237, 222 C.A.2d 438.

Ill.—People v. Heinz, 409 N.E.2d 64, 42 Ill.Dec. 569, 87 Ill.App.3d 1.

Minn.—State v. Mathiasen, 141 N.W.2d 805, 273 Minn. 372.

N.M.—State v. Jones, 389 P.2d 398, 73 N.M. 459.

N.C.—State v. Fowler, 146 S.E.2d 418, 266 N.C. 528.

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98. Tried on greater charge and convicted on lesser

Ky.—Coley v. Com., App., 553 S.W.2d 472.

99. Cal.—In re Dick, 49 Cal.Rptr. 673, 411 P.2d 561, 64 C.2d 272.

Buck v. Superior Court, 42 Cal.Rptr. 527, 232 C.A.2d 153, 11 A.L.R.3d 1064, cert. den. 86 S.Ct. 77, 382 U.S. 834, 15 L.Ed.2d 77—People v. Parker, 63 Cal.Rptr. 413, 255 C.A.2d 664.

Utah—State v. Forshee, 588 P.2d 181.

Rule under worthless check law

(2) Other matters.

Fla.—Penrod v. Cochran, 123 So.2d 334.

Aggregate of separate amounts or items

(4) Other statements.

Cal.—People v. Bailey, 11 Cal.Rptr. 543, 360 P.2d 39, 55 C.2d 514.

People v. Kennedy, 26 Cal.Rptr. 696, 210 C.A.2d 599, cert. den. 84 S.Ct. 126, 375 U.S. 861, 11 L.Ed.2d 87.

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Mich.—People v. Robinson, 296 N.W.2d 99, 97 Mich. App. 542.

N.Y.—People v. LaRock, 357 N.Y.S.2d 625, 78 Misc.2d 525.

Amounts combined to find felony

R.I.—State v. Aurgemma, 358 A.2d 46, 116 R.I. 425.

1. Mo.—State v. Watson, App., 562 S.W.2d 721.

Ohio—State v. Giaros, 173 N.E.2d 146, 114 Ohio App. 185, aff'd. 180 N.E.2d 134, 173 Ohio St. 63.

2. Ill.—People v. Tarlton, 434 N.E.2d 1110, 61 Ill. Dec. 513, 91 Ill.2d 1.

4. Cal.—People v. Hess, 90 Cal.Rptr. 268, 10 C.A.3d 1071, 43 A.L.R.3d 643—People v. Ross, 100 Cal. Rptr. 703, 25 C.A.3d 190.

Extent of loss immaterial

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Fair market cash value

Ill.—People v. Heinz, 409 N.E.2d 64, 42 Ill.Dec. 569, 87 Ill.App.3d 1.

§ 36. Attempts

Fla.—C.J.S. black letter summary quoted in *Benefield v. State*, 151 So.2d 650, 661, decision quashed, Sup., 160 So.2d 706.

5. Pa.—*People v. Ali*, 57 Cal.Rptr. 348, 424 P.2d 932, 66 C.2d 277.

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Ill.—*People v. Elmore*, 276 N.E.2d 325, 50 Ill.2d 10. N.C.—*State v. Cronin*, 262 S.E.2d 277, 299 N.C. 229. Pa.—*Com. v. Silva*, 53 Luz.L.Reg. 107.

Gravamen of offense

Md.—*Bosley v. State*, 286 A.2d 203, 14 Md.App. 83.

Statutory crime of attempt held not to exist Neb.—*State v. Hauck*, 209 N.W.2d 580, 190 Neb. 534, 60 A.L.R.3d 1286.

6. Ala.—*Shelby Mut. Ins. Co. of Shelby, Ohio v. Ralston, Civ.App.*, 369 So.2d 285.

Cal.—*People v. Reed*, 11 Cal.Rptr. 780, 190 C.A.2d 344.

D.C.—*Blackledge v. U.S.*, App., 447 A.2d 46.

Ill.—*People v. Ramsey*, 297 N.E.2d 295, 11 Ill.App.3d 596.

Md.—*Franczkowski v. State*, 210 A.2d 504, 239 Md. 126, 6 A.L.R.3d 238.

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N.Y.—*People v. Bauer*, 305 N.Y.S.2d 42, 32 A.D.2d 463, affd. 258 N.E.2d 399, 26 N.Y.2d 915, 310 N.Y.S.2d 101.

7. Cal.—*People v. Orndorff*, 67 Cal.Rptr. 824, 261 C.A.2d 212.

Ill.—*People v. Vettese*, 377 N.E.2d 1168, 18 Ill.Dec. 532, 61 Ill.App.3d 279.

Acts held sufficient

(4) N.H.—*State v. Gravel*, 229 A.2d 686, 108 N.H. 142.

N.J.—*State v. Thyfault*, 297 A.2d 873, 121 N.J.Super. 487, affd. 315 A.2d 424, 126 N.J.Super. 459.

Pa.—*Com. v. Allen*, 435 A.2d 1270, 291 Pa.Super. 366.

Acts held insufficient

Colo.—*Martin v. People*, 499 P.2d 606, 179 Colo. 237.

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8. Cal.—*People v. Anderson*, 12 Cal.Rptr. 500, 361 P.2d 32, 55 C.2d 655, cert. den. 82 S.Ct. 368, 368 U.S. 931, 7 L.Ed.2d 193.

9. Cal.—*People v. Layman*, 66 Cal.Rptr. 267, 259 C.A.2d 404.

Mich.—*People v. Robinson*, 179 N.W.2d 239, 23 Mich. App. 672.

Pa.—*Com. v. Evans*, 154 A.2d 57, 190 Pa.Super. 179, affd. 160 A.2d 407, 399 Pa. 387, cert. den. 81 S.Ct. 233, 364 U.S. 899, 5 L.Ed.2d 194, reh. den. 81 S.Ct. 377, 364 U.S. 939, 5 L.Ed.2d 371.

10. Ariz.—*State v. Savchick*, 569 P.2d 220, 116 Ariz. 278.

N.Y.—*People v. Bauer*, 305 N.Y.S.2d 42, 32 A.D.2d 463, affd. 258 N.E.2d 399, 26 N.Y.2d 915, 310 N.Y.S.2d 101.

11. Ill.—*People v. Elmore*, 261 N.E.2d 736, 128 Ill. App.2d 312, affd. 276 N.E.2d 325, 50 Ill.2d 10.

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13. Cal.—*People v. Lynam*, 68 Cal.Rptr. 202, 261 C.A.2d 490.

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§ 37. Defenses

21. Or.—C.J.S. quoted in *State v. Ewers*, 458 P.2d 708, 710, 1 Or.App. 47.

22. R.I.—*State v. Aurgemma*, 353 A.2d 46, 116 R.I. 425.

24. N.Y.—*People v. Broome*, 251 N.Y.S.2d 747, 21 A.D.2d 899, revd. on oth. grds. 207 N.E.2d 603, 15 N.Y.2d 985, 260 N.Y.S.2d 6.

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25.5. Ariz.—*State v. Daymus*, 367 P.2d 647, 90 Ariz. 294.

27.20. Usury

Wash.—*State v. Zorich*, 431 P.2d 584, 72 Wash.2d 31.

Various other matters have been held to constitute defenses.^{27.36}

27.36. Cal.—*People v. Poyet*, 99 Cal.Rptr. 758, 492 P.2d 1150, 6 C.3d 530.

Certificate from bank that check was good for face amount

N.C.—*State v. Copley*, 133 S.E.2d 147, 260 N.C. 542.

Religious defense

Nev.—*Chedester v. State*, 535 P.2d 794, 91 Nev. 316.

It has been held not a defense that a worthless check has not been presented to the bank for payment.^{27.40}

27.40. Cal.—*People v. Sanderson*, 6 Cal.Rptr. 330, 183 C.A.2d 544.

N.D.—*State v. Houn*, 299 N.W.2d 563.

Or.—*State v. Hodges*, 484 P.2d 1107, 5 Or.App. 362.

Various other matters have been held not to be defenses.^{27.45}

27.45. Cal.—*People v. Silver*, 121 Cal.Rptr. 153, 47 C.A.3d 837.

Colo.—*Woodman v. People*, 450 P.2d 330, 168 Colo. 80—*Lewis v. People*, 483 P.2d 949.

Idaho—*State v. Campbell*, 543 P.2d 1171, 97 Idaho 331.

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Or.—*State v. Hodges*, 484 P.2d 1107, 5 Or.App. 362.

Utah—*Combs v. Turner*, 483 P.2d 437, 25 Utah2d 397.

Va.—*Warren v. Com.*, 247 S.E.2d 692, 219 Va. 416.

Wis.—*State v. Kennedy*, App., 314 N.W.2d 884, 105 Wis.2d 625.

Contract provision

Wash.—*State v. Cooke*, 371 P.2d 39, 59 Wash.2d 804, 94 A.L.R.2d 564.

Intent to deposit sufficient funds

N.Y.—*People v. Parker*, 274 N.Y.S.2d 38, 51 Misc.2d 843.

No personal benefit

Cal.—*People v. Taylor*, 106 Cal.Rptr. 216, 30 C.A.3d 117.

28. Pa.—*Com. ex rel. Carr v. Ceraul*, 175 A.2d 340, 196 Pa.Super. 269.

Com. v. Matthews, 21 D. & C.2d 555, 32 Northumb.L.J. 50, affd. 173 A.D.2d 772, 196 Pa.Super. 60.

29. Kan.—*Foor v. State*, 413 P.2d 719, 196 Kan. 618. Neb.—*State v. Swanson*, 140 N.W.2d 618, 179 Neb. 693.

Pa.—*Com. v. Matthews*, 173 A.2d 772, 196 Pa.Super. 60.

31. Cal.—*People v. Braver*, 40 Cal.Rptr. 142, 229 C.A.2d 303, 10 A.L.R.3d 565—*People v. Katzman*, App., 66 Cal.Rptr. 319, 258 C.A.2d 777.

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Mo.—*State v. McWilliams*, 331 S.W.2d 610.

Pa.—*Com. v. Matthews*, 173 A.2d 772, 196 Pa.Super. 60.

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Va.—*Quidley v. Com.*, 275 S.E.2d 622, 221 Va. 963.

31.5. Ill.—*People v. Cundiff*, 305 N.E.2d 735, 16 Ill.App.3d 267.

Intent to make restitution

Ill.—*People v. Reans*, 313 N.E.2d 184, 20 Ill.App.3d 1005.

33. Fla.—*Kravets v. State*, App., 360 So.2d 486.

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34. Mo.—C.J.S. cited in *State v. Warren*, 628 S.W.2d 410, 414.

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35. Ariz.—*State v. Joseph*, 510 P.2d 69, 20 Ariz.App. 70.

Mo.—*State v. DeClue*, 400 S.W.2d 50.

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35.5. Cal.—*People v. Felsman*, 64 Cal.Rptr. 870, 257 C.A.2d 437.

Md.—*Baskerville v. State*, 327 A.2d 918, 23 Md.App. 439.

36. Ark.—*Garroute v. State*, 408 S.W.2d 485, 241 Ark. 285.

Cal.—*People v. Brady*, 80 Cal.Rptr. 418, 275 C.A.2d 984—*People v. Ross*, 100 Cal.Rptr. 703, 29 C.A.3d 190.

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Partial restitution, etc.

S.D.—*State v. Yarber*, 285 N.W.2d 592.

37. Promise to repay

Cal.—*People v. Felsman*, 64 Cal.Rptr. 870, 257 C.A.2d 437.

42. Ariz.—*State v. DeVinney*, 403 P.2d 921, 98 Ariz. 273.

42.5. Activity held not crime

Nev.—*Kelley v. State*, 348 P.2d 966, 76 Nev. 65.

44. Cal.—*People v. Bresin*, 53 Cal.Rptr. 687, 245 C.A.2d 232—*People v. Katzman*, 66 Cal.Rptr. 319, 258 C.A.2d 777.

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50. Ala.—Harris v. State, Cr.App., 378 So.2d 257, writ den., Sup., 378 So.2d 263.

§ 38. Persons Liable

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57. Ga.—Cross v. State, 190 S.E.2d 561, 126 Ga.App. 346.
 58. N.Y.—People v. Sobel, 448 N.Y.S.2d 511, 87 A.D.2d 656.
Individual signing Housing Administration application for company
 U.S.—Syverson v. U.S., C.A.Iowa, 342 F.2d 780, cert. den. 86 S.Ct. 443, 382 U.S. 961, 15 L.Ed.2d 364, reh. den. 86 S.Ct. 623, 382 U.S. 1021, 15 L.Ed.2d 537.

Present as agent of corporation

- N.C.—State v. Louchheim, 244 S.E.2d 195, 36 N.C. App. 271, app. dismissed, 245 S.E.2d 779, 295 N.C. 263, aff'd, 250 S.E.2d 630, 296 N.C. 314, app. dismissed, 257 S.E.2d 435, 295 N.C. 470, cert. den. 100 S.Ct. 71, 444 U.S. 836, 62 L.Ed.2d 47.
 Ind.—Cooper v. State, 391 N.E.2d 841, 181 Ind.App. 275.

- 62.5. Vt.—State v. Sears, 296 A.2d 218, 130 Vt. 379.

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63. Stockholder of corporation liable

- Conn.—State v. Pilch, 394 A.2d 1364, 35 Conn.Sup. 536.
 N.Y.—People v. Dean, 368 N.Y.S.2d 349, 48 A.D.2d 223.
 67. Mass.—Com. v. Greenberg, 160 N.E.2d 181, 339 Mass. 557.
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 Mich.—People v. Akerley, 251 N.W.2d 309, 73 Mich. App. 321.
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 68. Cal.—People v. Phipps, 12 Cal.Rptr. 681, 191 C.A.2d 448.
 69. Cal.—People v. Barker, 2 Cal.Rptr. 467, 349 P.2d 73, 53 C.2d 539.
 72. Ill.—People v. Gipson, 194 N.E.2d 318, 29 Ill.2d 336.
 72.5. Pa.—Com. v. Francis, 191 A.2d 884, 201 Pa.Super. 313, cert. den. 84 S.Ct. 517, 375 U.S. 985, 11 L.Ed.2d 472.
 73. Cal.—Nugent v. Superior Court for San Mateo County, 62 Cal.Rptr. 217, 254 C.A.2d 420.
 74. Mich.—People v. Killingsworth, 263 N.W.2d 278, 80 Mich.App. 45.

The mere presence of one in the automobile used by the principals at the time of arrest may not be sufficient to establish guilt.^{75.5}

- 75.5. Ga.—Browner v. State, 193 S.E.2d 58, 127 Ga. App. 189.

§ 39. Requisites and Sufficiency in General

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76. Proof required

- S.D.—State v. West, 260 N.W.2d 215.
 78. U.S.—U.S. v. Crisona, D.C.N.Y., 271 F.Supp. 150.
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 N.Y.—People v. Kirk, 310 N.Y.S.2d 155, 62 Misc. 1078.

Fictitious or worthless checks

(11) Other matters.

- Idaho—State v. Roderick, 375 P.2d 1005, 85 Idaho 80.
 78.5. U.S.—Shayne v. U.S., C.A.Cal., 255 F.2d 739, cert. den. 79 S.Ct. 39, 358 U.S. 823, 3 L.Ed.2d 64—Yeloushan v. U.S., C.A.Fla., 339 F.2d 533—Gevinson v. U.S., C.A.Tex., 358 F.2d 761, cert. den. 87 S.Ct. 51, 385 U.S. 823, 17 L.Ed.2d 60—U.S. v. Flick, C.A.Ind., 516 F.2d 489, cert. den. 96 S.Ct. 282, two cases, 423 U.S. 931, 46 L.Ed.2d 260.
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- Mo.—State v. Wright, App., 409 S.W.2d 797.
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- Neb.—State v. Jarrett, 129 N.W.2d 259, 177 Neb. 459.
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- N.M.—State v. Ferris, App., 459 P.2d 462, 80 N.M. 663.

- N.C.—State v. Wallace, 213 S.E.2d 420, 25 N.C.App. 360, cert. den. 215 S.E.2d 628, 287 N.C. 468.
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- Vt.—State v. Quesnel, 207 A.2d 155, 124 Vt. 491.

Cheating and swindling

- Ga.—Maurier v. State, 144 S.E.2d 918, 112 Ga.App. 297.

Confidence game

- Minn.—State v. Hodge, 123 N.W.2d 323, 266 Minn. 193.

- Mo.—State v. Barnes, App., 517 S.W.2d 155.

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- Colo.—People v. Plumlee, 380 P.2d 910, 152 Colo. 159.
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 Okl.—Stokes v. State, Cr., 366 P.2d 425 Moore v. State, Cr., 374 P.2d 630.

- Tex.—Reeves v. State, Cr., 428 S.W.2d 320.

- Wash.—State v. Wilder, 529 P.2d 1109, 12 Wash.App. 296.

Knowing use of stolen credit card

- Cal.—People v. Perry, 40 Cal.Rptr. 829, 230 C.A.2d 258.

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- 78.10. D.C.—U.S. v. Brown, App., 309 A.2d 256.
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- Ill.—People v. James, 176 N.E.2d 659, 32 Ill.App.2d 55—People v. Tedesco, 190 N.E.2d 140, 41 Ill. App.2d 27—People v. Samples, 224 N.E.2d 284, 80 Ill.App.2d 182.

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- Tex.—Fancher v. State, Cr., 422 S.W.2d 919.

82. Me.—Gamblin v. State, 281 A.2d 229.

86. Ill.—People v. Samples, 224 N.E.2d 284, 80 Ill. App.2d 182.

- Vt.—State v. Quesnel, 207 A.2d 155, 124 Vt. 491.

- Wash.—State v. Johnson, 355 P.2d 13, 56 Wash.2d 700, cert. den. 81 S.Ct. 1658, 366 U.S. 934, 6 L.Ed.2d 846.

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87. Mo.—State v. Miles, 412 S.W.2d 473.

90. Ill.—People v. Billingsley, 213 N.E.2d 765, 67 Ill.App.2d 292.

§ 41. — Intent

97. Ga.—Lowe v. Turner, 154 S.E.2d 792, 115 Ga. App. 503.

- Okla.—C.J.S. cited in Stokes v. State, Cr., 366 P.2d 425, 429.

Intent to defraud; complaint

- (2) Allegations insufficient to allege intent in false pretenses prosecutions.

- Md.—Andresen v. State, 331 A.2d 78, 24 Md.App. 128, aff'd, 96 S.Ct. 2737, 427 U.S. 463, 49 L.Ed.2d 627.

- Mo.—State v. Barnes, App., 517 S.W.2d 155.

Indictments or informations held insufficient

- (1) U.S.—U.S. v. Randolph, C.A.Fla., 460 F.2d 367.

- Ill.—People v. Johnson, 233 N.E.2d 574, 91 Ill.App.2d 378—People v. Greene, 235 N.E.2d 295, 92 Ill. App.2d 201—People v. Huard, 317 N.E.2d 375, 22 Ill.App.3d 198.

- Mich.—People v. Batten, 156 N.W.2d 640, 9 Mich.App. 195.

- Mo.—State v. Dunlap, 408 S.W.2d 76.

- N.M.—State v. Jones, 389 P.2d 398, 73 N.M. 459.

- (1) Ga.—McCain v. Smith, 144 S.E.2d 522, 221 Ga. 353.

- Ill.—People v. Tedesco, 190 N.E.2d 140, 41 Ill.App.2d 27—People v. Samples, 224 N.E.2d 284, 80 Ill. App.2d 182.

- Me.—State v. Austin, 188 A.2d 275, 159 Me. 71.

- Tex.—Parsons v. State, Cr., 398 S.W.2d 283.

Complaint held invalid

- Tex.—Burleson v. State, Cr., 403 S.W.2d 143.

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Allegation unnecessary under statutory presumption of intent

Tex.—Chapa v. State, Cr., 420 S.W.2d 943.

Terms "unlawfully and knowingly" as not alleging "specific" intent

Md.—Andresen v. State, 331 A.2d 78, 24 Md.App. 128, affd. 96 S.Ct. 2737, 427 U.S. 463, 49 L.Ed.2d 627.

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99. N.C.—State v. Fowler, 146 S.E.2d 418, 266 N.C. 528.

4. Tex.—Chapa v. State, Cr., 420 S.W.2d 943.

§ 42. — Pretense or Token

7. Miss.—C.J.S. cited in *Prisock v. State*, 141 So.2d 711, 714, 244 Miss. 408.

Mo.—State v. Newhart, App., 503 S.W.2d 62, app. after remand 539 S.W.2d 486.

Indictments or informations held sufficient

(1) Me.—Gamblin v. State, 281 A.2d 229.

Mich.—People v. Batten, 156 N.W.2d 640, 9 Mich.App. 195.

Indictments held insufficient

Me.—Ellis v. State, 276 A.2d 438.

N.J.—State v. Donohue, 201 A.2d 413, 84 N.J.Super. 226.

N.C.—State v. Hargett, 130 S.E.2d 865, 259 N.C. 496.

Denial of truth of pretended facts

Me.—State v. Binette, 190 A.2d 744, 159 Me. 231—*State v. Deschambault*, 191 A.2d 119, 159 Me. 216.

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10. Cal.—People v. Dimitrovich, 15 Cal.Rptr. 407, 194 C.A.2d 710.

12. Ga.—Cohen v. State, 112 S.E.2d 672, 101 Ga. App. 23—*Pierce v. State*, 120 S.E.2d 905, 104 Ga.App. 52.

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15. Or.—C.J.S. quoted in *State v. Mims*, 385 P.2d 1002, 1005, 235 Or. 540.

19. Miss.—*Prisock v. State*, 141 So.2d 711, 244 Miss. 408.

21. Miss.—*Prisock v. State*, 141 So.2d 711, 244 Miss. 408.

28. Ark.—*Davis v. State*, 411 S.W.2d 531, 241 Ark. 646, 242 Ark. 43.

Me.—*Herrick v. State*, 196 A.2d 101, 159 Me. 499, 99 A.L.R.2d 918.

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33. Ill.—*People v. Curtis*, 316 N.E.2d 557, 22 Ill. App.3d 4.

Okl.—C.J.S. cited in *Stokes v. State*, Cr., 366 P.2d 425, 429.

Complaint held insufficient

Ill.—*People v. Tenen*, 270 N.E.2d 179, 132 Ill.App.2d 786—*People v. Greer*, 310 N.E.2d 391, 18 Ill. App.3d 617.

37. Ill.—*People v. Ahmer*, 291 N.E.2d 343, 8 Ill. App.3d 795.

38. Ill.—*People v. Brakebill*, 292 N.E.2d 491, 9 Ill. App.3d 691.

41. Tex.—*Worton v. State*, Cr., 492 S.W.2d 519.

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47. Ga.—*Norman v. State*, 127 S.E.2d 878, 106 Ga. App. 641.

48. Me.—*State v. Binette*, 190 A.2d 744, 159 Me. 231—*State v. Deschambault*, 191 A.2d 119, 159 Me. 216.

Mo.—*State v. Jurett*, 481 S.W.2d 504.

False or worthless checks

(7) Other matters.

Or.—*State v. Hodges*, 484 P.2d 1107, 5 Or.App. 362.

49. N.Y.—*People v. Farruggia*, 342 N.Y.S.2d 924, 41 A.D.2d 894.

50. Mo.—C.J.S. cited in *State v. Jarrett*, 481 S.W.2d 504, 507.

Indictment held insufficient

Me.—*State v. Deschambault*, 191 A.2d 119, 159 Me. 216.

Mo.—*State v. Jarrett*, 481 S.W.2d 504.

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62. Ind.—*Woodall v. State*, 177 N.E.2d 910, 242 Ind. 233.

Okl.—C.J.S. cited in *Stokes v. State*, Cr., 366 P.2d 425, 429.

Wash.—*State v. Kaliman*, 516 P.2d 1096, 10 Wash.App. 41.

Indictments held sufficient

Mich.—*People v. Batten*, 156 N.W.2d 640, 9 Mich.App. 195.

False or worthless checks

(2) Tex.—*Norman v. State*, 338 S.W.2d 714, 170 Tex.Cr.R. 25.

(4) Mo.—*State v. Friedman*, App., 398 S.W. 37.

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65. Me.—*State v. Deschambault*, 191 A.2d 119, 159 Me. 216.

Miss.—*Everett v. State*, 248 So.2d 439.

Neb.—*State v. Banse*, 169 N.W.2d 294, 184 Neb. 534.

Okl.—*Carroll v. State*, Cr., 347 P.2d 812.

Indictments and informations held sufficient

N.C.—*State v. Simpson*, 212 S.E.2d 566, 25 N.C.App. 176, cert. den. 214 S.E.2d 436, 287 N.C. 263.

Bad check

(2) Simultaneous giving of check and receiving of thing of value.

Ky.—*Harrell v. Com.*, 328 S.W.2d 531.

66. Mo.—*State v. Stegall*, 353 S.W.2d 656—*State v. Kesterson*, 403 S.W.2d 606—*State v. Garner*, 432 S.W.2d 259.

Information held insufficient

Mo.—*State v. Walker*, App., 520 S.W.2d 708.

Neb.—*State v. Banse*, 169 N.W.2d 294, 184 Neb. 534.

Bad check

(2) Allegation not necessarily implying reliance insufficient.

Me.—*Ellis v. State*, 276 A.2d 438.

68. Ky.—*Davidson v. Com.*, 436 S.W.2d 495.

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76. Ariz.—*State v. Brown*, 400 P.2d 111, 97 Ariz. 310.

§ 43. — Obtaining Property

87. Fla.—*Penrod v. Cochran*, 123 So.2d 334.

Md.—*Dunphy v. State*, 284 A.2d 631, 13 Md.App. 671.

Okl.—C.J.S. cited in *Stokes v. State*, Cr., 366 P.2d 425, 429.

Indictments and informations held sufficient

(1) Tex.—*Cameron v. State*, Cr., 401 S.W.2d 809—*Smith v. State*, Cr., 502 S.W.2d 133.

Indictment held insufficient

(1) U.S.—*Cameron v. Hauck*, C.A.Tex., 383 F.2d 966, cert. den. 88 S.Ct. 777, 389 U.S. 1039, 19 L.Ed.2d 828.

N.Y.—*People v. Kirk*, 310 N.Y.S.2d 155, 62 Misc. 1078.

§ 44. — Property, Instrument, or Signature Obtained

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90. Fraudulent check

Ind.—*Ferrell v. State*, 219 N.E.2d 804, 247 Ind. 535.

Descriptions held sufficient

Fla.—*Penrod v. Cochran*, 123 So.2d 334.

92. Ala.—*Clonts v. State*, 161 So.2d 155, 42 Ala.App. 287.

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97. Neb.—*State v. Swanson*, 140 N.W.2d 618, 179 Neb. 693.

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14. Md.—C.J.S. cited in *Flannigan v. State*, 191 A.2d 591, 593, 232 Md. 13.

Miss.—*Young v. State*, 209 So.2d 189.

Allegations held sufficient

Miss.—*Westmoreland v. State*, 246 So.2d 487, cert. den. 92 S.Ct. 702, 404 U.S. 1038, 30 L.Ed.2d 729, reh. den. 92 S.Ct. 931, 405 U.S. 948, 30 L.Ed.2d 818.

20. Ga.—*Cohen v. State*, 112 S.E.2d 672, 101 Ga. App. 23.

28. Ala.—*Harvey v. State*, 130 So.2d 823, 41 Ala. App. 300.

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34. Or.—*State v. Alden*, 495 P.2d 302, 8 Or.App. 519.

38. Indictment held sufficient

(2) Other instances.

Tex.—*Bond v. State*, 345 S.W.2d 520, 171 Tex.Cr.R. 119.

§ 45. — Loss to Prosecutor

42. Accusation held insufficient

Mo.—*State v. Cunningham*, 380 S.W.2d 401.

§ 46. — False Personation of Officer or Another Person

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46. Indictments and informations held sufficient

Ala.—*Teal v. State*, 196 So.2d 729, 43 Ala.App. 584.

Indictment held insufficient

U.S.—*U.S. v. Grewe*, D.C.Mo., 242 F.Supp. 826.

§ 47. — Presentation of Fraudulent Claim

48. Indictments and informations held sufficient

(1) N.Y.—*People v. Licausi*, 200 N.Y.S.2d 582, 23 Misc.2d 75.

Indictments or informations held insufficient

Or.—*State v. Mims*, 385 P.2d 1002, 235 Or. 540.

49. Or.—*State v. Mims*, 385 P.2d 1002, 235 Or. 540.

50. Or.—*State v. Mims*, 385 P.2d 1002, 235 Or. 540.

§ 48. Attempt

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52. Indictment held sufficient

(1) Miss.—*Everett v. State*, 248 So.2d 439.

Mo.—*State v. Thomas*, 438 S.W.2d 441.

§ 49. Issues, Proof, and Variance

59.50. Mich.—*People v. Robinson*, 179 N.W.2d 239, 23 Mich.App. 672.

Mo.—*State v. Dunlap*, 408 S.W.2d 76.

60. Md.—*Harris v. State*, 342 A.2d 305, 27 Md.App. 547.

Mich.—*People v. Batten*, 156 N.W.2d 640, 9 Mich.App. 195.

Or.—*State v. Hunt*, 475 P.2d 596, 3 Or.App. 634.

Tex.—*Reeves v. State*, Cr., 428 S.W.2d 320.

Matters to be proved

(8) Other matters.

Fla.—*Penrod v. Cochran*, 123 So.2d 334.

Mo.—*State v. Warfield*, App., 507 S.W.2d 428.

Immaterial variance

Fla.—*Sherwood v. State*, App., 221 So.2d 154.

Ky.—*Braswell v. Com.*, 339 S.W.2d 637.

Tex.—*Young v. State*, 341 S.W.2d 933, 170 Tex.Cr.R. 500.

No variance

- (3) Ala.—Lambert v. State, Cr., 314 So.2d 318, 55 Ala.App. 242, cert. den. 314 So.2d 322, 294 Ala. 763.
Or.—State v. Wilson, 369 P.2d 739, 230 Or. 251.
Tex.—Parker v. State, 342 S.W.2d 764, 170 Tex.Cr.R. 570—Bond v. State, 345 S.W.2d 520, 171 Tex.Cr.R. 119—Cameron v. State, Cr., 401 S.W.2d 809—Moore v. State, Cr., 505 S.W.2d 842.

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61. Okl.—Moore v. State, Cr., 374 P.2d 630—Agnew v. State, Cr., 526 P.2d 1158.
Wash.—State v. Johnson, 355 P.2d 13, 56 Wash.2d 700, cert. den. 81 S.Ct. 1658, 366 U.S. 934, 6 L.Ed.2d 846.
63. Tex.—Gutierrez v. State, 352 S.W.2d 124, 171 Tex.Cr.R. 493.
64. Tex.—Howard v. State, Cr., 420 S.W.2d 706.
66.5. Fla.—Stephens v. State, App., 324 So.2d 190.
Ga.—Washington v. State, 115 S.E.2d 600, 102 Ga.App. 69.
Tex.—Witting v. State, Cr., 375 S.W.2d 719.
67. Ky.—Jones v. Com., 463 S.W.2d 936.
Mo.—C.J.S. cited in State v. Jarrett, 481 S.W.2d 504, 509.

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68. Me.—State v. Chick, 263 A.2d 71.
Tex.—Burleson v. State, Cr., 449 S.W.2d 252.

No variance

- (1) Ala.—Latham v. State, 320 So.2d 760, 294 Ala. 685.
Mo.—State v. Jarrett, 481 S.W.2d 504.
N.Y.—People v. Farruggia, 342 N.Y.S.2d 924, 41 A.D.2d 894.
69. Wash.—State v. Kaliman, 516 P.2d 1096, 10 Wash.App. 41.
70. **Variances held immaterial**
(2) Cal.—People v. Kovach, 16 Cal.Rptr. 828, 197 C.A.2d 85.
(4) Mo.—State v. Jarrett, 481 S.W.2d 504.
Tex.—Christ v. State, Cr., 480 S.W.2d 394.

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71. Miss.—Westmoreland v. State, 286 So.2d 807.
73. Mo.—State v. Jarrett, 481 S.W.2d 504.
76. Mo.—C.J.S. quoted in State v. Jarrett, 481 S.W.2d 504, 509.
Tex.—Cameron v. State, Cr., 401 S.W.2d 809.
77. Ga.—Mitchell v. State, 149 S.E.2d 172, 113 Ga. App. 523.
79. Ark.—Davis v. State, 411 S.W.2d 531, 241 Ark. 646, 242 Ark. 43.
80.5. La.—Davis-Delcambre Motors, Inc. v. Simon, 163 So.2d 553, 246 La. 105.
Minn.—State v. Everson, 175 N.W.2d 503, 286 Minn. 246.
N.H.—State v. Gravel, 229 A.2d 686, 108 N.H. 142.
Tenn.—Mulligan v. State, 360 S.W.2d 35, 210 Tenn. 505.
Tex.—Chapa v. State, Cr., 420 S.W.2d 943.

Mode of proof

- Tex.—Crum v. State, Cr., 427 S.W.2d 623.

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83. Mich.—People v. Pickett, 166 N.W.2d 24, 15 Mich.App. 1.

Variance held fatal

- (1) Ind.—Ferrell v. State, 219 N.E.2d 804, 247 Ind. 535.
Tex.—Nesbit v. State, Cr., 374 S.W.2d 666.

No variance

- (2) Other matters.
Tex.—Cameron v. State, Cr., 401 S.W.2d 809.
85. Ill.—People v. Lewis, 161 N.E.2d 821, 17 Ill.2d 403.

- Tex.—Martini v. State, Cr., 371 S.W.2d 387—Colaluca v. State, Cr., 494 S.W.2d 885.

87. Ala.—Burnette v. State, Cr., 282 So.2d 70, 50 Ala.App. 630.
Ark.—Miller v. State, 464 S.W.2d 594, 250 Ark. 199.
Ga.—Cohen v. State, 112 S.E.2d 672, 101 Ga.App. 23—Hamilton v. State, 165 S.E.2d 884, 118 Ga. App. 842.
Md.—Gentry v. State, 276 A.2d 673, 12 Md.App. 44.

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90. Colo.—Digiallonardo v. People, 488 P.2d 1109, 175 Colo. 560.
91. Iowa—State v. Armstrong, 183 N.W.2d 205, app. after remand 203 N.W.2d 269, cert. den. 94 S.Ct. 163, 414 U.S. 857, 38 L.Ed.2d 108.
Neb.—State v. Jarrett, 129 N.W.2d 259, 177 Neb. 459.
Tex.—Watkins v. State, Cr., 438 S.W.2d 819.
92. Ohio—State v. Pittman, 224 N.E.2d 913, 9 Ohio St.2d 186.
96. Tex.—Abbe v. State, Cr., 469 S.W.2d 175.
97. Tex.—Hogan v. State, Cr., 393 S.W.2d 898.
1. **Variance not fatal**
N.M.—State v. Jones, 389 P.2d 398, 73 N.M. 459.

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- 3.5. Md.—Maloney v. State, 304 A.2d 260, 17 Md. App. 609.
4. Tex.—Pitt v. State, 362 S.W.2d 117, 172 Tex.Cr.R. 637.

7. Corporation or partnership

- (4) Other statements
Ala.—Clonts v. State, 161 So.2d 155, 42 Ala.App. 287.

Immaterial variance

- (2) Other variances.
Mont.—State v. Love, 440 P.2d 275, 151 Mont. 190.

page 890**8. Proof of any legal interest or special property sufficient**

- Md.—Flannigan v. State, 191 A.2d 591, 232 Md. 13.
9. Ill.—People v. Dillon, 236 N.E.2d 411, 93 Ill. App.2d 151.
Md.—Flannigan v. State, 191 A.2d 591, 232 Md. 13.
Mo.—State v. Bywaters, 476 S.W.2d 588.

§ 50. Presumptions and Burden of Proof

13. Iowa—State v. Johnson, 196 N.W.2d 563.
14. Tex.—Ward v. State, Cr.App., 581 S.W.2d 164.
15. Ala.—Burnette v. State, Cr., 282 So.2d 70, 50 Ala.App. 630.
Ill.—People v. Brooks, 357 N.E.2d 1169, 2 Ill.Dec. 726, 65 Ill.2d 343.
Md.—Davis v. State, 182 A.2d 49, 229 Md. 139, cert. den. 83 S.Ct. 200, 371 U.S. 898, 9 L.Ed.2d 130.
N.Y.—People v. Powell, 256 N.Y.S.2d 117, 22 A.D.2d 959.

Matters to be proved in prosecution for issuing bad check

- (1) Md.—Marr v. State, 177 A.2d 862, 227 Md. 510.
N.J.—State v. Pollack, 202 A.2d 433, 43 N.J. 34.
State v. Turetsky, 188 A.2d 198, 78 N.J.Super. 203.

(8) Other matters.

- Fla.—Davis v. State, App., 155 So.2d 167.
N.Y.—People v. Martin, 310 N.Y.S.2d 450, 62 Misc.2d 884.
Tenn.—Meadows v. State, 421 S.W.2d 639, 220 Tenn. 615.
Tex.—Chapa v. State, Cr., 420 S.W.2d 943.

Common-law elements

- Nev.—Harvey v. State, 375 P.2d 225, 78 Nev. 417.

Matters to be proved in prosecution for cheating by false pretense

- U.S.—U.S. ex rel. Siegel v. Lennox, C.A.Pa., 460 F.2d 690.

Matters to be proved in prosecution for falsely receiving welfare health care

- Cal.—People v. Dixon, 120 Cal.Rptr. 163, 46 C.A.3d 431.

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16. Idaho—State v. Roderick, 375 P.2d 1005, 85 Idaho 80.
Mass.—Com. v. Barrasso, 175 N.E.2d 251, 342 Mass. 680.
17. Ala.—Taylor v. State, Cr., 238 So.2d 902, 46 Ala.App. 105.
Ariz.—State v. Goodman, 526 P.2d 1073, 22 Ariz.App. 275.
D.C.—White v. U.S., App., 284 A.2d 464.
Md.—Nicholas v. State, 212 A.2d 291, 239 Md. 569.
Davis v. State, 306 A.2d 620, 18 Md.App. 378.
Mass.—Com. v. Barrasso, 175 N.E.2d 251, 342 Mass. 680.
N.Y.—People v. Pollack, 239 N.Y.S.2d 602, 38 Misc.2d 1075.
Tex.—Garcia v. State, Cr., 501 S.W.2d 652.
18. Mass.—Com. v. Barrasso, 175 N.E.2d 251, 342 Mass. 680.
Permissive inference, not mandatory presumption
Vt.—State v. McBurney, 484 A.2d 926, 145 Vt. 201.

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19. Cal.—People v. Mason, 7 Cal.Rptr. 627, 184 C.A.2d 317, cert. den. 81 S.Ct. 1046, 366 U.S. 904, 6 L.Ed.2d 203.
Mass.—Com. v. Barrasso, 175 N.E.2d 251, 342 Mass. 680.
N.Y.—People v. Pollack, 239 N.Y.S.2d 602, 38 Misc.2d 1075.
Wash.—State v. Cooke, 371 P.2d 39, 59 Wash.2d 804, 94 A.L.R.2d 564.
20. Mass.—Com. v. Barrasso, 175 N.E.2d 251, 342 Mass. 680.
21. Ariz.—State v. Burton, 444 P.2d 743, 8 Ariz.App. 186.
Neb.—State v. Koester, 209 N.W.2d 172, 190 Neb. 485.
Okl.—Lamasus v. State, Cr., 516 P.2d 279.
Tex.—Chapa v. State, Cr., 420 S.W.2d 943.

Affirmative defense

- Utah—State v. Vatsis, 351 P.2d 96, 10 Utah 2d 244.

Right of reliance

- Wash.—State v. Cooke, 371 P.2d 39, 59 Wash.2d 804, 94 A.L.R.2d 564.
24.5. Cal.—People v. Reed, 11 Cal.Rptr. 780, 190 C.A.2d 344—People v. Randonio, 108 Cal.Rptr. 326, 32 C.A.3d 164.

Statutory presumption unavailable without notice

- U.S.—Alley v. Paderick, D.C.Va., 373 F.Supp. 920.

Credit card act

- N.J.—State v. Gledhill, 342 A.2d 161, 67 N.J. 565.
25. Cal.—People v. Marsh, 26 Cal.Rptr. 300, 376 P.2d 300, 58 C.2d 732.
Fla.—Benefield v. State, App., 151 So.2d 650, decision quashed, Sup., 160 So.2d 706.
Idaho—State v. Campbell, 543 P.2d 1171, 97 Idaho 331.
Md.—Waye v. State, 191 A.2d 428, 231 Md. 510.
N.Y.—People v. Pollack, 239 N.Y.S.2d 602, 38 Misc.2d 1075.
Tex.—Atkinson v. State, Cr., 523 S.W.2d 708.
Va.—Huntt v. Com., 187 S.E.2d 183, 212 Va. 737.
26. N.J.—State v. Fladger, 227 A.2d 528, 94 N.J.Super. 205.
S.C.—State v. McCord, 187 S.E.2d 654, 258 S.C. 163.

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27. Intent to defraud inferred

Cal.—People v. Taylor, 106 Cal.Rptr. 216, 30 C.A.3d 117.

Md.—Nichols v. State, 190 A.2d 645, 231 Md. 383.

28. Cal.—People v. Randoni, 108 Cal.Rptr. 326, 32 C.A.3d 164.

Colo.—People v. Kanan, 526 P.2d 1339, 186 Colo. 255.

Idaho—State v. Campbell, 543 P.2d 1171, 97 Idaho 331.

Pa.—Com. v. Horton, 348 A.2d 728, 465 Pa. 213.

34. Ariz.—State v. Daymus, 367 P.2d 647, 90 Ariz. 294.

Cal.—People v. Pitts, 16 Cal.Rptr. 879, 196 C.A.2d 841—People v. Gentry, 65 Cal.Rptr. 235, 257 C.A.2d 607.

Fla.—Stephens v. State, App., 324 So.2d 190.

Md.—Marr v. State, 177 A.2d 862, 227 Md. 510.

Mo.—State v. Bywaters, 476 S.W.2d 588.

Ohio—State v. Robinson, 254 N.E.2d 56, 20 Ohio Misc. 262.

Utah—State v. Coleman, 406 P.2d 308, 17 Utah2d 166.

Va.—Patterson v. Com., 218 S.E.2d 435, 216 Va. 306.

Burden of proof unchanged

Md.—Way v. State, 191 A.2d 428, 231 Md. 510.

Neb.—State v. Eggers, 120 N.W.2d 541, 175 Neb. 79.

N.J.—State v. Turetsky, 188 A.2d 198, 78 N.J.Super. 203.

Prima facie case

(1) Md.—Flannigan v. State, 191 A.2d 591, 232 Md. 13.

(4) Other matters.

Ala.—Tolbert v. State, 321 So.2d 227, 294 Ala. 738, on remand 321 So.2d 234, 56 Ala.App. 730.

Ark.—Tolbert v. State, 428 S.W.2d 264, 244 Ark. 1067.

Ga.—Marshall v. State, 197 S.E.2d 161, 128 Ga.App. 413.

Idaho—State v. Campbell, 543 P.2d 1171, 97 Idaho 331.

Md.—Flannigan v. State, 191 A.2d 591, 232 Md. 13.

N.J.—State v. Pollack, 202 A.2d 433, 43 N.J. 34.

Or.—Gumm v. Heider, 348 P.2d 455, 220 Or. 5.

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35. La.—Davis-Delcambre Motors, Inc. v. Simon, 163 So.2d 553.

Tenn.—Smithson v. State, 438 S.W.2d 61, 222 Tenn. 499—Johnston v. Zale Corp., 484 S.W.2d 531.

Tex.—Parker v. State, Cr., 385 S.W.2d 390.

Va.—Rinkov v. Com., 191 S.E.2d 731, 213 Va. 307.

Prima facie case

(2) Kan.—State v. Shannon, 398 P.2d 344, 194 Kan. 258, cert. den. 86 S.Ct. 172, 382 U.S. 881, 15 L.Ed.2d 122, reh. den. 86 S.Ct. 298, 382 U.S. 922, 15 L.Ed.2d 238.

(4) Other matters.

Conn.—State v. Callahan, Cir.A.D., 183 A.2d 861, 23 Conn.Sup. 374, 1 Conn.Cir. 247.

Kan.—State v. Shannon, 398 P.2d 344, 194 Kan. 258, cert. den. 86 S.Ct. 172, 382 U.S. 881, 15 L.Ed.2d 122, reh. den. 86 S.Ct. 298, 382 U.S. 922, 15 L.Ed.2d 238.

Mo.—State v. Brookshire, App., 329 S.W.2d 252.

Payment

(4) Other matters.

Conn.—State v. Callahan, Cir.A.D., 183 A.2d 861, 23 Conn.Sup. 374, 1 Conn.Cir. 247.

Provision inapplicable where instrument not a check within terms of statute

S.C.—State v. Brazzell, 149 S.E.2d 339, 248 S.C. 118.

36.5. Ga.—Tapley v. State, 126 S.E.2d 715, 106 Ga. App. 215.

N.J.—State v. Turetsky, 188 A.2d 198, 78 N.J.Super. 203.

37. Ala.—Tolbert v. State, 321 So.2d 227, 294 Ala. 738, on remand 321 So.2d 234, 56 Ala.App. 730.

Kan.—State v. Haremsa, 515 P.2d 1217, 213 Kan. 201.

Md.—Flannigan v. State, 191 A.2d 591, 232 Md. 13.

Shipp v. Autoville Ltd., 328 A.2d 349, 23 Md. App. 555.

Mo.—State v. Phillips, App., 430 S.W.2d 635.

Neb.—State v. Eggers, 120 N.W.2d 541, 175 Neb. 79.

Va.—Rinkov v. Com., 191 S.E.2d 731, 213 Va. 307—Patterson v. Com., 218 S.E.2d 435, 216 Va. 306.

How rebutted

(5) Other methods.

Md.—Maki v. State, 211 A.2d 711, 239 Md. 311.

37.5. Ariz.—State v. Daymus, 367 P.2d 647, 90 Ariz. 294.

Md.—Flannigan v. State, 191 A.2d 591, 232 Md. 13.

N.J.—State v. Turetsky, 188 A.2d 198, 78 N.J.Super. 203.

Tenn.—Smithson v. State, 438 S.W.2d 61, 222 Tenn. 499.

Va.—Patterson v. Com., 218 S.E.2d 435, 216 Va. 306.

38. Mo.—State v. Phillips, App., 430 S.W.2d 635.

39.5. Ga.—Tapley v. State, 126 S.E.2d 715, 106 Ga. App. 215.

40. Tex.—Barker v. State, Cr., 412 S.W.2d 652.

Va.—Hunt v. Com., 187 S.E.2d 183, 212 Va. 737—Rinkov v. Com., 191 S.E.2d 731, 213 Va. 307.

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41. N.Y.—People v. Martin, 310 N.Y.S.2d 450, 62 Misc.2d 884.

43. Ariz.—State v. Holmes, App., 476 P.2d 878, 13 Ariz.App. 357, application den. 91 S.Ct. 1669, 402 U.S. 971, 29 L.Ed.2d 135, cert. den. 91 S.Ct. 2255, 403 U.S. 936, 29 L.Ed.2d 717.

44. Md.—Quinn v. State, 230 A.2d 368, 1 Md.App. 373.

Pa.—Com. v. Tattersall, 49 Luz.L.Reg. 67.

46. Ark.—Edens v. State, 357 S.W.2d 641, 235 Ark. 284.

Kan.—State v. Morris, 372 P.2d 282, 190 Kan. 93.

Md.—Maki v. State, 211 A.2d 711, 239 Md. 311.

Quinn v. State, 230 A.2d 368, 1 Md.App. 373.

N.Y.—People v. Parker, 274 N.Y.S.2d 38, 51 Misc.2d 843.

Tenn.—State v. Rice, 490 S.W.2d 516.

§ 51. Admissibility

48. Ala.—Mathis v. State, Cr., 296 So.2d 760, 52 Ala.App. 674, cert. quashed 296 So.2d 764, 292 Ala. 732, cert. den. 95 S.Ct. 777, 419 U.S. 1106, 42 L.Ed.2d 802, reh. den. 95 S.Ct. 1363, 420 U.S. 967, 43 L.Ed.2d 446.

Evidence held admissible

(20) Ark.—Kerby v. State, 342 S.W.2d 412.

Cal.—People v. Griffith, 5 Cal.Rptr. 620, 181 C.A.2d 715—People v. Rubin, 36 Cal.Rptr. 167, 223 C.A.2d 825, 9 A.L.R.3d 707—People v. Samuel, 53 Cal.Rptr. 887, 245 C.A.2d 210—People v. Lockett, 102 Cal.Rptr. 41, 25 C.A.3d 433.

Iowa—State v. Hopkins, 192 N.W.2d 747.

Md.—Sinclair v. State, 340 A.2d 359, 27 Md.App. 207, revd. on oth. grds. and remd. 363 A.2d 468, 278 Md. 243.

Mass.—Com. v. Barrasso, 175 N.E.2d 251, 342 Mass. 680.

Mich.—People v. Vida, 166 N.W.2d 465, 381 Mich. 595.

Mont.—State v. Evans, 456 P.2d 842, 153 Mont. 303.

Pa.—Com. v. Petrosky, 166 A.2d 682, 194 Pa.Super. 94.

Tex.—Bond v. State, 345 S.W.2d 520, 171 Tex.Cr.R. 119.

Wash.—State v. Goldstein, 361 P.2d 639, 58 Wash.2d 155—State v. Zorich, 431 P.2d 584, 72 Wash.2d 31.

Evidence held inadmissible

Cal.—People v. Samuel, 53 Cal.Rptr. 887, 245 C.A.2d 210.

Ill.—People v. Epping, 162 N.E.2d 366, 17 Ill.2d 557.

Scheme to defraud

Minn.—State v. Kline, 124 N.W.2d 416, 266 Minn. 372, cert. den. 84 S.Ct. 1124, 376 U.S. 962, 11 L.Ed.2d 980, reh. den. 84 S.Ct. 1331, 377 U.S. 940, 12 L.Ed.2d 304.

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49. Ill.—People v. Epping, 162 N.E.2d 366, 17 Ill.2d 557.

Evidence held not admissible

(4) Cal.—People v. Porter, 31 Cal.Rptr. 841, 217 C.A.2d 824—People v. Sharlow, 43 Cal.Rptr. 778, 233 C.A.2d 596.

50. Ind.—Yeary v. State, 283 N.E.2d 356, 258 Ind. 587.

Minn.—State v. Kline, 124 N.W.2d 416, 266 Minn. 372, cert. den. 84 S.Ct. 1124, 376 U.S. 962, 11 L.Ed.2d 980, reh. den. 84 S.Ct. 1331, 377 U.S. 940, 12 L.Ed.2d 304.

Pa.—Com. v. Petrosky, 166 A.2d 682, 194 Pa.Super. 94.

Flight

Cal.—People v. Reichenau, 343 P.2d 603, 173 C.A.2d 584.

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53. Cal.—People v. Fujita, 117 Cal.Rptr. 757, 43 C.A.3d 454, cert. den. 95 S.Ct. 1952, 421 U.S. 964, 44 L.Ed.2d 451.

N.H.—State v. Garceau, 231 A.2d 625, 108 N.H. 209.

55. Evidence held admissible

(6) Mont.—State v. Lagerquist, 445 P.2d 910, 152 Mont. 21.

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58. N.Y.—People v. Bel Air Equipment Corp., 360 N.Y.S.2d 465, 46 A.D.2d 773, affd. 346 N.E.2d 529, 39 N.Y.2d 48, 382 N.Y.S.2d 728.

Tex.—Hampton v. State, Cr., 402 S.W.2d 748.

Wash.—State v. Wallis, 492 P.2d 236, 6 Wash.App. 34, affd. 503 P.2d 1068, 81 Wash.2d 618.

Evidence held irrelevant

Conn.—State v. Carnegie, 259 A.2d 628, 158 Conn. 264, cert. den. 90 S.Ct. 488, 396 U.S. 992, 24 L.Ed.2d 455.

59. Cal.—People v. Privittier, 19 Cal.Rptr. 640, 200 C.A.2d 725.

Kan.—State v. Morris, 372 P.2d 282, 190 Kan. 93.

Evidence held immaterial

Wash.—State v. Scherer, 462 P.2d 549, 77 Wash.2d 345.

61. Alaska—Lanier v. State, 448 P.2d 587.

62. Ind.—Von Hauger v. State, 251 N.E.2d 116, 252 Ind. 619.

Iowa—State v. Moline, 164 N.W.2d 151,

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65. Bank account

(3) Evidence as to amount of funds in account.

La.—State v. Smith, 262 So.2d 362, 262 La. 39.

68. Ariz.—State v. Mays, 395 P.2d 719, 96 Ariz. 366.

Cal.—People v. Lynam, 68 Cal.Rptr. 202, 261 C.A.2d 490.

Md.—Andresen v. State, 331 A.2d 78, 24 Md.App. 128, affd. 96 S.Ct. 2737, 427 U.S. 463, 49 L.Ed.2d 627.

Mont.—State v. Love, 440 P.2d 275, 151 Mont. 190.

N.J.—State v. Lemken, 346 A.2d 92, 136 N.J.Super. 310, affirmed 346 A.2d 65, 68 N.J. 348, cert. gr. 335 A.2d 46, 67 N.J. 93.

Tex.—Farabee v. State, 362 S.W.2d 117, 172 Tex.Cr.R. 639.

Va.—C.J.S. cited in Hubbard v. Com., 109 S.E.2d 100, 104, 201 Va. 61.

Wash.—State v. Evans, 356 P.2d 589, 57 Wash.2d 288.

Evidence not admissible

(3) Other evidence.

Cal.—People v. Marsh, 26 Cal.Rptr. 300, 376 P.2d 300, 58 C.2d 732.

Mo.—State v. Klosterman, 471 S.W.2d 175.

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69. Ala.—Tolbert v. State, 321 So.2d 227, 294 Ala. 738, on remand 321 So.2d 234, 56 Ala.App. 730.

Cal.—People v. Marsh, 26 Cal.Rptr. 300, 376 P.2d 300, 58 C.2d 732.

Iowa—State v. Moline, 164 N.W.2d 151.

N.J.—State v. Zwillman, 270 A.2d 284, 112 N.J.Super. 6.
Wash.—State v. Wilder, 529 P.2d 1109, 12 Wash.App. 296.

Widest latitude, etc.

Wash.—State v. Konop, 384 P.2d 385, 62 Wash.2d 715.

To disprove intent

(1) Pa.—Com. v. Bollinger, 179 A.2d 253, 197 Pa.Super. 492.

(16) Other matters.

Cal.—People v. Braver, 40 Cal.Rptr. 142, 229 C.A.2d 303, 10 A.L.R.3d 565.

Evidence held admissible

(16) Ariz.—State v. Weis, 375 P.2d 735, 92 Ariz. 254, cert. den. 88 S.Ct. 226, 389 U.S. 899, 19 L.Ed.2d 221.
Ark.—Stewart v. State, 509 S.W.2d 298, 256 Ark. 619—Dean v. State, 522 S.W.2d 421, 258 Ark. 32.

Cal.—People v. Shirley, 11 Cal.Rptr. 537, 360 P.2d 33, 55 C.2d 521, 92 A.L.R.2d 413.

People v. Bandy, 31 Cal.Rptr. 10, 216 C.A.2d 458—People v. Curtis, 43 Cal.Rptr. 286, 232 C.A.2d 859—People v. Gentry, 65 Cal.Rptr. 235, 257 C.A.2d 607—People v. Lockett, 102 Cal.Rptr. 41, 25 C.A.3d 433.

Colo.—Nora v. People, 491 P.2d 62, 176 Colo. 454.

Iowa—State v. Mathias, 216 N.W.2d 319.

La.—State v. Smith, 262 So.2d 362, 262 La. 39.

Neb.—State v. Bohannon, 193 N.W.2d 153, 187 Neb. 594.

N.M.—State v. Jones, 389 P.2d 398, 73 N.M. 459.

Pa.—Com. v. Petrosky, 166 A.2d 682, 194 Pa.Super. 94.

Evidence not admissible

(3) Other matters.

Cal.—People v. Kagan, 70 Cal.Rptr. 732, 264 C.A.2d 648, cert. den. 89 S.Ct. 1027, 394 U.S. 911, 22 L.Ed.2d 224.

Iowa—State v. Johnson, 196 N.W.2d 563—State v. Mathias, 216 N.W.2d 319.

Kan.—State v. Marsh, 506 P.2d 1132, 211 Kan. 617.

Pa.—Com. v. Price, 10 Cumb. 18.

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70. Cal.—People v. Lynam, 68 Cal.Rptr. 202, 261 C.A.2d 490.

Mich.—People v. Vida, 140 N.W.2d 559, 2 Mich.App. 409, aff'd. 166 N.W.2d 465, 381 Mich. 595.

To disprove intent

(2) Iowa—C.J.S. quoted in State v. Johnson, 196 N.W.2d 563, 569.

71. Cal.—People v. Kennedy, 4 Cal.Rptr. 862, 180 C.A.2d 862—C.J.S. cited in People v. Braver, 40 Cal.Rptr. 142, 145, 229 C.A.2d 303, 10 A.L.R.3d 565.

Evidence held inadmissible

(3) Other matters.

Ala.—Edwards v. State, Cr., 227 So.2d 134, 45 Ala. App. 136.

Evidence held admissible

(4) Knowledge of payee as to nonpayment of previous checks.

Iowa—State v. Johnson, 196 N.W.2d 563.

73. Evidence held admissible

(4) Other matters.

Ind.—Snelling v. State, 326 N.E.2d 606, 163 Ind.App. 644.

74. Ariz.—State v. Mills, 370 P.2d 946, 91 Ariz. 206.
Mass.—Com. v. Greenberg, 160 N.E.2d 181, 339 Mass. 557.

Representative or agent

(4) Other persons.

Mass.—Com. v. Abbott Engineering, Inc., 222 N.E.2d 862, 351 Mass. 568.

§ 52. Weight and Sufficiency

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75. N.H.—State v. Story, 83 A.2d 142, 97 N.H. 141—State v. Langlais, 276 A.2d 487, 111 N.H. 83.

Pa.—Com. v. Adams, 35 North. 393.

Evidence held sufficient to sustain conviction

(1) U.S.—Coil v. U.S., C.A.Neb., 343 F.2d 573, cert. den. 86 S.Ct. 48, 382 U.S. 821, 15 L.Ed.2d 67—U.S. v. Marchisio, C.A.N.Y., 344 F.2d 653—Steiger v. U.S., C.A.Okla., 373 F.2d 133—Halfon v. U.S., C.A.Fla., 380 F.2d 26—Morgan v. U.S., C.A.Cal., 380 F.2d 686, cert. den. 88 S.Ct. 1064, 390 U.S. 962, 19 L.Ed.2d 1160, reh. den. 88 S.Ct. 1249, 390 U.S. 1008, 20 L.Ed.2d 110—Charron v. U.S., C.A.Wash., 412 F.2d 657—Caruso v. U.S., C.A.Fla., 414 F.2d 225—U.S. v. Callaway, C.A.N.J., 446 F.2d 753, cert. den. 92 S.Ct. 694, 404 U.S. 1021, 30 L.Ed.2d 670.

Ala.—Sullivan v. State, App., 189 So.2d 593, 43 Ala. App. 302.

Alaska—Lanier v. State, 448 P.2d 587.

Ariz.—State v. Weis, 375 P.2d 735, 92 Ariz. 254, cert. den. 88 S.Ct. 226, 389 U.S. 899, 19 L.Ed.2d 221—State v. Barton, 399 P.2d 169, 97 Ariz. 224.

State v. Casey, 460 P.2d 52, 10 Ariz.App. 516—State v. Slefkin, 475 P.2d 756, 13 Ariz.App. 271—State v. Holmes, App., 476 P.2d 878, 13 Ariz.App. 357, application den. 91 S.Ct. 1669, 402 U.S. 971, 29 L.Ed.2d 135, cert. den. 91 S.Ct. 2255, 403 U.S. 936, 29 L.Ed.2d 717.

Ark.—Edens v. State, 359 S.W.2d 432, 235 Ark. 178, cert. den. 83 S.Ct. 551, 371 U.S. 968, 9 L.Ed.2d 538—Slaughter v. State, 400 S.W.2d 267, 240 Ark. 471—Rice v. State, 401 S.W.2d 562, 240 Ark. 674—Kurck v. State, 415 S.W.2d 61, 242 Ark. 742.

Cal.—People v. Shirley, 11 Cal.Rptr. 537, 360 P.2d 33, 55 C.2d 521, 92 A.L.R.2d 413.

People v. Lockett, 102 Cal.Rptr. 41, 25 C.A.3d 433.

Conn.—State v. Davis, 215 A.2d 414, 153 Conn. 228—State v. Carnegie, 259 A.2d 628, 158 Conn. 264, cert. den. 90 S.Ct. 488, 396 U.S. 992, 24 L.Ed.2d 455.

State v. Davis, Cir.A.D., 197 A.2d 668, 2 Conn. Cir. 257—State v. Winters, Cir.A.D., 202 A.2d 908, 2 Conn.Cir. 508, certification den., 199 A.2d 705, 151 Conn. 738.

D.C.—Kelly v. U.S., C.A., 297 F.2d 437, 111 U.S.App. D.C. 360, cert. den. 82 S.Ct. 1159, 369 U.S. 886, 8 L.Ed.2d 287, reh. den. 83 S.Ct. 16, 371 U.S. 854, 9 L.Ed.2d 91—Levin v. U.S., C.A., 338 F.2d 265, 119 U.S.App.D.C. 156, cert. den. 85 S.Ct. 719, 379 U.S. 999, 13 L.Ed.2d 701.

Hymes v. U.S., App., 260 A.2d 679.

Fla.—Adjmi v. State, App., 208 So.2d 859, cert. den. 89 S.Ct. 2098, 395 U.S. 958, 23 L.Ed.2d 745—Youngker v. State, App., 215 So.2d 318.

Ga.—Washington v. State, 115 S.E.2d 600, 102 Ga.App. 69—Vickers v. State, 186 S.E.2d 157, 124 Ga.App. 752.

Ill.—People v. Neary, 248 N.E.2d 695, 109 Ill.App.2d 302—People v. Gill, 257 N.E.2d 115, 122 Ill. App.2d 60—People v. Enright, 275 N.E.2d 294, 1 Ill.App.3d 654—People v. Jones, 282 N.E.2d 283, 4 Ill.App.3d 927—People v. Cassman, 288 N.E.2d 667, 7 Ill.App.3d 786.

Ind.—O'Riordan v. State, 215 N.E.2d 185, 247 Ind. 265—Von Hauger v. State, 251 N.E.2d 116, 252 Ind. 619.

Kan.—State v. Young, 375 P.2d 611, 190 Kan. 453—State v. Ellis, 387 P.2d 198, 192 Kan. 315—State v. Paxton, 440 P.2d 650, 201 Kan. 353, 607, cert. den. 89 S.Ct. 137, 393 U.S. 496, 21 L.Ed.2d 120—State v. Holle, 451 P.2d 237, 202 Kan. 592.

Ky.—White v. Com., 394 S.W.2d 770—Jones v. Com., 463 S.W.2d 936.

Md.—Lockard v. State, 240 A.2d 312, 3 Md.App. 580—Spillers v. State, 272 A.2d 49, 10 Md.App. 643—Tumminello v. State, 272 A.2d 77, 10 Md.App. 612, cert. den. 92 S.Ct. 276, 404 U.S. 948, 30 L.Ed.2d 264—Polisher v. State, 276 A.2d 102, 11 Md.App. 555.

Mass.—Com. v. Kiernan, 201 N.E.2d 504, 348 Mass. 29, cert. den. 85 S.Ct. 901, 380 U.S. 913, 13 L.Ed.2d 800—Com. v. Monahan, 207 N.E.2d 29, 349 Mass. 139—Com. v. Gardiner, 214 N.E.2d 732, 350 Mass. 331.

Mich.—People v. Winstanley, 174 N.W.2d 170, 20 Mich.App. 528.

Minn.—State v. Klinke, 124 N.W.2d 416, 266 Minn. 372, cert. den. 84 S.Ct. 1124, 376 U.S. 962, 11 L.Ed.2d 980, reh. den. 84 S.Ct. 1331, 377 U.S. 940, 12 L.Ed.2d 304—State v. Currie, 143 N.W.2d 58, 274 Minn. 160.

Miss.—Young v. State, 209 So.2d 189—Necce v. State, 210 So.2d 657—Vanderpool v. State, 251 So.2d 922.

Mo.—State v. Wishom, 416 S.W.2d 921.

Kansas City v. Garner, App., 430 S.W.2d 630.

Mont.—State v. Love, 440 P.2d 275, 151 Mont. 190.

Neb.—State v. Easter, 118 N.W.2d 515, 174 Neb. 412.

Nev.—Vincze v. State, 472 P.2d 936, 86 Nev. 546.

N.J.—State v. Chaff, 170 A.2d 254, 67 N.J.Super. 130.

N.M.—State v. McKay, 450 P.2d 435, 79 N.M. 797.

N.Y.—People v. Fitzgerald, 271 N.Y.S.2d 395, 26 A.D.2d 712.

N.C.—State v. Beaver, 145 S.E.2d 330, 266 N.C. 115—State v. Houston, 166 S.E.2d 881, 4 N.C.App. 484—State v. Mayo, 175 S.E.2d 297, 9 N.C.App. 49.

Or.—State v. Moore, 393 P.2d 180, 238 Or. 117.

Pa.—Com. v. Koritan, 163 A.2d 915, 193 Pa.Super. 212—Com. v. Doria, 163 A.2d 918, 193 Pa.Super. 206—Com. v. Silia, 166 A.2d 73, 194 Pa.Super. 291, cert. den. 82 S.Ct. 443, 368 U.S. 969, 7 L.Ed.2d 397—Com. v. Petrosky, 166 A.2d 682, 194 Pa.Super. 94—Com. v. Emmel, 168 A.2d 609, 194 Pa.Super. 441—Com. v. Wakin, 175 A.2d 886, 196 Pa.Super. 545—Com. v. Francis, 191 A.2d 884, 201 Pa.Super. 313, cert. den. 84 S.Ct. 517, 375 U.S. 985, 11 L.Ed.2d 472.

S.D.—State v. Cole, 168 N.W.2d 507, 84 S.D. 111—State v. Brewer, 197 N.W.2d 409, 86 S.D. 434.

Tex.—Bond v. State, 345 S.W.2d 520, 171 Tex.Cr.R. 119—Stone v. State, Cr., 346 S.W.2d 323, 171 Tex.Cr.R. 101—Skates v. State, 353 S.W.2d 862, 172 Tex.Cr.R. 124—Luster v. State, 356 S.W.2d 934, 172 Tex.Cr.R. 319—Hill v. State, Cr., 364 S.W.2d 381—Martini v. State, Cr., 371 S.W.2d 387—Turner v. State, Cr., 372 S.W.2d 346—McDonald v. State, Cr., 385 S.W.2d 253—Cameron v. State, Cr., 401 S.W.2d 809—Hilliard v. State, Cr., 401 S.W.2d 814, cert. den. 87 S.Ct. 310, 385 U.S. 941, 17 L.Ed.2d 220, reh. den. 87 S.Ct. 726, 385 U.S. 1021, 17 L.Ed.2d 561—Morris v. State, Cr., 402 S.W.2d 161—Bryant v. State, Cr., 408 S.W.2d 721—Howard v. State, Cr., 420 S.W.2d 706—Dennis v. State, Cr., 420 S.W.2d 940—Hessbrook v. State, Cr., 421 S.W.2d 907—Watkins v. State, Cr., 438 S.W.2d 819—Burleson v. State, Cr., 449 S.W.2d 252—Scott v. State, Cr., 450 S.W.2d 868.

Utah—State v. Vatsis, 351 P.2d 96, 10 Utah2d 244.

Wash.—State v. James, 363 P.2d 116, 58 Wash.2d 383—State v. Cooke, 371 P.2d 39, 59 Wash.2d 804, 94 A.L.R.2d 564—State v. Eichman, 418 P.2d 418, 69 Wash.2d 327—State v. Bryant, 437 P.2d 398, 73 Wash.2d 168.

State v. Hendrickson, 459 P.2d 55, 1 Wash.App. 61, cert. den. 90 S.Ct. 1712, 398 U.S. 913, 26 L.Ed.2d 75.

Wis.—State v. Stevens, 132 N.W.2d 502, 26 Wis.2d 451—Lehmann v. State, 159 N.W.2d 607, 39 Wis.2d 619.

Wyo.—DeBaca v. State, 404 P.2d 738—Hutchins v. State, 483 P.2d 519.

(3) U.S.—U.S. ex rel. Miller v. Brierley, D.C.Pa., 271 F.Supp. 526.

(4) Ark.—Daley v. State, 364 S.W.2d 678, 236 Ark. 89.

Colo.—Krantz v. People, 374 P.2d 199, cert. den. 83 S.Ct. 735, 372 U.S. 921, 9 L.Ed.2d 725, 150 Colo. 469—Coppinger v. People, 380 P.2d 19, 152 Colo. 9, cert. den. 84 S.Ct. 270, 375 U.S. 923, 11 L.Ed.2d 167—Hutchison v. People, 387 P.2d 265, 153 Colo. 365—Dodge v. People, 452 P.2d 759, 168 Colo. 531.

Ill.—People v. Lewis, 161 N.E.2d 821, 17 Ill.2d 403—People v. Epping, 162 N.E.2d 366, 17 Ill.2d 557—People v. Caruth, 192 N.E.2d 911, 28 Ill.2d 514—People v. Gipson, 194 N.E.2d 318, 29 Ill.2d 336.

People v. Wilson, 202 N.E.2d 103, 52 Ill.App.2d 304.

Minn.—State v. Wells, 121 N.W.2d 68, 265 Minn. 126.
212—State v. Ruffin, 158 N.W.2d 202, 280 Minn. 126.

Mo.—State v. Fields, 366 S.W.2d 462.

Tex.—Burns v. State, Cr., 432 S.W.2d 93.

(6) Cal.—People v. Parker, 44 Cal.Rptr. 900, 235 C.A.2d 86.

Wyo.—Durham v. State, 422 P.2d 691.

(7) Tex.—Griffin v. State, 355 S.W.2d 532, 172 Tex. Cr.R. 194.

(8) Pa.—Com. v. Tudesco, 169 A.2d 585, 194 Pa.Super. 618.

(10) Fla.—Burton v. State, App., 207 So.2d 465.

N.H.—State v. Gravel, 229 A.2d 686, 108 N.H. 142.

Or.—State v. Seydell, 446 P.2d 678, 252 Or. 160.

(12) Alaska—Steffa v. State, 391 P.2d 11.

Ariz.—State v. Mays, 395 P.2d 719, 96 Ariz. 366—State v. Brookshire, 452 P.2d 703, 104 Ariz. 349.

State v. Burton, 444 P.2d 743, 8 Ariz.App. 186.

Cal.—People v. Haines, 1 Cal.Rptr. 41, 176 C.A.2d 41—People v. Davis, 1 Cal.Rptr. 103, 176 C.A.2d 80—People v. Cuthbertson, 1 Cal.Rptr. 435, 176 C.A.2d 393—People v. Reichenau, 343 P.2d 603, 173 C.A.2d 584—People v. Sanderson, 6 Cal.Rptr. 330, 183 C.A.2d 544—People v. Pitts, 6 Cal.Rptr. 879, 196 C.A.2d 841—People v. Davey, 19 Cal.Rptr. 88, 199 C.A.2d 886—People v. Privittier, 19 Cal.Rptr. 640, 200 C.A.2d 725—People v. Pratt, 23 Cal.Rptr. 469, 205 C.A.2d 838—People v. Martin, 25 Cal.Rptr. 610, 208 C.A.2d 867—People v. Maldonado, 34 Cal.Rptr. 168, 221 C.A.2d 128—People v. Costello, 36 Cal.Rptr. 155, 223 C.A.2d 748—People v. Simon, 39 Cal.Rptr. 138, 227 C.A.2d 849—People v. McCann, 43 Cal.Rptr. 789, 233 C.A.2d 561—People v. Mason, 66 Cal.Rptr. 601, 259 C.A.2d 30.

Colo.—Parrott v. People, 357 P.2d 634, 144 Colo. 587.

Fla.—Wooley v. State, App., 193 So.2d 706.

Ga.—Hamilton v. State, 165 S.E.2d 884, 118 Ga.App. 842.

Idaho—State v. Ramsbottom, 402 P.2d 384, 89 Idaho 1.

Ind.—Hanrahan v. State, 241 N.E.2d 143, 251 Ind. 325.

Iowa—State v. Johnson, 196 N.W.2d 563.

La.—State v. Smith, 262 So.2d 362, 262 La. 39.

Md.—Flannigan v. State, 191 A.2d 591, 232 Md. 13—Cropper v. State, 197 A.2d 112, 233 Md. 384, 16 A.L.R.3d 1069—Sisk v. State, 204 A.2d 684, 236 Md. 589—Maki v. State, 211 A.2d 711, 239 Md. 311.

Mich.—People v. Cimini, 181 N.W.2d 565, 25 Mich. App. 698, reh. 190 N.W.2d 323, 33 Mich.App. 461.

Miss.—Jackson v. State, 170 So.2d 438, 251 Miss. 529.

Neb.—State v. Martin, 128 N.W.2d 583, 177 Neb. 209.

N.Y.—People v. Parker, 274 N.Y.S.2d 38, 51 Misc.2d 843.

N.C.—State v. Cruse, 117 S.E.2d 49, 253 N.C. 456.

Okla.—Lanter v. State, 425 P.2d 1012.

Maiden v. State, Cr., 481 P.2d 794.

Or.—State v. Wilson, 369 P.2d 739, 230 Or. 251.

Tenn.—Kirby v. State, 379 S.W.2d 780, 214 Tenn. 296.

Tex.—Dinsmore v. State, 335 S.W.2d 612, 169 Tex. Cr.R. 504—Parker v. State, 336 S.W.2d 431, 169 Tex.Cr.R. 583—Parker v. State, 342 S.W.2d 764, 170 Tex.Cr.R. 570—Renty v. State, 358 S.W.2d 390, 172 Tex.Cr.R. 446—Davis v. State, Cr., 380 S.W.2d 122—Royal v. State, Cr., 391 S.W.2d 411—Towne v. State, Cr., 396 S.W.2d 400—Vick v. State, Cr., 397 S.W.2d 229—Hampton v. State, Cr., 402 S.W.2d 748—Crum v. State, Cr., 427 S.W.2d 623.

Utah—State v. Myers, 388 P.2d 801, 15 Utah2d 130.

Wash.—State v. Etheridge, 443 P.2d 536, 74 Wash.2d 102.

(13) Ala.—Bethune v. State, 202 So.2d 46, 44 Ala. App. 30, cert. den. 202 So.2d 48, 281 Ala. 715.

Cal.—People v. McNear, 12 Cal.Rptr. 124, 190 C.A.2d 541.

(14) Ind.—Streeval v. State, 241 N.E.2d 255, 251 Ind. 349, reh. den. 244 N.E.2d 126, 251 Ind. 349.

Mass.—Com. v. Greenberg, 160 N.E.2d 181, 339 Mass. 557.

Neb.—State v. Swanson, 140 N.W.2d 618, 179 Neb. 693.

(18) Ark.—Kerby v. State, 342 S.W.2d 412, 233 Ark. 8.

Ga.—Cohen v. State, 112 S.E.2d 672, 101 Ga.App. 23—Thrallkill v. State, 118 S.E.2d 837, 103 Ga. App. 189.

(20) Colo.—Woodman v. People, 450 P.2d 330, 168 Colo. 80.

Mont.—State v. Lagerquist, 445 P.2d 910, 152 Mont. 21.

(21) Cal.—People v. Griffith, 5 Cal.Rptr. 620, 181 C.A.2d 715.

Colo.—Woodard v. People, 389 P.2d 411, 154 Colo. 162.

Ga.—Harris v. State, 165 S.E.2d 462, 118 Ga.App. 769, adhered to 166 S.E.2d 94, 118 Ga.App. 848.

Md.—Fisher v. State, 231 A.2d 720, 1 Md.App. 505.

Okla.—Kelsey v. State, Cr., 409 P.2d 383—Rapp v. State, Cr., 418 P.2d 357—Mathes v. State, 423 P.2d 746.

Tex.—Moulton v. State, Cr., 486 S.W.2d 334.

Wash.—State v. Konop, 384 P.2d 385, 62 Wash.2d 715.

(25) Md.—Sutton v. State, 241 A.2d 145, 4 Md.App. 70.

(28) Iowa—State v. Timmer, 151 N.W.2d 558, 260 Iowa 993.

(33) Cal.—People v. Stevens, 345 P.2d 582, 175 C.A.2d 123—People v. Fulton, 10 Cal.Rptr. 319, 188 C.A.2d 105.

D.C.—Marganella v. U.S., App., 268 A.2d 803.

Mich.—People v. Robinson, 179 N.W.2d 239, 23 Mich. App. 672.

Miss.—Prisock v. State, 141 So.2d 711, 244 Miss. 408.

Mo.—State v. Thomas, 438 S.W.2d 441.

Okla.—Adams v. State, Cr., 350 P.2d 985.

(34) Unlawful use of credit card.

Fla.—Caputo v. State, App., 173 So.2d 745.

(35) For deceptive practices.

Ill.—People v. Cassell, 243 N.E.2d 363, 101 Ill.App.2d 279.

Evidence held insufficient to sustain conviction

(1) U.S.—Gay v. U.S., C.A.Iowa, 408 F.2d 923, cert. den. 90 S.Ct. 65, 396 U.S. 823, 24 L.Ed.2d 74—U.S. v. Milton, C.A.Okla., 421 F.2d 586.

U.S. v. York, D.C.Va., 202 F.Supp. 275.

Conn.—State v. Semrau, Cir.A.D., 199 A.2d 580, 2 Conn.Cir. 392.

D.C.—Willgoos v. U.S., App., 228 A.2d 635—McMillan v. U.S., App., 230 A.2d 714.

Ga.—Sutton v. State 122 S.E.2d 303, 104 Ga.App. 552.

Ind.—Klahr v. State, 177 N.E.2d 210, 241 Ind. 357—Bradley v. State, 232 N.E.2d 358, 249 Ind. 330.

Ky.—Rowland v. Com., 355 S.W.2d 292.

Md.—Stackhouse v. State, 230 A.2d 358, 1 Md.App. 399.

Mich.—People v. Pickett, 166 N.W.2d 24, 15 Mich. App. 1.

Mont.—State v. Heiser, 407 P.2d 370, 146 Mont. 413.

N.Y.—People v. Hubbard, 199 N.Y.S.2d 206, 10 A.D.2d 735.

Pa.—Com. v. Wright, 275 A.2d 873, 220 Pa.Super. 12—Com. v. Gold, 286 A.2d 676, 220 Pa.Super. 181.

Com. v. Adams, 35 North. 393.

Tenn.—Meadows v. State, 421 S.W.2d 639, 220 Tenn. 615.

Tex.—Thornton v. State, 352 S.W.2d 742, 171 Tex. Cr.R. 565—Crow v. State, Cr., 448 S.W.2d 125.

(2) Ill.—People v. Walker, 192 N.E.2d 833, 28 Ill.2d 393.

Tex.—Hullum v. State, Cr., 415 S.W.2d 192.

(3) N.Y.—People v. Martin, 310 N.Y.S.2d 450, 62 Misc.2d 884.

(7) Ark.—Edens v. State, 357 S.W.2d 641, 235 Ark. 284.

D.C.—White v. U.S., App., 284 A.2d 464.

Md.—League v. State, 232 A.2d 828, 1 Md.App. 681.

Miss.—Edwards v. State, 217 So.2d 14.

N.M.—State v. Downing, App., 488 P.2d 112, 83 N.M. 62, 52 A.L.R.3d 461.

N.C.—State v. Hinson, 135 S.E.2d 583, 261 N.C. 614.

Tenn.—Meadows v. State, 421 S.W.2d 639, 220 Tenn. 615.

Tex.—Thomas v. State, 335 S.W.2d 223, 169 Tex.Cr.R. 446—Towne v. State, Cr., 385 S.W.2d 854.

Wash.—State v. Smithers, 409 P.2d 463, 67 Wash.2d 666.

(12) Stealing by deceit.

Mo.—State v. Fenner, 358 S.W.2d 867.

Evidence held sufficient to show particular facts

(1) Ind.—Dillon v. State, 275 N.E.2d 312, 257 Ind. 412.

(6) Alaska—Lanier v. State, 448 P.2d 587.

Ariz.—State v. Mills, 396 P.2d 5, 96 Ariz. 377.

Cal.—People v. De Casaus, 15 Cal.Rptr. 521, 194 C.A.2d 666—People v. Kovach, 16 Cal.Rptr. 828, 197 C.A.2d 85—People v. Rozell, 28 Cal.Rptr. 478, 212 C.A.2d 875.

Colo.—Woodman v. People, 450 P.2d 330, 168 Colo. 80.

Ill.—People v. McClain, 285 N.E.2d 239, 6 Ill.App.3d 451.

Iowa—State v. Moline, 164 N.W.2d 151.

Pa.—Com. v. Francis, 191 A.2d 884, 201 Pa.Super. 313, cert. den. 84 S.Ct. 517, 375 U.S. 985, 11 L.Ed.2d 472.

Tex.—Reeves v. State, Cr., 428 S.W.2d 320—Howell v. State, 478 S.W.2d 468.

Evidence held insufficient to show particular facts

(7) Colo.—Burmeister v. People, 361 P.2d 784, 146 Colo. 419.

Mass.—Com. v. Greenberg, 160 N.E.2d 181, 339 Mass. 557.

Utah—State v. Bettis, 496 P.2d 715, 27 Utah2d 373.

Va.—Huntt v. Com., 187 S.E.2d 183, 212 Va. 737.

Evidence held sufficient to support conviction

(1) Ind.—Yeary v. State, 283 N.E.2d 356, 258 Ind. 587.

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1. Evidence held insufficient to sustain conviction

(1) Ind.—Ferrell v. State, 219 N.E.2d 804, 247 Ind. 535.

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77. Perjury corroboration rule inapplicable

U.S.—Shayne v. U.S., C.A.Cal., 255 F.2d 739, cert. den. 79 S.Ct. 39, 358 U.S. 823, 3 L.Ed.2d 64—U.S. v. Marchisio, C.A.N.Y., 344 F.2d 653.

78. Alaska—Lanier v. State, 448 P.2d 587.

Ind.—Yeary v. State, 283 N.E.2d 356, 258 Ind. 587.

Wash.—State v. Waldenburg, 513 P.2d 577, 9 Wash. App. 529.

Records instead of oral testimony sufficient

D.C.—Marganella v. U.S., App., 268 A.2d 803.

81. Corpus delicti established

Ill.—People v. Wilson, 202 N.E.2d 103, 52 Ill.App.2d 304.

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84. Evidence held sufficient to show representation

(1) U.S.—Cortez v. U.S., C.A.Tex., 328 F.2d 51, cert. den. 85 S.Ct. 89, 379 U.S. 848, 13 L.Ed.2d 52.

Evidence held insufficient to show representation

(1) Mass.—Com. v. Ancillo, 214 N.E.2d 870, 350 Mass. 427.

Evidence held sufficient to show pretense was by accused

(3) Cal.—People v. Greenwood, 24 Cal.Rptr. 337, 207 C.A.2d 300.

Evidence held insufficient to show pretense was by accused

(8) Other instances.

Pa.—Com. v. Roubra, 79 Dauph. 53.

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85. Iowa—State v. Kulow, 123 N.W.2d 872, 255 Iowa 789, 16 A.L.R.3d 1085.

Miss.—Lee v. State, 146 So.2d 736, 244 Miss. 813. N.C.—State v. Clontz, 167 S.E.2d 520, 4 N.C.App. 667.

Evidence held sufficient to show falsity

(1) U.S.—U.S. v. Marchisio, C.A.N.Y., 344 F.2d 653. Cal.—People v. De Casaus, 15 Cal.Rptr. 521, 194 C.A.2d 666.

Md.—Brown v. State, 242 A.2d 595, 4 Md.App. 307. Mich.—People v. Vida, 166 N.W.2d 465, 381 Mich. 595.

Mo.—State v. Dunlap, 408 S.W.2d 76.

Pa.—Com. v. Conners, 193 A.2d 682, 201 Pa.Super. 500.

Tex.—Womack v. State, Cr., 408 S.W.2d 119.

Evidence held insufficient to show falsity

(1) Ala.—Taylor v. State, Cr., 238 So.2d 902, 46 Ala.App. 105.

Mass.—Com. v. Ancillo, 214 N.E.2d 870, 350 Mass. 427.

Pa.—Com. v. Connor, 80 Dauph. 116.

Tex.—Kinder v. State, Cr., 477 S.W.2d 584.

Evidence as to particular matters

(1) Pa.—Com. v. Bonetti, 235 A.2d 447, 211 Pa.Super. 161.

Tex.—Richardson v. State, 332 S.W.2d 736, 169 Tex. Cr.R. 244—Reeves v. State, Cr., 428 S.W.2d 320.

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86. Mass.—Com. v. Ancillo, 214 N.E.2d 870, 350 Mass. 427.

Evidence held sufficient to show representation of past or existing fact

(1) D.C.—Williamson v. U.S., App., 224 A.2d 309. Pa.—Commonwealth v. Evans, 72 Dauph. Co. 31, affd. in part and revd. in part 154 A.2d 57, 190 Pa.Super. 179, affd. 160 A.2d 407, 399 Pa. 387, cert. den. 81 S.Ct. 233, 364 U.S. 377, 364 U.S. 939, 5 L.Ed.2d 371.

Tex.—Farabee v. State, 362 S.W.2d 117, 172 Tex.Cr.R. 639.

Evidence held insufficient to show representation as to past or existing fact

Tex.—Farabee v. State, 362 S.W.2d 117, 172 Tex.Cr.R. 639.

As to future events

(1) Pa.—Com. v. Tearpock, 23 Beaver 191.

87. Sufficiency of token or writing

(6) Ark.—Rice v. State, 401 S.W.2d 562, 240 Ark. 674.

Nev.—Williams v. State, 494 P.2d 960, 88 Nev. 164.

88. Corroboration required

(2) Cal.—People v. Kagan, 70 Cal.Rptr. 732, 264 C.A.2d 648, cert. den. 89 S.Ct. 1027, 394 U.S. 911, 22 L.Ed.2d 224.

(4) Cal.—People v. Randon, 108 Cal.Rptr. 326, 32 C.A.3d 164.

(6) Cal.—People v. Riley, App., 31 Cal.Rptr. 404, 217 C.A.2d 11—People v. Randon, 108 Cal.Rptr. 326, 32 C.A.3d 164.

(7) Cal.—People v. Riley, App., 31 Cal.Rptr. 404, 217 C.A.2d 11—People v. Felsman, 64 Cal.Rptr. 870, 257 C.A.2d 437.

(8) Other matters.

Ariz.—State v. Holmes, 472 P.2d 71, 106 Ariz. 202. Cal.—People v. Randon, 108 Cal.Rptr. 326, 32 C.A.3d 164.

Idaho—State v. Krepp, App., 688 P.2d 1219, 107 Idaho 314.

Corroboration held sufficient

(1) Cal.—People v. Carlin, 3 Cal.Rptr. 301, 178 C.A.2d 705—People v. Phillips, 8 Cal.Rptr. 830, 186 C.A.2d 231—People v. Allen, 21 Cal.Rptr. 789, 203 C.A.2d 659—People v. Kagan, 70 Cal.Rptr. 732, 264 C.A.2d 648, cert. den. 89 S.Ct. 1027, 394 U.S. 911, 22 L.Ed.2d 224.

(4) Cal.—People v. Barker, 2 Cal.Rptr. 467, 349 P.2d 73, 53 C.2d 539.

Corroboration held insufficient

(1) Ariz.—State v. Holmes, 472 P.2d 71, 106 Ariz. 202.

Statute inapplicable in prosecution for obtaining money by trick and deception

Okl.—Nix v. State, Cr., 453 P.2d 309.

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89. Cal.—People v. Privitier, 19 Cal.Rptr. 640, 200 C.A.2d 725.

Fla.—C.J.S. quoted at length in Benefield v. State, 151 So.2d 650, 663, decision quashed, Sup., 160 So.2d 706.

Okl.—Bradshaw v. State, Cr., 510 P.2d 972.

Prima facie evidence

(5) Other matters.

Pa.—Com. v. Ali, 265 A.2d 796, 438 Pa. 463.

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92. Ariz.—State v. Holmes, 472 P.2d 71, 106 Ariz. 202.

Miss.—Lee v. State, 146 So.2d 736, 244 Miss. 813. N.C.—State v. Clontz, 167 S.E.2d 520, 4 N.C.App. 667.

Statutory presumption or prima facie case

(6) Other matters.

Ala.—Biggs v. State, Cr., 246 So.2d 472, 46 Ala.App. 585.

Mo.—State v. Euge, App., 359 S.W.2d 369, cert. den. 83 S.Ct. 1014, 372 U.S. 960, 10 L.Ed.2d 12, reh. den. 83 S.Ct. 1677, 373 U.S. 954, 10 L.Ed.2d 708.

N.M.—State v. Lee, App., 432 P.2d 265, 78 N.M. 421. Or.—State v. Scott, 390 P.2d 328, 237 Or. 390.

Tex.—Sears, Roebuck & Co. v. Coker, Civ.App., 428 S.W.2d 710, err. ref. no rev. err.

Time of intent

(2) Other matters.

Wash.—State v. Konop, 384 P.2d 385, 62 Wash.2d 715.

Evidence held sufficient to show fraudulent intent

(1) U.S.—Cortez v. U.S., C.A.Tex., 328 F.2d 51, cert. den. 85 S.Ct. 89, 379 U.S. 848, 13 L.Ed.2d 52.

Alaska—Lanier v. State, 448 P.2d 587.

Ariz.—State v. Mills, 370 P.2d 946, 91 Ariz. 206. Cal.—People v. Phipps, 12 Cal.Rptr. 681, 191 C.A.2d 448—People v. De Casaus, 15 Cal.Rptr. 521, 194 C.A.2d 666—People v. Kegley, 17 Cal.Rptr. 784, 198 C.A.2d 501—People v. Ford, 46 Cal.Rptr. 144, 236 C.A.2d 438, app. diss. 86 S.Ct. 1365, 384 U.S. 100, 16 L.Ed.2d 396—People v. Brown, 61 Cal. Rptr. 368, 253 C.A.2d 820—People v. Kagan, 70 Cal.Rptr. 732, 264 C.A.2d 648, cert. den. 89 S.Ct. 1027, 394 U.S. 911, 22 L.Ed.2d 224—People v. Hedrick, 71 Cal.Rptr. 352, 265 C.A.2d 392—People v. Chatfield, 77 Cal.Rptr. 118, 272 C.A.2d 141, cert. den. 91 S.Ct. 1629, 402 U.S. 951, 29 L.Ed.2d 121, reh. den. 92 S.Ct. 32, 404 U.S. 877, 30 L.Ed.2d 124—People v. Britz, 95 Cal.Rptr. 303, 17 C.A.3d 743.

Conn.—State v. Farrah, 282 A.2d 879, 161 Conn. 43. Fla.—Rosengarten v. State, App., 171 So.2d 591—Green v. State, App., 190 So.2d 614.

Ill.—People v. Neary, 248 N.E.2d 695, 109 Ill.App.2d 302—People v. Enright, 275 N.E.2d 294, 1 Ill. App.3d 654.

Ind.—Von Hauger v. State, 251 N.E.2d 116, 252 Ind. 619.

Md.—Brown v. State, 252 A.2d 887, 6 Md.App. 631. Mass.—Com. v. Schmaekelberg, 248 N.E.2d 273, 356 Mass. 65.

Miss.—Lee v. State, 146 So.2d 736, 244 Miss. 813. Mo.—State v. Cook, 470 S.W.2d 376.

N.J.—State v. Allen, 250 A.2d 12, 53 N.J. 250. N.M.—State v. Lee, App., 432 P.2d 265, 78 N.M. 421.

N.Y.—People v. Rolchigo, 307 N.Y.S.2d 412, 33 A.D.2d 1060, affd. 269 N.E.2d 39, 28 N.Y.2d 644, 320 N.Y.S.2d 251.

Vt.—State v. Zeisner, 340 A.2d 69, 133 Vt. 375. Wash.—State v. Lewis, 417 P.2d 618, 69 Wash.2d 120.

(3) Cal.—People v. Moore, 345 P.2d 298, 175 C.A.2d 78—People v. Hewitt, 18 Cal.Rptr. 5, 198 C.A.2d 247—

People v. Greenwood, 24 Cal.Rptr. 337, 207 C.A.2d 300—People v. Rubin, 36 Cal.Rptr. 167, 223 C.A.2d 825, 9 A.L.R.3d 707.

Colo.—Miller v. People, 409 P.2d 520, 159 Colo. 58. Idaho—State v. Ramsbottom, 402 P.2d 384, 89 Idaho 1.

Md.—Waye v. State, 191 A.2d 428, 231 Md. 510. Mich.—People v. Vida, 140 N.W.2d 559, 2 Mich.App. 409, affd. 166 N.W.2d 465, 381 Mich. 595.

Mo.—State v. DeClue, 400 S.W.2d 50. State v. Euge, App., 349 S.W.2d 502.

N.M.—State v. McKay, 450 P.2d 435, 79 N.M. 797. Pa.—Com. v. Bonetti, 235 A.2d 447, 211 Pa.Super. 161.

Com. v. Corcoran, 16 Bucks 253. Tex.—Reeves v. State, Cr., 428 S.W.2d 320.

Wash.—State v. Scherer, 462 P.2d 549, 77 Wash.2d 345. (4) U.S.—U.S. v. Frazier, C.A.Fla., 444 F.2d 235.

Ark.—Tolbert v. State, 428 S.W.2d 264, 244 Ark. 1067. Md.—Marr v. State, 177 A.2d 862, 227 Md. 510.

Mo.—State v. Gagallarritti, 377 S.W.2d 298. (6) In False Statement to Federal Housing Administration.

U.S.—Burnett v. U.S., C.A.Fla., 341 F.2d 581.

Evidence held insufficient to show fraudulent intent

(1) Cal.—People v. Samuel, 53 Cal.Rptr. 887, 245 C.A.2d 210.

Ga.—Allen v. State, 138 S.E.2d 431, 110 Ga.App. 294. Ill.—People v. Nicky Chevrolet Sales, Inc., 190 N.E.2d 154, 41 Ill.App.2d 50.

N.D.—State v. Persons, 201 N.W.2d 895. Utah—State v. Coleman, 406 P.2d 308, 17 Utah2d 166.

Va.—Harrison v. Com., 174 S.E.2d 783, 211 Va. 8. (2) U.S.—Williams v. U.S., C.A.Hawaii, 278 F.2d 535.

Ariz.—State v. Stout, 448 P.2d 115, 8 Ariz.App. 545. Conn.—State v. Callahan, Cir.A.D., 183 A.2d 861, 23 Conn.Sup. 374, 1 Conn.Cir. 247.

State v. Sills, Cir.A.D., 199 A.2d 186, 2 Conn. Cir. 349.

Ga.—Tapley v. State, 126 S.E.2d 715, 106 Ga.App. 215. Mo.—State v. Euge, 400 S.W.2d 119.

N.J.—State v. Fladger, 227 A.2d 528, 94 N.J.Super. 205.

Va.—Huntt v. Com., 187 S.E.2d 183, 212 Va. 737. (3) Cal.—People v. Porter, 31 Cal.Rptr. 841, 217 C.A.2d 824.

Willfulness shown

U.S.—Coil v. U.S., C.A.Neb., 343 F.2d 573, cert. den. 86 S.Ct. 48, 382 U.S. 821, 15 L.Ed.2d 67.

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93. Cal.—People v. Conlon, 24 Cal.Rptr. 219, 207 C.A.2d 86—People v. Hambleton, 32 Cal.Rptr. 471 218 C.A.2d 479.

94. Cal.—People v. Haines, 1 Cal.Rptr. 41, 176 C.A.2d 41—People v. Davis, 1 Cal.Rptr. 103, 176 C.A.2d 80—People v. Phillips, 8 Cal.Rptr. 830, 186 C.A.2d 231—People v. Reed, 11 Cal.Rptr. 780, 190 C.A.2d 344—People v. De Casaus, 15 Cal.Rptr. 521, 194 C.A.2d 666—People v. Privitier, 19 Cal.Rptr. 640, 200 C.A.2d 725—People v. Conlon, 24 Cal.Rptr. 219, 207 C.A.2d 86—People v. Bandy, 31 Cal.Rptr. 10, 216 C.A.2d 458—People v. Kassab, 33 Cal.Rptr. 494, 219 C.A.2d 687—People v. Costello, 36 Cal.Rptr. 155, 223 C.A.2d 748—People v. Johnson, 65 Cal.Rptr. 441, 258 C.A.2d 165, cert. den. 89 S.Ct. 468, 393 U.S. 991, 21 L.Ed.2d 455, reh. den. 89 S.Ct. 1278, 394 U.S. 955, 22 L.Ed.2d 492—People v. Hedrick, 71 Cal. Rptr. 352, 265 C.A.2d 392—People v. Brady, 80 Cal.Rptr. 418, 275 C.A.2d 984—People v. Jenkins, 83 Cal.Rptr. 525, 3 C.A.3d 529.

Conn.—State v. Winters, Cir.A.D., 202 A.2d 908, 2 Conn.Cir. 508, certification den. 199 A.2d 705, 151 Conn. 738.

Iowa—C.J.S. cited in State v. Timmer, 151 N.W.2d 558, 561, 260 Iowa 993.

Neb.—State v. Swanson, 140 N.W.2d 618, 179 Neb. 693—State v. Bohannon, 193 N.W.2d 153, 187 Neb. 594.

N.J.—State v. Allen, 250 A.2d 12, 53 N.J. 250.

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N.D.—State v. Persons, 201 N.W.2d 895.

Determined from all evidence

(1) Cal.—People v. Caruso, 1 Cal.Rptr. 428, 176 C.A.2d 272, cert. den. 80 S.Ct. 1259, 363 U.S. 819, 4 L.Ed.2d 1517.

(2) Cal.—People v. Porter, 31 Cal.Rptr. 841, 217 C.A.2d 824—People v. Hambleton, 32 Cal.Rptr. 471, 218 C.A.2d 479.

Evidence negating intent

(2) Intent not negated.

Md.—Brown v. State, 242 A.2d 595, 4 Md.App. 307.

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96. Cal.—People v. Johnson, 65 Cal.Rptr. 441, 258 C.A.2d 165, cert. den. 89 S.Ct. 468, 393 U.S. 991, 21 L.Ed.2d 455, reh. den. 89 S.Ct. 1278, 394 U.S. 955, 22 L.Ed.2d 492.

97. U.S.—U.S. v. Gilliam, D.C.Cal., 273 F.Supp. 507. Cal.—People v. Gentry, 65 Cal.Rptr. 235, 257 C.A.2d 607.

Mass.—Com. v. Ancillo, 214 N.E.2d 870, 350 Mass. 427.

Facts showing knowledge

(5) Other facts.

Cal.—People v. Owens, 42 Cal.Rptr. 153, 231 C.A.2d 691.

Evidence held sufficient to show knowledge

(1) U.S.—U.S. v. Marchisio, C.A.N.Y., 344 F.2d 653. Cal.—People v. Brady, 80 Cal.Rptr. 418, 275 C.A.2d 984.

Ga.—Coward v. State, 181 S.E.2d 518, 123 Ga.App. 495.

Ind.—Von Hauger v. State, 251 N.E.2d 116, 252 Ind. 619.

Ky.—Braswell v. Com., 339 S.W.2d 637.

(6) Ark.—Garrouette v. State, 408 S.W.2d 485, 241 Ark. 285.

Cal.—People v. Greenwood, 24 Cal.Rptr. 337, 207 C.A.2d 300.

N.J.—State v. Pollack, 202 A.2d 433, 43 N.J. 34.

Tex.—Young v. State, 341 S.W.2d 933, 170 Tex.Cr.R. 500.

Evidence held insufficient to show knowledge

(1) Ala.—Teal v. State, 196 So.2d 729, 43 Ala.App. 584.

Mo.—State v. Kleen, 481 S.W.2d 229.

N.Y.—People v. Dowridge, 249 N.Y.S.2d 739, 21 A.D.2d 656.

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98. Cal.—People v. Davis, 1 Cal.Rptr. 103, 176 C.A.2d 80—People v. Phillips, 8 Cal.Rptr. 830, 186 C.A.2d 231—People v. Bandy, 31 Cal.Rptr. 10, 216 C.A.2d 458—People v. Gentry, 65 Cal.Rptr. 235, 257 C.A.2d 607—People v. Brady, 80 Cal.Rptr. 418, 275 C.A.2d 984.

D.C.—Willgoos v. U.S., App., 228 A.2d 635.

Recklessness alone insufficient

D.C.—U.S. v. Avant, C.A., 275 F.2d 650, 107 U.S.App. D.C. 192.

99. Cal.—People v. Bandy, 31 Cal.Rptr. 10, 216 C.A.2d 458.

2. Neb.—State v. Swanson, 140 N.W.2d 618, 179 Neb. 693.

Evidence held sufficient to show reliance on pretense

(1) Ala.—Franklin v. State, 214 So.2d 924, 44 Ala. App. 521.

Alaska—Lanier v. State, 448 P.2d 587.

Ariz.—State v. Brown, 400 P.2d 111, 97 Ariz. 310.

Cal.—People v. Shirley, 11 Cal.Rptr. 537, 360 P.2d 33, 55 C.2d 521, 92 A.L.R.2d 413.

People v. De Casaus, 15 Cal.Rptr. 521, 194 C.A.2d 666.

Ky.—Davidson v. Com., 436 S.W.2d 495.

Md.—Draper v. State, 190 A.2d 643, 231 Md. 423.

Mass.—Com. v. Leonard, 227 N.E.2d 721, 352 Mass. 636.

Brown v. State, 242 A.2d 595, 4 Md.App. 307.

Mich.—People v. Johnson, 183 N.W.2d 813, 28 Mich. App. 10.

Mo.—State v. Todd, 372 S.W.2d 133.

N.J.—State v. Allen, 250 A.2d 12, 53 N.J. 250.

N.M.—State v. Jones, 389 P.2d 398, 73 N.M. 459.

Pa.—Com. v. Connors, 193 A.2d 682, 201 Pa.Super. 500.

Wash.—State v. Zorich, 431 P.2d 584, 72 Wash.2d 31.

(3) D.C.—Gilmore v. U.S., C.A., 273 F.2d 79, 106 U.S.App.D.C. 344.

Evidence held insufficient to show reliance on pretense

(1) Cal.—People v. Samuel, 53 Cal.Rptr. 887, 245 C.A.2d 210.

Tex.—Womack v. State, Cr., 408 S.W.2d 119—Cleveland v. State, Cr., 438 S.W.2d 807—Kinder v. State, Cr., 477 S.W.2d 584.

Confidence game

(5) Other matters.

Ill.—People v. Gipson, 194 N.E.2d 318, 29 Ill.2d 336.

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3. D.C.—C.J.S. cited in Hynes v. U.S., App., 260 A.2d 679, 680.

4. Cal.—Perry v. Superior Court of Los Angeles County, 19 Cal.Rptr. 1, 368 P.2d 529, 37 C.2d 276.

5. N.C.—State v. Clontz, 167 S.E.2d 520, 4 N.C.App. 667.

6. Ala.—Bethune v. State, 202 So.2d 46, 44 Ala.App. 30, cert. den. 202 So.2d 48, 281 Ala. 715.

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7. Evidence held to show loss

(5) Other instances.

N.D.—State v. Persons, 201 N.W.2d 895.

8. U.S.—Cameron v. Hauck, C.A.Tex., 383 F.2d 966, cert. den. 88 S.Ct. 777, 389 U.S. 1039, 19 L.Ed.2d 828.

Prima facie evidence

(2) Other instances.

Ala.—Teal v. State, 196 So.2d 729, 43 Ala.App. 584.

Cal.—People v. Brady, 80 Cal.Rptr. 418, 275 C.A.2d 984.

Transfer of possession

(2) Other statements.

Mich.—People v. Vida, 166 N.W.2d 465, 381 Mich. 595.

9. Evidence held sufficient

Cal.—People v. Allen, 21 Cal.Rptr. 789, 203 C.A.2d 659.

Mo.—State v. Todd, 372 S.W.2d 133.

11. D.C.—Hynes v. U.S., App., 260 A.2d 679.

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12. Prosecution for attempt

Mich.—People v. Robinson, 179 N.W.2d 239, 23 Mich. App. 672.

14. Mont.—State v. Lagerquist, 445 P.2d 910, 152 Mont. 21.

Evidence of amount held sufficient

(3) Other matters.

Cal.—People v. Barker, 2 Cal.Rptr. 467, 349 P.2d 73, 53 C.2d 539.

Fla.—Richardson v. State, App., 193 So.2d 637.

Ill.—People v. Wilson, 228 N.E.2d 131, 84 Ill.App.2d 269.

Tex.—Welch v. State, 341 S.W.2d 909, 170 Tex.Cr.R. 425—Burlison v. State, Cr., 449 S.W.2d 252.

§ 53. Questions of Law and Fact

20. Ariz.—State v. DeVinney, 403 P.2d 921, 98 Ariz. 273.

Mass.—Com. v. Corcoran, 204 N.E.2d 289, 348 Mass. 437.

Mich.—People v. Sharpe, 178 N.W.2d 90, 22 Mich.App. 454.

Mo.—State v. Schmidt, App., 530 S.W.2d 424.

Particular questions held for jury

(6) Ala.—Burnette v. State, Cr., 282 So.2d 70, 50 Ala.App. 630.

Ariz.—State v. Daymus, 380 P.2d 996, 93 Ariz. 332. Cal.—People v. Mason, 7 Cal.Rptr. 627, 184 C.A.2d 317, cert. den. 81 S.Ct. 1046, 366 U.S. 904, 6 L.Ed.2d 203—People v. O'Hara, 8 Cal.Rptr. 114, 184 C.A.2d 798—People v. Gentry, 65 Cal.Rptr. 235, 257 C.A.2d 607.

Ill.—People v. Drwal, 188 N.E.2d 688, 27 Ill.2d 184. Iowa—State v. Mason, 203 N.W.2d 292.

Ky.—Jackson v. Com., 445 S.W.2d 835.

Mass.—Com. v. Greenberg, 160 N.E.2d 181, 339 Mass. 557.

Mo.—State v. DeClue, 400 S.W.2d 50.

N.J.—State v. Covington, 273 A.2d 402, 113 N.J.Super. 229, aff'd. 284 A.2d 532, 59 N.J. 536.

N.M.—State v. McKay, App., 450 P.2d 435, 79 N.M. 797.

N.C.—State v. Hinson, 193 S.E.2d 415, 17 N.C.App. 25, cert. den. 194 S.E.2d 151, 282 N.C. 583, cert. den. 93 S.Ct. 2762, 412 U.S. 931, 37 L.Ed.2d 159.

Okl.—Clark v. State, Cr., 499 P.2d 467.

Tex.—Colaluca v. State, Cr., 494 S.W.2d 885.

Utah—State v. Vassiss, 351 P.2d 96, 10 Utah 2d 244—State v. Harris, 519 P.2d 247, 30 Utah 2d 439.

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21. Intoxication as negating intent

Cal.—People v. Pratt, 23 Cal.Rptr. 469, 205 C.A.2d 838.

22. Okl.—Carroll v. State, Cr., 347 P.2d 812.

Or.—State v. Losey, 475 P.2d 430, 3 Or.App. 612.

Pa.—Com. v. Bricker, 58 Lanc.Rec. 381.

23. Fla.—Casso v. State, App., 182 So.2d 252.

Me.—Herrick v. State, 196 A.2d 101, 159 Me. 499, 99 A.L.R.2d 918.

Okl.—Carroll v. State, Cr., 347 P.2d 812.

24. Cal.—People v. Keeser, 110 Cal.Rptr. 597, 35 C.A.3d 156.

D.C.—U.S. v. Avant, C.A., 275 F.2d 650, 107 U.S.App. D.C. 192.

Issuing bad check

(2) D.C.—Clarke v. U.S., Mun.App., 140 A.2d 181, aff'd. 263 F.2d 269, 105 U.S.App.D.C. 19.

(3) Knowledge of lack of credit.

Ariz.—State v. DeVinney, 403 P.2d 921, 98 Ariz. 273.

Wash.—State v. Etheridge, 459 P.2d 395, 77 Wash.2d 39.

25. Ariz.—State v. Hess, 436 P.2d 139, 7 Ariz.App. 45.

Cal.—Perry v. Superior Court of Los Angeles County, 19 Cal.Rptr. 1, 368 P.2d 529, 37 C.2d 276.

People v. Mason, 7 Cal.Rptr. 627, 184 C.A.2d 317, cert. den. 81 S.Ct. 1046, 366 U.S. 904, 6 L.Ed.2d 203—People v. Kovach, 16 Cal.Rptr. 828, 197 C.A.2d 85—People v. Rosson, 20 Cal.Rptr. 833, 202 C.A.2d 480—People v. Riley, 31 Cal.Rptr. 404, 217 C.A.2d 11—People v. Causey, 34 Cal.Rptr. 43, 220 C.A.2d 641, cert. den. 84 S.Ct. 981, 376 U.S. 959, 11 L.Ed.2d 976—Buck v. Superior Court, App., 42 Cal.Rptr. 527, 232 C.A.2d 153, 11 A.L.R.3d 1064, cert. den. 86 S.Ct. 77, 382 U.S. 834, 15 L.Ed.2d 77—People v. Felsman, 64 Cal.Rptr. 870, 257 C.A.2d 437—People v. Gentry, 65 Cal.Rptr. 235, 257 C.A.2d 607—People v. Gibson, 79 Cal.Rptr. 693, 275 C.A.2d 198—People v. Silver, 121 Cal.Rptr. 153, 47 C.A.3d 837.

Fla.—Casso v. State, App., 182 So.2d 252.

Ga.—McKenney v. State, 188 S.E.2d 116, 125 Ga.App. 508.

Mont.—State v. Johnston, 367 P.2d 891, 140 Mont. 111.

Neb.—State v. Edmonds, 153 N.W.2d 364, 182 Neb. 140.

N.Y.—People v. Bauer, 305 N.Y.S.2d 42, 32 A.D.2d 463, aff'd. 258 N.E.2d 399, 26 N.Y.2d 915, 310 N.Y.S.2d 101.

Okl.—Lamascus v. State, Cr., 516 P.2d 279.

Tenn.—Mulligan v. State, 360 S.W.2d 35, 210 Tenn. 505.

Issuing, uttering, or depositing bad or fictitious check

- Cal.—People v. Madrid, 6 Cal.Rptr. 145, 182 C.A.2d 464.
 Colo.—Parrott v. People, 357 P.2d 634, 144 Colo. 587.
 Ill.—People v. Reans, 313 N.E.2d 184, 20 Ill.App.3d 1005.
 Okl.—Wooldridge v. State, Cr., 502 P.2d 348—Grice v. State, Cr., 530 P.2d 565.

At specified time

- Wash.—State v. Konop, 384 P.2d 385, 62 Wash.2d 715.

Trial by court

- Ark.—Garroue v. State, 408 S.W.2d 485, 241 Ark. 285.
 26. Ala.—Snipes v. State, Cr., 277 So.2d 413, 50 Ala.App. 139.
 S.D.—State v. Johnson, 200 N.W.2d 238, 86 S.D. 628.
 Wash.—State v. Zorich, 431 P.2d 584, 72 Wash.2d 31.
 27. Pa.—Com. v. Hoffman, 28 Lehigh. 471.

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33. Me.—Herrick v. State, 196 A.2d 101, 159 Me. 499, 99 A.L.R.2d 918.
 34. Me.—Herrick v. State, 196 A.2d 101, 159 Me. 499, 99 A.L.R.2d 918.
 39. Ala.—Latham v. State, Cr., 320 So.2d 747, affirmed 320 So.2d 760, 294 Ala. 685.
 Cal.—People v. Caruso, 1 Cal.Rptr. 428, 176 C.A.2d 272, cert. den. 80 S.Ct. 1259, 363 U.S. 819, 4 L.Ed.2d 1517.
 Mass.—Com. v. Wilson, 245 N.E.2d 439, 355 Mass. 441.
 Okl.—Chase v. State, Cr., 541 P.2d 867.

Inferences from evidence

- Cal.—People v. Jenkins, 83 Cal.Rptr. 525, 3 C.A.3d 529.
 40. U.S.—U.S. v. Marchisio, C.A.N.Y., 344 F.2d 653.
 41. Ill.—People v. Drwal, 188 N.E.2d 688, 27 Ill.2d 184.
 Or.—State v. Johnson, 525 P.2d 1077, 18 Or.App. 502.
 Tex.—Donald v. State, Cr., 418 S.W.2d 818.

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44. U.S.—King v. U.S., C.A.Fla., 341 F.2d 579.
 Ariz.—State v. Daymus, 367 P.2d 647, 90 Ariz. 294.
 Ark.—Davis v. State, 411 S.W.2d 531, 241 Ark. 646, 242 Ark. 43.
 Iowa—State v. Pullen, 110 N.W.2d 328, 252 Iowa 1324—State v. Kulow, 123 N.W.2d 872, 255 Iowa 789, 16 A.L.R.3d 1085.
 Mo.—State v. Fraley, 369 S.W.2d 195—State v. Crow, 487 S.W.2d 461.
 N.Y.—People v. Festa, 189 N.Y.S.2d 381, 9 A.D.2d 556, rearg. den. 191 N.Y.S.2d 379, 9 A.D.2d 712.
 N.C.—State v. Kiziah, 145 S.E.2d 308, 266 N.C. 118.
 Okl.—Kidd v. State, Cr., 462 P.2d 281—Bradshaw v. State, Cr., 510 P.2d 972.
 Pa.—Com. v. Evans, 154 A.2d 57, 190 Pa.Super. 179, affd. 160 A.2d 407, 399 Pa. 387, cert. den. 81 S.Ct. 233, 364 U.S. 899, 5 L.Ed.2d 194.
 Tex.—Skates v. State, 353 S.W.2d 862, 172 Tex.Cr. 124—Hogan v. State, Cr., 393 S.W.2d 898.
 45. Ill.—People v. Wilson, 228 N.E.2d 131, 84 Ill. App.2d 269.
 46. Ohio—State v. Cickelli, 193 N.E.2d 409, 118 Ohio App. 87, app. dismissed. 191 N.E.2d 806, 175 Ohio St. 146, app. dismissed. 84 S.Ct. 1178, 377 U.S. 128, 12 L.Ed.2d 184.

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47. U.S.—U.S. v. Berzon, C.A.N.Y., 341 F.2d 899.
 Ind.—Streeval v. State, 241 N.E.2d 255, 251 Ind. 349, reh. den. 244 N.E.2d 126, 251 Ind. 349.
 Wash.—State v. Benson, 364 P.2d 220, 58 Wash.2d 490.
Uttering bad check
 (2) Other matters.
 Cal.—People v. Bandy, 31 Cal.Rptr. 10, 216 C.A.2d 458.

49. Ark.—Swan v. State, 431 S.W.2d 475, 245 Ark. 154.
 Fla.—Weldon v. State, App., 287 So.2d 133.
 Mo.—State v. Euge, App., 349 S.W.2d 502.

Issuing or uttering bad or fictitious check**(5) Other matters.**

- Mo.—State v. Brookshire, App., 329 S.W.2d 252.
 50. Colo.—Marshall v. People, 417 P.2d 491, 160 Colo. 323.
 Ill.—People v. Wilson, 202 N.E.2d 103, 52 Ill.App.2d 304.
 Ky.—Mercer v. Com., 332 S.W.2d 655.
 Mass.—Com. v. Hamblen, 225 N.E.2d 911, 352 Mass. 438.
 54. Cal.—People v. Piascik, 323 P.2d 1032, 159 C.A.2d 622, cert. den. 79 S.Ct. 743, 359 U.S. 954, 3 L.Ed.2d 762.
 55. Ky.—Stiles v. Com., 348 S.W.2d 843.
 Mass.—Com. v. Gordon, 166 N.E.2d 688, 340 Mass. 754—Com. v. Barrasso, 175 N.E.2d 251, 342 Mass. 680.
 R.I.—State v. Riffkin, 309 A.2d 15, 112 R.I. 308.

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56. N.J.—State v. Turetsky, 188 A.2d 198, 78 N.J.Super. 203.
 N.C.—State v. Arney, 208 S.E.2d 899, 23 N.C.App. 349.
 57. N.C.—State v. Houston, 166 S.E.2d 881, 4 N.C. App. 484—State v. Hinson, 193 S.E.2d 415, 17 N.C.App. 25, cert. den. 194 S.E.2d 151, 282 N.C. 583, cert. den. 93 S.Ct. 2762, 412 U.S. 931, 37 L.Ed.2d 159.
 58. Ark.—Edens v. State, 357 S.W.2d 641, 235 Ark. 284.
 Md.—Carey v. State, 313 A.2d 696, 19 Md.App. 695.
 Neb.—Harger v. State, 106 N.W.2d 176, 171 Neb. 342.

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60. Wash.—State v. Eide, 470 P.2d 220, 2 Wash.App. 789.
Refusal held error
 Ala.—Lucas v. State, Cr., 272 So.2d 261, 49 Ala.App. 335, certiorari denied 272 So.2d 267, 289 Ala. 745.

§ 54. Instructions

66. Cal.—People v. Sanchez, 109 Cal.Rptr. 56, 33 C.A.3d 413.
 N.J.—State v. Turetsky, 188 A.2d 198, 78 N.J.Super. 203.

Instructions held sufficient or not erroneous

- (6) Other instructions.
 U.S.—U.S. v. Marchisio, C.A.N.Y., 344 F.2d 653.
 Cal.—People v. Bailey, 11 Cal.Rptr. 543, 260 P.2d 39, 55 C.2d 514.
 People v. Wood, 29 Cal.Rptr. 444, 214 C.A.2d 298.
 Ga.—Rowland v. State, 184 S.E.2d 495, 124 Ga.App. 495.
 Md.—Bosley v. State, 286 A.2d 203, 14 Md.App. 83.
 Mass.—Com. v. Greenberg, 160 N.E.2d 181, 339 Mass. 557—Com. v. Corcoran, 204 N.E.2d 289, 348 Mass. 437—Com. v. Monahan, 207 N.E.2d 29, 349 Mass. 139.
 Mo.—State v. Morris, 470 S.W.2d 467.

Instructions held vague

- Wash.—State v. Walters, 508 P.2d 1390, 8 Wash.App. 706.

67. Instructions held not misleading

- Mo.—State v. Fields, 366 S.W.2d 462.
 Pa.—Com. v. Evans, 154 A.2d 57, 190 Pa.Super. 179, affd. 160 A.2d 407, 399 Pa. 387, cert. den. 81 S.Ct. 233, 364 U.S. 899, 5 L.Ed.2d 194, reh. den. 81 S.Ct. 377, 364 U.S. 939, 5 L.Ed.2d 371.
 68. Colo.—Zarate v. People, 429 P.2d 309, 163 Colo. 205.

Giving explanatory instruction**(2) Other matters.**

- Ga.—Vickers v. State, 186 S.E.2d 157, 124 Ga.App. 752.
 N.J.—State v. Turetsky, 188 A.2d 198, 78 N.J.Super. 203.

Instruction held not confusing

- Mo.—State v. Todd, 372 S.W.2d 133.

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71. Cal.—People v. Kagan, 70 Cal.Rptr. 732, 264 C.A.2d 648, cert. den. 89 S.Ct. 2027, 394 U.S. 911, 22 L.Ed.2d 224.
 Mich.—People v. Robinson, 179 N.W.2d 239, 23 Mich. App. 672.
 Nev.—Kelley v. State, 348 P.2d 966, 76 Nev. 65.
Requested instruction properly refused
 N.M.—State v. Jones, 389 P.2d 398, 73 N.M. 459.
 72. Colo.—Woodman v. People, 450 P.2d 330, 168 Colo. 80—People v. Kanan, 526 P.2d 1339, 186 Colo. 255.

Requested instruction properly refused

- Ala.—Harvey v. State, 130 So.2d 823, 41 Ala.App. 300.
 Ind.—Snelling v. State, 326 N.E.2d 606, 163 Ind.App. 644.

- Pa.—Com. v. Petrosky, 166 A.2d 682, 194 Pa.Super. 94.
 Tex.—Dennis v. State, Cr., 420 S.W.2d 940.

Requested instruction erroneously refused**(2) Other instances.**

- Ark.—Dean v. State, 522 S.W.2d 421, 258 Ark. 32.
 Fla.—Levi v. State, App., 297 So.2d 617.

Instructions held erroneous

- Ariz.—State v. Brookshire, 452 P.2d 703, 104 Ariz. 349.
 73. Ariz.—State v. Goodman, 526 P.2d 1073, 22 Ariz. App. 275.

Requested instruction properly refused

- Ind.—Snelling v. State, 337 N.E.2d 829, 167 Ind.App. 70.

Instructions held not erroneous

- Mo.—State v. Todd, 372 S.W.2d 133.

74. Mo.—State v. Tomlinson, 364 S.W.2d 529.
 75. N.J.—State v. Pollack, 202 A.2d 433, 43 N.J. 34.
 Utah—State v. Harris, 519 P.2d 247, 50 Utah 2d 439.

Instruction held not comment on evidence

- Mo.—State v. Fields, 366 S.W.2d 462.

83. N.J.—State v. Pollack, 202 A.2d 433, 43 N.J. 34.

Necessity of corroboration

- (1) Cal.—People v. Mason, 109 Cal.Rptr. 867, 34 C.A.3d 281.

Instructions held sufficient or not erroneous

- (1) Ariz.—State v. White, 465 P.2d 602, 11 Ariz. App. 465.
 Cal.—People v. Kagan, 70 Cal.Rptr. 732, 264 C.A.2d 648, cert. den. 89 S.Ct. 1027, 394 U.S. 911, 22 L.Ed.2d 224.
 Colo.—Woodman v. People, 450 P.2d 330, 168 Colo. 80.
 Iowa—State v. Hatridge, 109 N.W.2d 705, 252 Iowa 1116.
 Mo.—State v. Euge, App., 359 S.W.2d 369, cert. den. 83 S.Ct. 1014, 372 U.S. 960, 10 L.Ed.2d 12, reh. den. 83 S.Ct. 1677, 373 U.S. 954, 10 L.Ed.2d 708.
 Wash.—State v. Benson, 364 P.2d 220, 58 Wash.2d 490.

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- 83 S.Ct. 1677, 373 U.S. 954, 10 L.Ed.2d 708.

- Wash.—State v. Benson, 364 P.2d 220, 58 Wash.2d 490.

Instruction held erroneous

- Colo.—Woodman v. People, 450 P.2d 330, 168 Colo. 80.

- Iowa—State v. Kulow, 123 N.W.2d 872, 255 Iowa 789, 16 A.L.R.3d 1085—State v. Mason, 203 N.W.2d 292.

- Wash.—State v. Walters, 508 P.2d 1390, 8 Wash.App. 706.

- (2) Mich.—People v. Vida, 140 N.W.2d 559, 2 Mich. App. 409, affd. 166 N.W.2d 465, 381 Mich. 595.

Failure to charge certain matters not error

- Ariz.—State v. Veres, 436 P.2d 629, 7 Ariz.App. 117, cert. den. 89 S.Ct. 613, 393 U.S. 1014, 21 L.Ed.2d 559.

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84. Instruction held sufficient or not erroneous

(1) Ark.—Kerby v. State, 342 S.W.2d 412, 233 Ark. 8.

Cal.—People v. Kagan, 70 Cal.Rptr. 732, 264 C.A.2d 648, cert. den. 89 S.Ct. 1027, 394 U.S. 911, 22 L.Ed.2d 224.

Mich.—People v. Burnette, 172 N.W.2d 453, 19 Mich. App. 336.

Neb.—State v. Swanson, 140 N.W.2d 618, 179 Neb. 693.

N.H.—State v. Gravel, 229 A.2d 686, 108 N.H. 142.
S.D.—State v. O'Connor, 173 N.W.2d 48, 84 S.D. 449.
Tex.—Scott v. State, Cr., 450 S.W.2d 868.

(4) Wash.—State v. Bryant, 437 P.2d 398, 73 Wash.2d 168.

(8) Ill.—People v. Kamsler, 214 N.E.2d 562, 67 Ill. App.2d 33.

Instructions held erroneous or properly refused

(1) Ariz.—State v. Daymus, 367 P.2d 647, 90 Ariz. 294.

Fla.—Smolen v. State, App., 188 So.2d 861.

Requested instruction held improperly refused
Ark.—Bostic v. State, 355 S.W.2d 165, 234 Ark. 690.

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85. N.J.—State v. Turetsky, 188 A.2d 198, 78 N.J.Super. 203.

86. Tex.—Finley v. State, Cr., 440 S.W.2d 849.

Requested instructions properly refused

N.C.—State v. Wallace, 213 S.E.2d 420, 25 N.C.App. 360, cert. den. 215 S.E.2d 628, 287 N.C. 468.

Pa.—Com. v. Mitchell, 335 A.2d 521, 234 Pa.Super. 21.

87. Cal.—People v. Faubus, 121 Cal.Rptr. 167, 48 C.A.3d 1.

N.Y.—People v. Powell, 256 N.Y.S.2d 117, 22 A.D.2d 959.

Instructions held sufficient

U.S.—Cortez v. U.S., C.A.Tex., 328 F.2d 51, cert. den. 85 S.Ct. 89, 379 U.S. 848, 13 L.Ed.2d 52.

Cal.—People v. Hedrick, 71 Cal.Rptr. 352, 265 C.A.2d 392.

Neb.—State v. Russell, 115 N.W.2d 578, 173 Neb. 882—State v. Edmonds, 153 N.W.2d 364, 182 Neb. 140.

Evidence held sufficient to warrant instruction

Neb.—State v. Martin, 128 N.W.2d 583, 177 Neb. 209.

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89. Mich.—People v. Vida, 140 N.W.2d 559, 2 Mich. App. 409, affd. 166 N.W.2d 465, 381 Mich. 595.

Instruction held improper

D.C.—Avant v. U.S., Mun.App., 154 A.2d 354, affd., C.A., 275 F.2d 650, 107 U.S.App.D.C. 192.

90. Instruction held sufficient

(2) Other instructions.

N.J.—State v. Zwillman, 270 A.2d 284, 112 N.J.Super. 6.

Wash.—State v. Etheridge, 443 P.2d 536, 74 Wash.2d 102.

91. Neb.—State v. Swanson, 140 N.W.2d 618, 179 Neb. 693.

That victim suffered some detriment, not necessarily pecuniary loss proper

Id.—Andresen v. State, 331 A.2d 78, 24 Md.App. 128, affd. 96 S.Ct. 2737, 427 U.S. 463, 49 L.Ed.2d 627.

96. Colo.—Zarate v. People, 429 P.2d 309, 163 Colo. 205.

Wash.—State v. Scherer, 462 P.2d 549, 77 Wash.2d 345.

Instruction properly refused

(2) Other instructions.

Mass.—Com. v. Leonard, 227 N.E.2d 721, 352 Mass. 636.

Mo.—State v. Wishom, 416 S.W.2d 921.

§ 55. Verdict

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3. Wash.—State v. Arndt, 529 P.2d 887, 12 Wash. App. 248, affd. 553 P.2d 1328, 87 Wash.2d 374.

6. Discrepancy between verdict and evidence not shown

Ill.—People v. Wilson, 228 N.E.2d 131, 84 Ill.App.2d 269.

7. Md.—Tyler v. Warden, Md. Penitentiary, 233 A.2d 380, 2 Md.App. 127.

12. Ariz.—State v. Kelly, 425 P.2d 850, 5 Ariz.App. 280.

§ 56. Sentence and Punishment

13. Alaska—Johnson v. State, 487 P.2d 1303.

Ariz.—State v. Davis, 511 P.2d 193, 20 Ariz.App. 180.

Fla.—State v. Harris, 136 So.2d 633, 91 A.L.R.2d 1088, conf. to 137 So.2d 243.

Miss.—Prisock v. State, 141 So.2d 711, 244 Miss. 408.

N.H.—State v. Ferbert, 306 A.2d 202, 113 N.H. 235.

N.J.—State v. Strickland, 271 A.2d 605, 112 N.J.Super. 425.

Okl.—Holder v. State, Cr., 488 P.2d 600.
Pa.—Com. ex rel. Garrett v. Banmiller, 180 A.2d 113, 197 Pa.Super. 542.

Concurrent sentences for single crime

(2) Other instances.

Fla.—Lore v. State, App., 267 So.2d 699.

Giving check

(1) Ariz.—State v. Buckmaster, 383 P.2d 869, 94 Ariz. 314.

State v. Adams, 403 P.2d 7, 1 Ariz.App. 354—
State v. White, 465 P.2d 602, 11 Ariz.App. 465.

Fla.—Harrington v. Wainwright, 148 So.2d 260.

N.C.—State v. Oates, 138 S.E.2d 139, 262 N.C. 532.

(8) Other matters.

U.S.—Lundgren v. Turner, D.C.Utah, 305 F.Supp. 996.

Cal.—In re Dick, 49 Cal.Rptr. 673, 411 P.2d 561, 64 C.2d 272.

People v. Kennedy, 26 Cal.Rptr. 696, 210 C.A.2d 599, cert. den. 84 S.Ct. 126, 375 U.S. 861, 11 L.Ed.2d 87.

Fla.—State ex rel. Broad v. Cochran, 115 So.2d 169—
Brooks v. Cochran, 121 So.2d 35—Parrish v. Cochran, 121 So.2d 423.

Crowell v. State, App., 153 So.2d 849.

Ind.—Ferrell v. State, 219 N.E.2d 804, 247 Ind. 535.

Md.—Waye v. State, 191 A.2d 428, 231 Md. 510—Flannigan v. State, 191 A.2d 591, 232 Md. 13.

Punishment or penalty held excessive

(1) N.Y.—People v. Alvarado, 210 N.Y.S.2d 312, 12 A.D.2d 822.

N.C.—State v. McCotter, 197 S.E.2d 50, 18 N.C.App. 411.

Punishment not excessive

(4) Conn.—State v. Irving, 202 A.2d 839, 25 Conn. Sup. 280.

(5) Other instances.

Alaska—Risher v. State, 523 P.2d 421.

Ariz.—State v. Reid, 348 P.2d 731, 87 Ariz. 123—State v. Sparks, 400 P.2d 586, 97 Ariz. 358.

Cal.—People v. Collins, 51 Cal.Rptr. 604, 242 C.A.2d 626.

Conn.—State v. Kania, 180 A.2d 472, 23 Conn.Sup. 204—State v. Pullen, 198 A.2d 218, 25 Conn.Sup. 141—State v. Lehrer, 204 A.2d 168, 25 Conn.Sup. 353.

Ill.—People v. Kamsler, 223 N.E.2d 237, 78 Ill.App.2d 349—People v. McClain, 285 N.E.2d 239, 6 Ill. App.3d 451—People v. Cassman, 288 N.E.2d 667, 7 Ill.App.3d 786—People v. Leonard, 310 N.E.2d 15, 18 Ill.App.3d 527.

Iowa—State v. Hatridge, 109 N.W.2d 705, 252 Iowa 1116—State v. Johnson, 196 N.W.2d 563—State v. Waterman, 217 N.W.2d 621.

Neb.—State v. Easter, 118 N.W.2d 515, 174 Neb. 412—
State v. Meloy, 195 N.W.2d 173, 188 Neb. 98—

State v. Mendenhall, 228 N.W.2d 617, 193 Neb. 659.

N.H.—Jones v. Vitek, 321 A.2d 589, 114 N.H. 445.
N.J.—State v. Schultz, 216 A.2d 372, 46 N.J. 254, cert. den. 86 S.Ct. 1367, 384 U.S. 918, 16 L.Ed.2d 439.

Okl.—Curtis v. State, Cr., 518 P.2d 1288.

Or.—State v. Weeks, 439 P.2d 1009, 249 Or. 638.

State v. Mathewson, 477 P.2d 222, 4 Or.App. 104—State v. Baldwin, 478 P.2d 437, 4 Or.App. 295.

Sentence held proper

Conn.—State v. Arrington, 202 A.2d 156, 25 Conn.Sup. 246—State v. Rybczyk, 236 A.2d 100, 27 Conn. Sup. 282.

Ill.—People v. McCullough, 283 N.E.2d 926, 5 Ill. App.3d 796—People v. Griffin, 315 N.E.2d 154, 21 Ill.App.3d 261.

Miss.—Anderson v. State, 288 So.2d 852.

N.J.—State v. Pickell, 346 A.2d 109, 136 N.J.Super. 340.

Wis.—Waddell v. State, 129 N.W.2d 201, 24 Wis.2d 364.

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14. Fla.—Helms v. State, App., 128 So.2d 756.

Sentence held proper

(2) Other sentences.

Md.—Turner v. State, 247 A.2d 412, 5 Md.App. 332.

W.Va.—State v. Legg, 151 S.E.2d 215.

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16. Conn.—State v. Clements, 174 A.2d 688, 22 Conn.Sup. 491.

19. Cal.—People v. Clark, 95 Cal.Rptr. 411, 17 C.A.3d 890.

Pa.—Com. ex rel. Dunbar v. Keenan, 176 A.2d 135, 196 Pa.Super. 592, cert. den. 83 S.Ct. 65, 371 U.S. 839, 9 L.Ed.2d 74.

21. Ariz.—State v. Buelna, 544 P.2d 238, 25 Ariz. App. 414.

Restitution may be ordered

Pa.—Com. v. Rosicci, 186 A.2d 648, 199 Pa.Super. 609.

FAMILY.

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43. Fla.—Carroll v. City of Miami Beach, App., 198 So.2d 643, 645.

44. Fla.—C.J.S. quoted in Carroll v. City of Miami Beach, App., 198 So.2d 643, 645.

45. Ala.—Southern Guaranty Ins. Co. v. Gipson, 156 So.2d 630, 632, 275 Ala. 538—Holloway v. State Farm Mut. Auto. Ins. Co., 151 So.2d 774, 776, 275 Ala. 41.

Fla.—C.J.S. quoted in Carroll v. City of Miami Beach, App., 198 So.2d 643, 645.

Minn.—LeRoux v. Edmundson, 148 N.W.2d 812, 814, 276 Minn. 120.

Wis.—C.J.S. cited in Henderson v. State Farm Mut. Automobile Ins. Co., Wis., 208 N.W.2d 423, 425, 59 Wis.2d 451.

Similarly expressed

(4) The word "family" is one of indefinite conception which gives rise to varying definitions, and when court is called on to give it a specific meaning to resolve a particular question of law, judicial construction must relate to and be consistent with context in which the word is found.—Planning and Zoning Commission of Town of Westport v. Synanon Foundation, Inc., 216 A.2d 442, 444, 153 Conn. 305.

46. Fla.—C.J.S. quoted in Carroll v. City of Miami Beach, App., 198 So.2d 643, 645.

46.5. Fla.—C.J.S. quoted in Carroll v. City of Miami Beach, App., 198 So.2d 643, 645.

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49.5. Family as an institution

Pa.—Com. ex rel. Butler v. Morris, 63 Lack.Jur. 153.

50. Sharing common dwelling and table
 Ariz.—Pesequeira v. Talbot, 441 P.2d 73, 77, 7 Ariz. App. 476.

Primary Signification

—In General.

51. N.Y.—Town of Henrietta v. Fairchild, 279 N.Y. S.2d 992, 997, 53 Misc.2d 862.

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52.5. U.S.—State Farm Mut. Auto. Ins. Co. v. Borg, C.A.Minn., 396 F.2d 740, 744.

Similarly defined

53. Miss.—C.J.S. quoted in Goens v. Arinder, 161 So.2d 509, 513.

(5) "Family" is body of persons who live in one house under one head including parents, children, servants, lodgers or boarders.—Pesequeira v. Talbot, 441 P.2d 73, 77, 7 Ariz. App. 476.

54. Idaho—McMahon v. Auger, 357 P.2d 374, 380, 83 Idaho 27.

Miss.—C.J.S. quoted in Goens v. Arinder, 161 So.2d 509, 513.

Mo.—Jaycox v. Brune, Mo., 434 S.W.2d 539, 544. In re Fox' Estate, Mo.App., 368 S.W.2d 909, 913—Boyer v. Gearhart's Estate, App., 367 S.W.2d 1, 5—Morris v. Retz, App., 413 S.W.2d 544, 549.

54.5. Miss.—C.J.S. quoted in Goens v. Arinder, 161 So.2d 509, 513.

S.C.—C.J.S. cited in Hunter v. Southern Farm Bureau Cas. Ins. Co., 129 S.E.2d 59, 61, 241 S.C. 446.

54.10. Miss.—C.J.S. quoted in Goens v. Arinder, 161 So.2d 509, 513.

55. Miss.—C.J.S. quoted in Goens v. Arinder, 161 So.2d 509, 513.

Similarly defined

(5) "Family" embraces a collection of persons as a single group, with one head, living together, a unit of permanent and domestic character, under one roof, that is a collective body of persons living together within one curtilage, subsisting in common and directing their attention to a common object, the promotion of their mutual interests and social happiness.—State Farm Mut. Auto. Ins. Co. v. Smith, 142 S.E.2d 562, 565, 206 Va. 280.

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56. Miss.—C.J.S. quoted in Goens v. Arinder, 161 So.2d 509, 513.

57. Miss.—C.J.S. quoted in Goens v. Arinder, 161 So.2d 509, 513.

60. Ill.—Edward Hines Lumber Co. v. Smith, 172 N.E.2d 429, 432, 29 Ill.App.2d 35.

Tex.—C.J.S. cited in Southampton Civil Club v. Couch, 322 S.W.2d 516, 518, 159 Tex. 464.

—Particular Elements Considered.

63.5. Mo.—C.J.S. quoted in Embry v. Martz' Estate, 377 S.W.2d 367, 370—Smith v. Sypret's Estate, 421 S.W.2d 9, 14.

Single sociological unit

"Family" embraces concept of group of related individuals, dwelling together, and welded by familial ties into single sociological unit; mere aggregation of individuals living under one roof does not constitute family, even though individuals may be related to each other.—State Farm Mut. Auto. Ins. Co. v. Pennington, D.C. Ark., 215 F.Supp. 784, 789.

Relation.

64. No relation of blood or marriage

N.J.—Marino v. Mayor and Council of Borough of Norwood, 187 A.2d 217, 221, 77 N.J.Super. 587.

65. Similarly expressed

(1) Family relationship must be of a permanent and domestic character, and must not be merely a temporary expedient.

U.S.—In re Murray, D.C.Mo., 284 F.Supp. 173, 175.

Mo.—State v. Haney, 277 S.W.2d 632, 636, 55 A.L.R.2d 717.

For the purpose of giving jurisdiction to a "family court," a "family" exists only where there is legal interdependence, either through a solemnized marriage or a recognized common-law union.^{66.5}

66.5. N.Y.—People v. Allen, 261 N.E.2d 637, 641, 27 N.Y.2d 108, 313 N.Y.S.2d 719.

Potter v. Bennett, 334 N.Y.S.2d 511, 513, 40 A.D.2d 546.

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Dependency.

74.5. Similarly expressed

(1) To constitute a family there must be two or more persons residing together under one head or manager, with legal or moral obligation on part of person who occupies position as head of house or family to support one or more of other members, and there must be state of dependency, at least partial, on part of one receiving such support.

U.S.—In re Murray, D.C.Mo., 284 F.Supp. 173, 175. **Mo.**—State v. Haney, 277 S.W.2d 632, 636, 55 A.L.R.2d 717.

74.10. N.C.—Manning v. Hart, 121 S.E.2d 721, 724, 255 N.C. 368.

Number.

77. Me.—In re Joyce's Estate, 183 A.2d 513, 514, 158 Me. 304.

Residing together.

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Restricted Sense

80. N.J.—C.J.S. cited in Mazzilli v. Acc. & Cas. Ins. Co. of Winterthur, Switzerland, 170 A.2d 800, 804, 35 N.J. 1.

84. N.Y.—People v. Hasse, 291 N.Y.S.2d 53, 55, 57 Misc.2d 59.

Group of persons consisting of parents and their children

N.Y.—People v. Hasse, 291 N.Y.S.2d 53, 55, 57 Misc.2d 59.

86. N.Y.—Town of Henrietta v. Fairchild, 279 N.Y. S.2d 992, 997, 53 Misc.2d 862.

87. N.Y.—Town of Henrietta v. Fairchild, 279 N.Y. S.2d 992, 997, 53 Misc.2d 862.

89. Similarly defined

(1) A group comprising immediate kindred; especially the group formed of parents and children, constituting the fundamental social unit in a civilized society. **N.Y.**—People v. Hasse, 291 N.Y.S.2d 53, 55, 57 Misc.2d 59.

Enlarged Sense

92. Similarly expressed

(1) The word "family" implies father, mother, and children and/or immediate blood relatives living in the same household.—People v. Harkins, 268 N.Y.S.2d 482, 484, 49 Misc.2d 673.

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1. N.Y.—Town of Henrietta v. Fairchild, 279 N.Y. S.2d 992, 997, 53 Misc.2d 862.

2. Relations by marriage

Ill.—St. Louis Union Trust Co. v. Hearn, 250 N.E.2d 674, 678, 111 Ill.App.2d 411.

Particular Persons Included

8. Lodgers and boarders

N.Y.—Town of Henrietta v. Fairchild, 279 N.Y.S.2d 992, 997, 53 Misc.2d 862.

Uncle and nephew or niece

U.S.—State Farm Mutual Auto. Ins. Co. v. Pennington, C.A.Ark., 324 F.2d 340, 344.

Mo.—In re Fox' Estate, App., 368 S.W.2d 909, 913.

Relatives-in-law

(4) Brother-in-law.

N.Y.—People v. Harkins, 268 N.Y.S.2d 482, 484, 49 Misc.2d 673.

Nephew

Pa.—Miller v. Preitz, 221 A.2d 320, 323, 422 Pa. 383.

Parents

(10) Mother.

Tex.—In re Guardianship of Neal's Estate, Tex.Civ. App., 406 S.W.2d 496, 502, 24 A.L.R.3d 851.

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9. Persons unlawfully married

U.S.—State Farm Mut. Auto. Ins. Co. v. Thompson, C.A.Ariz., 372 F.2d 256, 259.

Nondomestic servant

Or.—Kenner v. Schmidt, Or., 448 P.2d 537, 539, 252 Or. 218.

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Other Terms Compared

11. Mo.—Giokaris v. Kincaid, 331 S.W.2d 633, 640.

In Phrases

14. Single family

(1) A "single family" may consist of persons other than the son, daughter, stepson, stepdaughter, father, mother, father-in-law or mother-in-law who constitute the immediate family.—Application of Estevez, 182 N.Y.S.2d 740, 743, 15 Misc.2d 742.

Immediate family

(4) "Immediate family" means person related by blood, adoption or marriage and living together in same household, and immediate relative is not necessarily member of immediate family.—Lewandowski v. Preferred Risk Mut. Ins. Co., 146 N.W.2d 505, 507, 33 Wis.2d 69.

15. Family offense

N.Y.—Seymour v. Seymour, 289 N.Y.S.2d 515, 519, 56 Misc.2d 546.

FARM.

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53.5. N.D.—C.J.S. quoted in Boehm v. Burleigh County, 130 N.W.2d 170, 174.

As a Noun

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57. N.D.—C.J.S. quoted in Boehm v. Burleigh County, 130 N.W.2d 170, 174.

57.5. Neb.—C.J.S. quoted in Goebel v. Holt County, 108 N.W.2d 406, 409, 172 Neb. 81.

N.D.—C.J.S. quoted in Boehm v. Burleigh County, 130 N.W.2d 170, 174.

58. N.D.—C.J.S. quoted in Fredrickson v. Burleigh County, 139 N.W.2d 250, 253—C.J.S. quoted at length in Butts Feed Lots v. Board of Cty. Commissioners, N.D., 261 N.W.2d 667, 671.

59. N.D.—C.J.S. quoted in Fredrickson v. Burleigh County, 139 N.W.2d 250, 253.

60. N.D.—C.J.S. quoted in Fredrickson v. Burleigh County, 139 N.W.2d 250, 253.

61. N.D.—C.J.S. quoted in Fredrickson v. Burleigh County, 139 N.W.2d 250, 253.

62. N.D.—C.J.S. quoted in Fredrickson v. Burleigh County, 139 N.W.2d 250, 253.

62.5. N.D.—C.J.S. quoted in Fredrickson v. Burleigh County, 139 N.W.2d 250, 253.

Similarly defined

(1) A piece of land used wholly or principally for agricultural purposes.

FARM

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U.S.—Nichols v. Bellavista Farms, Inc., D.C.Or., 186 F.Supp. 594, 596.

(2) "Farm" means tract of land used for cultivation or production of crops or raising of livestock.—Goebel v. Holt County, 108 N.W.2d 406, 409, 172 Neb. 81.

(3) The word "farm" means a tract of land used for cultivation or production of crops of any nature, or raising of any type of animal embraced within term livestock.—In re Assessment of Certain Livestock, 108 N.W.2d 808, 810, 172 Neb. 88.

(4) Term "farm" means tract of land used for cultivation or production of crops of any nature, or raising of any type of animal embraced within term "livestock".—In re Svoboda and Hannah, 142 N.W.2d 328; 335, 180 Neb. 215.

62.10. N.D.—C.J.S. quoted in Frederickson v. Burleigh County, 139 N.W.2d 250, 253.

62.15. N.D.—C.J.S. quoted in Frederickson v. Burleigh County, 139 N.W.2d 250, 253.

Similarly defined

(7) "Farm" is a piece of land held under lease for cultivation or any tract of land devoted to agricultural purposes generally under management of tenant or owner or any parcel or group of parcels of land cultivated as a unit.

N.D.—Boehm v. Burleigh County, 130 N.W.2d 170, 174.

Wis.—In re Buser's Estate, 98 N.W.2d 425, 427, 8 Wis.2d 40.

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63. N.D.—C.J.S. quoted in Frederickson v. Burleigh County, 139 N.W.2d 250, 253.

63.5. N.D.—C.J.S. quoted in Frederickson v. Burleigh County, 139 N.W.2d 250, 253.

64. N.D.—C.J.S. quoted in Frederickson v. Burleigh County, 139 N.W.2d 250, 253.

64.5. N.D.—C.J.S. quoted in Frederickson v. Burleigh County, 139 N.W.2d 250, 253.

64.15. N.D.—Boehm v. Burleigh County, 130 N.W.2d 170, 174.

71.5. N.D.—C.J.S. quoted in Boehm v. Burleigh County, 130 N.W.2d 170, 174.

72. N.D.—C.J.S. quoted in Boehm v. Burleigh County, 130 N.W.2d 170, 174.

72.5. N.D.—C.J.S. quoted in Boehm v. Burleigh County, 130 N.W.2d 170, 174.

72.10. N.D.—C.J.S. quoted in Boehm v. Burleigh County, 130 N.W.2d 170, 174.—C.J.S. quoted in Frederickson v. Burleigh County, 139 N.W.2d 250, 253.

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As a Verb

72.15. N.D.—C.J.S. quoted in Boehm v. Burleigh County, 130 N.W.2d 170, 174.—C.J.S. quoted in Frederickson v. Burleigh County, 139 N.W.2d 250, 253.

72.20. N.D.—C.J.S. quoted in Boehm v. Burleigh County, 130 N.W.2d 170, 174.—C.J.S. quoted in Frederickson v. Burleigh County, 139 N.W.2d 250, 253.

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—Farming.

89. Similarly defined

(1) "Farming", in the traditional sense, pertains to preparation of soil, planting of seeds, caring for crops, and harvesting the yield at the end of the process.—Mountain Credit v. Michiana Lumber & Supply Inc., Colo.App., 498 P.2d 967, 969, 31 Colo.App. 112.

93. Held to constitute "farming"

(5) Planting of portion of farm into grasses and legumes for grazing.—Georgia Power Co. v. Fletcher, 148 S.E.2d 915, 916, 917, 113 Ga.App. 559.

Held to constitute "farming"

(6) Placing a portion of the land in Voluntary Crop-land Adjustment Program, since soil conservation through use of the government program was recognized

farming practice.—Georgia Power Co. v. Fletcher, 148 S.E.2d 915, 916, 917, 113 Ga.App. 559.

As an Adjective

Farm product.

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21. Held not to include

(5) Timber.

Tex.—Kirby Lumber Corp. v. Hardin Independent School Dist., Civ.App., 351 S.W.2d 310, 312, err. ref. no rev. err.

Other phrases:

23. Phrases

(14) See Motor Vehicles § 8.

Additional phrases

(1) "Farm service."

The words "farm service" are generic and also descriptive of a business.—Farm Service, Inc. v. U.S. Steel, Corp., 414 P.2d 898, 907, 90 Idaho 570.

FAST.

Phrases:

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61. Fast dollar or fast buck

A slang concept intended to connote money obtained in a fashion distinguished from the scriptural prescription of eating one's sustenance in the sweat of one's brow, or to connote easy money, money taken through adroit or fast talking, or appropriated in a selfish fashion without any equivalent quid pro quo, and such phrases have opprobrious connotations.

Me.—Spofford v. Gentner, 165 A.2d 68, 71, 156 Me. 363.

FASHION. Held to be synonymous with "manner." 54.58

54.58. Cal.—In re Grossman, 101 Cal.Rptr. 176, 185, 24 C.A.3d 624.

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FAT.

66. As used with respect to heroin, it means that the heroin content is high.—Byrd v. State, 297 A.2d 312, 315, 16 Md.App. 391.

Under the commonly accepted meaning of the term "fat" there is no chemical difference between a fat and an oil; the term "fat" encompasses solid fat and liquid fat (oil).^{65.5}

65.5. U.S.—U.S. v. Rockwell Import Corp., Cust. & Pat.App., 564 F.2d 72, 76, 65 CCPA 12.

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FATHOMETER. An echo sounding device for determining the depth of water beneath a vessel's keel.^{87.10}

87.10. Operation

It gives continuous readings of depth of water under keel while vessel is at full speed and these readings are presented both on a dial and on a graph on the ship's bridge.—U.S. v. Soriano, C.A.Wash., 366 F.2d 699, 704.

FATIGUE. A state of exhaustion from labor or exertion.^{87.50}

87.50. Okl.—H. J. Jeffries Truck Line v. Grisham, 397 P.2d 637, 640.

FAULT.

98.5. Pa.—Kersey Mfg. Co. v. Rozic, 215 A.2d 323, 325, 207 Pa.Super. 182.

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9. Breach or neglect of legal duty

Tex.—St. Joseph Professional Bldg. Co. v. New York Life Ins. Co., Civ.App., 449 S.W.2d 848, 850.

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Phrases:

19. Phrases

(10) "Inscrutable fault" exists where court concedes that fault had been committed, but is unable, from conflict of testimony or otherwise to locate it.—Cities Service Oil Co. v. M/V Melvin H. Baker, D.C.Pa., 260 F.Supp. 244, 246.

FAULTY. Marked by fault; having a fault, blemish, or defect; imperfect; unsound.^{19.50}

19.50. Cal.—Wingfield v. Fielder, 105 Cal.Rptr. 619, 625, 29 C.A.3d 209.

FAVORABLE.

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40. Indefinite meaning

Conn.—State v. Sivin, 225 A.2d 846, 851, Conn.Cir. A.D., 4 Conn.Cir. 93.

FEAR.

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50. Element of being startled

Fear is sometimes, if not always, an element of being startled.

Mo.—State v. Ray, 354 S.W.2d 840, 843.

FEASIBLE.

54. Cal.—Morris v. Williams, 63 Cal.Rptr. 689, 705, 433 P.2d 697, 67 C.2d 733.

Me.—C.J.S. quoted in Hillock v. Bailey, 223 A.2d 426, 434.

Capable of being done

Wis.—DeLap v. Institute of America, Inc., 143 N.W.2d 476, 478, 31 Wis.2d 507.

54.5. Me.—C.J.S. quoted in Hillock v. Bailey, 223 A.2d 426, 434.

55. Possible

Wis.—DeLap v. Institute of America, Inc., 143 N.W.2d 476, 478, 31 Wis.2d 507.

56.5. Reasonable

Wis.—DeLap v. Institute of America, Inc., 143 N.W.2d 476, 478, 31 Wis.2d 507.

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FEASOR

60.5. Pa.—C.J.S. quoted in Sleasman v. Brooks, 32 D. & C.3d 187, 189.

FEATHER.

In a mechanical sense, the term has been held to denote strips of stainless steel.^{63.1}

63.1. U.S.—Krentz v. Union Carbide Corp., C.A. Mich., 365 F.2d 113, 120.

Feathering is a procedure which turns propeller blades to the stream-lined position so that it has the least amount of drag.^{63.2}

63.2. U.S.—Wenzel v. U.S., C.A.N.J., 419 F.2d 260, 261.

FEATHERBEDDING. A method of creating or spreading employment un-

necessarily maintaining or increasing the number of employees or the time used to complete a particular job.^{64.5}

64.5. U.S.—Cotton's, Inc. v. Teamsters Local No. 5, D.C.La., 547 F.Supp. 1336, 1341.

As unfair labor practice see C.J.S. Labor Relations § 341.

FEATURE. The term is also used to signify a literary or artistic creation prepared for publication in newspapers.^{67.5}

67.5. U.S.—U.S. v. Chicago Tribune-New York News Syndicate, Inc., D.C.N.Y., 309 F.Supp. 1301, 1302.

FEDERAL.

74. Federal enclaves or federal islands

U.S.—Cooper v. General Dynamics, Convair Aerospace Division, Fort Worth Operation, D.C.Tex., 378 F.Supp. 1258, 1260, revd. on oth. grds., C.A., 533 F.2d 163, reh. den. 537 F.2d 1143, two cases, cert. den. 97 S.Ct. 2972, 433 U.S. 908, 53 L.Ed.2d 1091.

